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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

PRICE SHOITER,
Defendant-Appellant.

SUPREME COURT NO. CR-04-0018-GA
SUPERIOR COURT NO. 03-0076

Cite as: 2007 MP 20

Decided September 21, 2007

Angela Marie Krueger, Public Defender, Commonwealth Public Defender's Office, for Defendant-Appellant.
Arin Greenwood, Assistant Attorney General, Commonwealth Attorney General's Office, for Plaintiff-Appellee.

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

CASTRO, J.:

¶ 1 Appellant Price Shoiter appeals his convictions of sexual abuse of a child on the grounds that due process requires suppression of a confession coerced by a private individual. Shoiter also argues that the trial court erred when it failed to disqualify the prosecuting attorney. The prosecutor interviewed the complaining witness ("victim") out of the presence of other persons before trial, and according to Shoiter, vouched for the victim's credibility during trial. We find that the due process clause of the Constitution of the Commonwealth of the Northern Mariana Islands ("CNMI Constitution") does not require a hearing to determine the voluntariness of confessions made to private individuals. We further hold that under the circumstances of this case, the trial court did not abuse its discretion when it did not disqualify the prosecuting attorney. Accordingly, we AFFIRM.

I

¶ 2 Shoiter lives in a group of homes where the victim and her extended family reside. In 2002, the victim told her mother she received ten dollars from Shoiter after he touched her vagina. According to Shoiter, sometime thereafter, the victim's grandfather invited Shoiter to his home where he confronted Shoiter about the molestation. While inside the house, the grandfather told Shoiter to tell the truth about molesting the victim. Even after the grandfather punched him, Shoiter denied the accusation. Eventually, Shoiter admitted to undressing and touching the victim once. The grandfather then grabbed Shoiter and demanded that he tell the truth. Shoiter did not respond and left the house. When police questioned him, Shoiter denied touching the victim and told police the grandfather assaulted him.

¶ 3 The grandfather claims that Shoiter first came to his house looking for cigarettes— but suggested that Shoiter was really there to confess about the molestation. He asked Shoiter to sit down, then closed the door. The grandfather told Shoiter he wanted to talk to him about the molestation rumor concerning Shoiter and the victim. Eventually, Shoiter confessed. The grandfather claims he pushed and grabbed Shoiter only after he confessed. He denies punching Shoiter.

¶ 4 Three days before the trial, prosecuting attorney Alex Shapiro ("Shapiro") interviewed the victim alone, out of the presence of a third party. The victim told Shapiro that: (1) Shoiter touched her five times; (2) Shoiter rubbed his penis on her "privates;" (3) one incident took place at night; and (4) another incident took place inside Shoiter's house. In her earlier statement, the

victim claimed that: (1) Shoiter touched her three times; (2) Shoiter rubbed his hand on her "privates;" (3) one incident took place during the day; and (4) she never entered Shoiter's home.

¶ 5 Shapiro promptly informed defense counsel and the Public Defender's Office of the new developments. At trial, Shoiter moved to disqualify Shapiro and the entire Attorney General's Office from prosecuting the case. Shoiter asked the trial court to appoint a special prosecutor. The trial court denied the motion and the trial proceeded as scheduled. The key pieces of evidence during the trial were the victim's testimony and Shoiter's confession to the grandfather. Shoiter requested the trial court to conduct a hearing to determine whether his confession to the grandfather was involuntary or coerced, and should therefore be suppressed. The trial court denied Shoiter's request and admitted his confession to the grandfather into evidence. Shoiter was then convicted of three counts of sexual abuse of a child. This appeal followed.

II

¶ 6 Shoiter first contends that the trial court should have conducted a hearing to determine whether his statements to the grandfather, a private individual, were involuntary and should be suppressed. Whether a criminal defendant's confession was voluntary is a mixed question of fact and law. *Commonwealth v. Ramangmau*, 4 NMI 227, 235 (1995). Mixed questions of fact and law are reviewed de novo. *Ito v. Macro Energy, Inc.*, 4 NMI 46, 54 (1993). Whether due process requires a voluntariness hearing for confessions to private individuals is thus reviewed de novo.

¶ 7 Beginning in the 1950s, the United States Supreme Court began to look to procedural fairness, based on federal constitutional due process guarantees, to protect individuals from oppressive "state" action and to exclude coerced confessions.[1] When there is an assertion that the defendant has been subjected to coercive "state" action, a voluntariness hearing must be conducted. *See generally Jackson v. Denno*, 378 U.S. 368 (1964).

