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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

JEFFREY LIZAMA,
Defendant-Appellant.

Supreme Court No. 2013-SCC-0035-CRM

Superior Court No. 13-0018

OPINION

Cite as: 2015 MP 2

Decided April 30, 2015

David G. Banes, Saipan, MP, for Defendant-Appellant.

Gilbert Birnbrich, Interim Attorney General, and Clayton Graef, Assistant
Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-
Appellee.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

CASTRO, C.J.:

¶ 1   Defendant Jeffrey Lizama ("Lizama") appeals his sentence, asserting the trial court erred by (1) accepting his guilty plea without first establishing a sufficient factual basis, (2) failing to order a presentence investigation report ("PSI"), and (3) failing to impose an individualized and particularized sentence. For the reasons discussed below, we REVERSE the trial court's judgment and REMAND the case for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

¶ 2   On January 15, 2013, the Commonwealth charged Lizama with two counts of Burglary (Count I and XIX), Conspiracy to Commit Burglary (Count V and XXII), Theft (Count IX and XVII), and Conspiracy to Commit Theft (Count XIII and XXX).

¶ 3   On August 6, 2013, Lizama entered into a plea agreement pursuant to NMI Rule of Criminal Procedure 11(e)(1)(B), indicating that he wished to plead guilty to Burglary on Count I of the First Amended Information.

¶ 4   Both the First Amended Information and the plea agreement contain a burglary charge. The former specifically charges Lizama with burglary punishable by 6 CMC §§ 1801(b)(2)(A) and 4101(a),[1] while the latter only charges Lizama with a violation of 6 CMC § 1801(a).[2] In consideration of

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[1] Count I of the First Amended Information reads:

> On or about December 18 to December 19, 2012, on Saipan, Commonwealth of the Northern Mariana Islands, the Defendant, **JEFFREY LIZAMA**, unlawfully entered the establishment of Han Nam Supermarket Warehouse, between the period between [sic] 30 minutes past sunset and 30 minutes before sunrise, with the purpose to commit Theft (6 CMC § 1601(a)), in violation of 6 CMC § 1801(a) and made punishable by 6 CMC §§ 1801(b)(2)(A) and 4101(a).

Commonwealth v. Anastacio, No. 13-0018C (NMI Super. Ct. Jan. 28, 2013) (First Amended Information at 1) [hereinafter First Amended Information].

[2] The plea agreement stated that "[o]n June 28, 2013, the Commonwealth filed a First Amended Information . . . charging Defendant with the following crimes:

> **COUNT I: <u>BURGLARY</u>,** because on or about Dec. 18, 2012-Dec. 19, 2012, while on Saipan, CNMI, Defendant unlawfully entered Han Nam Supermarket Warehouse, between the hours of 30 minutes past sunset and 30 minutes before sunrise, with the purpose of committing Theft, and did in fact execute Theft, in violation of 6 § 1801(a), carrying a maximum penalty of 10 years imprisonment and $10,000 fine."

Commonwealth v. Petrus, No. 13-0018C (NMI Super. Ct. Aug. 6, 2013) (Plea Agreement (as to Jeffrey Lizama) at 1–2) [hereinafter Plea Agreement].

Lizama's guilty plea, the Commonwealth recommended a sentence of ten years imprisonment, all suspended but five, "to run consecutively with any other term to which Defendant has been sentenced." Plea Agreement, *supra* note 3, at 3–4.

¶ 5   At Lizama's change of plea hearing, the trial court explained the Rule 11(e)(1)(B) guilty plea, and established that Lizama understood he was pleading guilty on his own volition to the first count of burglary, a crime carrying a maximum penalty of ten years and a $10,000 dollar fine, and that by pleading guilty he was forfeiting certain rights. The factual basis provided at the change of plea hearing and within the plea agreement differs from the charge in the plea agreement and the first amended information. Specifically, the factual basis neither references the time period the crime was committed nor discusses the sentence the Commonwealth seeks to impose.[3]

¶ 6   At the change of plea hearing, and without ordering a PSI or garnering any further information from Lizama, the trial court imposed a sentence of ten years without the possibility of probation, parole, or release.

