FOR PUBLICATION

IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee

v.

JESSE JAMES BABAUTA CAMACHO,
Defendant-Appellant

OPINION

Cite as: *Commonwealth v. Camacho*, 2002 MP 6

Appeal No. 99-018
Criminal Case No. 98-0175

Argued and submitted December 14, 2000
Decided April 8, 2002

For Appellant:

G. Anthony Long, Esq.
PMB 1797, P.O. Box 10001
Saipan, MP 96950

For Appellee:

Barry Hirshbein, Esq.
Assistant Attorney General
Office of the Attorney General
Criminal Division, Civic Center Complex
Saipan, MP 96950

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and JOHN A. MANGLONA, Associate Justice

CASTRO, Associate Justice:

INTRODUCTION

¶1 Jesse James Babauta Camacho appeals the trial court's judgment of conviction of first degree murder and the sentence of 45 years of imprisonment. The notice of appeal being timely, we have jurisdiction in accordance with Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands and 1 CMC § 3102(a). We affirm both the conviction and the sentence.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On the morning of April 30, 1998, a group of boys was playing together at the Dan Dan homestead on Saipan. Ian Dela Cruz ("Ian"), Jesse James Camacho ("Jesse" or "Camacho"), his brother Kevin Camacho ("Kevin"), and Carlos Sanchez ("Carlos"), walked to the home of Antonio Sablan ("Antonio") to play with his electronic games.

¶3 While there, the boys noticed a sword. Ian stole it after Camacho allegedly told him to do so. Antonio eventually realized that the sword was missing. Suspecting the other boys of taking it, he confronted them.

¶4 After Antonio confronted them, Camacho told Ian that "the gang's boss" had issued an order to kill Antonio and had assigned Ian the task. He warned that the order had to be carried out or Ian and his

family would be killed. Camacho purportedly gave Ian the murder weapon, a knife, and directed his brother Kevin to accompany Ian. Kevin later stated that he had seen Ian stab Antonio multiple times in Antonio's bedroom.

¶5 At his juvenile proceeding, Ian admitted stabbing Antonio to death. He was consequently committed to the juvenile detention center. Ian also testified that Camacho had instructed him to carry out the stabbing.

¶6 At the time of the killing, Ian had run away from home and was living in an abandoned shack near Antonio's house. He was befriended by Camacho and spent time with him and other boys who were members of a gang called "Rerum." Ian testified that, although he was never officially a member, he was asked to join the gang and was beaten up for failing to respond at all to the invitation.

¶7 On May 27, 1998, an information was filed charging Camacho with first degree murder. The information also alleged that he "did aid, abet, counsel, command, and induce another person . . . to commit, and did procure the commission of, the crime of First Degree Murder. . . ." The information was signed by Ross Buchholz on behalf of Sally Pfund, the Acting Attorney General at the time. The Commonwealth (also referred to as "Government") also instituted a juvenile proceeding against Camacho, who was just shy of his 18th birthday, charging him with conspiracy to commit murder and solicitation of murder.[1]

¶8 Initially, the Commonwealth sought to consolidate the juvenile case with the instant action by amending the criminal information, but the trial court denied its motion. The Commonwealth then moved to stay this case, pending the resolution of the appeal in the related juvenile proceeding. Again, the trial

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[1] *In re J.J.C.*, App. No. 98-043 (N.M.I. Sup. Ct. May 9, 2000), *aff'd*, 255 F.3d 1069 (9th Cir. 2001).

court denied the motion for stay, as well as the Commonwealth's final pre-trial motion to dismiss the information without prejudice.

¶9 Camacho also filed two unsuccessful pre-trial motions: (1) to dismiss the information on the grounds of double jeopardy and lack of jurisdiction; and (2) in limine, to exclude the introduction of "gang-related" evidence.

¶10 Opening arguments in the jury trial were scheduled for March 9, 1999, but were postponed to the following day because of a riot situation at the pre-trial detention center. Camacho moved for a mistrial, arguing that his case was prejudiced by a newspaper article implying that his trial was delayed because he was being held in the detention center. The trial court denied the motion and opening arguments were heard on March 10. The Commonwealth completed its case-in-chief the same day, introducing one exhibit and calling five witnesses to testify.

¶11 After the Commonwealth rested, Camacho moved for a judgment of acquittal, claiming the evidence was insufficient. The trial court denied the motion. At the close of the defense's case-in-chief, Camacho renewed his motion for judgment of acquittal, due to insufficient evidence, but the trial court again denied his motion. The jury returned a guilty verdict of first degree murder. After the verdict was announced, Camacho moved for acquittal and for a new trial. The lower court denied both motions.

¶12 At a hearing on June 23, 1999, the court sentenced Camacho to 45 years imprisonment with credit for time served.

QUESTIONS PRESENTED AND STANDARDS OF REVIEW

¶13 Camacho presents the following questions for our consideration:

¶14 I. Whether the trial court properly assumed jurisdiction over a criminal information signed by an Acting Attorney General and without juvenile court certification. The issue of jurisdiction is a question of law subject to *de novo* review. *See In re N.T.M.*, App. No. 98-022

(N.M.I. Sup. Ct. December 14, 1999) (Opinion at 1); *Office of the Attorney General v. Rivera*, 3 N.M.I. 436, 441 (1993).

¶15 II. Whether a defendant's due process rights, guaranteed by the Fourteenth Amendment to the Unites States Constitution and Article I, Section 5 of the Constitution of the Northern Mariana Islands, are violated when: (1) charged as an aider and abettor, despite the provisions of 6 CMC § 251(d), the defendant is not allowed to present the common law defense of not being a principal; (2) the Commonwealth fails to obtain juvenile court authorization to treat the defendant as an adult; or (3) the defendant is prosecuted by an alleged usurper of the C.N.M.I. Attorney General's prosecutorial power. We review all constitutional questions *de novo. See Triple J. Saipan, Inc. v. Rasiang*, 1999 MP 7 ¶ 2, 5 N.M.I. 232, 233 (1999); *Commonwealth v. Bergonia*, 3 N.M.I. 22, 35 (1992).

¶16 III. Whether, under the Fifth Amendment to the United States Constitution and Article I, Section 4(e) of the Constitution of the Northern Mariana Islands, double jeopardy bars the defendant's prosecution in the trial court when the Commonwealth has also instituted juvenile proceedings against the defendant. Implicating a constitutional right, this issue is again subject to *de novo* review. *See Triple J. Saipan, Inc.*, 1999 MP 7 ¶ 2, 5 N.M.I. at 233; *Bergonia*, 3 N.M.I. at 35.

¶17 IV. Whether the trial court erred in admitting gang-related evidence and the victim's photograph. The admission of evidence is within the sound discretion of the trial court, and is subject to review for abuse of discretion. *See Commonwealth v. O'Connor*, App. No. 99-021 (N.M.I. Sup. Ct. June 28, 2000) (Opinion at 2). Only relevant evidence is admissible, but reversal is not warranted unless erroneously admitted evidence caused prejudice affecting a party's substantial right. *See* Com. R. Evid. 103(a) and 402; *Pellegrino v. Commonwealth*, 1999 MP 10 ¶ 4, 5 N.M.I. 242, 243 (1999); *see also United States v. Gonzalez-Torres*, 273 F.3d 1181, 1188-89 (9th Cir. 2001) (admission of evidence requires balancing of probative value against prejudicial effect for abuse of discretion).

¶18 V. Whether, in issuing jury instructions, the trial court erred by failing to: (1) give requested defense instructions; or (2) instruct the jury *sua sponte* on actual perpetrator's *mens rea* and lesser included offenses. A trial court's ruling to preclude a defendant's proffered defense is reviewed *de novo. See United States v. Moreno*, 102 F.3d 994, 997 (9th Cir. 1996); *Commonwealth v. Bergonia*, 3 N.M.I. 22, 35 (1992). A defendant is entitled to reversal, based on the adequacy or completeness of jury instructions on the essential elements of the offense, only for plain error. Plain error is a highly prejudicial error, which affects the defendant's substantial rights. *See United States v. Payne*, 944 F.2d 1458, 1463 (9th Cir. 1991), *cert. denied*, 503 U.S. 975, 112 S. Ct. 1598, 118 L. Ed. 2d. 313 (1992). We decline to reach the standard for reversal regarding *sua sponte* instructions on lesser included offenses.

¶19 VI. Whether, during closing arguments, the Commonwealth: (1) violated the defendant's Fifth Amendment rights by commenting on his post-arrest silence; or (2) made other improper statements which violated his due process rights. As with other constitutional questions, we review these potential infractions *de novo*. *See Bergonia*, 3 N.M.I. at 35; *United States v. Ross*, 123 F.3d 1181, 1187 (9th Cir. 1997), *cert. denied*, 522 U.S. 1066, 118 S. Ct. 733, 139 L. Ed. 2d 670 (1998). There is, however, no automatic reversal of conviction for constitutional errors which, in the setting of a particular case, are of such unimportance that they may be deemed harmless. *See Commonwealth v. Saimon*, 3 N.M.I. 365, 379-80 (1992); *Neder v. United States*, 527 U.S. 1, 7, 119 S. Ct. 1827, 1833, 144 L. Ed 2d 35 (1999); *Chapman v. State of California*, 386 U.S. 18, 22, 87 S. Ct. 824, 827, 17 L. Ed. 2d 705 (1967). Under the harmless error standard, the aim is to "determine 'whether allegedly improper behavior, considered in the context of the entire trial . . . affected the jury's ability to judge the evidence fairly.'" *United States v. De Cruz*, 82 F.3d 856, 862 (9th Cir. 1996) (*quoting United States v. Endicott*, 803 F.2d 506, 513 (9th Cir. 1986)).

