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

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**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,**
*Plaintiff-Appellee,*

***v.***

**HANK TAITANO,**
*Defendant-Appellant.*

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**Supreme Court No. 2016-SCC-0021-CRM**
Superior Court No. 14-0143

**OPINION**

**Cite as: 2018 MP 12**

Decided December 17, 2018

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Matthew Baisley, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

Cong Nie, Saipan, MP, for Defendant-Appellant.

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

CASTRO, C.J.:

¶ 1 Defendant-Appellant Hank Taitano ("Taitano") appeals his conviction and sentence for Sexual Abuse of a Minor in the First Degree ("SAM 1") in violation of 6 CMC § 1306 on the grounds that: (1) the court conducted an incomplete *Daubert* hearing; (2) the prosecution engaged in prosecutorial misconduct; (3) the court's errors were cumulative; (4) Taitano received ineffective assistance of counsel; and (5) the court failed to properly individualize his sentence. For the following reasons, we AFFIRM Taitano's conviction and sentence.

## I. FACTS AND PROCEDURAL HISTORY

¶ 2 In December 2014, Taitano was charged with one count of SAM 1. The charging document alleged Taitano engaged in sexual intercourse with B.L., his twelve-year-old daughter.

¶ 3 B.L. was primarily raised by her mother and stepfather and had not seen Taitano in four to five years. On two occasions, B.L. visited Taitano at his apartment. B.L. testified that on the second occasion, in July 2014, Taitano began nonconsensual sexual intercourse with her in the shower. According to B.L., she asked him to stop and leave, at which point he complied. B.L. then left the shower and went into another room, after which Taitano followed her and resumed nonconsensual sexual intercourse. At trial, B.L. stated she did not tell anyone what occurred because Taitano said that if she told anyone, he would hurt her.

¶ 4 In November 2014, B.L.'s stepfather took her to the hospital, where it was discovered B.L. was pregnant. Later that day, a Department of Public Safety detective interviewed B.L.. In the interview, she stated that during the July 2014 visit to Taitano's apartment, she woke up from a nap to find Taitano pulling her pants off and then engaging in nonconsensual sexual intercourse with her. In March 2015, B.L. gave birth to a son, P..

¶ 5 A jury trial was held where the court conducted two hearings in accordance with NMI Rule of Evidence 702 ("Rule 702") and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) ("*Daubert*") for Dr. Gary M. Stuhlmiller ("Dr. Stuhlmiller"), a director of the DNA Identity Testing Division at Laboratory Corporation of America. These *Daubert* hearings were conducted to determine whether the court would permit Dr. Stuhlmiller to testify as an expert witness with respect to the DNA analysis determining the paternity of P.. After some argument, the court did not permit Dr. Stuhlmiller to testify as an expert witness, determining the methodology underlying his DNA analysis for the paternity results was unreliable.

¶ 6 At closing argument, the Commonwealth of the Northern Mariana Islands ("Commonwealth") made several remarks. The Commonwealth suggested the math in calculating the time between P.'s conception and P.'s birth is straightforward, the jury was required to figure out what was a reasonable way

for B.L. to respond to the sexual assault, the Commonwealth was not required to put on all available evidence, and it was beyond a reasonable doubt that B.L. was sure Taitano had sexually assaulted her and that he was the father of P.. Taitano did not object to the Commonwealth's remarks.

¶ 7 The jury found Taitano guilty of SAM 1. The court sentenced him to the maximum of thirty years' imprisonment without the possibility of parole. Taitano appeals.

## II. JURISDICTION

¶ 8 We have jurisdiction over all final judgments and orders issued by the Superior Court. NMI CONST. art. IV, § 3.

## III. STANDARDS OF REVIEW

¶ 9 There are five issues on appeal. First, whether the court conducted a complete *Daubert* hearing in accordance with Rule 702 and appropriately found Dr. Stuhlmiller's methodology unreliable. We review whether to exclude or admit expert testimony under Rule 702 for an abuse of discretion. *Commonwealth v. Crisostomo*, 2018 MP 5 ¶ 12. Second, whether the Commonwealth engaged in prosecutorial misconduct. Where a contemporaneous objection is not raised, we review prosecutorial misconduct issues for plain error. *Commonwealth v. Xiao*, 2013 MP 12 ¶ 16; *see also United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993) (applying plain error review where no objection was raised to prosecutorial misconduct issues concerning vouching). Third, if the court erred as to the first two issues, whether the errors were cumulative. We review claims of cumulative error de novo. *Commonwealth v. Cepeda*, 2014 MP 12 ¶ 10. Fourth, whether Taitano received ineffective assistance of counsel due to his counsel's failure to object to alleged prosecutorial misconduct. We review ineffective assistance of counsel claims de novo. *Commonwealth v. Taivero*, 2009 MP 10 ¶ 7. Finally, whether the court properly individualized Taitano's sentence. A court's sentencing decisions are reviewed under an abuse of discretion standard. *Commonwealth v. Jin Song Lin*, 2016 MP 11 ¶ 6.

## IV. DISCUSSION

### *A. Expert Testimony*

¶ 10 Taitano argues the court did not conduct a complete or "full" *Daubert* hearing in the absence of the jury because it did not make the requisite Rule 702 findings for Dr. Stuhlmiller's DNA methodology at the end of the first *Daubert* hearing.[1] He contends that there is nothing in the NMI Rules of Criminal

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[1] Rule 702, which mirrors Federal Rule of Evidence 702 ("FRE 702"), states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

Procedure or Rules of Evidence permitting a postponement of part of the Rule 702 inquiry. Therefore, Taitano concludes that when the court explicitly delayed its ruling in response to Taitano's objection on reliability it performed an incomplete *Daubert* hearing and abused its discretion. The Commonwealth argues that a complete *Daubert* hearing was conducted because the parties sufficiently explored Rule 702's four requirements and the court rendered complete findings on reliability. It contends that if there was any error, it is the exclusion of Dr. Stuhlmiller's expert testimony on the DNA report.

