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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

JING XIN XIAO,
Defendant-Appellant.

SUPREME COURT NO. 2011-SCC-0007-CRM
SUPERIOR COURT NO. 10-0097E

OPINION

Cite as: 2013 MP 12

Decided October 4, 2013

Eden Schwartz (Argued), Assistant Public Defender, and Daniel Guidotti (On Brief), Assistant Public Defender, Office of the Public Defender, Saipan, MP, for Defendant-Appellant Jing Xin Xiao

James B. McAllister, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee Commonwealth of the Northern Mariana Islands

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

CASTRO, C.J.:

¶ 1 We decide an appeal arising from Defendant-Appellant Jing Xin Xiao's ("Xiao") convictions for Trafficking and Possession of a Controlled Substance in violation of 6 CMC § 2141(a) and § 2142(a), respectively. Xiao challenges these convictions, claiming numerous deficiencies before and during trial: (1) prosecutorial misconduct during opening and closing statements; (2) impermissible expert witness testimony; (3) the trial court's improper denial of his motion requesting an expert witness; (4) the trial court's improper denial of his motion for continuance; (5) impermissible chains-of-custody admitted into evidence; (6) improper character evidence; and (7) cumulative errors resulting in an unfair trial. For the reasons expressed below, we AFFIRM the defendant's convictions.

I. Facts and Procedural History

¶ 2 This case commenced when Department of Public Safety ("DPS") officers arrested the cooperating defendant ("CD") for Possession and Trafficking of crystal methamphetamine. In exchange for a potential reduction in sentence, CD agreed to work as an informant for DPS. Law enforcement officers set up a controlled buy on April 7, 2011, during which CD attempted to purchase methamphetamines from Xiao, whom CD claimed as his previous drug supplier.

¶ 3 DPS provided CD with a few hundred dollars in specially-marked bills to conduct the purchase. With these funds, he drove to Xiao's residence and purchased a small plastic bag containing approximately one gram of a crystalline substance from Xiao. Before, during, and after the transaction, DPS officers conducted visual and audio surveillance. Following the buy, they collected the small plastic bag and its contents.

¶ 4 Following this sting operation, Detective Sean White obtained a search warrant for Xiao's residence. During the warrant's execution, officers observed an Asian male standing outside the home. DPS officers detained and searched the man, discovering over $1,000 in his pocket, including the specially-marked bills. Detective Steven A. Castro then took CD to the residence, where he identified the Asian man, Xiao, as his drug supplier.

¶ 5 During their search of Xiao's house and the surrounding premises, DPS officers found scales, plastic straws, and small plastic bags, including one containing a crystalline substance. Detective Dennis Reyes then followed a path around Xiao's house to a small farming area. He searched the farming area with other DPS officers and unearthed a container holding four small plastic bags. Each small plastic bag contained a crystalline substance. Subsequently, DPS performed field tests on the substances seized, which registered positive for methamphetamine.

¶ 6 Xiao was charged with one count of Trafficking crystal methamphetamine and one count of Possession of crystal methamphetamine.

¶ 7 Prior to the trial's start, Xiao visited CD's residence. Xiao asked CD how much money the police had given him on the day of his arrest. CD did not answer. Xiao then said he would go to jail for a long time if CD testified against him. Again, CD did not reply and the conversation ended.

¶ 8 Approximately one month before trial, the Commonwealth provided drug test results for some of the substances recovered. The Guam Police Department Crime Laboratory received this evidence in August 2010, but due to a backlog, it did not process the substances for months.

¶ 9 When the lab finally tested the substances, it did so in two phases. Parties apparently reviewed the first set of test results approximately one month before trial (although it is unclear from the record when the lab mailed out its first set of test results). Trial Tr. at 132. Four days before trial, the laboratory then mailed out the second batch of test results. Trial Tr. at 525. These results revealed that the largest sample of purported crystal methamphetamine, approximately 170 grams, was actually sucrose. Trial Tr. at 634-35. Of the total amount seized, the laboratory examiner testified that slightly less than 3.5 grams of the sample was actually crystal methamphetamine. Trial Tr. at 639. The examiner also testified that the lab did not conclusively test all of the samples provided; but it did conclusively test all of the substances found to constitute crystal methamphetamine. Trial Tr. at 652.

¶ 10 After discovering the second set of test results on the Friday prior to trial, Xiao filed a motion requesting a continuance and the appointment of his own expert to conduct tests on the substances. Ostensibly, he filed the motion because the Commonwealth had not provided Xiao with the second set of results until just before the trial (Xiao received the second batch of results on the day of trial, despite having filed this motion the previous Friday).

¶ 11 In another pretrial matter, the Court initially decided to admit CD's testimony regarding Xiao's history of drug transactions with him during the previous 18 months. When Xiao filed a motion opposing what effectively was an ex parte decision by the trial court, the trial court took the matter under advisement; the court concluded it would wait to decide the matter until Xiao lodged an objection during CD's testimony. At trial, Xiao objected during the middle of CD's testimony, but only after CD explained he had purchased and sold crystal methamphetamines for Xiao for a year and a half prior to the controlled buy. The trial court overruled Xiao's objection, but issued an instruction limiting the jury's consideration of this testimony.

¶ 12 In the course of his trial, Xiao offered several other objections. First, he objected when the Commonwealth: (a) asked the jurors to convict him because he was contributing to a methamphetamine epidemic on Saipan in its opening statement; and (b) declared that Xiao had "practically confessed" in its closing argument. Trial Tr. at 784. The prosecutor again alluded to "the confession," without any qualifier

or the modifier "practically" in its rebuttal – though Xiao did not renew his objection. *Id.* at 801. Second, Xiao objected when Detective Castro testified that Xiao sold the drugs to CD (during the controlled buy). He lodged this objection because he believed the detective testified not simply on the basis of direct knowledge or observation, but rather primarily due to his training, knowledge, and experience as a detective of eight years. *Id.* at 743-44. And, third, Xiao objected to the chains-of-custody accompanying Exhibits 6, 7, 13, 14, 15, and 23, which he claimed lacked proper foundation.[1] Each objection was overruled.

¶ 13 At the close of trial, the trial court convicted Xiao of one count of Trafficking of a Controlled Substance and one count of Possession of a Controlled Substance, in violation of 6 CMC § 2141(a) and § 2142(a), respectfully. He was sentenced to imprisonment for five years without the possibility of parole or suspension and ordered to pay a $15,000 fine.

¶ 14 Xiao appealed his convictions to this Court.

II. Jurisdiction

¶ 15 We have jurisdiction over Superior Court final judgments and orders, 1 CMC § 3102(a), as well as all criminal actions in the Commonwealth. 1 CMC § 3202. Because Xiao timely appealed his convictions, we have jurisdiction. 1 CMC § 3105; NMI SUP. CT. R. 4(b)(1)(A)(i).

III. Standards of Review

¶ 16 Xiao raises numerous issues on appeal. We review his constitutional claims de novo for harmless error when he lodged a contemporaneous objection, *see Commonwealth v. Camacho*, 2002 MP 6 ¶¶ 19, 43 (reviewing a contemporaneous objection to a constitutional issue for harmless error), and for plain error when no timely objection is registered. NMI R. CRIM. P. 52(b). We, in contrast, review a trial court's decisions to admit or exclude evidence, as well as to deny or grant motions for continuance and appointment of expert assistance, for abuse of discretion. *In re Estate of Malite*, 2011 MP 4 ¶ 36 (reviewing the exclusion of evidence); *Commonwealth v. Cristobal*, 4 NMI 345, 346 (1996) (reviewing a motion for continuance); *Commonwealth v. Perez*, 2006 MP 24 ¶ 9 (reviewing a motion for appointment of expert assistance). And, when reviewing for possible cumulative errors, we will reverse only when "it is more probable than not that, taken together, the errors materially affected the verdict." *Commonwealth v. Cepeda*, 2009 MP 15 ¶ 46 (citing *United States v. Fernandez*, 388 F.3d 1199, 1256 (9th Cir. 2004)).

