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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

GAO YUE YING TAMAN,
Defendant-Appellant.

SUPREME COURT NO. 2009-SCC-0044-CRM
SUPERIOR COURT NO. 09-0035(E)

OPINION

Cite as: 2014 MP 8

Decided August 14, 2014

Matthew T. Gregory, Saipan, MP, for Defendant-Appellant Gao Yue Ying Taman
Chemere K. McField, 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.

MANGLONA, J.:

¶ 1 Defendant-Appellant, Gao Yue Ying Taman ("Taman") appeals her conviction for promoting prostitution, 6 CMC § 1344. She argues: (1) the trial court should have excluded testimony of military personnel because their involvement in the investigation was illegal under the Posse Comitatus Act ("PCA"), 18 U.S.C. § 1385; (2) the evidence was insufficient to sustain her conviction for promoting prostitution; (3) counsel ineffectively assisted her because she was precluded from testifying and not informed she had the right to testify; (4) the trial court violated her constitutional rights by not informing her she had a right to testify; and (5) criminalization of prostitution is unconstitutional under the Fourteenth Amendment to the United States Constitution. For the reasons discussed below, we AFFIRM Taman's conviction.

I. Facts and Procedural History

¶ 2 Naval Criminal Investigative Service ("NCIS") Agents Joseph Twilley ("Agent Twilley") and Robert Vogt ("Agent Vogt") were tasked with identifying potential risks to the United States Navy in advance of the USS Cable's arrival on Saipan.[1]

¶ 3 On March 23, 2009, Agents Twilley and Vogt entered Kelly's Bar to assess whether any criminal activity was occurring that posed a threat to military operations. They began negotiating with Taman, the bartender at Kelly's Bar, a price for sex with the bar's hostesses. Taman said it would cost $200. After these negotiations, Agents Twilley and Vogt worked with local authorities to formulate an operational plan for an in-depth investigation.

¶ 4 On March 27, 2009, Agent Twilley, Agent Vogt, Marshal Wolf Calvert ("Marshal Calvert"), and DPS Officer Roy Barcinas returned to Kelly's Bar to continue the investigation. After Taman said something to the women in the bar, the women went and sat down by the investigating team. At this point, Agent Twilley asked Taman how much it would cost to take the women back to the Hyatt Regency Hotel, and Taman said: "$200." Trial Tr. at 20. Marshal Calvert also asked whether he could have sex with the women at the bar, and Taman responded: "yes, and I will give you a good deal." *Id.* at 110-11.

¶ 5 After negotiating with Taman, Agent Twilley turned to Emily, the hostess next to him, and said: "does this mean we [f]uck?" *Id.* at 22. Emily responded by grabbing Agent Twilley's genitals and hugging him in front of Taman. Similarly, after Taman informed Agent Vogt of the hourly rate, another hostess began fondling Agent Vogt's genitals. Officer Barcinas also had a hostess sitting next to him who

[1] On this assignment, NCIS collaborated with the Department of Public Safety ("DPS"), the Office of the Attorney General, the Drug Enforcement Agency, and the United States Marshal Service.

smiled and laughed while touching the officer's genitals. While this was occurring, and after he talked to Emily, Agent Twilley called DPS. DPS then entered Kelly's Bar and began to make arrests.

¶ 6 Taman was convicted of promoting prostitution. She now appeals.

II. Jurisdiction

¶ 7 We have jurisdiction over trial court final judgments and orders, NMI CONST. art. IV, § 3; 1 CMC § 3102(a), as well as all criminal actions in the Commonwealth, 1 CMC § 3202.

