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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

JOSEPH A. CRISOSTOMO,
Defendant-Appellant.

Supreme Court No. 2014-SCC-0013-CRM

Superior Court No. 13-0049

SLIP OPINION

Cite as: 2018 MP 5

Decided July 13, 2018

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

Janet H. King, Saipan, MP, and F. Randall Cunliffe & Jeffrey A. Moots, Hagatna, Guam, for Defendant-Appellant.

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

MANGLONA, J.:

¶ 1 Defendant-Appellant Joseph A. Crisostomo ("Crisostomo") appeals his convictions for First Degree Murder, Kidnapping, Sexual Assault in the First Degree, Robbery, Assault and Battery, and Disturbing the Peace. Crisostomo challenges these convictions, claiming numerous deficiencies before and during trial: (1) denial of expert testimony; (2) admission of expert testimony; (3) denial of his motion to transfer venue; (4) failure to reiterate jury instructions at the close of evidence; (5) admission of improper character evidence; (6) admission of testimony based on an impermissibly suggestive identification; (7) admission of footprint evidence; (8) use of Skype testimony; (9) admission of testimony concerning refusal to submit to polygraph examination; and (10) cumulative errors resulting in an unfair trial. For the following reasons, we AFFIRM Crisostomo's convictions.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 On February 7, 2012, Federal Bureau of Investigation ("FBI") Agents Hae Jun Park ("Park) and Joseph Auther ("Auther") searched northern Saipan in pursuit of Emerita Romero ("Romero"), who had been reported missing on February 5. Upon receiving information that the Palms Resort cell tower had picked up Romero's last phone call, the agents searched the abandoned La Fiesta Mall. Auther and Park found footprints and drag marks leading to a body in one of the buildings' bathrooms, which was later identified as Romero.

¶ 3 Two days earlier, on February 5, 2012, Romero placed a call between 2 and 3 a.m. requesting that her usual taxi driver, Cebong Kim ("Kim"), pick her up near Garapan Market. At approximately 2:45 a.m., Natalie Ocon ("Ocon") observed Romero, her coworker, get into a blue or green Toyota parked in front of Wild Bill's restaurant in Garapan. Romero was in a rush to get into the taxi she had called earlier; she planned to visit her boyfriend, Taj Van Buren ("Van Buren"), in Chalan Piao. By the time Kim arrived to pick her up, however, Romero was no longer there. After realizing the car she was in was not the taxi she called for, Romero called Kim, informing him of the situation and asking for the taxi service's phone number. A few minutes later, Romero called Kim again. Sounding shocked, she asked Kim to pick her up in Puerto Rico. The car was on the move, and before the line was disconnected, Kim heard Romero and a man shouting. Concerned, Kim met with Van Buren and informed him of the phone calls. Kim waited as Van Buren called and texted Romero for approximately twenty minutes with no answer.

¶ 4 Department of Public Safety ("DPS") dispatcher Loni Perry ("Perry") received a 911 call at 3:02 a.m. that same morning. On this call, Perry heard a Filipina female crying, telling a local male that her neck hurts and pleading to be let go. In response, the male voice told her "[*i*]*t's okay, it's okay. I'll take you home*," tr. 1125, and asked, "[w]hat's your name?" *Id.* The female responded,

"Emie." *Id*. Sensing the importance of the call, Perry transferred the phone to her supervisor, DPS Officer Sandy Hambors ("Hambors"). As Hambors listened, the female pleaded for help, asked to pull up her pants, and indicated she was at Marianas Resort. The call was cut off, and Hambors immediately dispatched himself and other officers to the Marpi area. Meanwhile, Perry unsuccessfully attempted to call back 989-4425, the number that had called 911. The officers were also unsuccessful, having been unable to locate the source of the 911 call in their search.

¶ 5 At about 5:00 p.m. that same day, Scott Dottino ("Dottino"), co-owner of Godfather's Bar and Romero's employer, arrived at work. Being that Romero was usually on time, Dottino called his partner and other staff members in search of Romero, also sending an employee to Romero's house to talk to her family and check her bedroom. After hearing no one had seen Romero, Dottino spoke with Auther and other DPS officers, reporting Romero as a missing person. News stories began running about Romero's disappearance, broadcasting images of the car Ocon had seen and asking for information.

¶ 6 Joanne Castro ("Castro"), Crisostomo's prior partner of seventeen years, saw the news reports. As a confidential informant, she reported seeing Crisostomo driving a car matching the description on the news around 9:00 p.m. on February 4. Shaine Castro ("Shaine"), Castro and Crisostomo's daughter, also noticed Crisostomo driving a dark-colored, tinted Toyota Corolla. As a result, DPS officers collected records from rental car companies. Edith Vargas ("Vargas") and Leticia Aquino ("Aquino"), Islander Rent-A-Car employees, both confirmed that Annie Crisostomo ("Annie"), Crisostomo's sister, had rented a turquoise tinted Toyota Corolla from February 3 to February 8. However, at 9:30 a.m. on February 5, Annie returned the vehicle, asking to exchange it. Although the Corolla's windows were tinted, she requested to exchange it for a car with tinted windows, receiving a car of the same model and similar color. Crisostomo also confirmed as such: he requested a meeting with Commissioner Ramon Mafnas ("Mafnas"), where he admitted he had been driving a sky blue/green rental car in Garapan on the evening of February 4. Crisostomo knew Annie had returned the vehicle but claimed not to know why.