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[1] As best as we can ascertain from the record (which did not contain copies of any exhibits from trial), these exhibits constituted the following: Exhibit 6 and 7 both consisted of small plastic bags containing vials; Exhibit 13 was a Skoal® container; Exhibit 14 and 15 were small plastic bags; and Exhibit 23 was a photograph of money.

IV. Discussion

A. *Whether Remarks in the Prosecutor's Opening or Closing Statements Constituted Prosecutorial Misconduct*

¶ 17 Xiao claims three remarks made by the Commonwealth during its opening and closing statements amounted to prosecutorial misconduct.

¶ 18 "To constitute a violation of a defendant's right to due process under the Fourteenth Amendment to the United States Constitution, prosecutorial misconduct must be of 'sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Commonwealth v. Camacho*, 2002 MP 6 ¶ 104 (quoting *Greer v. Miller*, 483 U.S. 756, 765 (1987)). In reviewing this claim, we must determine whether the prosecutor's conduct was improper; and if so, whether the Defendant suffered prejudice. *United States v. Stinson*, No. 07-50408, No. 07-50409, 2011 U.S. App. LEXIS 17979, at *****33-34 (9th Cir. Aug. 26, 2011) (amended opinion). In making that assessment, it "is not enough that the prosecutor's remarks were undesirable or even universally condemned," *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Darden v. Wainwright*, 699 F. 2d 1031, 1036 (11th Cir. 1983)), because "[i]mproper argument does not, per se, violate a defendant's constitutional rights." *Runningeagle v. Ryan*, 686 F.3d 758, 781 (9th Cir. 2012) (quoting *Fields v. Woodford*, 309 F.3d 1095, 1109 (9th Cir. 2002)). Instead, the relevant question is whether the prosecutor's comments "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parker v. Matthews*, 132 S. Ct. 2148, 2153; 183 L. Ed. 2d 32, 39 (2012) (quoting *Darden*, 477 U.S. at 181). *See, e.g.*, *Commonwealth v. Saimon*, 3 NMI 365, 382 (1992) ("In performing our review, we are reminded that 'while [the prosecutor] may strike hard blows, he [or she] is not at liberty to strike foul ones.'") (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

¶ 19 Three factors guide our analysis in determining whether a prosecutor's statement(s) injected prejudicial unfairness: (1) the efficacy of any cautionary instruction by the judge, *Runningeagle*, 686 F.3d at 781; (2) the context's effect upon the prosecutor's remarks, *United States v. Ruiz*, 710 F.3d 1077, 1082 (9th Cir. 2013); and (3) the strength of the evidence supporting the conviction. *Ruiz*, 710 F.3d at 1084.

¶ 20 Xiao contends three statements by the Commonwealth crossed the line into unconstitutional prosecutorial misconduct. We address each in turn.

Statement One

¶ 21 The prosecutor delivered his opening statement beginning with the following remarks, to which Xiao lodged a timely objection:

> Ladies and gentlemen[,] Saipan is sick. It is sick with an addiction, with the drug called crystal methamphetamine, I am not telling you this to be dramatic. The legislature has called it an epidemic. An epidemic is defined as a disease – a wide spread disease affecting a given population in a given area. This disease is affecting Saipan, affecting this population and is affecting it right now. It's causing an increase in [sic] crime rate in

> Saipan, taking away opportunities and it's ruining peoples' lives. And at the end of this trial you are gonna [sic] have an opportunity to hold one person accountable for his participation in spreading that disease in Saipan. You are going to have an opportunity to make Saipan a little bit healthier.

Trial Tr. at 200.

¶ 22 Xiao asserts that the Commonwealth's emotional appeal represented prosecutorial misconduct, which violated his constitutional right to a fair trial, as articulated in *United States v. Monaghan*, 741 F.2d 1434, 1441 (D.C. Cir. 1984). In particular, Xiao complains of the Commonwealth's comparison of crystal methamphetamine use to an "epidemic," as well as the call to do something about this "disease . . . affecting Saipan" by convicting Xiao of crimes related to this drug. Trial Tr. at 200. The Commonwealth contends these statements merely constitute the kind of "emotional language [that] is an acceptable weapon" in an opening or closing statement. Appellee's Resp. Br. 3 (quoting *Saimon*, 3 NMI at 389).

¶ 23 In characterizing these remarks as unconstitutional prosecutorial misconduct, Xiao heavily relies on a particular passage in *Monaghan*. Appellant's Opening Br. 6-7. In that case, among other things, prosecutors specifically beseeched the jury during the closing statement to publicly condemn the defendant's behavior by finding him guilty. *Monaghan*, 741 F.2d at 1441 The *Monaghan* Court found this statement permissible. *Id.* Xiao does not direct us to a holding in that case, but rather to dicta he believes proscribes the Commonwealth's statements at issue here: "A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking." *Id.* at 1441. But Xiao omits an important qualification found on the next page of that opinion: a prosecutor may properly "request that the jury condemn an accused for engaging in illegal activity . . . , so long as it is not calculated to excite prejudice or passion." *Monaghan*, 741 F.2d at 1442. Thus, *Monaghan* stands for the unremarkable proposition that a prosecutor may not purposefully urge a jury to convict or condemn a defendant on any basis other than their criminal guilt. *United States v. Nobari*, 574 F.3d 1065, 1076-77 (9th Cir. 2009) (citing *Monaghan*, 741 F.2d at 1441).

¶ 24 Xiao also cites to other cases in an apparent effort to analogize to statements that various United States Courts of Appeals have found constitutionally infirm. The trouble with his approach is that it lacks a coherent analytical framework and cites to questionable authority.[2] This is especially true because

[2] Xiao heavily relies on *United States v. Solivan*, 937 F.2d 1146, 1150-55 (6th Cir. 1991), but the United States Court of Appeals for the Sixth Circuit quickly cast doubt upon the *Soilvan* test in *United States v. Carroll*, 26 F.3d 1380, 1383 n.5 (6th Cir. 1994), which it explicitly reaffirmed in *United States v. Warshak*, 631 F.3d 266, 302 (6th Cir. 2010), *United States v. Reid*, 625 F.3d 977, 982 (6th Cir. 2010), and *United States v. Galloway*, 316 F.3d 624, 632 (6th Cir. 2003), among others. While we do not endorse or adopt current Sixth Circuit law on this matter — a test the United States Supreme Court recently questioned on habeas review, *Parker v. Matthews*, 132 S. Ct. 2148, 2155; 183 L. Ed. 2d 32, 41 (2012) — we find Xiao's citation to *Solivan*, without any further explanation regarding its precedential value, highly problematic.

different United States Courts of Appeals utilize different factors for prejudice determinations in this context.[3] We are persuaded that the approach utilized by the Court of Appeals for the Ninth Circuit best resolves how to make determinations of prejudice in this context for the following reason. Unlike the cases Xiao cites, this approach most effectively measures the precise consequence(s) an improper statement had on a trial's fundamental fairness by directing a court's focus to clearly discernible criteria. If Xiao believes we should adopt a different test, however, he should have explained why. He has offered no reasons for such a proposition.

