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

PEDRO R. D.L. GUERRERO,
Plaintiff-Appellant

v.

TINIAN DYNASTY HOTEL AND CASINO
and JOHN DOES 1 through 10,
Defendants-Appellees.

Supreme Court Appeal No. 03-0016-GA
Superior Court Civil Case No. 98-1303D

FOR PUBLICATION

OPINION

Cite as: *Guerrero v. Tinian Dynasty Hotel*, 2006 MP 26

Argued and submitted on August 20, 2004
Tinian, Northern Mariana Islands

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BEFORE: MIGUEL S. DEMAPAN, *Chief Justice*; JOHN A. MANGLONA, *Associate Justice*; F. PHILIP CARBULLIDO, *Justice Pro Tempore (dissenting).*

MANGLONA, Associate Justice:

&1 Plaintiff-Appellant Pedro R. DL Guerrero ("Guerrero" or "Appellant") appeals the trial court's entry of judgment after a jury verdict in favor of Tinian Dynasty Hotel and Casino (ATinian Dynasty@ or "Appellee") in this personal injury action. Guerrero appeals the trial court's decision to grant Tinian Dynasty's motion to change the venue to Tinian and the trial court's denial of Guerrero's challenge to the array of the jury panel. Guerrero further appeals the trial court's admission of certain exhibits into evidence. We have jurisdiction pursuant to Article IV, Section 3 of the Commonwealth Constitution and Title 1, Section 3102(a) of the Commonwealth Code. We AFFIRM the trial court's rulings as well as the jury verdict.

I.

&2 On July 22, 1998, Guerrero and his friend, Candido Castro, were gambling at Tinian Dynasty when Castro got into an altercation with the dealer at his table. After the dealer told him that his turn had resulted in a "no play," Castro claimed he had been cheated and used an expletive. When the dealer called a supervisor, Castro repeated the expletive, demanded to see the house rules, used the expletive again, and took his money to where Guerrero was playing. Guerrero told Castro the same thing had happened to him a week prior.

&3 Two Tinian Dynasty employees then came over to talk to Guerrero. Guerrero was asked to get down from the gaming table where he sat, but he refused. This prompted an argument between an employee and Guerrero which quickly escalated. Guerrero was visibly angry, pointing and shouting at the Tinian Dynasty security staff. When the security staff

moved in to physically remove Guerrero, he resisted and tripped a security guard. Frank Perez, the Security Manager, testified that he decided to put Guerrero on the floor until he calmed down to prevent anyone else from being injured. Guerrero was then subdued and removed from the casino. Guerrero tried to get back into the Tinian Dynasty and was removed again. He testified that, due to an asthma attack, he could not breathe and needed the air conditioning. A Tinian Dynasty employee permitted Guerrero to wait inside the lobby doorway for the arrival of the Tinian police. Guerrero left the premises with a police officer who gave him a ride to the airport.

&4 As a result of the altercation, Guerrero filed a personal injury action against Tinian Dynasty. There were two motions made prior to the jury trial which are being appealed. Tinian Dynasty's motion to change venue from Saipan to Tinian was granted over the objection of Guerrero. Guerrero's motion to challenge the array of the jury panel was denied.

&5 In support of Guerrero's motion challenging the jury array, he called Arlene H. Pangelinan, the Deputy Clerk in Tinian, to testify about her involvement in the selection of the jury panel known as APanel CT.@ She testified that she first received by facsimile a list of potential jurors from Orana Santos, the Assistant Clerk in Saipan. The list of potential jurors was derived from the Board of Elections' list of registered voters from Tinian.[1]

&6 Panel CT originally contained 174 names; 24 of which were randomly selected and removed, reducing the list to 150. This random selection and removal was accomplished by

[1] Deputy Clerk of Court Jovita Castro Flores secured the voter list and notice of the jury selection process was posted in front of the courthouse at an unspecified time. The assistant clerk in Saipan then prepared the official panel and faxed it back to the deputy clerk in Tinian. Tinian residents composed the entire jury panel with one exception.

scattering the 174 names on the Tinian courthouse floor and then picking 24.[2] Those 24 were recorded on one list and the remaining 150 were recorded on a different list, which was then sent back to the assistant clerk in Saipan.

&7 Guerrero contested the method of jury selection. At trial, Judge Juan T. Lizama defended the method of jury selection by offering to testify to refute Pangelinan=s testimony. Guerrero alleges that Judge Lizama=s offer was refused because it was Ahighly improper.@[3] Ultimately, under Judge Lizama=s instructions, Guerrero recalled Pangelinan to the stand to clarify the jury selection process. During Pangelinan=s testimony, Judge Lizama Ainterjected@ and Atestified@ that he in fact picked the 24 names off the floor. He also stated that he scattered the names across the floor.

&8 In addition to Panel CT, a "Panel BT" had also been called at the beginning of the jury selection process. Pangelinan was not involved in the selection of Panel BT. Pangelinan testified that she knew nothing of the selection process, and that it was conducted entirely on Saipan. Judge Lizama dismissed Panel BT and ultimately determined that jury selection was complete and that all preemptory challenges had been exercised. During the selection process, several panel members were called and excused after it was determined that they were either directly or indirectly tied to Tinian Dynasty. After selection was complete, Guerrero made one final challenge to Juror Number Five due to his admitted lack

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[2] Jury selection in the Commonwealth is typically done by putting names face down on a desk or in a box of some kind to maintain the dignity of the proceedings. It was not disclosed why the trial court deviated from this practice.

