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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

DAN KALIKOLEHAU JOHNSON,
Defendant-Appellant.

Supreme Court No. 2013-SCC-0034-CRM

Superior Court No. 12-0157

OPINION

Cite as: 2015 MP 17

Decided December 30, 2015

Michael A. Sato and Eden Schwartz, Assistant Public Defenders, Office of the Public Defender, Saipan, MP, for Defendant-Appellant.

Shannon R. Foley, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

BEFORE: JOHN A. MANGLONA, Associate Justice; TIMOTHY H. BELLAS, Justice Pro Tem; and JOSEPH N. CAMACHO, Justice Pro Tem.

MANGLONA, J.:

¶ 1 Defendant Dan Kalikolehau Johnson ("Johnson") appeals his convictions for Sexual Abuse of a Minor in the Second Degree, Attempted Sexual Abuse of a Minor in the Second Degree, Assault and Battery, and two counts of Disturbing the Peace. Johnson raises eight issues on appeal, but we only reach three: whether the trial court erred by admitting several hearsay statements, whether the court erred by failing to provide a limiting instruction for fresh complaint evidence, and whether cumulative error requires reversal. For the reasons discussed below, we VACATE Johnson's convictions and REMAND for a new trial.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 Johnson was charged with one count of Attempted Sexual Abuse of a Minor in the Second Degree, one count of Sexual Abuse of a Minor in the Second Degree, one count of Assault and Battery, and two counts of Disturbing the Peace. *Commonwealth v. Johnson*, 12-0157(E) (NMI Super. Ct. Apr. 1, 2013) (Second Amended Information at 1–3) [hereinafter Information]. The charges arose out of two incidents, one on May 17, 2009 and the other on June 23, 2012, involving a minor child, Johnson's girlfriend's daughter ("the minor").

¶ 3 According to the Information, on or about May 17, 2009, Johnson caused the minor to touch his genitals. Count II for Sexual Abuse of a Minor in the Second Degree, Count III for Assault and Battery, and Count V for Disturbing the Peace arose from the alleged conduct. At trial, the minor initially testified she did not remember that day. After the prosecution presented a police report to refresh her memory, the minor testified that she was cooking rice that night when Johnson asked her to get him a cigarette, which she passed to him through a window. The minor testified nothing else happened that night, but that the next morning she woke up and "decided to be a bad person" by telling her mom "something that never happened"—that Johnson touched her when she was cooking rice and asked her to follow him into a room and then asked her to touch his penis. Tr. 186–87.[1] When asked to describe the story in greater detail, specifically regarding what happened with Johnson in the room, the minor stated: "I don't remember because it's a lie." *Id.* at 188.

¶ 4 The prosecution then attempted to refresh the minor's memory by showing her a Division of Youth Services ("DYS") report dated May 19, 2009. Upon review of the document, the minor said her memory of the day was not refreshed, but she could recall having a conversation with DYS social worker Mona Camacho ("Camacho"). The minor recognized her own signature on the

[1] All citations to the transcript are to the corrected certified transcript filed on September 29, 2014.

report. The prosecution then published a portion of the report as a past recollection recorded. In the report, the minor stated Johnson touched her more than five different times inside her clothes over the previous several months, most recently on May 17, 2009. At trial, the minor did not testify that the contents of the report were accurate or truthful.

¶ 5 The prosecution also elicited testimony from the minor regarding a conversation she had with two employees of the prosecutor's office, including Keola Fitial ("Fitial"). Over Johnson's objections for foundation, relevance, and hearsay, the minor was allowed to review a document presented during an interview with Fitial containing the minor's corrections on it. The minor then testified she told Fitial that after she got Johnson a cigarette he "called [her] inside into the room . . . and then he asked [her] to play with him." *Id.* at 204–05. The minor clarified she told Fitial that Johnson held her hand, made her rub his penis, and she subsequently told her mother that Johnson made her touch him and her mother then called the police. The minor testified that she told the police officer that Johnson made her touch him and that she told her mom about it the next morning.

