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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

RAMON C. BLAS,
Defendant-Appellant.

Supreme Court No. 2016-SCC-0009-CRM
Superior Court No. 14-0127

OPINION

Cite as: 2018 MP 2

Decided April 30, 2018

Jonathan Wilberscheid, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

Heather Zona, Assistant Public Defender, Office of the Public Defender, Saipan, MP, for Defendant-Appellant.

BEFORE: JOHN A. MANGLOÑA, Associate Justice; PERRY B. INOS, Associate Justice; KATHERINE A. MARAMAN, Justice Pro Tempore.

INOS, J.:

¶ 1 Defendant-Appellant Ramon Cabrera Blas ("Blas") appeals his convictions of criminal trespass, disturbing the peace, burglary, and theft. He seeks to vacate his convictions, arguing the trial court: (1) improperly admitted testimonial hearsay in violation of the United States and NMI Constitutions' Confrontation Clauses; and (2) abused its discretion in admitting evidence of a prior burglary under NMI Rules of Evidence 403 and 404(b).

¶ 2 For the following reasons, we AFFIRM Blas' convictions.

I. FACTS AND PROCEDURAL HISTORY

¶ 3 Blas was charged with criminal trespass, disturbing the peace, burglary, and theft, arising from two separate incidents. The criminal trespass and disturbing the peace charges arose from an incident on August 21, 2014, where Ms. Svitlana Zakharova ("Ms. Z") discovered Blas trespassing on the balcony of her home. The burglary and theft charges arose from an incident on November 9, 2014, when the home of Ms. Z and Mr. Alexander Nikolaychuk ("Mr. N") was burglarized. Items, including a laptop and jewelry, were stolen from the home.

¶ 4 In February 2015, as part of its discovery obligation under NMI Rule of Criminal Procedure 16, the Commonwealth of the Northern Mariana Islands ("Commonwealth") disclosed fifty-eight pages of discovery materials, including evidence of Blas' involvement in burglarizing the home of Haramitsu and Maki Ono ("Ono burglary"), Ms. Z and Mr. N's neighbors. Department of Public Safety ("DPS") officers had apprehended Blas, at which point he confessed to his involvement in the Ono burglary and showed DPS Detective Catherine Pangelinan ("Det. Pangelinan") where the stolen items were hidden. Ten days before trial, the Commonwealth notified Blas it intended to introduce evidence of the Ono burglary pursuant to NMI Rule of Evidence 404(b). On the day of trial, Blas filed a motion opposing the Commonwealth's 404(b) notice, arguing it was untimely. The following day, the Commonwealth filed a supplemental notice, and the court subsequently found the 404(b) evidence admissible. Det. Pangelinan testified about the Ono burglary. Her testimony included statements made by the Onos describing the stolen items, as well as statements by an unnamed witness alleging Blas had sold him a stolen laptop.

¶ 5 Following trial, Blas was convicted of one count each of criminal trespass, disturbing the peace, burglary, and theft. He appeals the convictions.

II. JURISDICTION

¶ 6 The Supreme Court has jurisdiction over final judgments and orders of

the Commonwealth Superior Court. NMI CONST. art. IV, § 3.[1]

III. STANDARDS OF REVIEW

¶ 7 We address two issues on appeal. First, whether admitting Det. Pangelinan's hearsay testimony violated the Confrontation Clauses of the United States and NMI Constitutions, and if so, whether Blas is entitled to a new trial. We review alleged violations of the Confrontation Clause de novo. *Commonwealth v. Zhen*, 2002 MP 4 ¶ 11. Second, whether the court properly admitted evidence of Blas' involvement in the Ono burglary under NMI Rules of Evidence 403 and 404(b) ("Rule 403" and "Rule 404(b)"). We review preserved evidentiary issues for abuse of discretion. *Commonwealth v. Togawa*, 2016 MP 13 ¶ 14.

IV. DISCUSSION

A. Confrontation Clause

¶ 8 Blas argues Det. Pangelinan's testimony regarding his involvement in the Ono burglary constituted testimonial hearsay in violation of the Confrontation Clauses of the United States and NMI Constitutions. He bases his argument on the following testimony:

> [Attorney]: What items were stolen?
> [Det. Pangelinan]: Very expensive jewelries. Um, watches that cost more than, uh, $5,000.00. Diamonds, uh, all—all jewelries and also fashion jewelries and other, um, cards and other stuff.
> . . . . .
> [Attorney]: Yes. How do you know the value of the items?
> [Det. Pangelinan]: Because I met with Mr. Ono, the victim, and Mrs. Ono.
> . . . . .
> [Attorney]: Okay. And how did you, um, recover first the laptop?
> [Det. Pangelinan]: Uh, me and, uh, Detective, uh, Andrew Taimanao, uh, we interviewed one of the witness. . . . According to the witness that, um . . . that Mr. Ramon Blas sold it to.