¶20 VII. Whether the evidence was sufficient to support the defendant's conviction of first degree murder. To determine the sufficiency of the evidence, we review the record in the light most favorable to the prosecution to determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Commonwealth v. O'Connor*, App. No. 99-021 (N.M.I. Sup. Ct. June 28, 2000) (Opinion at 2); *Commonwealth v. Oden*, 3 N.M.I. 186, 191 (1992).

¶21 VIII. Whether the trial court erred in denying the defendant's motion for a mistrial. The trial court's denial of a motion for mistrial is reviewed for abuse of discretion. *See United States v. Sarkisian*, 197 F.3d 966, 981 (9th Cir. 1999), *cert. denied*, 530 U.S. 1220, 120 S. Ct. 2230, 147 L. Ed. 2d 260 (2000); *United States v. Homick*, 964 F.2d 899, 906 (9th Cir. 1992).

¶22 IX. Whether the trial court erred in denying the defendant's motion for a new trial. The trial court's denial of a motion for new trial is reviewed for abuse of discretion. *See Saimon*, 3 N.M.I. at 397; *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1104 (9th Cir. 2002).

¶23 X. Whether cumulative errors require reversal of the defendant's conviction. We review to determine whether the overall effect of multiple errors amounts to prejudice. *See United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000).

¶24 XI. Whether the trial court's imposition of a 45-year sentence should be set aside in light of evidence of the defendant's youth and absence of a prior criminal record. In reviewing what evidence the trial court should have considered, we look for abuse of discretion. *See United States v. Ayers*, 924 F.2d 1468, 1481 (9th Cir. 1991).

ANALYSIS

I. The Trial Court's Assumption of Jurisdiction

¶25 The issue of jurisdiction is a question of law subject to *de novo* review. *See In re N.T.M.*, App. No. 98-022 (N.M.I. Sup. Ct. December 14, 1999) (Opinion at 1).

A. Prosecution by lawful Attorney General

¶26 Camacho argues that the trial court lacked subject jurisdiction over the information because the Government did not have a constitutionally appointed Attorney General at any time from the institution of the information to the return of the jury verdict.

¶27 We thoroughly considered and rejected Camacho's argument in a contemporaneous case. *See Commonwealth v. Zhen*, 2002 MP 4 ¶¶ 36-41. Pursuant to Rule 12 of the Commonwealth Rules of Criminal Procedure, defenses based on "defects in the institution of prosecution" are mandatory pretrial matters. *See* Com. R. Crim. P. 12(b)(1). Camacho's failure to raise the present objection before trial therefore resulted in a waiver. *See* Com. R. Crim. P. 12(f).[2]

B. Juvenile court certification hearing

¶28 Camacho states that the trial court had no jurisdiction because he was charged with aiding and abetting in a murder and thus, he cannot be automatically tried as an adult under 6 CMC § 5103(a). Because the Government did not seek and receive certification from the juvenile court by way of a hearing under 6 CMC § 5102, Camacho maintains that the trial court lacked jurisdiction over the case.

¶29 Although our statutory scheme empowers the juvenile court with exclusive original jurisdiction over all delinquency proceedings, 6 CMC § 5103(a) provides an exception for certain juveniles charged with

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[2] While jurisdictional matters may be raised on appeal, they are limited to allegations that "the applicable statute is unconstitutional or that the indictment fails to state an offense." *U.S. v. Kahlon*, 38 F.3d 467, 469 (9th Cir. 1994).

murder.[3] *See In re J.J.C.*, App. No. 98-043 (N.M.I. Sup. Ct. May 9, 2000) (Opinion at 3) (*citing In re N.T.M.*, App. No. 98-022 (N.M.I. Sup. Ct. December 28, 1999) (Opinion at 4)), *aff'd*, 255 F.3d 1069 (9th Cir. 2001). This Court has interpreted 6 CMC § 5103(a) as dispensing with the need for a certification hearing under 6 CMC § 5102, where an offender 16 years of age or older, is accused of a traffic offense, murder, or rape. *See In re N.T.M.* (Opinion at 5). In other words, under such circumstances, the juvenile court is automatically divested of jurisdiction and the accused juvenile is thereby subject to the original jurisdiction of the adult criminal court. *See id*.

¶30 That the basis of the first degree murder charge in this case stems from Camacho's alleged participation as an aider and abettor is of minimal significance in light of 6 CMC § 201, which eliminates the common-law distinction between principals and those who aid or abet the commission of a crime. A full discussion of this issue follows immediately below.

II. Defendant's Due Process Rights

¶31 We review *de novo* questions involving the application of the United States or Northern Mariana Islands Constitution. *See Triple J. Saipan, Inc.*, 1999 MP 7 ¶ 2, 5 N.M.I. at 233.

A. Common law distinction between a principal and an aider and abettor.

¶32 Camacho contends that his procedural due process rights were violated because, despite the provisions 6 CMC § 251(d), he was not permitted to raise the common law defense of being an aider and abettor. That section provides: "[n]othing contained in this title is to be construed to deny a defendant the right to raise any defense available at common law." Because the common law draws a distinction between

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[3] In relevant part, 6 CMC § 5103(a) defines "delinquent child" as any juvenile "[w]ho violates any Commonwealth law, ordinance, or regulation while under the age of 18; provided, that a juvenile 16 years of age or older accused of a traffic offense, murder, or rape shall be treated in the same manner as an adult . . . ."

a principal in the first degree and an aider and abettor, Camacho insists that, under section 251(d), an aider and abettor may not be convicted as a principal.

¶33 We are required to read the criminal code reasonably and "with a view to effect the plain meaning of its object". 6 CMC § 104(d). At the same time, we are not to interpret a statutory provision in a way that would render another provision either inconsistent or meaningless. *See Estate of Faisao v. Tenorio*, 4 N.M.I. 260, 265 (1995).

¶34 Camacho's suggested interpretation of 6 CMC § 251(d) is at odds with 6 CMC § 201, which reads:

> Every person is punishable as a principal who commits an offense against the Commonwealth or aids, abets, counsels, commands, induces, or procures its commission or who causes an act to be done, which, if directly performed by that person, would be an offense against the Commonwealth. No distinction is made between principals in the first and second degrees, and no distinction is made between a principal and what has heretofore been called an accessory before the fact.

If we were to adopt Camacho's approach, we would derogate section 201's objective of eliminating the common law distinction between principals and aiders and abettors.

¶35 While we have not considered this very issue, the trial division of the Trust Territory High Court observed that, under section 430 of the Trust Territory Code, from which section 201 of the Commonwealth Code is derived, "[t]he distinction between a principal and an accessory before the fact is a very technical one and of so little practical significance that it has been abolished in many states and in the case of crimes under the United States Code." *Ropon v. Trust Territory*, 2 T.T.R. 313, 315 (1962).[4] As such, we find

[4] For a historical account of the abolishment of the common law distinction between principals and aiders and abettors see *Standefer v. United States*, 447 U.S. 10, 15-20, 100 S. Ct. 1999, 2003-06, 64 L. Ed. 2d 689 (1980).

it difficult to accept Camacho's argument that the common law distinction survives the enactment of this statutory provision.

¶36 Moreover, although section 251(d) was enacted after section 201, we do not believe, as Camacho maintains, that its subsequent enactment evinces a legislative intent to supersede or repeal section 201 to the extent it conflicts with section 251(d).[5] Indeed, Public Law 3-71, containing section 251(d), enumerates various specific repealer provisions, none of which directs the repeal of section 201.

¶37 Camacho relies on the implied repealer rule, a heavily disfavored tool of statutory construction invoked only where nullification is "established by 'plain, unavoidable, and irreconcilable repugnancy.'" *State v. Langdon*, 999 P.2d 1127, 1132 (Or. 2000) (*quoting State v. Shumway*, 630 P.2d 796, 801 (Or. 1981)); *see also Tinoqui-Chalola Council v. U.S. Dep't of Energy*, 232 F.3d 1300, 1306 (9th Cir. 2000). The general rule disfavoring implied repeal is especially strong where, as here, certain provisions are expressly abrogated, demonstrating clearly that if the legislature "had meant to repeal any part of any other previous statute, it could easily have done so." *Hagen v. Utah*, 510 U.S. 399, 416, 114 S. Ct. 958, 968, 127 L. Ed. 2d 252 (1994).

¶38 As the trial court suggests, we can easily reconcile the apparent inconsistency between sections 201 and 251(d) by reading section 251(d) to mean that the legislature sought to preserve only those common law defenses not previously addressed by codified Commonwealth law. Because we conclude that section 201 was not repealed by the enactment of section 251(d), we hold that the Commonwealth Criminal Code

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[5] Section 201 of Title 6 of the Commonwealth Code originates from the Trust Territory Code, *see* 11 TTC § 2, and remains in force pursuant to section 2 of the Schedule on Transitional Matters of the Constitution of the Northern Mariana Islands. Section 251(d) of Title 6 of the Commonwealth Code was enacted in 1983. *See* Public Law 3-71.

does not afford Camacho the due process right to assert that, as an aider and abettor, he is entitled to be punished differently from a principal, according to the distinction established by the common law.