¶ 6 On cross examination, the minor testified she had lied about Johnson making her touch his penis that day. She further testified that some of the allegations she made were entirely false and that she made those false allegations because Johnson drank too much and was hitting her siblings.

¶ 7 Johnson was also charged with alleged conduct occurring on June 23, 2012. According to the Information, Johnson allegedly committed "an overt act which constituted a substantial step in a course of conduct planned to culminate in the commission of the offense of Sexual Abuse of a Minor in the Second Degree," by entering the minor's "room at night and rubb[ing] her stomach heading towards her breast beneath her clothing." Information at 1. The minor testified Johnson came into her room in the evening after he had been drinking and tried to wake her up by touching her arm and then the side of her body. Johnson left after she didn't get up, but he returned and tried to wake her up again by flashing the light on his phone and touching her side again. The minor testified that Johnson touched her over her clothes, and had never touched her under her clothes before. After Johnson left the room, the minor packed her bags because she believed Johnson was going to come back into the room and touch her underneath her clothes. The minor clarified that Johnson had never touched her under her clothes but she was "thinking negative." Tr. 216. The minor testified that she left home, got a ride to Kagman, and eventually met up with her friend Roman Babauta ("Babauta") at the basketball court.

¶ 8 The prosecution elicited testimony from the minor regarding a conversation she had with DYS social worker Melycher Sablan ("Sablan"). The minor testified that she told Sablan when Johnson had come home he sounded drunk, he came into her room several times and touched her side, over her clothes, and she thought Johnson was "going to do something to [her] when he kept coming in the room more than twice." *Id.* at 234–35.

¶ 9 Babauta testified about his encounter with the minor at the basketball court. He described the minor as a close friend who he met through text messaging on the phone. However, the first time he met her in person was at the basketball court after she had run away from home. He testified that the minor said her mom's boyfriend "would come home drunk . . . and he would do things." *Id.* at 118. Babauta testified that the minor's mom's boyfriend would do "uncomfortable things" like "touching hands." *Id.* at 118–19.

¶ 10 The jury convicted Johnson of Count II, Sexual Abuse of a Minor in the Second Degree and Count I, Attempted Sexual Abuse of a Minor in the Second Degree. The court also found Johnson guilty of Count III, Assault and Battery, and Counts IV and V, Disturbing the Peace. In total, Johnson was sentenced to serve ten years imprisonment along with five years suspended.[2]

¶ 11 Johnson now appeals.

II. JURISDICTION

¶ 12 We have jurisdiction over final judgments and orders issued by the Superior Court. NMI CONST. art. IV, § 3. Johnson timely appealed. We therefore have jurisdiction.

III. STANDARDS OF REVIEW

¶ 13 Johnson argues the trial court erred by admitting several hearsay statements. Admission of alleged hearsay is reviewed for abuse of discretion. *Commonwealth v. Taitano*, 2005 MP 20 ¶ 16. Unpreserved evidentiary issues are reviewed for plain error. NMI R. EVID. 103(d); NMI R. CRIM. P. 52(b). Johnson further asserts the court erred by failing to provide a limiting instruction for fresh complaint evidence. Because he failed to object at trial, we review for plain error. *Commonwealth v. Quitano*, 2014 MP 5 ¶ 9. Last, Johnson argues cumulative error requires reversal. We review the cumulative impact of errors de novo. *Commonwealth v. Cepeda*, 2014 MP 12 ¶ 10.

IV. DISCUSSION

¶ 14 Johnson argues that the trial court erred by admitting several hearsay statements that do not fall within any exceptions to the hearsay rule. More specifically, he asserts the court erred by: (1) admitting prior inconsistent statements not made under oath concerning the alleged sexual abuse in 2009, and (2) prior statements made to a social worker. He also argues the court erred by failing to provide a fresh complaint limiting jury instruction. Alternatively, he asserts cumulative error requires reversal.