¶ 7 Numerous other pieces of evidence were found during the investigation. Hambors' part of the 911 call was recorded; this recording was separately played to DPS Detective Elias Saralu ("Saralu"), DPS Detective Roque King Camacho ("Camacho"), and Castro, all of whom had known Crisostomo outside of the investigation. Each of them individually identified the male voice on the 911 call as Crisostomo's. Romero's purse was recovered from La Fiesta, but her phone, a Blackberry Torch, was not found. Crisostomo did not own a cell phone, and yet, DPS Detective Simon Manacop ("Manacop") testified that a witness saw Crisostomo on February 5 attempting to sell a Blackberry Torch. On the evening of February 4, however, Crisostomo met with some friends, including Alice Kintaro ("Kintaro"), at Piano Poker in Garapan around 1:30 a.m. He asked Kintaro to borrow her cell phone (788-5324), and she obliged. Kintaro left Piano

Poker soon after and did not hear from Crisostomo until 6:00 a.m. on February 5, at which time he asked her to pick up Annie and others from Piano Poker, stating he was busy. IT&E phone records extracted from 788-5324 and 989-4425 indicated that 989-4425 had made calls picked up by the Hafa Adai cell site in Garapan at 2:55, 2:57, and 2:58 a.m, and 788-5324 had made a call picked up by the Hafa Adai cell tower at 2:44 a.m., with the next call picked up at the Palms Resort cell tower covering north and south Marpi Road at 6:00 a.m.

¶ 8 Expert testimony was also crucial in interpreting evidence. Gel impressions were created from barefoot footprints left at La Fiesta and subsequently compared to footprints obtained from Crisostomo pursuant to a search warrant. William Bodziak ("Bodziak"), an expert in barefoot morphology, found that he could not exclude Crisostomo's footprints from the gel lifts on any basis. Although the rental car had since been cleaned and twice-rented, DPS and FBI agents collected remaining debris and vacuum sweepings. Linda Otterstatter ("Otterstatter"), an expert in the microscopic analysis of hair and fiber, found a hair sample from the front passenger's side that exhibited the same microscopic characteristics as Romero's hair. She found two black cotton fibers from the driver's seat that exhibited the same microscopic characteristics and optical properties as Romero's leggings. Otterstatter also indicated that two black brown polyester fibers found on Romero's shoe exhibited the same microscopic characteristics as fibers found on the front and rear passenger's seats. DNA was also collected from Romero as part of a rape kit. Susana Kehl ("Kehl"), an FBI DNA analyst, testified that DNA taken from Romero signified the presence of two or more individuals' DNA. The DNA found was compared to DNA samples taken from Crisostomo, Van Buren, Ivan Castro ("Ivan"), and Cheyenne Sablan ("Sablan"). No DNA was found on Romero matching Ivan, Sablan, or Van Buren. After accounting for Romero's DNA, however, Kehl determined Crisostomo was likely the major contributor of the DNA. Crisostomo attempted to present his own DNA expert, Dr. David Haymer ("Haymer"), but the court denied Haymer's testimony.

¶ 9 Pretrial motions and jury instructions were extensive. Amongst other motions, Crisostomo filed pretrial motions to transfer the trial's venue, exclude evidence of his prior bad acts, and exclude evidence of the footprints found at La Fiesta. Both Crisostomo and the Commonwealth filed motions to exclude the testimony of multiple experts and hold *Daubert* hearings to determine their ability to testify. At the close of trial, the court read new and amended jury instructions while passing out packets with all of the instructions, instructing jurors to consider all of them. Amongst the newly added instructions was one addressing a defendant's right to refuse to submit to a polygraph test.

¶ 10 After a day of deliberations, the jury convicted Crisostomo of First Degree Murder, Kidnapping, Sexual Assault in the First Degree, and Robbery. The judge convicted Crisostomo of Assault and Battery and Disturbing the Peace. Crisostomo appeals his convictions.

II. JURISDICTION

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

III. STANDARDS OF REVIEW

¶ 12 There are ten issues on appeal. First, whether Crisostomo's rebuttal expert witness was properly excluded from testifying regarding the Commonwealth's interpretation of forensic DNA results. Second, we review whether the Commonwealth's expert witness was properly admitted. We review a court's decisions whether to exclude or admit evidence under NMI Rule of Evidence 702 ("Rule 702") for abuse of discretion. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Third, whether the court properly denied Crisostomo's motion to transfer venue. We review a court's ruling on a motion regarding venue for abuse of discretion. *Guerrero v. Tinian Dynasty Hotel & Casino*, 2006 MP 26 ¶ 10. Fourth, whether the court erred in delivering jury instructions. Absent an objection, we review the court's failure to reread jury instructions following the close of evidence for plain error. *Commonwealth v. Reyes*, 2016 MP 3 ¶ 9. Fifth, whether the court should have declared a mistrial pursuant to Castro's reference to Crisostomo's prior bad acts. Where defendant fails to move for a mistrial, we review the court's failure to declare a mistrial sua sponte for plain error. *United States v. Abakar*, 573 Fed. Appx. 613, 614 (9th Cir. 2014). Sixth, whether the court violated Crisostomo's Due Process rights in admitting testimony resulting from a suggestive identification. We review constitutional claims de novo. *J.G. Sablan Rock Quarry, Inc. v. Dep't of Pub. Lands*, 2012 MP 2 ¶ 17. Seventh, whether Crisostomo's Sixth Amendment rights were violated in the taking of his footprints. Eighth, whether Crisostomo's Sixth Amendment and Due Process rights were violated when the court allowed witness testimony over Skype. We review issues seven and eight under plain error because Crisostomo did not timely object at trial. *See Commonwealth v. Xiao*, 2013 MP 12 ¶ 16. Ninth, whether the court erred in admitting testimony of Crisostomo's refusal to take a polygraph test. Where a specific objection is not raised, we review for plain error. *Reyes*, 2016 MP 3 ¶ 11. Finally, we review for cumulative error. Because the court below did not and could not have ruled on such a claim, we review de novo. *Commonwealth v. Cepeda*, 2014 MP 12 ¶ 37.

