

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

FRANKLIN CABRERA CEPEDA, JR., and GEORGE ILO,
Defendants,

FRANKLIN CABRERA CEPEDA, JR.,
Defendant-Appellant.

SUPREME COURT NO. 05-0011-GA
SUPERIOR COURT NO. 03-253D

Cite as: 2009 MP 15

Decided November 19, 2009

Melissa Simms, Assistant Attorney General, Commonwealth Attorney General's Office, for Appellee
Michael A. Pangelinan, Saipan, Northern Mariana Islands, for Defendant-Appellant

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

CASTRO, J.:

¶ 1 Appellant Franklin Cabrera Cepeda, Jr., (“Cepeda”) appeals his convictions for first degree murder, robbery, aggravated assault and battery, assault with a dangerous weapon, and conspiracy. Cepeda argues that: (1) hearsay and prejudicial character testimonies were improperly admitted; (2) the trial court erred by not instructing the jury to consider whether he had specific intent to permanently deprive the victim of his property; (3) he was deprived of effective assistance of counsel; and (4) the cumulative effect of trial court errors prejudiced his case sufficiently to warrant reversal of all convictions. Because both character evidence and hearsay testimony are only admissible if they satisfy certain conditions set forth in the Commonwealth Rules of Evidence, and the testimonies at issue on appeal failed to meet those conditions, we hold that they were improperly admitted. We further hold that specific intent is an essential element of the crime of robbery and that the trial court had a duty to *sua sponte* instruct the jury.¹ Accordingly, we VACATE Cepeda’s convictions and REMAND this matter to the trial court for a new trial.

I

Factual Background

¶ 2 In the early morning of March 1, 2000, two men entered the Yellow House Karaoke Bar (“Yellow House”) in San Jose and stabbed the owner, Rong Matthew Zhou (“Zhou”),² multiple times with a knife and struck him in the head with a blunt object. At approximately 3:00 a.m., the police arrived at the scene and found Zhou dead. The police collected various pieces of evidence, including tire tracks, footprints, and beer cans; however, no knife was found. Ms. Quixing You, a bystander, identified Jose Deleon Guerrero (“Guerrero”) as one of the attackers. Guerrero was charged with Zhou’s murder, but was acquitted by a jury of all charges.

¶ 3 In 2003, police reopened the investigation into Zhou's death based on a tip that Cepeda, Benjamin Fitial (“Fitial”), and Guerrero’s cousin, George Ilo (“Ilo”), had been involved. The tip came from Cepeda’s father, Francisco Cepeda (“Cepeda Sr.”),³ who claimed to have knowledge that his son was involved in a crime that Guerrero had been accused of committing. When questioned, Ilo told police that both he and Cepeda were involved in Zhou’s death. Ilo confessed to stabbing Zhou, and on December 30, 2003, pled guilty to second degree murder and was sentenced to eighteen years in prison pursuant to a plea agreement. ER at 155. Cepeda was subsequently charged in connection with Zhou’s death, but

¹ Because we dispose of this appeal on the above grounds, we need not address Cepeda’s ineffective assistance of counsel argument.

² At trial, Zhou was also referred to as “Matthew.” *See, e.g.*, Appellant’s Excerpts of Record (“ER”) at 134-35 (during direct examination of Ilo).

³ Francisco Cepeda is also referred to by the parties as “Franklin Cepeda, Sr.” *See, e.g.*, Appellee’s Br. at 10.

denied any involvement.

¶ 4 At Cepeda's trial, the Commonwealth presented several witnesses. Ilo testified that he, Fitial, and Cepeda had been drinking on the day of the incident, and that they went to Yellow House because they needed money to buy crystal methamphetamine. When they arrived, Zhou was not there. When Zhou did arrive, Cepeda retrieved a knife and bat from the trunk of his car, gave the knife to Ilo and then covered his own face with a bandana. Once inside Yellow House, Cepeda began swinging the bat, and Zhou jumped toward Ilo. When Ilo called to Cepeda for help, Cepeda hit Zhou in the back of the head, causing Zhou to fall. The knife went through Zhou's stomach as he fell. Ilo also testified that Cepeda then stabbed Zhou in his lower chest and took Zhou's wallet before they both returned to their car. Since Ilo testified in connection with his plea agreement, the trial court instructed the jury on the reliability of his testimony.⁴

¶ 5 The Commonwealth also put forth testimony from Cepeda's father. While discussing his relationship with his son, the following exchange occurred:

Q: Now would you tell the court a little bit about Franklin's life with you and your wife and his brothers and sisters.

A: Franklin is my second son and while he was growing up he's the naughtiest. He's rebellious. I'd tell him not to do something and I turn my back, most of the time he does what I tell him not to do.

ER at 68. Defense counsel objected to this line of questioning on relevance grounds. The Commonwealth responded that it was permissible because defense counsel had "opened the door" to character evidence during opening statement by raising the issue of whether Cepeda Sr. beat Cepeda as a child.⁵ In response to the objection, the court stated that the Commonwealth was asking a narrative question and asked counsel to "break it down." *Id.*

¶ 6 Cepeda Sr. later testified about a separate incident where he had been called at work because Cepeda had a gun:

Q: Did you use any other special things to beat Franklin.

A: I do remember one day when I was at work and I was called that my Franklin, my son, had a gun.

Mr. Pixley:⁶ I object to the hearsay Your Honor.

⁴ The trial court charged the jury as follows: "You have heard testimony from George Ilo, a witness who has been charged and has entered into a plea agreement with the Commonwealth in this case. In evaluating George Ilo's testimony, you should consider the extent to which or whether his testimony may have been influenced by his plea agreement with the Commonwealth. In addition, you should examine the witness testimony with greater caution than that of the other witnesses." ER at 12.

⁵ During opening statement defense counsel stated, "[Cepeda Sr.] . . . I can tell you, he's not a loving father. He's a vicious, evil man who beat Frank Cepeda with a wire, [sic] numerous occasions and that will come out." ER at 37.

⁶ Cepeda's trial attorney.

The Court: Sustained
Ms. Warfield:⁷ And I will submit to the court that it's not for the truth of
The Court: Well, sustained.
Ms. Warfield: Yes Your Honor.

Q: When you heard that, what did you do. I'd ask you not to mention that again, but when you heard that, what did you do.

A: I have to drive all the way home to find out what actually transpired. I asked my other son, Immanuel. He told me what happened. My strict instruction is that none of my children is allowed to go inside my bedroom because I have things that they are not supposed to touch. And for that reason, I did went all the way out and instead of using the belt, I did use a wire. I cannot forget that day.

Q: Will you please tell, tell the jury about that day Mr. Cepeda.

A: I am working to provide for them their needs and I have given instructions that they should respect and I had a gun. I do not want any of my children to, to be near that. That is why I gave that specific instruction that no one is authorized to go into my bedroom, but yet he did not respect that instruction.

ER at 69.⁸ Shortly thereafter, Cepeda Sr. also testified, "I do not understand why my son is like this. It is not what I taught him." ER at 70.

¶ 7 The Commonwealth also questioned Cepeda Sr. concerning how he learned of his son's potential involvement in Zhou's death, and about his subsequent decision to call the police. The following testimony was elicited:

A: [Fitial] said to me, he has something that he wants to tell me but it's very, it is very hard for him to tell me.

Mr. Pixley: Object, move to strike.

The Court: Overruled.

ER at 73. Defense counsel again objected that anything Fitial told Cepeda Sr. was hearsay. The court again overruled this objection, and Cepeda Sr. continued his testimony:

A: [Fitial] said, your son is involve[d] in the Yellow House incident.

Mr. Pixley: Objection again, move to strike.

The Court: Overruled.

A: I said what do you mean. He said they were drinking and my son said he wanted to take Benjie, I mean he wanted Benjie to drive them, him and George, because he wanted to check somebody in San Jose.

ER at 74. Defense counsel again objected on hearsay grounds, and after the court called a sidebar conference the jury was instructed to disregard Cepeda Sr.'s last statement.

¶ 8 The Commonwealth also put forth testimony from Detective Hosono ("Hosono"), who had investigated Cepeda's possible involvement in Zhou's death. Hosono testified about information gathered from witnesses during his investigation. Defense counsel objected repeatedly to Hosono's testimony, including to the following narrative, now controverted on appeal:

⁷ Trial attorney for the Commonwealth.

⁸ For reference purposes, the exchange presented in ¶ 6 will be hereafter referred to as the "gun incident."

Frankie got a knife. He gave the knife to George, took the bat, they went up. Went upstairs. George Ilo was leading while heading up the stairs. Frankie Cepeda was behind. * * * He was poking George to go in. George stepped in and pushing Matthew behind. They went on a struggle on the knife and from that struggle, the knife was turning towards Ilo. He shouted for help. Frankie came from behind, struck Matthew on the head. On the first strike, he lost his grip which the knife went through his abdominal. Ilo backed out. When he backed out, Cepeda came from behind, shouted, Buddy, what are you doing or what happened, but it was in Chamorro verse. So, he took the knife. He dropped the bat, George took the knife or George took the bat, Frankie took the knife. After that, George Ilo also witnessed Frank Cepeda taking the cash, the wallets from Mr. Matthew's pocket.

ER at 88-89. The trial court permitted this testimony on the ground that it indicated how Hosono conducted his investigation and because it was not offered to prove the truth of the matter asserted. The trial court gave a limiting instruction regarding Hosono's testimony.⁹

¶ 9

After all of the evidence was presented, the trial court gave the jury several instructions, one of which dealt with the elements of robbery:

The Defendant is charged in Count XV of the Information of Robbery, in violation of 6 CMC §1411(a). In order for the defendant to be found guilty of robbery, each of the following elements must be proved beyond a reasonable doubt.