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[2] The court sentenced Johnson to ten years, all suspended except eight for Count II; and five years, all suspended except two for Count I, to be served consecutive with the sentence in Count II. *Commonwealth v. Johnson*, No. 12-0157(E) (NMI Super. Ct. July 22, 2013) (Sentence and Commitment Order at 3) [hereinafter Sentence and Commitment Order]. The court further sentenced Johnson to one year incarceration for Count III, to run concurrent with the sentences in Counts I and II, and six months each for Counts IV and V, to run concurrent with the sentences in Counts I and II. *Id.* at 3–4.

A. Alleged Sexual Abuse in 2009

¶ 15 Johnson argues the trial court erred by admitting the minor's hearsay testimony regarding her conversations with Fitial, a police officer, and her mother concerning the alleged sexual abuse in 2009. Johnson objected for hearsay when the minor testified as to her conversation with Fitial. Thus, we review for abuse of discretion. *Taitano*, 2005 MP 20 ¶ 16. However, he did not object for hearsay when she testified regarding conversations with her mother and the police officer. Consequently, we review those claims for plain error. NMI R. EVID. 103(d); NMI R. CRIM. P. 52(b). When reviewing for plain error we must evaluate alleged errors against the record as a whole "so as 'not to extract from episodes in isolation abstract questions of evidence and procedure.'" *Commonwealth v. Rabauliman*, 2004 MP 12 ¶ 25 (quoting *Commonwealth v. Saimon*, 3 NMI 365, 381 (1992)) (reviewing prosecutor's allegedly improper statements for plain error). Accordingly, we will review each alleged hearsay error before assessing the overall prejudicial impact. *See id.* ("we shall review each statement in its context so that we can understand more clearly its intended meaning and what harm, if any, came as a result").

¶ 16 Johnson asserts the statements were not admissible as prior inconsistent statements made under oath pursuant to NMI R. EVID. 801(d)(1)(A). A prior statement made by a witness is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." NMI R. EVID. 801(d)(1)(A).

¶ 17 The minor testified that Johnson did not touch her inappropriately on May 17, 2009, and she lied to her mother the next day when she said he had touched her. Later in direct examination, the prosecution sought to elicit the minor's testimony regarding a conversation she had with Fitial at the prosecutor's office by asking "what did you tell to Keola happened on the day you were cooking rice?" Tr. 201. After the minor referenced a document to refresh her memory, she testified extensively regarding her recitation to Fitial of the alleged events of May 17, 2009—that Johnson called her into the room and asked her to touch him and he then held her hand and used it to rub his penis.

¶ 18 While the minor's testimony regarding her conversation with Fitial was inconsistent with her earlier testimony that Johnson had not touched her, the conversation with Fitial was not "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." NMI R. EVID. 801(d)(1)(A). Except under very limited circumstances, statements given to investigating officials do not qualify as being made at a proceeding under Rule 801(d)(1)(A). *United States v. Livingston*, 661 F.2d 239. 242–43 (D.C. Cir. 1981) (noting that *United States v. Castro-Ayon*, 537 F.2d 1055 (9th Cir. 1976) offered the single exception, where a federal agent conducted a sworn, and essentially prosecutorial, interrogation at a Border Patrol station); *accord*,

e.g., *United States v. Tavares*, 512 F.2d 872, 875 (9th Cir. 1975) (prior inconsistent statement made to FBI officer held to be hearsay); *United States v. Ragghianti*, 560 F.2d 1376, 1380–81 (9th Cir. 1977) (same). Thus, the minor's testimony was inadmissible hearsay to the extent that it was offered as substantive proof that Johnson touched her.

¶ 19 As to the minor's testimony regarding what she told the responding police officer and what she told her mother, Johnson did not make a hearsay objection to this testimony. Rather, Johnson objected for "asked and answered," and leading questions. Accordingly, we review for plain error. *See Commonwealth v. Xiao*, 2013 MP 12 ¶ 71 (reviewing for plain error where appellant objected for lack of foundation but presented hearsay argument on appeal). When reviewing for plain error, we determine whether there "was an error that was plain and affected [the defendant's] substantial rights." *Commonwealth v. Salasiban*, 2014 MP 17 ¶ 10. We then have discretion to remedy a plain error, 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 (2009)).

