

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

DUAN SHENG HONG,
Defendant-Appellant.

SUPREME COURT NO. 2011-SCC-0027-CRM
SUPERIOR COURT NO. 10-0261D

OPINION

Cite as: 2013 MP 19

Decided December 30, 2013

Judy DLG. Torres, Saipan, MP, for Defendant-Appellant Duan Sheng Hong
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; and DAVID A. WISEMAN, Justice Pro Tem.

MANGLONA, J.:

¶ 1 Defendant Duan Sheng Hong (“Hong”) appeals his conviction for disturbing the peace. Hong asserts: (1) the Commonwealth’s post-discovery production of his letters to an FBI agent deprived him of due process and violated *Brady v. Maryland*, 373 U.S. 83 (1963); (2) the trial court erred in failing to cure the *Brady* violation through a continuance of trial; (3) the trial court erred in discounting the prejudicial or probative impact of the letters and the agent’s testimony; and (4) alternatives to admission of the letters and testimony were appropriate. The Commonwealth counters: (1) admission of the letters did not deny Hong a fair trial because the letters were incriminating, thus unfavorable to his defense, and Hong had ample time to review the letters before trial; (2) the trial court’s denial of a continuance was warranted because Hong had sufficient time to investigate the letters and prepare a defense; and (3) admission of the letters was proper because its probative value substantially outweighed the danger of unfair prejudice. For the reasons following, we AFFIRM Hong’s conviction for disturbing the peace.

I. Factual and Procedural Background

¶ 2 Hong’s appeal centers on discovery material the Commonwealth produced on July 11, 2011, twenty-nine days before trial.¹ The Commonwealth produced Hong’s four letters to FBI Special Agent Joseph E. Auther (“Auther”) totaling six pages that it received sometime in December 2010. The Commonwealth maintains the delayed disclosure of the letters “stuck in the file” as an “oversight.” Tr. at 16.

¶ 3 A week following disclosure, Hong filed a motion to vacate the bench trial in response to the post-discovery production of the letters and in anticipation of further discovery from the Commonwealth. The Commonwealth opposed the motion, noting the non-prejudicial effect of the letters and asserting compliance with its duty to disclose additional evidence under Rule 16(c) of the Commonwealth Rules of Criminal Procedure. Hong replied to the Commonwealth’s opposition highlighting the Commonwealth’s minimization of the potential prejudice resulting from additional discovery materials. Ultimately, the trial court denied the motion to vacate trial.

¶ 4 The Commonwealth subsequently filed a notice of intent to introduce into evidence Hong’s four letters to Auther and testimony by Auther under Rule 404(b) of the Commonwealth Rules of Evidence

¹ Prior to trial, the court ordered that parties exchange discovery within a forty-five day period, concluding the exchange on January 13, 2011. *Commonwealth v. Duan Sheng Hong*, No. 10-261D (NMI Super. Ct. Nov. 29, 2010) (Case Mgmt. Order at 1-2). At a pre-trial conference held a few months later, discovery issues were not present. *Duan Sheng Hong*, No. 10-261D (NMI Super. Ct. July 18, 2011) (Mot. to Vacate Bench Trial Date and Set Status Conference at 2).

(“Rule 404(b)”² Hong opposed the introduction of such 404(b) evidence because the Commonwealth failed to provide with sufficient particularity its basis for admission. In his opposition, Hong noted the requirement in Rule 403 of the Commonwealth Rules of Evidence (“Rule 403”) that the trial court weigh the probative and prejudicial nature of the evidence prior to introduction.³

¶ 5 Over two weeks later and a day before trial, Hong filed another motion to vacate and continue the bench trial. Hong argued the untimeliness of the Commonwealth’s production of the letters and the additional time needed to prepare an adequate defense. The trial court denied the second motion after considering the Commonwealth’s key witness would leave Saipan on August 18, 2011.

¶ 6 Also before trial, Hong unsuccessfully moved to suppress Auther’s testimony in limine. Hong later objected to Auther’s testimony prior to the Commonwealth’s direct examination of Auther, but the trial court deemed the objection untimely. During direct examination of Auther, Hong again objected to the admission of the letters into evidence based on the same assertions in his motion in limine. The trial court nonetheless admitted the letters into evidence without an explicit basis for admission at the time.⁴

¶ 7 After a two-day bench trial, the trial court convicted Hong of four counts of disturbing the peace under 6 CMC § 3101(a). Hong appeals.

II. Jurisdiction

¶ 8 We have jurisdiction over final judgments and orders of the Superior Court. NMI CONST. art. IV, § 3; 1 CMC § 3102(a). Hong timely appealed the Superior Court’s final judgment, over which we have jurisdiction. 1 CMC § 3105; NMI SUP. CT. R. 4(b)(1)(A)(i).