III. Standards of Review

¶ 8 Taman raises five issues: (1) improper admission of testimony; (2) insufficient evidence; (3) ineffective assistance of counsel; (4) the trial court's failure to inform her of the right to testify; and (5) the constitutionality of the Commonwealth's prostitution laws. First, we review whether the trial court improperly admitted the testimonies of Agents Twilley and Vogt for plain error because Taman did not object to the admission of their testimony at trial. *See Commonwealth v. Xiao*, 2013 MP 12 ¶ 16 (reviewing claims for plain error when no objection was made at trial). Second, we review whether there was sufficient evidence to sustain her promoting prostitution conviction by "consider[ing] the evidence in the light most favorable to the government and [then] determin[ing] whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Commonwealth v. Quemado*, 2013 MP 13 ¶ 14 (Slip Opinion, Nov. 7, 2013) (internal quotation marks omitted). Third, we review her ineffective assistance of counsel claims de novo. *Commonwealth v. Taivero*, 2009 MP 10 ¶ 7. Fourth, we review whether the trial court violated Taman's federal constitutional rights by not informing her that she had the right to testify for plain error because she did not object at trial. *See Xiao*, 2013 MP 12 ¶ 16. Fifth, we review whether the criminalization of prostitution violates due process or equal protection under the United States Constitution's Fourteenth Amendment for plain error because she did not raise these issues at trial. *See id.*

IV. Discussion

¶ 9 We will address each of the issues in turn.

A. Admission of Testimony from Military Personnel and the Posse Comitatus Act

¶ 10 Taman contends the trial court should not have admitted the testimonies of Agents Twilley and Vogt because their involvement in the investigation was barred by the PCA. The decision to admit the testimonies is reviewed for plain error because Taman did not object to the admission of their testimonies during the trial. *See Xiao*, 2013 MP 12 ¶ 16. To satisfy the plain-error test, "an appellant must show that: (1) there was error; (2) the error was 'plain' or 'obvious'; [and] (3) the error affected the appellant's 'substantial rights,' or put differently, affected the outcome of the proceeding." *Commonwealth v. Hossain*, 2010 MP 21 ¶ 29.

¶ 11 Taman's argument centers on the idea that the trial court committed plain error by admitting testimonies based on evidence gained during an investigation that violated the PCA. The first prong of the plain-error test is establishing an error. Here, finding error depends on whether or not the PCA permitted the agents' involvement in the investigation.

¶ 12 The PCA limits the ability of the military to enforce state laws and intervene in civilian affairs.[2] 18 U.S.C. § 1385. The United States Secretary of Defense is required to create regulations preventing the military from directly participating in the "search, seizure, arrest, or other similar activity unless participation by such a member is otherwise authorized by law." 10 U.S.C. § 375. However, the PCA is not a blanket prohibition on direct military involvement. Federal regulations, authorized by § 375, permit the military to directly participate in civilian affairs when doing so "for the primary purpose of furthering a [military] or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities." 32 C.F.R. § 182.6(b)(ii) (2013); *see also United States v. Chon*, 210 F.3d 990, 994 (9th Cir. 2000) (recognizing that military intervention is permissible when there is independent military purpose for the action). Under these regulations, the military can be directly involved in civilian law enforcement when attempting to protect military personnel or secrets. 32 C.F.R. § 182.6(b)(ii)(4-5).

¶ 13 Because the PCA is not an absolute bar to direct military intervention, our inquiry turns to whether the agents' direct involvement in the investigation of Kelly's Bar was permissible. The agents were part of an NCIS advance team that visited ports before a ship's arrival to identify potential dangers to military personnel. In particular, the agents "conduct[ed] proactive operations" and identified "narcotics, prostitution, and other immoral or criminal acts." Trial Tr. at 6. During these operations, the agents investigated prostitution for two reasons. First, prostitution impairs the ability of the military to maintain operational readiness: soldiers having sex with prostitutes could lead to STDs and other health risks that would weaken the military. Second, prostitution poses a threat to military secrets: prostitutes may elicit confidential information from their clients and then pass that information onto foreign governments. Having been aware of the bar's reputation for prostitution, these concerns prompted Agents Twilley and Vogt to investigate Kelly's Bar.