¶ 20 A court errs by deviating "from a legal rule that has not been intentionally relinquished or abandoned by the appellant." *Id.* ¶ 11. "The error is plain if it is not subject to reasonable dispute at the time we review the error." *Id.* (citations omitted).

¶ 21 The minor testified that she told her mother Johnson held her by the waist, asked her to follow him into a room, and then asked her to touch his penis. As to what the minor told the police officer, she testified:

> I made it short, I told the officer that my dad was making—my dad made me touch him and that I told my mom the next morning and she told me to just go to school and she's going to call the cops and then I didn't feel like talking about it so the officer talked to my mom more than he talk to me.

Tr. 208. Like the minor's conversation with Fitial, these statements are hearsay because they are out-of-court statements offered as proof of Johnson's guilt and do not concern statements the minor made "under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." NMI R. EVID. 801(d)(1)(A); *see supra* ¶ 18. Thus, admitting the minor's hearsay testimony was erroneous and such error was plain or obvious.

¶ 22 An error affects a defendant's substantial rights if "there is a 'reasonable probability' it affected the outcome of the proceeding." *Salasiban*, 2014 MP 17 ¶ 11. The Commonwealth contends there was ample non-hearsay evidence supporting the Sexual Abuse of a Minor in the Second Degree charge because the minor demonstrated how she used her hand to touch Johnson's penis. The Commonwealth's argument is unavailing. First, a demonstration can be hearsay because nonverbal conduct intended as an assertion is subject to the hearsay rule. NMI. R. EVID. 801(a)(2); *see also* FED. R. EVID. 801, advisory

committee's notes ("Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement."). Second, the minor's demonstration concerned the content of her conversation with Fitial. Thus, the demonstration was hearsay and inadmissible to prove the minor touched Johnson's penis.

¶ 23 Contrary to the Commonwealth's assertion, there was little evidence of the alleged sexual abuse other than the minor's inadmissible hearsay statements to Fitial, the police officer, and her mother.[3] Furthermore, the court's erroneous admission of hearsay evidence was exacerbated by a jury instruction directing the jury to consider prior inconsistent statements as proof of the truth of the matter asserted:

> Evidence that at some other time, a witness made a statement or statements that is or are inconsistent or consistent with his or her testimony in this trial may be considered by you, not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on that former occasion.

Tr. 412. Although prior inconsistent statements not made under oath may be permissible for impeachment purposes, *see Cepeda*, 2014 MP 12 ¶ 33 (noting hearsay rules concern admission of evidence for truth of the matter asserted); *Ragghianti*, 560 F.2d at 1381 (describing the difference between using prior inconsistent statements for impeachment purposes and for proving underlying facts), admitting such statements without a proper limiting instruction can be highly prejudicial. For instance, in *Bartley v. United States*, the trial court admitted a witness's prior inconsistent statement without a proper limiting instruction. 319 F.2d 717, 719–20 (D.C. Cir. 1963). The D.C. Circuit Court of Appeals found reversible plain error, noting "[w]ithout the protection of an admonition or instruction from the court to the latter end, we cannot say that the jury did not give weight, when it was not entitled to do so, to the prior written statement and [felt] itself free to choose between the conflicting versions." *Id.* at 720. Here, a jury instruction was given explicitly authorizing the use of crucial evidence for an impermissible purpose. Under these circumstances, we conclude there is a reasonable probability that admission of the minor's hearsay testimony affected the outcome of the proceeding

¶ 24 Reversal of Johnson's convictions on counts II, Sexual Abuse of a Minor in the Second Degree; III, Assault and Battery; and V, Disturbing the Peace is warranted because the errors in this case "seriously affected the fairness,

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[3] In the 2009 DYS Report that was published as a past recollection recorded, the minor briefly stated Johnson had touched her underneath her clothing five times over the previous several months, the most recent of instances was on May 17, 2009. Even assuming its admissibility, the report provides a mere scintilla of evidence supporting Johnson's convictions as compared to the substantial and repeated allegations in the inadmissible hearsay testimony.