¶ 8 In the Commonwealth, we have dealt with state action in the context of confessions to police officers. For a confession to the police to be admissible, the government has the burden of establishing, based on the totality of the circumstances, that the defendant intelligently, knowingly, and voluntarily waived his or her procedural due process rights. *Ramangmau*, 4 NMI at 235; *Commonwealth v. Cabrera*, 4 NMI 240, 246 (1995). Evidence of coercive police activity rendering a confession involuntary includes physical threats of harm, deprivation of sleep or food, lengthy questioning, and psychological persuasion. *Ramangmau*, 4 NMI at 236. Absent coercive police activity, a confession will not be deemed involuntary. *Cabrera*, 4 NMI at 246. Here, both parties concede there is no state action. Hence, this matter is not subject to a constitutional due

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[1] *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966); *Payne v. Arkansas*, 356 U.S. 560 (1958); *Fikes v. Alabama*, 352 U.S. 191 (1957).

process analysis. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (finding that confessions resulting from coercive interrogations conducted by private individuals are not subject to a constitutional due process analysis in determining whether or not to exclude the confession at trial). The United States Supreme Court, however, left the states to determine the reliability of confessions not involving coercive police activity. *Id.* Whether the coercive conduct of a private individual is sufficient to render a confession involuntary is a matter of first impression in the Commonwealth. We therefore examine the practice of other jurisdictions for guidance.

¶ 9 Jurisdictions are split on the issue of whether private party confessions must be analyzed under a voluntariness standard. Nine states hold that their state constitutions or statutes mandate a finding that confessions made to private parties are voluntary before those confessions are admitted at trial.[2] *See, e.g.*, *State v. Bowe*, 77 Haw. 51, 60 (1994) (declining to follow *Connelly* as a matter of state constitutional law because "the coercive conduct of a private person may be sufficient to render a confession inadmissible"); *State v. Foster*, 303 Or. 518, 525 (1987) (stating that a confession induced by private threats was inadmissible under a state statute that applies to all confessions); *State v. Kelly*, 61 N.J. 283, 293-95 (1972) (holding that defendant was entitled to a voluntariness determination regardless of the fact that the inculpatory statements were elicited by a private individual, the victim, rather than by a government officer).

¶ 10 In Hawaii, for instance, an athlete's confession triggered protection under the Hawaii constitution after a coach encouraged the athlete to confess. *Bowe*, 77 Haw. at 60. In Hawaii, the only state action required is the introduction of the coerced confession into evidence. *Id.* at 59. The Hawaii Supreme Court stated that, "although no state action is involved where an accused is coerced into making a confession by a private individual, we find that the state participates in that violation by allowing the coerced statements to be used as evidence." *Id.*

¶ 11 On the other hand, eleven states hold that due process does not require a voluntariness hearing for coerced private party confessions.[3] That is, these states allow involuntary confessions to private individuals to be used as evidence. *See, e.g., Pappaconstantinou v. State*, 352 Md. 167, 180 (1998) (holding that Maryland's common law voluntariness requirement does not apply to confessions elicited by purely private conduct, and finding that the voluntariness requirement is applicable when a confession is elicited by anyone in authority, or in his or her presence and with his or her sanction); *Commonwealth v. Cooper*, 899 S.W.2d 75, 75-76 (Ky. 1995) (rejecting the

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[2] The nine states include Connecticut, Georgia, Hawaii, Louisiana, Massachusetts, Michigan, New Jersey, New York, and Oregon.

[3] The eleven states include Alabama, Colorado, Florida, Kentucky, Maryland, Missouri, Ohio, New Hampshire, Texas, Washington, and Wisconsin.

argument that Kentucky's constitution or common law requires suppression of a confession "coerced or improperly obtained by private parties").