¶ 11 In *Commonwealth v. Crisostomo*, we determined that the United States Supreme Court's Rule 702 interpretation in *Daubert* would be applicable in the Commonwealth. 2018 MP 5 ¶ 19 ("While we have never explicitly held *Daubert* and its progeny applicable in the Commonwealth, we do so now."). We held courts responsible for monitoring the admission of expert testimony based on the four Rule 702 requirements, thus delegating a gatekeeping duty to trial judges. *See generally id.* ¶¶ 20–25 (discussing and applying requirements of the gatekeeping function to the Commonwealth). We carefully balanced the need to relax barriers to expert testimony with the need to ensure such testimony did in fact meet the requirements of Rule 702. *See Crisostomo*, 2018 MP 5 ¶ 20 (balancing the "broad discretion" afforded and duty to maintain gatekeeping function). Whether a court properly conducted its gatekeeping duty and properly admitted or excluded expert testimony is reviewed for an abuse of discretion, determining whether it "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* ¶ 19 (citation omitted).

¶ 12 In defining the contours of the gatekeeping functions, we outlined two requirements. First, courts must "allow presentation of evidence as to the relevance and reliability of the expert's proffered testimony," so as not to abandon the gatekeeping function *Id.* ¶ 21. Parties must be allowed "the opportunity to explore the proposed testimony's relevance and reliability." *Id.* Thus, when a court does not allow parties to question experts, nor independently inquire with experts, it abdicates its gatekeeping duty and abuses its discretion. *Id.* ¶¶ 21, 28. Second, to properly perform their gatekeeping responsibilities, courts must "make specific findings regarding its evaluation of the expert . . . ." *Id.* ¶ 23. We emphasized that courts must "make specific determinations as to whether the purported expert met the requisite standard. . . . [C]onclusory findings are not sufficient." *Id.* ¶ 40 (citations omitted). "[*S*]*ome* kind of reliability determination" must be made, and "summarily admitting or excluding testimony without assessing reliability is inadequate . . . ." *Id.* ¶ 23. Failing to render specific determinations and thereby creating an incomplete record is an inadequate performance of the gatekeeping function and, thus, an abuse of

(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

discretion. *See Crisostomo*, 2018 MP 5 ¶ 23.

¶ 13 Although there is no explicit requirement that a court must make findings as to all Rule 702 requirements where it determines one or more requirement is not met, federal courts have frequently excluded an alleged expert's testimony on more than one Rule 702 requirement. *Lutron Elec. Co. v. Crestron Elec. Inc.*, 970 F. Supp. 2d 1229, 1241–1242 (D. Utah 2013) (holding both electrical engineer expert is unqualified and methodology unreliable); *Gallagher v. Southern Source Packaging, LLC*, 568 F. Supp. 2d 624, 633–36 (E.D.N.C. 2008) ("Further, even if [the witness] somehow did qualify as an expert, his original expert report and testimony would still be inadmissible as unreliable."); *Foster v. City of Fresno*, 392 F. Supp. 2d 1140, 1156 (E.D. Cal. 2005) (finding law enforcement officer unqualified and methodology unreliable). We find this consistent with the mandate to render a complete record. *See Jahn v. Equine Servs., PSC*, 233 F.3d 382, 393 (6th Cir. 2000) (A [trial] court should not make a *Daubert* ruling prematurely, but should only do so when the record is complete enough to measure the proffered testimony against the proper standards of reliability and relevance."). We thus hold that in the Commonwealth, trial courts must make findings on all four Rule 702 requirements so as to avoid unnecessary expense and delay. With these principles in mind, we next assess the court's *Daubert* hearings and rulings and determine whether the court conducted a complete and proper *Daubert* analysis.

¶ 14 We turn to the first discussion of Dr. Stuhlmiller's admissibility as an expert.[2] This first Rule 702 ruling occurred outside the presence of the jury. Prior to the court's ruling, the parties had extensively questioned Dr. Stuhlmiller's qualifications and the reliability of his methodology underlying the paternity results. Taitano persistently argued the court was required to act as the gatekeeper of scientific testimony and to find the methodology unreliable. Despite this, the court certified Dr. Stuhlmiller to testify as an expert on the basis of his qualifications alone. The court took care to notify and permit Taitano to renew his objection at a later time. Specifically, the judge stated:

> [T]he court is not making a ruling . . . whether or not the actual

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[2] We take note of the deficiencies in the way the court conducted its *Daubert* hearing(s). In determining whether it conducted a complete *Daubert* hearing, we must ascertain at what point the judge rendered its Rule 702 findings. It appears to render three separate Rule 702 findings as to Dr. Stuhlmiller's expert testimony—that is, the court made a ruling regarding one or several of the Rule 702 requirements for a single expert three times.

A court has "an independent responsibility to properly manage the case." *Crisostomo*, 2018 MP 5 ¶ 22 (citing *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 417 (3d Cir. 1999)). Overseeing a trial thus requires judges to ensure some level of management and organization. To do otherwise compromises the hearing and risks reversal. Therefore, when the court rendered multiple findings, first skirting the issue on reliability and then changing its mind on reliability by its third ruling, it was improperly managing the case, which reinforces our disposition to find an abuse of discretion.