III. Standards of Review⁵

² Under Rule 404(b), evidence of other crimes, wrongs, or acts may be admitted for limited purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

³ Rule 403 states that “[r]elevant . . . evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice”

⁴ During direct examination of the victim and prior to the admission of Hong’s letters to Auther, the court acknowledged the link to Hong’s text messages to the victim, specifically that it would be established piece by piece. At sentencing, the court noted the “disturbing” nature of the letters and its link to Hong’s text messages to the victim, a key aspect of the Commonwealth’s case. Tr. at 242-43. The record provides that the text messages to the victim occurred around the time Hong sent letters to Auther.

⁵ Instead of utilizing a criminal case to provide a standard for this Court’s review, Hong cites two civil cases in his brief. Duan Sheng Hong Opening Br. at 4. Hong also failed to include quotation marks when citing the standard of review in *Sablan v. Elameto*, 2013 MP 7 ¶ 30. Plagiarism is “totally unacceptable conduct” and is a “form of misrepresentation” that “violates ABA Model Rule of Professional Responsibility 8.4.” *Premier Insurance Co. v. Commonwealth Dep’t of Labor*, 2012 MP 16 ¶ 13 n.7. Rule 8.4 states that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Just as we expect the Office of the Attorney General to “hold itself to the highest standards of integrity and professionalism, . . . includ[ing] accurate and well-supported work product,” *Premier Insurance Co.*, 2012 MP 16 ¶ 13 n.7 (emphasis added), we expect the same from private counsel.

¶ 9 We address two issues: (1) whether a *Brady* violation occurred, and (2) whether the trial court erred in admitting into evidence the letters and Auther’s testimony. We review a *Brady* violation in two parts: (1) de novo for a violation of the defendant’s right to due process, *Commonwealth v. Campbell*, 4 NMI 11, 15 (1993) (citing *Commonwealth v. Lizama*, 3 NMI 400 (1992), *aff’d* 27 F.3d 444 (9th Cir. 1994)), *aff’d*, 42 F.3d 546 (9th Cir. 1994), and (2) abuse of discretion for the denial of relief. *Campbell*, 4 NMI at 15 (citing *Commonwealth v. Saimon*, 3 NMI 365 (1992)). We review for abuse of discretion the admission of evidence. *Commonwealth v. Jing Xin Xiao*, 2013 MP 12 ¶ 16 (citations omitted).

IV. Discussion

¶ 10 Hong urges this Court to reverse his conviction because (1) the Commonwealth’s post-discovery production of the letters constituted a *Brady* violation, and (2) the trial court abused its discretion by admitting into evidence the letters and Auther’s testimony at trial without first weighing their unfairly prejudicial effect and probative value. We first address the standard for a *Brady* violation.

A. The Brady Standard

1. Hong’s Right to Due Process

¶ 11 The first issue on appeal is the Commonwealth’s post-discovery production of Hong’s letters to Auther twenty-nine days before trial. *Brady* requires the government to disclose evidence favorable to the defendant and material to guilt or punishment. 373 U.S. at 87; *accord Commonwealth v. Adlaon*, 4 NMI 171, 175 (1994) (quoting *Brady*, 373 U.S. at 87); *accord Campbell*, 4 NMI at 15 (quoting *Brady*, 373 U.S. at 87); *cf. United States v. Agurs*, 427 U.S. 97, 106-07 (1976) (noting a defendant does not have to request evidence). Such evidence must be exculpatory and given to the defendant “promptly upon discovery.” *Campbell*, 4 NMI at 16. To establish a *Brady* violation, this Court must first determine whether the trial court’s order violated the defendant’s right to due process. *Id.* at 15.

¶ 12 In making that determination, the Ninth Circuit has held that “*Brady* does not necessarily require that the prosecution turn over exculpatory material *before* trial.” *United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988). Rather, “*Brady* requires only that the government produce exculpatory material in time for the defendant’s effective use of those materials at trial.” *Campbell*, 4 NMI at 16 (citing *Gordon*, 844 F.2d at 1403; *United States v. Andersson*, 813 F.2d 1450, 1458-59 (9th Cir. 1987)). Thus, a *Brady* claim is meritless where disclosure of material evidence is not produced “too late to deprive the defendant of a fair trial.” *Campbell*, 4 NMI at 15-16 (internal quotation marks omitted) (referencing in part *Gordon* and *Andersson*).