[3] Com. R. Evid., Rule 605, states that "[t]he judge presiding at the trial may not testify in that trial as a witness…." Furthermore, under the Commonwealth Code of Judicial Conduct and 1 CMC 3308, a judge may not preside over a proceeding in which his impartiality may reasonably questioned (Rule C(a); 3308(a)) or where he has personal knowledge of a disputed evidentiary fact concerning the proceeding (Rule C(b)(1); 3308(b)(1)). Although not an issue in this case, we do not condone the trial judge's offer to testify to refute a witness' testimony in a trial in which he was presiding.

of proficiency in the English language. The challenge was denied.[4]

&9 On March 12, 2003, the jury returned a verdict in favor of Tinian Dynasty, and the trial court entered a judgment for Tinian Dynasty. Guerrero timely appealed.

II.

A. Venue afforded Guerrero a constitutionally fair trial

&10 Guerrero argues that the trial court's decision to grant Tinian Dynasty's motion to change venue violated Guerrero's Seventh Amendment substantive and procedural due process rights which mandate a fair trial. The Seventh Amendment is applicable within the CNMI. *Santos v. Nansay Micronesia, Inc.*, 4 N.M.I. 155, 166 (1994).[5] A trial court=s decision to transfer or dismiss an action on the ground of improper venue is reviewed for an abuse of discretion. *See Kerobo v. Southwestern Clean Fuels, Corporation*, 285 F.3d 531, 533 (6th Cir. 1997); *Bruns v. National credit Union Administration*, 122 F. 3d 1251, 1253 (9th Cir. 1997). Here, the trial court's decision to remove the case from Saipan and to hold the jury trial on Tinian was not such an abuse.

&11 While there is no specific statute in the CNMI which authorizes a change of venue in a civil case, the trial court's transfer of venue from Saipan to Tinian was rooted in its inherent powers.

> The inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy had

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4 Guerrero does not specifically appeal the denial of this challenge.

5 The Commonwealth does not have a specific statutory provision that determines venue in a civil action. While Rule 12(b)(3) of the Commonwealth Rules of Civil Procedure provides for dismissal if venue is improper, there is no definition of what is proper. Section 108 of Title 6 provides venue determination in criminal matters. If a court which is competent to hear the case is located or regularly sits on the island where the offense or a material element of the offense was committed, the case is heard on that island. 6 CMC §108 (a) and (b). The defendant or the Commonwealth, however, may petition the court for a change of location for good cause shown. 6 CMC §108 (c).

> been granted or not; the power to promulgate rules for its practice; and the power to provide process where none exists.

Jacobson v. Avestruz, 81 Wis.2d 240, 245, 260 N.W.2d 267, 269 (Wis. 1977)(citing *In re Bruen*, 102 Wash. 472, 172 P. 1152 (Wash. 1918)). The power to transfer a case from one county to another existed at common law. *State v. Chandler*, 324 N.C. 172, 184, 376 S.E.2d 728, 735 (N.C. 1989); *Wafai v. People*, 750 P.2d 37, 41 -44 (Colo. 1988).[6] Furthermore, in the CNMI, the common law principles of venue cannot be applied the way they would be in the United States because here, it is the same Judges who sit on our only Superior Court. Whether the actual location is Saipan, Tinian or Rota, our Superior Court remains the same, and so we cannot fully analogize a change of location from Saipan to Tinian as a change in "county," as United States case law does. Concepts of venue in the CNMI must take into account our special geographical and cultural situation.

&12 We do acknowledge, however, that there should be traditional considerations of venue applied by the Superior Court when it makes decisions relating to venue, and we look to the federal rules and our local criminal venue statute for guidance. In the federal system, a motion to transfer venue to a more convenient forum is governed by 28 USC 1404(a) which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer a civil action to any other district or division where it might have been brought." 28 USC 1404(a) echoes the same ideas inherent in our local criminal venue statute: venue should involve the place where an action occurred, and should consider the

[6] In addition, while we do not analyze the transfer on common law principles, under common law, the action would be brought at the place where the transaction occurred, which would have been Tinian. *See Calder v. Third Judicial Dist. Court In and For Salt Lake County,* 2 Utah 2d 309, 314-316, 273 P.2d 168, 171 - 172 (1954).

convenience of the parties as well as the fair administration of justice. *See Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964).

&13 If fairness considerations are implicated under the Seventh Amendment, the court should, in its discretion, consider whether there is good cause to change venue upon a motion by either party. Fairness considerations need not prompt a change in venue if it is possible to empanel an impartial jury. *See Bashor v. Risley, 730* F.2d 1228, 1238 (9th Cir. 1984); *Ignacio v. People of Territory of Guam*, 413 F.2d 513, 518 (9th Cir. 1969)(allegations of adverse publicity without an actual showing of bias are not sufficient to require a change of venue). "The right to an impartial jury does not mean that the jury must be ignorant of the subject matter involved." *Bashor*, 730 F.2d at 1235. The fact that some of our islands have small populations which may implicate certain community knowledge and family ties cannot lead to a presumption against fairness and what would surely be a resulting loss of participation in the judicial process.