> results are reliable or not. We've deferred and state our decision. What we are ruling on is whether or not Dr. Stuh[l]miller has the experience and education to testify as to DNA paternity testing and the court finds that the government has met that burden.

Tr. 341.

¶ 15 First, the court abandoned its gatekeeping duty because it did not allow sufficient opportunity "to explore the proposed testimony's relevance and reliability." *Crisostomo*, 2018 MP ¶ 21. Although Taitano asked some questions regarding the reliability of the proffered scientific methodology, the court did not direct the parties to inquire as to the methodology's relevance and reliable application, in accordance with 702(b) and (d), respectively. It found Dr. Stuhlmiller fit to "testify as to DNA paternity testing," tr. 341, despite its failure to allow Taitano to demonstrate otherwise and the Commonwealth to rebut this demonstration. At this juncture, the court abandoned its gatekeeping duties because it did not allow the parties to sufficiently inquire into, or explore on its own, Dr. Stuhlmiller's methodology. Secondly, the court performed its duty inadequately because it did not make any determination as to reliability, let alone relevance and the reliable application of the methodology, and still found Dr. Stuhlmiller fit to testify. In intentionally and explicitly refusing to make a ruling as to the methodology's reliability, the court failed to make any determination at all, and contravened the *Daubert* mandate. At this point it had not conducted a complete and proper *Daubert* hearing because it abdicated its gatekeeping duties and performed such duties inadequately, thereby abusing its discretion.

¶ 16 The second Rule 702 ruling occurred shortly after this initial ruling, and still outside the presence of the jury. Taitano once again urged the court to make a ruling consistent with Rule 702 and *Daubert*. The court made a second ruling in response:

> The doctor has extensive education and technical experience. The testimony is based on sufficient facts or data. He received various samples, he's run those samples. The testimony is the product of reliable principles and methods I did not hear from the various arguments and questioning from the attorneys that the testing of a DNA is established in right. Other case[s] have established that the principle in order to take the samples of the DNA are reliable. And then the expert has reliably applied those principles and methods to the facts of the case. That's what they did as to Mr. Taitano's sample and the alleged victim as well as the child.

Tr. 343. Taitano then argued the 702(c) requirement was not met. The court answered: "you're welcome to argue [reliability] to the jury [later]." Tr. 345.

¶ 17 Although all four Rule 702 requirements were recited, the court's language shows its deficiencies. First, it did not receive additional testimony between the first and second rulings because the parties did not further question the witness. Without further examination by the parties, the court still abandoned its

gatekeeping duties. Moreover, its cursory statements do not fulfill the mandate to make "some" kind of determination as to each requirement. The court provided mere conclusory statements, which without any meaningful analysis or explanation manifest an inadequate performance of its gatekeeping duties. It still had not conducted a complete or proper *Daubert* hearing in its second ruling as it performed its gatekeeping duties inadequately. Because the court's second ruling demonstrates an erroneous view of the law, we find an abuse of its discretion.

¶ 18 The second *Daubert* hearing occurred when Taitano objected to the admission of the DNA paternity results into evidence. He additionally renewed his objection on the reliability of the methodology and consequently, Dr. Stuhlmiller's expert testimony on the paternity results. After hearing the parties' arguments, the court made a third and final *Daubert* ruling on Dr. Stuhlmiller's methodology:

> [R]elying both on 702 as well as 403, the court is very concerned in part notwithstanding that the database, the DNA database that was in the FBI lab to the tune about 5,000 samples did not include any Pacific Islanders here in the Lab Corp. they have a much broader, wider number of samples including some Pacific Islanders. What is not clear is that how many of those samples of Pacific Islanders are actually from the Northern Marianas. . . . In this specific case we have an alleged, a defendant who's alleged to have fathered his own grandchild because the CNMI is a closed community . . . and because there is no specific information that says people who are from the CNMI whether Chamorro or Carolinian or other Pacific Islanders. . . . In order to flesh out the difference between a grandparent and a grandchild . . . here in a closed community he would have to do a very specific testing within the commonwealth. The court is very concerned that the database itself is fraud in a sense that it will not give the kind of information that would give the jurors the ability to assess the information.

Tr. 381.

¶ 19 Although the court's language could ostensibly satisfy the requirements of Rule 702 (a)–(c), it nonetheless failed to review the fourth requirement on the reliable application of the methodology, encompassed in Rule 702(d). Neither the parties nor the court inquired into the fourth requirement. Taitano, throughout the *Daubert* hearings, focused primarily on rebutting the Commonwealth's assertion that reliability could be established. Thus, when Taitano's objection on reliability was sustained, and Dr. Stuhlmiller was not permitted to testify on the paternity results, the court prematurely rendered a decision. As a result, the court abandoned its gatekeeping duties. But it also performed its gatekeeping responsibility inadequately because it rendered an incomplete *Daubert* ruling. This third ruling was a determination in response to Taitano's argument on the reliability of the methodology. But, whether Dr. Stuhlmiller's scientific

methodology could be reliably applied to the facts of the case, we cannot say a conclusion was made either way. In abdicating its gatekeeping duties and performing them inadequately in its third *Daubert* ruling, the court therefore abused its discretion, basing its ruling on an erroneous view of the law.

¶ 20 At no point in the court's three separate *Daubert* rulings did it make a complete and proper determination. First, the parties did not question Dr. Stuhlmiller as to all four requirements of Rule 702. Second, the court did not make complete findings on Rule 702(a)–(d). The procedure by which Dr. Stuhlmiller's methodology was assessed was based on an erroneous view of the law and therefore an abuse of discretion.