1. The Defendant took property from the person of or the immediate control of Zhou Rong, and
2. The Defendant did so by use of threat – or threatened use or immediate force or violence.

If after considering all the evidence you find that the Commonwealth has not proven each element beyond a reasonable doubt, you should find the Defendant not guilty of robbery. If after considering all of the evidence you find that the Commonwealth has proven each element beyond a reasonable doubt, you should find the Defendant guilty of robbery.

ER at 20-21. This instruction mirrored the Commonwealth robbery statute and defense counsel neither objected to nor requested an alternate instruction.¹⁰

⁹ The jury was given the following instruction during Hosono's testimony: "[T]estimony of Officer Hosono does not suggest that he has personal knowledge of what had happened on March, the early morning hour of March 1st, two thousand and [sic], two thousand, but merely what he has gathered as his information regarding the investigation that he was involved [sic]." ER at 97.

¹⁰ The Commonwealth claims that "[t]he record is silent as to what occurred during the charging conference, as it was not included in Appellant's citations of record. It does not appear that the charging conference was held on the record, and thus, is silent on the issue of whether Appellant objected to any proposed jury instruction. It is therefore assumed that Appellant did not object to the Robbery jury instruction, and thus, has waived this issue before this Honorable Court." Appellee's Br. at 15. It is the Appellant's burden to provide a record containing properly preserved errors, and to this end we note the value of either recording the charging conference or at least stating on the record whether any objections were made. Since the record contains no record of an objection, we review for plain error. *See infra* ¶ 30.

¶ 10 The jury returned a verdict finding Cepeda guilty of robbery, which then served as the predicate felony for his first degree murder conviction. Cepeda was also convicted of aggravated assault and battery, assault with a dangerous weapon, and conspiracy. Cepeda now appeals his convictions¹¹ on the grounds of improper admission of hearsay and character testimonies, inadequate jury instructions, ineffective assistance of counsel, and cumulative error.¹²

II

Admission of Evidence at Trial

¶ 11 Cepeda asserts a number of issues on appeal and we turn first to his argument that character evidence and hearsay testimony were wrongly admitted at trial. Defense counsel argues that Cepeda Sr.'s testimony improperly addressed Cepeda's character, and that his testimony concerning the "gun incident" was evidence of a prior bad act and inadmissible. Cepeda also asserts that the trial court erred by admitting Cepeda Sr.'s testimony concerning an out-of-court conversation with Fitial, as well as Hosono's testimony describing the events immediately preceding Zhou's death. Given the range of evidentiary principles implicated by each challenge, we will examine each separately.

¶ 12 We review a trial court's decision pertaining to the admission of evidence for abuse of discretion. *Norita v. Norita*, 4 NMI 381, 383 (1996). "An abuse of discretion exists if the [trial] 'court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Commonwealth v. Campbell*, 4 NMI 11, 16 (1993) (quoting *Lucky Dev. Co., Ltd. v. Tokai, U.S.A., Inc.*, 3 NMI 79, 84 (1992)).

A. Character Testimony was Improperly Admitted

¶ 13 Cepeda argues that the trial court improperly admitted testimony from Cepeda Sr. that Cepeda was "naughty," "rebellious," and of a generally disobedient character. Cepeda claims that this testimony was highly prejudicial and irrelevant to any material issue regarding his guilt, particularly because at trial Cepeda never offered any evidence of his good character, or evidence of the bad character of the victim. Furthermore, Cepeda argues that there is a "reasonable probability" that the jury gave his father's testimony considerable weight,¹³ and thus, admitting the testimony materially affected the verdict.

¹¹ We note that the trial court sentenced Cepeda to a single prison sentence of sixty-six years. Every charge Cepeda was convicted of has a prescribed sentencing range and Cepeda must be sentenced within the sentencing range applicable for each conviction. A blanket sentence for all of Cepeda's convictions violates his due process rights and, at the same time, hinders our ability to review the convictions and sentence.

¹² In view of our disposition – vacating all convictions and remanding the case for a new trial – we need only consider those issues that are likely to recur at any subsequent trial. *See State v. Murphy*, 7 Wash. App. 505, 508 (1972).

¹³ During sentencing, the trial court explained that Cepeda is "not an evil person," but rather, "agagat," naughty, and rebellious, refusing to be told what to do. ER at 394-95. Defense counsel draws the Court's attention to the fact that these statements "echo the testimony of [Cepeda Sr.], who characterized his son as naughty,

¶ 14 The Commonwealth responds that defense counsel’s assertion during opening statement that Cepeda was beaten by this father “opened the door” to testimony that Cepeda Sr. was not the “vicious, evil man” Cepeda alleged, and that Cepeda was not the only child that Cepeda Sr. punished. In response to testimony concerning the “gun incident,” the Commonwealth argues that after the trial court sustained defense counsel’s objection Cepeda Sr. did not venture into the subject again.

¶ 15 Courts are divided on the particular “open the door” theory of admissibility argued by the Commonwealth. Some federal courts have held that “a party who raises a subject in an opening statement ‘opens the door’ to admission of evidence on that same subject by the opposing party.” *United States v. Magallanez*, 408 F.3d 672, 678 (10th Cir. 2005) (citation omitted); *accord United States v. Croft*, 124 F.3d 1109, 1120 (9th Cir. 1997) (holding that the defendant opened the door to bolstering testimony of a prosecution witness by branding that witness a liar in opening statement); *United States v. Knowles*, 66 F.3d 1146, 1161 (11th Cir. 1995) (ruling that defense counsel attacking credibility of government witness during opening statement opened the door for prosecution to introduce on direct examination plea agreements of witnesses with statements requiring truthful testimony). Other federal courts, however, have held that an opening statement has no evidentiary value, and as such cannot operate to place an issue in controversy. *See, e.g., United States v. Tomaiolo*, 249 F.2d 683, 689 (2d Cir. 1957) (holding that the rule relating to the introduction of rebuttal evidence involved only the rebuttal of actual evidence, specifically, sworn testimony, and that any argument made in an opening statement could effectively be explained or neutralized by counter-argument or trial court instruction); *United States v. McLister*, 608 F.2d 785, 790 (9th Cir. 1979) (ruling that counsel's opening statement could not have placed the defendant's character at issue).

¶ 16 Many state courts have ruled that remarks made during opening statement do not open the door to admission of rebuttal evidence on the same subject. *See, e.g., Rufo v. Simpson*, 86 Cal. App. 4th 573, 603-04 (2001) (finding that opening statement is not evidence); *State v. Donovan*, 698 A.2d 1045, 1048 (Me. 1997) (“The defendant's opening statement did not ‘open the door’ for rebuttal evidence concerning matters never placed in issue by the evidence.”); *State v. Bronner*, 2002 Ohio 4248, P57 (2002) (“Because statements regarding the potential bias of a prosecution witness made in opening statement are not evidence, such statements may not lay a foundation for or open the door to rebuttal with otherwise inadmissible character evidence as to the defendant.”); *Cooper v. Commonwealth*, 31 Va. App. 643, 650 (2000) (“The opening statement is not evidence, and, thus, cannot ‘open the door’ for otherwise inadmissible prior crimes evidence.”). *But see Bass v. State*, 270 S.W.3d 557, 562 (Tex. Crim. App. 2008) (finding that defendant’s opening statement opened the door to extraneous offense evidence to rebut a

‘rebellious,’ generally ‘do[ing] what I tell him not to do,’ and never learning the ‘lesson’ his father’s frequent punishments were meant to impress upon him.” Appellant’s Opening Br. at 23 (quoting ER at 68, 79).

defensive theory). Where opening statement is deemed not to be evidence and “improper remarks are made by counsel, the remedy lies in a curative instruction to the jury or, if absolutely necessary, a mistrial.” *Winfred D. v. Michelin North America, Inc.*, 165 Cal. App. 4th 1011, 1027 (2008) (quoting *State v. Anastasia*, 356 N.J. Super. 534, 542 (2003)).

¶ 17 The Commonwealth argues that it offered Cepeda Sr.’s testimony not “to improperly place [Cepeda’s] character into evidence, rather it was offered by the prosecution as a means to rebut Appellant’s argument that perhaps he was involved in this incident due to his horrible upbringing by a ‘vicious, evil man.’” Appellee’s Br. at 24 (quoting ER at 37). After examining how other jurisdictions have treated this issue,¹⁴ we must reject the Commonwealth’s argument. We hold that remarks made during opening statement have no evidentiary value and cannot lay a foundation for, or open the door to, rebuttal with otherwise irrelevant and inadmissible character evidence.¹⁵ In reaching this decision we believe that, as suggested in *Winfred* and *Anastasia*, such remarks are best neutralized not by admitting otherwise inadmissible evidence, but by counterargument or with a curative instruction from the trial court judge. In contrast to such measured alternatives, admitting evidence of Cepeda’s bad acts as a child served no probative function except to inflame the minds and passions of the jury against Cepeda. As stated in the jury instructions in this case, “[a]rguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements . . . is not evidence.” ER at 13. We find no need to unsettle this rule.

B. Evidence of the “Gun Incident” was Improperly Admitted

¶ 18 Testimony by Cepeda Sr. concerning the “gun incident” was also improperly admitted. The Commonwealth Rules of Evidence provide that, subject to limited exceptions, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” NMI R. Evid. 404(b). The Commonwealth claims that after Cepeda’s hearsay objection was sustained, Cepeda Sr. “did not venture into the issue of the gun again.” Appellee’s Br. at 24. The trial transcript suggests otherwise. For example, following the sustained objection, Cepeda Sr. testified that he gave a “strict instruction” to his children to not go into his bedroom, and that Cepeda “did not respect that instruction.” ER at 69. This testimony had no probative value other than to show Cepeda’s propensity for committing bad acts – an impermissible use of such testimony under Rule

¹⁴ Pursuant to 7 CMC § 3401, when we have no guidance from our own rules and statutes we look to restatements and the law as generally understood and applied throughout the United States. *See infra* ¶ 34.