B. Juvenile court authorization

¶39 In addition to his jurisdictional claim, Camacho asserts that the Government's failure to obtain certification from the juvenile court constitutes a denial of due process.

¶40 As indicated, we have previously held juvenile court certification is not required in a criminal case involving an offender, who is between sixteen and eighteen years of age and is charged with the crime of murder. *See supra* at ¶ 29. A juvenile court is automatically divested of jurisdiction under such circumstances, thereby subjecting the offender to the trial court's original jurisdiction. *See id*. Accordingly, Camacho has no due process right to a juvenile court certification hearing.

C. Prosecution by alleged usurper of the Commonwealth's prosecutorial power

¶41 Camacho further claims that he has a due process right to be tried by a constitutionally-appointed Attorney General. To support his argument, he cites *Hines v. Enomoto*, 658 F.2d 667 (9th Cir. 1981). This creates two problems. First, *Hines* has been abrogated by *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988). Second, Camacho fails to articulate how *Hines* helps his case, as the question there dealt with peremptory challenges and their affect on a trial proceeding and a defendant's right to due process.

¶42 While we readily see the connection between peremptory challenges and a defendant's right to a fair trial, we have difficulty with the contention, which we assume Camacho is making, that a constitutionally-defective appointment of an Acting Attorney General deprived him of his right to a fair trial. Because he did not explore this argument or provide a cogent analysis backed by case law, we cannot decipher Camacho's

claim. We therefore decline to rule on this issue. *See Roberto v. De Leon Guerrero*, 4 N.M.I. 295, 297-98 (1995) (reviewing court need not address argument unaccompanied by cited authority).

III. Double Jeopardy Clause

¶43 We now consider the issue of whether Camacho's juvenile transfer proceedings in the companion case, *In re J.J.C.*, App. No. 98-043 (N.M.I. Sup. Ct. May 9, 2000), *aff'd* 255 F.3d 1069 (9th Cir. 2001), invoked the double jeopardy clause of the Fifth Amendment to the United States Constitution, thereby barring his prosecution for first degree murder. This issue again implicates a constitutional right and is subject to *de novo* review. *See Triple J. Saipan, Inc.*, 1999 MP 7 ¶ 2, 5 N.M.I. at 233.

¶44 The Commonwealth filed a juvenile delinquency complaint in juvenile court against Camacho, charging him with conspiracy to commit murder and solicitation to commit murder. We held that "[a]s long as the transfer hearing does not involve the risk of an adjudication of guilt, the juvenile court is not prohibited from conducting such a hearing even if substantial evidence that the juvenile committed the alleged offense is a prerequisite to the transfer." *In re J.J.C.*, (Opinion at 12-13). We found nothing introduced at the juvenile hearing which amounted to substantial evidence that Camacho committed the alleged offense. *See id*. at 13.

¶45 To preserve the issue for Ninth Circuit review, Camacho reasserts his argument that jeopardy attached to the transfer hearing on the conspiracy complaint. He further extends this argument by insisting that, because jeopardy attached to the juvenile transfer hearing, the Commonwealth is precluded from prosecuting him as an adult "on any charge related to the same underlying conduct." Camacho neglects to mention that the case upon which he relies pertains to multiple prosecutions for the *same offense* based on the same underlying conduct. *See People v. Holloway*, 662 N.Y.S.2d 677 (N.Y. Sup. Ct. 1997) (both juvenile and family court charges were for offense of sodomy in the first degree).

¶46 In this case Camacho was tried for first degree murder. The subject of the juvenile transfer proceeding, on the other hand, was conspiracy. A settled principle of double jeopardy provides that the commission of a substantive offense and a conspiracy to commit the offense are separate and distinct crimes to which double jeopardy is not a defense. *See United States v. Felix*, 503 U.S. 378, 388-93, 112 S. Ct. 1377, 1383-85, 118 L. Ed. 2d 25 (1992); *Pereira v. United States*, 347 U.S. 1, 11, 74 S. Ct. 358, 364, 98 L. Ed. 435 (1954); *United States v. James*, 109 F.3d 597, 600 (9th Cir. 1997). Specifically, the Ninth Circuit has held charges of conspiracy and aiding and abetting in the commission of a substantive offense are separate offenses for purposes of double jeopardy. *See United States v. Nelson*, 137 F.3d 1094, 1107-1108 (9th Cir. 1998) (*citing United States v. Arbelaez*, 812 F.2d 530, 534 (9th Cir. 1987)). Accordingly, because the juvenile proceedings dealt with a separate and distinct offense, we find no double jeopardy violation in the Commonwealth's separate prosecution of Camacho for first degree murder.

¶47 Without any analysis, Camacho alternatively argues that the double jeopardy clause of Article I, Section 4(e) of the Constitution of the Northern Mariana Islands bars the Commonwealth's prosecution for first degree murder. We have acknowledged that because the double jeopardy clause in the N.M.I. Constitution is patterned after the double jeopardy clause in the United States Constitution, it is appropriate to resort to federal case law to ensure that our interpretation of Article I, Section 4(e) provides at least the same protection granted under the federal Constitution. *See Commonwealth v. Oden*, 3 N.M.I. 186, 206 (1992). We see no reason to depart from relying on federal case law for guidance to determine the parameters of the N.M.I. Constitution's double jeopardy clause. As articulated in the discussion on the federal double jeopardy clause, we will not construe Article I, Section 4(e) in the expansive way Camacho would have us read the provision, that is, to prohibit the subsequent prosecution of any offense related to the same underlying conduct.

IV. Admission of Evidence at Trial

¶48 The admission of evidence at trial is subject to review for abuse of discretion. *See Pellegrino v. Commonwealth*, 1999 MP 10 ¶ 4, 5 N.M.I. 242, 243 (1999).

A. Gang-affiliation evidence

¶49 Camacho maintains that any probative value of evidence on the Redrum gang was outweighed by its unfair prejudice, in that the admission of such evidence impermissibly influenced the jury to convict him on the basis of his association with the gang.[6] The Commonwealth responds by pointing to recent Ninth Circuit decisions holding that such evidence is admissible where gang affiliation is intertwined with the commission of the crime, shows motive for "an otherwise inexplicable act," or is necessary to explain why a person would kill a stranger.[7]

¶50 Indeed, gang-affiliation evidence may only be admitted when it is relevant to a material issue in the case. *See United States v. Abel*, 469 U.S. 45, 49, 105 S. Ct. 465, 467, 83 L. Ed. 2d 450 (1984). Such material issues include bias, motive, and preparation. *See* Com. R. Evid. 404(b);[8] *United States v. Takahashi*, 205 F.3d 1161, 1164 (9th Cir. 2000) (evidence of Yakuza membership admitted to show bias); *United States v. Santiago*, 46 F.3d 885, 889 (9th Cir. 1995) (admitting evidence regarding prison gang membership to prove motive).

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[6] *See* Com. R. Evid. 403 (allowing exclusion of relevant evidence if probative value substantially outweighed by, among other things, danger of unfair prejudice, confusion of issues, or misleading the jury).

[7] *See United States v. Santiago*, 46 F.3d 885 (9th Cir. 1995), *United States v. Winslow*, 962 F.2d 845 (9th Cir. 1992), and *United States v. Skillman*, 922 F.2d 1370 (9th Cir. 1991).

[8] Com. R. Evid. 404(b) reads in pertinent part: "[e]vidence of other crimes, wrongs, or acts . . . may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

¶51 However, gang membership alone may not be used as proof of "intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting." *United States v. Garcia*, 151 F.3d 1243, 1246 (9th Cir. 1998) (*citing Mitchell v. Prunty*, 107 F.3d 1337, 1342 (9th Cir. 1997), *cert. denied*, 522 U.S. 913, 118 S. Ct. 295, 139 L. Ed. 2d 227 (1997), *overruled in part, on other grounds, en banc, by Santamaria v. Horsley*, 133 F.3d 1242 (9th Cir. 1998)). Thus gang membership evidence has been found inadmissible to establish an individual gang member aided and abetted in a killing "by fanning the fires of gang warfare that culminated in . . . [the victim's] death." *Mitchell*, 107 F.3d at 1342. The Ninth Circuit reasoned that admitting evidence on such a basis "smacks of guilt by association" and "would invite absurd results" by holding any gang member liable for any other member's act "so long as the act was predicated on the 'common purpose of "fighting the enemy."'" *Id*. (*citing Curtin v. Lataille*, 527 A.2d 1130, 1133 (R.I. 1987)).

¶52 Here the gang-affiliation evidence was admitted for the particular purpose of explaining a material issue in this case -- Camacho's role in aiding and abetting in Antonio's murder. Ian testified that Camacho delivered the order to kill, which apparently came from a person who was referred to as the "gang's boss." Ian also stated that Camacho furnished the knife used to stab Antonio to death and directed Kevin to accompany Ian to ensure the order was carried out. The Commonwealth sought to establish a missing link in this chain of events by offering gang membership evidence to explain why Camacho had such control and influence over Ian. In fact, the trial court predicated its evidentiary ruling on this link. Accordingly, we find no abuse of discretion and that the admission of the gang membership evidence was proper.

B. Victim's photograph

¶53 It is well established that photographs may be used to portray relevant matters, including the identification of the victim. *See State v. Finch*, 975 P.2d 967, 981 (Wash. 1999); *People v. Anderson*,

954 P.2d 627, 630 (Colo. Ct. App. 1997). As with other evidence, the trial court has wide latitude in deciding whether to admit or exclude photographs of a victim; its ruling will not be overturned absent an abuse of discretion. *See People v. Seaton*, 28 P.3d 175, 208 (Cal. 2001).