¶ 14 In light of these concerns, the agents became directly involved in the investigation of Kelly's Bar to protect military secrets and personnel.[3] As such, the agents' investigation falls under two explicit

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[2] The PCA explicitly prohibits Army and Air Force military personnel from intervening in civilian affairs. 18 U.S.C. § 1385. In addition, the Ninth Circuit has concluded the PCA also applies to the Navy and Marine Corps, *United States v. Chon*, 210 F.3d 990, 993 (9th Cir. 2000), and the Secretary of Defense issued regulations making the PCA applicable to all military branches, 32 C.F.R. § 182.2(a) (2013).

[3] We do not find merit in Taman's argument that military personnel must have been present at the bar at the time of the investigation in order to conclude an investigation was designed to protect military personnel. Allowing the military to investigate only after personnel were at the bar would undermine the goal of protecting military secrets and maintaining operational readiness. This conceptualization of the rule would make the military

exceptions to the prohibition on direct military involvement in civilian affairs: maintaining military secrets and protecting military personnel. *See* 32 C.F.R. § 182.6(b)(ii)(4-5). Thus, the investigation did not violate the PCA. Because the trial court properly admitted the testimony of Agents Twilley and Vogt, we find no reversible error.

B. Insufficient Evidence of Promoting Prostitution

¶ 15 Taman next argues there was insufficient evidence to convict her of promoting prostitution under 6 CMC § 1344.

¶ 16 Before addressing whether there was sufficient evidence to sustain Taman's promoting prostitution conviction, the Court first must determine whether the trial court convicted her of promoting prostitution in the first or second degree. The judgment is not clear as to the degree. *See Commonwealth v. Gao Yue Ying Taman*, No. 09-0035(E) (Super. Ct. Dec. 9, 2009) (Third Amended Judgment of Conviction and Commitment Order as to Defendant Taman) (convicting Taman of "Promoting Prostitution in violation of 6 CMC § 1344"). However, the Amended Information states Taman's actions are punishable by the statutory provision setting forth the penalty for second-degree convictions. *Gao Yue Ying Taman*, No. 09-0035(E) (Super. Ct. July 13, 2009) (Amended Information) (explaining Taman's actions are punishable by 6 CMC § 1346(c)). Because the Amended Information sets forth what Taman was charged with (and thus what she could be convicted of), we conclude that she was convicted of promoting prostitution in the second degree.

¶ 17 Our inquiry now turns to whether there was sufficient evidence to sustain her conviction. We review sufficiency of the evidence allegations under a highly deferential standard. *Commonwealth v. Camacho*, 2002 MP 6 ¶ 108; *Commonwealth v. Minto*, 2011 MP 14 ¶ 38. We do "not weigh conflicting evidence or consider the credibility of witnesses." *Camacho*, 2002 MP 6 ¶ 108. Rather, we consider the evidence in the light most favorable to the government, and then determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Minto*, 2011 MP 14 ¶ 38.

¶ 18 Promoting prostitution in the second degree requires a person to advance or knowingly profit from prostitution. 6 CMC § 1344(d). A person profits from prostitution when, acting other than as a prostitute, "he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity." *Id.* at § 1344(b). A person advances prostitution when, acting other than as a prostitute or a customer, "he causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution

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investigatory power reactionary rather than preemptive: the military would have to allow its personnel and secrets to be at risk before taking any action. Taman's argument is not supported by the text of the federal regulations and we find no case law supporting her position.

purposes, operates or assists in the operation of a house of prostitution or prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution." *Id.* at 1344(c).

¶ 19 Our inquiry begins and ends with whether there was enough evidence for a reasonable juror to conclude that Taman advanced prostitution. A defendant advances prostitution by, *inter alia*, operating a place of prostitution or helping others engage in prostitution. *See id*. (listing various actions that are sufficient to satisfy advancing prostitution). On this count, the trial court heard testimony from multiple witnesses about Taman's actions at Kelly's Bar. Agent Twilley said he negotiated a price with her for taking the hostesses back to the Hyatt and, for $150, Agent Twilley could get "whatever [he] want[s]." Trial Tr. at 21. This testimony could lead a juror, drawing all reasonable inferences, to reasonably conclude that Taman was operating a place of prostitution.