IV. DISCUSSION[1]

A. Denial of Expert Testimony

¶ 13 Crisostomo argues the court abused its discretion in denying his motion to

[1] We are implored to point out the deficiencies in Crisostomo's briefs. The Commonwealth notes Crisostomo has taken an "everything-but-the-kitchen-sink-approach" to the appeal, and we agree. Resp. Br. 10. In addition, Crisostomo's briefing is littered with violations of NMI Supreme Court rules, conclusory statements, underwhelming legal arguments, and misstatements of law. Even a standard of review is not provided for half of the issues on appeal. Counsel herself admitted to such defects in briefing during the trial, stating "[c]itation errors and omissions waste the Court's time, the opposing counsels' time, and weakens the credibility of the proponent of the

admit Haymer as an expert witness under Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) ("*Daubert*"). He asserts the court incorrectly concluded Haymer was unqualified to give expert testimony on human DNA mixtures due to a lack of specialization in forensic DNA. Crisostomo claims that Haymer did, in fact, possess sufficient skills, education, and experience to qualify as an expert pursuant to the broad dictates of Rule 702. The Commonwealth, on the other hand, argues Haymer did not have the experience and education required to testify in the specialized field of forensic DNA analysis, and that the court correctly excluded his testimony. The Commonwealth further claims the court not only excluded Haymer due to his qualifications, but also pursuant to 702(c) and (d). It claims Crisostomo did not present testimony to satisfy the court that Haymer's testimony was based on reliable principles and methods and that he would reliably apply these principles and methods to the facts of the case.[2]

¶ 14 The admissibility of an expert pursuant to *Daubert* and Rule 702 presents an issue of first impression for the Commonwealth. While we have previously touched upon the parameters of expert testimony in the context of Rule 702, *see*

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argument. For all of these failures, counsel apologizes." Appellant's App. 0264. Counsel apologized but repeated such errors on appeal. We remind those before us that "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Furthermore, [r]ulings on undeveloped or poorly developed issues run the risk of being improvident or ill-advised." *Kim v. Baik*, 2016 MP 5 ¶ 30 (citations and internal quotation marks omitted). Such deficient briefing is grounds for rejecting the appeal.

[2] The Commonwealth correctly notes that an issue not raised in an appellant's opening brief is generally waived. *Commonwealth v. Calvo*, 2014 MP 10 ¶ 8 (waiving issue "unless the party's initial brief provides legal authority or public policy, and applies the facts of the case to the asserted authority in a non-conclusory manner"). However, we have also recognized exceptions to this rule. We may consider issues not raised in the opening brief if: "(1) there is good cause shown, or failure to do so would result in manifest injustice; (2) the issue is raised in the appellee's brief; or (3) failure to properly raise the issue does not prejudice the defense of the opposing party." *Commonwealth v. Lizama*, 2015 MP 2 ¶ 11 n. 4 (quoting *United States v. Mageno*, 762 F.3d 933, 940 (9th Cir. 2014)). We may also lift this prohibition "when the case offers a valuable opportunity to guide future courts and litigants faced with similar issues." *Calvo*, 2014 MP 10 ¶ 7 n. 1 (citation and internal quotation marks omitted).

Here, the second and third exceptions apply. First, the Commonwealth discussed the court's exclusion of Haymer pursuant to Rule 702(c) and (d) in detail, dedicating over three and a half pages briefing this assertion. Second, Crisostomo's failure to argue the court's potential abuse of discretion as to 702(c) and (d) does not prejudice the Commonwealth. Not only did the Commonwealth fully brief its assertions as to this issue, but it was also extensively discussed by both parties during oral argument. Furthermore, this case provides a valuable opportunity to expand our limited jurisprudence on Rule 702. As such, we consider whether the court addressed 702(c) and (d) in its ruling.

Xiao 2013 MP 12 ¶¶ 43–49; *Commonwealth v. Palacios*, 4 NMI 330, 332–33 (1996), we have not addressed the requirements under this rule as outlined by the United States Supreme Court in *Daubert*, 509 U.S. at 579, *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) ("*Joiner*"), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) ("*Kumho Tire*"). As Rule 702 mirrors Federal Rule of Evidence 702 ("FRE 702"), we look to the United States Supreme Court and federal circuit courts for guidance. *Xiao*, 2013 MP 12 ¶ 47 n. 5; *compare* NMI R. EVID. 702 *with* FED. R. EVID. 702. Because we have not had occasion to review the parameters of a judge's gatekeeping function pursuant to Rule 702, we review our previous decisions contemplating expert testimony as well as the requirements for admitting such testimony as explained in the United States Supreme Court's *Daubert* trilogy and applied by the federal circuit courts.

¶ 15 Under Rule 702, "a person with 'specialized knowledge' qualified by his or her 'knowledge, skill, experience, training, or education' may give opinion testimony" if it satisfies the rule's requirements. *Xiao*, 2013 MP 12 ¶ 43 (quoting NMI R. EVID. 702). Rule 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

NMI R. EVID. 702. Put simply, Rule 702 requires that: "(1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony 'fit' the facts of the case." FED. R. EVID. 702 advisory committee's note to 2000 amendment. Because "the admissibility of all expert testimony is governed by the principles of [Federal Rule of Evidence] 104(a). . . . the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence." FED. R. EVID. 702 advisory committee's note to 2000 amendment.

