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. 12-0111D

OPINION

Cite as: 2014 MP 15

Decided November 18, 2014

Brien Sers 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.

CASTRO, C.J.:

¶ 1 Defendant-Appellant Francisco Q. Guerrero ("Guerrero") appeals his convictions for sexual abuse of a minor, disturbing the peace, and assault and battery. On appeal, Guerrero makes three arguments. First, the trial court violated his due-process rights by using his decision not to testify as the sole basis for finding the testimony of the victim—Jane Doe[1] ("Doe")—credible. Second, the trial court erroneously denied his motion to dismiss the sexual assault in the second- and fourth-degree charges because, as a matter of law, he could not meet the statutory requirement that the offender occupy a position of authority over Doe. And, third, the trial court erroneously denied his motion to dismiss the assault-and-battery charges because those charges violated double jeopardy. For the reasons below, we AFFIRM the convictions.

I. Factual and Procedural Background

¶ 2 Over several years, Guerrero allegedly abused Doe sexually. In response, the Commonwealth charged Guerrero with fifteen counts related to six charges. Guerrero filed a motion to dismiss several counts and charges, including sexual assault, assault and battery, and indecent exposure in the first degree. The trial court dismissed the indecent-exposure-in-the-first-degree charge, but upheld the rest.

¶ 3 At trial, the prosecution presented six witnesses. The key witness was Doe. She testified to several instances where Guerrero openly masturbated in front of her, touched her private parts, or forced her to touch his private parts. The first incident took place at Guerrero's house when Doe was fourteen years old. She was using the computer when Guerrero entered the room and began to watch television. At some point, Guerrero started to stare at her while masturbating. Guerrero then approached her, grabbed her hand, and forced her to touch his genitals. Seven months after the television incident, Doe was again at Guerrero's house. She was lying in bed when Guerrero entered her room and closed the door. Guerrero began to masturbate as he walked towards her. The masturbation was cut short when the housekeeper appeared. Ten months later, Doe and Guerrero went to Veteran's Cemetery in Marpi to practice driving. While she was driving, Guerrero unzipped his pants and began to masturbate. Guerrero then slid his hand under her underwear and touched her genitals. She pulled the car over and demanded to go home. Two months after the driving-practice session, Guerrero picked Doe up from school. Instead of taking the usual route home, Guerrero took a long detour. During the detour, Guerrero masturbated, forced her to touch his genitals, and placed his hands inside her underwear and touched her genitals. The incident

[1] We use "Jane Doe" to preserve the minor victim's anonymity.

ended when Guerrero ejaculated on her hand. One month later, Guerrero drove Doe home. During the drive, Guerrero pressured her to massage him. Guerrero then began to masturbate.

¶ 4 Following the prosecution's case-in-chief, the defense presented one witness. But Guerrero did not personally take the stand to challenge Doe's testimony.

¶ 5 At the end of trial, the jury found Guerrero not guilty of one jury count while the trial court found Guerrero guilty of four bench counts. In finding Guerrero guilty of the bench counts, the trial court repeatedly stated that it had not heard any testimony denying or disputing that the events underlying the guilty verdict and that it found Doe's testimony credible. Specifically, the court said,

- I did not hear any testimony that disputed or denied that this event occurred. . . . I find [Doe's] testimony credible. Tr. 223.
- The Court finds [Doe's] testimony credible and, again, does not recall hearing any testimony that disputed or denied this event. *Id.* at 224.
- The Court finds [Doe's] testimony credible regarding this incident and, again, does not recall any testimony that disputed or denied that this event happened. *Id.* at 225.
- And, again, the Court does not find, recall any testimony that either disputed, substantively, or denied this event happening. The Court found [Doe's] testimony credible. *Id.* at 226-27.

¶ 6 Guerrero appeals.

II. Jurisdiction

¶ 7 We have jurisdiction over Superior Court final judgments and orders. 1 CMC § 3102(a).

III. Standards of Review

¶ 8 Guerrero raises three issues. We review for plain error whether the trial court's deny-or-dispute remarks violated Guerrero's constitutional right to remain silent because Guerrero did not make a timely objection at the trial level. *Commonwealth v. Jian Yun Yao*, 2007 MP 12 ¶ 6. We review de novo whether the trial court improperly denied Guerrero's motion to dismiss the sexual-abuse-of-a-minor charges because the claim centers on statutory interpretation. *See Ada v. Calvo*, 2012 MP 11 ¶ 16 ("[A] question of statutory interpretation [is] reviewable de novo"). And we review de novo whether the trial court improperly denied Guerrero's motion to dismiss the assault-and-battery charges because the claim implicates double jeopardy. *Commonwealth v. Peter*, 2010 MP 15 ¶ 4.