&14 To show that the constitutional right to a fair trial was violated, Guerrero must show either actual or presumed prejudice. Prejudice may be presumed if the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity. Actual prejudice must be demonstrated by showing that jurors exhibited "actual partiality or hostility that could not be laid aside." *See Gallego v. McDaniel*, 124 F.3d 1065, 1070 (9th Cir.1997)(quoting *United States v. Sherwood,* 98 F.3d 402, 410 (9th Cir.1996)).

&15 We find that the trial court did not abuse its discretion when it transferred venue to Tinian. Considering the venue principles laid out by our criminal statute and the federal rules, Tinian was a proper venue for this trial. Tinian was the island where the incident that

led to the lawsuit occurred. Tinian is the principal place of business of the defendant, Tinian Dynasty. The lawsuit could have initially been filed on Tinian. Transferring the case to Tinian advanced the convenient administration of justice. These factors all suggest that Tinian was a proper place to hold the trial. Furthermore, Guerrero has not shown actual or presumed prejudice occurred as a result of the change of venue. While the small community of Tinian was undoubtably aware of the case, the record did not demonstrate that the community was saturated with prejudicial and inflammatory media publicity. In addition, there was no showing by Guerrero that the jurors exhibited actual partiality or hostility. Guerrero argues that many in the community of Tinian had some kind of direct or indirect economic tie to the Tinian Dynasty. Even assuming this is true, there was no showing whatsoever that any juror called as part of the jury pool was actually partial or hostile. We do not consider self-serving declarations to be evidence. As a result, we find that the transfer of venue to Tinian was not an abuse of discretion.

B. Jury Array

&16 Guerrero challenges the jury array and petit jury based on concepts of a fair jury trial found in the Sixth Amendment of the U.S. Constitution. Guerrero's reliance on the Sixth Amendment, however, is misplaced. The Sixth Amendment deals exclusively with criminal prosecutions and therefore is not implicated by Guerrero's personal injury claim. Although his argument is technically flawed, he is correct to the extent that a fair trial is clearly required in civil as well as criminal proceedings, and "[o]ne touchstone of a fair trial is an impartial trier of fact . . . ." *McDonough Power Equipment, Inc, v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 849, 78 L.Ed.2d 663 (1984).

&17 Federal courts have found an impartial jury requirement in civil cases to be implicit in the Fifth Amendment's due process protections and in the Seventh Amendment's right to trial by jury in civil cases. *See Skaggs v. Otis Elevator Company*, 164 F.3d 511, 514-15 (10th Cir. 1998); *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981); *Kieran v. Van Schaik*, 347 F.2d 775, 778 (3rd Cir. 1965). Similar reasoning leads us to conclude that Commonwealth law also mandates an impartial jury in civil cases. The Commonwealth Constitution specifically provides due process protection at Article I, Section 5: "[n]o person shall be deprived of life, liberty or property without due process of law." Additionally, although the Commonwealth Constitution does not provide for jury trials in civil cases,[7] 7 CMC §3101 grants a right to trial by jury for suits over $1,000. Clearly, without the requirement of an impartial jury these provisions would be meaningless. Indeed, "[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181 (1946).

&18 Guerrero argues jury bias based on an improper jury array from which the individual jurors were selected. This being a question of law, we review it *de novo. Pellegrino v. Commonwealth*, 1999 MP 10 ¶5, 5 N.M.I. 242, 243. Because we find that impartial juries are required under Commonwealth law, we need not address the federal constitution on this matter. In determining what comprises an impartial jury, however, we look to cases addressing the question under federal law. And in this vein, Sixth Amendment analysis is helpful. *Skaggs*, 164 F.3d at 515 n.2.

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[7] Article I, Section 8 reads: "The legislature may provide for trial by jury in criminal or civil cases."

&19 The Sixth Amendment requires that a defendant be tried by a jury which represents a fair cross-section of the community. *Taylor v. Louisiana,* 419 U.S. 522, 528 (1975). To establish a prima facie violation of the right to a fair cross-section, a defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community;
> (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
> (3) that this under representation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979). "[A] violation of the fair cross-section requirement cannot be premised upon proof of under-representation in a single jury. While juries must be drawn from a source fairly representative of the community, the composition of *each jury* need not mirror that of the community." *U.S. v. Miller,* 771 F.2d 1219, 1228 - 1229 (9th Cir. 1985). Unless there is a showing that the fair cross-section requirement of the Sixth Amendment was violated, a mere failure to follow technical requirements of a state law prescribing methods to be used in jury selection does not result in a constitutional violation. *See id.*

&20 At the outset, the parties dispute whether the Appellant waived his challenge to the jury array because he did not include in the excerpts of record a copy of the transcript pages which reflect the motion challenging jury panel CT or the court's ruling on the issue. Rule 30 (c)(1) of the Commonwealth Rules of Appellate Procedure states:

> c) Additional Items Which Shall Be Included In The Excerpts Of Record In Appropriate Circumstances.
>
> (1) Transcript: When an appeal is based upon a challenge to the admission or exclusion of evidence or any other ruling or order, but not otherwise, a copy

> of the relevant pages of the transcript at which the evidence, offer of proof, ruling, or order and any necessary objection are recorded should be included.