*i. Reliability*

¶ 21 Although we find the court inadequately performed an incomplete *Daubert* hearing, the parties also dispute its findings on reliability.[3] Taitano asserts that choosing a Pacific Islander database to assess the likelihood of a match between Taitano and B.L., without any certainty as to the number of persons from the CNMI included in the database, renders the entire methodology unreliable. Because the database is unreliable, he argues that distinguishing between a grandfather's DNA sample and a father's DNA sample is not possible, and calculating the probability of a match via the "product rule" becomes skewed. The Commonwealth maintains that Dr. Stuhlmiller's methodology fulfills *Daubert*'s mandate in establishing reliability, and consequently Dr. Stuhlmiller's expert testimony should have been admitted.

¶ 22 Rule 702(c) provides that an expert's testimony is reliable if it is "the product of reliable principles and methods." NMI R. EVID. 702. *Daubert* recognized that "testing, peer review, error rates and 'acceptability' in the relevant scientific community . . . might prove helpful in determining the reliability of a particular scientific 'theory or technique.'" *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). But "these factors are 'meant to be helpful, not definitive, and the trial court has discretion to decide how to test an expert's reliability as well as whether the testimony is reliable, based on the particular circumstances of the particular case.'" *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014) (quoting *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010)). The absence of one or more of these factors is not definitive of admissibility and peer-reviewed publication does not "necessarily correlate with reliability." *Daubert*, 509 U.S. at 593; *see also United Fire & Cas. Co. v. Whirlpool Corp.*, 704 F.3d 1338, 1342 (11th Cir. 2013) (finding publications unnecessary to demonstrate scientific reliability). "Rule 702 does not require scientific evidence to be based on perfect, or even the best available, methodologies." *Clark v. Edison*, 881 F. Supp. 2d 192, 215 (D. Mass. 2012); *see also United States v. Mallory*, 902 F.3d 584, 594 (6th Cir. 2018) (expert

[3] Although the Commonwealth's brief discusses all four requirements of Rule 702, Taitano's brief only disputes reliability. Thus, we do not address whether Dr. Stuhlmiller meets the requirements of Rule 702(a), (b), and (d).

testimony need not be "perfect to be admissible."); *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1234 (10th Cir. 2004) ("[I]t is the specific relation between an expert's method, the proffered conclusions, and the particular factual circumstances of the dispute, and not asymptotic perfection, that renders testimony both reliable and relevant."). Accordingly, we interpret *Daubert* as a liberal standard and "rejection of expert testimony is the exception rather than the rule." FED. R. EVID. 702 advisory committee note to 2000 amendment.

¶ 23 *Daubert* also cautioned against being "overly pessimistic" about a jury's capabilities and the adversary system in general. *Daubert*, 509 U.S. at 596. Thus, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.*; *see also Jahn*, 233 F.3d at 393 (concluding shaky expert opinions were admissible because the opinions were "clearly not, as the [trial] court apparently believed, 'guesses' or 'assumptions'"). In determining whether to admit expert testimony under Rule 702(c), "the test 'is not the correctness of the expert's conclusions but the soundness of his methodology' . . . ." *Pyramid Techs., Inc.*, 752 F.3d at 814 (quoting *Primiano*, 598 F.3d at 564). Thus, when an expert's methodology meets Rule 702's admissibility threshold, challenges going to the weight of the evidence "are within the province of a fact finder, not a trial court judge," and "credibility determinations . . . are reserved for the jury." *Id.*

> [A] trial judge should exclude expert testimony if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison. By contrast, other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony. . . . Frequently, though, gaps or inconsistencies in the reasoning leading to [the expert's] opinion . . . go to the weight of the evidence, not to its admissibility.

*Restivo v. Hessemann*, 846 F.3d 547, 577 (2d Cir. 2017) (citations and internal quotation marks omitted); *see also City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1046 (9th Cir. 2014) (excluding expert testimony was improper because the methodology was tested by other laboratories, the procedures were subject to retesting, and challenges to the results of the techniques go to the weight of the evidence); *Ambrosini v. Labarraque*, 101 F.3d 129, 140 (D.C. Cir. 1996) (holding that the failure of a doctor to perform "a critical family history" or order "a more state-of-the-art chromosomal study" went to the weight, rather than the admissibility of the testimony); *In re Paoli R.R. Yard Pcb Litig.*, 35 F.3d 717, 745 (3d Cir. 1994) (failing to use quality control measures may render a methodology unreliable); *United States v. McCluskey*, 954 F. Supp. 2d 1224, 1272 (D.N.M. 2013) (finding quality control measures present in "every step" of the testing process).

¶ 24 In *United States v. Chischilly*, 30 F.3d 1144 (9th Cir. 1994), the Ninth Circuit confronted a similar issue. There, the court considered whether an

accurate statistical calculation using the product rule extrapolated from a specific ethnic database (Navajo American Indian), was reliable.[4] It considered whether the database contained too few Navajo American Indians to be considered reliable. *Id*. at 1155. Although there were "opposing academic camps," *id*., as to the reliability of the methodology, the court concluded this did not preclude the admission of the expert's testimony on the methodology. Two decades later, in *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036 (9th Cir. 2014), the Ninth Circuit relied on *Chischilly* and further indicated that "[a] factual dispute is best settled by a battle of the experts before the fact finder, not by judicial fiat. Where two credible experts disagree, it is the job of the fact finder, not the [judge], to determine which source is more credible and reliable." *Id*. at 1049. Thus, in *City of Pomona*, the Ninth Circuit concluded that where a reference database was alleged to be too small, the trial court still abused its discretion in excluding expert testimony because the effect of the database's sampling on the outcome was to be decided by the jury and not the trial judge. *Id*.