¶ 16 In *Commonwealth v. Xiao* and *Commonwealth v. Palacios*, we addressed issues which implicated Rule 702. *See* 2013 MP 12 ¶¶ 43–49; 4 NMI at 332–33. In *Xiao*, we determined whether a police officer's opinion regarding a defendant's mental state constituted expert testimony. *Xiao*, 2013 MP 12 ¶ 44. In *Palacios*, we considered whether testimony concerning a field sobriety test concerned scientific, technical, or specialized knowledge such that an officer testifying to such was required to be qualified as an expert. *Palacios*, 4 NMI at 332. In both instances, we determined the officers did not need to be qualified as

experts since they were testifying based on personal knowledge and not "scientific, technical or specialized knowledge" within the meaning of Rule 702. *Xiao*, 2013 MP 12 ¶ 47; *Palacios*, 4 NMI at 333. However, we noted that should a witness testify about specialized knowledge, their testimony would then be subject "to the relevant qualification procedure" and "particularized evidentiary rules regarding their testimony," just like any other expert witness. *Xiao*, 2013 MP 12 ¶ 48.[3] Faced with an issue implicating the relevant qualification procedure for expert testimony under Rule 702, we now discuss these requirements.

¶ 17 In *Daubert*, the United States Supreme Court considered the viability of the previous standard governing admission of expert testimony, the *Frye* "general acceptance" test, in light of the adoption of the Federal Rules of Evidence. *Daubert*, 509 U.S. at 586. The Court found the "general acceptance" test had been superseded by the Federal Rules of Evidence. *Id.* at 589. Instead, courts were tasked with ensuring testimony admitted under FRE 702 was reliable, pertaining to scientific knowledge, and relevant, "assist[ing] the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 589–91 (quoting FRE 702). The Court further explained that relevance was a question of fit, requiring courts to review whether the testimony is "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Id.* at 591 (citing *United States v. Downing*, 753 F.2d 1224, 1242 (3rd Cir. 1985)) (internal quotation marks omitted). Thus, the new standard for admissibility required courts to "determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592. The Court listed sample potential considerations for making this determination, such as testability, peer review and publication, error rate, and general acceptance in the relevant scientific community. *Id.* at 593–94. The Court concluded by emphasizing the test outlined was meant to be flexible, focused on determining the scientific validity of the principles underlying the proposed testimony. *Id.* 594–95.

¶ 18 The Supreme Court elaborated on *Daubert* in *Joiner* and *Kumho Tire*. First, in *Joiner*, it determined abuse of discretion was the proper standard for an appellate court's review of the decision to admit or exclude expert testimony. 522 U.S. at 139. Then, in *Kumho Tire*, it elaborated upon the gatekeeping obligation outlined in *Daubert*, explaining it applies to "testimony based on technical and other specialized knowledge" in addition to scientific knowledge. 526 U.S. at 141 (citation and internal quotation marks omitted). Moreover, it explained the judge has broad latitude in how they perform their obligation, both in deciding "*how* to test an expert's reliability" and "*whether* that expert's relevant testimony

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[3] We have also considered the parameters of expert assistance in a different context, considering when, pursuant to the Sixth and Fourteenth Amendments of the United States Constitution, an indigent defendant must be provided with access to expert assistance. *See Commonwealth v. Monkeya*, 2017 MP 7 ¶¶ 5–14 (Slip. Op., Sept. 5, 2017); *Commonwealth v. Xiao*, 2013 MP 12 ¶¶ 50–56; *Commonwealth v. Perez*, 2006 MP 24 ¶¶ 9–15.

is reliable." *Id.* at 152 (finding the abuse of discretion standard "applies as much to a [lower] court's decisions about how to determine reliability as to its ultimate conclusion"). The Court explained that because "there are many different kinds of experts, and many different kinds of expertise," scientific foundations, personal knowledge, and numerous other criteria may be at issue. *Id.* at 150. And because a court's gatekeeping inquiry must be tied to the facts of the particular case, "the factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Id.* (citation and internal quotation marks omitted). Importantly, the Court added that "discretion in choosing the manner of testing expert reliability—is not discretion to abandon the gatekeeping function. . . . [or] perform the function inadequately." *Id.* at 158–59 (Scalia, J., concurring). "Rather, it is discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky." *Id.* (Scalia, J., concurring).

¶ 19 While we have never explicitly held *Daubert* and its progeny applicable in the Commonwealth, we do so now. With these instructions in mind, we review the manner in which the court made its determination to exclude Haymer's testimony under the abuse of discretion standard. *Kumho Tire*, 525 U.S. at 152. We also review the court's ultimate determination to exclude Haymer based on his expertise for abuse of discretion. *Id.*; *see also Xiao*, 2013 MP 12 ¶ 43 (citation omitted). We will not reverse a decision to exclude or admit evidence "unless the ruling is manifestly erroneous." *Joiner*, 522 U.S. at 142. "An abuse of discretion exists if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Commonwealth v. Taitano*, 2017 MP 19 ¶ 37 (citation and internal quotation marks omitted); *United States v. Cohen*, 510 F.3d 1114, 1123 (9th Cir. 2007) (same). We address the parties' arguments in turn, first considering the court's determination as to 702(c) and (d), then addressing the court's ruling on Haymer's qualifications.