Com. R. App. P. Rule 30(c)(1).

&21 Guerrero does not provide the Court with the relevant transcript excerpts in either his Excerpts of Record or Supplemental Excerpts of Record. Instead, he argues that under Rule 10(a) of the Commonwealth Rules of Appellate Procedure, Athe original papers and exhibits filed in the Superior Court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the Clerk of the Superior Court shall constitute the available record on appeal in all cases.@ Guerrero argues that including transcript excerpts might subject him to penalties under Rule 30(g) of the Commonwealth Rules of Appellate Procedure, which provides for sanctions against any attorney who increases the cost of litigation by the inclusion of unnecessary matter in the excerpts of record.[8]

&22 These arguments fail. The available record on appeal is that from which counsel may extract relevant information to bring to the Court=s attention through inclusion in the appellate record. *See In re Estate of Deleon Castro*, 4 N.M.I. 102, 109, fn. 20 (1994). "An appellant should not feel free to argue that a court's decision is not supported by the evidence without proffering that very evidence before this Court in its excerpts of the record. Otherwise, the burden of furnishing the record on appeal to this Court would unduly be placed upon the appellee and the reviewing court." *In re Estate of Deleon Castro*, 4 N.M.I. at 108.

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[8]Rule 30(g) states:

> The Court in appropriate cases will impose sanctions against any attorney who vexatiously and unreasonably increases the cost of litigation by inclusion of unnecessary material in the excerpts of record. Counsel will be provided notice and have an opportunity to respond before sanctions are imposed.

&23 Guerrero's counsel would clearly not be subject to sanctions under Rule 30(g) by providing the Court with information required to make its decision. Furthermore, while there may be a complete transcript that exists as part of the Superior Court record below, it is not permissible to cite to a transcript which is not part of the appellate record. *In re Estate of Deleon Castro*, 4 N.M.I. at 109, fn. 20. A transcript does not automatically become part of an appellate record: counsel must make it part of the record. *See Abood v. Block*, 752 F.2d 548 (11th Cir. 1985). Failure to include transcript testimony in an appellate record, especially after the Appellant fails to supplement the record or explain why a transcript is not necessary for meaningful review will lead to dismissal of an argument. *See Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714 (7th Cir. 2003).

&24 Here, even after being put on notice by Tinian Dynasty's response brief, Appellant failed to include the relevant transcript excerpts in his Supplemental Excerpts of Record. If an appellant fails to provide a sufficient record to review by not including the relevant portions of the transcripts in the excerpts of record, the Court may not reach the merits of the claim. *See In re Estate of Deleon Castro*, 4 N.M.I. 102 (1994); *Commonwealth v. Repeki*, 2003 MP 1 at & 18-21; *Commonwealth v. Lucas*, 6 N.M.I. 564 (2003). We therefore find that Guerrero, by his failure to provide the necessary transcript, has waived his challenge to the jury array.

C. Jury instructions 28, 28(A), and 29

&25 Guerrero argues that the trial court should not have allowed the jury instructions as presented. The instructions supported Tinian Dynasty's affirmative defense of privilege, that "no person has a right against a casino operator," except as provided for by law. 10 CMC §25101. We review jury instructions either *de novo* or for abuse of discretion:

> The standard of review on appeal for an alleged error in jury instructions depends on the nature of the claimed error. *Oglesby v. S. Pac. Transp. Co.*, 6 F.3d 603, 606 (9th Cir.1993). If jury instructions are challenged as a misstatement of the law, we review the challenged instructions de novo. *Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir.1998). Otherwise, we afford a district court "substantial latitude in tailoring jury instructions, [and] we review the formulation of those instructions for abuse of discretion." *Gilbrook v. City of Westminster*, 177 F.3d 839, 860 (9th Cir.1999).

Navellier v. Sletten, 262 F.3d 923, 944 (9th Cir. 2001). *See Santos v. Nansay Micronesia, Inc.*, 4 N.M.I. 155 (1994)(Jury instructions are reviewed under an abuse of discretion standard to determine if they are misleading or inadequate.) When reviewing a jury instruction for a misstatement of law, the Court determines whether the instructions contained all the legal elements of the statute. *See U.S. v. You*, 382 F.3d 958, 965 (9th Cir. 2004). Here, because Guerrero challenges the constitutional underpinnings of the law itself, we review using the clear and convincing standard as set forth below.

&26 Before addressing the validity of the specific jury instructions, we must determine the threshold matter of whether Guerrero has waived his challenges by failing to preserve them for appellate review. Tinian Dynasty argues that Guerrero failed to properly object pursuant to Com. R. Civ. P. 51 and Com. R. App. P. 30(c)(1) and has thus forfeited his right to challenge the trial court's ruling.