¶ 12 In *State v. Carroll*, 138 N.H. 687, 689 (1994), for example, the trial court convicted defendant of second-degree murder and conspiracy to commit murder for strangling a pregnant woman. During an interview with a police officer, defendant asked to have his mother present, who was also a police officer. *Id.* at 689-90. Before his mother entered the interview room, the police officer told the mother that she was entering as the defendant's mother, not as a police officer, and that, although she was not to assist the police in their interrogation, she was free to do anything she wanted as defendant's mother. *Id.* at 690. The police officer repeated his warning to defendant's mother in defendant's presence. *Id.* Once in the interview room the mother began to aggressively question her son, and defendant admitted stabbing the victim. *Id.*

¶ 13 On appeal, defendant argued that his confession was involuntary under the New Hampshire constitution because it was induced by promises of immunity and leniency from both his mother and the police officer. *Id.* at 690-91. The New Hampshire Supreme Court held that the mother, although a police officer, was not an agent of the State because the police officer cautioned her, outside then in defendant's presence, about her private role. *Id.* at 692. The court concluded that even though the New Hampshire constitution provides greater protection to a defendant with respect to the voluntariness of confessions than does the federal constitution, only state action offends the New Hampshire constitution. *Id.* at 690-91.

¶ 14 The CNMI Constitution provides that, "[n]o person shall be deprived of life, liberty or property without due process of law." NMI Const. art I, § 5. While we interpret the CNMI Constitution more broadly than the United States Constitution,[4] we elect to follow the eleven states that hold that involuntary private party confessions are admissible. Just as the New Hampshire Supreme Court held that their constitution does not provide protection with respect to the voluntariness of confessions in the absence of state action even though their constitution provides greater protection than the federal constitution, *see Carroll*, 138 N.H. at 690-91, we similarly hold that our constitution generally does not protect defendants against involuntary confessions in the absence of state action. However, while not the case here, we recognize there might be instances when due process requires that an involuntary confession a private party obtains should be excluded. *See State v. Goree*, 151 Or. App. 621, 634 (1997) (conducting

[4] The Fourteenth Amendment to the United States Constitution provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

voluntariness inquiry where defendant made statements to his girlfriend whom he did not know was acting as a government agent).

¶ 15 There is no state action eliciting Shoiter's confession in the instant case. Shoiter claims the grandfather assaulted him before he confessed to molesting the victim while the grandfather claims he only pushed and grabbed Shoiter after he confessed to the molesting. As the United States Supreme Court wrote in *Connelly*, "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make the evidence inadmissible . . . ." 479 U.S. at 166. We follow the United States Supreme Court's pronouncement because "suppressing [Shoiter's] statements would serve absolutely no purpose in enforcing constitutional guarantees. The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution." *Id.*

III

¶ 16 Shoiter also asserts that the trial court erred when it failed to disqualify Shapiro and appoint a special prosecutor. Shoiter's arguments are jumbled and not easily delineated. We therefore interpret Shoiter's arguments as follows: that Shapiro (1) made himself a material witness when he interviewed the victim without the presence of a third party, and (2) vouched for his interviewing techniques and the victim's testimony on the victim's re-direct. The denial of a motion to disqualify an attorney or to appoint or not to appoint a special prosecutor is reviewed on an abuse of discretion standard. *Commonwealth v. Oden*, 3 NMI 186, 191 (1992). Under the abuse of discretion standard, we may reverse the trial court if its decision was based on a clearly erroneous finding of material fact or the trial court did not apply the law correctly. *Pangelinan v. Itaman*, 4 NMI 114, 118 (1994).

Material Witness

¶ 17 Shoiter first maintains that Shapiro made himself a necessary witness when he interviewed the victim alone. Under the Sixth Amendment to the United States Constitution, a defendant has the right to procure the attendance of witnesses "to have compulsory process for obtaining witnesses in his favor . . . ." *United States v. Verkuilen*, 690 F.2d 648, 659 (7th Cir. 1982) (quotation omitted). A defendant also has the right to fundamental fairness embodied in the due process clause of the Fifth Amendment to the United States Constitution. *Id.*

¶ 18 However, a defendant's rights under these amendments are not violated unless a potential witness provides relevant and material testimony for the defense. *Id.* (citing *United States v. DeStefano*, 476 F.2d 324, 330 (7th Cir. 1973)). "Mere allegations of materiality and necessity are not sufficient to establish that a witness is necessary to an adequate defense." *United States v.*

Yougman, 481 F.3d 1015, 1017 (8th Cir. 2007) (quoting *United States v. LeAmous*, 754 F.2d 795, 798 (8th Cir. 1985)).

