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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

AMBROSIO T. OGUMORO,
Defendant-Appellant.

Supreme Court No. 2016-SCC-0016-CRM

Superior Court No. 12-0134

ORDER DENYING RULE 9 MOTION FOR REVIEW

Cite as: 2016 MP 9

Decided July 22, 2016

Daniel T. Guidotti, Saipan, MP for Defendant-Appellant.

George L. Hasselback, Saipan, MP for Plaintiff-Appellee.

BEFORE: JOHN A. MANGLONA, Associate Justice; ROBERT J. TORRES, Justice Pro Tem; F. PHILIP CARBULLIDO, Justice Pro Tem.

MANGLONA, J.:

¶ 1 Defendant-Appellant Ambrosio T. Ogumoro ("Ogumoro") seeks review of the trial court order denying his motion for release pending appeal. He asserts the trial court misapplied the legal standard to evaluate whether he raised "a substantial question of law or fact likely to result in reversal or in an order for a new trial." NMI SUP. CT. R. 9(c). For the following reasons, we DENY his motion.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 Ogumoro was charged with fifteen criminal counts for his role in a conspiracy to prevent former Attorney General Edward Buckingham ("Buckingham") from being served with penal summons on August 3 and 4, 2012. In particular, Ogumoro was charged with appropriating the services of the Department of Public Safety ("DPS"), including the use of DPS personnel and government vehicles, to provide Buckingham an armed escort to the airport, thereby preventing him from being served with penal summons.

¶ 3 At trial, Juanette David-Atalig ("David-Atalig"), a former investigator for the Office of the Public Auditor ("OPA"), testified that she approximated the value of services Ogumoro appropriated as exceeding $250. According to David-Atalig, DPS does not generally provide armed escorts to evade penal summons; therefore, she considered the pay rate of the two DPS officers for four hours each and the daily rental value of the three SUV's used in the escort. She provided inconsistent testimony as to the availability of car rentals for periods of less than one day—first she noted that one of three vendors offered half-day rentals, but later she testified that no vendors offered rentals for less than one day. However, she concluded the value of services certainly exceeded $250.

¶ 4 The jury convicted Ogumoro of Theft of Services and Conspiracy to Commit Theft of Services and the court convicted him of five counts of Misconduct in Public Office, and one count each of Obstructing Justice and Criminal Coercion. The court subsequently sentenced Ogumoro to serve one year imprisonment beginning April 13, 2016, and fined him a total of $3,500.

¶ 5 On April 8, Ogumoro sought release pending his appeal and a stay of execution of his sentence. The court set an expedited briefing scheduled and set a hearing on the motion for April 13. Consistent with the sentencing order, Ogumoro reported to Department of Corrections to begin serving his sentence on April 13. The trial court denied his motion for release on April 25. Ogumoro now seeks review of the trial court's decision, pursuant to NMI Supreme Court Rule 9.

II. DISCUSSION

¶ 6 Ogumoro raised four issues in his trial court motion for release pending appeal: (1) there was insufficient evidence for the jury to convict him of Theft of Services and Conspiracy to Commit Theft of Services, (2) alleged coconspirator statements were inadmissible hearsay, (3) the Commonwealth failed to establish that an OPA investigator was a law enforcement officer, and (4) his failure to assist OPA in serving penal summons did not constitute Misconduct in Public Office. The trial court ruled against him as to each of the four issues. Pursuant to NMI Supreme Court Rule 9(b), he seeks review of the trial court's order. In his motion, he argues the court misapplied the standard for granting release and erroneously determined it need not consider his argument that the potential for mootness weighs in favor of granting release

¶ 7 Under NMI Supreme Court Rule 9(b), a party may seek review of the trial court's order regarding post-judgment release pending appeal. To be entitled to release, the defendant must establish "that he or she will not flee or pose a danger to any other person or to the community and that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial." NMI SUP. CT. R. 9(c). Here, the trial court found Ogumoro was not likely to flee or pose a danger and that the appeal was not for the purpose of delay. Nevertheless, it denied Ogumoro's motion for release because it determined each of his four arguments failed to raise "a substantial question of law or fact likely to result in reversal or an order for a new trial." *Commonwealth v. Ogumoro*, Crim. No. 12-0134 (NMI Super. Ct. Apr. 25, 2016) (Order Den. Defs.' Am. Mot. for Stay Pending Appeal at 1).