¶ 25 Our independent review of the record and case law reflects that there is sufficient testimony establishing the reliability of Dr. Stuhlmiller's methodology on the basis that (1) quality control measures evince support for finding the testing factor of *Daubert* satisfied; and (2) the general acceptance in the scientific community of the product rule also supports finding reliability. First, Dr. Stuhlmiller painstakingly explained the quality control process, as well as the statistical analysis at some length. He indicated his training on a number of published standards that a variety of agencies and laboratories adhere to, thereby contributing to the quality control process enabling accurate results. More specifically, Dr. Stuhlmiller testified, "[b]y putting a number of tests together . . . we have built a very, very large measure of protection," and thus implemented preventative measures to avoid wrongful matching. Tr. 350. He additionally emphasized that paternity tests are reproducible, thereby ensuring the same results would occur even if a different lab performs the test, so long as it uses the same technology, testing, and samples. We find the testimony supports the methodology's reliability precisely because the tests are reproducible and the methodology implements a number of quality control measures.

¶ 26 Additionally, since *Chischilly*, the product rule has enjoyed increasing acceptance. *Cf. United States v. Pritchard*, 993 F. Supp. 2d 1203, 1210–1211 (C.D. Cal. 2014) (finding the testing and error rate factors listed by *Daubert* are satisfied by the product rule); *Commonwealth v. Robinson*, 864 A.2d 460, 459–

[4] Dr. Stuhlmiller's DNA analysis is twofold. After conducting Short Tandem Repeat testing, he uses the product rule to compare two sets of DNA sequences and calculate the probability of a DNA match. This probability statistical analysis requires DNA analysts to examine the relative frequency of an individual's genetic profile in a given population. Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 781 (2007). Put differently, DNA analysts assess the likelihood that the genetic material comes from someone other than the defendant.

96 (Pa. 2004) ("[T]he controversy over the use of the product rule has been sufficiently resolved . . . ."); *People v. Soto*, 981 P.2d 958, 968 (Cal. 1999) (concluding use of the unmodified product rule to determine statistical probabilities is admissible). *Chischilly* found no abuse of discretion where the expert's testimony was admitted despite the split in the scientific community. Here, the split has substantially subsided, and this lends support to rendering the methodology reliable. Under *Daubert*'s liberal standard, a general acceptance in the scientific community is present; the case law is consistent with our understanding that admission of expert testimony is the rule rather than the exception, and thus reinforces our finding that Dr. Stuhlmiller's methodology should have been deemed reliable.

¶ 27 Subsequent to passing muster under *Daubert's* liberal reliability standard, any additional challenges to Dr. Stuhlmiller's methodology go to the weight of his testimony, rather than its admissibility. First, any further challenges to the quality control measures of the methodology should have been evaluated through cross-examination by Taitano or by an expert witness provided by Taitano testifying to the methodology's error rates and inability to be tested. Challenges questioning whether the methodology is accurately tested or whether it contains sufficient quality control measures are ultimately to be decided by the fact-finder. We fail to see how Dr. Stuhlmiller's methodology was completely void of any testability or particularly skewed because of high error rates. Furthermore, that Dr. Stuhlmiller's testimony shows the methodology employed enjoys widespread acceptance, as well as caselaw indicating the general acceptance of the product rule, demonstrates that the testimony should have been considered reliable. Any contrary conclusion should have been put forth by Taitano and assessed by the fact-finder. Finally, failing to establish with certainty whether the database contains a sufficient number of persons of Northern Marianas descent is not fatal to the methodology.[5] Rather, an imperfect database, or a database with a small number of samples, is not grounds for dismissing its reliability and thereby its admissibility. It is ultimately up to the factfinder to assess the results generated by the database used in Dr. Stuhlmiller's methodology, however shaky they may be.

¶ 28 We cannot say Dr. Stuhlmiller's methodology was so unreliable that it should be excluded. Instead, *Daubert*'s liberal thrust and our findings indicate Dr. Stuhlmiller's methodology should have been judged reliable. The court's decision otherwise was based on a very narrow view of admissibility,

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[5] In fact, Dr. Stuhlmiller was transparent and indicated the methodology could not establish the identity of a biological father with absolutely certainty. Even still, Dr. Stuhlmiller explained "what we are able to show is a consistency between the type of the child and the type of the alleged father," but "one could ultimately find enough individual[s] perhaps who could also express the same set of genetic markers." Tr. 352. He also noted it is "mathematically impossible to say 100% probability of paternity." *Id.* This is not unreasonable, and, in light of our adoption that the method need not be perfect, we find this impossibility does not render the entire process unreliable.

manifesting an erroneous view of the law and thus an abuse of discretion.

*ii. Harmless Error*

¶ 29 Because we find the court abused its discretion in two ways, we next consider whether the court's error was harmless. First, we determine whether the court committed prejudicial error in conducting an incomplete *Daubert* hearing.[6] Then, we determine whether the court's failure to find Dr. Stuhlmiller's methodology reliable was harmless error. With respect to the admissibility of expert testimony, we find harmless error where "it is more probable than not that the error did not materially affect the verdict." *Crisostomo*, 2018 MP 5 ¶ 35 (quoting *United States v. Cohen*, 510 F.3d 1114, 1127 (9th Cir. 2007).