IV. Discussion

¶ 9 We begin with whether the trial court's deny-or-dispute remarks breached Guerrero's constitutional right to silence, move to whether Calvo fell within the scope of the sexual-abuse-of-a-minor statute, and end with whether assault and battery is a lesser-included offense of sexual abuse.

A. Right to Silence

¶ 10 Guerrero first argues that the trial court violated his due-process rights by punishing him for exercising his constitutional right to remain silent. We review the trial court's finding for plain error

because Guerrero did not object during the sentencing hearing. *Commonwealth v. Jian Yun Yao*, 2007 MP 12 ¶ 6 (reviewing a sentence for plain error because the defendant did not challenge the sentence in the trial court); *accord United States v. Vontsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992) (reviewing for plain error when the appellant did not object during the judge's sentencing discussion); *United States v. Prichett*, 898 F.2d 130, 131 (11th Cir. 1990) (similar).

¶ 11 To receive relief under the plain-error standard, an appellant must "show that: (1) there was error; (2) the error was 'plain' or 'obvious'; [and] (3) the error affected the appellant's 'substantial rights,' or put differently, affected the outcome of the proceeding." *Commonwealth v. Hossain*, 2010 MP 21 ¶ 29.

¶ 12 Starting with whether the trial court's deny-or-dispute language violated Guerrero's right to silence, the United States Supreme Court has held that fact finders cannot use a defendant's silence as evidence, *Griffin v. California*, 380 U.S. 609, 614-15 (1965), because "[t]he normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted." *Mitchell v. United States*, 526 U.S. 314, 327-28 (1999). This rule radiates from two related principles: the government bears the burden of proof and the government cannot meet that burden through adverse inferences from the defendant's silence. *See State v. Hart*, 463, P.2d 885, 888 (Mont. 1969) (rejecting a prosecutorial allusion to the defendant's silence because the defendant "had the right not to testify, to put the government to its proof, and not to have the fact of his muteness be used as an argument to support the credibility of the government's witness"). In other words, "the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights." *Mitchell*, 526 U.S. at 330.

¶ 13 Applying the no-adverse-inference rule, the United States Supreme Court reversed a sentence because the sentencing court drew adverse inferences from the defendant's refusal to testify. *Mitchell*, 526 U.S. at 330. There, the prosecution witness testified that during one five-month period, the defendant sold 1.5 to 2 ounces of cocaine a day. *Id.* at 318. And that during a seventeen-month period, the defendant worked three to five times a week selling a similar amount of cocaine. *Id.* But on cross-examination the witness conceded he had not seen the defendant regularly during those periods. *Id.* Following the proceeding, the court stated it found the prosecution witness' testimony credible, *id.* at 319, and that one of the reasons for that finding was the defendant's "not testifying to the contrary," *id.* (internal quotation omitted). This adverse inference, according the United States Supreme Court, violated the defendant's right to remain silent because it wrongfully shifted the burden from the government to the defendant. *See id.* at 330 (stating that the self-incrimination privilege bars the government from enlisting the defendant's silence to satisfy its burden of proof).

¶ 14 Because judges (and juries) cannot use a defendant's silence to draw an adverse factual inference regarding the crime, we need to decide whether the court's statements constituted an adverse inference.

To decide that, case law regarding prosecutor's statements is helpful. The United States Constitution prohibits a prosecutor from commenting on a defendant's refusal to testify. *Griffin*, 380 U.S. at 615. A prosecutor violates this prohibition if "the language used, in context, is such that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. Harris*, 627 F.2d 474, 476 (D.C. Cir. 1980) (internal quotation omitted). "The rule set forth in *Griffin* therefore protects against comments, even unintentional ones, which invite the jury to draw adverse inferences about the defendant's choice not to testify." *Gomes v. Brady*, 564 F.3d 532, 537 (1st Cir. 2009). Construing that standard, several United States Courts of Appeals, and many state courts, have held that the no-comment rule prohibits any statement that a government witness' testimony was "uncontradicted" or "unrefuted" when the defendant was the only person who could have refuted the witness' testimony.[2]

¶ 15 Here, the trial court repeatedly mentioned it did not hear any testimony denying or disputing the events underlying the guilty verdict:

- [The Court] did not hear any testimony that disputed or denied that this event occurred. Tr. 223.
- The Court finds [Doe's] testimony credible and, again, does not recall hearing any testimony that disputed or denied this event. *Id.* at 224.
- The Court finds [Doe's] testimony credible regarding this incident and, again, does not recall any testimony that disputed or denied that this event happened. *Id.* at 225.
- And, again, the Court does not find, recall any testimony that either disputed, substantively, or denied this event happening. *Id.* at 226-27.

