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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

ERWIN PAUL TOGAWA,
Defendant-Appellant.

Supreme Court No. 2014-SCC-0011-CRM

Superior Court No. 13-0031A

OPINION

Cite as: 2016 MP 13

Decided October 25, 2016

Mark B. Hanson, Saipan, MP, for Defendant-Appellant.

Leonardo M. Rapadas, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

BEFORE: JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice; TERESA K. KIM-TENORIO, Justice Pro Tem.

INOS, J.:

¶ 1 Defendant-Appellant Erwin Paul Togawa ("Togawa") appeals his conviction of Assault and Disturbing the Peace, arguing the trial court erred by admitting improper hearsay statements and character evidence and by allowing leading questions during direct examination. For the following reasons, we REVERSE Togawa's conviction on both charges and REMAND for a new trial.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 Togawa was charged with one count of Assault and two counts of Disturbing the Peace, arising out of an incident occurring on January 29, 2013.[1] At trial, the court heard testimony from Officer Jonathan Decena ("Decena"), investigator Melissa Bauleong ("Bauleong"), and complainant Michelle Togawa ("Michelle").

A. Decena's Testimony

¶ 3 According to Officer Decena, Michelle went to the police station to file a complaint against Togawa on the morning of January 30, 2012. Decena met Michelle at the front desk of the police station. Decena observed that Michelle was in tears, was speaking in a low tone of voice, and appeared to be afraid. When Decena interviewed her, Michelle disclosed that she was frightened of Togawa because he had threatened her with a knife on January 29.

¶ 4 At trial, the Commonwealth sought to elicit testimony from Decena as to why Michelle was afraid and why she was scared of Togawa. Togawa objected on hearsay grounds. The court overruled his objection, allowing the testimony under NMI Rule of Evidence 803(3) as relating to the declarant's then existing state of mind. Under the same hearsay exception, the court permitted Decena to testify that Michelle told him about Togawa's threats the evening of January 29. Also, over hearsay, lack of personal knowledge, and lack of foundation objections, the court allowed Decena to testify under Rule 803(3) that children were in the home when Togawa threatened Michelle.

B. Bauleong's Testimony

¶ 5 Investigator Bauleong investigated Michelle's complaint and interviewed her within twenty-four hours of the incident. She observed Michelle had puffy eyes and was crying during the interview. As with Decena's testimony, the court overruled Togawa's hearsay and lack of foundation objections and allowed Bauleong to testify under Rule 803(3) that Michelle was afraid of Togawa because he threatened her with a knife. In contrast to Decena,

[1] At trial, there was significant confusion about whether the January incident occurred in 2012 or 2013. Chronologically, it seems obvious that this incident occurred in January of 2013. However, the record on appeal reflects an uncertainty about the relevant dates, which in turn is reflected in this opinion.

Bauleong testified Michelle told her the incident was on January 29, 2013, one year later than Decena's testimony indicated.

C. Michelle's Testimony

¶ 6 The Commonwealth directed Michelle's attention to January 29, 2012, and asked her if she remembered the events of that night. When Michelle replied that she did not exactly recall, the court permitted the Commonwealth to attempt to refresh her recollection with her petition for a temporary restraining order ("petition"). After Michelle reviewed the petition, the Commonwealth asked her if she remembered the events of January 30, 2012–a different date than the witness was initially asked to recall. Again, Michelle replied that she did not recall exactly. The Commonwealth then sought to read the petition into the record as a past recollection recorded. Before reading the petition, the Commonwealth established Michelle's signature was on the petition and it was signed on January 30, 2013.

¶ 7 Togawa objected to the petition being read into the record, asserting a violation of the Confrontation Clause of the United States Constitution. He further objected on hearsay grounds and argued the petition was not created at a time when the recorded events were fresh in Michelle's mind as required for the past recollection recorded hearsay exception to apply. Particularly, he contended there was a one-year discrepancy since the petition was signed on January 30, 2013, while Michelle was asked about January of 2012. After the Commonwealth responded that the petition was executed on January 30, 2012, one day after the incident, the court allowed the petition to be read into the record.

¶ 8 After the petition was read into the record, Michelle confirmed that she remembered making the statement contained in the petition. She further testified that she filed the petition not because she felt threatened by Togawa's actions that night; but rather, she filed the petition and called the police because she wanted to stop their arguments.