¶ 30 Although the court conducted incomplete and improper *Daubert* hearings, this was harmless error. Any incompleteness or impropriety of the *Daubert* hearing for Dr. Stuhlmiller would be detrimental to the Commonwealth, rather than Taitano, because it is the Commonwealth's expert that is being questioned. However, despite the exclusion of Dr. Stuhlmiller as an expert on the basis of an incomplete and improper *Daubert* hearing, the jury rendered a verdict favorable to the Commonwealth. It is more probable than not the error did not materially affect the verdict. For the same reason, the court's finding the methodology unreliable is also harmless error. The jury rendered a favorable verdict to the Commonwealth, so the exclusion of Dr. Stuhlmiller's expert testimony did not materially affect the verdict. Thus, although we find impropriety in both instances, both instances were harmless error.

*B. Prosecutorial Misconduct*

¶ 31 Taitano claims the Commonwealth made four remarks during its closing statements which amounted, either individually or cumulatively, to prosecutorial misconduct. He argues the prosecutor engaged in misconduct when he (1) personally endorsed, or "vouched," for a witness' credibility; (2) diluted the prosecutor's burden of proof in two instances; and (3) referred to evidence not in existence or available in the record.

¶ 32 We review Taitano's constitutional claims of prosecutorial misconduct de novo. *Xiao*, 2013 MP 12 ¶ 16. Because Taitano did not raise his objections at trial, we review for plain error. *Id*.; *see also Necoechea*, 986 F.2d at 1276. Under

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[6] Taitano additionally asserts that permitting the jury to hear about the paternity results as a consequence of the incomplete *Daubert* hearing was not harmless error. The Tenth Circuit in *United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999) concluded that a trial court did not abuse its discretion where it declined to hold a preliminary evidentiary hearing outside the presence of the jury. *See also United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000) ("[T]rial courts are not compelled to conduct pretrial hearings in order to discharge the gatekeeping function."). Rather, only when questioning is too prolonged or includes "matters inappropriate for hearing by the jury . . . [the questioning] *may* be done during a recess period." *Id*. at 1263 (emphasis added). Consequently, while we find the error is harmless, we recognize courts have determined there is no error at all in similar circumstances.

plain error review, "[w]e examine whether: (1) there was error; (2) the error was plain or obvious; [and] (3) the error affected the appellant's substantial rights." *Commonwealth v. Reyes*, 2016 MP 3 ¶ 11 (citations omitted).

¶ 33 In *Xiao*, we articulated a two-step framework to determine whether a prosecutor's statement constitutes unconstitutional prosecutorial misconduct. 2013 MP 12 ¶ 18. To violate a defendant's right to due process under the United States Constitution's Fourteenth Amendment, the misconduct "must be of 'sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Id*. (quoting *Commonwealth v. Camacho*, 2002 MP 6 ¶ 104). Under this framework, we first determine whether the prosecutor's conduct was improper. *Id*. If the first step is satisfied, we determine whether the defendant suffered prejudice as a result of the improper conduct. *Id*.; *see also Commonwealth v. Monkeya*, 2017 MP 7 ¶ 23. In reviewing the second step, we consider: "(1) the efficacy of any cautionary instruction by the judge, (2) the context's effect upon the prosecutor's remarks; and (3) the strength of evidence supporting the conviction." *Id*. ¶ 19; *see also Commonwealth v. Calvo*, 2014 MP 7 ¶¶ 31–32.

¶ 34 Of the four statements at issue, we address the first individually and the last three collectively.

*i. Statement One*

¶ 35 Taitano asserts the Commonwealth impermissibly "vouched," or personally endorsed B.L.'s statements in front of the jury regarding the timeframe between P.'s birth and P's conception. More specifically, during closing arguments, the Commonwealth stated:

> [B.L.] also told you what day [P.], her baby was born, March 22nd. I'll leave the math up to you. It's fairly straight-forward. [B.L.] testified that she had her baby one day before her due date, not premature, not late, almost exactly on time.

Tr. 392. Taitano argues the Commonwealth implicitly suggested its belief that P.'s birth coincides with the gestation period from the date P. was conceived, thus indicating B.L. was telling the truth about the time frame in which she was raped and who raped her. He also asserts the Commonwealth relied on information outside of the record because it required the jury to calculate B.L.'s pregnancy term. He disagrees that the jury could reasonably infer B.L.'s pregnancy term because there is disagreement in the scientific community regarding gestational time frames. Thus, Taitano asserts implying that calculating the gestational period is "straight forward" rises to the level of misconduct.

¶ 36 A prosecutor's conduct may rise to the level of impropriety when a prosecutor "vouches" for a witness. *See Commonwealth v. Shoiter*, 2007 MP 20 ¶ 21. Improper vouching includes:

> (1) the prosecutor plac[ing] the prestige of the government behind a witness by expressing his or her personal belief in the veracity of the witness, or (2) the prosecutor indicat[ing] that information not

> presented to the jury supports the witness'[] testimony.