¶ 19 In the instant case, Shapiro interviewed the victim and she made highly exculpatory statements to Shapiro that were contradictory to what she told the hospital personnel, Department of Youth Services personnel, her mother, and the police. Shoiter questioned the victim on cross-examination about what she told Shapiro and how her statements to Shapiro differed from what she told others about how many times Shoiter sexually abused her:

> Q Now you told the hospital people that it happen[ed] twice, right?
> A Yes.
>
> . . . .
>
> Q You told [the detective] it happen[ed] . . . three times, right?
> A Yes.
> Q But the third time [Shoiter] touched you he just came over to the window and called you, right?
> A Yes.
> Q But then six days ago, you met with Mr. Shapiro, right?
> A Yes.
> Q And [you] talked to him?
> A Yes.
> Q And you told him it happen[ed] at least five times?
> A Yes.
> Q But you didn't tell anybody else that, did you?
> A Yes.

Appellee's Excerpts of Record, Volume 2 at 50-51. This exchange displays the effective cross-exam that Shoiter gave to the victim regarding her conversation with Shapiro. Shapiro did not need to be removed as the prosecutor for Shoiter to get all the information he wanted because that information was readily available through the victim's testimony. Shoiter, therefore, has not demonstrated that Shapiro would have been a relevant and material witness who knew facts otherwise unascertainable. *See United States v. Hosford*, 782 F.2d 936, 939 (11th Cir. 1986) (finding that a prosecutor should not be "selected as prosecutor when it is obvious he is the sole witness whose testimony is necessary to establish essential facts otherwise not ascertainable").

Vouching

¶ 20 Shoiter next argues that Shapiro vouched for his interviewing techniques and the victim's testimony on the victim's re-direct. "Improper vouching typically occurs in two situations: (1) the prosecutor places the prestige of the government behind a witness by expressing his or her personal belief in the veracity of the witness, or (2) the prosecutor indicates

that information not presented to the jury supports the witness'[] testimony." *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002).

¶ 21 A prosecutor in a criminal case has a "special obligation to avoid 'improper suggestions, insinuations, and especially assertions of personal knowledge.'" *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). A prosecutor may not impart to the jury his or her belief that a government witness is credible. *United States v. McKoy*, 771 F.2d 1207, 1210-11 (9th Cir. 1985). But argument becomes impermissible vouching only if the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness' veracity or is implicitly indicating that information not presented to the jury supports the witness' testimony. *United States v Bowie*, 892 F.2d 1494, 1498 (10th Cir. 1990). When the credibility of witnesses is crucial, improper vouching is particularly likely to jeopardize the fundamental fairness of the trial. *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991).

¶ 22 In *United States v. Manning*, 23 F.3d 570, 574-75 (1st Cir. 1994), the prosecutor's vouching for a police witness in response to defendant's anticipated argument, and the trial court's failure to uphold defense counsel's objections to vouching and failure to give adequate curative instruction, entitled defendant to a new trial. The Ninth Circuit has further identified improper vouching and related misconduct in a broader range of circumstances. A prosecutor may not denigrate the defense as a sham, *United States v. Sanchez*, 176 F.3d 1214, 1224-25 (9th Cir. 1999), vouch for his or her own credibility, *United States v. Smith*, 962 F.2d 923, 933-34 (9th Cir. 1992), express an opinion of the defendant's guilt, *Molina*, 934 F.2d at 1444-46, or implicitly vouch for a witness' credibility, *McKoy*, 771 F.2d at 1211.

¶ 23 "Akin to the rule against vouching is the advocate-witness rule, under which attorneys are generally prohibited from taking the witness stand to testify in a case they are litigating." *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998). "As with vouching, the policies underlying the application of the advocate-witness rule in a criminal case are related to the concern that jurors will be unduly influenced by the prestige and prominence of the prosecutor's office and will base their credibility determinations on improper factors." *Id.*; *see United States v. Prantil*, 764 F.2d 548, 553 (9th Cir. 1985) ("[T]he rule expresses an institutional concern, especially pronounced when the government is a litigant, that public confidence in our criminal justice system not be eroded by even the appearance of impropriety."). "Essentially, the danger in having a prosecutor testify as a witness is that jurors will automatically presume the prosecutor to be credible and will not consider critically any evidence that may suggest otherwise." *Edwards*, 154 F.3d at 921. "This rule may be violated when the prosecutor was involved in the

investigation and the prosecutor's credibility is therefore placed before the jury, even where the prosecutor does not actually take the stand." *Hermanek*, 289 F.3d at 1098-99.