Tr. 118–19. Blas further contends that his inability to confront and cross-examine the witnesses whose statements Det. Pangelinan testified to was not harmless, requiring a new trial. The Commonwealth concedes the testimony

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[1] Blas claims his appeal is timely because the court issued its Sentencing Order on February 3, 2016. But since he is appealing the merits of his convictions, and not his sentence, the notice of appeal should have been filed within thirty days of the October 23, 2015 Judgment. NMI SUP. CT. R. 4(b)(1). However, we have previously determined that NMI Supreme Court Rule 4(b)(1) ("Rule 4(b)(1)") is only mandatory if properly invoked, requiring an objection to the appeal's timeliness prior to oral argument. *Commonwealth v. Borja*, 2015 MP 8 ¶ 19. Because the Commonwealth did not object to the appeal's timeliness, we may consider the appeal.

violated the Confrontation Clause, but asserts that because the testimony was immaterial to Blas' convictions, its admission was harmless error.

¶ 9 We review constitutional claims de novo for harmless error when a contemporaneous objection is lodged, but for plain error when no timely objection is made. *Commonwealth v. Xiao*, 2013 MP 12 ¶ 16. Because Blas lodged timely objections, we review his Confrontation Clause claim de novo. *Zhen*, 2002 MP 4 ¶ 11. If we find the court erred, we look to the record to determine "whether the error was harmless beyond a reasonable doubt." *Commonwealth v. Rabauliman*, 2004 MP 12 ¶ 42. We examine whether the error was harmless beyond a reasonable doubt by "excis[ing] the evidence subject to objection and then examin[ing] the untainted evidence to see whether the same result would assuredly follow." *Commonwealth v. Lucas*, 2003 MP 9 ¶ 13 n.10.

¶ 10 The United States Constitution affords defendants the right to confront adverse witnesses in all criminal prosecutions. U.S. CONST. amend. VI. Article I, Section 4(b) of the NMI Constitution also provides the accused "the right to be confronted with adverse witnesses."[2] We recently stated in *Commonwealth v. Jackson* that the Confrontation Clause insures the witness will testify under oath, submit to cross-examination, and allow the jury to observe their testimony. 2015 MP 16 ¶ 12 (finding no Confrontation Clause violation where court allowed child victim to testify in separate courtroom via closed-circuit television with only the judge, defendant, and counsels present). Our holding is consistent with the United States Supreme Court's recent narrowing of exceptions to the Confrontation Clause, holding it "bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Davis v. Washington*, 547 U.S. 813, 821–22 (2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 53–54, 68–69 (2004)) (finding a statement testimonial "when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"). We adopt the reasoning from *Crawford* and *Davis*.

¶ 11 We turn to Det. Pangelinan's testimony. Det. Pangelinan testified to the Onos' statements regarding their valuation of the stolen jewelry and watches, as well as an unnamed witness' claim that Blas sold him a stolen laptop. No ongoing emergency was shown; rather, both statements were made as part of Det. Pangelinan's investigation into the Ono burglary, which focused on proving Blas' connection to the crime. The witnesses' statements were thus testimonial. The Commonwealth had the burden of proving these witnesses

[2] Because our Confrontation Clause is patterned after the United States Constitution's Sixth Amendment, federal case law is helpful to our interpretation. *Commonwealth v. Attao*, 2005 MP 8 ¶ 21.

were unavailable to testify and that Blas had a prior opportunity to cross-examine them in order for these statements to be admitted at trial. Because the Commonwealth made no such showing, admitting the statements was in error. Accordingly, Det. Pangelinan's testimony violated the United States and NMI Constitutions' Confrontation Clauses.

¶ 12 Although admitting the statements violated Blas' right to confront adverse witnesses, he is not entitled to a new trial if the error was harmless beyond a reasonable doubt. Other evidence presented at trial included Ms. Z and Mr. N's eyewitness identification of Blas, discovery of a stolen necklace in Blas' home, and additional evidence of Blas' involvement in the Ono burglary. The improper testimony was only circumstantial and did not directly implicate Blas in the burglary of Ms. Z and Mr. N's residence. Thus, excising the two improper statements—the Onos' valuation of the stolen items and unnamed witness' testimony Blas sold him a stolen laptop—leaves sufficient evidence to support Blas' conviction. We therefore find the admission of the offending testimony harmless error. We now consider whether the court abused its discretion in admitting evidence of Blas' involvement in the Ono burglary.