¶ 20 The evidence did not end there. Marshal Calvert offered further testimony supporting the conviction. Marshal Calvert, describing Taman's role in the prostitution enterprise, testified that a hostess at Kelly's Bar indicated that he could have sex with her if he coordinated with Taman. He explained that she said he could have sex with the hostesses for the right price. Calvert said that Agent Twilley and Taman discussed different fees. Furthermore, when Marshal Calvert asked Taman if he could take a hostess for sex Taman said: "yes, and I will give you a good deal." *Id.* at 110-11. Finally, Marshal Calvert explained that the agents and Taman were "making conversation about taking the girls home for sex" and that Taman told the agents something along the lines of: "you know I'll take care of you for a good price." *Id.* at 92.

¶ 21 Drawing all reasonable inferences from the direct and circumstantial evidence, a reasonable juror could find that Taman violated § 1344 because she advanced prostitution by operating a place of prostitution and/or helping others engage in prostitution. Accordingly, we conclude there was sufficient evidence to sustain her conviction for promoting prostitution in the second degree.

C. Ineffective Assistance of Counsel

¶ 22 Taman raises two ineffective-assistance-of-counsel claims. The first claim is predicated on her counsel's failure to object to the agents' testimonies on the basis that the PCA precluded their testimonies. The second claim is based on the assertion that her counsel prevented her from testifying by failing to inform her of the right to testify. We review each claim de novo. *Taivero*, 2009 MP 10 ¶ 7. An ineffective-assistance-of-counsel claim is a two-part inquiry that requires her to show: (1) counsel's performance was deficient, and (2) prejudice from the deficiency. *Commonwealth v. Shimabukuro*, 2008 MP 10 ¶ 11 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

1. Counsel's Failure to Raise the Posse Comitatus Act

¶ 23 Taman unpersuasively argues that her counsel's failure to raise the PCA as a bar to the agents' testimony constitutes deficient performance. The PCA, however, did not bar the testimony. *Supra* ¶ 14. Counsel's failure to raise a meritless objection is not deficient performance. Moreover, even if the Court concluded Taman's counsel was deficient, Taman has not (and cannot) show prejudice because the objection would likely have been denied for good reason. *See id.* The failure to oppose properly admitted evidence is neither deficient representation nor prejudicial to the defendant. Therefore, Taman's counsel's failure to raise an objection to the agents' testimony does not constitute ineffective assistance of counsel.

2. Counsel's Failure to Inform Her of the Right to Testify

¶ 24 Taman also argues she received ineffective assistance of counsel because her counsel failed to inform Taman that she had the right to testify. We ordinarily do not consider ineffective-assistance-of-counsel claims on direct appeal. *Shimabukuro*, 2008 MP 10 ¶ 8. "We may, however, review the issue on direct appeal, but only where the record is sufficiently complete to decide the issue." *Id.* (quoting *Commonwealth v. Esteves*, 3 NMI 447, 460 (1993) (internal quotation marks omitted)); *see Commonwealth v. Diaz*, 2003 MP 14 ¶ 9 (declining to consider an ineffective-assistance-of-counsel claim when "there is nothing in the record to substantiate [the defendant's] claim").

¶ 25 Following *Shimabukuro*, we first inquire whether the record is sufficiently complete to decide Taman's claim because the Court can only consider evidence in the record. 1 CMC § 3103. The evidence in the record must support her allegation that her counsel denied her the right to testify and failed to inform her about the right to testify.