¶ 25 As a result, we return to *Monaghan* and *Nobari* to consider whether the remarks in question were improper. *Monaghan* and *Nobari* specifically addressed prosecutorial comments uttered to "'inflame the juries passions and fears,' in violation of due process." *Nobari*, 574 F.3d at 1076 (quoting *United States v. Weatherspoon*, 410 F.3d 1142, 1149 (9th Cir. 2005)). In *Monaghan*, those remarks contained: (1) a permissible call to publicly condemn the defendant for his crime; (2) improper references to the moral standards society holds police officers; and (3) an impermissible call to sympathize for the victim. In *Nobari*, these comments included: (1) an improper suggestion that something terrible may have happened to a "little boy," at the hands of the defendant, if government agents had not arrested the defendant when they did; and (2) an impermissible admonition to "not let the City of Turlock down." 574 F.3d at 1077. In other words, while prosecutors possess substantial leeway in opening and closing statements, *Monaghan* and *Nobari* recognize an important constitutional limitation: remarks designed to appeal to "'passions, fears, and vulnerabilities of the jury'" are impermissible. *Id.* (quoting *Weatherspoon*, 410 F.3d at 1149). We now consider whether the Commonwealth crossed this line.

¶ 26 The prosecutor, in addition to asking the jury to convict Xiao on the basis of guilt, called upon the jury to "hold [Xiao] accountable for his participation in spreading [a] disease in Saipan." Trial Tr. at 200. At first glance, the statements Xiao decries appear merely to involve a rhetorical gloss intended to paint a harsh picture of the harm done by those who distribute illegal drugs. But on further examination, the Commonwealth's implicit charge to jurors that they should clean up the community went well beyond a plain description of the specific harm drug use causes. This is precisely the sort of quasi-jury instruction that *Monaghan* and *Nobari* prohibited: an admonition that jurors should convict because it is their *duty* to

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[3] For examples of other approaches we find unpersuasive see *United States v. Ebron*, 683 F.3d 105, 140 (5th Cir. 2012) ("This court generally looks to three factors in deciding whether any misconduct casts serious doubt on the verdict: '(1) the magnitude of the prejudicial effect of the prosecutor's remarks, (2) the efficacy of any cautionary instruction by the judge, and (3) the strength of the evidence supporting the conviction.'"); *Galloway*, 316 F.3d at 632 ("There are four factors that we utilize to determine if an improper statement was flagrant: 1) whether the statements tended to mislead the jury and prejudice the defendant; 2) whether the statements were isolated or pervasive; 3) whether the statements were deliberately placed before the jury; and 4) whether the evidence against the accused is otherwise strong."); and *United States v. Johnson*, 968 F.2d 768, 771 (8th Cir. 1992) (considering three factors: "(1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant's guilt; and (3) the curative actions taken by the trial court").

protect their communities from drugs, not because the prosecution proved beyond a reasonable doubt that the defendant was guilty. This may be a fine line, but the prosecutor's emphasis on the nature of this "disease" in the preceding sentences convinces us his remarks misled the jury and crossed the line. A prosecutor may not characterize a juror's duty to convict as an opportunity to remedy an emotionally-charged, wide-scale social problem.

¶ 27 In considering whether these remarks were harmless error—that is, whether the prosecutor's comments "'so infected the trial with unfairness as to make the resulting conviction a denial of due process,'" *Parker*, 132 S. Ct. at 2153—we must assess the impact of: (1) any remedial instructions by the trial court, *Runningeagle*, 686 F.3d at 781; (2) the context upon the remarks, *Ruiz*, 710 F.3d at 1082; and (3) the overall force of the evidence against the defendant. *Id.* at 1084.

¶ 28 In applying that test, we begin by noting that the trial court did not issue a specific jury instruction regarding these statements. But it did provide general instruction that attorney arguments are not evidence. Ordinarily, a general instruction overcomes prejudice created by slightly egregious opening remarks. *See United States v. Necoechea*, 986 F.2d 1273, 1280 (9th Cir. 1993) ("Since the vouching during opening statement was mild, this general instruction was sufficient to cure the error."). Second, and related to the first, the context of these remarks helps insulate them from where they would be at their great potency. *See Abromson v. American Pac. Corp*., 114 F.3d 898 (9th Cir. 1997) (observing that impermissible remarks uttered in an opening statement, if not repeated, generally do not create prejudice). And, finally, the strength of the evidence against Xiao is significant, including: (1) the testimony of a police detective regarding Xiao's participation in a controlled buy; (2) the positive laboratory test results for crystal methamphetamine found in Xiao's possession during a police search of his property; and (3) CD's testimony implicating Xiao as his supplier in numerous (if not hundreds of) previous drug transactions, Trial Tr. at 317-322, which helped prove Xiao acted with the requisite intent. As a result, we do not think Xiao suffered prejudice as a result of these improper remarks.

Statement Two

¶ 29 Xiao also contends a statement during the Commonwealth's closing statement prejudiced his constitutional right to a fair trial. In the middle of the prosecutor's closing statement, the Commonwealth made a declaration Xiao objected to, which the trial court overruled. This colloquy surrounded the prosecution's representation of his conversation with CD:

> Commonwealth: One, oh I'm sorry, two, two times that this defendant practically confessed to [CD] that he committed this crime.
>
> Defendant: Objection, your Honor.
>
> . . . .
>
> Defendant: Fact not in evidence.

. . . .

The Court: Okay. . . . [Objection] overrule[d].

Trial Tr. at 784-85.

¶ 30 The Commonwealth characterizes this statement as a reasonable extrapolation from the facts, and directs our attention to case law authorizing rhetorical flexibility. *See Commonwealth v. Brel*, 4 NMI 200, 204 (1994) ("A prosecutor may not go so far as to express his or her personal opinion about a defendant's guilt, but he or she may make any reasonable inference supported by the record."); *Commonwealth v. Saimon*, 3 NMI 365, 385 (1992) (noting that a "prosecutor may argue reasonable inferences from the evidence").

¶ 31 The basic facts underlying the testimony at issue stem from a conversation between CD and Xiao about three weeks prior to trial. Xiao visited CD to ask him the following: (1) not to testify because it would result in serious jail time for Xiao; and (2) how much police money CD had given him on the day police arrested Xiao. Trial Tr. at 346-48. The salient question before us, then, is whether describing that conversation as a "practical[] confess[ion]" constituted prosecutorial conduct depriving Xiao of a fair trial. We think not.

¶ 32 CD testified to two comments uttered by Xiao, which may properly be construed to some small degree as a partial confession. After all, the Commonwealth could reasonably infer that directing another not to testify—or even suggesting or hinting that another not testify—because it could result in penal consequence for them, came close to an actual admission of guilt. The Commonwealth adequately made that distinction without improperly portraying it as an actual or full confession in that statement. Perhaps the prosecutor could have more properly described Xiao's statements as displaying implications of guilt. Nonetheless, the qualification "practically" has the distinct effect of diluting the power of this statement. Moreover, the prosecutor explained exactly why he described the statements in those terms after the objection was overruled. Trial Tr. at 785. Thus, this statement did not cross the line into prosecutorial misconduct.

