

FOR PUBLICATION

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

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COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS  
Plaintiff/Appellee,

v.

JOSE O. RABAULIMAN,  
Defendant/Appellant.

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Supreme Court Appeal No. 00-019 GA  
Superior Court Criminal Case No. 98-0083

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OPINION

Cite as: *Commonwealth v. Rabauliman*, 2004 MP 12

Argued and submitted on August 11, 2003  
Saipan, Northern Mariana Islands  
Decided July 13, 2004

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice, ALEXANDRO C. CASTRO, Associate Justice, and JOHN A. MANGLONA, Associate Justice.

DEMAPAN, Chief Justice:

¶ 1 Jose O. Rabauliman appeals his trial court conviction and sentence for the crimes of kidnapping, oral copulation, rape, and assault and battery. Because we find the prosecutorial misconduct was harmless beyond a reasonable doubt and the trial court did not abuse its discretion in denying a motion for mistrial, we AFFIRM the conviction and sentence.

### I.

¶ 2 In the early morning hours of March 28, 1998, Jose O. Rabauliman (“Rabauliman”), Hadley Renguul (“Renguul”) and Sheldon Yano (“Yano”) were driving in their van along Beach Road. After a few stops, they went to the Thirteen Fishermen Memorial and picked up Jake Ito (“Ito”). Continuing north, they saw two women, Wen Qun Li and Hong Jin Wang in front of the Horiguchi Building.

¶ 3 Yano asked Renguul to stop so that he could scare the women. Renguul stopped the van and Rabauliman asked what was going on. Yano said that he was going to take the women, to which Rabauliman responded, “Go ahead, Par. I have money.” They got out of the van, took the women from behind and dragged them to the van. During this time Ms. Li and Ms. Wang were kicking and screaming. They carried and placed the women into the van at opposite ends. Ms. Li and Ms. Wang were still screaming. In all of this commotion, one of Ms. Li’s shoes was knocked off and left in the street outside of the building.

¶ 4 Renguul drove toward American Memorial Park and then turned toward Middle Road. At Middle Road, Renguul and Yano discussed where to go and then decided to drive toward Marpi. They wanted to go to Suicide Cliff, because they did not want to be seen with the Chinese women.

¶ 5 During the ride to Marpi, the women were scared and crying. Rabauliman said that when Ms. Wang got into the van, she was shaking, appeared to be scared and was looking around in the van. The men showed Ms. Li and Ms. Wang money, but the women asked to be taken back to Garapan. One of the women was punched in the back of the head and she began to cry louder. Ms. Wang again asked Rabauliman to go back. Renguul turned the music in the van louder at this point, so that he wouldn't hear their cries.

¶ 6 When they arrived at Suicide Cliff, the men got out of the van. For the third time, Ms. Wang asked to go back, but Rabauliman told her that they were going to have sex there. The men negotiated prices for sex, but the women were unresponsive and scared. Renguul and Rabauliman took Ms. Wang near the monument, while Yano took Ms. Li to the other side of the road.

¶ 7 Ito, who had stayed in the car, approached the monument to ask the men for a cigarette. There he saw Renguul and Rabauliman raping Ms. Wang at the same time. Renguul was raping Ms. Wang vaginally, while Rabauliman hovered over her face and forced her to orally copulate with him. Ito took Ms. Wang's purse and rummaged through its contents. On the other side of the road, Yano was having intercourse with Ms. Li.

¶ 8 When Renguul finished, he began looking for his knife. He moved the van closer to the monument and turned on the headlights to look for it. Rabauliman and Yano saw the van moved closer to the monument, walked over to it, but found that the keys were not in the ignition. At this time, Ito was orally copulating with Ms. Wang. Rabauliman stated that the woman was screaming as if she was going to die.

¶ 9 Unaware that any of this was taking place, Augustine Chong was driving up Suicide Cliff that early morning. He was surprised when he heard screams. He said that he began to hear the women's screams before he came to the last curve on the way up to Suicide Cliff.