¶ 7   On August 6, 2013, the trial court issued its Judgment and Commitment Order ("Order"), accepting Lizama's guilty plea to the burglary offense.

¶ 8   Lizama appeals his sentence.

II. JURISDICTION

¶ 9   We have jurisdiction over final judgments and orders issued by the Superior Court. NMI Const. art. IV, § 3; 1 CMC § 3102(a). Lizama timely appealed the Superior Court's final judgment. Accordingly, we have jurisdiction.

III. STANDARDS OF REVIEW

¶ 10   Lizama raises three issues, but we only reach two. First, he contends the trial court erred by accepting a guilty plea not supported by a factual basis. Because Lizama argues the sufficiency of the factual basis for the first time on appeal, we review for plain error. *United States v. Ternus*, 598 F.3d 1251, 1254 (11th Cir. 2010); *see Commonwealth v. Taman*, 2014 MP 8 ¶ 8 (reviewing issues not raised before the trial court for plain error). Second, Lizama asserts the trial court erred by failing to order a PSI. Because Lizama "neither requested a PSI nor objected to the trial court's failure to order one," we review for plain error. *Commonwealth v. Salasiban*, 2014 MP 17 ¶ 9. Third, Lizama

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[3] Lizama agreed to the following factual basis:

> On or about December 18, 2012, to December 19, 2012, on Saipan, CNMI, defendant Jeffrey Lizama, entered the warehouse formerly known as Onu Moda Factory in Afetnas without consent to enter and with the intent to commit the crime of Theft once inside. Upon entering without consent, defendant stole various power tools from the factory, in violation of 6 CMC § 1801(a).

Tr. 5; Plea Agreement, *supra* note 3, at 4–5.

contends that the trial court erred by imposing the maximum sentence. We do not reach this issue because its resolution is unnecessary to the disposition of this case.

IV. DISCUSSION
A. Factual Basis of Lizama's Guilty Plea

¶ 11   A court should not enter a judgment upon a guilty plea without first establishing a factual basis for that plea. NMI R. CRIM. P. 11(f).[4] The purpose of establishing a factual basis is to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *McCarthy v. United States*, 394 U.S. 459, 467 (1969) (quoting FED. R. CRIM. P. 11, Notes of Advisory Committee on Criminal Rules).

¶ 12   We examine the trial court's acceptance of Lizama's guilty plea for plain error. To prevail, the appellant must establish: "(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 (internal quotations omitted). If the appellant shows the trial court "[deviated] from a legal rule that [had] not been intentionally relinquished or abandoned," and the error "is not subject to reasonable dispute at the time we review the error," then the first and second elements of plain error review are satisfied. *Salasiban*, 2014 MP 17 ¶ 11.

¶ 13   Here, Lizama establishes that the trial court erred, and the error was plain or obvious, because the record does not support imposition of a ten year sentence under 6 CMC § 1801(b)(2)(A).[5]

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[4] Generally, a party waives an issue that is not sufficiently developed. *Commonwealth v. Calvo*, 2014 MP 10 ¶ 8. However, an argument not raised in an opening brief may be considered if any of the following exceptions apply: "(1) there is good cause shown, or failure to do so would result in manifest injustice; (2) the issue is raised in the appellee's brief; or (3) failure to properly raise the issue does not prejudice the defense of the opposing party." *United States v. Mageno*, 762 F.3d 933, 940 (9th Cir. 2014) (citations and internal quotation marks omitted). Lizama's factual basis argument is grounded on his federal due process rights, whereas the Commonwealth's response is based on NMI Rule of Criminal Procedure 11.

Here, two exceptions apply. First, failure to consider the argument will result in manifest injustice because "a defendant is entitled to plead anew" when a trial court accepts a guilty plea not supported by a factual basis. *McCarthy v. United States*, 394 U.S. 459, 463–64 (1969). Second, the factual basis argument in the context of Rule 11 was raised by the Commonwealth rather than Lizama. Thus, although Lizama did not raise the factual basis issue under Rule 11, we consider that argument on appeal because the above exceptions apply.