¶54 Camacho contends that a photograph of Antonio in his football uniform served only to inflame the emotions of the jury, yet he fails to offer any indication of unfair prejudice. The trial court reviewed the photograph and determined that it was relevant and probative because it identified the victim. As such, we cannot say that the trial court abused its discretion in admitting the photograph.

V. Jury Instructions

A. Common law aiding and abetting

¶55 Camacho reiterates his earlier argument that he was improperly charged as a principal in the crime in light of 6 CMC § 251(d), which affords him the right to assert common law defenses. He requested, but was denied, a jury instruction on the common law defense of not being a principal to the commission of a crime. Having disposed of a similar issue in our discussion about whether Camacho was deprived of a due process right to present a defense of not being a principal, *see supra* at ¶ 38, we uphold the trial court's rejection of the proffered jury instruction. The trial court's ruling comports with 6 CMC § 201, which draws no distinction between a principal and an accessory before the fact.

B. Actual perpetrator's *mens rea*

¶56 The adequacy or completeness of jury instructions on the essential elements of the offense is reviewed for plain error. *See Commonwealth v. Esteves*, 3 N.M.I. 447, 452 (1993). In conducting such a review, "we must consider whether the instructions as a whole were misleading or inadequate to guide the jury's determination." *Id*. at 454.

¶57 Camacho argues that he was entitled to an instruction on Ian's *mens rea* because, to be convicted of aiding and abetting, the direct perpetrator must possess the requisite *mens rea* to commit the underlying offense. Contrary to this assertion, the portion of the transcript where proposed jury instructions were reviewed discloses that the trial court did not deny an instruction specifically related to Ian's *mens rea*. The court instead rejected Camacho's proposed instruction that Ian, as the direct perpetrator, acted out of duress and/or necessity.[9]

¶58 Section 201 of Title 6 of the Commonwealth Code requires the punishment, as a principal, of any person who aids, abets, counsels, commands, induces, or procures the commission of a crime, or who otherwise "causes an act to be done, which, if directly performed by that person, would be an offense against the Commonwealth."[10] Dividing section 201 into two provisions, the first provision necessitates proof that each element of the underlying criminal offense was committed by someone, other than the aider, who had the requisite *mens rea*. In the alternative, the second provision prevents a culpable party from escaping prosecution by using a so-called "innocent instrument" to do his dirty work.

¶59 In other words, to earn a conviction under section 201, the prosecution must prove that the defendant:

> (1) intentionally committed an act, which contributed to the commission of a second act;
> (2) which second act
> (a) either:
> (i) is a crime or
> (ii) would be a crime if done by defendant; and
> (b) was later committed.

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[9] Defense counsel seemed to be unclear on the effect of such an instruction, as he alternately argued that duress and/or necessity was a mitigating factor, a defense and a justification. He also mentioned at one point that it would be the defense's position that there was no first degree murder because "they" were juveniles, and that the defense was being precluded from contesting Ian's *mens rea*. However, he did not request instructions specifically relating to incapacity or *mens rea*.

[10] *See supra* at ¶ 34 for the complete text of 6 CMC § 201.

Under (2)(a)(i), above, it is necessary to prove that the direct perpetrator had the specific intent to commit the crime because, without the *mens rea* element, the second act would not be a crime. *See United States v. Fulbright*, 105 F.3d 443, 451-52 (9th Cir. 1997) (*quoting United States v. Powell*, 806 F.2d 1421, 1423-24 (9th Cir. 1986)).[11] Under (2)(a)(ii), above, it is unnecessary for the perpetrator to have formed, or been capable of forming, the specific intent. Here, the relevant inquiry is whether the second act would have been a crime, if performed by defendant, in which case "[i]t is the aider and abettor's state of mind, rather than the state of mind of the principal, that determines the former's liability." *United States v. Short*, 493 F.2d 1170, 1172 (9th Cir. 1974), *modified*, 500 F.2d 676 (9th Cir. 1974), *cert. denied*, 419 U.S. 1000, 95 S. Ct. 317, 42 L. Ed. 2d 275 (1974)*; see also United States v. Johnson*, 132 F.3d 1279, 1285 (9th Cir. 1997); *United States v. Laurins*, 857 F.2d 529, 535 (9th Cir. 1988).

¶60 Thus the critical issue upon which the jury was to have been instructed in this case is Camacho's *mens rea*, not Ian's. Viewing the instructions given at Camacho's trial together as a whole, we conclude that the jury was properly informed of every element required for conviction. It is true that the instruction on aiding and abetting referred to the principal's commission of a crime without including acts which would have been crimes if committed by the defendant.[12] Nevertheless, the first degree murder instruction laid out with

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[11] The federal cases cited are based on a parallel law, 18 U.S.C. § 2, which reads:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[12] The trial judge read the following aiding and abetting instruction:

> A person aids and abets the commission of a crime when he or she, with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing or encouraging or facilitating the commission of the crime and by act or advice aids, abets, counsels, commands, induces, or procures the commission of the crime. A person who aids and abets the commission of the crime need not be present at the scene of the crime. Mere presence at the scene of the crime which

specific detail the elements of that offense, including the culpable mental state, and correctly required a finding that Camacho had specific intent.[13]

¶61 Although the trial court could have provided better and more precise instructions, we do not find that the instructions were inadequate or incomplete such that they failed to instruct on each and every essential element of the crime with which Camacho was charged. Because the disputed instruction was immaterial to Camacho's conviction, we conclude that there is no plain error.[14]

C. Instructions on lesser included offenses

¶62 Camacho claims that the trial court had an independent duty to instruct the jury on lesser included offenses even though he did not so request. He further asserts that, by not instructing the jury on lesser included offenses, namely second degree murder and manslaughter, the trial court committed reversible

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> does not itself assist the commission of the crime does not amount to aiding and abetting. Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.

[13] The transcript of the jury instructions given by the trial court reads in pertinent part:

> First degree murder defined. Defendant is accused of having committed the crime of murder, a violation of 6 CMC 1101(a) [sic]. Every person who unlawfully kills a human being with malice [aforethought] . . . is guilty of the crime of murder in violation of this statute. In order to prove this crime, each of the following elements must be proved. No. 1, that a human being was killed; No. 2, the killing was unlawful; No. 3, the killing was done with malice [aforethought] . . . and No. 4, the killing was wilful, premeditated and deliberate. So, let's define some of those terms . . . .
>
> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill which was the result of deliberation and premeditation so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion, or other condition, precluding the idea of deliberation, it is murder in the first degree.

[14] While some federal cases may hold otherwise, our statute does not reflect the same division between aiding and abetting and use of an innocent instrument seen in 18 U.S.C. § 2(a) and (b).

error. The Commonwealth counters that Camacho did not meet his burden in establishing that a rational jury could have found him guilty of the lesser offense, a predicate to obtaining a lesser offense instruction.

¶63 It is well settled that, in a criminal case, the trial court must instruct on lesser included offenses where there is evidence from which a rational jury could find the defendant guilty of the lesser offense and acquit him of the greater, regardless of whether such instruction has been requested.[15] *See, e.g., Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980); *Turner v. Calderon*, 281 F.3d 851, 885-87 (9th Cir. 2002); *People v. Breverman*, 960 P.2d 1094 (Cal. 1998); *State v. Haanio*, 16 P.3d 246, 255 (Haw. 2001); *Angoco v. Bitanga*, 2001 Guam 17 ¶ 12.[16]

¶64 In fact, the court must instruct on a lesser included offense supported in the record even where such an instruction is explicitly rejected by a party. *See Breverman*, 960 P.2d at 1101 (regardless of trial tactics or objections, the court must instruct *sua sponte* on any and all lesser included offenses insofar as supported by the evidence); *Haanio*, 16 P.3d at 255; *Angoco*, 2001 Guam at 17 ¶ 18.

¶65 "Our courts are not gambling halls but forums for the discovery of truth." *People v. Barton*, 906 P.2d 531, 536 (Cal. 1995). Thus, our ultimate concern must go beyond individual parties' trial strategies. *See Breverman*, 960 P.2d at 1101 ("Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense."); *Haanio*, 16 P.3d at 256 ("in our judicial

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[15] By way of contrast, courts are not expected to instruct *sua sponte* regarding all possible defenses, as this would place upon them an undue burden.

[16] We are aware that this is inconsistent with Rule 30 of the Commonwealth Rules of Criminal Procedure, which states in part: "[n]o party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict . . . ." Nevertheless, due process dictates that Rule 30 is inapplicable to the extent that it is inconsistent with the duty to instruct *sua sponte* regarding lesser included offenses.

system, the trial courts, not the parties, have the duty and ultimate responsibility to insure that juries are properly instructed on issues of criminal liability"); *Angoco*, 2001 Guam 17 ¶¶ 19-20.

¶66 However, the United States Supreme Court has made it clear that a lesser included offense instruction is required only when warranted by the evidence. *Hopper v. Evans*, 456 U.S. 605, 611, 102 S. Ct. 2049, 2053, 72 L. Ed. 2d 367 (1982). "To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, 'evidence from which a rational trier of fact could find beyond a reasonable doubt' that the defendant committed the lesser offense [but not the greater]." *People v. Mendoza*, 6 P.3d 150, 174 (Cal. 2000) (citations omitted); *see also Breverman*, 960 P.2d at 1106 (existence of "any evidence" will not justify instructions on lesser included offense; instruction is required only if evidence that defendant is guilty solely of lesser offense is "substantial enough to merit consideration" by the jury).