i. Reliability

¶ 20 Parts (c) and (d) of Rule 702 require that "the testimony is the product of reliable principles and methods" and that "the expert has reliably applied the principles and methods to the facts of the case." FED. R. EVID. 702. Indeed, "[i]t is by now well established that [FRE 702] imposes on a . . . court a gatekeeper obligation to 'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1221 (10th Cir. 2003) (quoting *Daubert*, 509 U.S. at 589). This obligation "requires the judge to assess the reasoning and methodology underlying the expert's opinion, and determine whether it is both scientifically valid and applicable to a particular set of facts." *Id.* As explained in paragraph 17, the *Daubert* Court offered four non-exclusive considerations for evaluating whether an expert's testimony is reliable and relevant, *Daubert*, 509 U.S. at 593–94, and elaborated on the flexibility of this determination in *Kumho Tire*. This flexibility, however, has limitations: a court has broad discretion in fulfilling its gatekeeping function, but it must not abandon this function or perform it inadequately. *Kumho Tire*,

526 U.S. at 159 (Scalia, J., concurring).

¶ 21 First, in not abandoning the gatekeeping function, courts must allow presentation of evidence as to the relevance and reliability of the expert's proffered testimony. *See Heer v. Costco Wholesale Corp.*, 589 Fed. Appx. 854, 860 (10th Cir. 2014) ("As part of their gatekeeper function under [FRE 702], district courts must create a sufficiently developed record . . . .") (citation and internal quotation marks omitted); *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1316 (9th Cir. 1995) (noting gatekeeping role requires judge to satisfy themselves of reliability, meaning that "the party presenting the expert must show that the expert's findings are based on sound science"); *see, e.g., Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 464 (9th Cir. 2014) (finding court abandoned role as gatekeeper by excluding expert based on credentials without any indication it assessed the scientific validity or methodology of the expert's proposed testimony). This inquiry does not need to take any particular form, the court must simply allow the parties the opportunity to explore the proposed testimony's relevance and reliability. *United States v. Alatorre*, 222 F.3d 1098, 1104–05, (9th Cir. 2000) ("Notably, this case does not involve a trial court's refusal to permit any inquiry into an expert's qualifications or the basis for the proffered opinion . . . . On the contrary, the trial court . . . indicated that it would allow further questioning . . . should that become necessary. Such a procedure is appropriate."); *see, e.g.*, *Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971, 979 (9th Cir. 2009) (finding briefing on expert's scientific expertise and proposed testimony prior to trial such that "[t]he district court could properly determine that this information comprised an adequate record from which the court could make its ruling" constituted a proper exercise of its gatekeeping function).

¶ 22 *Padillas v. Stork-Gamco, Inc.* provides an example of the process required for a court to properly perform its gatekeeping function. 186 F.3d 412 (3rd Cir. 1999). There, the plaintiff filed a report prepared by its proffered expert as part of its opposition to a summary judgment motion. *Id.* at 416. In its ruling, the court found the expert's testimony inadmissible under FRE 702 because it "provide[d] no basis for the conclusions and observations that he makes. . . . He does not set forth in his report the methodology by which he made his determinations in this case. He does not indicate that he conducted any tests or what the testing techniques were." *Id.* The *Padillas* court took issue, not with the court's ultimate conclusion to exclude the report, but with "the *process* by which the court arrived at its ruling." *Id.* at 417 (emphasis added). The court in particular noted the requirement of "adequate process at the evidentiary stage," necessitating that parties be given an adequate chance to defend the expert's admission. *Id.* Regardless of whether the plaintiff had requested an in limine hearing, the court had an independent responsibility to properly manage the case. *Id.* Importantly, the court's analysis did not establish that the expert did not have "'good grounds' for his opinions, but rather, that they [were] insufficiently explained and the reasons and foundations for them inadequately and perhaps confusingly explicated." *Id.* at 418. The court abandoned its role as gatekeeper by excluding the testimony rather than giving the testimony's proponent "an opportunity to

respond to the court's concerns." *Id.*

¶ 23 Second, courts must also not perform the gatekeeping function inadequately: after a proper inquiry into relevance and reliability, the court must make specific findings regarding its evaluation of the expert. *See Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1066 (9th Cir. 2002). Thus, summarily admitting or excluding testimony without assessing reliability is inadequate—*Daubert* and its progeny require "*some* kind of reliability determination" to be made on the record. *Daubert*, 509 U.S. at 597; *United States v. Velarde*, 214 F.3d 1204, 1209 (6th Cir. 2000); *see, e.g.*, *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014) ("Because the district court provided no explanation or analysis for rejecting these qualifications, the district court abused its discretion in summarily determining that Spiegel was not qualified as an expert."). The Ninth Circuit's decision in *Estate of Barabin* exemplifies the necessity of making findings pursuant to *Daubert* and FRE 702.