¹⁵ The Commonwealth Rules of Evidence provide that, “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” NMI R. Evid. 404(a). Limited exceptions to this rule provide that such evidence is admissible when “offered by an accused, or by the prosecution to rebut the same,” or after the accused has already caused evidence of the same “trait of character of the alleged victim of the crime” to be admitted. NMI R. Evid. 404(a)(1)-(2).

404(b). Additionally, the Commonwealth failed to assert that the testimony was subject to any of the exceptions laid out in the rule. Accordingly, we find that testimony concerning the “gun incident” was improperly admitted.

C. *Cepeda Sr.’s Conversation with Fitial was Hearsay and Improperly Admitted*

¶ 19

Cepeda argues that the trial court erroneously admitted testimony by Cepeda Sr. concerning his discussion with Fitial and subsequent decision to call the police. Cepeda contends that whether Fitial’s statement led Cepeda Sr. to call the police was irrelevant to any element of the charged crimes or asserted defenses, or any other material issue in this case. Cepeda also asserts that such testimony was highly prejudicial because it led the jury to believe that Fitial was a credible witness based on the fact that Cepeda Sr. found Fitial’s statements credible enough to call the police. Cepeda argues that without this bolstered credibility, the jury may have placed less weight on Fitial’s testimony because Fitial was a drug user who admitted to being passed out drunk when Zhou was killed. The Commonwealth responds that testimony concerning Cepeda Sr.’s conversation with Fitial was properly offered to show the effect of the contested statements on Cepeda Sr.’s state of mind, and was necessary for the jury to understand the origins of the police investigation and to avoid jury confusion in light of that fact that Guerrero had previously been acquitted of the same crime.

¶ 20

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” NMI R. Evid. 801(c). While hearsay is generally inadmissible, it may be admitted if the statement is explicitly defined as non-hearsay by Commonwealth Rule of Evidence 801(d), or if one of the hearsay exceptions enumerated in Rules 803, 804, or 807 applies. A statement is not hearsay “if it is used only to show the effect on the listener, without regard to the truth of the statement.” *Washington v. Edwards*, 131 Wash. App. 611, 632 (2006) (citations omitted). In *Edwards*, detective testimony concerning out-of-court statements by an informant was offered to show why the detective started his investigation. *Id.* at 614. The Washington Court of Appeals ruled that the testimony was not relevant because the reason the investigation began was not in controversy, and furthermore that such evidence was inadmissible hearsay because the detective’s “state of mind is simply not relevant to whether [the defendant] committed the crimes charged.” *Id.* at 615.

¶ 21

Analogous to the situation in *Edwards*, we conclude that Cepeda Sr.’s role in prompting the police to investigate his son was not relevant in this case. More specifically, the effect that Fitial’s statements had on Cepeda Sr.’s mental state does not make it any more or less probable that his son committed the charged crimes. Instead, such comments are relevant to explain the origin of the police investigation, which was never contested at trial. Given this lack of relevance, the only relevant purpose for such testimony arises from its value in implicating Cepeda. Such a use constitutes hearsay, and thus the testimony was wrongfully admitted.

D. *Detective Hosono's Testimony was Improperly Admitted*

¶ 22 Cepeda argues that portions of Hosono's testimony should have been excluded because they were irrelevant and hearsay. Cepeda contends that Detective Hosono's lengthy "narrative regarding what he believed happened the night of the Yellow House murder . . . was conclusory and stated as if he were relating substantiated findings of fact, despite [his own] admission that he did not have personal knowledge of most of the events to which he testified." Appellant's Opening Br. at 25. Furthermore, Cepeda argues that even though Ilo and Fitial were subjected to cross-examination and the trial court gave a limiting instruction regarding Hosono's testimony,¹⁶ the resulting prejudice was material because as an accomplice, Ilo's testimony was inherently suspect. Cepeda claims that the trial court's instruction "served to sanction the improper testimony by allowing the jury to consider it despite its irrelevance and the inapplicability of any hearsay exception." *Id.* at 27. Additionally, Cepeda argues that admission of hearsay testimony was prejudicial because by having Hosono, a respected law enforcement member, "essentially offer up [Fitial's and Ilo's] hearsay statements as his own testimony," the Commonwealth "was able to give those statements an official imprimatur of credibility, which would have otherwise been lacking had it been offered by [Fitial and Ilo] alone."¹⁷ *Id.* at 28.

¶ 23 In response, the Commonwealth argues that Hosono's testimony was offered to explain why he conducted the investigation in the manner that he did. The Commonwealth argues that the trial court properly addressed Ilo's credibility through a jury instruction,¹⁸ and that arguments concerning Ilo's and Fitial's credibility invade the province of the jury by second-guessing the jury's ability to "assess witness credibility to resolve evidentiary conflicts and draw reasonable inferences from proven facts." Appellee's Br. at 28 (citing *Commonwealth v. Castro*, 2007 MP 9 ¶ 11 (citing *United States v. Ramos*, 558 F.2d 545, 546 (9th Cir. 1997))). Additionally, the Commonwealth contends that since both Ilo and Fitial were available for cross-examination, any prejudice to Cepeda resulting from Hosono's testimony was cured.

¶ 24 We previously set forth the applicable rules governing hearsay,¹⁹ and now focus on how these rules apply with respect to police officer testimony. "Out-of-court declarations made to a law enforcement officer may be admitted to demonstrate the officer's or the declarant's state of mind only if their state of mind is relevant to a material issue in the case; otherwise, such declarations are hearsay." *State v. Johnson*, 61 Wash. App. 539, 545-46 (1991) (citations omitted). The court in *Johnson* relied on *State v.*

¹⁶ See *supra* note 9.

¹⁷ Cepeda claims that testimony by Ilo and Fitial had multiple credibility issues marked by unreliable memories, refusals to answer straightforward questions and by virtue of that fact that those witnesses were accomplices in the alleged crime. Appellant's Opening Br. at 27-28.

¹⁸ See *supra* note 4.

¹⁹ See *supra* ¶ 20.

Lowrie, 14 Wash. App. 408 (1975), in which a detective testified that an informant had told him about the defendant’s involvement in the charged crimes. The trial court admitted the testimony on the grounds that it was not offered for the truth of the matter asserted, but only to show that the statement to the detective resulted in police action. *Id.* at 412-13. Reversing the trial court, the Washington Court of Appeals expressly rejected the trial court’s reasoning, stating that neither the contents of the statement given to police nor the subsequent police action were in question. *Id.* at 413. Accordingly, because the “sole question presented to the jury was whether or not the defendant was involved in the commission of the crimes,” the testimony was not relevant “to any issue before the trial court, except to prove the truth of the matter asserted.” *Id.*

¶ 25 Courts in other jurisdictions have limited police officer testimony in similar situations. Under the “explanatory exception” to the hearsay rule, some courts allow “the admission of statements that explain the progress of a police investigation under the rationale that such evidence is not offered for its truth” but instead for the limited purpose of showing the course of police action. *See People v. Peoples*, 377 Ill. App. 3d 978, 984 (2007) (citation omitted). The Commonwealth argues that Hosono’s statements were not offered for the truth of the matter asserted, but “to explain why Hosono conducted the investigation in the way he did, and why he spoke with the people he did.” Appellee’s Br. at 28. An often-quoted excerpt further summarizes the relevant rule and underlying rationale:

In criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence in conduct. . . . [The Officer] will often explain [his actions] . . . by stating that he did so ‘upon information received’ and this of course will not be objectionable as hearsay, but if he becomes more specific by repeating definite complaints of a particular crime by the accused, this is so likely to be misused by the jury as evidence of the fact asserted that it should be excluded as hearsay.

McCormick on Evidence, § 248 (2d ed. 1972).

¶ 26 Courts have been mindful to ensure that this hearsay exception does not “become a passkey to get to the jury the substance of . . . out-of-court information, directly or indirectly, that otherwise might be barred by the hearsay rule.” *Louisiana v. Legendre*, 942 So. 2d 45, 53 (La. Ct. App. 2006). To this end, in determining admissibility, courts have focused on whether an officer’s testimony is necessary for the jury to understand the police conduct, and whether the officer had personal knowledge of the events in question. In *Commonwealth v. Palsa*, 521 Pa. 113 (1989), a police officer testified to out-of-court statements made by an individual who had implicated the defendant. While the trial court admitted the statements, the Pennsylvania Supreme Court reversed, reasoning that the statements did not “provide[] only the information necessary for a reasonable understanding of police conduct,” and that “the police easily could have explained the course of conduct pertaining to their investigation . . . without resorting to the full and explicit statements” given by the out-of-court declarant. *Id.* at 119. Whether a testifying

officer has personal knowledge of the subject of his or her testimony also plays a critical role in determining the admissibility of such statements. *See Montana v. Suit*, 277 Mont. 227, 230-31 (1996) (holding that police officer testimony concerning date of shooting and identity of shooter was inadmissible where testimony was based on out-of-court statements and not personal knowledge). Accordingly, while general testimony that an officer spoke with an individual is permissible, testimony that “recounts the *substance* of a conversation is not within the officer’s knowledge and is inadmissible hearsay.” *Illinois v. Sample*, 326 Ill. App. 3d 914, 920-21 (2001) (citing *People v. Gaucho*, 122 Ill. 2d 221, 248 (1988)).