Statement Three

¶ 33 Xiao next claims, much more plausibly, that the Commonwealth's statement during their closing rebuttal represents prosecutorial misconduct. During the Commonwealth's rebuttal, the prosecutor argued the following to the jury: "What you should consider is the 40 pieces of evidence sitting in front of you, of the drugs, of the drug paraphernalia, the audio tape, the *confession*." Trial Tr. at 801 (emphasis added). Interestingly, the Commonwealth does not attempt to justify the use of this statement in their brief. Instead, the Commonwealth immediately pivots to the question of whether this statement prejudiced Xiao. The government provides little to no analysis specifically on this comment, including whether Xiao

lodged a timely objection, eliding the difference between saying "the confession," and "the practical confession. [4]

¶ 34 We need not decide whether a timely objection occurred, because our review indicates that the inclusion of this statement was, at most, harmless error.

¶ 35 A prosecutor may not refer to a confession not in evidence during a closing argument because, at a minimum, such a statement does not represent a reasonable inference from the evidence. *See Saimon*, 3 NMI at 385 (allowing prosecutors only the flexibility to "argue reasonable inferences from the evidence"). Uttering this type of remark is particularly problematic because it creates the distinct impression that a prosecutor has knowledge of incriminating evidence not presented to the jury. Here, then, it is not difficult to conclude the prosecutor improperly overreached in his characterization of Xiao's remarks to CD as, "the confession." Trial Tr. at 801. The prosecutor could well have asked the jury to consider whether Xiao confessed to CD. But he did not. Much as the Commonwealth apparently believes—as the government did not even attempt to defend this statement—we have little trouble identifying this statement as improper.

¶ 36 While we find the prosecutor's statement crossed the line into impermissible argument, we do not conclude they prejudiced Xiao. Thus the statement does not require a new trial. This conclusion flows from our consideration of the three relevant factors. *Runningeagle*, 686 F.3d at 781; *Ruiz*, 710 F.3d at 1082-84.

¶ 37 Under *Runningeagle*, the first question to consider is the efficacy of any instructions issued by the trial court. 686 F.3d at 781. Here, the general warning by the trial court cannot, in and of itself, cure the harm introduced by a prosecutor's reference to "the confession." Because the trial court did not offer any additional statements, this factor weighs in Xiao's favor.

¶ 38 In considering the context of this remark, *Ruiz*, 710 F.3d at 1082-84, we observe not simply the immediate surroundings of this phrase, but also the remainder of the trial. In doing so, we conclude that despite its isolation, which would ordinarily heighten the flagrant nature of the comment, the greater context dampened the remark's effect. After all, while the Commonwealth's linguistic looseness improperly suggested to the jury that they may not have heard a damaging admission made by Xiao, we find the jury's acceptance of this proposition unlikely. Here, the remark appeared to allude to a recent,

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[4] Xiao did not renew his objection regarding the statement referencing a "practical confession" during the prosecutor's rebuttal remark, "the confession," at closing argument. This objection may effectively mirror his previous objection during the closing statement, and thus be treated as timely made, NMI R. EVID. 103(a), but we need not decide that issue. That is fortunate, because if we had to address this issue we would have been left without any guidance by either of the parties. We are particularly surprised that the Commonwealth did not press plain error as the proper stand of review. In fact, the government takes the position this entire issue is so utterly unimportant that they need only offer two sentences of conclusory analysis. Appellee's Resp. Br. 6. Such perfunctory legal writing fails to assist us in reviewing the issue in any meaningful way, which is the purpose of written submissions to the Court. It should be clear why this sort of brief writing is wholly unacceptable.

previous statement regarding how Xiao "practically confessed," Trial Tr. at 784, the basis of which the prosecutor fully explained. *Id.* at 485. These circumstances minimize much of the speculative damage Xiao claims.

¶ 39 Further, we are also guided by the overwhelming evidence of Xiao's guilt, which we discussed above. *Ruiz*, 710 F.3d at 1084.

¶ 40 Taken together, then, we do not find prejudice because, when viewed in light of context and the overall strength of the evidence, the prosecution's statement, improper though it may have been, did not "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process,'" *Parker*, 132 S. Ct. at 2153 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)).

¶ 41 But while the statement did not materially affect the verdict, the prosecutor knew (or should have known) better than to inject this sort of confusion into jury deliberations. Urging jurors to consider "the confession" when deciding a verdict is completely inappropriate in the absence of evidence. Had the sheer forcefulness of the evidence against Xiao been different in this case, this statement's effect may well have caused Xiao prejudice.

¶ 42 Prosecutors, as servants of the law, are subject to constraints and responsibilities that do not apply to other lawyers; they must serve truth and justice first and foremost. *See, e.g.*, *Berger*, 295 U.S. at 88. Their "job isn't just to win, but to win fairly, staying well within the rules." *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993). Constitutional guardrails preserving fair trials are not fair-weather friends, present when advantageous, conveniently absent when not.

B. *Detective Castro's Testimony Regarding Whether Xiao Unlawfully Distributed a Controlled Substance*

¶ 43 We next consider Xiao's claim that the trial court abused its discretion by improperly allowing Detective Steven A. Castro ("Detective Castro") to give his opinion regarding Xiao's mental state. Under Commonwealth Rule of Evidence 702 ("Rule 702"), a person with "specialized knowledge" qualified by his or her "knowledge, skill, experience, training, or education" may give opinion testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." NMI R. EVID. 702. For those expert witnesses so qualified, the Commonwealth Rules of Evidence prohibit testimony, directly or indirectly, as to whether a defendant possessed a particular mental state in a criminal matter. NMI R. EVID. 704(b).

¶ 44 Xiao argues that the Commonwealth Rules of Evidence regulating expert opinion witness testimony apply here. He specifically contends a short response by Detective Castro constituted improper opinion testimony regarding Xiao's mental state. We reach a different conclusion.

¶ 45 Xiao is correct that a party may call a police detective to testify in a manner that implicates Rule 702. There are, for example, innumerable trades and practices that employ unique devices, feints, and

codes that may mean nothing to the untrained observer but may speak volumes to a specialist qualified by experience or training. The illegal drug trade certainly fits into that category.

¶ 46 But that is not what happened here. The testimony at issue arose from the following question posed by the Commonwealth, to which Xiao lodged a timely objection: "based on your eight years of training and experience as a detective, uh, do you have an opinion on who sold the drugs on April 7th"? Trial Tr. at 743-44. Detective Castro answered affirmatively. Trial Tr. at 744. The prosecutor proceeded to ask him to identify the seller. *Id.* Detective Castro responded with two words: "The defendant." *Id.* At no time did either party move to qualify Detective Castro as an expert witness pursuant to Rule 702.

¶ 47 His answer neither offered, nor relied upon, "scientific, technical, or other specialized knowledge." NMI R. EVID. 702. Such testimony was, in fact, a product of Detective Castro's requisite personal knowledge, *see* NMI. R. EVID. 602, and fell within the bounds of Commonwealth Rule of Evidence 701, because it was, at most, derived from "particularized knowledge that [Detective Castro had obtained] by virtue of his . . . position" as a police detective tasked with investigating the illegal drug trade in the Commonwealth. FED. R. EVID. 701, advisory committee's notes on 2000 Amendments.[5]

¶ 48 Nonetheless, as we elaborated above, we do not doubt a police detective may give testimony that contains "scientific, technical, or other specialized knowledge." NMI R. EVID. 702. In such circumstances, the trial court may only allow such testimony after it is subject to the relevant qualification procedure. Then, just as any other expert witness is subject to particularized evidentiary rules regarding their testimony, NMI R. EVID. 702-705, a police detective would also remain subject to these strictures.