integrity, or public reputation of judicial proceedings." *Salasiban*, 2014 MP 17 ¶ 27. Here, the trial court erroneously admitted several hearsay statements elicited for the purpose of proving that Johnson caused the minor to touch his penis in 2009. In the absence of this hearsay testimony, there is a dearth of evidence supporting Johnson's convictions. Moreover, the Commonwealth made multiple lengthy references to the erroneously admitted hearsay testimony during closing arguments, thereby highlighting the testimony's importance to the Commonwealth's case and exacerbating the effect of the error. *See Livingston*, 661 F.2d at 243 (noting the importance of erroneously admitted prior inconsistent statements and prejudicial impact where the government emphasized the testimony during closing argument). As a consequence of these convictions, Johnson was sentenced to ten years, two of which were suspended, and one year and six month sentences to be served concurrently. In light of the serious consequence of these errors, we conclude reversal of Johnson's convictions is necessary.[4]

B. Alleged Attempted Sexual Abuse in 2012

¶ 25 We next address two of Johnson's arguments pertaining to the alleged attempted sexual abuse in 2012—that the trial court erred by: (1) failing to provide a limiting instruction pertaining to Babauta's fresh complaint evidence and (2) admitting hearsay statements the minor made to DYS social worker Sablan. Because Johnson did not object at trial, we review for plain error. *See Quitano*, 2014 MP 5 ¶ 9; NMI R. CRIM. P. 52(b); NMI R. EVID. 103(d).

1. Fresh Complaint Testimony

¶ 26 First, Johnson argues the trial court erred by failing to issue a limiting instruction relating to Babauta's fresh complaint testimony. Under the fresh complaint doctrine, an "an out-of-court complaint seasonably made by the complainant in a sexual [offense] case [may] be admitted as part of the prosecution's case-in-chief." *Commonwealth v. Sanchez*, 2014 MP 3 ¶ 26 (quoting *Commonwealth v. King*, 834 N.E.2d 1175, 1189 (Mass. 2005)) (internal quotation marks omitted). Such "evidence serves the narrow purpose of establishing that the victim complained at a certain time, rather than for corroboration purposes." *Id.* (citing *State v. W.B.*, 17 A.3d 187, 204 (N.J. 2011)). Courts permit fresh complaint evidence "to dispel any erroneous inference that the victim was silent, but not as proof of the truth of the content of the victim's statement." *Id.* (quoting *People v. Brown*, 883 P.2d 949, 955 (Cal. 1994)) (internal quotation marks omitted).

¶ 27 Here, the Commonwealth offered Babauta as a fresh complaint witness regarding the alleged sexual abuse attempt on June 23, 2012. Babauta testified that he met with the minor on June 24, 2012, and she told him that her mom's

[4] Johnson was sentenced to ten years, all suspended except eight years for Sexual Abuse of a Minor in the Second Degree, one year to be served concurrently for Assault and Battery, and six months to be served concurrently for Disturbing the Peace.

boyfriend "would come home drunk . . . and he would do things." Tr. 118. Babauta clarified that she said her mom's boyfriend would do "uncomfortable things" like "touching hands." *Id.* at 118–19. The trial court did not give a limiting instruction regarding Babauta's testimony.

¶ 28 Because of the limited purpose for which fresh complaint evidence serves, many jurisdictions hold that trial courts should issue limiting instructions. *See, e.g.*, *State v. Daniels*, 388 N.W.2d 446, 450 (Neb. 1986) (because fresh complaint evidence is not admissible for substance, limiting instruction should be given); *State v. Blohm*, 281 N.W.2d 651, 652–53 (Minn. 1979) (defendant would have been entitled to instruction limiting fresh complaint evidence for corroborative purposes only); *King*, 834 N.E.2d at 1181 (fresh complaint evidence cannot serve as proof of sexual assault and limiting instruction must be given contemporaneously with testimony and again during final jury instructions); *State v. Bethune*, 578 A.2d 364, 369 (N.J. 1990) (limiting instructions should be given explaining that fresh complaint evidence does not prove underlying truth of charges). Likewise, we conclude that a limiting instruction is necessary when fresh complaint evidence is introduced. Absent a limiting instruction, there is a substantial danger that testimony permitted under the fresh complaint doctrine will be considered for the truth of the matter asserted. *See Brown*, 883 P.2d at 959–60 (noting that courts should exercise caution in admitting fresh complaint evidence because "even with a proper limiting instruction, a jury may well find it difficult not to view these details as tending to prove the truth of the underlying charge of sexual assault"). Thus, the trial court erred by failing to issue a limiting instruction regarding Babauta's fresh complaint testimony and such error was plain.[5]