¶ 24 Shoiter relies heavily on *Edwards* where the Ninth Circuit reversed defendant's conviction after concluding that the prosecutor violated both the rule against prosecutorial vouching and the advocate-witness rule. 154 F.3d at 921. In *Edwards*, the prosecuting attorney found physical evidence, previously unknown to the parties, tying the defendant to the crime. *Id.* at 917. The prosecuting attorney then called two detectives to testify that they saw him discover the evidence. *Id.* at 919-921. The court explained, "[o]nce the members of the jury learned that the prosecutor found the [evidence], it is almost certain that they attributed the authority of the prosecutor's office to the receipt's discovery." *Id.* at 922. The court thus found that the prosecuting attorney's actions, combined with the ban against prosecutorial vouching and the advocate-witness rule, worked together to prejudice defendant. *Id.* at 921.

¶ 25 Similarly, in *Hermanek*, the Ninth Circuit concluded that the use of the words "we" and "us" to refer to steps taken during the investigation of the case ran afoul of the rule against vouching and the advocate-witness rule. 289 F.3d at 1099. When the participants in the criminal investigation identified themselves during closing arguments, "the prosecutors assumed a witness-like role in addition to serving as advocates." *Id.* "Their statements conveyed to the jury a message that prosecutors 'personally believed, based on [their] own observations,' in the integrity and good faith of the investigation." *Id.* (quoting *Edwards*, 154 F.3d at 922). The court stated that the "[p]rosecutors placed the prestige of the government . . . behind the testifying investigators and behind the credibility of the investigation. Prosecutors also implicitly bolstered the credibility of several government witnesses who testified about the investigation . . . ." *Id.*

¶ 26 Here, Shapiro interviewed the victim alone and elicited information that, prior to his interview, she neither remembered nor claimed. Shapiro then, according to Shoiter, vouched for his interview techniques on the victim's re-direct during the following exchange:

Q [Y]ou didn't tell [your mother] everything that happen[ed], did you?
A Yes.
Q Yes what?
A I didn't.
Q Is that because she didn't ask[] you the right questions?
A Yes.

. . . .

Q [W]hen you talked to the Police, you didn't tell them all the details of what had happen[ed] to you, did you?
A Yes.
Q What do you mean by yes?

A I didn't tell them.
Q You said that[] because they didn't ask[] the right questions, is that right?
A Yes.
Q [I]f the Police had asked you the right questions, would you have told them what happen[ed]?
A Yes.

Appellant's Excerpts of Record at 98-98A.

¶ 27 The rule against vouching and the advocate-witness rule were not violated under these circumstances. Unlike the situation in *Edwards*, the policies underlying both rules were not breached when Shapiro discussed his interviewing techniques. Once the members of the jury heard Shapiro, it is doubtful they attributed the authority of the prosecutor's office to the victim's testimony. While we disapprove of Shapiro's behavior, he did not, through his questioning of the victim, impart to the jury a belief that the victim was credible. *See Edwards*, 154 F.3d at 921 (providing that a prosecutor may not impart to the jury his belief that a government witness is credible).

¶ 28 Even assuming Shapiro's comments constitute vouching, Shoiter neither objected to the apparent vouching, nor did he request for a jury instruction to disregard the statement. Shoiter had the opportunity to question the victim at length about the inconsistencies in her story, and Shoiter failed to ask the victim about what Shapiro said to her that changed her story. The victim was also thoroughly impeached on cross-examination. Shoiter fails to show that the result in his trial would have been different if further impeachment evidence was presented. Shapiro did not need to be removed as prosecutor to get the information Shoiter wanted. *See United States v. Fancutt*, 491 F.2d 312, 313-315 (10th Cir. 1974) (holding that it was improper for the prosecutor to state during closing argument that he believed a narcotics agent testified truthfully about the drug transactions in the case, but concluding that no prejudice was shown requiring the court to invoke the plain error rule because no objection was made to the prosecutor's statements, nor was a request made for a jury instruction to disregard the statement). Accordingly, the trial court's decision to deny Shoiter's request for a special prosecutor was not based on a clearly erroneous finding of material fact or law.

IV

¶ 29 For the foregoing reasons, we hereby AFFIRM Shoiter's convictions.

Concurring:
Demapan, C.J., Manglona, J.