¶10 When the men saw approaching headlights, they all began to scatter. Renguul got into the van and drove away. Rabauliman, Ito, and Yano ran into the boonies. Rabauliman took the trail down to the Last Command Post. Ito and Yano took the trail down to the road and walked toward the go-kart track. The victims were left at Suicide Cliff.

¶11 The police arrived and found the half-dressed women crying, hysterical and holding on to one another. The police found a torn bra strap lying on the ground near the monument. Ms. Wang's pants were also torn. Ms. Li and Ms. Wang's personal items were found strewn about on the ground.

¶12 Photographs of the women show bruises of fingerprints and the outlines of fingers on their thighs and extremities. There is also a photograph of Ms. Wang's back, showing scrapes and cuts. Other medical records indicate injuries to the genital area.

¶13 Later, on that same day, the investigation of the rape led the police to Renguul and Rabauliman. They both gave statements to the police. They admitted to taking the women up to Suicide Cliff. Renguul admitted to having sex with Ms. Wang, and Rabauliman admitted to having oral sex with her. Rabauliman also admitted that the women were scared, shaking and crying when they took them. Rabauliman told police that when he asked Ms. Wang for oral sex, she refused but that he was able to persuade her using sign language. Both men claim to have offered the women money for sex.

¶14 Two days later, on April 1, 1998, Ito went voluntarily to the police. He told them that he felt bad about what happened and wanted to come forward. He gave a statement and agreed to plead guilty to rape.

¶15 Renguul and Rabauliman were each charged with rape, criminal oral copulation, two counts of kidnapping and assault and battery. They were tried together at the Superior Court. The jury trial

began on December 20, 1999 and continued through January 11, 2000. During the three weeks of trial, the jury heard testimony from Ms. Li and Ms. Wang, Ito, Chong and the police officers who were at the crime scene and later interviewed Rabauliman and Renguul. The defense offered testimony from the defendants' friends and family, who testified to their characters.

¶16 The closing arguments were delivered on January 11, 2000. During this time, the Prosecutor made several statements which are the subject of this controversy. Three of the statements were objected to, while four of the statements were not. Rabauliman characterizes these statements as:

1. Statements about facts not in evidence;
2. Unfairly attacking the role of the defense attorney;
3. Inviting the jury to make adverse inference against Rabauliman's decision not to testify in violation of his rights under the Fifth Amendment to the U.S. Constitution and Article I, Section 4 (c) of the Constitution of the Northern Mariana Islands.

¶17 At the end of closing arguments, counsel for Rabauliman moved for a mistrial based on the Prosecutor's comment and references to his client's invocation of his Fifth Amendment rights during the summation. The motion for mistrial was denied.

¶18 The jury went into deliberation later that day. On January 12, the jury asked to hear and review testimony of one of the victims, Ms. Wang. The jury also indicated at that time that they had decided on all charges except one. The jury listened to a replay of Ms. Wang's testimony, at their request. On January 13, 2000, the jury returned a verdict finding both defendants guilty on all charges.

¶19 Rabauliman was convicted of Rape, 6 CMC §§ 201, 1301(a) and 1303 (b)(4); Criminal Oral Copulation, 6 CMC §§ 201, 1307(a); two counts of Kidnapping, 6 CMC §§ 201, 1421(a)(1) or (2), 1421(c)(2); and Assault and Battery, 6 CMC § 1202(a) & (b). He received a combined sentence of 41 years in prison, with 10 years suspended time. Renguul was also convicted on all counts.

Rabauliman now appeals his conviction and sentences based on the improper statements made by the Prosecutor during closing arguments and rebuttal.

## II.

¶20 The appeal being timely, this Court has jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands and 1 CMC § 3102 (a).

## III.

¶21 Rabauliman asserts that seven statements made by the Prosecutor during closing argument and rebuttal were improper and seeks reversal of the conviction. He characterizes these statements as unfairly attacking the defense attorney's role and inviting the jury to draw inferences against a defendant's right not to testify. Rabauliman further asserts that the trial court abused its discretion in denying his motion for a mistrial, since the statements made by the Prosecutor violated the Fifth Amendment to the U.S. Constitution and N.M.I. Constitution Article I, Section 4(c).