¶ 13 While the legal standards set forth in *Adlaon* and *Campbell* govern this appeal, the cases are factually and procedurally distinguishable from the instant case. In *Campbell*, the government refused to provide discovery requested by the defendant. *Id.* at 14. On appeal, the government challenged the trial court’s dismissal of the case without an examination of the evidence and its materiality. *Id.* at 15. We

found error in the trial court’s premature dismissal before the commencement of trial and its failure to review and determine whether the evidence contained *Brady* material. *Id.* at 16-18. This Court then ordered the trial court to conduct an *in camera* inspection of the materials. *Id.* at 17. In *Adlaon*, the government appealed the trial court’s dismissal of the case on due process grounds. *Id.* at 172. The government argued that its alleged discovery violation, producing discovery on the day of trial, did not warrant dismissal. *Id.* at 174. We held the trial court erred because it dismissed the case without considering the application of *Brady* to discovery produced on the day of trial. *Id.* at 175. In both cases, the trial courts did not evaluate any potential *Brady* material contained in the evidence due to their premature dismissal of the cases.

¶ 14 The instant matter is further distinguishable from *Campbell* and *Adlaon* because (1) the Commonwealth produced Hong’s letters about a month before trial, and (2) the trial court implicitly evaluated Hong’s letters throughout trial proceedings. Specifically, the trial court noted the incriminating and material nature of the letters to Hong’s guilt or punishment. *See* Tr. at 242-43 (“[T]his [c]ourt find[s] the letters to the FBI very disturbing and that’s the very link that the [g]overnment provided to this [c]ourt to prove that [Hong] sent those text messages.”). The letters “linked” Hong’s text messages to the victim.⁶ *Id.* These statements indicate the trial court considered both the materiality of the evidence and its potential for unfair prejudice. Thus, these statements reflect that the trial court implicitly reviewed the evidence for a violation of *Brady* and Rule 403.

¶ 15 Turning to the time period for producing *Brady* material, the Ninth Circuit has repeatedly found no *Brady* violation where the delayed disclosure of evidence was still “of value to the accused.” *United States v. Davenport*, 753 F.2d 1460, 1462 (9th Cir. 1985); *see also Davenport*, 753 F.2d at 1462 (concluding no *Brady* violation occurred because the defendant had access to evidence at the commencement of trial, despite its delayed disclosure by the prosecution, and the defendant’s use of the evidence during cross-examination of a witness); *see also Gordon*, 844 F.2d at 1403 (finding no *Brady* violation where the government disclosed documents at the end of its case-in-chief and noting its “substantial value” to the defendants because they had an opportunity to recall and cross-examine a witness regarding the documents); *see also United States v. Browne*, 829 F.2d 760, 765-66 (9th Cir. 1987) (holding the government’s disclosure of evidence after the testimony of several witnesses at trial still allowed the defendant to utilize the evidence through impeachment of the government’s witnesses). The Ninth Circuit also did not find prejudice to the defendant where the government delayed disclosure of hundreds of pages of alleged *Brady* material until the day before trial. *United States v. Shelton*, 588 F.2d 1242, 1247 (9th Cir. 1978). The *Shelton* court determined the defendant failed to establish how the

⁶ In the audio recording, the Commonwealth stated that the initial discovery materials were the heart of its case, while the letters and testimony corroborated Hong’s criminal actions.

delayed production of evidence, much of which contained testimony by defense witnesses, unfairly prejudiced his preparation of a defense. *See id.*

¶ 16 Like *Shelton*, Hong does not demonstrate how the post-discovery, pre-trial disclosure of six pages of letters written by him unfairly prejudiced his defense. Furthermore, the Commonwealth's delayed disclosure of evidence remained valuable and did not come "too late" to deny Hong due process. In fact, Hong's counsel cross-examined Auther regarding the letters. The Commonwealth's production of the letters about a month prior to trial gave Hong more than sufficient time to read letters he penned and to prepare an adequate defense. Therefore, the late production neither violated Hong's right to due process nor constituted a *Brady* violation.

2. Denial of Requested Relief

¶ 17 Because there was no violation of his right to due process, we need not address whether the trial court abused its discretion in denying Hong's requested relief of a continuance of trial. Even assuming a continuance of trial would have remedied the alleged *Brady* violation, as Hong asserts, he failed to adequately develop this argument and merely asserted the reasonableness of the request. We only consider sufficiently developed arguments. *Matsunaga v. Cushnie*, 2012 MP 18 ¶ 13 (quoting *Commonwealth v. Minto*, 2011 MP 14 ¶ 46 n.8). Thus, we do not reach the issue because Hong did not set forth the standard for a continuance or provided a developed analysis.