¶ 9 The Commonwealth then sought to elicit testimony concerning a prior incident between Togawa and Michelle on May 10, 2012. Togawa objected citing NMI Rule of Evidence 404(b), arguing the Commonwealth was trying to introduce improper character evidence of a prior bad act to show he acted in conformity therewith. He further argued the prejudicial effect of the prior bad act outweighs its probative value under NMI Rule of Evidence 403. The Commonwealth responded that the evidence was admissible under Rule 404(b) to show motive, opportunity, knowledge, and absence of mistake. The court overruled the objections and allowed the testimonies into the record.

¶ 10 After using the petition to refresh Michelle's memory, the Commonwealth asked her a series of questions about the May 2012 incident. When Michelle failed to directly answer six questions the Commonwealth requested permission to ask leading questions, claiming Michelle identified with an adverse party. Over Togawa's objection, the court allowed the

Commonwealth to ask leading questions. The Commonwealth then sought testimony from Michelle regarding a specific statement Togawa made during the May 2012 incident. However, when the Commonwealth sought Michelle's confirmation that Togawa made the statement, Michelle could not recall what was said. Over Togawa's Rule 404(b) objection, the Commonwealth read into the record a portion of the petition in which Michelle reported Togawa said: "If you don't get in the car, I will run you over." Tr. 61.

¶ 11 On cross-examination, Michelle testified that Togawa never used force or violence against her; that on January 29 nothing happened; that on the morning of January 30 she went to DPS to petition for a temporary restraining order because she was emotional; that she never felt threatened, harassed, or annoyed by Togawa; and that she believed Togawa did not want to hurt her.

¶ 12 The court found Togawa guilty of one count each of Assault and Disturbing the Peace but acquitted him of the other count of Disturbing the Peace. The court sentenced him to six months incarceration, all suspended except thirty days.

II. JURISDICTION

¶ 13 We have jurisdiction over Superior Court final judgments and orders. NMI CONST. art. IV, § 3.

III. STANDARDS OF REVIEW

¶ 14 We review preserved evidentiary issues for abuse of discretion, *Commonwealth v. Camacho*, 2002 MP 6 ¶ 48, and unpreserved evidentiary issues for plain error. NMI R. EVID. 103(d); NMI R. CRIM. P. 52(b).

IV. DISCUSSION

A. Then-Existing Mental, Emotional, or Physical Condition

¶ 15 Togawa argues the trial court erred by admitting Decena's and Bauleong's hearsay testimonies that Michelle was afraid because Togawa assaulted her. Over Togawa's hearsay objection, the trial court admitted Decena's and Bauleong's testimonies as statements of Michelle's then-existing mental or emotional condition under NMI Rule of Evidence 803(3). We review admission of alleged hearsay evidence for abuse of discretion. *Camacho*, 2002 MP 6 ¶ 48.[2]

¶ 16 Rule 803(3) allows admission of "A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health) . . . ." NMI R. EVID 803(3). The rule, however, does not allow admission of statements "of memory or belief to prove the fact remembered or believed." *Id.* An Advisory

[2] Although the Commonwealth asserts Togawa failed to properly object to the admission of evidence under Rule 803(3), we conclude otherwise because at trial Togawa argued that admitting evidence of the cause of Michelle's then existing emotion condition was an overbroad interpretation of that rule.

Committee note to Federal Rule of Evidence 803(3), which NMI Rule of Evidence 803(3) derives from, points to the importance of this distinction:

> The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.

FED. R. EVID. 803 advisory committee's note to Exception (3) (citing *Shepard v. United States*, 290 U.S. 96 (1933)).

¶ 17 In other words, Rule 803(3) is a limited exception to the hearsay rule and it does not allow admission of all evidence relating to a declarant's then-existing mental or emotional condition. Rule 803(3) only permits admission of evidence of what the mental or emotional condition was; it does not permit evidence as to why the declarant was in the particular condition. *United States v. Cohen*, 631 F.2d 1223, 1225 (5th Cir. 1980) ("[T]he state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind."); *United States v. Emmert*, 829 F.2d 805, 810 (9th Cir. 1987) (adopting and applying the reasoning from *Cohen* and concluding the trial court properly excluded evidence relating to declarant's fear of government agents believed to be members of a crime family).