¶22 Four out of the seven statements Rabauliman presents in this appeal were never objected to at trial. Generally, failure to object to improper statements at trial precludes appellate review. *Commonwealth v. Saimon*, 3 N.M.I. 365, 380 (1992). Even when counsel posed no objections at trial, however, we have the discretion to look at a statement to determine whether it was improper, and, if so, whether it constitutes "plain error." *Id.*; *see also*, Com. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

¶23 The power to notice plain error, even at the request of counsel, is one that courts exercise cautiously. We will not invoke this power lightly. *Saimon*, 3 N.M.I. at 381. Attorneys have a duty to their clients to raise objections during trial, so that the harm may be cured when it occurs.

Furthermore, appeals should be based on questions and objections raised during trial, not after a review of the transcript.

¶24 Our Rule 52(b) is analogous to the Federal Rule of Criminal Procedure 52(b). We find guidance in its interpretation by the U.S. Supreme Court:

The plain error doctrine of Rule 52(b) tempers the blow of a rigid application of the contemporaneous-objection requirement. The Rule authorizes the Courts of Appeals to correct only particularly egregious errors, those errors, those errors that seriously affect the fairness, integrity or public reputation of judicial proceedings. In other words, the plain-error exception to the contemporaneous-objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.

*Saimon*, 3 N.M.I. at 381 (quoting *Untied States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 1046, 84 L. Ed. 2d 1, 12 (1985)).

¶25 When we do review statements under a plain error standard, we must judge them against the whole record, so as “not to extract from episodes in isolation abstract questions of evidence and procedure.” *Id.* For that reason, we shall review each statement in its context so that we can understand more clearly its intended meaning and what harm, if any, came as a result.

¶26 Rabauliman’s first claim is that the Prosecutor pointed to facts which are not in evidence. To support this assertion, he offers this statement made by the Prosecutor: “99.99% of all the people we prosecute are drunk when they commit their crimes. Victims are drunk. Witnesses are drunk. That’s a fact of life.”<sup>1</sup>

¶27 Rabauliman argues that in making this claim, the Prosecutor is trying to introduce the “fact” that 99.99% of all people who are prosecuted are drunk. He claims that it is unfair, because he did not have a chance to rebut this fact. From reviewing the record, it is obvious to the Court that this statement was not meant to be understood as fact, but a figure of speech. We find that Rabauliman

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<sup>1</sup> All statements of the Prosecutor have been taken from the Excerpts of Record, unless otherwise noted.

has mistaken this rhetorical device for evidence, which it was never intended to be. We trust that the jury understood that the Prosecutor simply meant many or most people when he said “99.99%.” We do not think the jury took it literally.

¶28 In the context in which it was stated, the Prosecutor was making a commentary on the prevalence of alcohol in criminal cases and was indicating to the jury that intoxication does not relieve a person of responsibility for their action. He was making this statement in anticipation of Rabauliman emphasizing his alcohol use as a defense in his summation, which he did. Further, the Prosecutor included witnesses and victims in his statement about alcohol use. He did not single out Rabauliman or the other defendants. We therefore find that the Prosecutor’s comment was not meant as evidence and that the statement did not prejudice Rabauliman.

¶29 Next, Rabauliman raises issue with two statements, each made in succession. Read together they are:

If you notice, nobody who talked about what happened up there at Suicide Cliff, nobody who has ever been charged with any of these crimes said, “I raped. I forced somebody to suck my penis.” And the reason is, and everybody likes to do this. “While bad things happened, but I didn’t do it. I was in the wrong place at the wrong time.” Nobody wants to admit they are rapists. Even people you’ve seen plead guilty to rape have a reluctance to come in and say, “I am a rapist.”

¶30 Rabauliman also argues that the Prosecutor has improperly drawn the jury’s attention to his choice not to testify. Considered in context, we must disagree. The Prosecutor was commenting on statements made by Rabauliman to the police and not on his Fifth Amendment right, as Rabauliman suggests.