¶ 49 Xiao also contends the detective improperly offered expert witness testimony when he testified that Xiao sold the drugs. More specifically, Xiao's counsel insisted at oral argument that because the term, "sell," implied some sort of underlying judgment regarding Xiao's mental state, the detective impermissibly testified regarding Xiao's mental state. Audio Tr. Oral Arg. 18:51-21:09. But the verb "sell" may well describe an act rather than *both* an act and a mental state. After all, a person can mistakenly sell a painting from her attic that, unbeknownst to her, is a Picasso. Or, perhaps more relevant to these circumstances, a person can sell a painting that, unbeknownst to him, contains a controlled substance embedded within its frame. Like these examples, the question at issue did not elicit any information related to Detective Castro's judgment as to whether Xiao *intentionally* sold drugs, which is Xiao's complaint. Detective Castro's answer simply identified the defendant, Xiao. His response covered no more than ground than who committed the *actus reus* in a transaction. Because Detective Castro was not asked, nor did he answer, whether Xiao purposefully, knowingly, recklessly, or negligently

[5] When a rule of this Court is "'patterned'" after a federal rule, it is appropriate to look to how the federal courts have interpreted that rule for guidance. *Sablan v. Elameto*, 2013 MP 7 ¶ 17 (Slip Opinion, June 3, 2013) (quoting *Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 60).

participated in a transaction for a controlled substance, his response did not address whether Xiao meant to participate in a transaction involving a controlled substance. Therefore, this testimony did not violate Rule 704(b).

C. *Xiao's Motion for a State-Appointed Forensic Expert*

¶ 50 The next claim Xiao asserts involves the trial court's denial of his request for an expert witness to assist him in his defense. This motion arrived on the Friday prior to the start of a Monday trial. The trial court denied the motion as untimely on Monday, the first day of trial. Xiao argues that under the circumstances, the Superior Court's decision violated his constitutional rights[6] and constituted an abuse of discretion. We are not persuaded.

¶ 51 Indigent defendants, like all defendants, have a right to put on a defense. This right under the Sixth Amendment to the United States Constitution ("Sixth Amendment") includes court-appointed counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). The United States Supreme Court has acknowledged that the Due Process Clauses provide an indigent defendant with access to additional resources or "basic tools," which ensure "meaningful access to justice." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). We have recognized as much in a previous ruling, where we held that an indigent defendant possesses a right to have access to an expert witness in the presentation of her defense at state expense under the Sixth Amendment; but only after the trial court, in its own sound discretion, finds a defendant has made the requisite particularized showing. *Commonwealth v. Perez*, 2006 MP 24 ¶¶ 14, 24.

¶ 52 Upon filing a timely motion, such a showing must contain specific facts which indicate that (1) it is reasonably probable "an expert would be of assistance to the defense and (2) the denial of expert assistance would result in a fundamentally unfair trial." *Perez*, 2006 MP 24 ¶ 14. "[U]ndeveloped assertions" offering little more than generalized statements claiming benefit will not pass muster. *Id.* ¶ 13 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985)).

¶ 53 Xiao's argument turns on the late arrival of certain test results.[7] He notes how he informally learned only days prior to trial that one of the substances seized tested positive for Chinese sugar (and did not formally receive these results until the day of trial). Chinese sugar is not a drug. Xiao also highlighted that the prosecutor indicated "the Guam lab did not test all of the provided samples, and that the testing lab was pressed for time." *Id.* Of course, if the underlying drug tests were fundamentally flawed, then Xiao is undoubtedly correct to call into question his convictions for drug-related crimes. Thus, Xiao

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[6] Xiao has only raised a claim under the Sixth Amendment to the United States Constitution. Therefore, we do not address a similar provision in our Commonwealth Constitution, Article I, § 4(a).

[7] It is indisputable that Xiao had an opportunity to file a similar motion regarding the test results delivered earlier. As a result, this contention is narrowly focused on how the delayed arrival of the last portion of test results casts doubt on the other controlled substance test results.

asserts his legal entitlement to an expert witness because the allegedly flawed testing results could not be cured through cross-examination.

¶ 54 Xiao's complaints regarding testing can be quickly dispatched by acknowledging a distinction Xiao elides in his brief regarding the approximately 3.5 grams of crystal methamphetamine. These drugs, which only produced multiple positive results under different testing regimes, were the basis of Xiao's drug crime convictions. So while other substances may have tested positive during field tests, only to register negative during subsequent laboratory testing, these differing results do not, on their face, cast serious doubt on the accuracy of the laboratory testing results for the approximately 3.5 grams of crystal methamphetamine that consistently tested positive.

¶ 55 The same goes for the veracity of the laboratory testing itself. Xiao points to no evidence which casts serious doubt on either the methodologies or processes used to identify the controlled substances here. At most, Xiao directs our attention to a misleading statement suggesting the laboratory (somehow) performed cursory testing. Appellant's Opening Br. 13. In fact, the testimony of the laboratory technician indicates that the laboratory possessed a high caseload and prioritized searches. In that vein, she did not feel compelled to confirm that an obvious substance that initially tested positive as sugar was, in fact, sugar. In contrast, she indicated that she did perform rigorous testing on the approximately 3.5 grams of crystal methamphetamine. As a consequence, while the late arrival of some test results certainly raises the issue of whether a continuance is appropriate (which we discuss next), it does not, under our deferential standard of review, clearly demonstrate that it is reasonably probable an expert would assist in Xiao's defense due to something related to the delayed arrival of some test results.[8] It is not enough that Xiao would have benefited from expert assistance; a generalized benefit unrelated to a particularized, timely showing of need does not give rise to the requisite demonstration of a reasonable probability.

¶ 56 Xiao also does not establish how his lack of access to expert assistance "result[ed] in a fundamentally unfair trial." *Perez*, 2006 MP 24 ¶ 14. First, as we explained earlier, the Commonwealth admitted a great deal of testimony linking Xiao directly to transactions involving a crystalline substance. Second, DPS officers seized the substance sold by Xiao, as well as other substances discovered on Xiao's premises, and subjected them to various testing regimes. The approximately 3.5 grams of crystal methamphetamine came back positive after separate field and rigorous laboratory tests. And, third, the charges were not all dependent on the amount of amphetamine seized, just that police seized some methamphetamines. For example, the trafficking offense, 6 CMC § 2141, makes no distinction based on quantity for Schedule I or II substances, which includes crystal methamphetamines. Likewise, although

[8] If Xiao had made such a timely request after his receipt of the first set of laboratory test results, this would present a different case. But under these circumstances, that request was untimely insofar as it was unrelated to the test results that arrived late.

possession offenses pursuant to 6 CMC § 2142 distinguish by amount, they only do so in establishing the minimum sentence allowed. Under the statute, a trial court retains the authority to impose the maximum sentence regardless of amount. Thus, possession of any amount could result in imposition of the statutory maximum, as it did here.[9] *Commonwealth v. Xiao*, Crim. No. 10-0097 (NMI Super. Ct. Aug. 24, 2011) (Sentence and Commitment Order at 3). As a result, Xiao's trial was not unconstitutionally unfair because the trial court denied his motion for expert assistance.