[5] 6 CMC § 1801(b)(2)(A) states that "[a] person convicted under this section may be punished . . . [b]y imprisonment for not more than 10 years if . . . [t]he dwelling is entered during the period between 30 minutes past sunset and 30 minutes before sunrise . . . ."

¶ 14   First, this Court considers the factual basis set forth in the plea agreement and at the change of plea hearing:

> On or about December 18, 2012, to December 19, 2012, on Saipan, CNMI, defendant Jeffrey Lizama, entered the warehouse formerly known as Onu Moda Factory in Afetnas without consent to enter and with the intent to commit the crime of Theft once inside. Upon entering without consent, defendant stole various power tools from the factory, in violation of 6 CMC § 1801(a).

Tr. 5; Plea Agreement, *supra* note 3, at 4–5. An individual convicted of burglary may be sentenced to ten years imprisonment if "the dwelling is entered during the period between 30 minutes past sunset and 30 minutes before sunrise."[6] 6 CMC § 1801(b)(2)(A). Here, the factual basis does not establish Lizama entered a dwelling during that period of time.

¶ 15   Although "an indictment or information can be used as the sole source of the factual basis for a guilty plea," the information must allege facts that indicate the defendant has violated the statute. *United States v. Garcia-Paulin*, 627 F.3d 127, 133 (5th Cir. 2010). In *Garcia-Paulin*, the defendant appealed his conviction of bringing an alien into the United States, arguing his guilty plea was not supported by a sufficient factual basis. *Id.* at 129. The government argued that the plea agreement and the indictment, when read together, "provides ample support for the guilty plea." *Id*. at 133. The court disagreed, stating that "the indictment in this case does not include any supporting facts to establish [an element of the crime]," and that "the recital of the statutory requirements in the indictment does not correct the deficiency." *Id*.

¶ 16   Here, the Commonwealth's First Amended Information provides no facts that establish Lizama entered a "dwelling."[7] All documents filed with the trial court indicate that Lizama entered a warehouse used to store raw materials or goods—not a dwelling.[8] Under 6 CMC § 1801(b)(2)(A), an individual

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[6] Other than 6 CMC § 1801(b)(2)(A), a person convicted of burglary may be sentenced to ten years imprisonment if "the defendant or an accomplice inflicts bodily injury on anyone or is armed with a dangerous weapon." 6 CMC §1801(b)(2)(B). If the defendant does not fall under either of these statutes, then he may not be imprisoned for more than five years. 6 CMC § 1801(b).

[7] While a "dwelling" is not defined under Title 6 of the Commonwealth Code, it is defined in Titles 2 and 10 to generally mean a home, apartment, or building that contains living facilities. *See* 2 CMC § 7112; 10 CMC § 2512; 10 CMC § 20303. In *Salasiban*, this Court relied on a similar definition of dwelling. In a footnote, this Court defined the word "dwelling" as "a house or other structure in which a person lives." *Salasiban*, 2014 MP 17 ¶ 24 n.8 (quoting Black's Law Dictionary 525 (7th ed. 1999) (internal quotation marks omitted)).

[8] The charge in the plea agreement and in the First Amended Information state that Lizama "unlawfully entered Han Nam Supermarket Warehouse." Plea Agreement, *supra* note 3, at 1–2; First Amended Information, *supra* note 2. The factual basis within the plea agreement and provided at the change of plea hearing state he "entered a Warehouse

convicted of burglary may receive a ten year sentence only if the burglary involved entering a dwelling thirty minutes past sunset and thirty minutes before sunrise. Because Lizama was sentenced to ten years imprisonment and neither the factual basis nor the first amended information establishes that Lizama burglarized a dwelling, the trial court erred, and the error was plain or obvious. Thus, the first and second elements of plain error review are satisfied.