¶31 This case has one unique aspect that most Fifth Amendment cases do not: although the defendants exercised their right not to testify, they did give statements to the police which were admitted into evidence. A prosecutor does not have a right to comment upon or make inference to a defendant’s exercise of his or her Fifth Amendment right. On the other hand, a prosecutor *does*

have the right to comment on *statements made by the defendants, admitted into evidence*. See *U.S. v. Werme*, 939 F.2d 108, 117 (3rd Cir. 1991) (“The prosecutor is entitled to considerable latitude in summation to argue evidence and any reasonable inferences that can be drawn from that evidence.”) Before making these comments, the Prosecutor referred to the contradictions in the police statements made by Renguul and Rabauliman. He was explicit about to what he was referring.

¶32 We note also that immediately after these statements, the Prosecutor singles out Renguul specifically, and uses this as an explanation of why Renguul did not tell the truth in his police statement. The Prosecutor says Renguul’s statements are inconsistent with Renguul’s own statement, with Rabauliman’s statement and with the evidence. In cases where there are two defendants tried together, courts will only review statements for error that were directed at the person bringing the appeal. *Compare U.S. v. Moreno*, 991 F.2d 943 (1st Cir 1993), *with U.S. v. Hardy*, 37 F.3d 753 (1st Cir 1994). If the above statements were improper, we find that they would have adversely affected Renguul, not Rabauliman. Hence, we cannot find error, upon Rabauliman’s appeal, based on this statement.

¶33 The final statement to be reviewed under the plain error standard is as follows:

So, how do we know that somebody was confined for the purpose of raping her? Well, it would be really nice if you make my job very, very, easy if the defendants had these little posted notes and they went around and stuck them on everything when they committed the crimes and they said, “I, Joe Rabauliman, have done this with the intent of,” and then they stick the little sticky notes outside. But they don’t do that.

¶34 Rabauliman argues that the Prosecutor is making reference to his right not to testify. He claims that had Rabauliman put out sticky notes, he would be testifying. In referring to his failure to put out sticky notes, then, the Prosecutor is referring to Rabauliman’s failure to testify. Rabauliman claims that the above statement places a heavy blame on him for not testifying. We disagree.

¶35 Rabauliman makes this assertion without basis. He cites no authority upon which to base his conclusion, nor does he provide the Court any analysis to make logical his assertion. He did not find this comment objectionable at trial. Instead, he puts it before this Court for the first time on appeal, but is unable to explain why.

¶36 We find this argument to be based on these “episodes in isolation” from which Rabauliman wishes the Court to extract “abstract questions of evidence and procedure,” that neglect to look at the context of the trial. *Saimon*, 3 N.M.I. at 381. When this comment was made, the Prosecutor was explaining to the jury one of the elements of kidnapping; namely, that of intent. We know this, because immediately before the passage above, the Prosecutor said, “. . . there has to be intent to commit that other crime. The law says if you unlawfully confine for a substantial period for the purpose of committing this crime. So, how do you know...?” Directly after this passage, he said, “Nobody does that. It’s a very rare occurrence and that is why the law allows you to infer somebody’s intent from what they do. The law supposes that you intend the naturally consequences of your acts when you do something.”

¶37 Although the Prosecutor refers to Rabauliman by name, we cannot agree that he is referring to his choice to assert his right not to testify. In context, the “sticky notes” example was a way of telling the jury that there is no direct, tangible evidence of intent. The Prosecutor does not refer, either explicitly or implicitly to Rabauliman’s failure to take the stand. If anything, he is referring to Rabauliman’s actions during the night the crime was committed, not during trial. We find it a stretch of the imagination that placing sticky notes at the scene of a crime is a reference to testimony during the time of trial. Hence, we do not find any infringement of a substantial right in this comment.

¶38 Having reviewed the statements made by the Prosecutor against the entire record, we decline

to reverse the decision of the jury on the basis of plain error. Plain error is a stringent standard, difficult to overcome. Under this standard, we shall correct only particularly egregious errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings. *See, e.g. U.S. v. Young*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

¶39 Two of the statements do not require our consideration as they were not directed at Rabauliman, but his co-defendant Renguul. Further, the other statements considered in this appeal, whether read singly or cumulatively, do not rise to the level required for a plain error reversal. We are not convinced that the misconduct is so pronounced and persistent that it “permeated the entire atmosphere of the trial.” *Saimon*, 3 N.M.I at 381 (citing *U.S. v McLain*, 823 F.2d 1457, 1462 (11th Cir. 1987)).<sup>2</sup> Consequently, we find no plain error.