D. *Xiao's Motion for a Continuance on the Eve of Trial*

¶ 57 Xiao appears to craft a compelling argument as to why the trial court erroneously denied his motion for continuance: he needed additional time to consider key exculpatory evidence that did not appear until the eve of his trial.[10]

¶ 58 In evaluating whether the Superior Court properly declined to grant Xiao's motion for continuance that was filed one business day prior to the start of Xiao's trial, we assess such a decision using the following test:

> (1) The movant's diligence in his efforts to ready his defense prior to the hearing on the motion;
> (2) The likelihood that a continuance would have satisfied the need for one;
> (3) The extent a continuance would have inconvenienced the court and opposing party; and
> (4) the extent . . . [the] movant might have suffered [harm] due to the denial.

Fitial v. Kim Kyung Duk, 2001 MP 9 ¶ 23; *In re Adoption of Olopai*, 2 NMI 91, 96 (1991). (citing *United States v. 2.61 Acres of Land More or Less*, 791 F.2d 666, 671 (9th Cir. 1995) (internal quotation marks omitted)). "No one factor is dispositive." *Guerrero v. Guerrero*, 2 NMI 61, 75 (1991). This Court, instead, examines each factor "to determine whether the denial was arbitrary or unreasonable." *Kim Kyung Duk*, 2001 MP 9 ¶ 23. For reversal, the movant must *also* "show that it was prejudiced by the denial." *Hwang Jae Corp. v. Marianas Trading & Dev. Corp.*, 4 NMI 142, 146 (1994).

Diligence

¶ 59 The evidence Xiao received on the day of his scheduled trial indicated that the vast *majority* of the white substance seized by DPS was sugar. Apparently, some of this substance registered positive

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[9] Citing a lack of judicial discretion regarding sentencing for drug trafficking offenses, the Superior Court chose to impose the statutory maximum for a possession offense (five years in addition to a $5,000 fine) and the statutory fine for a drug trafficking conviction ($10,000), in lieu of imposing the 25-year minimum *prison* term for a drug trafficking conviction. *See Commonwealth v. Diaz*, 2003 MP 14 ¶ 26 (holding that the trial court, if it chooses to impose any prison term, must sentence a defendant to a minimum 25 years under 6 CMC § 2141(a)).

[10] Xiao has not argued that the Commonwealth committed prosecutorial misconduct by withholding key, exculpatory pieces of evidence, although it does suggest some smaller level of malfeasance in the delay of turning over the second set of test results. Appellant's Opening Br. 17-18.

under a field test. Xiao claims "a timely request for a continuance was impossible" under these circumstances, because he had no reason to address false-positive test results prior to the day of trial. Appellant's Opening Br. 18; Appellant's Reply Br. 3. The Commonwealth disputes that contention, noting that Xiao could have sought independent testing—but did not—after learning of either the field test or the remainder of the laboratory test results received approximately one month before trial. Xiao frames the standard for determining diligence this way: "'Did Xiao do what he *ought* to have done prior to making his request for a continuance?" Appellant's Opening Br. 16. A more precise framing of the test for diligence considers whether a party acted attentively and persistently in trial preparation. *See Kim Kyung Duk*, 2001 MP 9 ¶ 26-28.

¶ 60 If we solely considered the approximately one month of time Xiao had to review the first portion of laboratory test results released, Xiao's decision to seek a continuance on the first day of trial is clearly untimely and lacking diligence on its face. While a month is not an enormous amount of time, Xiao assuredly possessed opportunities for making such a motion before the eve of trial. Surely Xiao, due to the crucial role these pieces of evidence would play at trial, considered whether to request a continuance then. After all, he presumably knew from the laboratory reports that not all testing was complete. Whatever the reason, Xiao did not seek another continuance. And despite Xiao's attempt to insinuate otherwise, Xiao points to nothing from the delayed results that cast any reasonable doubt on the integrity of the first portion of results. Therefore, the delayed arrival of the second set of laboratory test results would not justify an untimely request for a continuance to study the first portion of laboratory test results.

¶ 61 The contention Xiao raises before us—that the trial court should have allowed him additional time to alter his trial strategy due to the late delivery of some test results, which indicated much of the white powder seized consisted of sugar—would ordinarily strike us as persuasive. Under these facts, which are far from clear, the delay in delivering some test results arose from the heavy case load of the Guam Crime Laboratory. While the delay is unfortunate, it hardly changed Xiao's defense theory that the substances seized were either *not*, in fact, unlawful controlled substances (or not his drugs). And, as previously noted, the amount of drugs seized is immaterial in this case because neither the trafficking offense, 6 CMC § 2141, nor the possession offense, 6 CMC § 2142, distinguishes based upon amount to receive the statutory maximum for drug possession (which Xiao received) or drug trafficking (which Xiao did not receive). This indicates Xiao always had good reason to challenge the authenticity of all substances seized as soon as he learned the Commonwealth would seek to admit these substances as evidence to incarcerate him.

¶ 62 While partial exculpatory evidence certainly adds vigor to Xiao's contentions disputing the positive test results, they do not eliminate the fact that Xiao had the opportunity to ask the court to delay proceedings for further study of these substances or the testing methodologies or processes which

generated the positive results. He apparently did not make that request until Xiao felt it would strategically favor him; or, perhaps, he simply did not proceed attentively and persistently. Whichever actually explains the decision to delay in seeking a continuance, it cannot be said that he diligently pursued this issue such that a last minute continuance was justifiable. *See Kim Kyung Duk*, 2001 MP 9 ¶ 26-28. As a result, this factor does not favor Xiao, despite the delayed receipt of evidence.

Redressability

¶ 63 As we discussed above, Xiao cites his need to "digest the exculpatory drug test and to reformulate the defense." Appellant's Opening Br. 17. He would have also sought expert assistance if given additional time. The Commonwealth disagrees with Xiao's characterization of his perceived need, noting that there is "no evidence that the results would be any different" if retested independently. Appellee's Resp. Br. 8. "In fact, there is uncontroverted evidence that the Guam lab results were highly reliable." *Id.* We address these arguments in considering whether a continuance would have satisfied the need averred.

¶ 64 The continuance requested by Xiao would appear to remedy the expressed need for it. The test results that arrived late, while helpful, do not change in any meaningful way his previous opportunity to request independent testing. Both the Commonwealth and Xiao apparently concluded that receiving laboratory test results close to the date of trial did not require them to stipulate to a continuance at an earlier date. It was only after news that other, more favorable test results existed that Xiao argued his right to a fair trial was at stake unless he (at the very least) received more time to digest these more favorable results. Both parties had to deal with the effects of receiving important evidence near the date of trial, and both parties apparently concluded this was not a constitutional problem then. Nonetheless, additional time would have allowed Xiao to study the results and formulate a thoughtful response to them at trial. Thus, to the extent Xiao's perceived need is time to respond to the delayed delivery of test results, we find this factor weighs in favor of granting a continuance.

Inconvenience

¶ 65 Xiao concedes the substantial inconvenience to the Superior Court as a result of his last-minute motion. Appellant's Opening Br. 17. As of the time when Xiao moved the Court for a continuance, jury summons had been served and all of the witnesses (including the expert witness who traveled from Guam and worked in a busy laboratory) and parties had prepared for a trial beginning just three days later. It is of no small consequence, then, to postpone the trial (especially in light of the fact that the trial had already been continued from a starting date in November 2010 at the parties' request). Under the circumstances presented, it is apparent a continuance would have caused inconvenience to those involved in the trial. *See Kim Kyung Duk*, 2001 MP 9 ¶ 30. Thus, this factor weighs against Xiao's request for continuance.