&27 Rule 51 provides in pertinent part that:

> [n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

A party must distinctly state its jury instruction objection or that objection is waived. *Snake River Valley Electric Association v. PacifiCorp*, 357 F.2d 1042, 1053 (9th Cir. 2004). If the jury instruction objection is not distinctly stated, it will not be preserved for appeal. *B.M.*

Co. v. Avery, 2002 Guam 19 at ¶27. Requirements of Rule 51 are strictly enforced. *Snake River Valley Electric Association*, 357 F.2d at 1053.

&28 Examining the appellate record, we find that while Guerrero properly made his objections concerning Jury Instructions 28 and 29 and included them as part of his Supplemental Excerpts of Record, he failed to include any transcript excerpt which shows he objected to Jury Instruction 28A. It is the appellant's burden to submit the relevant evidentiary record before this Court and identify the parts of the record which support the appeal. In *re Estate of Deleon Castro*, 4 N.M.I. 102, 108-9 (1994); *B.M. Co.*, 2002 Guam 19 at ¶28. Because Guerrero failed to provide the Court with materials in the excerpts of record regarding his objection to Jury Instruction 28A, we do not review it. Com. R. Civ. P. Rule 51; In *re Estate of Deleon Castro*, 4 N.M.I. 102, 108-9 (1994).

&29 Turning to Jury Instructions 28 and 29, Jury Instruction Number 28 was taken from the Tinian Casino Gaming Control Act of 1989 ("the Statute"), which reads in pertinent part:

> (c) It is lawful for a casino operator and an employee or agent of a casino operator employed in or acting in connection with the casino and any person acting by the authority of the casino operator, employee or agent to use such force as is reasonably necessary in order to prevent any person who is the subject of a direction under 10 CMC §§25101 or 25103 from entering the casino or in order to remove any such person who remains in the casino, provided that he does not do serious bodily injury to such person. In this subsection the term "serious bodily injury" has the meaning assigned to it in 6 CMC §103(o). 10 CMC §25104.

The applicable provision in this case, 10 CMC §25101, provides that a casino operator or person in charge may prohibit a person from entering or remaining in a casino by verbal or written direction. Jury Instruction Number 29, which defines serious bodily injury, was taken from 6 CMC §103(o) which reads:

> "Serious bodily injury" means bodily injury which creates a high probability of death or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other bodily injury of like severity.

&30 Guerrero argues that the Jury Instructions were improper because they were drawn from the Statute, a local law which Guerrero argues conflicts with primary Commonwealth-wide law. 10 CMC §25104. *See Commonwealth v. Tinian Casino Gaming Control Commission,* 3 N.M.I. 134 (1992); *Commonwealth v. Tinian Casino Gaming Control Commission*, Civ. No. 91-690 (N.M.I. Super. Ct. Aug. 18, 1993). Guerreo argues specifically that the Statute conflicts with 6 CMC §§6104 and 6107, which are criminal statutes governing arrest by a police officer.[9] Because a casino operator does not have to place a person under arrest before using force and a casino operator is not restricted to the use of force necessary to compel submission, Guerrero argues that the Statute improperly supercedes Commonwealth law.

&31 We do not find Guerrero's argument persuasive. If two statutory provisions are capable of co-existing, then we may regard each as effective. *Estate of Faisao v. Tenorio,* 4 N.M.I. 260, 265 (1995). In addition,

> There is a symbiotic relationship between Commonwealth-wide laws and the local laws of each senatorial district, including those enacted by local initiatives. Each set of laws should be able to co-exist harmoniously, without either doing violence to the other. The unity of the entire Commonwealth must be a paramount consideration, but our Constitution nevertheless allows for a certain degree of flexibility permitting each of the Commonwealth's three senatorial districts to

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9 6 CMC §6104 provides: "In all cases where the person arrested refuses to submit or attempts to escape, such degree of force may be used as is necessary to compel submission." 6 CMC §6107 provides:

> No violation of a provision of this division shall in and of itself entitle an accused to an acquittal, but no evidence obtained as a result of any violation may be admitted against the accused…. The relief authorized by this section shall be in addition to, and does not bar, all forms of relief to which the arrested person may be entitled by law.

> enact local laws pertaining only to that district. Local laws and local initiatives allow each district the ability to maintain and to retain its own unique characteristics and promote its own special aspirations.

Commonwealth v. Tinian Casino Gaming Control Commission, 3 N.M.I. 134 (1992).

&32 We have already put forth the test that we would use to determine whether provisions of the Statute "run afoul of the constitutional scheme pertaining to the interrelationship between Commonwealth-wide laws and local initiatives as envisioned by the framers." *Id*; N.M.I. Const. art. IX, XXI.[10] The test is as follows:

> First, there is a presumption that the provisions of a local initiative concerning gambling which is duly enacted pursuant to Articles IX and XXI of the Commonwealth Constitution are valid unless any provision of the local initiative conflicts with a provision of the U.S. Constitution, the Commonwealth Constitution, or a Commonwealth-wide law. The opponent of a local gambling initiative has the initial burden to show by clear and convincing evidence which provisions of the local gambling initiative are inconsistent and in conflict with which constitutional provisions or Commonwealth-wide laws, and why.
>
> Second, if any provision of the local gambling initiative conflicts with a provision of the U.S. Constitution, the Commonwealth Constitution, or a Commonwealth-wide law, that provision must fall, unless, with respect to a Commonwealth-wide law, the application of the Commonwealth-wide law would frustrate the establishment of gambling in a senatorial district.
>
> Third, once it clearly is shown that there is a conflict between a Commonwealth-wide law and a local gambling initiative, then the Commonwealth-wide law prevails, unless the proponent of the gambling initiative demonstrates by clear and convincing proof that the application of a Commonwealth-wide law would itself violate Article XXI of the Commonwealth Constitution. In this case, the appellees must show that a Commonwealth-wide law, if it were to supersede a provision of the Act, would unduly and unreasonably

[10] Article IX provides that local laws may be enacted by initiative: Article XXI provides: "Gambling is prohibited in the Northern Mariana Islands except as provided by Commonwealth law or established through initiative in the Commonwealth or in any senatorial district."

> interfere with the second senatorial district's constitutional right to effectively establish gambling.

&33 Guerrero fails in his initial burden to show by clear and convincing evidence that the Statute conflicts with a provision of the U.S. Constitution, the Commonwealth Constitution, or a Commonwealth-wide law. The purpose of the Statute, insofar as the applicable provisions used for the jury instructions here, is to provide the casino with the ability to remove disruptive persons from its premises to maintain order within the casino. The Statute is consistent with the Restatement, Second, Torts §77, which provides that:

> An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another's intrusion upon the actor's land or chattels, if
> (a) the intrusion is not privileged or the other intentionally or negligently causes the actor to believe that it is not privileged, and
> (b) the actor reasonably believes that the intrusion can be prevented or terminated only by the force used, and
> (c) the actor has first requested the other to desist and the other has disregarded the request, or the actor reasonably believes that a request will be useless or that substantial harm will be done before it can be made.

Looking at the Statute, it provides that the casino operator can use force "as is reasonably necessary," provided that "he does not do serious bodily injury." This language comports with the Restatement. Guerrero has not shown how this provision for private business which only applies within the casino relates to the ability of police officers to make arrests among the public at large. Accordingly, we find that Guerrero has not shown by clear and convincing evidence that the Statute improperly supercedes Commonwealth law.

&34 Because we find that the Statute does not conflict with Commonwealth-wide law, we find that the jury instructions adequately reflect Tinian Casino Gaming Control Act of 1989, and did not constitute a misstatement of the law. The trial court did not abuse its discretion because it adequately tailored the jury instructions to reflect the existing Statute.

D. Admission of exhibits F, G, L, J, N, and P over Appellant=s hearsay objections.

&35 Appellant argues that exhibits F, G, J, L, N, and P should not have been admitted as business records over Appellant=s hearsay objections. This Court reviews Superior Court=s decision to admit the exhibits under the abuse of discretion standard. *Tropic Isles Cable TV Corp. v. Mafnas*, 1998 MP 11 &2. Rule 803(6) of the Commonwealth Rules of Evidence [Com. R. Evid. 803(6)] provides for a business records exception to the hearsay doctrine as follows:

> (6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

&36 In admitting a document as a business record, the most important consideration is the trustworthiness of the document: there should be no strong motive by the declarant to misstate the facts. *Commonwealth of the Northern Mariana Islands v. Taitano,* 2005 MP 20 (2005); *Hoffman v. Palmer*, 129 F.2d 976, 991 (2nd Cir. 1942), *aff'd*, 318 U.S. 109 (1943). "Rule 803(6) 'favor[s] the admission of evidence rather than its exclusion if it has any probative value at all.'" *Taitano,* 2005 MP 20 (2005)(quoting *In re Ollag Constr. Equip. Corp.*, 665 F.2d 43, 46 (2d Cir.1981)). For a document to be admitted as a business record under the hearsay exception, it must be relevant to regularly conducted business and the

proponent must show that the generation of such a record is a regularly conducted activity of that business. *See, e.g., United States v. Kim,* 595 F.2d 755, 761 (D.C.Cir.1979). The preparer, the custodian or any other person who understands and has personal knowledge of the record-keeping system can authenticate a business record. *See United States v. Ray,* 930 F.2d 1368, 1371 (9th Cir. 1991).

&37 Here, Exhibits F, G, L, and J are reports prepared by Tinian Dynasty security personnel who witnessed the incident involving Guerrero. The Tinian Dynasty Security Department Operations Manual requires that each security person involved in a removal must prepare a report of the incident. Timothy Kevin Lowe, the Casino Operations Manager, authenticated these exhibits as business records. Accordingly, these Exhibits were properly admitted.

&38 Exhibit N, prepared by Tinian Dynasty employee Peter Bradbury, was a videotape which showed multiple camera angles of Guerrero's altercation with the Tinian Dynasty security staff. Tinian Dynasty uses more than 200 cameras to monitor its premises, focusing most of its surveillance resources on its casino. These cameras are connected to VCRs that are continuously recording. Tapes that are fully recorded and contain no incident footage are maintained for a period of seven days, the industry standard. If an incident occurs, a compilation tape (produced by editing together multiple angles from multiple tapes to create one continuous video of an event) is maintained by the Surveillance Department until it is no longer needed. Here, there were nine tapes that captured Guerrero's altercation with the security staff.[11] These tapes were made into the compilation tape which was admitted into

[11] Exhibits A-1 through A-9

evidence at trial and made part of the record on appeal.[12] The tape was labeled "Incident Report Number IR0722981," and Mr. Bradbury testified at the trial. Guerrero fails to demonstrate how this business record might have been unreliable or untrustworthy and we find it was not an abuse of discretion for the trial court to admit Exhibit N.