¶40 We turn now to those comments to which objections were made during trial. If a timely objection to an improper statement is made at trial, we apply a harmless error test to determine whether it is more probable than not that the prosecutor’s conduct materially affected the fairness of the trial. *Saimon*, 3 N.M.I at 379-80; Com. R. Crim. P. 52(a) (“Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”); *Commonwealth v. Delos Reyes*, 4 N.M.I. 340, 342 (1996).

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<sup>2</sup> While there is no clear line in deciding what shall and shall not constitute prosecutorial misconduct so pronounced as to warrant reversal, the United States Supreme Court offers some guidance on the issue. The question is: “whether the degree of prejudice, buttressed by the legitimate interest in deterring prosecutorial misconduct, is sufficient to warrant reversal.” *U.S. v. Young*,. 470 U.S. 1, 37, 105 S. Ct. 1038, 1057, 84 L. Ed. 2d 1, 26 (1985). Where a prosecutor opined in rebuttal that the defendant was guilty and urged the jury to “do its job,” the Court found the misconduct was not so egregious as to overturn the conviction. *Id.* Ambiguous statements that might or might not affect the jury may be permissible whereas remarks that are focused, unambiguous and strong are not. *Darden v. Wainright*, 477 U.S. 168, 193, 106 S.Ct. 2464, 2478, 91 L. Ed. 2d 144, 165 (1986). When it is impossible to read the transcript of a summation without seeing it as “a calculated and sustained attempt to inflame the jury,” the prosecutorial misconduct is not “slight or confined to a single instance, but [ ] so pronounced and persistent, with a probable cumulative effect upon the jury [that it] cannot be disregarded as inconsequential.” *Id.* (citations omitted)

¶41 As this Court noted in *Commonwealth v. Lucas*, 2003 MP 9 ¶ 13 n.10, the harmless error concept was developed by appellate courts to embody and implement the truism that no litigant is assured a perfect trial, only a fair one. Since some errors inevitably occur during a contested trial, it would be impossible to administer a judicial system in which every trial court error, no matter how minor or how non-critical to the outcome, would automatically trigger a new trial, let alone a reversal. *Id.* (citing *Neder v. United States*, 527 U.S.1, 18, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35, 53 (1999)). The doctrine of harmless error enables a reviewing court to excise the evidence subject to objection and then examine the untainted evidence to see whether the same result would assuredly follow. *Id.*

¶42 Accordingly, there are two parts to the harmless error analysis. First, we shall consider the statements in context to determine whether an error has occurred affecting a substantial right. If there is error, we shall then look to the record of the trial to determine whether the error was harmless beyond a reasonable doubt. *Saimon*, 3 N.M.I. at 380.

¶43 The first statement we shall review under a harmless error standard is:

Chong testified that Ms. Wang struggled and screamed the whole time on his way up there.[sic] Why would he lie? Now, there are only two people in the courtroom who have a real incentive to lie. And we know who they are. Mr. Rabauliman and Mr. Renguul because they are attempting to escape.

We find no error in this statement for two reasons. First, the comment refers to the statement Rabauliman made to the police and not to his right to testify. In making this statement, the Prosecutor was referring to the state of mind of Rabauliman and Renguul when they spoke to the police and their incentive to lie. As discussed above, a prosecutor may refer to these statements just as he may refer to anything admitted into evidence in this trial. It is only the defendants' right to chose not to testify that is protected.

¶44 The second, and more compelling, argument, that there was no error, comes from Rabauliman himself. After speaking with the Judge and Rabauliman, the Prosecutor came back to the jury and said:

First, ladies and gentlemen it goes without saying you've already been advised more than one time, the defendants have an absolute right not to testify. You may not hold against them that they did not testify but they did give statements to the police. And to the extent that they lied in those statements . . . they have a valid motive for not telling the truth to the police.