¶67 Accordingly, in determining whether to give a lesser included offense instruction, courts apply a two-prong test. *See Commonwealth v. Kaipat*, 4 N.M.I. 300, 303 (1995) (*citing United States v. Gutierrez*, 990 F.2d 472, 477 (9th Cir. 1993), *overruled on other grounds by United States v. Armstrong*, 48 F.3d 1508 (9th Cir. 1995)), *aff'd in unpub. decision* 91 F.3d 151 (9th Cir. 1996). First, under the legal prong, the court must determine whether the elements of the lesser offense are such that one cannot commit the greater offense without committing the lesser. *See id.* If so, under the factual prong, the court must review the evidence to determine whether a rational jury could find the defendant guilty of the lesser offense while acquitting him of the greater. *See id.*; *Haanio*, 16 P.3d at 254[17]

[17] Even where both answers are affirmative, an additional level of inquiry is required on appeal; we would have to determine whether the flaws amount to plain error. *See United States v. Parker*, 991 F.2d 1493, 1496 (9th Cir. 1993). Because Camacho has not met the factual prong, we need not reach that issue today.

¶68 There is no dispute that, under the legal prong, second degree murder and manslaughter are lesser offenses included within the crime of first degree murder. *See* 6 CMC §§ 1101, 1102;[18] *People v. Lewis*, 22 P.3d 392, 416 (Ca. 2001). We therefore review the record to determine whether it establishes an inference that one of the elements of first degree murder was missing, and that Camacho might have been guilty of one of the lesser charges.

¶69 The only distinction in elements between first degree murder and second degree murder or manslaughter is intent. Camacho seems to imply that the instructions on lesser offenses should have been included due to Ian's *mens rea*. However, as we have already discussed at some length, it is Camacho's intent which is at issue here. *See supra* at ¶¶ 57-61. It simply defies logic to imagine, on the facts

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[18] Sections 1101 and 1102 of Title 6 of the Commonwealth Code read in pertinent parts, as follows:

> § 1101. Murder.
> Murder is the unlawful killing of a human being by another human being with malice aforethought.
> (a) *First Degree Murder*. First degree murder is a murder which is:
> (1) Willful, premeditated, and deliberated;
> (2) Perpetrated by poison, lying in wait, torture, or bombing; or
> (3) One that occurs during the perpetration or attempted perpetration of arson, rape, burglary, robbery, or any sexual abuse of a child.
> (b) *Second Degree Murder*. Second degree murder is murder which is not one of the types specified as first degree murder.
>
> § 1102. Manslaughter.
> Manslaughter is the unlawful killing of one human being by another human being without malice aforethought.
> (a) *Voluntary Manslaughter*. Voluntary manslaughter is an unlawful killing done in a sudden quarrel or heat of passion caused by a reasonable provocation.
> (b) *Involuntary Manslaughter*. Involuntary manslaughter is an unlawful and unintentional killing done either:
> (1) In the commission of an unlawful act not amounting to a felony;
> (2) In the commission of a lawful act which might produce death in an unlawful manner; or
> (3) In the commission of a lawful act in a criminally negligent manner, provided that this subsection shall not apply to acts committed in the driving of a vehicle.

presented, that Camacho could have instructed Ian to stab Antonio to death, without possessing malice aforethought, and that this instruction could have been anything less than willful, premeditated, and deliberate. There was not even a scintilla of evidence warranting a third option, let alone enough to amount to reversible error. Without the requisite inference from the record, the trial court did not have a duty to instruct the jury on lesser included offenses.

VI. Improper statements during closing arguments

¶70 Allegations of constitutional error are reviewed *de novo*. Nevertheless, such errors are not necessarily fatal. Unless they are of a structural nature, "[r]eviewing courts normally disregard trial errors that are harmless." *O'Neal v. McAninch*, 513 U.S. 432, 434, 115 S. Ct. 992, 994, 130 L.Ed.2d 947 (1995); *see also Neder v. United States*, 527 U.S. 1, 7, 119 S. Ct. 1827, 1833, 144 L.Ed 2d 35 (1999). We have previously acknowledged and adopted the harmless error test. *See Commonwealth v. Saimon*, 3 N.M.I. 365, 379-80 (1992).

¶71 On direct appeal, both non-constitutional and constitutional trial errors are subject to the *Chapman* standard, under which "the burden [is] on the beneficiary of the error . . . to prove that there was no injury." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967); *see also United States v. Olano*, 507 U.S. 725, 741, 113 S. Ct. 1770, 1781, 123 L. Ed. 2d 508 (1993).

¶72 The focus of this inquiry is whether, in the context of the entire trial, it is more probable than not that the misconduct "had substantial and injurious effect or influence in determining the jury's verdict." *Commonwealth v. Mendiola*, 976 F.2d 475, 487 (9th Cir. 1993), *overruled on other grounds by George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997); *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 1714, 123 L. Ed. 2d 353 (1993) (*quoting, and adopting, standard set forth in Kotteakos*

v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253, 90 L.Ed. 1557 (1946)); *see also United States v. De Cruz*, 82 F.3d 856, 862 (9th Cir. 1996) (*quoting United States v. Endicott*, 803 F.2d 506, 513 (9th Cir. 1986)).[19]

A. Comments on the defendant's post-arrest silence and the Fifth Amendment

¶73 Camacho asserts that the prosecution's statements during closing arguments on his post-arrest silence violated his Fifth Amendment right to remain silent. He also argues that due process requires that a defendant be allowed to exercise his constitutional right to remain silent without being penalized for doing so; it is his position that the Commonwealth, therefore, cannot draw attention to his silence in order to emphasize an inappropriate inference of guilt to the jury.

¶74 In response, the Commonwealth urges the court to read its statements in context, since references to Camacho's silence were made during the prosecution's explanation to the jury on the weight to be given to four extra-judicial statements that were admitted at trial: (1) Camacho's statement to the police that he did not leave his home on the day of the killing; (2) Camacho's order to Ian to steal the sword; (3) Camacho's order to kill Antonio; and (4) Camacho's statement to Carlos not to return to the victim's home.

¶75 The Commonwealth contends that it was appropriate to remind the jury that they could not consider a defendant's decision not to testify against himself. Moreover, the trial court had informed the jury that

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[19] The Commonwealth argues that Camacho failed to preserve these challenges for review because he did not timely object and, therefore, is only entitled to review for plain error. However,

> Defense counsel entered his objections to the language and tenor of the prosecutor's closing remarks by way of a mistrial motion after the government finished its summation. This circuit has recognized this as an acceptable mechanism by which to preserve challenges to prosecutorial conduct in a closing argument in lieu of repeated interruptions to the closing arguments.

United States v. Prantil, 764 F.2d 548, 555 n.4 (9th Cir.1985).

Camacho was not required to testify or to produce any evidence, instructed them not to draw any inferences from Camacho's decision not to take the stand, and warned that counsel's arguments and statements were not evidence.

¶76 As the United States Supreme Court noted in the canonical *Miranda* decision, Fifth Amendment doctrine recognizes a general prohibition against prosecutorial comments about a defendant's post-arrest silence. *See Miranda v. Arizona*, 384 U.S. 436, 468-69 n.37, 86 S. Ct. 1602, 1624-25 n.37, 16 L. Ed. 2d 694 (1966) and cases cited therein; *Mitchell v. United States*, 526 U.S. 314, 328, 119 S. Ct. 1307, 1314-15, 143 L. Ed. 2d 424 (1999) (normal rule in a criminal case permits no negative inference from defendant's failure to testify) (*citing Griffin v. California*, 380 U.S. 609, 614, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106 (1965)); *United States v. Hale*, 422 U.S. 171, 180, 95 S. Ct. 2133, 2138, 45 L. Ed. 2d 99 (1975) (noting that mention of defendant's silence following arrest has significant potential for prejudice); *Guam v. Veloria*, 136 F.3d 648, 652 (9th Cir. 1998) ("The right to remain silent carries an implicit assurance that silence will carry no penalty.").

¶77 To inform a person that he has the right to remain silent and then allow an unfavorable inference to be drawn from such silence at trial "would be fundamentally unfair and a deprivation of due process." *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91 (1976).

¶78 Presuming that even a cautionary mention of defendant's silence is error, it is the Commonwealth's burden to show this misconduct harmless "beyond a reasonable doubt." *Sullivan v. Lousiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993) (*quoting Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967)); *see also United States v. Kallin*, 50 F.3d 689, 693 (9th Cir.1995).

¶79 In the context of comments on silence, the test for harmless error comprises the following factors: (1) the extent of the comments made, (2) whether inference of guilt from silence was stressed to the jury, and (3) the extent of other evidence implicating the defendant's guilt. *See United States v. Valarde-Gomez*, 269 F.3d 1023, 1034-35 (9th Cir. 2001) (*quoting United States v. Newman*, 943 F.2d 1155, 1158 (9th Cir.1991)); *Anderson v. Nelson*, 390 U.S. 523, 523-24, 88 S. Ct. 1133, 1134, 20 L. Ed. 2d 81 (1968). Circumstances such as curative jury instructions may also be taken into account. *See United States v. Tarazon*, 989 F.2d 1045, 1052 (9th Cir. 1993).