&39 Finally, Exhibit P was a report prepared by Patrick San Nicolas in his capacity as an inspector for the Tinian Gaming Control Commission. The Commission maintains such reports in the course of its business and the preparer testified as to the authenticity of the document. While Mr. San Nicolas relied on documents and interviews of third persons, this does not change the business record nature of the report. We have recognized that investigative reports are often not the product of the declarant's firsthand knowledge. *Commonwealth of the Northern Mariana Islands v. Taitano,* 2005 MP 20 (L 3771423)(2005)(citing *Combs v. Wilkinson* 315 F.3d 548, at 555 (6th Cir.2002)). While we will examine statements for double hearsay, here Guerrero has not adequately identified the double hearsay to which he objects. Without a more exact objection, we do not find that the introduction of Exhibit P was an abuse of discretion.

E. Guerrero did not establish that there was plain error on the face of the record which would require this court to review the jury verdict.

&40 Guerrero challenges the jury verdict on the grounds of insufficiency of the evidence. If a motion for a directed verdict pursuant to Rule 50(a) of the Commonwealth Rules of Civil Procedure is not made at the close of the evidence, then the standard on appeal is plain error, not sufficiency of the evidence. *See Patel v. Penman,* 103 F.3d 868, 878 (9th Cir. 1996);

[12] Exhibit A-10. We have viewed the Tape as part of the appellate record and in the context of our examination of other exhibits which Guerrero argued were wrongfully admitted as hearsay.

Image Technical services., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1212 (9th Cir. 1997).

Rule 50(a) provides that:

> (1) If during a trial by jury, a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot, under the controlling law, be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury…. Com. R. Civ. P., Rule 50(a).

Rule 50(b) provides in pertinent part:

> (b) Whenever a motion for a judgment as a matter of law is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than ten days after entry of judgment…. Com. R Civ. P., Rule 50(b).

Guerrero concedes that he failed to meet the requirements of Rule 50(a), Commonwealth Rules of Civil Procedure, because he did not move for judgment as a matter of law before the case was submitted to the jury. Accordingly, because Guerrero did not challenge the jury verdict at the proper time, our standard of review is for plain error.

&41 If there is plain error apparent on the face of the record which would cause a "manifest miscarriage of justice," we must review a jury verdict. *Patel*, 103 F.3d at 878. Plain error review permits only "'extraordinarily deferential review,'" that is "'limited to whether there was *any* evidence to support the jury's verdict, irrespective of its sufficiency.'" *Id*. (citing *Benigni v. City of Hemet*, 879 F.2d 473, 476 (9th Cir.1988) (emphasis added) (quoting *Herrington v. Sonoma County*, 834 F.2d 1488, 1500-01 (9th Cir.1987), *cert. denied*, 489 U.S. 1090, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989)). We do not find such plain error on

the face of the record presented here. The record includes the testimony of Tinian Dynasty employees, the testimony of Guerrero and the surveillance videotape footage of the incident. Under the plain error standard we inquire no further. We reverse under plain error only if there is an absolute absence of evidence to support the jury's verdict. This evidence is more than enough to overcome the plain error standard. Accordingly, the jury verdict withstands the challenge to its sufficiency under the plain error standard.

F. The argument that Superior Court erred in granting judgment as a matter of law on the false imprisonment claims is waived.

&42 This argument is waived as the relevant transcript pages required by Rule 30(c)(1) and Rule 10(b)(2) of the Commonwealth Rules of Appellate Procedure were not included in the record. While Guerrero argues he has included the ruling on the motion at E.R. 5, it is only the judgment he has included, not the ruling.

CONCLUSION

&43 For the reasons stated above, we hold that the trial court's decision to grant Tinian Dynasty-s motion to change venue to Tinian was not an abuse of discretion; the trial court's denial of the motion challenging the array of the jury panel was not erroneous; and the jury verdict in favor of Tinian Dynasty was not subject to challenge. The judgment is hereby AFFIRMED.

SO ORDERED this 28th day of December, 2006.

/s/ Miguel S. Demapan
MIGUEL S. DEMAPAN
Chief Justice

_____*/s/ John A. Manglona*_____
JOHN A. MANGLONA
Associate Justice

Justice *Pro Tempore* CARBULLIDO, dissenting.

CARBULLIDO, J.

I respectfully dissent from the majority's determination that the trial court's decision to grant Tinian Dynasty's motion to transfer venue from Saipan to Tinian was not an abuse of discretion.

