

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

FRANCISCO Q. GUERRERO,
Defendant-Appellant.

SUPREME COURT NO. 2013-SCC-0045-CRM
SUPERIOR COURT NO. 12-0111

ORDER DENYING STAY

Cite as: 2013 MP 16

Decided December 17, 2013

Brien Ser Nicholas, Saipan, MP, for Defendant-Appellant Francisco Q. Guerrero
James B. McAllister, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for
Plaintiff-Appellee Commonwealth of the Northern Mariana Islands

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; TIMOTHY H. BELLAS, Justice Pro Tem.

PER CURIAM:

¶ 1 Defendant-Appellant Francisco Q. Guerrero (“Guerrero”) filed an emergency motion with this Court seeking a stay of his sentence pending appeal. Before trial, Guerrero had requested discovery material from the Commonwealth, including an Attorney General Investigative Unit Report (“AGIU Report”) made at or around the time of Guerrero’s arrest, which potentially contained statements from the victim that Guerrero believed were material and exculpatory. When the Commonwealth did not provide the AGIU Report or additional discovery, Guerrero filed a motion to compel, arguing the small amount of materials the Commonwealth produced in the course of the case could not have met the Commonwealth’s burden to turn over evidence. The trial court denied Guerrero’s motion, and declined to review the disputed evidence *in camera*, because “the Government had assured the [c]ourt that all exculpatory material had been produced.” *Commonwealth v. Guerrero*, Crim. No. 12-0111D (NMI Super. Ct. Nov. 29, 2013) (Order Denying Defendant’s Motion for a Stay at 3) (“Order Denying Stay”). The trial court also allowed expert testimony from Julian Camacho, a Division of Youth Services Officer, regarding the delayed reporting and coping mechanisms of sexual abuse victims. *Id.* at 4. The Commonwealth has since conceded in a different case that Camacho is not a qualified expert witness. Despite these alleged irregularities, the trial court found Guerrero guilty of eleven bench counts for sexual abuse of a minor and sentenced him to six years in prison without the possibility of parole. In coming to that finding, the trial court relied “on the credibility of the victim’s testimony.” *Id.* at 5.

¶ 2 Against that backdrop, Guerrero’s motion claims two errors. First, the Commonwealth’s failure to produce requested discovery material constituted a *Brady* violation. It violated *Brady*, according to Guerrero, because the discovery documents contained potentially material and exculpatory evidence regarding the victim’s testimony. Second, the trial court erred by allowing Camacho to testify as an expert witness regarding child abuse victims. The expert, according to Guerrero, was not an expert and his testimony impermissibly buttressed the credibility of the victim’s testimony.

¶ 3 In determining whether Guerrero’s claims merit a stay, Rule 9 of the NMI Supreme Court Rules requires the defendant to establish: (1) he “will not flee or pose a danger to any other person or to the community;” (2) “the appeal is not for the purpose of delay;” and (3) the appeal “raises a substantial question of law or fact likely to result in reversal or in an order for a new trial.” NMI SUP. CT. R. 9(c).

¶ 4 We do not reach the first two prongs because Guerrero, on the opaque record before us,¹ has not met his burden to raise a substantial question of law or fact likely to result in reversal or a new trial.

¶ 5 Turning to the third prong, Guerrero claims the Commonwealth’s failure to submit requested discovery material combined with the trial court’s denial of Guerrero’s motion to compel discovery without reviewing the materials *in camera* violated *Brady*.

¶ 6 In *Brady v. Maryland*, the United States Supreme Court held “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. 83, 87 (1963). This principle has since been expanded to encompass instances where the defendant did not request favorable evidence. *United States v. Agurs*, 427 U.S. 97, 106-07 (1976), *abrogated in part on other grounds by United States v. Bagley*, 473 U.S. 667, 682 (1985) (modifying the test for determining whether an alleged *Brady* violation was material); *accord Cone v. Bell*, 556 U.S. 449, 470 (2009).

¶ 7 Under *Brady* and its progeny, “[a]ny evidence that would tend to call the government’s case into doubt is favorable for *Brady* purposes.” *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013) (citing *Strickler v. Greene*, 527 U.S. 263, 290 (1999)). Consequently, “*Brady* material includes information ‘that bears on the credibility of a significant witness in the case,’” *Commonwealth v. Campbell*, 4 NMI 11, 15 (1993) (quoting *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1461 (9th Cir. 1992)), such as “[i]mpeachment evidence.” *Campbell*, 4 NMI at 15. “Where the parties disagree on whether certain information is *Brady* material, an *in camera* determination is the preferred means of resolving the dispute.” *Id.* at 17. *See also Milke*, 711 F.3d at 1011 (“[T]he trial court must do more than take the government’s word that *Brady* material doesn’t exist—the court *must* review the files in question.”) (emphasis added); *United States v. Kiszewski*, 877 F.2d 210, 215-17 (2d Cir. 1989) (holding that where credibility is central to a case, a court should review disputed evidence *in camera* rather than relying on government representations that the potential impeachment evidence did not violate *Brady*).