¶ 26 Upon review of the record below, we find no evidence supporting her claim.[4] The only evidence Taman presents is an affidavit she filed for this appeal. *See Gao Yue Ying Taman*, No. 2009-SCC-0044-CRM (NMI Super. Ct. Feb. 4, 2014) (Affidavit of Gao Yue Ying Taman). The affidavit, however, is not part of the record. *Compare id.* (Taman's affidavit), *with* NMI SUP. CT. R. 10(a) (setting forth what constitutes the record).[5] As such, we may not consider the affidavit while reviewing her ineffective-assistance-of-counsel claim. Because the record lacks sufficient evidence supporting her claim, we decline review on direct appeal.

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[4] While the record reflects that she did not testify, this fact, without more, is not sufficient to deem it evidence of her argument. The decision to testify or not to testify is often a strategic choice made between a lawyer and the client. As such, a defendant's failure to testify is not *per se* evidence that the defendant was denied the right to testify.

[5] The record consists of "(1) the original papers and exhibits filed in the trial court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the trial court clerk." NMI SUP. CT. R. 10(a).

D. Trial Court's Failure to Inform Taman of the Right to Testify

¶ 27 Taman asserts that the trial court's failure to inform her about her right to testify violated her rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.[6] We review this issue for plain error because she raises it for the first time on appeal. *Xiao*, 2013 MP 12 ¶ 16.

¶ 28 The first step of the plain-error inquiry is to determine whether the trial court committed an error. The Court must decide whether the trial court has a federal constitutional obligation to inform a defendant about his or her right to testify. This is an issue of first impression for the Court. Courts addressing this question have taken two different approaches.

¶ 29 The minority position, a view Taman urges the Court to take, requires trial courts to inform defendants of their right to testify. *LaVigne v. State*, 812 P.2d 217, 222 (Alaska 1991). This position starts from the same point as the majority: the right to testify can only be waived by the defendant. *See, e.g.*, *id.* at 221 (acknowledging the right to testify is personal); *United States v. Martinez*, 883 F.2d 750, 757 (9th Cir. 1989) (same). But the minority position requires an on-the-record inquiry because it: (1) ensures that a defendant's decision not to testify is "the result of a knowing and a voluntary decision made by the defendant" and (2) helps courts determine whether there was a voluntary waiver. *See, e.g.*, *LaVigne*, 812 P.2d at 222.

¶ 30 The majority of jurisdictions, on the other hand, have concluded that a trial court has no duty to inform the defendant of the right to testify. This is the position taken by "[a]ll circuit courts reaching the question" and "by far the majority of the states that have considered the question." *Martinez*, 883 F.2d at 760, *vacated on other grounds*, 928 F.2d 1470, 1471 (9th Cir. 1991) (vacating because jury selection was conducted by a magistrate judge). These courts have reached this conclusion for a variety of reasons:

> First, the right to testify is seen as the kind of right that must be asserted in order to be recognized. Second, it is important that the decision to testify be made at the time of trial and that the failure to testify not be raised as an afterthought after conviction. Third, by advising the defendant of his right to testify, the court could influence the defendant to waive his right not to testify, thus threatening the exercise of this other, converse, constitutionally explicit and more fragile right. Fourth, a court so advising a defendant might improperly intrude on the attorney-client relation, protected by the Sixth Amendment. Fifth, there is danger that the judge's admonition would introduce error into the trial. Sixth, it is hard to say when the judge should appropriately advise the defendant — the judge does not know the defendant is not testifying until the defense rests, not an opportune moment to conduct a colloquy. Seventh, the judge should not interfere with defense strategy.

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[6] While Taman briefs this argument under the ineffective assistance of counsel heading, her argument does not focus on counsel's performance. Instead, her argument is premised on the trial court's action or omission. Properly construed, this is not an ineffective-assistance-of-counsel claim; rather, her claim is focused on her constitutional rights being violated by the trial court.

Martinez, 883 F.2d at 760 (internal citations omitted).