B. Prior Act Evidence

¶ 13 Blas raises four arguments regarding evidence of his involvement in the Ono burglary. First, he contends that pursuant to Rule 404(b), the Commonwealth did not provide timely notice of its intent to introduce the prior act evidence. Second, he claims the notice itself was insufficient. Third, he argues the evidence was inadmissible under Rule 404(b). Fourth, Blas claims that pursuant to Rule 403, the risk of unfairly prejudicing the jury substantially outweighed the probative value of the prior act evidence. We consider his arguments in turn.

¶ 14 Because Blas properly objected to the admission of the evidence of the Ono burglary at trial, we review for abuse of discretion. *Togawa*, 2016 MP 13 ¶ 14. We stated in *Commonwealth v. Taitano* that "'[a]n abuse of discretion exists if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" 2017 MP 19 ¶ 35 (quoting Commonwealth v. Campbell, 4 NMI 11, 16 (1993)). "'Under this standard, the lower court's decision need only be reasonable to be upheld.'" *Id.* (quoting *Angello v. Louis Vuitton Saipan, Inc*., 2000 MP 17 ¶ 24).

1. Timeliness of Rule 404(b) Notice

¶ 15 Blas argues he received untimely notice of the Commonwealth's intent to introduce evidence of his involvement in the Ono burglary. Although the Commonwealth provided fifty-eight pages of discovery regarding Blas' status as a suspect as early as February 2015, he claims the Commonwealth's ten-day notice of its intent to introduce the burglary under 404(b) was insufficient.[3] He

[3] Because Blas' argument focuses on the timeliness of the initial ten-day notice, we do not consider the supplemental notice. However, since both notices discussed the same

contends the common practice is to provide notice at least fifteen days before trial.

¶ 16 Rule 404(b) specifies the required notice period.[4] "On request by a defendant in a criminal case, the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice." NMI R. EVID. 404(b)(2). By its plain terms, the notice requirement is triggered upon a defendant's request. Federal courts have not interpreted Rule 404(b) to dispel of such a requirement, and neither do we. *See United States v. Vega*, 188 F.3d 1150, 1154 (9th Cir. 1999) ("[T]he notice requirement in Rule 404(b) is not triggered until the accused makes a request . . . ."); *United States v. Tuesta-Toro*, 29 F.3d 771, 774 (1st Cir. 1994) (explaining that "the requirement [is] implicit in the rule itself that the defense must submit, 'in a reasonable and timely manner,' its request for pretrial notification . . . ." (quoting from Federal Rule of Evidence 404(b)).

¶ 17 Even when a defendant makes a 404(b) request, the federal advisory notes explain that "no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case." FED. R. EVID. 404(b) advisory committee's notes to 1991 amendment. Courts have found a one-week notice to satisfy 404(b)'s reasonable notice requirement. *See, e.g., United States v. White*, 816 F.3d 976, 984–85 (8th Cir. 2016) ("learning about the evidence one week before trial. . . . was reasonable under the circumstances of this case")*; United States v. Blount*, 502 F.3d 674, 678 (7th Cir. 2007) ("Arriving as it did a week before trial, the first notice . . . was timely."); *United States v. Barnes*, 49 F.3d 1144, 1148 (6th Cir. 1995) (concluding the court's "approval of a one-week notice to the defense did not amount to an abuse of discretion").

¶ 18 The court's conclusions that "[t]he defendant made no showing of requesting the notice" and that ten days' notice was timely were reasonable. Tr. 109. Nothing in the record indicates Blas requested notice. Indeed, defense counsel's representations at trial confirm no such filing was made: "I didn't file a motion to exclude before the government filed a notice because I didn't believe the evidence was admissible. And I didn't know that the government would intend to introduce it this way." Tr. 112. As Blas did not request notice, the rule does not oblige the Commonwealth to provide it. But even had Blas requested notice, he received it a full ten calendar days before trial. Regardless of the common practice Blas relies on, ten days is reasonable notice under Rule 404(b), especially considering he received evidence of the Ono burglary eight

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acts, Blas was already aware of the evidence intending to be introduced when the supplemental notice was filed.