¶ 27 We reject the Commonwealth’s contention that Hosono’s testimony was properly admitted. Both parties agree that Hosono had no personal knowledge of the facts underlying his narrative testimony purportedly describing the moments leading up to the Zhou’s death. Admittedly, there is a “subtle, and elusive, difference between the use of statements to establish the truth of facts averred . . . and their use to establish a course of conduct by police.” *Palsa*, 521 Pa. at 120. However, while a trial court must exercise discretion when balancing the necessity of such background information against its improper effect, Hosono’s testimony impermissibly tipped the scale in favor of the Commonwealth. Similar to *Palsa*, Hosono’s testimony went beyond explaining the investigative steps taken, and reached the substance of the conversations he had with Ilo, Fitial and other witnesses. Moreover, as in *Lowrie*, the only questions presented to the jury in this case concerned Cepeda’s involvement in the crimes, and therefore the testimony was only relevant to prove the truth of the matter asserted. Hosono’s explicit, detailed testimony in no way provided the jury with necessary information about the investigation, was in no way grounded in the officer’s personal knowledge, and was therefore impermissible hearsay.

¶ 28 We also reject the Commonwealth’s contention that the ability to cross-examine Ilo and Fitial sufficiently minimized the prejudicial effect of Hosono’s testimony. While the above-cited cases deal with officers testifying to out-of-court statements of witnesses who did not testify at trial, this distinction does not undermine the application of these cases to the present context. First, Hosono stated that his testimony was based on his investigation, which included interviewing 8-10 witnesses, some of whom did not testify at trial subject to cross-examination. ER at 97. Moreover, Hosono did not simply relay an out-of-court statement made by a testifying witness, but instead drew upon conversations with multiple witnesses in reciting his narrative summary of the night of Zhou’s death. While the former situation may be conducive to arguments that a defendant’s opportunity to cross-examine a witness minimized prejudice, the latter situation is not. Hosono’s testimony was riddled with hearsay, and unattributed to any specific witness. While we agree with the Commonwealth that it is the jury’s province to assess witness credibility and resolve evidentiary conflicts, such a comparison was not even possible because the jury had no way of knowing which information Hosono had received from which witness.

¶ 29 Finally, the Commonwealth asserts that the limiting instruction given to the jury was sufficient to overcome any prejudice to Cepeda resulting from Detective Hosono’s testimony. In *Pasla*, the jury was instructed that a police officer’s testimony conveying out-of-court statements by an individual implicating the defendant should “not be considered as substantive evidence of guilt, and that it could be considered only as providing a foundation for understanding why police took subsequent actions.” 521 Pa. at 116. Despite this precaution, in ordering a new trial the Pennsylvania Supreme Court reasoned that “there is great risk that, despite cautionary jury instructions, certain types of statements will be considered by the jury as substantive evidence of guilt.” *Id.* at 118. Similarly, in the instant case, especially in light of the potential credibility issues surrounding the testimony of Ilo and Fitial, the trial court’s instruction did not nullify the resulting prejudice to Cepeda. Hosono’s testimony was therefore improperly admitted.

III

Jury Instructions

¶ 30 Cepeda asserts that the trial court gave improper jury instructions by failing to instruct, on its own motion, that a robbery conviction under 6 CMC § 1411 requires proof of specific intent to steal.²⁰ Cepeda claims that because an essential element of robbery was not proved beyond a reasonable doubt by the Commonwealth, his convictions for both robbery and first degree murder should be reversed. Cepeda’s challenge raises three questions: (1) what is the requisite mens rea for robbery; (2) did the trial court have a duty to instruct the jury on this element; and if so (3) does the failure to instruct warrant reversal. Where a defendant “fails to contemporaneously object” to a jury instruction “we review for plain error.” *Commonwealth v. Ramangmau*, 4 NMI 227, 238 (1995). “Plain error is a highly prejudicial error, which affects the defendant’s substantial rights.” *Commonwealth v. Camacho*, 2002 MP 6 ¶ 18.

A. Robbery is a Specific Intent Crime

¶ 31 It is well understood that subjecting a person to criminal liability generally requires both an actus reus, an unlawful act, and a mens rea, a culpable mental state. *See generally Morissette v. United States*, 342 U.S. 246, 250-52 (1952). Cepeda rightly points out that the Commonwealth statutory definition of robbery describes an actus reus, but does not state the necessary mens rea. Crimes are generally divided by mental state into three categories: strict liability offenses, crimes requiring general intent, and crimes requiring specific intent. *See, e.g., United States v. Sewell*, 252 F.3d 647, 650 (2d Cir. 2001) (citation omitted). The issue of the requisite mens rea to commit robbery is one of first impression for this Court. Given that “[f]ew areas of criminal law pose more difficulty than the proper definition of the mens rea

²⁰ The Commonwealth’s robbery statute reads: “(a) A person commits the offense of robbery if he or she takes property from the person of another, or from the immediate control of another, by use or threatened use of immediate force or violence. (b) A person convicted under this section may be punished: (1) By imprisonment for not more than 10 years; or (2) If the defendant or an accomplice uses a dangerous weapon to obtain the property or inflicts serious bodily injury, the term of imprisonment may be not more than 20 years.” 6 CMC § 1411.

required for any particular crime,” this matter warrants particularly in-depth examination. *United States v. Bailey*, 444 U.S. 394, 403 (1980).

¶ 32 While the Commonwealth robbery statute lacks an express mens rea requirement, the offense of robbery is not necessarily void of such an element. “The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” *Dennis v. United States*, 341 U.S. 494, 500 (1951) (citation omitted); *See generally Morissette*, 342 U.S. at 243-44 (describing common law relationship between a culpable mental state and punishment). No United States jurisdiction considers robbery a strict liability offense, and the parties rightfully refrain from contending otherwise. “Criminal statutes will not be construed to impose strict liability absent a clear indication of a legislative intention to do so.” *Guichard v. Smith*, 471 F. Supp. 784, 790 n.5 (E.D.N.Y. 1979) (citing *Morissette*, 342 U.S. 246). Our criminal code contains no such evidence, and we are therefore left with determining whether robbery is a general or specific intent crime.

¶ 33 Numerous courts and scholars have noted the ambiguity and confusion surrounding the use of the terms “specific intent” and “general intent,” and it is helpful at this juncture to define them explicitly. A commonly understood meaning of specific intent, which we adopt, is “a special mental element which is required above and beyond any mental state required with respect to the actus reus of the crime.” *United States v. Torres*, 977 F.2d 321, 326 (7th Cir. 1992) (quoting 1 W. LaFare & A. Scott, *Substantive Criminal Law*, § 3.5, p. 315 (1986)). In the context of robbery, this is the specific intent to permanently deprive a person of his or her property. *See, e.g., Hamilton v. Vasquez*, 17 F.3d 1149, 1173 (9th Cir. 1994). In contrast, general intent is defined as, “in criminal law, the intent to do that which the law prohibits. It is not necessary for the prosecution to prove that the defendant intended the precise harm or the precise result which eventuated.” *United States v. Jennings*, 855 F. Supp. 1427, 1439 (M.D. Pa. 1994) (quoting *Black’s Law Dictionary* 810 (6th ed. 1990)).

¶ 34 Neither the Commonwealth robbery statute itself nor the legislative history for this statute indicate whether robbery in the Commonwealth is a general or specific intent crime. Given this absence, 7 CMC § 3401 directs us to look to “the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States.”²¹ Accordingly, we have examined the Model Penal Code and conducted a fifty-state survey to determine how other jurisdictions have determined the requisite mens rea for robbery in their respective jurisdictions. Relying on these authorities, we conclude that specific intent is

²¹ While 7 CMC § 3401 is located in Title 7 (entitled “Civil Procedure”), we find that this rule also applies to criminal law matters. This interpretation is supported by the rule itself, which states that it applies “in all proceedings” and even addresses criminal law by stating that “no person shall be subject to criminal prosecution except under the written law of the Commonwealth.” 7 CMC § 3401.

required to secure a robbery conviction.

i. Robbery Under the Model Penal Code Requires Specific Intent

¶ 35

Although not technically a Restatement, the Model Penal Code (“MPC”) is prepared by the American Law Institute and has generally been treated as possessing the same authority in criminal law matters as the Restatements have in civil matters. *See, e.g., Government of Virgin Islands v. Harris*, 938 F.2d 401, 411 n. 9 (1991); *State v. Flores*, 218 Ariz. 407, 413 n. 10 (2008); *Commonwealth v. True*, 16 Mass. App. Ct. 709, 711 (1983). The MPC defines robbery as a forceful or threatening act that occurs in “the course of committing a theft.”²² MODEL PENAL CODE § 222.1 (1962). The MPC does not explicitly distinguish between general and specific intent, but instead classifies crimes based on whether the act is done with the following degrees of mental culpability: purposely, knowingly, recklessly, or negligently. *Id.* § 2.02. However, significantly, the MPC defines theft as taking “moveable property of another with purpose to deprive him thereof.” *Id.* § 223.2. Accordingly, while the MPC does not expressly use the term “specific intent,” the robbery statute implicitly adopts this requisite mental state – “purpose to deprive” – from the MPC theft definition. Eighteen states follow this approach and have robbery statutes that include the phrase “in the course of committing theft”²³ or similar language linking robbery to theft.²⁴ Since theft in these jurisdictions requires “intent to deprive,” referencing “theft” in the robbery statute incorporates this specific intent element. Accordingly, the MPC supports a finding that robbery is a specific intent crime.

ii. A Majority of States Consider Robbery a Specific Intent Crime

¶ 36

Pursuant to 7 CMC § 3401, we also conducted a fifty-state survey to determine how robbery, a traditional common law offense, is “generally understood and applied in the United States.” It is indisputable that in a sizeable majority of state jurisdictions robbery is treated as a specific intent crime. As previously stated, eighteen states achieve this result by following the MPC approach. Similarly, four

²² The full MPC definition of robbery reads as follows: “A person is guilty of robbery if, in the course of committing a theft, he: (a) inflicts serious bodily injury upon another; or (b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or (c) commits or threatens immediately to commit any felony of the first or second degree. An act shall be deemed ‘in the course of committing a theft’ if it occurs in an attempt to commit theft or in flight after the attempt or commission.” MODEL PENAL CODE § 222.1(1).