¶ 16 The remarks were an error for two reasons. First, if a prosecutor cannot allude to the defendant's silence because the remarks *might* cause the jury to use that silence as evidence of guilt, a court certainly cannot do so to bolster a finding of guilt. Second, the court's remarks, in effect, shifted the burden of proof to Guerrero because the remarks appear to put the onus on Guerrero to take the stand to dispute or deny the victim's testimony. But defendants do not have the burden of proof; the government does. *Mitchell*, 526 U.S. at 330. That burden cannot be skirted by enlisting the defendant's silence. *See id.* at 316-17 (holding that a trial court cannot draw adverse inferences from the defendant's silence).

¶ 17 Because the trial court erred, we must next decide whether that error was plain or obvious in light of current jurisprudence. *Commonwealth v. Quitano*, 2014 MP 5 ¶ 27. We answer in the affirmative

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[2] *See Runnels v. Hess*, 653 F.2d 1359, 1362-63 (10th Cir. 1981) ([E]xcept in those special cases where it appears that the accused himself is the only one who could possibly contradict the government's testimony, the prosecutor may properly call attention to the fact that the testimony of the government witnesses has not been contradicted.); *United States v. Buege*, 578 F.2d 187, 188 (7th Cir. 1978); *United States v. Thurmond*, 541 F.2d 774, 776 (8th Cir. 1976); *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1269 (2nd Cir. 1969); *United States v. Flannery*, 451 F.2d 880, 881 (1st Cir. 1971); *Langford v. United States*, 178 F.2d 48, 55 (9th Cir. 1949); *State v. Still*, 582 P.2d 639, 641 (Ariz. 1978); *Rowley v. State*, 285 N.E.2d 646, 648 (Ind. 1972); *White v. United States*, 248 A.2d 825, 826 (D.C. App. 1969); *State v. Morgan*, 444 S.W.2d 490, 493 (Mo. 1969); *State v. Hart*, 462 P.2d 885, 888 (Mont. 1969).

because it is well established that a defendant's silence cannot be held as evidence of guilt. *Mitchell*, 526 U.S. at 327-28. This prohibition is hardly new. *E.g. Linden v. United States*, 296 F. 104, 106 (3rd Cir. 1924) (holding that neither the court nor the prosecutor can comment on a defendant's silence because "[b]eing innocent in the eyes of the law, [a defendant] is not called upon to meet accusing testimony by contradiction or explanation"). If the law has long prohibited merely drawing attention to a defendant's silence as improper, then it is similarly clear that a court cannot use the defendant's silence to support its guilty verdict.

¶ 18 Because the error was plain, the final question is whether the defendant has shown that the "error affected the appellant's 'substantial rights,' or put differently, affected the outcome of the proceeding." *Hossain*, 2010 MP 21 ¶ 29. He has not.

¶ 19 Guerrero's substantial-rights argument hinges on the difference in verdicts between the judge and the jury. This argument does not show the deny-or-dispute language affected the outcome of the proceeding for three reasons. First, Guerrero's argument treats the judge and the jury as if they had an identical task. They didn't. The jury considered a single charge; the judge considered four. The jury decided whether Guerrero had sexual contact with Doe, 6 CMC § 1307(a)(5). The judge, like the jury, decided whether Guerrero had sexual contact with Doe, 6 CMC §§ 1202(a); 1309(a). But unlike the jury, the judge also decided whether Guerrero had exposed his genitals, 6 CMC § 1316(a); and unreasonably annoyed or disturbed Doe, 6 CMC § 3101(a). Second, to the extent the judge and the jury answered similar questions, a differing decision is not a smoking gun because judges may weigh the evidence and come to their own decision; they are not bound to the jury's verdict. *Commonwealth v. Blas*, 2007 MP 17 ¶ 8 n.2. Third, the deny-or-dispute language, though made in error, was superfluous because the court found the victim credible independent of the defendant's silence. Tr. 224 ("The Court finds [Doe's] testimony credible *and*, again, does not recall hearing any testimony that disputed or denied this event." (emphasis added)); *id.* at 225 ("The Court finds [Doe's] testimony credible regarding this incident *and*, again, does not recall any testimony that disputed or denied that this event happened." (emphasis added)).