Harm

¶ 66 Xiao complains that the late receipt of evidence harmed his right to a fair trial under the Due Process Clause because the Commonwealth's "with[o]ld[ing] disclosure [of the second set of test results] until the morning of trial," deprived him of the opportunity to prepare a full defense to the charges. Appellant's Opening Br. 18. The Commonwealth disputes Xiao's claim, arguing he was "fully aware of the charges and items seized." Appellee's Resp. Br. 9. We proceed to consider any harm Xiao sustained as a result of the trial court's denial of his motion.

¶ 67 While unnecessary delay in passing along already delayed testing results is deplorable,[11] any harm that befell Xiao at trial occurred largely because of his own choice not to request additional time (or the provision of an expert witness) in the face of such delayed test results a month prior to trial. He also cannot entirely blame the late arrival on prosecutorial malfeasance, as the laboratory technician testified that she did not mail these results until March 10, 2011, the day before Xiao moved for a continuance. Because he waited until the eve of trial, despite having reason long before trial to independently examine the substances or ask for more time in the face of delayed test results (because his trial would hinge on them), the harm Xiao suffered cannot fairly be traced to the trial court's denial of his request for a continuance.

¶ 68 Therefore, Xiao cannot demonstrate material prejudice caused by the denial of his motion for continuance. *Hwang Jae Corp. v. Marianas Trading & Dev. Corp.*, 4 NMI 142, 146 (1994) (requiring such a showing). Based on the aforementioned reasons, the trial court did not act arbitrarily or unreasonably or otherwise abuse its discretion in denying the motion for continuance.

E. *Six Chains-of-Custody*

¶ 69 At trial, Xiao repeatedly objected to the admission of six exhibits (or, more precisely, six components of six different exhibits) indicating chain-of-custody (Exhibits 6, 7, 13, 14, 15, & 23),[12] citing only a lack of foundation. Trial Tr. at 464, 466, 690, & 702. Establishing chain-of-custody helps ensure that substantive evidence offered is in substantially the same condition as it was when the underlying events occurred. *See Commonwealth v. Cabrera*, 4 NMI 240, 246 (1995) (reviewing whether the party offering evidence had shown "the object was the same one involved in the alleged incident" and in

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[11] Any attempts by any party to willfully, and unjustifiably, delay the transmission of material evidence to an opposing party, particularly if a trial is only days away, may result in attorney sanctions. Such conduct may also invite a disciplinary referral, and may well give us no choice other than to order a new trial.

[12] Exhibits 6, 7, 13, 14, and 15 constituted substantive evidence, and Xiao objected to the indications on these items that tracked their chains-of-custody. Exhibit 23 also represented substantive evidence (a photograph of money), and Xiao now argues the chain-of-custody for this money should not have been admitted, although Xiao cannot point us to the portion of the transcript indicating that the trial court admitted Exhibit 23 into evidence. Trial Tr. at 701-03. Therefore, we do not consider whether the trial court erred in admitting this exhibit into evidence.

substantially the same condition). Exhibits or testimony introduced for chain-of-custody purposes must still comply with the rules of evidence.[13]

¶ 70 Under our deferential standard of review for admitted evidence, a party must not only show an abuse of discretion, *In re Estate of Malite*, 2011 MP 4 ¶ 36, but also: (1) a timely objection or motion to strike; and (2) a substantive right of the objecting party was affected. *Commonwealth v. Peters*, 1 NMI 466, 475 (1991); NMI R. EVID. 103(a)(1). If a party does not properly preserve an argument below, she must demonstrate the following: (1) an obvious error affected a substantive right; and (2) correcting this obvious error "is necessary to safeguard the integrity and reputation of the judicial process, or to forestall a miscarriage of justice." *Peters*, 1 NMI at 476; *see also Commonwealth v. Hossain*, 2010 MP 21 ¶¶ 28-29 (citing NMI R. CRIM. P. 52(b)).

¶ 71 On appeal, Xiao ostensibly labels his argument as one pertaining to foundation, which was his objection at trial, when in fact he now argues that these exhibits constituted inadmissible hearsay. Appellant's Opening Br. 20. Whether due to conflation or an attempted sleight of hand, Xiao pursues an argument he did not present below.[14] Therefore, he cannot press his argument under the clear error standard, as articulated above. He must proceed by pointing to plain error. *Peters*, 1 NMI at 476.

¶ 72 In his brief, Xiao protests the admission of various items introduced to establish chain-of-custody under the Business Record exception[15] to the hearsay rule. He asserts that the Commonwealth "did not establish" sufficient "indicia of reliability" for any of these five items. Appellant's Opening Br. 20. Xiao relies upon *Commwealth v. Taitano*, 2005 MP 20 ¶¶ 17-21, where this Court analyzed whether a chain-of-custody form came underneath this exception. The problem with Xiao's argument is that its application here flatly contradicts the rule, which requires *him* to demonstrate a "lack of trustworthiness" by pointing to much more than mere "barebones testimony," Appellant's Opening Br. 20, not the other way around.

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[13] This rule is distinct from the proposition, in reference to substantive evidence, that chain-of-custody objections generally go to the weight, rather than the admissibility, of the substantive evidence. *Cabrera*, 4 NMI at 247; *United States v. Collins*, 715 F.3d 1032, 1036 (7th Cir. 2013); *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995).

[14] Nowhere in his brief does Xiao point to where he challenged the introduction of these exhibits into evidence as inadmissible hearsay. Moreover, regarding four of the six exhibits he challenges (Exhibits 13, 14, 15, & 23), Xiao does not direct us to where the record indicates Xiao's counsel objected to their admission during trial.

[15] NMI R. EVID. 803(6):

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, 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.

By allowing items that otherwise qualify as business records into evidence "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness," NMI R. EVID. 803(6), this rule operates on a presumption of trustworthiness. *See Guerrero v. Tinian Dynasty Hotel & Casino*, 2006 MP 26 ¶ 38 (finding that the party seeking to exclude an item from qualifying under the Business Record Exception did not carry their burden to show how this item was untrustworthy).

¶ 73 Though not recognizing this presumption, Xiao nonetheless suggests a couple of reasons why these items do not possess the hallmarks of trustworthiness. He contends that Detective Nekai, who testified regarding the paperwork constituting the chains-of-custody at issue here, Trial Tr. at 464-66, 690-93, & 702, merely recognized her signature and did not offer detailed testimony indicating DPS procedures for securing, storing, or cataloguing evidence. But he must do more than cast generalized doubts by asking questions; he must also provide the answers to those questions by pointing to something that "indicate[s] [a] lack of trustworthiness." NMI R. EVID. 803(6). For example, a good start could have involved showing how Detective Nekai grossly deviated from proper procedures cataloguing evidence, if that had indeed occurred. This he did not do.

¶ 74 Xiao's contention is particularly weak given the plain error standard he must satisfy. It is far from clear how the trial court made any apparent error admitting these exhibits, nor is it obvious how any of Xiao's substantive rights were affected, as they must be. *Hossain*, 2010 MP 21 ¶ 29. Additionally, admitting such evidence does not appear to result in a "miscarriage of justice." *Id.*; *Peters*, 1 NMI at 476. Tellingly, Xiao, in his briefs, does not direct our attention to anything that explains how admitting these chains-of-custody affected any of his substantive rights or produced a "miscarriage of justice." *Id.*

F. *Prior Acts Evidence*

¶ 75 During the Commonwealth's presentation of their case against Xiao, the prosecutor asked CD to testify regarding an extensive history of drug transactions between Xiao and himself. Xiao argues that the trial court's decision to allow the Commonwealth to admit such evidence violated Commonwealth Rules of Evidence 403 and 404(b), and constituted an abuse of discretion. We disagree.