Rabauliman himself offers to this Court that this instruction may have cured any harm done by the statement. Appellant's Opening Brief at 15. We agree. Although we find no error in the statement, we also find that the instruction to the jury was curative and clarified what the Prosecutor meant.

¶45 We find two comments in particular, however, that have raised our judicial eyebrow. They have crossed a line and have infringed upon Rabauliman's rights. We shall examine each of these statements below.

¶46 The first was made by the Prosecutor during rebuttal:

Under our rules of ethics, defense lawyers have one duty, one obligation and that is to zealously represent their client with the duty, and within the bounds of ethics and the law, that is their only consideration and whether these men are guilty or innocent, does not concern them, *whether they go out and rape a dozen more women.*<sup>3</sup>

¶47 In its defense, the Commonwealth has pointed out that a prosecutor is entitled to a fair response when its case is attacked by the defense attorney. *U.S. v Flynn*, 196 F.3d 927 (8th Cir. 1999). Indeed, the defense attorney had attacked the Commonwealth's case by telling the jury in its closing that the Commonwealth is saying, "if you don't agree with us, you're racist." In responding

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<sup>3</sup> At this point, an objection was made by Rabauliman. There was no offer of proof on the objection and the court made no ruling. The Prosecutor completed his thought as follows: "[i]t is the government's duty, the government's attorney has to be responsible for the protection of the entire community and for the enforcement of all the laws so if there is a difference in what we say that is where it comes from."

to this assertion, the Commonwealth maintains, the Prosecutor was attempting to explain why the defense and prosecution interpret facts differently. It is not enough, however, that the response is invited under a fair response theory. The comment must also be fair. *Id.* at 930. We find that it is not.

¶48 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.” *Saimon*, 3 N.M.I at 382 (*citing Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935)). We are particularly concerned with the statement, “[it] does not concern them [defense counsel] whether they [defendants] go out and rape a dozen more women.” This is a flagrant and unnecessary attack on the role of defense counsel.

¶49 In *Saimon*, we cited two cases which give us guidance in distinguishing “hard blows” from “foul ones.” *Id.* at 383-84. In *Carol v. Oklahoma*, 756 P.2d 614, 617 (Okla. 1988), the court declined to find impropriety in a prosecutor’s statement, reasoning that the statements were an interpretation of evidence and not an improper attack of defense counsel (prosecutor commented that the defense attorney was “talking as a smoke screen”). In *California v. Miller*, 790 P.2d 1289 (Cal. 1990), a prosecutor, during closing arguments, stated that “the defense can come in here and say pretty much whatever they want to.” As the statement did not directly impugn defense counsel’s honesty or integrity, it was not found improper. *Id.*

¶50 We find that this statement made by the Prosecutor in rebuttal is not a fair response to defense counsel’s attack. Instead, it is a foul blow to the role of the defense counsel. It is not directed at the interpretation of evidence, but at the person. Further, it impugns the integrity of the defense counsel, by suggesting that they would have neither care nor concern if dozens of women

in their community were raped. This statement can neither be ignored nor condoned by this Court. Accordingly, we find that this statement is evidence of prosecutorial misconduct.

¶51 Moreover, we agree with Rabauliman that with another comment the Prosecutor improperly referenced his right not to testify. In his closing argument, the Prosecutor said: “[d]efendants do not have to take the stand and you may not hold it against them if they didn’t. *But if they had, if they had taken the stand and said, ‘those little Chinese tramps wanted it.’*” The court sustained an objection to the above statement. The Prosecutor continued: “[i]t’s not less offensive that *these defendants get their lawyers to stand up and say these things for them*. Defendants think that you are going to ignore what they did because they are Chinese.”<sup>4</sup>

¶52 Defendants in a criminal trial have a right not to testify.<sup>5</sup> Direct reference by a prosecutor to a defendant’s decision not to testify is always a violation of the defendant’s Fifth Amendment right against self-incrimination. *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 12 L. Ed. 2d 106 (1965). Indirect references to the defendant’s failure to testify are constitutionally impermissible if “the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on their defendant’s failure to testify.” *United States v. Lyon*, 397 F.2d 505, 509 (7th Cir. 1968).