[4] Rule 404(b) mirrors the corresponding federal rule. As such, reference to federal case law is instructive. *Togawa*, 2016 MP 13 ¶ 23 n.4.

months prior. We therefore conclude the ten-day notice was reasonable under the circumstances and find the court did not abuse its discretion.

2. Sufficiency of 404(b) Notice

¶ 19 Next, Blas argues the contents of the notice itself were substantively deficient because it simply listed the various potential uses contemplated by Rule 404(b). He argues a recitation of the rule's possibilities fails to warn the defendant of the information's intended use, and, as such, prevents him from preparing a defense. He further claims the supplemental notice was insufficient because although the Commonwealth narrowed the evidence's intended uses to proving identity and intent, the Commonwealth did not actually use the evidence to prove either.

¶ 20 Once the defendant triggers a Rule 404(b) notice, the government need only describe the "general nature" of the evidence. NMI. R. EVID. 404(b). The Advisory Committee's Notes provide insight as to this requirement:

> [N]o specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts.

FED. R. EVID. 404 advisory committee notes to 1991 amendment (internal citation omitted). Indeed, "[m]indful of Rule 404(b)'s requirement that the government provide the 'general nature' of the evidence, courts have not been stringent in this regard." *Blount*, 502 F.3d at 678. The notice must simply satisfy the rule's intent to "reduce surprise and promote early resolution on the issue of admissibility." FED. R. EVID. 404 advisory committee notes to 1991 amendment; *see, e.g., United States v. Robinson*, 110 F.3d 1320, 1326 (8th Cir. 1997) (finding notice "that the government intended to introduce evidence that [the defendant] was arrested while in possession of cocaine base[d] on two specific dates" reasonable under the advisory committee's standard).

¶ 21 We find Blas' argument unconvincing. In relevant part, the Commonwealth notified Blas:

> The Commonwealth intends to introduce evidence of the following acts which showed [Blas'] proof of intent, motive, opportunity, preparation, plan, knowledge, identity, and/or absence of mistake for the underlying criminal case . . . . [Blas] has . . . been previously arrested for the offense of Burglary and Theft in DPS Case No. 14-005126. At this time, [Blas] allegedly entered the home of [the Onos] on or about July 07, 2014 and took several items, the value of their property being more than $250.00 and less than $20,000.00.

App'x 4, 6. In addition, the Commonwealth provided Blas with fifty-eight pages of discovery relating to the contents of the 404(b) notice months in advance of the trial. The court determined no notice was required due to Blas' lack of request, and that even if such notice was required: "[t]he rule only requires that the prosecutor provide notice of the general nature of intended evidence. The Commonwealth seems to provide this." Tr. 109. The court heard evidence that Blas was aware of the general nature of the act the Commonwealth intended to introduce at trial. Even if the exact purpose for introducing the act was not specified, Rule 404(b) does not require such specificity. Thus, the court's conclusion that the Commonwealth sufficiently appraised Blas of the general nature of the acts it intended to introduce was not based on an erroneous view of the law and, as such, not an abuse of discretion.

3. Admission of Prior Acts Under Rule 404(b)

¶ 22 Third, Blas claims the court abused its discretion in finding the prior act admissible under 404(b). He argues the prior burglary clearly failed the first and third prongs of the test determining admissibility of prior act evidence. Further, he claims admitting evidence of his involvement in the Ono burglary under such a loose standard would result in admission of prior act evidence for every defendant with a criminal record.

¶ 23 We have previously recognized the Ninth Circuit's four-factor test for determining admissibility of prior act evidence. *See Xiao*, 2013 MP 12 ¶ 77. The test requires:

> First, the evidence of other crimes must tend to prove a material issue in the case. Second, the other crime must be similar to the offense charged. Third, proof of the other crime must be based on sufficient evidence. Fourth, commission of the other crime must not be too remote in time.

United States v. Montgomery, 150 F.3d 983, 1000 (9th Cir. 1998). We examine whether the Commonwealth's evidence of Blas' involvement in the Ono burglary satisfies the test's first and third prongs.

¶ 24 We find the first factor satisfied. "The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." *Huddleston v. United States*, 485 U.S. 681, 686 (1988). Only some logical connection is required. *United States v. Mehrmanesh*, 689 F.2d 822, 831 (9th Cir. 1982); *see Montgomery*, 150 F.3d at 1001 (finding knowledge and intent to be material issues "simply because the government [has] to prove them"). Here, although the court could have been clearer in its reasoning, the record evinces identity was a material issue. The Commonwealth echoed its supplemental notice during trial, stating intent and identity were material to the case. The court adopted such an argument: "the Commonwealth, uh, stated in their . . . supplemental notice, right, what they had intended to use it for . . . ." Tr. 112. Indeed, evidence of Blas' presence during the Ono burglary within one month

and only three hundred feet away from the current burglary, and participation in keeping jewelry and a laptop from that crime reflects on the likelihood that Blas was the person who burglarized Ms. Z and Mr. N's household. Thus, the court did not abuse its discretion in finding this evidence had bearing on the likelihood Blas was indeed the burglar—a material issue in this case.