¶80 After weighing the comments against the three-factor test, we conclude that they were harmless error beyond a reasonable doubt. The post-arrest comments were made only twice while the Commonwealth explained Camacho's various statements to Ian, Carlos, and the police. Viewed against Ian's testimony concerning Camacho's role in the murder, we do not find any emphasis of Camacho's post-arrest silence to establish his guilt, nor any inference that the jury relied on the statements to convict Camacho. Furthermore, the trial court instructed the jury that the defendant has no obligation to testify on his own behalf or to produce exculpatory evidence. The curative jury instruction sufficiently guarded against any impermissible consideration by the jury of the Commonwealth's comments on Camacho's post-arrest silence.

B. Other improper comments

1. Sympathy for the victim

¶81 Although emotional language is acceptable during closing arguments, "language which evokes sympathy for the victim is improper." *Saimon*, 3 N.M.I. at 390 (*citing Jones v. State*, 738 P.2d 525, 529 (Okl. Crim. App.1987)). Nevertheless, a single call for sympathy during closing argument is harmless, particularly where evidence of guilt is strong. *See id*.

¶82 Camacho contends that the prosecutor committed reversible error by stating that the sole person who should have the jury's sympathy is Antonio. The Commonwealth responds that, in context, this entreaty alone amounts to harmless error.

¶83 The controverted statement is as follows:

> [I]n some of your minds you may have a certain degree of sympathy for Jesse James Camacho. I *can't read your minds and I don't know, but what I tell you is, there is really only one person that should be the object of your sympathy, if you have any, and that is Antonio Sablan*. He is no longer with us. He's the one whose life was terminated, you should base your decision solely on the facts on this case and not based upon sympathy, bias, or other outside feelings or emotions you may have.

Strikingly similar to the record in *Saimon*, the Commonwealth here made just one plea for sympathy for the victim. We thus conclude that, while improper, that lone statement does not rise to the level of error compelling reversal of Camacho's conviction.

2. Vouching for witness credibility.

¶84 Vouching occurs when a prosecutor places the prestige of the government behind a witness by personally assuring that person's veracity. *See United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001).

¶85 A prosecutor may not attest to any witness's credibility. *See, e.g., United States v. Garcia-Guizar*, 160 F.3d 511, 520 (9th Cir. 1998); *United States v. McKoy*, 771 F.2d 1207, 1210-11 (9th Cir. 1985).

¶86 Nevertheless, prosecutors are given reasonable latitude to fashion closing arguments, and they may argue reasonable inferences drawn from the evidence, "including that one of the two sides is lying." *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993); *see also United States v. Sarno*, 73 F.3d 1470, 1496-97 (9th Cir. 1995) (prosecutor can call for reasonable inferences, especially where case "essentially reduces to which of two conflicting stories was true").

¶87 While there is no bright-line rule on when prosecutorial vouching will result in reversal, courts consider:

> [1] the form of vouching; [2] how much the vouching implies that the prosecutor has extra-record knowledge of or the capacity to monitor the witness's trustfulness; [3] any inference that the court is monitoring the witness's veracity; [4] the degree of personal opinion asserted; [5] the timing of the vouching; [6] the extent to which the witness's credibility was attacked; [7] the specificity and timing of a curative instruction, [and 8] the importance of the witness's testimony and the vouching to the case overall.

Necoechea, 986 F.2d at 1278.

Where the credibility of a particular witness is crucial, vouching of that witness's credibility may require reversal. *See United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991).

¶88 Camacho claims prosecutorial misconduct based on the following statements:

(1) "There is an instruction in here on credibility, what it takes to make someone credible. I'm going into that in a little more detail, but by, in contrast, I think if you just look at Ian and Kevin, Ian, I think, you can accept that [Ian] . . . is remorseful and sincere in his testimony."

(2) "There's absolutely nothing that would cause [Ian] to lie."

(3) "I find him to be a very believable witness."

(4) "There is no evidence that he received anything in exchange for his testimony. He is serving his time as the law provides in that case, so he, in my opinion, is a very believable witness."

¶89 In the first excerpt, where the prosecutor twice said "I think," he was attempting to draw an inference of Ian's credibility from evidence in the record by comparing Ian's demeanor while testifying with Kevin's bearing while in court. The Commonwealth had to argue that Ian was telling the truth in order to secure Camacho's conviction; the prosecutor did so, by suggesting that the jury could perceive Ian's credibility from his behavior on the witness stand. Notwithstanding the utterances of the phrase "I think," taken as a whole, the statement does not imply that the Commonwealth was certifying to Ian's veracity. To the extent that an opinion was given, that opinion related to the jury, not the defendant.

¶90 Neither was the prosecutor vouching for Ian's credibility in making the second statement. Read in context, we view the statement as an allowable inference from evidence in the record. In light of Ian's testimony on direct examination that he had admitted to the killing at his juvenile proceeding and that, as a consequence, he was being held at the juvenile detention center, Ian had nothing to gain by his testimony regarding Camacho. By drawing such inference from the record, the Commonwealth permissibly asserted that Ian was being truthful about Camacho's participation.

¶91 It is clear, however, that the last two statements vouch for Ian's credibility. Viewing the statements against the *Necoechea* factors, we find this error harmless for the following reasons: (1) the comments were made as the prosecutor explained Ian's testimony and the desired inference that Ian had testified truthfully; (2) very little personal opinion was actually asserted; and (3) there is no hint that the prosecutor had extra-record knowledge of Ian's truthfulness.

¶92 Additionally, the trial court instructed the jury that neither opening nor closing arguments were to be considered as evidence,[20] and the jury was told to scrutinize accomplice testimony with great care.[21] Since the vouching was minimal, the instructions were sufficient to cure any prejudice which may have resulted from the prosecutor's error.

3. Remarks about defendant's guilt

¶93 A prosecutor's statement regarding a defendant's guilt is evaluated similarly to vouching, to determine whether it constitutes improper conduct requiring reversal. *See Molina*, 934 F.2d at 1445-46.

¶94 Camacho claims that the prosecutor impermissibly made the following statements about his guilt during closing arguments:

(1) "How I viewed this case, in a way, is that Ian Dela Cruz is a gun in the hands of Jesse Camacho."

(2) "We know that he told Officer Chen a lie."

(3) "Cause that's my burden, I have to convince you, reasonable people, I believe, that Jesse

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[20] Although several cautionary references were made, the court specifically stated as follows:

> Certain things are not evidence and you may not consider them in deciding what the facts are . . . . No. 1 is the arguments and statements by the lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is still not evidence.

[21] In part, that instruction read as follows:

> [A]ccomplice testimony is of such nature that it must be scrutinized with great care and viewed with particular caution . . . . You should ask yourselves whether the so-called accomplices would benefit more by lying or by telling the truth. Was their testimony made up in any way because they believed or hoped that they would somehow receive favorable treatment by testifying falsely[?] . . . . If you believe that the witness was motivated by hopes of personal gain, was the motivation one which would cause him to lie[?] . . . . Did this motivation color his testimony[?] In sum, you should look at all of the evidence in deciding what credence and what weight, if any, you would want to give to accomplice testimony.

Camacho ordered this murder to be committed and I have to prove to you beyond a reasonable doubt and this is, this is something that people do get confused about in terms of reasonable doubt."

¶95 After examining the prosecutor's controverted comments, we find them to be nothing more than red herrings. The prosecution merely attempted to explain its legal theory with the gun analogy, it did not directly speak to Camacho's guilt. The commentary on Camacho's statement to Detective Chen was made to explain the concepts of circumstantial evidence and inference. Its meaning cannot be gleaned in isolation, but must be understood in light of the prosecution's instruction as to what the jury could infer if it believed Officer Chen.[22] As for the third comment, Camacho deceptively begins to quote the prosecution mid-sentence with the phrase "I believe that Jesse ordered this murder." Read in context, it is difficult to construe the phrase "I believe" so as to pertain to Camacho. Rather, it is an assertion as to the prosecutor's belief in the *jury's reasonableness*.[23]

¶96 In any event, had these statements resulted in any prejudicial effect on the jury, it would have been so minimal as to be inconsequential, and would further have been neutralized when the court instructed the jury that closing arguments are not to be considered evidence. Thus, viewing the closing arguments as a

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[22] Immediately prior, the prosecutor said:

> What it means is that, if you believe Officer Chen that he went and talked to Jesse and Jesse told him "I was home all day," you are allowed to draw certain inferences. In other words, you can believe that if Jesse actually said that, that is evidence of some other things, and in this case, what I suggest to you is that it's evidence of his conscientiousness of guilt . . . . If a young man is out playing with his friends and all they're doing is playing that day and the police come over later and say "what were you doing that day," you would expect them to say "I was out playing with my friends that day."

[23] In other words, we interpret the prosecutor's statement as "I believe you are reasonable people. And it is my burden to convince you that Jesse Camacho ordered this murder to be committed; I have to prove this to you beyond a reasonable doubt."

whole and together with the court's instruction, we conclude that any prejudice in the prosecutor's comments was cured.

4. Comments on evidence not admitted at trial

¶97 In addition to offering opinions on a witness's testimony or the defendant's guilt, it is improper for the prosecutor to refer to evidence not admitted at trial. *See, e.g., United States v. Freter*, 31 F.3d 783, 786 (9th Cir. 1994); *Molina*, 934 F.2d at 1445. Although counsel may comment on any matter brought to the attention of the jury, "[i]t is elementary, however, that counsel may not premise arguments on evidence which has not been admitted." *Johnson v. United States*, 347 F.2d 803, 805 (D.C. Cir. 1965); *see also United States v. Gibson*, 513 F.2d 978, 980 (6th Cir. 1975).