¶53 The Prosecutor prefaced his statement by reminding the jury that the defendants are not required to testify. He continues, then, by violating the very right he had just explained. He knew he was going to refer to the fact that they didn’t testify. In doing so, he not only alerted the jury to

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<sup>4</sup> Rabauliman did not renew his objection to this second statement, thus it should be reviewed under a plain error standard. We place it here, however, to give meaning and context to statement before it. As plain error is a stricter standard than harmless error and we find this error to be harmless, discussing this statement in this section shall not affect the outcome.

<sup>5</sup> The Fifth Amendment to the United States Constitution, “[n]o person shall be . . . compelled in any criminal case to be a witness against himself,” and Article I, Section 4(c) of the CNMI Constitution, “[n]o person shall be compelled to give self-incriminating testimony.”

the fact Rabauliman didn't testify, but then goes one step further. He testifies for Rabauliman by telling the jury what he would have said, had he taken the stand.

¶54 The Commonwealth asks us to look at this comment in the context of the larger argument. The Prosecutor had a recurring theme that the victims were “disposable.” He called attention to the fact that defense lawyers were using the way the women were dressed, their age, and their race as a defense for the crime. While we agree that this was a valid point to make during argument, we find there are many ways in which the Prosecutor could have made it. It was not necessary to reference Rabauliman's exercise of his Fifth Amendment right. Accordingly, we find this comment to be “manifestly intended to be a comment on the defendant's failure to testify” and thus impermissible, both by the United States Constitution and the CNMI Constitution. *U.S. ex rel. Burke v. Greer*, 756 F.2d 1295, 1300 (7th Cir. 1985).

¶55 Errors of this kind, however, are not *per se* error requiring automatic reversal. *Chapman v. Supreme Court of the United States*, 386 U.S. 18, 87 S.Ct. 824, 17 L. Ed. 2d 705 (1967). We must look to the record and determine whether the constitutional error was harmless beyond a reasonable doubt. *Id.* at 710-11. It is our duty to consider the trial record as a whole and ignore errors that are harmless, including most constitutional violations.<sup>6</sup> *Id.*

¶56 The question we must ask ourselves is this: absent the Prosecutor's allusion to the Rabauliman's failure to testify and his improper remarks about the defense counsel, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty? The jurors sat in the courtroom for almost three weeks, observing and listening to the attorneys and witnesses. Plenty

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<sup>6</sup> While the U.S. Supreme Court has recognized the application of the harmless error rule for a violation of the Fifth Amendment, other rights have been acknowledged as “so basic to a fair trial that their infraction can never be treated as harmless error.” *Chapman v. Supreme Court of the United States*, 386 U.S. 18, 23 & n.8, 87 S.Ct. 824, 827-28 & n.8, 17 L. Ed. 2d 705, 710 & n.8 (1967). These rights include coerced confession, right to counsel and an impartial judge. (citations omitted)

of testimony was heard from the victims as well as Rabauliman's accomplice. Rabauliman himself gave a statement to the police which was admitted into evidence. In this statement, Rabauliman admitted that force was used to get the women in the car, that they looked scared during the trip to Marpi and that he engaged in oral copulation with Ms. Li. He further admitted that Ms. Wang refused to engage in oral copulation with him.

¶57 Additionally, there is testimony by Mr. Chong, a neutral witness. He was unconnected with anyone involved and had no incentive to lie. He testified that he heard screams from the women as he was approaching the last curve to Suicide Cliff. Moreover, police officers testified that when they arrived at the scene, the women were crying hysterically, half-naked and holding on to each other.

¶58 There is also physical evidence indicating guilt.<sup>7</sup> One of the women's shoes was found at the place where she was kidnapped, signifying force. There are medical records that show fingerprint bruises on the women and scrapes on their backs. At Suicide Cliff, a woman's torn bra strap and torn pants were found.