¶ 29 However, Johnson does not demonstrate there was a reasonable probability that this error affected the outcome of the proceeding. "Substantial rights are not affected if the erroneously admitted evidence is merely corroborative or cumulative of other evidence in the record." *Commonwealth v. Leon Guerrero*, 2013 MP 3 ¶ 9. Babauta's testimony was duplicative to the testimony of the minor and Sablan to the extent it indicated Johnson touched the minor the night before. Although Babauta added that Johnson "would come home drunk . . . and he would do things," and that the minor's mom's boyfriend would do "uncomfortable things" like "touching hands," Tr. at 118–19, we are not persuaded his testimony, by itself, affected the outcome of the proceeding.

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[5] We note that the traditional application of the fresh complaint doctrine "has been criticized by numerous legal scholars and commentators because modern thinking and empirical studies have discredited its underlying stereotypical rationale that each victim responds to sexual violations promptly and in the same manner." *Sanchez*, 2014 MP 3 ¶ 26 n.12 (citing *Brown*, 883 P.2d at 950). Nevertheless, many jurisdictions retain the doctrine for various reasons. *Id.* Because the parties do not brief the issue, we decline to address whether fresh complaint evidence should be inadmissible altogether or whether the Commonwealth should adopt a modified fresh complaint doctrine.

Accordingly, we conclude the trial court's failure to order a limiting instruction was not plain error warranting reversal.[6]

2. Hearsay Statements Made to Sablan

¶ 30 Second, Johnson contends the court erred by admitting the minor's hearsay testimony regarding her conversation with Sablan. That testimony concerned why the minor ran away from home after the alleged attempted sexual abuse in June 2012. The minor testified she told Sablan that Johnson sounded drunk when he came home and he came into her room several times. She told Sablan that Johnson touched her on the side, over her clothes, and that she thought he was "going to do something to [her]." Tr. 234. When Sablan asked whether the minor felt safe to go home, she responded in the negative. *Id.*

¶ 31 Here, the minor's testimony was inadmissible hearsay to the extent that it was elicited to prove the truth of the matter asserted—that Johnson came into her room and touched her several times on June 23, 2012. The Commonwealth contends that the testimony was admissible under NMI R. EVID. 803(3) because it concerned the minor's then-existing mental condition and gave context to why the minor ran away from home in 2012. The Commonwealth asserts "[t]he purpose of the statements are not to discuss an out of court statement, but to discuss what she saw that night, what she heard that night, what she felt that night, and why she decided to run away." Response Br. at 11.

¶ 32 In *Commonwealth v. Cepeda*, the trial court admitted testimony regarding a conversation that led the defendant's father to inform the police that the defendant was involved in a homicide. 2009 MP 15 ¶¶ 2–3, 19. The Commonwealth asserted the testimony was admissible as demonstrating the effect of the conversation on the father's state of mind and as explaining the origins of the police investigation. *Id.* ¶ 19. We concluded the testimony was wrongfully admitted because the father's state of mind and the origin of the police investigation was irrelevant to the charges against the defendant. *Id.* ¶ 21. Rather, the testimony's only value regarded the truth of the matter asserted—to implicate the defendant in the criminal conduct. *Id.*

¶ 33 Likewise, we conclude the trial court wrongly admitted the minor's testimony regarding her conversation with Sablan. Here, the Commonwealth does not clearly articulate why the minor's state of mind when she decided to