¶ 31 This case presents competing constitutional concerns. On the one hand, there is the concern about a defendant involuntarily waiving the right to testify, *LaVigne*, 812 P.2d at 222, and on the other hand, there are numerous concerns highlighted by *Martinez* about a trial court conducting a colloquy with the defendant, *Martinez*, 883 F.2d at 760. Having evaluated the concerns presented by both positions, we find *Martinez*'s analysis, shared by a significant majority of other jurisdictions, more compelling. Compared to following the minority rule, adopting the majority rule creates fewer and less significant constitutional as well as practical concerns for a defendant. *Compare id.* (highlighting justifications for concluding there is no constitutional obligation to inform the defendant of the right to testify), with *LaVigne*, 812 P.2d at 222 (justifying a rule requiring that the court inform the defendant of the right to testify). Moreover, prudential considerations support our decision: following the majority decision provides a more voluminous and well-established body of case law to guide lawyers and the Court in the future. Therefore, we conclude that there is no constitutional requirement to inform a defendant about the right to testify. Because the trial court's failure to inform Taman of her right to testify does not constitute an error, she cannot satisfy the plain-error test's first prong: finding an error. Therefore, the trial court's failure to inform Taman of her right to testify does not constitute reversible error.

E. Constitutional Limits on Prostitution

¶ 32 Taman argues her conviction for promoting prostitution should be reversed because the Commonwealth's prostitution law is unconstitutional.[7] Because she raises this issue for the first time on appeal, we review the claim for plain error. *Xiao*, 2013 MP 12 ¶ 16.

¶ 33 Under the plain-error standard, our inquiry again begins with identifying whether the trial court committed an error. If the Commonwealth's criminalization of prostitution under 6 CMC § 1343 is unconstitutional, then convicting Taman for a crime related to prostitution was an error. She asserts § 1343 is unconstitutional because the law infringes on the federal constitution's: (1) due process liberty interest recognized by *Lawrence v. Texas*, 539 U.S. 558 (2003) and (2) equal protection clause because of the law's discriminatory application. Each claim is discussed and rejected in turn.

¶ 34 First, we are not persuaded that *Lawrence* created a liberty interest making prostitution laws unconstitutional. *Lawrence* overturned a statute criminalizing homosexual sodomy, *id.* at 579; recognized a due process liberty interest in private consensual sex, *id.* at 578; and concluded that moral disapproval is not an adequate basis for criminalizing conduct, *id.* at 577-78. However, *Lawrence* offers no basis to invalidate laws on prostitution. While some courts have interpreted *Lawrence* as extending beyond sodomy, *see Cook v. Gates*, 528 F.3d 42, 48-51 (1st Cir. 2008) (addressing *Lawrence*'s framework while

[7] Essentially, this argument boils down to the following: prostitution is legal under the Constitution, and one cannot be convicted for promoting or facilitating a legal activity.

evaluating the military's "Don't Ask, Don't Tell" policy), *Lawrence* has not been interpreted as creating a liberty interest that invalidates prostitution laws, *see e.g.*, *Doe v. Jindal*, 851 F. Supp. 2d 995, 1000 n.11 (E.D. La. 2012) ("*Lawrence* does not speak to the solicitation of sex for money, and has little precedential force here."); *Lowe v. Swanson*, 639 F. Supp. 2d 857, 871 (N.D. Ohio 2009) ("[I]t would be more correct to narrowly construe *Lawrence*, so as not to unnecessarily disturb the prohibitions which were not before the Supreme Court in *Lawrence*, such as adultery, prostitution . . . ."); *United States v. Thompson*, 458 F. Supp. 2d 730, 732 (N.D. Ind. 2006) (explaining "it would be an untenable stretch to find that *Lawrence* necessarily renders (or even implies) laws prohibiting prostitution . . . unconstitutional"); *United States v. Palfrey*, 499 F. Supp. 2d 34, 41 (D.D.C. 2007) (explaining that invalidating prostitution laws because of *Lawrence* "stretches the holding in *Lawrence* beyond any recognition"); *State v. Romano*, 155 P.3d 1102, 1110 (Hawaii 2007) (explaining that prostitution "is expressly rejected as a protected liberty interest under *Lawrence*"); *State v. Thomas*, 891 So. 2d 1233, 1236 (La. 2005) ("[T]he majority opinion in *Lawrence* specifically states the court's decision does not disturb state statutes prohibiting public sexual conduct or prostitution."). Taman offers no reason to deviate from these jurisdictions and fails to provide any case that has done so. Without any case law to the contrary, we are persuaded by the rationale used in other jurisdictions addressing this issue. Thus, we adopt their conclusion: *Lawrence* does not preclude criminalizing prostitution.[8]