¶59 In his defense, Rabauliman offers dubious theories and weak excuses. His claim was that the sex was consensual and that since he was drunk he may not have known if the women did not consent. He offers evidence that the women wore short skirts and walked the street in the early morning. Rabauliman asserts that they took the women to Suicide Cliff because they were embarrassed to be seen with Chinese women. He further posits that the women made up the story to avoid deportation if they were found guilty of prostitution. He ignores the fact that even prostitutes can be rape victims if they do not give their consent.<sup>8</sup>

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<sup>7</sup> We should also note that for the charges of kidnapping and rape, Rabauliman was tried and convicted on a theory of aiding and abetting. Thus, the evidence against his accomplices was also considered by the jury.

<sup>8</sup> There was no conclusive evidence to support a finding that the women were prostitutes.

¶60 Rabauliman draws our attention to two cases where convictions were overturned on the basis that errors made by the prosecutor were harmful, rather than harmless. In both of those cases there was flimsy evidence and no clear identification of the defendants. *United States ex rel. Burke v. Greer*, 756 F.2d 1295 (7th Cir. 1985) (no positive identification, all evidence circumstantial); *U.S. v. Hardy*, 37 F.3d 753 (1st Cir 1994) (only evidence was one witness' testimony, all circumstantial, no physical evidence, no clear identification). We find the present case distinguishable in light of the overwhelming evidence and Rabauliman's own statements. Unlike either of the cases cited, there is no problem of identification here, since Rabauliman admits being present and taking part in the activities.

¶61 There is also evidence that the jury made their decision without regard for the Prosecutor's inappropriate statements. During deliberations, the jury requested and then listened to a playback of Ms. Wang's testimony. At the time of the request, they also indicated to the judge that they had made their decision on all but one charge for one defendant. Although we don't know what that charge was, this indicated to the Court that they were considering the evidence to make their decision, rather than the comments of the Prosecutor during closing argument and rebuttal.

¶62 In addition, at the end of the trial, the judge instructed the jury twice that the comments made by attorneys were not evidence, but opinions. The jury was instructed to interpret the evidence and they saw it and not as the attorneys proposed. The jury was also told that they should disregard any evidence where an objection was sustained.<sup>9</sup>

¶63 Having reviewed the trial record, it is our duty to ignore errors that are harmless beyond a reasonable doubt, including constitutional violations. We find that there is ample evidence on this record for the jury to have found Rabauliman guilty, absent the errors made by the Prosecutor.

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<sup>9</sup> Thus, they should have not considered the statement made by the Prosecutor that infringed upon Rabauliman's right not to testify

Additionally, the jury demonstrated that they considered the evidence, rather than the statements of the Prosecutor, in making their decisions. Therefore, we find that the improper statements made by the Prosecutor were harmless error and did not so poison the well as to require a new trial.

¶64 Nevertheless, we do not condone the behavior of the Prosecutor. For the sake of future cases, we think it is worth saying: inflammatory comments to the jury infringing upon the rights of a criminal defendant will exhaust the patience of the court and gradually undermine the reputation of the Prosecutor's office. As the First Circuit noted in *Moreno*, 991 F.2d at 949 “[t]rials to be sure, are hard fought contests where not every remark can be carefully weighed. But for the government in a criminal case, fairness is even more important than victory.” Although we view the evidence to be substantial enough to affirm the jury's conviction, the government would do well to take this warning seriously.

¶65 Finally, we do not find that the trial court abused its discretion in denying Rabauliman's motion for a mistrial. Having been present through the entire trial, the trial court was in the best position to decide the impact of the statements. Having found the error harmless, it was correct for the judge to deny the motion. Thus, we hold there was no abuse of discretion.

#### IV.

¶66 We have reviewed statements made by the Prosecutor in this case under both a plain error and harmless error standard. Although some of the statements made by the Prosecutor were foul and improper, they were harmless beyond a reasonable doubt in light of the overwhelming evidence and weak defense. Rabauliman's conviction and sentence are therefore AFFIRMED.

SO ORDERED this 13th day of July 2004.

/s/  
MIGUEL S. DEMAPAN, Chief Justice

/s/  
ALEXANDRO C. CASTRO, Associate Justice

/s/  
JOHN A. MANGLONA, Associate Justice