¶ 8 Whether a defendant raises "a substantial question of law or fact likely to result in reversal" or a new trial involves a two-pronged analysis. First, whether a question is "substantial" pertains to the merit of the question presented. *United States v. Handy*, 761 F.2d 1279, 1280 (9th Cir. 1985).[1] "A 'substantial question' of law is one that is 'fairly debatable' or 'doubtful.'" *Commonwealth v. Blas*, 2004 MP 26 ¶ 8 (quoting *Handy*, 761 F.2d at 1283). In other words, "a 'substantial question' is one of more substance than would be necessary to a finding that it was not frivolous." *Handy*, 761 F.2d at 1283 (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)). Second, the requirement that the question raised be one "likely to result in reversal" or a new trial relates to the type of question defendant raises. *Handy*, 761 F.2d at 1280. The reviewing court does not evaluate the likelihood of success on the merits; rather, the court considers whether the question is the type that, if answered in favor of the defendant, warrants reversal or a new trial.[2] *Id*. Thus, a

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[1] Because NMI Supreme Court Rule 9(c) is patterned after Federal Rule of Appellate Procedure 9(c), federal case law interpreting the federal rule provides useful guidance. *See Commonwealth v. Blas*, 2004 MP 26 ¶¶ 4–5, 8 (examining federal case law interpreting Federal Rule of Appellate Procedure 9(c)).

[2] The defendant need not demonstrate success on the merits of the appeal is likely. Indeed, such a showing would be peculiar in light of the requirement that the request

defendant is not entitled to release by raising a substantial question pertaining to harmless or non-prejudicial errors. *United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985).

A. Sufficiency of Evidence

¶ 9 Ogumoro asserts there was insufficient evidence supporting his convictions for Theft of Services and Conspiracy to Commit Theft of Services because David-Atalig failed to provide a clear basis for her conclusion that the value of services Ogumoro appropriated exceeded $250. Theft of Services occurs when a person has "control over the disposition of services of others to which the person is not entitled, [and] that person knowingly diverts those services to his or her own benefit or to the benefit of another not entitled to it." 6 CMC § 1607(b). Theft of Services is punishable under 6 CMC § 1601(b), which provides for imprisonment not exceeding one year when the value of services is less than $250, and imprisonment not exceeding five years when the value is less than $20,000 but at least $250. 6 CMC §§ 1601(b)(1)–(2). Ogumoro further asserts that reversal on these counts would also justify reversal of Counts II and IV for Misconduct in Public Office because the misconduct counts arose from the Theft of Services and Conspiracy to Commit Theft of Services convictions.

¶ 10 When considering the sufficiency of the evidence, we view "the evidence in the light most favorable to the prosecution to determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Commonwealth v. Fitial*, 2015 MP 15 ¶ 15 (quoting *Commonwealth v. Caja*, 2001 MP 6 ¶ 3) (internal quotation marks omitted). To preserve a sufficiency of the evidence argument, the defendant must file a motion for judgment of acquittal under NMI Rule of Criminal Procedure 29. *Fitial*, 2015 MP 15 ¶ 15 (citing *United States v. Carranza*, 289 F.3d 634, 641 (9th Cir. 2002)).

¶ 11 Here, the trial court concluded Ogumoro did not establish that his sufficiency of the evidence arguments were likely to result in reversal because of his failure to preserve the issue for appeal. Though there are federal cases indicating reversal or a new trial is not likely because of defendant's failure to preserve an issue for appeal, *see e.g.*, *Miller*, 753 F.2d at 23 ("A question of law or fact may be substantial but may, nonetheless, in the circumstances of a particular case, be considered harmless, to have no prejudicial effect, or to have been insufficiently preserved."), we conclude failure to preserve a sufficiency claim is an insufficient ground to deny his motion for release. In considering whether reversal or a new trial is likely, the critical inquiry is whether Ogumoro would be entitled to reversal or a new trial should he prevail on the sufficiency