¶ 24 In *Estate of Barabin*, the Ninth Circuit evaluated whether the court abused its discretion in failing to make gateway determinations as to the relevance and reliability of two experts' methodologies. 740 F.3d at 467. The judge admitted the first expert without a *Daubert* hearing or factual findings, solely stating that "the plaintiffs did a much better job of presenting to me the full factual basis behind [the expert] testifying and his testimony in other cases." *Id*. at 464 (internal quotation marks omitted). As to the second expert, the court deemed the testimony admissible as long as "the jury was informed of the marked differences" between actual and test conditions. *Id.* (internal quotation marks omitted). The Ninth Circuit first noted that although the *Daubert* inquiry is flexible, it interpreted FRE 702 to "clearly contemplate[] *some* degree of regulation of the subjects and theories about which an expert may testify." *Id.* at 463–64 (citations and internal quotation marks omitted). Despite determining that as the reviewing court it had the authority to make *Daubert* findings, the *Barabin* court found it could not "speak to the admissibility of the expert testimony at issue here because the record . . . [was] too sparse to determine whether the expert testimony is relevant and reliable." *Id.* at 467. It could only say with certainty that the court abused its discretion, inadequately performing the gatekeeping role by failing to make determinations as to the relevancy and reliability of the expert's testimony. *Id.*

¶ 25 Although the record is scant, we find the court failed to adequately perform its gatekeeping role. Like in *Padillas*, the court abandoned its gatekeeping role when it failed to allow sufficient questioning and examination of Haymer as to his qualifications under 702(c) and (d), nor did it voice its own questions. And, as in *Barabin*, the court failed to make specific findings as to why it excluded Haymer pursuant to 702(c) and (d). The voir dire as to Haymer and Kehl reveals the procedural flaw.

¶ 26 The *Daubert* hearing for Kehl began with the Commonwealth eliciting her qualifications. After the Commonwealth's questions, Crisostomo waived questioning as to Kehl's qualifications, with the court specifically asking

"[y]ou're gonna forego your voir dire as to her credentials?". Tr 2. 295.[4] Immediately after, the Commonwealth offered Kehl as an expert in "DNA in general and serology mixtures," tr 2. 296, and the court qualified her. After a break, the court reconvened. Only then—after Kehl had already been admitted as an expert—was she questioned as to her methodology in general and its application to the facts of the case.

¶ 27 This same piecemeal *Daubert* procedure was used for Haymer. Prior to testifying, the court explained: "[w]e'll conduct a *Daubert* hearing and see if whether or not he has the training, education, and credentials to be certified to testify as an expert. . . . If the court deems . . . that he's an expert then he can testify to whatever extent reports he has read." Tr 2. 416. Following this procedure, the *Daubert* hearing as to Haymer similarly began with questioning only as to his qualifications. The court then requested arguments as to whether Haymer's qualifications satisfy Rule 702. Crisostomo limited his argument to Haymer's qualifications as an expert. The Commonwealth, on the other hand, argued both Haymer's qualifications and satisfaction of 702(c) and (d), claiming "we didn't hear anything about what he did when he looked at this evidence. There was no methods or principles that he testified about when he looked at [Kehl's] bench notes." Tr 2. 453. Crisostomo attempted to alert the court that Haymer had not been questioned about his methodology and its application, arguing Haymer was prepared to:

> Challeng[e] the—the manner in which [Kehl] came up with her conclusion that the potential major contributor of the DNA is [Crisostomo's] based on a mixture interpretation. Now what we have here is a table and an electropherogram. Based on the table, [Kehl] has testified that it—based on a computer program that separated the major and minor, she also did an additional electropherogram anlaysis [sic] of that DNA . . . . It's a matter of the interpretation of the DNA that is at issue in this case. The DNA, that if it goes towards prosecution's story, points to [Crisostomo], the DNA profile of the major contributor. Now, [Haymer] is prepared to testify that that is dubious. . . . [Haymer] . . . is going to say, well I looked at this, I have made an opinion, this is based on my expertise.

Tr 2. 456–57. Despite Crisostomo's offer of proof and the court's own acknowledgment that the parties had *only* made arguments as to Haymer's qualification as a forensic DNA examiner, the court not only ruled that Haymer was unqualified, but also that he did not satisfy 702(c) and (d). It stated it "did not hear from the doctor as to what reliable principles and methods, other than his, uh, general statement that DNA is DNA and that, uh, further as to whether or not he applied those principles and methods to the facts of this case." Tr 2.

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[4] Because we have been provided with two separately numbered transcripts, we refer to the certified transcript for April 16–17 and 21–23 as Tr 2.

459.

¶ 28 The court abandoned and improperly performed its gatekeeping function. It did not allow either counsel to question Haymer as to his methodology and its reliability, nor did it inquire as to these issues on its own accord, failing to establish a sufficiently developed record for our review. As a result, the court was also unable to make specific findings or explain its 702(c) and (d) rulings. Notably, the court found that it did not hear Haymer's purported reliable methodology, *not* that Haymer's methodology was unreliable. It unreasonably limited the evidence regarding the reliability and application of Haymer's methodology, and, as a result, prematurely rendered its conclusion on Haymer's admissibility. Because of this error, the court could not make specific findings on the record. The manner in which the court made its ruling was manifestly erroneous, based on an erroneous view of the law. We therefore conclude the court abused its discretion.

ii. Qualifications

¶ 29 Crisostomo argues the court abused its discretion when it deemed Haymer unqualified to testify as an expert based on a lack of educational or experiential background. Crisostomo asserts we should liberally construe Rule 702, especially when considering an expert's qualifications. He claims an expert's lack of specialization in a certain subject is a reflection on the expert's credibility, not the testimony's admissibility; a witness may be competent to testify as an expert despite not being the best qualified to do so. When considering admissibility, Crisostomo argues the court is to determine whether the proffered expert has a basic knowledge of the relevant scientific principles.