²³ Twelve states adopt this approach. Ala. Code § 13A-8-43; Del. Code Ann. tit. 11, § 831; Haw. Rev. Stat. § 708-840; Ky. Rev. Stat. Ann. § 515.030; Mont. Code Ann. § 45-5-401; N.D. Cent. Code § 12.1-22-01; N.H. Rev. Stat. Ann. § 636:1; N.J. Stat. Ann. § 2C:15-1; Ohio Rev. Code Ann. § 2911.02; Or. Rev. Stat. § 164.395 (“in attempting or committing a theft offense”); 18 Pa. Cons. Stat. § 3701; Tex. Penal Code Ann. § 29.02.

²⁴ Six states adopt this approach. Ark. Code Ann. § 5-12-102 (“with the purpose of committing a felony or misdemeanor theft”); Ga. Code Ann. § 16-8-40 (requiring “intent to commit theft”); Iowa Code § 711.1 (same); Me. Rev. Stat. Ann. tit. 17-A, § 651 (“robbery if the person commits or attempts to commit theft”); N.M. Stat. § 30-16-2 (stating that robbery “consists of theft”); Tenn. Code Ann. § 39-13-401 (defining robbery as “intentional or knowing theft of property”).

state statutes contain the phrase “in the course of committing larceny,”²⁵ and in these states larceny, like theft, involves “intent to deprive.” One state has a robbery statute expressly adopting specific intent.²⁶

¶ 37

Courts in the remaining states have been called upon, as we are in this case, to interpret state robbery statutes to determine whether specific intent is required. The majority of these states have found robbery to require specific intent. Five states have statutes containing the word “felonious,” which has been interpreted as requiring specific intent.²⁷ Two states have statutes that include the phrase “intent to steal” which has been interpreted likewise.²⁸ Three state statutes expressly adopt the common law definition of robbery, which requires specific intent.²⁹ The remaining jurisdictions lack such explicit statutory language to rely upon, and have had to interpret a variety of statutory language to determine the requisite mens rea for robbery. While divided, many of these states consider robbery a specific intent crime, regardless of whether this requirement is statutorily prescribed.³⁰ Other states have adopted the

²⁵ Conn. Gen. Stat. § 53a-133; Mich. Comp. Laws § 750.530; N.Y. Penal Law § 160.00; Wyo. Stat. Ann. § 6-2-401 (referencing larceny statute).

²⁶ Fla. Stat. § 812.13 (stating that robbery requires the “[i]ntent to either permanently or temporarily deprive” a person of property).

²⁷ Cal. Penal Code § 211 (defining robbery as a “felonious taking”); Idaho Code Ann. § 18-6501 (same); Miss. Code Ann. § 97-3-73 (using “feloniously” in robbery statute); W. Va. Code § 61-2-12 (same); *see also State v. Potter*, 627 P.2d 75, 80-81 (Utah 1981) (stating that while Utah robbery statute, Utah Code Ann. § 76-6-301, used the phrase “unlawful and intentional taking,” since the previous robbery statute used the word “felonious,” specific intent would continue to be inferred).

²⁸ Neb. Rev. Stat. § 28-324; Wis. Stat. § 943.32. In *State v. Martin*, 232 Neb. 385, 394-95 (1989), the court noted that theft, which requires “intent to deprive,” is a lesser-included offense of robbery, thus supporting that an “intent to steal” requires specific intent. In *State v. Koller*, 87 Wis. 2d 253, 265 (1979), the court quoted the Wisconsin Jury Instructions, which state that the “intent to steal” requires an “intent thereby to deprive.”

²⁹ Md. Code Ann. Crim. § 3-401(e) states that robbery retains its “judicially determined meaning,” which was noted in *Coles v. State*, 374 Md. 114, 123 (2003), as “the felonious taking and carrying away of the personal property of another.” N.C. Gen. Stat. § 14-87.1 adopts the common law definition of robbery, which was interpreted in *State v. Smith*, 305 N.C. 691, 700 (1982), as “the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence.” S.C. Code Ann. § 16-11-325 states that, “The common law offense of robbery is a felony.” In *State v. Mitchell*, 382 S.C. 1, 4 (2009), the court noted that at common law robbery is a “felonious or unlawful taking.”

³⁰ *See State v. Celaya*, 135 Ariz. 248, 252 (1983) (holding that specific intent is an element of robbery despite not being specifically listed in statute); *Williams v. State*, 273 Ind. 105, 107 (1980) (finding that use of the word “knowingly” in state robbery statute makes robbery a specific intent crime) (superseded on other grounds by statute relating to involuntary intoxication defense, as noted in *State v. Van Cleave*, 674 N.E.2d 1293 (Ind. 1996)); *Commonwealth v. Johnson*, 379 Mass. 177, 181 (1979) (stating that “[r]obbery includes all the elements of larceny” including “specific intent to deprive the person of the property permanently”); *State v. Charlton*, 338 N.W.2d 26, 29-30 (Minn. 1983) (stating that although “intent is not specified as an element of robbery or aggravated robbery” the Minnesota Supreme Court has “implied that specific intent . . . is an element of a robbery charge.”); *State v. Reposa*, 99 R.I. 147, 149 (1965) (noting that Rhode Island adopts “common-law definition of robbery,” requiring a “felonious and forcible taking”); *State v. Francis*, 151 Vt. 296, 307-08 (1989) (holding that “specific intent element should be read into Vermont’s assault and robbery statute” where statute concerns a “person who assaults another and robs, steals, or takes from his person or in his presence money or other property which may be the subject of larceny . . .”); *Pierce v. Commonwealth*, 205 Va. 528, 532-33 (1964) (Stating that “Va. Code Ann. § 18.1-91 fixes

minority position, and ruled that in the absence of clear statutory language implicating specific intent, robbery is a general intent crime.³¹

¶ 38 The overall trend toward categorizing robbery as a specific intent crime is also present among states in the Ninth Circuit. Of these states, only Alaska and Nevada classify robbery as a general intent crime.³² Courts in Washington, a state in the Ninth Circuit whose robbery statute is close to our own,³³ have repeatedly held that despite the absence of explicit statutory language, robbery requires specific intent because the “statutory elements [of robbery] . . . presuppose that intent to deprive the victim of property is a necessary element.” *State v. Corwin*, 32 Wash. App. 493, 497 (1982); *see also, State v. Faucett*, 22 Wash. App. 869, 871 (1979). Other Washington courts have reached this same conclusion – that robbery requires an intent to deprive – by reasoning that “robbery requires a specific intent to commit theft of the property taken.” *State v. Mathews*, 38 Wash. App. 180, 184 (1984). Since Washington’s theft statute requires an “intent to deprive,” this element is incorporated into the robbery definition. *See* R.C.W. § 9A.56.020(1)(a). Analogous to the Washington cases cited above, the basis for the Commonwealth specific intent definition is grounded in our own law. Specifically, the Commonwealth Criminal Code, like the Revised Code of Washington, expressly states that theft requires “intent to permanently deprive the owner of his or her rights to the property or services.” 6 CMC § 1601(a).

¶ 39 After examining the MPC and surveying all fifty states on this issue, we conclude that both support a finding that specific intent is an element of robbery.³⁴ The MPC adopts a robbery definition that

the punishment for, but does not define, the crime of robbery,” and subsequently adopting the common law definition of “intent to steal,” which “means the intent to permanently deprive the owner of his property”); *State v. Quillin*, 49 Wash. App. 155, 164-65 (1987) (stating that intent to deprive the victim of property is a necessary element of robbery).

³¹ *See Nell v. State*, 642 P.2d 1361, 1365-66 (Alaska 1982) (holding that proof of intent to deprive owner of property is not a required element of robbery); *People v. Meeks*, 542 P.2d 397, 398 (Colo. Ct. App. 1975) (declaring that robbery is not a specific intent crime); *People v. Lewis*, 165 Ill. 2d 305, 337 (Ill. 1995) (“robbery is a general intent crime”); *State v. Thompson*, 221 Kan. 165, 175 (1976) (stating that intent to permanently deprive is not an element of robbery and that general intent is sufficient); *State v. Helm*, 624 S.W.2d 513, 517 (Mo. Ct. App. 1981) (declaring that robbery statute does not “contain any explicit requirement that the offense be committed with purpose or knowing intent” and so “jury is not called upon to assess the defendant’s mental state as a condition to reaching a verdict.”); *Leonard v. State*, 117 Nev. 53 (2001) (stating that robbery doesn’t require specific intent); *Traxler v. State*, 96 Okla. Crim. 231, 250 (1952) (finding that use of “wrongful taking” in robbery statute evidences narrower view of robbery than under common law, and so intent to steal or deprive is not an element of robbery).

³² *See, e.g., Nell v. State*, 642 P.2d 1361 (Alaska 1982); *Leonard v. State*, 117 Nev. 53 (2001).

³³ R.C.W. § 9A.56.190 reads, “A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. . . .”