¶ 18 Examining the Ninth Circuit's reasoning in *Emmert* is helpful in our analysis. In *Emmert* the Ninth Circuit considered whether third-party testimony about Emmert's fear of undercover government agents he believed to be members of a crime family was properly excluded by the district court. The Ninth Circuit examined the Fifth Circuit's ruling in *Cohen*, and emphasized a specific limitation the Fifth Circuit drew:

> *If the reservation in the text of [Rule 803(3)] is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition – "I'm scared" – and not belief – "I'm scared because Galkin threatened me."*

Id. at 810 (quoting *Cohen*, 631 F.2d at 1225). The Ninth Circuit found that when this limitation was applied to the facts in *Emmert*, third-party testimony that Emmert was scared *because of the threats made by the government agents* would fall within the "belief" category and would not be limited to the Emmert's state of mind, thus was properly excluded. *Id.* at 810.

¶ 19 Here, Decena and Bauleong testified not just that Michelle was afraid, but that Michelle was afraid of Togawa *because he threatened her with a knife*. The limitation in Rule 803(3), clearly delineated by the Ninth Circuit, does not permit admission of Decena's and Bauleong's testimonies that Michelle was afraid as result of Togawa assaulting her. Although testimony that Michelle was

afraid at the time she filed her complaint against Togawa may have been admissible under Rule 803(3), any testimony pertaining to the reasons for her emotional or mental condition was inadmissible. Thus, we conclude the trial court abused its discretion by admitting hearsay testimony that exceeded the limits of the Rule 803(3) exception.

B. Past Recollection Recorded

¶ 20 As a threshold matter, we must determine the applicable standard of review for Togawa's claim that the court erred by allowing the Commonwealth to read the contents of the petition into the record. If Togawa adequately preserved his evidentiary objection, we review for abuse of discretion, *Camacho*, 2002 MP 6 ¶ 48; otherwise, we review for plain error, NMI R. EVID. 103(d); NMI R. CRIM. P. 52(b). A party preserves an evidentiary objection by making "a timely objection or motion to strike . . . stating the specific ground of objection, if the specific ground was not apparent from the context." NMI R. EVID. 103(a)(1); *accord United States v. Bailey*, 270 F.3d 83, 87–88 (1st Cir. 2001). Parties are required to make specific objections in order "to alert [the judge] to the proper course of action." *Id.* at 87 (quoting *United States v. Holmquist*, 36 F.3d 154, 168 (1st Cir. 1994)). Thus, "[t]o preserve [an] objection, the specific ground stated must be the correct one." *United States v. O'Brien*, 435 F.3d 36, 39 (1st Cir. 2006); *accord Dilutaoch v. C & S Concrete Block Prod.*, 1 NMI 478, 486 (1991) (holding that a relevance objection did not preserve appellate claim that evidence was inadmissible because it was prejudicial).

¶ 21 Here, we conclude Togawa adequately preserved his evidentiary objection. He objected to the Commonwealth's attempt to read the petition into the record, asserting that it would violate the Confrontation Clause and that the petition was hearsay. After his objection was overruled, Togawa objected again, arguing there was no evidence the petition was made when the incident was fresh in Michelle's mind. In particular, Togawa noted that the Commonwealth stated that the petition was executed on January 30, 2013, while the incident occurred on January 30, 2012—a one year difference. The Commonwealth, on the other hand, contends Togawa's argument is not adequately preserved because he did not specifically object to the lack of foundation for the petition as a recorded recollection. However, the Commonwealth provides no legal authority supporting its position that the objection must be made with such specificity. Togawa raised a hearsay objection and specifically argued one of the foundational requirements of a past recollection recorded was lacking. In context, we find the nature of Togawa's objection sufficiently clear to review his claim for an abuse of discretion.

¶ 22 Rule 803(5) allows a memorandum or record to be read into evidence if it "(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge." NMI R. EVID. 803(5). Togawa asserts there was

inadequate foundation to admit the petition because Michelle did not (1) confirm the document was created while the event was fresh in her mind or near the time of the event; (2) vouch for the accuracy of the statements in the document; and (3) confirm that she made or adopted the statement.[3]

¶ 23 A witness need not explicitly confirm her knowledge nor the contemporaneity and accuracy of the document in order for the record to be admitted; rather, the court has broad discretion in determining these prerequisites to admission:

> Broad discretion for the trial judge is clearly intended under [Federal Rule of Evidence 803(5)], as the advisory committee notes indicate: "No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate."