¶ 30 An expert witness is not required to be a specialist. *Kannankeril v. Terminix Int'l*, 128 F.3d 802, 809 (3rd Cir. 1997). In particular, "courts allow experts to testify to matters within their general expertise even when they lack qualifications as to specific matters within that field if their general expertise allows them to give relevant and reliable opinions." FED. R. EVID. 702 interpretive notes and decisions; *see e.g.*, *Gayton v. McCoy*, 593 F.3d 610, 617–18 (7th Cir. 2010) (finding general practitioner could testify about potential effects of certain medications on decedent's heart condition because the issue did not concern "specialized knowledge held only by cardiologists"); *Surles v. Greyhound Lines, Inc.*, 474 F.3d 288, 294 (6th Cir. 2007) ("While not specific to the bus industry, Martin's background and experience leaves him well-positioned to 'assist the trier of fact' to make sense of the prior incident reports from the perspective of a specialist in threat assessment."). Rather, a lack of specialization goes to the weight of the expert's testimony, not its admissibility. *United States v. Wen Chyu Liu*, 716 F.3d 159, 168 (5th Cir. 2013). In fact, courts have found that excluding a witness merely because they lack expertise that is more specialized and directly related to the pertinent issue is an abuse of discretion. *See Smith v. BMW N. Am., Inc.*, 308 F.3d 913, 919–20 (8th Cir. 2002); *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3rd Cir. 2008).

¶ 31 Further, the focus of the court's inquiry should be specific: whether the expert's qualifications fit the particular issues in the case. *See Kumho Tire*, 526

U.S. at 156. "It is well settled that bare qualifications alone cannot establish the admissibility of scientific expert testimony." *United States v. Hermanek*, 289 F.3d 1076, 1093 (9th Cir. 2002). Moreover, "[t]he issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994); *see Hall v. Flannery*, 840 F.3d 922, 929 (7th Cir. 2016) (instructing courts to look at "each of the conclusions [an expert] draws individually to see if he has the adequate education, skill, and training to reach them.") (citation and internal quotation marks omitted). Thus, "[w]hether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *Gayton*, 593 F.3d at 616 (citation and internal quotation marks omitted).

¶ 32 Haymer's qualifications as to interpret the results of the nuclear DNA testing performed by Kehl were thoroughly examined at the *Daubert* hearing. Notably, he testified that he was employed as a professor at the University of Hawaii's department of cell and molecular biology and consultant for forensic cases involving human DNA analysis. As to his education, Haymer explained he had a Ph.D. in biology and specialized in molecular genetics, with much of his research in the area of insect molecular biology. Haymer also demonstrated his experience in the field with his multiple publications in the area of DNA analysis and online certification in STR analysis in forensic DNA investigations, as well as his "working with DNA for more than . . . 25 years." Tr 2. 423. More specifically, Haymer had worked with mixtures of forensic DNA during his work as a consultant, including almost eight years as a DNA consultant for the Innocence Project.

¶ 33 Prior to the hearing, the court was aware that Haymer would interpret the results of the nuclear DNA testing done by Kehl on the DNA sample obtained from Romero. Specifically, Haymer was called to provide his own interpretation of the electropherogram which Kehl had analyzed as containing a mixed sample of up to two DNA profiles other than Romero's, of which she claimed Crisostomo was the major DNA contributor. Although the court had received a variety of information about Haymer's qualifications, it had not heard anything about Haymer's methodology or how he would apply it to interpreting Kehl's electropherogram. Nonetheless, the court denied Haymer's testimony, explaining:

> I heard . . . Haymer, he has, uh, some experience, has a lot of, uh, educational background in the field of, uh, general DNA. He teaches classes at the university and, uh, participates in some fashion with, uh, the Innocence Project. But those experience [sic] and, uh, training that he has received or generally are tailored to, uh, DNA regarding insects or, uh – uh, things of that fashion. And, um, the experience he has is dealing with those insects and along those lines. Uh, but education or training he's received in regards to, uh,

> forensic DNA examination has come from his, uh, reading, uh, self education by reading some, uh, publications, things of that nature. I did not hear from the doctor as to what reliable principles and methods, other than his, uh, general statement that DNA is DNA and that, uh, further as to whether or not he applied those principles and methods to the facts of this case. Granted that the doctor is well-versed in the general sense as to DNA, whether or not he's versed in the sense of forensic DNA examination, the court is not convinced. . . . [Y]ou could be a mechanic for a sports car . . . but that does not necessarily translate to you being a mechanic for an airplane, right? They have . . . a general idea about how engines work but they're not necessarily, um, the kind of specialized training or specialized, um, experience, um, as . . . a [sic] air—airplane mechanic or automobile—automobile mechanic. That being said and the court, uh, declines at this time to certify, uh, Haymer as an expert in forensic DNA examination.

Tr 2. 459.

¶ 34 The court erred in its ruling as to the admissibility of Haymer's testimony on two bases. First, the court construed the qualifications needed to testify as an expert under *Daubert* and Rule 702 far too narrowly, as Haymer's qualifications had the potential to assist the trier of fact.[5] It analyzed Haymer's research in insect molecular biology as a lack of specialization in forensic DNA analysis, failing to consider Haymer's other work as well as the principle that a lack of specialization alone is an insufficient basis for exclusion. Rather, the record shows Haymer's qualifications rendered him able to provide at least a general opinion as to the interpretation of forensic DNA mixtures. Upholding such a ruling—even on an abuse of discretion standard—would establish too narrow of a range for acceptable expert testimony for our jurisdiction. Second, the court failed to consider whether Haymer's qualifications 'fit' the facts of the case. Prior to the *Daubert* hearing, the court had not received any information about Haymer's methodology or how he would apply it to interpreting the DNA evidence. And, as discussed in the preceding section, the court failed to elicit such information through its own questioning. Review of Haymer's credentials, without discussion as to what methodology, analysis, or specific conclusions the credentials were needed for, was an erroneous application of the law. Thus, the court's unreasonably narrow view of acceptable expertise and failure to determine the fit of the expertise to the proffered testimony contained both a clearly erroneous assessment of the evidence and an erroneous assessment of the law. We find the ruling manifestly erroneous and thus, an abuse of discretion.