¶98 After Camacho's attorney finished his closing argument, the prosecution began its rebuttal by stating: "Thirty-seven stab wounds definitely in evidence. There were a lot of other things that you didn't see that could have been produced. The picture of those stab wounds, the autopsy, all of that could have been . . ." At that point, the trial judge interrupted the prosecutor by asking counsel to approach, presumably to warn against such comments. After the sidebar, the prosecutor resumed his rebuttal argument without further reference to items not in evidence.

¶99 Camacho contends that the comments were improper and, because the court did not give a specific curative instruction to the jury, constitute reversible error.

¶100 Obviously the references to photographs of the stab wounds and to the autopsy were improper, as these items were not admitted at trial. Nevertheless, the trial court's quick intervention prevented the

prosecution from pursuing an argument predicated on such evidence. As a result, it is highly unlikely that the jury's ability to determine the facts solely on the evidence was affected.[24]

¶101 A specific curative instruction immediately after the statements were made would have been preferable, but was unnecessary. The comments were relatively innocuous and any potential prejudicial effect was nullified by the general instruction regarding counsels' arguments. In short, the minor mention of out-of-court evidence was not prejudicial; any error which may have existed was harmless.

5. References to gang membership

¶102 According to Camacho, the prosecution made 40 references to the Redrum gang in its closing argument. He maintains that the repeated comments served only to inflame the jury's emotions and to impermissibly influence it into rendering a verdict based on passion rather than evidence.

¶103 We have ruled earlier in this opinion that the lower court properly admitted testimony relating to the gang at trial to explain Camacho's influence over Ian. *See supra* at ¶ 52. The prosecution undoubtedly had to mention the gang-related evidence in its closing argument to show how such evidence fit into its theory of the case. Thus, we find no error.

C. Due process rights and closing argument

¶104 To constitute a violation of a defendant's right to due process under the Fourteenth Amendment to the United States Constitution, prosecutorial misconduct must be of "sufficient significance to result in the denial of the defendant's right to a fair trial." *Greer v. Miller*, 483 U.S. 756, 765, 107 S. Ct. 3102, 3109, 97 L. Ed. 2d 618 (1987); *see also Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9, 113 S. Ct. 1710, 1722 n.9, 123 L. Ed. 2d 353 (1993); *Mancuso v. Olivarez*, 282 F.3d 728, 745 (9th Cir. 2002).

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[24] In addition, the prosecutor was attempting to respond to the defense's emphasis in its closing argument on the number of stab wounds. This further minimizes the error. *See United States v. Sarkisian*, 197 F.3d 966, 990 (9th Cir. 1999) (invoking "invited reply" rule).

¶105 Camacho asserts that the Commonwealth's numerous improper remarks and comments during closing argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. He points to the shortness of the trial and the alleged weakness of the prosecution's case as indicating that we must reverse his conviction. The Commonwealth counters by arguing that the strength of the case called for a short trial and the improper conduct, if any, did not affect the outcome. We agree with the Commonwealth.

¶106 In order to prevail on this point, Camacho would have to show that the error was "deliberate and especially egregious" or combined with a true pattern of misconduct. *See Karis v. Calderon*, 283 F.3d 1117, 1128 (9th Cir. 2002); *Greer*, 483 U.S. at 769, 107 S. Ct. at 3110 (Stevens, J. concurring); *Brecht*, 507 U.S. at 638 n.9, 113 S. Ct. at 1722 n.9; *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir.1995). Although the prosecution made a few improper statements in its closing argument, the prejudice that these comments created was marginal. Furthermore, the court explicitly and clearly warned the jury that counsel's statements and arguments were not evidence, and that the facts were to be decided only the evidence.[25]

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[25] At the close of trial alone, the jury was reminded at least a dozen times about the importance of focusing on the evidence, and the evidence alone. A sampling of these warnings includes the following:

> It is your duty to find the facts from all the evidence in the case.
>
> You are to decide the case solely on the evidence received at trial.
>
> Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions.
>
> You must decide all questions of fact in this case from the evidence received in this trial and not from any other source.
>
> [Y]ou must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy.
>
> You are to perform the duty of find the fact without bias or prejudice . . .

¶107 We are thus unable to say that these statements contributed to the conviction, in light of the other boys' testimony which implicated Camacho. Viewed as a whole, we find that the closing argument, while imperfect, was not fundamentally flawed to the extent that it deprived Camacho of his right to a fair trial.

VII. Sufficiency of the Evidence to Support the Verdict

¶108 In reviewing a challenge to the sufficiency of the evidence, we examine the record in the light most favorable to the prosecution to establish whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Commonwealth v. O'Connor*, Appeal No. 99-021 (N.M.I. Sup. Ct. June 28, 2000) (Opinion at 2);*Commonwealth v. Oden*, 3 N.M.I. 186, 191 (1992). All reasonable inferences are to be drawn in favor of the government, and any conflicts in the evidence are to be resolved in favor of the verdict. *See United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1201-02 (9th Cir. 2000). We may not weigh conflicting evidence or consider the credibility of witnesses. *See United States v. Croft*, 124 F.3d 1109, 1125 (9th Cir. 1997) (appeals court "powerless to question a jury's assessment of witnesses' credibility"); *United States v. Shelton*, 588 F.2d 1242, 1245 (9th Cir. 1978).

A. Uncorroborated testimony

¶109 The trier of fact has wide latitude in deciding which witnesses to believe and disbelieve. *See United States v. Terry*, 760 F.2d 939, 942 (9th Cir. 1985); *Spain v. Rushen*, 883 F.2d 712, 733-34 (9th Cir. 1989) (Noonan, J. dissenting). Therefore, we cannot disregard a witness's statement unless the testimony is "incredible or unsubstantial on its face." *See id.*; *see also United States v. Yossunthorn*, 167 F.3d 1267, 1270 (9th Cir. 1999) and *United States v. Leung*, 35 F.3d 1402, 1405 (9th Cir. 1994), *both citing United States v. Lopez*, 803 F.2d 969, 973 (9th Cir. 1986) *cert. denied*, 481 U.S. 1030, 107 S. Ct. 1958, 95 L. Ed. 2d 530 (1987).

¶110 If believed by the trier of fact, uncorroborated accomplice testimony alone may support a conviction. *See id.*; *see also Necoechea*, 986 F.2d at 1282; *Shelton*, 588 F.2d at 1245. Even if there are inconsistencies in the testimony, so long as the testimony is not inherently implausible, the conviction must stand. *See id*.

¶111 Camacho argues that the only evidence admitted at trial on his participation in the murder came from Ian's uncorroborated testimony, and that this testimony is facially incredible. The evidence, according to Camacho, did not show that there were boonies in the area of Dan Dan where the killing occurred, or that the alleged gang members had access to guns, or that the Redrum gang had a history of violence or lawlessness. As such, Camacho insists that Ian's testimony regarding people with guns watching him from the boonies, who would kill him and his family, was not credible and ultimately untrustworthy.

¶112 Having reviewed the record, we conclude that Ian's testimony was not implausible. Ian merely reported what Camacho had said to him. What matters is that the jury could reasonably believe, as they did, that Camacho made the statements, causing Ian to fear for his life. There was no need for the prosecution to show that Ian and his family were actually in mortal danger. Hence, whether the threats themselves were plausible is of no consequence.

B. Evidence to establish the commission of first degree murder.

¶113 Camacho contends that the Commonwealth failed to demonstrate that Ian had the requisite *mens rea* to commit first degree murder. He relies on 6 CMC § 253, which establishes a rebuttable presumption that children between the ages of 10 and 14 years are incapable of committing murder or rape. *See also In re "S.S."*, 3 N.M.I. 178, 180-82 (1992). Ian was 14 years old at the time he killed Antonio. Ergo, Camacho asserts, the rebuttal presumption applied to Ian and, since the prosecution failed to offer any evidence that Ian formed the specific intent, it was a legal impossibility for Ian to have committed murder.

¶114 We have already discussed this issue at some length, finding that the critical *mens rea* at issue was Camacho's, not Ian's. *See supra* at ¶¶ 57-61. Thus we conclude that a rational jury could, and indeed did, convict Camacho of first degree murder.

C. Evidence of the defendant's premeditation, willfulness and deliberateness.

¶115 Finally, Camacho contends that the evidence does not establish that he had the requisite *mens rea* to commit first degree murder. As discussed above, if Camacho participated in this killing, it is virtually certain that he acted with specific intent. Viewing the record in the light most favorable to the prosecution, we conclude that there was sufficient evidence for a reasonable trier of fact to conclude that Camacho's *mens rea* was "willful, premeditated, and deliberated."

VIII. Motion for Mistrial

¶116 On the day opening arguments in this case were originally scheduled, a riot and hostage situation took place at the pre-trial detention facility, prompting the postponement of arguments to the following day. The media erroneously reported that Camacho was in the facility at the time. Camacho asserts that the news report may have tainted the jury, resulting in a mistrial.

¶117 We review the trial court's decision to deny such a motion for abuse of discretion, *Saimon*, 3 N.M.I. at 397-98, giving substantial weight to its assessment of the impact of extraneous information, *United States v. Sarkisian*, 197 F.3d 966, 981 (9th Cir. 1999).

¶118 When questioned individually, the jurors said they had no knowledge of the inaccurate news report, and assured the judge that they could set aside the "misinformation" and render an impartial verdict. Moreover, they were specifically instructed that the riot situation had nothing to do with the allegations against Camacho, that the erroneous report about the defendant's involvement could not be considered at trial, and that the case had to be decided solely on the evidence presented.