¶ 25 The third factor is also satisfied. Sufficient evidence does not require the prosecution to demonstrate the prior crime beyond a reasonable doubt; rather, the jury only needs to be able to "reasonably conclude that the act occurred and that the defendant was the actor." *Huddleston*, 485 U.S. at 689 (explaining Rule 404(b) requires more than evidence "connected to the defendant only by unsubstantiated innuendo"). Testimony by victims and government informants, as well as proof the defendant was actually convicted of the prior act, have all been deemed to satisfy the United States Supreme Court's standard. *See, e.g.*, *United States v. Romero*, 282 F.3d 683, 688 (9th Cir. 2002) (government informant testimony); *United States v. Hadley*, 918 F.2d 848, 851 (9th Cir. 1990) (victim testimony); *United States v. Howell*, 231 F.3d 615, 629 (9th Cir. 2000) (conviction). Here, Det. Pangelinan was one of the detectives assigned to investigate both the Ono and Ms. Z and Mr. N's burglaries. She testified about Blas' participation in the Ono burglary. She stated Blas waited in the jungle for his co-perpetrator to commit the burglary, helped separate the "expensive jewelries and the fashion jewelries," took the jewelry and a laptop that had been removed from the home, and later led Det. Pangelinan back to the remaining jewelry in the jungle. Tr. 150. Det. Pangelinan's testimony was sufficient for the jury to be able to reasonably conclude that the Ono burglary occurred and Blas was one of the actors involved. Thus, the court did not abuse its discretion in finding sufficient evidence of the prior burglary was presented.

¶ 26 We conclude the court did not abuse its discretion in finding the prior act evidence satisfied factors one and three of the admissibility test. We now examine whether the prior act evidence should have been excluded under the Rule 403 balancing test.

4. Rule 403 Balancing Test

¶ 27 Finally, Blas claims the court should have excluded the Ono burglary evidence pursuant to Rule 403. He argues the evidence had no probative value and a high danger of unfair prejudice, as it included an admission to Blas' knowledge of and involvement in another burglary. He claims the evidence unfairly prejudiced the jury and resulted in a conviction based on his past.

¶ 28 NMI Rule of Evidence 402 requires evidence to be relevant to be admissible. Still, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." NMI R. EVID. 403. Amongst other means, a court may provide a limiting instruction to reduce the risk of a jury's improper consideration of evidence. *See Xiao*, 2013 MP 12 ¶ 78. Although the court "must go through a conscious process of balancing the

costs of the evidence against its benefits," *Commonwealth v. Hong*, 2013 MP 19 ¶ 18 (internal quotation marks omitted), and explicit evidentiary rulings are desirable, "the admission of evidence based on an implicit balance of its probative value and unfair prejudicial effect does not constitute an abuse of discretion." *Id.* ¶ 20.

¶ 29 Here, although a more explicit balancing of the prior act evidence would have been desirable, admission of the evidence was proper. After hearing arguments from both parties as to the probative and prejudicial value of Blas' involvement in the Ono burglary, the court stated that the evidence's probative value was not substantially outweighed by any grounds under Rule 403. Furthermore, the court took extra caution to limit the prejudice to Blas, instructing the jury:

> You've heard evidence that the defendant committed other crimes, wrongs, and acts not charged here. You may consider this evidence only for its bearing, if any, on the question of the defendant's intent or identity and for no other purpose. You may not consider this evidence as evidence of guilt of the crime for which the defendant is now on trial.

Tr. 190. The evidence was indeed probative insofar as it pointed to Blas' identity. We find the court did not abuse its discretion in determining the evidence's probative value was not substantially outweighed by unfair prejudice.

V. CONCLUSION

¶ 30 For the foregoing reasons, we AFFIRM Blas' convictions.

SO ORDERED this 30th day of April, 2018.

/s/
JOHN A. MANGLOÑA
Associate Justice

/s/
PERRY B. INOS
Associate Justice

/s/
KATHERINE A. MARAMAN
Justice Pro Tempore