¶ 35 Second, Taman unpersuasively argues that the Commonwealth's prostitution law is a vehicle for discrimination in violation of the United States Constitution's equal protection clause. Rather than asserting the law is discriminatory, she appears to argue that the law is applied unequally because prosecutions almost exclusively focus on women, specifically Chinese women.[9] However, Taman provides no evidence that the law is applied unequally. Instead, she uses her reply brief to ask the Court to

[8] Beyond following the unanimous conclusions of other jurisdictions, non-morality based justifications for criminalizing prostitution also support the conclusion that *Lawrence* does not preclude prostitution laws. *See Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 746 (5th Cir. 2008) ("[T]here are justifications for criminalizing prostitution other than public morality, including promoting public safety and preventing injury and coercion."). Because there are non-morality based justifications for criminalizing prostitution, Taman's argument that *Lawrence*'s prohibition on morality-based laws precludes criminalization of prostitution is unpersuasive.

[9] If she were arguing that the law has a discriminatory purpose, we would not agree. Because 6 CMC § 1343 is facially neutral—that is, the law does not target a specific group—Taman would bear the burden of establishing a prima facie case that the law has a discriminatory purpose. *See Washington v. Davis*, 426 U.S. 229, 241 (1976) (explaining the burden of proof for equal protection claims challenging the application of a law). She does not make this showing because she merely asks the Court to take judicial notice that women, specifically Chinese women, are primarily prosecuted under this statute. Even if we were to take judicial notice of this fact—which we cannot—this does not establish a *prima facie* case that the law has a discriminatory purpose because disparate impact is not sufficient without more evidence. *Id.* at 232-33 (permitting a test that excluded a disproportionately high number of black applicants).

take judicial notice of her asserted facts.[10] This we cannot do. We can only take judicial notice of facts that are free of reasonable dispute because the facts are "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." NMI R. EVID. 201(b); *see In re Yana and Atalig*, 2014 MP 1 ¶ 19 (highlighting the narrow scope of judicial notice). Applying this rule, the information about the race and gender of prostitution prosecutions is not subject to judicial notice because this information is neither "generally known" nor "capable of accurate and ready determination."[11] *See id.* Without such evidence, we cannot conclude § 1343 is applied discriminatorily. As such, we conclude Taman has not shown the Commonwealth's prostitution law runs afoul of the protections guaranteed by the Fourteenth Amendment's equal protection clause.

¶ 36 Because *Lawrence* does not preclude criminalizing prostitution and Taman has not shown the Commonwealth's prostitution law violates the equal protection clause, the trial court did not commit an error by convicting the defendant of a prostitution-based crime. Therefore, Taman's conviction for a crime related to prostitution is not reversible error.

V. Conclusion

¶ 37 For the reasons discussed above, we AFFIRM Taman's conviction for promoting prostitution.

SO ORDERED this 14th day of August, 2014.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

[10] Her attempt to raise judicial notice for the first time in her reply brief is also fatal to her argument. For the sake of fairness, the Court ordinarily does not permit a party to raise new arguments in a reply brief because the other party does not have a chance to respond. *Bank of Saipan v. Fennell*, 2002 MP 17 ¶ 20-21. We find no compelling reason to deviate from our general rule governing new arguments in reply briefs.

[11] Taman's briefing supports this conclusion because she acknowledges that she "is not aware of any such statistics kept by the Commonwealth." Reply Br. at 7.

/s/
PERRY B. INOS
Associate Justice