United States v. Patterson, 678 F.2d 774, 779 (9th Cir. 1982) (quoting 28 U.S.C. app. at 581 (1976)).[4] This discretion enables courts to examine freshness on a case-by-case basis and find a recollection recorded sufficiently fresh when relatively long periods of time may pass between the recordation and the event recorded. Indeed, a period of three years between an event and the writing memorializing the event has been held sufficiently fresh in the witness's mind. *United States. v. Senak*, 527 F.2d 129, 141–42 (7th Cir. 1975). In *Senak*, the court did not find reversible error in the admission of a statement taken by the FBI regarding a conversation the witness had three years prior. *Id.* at 142. There, the witness reviewed the statement, testified that she had handwritten on the statement an affirmation of the statement's truth, and explicitly testified that the statement was true at the time she was interviewed by the FBI agents. *Id.* at 136–37. In *Patterson* the court concluded it was within the trial court's discretion to find that the witness's memory was sufficiently fresh when ten months elapsed between a conversation and his grand jury testimony regarding that conversation. 678 F.2d at 779. Despite the substantial lapses in time in these cases, the freshness of the past recollections recorded was demonstrated

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[3] Togawa also asserts reading the petition was erroneous because the document was made in preparation for litigation. However, he cites no legal authority supporting his claim of error. Accordingly, we decline to address this claim. *See Commonwealth v. Calvo*, 2014 MP 10 ¶ 8 (failure to cite legal authority or public policy may result in waiver of issue).

[4] Because NMI Rule of Evidence 803(5) is substantially similar to Federal Rule of Evidence 803(5), it is appropriate to turn to the federal interpretation of the rule for guidance. *See Commonwealth v. Cepeda*, 2014 MP 12 ¶ 22 n.3 (examining federal case law because NMI Rule of Evidence 801(d)(2)(B) is patterned after the federal version). *Compare* FED R. EVID. 803(5), *with* NMI R. EVID. 803(5).

by eliciting testimony relating to the witnesses' knowledge at the time the recollections were recorded.

¶ 24 In contrast, the span of time between the alleged threat and petition's execution is unclear and the Commonwealth failed to elicit testimony relating to Michelle's knowledge at the time of execution. First, based upon the facts properly before the trial court, the length of time between the alleged incident and the preparation of the petition is unclear. The Commonwealth presented significantly contradictory dates as to the incident and the execution of the petition. When the Commonwealth asked Michelle if she recalled the night of January 29, 2012, she responded that she did not exactly recall. After attempting to refresh Michelle's recollection by showing her the petition, the Commonwealth asked if she remembered the events of January 30, 2012. Then, when the Commonwealth began to read the petition into the record, it commented the petition was dated January 30, 2013. After Togawa objected, correctly pointing out the year difference in the dates cited, the Commonwealth asserted the petition was executed on January 30, 2012, a day after the incident. In doing so, the Commonwealth contradicted its earlier statement and said the petition was signed January 30, 2012.[5] Moreover, the Commonwealth elicited no testimony that the matter was fresh in Michelle's mind when she made the statement before it read the petition into the record—whether she recognized her statement, remembered the preparation of the petition, or remembered signing it. Only after the Commonwealth read the petition did Michelle testify she remembered making the statement. In addition, she contradicted several representations contained therein, testifying that she did not feel threatened by Togawa and she only filed the petition to stop the arguments she was having with him.

¶ 25 A witness need not vouch the accuracy of a written record or memorandum for the evidence to be admitted as a past recollection record; rather, admissibility is "determined on a case-by-case basis upon a consideration . . . of factors indicating trustworthiness, or the lack thereof." *United States v. Porter*, 986 F.2d 1014, 1017 (6th Cir. 1993). For example, in *Porter*, the appellate court determined a statement was properly admitted as a past recollection recorded where the declarant testified she was unsure of the accuracy of the statement because she was on drugs when the statement was made. *Id.* There, the lower court considered several indicia of reliability, including the statement being made shortly after the event in question, signed