*Id*. at ¶ 20 (citation omitted); *see also United States v. Alcantara-Castillo*, 788 F.3d 1186, 1191 (9th Cir. 2015) (explaining the impropriety of vouching as "compromis[ing] the integrity of the trial and den[ying] the defendant due process because the 'prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.'" (quoting United States v. Reyes, 577 F.3d 1069, 1077 (9th Cir. 2009))). We look to the context of the statements in determining whether improper vouching occurred. *See Commonwealth v. Rabauliman*, 2004 MP 12 ¶¶ 28, 30. Where a prosecutor explicitly expressed a personal belief in a witness's veracity, we have found improper vouching. *See Commonwealth v. Camacho*, 2002 MP 6, ¶¶ 88, 91 (holding the prosecutor's statement "I find him to be a very believable witness," constituting improper vouching). "Nevertheless, prosecutors are given reasonable latitude to fashion closing arguments, and they may argue reasonable inferences drawn from the evidence . . . ." *Camacho*, 2002 MP 6 ¶ 86 (citing *Necoechea*, 986 F.2d at 1276); *see also Monkeya*, 2017 MP 7 ¶ 32.

¶ 37 We fail to see how the prosecutor improperly vouched for its witness. First, there was no explicit personal assurance of the witness's veracity, and secondly, we also find no implicit personal assurance based on information outside the record. A full-term gestation period is commonly understood to be 39 to 40 weeks, or nine months. AM. C. OF OBSTETRICIANS AND GYNECOLOGISTS, Op. No. 579 (Nov. 2013). The prosecutor did not ask the jury to calculate the precise moment of P.'s conception; rather, the prosecutor asked the jury to make a reasonable inference based on their knowledge of a pregnancy term with no complications. This does not rise to the level of misconduct on the part of the Commonwealth. We thus find no prosecutorial misconduct, and therefore, no plain error.

*ii. Statements Two Through Four*

¶ 38 Taitano also asserts that three other instances of prosecutorial misconduct occurred during the Commonwealth's rebuttal closing statements. For two statements, Taitano urges us to find the Commonwealth was directing the jury's attention away from determining whether it met its burden of proof under the reasonable doubt standard. For the last statement, Taitano argues the Commonwealth's reference to a DNA report is impermissible because the report was not in the record and was specifically excluded.

¶ 39 Taitano fails to provide sufficient legal authority to support his arguments for all three instances.[7] As we stated in *Kim v. Baik*:

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[7] Taitano does provide a single case citation in support of his second claim of prosecutorial misconduct. Specifically, he claims the Commonwealth diluted its burden of proof in stating "[the] problem here [was] trying to figure out what's a reasonable way for a twelve year old to respond to being sexually assaulted by her father." Tr. 395. He cites *People v. Centeno*, 338 P.3d 938, 949 (Cal. 2014), in asserting support for the

> We typically consider only those arguments sufficiently developed to be cognizable. An issue is insufficiently developed when the party's principal brief fails to provide[] legal authority or public policy, [or] appl[y] the facts of the case to the asserted authority in a non-conclusory manner. . . . [R]ulings on undeveloped or poorly developed issues run the risk of being improvident or ill-advised. Thus, when parties insufficiently develop an argument, we have the discretion to find the issue waived.

2016 MP 5 ¶ 30 (citations and internal quotation marks omitted). Because Taitano did not make any effort to provide legal authority for his prosecutorial misconduct claims, we find his arguments inadequately developed to permit meaningful review. Therefore, the arguments as to statements two through four are waived.[8]

### *C. Ineffective Assistance of Counsel*

¶ 40 Taitano additionally claims he received ineffective assistance of counsel because his trial counsel did not object to the prosecutor's allegedly improper closing statements. However, because we find the prosecutor's first set of remarks was not improper, and because we find Taitano failed to provide sufficient legal authority supporting his assertions of prosecutorial misconduct for the other three statements, Taitano did not receive ineffective assistance of counsel.

### *D. Individualized Sentencing*

¶ 41 Finally, Taitano argues the court abused its discretion when it failed to individualize his sentence. He argues it: (1) did not properly consider his lack of a prior criminal record as a mitigating factor; and (2) improperly considered an element of the crime, being the victim's natural parent, as an aggravator.[9] We review whether the court failed to individualize Taitano's sentence for an abuse of discretion. *Lin*, 2016 MP 11 ¶ 6. Under this standard, courts enjoy "nearly unfettered discretion in determining what sentence to impose," and reversal is only appropriate "if no reasonable person would have imposed the same

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prosecutorial misconduct claim. In *Centeno*, the prosecutor "left the jury with the impression that so long as her interpretation of the evidence was reasonable, the People had met their burden." *Id*. Here, the prosecutor did not engage in such blatant disregard with respect to its burden of proof, and thus, *Centeno* is distinguishable. We cannot say the prosecutor's statements rise to the level of impermissible prosecutorial misconduct, and therefore, there was no plain error.

[8] On Taitano's claim of cumulative error, he argues the prosecutor's allegedly improper statements materially affected the verdict. As stated previously, because we do not find the prosecutor's statements rose to the level of impropriety, we do not find any error, and thus no cumulative error.

[9] 6 CMC § 1306(a)(2) defines SAM 1 as: "being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian."

sentence." *Commonwealth v. Palacios*, 2014 MP 16 ¶ 12.

¶ 42 Where the legislature sets a sentencing range, courts must weigh both mitigating and aggravating factors to fashion an appropriately individualized sentence.[10] *Commonwealth v. Borja*, 2015 MP 8 ¶ 38 (finding a "duty to mete out individualized sentences"). On a number of occasions, we vacated sentencing decisions based on insufficient individualization. *See, e.g.*, *Commonwealth v. Lizama*, 2017 MP 5 ¶¶ 17–18 (finding no individualization); *Lin*, 2016 MP 11 ¶¶ 17–18 (same); *Commonwealth v. Kapileo*, 2016 MP 1 ¶ 24 (same). A sentence must consider "both the crime and the offender—it must examine and measure the relevant facts, the deterrent value of the sentence, the rehabilitation and reformation of the offender, the protection of society, and the disciplining of the wrongdoer." *Borja*, 2015 MP 8 ¶ 39.