¶ 8 Here, the victim’s testimony was pivotal, and the parties disputed whether *Brady* material useful to impeach the victim’s testimony existed; yet the trial court did not perform an *in camera* review of any evidence because the “the Government had assured the Court that all exculpatory material had been produced.” Order Denying Stay at 3. But the Commonwealth, given its role as prosecutor, has an inherent bias, and *Campbell* instructs trial courts to review disputed *Brady* material *in camera*. Consequently, because *in camera* review is mandatory under these circumstances, the trial court should have reviewed the disputed AGIU Report *in camera*.

¹ The parties seem to disagree on the basic discovery-related facts of the case. The parties would do well to remedy those inconsistencies before briefing begins.

¶ 9 At this early juncture in the appeal, however, we cannot say the oversight violated *Brady*, and would, therefore, require a new trial, for three reasons. First, we do not know whether the AGIU Report contained any *Brady* material and we are not the preferred body for making that determination. See *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 n.5 (9th Cir. 1999) (en banc) (remanding an evidentiary question because factual determinations are “ordinarily committed . . . to trial courts, not appellate courts”). Second, Guerrero received discovery documents created shortly after his arrest containing the victim’s statements. *Commonwealth v. Guerrero*, Crim. No. 12-0111D (NMI Super. Ct. June 26, 2013) (Motion to Compel Discovery at 2). The document may have provided all of the victim’s statements, and, as a result, made Guerrero’s request for the AGIU Report and other material moot. But in the absence of the AGIU Report, and the scant record before us, which does not include the victim statements provided to Guerrero, we simply do not know. Third, the oversight may still be remedied through the trial court conducting an *in camera* review of the AGIU Report prepared at or around the time of Guerrero’s arrest. See *Campbell*, 4 NMI at 15 (noting a *Brady* violation arises only if “the disclosure of material evidence did not come too late to deprive the defendant of a fair trial” (internal quotation omitted)). Under these narrow circumstances, a *Brady* violation has yet to ripen because the conviction is based solely on bench counts, the defendant raised the alleged violation before this Court shortly after sentencing, and the trial court may conduct a post-remand review of the disputed evidence *in camera* and then reconsider its guilty finding in light of that review.

¶ 10 This approach is consistent with Rule 33 of the NMI Rules of Criminal Procedure. Under Rule 33, “[i]f trial was by the court without a jury[,] the court . . . may vacate the judgment if entered, take additional testimony,” or order a new trial in light of “newly discovered evidence.” NMI R. CRIM. P. 33. If the case has been appealed, the trial court retains this authority “on remand” from the Supreme Court. *Id.*

¶ 11 Guerrero next argues Camacho should not have been allowed to testify as an expert and that this testimony resulted in reversible error because Camacho’s testimony impermissibly bolstered the victim’s credibility. *Commonwealth v. Guerrero*, 2013-SCC-0045-CRM (NMI Sup. Ct. Dec. 2, 2013) (Emergency Motion Under Rule 27-2 at 16) (citing *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985) *overruled in part on different grounds by United States v. Morales*, 108 F.3d 1031, 1035 & n.1 (9th Cir. 1997)). On the limited record before us,² we disagree.

¶ 12 According to the trial court, Camacho was allowed to testify regarding delayed reporting and coping mechanisms, not regarding the victim’s credibility. Order Denying Stay at 3-4. Although this

² Because of the early stage in the proceedings, the parties did not supply us with a transcript and other documents that would have aided in determining this issue.

testimony could have supported portions of the victim's testimony, Camacho's testimony was harmless because the trial court "explicitly . . . based its finding of guilt on the credibility of the victim's testimony." *Id.* at 5. In other words, even if Camacho would not have testified, the trial court would have still found Guerrero guilty. Because the trial court would have found Guerrero guilty regardless of the expert testimony, we conclude Guerrero has not supplied sufficient evidence at this time to show the expert-witness issue would likely result in reversal or a new trial.

¶ 13 Because Guerrero has not met the requirements in Rule 9(c), we DENY the motion for a stay. But we REMAND, in part, for further proceedings to determine if an AGIU Report regarding Guerrero's sexual-abuse charges exists. If that report exists, and contains *Brady* material different from discovery already provided to Guerrero from the Commonwealth, we may reconsider Guerrero's motion based on the supplemented record.

SO ORDERED this 17th day of December, 2013.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
TIMOTHY H. BELLAS
Justice Pro Tem