¶ 17   The third element of plain error review requires that the error affect the defendant's substantial rights. An error that has a "substantial and injurious effect or influence in determining the . . . verdict" affects the defendant's substantial rights. *United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (2004) (internal quotation marks omitted)). Furthermore, relief may be granted when the error has a prejudicial effect on the judicial proceeding's outcome. *Dominguez Benitez*, 542 U.S. at 81; *see Salasiban*, 2014 MP 17 ¶ 11 (explaining that a defendant's substantial rights are affected if "there is a reasonable probability [the error] affected the outcome of the proceeding" (quoting *United States v. Marcus*, 560 U.S. 258, 262 (2010)) (internal quotation marks omitted)). If the error was inconsequential to the defendant's decision to enter the guilty plea, then the error did not have a prejudicial effect on the outcome of the proceeding. *Dominguez Benitez*, 542 U.S. at 84–85. Here, the trial court's error affected Lizama's substantial rights because there is a reasonable probability he would not have pled guilty had he realized the factual basis relied on by the trial court and government insufficiently supported the imposition of a ten year sentence. Thus, the third element of plain error review is met.

¶ 18   Consequently, it was plain error for the trial court to accept Lizama's guilty plea without an adequate factual basis.

B. Presentence Investigation

¶ 19   We review the trial court's failure to order a PSI for plain error because Lizama "neither requested a PSI nor objected to the trial court's failure to order one." *Salasiban*, 2014 MP 17 ¶ 9. Under plain error review, the appellant "must show the court's failure to order a PSI was an error that was plain and affected his substantial rights." *Id.* ¶ 10. Then, "[i]f each element is met, we have 'the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *Puckett v. United States*, 556 U.S. 129, 135) (emphasis omitted).

¶ 20   The facts at hand are substantially similar to the facts in *Salasiban*.[9] Both defendants' pleas lacked a sufficient factual basis to support their conviction of

formerly known as the Onu Moda Factory in Afetnas." Plea Agreement, *supra* note 3, at 4–5; Tr.5.

[9]   Salasiban and Lizama were co-defendants in Superior Court No. 13-0018, the case from which this appeal arises.

burglarizing a dwelling thirty minutes past sunset and thirty minutes before sunrise. Furthermore, without ordering a PSI, both parties were sentenced to ten years imprisonment under 6 CMC § 1801(b)(2)(a) instead of 6 CMC § 1801(b)(1), which allows for a maximum five year sentence.

¶ 21   In *Salasiban*, this Court held there was plain error when the trial court failed to order a PSI, because the defendant "did not waive the PSI, and the trial court did not explain why a PSI was unnecessary . . . ." *Id*. ¶¶ 18–21. Our reasoning there makes clear that when a court fails to order a PSI, a defendant's substantial rights are affected if the defendant pleads guilty to an offense unsupported by a factual basis and is sentenced to a harsher penalty than he would have otherwise received. *See id*. ¶ 25–26. Last, we held that the error warrants reversal because it affected the fairness of the judicial proceeding. *Id*. ¶ 27.

¶ 22   Here, Lizama did not waive the PSI, and the trial court failed to explain why a PSI was unnecessary; thus, the trial court erred, and the error was plain or obvious. Furthermore, Lizama's substantial rights were affected because there is a reasonable probability the PSI would have altered the outcome of his change of plea hearing.[10] Like *Salasiban*, the error warrants reversal because it affected the fairness of the judicial proceeding.

¶ 23   Thus, the trial court's failure to order the PSI constituted plain error that affected Lizama's substantial rights and entitles Lizama to relief.[11]

V. CONCLUSION

¶ 24   For the foregoing reasons, we REVERSE the trial court's judgment and REMAND the case for further proceedings consistent with this opinion.

ORDERED this 30th day of April, 2015.

/s/ _____
ALEXANDRO C. CASTRO
Chief Justice

/s/ _____
JOHN A. MANGLONA

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[10]   If the PSI had been ordered, the court would have likely discovered that the factual basis was insufficient. *Salasiban*, 2014 MP 17 ¶ 24–26. Then, under NMI Rule of Criminal Procedure 35 and 36, the court would have likely corrected the sentence or set aside the sentence and permit the appellant to withdraw his plea. *Id*. ¶ 25.

[11]   We need not decide the third issue because Lizama's sentence is vacated on the aforementioned grounds. *See Fu Zhu Lin*, 2014 MP 6 ¶ 49 (declining to review whether the imposition of a maximum sentence was an abuse of discretion because the Court had "already vacated and remanded for resentencing on other grounds").

Associate Justice

/s/
PERRY B. INOS
Associate Justice