¶ 76 In response to a pretrial filing by the Commonwealth, the Superior Court decided (at first) to admit this testimony. When Xiao opposed such a move, the Court took the matter under advisement. The Court then discussed the admissibility of this testimony in a pretrial hearing on the cusp of trial, but declined to rule on the matter in advance of the actual testimony, expressly postponing any decision until Xiao lodged an objection during the testimony itself.[16] Trial Tr. at 186. Inexplicably, Xiao waited to

[16] It does not appear Xiao lodged a timely objection, because CD had already offered much of the substance encompassed by Xiao's objection. Nonetheless, as we will explain, we need not decide whether Xiao made a timely objection because the trial court did not err in admitting this testimony.

object until CD had already offered some of the details of their prior relationship, though the Court still ruled on his objections under Rules 403 and 404(b). The trial court allowed CD to testify over Xiao's objection and instructed the jury to consider this testimony only for mental propensity purposes. Trial Tr. at 332.

¶ 77 The Commonwealth Rules of Evidence prohibit the admission of evidence of "other crimes" solely to prove a defendant's bad character, NMI R. EVID. 404(b), but such evidence "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*; *see also United States v. Ramirez-Robles*, 386 F.3d 1234, 1242 (9th Cir. 2004) (discussing Federal Rule of Evidence 404(b) and the four-factor test used to determine admissibility).[17] A prosecutor wishing to admit mental propensity evidence must provide a defendant with reasonable, pretrial notice, unless the trial court "excuses pretrial notice on good cause shown." NMI R. EVID. 404(b).

¶ 78 Essentially, Xiao wishes to exclude this evidence of his prior dealings with CD because it suggests that since he sold drugs to CD in the past and he was likely to sell them again — specifically on the day of the controlled buy. Of course, evidence admitted for such a purpose would patently represent impermissible character evidence under Rule 404(b) if the Commonwealth could not point to a permissible purpose, (e.g., intent or preparation), which it did here. The trial court correctly recognized that evidence of previous, identical criminal acts within the prior 18 months of an alleged crime is admissible (at least) for the purpose of showing Xiao had the requisite intent to commit the drug trafficking offense. Moreover, the Court issued a limiting instruction to the jury emphasizing that this evidence may only be considered for these permissible, mental propensity purposes. Trial Tr. at 332. Thus, the classic act propensity use that Rule 404(b) prohibits was not violated here.

¶ 79 Evidence admissible under Rule 404(b), however, may yet be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. NMI R. EVID. 403. *Commonwealth v. Brel*, 4 NMI 200, 203 (1994). Unfair prejudice means an "'undue tendency to suggest decision on an improper basis,'" commonly, though not necessarily, an emotional one. *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 993 (9th Cir. 2009)[18]; *cf. Saimon*, 3 NMI at 377-79 (discussing the unfairly prejudicial effect of crime scene photographs). The trial court, in allowing the testimony at issue, found the evidence highly probative and lacking any unfair prejudice. Trial Tr. at 331. We agree regarding the probative nature of this testimony, although we diverge on the issue of prejudice.

¶ 80 Character evidence is a difficult subject to understand, and the trial court's brief limiting instruction could not, under these circumstances, reasonably be said to clarify it to those untrained in legal

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[17] *See*, *supra* note 5.

[18] *See*, *supra* note 5.

matters such that it removed the danger of unfair prejudice. In this case, mitigation by instruction is required more precisely because the impermissible use would suggest a grossly improper basis for decision. Otherwise, because a limited permissible use exists, jurors will be asked to consider a long history of Xiao's drug transactions without specific, plain instructions regarding how to do so properly. Such a situation, given the temptation presented by the evident, improper use, introduces the peril of an "undue tendency to suggest decision on an improper basis." *Dream Games of Ariz., Inc.*, 561 F.3d at 993.

¶ 81 Nonetheless, the probative value of this mental propensity evidence was not "substantially outweighed" by the risk of unfair prejudice. NMI R. EVID. 403. After all, this evidence helped establish that Xiao possessed the requisite mental state, making it highly probative. And the danger of unfair prejudice introduced was not so significant that it "substantially outweighed" the probative value of this evidence. *Id.* As a result, we find that the trial court did not err in admitting this evidence under Rule 403.[19]

G. *Cumulative Error*

¶ 82 Under the cumulative error doctrine, a criminal defendant may challenge the aggregative, prejudicial effect of multiple trial errors. *Commonwealth v. Cepeda*, 2009 MP 15 ¶ 46 (citing *United States v. Fernandez*, 388 F.3d 1199, 1256 (9th Cir. 2004)). "Cumulative error, by definition, requires two or more individually harmless errors that prejudiced the defendant to the same extent as a single reversible error." *Commonwealth v. Sebuu*, 2011 MP 15 ¶ 8 n.5. When multiple errors exist, "[r]eversal is required under the cumulative error doctrine if it is more probable than not that, taken together, the errors materially affected the verdict." *Cepeda*, 2009 MP 15 ¶ 46.

¶ 83 Here, there are, at most, two harmless errors. These emanate from the trial court's decision to allow the prosecution to: (1) urge the jury to consider how a guilty verdict might assist in addressing the drug problem; and (2) suggest that the jury convict Xiao on the basis of "the confession." Trial Tr. at 801. We do not find that these two errors, in conjunction, created such prejudice that it is probable they materially affected the verdict because of the strength of the evidence against Xiao, *Cepeda*, 2009 MP 15 ¶¶ 64-65 (Manglona, J., concurring in part and dissenting in part), which he did not effectively rebut. That does not mean, however, that we approve of these statements or that the same errors in a different trial would not merit a new trial. We conclude only that it is *not* more probable than not, given the strength of the evidence, that the two improper statements made by the prosecutor affected the outcome in this matter. After all, while the trial court should not have exposed the jury to these improper statements, a

[19] Therefore, we need not decide whether the correct standard of review is clear or plain error, because the trial court did not err in admitting CD's testimony on this subject.

defendant is assured only a fair trial presided over by an imperfect mortal, not a trial free of any and all defects. *Commonwealth v. Lucas*, 2003 MP 9 ¶ 13 n.10.

V. Conclusion

¶ 84 After considering all of the contentions raised by Xiao, we conclude two harmless errors occurred during his trial. Because these errors did not alter the trial's fundamental fairness, we AFFIRM the Superior Court's convictions of Xiao for Possession and Trafficking of a Controlled Substance.

SO ORDERED this 4th Day of October, 2013.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

JING XIN XIAO,
Defendant-Appellant.

SUPREME COURT NO. 2011-SCC-0007-CRM
SUPERIOR COURT NO. 10-0097E

JUDGMENT

¶ 1 Defendant-Appellant Jing Xin Xiao's ("Xiao") appeals his convictions for Trafficking and Possession of a Controlled Substance in violation of 6 CMC § 2141(a) and § 2142(a), respectively. The Court found two harmless errors occurred during his trial. Because these errors did not alter the trial's fundamental fairness, the Court AFFIRMS the Superior Court's convictions of Xiao for Possession and Trafficking of a Controlled Substance.

ENTERED this 4th day of October, 2013.

/s/
DEANNA M. MANGLONA
Clerk of the Supreme Court