¶ 43 We have been especially concerned with maximizing sentences based on a single impermissible aggravating factor, such as an element of the crime. *See, e.g.*, *Lin*, 2016 MP 11 ¶ 17–18 (sexual offense against a minor); *Borja*, 2015 MP 8 ¶¶ 36 n.14, 40 (sexual abuse of a minor). We cautioned against the use of an element of the crime in determining a sentence, stating:

> "[O]therwise, every offense arguably would implicate aggravating factors merely by its commission, thereby eroding the basis for the gradation of offenses and the distinction between elements and aggravating circumstances." Elements of a crime establish the actions the Commonwealth must prove beyond a reasonable doubt to convict a defendant—they are not factors particular to a defendant at sentencing.

*Kapileo*, 2016 MP 1 ¶ 25 (quoting *State v. Fuentes*, 85 A.3d 923, 933 (N.J. 2014)). Recently, we refined this notion in *Commonwealth v. Calvo*, 2018 MP 9 ¶ 9, and held *Kapileo* did not stand for the proposition that every impermissible factor renders the entire sentence insufficient. Rather, we held that where a court relies *solely* on that impermissible factor, then we may consider whether it has abused its discretion. *Id*.

¶ 44 We further clarify that a court must still engage in balancing the permissible aggravating factors against the available mitigating factors to reach an appropriate sentence. *Cf. Lin*, 2016 MP 11 ¶ 20 (noting the court did not balance mitigating and aggravating factors). If a sentence relies heavily on an impermissible factor, such that without it, the sentence would have been different, we cannot say the sentence is individualized. *See United States v. Sicken*, 223 F.3d 1169, 1177 (10th Cir. 2000) (basing departure from Federal Sentencing Guidelines Range on both permissible and impermissible factors requires examination of whether the same sentence would have been imposed

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[10] SAM 1 carries a maximum sentence of 30 years imprisonment, 6 CMC § 1306(b), and a minimum of "no less than eight years if the person convicted has no record of prior felony conviction . . . ." 6 CMC § 4102(d).

without reliance on "improper factor[s]."); *United States v. Hemmingson*, 157 F.3d 347, 360 (5th Cir. 1998) (same).

¶ 45 Taitano's sentencing hearing, as well as the Sentencing Order, demonstrate the court's use of Taitano's parental relationship with the victim, an element of the crime, as an aggravating factor. The court stated the "act to have sex with the very young" is "deviant behavior," especially because the victim was an "immediate blood relative." Tr. 437; *Commonwealth v. Taitano*, No. 14-0143-CRM (NMI Super. Ct. June 15, 2016) (Sentencing and Commitment Order at 7) ("Sentencing Order"). It further noted "[t]his deep rooted sexual deviance is a particular concern for the [c]ourt, and the [c]ourt gives this factor much weight." Tr. 437. However, it did not rely solely on this impermissible factor; and when weighing the proper aggravating factors against the sole mitigating factor, we cannot say the sentence would have been different.

¶ 46 Although the court does place much weight on a single impermissible factor, we cannot ignore the mélange of other permissible and significant aggravating factors considered. It listened to extensive discussion as to why this first-time offense should mitigate Taitano's sentence but was ultimately not persuaded.[11] It seriously considered a number of aggravating factors that, taken together, are substantial. It observed that because Taitano was an "absentee father" with "four biological children from four different women," who has not "really demonstrated his ability to be responsible for raising these children," Taitano has a "tendency towards irresponsibility for [his] own actions." Sentencing Order at 7. Further, it acknowledged how Taitano manipulated his daughter and abused their relationship. After an extended absence from his daughter, Taitano, "[u]nder the guise of trying to establish a father-daughter relationship," took advantage of her. *Id*. at 6. It also treated as aggravating factors the mental anguish, pain, and public ridicule the victim faced—and will continue to face—for being impregnated by her own father. *Id*. Critically, the court emphasized the sexual abuse suffered by the victim was not confined to sexual penetration but also impregnation. Thus, "[t]he baby born out of the result of [Taitano's] sexual abuse is equally a victim in the sense that as he grows up, this baby boy must reconcile the fact he was the product of forcible rape and incest." *Id*. Certainly, Taitano's egregious conduct not only impacts the victim but also extends to her baby. Such an important factor cannot be ignored. Whatever weight was attached to the impermissible aggravating factor was balanced out by the aforementioned permissible aggravators.

¶ 47 Taking all mitigating and permissible aggravating factors into account, we cannot say "no reasonable person would have imposed the same sentence." *Palacios*, 2014 MP 16 ¶ 12. To the contrary, in light of the number of permissible

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[11] "The [c]ourt encouraged [Taitano's counsel] to provide or inform the [c]ourt of any other mitigating factors or information. Defense [c]ounsel stated that there is only one mitigating factors [sic] – that [Taitano] is not a repeat offender. The [c]ourt did consider mitigate[ing] factors but was not persuaded." Sentencing Order at 5.

and significant aggravating factors weighed against the sole mitigating factor, we hold the sentence was properly individualized and therefore, find the court did not abuse its discretion in rendering the maximum sentence. *Id*.

## V. CONCLUSION

¶ 48 For the foregoing reasons, Taitano's conviction and sentence are AFFIRMED.

SO ORDERED this 17th day of December, 2018.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLOÑA
Associate Justice

/s/
PERRY B. INOS
Associate Justice