³⁴ While the dissenting opinion relies in part on principles of statutory construction to determine that robbery is a general intent crime, we note that none of the cited cases apply this principle in the robbery context. *See infra* ¶ 50 and note 45. Given the common law origin of robbery as a specific intent crime, and the overwhelming trend

incorporates a “purpose to deprive” – what we classify as specific intent. In addition, a sizeable majority of jurisdictions consider robbery a specific intent crime. In reaching our conclusion we recognize that Illinois and Kansas have robbery statutes that closely mirror ours,³⁵ and that in both states robbery is a general intent crime.³⁶ However, “we are constrained in our ability to formulate the applicable law by the statutory mandate to apply the common law as enunciated in the American Law Institute’s Restatements of the Law,” and to the extent not contained therein, as generally understood and applied in the United States. *See Manglona v. Commonwealth*, 2005 MP 15 ¶ 19 (citing 7 CMC § 3401). Accordingly, while these two jurisdictions provide an example of how a similar statute has been interpreted differently, pursuant to 7 CMC § 3401, we are unable to disregard the MPC and the overwhelming trend among United States jurisdictions classifying robbery as a specific intent crime. We therefore find that an element of robbery is the specific intent to permanently deprive a person of his or her property. General intent is insufficient to sustain a guilty verdict.

B. The Trial Court Had a Duty to Instruct the Jury on the Requisite Mens Rea for Robbery

¶ 40

Cepeda contends that the trial court had a duty to instruct the jury *sua sponte* on the mental state required to commit robbery.³⁷ “The law is quite clear that the trial court has a duty to instruct the jury, and such instructions may not be incomplete, but should ‘instruct in all essential questions of law whether requested or not.’” *Commonwealth v. Esteves*, 3 NMI 447, 454 (1993) (quoting *Morris v. United States*, 156 F.2d 525, 527 (9th Cir. 1946)). A trial court’s duty is not always adequately performed by merely reading to the jury the requested instructions. “It is incumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case.”

among states treating robbery as such, we conclude that this canon of construction, while appropriate in other contexts, does not apply in the case of robbery.

³⁵ In relevant part, 720 Ill. Comp. Stat. 5/18-1 reads, “(a) A person commits robbery when he or she takes property . . . from the person or presence of another by the use of force or by threatening the imminent use of force.” Kan. Stat. Ann. § 21-3246 reads, “Robbery is the taking of property from the person or presence of another by force or by threat of bodily harm to any person.”

³⁶ *See People v. Lewis*, 165 Ill. 2d 305, 337 (1995); *State v. Thompson*, 221 Kan. 165, 175 (1976).

³⁷ The Commonwealth also argues that Rule 30 of the Commonwealth Rules of Criminal Procedure does not permit this court to review a serious error which has not been objected to at the trial court. Rule 30 states in part that, “[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. . . .” NMI R. Crim. P. 30. In *Camacho*, we faced the issue of whether a trial court has the duty to *sua sponte* instruct the jury on lesser included offenses. 2002 MP 6 ¶ 18. We stated that Rule 30 of the Commonwealth Rules of Criminal Procedure is “inapplicable to the extent that it is inconsistent with the duty to instruct *sua sponte* regarding lesser included offenses.” *Id.* ¶ 63 n. 16. Applying this reasoning to the present case, the Rule 30 procedural limitation does not allow the trial court to side-step its duty to properly instruct the jury.

People v. Davis, 43 Cal. 2d 661, 673 (1954) (citation omitted). The court in *People v. Iverson* succinctly stated the rules concerning this trial court duty:

It is settled that in criminal cases, even when not requested, a court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the evidence adduced before the court which are necessary for the jury's proper consideration of the case. At a minimum, it is a court's duty to ensure the jury is adequately instructed on the law governing all elements of the case submitted to it to the extent necessary for a proper determination in conformity with the applicable law.

26 Cal. App. 3d 598, 604-05 (1972) (citations omitted), overruled on other grounds in *In re Earley*, 14 Cal. 3d 122, 130 (1975). Furthermore, “[w]here life or liberty is involved, an appellate court may notice a serious error which is plainly prejudicial even though it was not called to the attention of the trial court in any form.” *Morris v. United States*, 156 F.2d 525, 527 (9th Cir. 1946) (citations omitted).

¶ 41 Given our finding that one of the essential elements of robbery is the specific intent to permanently deprive another of his or her property, it follows that, even without a request by Cepeda, it was the trial court’s duty to instruct the jury on this required mental state. Failure to do so prejudiced Cepeda by permitting a conviction without proving all the elements of the underlying robbery offense.

i. *Implying a Mens Rea For Robbery Fails to Distinguish Innocent from Guilty Conduct*

¶ 42 Ruling that the jury instructions in the present case were inadequate is consistent with United States Supreme Court precedent. While not cited by either party, in *Carter v. United States*, 530 U.S. 255 (2000), the Court interpreted a bank robbery provision that contained “no explicit *mens rea* requirement of any kind.”³⁸ *Id.* at 267. In concluding that a violation of the provision only required general intent, the Court reasoned that a court need read into a statute “only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Id.* at 268-69 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)). To help illustrate this distinction the Court gave the example of “the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, but aberrant activity).” *Id.* at 269. The Court explained that wrongful and “otherwise innocent” conduct are separated – in this case, the sleepwalker would not be guilty of bank robbery – “by simply requiring . . . general intent – i.e., proof of knowledge with respect to the *actus reus* of the crime.” *Id.* The Court concluded that scienter requirements were satisfied “once this mental state and *actus reus* are shown.” *Id.*

¶ 43 In the present case we are not only asked to determine whether robbery is a general or specific intent crime, but must also address whether a robbery conviction can be secured without instructing the

³⁸ The relevant statutory provision reads, “Bank robbery and incidental crimes (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association. . .” *Carter*, 530 U.S. at 262 (quoting 18 U.S.C. § 2113(a)).

jury on the mens rea element. Stated alternatively, to uphold the robbery instruction given in this case, we must find that the requisite mental state was *implied* from the use of force required under the robbery statute. The *Carter* Court stressed that a requirement of general intent is sufficient to separate innocent from guilty conduct when the requisite “mental state and actus reus are shown.” *Id.* Implying the requisite mental state in the context of the Commonwealth robbery statute likely conflicts with this requirement. For example, under the reasoning argued by the Commonwealth, the sleepwalker – who possesses neither general nor specific intent – would be convicted if the jury found that she took property from the person or immediate control of another, and did so by use or threatened use of immediate force of violence.³⁹ While this example may seem outlandish, it illustrates that while a general intent requirement can separate guilty from innocent conduct, this is not necessarily true when the jury receives no instruction on any mens rea whatsoever. Accordingly, instructing on the requisite mens rea – in the case of robbery, specific intent – is critical to ensuring the presence of the requisite culpable mental state. Moreover, the effect of adopting the Commonwealth’s position would be to imply a mens rea from the commission of the robbery itself, and then permit this implied mental state to serve as the basis for first degree felony murder. We can find no jurisdiction that expressly supports this exact position,⁴⁰ and are unwilling to adopt it in the present case.⁴¹

C. *Failure to Instruct on Specific Intent Constitutes Plain Error*

¶ 44

“Plain error is a highly prejudicial error, which affects the defendant’s substantial rights.” *Camacho*, 2002 MP 6 ¶ 18 (citation omitted). We have previously found that failure to instruct on an essential element of a crime is plain error. *See Esteves*, 3 NMI at 454. In *Esteves*, the defendant was charged with assault with a dangerous weapon, and this Court held that the trial court erred by omitting from its instruction “an essential element” of the charged offense: the use of a dangerous weapon. *Id.*

³⁹ *See supra* ¶ 9 (listing robbery jury instructions).

⁴⁰ We are aware that in *Illinois v. Talley*, 177 Ill. App. 3d 170, 173 (1988), the court held that the requisite general intent for robbery could be implied from the act itself, and therefore that the jury did not need to be instructed on any intent element. However, we note that Illinois has limited the reach of this approach, stating in *Illinois v. Garland*, that “failure to include a mental state in the jury instructions is grounds to reverse a conviction when the record reveals that the principle contested issue was defendant’s mental state.” 254 Ill. App. 3d 827, 833 (1993) (citing *Podhrasky*, 197 Ill. App. 3d 349 (1990)).

⁴¹ Our position on this matter is also consistent with a Ninth Circuit Court of Appeals decision examining robbery with respect to first degree murder. In *United States v. Lilly*, 512 F.2d 1259, 1261 (9th Cir. 1975), the court held that when used as the predicate felony for first degree felony murder, specific intent remained an element of robbery despite its non-appearance in the robbery statute. The court reasoned that, “it was robbery’s specific intent that served to supply the element of premeditation” required for first degree murder. *Id.* The court stated that if robbery did not require specific intent, “the extraordinary result would be that first-degree murder, the essence of which historically has been cold-blooded premeditation in the nature of poisoning or lying in wait, could, as federal felony murder, be committed without specific intent to commit any crime at all.” *Id.* In the present case, we are unwilling to adopt the “extraordinary” result admonished by the Ninth Circuit Court of Appeals.

After examining the record “as a whole” we found that, as a result of the omission, the instructions “were incomplete and did not provide the jury with adequate guidance.” *Id.* This constituted plain error requiring the verdict to be set aside. *Id.*

¶ 45 Similar to the *Esteves* case, we find that failure to instruct the jury on the applicable mens rea for robbery constituted plain error. The jury must be instructed that robbery is a specific intent crime. Failing to provide this necessary instruction compromised the integrity of the judicial process by not providing the jury with adequate guidance for their deliberations. Specifically, omitting an instruction on specific intent – an essential element of the charged crime – permitted the jury to convict Cepeda of robbery without finding that he possessed the necessary culpable mental state. Cepeda was entitled to have each element of robbery proved beyond a reasonable doubt, and this inadequate jury instruction improperly relieved the Commonwealth of its burden.⁴² This deficiency constituted plain error. Accordingly, we vacate Cepeda’s robbery conviction, and must therefore also vacate Cepeda’s first degree murder conviction predicated on the robbery offense.⁴³

IV

Cumulative Error

¶ 46 While we have found plain error arising from the faulty robbery jury instruction, this conclusion does not necessarily demand reversal of the remaining convictions – aggravated assault and battery, assault with a dangerous weapon, and conspiracy. Cepeda argues that the cumulative effect of trial court errors is sufficient to warrant reversal of these convictions.