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be first made at the trial court because it would demand "the defendant to demonstrate to the [trial] court that its ruling is likely to result in reversal." *Handy*, 761 F.2d at 1281. This would be "tantamount to requiring the [trial] court to certify that it believes its ruling to be erroneous." *Id.*

claim. *Handy*, 761 F.2d at 1280. Although Ogumoro failed to preserve his sufficiency of the evidence argument, his claim would nevertheless be reviewable for plain error. *Fitial*, 2015 MP 15 ¶ 15. However, because there is little practical impact between de novo and plain error review in the context of a challenge to the sufficiency of the evidence, *e.g.*, *United States v. Kaipat Pelisamen*, 641 F.3d 399, 409 n.6 (9th Cir. 2011) ("the distinction is largely academic, given that, whether review is de novo or for plain error, we must give great deference to the jury verdict and 'must affirm if any rational trier of fact could have found the evidence sufficient.'" (quoting *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1010 (9th Cir. 1995)), Ogumoro's failure to preserve his sufficiency claim does not affect the likelihood of reversal or a new trial.

¶ 12 Notwithstanding this error, we conclude Ogumoro fails to carry his burden of demonstrating a substantial question of law or fact because we are not persuaded by his claim that David-Atalig failed to sufficiently support her conclusion that the value of stolen services exceeded $250. NMI SUP. CT. R. 9(c); *see also United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985) (defendant bears burden of satisfying criteria for bail pending appeal under federal statute).[3] When reviewing for sufficiency of the evidence, we "must respect the exclusive province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts, by assuming that the jury resolved all such matters in a manner which supports the verdict." *Commonwealth v. Castro*, 2007 MP 9 ¶ 11 (citing *United States v. Ramos*, 558 F.2d 545, 546 (9th Cir. 1977)). David-Atalig testified that she could not ask DPS what would be the value of a protective detail to avoid service of penal summons because DPS does not provide such services. Instead, she considered the hourly pay for two DPS officers over four hours and the average daily rental rate for three SUV's of $80 each. Her testimony regarding the SUV rental was contradictory—first she testified that one of the three vendors offered half-day rentals, but later she testified that she could not find any place that rented SUV's for less than a day. However, she concluded the value of the three SUV's was about $240, and the total value of services "was definitely over $250." *Commonwealth v. Ogumoro*, Crim. No. 12-0134 (NMI Super. Ct. Jan. 20, 2016) (Audio Tr. at 1:36). Although her testimony was not entirely consistent, David-Atalig provided the jury the basis for her valuation of a service that was not readily available to the public. Furthermore, David-Atalig was available for cross examination, but Ogumoro failed to ask any questions regarding her valuation of the appropriated services. Consequently, we conclude Ogumoro failed to raise a substantial question of law or fact as to the sufficiency of the evidence supporting his convictions for Theft of Services and Conspiracy to Commit Theft of Services.

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[3] "[Q]uestions of the sufficiency or admissibility of evidence are rarely considered to be 'substantial' for purposes of the statute." *United States v. Butler*, 704 F. Supp. 1351, 1353 (E.D. Va. 1989); *accord United States v. Colletta*, 602 F. Supp. 1322 (E.D. Pa. 1985).

B. Coconspirator Statements

¶ 13 Ogumoro also contends the court erred by admitting alleged coconspirator statements, which relate to all nine counts for which he was sentenced to imprisonment. A statement that is "offered against an opposing party" and "made by the party's coconspirator during and in furtherance of the conspiracy" is not hearsay. NMI R. EVID. 801(d)(2)(E). This requires the proponent to demonstrate by a preponderance of the evidence that "(1) a conspiracy existed at the time the statement was made; (2) the defendant had knowledge of, and participated in, the conspiracy; and (3) the statement was made in furtherance of the conspiracy." *Commonwealth v. Lucas*, 2003 MP 9 ¶ 10 (citing FED. R. EVID. 801(d)(2)(E) and *Bourjaily v. United States*, 483 U.S. 171, 175 (1987)). Ogumoro asserts the Commonwealth failed to satisfy each of the three elements for admission as coconspirator statements regarding text messages between Buckingham and Governor Fitial, statements made by Governor Fitial to Peter Camacho, and Haejun Park's testimony as to statements made by John Rebuenog.