"Venue relates to the convenience of litigants." *Panhandle East. P.L. Co. v. Federal Pow. Com'n*, 324 U.S. 635, 639; 65 S.Ct. 821, 823-824 (1945). Venue is "the place where the power to adjudicate is to be exercised, the place where the suit may or should be heard," and is not equivalent to the meaning of subject matter jurisdiction, which is "the power and authority of the Court to act." *Farmers Elev. Mut. Ins. Co. v. Carl J. Austad & Sons, Inc.*, 343 F.2d 7, 11 (1965)(citing 56 Am.Jur. Venue § 2; 92 C.J.S. Venue § 1; 14 Am.Jur. Courts § 160; 21 C.J.S. Courts § 15). However, "[a] judgment or order issued by a court without venue is void." *First Amer. Title Ins. Co. v. Broadstreet*, 260 Ga.App. 705, 706; 580 S.E.2d 676, 678 (2003) (citing *Thorpe v. Thorpe*, 268 Ga. 724, 726; 492 S.E.2d 887 (1997) and *Bradley v. State*, 272 Ga. 740, 743; 533 S.E.2d 727, 730-731 (2000)(discussing venue in a criminal case)); 77 Am.Jur.2d Venue § 1 (West, 2006).

"The right to demand a change of venue and the authority of the courts to remove a cause from one county to another for trial is purely statutory." *Lovegrove v. Lovegrove*, 237 N.C. 307, 308; 74 S.E.2d 723, 724 (1953); 77 Am.Jur.2d Venue § 47 (West, 2006); *see also Inhab. of County of Lincoln v. Prince*, 2 Mass. 544, 546-547 (1807) and *Cleveland v. Welsh*,

4 Mass. 591, 592 (1808)(stating that Massachusetts courts did not have power at common law to allow a change of venue); *Cf. Penn. Power & Light Co. v. Gulf Oil Corp.*, 270 Pa.Super. 514, 526 n.14; 411 A.2d 1203, 1210 n.14 (1979)(noting that Pennsylvania Supreme Court's "inherent power to grant a change of venue" derived from the Act of May 22, 1722) and *Cocheco R.R. v. Farrington*, 6 Fost. 428 (1853) (discussing adoption of common law via enactments indicating that certain New Hampshire courts had power to change venue). "The right to a change of venue . . . can be asserted successfully only by one who brings himself within the statute. *Danielson v. Danielson*, 62 Mont. 83, --; 203 P. 506, 507 (1922)(citing *Powell v. Sutro*, 80 Cal. 559, 561; 22 P. 308, -- (1889)). "Parties can not, by their act, change the venue of a proceeding for which the statute contains no warrant; nor can the court where it was instituted usurp authority to make an order to that effect, which will become lawful if acted on, any more than any other wholly unwarranted act can be thus validated." *Cole v. Cole*, 89 Mo.App. 228, --; 1901 WL 1707, at *3 (1901)(overruled on other grounds by *Hayes v. Hayes*, 363 Mo. 583, 252 S.W.2d 323 (1952)). "Proceedings for change of venue are statutory in their origin, and, where no statutory provision exists authorizing a change, the right thereto is nonexistent." *Franken v. State*, 190 Wis. 424, --; 209 N.W. 766, 767, 769 (1926). Where venue is not changeable pursuant to statute, the court to which venue is transferred does not acquire jurisdiction. *Cole*, 89 Mo.App. at --; 1901 WL 1707, at *3.

Addressing Guerrero's argument that changing venue from Saipan to Tinian violated his 7th amendment rights to substantive and procedural due process, the majority conceded that there was an "absence of specific local venue statutes" applicable to the present civil case. The majority then found that the trial court had inherent power to transfer the case and

that federal rule 28 USC 1404(a) was "persuasive" in guiding the analysis.

Absent statutory authority granted by the Commonwealth legislature, the trial court could not exercise its discretion in transferring the proceedings in the instant case from Saipan to Tinian. The majority noted that "[t]he Commonwealth does not have a specific statutory provision that determines venue in a civil action." Specifically, the majority did not reference any local statutory basis authorizing the trial court to transfer the proceedings. Therefore, the trial court erred in granting Tinian Dynasty's motion to transfer venue because no such statute authorized the trial court to so grant the motion. For these reasons, I disagree with the majority's holding that the trial court did not abuse its discretion by transferring the present case, and I would reverse the trial court's decision to change venue and remand to vacate the judgment and order a new trial.

/s/ F. Philip Carbullido
F. PHILIP CARBULLIDO
Justice *Pro Tempore*

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

PEDRO R. D.L. GUERRERO,
Plaintiff-Appellant

v.

TINIAN DYNASTY HOTEL AND CASINO
and JOHN DOES 1 through 10,
Defendants-Appellees.

Supreme Court Appeal No. 03-0016-GA
Superior Court Civil Case No. 98-1303D

JUDGMENT

For the reasons stated in its Opinion issued this date, the Supreme Court by a majority decision has determined that the trial court's decision to grant Tinian Dynasty's motion to change venue to Tinian was not an abuse of discretion; the trial court's denial of the motion challenging the array of the jury panel was not erroneous; and the jury verdict in favor of Tinian Dynasty was not subject to challenge. The judgment is thereby AFFIRMED.

ENTERED this 28th day of December, 2006.

/s/ Kenneth E. Barden
KENNETH E. BARDEN
Clerk of Supreme Court