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[6] Johnson also argues the trial court erred by admitting fresh complaint evidence without adequate foundation. We have previously noted that the traditional prerequisites for fresh complaint evidence are that "(1) a person volunteer the information in a complaint and (2) the complaint be recent." *Sanchez*, 2014 MP 3 ¶ 26 (citing *Brown*, 883 P.2d at 950). Johnson asserts that a fresh complaint must also be made to someone to whom the complainant would normally turn to for support. However, we need not reach this claim. Because Johnson did not object for foundation at trial, we would review for plain error. Assuming we agreed with Johnson's assertion that foundation was lacking, under plain error review we would conclude Johnson was not prejudiced by the error. *See supra* ¶ 29.

run away from home was a relevant issue in this case. Instead, the only purpose of the testimony was to provide evidence that Johnson entered the minor's room repeatedly and touched her several times. Thus, the trial court plainly erred by admitting the minor's hearsay testimony.

¶ 34 However, we conclude the error did not affect Johnson's substantial rights because there is not "a 'reasonable probability' [the error] affected the outcome of the proceeding." *Salasiban*, 2014 MP 17 ¶ 11. The minor's own testimony regarding the June 23, 2012 incident was substantially duplicative of her conversation with Sablan. *See Leon Guerrero*, 2013 MP 3 ¶ 9 (substantial rights not affected when inadmissible evidence was cumulative). Thus, the admission of the minor's testimony regarding her conversation with Sablan was not plain error.

3. Cumulative Error

¶ 35 Last, we consider Johnson's assertion that reversal of his remaining convictions is warranted under the cumulative error doctrine.[7] Where "no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *Commonwealth v. Camacho*, 2002 MP 6 ¶ 120. When there are numerous trial errors, "'a balkanized, issue-by-issue harmless error review' is far less effective then analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." *Id.* (quoting *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996)). We consider all errors, including both preserved errors and plain errors, and will reverse "if it is more probable than not that, taken together, the errors materially affected the verdict." *Cepeda*, 2009 MP 15 ¶ 46.

¶ 36 In *Camacho*, we concluded reversal for cumulative error was unnecessary when the Commonwealth had made several improper remarks during closing arguments, noting that "[t]he portions of the trial most critical to fair deliberations, the presentation of evidence and jury instructions, were untainted." 2002 MP 6 ¶ 123. In *Cepeda*, however, we reversed for cumulative error when the trial court erroneously admitted hearsay and character evidence and gave faulty jury instructions. 2009 MP 15 ¶ 47. We distinguished *Camacho* because "Cepeda was repeatedly prejudiced by admission of testimony during the Commonwealth's case-in-chief," and improper jury instructions "prejudiced [his] overall fair trial right." *Id.*

¶ 37 Similarly, Johnson was "repeatedly prejudiced by admission of testimony during the Commonwealth's case-in-chief." *Id.* As to the charges relating to Johnson's conduct in 2012, both Babauta's testimony and the minor's testimony regarding her conversation with Sablan was hearsay to the extent offered to prove the truth of the matter asserted and Babauta's testimony was not limited by a fresh complaint instruction. The impact of Babauta's

[7] The remaining convictions are for Attempted Sexual Abuse of a Minor in the Second Degree and Disturbing the Peace, arising out of Johnson's alleged conduct in 2012.

testimony was compounded by the Commonwealth's emphasis in closing arguments that the minor told Babauta that Johnson came into her room and touched her. *See supra* ¶ 24. The Commonwealth asserted that the minor described these touches to Babauta as "uncomfortable touches," and it argued that such touches were not for the purpose of awakening her. Moreover, the erroneous admission of graphic hearsay testimony regarding Johnson's alleged conduct in 2009, combined with improper jury instructions directing the jury to consider prior inconsistent statements as substantive evidence, further prejudiced his overall right to a fair trial. *See Cepeda*, 2009 MP 15 ¶ 47 (noting erroneously admitted testimony from a detective was "particularly prejudicial," despite the court's cautionary instruction, because of the detailed and graphic recounting of facts and the detective's credibility). Because it is more probable than not that the cumulative impact of multiple trial errors materially affected the outcome of the proceeding, we conclude reversal of Johnson's convictions on Count I, Attempted Sexual Abuse of a Minor in the Second Degree and Count IV, Disturbing the Peace is warranted under the cumulative error doctrine.