¶ 14 We conclude Ogumoro's argument regarding alleged coconspirator statements fails to raise substantial questions of law or fact likely to result in reversal or a new trial. Here, he contends that he "intends to challenge all three elements of the Rule 801(d)(2)(E) admission test," as to several unidentified statements made by Buckingham, Governor Fitial, and John Rebuenog. Mot. at 8. This general assertion fails to carry Ogumoro's burden of demonstrating that his hearsay claim will likely result in reversal or a new trial. Ogumoro must establish that if the "substantial question is determined favorably to [him] on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed." *Handy*, 761 F.2d at 1283 (citing *Giancola*, 754 F.2d 901; *Miller* 753 F.2d at 24); *see also Miller*, 753 F.2d at 23 ("A court may find that reversal or a new trial is 'likely' only if it concludes that the question is so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial."). However, he fails to articulate how the hearsay statements relate to any of the nine counts for which he was convicted—he does not demonstrate the erroneous admission of hearsay testimony would be harmful or prejudicial. Thus, he has not shown he would be entitled to reversal or a new trial should this Court decide this issue in his favor on appeal.

¶ 15 Critically, the defendant must demonstrate a reversal would be warranted with regard to each count for which he was sentenced to imprisonment. *Morrison v. United States*, 486 U.S. 1306 (Rehnquist, C.J., in chambers) (denying application for bail pending appeal where defendant failed to raise substantial question "with respect to all the counts for which imprisonment was imposed"); *Handy*, 761 F.2d 1279, 1283 (it must be likely that the substantial question "result in reversal or an order for a new trial of all counts on which imprisonment has been imposed") (citing *Giancola*, 754 F.2d at 901; *Miller*, 753 F.2d at 24). Because we conclude Ogumoro fails to demonstrate a

substantial question as to the sufficiency claim relating to the Theft of Services and Conspiracy to Commit Theft of Services counts and because he fails to show reversal of all counts would be likely as a result of the alleged hearsay error, we need not reach his remaining claims regarding two counts of Misconduct in Public Office and one count of Obstructing Justice.

C. Mootness

¶ 16 Ogumoro also argues the trial court erroneously failed to consider the potential for mootness when evaluating his motion for release. He asserts that because his unsuspended sentence is relatively short, the trial court was required to consider the potential that he may serve his sentence before this Court can issue its decision, thereby rendering his appeal moot.

¶ 17 "The issue of mootness if a stay is not granted pending appeal is one which the court may weigh in to the factors considered under [NMI Supreme Court Rule 9(c)], and may tip the balance in favor of a stay, especially where the likelihood of success on appeal is strongly disputed." *Martinez*, 4 NMI 18, 21 (1993) (citing *United States v. Moore*, 783 F. Supp. 317, 318–19 (S.D. Tex. 1992); *Republican State Cent. Comm. of Ariz. v. Ripon Soc'y Inc.*, 409 U.S. 1222, 1227 (1972); *Barnes v. E-Systems, Inc. Group Hosp. Ins. Plan*, 501 U.S. 1301 (1991); *Corsetti v. Massachusetts*, 458 U.S. 1306, 1307 (1982)). However, "[w]here there is little or no likelihood of success on appeal, mootness would not be an important factor." *Id.* at 21 n.5.

¶ 18 Although Ogumoro may serve his one-year unsuspended sentence before his appeal is resolved, we conclude the potential for mootness does not "tip the balance in favor of a stay" in this case. Simply put, mootness is not an important factor here because he does not demonstrate there is a requisite likelihood of success on appeal.[4] Ogumoro must demonstrate substantial questions of law or fact likely to result in reversal or a new trial as to *each* of his convictions, and the trial court concluded he failed to meet this requirement as to *any* of his convictions. We agree with the trial court as to six of the nine counts for which Ogumoro was sentenced to imprisonment and reserve judgment on the remaining three counts. Accordingly, we conclude mootness does not "tip the balance in favor of a stay." *Id.* at 21.

V. CONCLUSION

¶ 19 For the reasons discussed above, we conclude Ogumoro has not met the burden to establish he is entitled to release pending resolution of the appeal. Accordingly, his motion for review is DENIED.

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[4] In his motion, Ogumoro contends *Martinez* does not require a defendant show a strong likelihood of success on the merits. Instead, he asserts, the likelihood of success must be strongly disputed between the parties. Although the trial court may have misstated the standard, *Martinez* plainly states that mootness is a factor a court *may* weigh, but "[w]here there is little or no likelihood of success on appeal, mootness would not be an important factor." 4 NMI at 21 n.5.

SO ORDERED this 22nd day of July, 2016.

/s/
JOHN A. MANGLONA
Associate Justice

/s/
ROBERT J. TORRES
Justice Pro Tem

/s/
F. PHILIP CARBULLIDO
Justice Pro Tem