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.

Camacho, 2002 MP 6 ¶ 120 (quoting *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (citations omitted). Cumulative error analysis considers all errors and instances of prosecutorial misconduct, including errors preserved for appeal and plain errors. *Camacho*, 2002 MP 6 ¶ 121 (citations omitted). Reversal is required under the cumulative error doctrine if it is more probable than not that,

⁴² It is well-established that evidence of voluntary intoxication may be offered as an affirmative defense to show that a defendant did not actually form the specific intent to commit an act. *See, e.g., People v. Spencer*, 60 Cal.2d 64, 86-87 (1963); *People v. Garcia*, 169 Cal. App. 2d 368, 371 (1959). Since we have established that the crime of robbery requires a showing that a defendant possessed the specific intent to permanently deprive a person of his or her property, Cepeda should have been given the opportunity to raise a defense of voluntary intoxication.

⁴³ Under the felony murder rule, first degree murder is a murder that “occurs during the perpetration or attempted perpetration of arson, rape, burglary, robbery, or any sexual abuse of a child.” 6 CMC § 1101(a).

taken together, the errors materially affected the verdict. *See United States v. Fernandez*, 388 F.3d 1199, 1256 (9th Cir. 2004) (citing *United States v. Berry*, 627 F.2d 193, 201 (9th Cir. 1980)).

¶ 47

The combination of all of the errors in this case – admission of hearsay and character testimonies and the faulty jury instructions – resulted in such significant prejudice that Cepeda was deprived of his right to a fair trial. While each error arising from improperly admitted testimony was by itself not egregious enough to warrant reversal, we believe that the cumulative effect of these errors was so substantial that it is more probable than not that the errors, taken together, materially affected the verdict. In *Camacho*, we noted that, “[s]ignificantly . . . [t]he portions of the trial most critical to fair deliberations, the presentation of evidence and jury instructions, were untainted.” *Camacho*, 2002 MP 6 ¶ 123. We therefore rejected the cumulative effect theory in that case. By contrast, in the instant case, Cepeda was repeatedly prejudiced by admission of testimony during the Commonwealth’s case-in-chief. While some instructions were given to the jury to limit this prejudice, “even if a particular error is cured by an instruction, the court should consider whether any traces of prejudice may remain.” *Id.* ¶ 121 (citation omitted). Even with the cautionary instruction, Hosono’s improperly admitted testimony was particularly prejudicial because his detailed and graphic testimony – recounting facts about which he had no personal knowledge – closely tracked that given by Ilo, but as a detective his testimony was not marred by the same credibility issues. Moreover, while the improper robbery jury instruction did not specifically taint the other convictions, we feel that such an error still prejudiced Cepeda’s overall fair trial right. Accordingly, we vacate the remaining convictions for aggravated assault and battery, assault with a dangerous weapon, and conspiracy, and remand this case for a new trial.

V

Conclusion

¶ 48

For the foregoing reasons, we hold that the trial court abused its discretion when it allowed Cepeda Sr. to testify to Cepeda’s prior bad acts as a child and to the substance of conversations he had with Fital concerning Cepeda’s alleged involvement in the charged crimes. The trial court also abused its discretion when it improperly admitted Hosono’s prejudicial hearsay testimony. We also find that specific intent is an essential element of the crime of robbery and that the trial court erred in not instructing the jury, *sua sponte*, as such. Finally, the cumulative effect of trial court errors sufficiently prejudiced Cepeda to warrant a new trial on the remaining convictions. Accordingly, Cepeda’s convictions for first degree murder, robbery, aggravated assault and battery, assault with a dangerous weapon, and conspiracy are VACATED and this matter is REMANDED to the trial court for a new trial.

SO ORDERED this 19th day of NOVEMBER 2009.

/s/
MIGUEL S. DEMAPAN
Chief Justice

/s/
ALEXANDRO C. CASTRO
Associate Justice

MANGLONA, J., concurring in part and dissenting in part:

¶ 49 I respectfully dissent from sections III, IV, and V of the majority’s opinion, as well as the majority’s final decision in this case. I write separately because I believe that principles of statutory construction previously relied on by this Court support a finding of general intent when a statute is silent on mens rea. I also believe that the majority’s survey of robbery statutes in other jurisdictions reaches the wrong conclusion. Specifically, examining the fifty state jurisdictions, and paying particular attention to the statutory language used in each state to define robbery, I conclude that specific intent should not be considered an element of robbery under our Commonwealth robbery statute. The robbery conviction and first degree murder conviction predicated on this offense were properly obtained.

I

A. *Principles of Statutory Construction Favor A Reading of General Intent*

¶ 50 The text of 6 CMC § 1411 does not state what mens rea is required to commit robbery. This Court faced a similar issue in *Commonwealth v. Atalig*, 2002 MP 20, when asked to determine the requisite mental state for assault and battery under 6 CMC § 1202(a).⁴⁴ In finding that assault and battery is a general intent crime, this Court reasoned that, “[t]he statute in question is silent on the issue of intent. When a criminal statute is silent as to intent, the default is general intent.” *Atalig*, 2002 MP 20 ¶ 67. This decision reflects the widely-recognized principle of statutory construction that when a criminal statute does not express a particular mental state as an element of a crime, then the offense only requires general intent on the part of the perpetrator.⁴⁵

⁴⁴ This provision reads, “A person commits the offense of assault and battery if the person unlawfully strikes, beats, wounds, or otherwise does bodily harm to another, or has sexual contact with another without the other person’s consent.” 6 CMC § 1202(a).

⁴⁵ See, e.g., *United States v. Campa*, 529 F.3d 980, 1006 (11th Cir. 2008) (“Ordinarily, we interpret statutes

¶ 51 I can find no language, and indeed, counsel cites to no language in the robbery statute, from which to infer specific intent. Where the Commonwealth legislature has established the elements necessary to secure a criminal conviction, I do not believe that 7 CMC § 3401 – relied heavily upon by the majority – is applicable, and it is not the province of this Court to deviate from the legislature’s established requirements. Accordingly, following this Court’s reasoning in *Atalig* and relying on established principles of statutory construction, I would decline to read an element of specific intent into the robbery statute.

B. *States with a Similar Statute Consider Robbery a General Intent Crime*

¶ 52 The majority opinion presents a comprehensive breakdown of robbery statutes throughout the United States. Even if 7 CMC § 3401 applied in the present case, however, I believe that the majority applies this information to the wrong question. The question the majority appears to examine is: “In the majority of states is robbery a specific or general intent crime?” Framing the issue as such, they reach the only logical conclusion in finding that a majority of United States jurisdictions consider robbery a specific intent crime. However, I believe the question more appropriate to the case before this Court is: “How do states with robbery statutes like our own treat robbery?” Indeed, the majority opinion focusing intently on relevant statutes throughout the United States seems to lose sight of the wording of our own statute – wording that I believe compels us to conclude that robbery in the Commonwealth is a general intent crime.

¶ 53 As the majority concedes, once we set aside those states with statutes expressly requiring specific intent or containing phrases historically interpreted as requiring it, states are “divided” concerning whether robbery is a specific or general intent crime.⁴⁶ Given this division, I find it most instructive to focus on those states with statutes most similar to our own. Of the fifty states surveyed, Illinois and Kansas are the only two whose statutes essentially mirror ours. Significantly, courts in both states have held that robbery is a general intent crime. *See People v. Banks*, 75 Ill. 2d 383, 392 (1979) (“we hold that robbery does not require specific intent”); *State v. Thompson*, 221 Kan. 165, 175 (1976) (holding that intent to permanently deprive is not an element of robbery and that general intent is sufficient for a robbery conviction). Broadening the search to “similar” state statutes is necessarily an imprecise

that are silent as to mens rea to require proof of general intent”); *United States v. Hicks*, 980 F.2d 963, 974 (5th Cir. 1992) (“courts should presume statutes require only general intent ‘in the absence of an explicit statement that a crime requires specific intent’”) (quoting *United States v. Lewis*, 780 F.2d 1140, 1143 (4th Cir. 1986); *State v. Dolsby*, 143 Idaho 352 (2006) (finding general intent required where statute for offense of unlawful possession of a firearm was silent on required mental state); *State v. Warner*, 55 Ohio St. 3d 31, 48 (1990) (stating that where a statute is silent on the question of intent, “[a]s a general rule of construction . . . proof of general intent to do the proscribed act is sufficient.”).

⁴⁶ See *supra* notes 30 and 31, and accompanying text.

exercise, and reveals no clear consensus. For example, within the Ninth Circuit, Arizona⁴⁷ and Alaska⁴⁸ lack statutory language requiring robbery to include “intent to deprive” (although an intent to coerce or compel is noted), and the state courts interpreting their respective statutes have reached opposite conclusions.⁴⁹

¶ 54 Cepeda contends that “[i]n the CNMI, as in California and other jurisdictions with *similar statutes*, the crime of robbery contains . . . the specific intent to steal.” Defendant’s Opening Br. at 11 (emphasis added). This argument, seemingly endorsed by the majority, conflates those states with statutes with language expressly requiring or implicating a specific intent requirement and those lacking such language. For example, Cepeda cites to *People v. Ford*, in which the court read the element of specific intent into the California robbery statute. 60 Cal. 2d 772, 792-93 (1964), *overruled on other grounds in People v. Satchell*, 6 Cal. 3d 28, 36-41 (1971). However, unlike the Commonwealth robbery statute, the California robbery statute, Cal. Penal Code § 211, contains the word “felonious,” which at common law has been consistently recognized as signifying the element of specific intent. Alabama, Florida, Michigan, and North Carolina, the other states cited by Cepeda in support of his argument, are similarly distinguishable because, unlike the Commonwealth robbery statute, each state has a statute with language implicating a mens rea element of specific intent.⁵⁰

¶ 55 I consider “similar statutes” to be those with similar statutory language; in particular, those that lack a specific reference to “theft” or other “trigger words” that necessarily, or when viewed in a historical context, require a mens rea of specific intent. I can find no language in the Commonwealth robbery statute from which to infer specific intent. The majority’s fifty-state survey reveals no consensus among state courts that have been asked to interpret statutes lacking language implicating specific intent. Furthermore, Illinois and Kansas, the two states with statutes most similar to ours, have both held that

⁴⁷ Ariz. Rev. Stat. Ann. § 13-1902 reads, “A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.”