V. CONCLUSION

¶ 38 We conclude reversal of Johnson's convictions for Sexual Abuse of a Minor in the Second Degree, Assault and Battery, and Disturbing the Peace, arising out of the alleged incident in 2009 is necessary because the trial court plainly erred by admitting several hearsay statements. Furthermore, Johnson's convictions for Attempted Sexual Abuse of a Minor in the Second Degree and Disturbing the Peace concerning the alleged conduct in 2012 must be reversed under the cumulative error doctrine. Accordingly, we VACATE Johnson's convictions and REMAND for a new trial.

SO ORDERED this 30th day of December, 2015.

/s/
JOHN A. MANGLONA
Associate Justice

/s/
TIMOTHY H. BELLAS
Justice Pro Tem

CAMACHO, J.P.T., concurring:

¶ 39 I agree with the majority that the trial court's failure to issue a limiting instruction for fresh complaint evidence constitutes reversible error, I would further hold that the fresh complaint evidence is inadmissible altogether. Under the fresh complaint doctrine, the prosecution can introduce evidence of an alleged sexual assault victim's out-of-court complaint for the limited purpose of "establishing that the victim complained at a certain time, rather than for corroboration purposes." *Commonwealth v. Sanchez*, 2014 MP 3 ¶ 26 (citing *State. v. W.B.*, 17 A.3d 187, 204 (N.J. 2004)). The traditional justification for fresh complaint evidence is that a sexual assault victim will "naturally be compelled to report the incident promptly and a failure to report" will trigger the fact-finder's suspicion; thus, such evidence can "repel the inference that the victim's story is a fabrication." Dale Joseph Gilsinger, Annotation, *Application of the Common-Law "Fresh Complaint" Doctrine as to Admissibility of Alleged Victim's Disclosure of Sexual Offense—Post-1950 Cases*, 39 A.L.R.6th 257 (2013). Fresh complaint evidence is generally used "to dispel any erroneous inference that the victim was silent, but not as proof of the truth of the content of the victim's statement." *Sanchez*, 2014 MP 3 ¶ 26 (citing *People v. Brown*, 883 P.2d 949, 955 (Cal. 1994)).

¶ 40 The fresh complaint doctrine "has been criticized by numerous legal scholars and commentators because modern thinking and empirical studies have discredited its underlying stereotypical rationale that each victim responds to sexual violations promptly and in the same manner." *Id.* ¶ 26 n.12 (citing *Brown*, 883 P.2d at 950). There is no "normal" response to a sexual assault—victims' responses can vary significantly. In my view, the continued application of the fresh complaint doctrine reinforces the false assumption that victims will promptly complain of sexual assaults. I am concerned that victims who do not immediately complain of sexual offenses may be placed at an evidentiary disadvantage to those who complain of the sexual assault immediately after the incident.

¶ 41 Further, the Commonwealth has written law concerning the introduction of evidence, the hearsay rule, exceptions to hearsay, and special rules of evidence in cases of sexual assault and child molestation. *See* NMI R. EVID. 412–14, 801(d)(1)(B), 802–04. The Commonwealth Rules of Evidence contain no provision for the fresh complaint doctrine. Although the majority states that fresh complaint evidence is not substantive evidence, and that the trial court must issue a limiting instruction, I would go further and hold that fresh complaint evidence is inadmissible for all purposes.

¶ 42 In summary, I would outright reject the fresh complaint doctrine as it is not based on any statutory authority. The fresh complaint doctrine is based upon an antiquated, outdated and incorrect view that sexual assault victims all respond the same way to being sexually assaulted. To ensure equal and solid evidentiary foundation, trial courts have broad discretion to exclude fresh complaint testimony. If a trial court allows a fresh complaint witness to testify

to non-substantive evidence then a limiting instruction must be given at the time the witness testifies and again at the close of all the evidence.

¶ 43 I join in all other aspects of the majority's opinion.

DATED this 30th day of December, 2015.

/s/
JOSEPH N. CAMACHO
Justice Pro Tem