¶119 The trial court's precautionary measures dispelled any chance that the jury's ability to deliberate Camacho's fate might have been impaired. There certainly was no abuse of discretion; the motion for mistrial was properly denied.

IX. Reversal for Cumulative Effect of Errors

¶120 Though we have not found reversible error in any of Camacho's individual challenges, Appellant urges the Court to consider whether the cumulative effect of errors necessitates a new trial.

> In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. Where, as here, there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant.

United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996) (internal citations omitted); *see also Thomas v. Hubbard*, 273 F.3d 1164, 1179-80 (9th Cir. 2001).

¶121 Cumulative error analysis considers all errors and instances of prosecutorial misconduct, including errors preserved for appeal and plain errors. *See Necoechea*, 986 F.2d at 1282; *United States v. Berry*, 627 F.2d 193, 200-201 (9th Cir. 1980), *cert. denied*, 449 U.S. 1113, 101 S. Ct. 925, 66 L. Ed. 2d 843 (1981). Even if a particular error is cured by an instruction, the court should consider whether any traces of prejudice may remain. *See id.* In particular, the Ninth Circuit has advocated a critical review of cumulative error in cases where the conviction rests on uncorroborated accomplice testimony. *See Necoechea*, 986 F.2d at 1283; *Berry*, 627 F.2d at 201; *United States v. Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988).

¶122 Regardless of whether a heightened standard applies, Camacho is not entitled to reversal. Among Camacho's myriad of complaints, we found but a few, minimal errors: (1) a mention of defendant's post-

arrest silence; (2) a call for sympathy for the victim; (3) two instances of vouching; (4) a possible remark about Camacho's guilt; and (5) a thwarted reference to evidence not admitted.[26]

¶123 Significantly, all arose during the Commonwealth's closing argument. The portions of the trial most critical to fair deliberations, the presentation of evidence and jury instructions, were untainted. This means that the conclusion of the cumulative error analysis necessarily mirrors our determination that the flaws in the closing argument did not deprive Camacho of his right to a fair trial. *See supra* at ¶¶ 104-107.

¶124 The instructions provided by the trial court in this case clearly and specifically guided the jury on the elements required to convict Camacho of first degree murder. *See supra* at ¶¶ 60-61, and accompanying footnotes. The jury was also cautioned about the limited role of counsel's arguments. *See supra* at ¶ 92, and accompanying footnote. Finally, the record shows that the court impressed upon the jury the importance of deliberating on all of the evidence, and solely the evidence. *See supra* at ¶ 106, and accompanying footnote. In light of these corrective measures, Camacho has not shown that the errors, even in aggregation, resulted in any prejudice whatsoever.

¶125 By way of comparison, the Seventh and Ninth Circuits have found that reversal is warranted in close cases, such as in the face of a "veritable avalanche of errors," *see United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000), where the testimony of the only direct witness is riddled with "inconsistency and contradictions," *see Frederick*, 78 F.3d at 1381, or where prosecutorial misconduct which is never

[26] Camacho also maintains that the Commonwealth made misleading statements during its closing argument to the effect that Ian and Kevin were convicted for their participation in Antonio's murder. While it is technically correct that, under N.M.I. law, neither Ian nor Kevin could be convicted of murder due to their young age, the prosecutor's less-than-precise characterization of their juvenile proceedings is immaterial to Camacho's trial.

corrected during trial, calling into question the jury's ability to weigh conflicting testimony, *see United States v. Sanchez*, 176 F.3d 1214 (9th Cir. 1999).[27]

¶126 Defendants are "entitled to a fair trial, not a perfect one." *Mancuso*, 282 F.3d at 745. The record before us shows that Camacho received a fair trial. Taken as a whole, the cumulative impact of the errors on the jury's verdict could only have been negligible.[28]

¶127 For the same reasons, we also reject Camacho's alternative ground for cumulative error premised on the Fourteenth Amendment's due process clause, which requires that the effect of the errors be so prejudicial that the right to a fair and impartial trial is violated. *See supra* at ¶¶ 104-107*, Thomas*, 273 F.3d at 1179-80 (due process violation occurs where cumulative errors produce substantial and injurious effect on the outcome of a case, rendering trial setting fundamentally unfair)*; Saimon*, 3 N.M.I. at 398-99 (no cumulative error in denial of pretrial motion for discovery, admission of disputed photographs, denial of motion for new trial, and improper prosecutorial comments).

X. Motion for New Trial

¶128 Camacho argues that the trial court should have granted his motion for a new trial on the following grounds: (1) improper prosecutorial comments during closing argument, (2) the court's failure to give

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[27] Specific examples of reversible cumulative error include a case during which the prosecution's main witness committed perjury, the prosecution failed to disclose impeachment evidence, and the prosecutor repeatedly badgered the defendant and insisted that her post-arrest silence meant she had something to hide, *see Killian v. Poole*, 282 F.3d 1204 (9th Cir. 2002), and a case where a "triple hearsay" statement established defendant's access to the murder weapon, improper evidence connected the defendant to prior use of multiple weapons, and the defense was obstructed from presenting evidence crucial to its principal theory, *see Thomas v. Hubbard*, 273 F.3d 1164, 1179-80 (9th Cir. 2001).

[28] We understand that this was the prosecutor's first jury trial. As the lower court acknowledged, a seasoned prosecutor likely would not have made mistakes of the nature we see here, but the errors certainly appear to result from inexperience, rather than guile or calculation Thus, in addition to not being "especially egregious," we do not believe them to have been "deliberate." *See Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9, 113 S. Ct. 1710, 1722 n.9, 123 L. Ed. 2d 353 (1993).

requested defense instructions, (3) improper admission of gang-related evidence, and (4) prejudicial effect of cumulative error.

¶129 The court below rejected each of Camacho's proffered justifications for a new trial. Defendant now carries a significant burden to establish that the trial court abused its discretion in so doing. *See United States v. Shaffer*, 789 F.2d 682, 687 (9th Cir. 1986); *United States v. Holmes*, 229 F.3d 782, 789 (9th Cir. 2000). We will not reverse, without a showing that it is "more probable than not" that misconduct materially affected the verdict. *See United States v. Peterson*, 140 F.3d 819, 821 (9th Cir. 1998).

¶130 Because our review of the record discloses no prejudicial error, there is no reasonable probability that, had the errors been avoided, the result of the trial would have been different. Under these circumstances we could not possibly find that the trial court abused its discretion.

XI. Sentencing Order

¶131 According to 6 CMC § 1101(c)(1), a person convicted of first degree murder shall be punished by imprisonment for a minimum term of 10 years and may be punished for a maximum term of life imprisonment.[29] The trial court sentenced Camacho to 45 years imprisonment, with credit for time already served.

¶132 Section 4115 of Title 6, reads: "[t]he court, in imposing any felony sentence, shall enter specific findings why a sentence, fine, alternative sentence, suspension of sentence, community service or probation, will or will not serve the interests of justice."

¶133 Camacho maintains that the trial court failed to make specific findings justifying the imposition of a 45-year imprisonment sentence as required by 6 CMC § 4115. The Commonwealth successfully counters

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[29] The full text of the section reads: "(c) Penalty for Murder. (1) *First Degree Murder*. Every person guilty of murder in the first degree shall be punished by imprisonment for a minimum term of 10 years and may be punished for a maximum term of life imprisonment."

that the court made such findings during the sentencing hearing, after reviewing counsel's arguments and the pre-sentencing report.

¶134 Indeed, the trial court indicated that it considered such factors as Camacho's age and the absence of any prior criminal record. On the other hand, the court also stated that, this was "the most serious crime that we have in the Commonwealth," given Camacho's coercive role in the murder, and that a deterrent message must be sent to the community that such conduct is unacceptable. Such statements clearly illustrate the court's specific findings to justify Camacho's sentence and, thereby, compliance with 6 CMC § 4115.

¶135 In the alternative, Camacho argues that the trial court abused its discretion in imposing the 45-year sentence. We have recognized that trial courts enjoy nearly unfettered discretion in determining what sentence to impose. *See Commonwealth v. Ramangmau*, 1996 MP 17, 5 N.M.I. 19 (1996) (per curiam); *United States v. Barker*, 771 F.2d 1362, 1364 (9th Cir. 1985). Absent a clear indication that a trial court has abused its discretion, we generally will not disturb the denial of a motion to reduce a lawful sentence. *See Ramangmau*, 1996 MP 17 ¶ 2, 5 N.M.I. at 19.

¶136 The Ninth Circuit has ruled that a criminal sentence "must reflect an individualized assessment of a particular defendant's culpability rather than a mechanistic application of a given sentence to a given category of crime." *Barker*, 771 F.2d at 1365.

¶137 This verdict is anything but mechanistic. The trial court engaged in an individualized assessment of Camacho's culpability by weighing several factors before determining the sentence. Consequently, the lower court did not abuse its discretion in imposing the 45-year imprisonment sentence.

CONCLUSION

¶138 Based on the foregoing, the trial court's judgment of conviction and sentencing order are **AFFIRMED**.

SO ORDERED THIS 8TH DAY OF APRIL, 2002.

_____/s/_____
MIGUEL S. DEMAPAN, Chief Justice

__/s/_____
ALEXANDRO C. CASTRO, Associate Justice

_/s/_____
JOHN A. MANGLONA, Associate Justice