[5] In its response brief, the Commonwealth asserts trial counsel incorrectly stated the date the petition was signed as January 30, 2012. While the Commonwealth did attempt to correct the mistake during closing arguments, the questions and the testimony elicited during trial relied on the dates read into the record from the petition. The Commonwealth, reading the petition into the record, stated that the incident occurred on January 30, 2012, and that the petition was executed on January 30, 2013. At a minimum, the Commonwealth failed to conclusively establish when the petition was executed.

by the declarant on each page, modified and initialed by the declarant several times, made under penalty of perjury, made consistent with the other evidence in the record, and made when the declarant feared reprisal from the defendant. *Id.*

¶ 26 Here, several indicia of reliability weighed against admission. Michelle acknowledged making the statement in the petition, but at trial she implied her statement was untruthful. The petition described the alleged threat and stated Michelle was afraid for the safety of herself and her children. At trial, she testified that Togawa did not actually threaten her and that she did not feel threatened. She further asserted she filed the petition to stop the arguments she was having with Togawa. Although Michelle signed the petition, there was no testimony indicating whether Michelle prepared the petition herself, or whether someone else assisted her. There was no testimony as to whether she reviewed the petition before signing it. Nor did the Commonwealth establish that the petition was signed under penalty of perjury or elicit testimony as to whether Michelle understood the effect of signing the petition.[6]

¶ 27 Furthermore, we express significant doubt the Commonwealth demonstrated Michelle had inadequate memory to testify fully as to the incident on January 29, 2013. As noted *supra* ¶ 23, the Commonwealth asked Michelle about her recollection as to the wrong dates—January 29 and 30, 2012—instead of the January 30, 2013 date in the charging documents. Michelle may have been answering truthfully as to those two nights in 2012 and she may have had a recollection of January 30, 2013. On the other hand, if Michelle was indicating she did not exactly recall the events of January 30, 2013, the Commonwealth should have made some further inquiry as to what Michelle could recall from that night. Instead, the Commonwealth proceeded to read from the petition, assuming an inexact recollection was equivalent to no recollection.

¶ 28 In sum, the Commonwealth failed to adequately establish the foundational requirements to admit the petition as a past recollection recorded. The Commonwealth presented contradictory dates supporting conclusions that the petition was made either one day or one year following the incident. Moreover, the Commonwealth did not elicit testimony from Michelle that she remembered the petition's preparation or that she reviewed its content. In fact, she testified at trial that the statement in the petition was untruthful. We are also unconvinced the Commonwealth demonstrated Michelle lacked sufficient memory to testify fully. Consequently, we conclude the trial court abused its discretion by allowing the petition to be read as a recorded recollection.

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[6] The petition was included in the appendix; however, the petition itself was not submitted to the trial court as evidence. Accordingly, we confine our analysis to the facts as they were presented to the trial court.

C. Harmless Error

¶ 29 Last, we must consider whether the errors were harmless. Under the harmless error doctrine, we disregard "[a]ny error, defect, irregularity or variance [that] does not affect substantial rights." NMI R. CRIM. P. 52(a). An error is harmless if "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Commonwealth v. Hossain*, 2010 MP 21 ¶ 18 (citation omitted).

¶ 30 Here, it does not appear beyond a reasonable doubt that the erroneous admission of hearsay testimony did not contribute to the verdict. The bulk of the evidence indicating Togawa threatened Michelle with a knife comprised of inadmissible hearsay. Decena and Bauleong both provided hearsay testimony that Michelle told them Togawa threatened her with a knife the night before. The petition also stated that Togawa threatened Michelle with a knife. However, the only other cumulative evidence resulted from a leading question the Commonwealth asked immediately after reading the petition into the record. Accordingly, we conclude the trial court's erroneous admission of hearsay evidence was not harmless error.[7]

V. CONCLUSION

¶ 31 The trial court abused its discretion by admitting the hearsay testimony of Decena and Bauleong and the petition as a past recollection recorded. Because the erroneously admitted hearsay testimony constituted the bulk of the evidence regarding the incident giving rise to the criminal charges, we are compelled to conclude the errors were not harmless. Accordingly, we REVERSE Togawa's convictions and REMAND for a new trial.

SO ORDERED this 25th day of October, 2016.

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice

/s/
TERESA K. KIM-TENORIO
Justice Pro Tem

[7] Because we conclude reversal is warranted due to the erroneous admission of the hearsay testimony of Bauleong and Decena and the petition as a past recollection recorded, we need not reach the remainder of Togawa's arguments.