B. Whether the Trial Court Erred in Admitting Hong's Letters and Auther's Testimony

¶ 18 The second issue on appeal is whether the trial court erred in admitting into evidence Hong's letters to Auther and Auther's testimony. Evidence admitted under Rule 404(b) requires a Rule 403 balancing analysis. *See Commonwealth v. Brel*, 4 NMI 200, 203 (1994) (discussing Rule 404(b) evidence and the Rule 403 balance test). In deciding whether to admit relevant evidence under Rule 403, the trial court must "go through a conscious process of balancing the costs of the evidence against its benefits" irrespective of a written or oral citation to Rule 403. *Saimon*, 3 NMI at 376 (citation omitted) (internal quotation marks omitted). "Unless . . . the probative worth of the evidence is substantially outweighed by . . . a countervailing factor[] [in Rule 403], there is no discretion to exclude; the evidence must be admitted." *Id.* Thus, the trial court must balance the probative value of the evidence against the danger of unfair prejudice before admitting relevant evidence. *Brel*, 4 NMI at 203.

¶ 19 Neither *Saimon* nor *Brel* addresses the trial court's failure to weigh the probative value or prejudicial effect of the evidence. In *Saimon*, a second degree murder case, this Court determined the trial court did not abuse its discretion in admitting relevant and highly probative photographic evidence of the decedent. 3 NMI 376. In *Brel*, we held sufficient a Rule 403 balancing analysis upon a review of the record and considering the trial court's sidebar conference prior to admission of the relevant evidence. 4

NMI at 203. These cases do not highlight the extent to which the trial court must balance the probative value against the unfair prejudicial impact of the evidence on the record.

¶ 20 In contrast, the Ninth Circuit has addressed this issue. The Ninth Circuit found sufficient a court's implicit consideration of Rule 403 requirements after a review of the record, *United States v. Jackson*, 84 F.3d 1154, 1159 (9th Cir. 1996), and a court's awareness of the balancing test. *See United States v. Ramirez-Jiminez*, 967 F.2d 1321, 1326 (9th Cir. 1992) (concluding the government's filing of a trial memorandum to admit Rule 404(b) testimony as a reminder to "the judge of the necessity of weighing probative value and prejudice"); *see also United States v. Sangrey*, 586 F.2d 1312, 1315 (9th Cir. 1978) (ruling the court engaged in a Rule 403 analysis because (1) it was aware of Rule 403 requirements and (2) the defense argued the issue of prejudice of a witness' testimony in a motion in limine). Although explicit rulings are significant and a clear statement of the balance is desirable, "a mechanical recitation of *Rule 403's* formula on the record as a prerequisite to admitting evidence under Rule 404(b)" is unnecessary. *Sangrey*, 586 F.2d at 1315; *see also id.* ("As long as it appears from the record as a whole that the trial judge adequately weighed the probative value and prejudicial effect of proffered evidence before its admission, . . . the demands of Rule 403 have been met."); *cf. United States v. Johnson*, 820 F.2d 1065, 1069, 1069 n.2 (9th Cir. 1987) (finding the court implicitly balanced the probative value and prejudicial effect of the evidence and emphasizing the importance of an explicit ruling). Furthermore, the admission of evidence based on an implicit balance of its probative value and unfair prejudicial effect does not constitute an abuse of discretion. *United States v. Lillard*, 354 F.3d 850, 855 (9th Cir. 2003). An implicit weighing of the probative and prejudicial nature of evidence by the trial court during a bench trial therefore complies with Rule 403 requirements.

¶ 21 In this case, the trial court did not explicitly address the probative or prejudicial nature of the evidence, but it heard arguments from Hong as to the prejudicial nature of Auther's testimony. Tr. at 16 ("And even if [the evidence] was for propensity [under Rule 404(b)]. . . , the information will be more prejudicial to the Defendant than purgative [sic][,] then the [c]ourt should exclude the evidence."). When Hong argued the prejudicial impact of Rule 404(b) evidence during pre-trial proceedings, the trial court was aware of its need to balance the prejudicial effect of the evidence against its probative value. Moreover, during direct examination of the victim, the trial court acknowledged that the link to Hong's text messages to the victim would be established piece by piece. The trial court also heard testimony by the victim with descriptions of text messages reflecting similar content in Hong's letters. At sentencing, the trial court noted the "disturbing" nature of the letters and its link to Hong's text messages to the victim, a key aspect of the Commonwealth's case. Tr. at 242-43. Based on the authority cited above and the trial court's implicit consideration of the probative and prejudicial nature of the evidence, the court did not abuse its discretion in admitting into evidence the letters and Auther's testimony.

V. Conclusion

¶ 22 For the foregoing reasons, we hold (1) no *Brady* violation occurred, and (2) the trial court did not abuse its discretion in admitting into evidence Hong's letters and Auther's testimony. We therefore AFFIRM Hong's conviction for disturbing the peace.

SO ORDERED this 30th day of December, 2013.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
DAVID A. WISEMAN
Justice Pro Tem