⁴⁸ Alaska Stat. § 11.41.510 reads, “(a) A person commits the crime of robbery in the second degree if, in the course of taking or attempting to take property from the immediate presence and control of another, the person uses or threatens the immediate use of force upon any person with intent to (1) prevent or overcome resistance to the taking of the property or the retention of the property after taking; or (2) compel any person to deliver the property or engage in other conduct which might aid in the taking of the property.”

⁴⁹ Compare *Nell v. State*, 642 P.2d 1361, 1365-66 (Alaska 1982), with *State v. Celaya*, 135 Ariz. 248, 252 (1983).

⁵⁰ Ala. Code § 13A-8-43 (containing “in the course of committing a theft”); Fla. Stat. § 812.13 (requiring “[i]ntent to either permanently or temporarily deprive” a person of property); Mich. Comp. Laws § 750.530 (containing “in the course of committing a larceny”); N.C. Gen. Stat. § 14-87.1 (adopting common law definition of robbery requiring specific intent).

general intent is sufficient to uphold a robbery conviction. Had our legislature intended to require specific intent as an element of robbery, it had no shortage of existing statutory models to choose from. However, absent any convincing evidence that such a consequence was intended, I would decline to read a requirement of specific intent into the statute.

II

The Jury was Properly Instructed on the Elements of Robbery

¶ 56 Having decided that a mens rea of general intent is sufficient to secure a robbery conviction, I next turn to whether the trial court nonetheless erred by not including a jury instruction stating this required mental state. This separate question arises from Cepeda’s argument that the Commonwealth was impermissibly relieved of its burden of proving each robbery element beyond a reasonable doubt because the jury instructions did not include any instruction defining the applicable mens rea.

¶ 57 We are not the first court to address this specific issue, as the Illinois Court of Appeals faced this argument in a strikingly similar case. In *Illinois v. Talley*, the defendant appealed his armed robbery conviction by arguing that the trial court’s “failure to instruct as to a mental state when giving the elements instruction for armed robbery” deprived him of his right to a fair trial. 177 Ill. App. 3d 170, 171 (1988). The Illinois armed robbery statute required violating the state’s robbery statute – which mirrors the Commonwealth robbery statute – while armed with a dangerous weapon. *Id.* The prosecution in *Talley* used the Illinois Pattern Jury Instructions, which, like the statute at issue, did not reference a mental state. *Id.* at 173. Talley argued that since armed robbery was “not a crime of absolute liability,” by implication, a mental state must be read into the statute, and that failure to instruct as to this mental state constituted reversible error. *Id.* at 171-72. Upholding the trial court conviction, the Illinois Court of Appeals held that where the charged offense “is a general intent crime and the mental state is necessarily implied by the crime, it is not error to omit the implied mental state from the issue instructions.” *Id.* at 174. In support of its ruling, the court reasoned that, “it is obvious that the commission of the general intent crimes of criminal sexual assault, robbery, or armed robbery, as defined by the statutes, necessarily implied an intent or knowledge,” while in contrast, “specific intent offenses . . . would not necessarily imply a criminal mental state . . . [and] [i]n those cases, the mental state would be a necessary subject of the [jury] instruction.” *Id.*

¶ 58 I similarly conclude that the trial court did not commit error by not instructing the jury about the mental state required to commit robbery. Under my interpretation of the statute, robbery is a general intent crime, and as such, the requisite mental state is implied from the act itself – the commission of the robbery. The instructions submitted to the jury required that Cepeda be found guilty of taking property from Zhou by use or threatened use of immediate force or violence. This requirement necessarily implied a mental state sufficient to satisfy general intent, and a separate jury instruction concerning Cepeda’s

mental state was therefore not required.

III

First Degree Murder can be Predicated on a General Intent Robbery Conviction

¶ 59 Under 6 CMC § 1101(a), a person can be convicted of first degree murder if a murder “occurs during the perpetration, or attempted perpetration of arson, rape, burglary, robbery, or any sexual abuse of a child.” Cepeda contends that by failing to prove beyond a reasonable doubt that he possessed the specific intent to commit the robbery, the felony murder conviction was improper. The Commonwealth responds that the jury was properly instructed.

¶ 60 A person can be convicted of first degree murder under a felony murder theory when the underlying offense is a general intent crime. As noted by the Colorado Supreme Court, the “[t]urpitude of the felonious act, in this case robbery, supplies the element of deliberation and design to effect death, and that therefore no express or implied design to effect death is essential and the murder is still of first degree” *Whitman v. People*, 161 Colo. 110, 114 (1966) (citations omitted). In each state where general intent robbery can serve as a predicate offense for first degree murder, courts have reasoned that a murder conviction can be secured when the only showing of mental culpability is for the underlying general intent felony. *See, e.g., People v. Hickman*, 684 P.2d 228 (Colo. 1984); *People v. Pecina*, 132 Ill. App. 3d 948, 955 (1985) (“The felonious-mental-state element of felony murder in this case is merely the general intent element inherent in the statutory offense of robbery”); *State v. Edwards*, 224 Kan. 266 (1978) (upholding first degree murder conviction where underlying crime was aggravated robbery, a general intent felony); *Daniels v. State*, 114 Nev. 261, 269 (1998) (“Robbery is a general intent crime, so [defendant’s] claimed incapacity to form specific intent would not shield him from culpability for robbery and concomitant culpability for first-degree murder under the felony murder rule.”).

¶ 61 Felony murder, itself, is not a specific intent crime. *See State v. Walker*, 252 Kan. 279, 298 (1993). Under a plain reading of 6 CMC § 1101(a), a first degree murder conviction can be predicated on an underlying robbery conviction. Like the abovementioned jurisdictions that have faced this question, I would similarly conclude that a general intent felony can serve as the predicate offense for a first degree murder conviction.

IV

Cumulative Error

¶ 62 While I concur with the analysis in section II of the majority opinion, given my belief that the jury instructions in this case were proper, I feel that there is insufficient error to warrant reversal under the doctrine of cumulative error.

¶ 63 The errors in this case arise from improper admission of character evidence and hearsay testimony from Cepeda Sr., and hearsay testimony from Hosono. As a preliminary matter, I note that

testimony concerning Cepeda Sr.'s conversation with Fitial and subsequent decision to call the police likely had a very limited prejudicial effect. Defense counsel argues that this testimony "was highly prejudicial to Defendant, in that it allowed the jury to infer that [Cepeda Sr.] found Mr. Fitial's statement credible enough to call the police." Appellant's Opening Br. at 24-25. However, I reject this argument because the fact that Fitial's conversation with Cepeda Sr. provided the impetus for his call to police would have been readily apparent to the jury. Specifically, whether Cepeda Sr. testified to the contents of the conversation he had with Fitial, or whether he testified that the conversation led him to call the police, the resulting effect, that he found Fitial's statement credible enough to call the police, would have been the same. With respect to Hosono's testimony, while a jury instruction cannot always cure the prejudice resulting from improperly admitted testimony, in examining the cumulative effect of trial court errors I consider it significant that once the evidence was improperly admitted, the trial court properly issued a limiting instruction concerning that testimony.⁵¹

¶ 64 In applying the cumulative error doctrine in the present case, it should be recognized that in "those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors." *Frederick*, 78 F.3d at 1381 (citing *Berry*, 627 F.2d 193). In *Frederick*, the court reversed a conviction on cumulative error grounds, reasoning that "the evidence against the defendant was not overwhelming and that the case was a close one" since the testimony of the only direct witness was marked by "inconsistency and contradictions." *Id.* Subsequent decisions have employed similar reasoning. *See Martin v. Grosshans*, 424 F.3d 588, 592 (7th Cir. 2005) (reversing on cumulative error grounds the denial of petition for a writ of habeas corpus by reasoning that the "prosecution's evidence was not overwhelming; the errors Martin's counsel made likely had a greater impact on the jury than they would have in a stronger prosecution case."); *see also Killian v. Poole*, 282 F.3d 1204, 1210 (9th Cir. 2002) (finding cumulative error where "make or break witness" admitted to offering perjured testimony, and prosecution failed to disclose impeachment evidence and commented eight times during trial on defendant's post-arrest silence).

¶ 65 In contrast to cases like *Killian*, *Frederick* and *Grosshans*, the Commonwealth presented a very strong case against Cepeda. Even after excluding the improperly admitted testimony, there is considerable evidence linking Cepeda to the charged crimes. For example, Fitial testified that when Cepeda and Ilo returned to the car following the alleged murder, Cepeda had blood on his t-shirt and a knife with blood on it. ER at 213-14. Additionally, Ilo testified at length and in detail about the moments leading up to Zhou's death.⁵² On cross-examination, defense counsel properly attempted to attack Ilo's credibility and

⁵¹ See *supra* note 9.

⁵² For example, Ilo testified that Cepeda, "came from around the counter and he, ah, hit Mathew's head with a bat," and that he saw Cepeda take "a brown wallet" out of Zhou's pocket. ER at 140, 142.