¶ 20 In sum, although the court committed an error, the court did not commit plain error because Guerrero failed to show the error affected the outcome of the proceedings.

B. Scope of Sexual-Abuse-of-a-Minor Statute

¶ 21 Guerrero next argues that the trial court improperly denied his motion to dismiss the counts relating to 6 CMC § 1307(a)(5)(B) and §1309(a)(2) because his status as a grandfather does not satisfy each statute's requirement that the "offender occupies a position of authority in relation to the victim." 6 CMC §§ 1307(a)(5)(B) and 1309(a)(2). Because this is a question of statutory interpretation, we review de novo. *Ada v. Calvo*, 2012 MP 11 ¶ 16. We interpret the statute according to "its plain meaning, so long as that meaning is clear, unambiguous, and will not lead to a result that is absurd or defies common

sense." *Commonwealth v. Diaz*, 2013 MP 20 ¶ 17. When the text does not give a clear answer, the Court turns to legislative intent. *Id.*

¶ 22 Here, the statute does not state that grandfathers are in a position of authority relative to their grandchildren. Instead, the statute defines "position of authority" as "an employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, babysitter, *or a substantially similar position* . . . ." 6 CMC § 1317(5) (emphasis added). "Substantially similar person" includes people "a reasonable adolescent would have believed . . . had coercive power over [the adolescent]." *Commonwealth v. Diaz*, 2013 MP 20 ¶ 18. In short, the definition captures "virtually all possible positions which could conceivably possess some responsibility over a minor." *Id.*

¶ 23 Applying *Diaz*'s gloss, Doe reasonably believed Guerrero held a position of authority because Guerrero was not only Doe's familial elder, but also regularly housed, supervised, and transported her. In each of these roles, Guerrero possessed some responsibility over her. As a homeowner, he held some responsibility for her while she was under his roof; he also had the authority to expel her if she did not maintain his approval. As a supervisor, he could have punished her. As a transporter, he could have refused to give rides or turn the car around if she did not succumb to his urgings. Together, these many roles of responsibility amply show Guerrero held a position of authority over her. Accordingly, we affirm the trial court's denial of Guerrero's motion to dismiss.

C. Double Jeopardy

¶ 24 Last, Guerrero claims his conviction for assault and battery violated double jeopardy because that conviction—and another—flowed from the same conduct. We review double-jeopardy claims de novo. *Quitano*, 2014 MP 5 ¶ 9.

¶ 25 The Double Jeopardy Clause provides that "[n]o person shall be put twice in jeopardy for the same offense regardless of the governmental entity that first institutes prosecution." NMI CONST. art. I, § 4(e). In practice, the Clause prohibits: "(1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *Commonwealth v. Peter*, 2010 MP 15 ¶ 5.

¶ 26 In reviewing Guerrero's multiple-punishments-for-the-same-offense challenge, we first ask whether the legislature intended to impose multiple sanctions for the same conduct. *Id.* If yes, there is no double-jeopardy violation. *Commonwealth v. Quitano*, 2014 MP 5 ¶ 41 (presuming the legislature did not intend multiple punishments for the same conduct absent *clear* legislative intent to the contrary). If no, we apply the *Blockburger* test. *Id.* Under *Blockburger*, "'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test . . . is whether each provision [of the challenged offenses] requires proof of a fact which the other does not.'" *Peter*, 2010 MP 15 ¶ 6 (quoting *Blockburger*

v. United States, 284 U.S. 299, 304 (1932)). To decide that, we compare the pertinent statutes to determine if the elements of the lesser-included offense are a subset of the charged offense. *Commonwealth v. Kaipat*, 4 NMI 300, 303 (1995). This review focuses on the elements required for each offense, not the actual evidence presented at trial. *Peter*, 2010 MP 15 ¶ 6.

¶ 27 Here, there is no legislative intent, thus we apply the *Blockburger* test. Guerrero's claim fails that test because the assault-and-battery statute and the sexual-abuse statute each require an element the other does not. The assault-and-battery statute requires lack of consent from the victim, 6 CMC § 1202; the sexual-abuse statute does not. *Id.* § 1309(a)(2) (criminalizing even consensual sex acts falling within the statute's ambit). The sexual-abuse statute requires that "the offender occupies a position of authority in relation to the victim, *id.*; the assault-and-battery statute does not. *Id.* § 1202. Because neither charge is a subset of the other, the convictions did not violate double jeopardy.

V. Conclusion

¶ 28 For the reasons above, we AFFIRM the convictions.

SO ORDERED this 18th day of NOVEMBER 2014.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
TIMOTHY H. BELLAS
Justice Pro Tem