iii. Harmless Error

¶ 35 Because we find the court abused its discretion in performing its

[5] Because Haymer was not able to present testimony explaining his methodology and its application to Crisostomo's case, we are left with some level of conjecture in our determination.

gatekeeping function and deeming Haymer unqualified, we consider whether the exclusion of Haymer was harmless. As we stated in *Commonwealth v. Lucas*, "[h]armless error is a concept developed by appellate courts to embody and implement the truism that no litigant is assured of a perfect trial, but only a fair one." 2003 MP 9 ¶ 13 n. 10 (citation and internal quotation marks removed). When reviewing errors as to the admissibility of expert testimony, an error is harmless if "it is more probable than not that the error did not materially affect the verdict." *Cohen*, 510 F.3d at 1127 (9th Cir. 2007) (citation and internal quotation marks omitted); *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (reversing "unless there is a fair assurance of harmlessness or, stated otherwise, unless it is more probable than not that the error did not materially affect the verdict") (citation and internal quotation marks omitted).

¶ 36 Although the court erred in determining the admissibility of Haymer's testimony, a close review leads us to conclude the exclusion was harmless. First, Haymer was a rebuttal witness. Crisostomo did not seek to introduce Haymer to testify about any new evidence, rather, his testimony was sought to point out potential flaws in Kehl's interpretation of the DNA mixture.[6] Crisostomo's cross-

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[6] Haymer's offer of proof was provided at trial:

> [W]e submit that [Haymer] will dispute that, uh, when a major and a minor profile are distinct, as in this case, that you may—it's impermissible to, uh, come up with a profile that matches [Crisostomo] as to the major profile because she clearly has a mixture of a separation of major and minor where she takes the alleles from the ma—the minor profile, for matching purposes to make the major profile reflect the profile of Doc—uh, of [Crisostomo]. . . . That interpretation calls into question the conclusion that [Crisostomo] is the so-called potential major contributor of this mixture.

Tr 2. 413–14. A similar purpose for Haymer's assistance was described in Crisostomo's motion for additional funds to continue retaining Haymer:

> As defense counsel is not a scientist, the DNA expert is needed to provide testimony to challenge the FBI analyst's evaluation of the DNA STR typing results for the mixed sample, particularly the interpretations of signal intensities (e.g., peak heights) among the different contributors' alleles. It is possible that the FBI analyst failed to provide an accurate interpretation of the mixed sample's allelic peaks.

Appellant's App. 0846. And once again, a similar rational was provided in counsel's declaration supporting her motion for additional funds, filed under seal:

> First, for the Q1 specimen (the key evidence), the two runs done on this (Q1-1an and Q1-1af) do not show the same results. Second, only a few loci provide evidence of multiple contributors (FGA, D21811). Most of the others do not. Third, and potentially most important, for Q1, the only way to get a match to the Defendant's DNA profile is to use a mix of alleles found in the "major" and "minor" rows of the results table. However, [Kehl's] report states that "The STR typing results for the

examination of Kehl sufficed to highlight the points to which Crisostomo alleged Haymer would testify.[7] In particular, various cross-examination questions tested Kehl's interpretation of the initial chart provided, including her technique of subtracting the alleles that matched Romero's DNA sample from the mixture.[8] Thus, given Kehl's extensive cross-examination, Haymer's additional testimony was unlikely to provide new information. And, to the extent his testimony would have clarified and detailed the points brought up on Kehl's cross-examination, it would still have been weighed by the jury against the multitude of other evidence presented at trial. Not only would this include prejudicial evidence such as comparison of the footprints left at La Fiesta and identification of Crisostomo's voice on the 911 call, but it would also inevitably include Kehl's opinion that "[Crisostomo] is potentially the major contributor of the DNA," tr 2. 316, and that such a match would only occur for "1 in every 960 million from the Chamorro population . . . if every single person on the island of Saipan was Chamorro, you would have to look at over 22,000 islands of Saipan . . . before you would expect to see someone with the same DNA profile." *Id.* 316–17.

> minor contributor to specimen Q1 are not suitable for matching purposes; however, they may be used for exclusionary purposes." Yet, despite this statement, [Kehl] has done exactly that—used the STR typing results from the "minor" contributor to get a match.

Appellant's App. 0850–51.

[7] Haymer was initially retained only to assist in preparing for Kehl's cross-examination.

[8] Kehl was forced to explain her treatment of the chart illustrating the DNA mixtures when she was asked:

> The major profile which is designated in your table by a computer program looking at Q1-1AM, right next to [Crisostomo's] profile of Q88, are different at six specific points. One. Two. Three. Four. Five. And six. Six times you take a—an allele from the minor contributor and put it with [Crisostomo] or put it with the major contributor to come up with a match. By itself, the major contributor's profile according to this table does not match Q88.

Tr 2. 357. She was again questioned as to the protocol of subtracting out the victim's DNA from an intimate sample:

> Q: [Kehl], in your report you stated that the ma—the minor profile, the STR typing results for the minor contributor to specimen Q1 are not suitable for matching purposes, however they may be utilized for exclusionary purposes, you utilized the minor profile here for matching purposes.
>
> A: No, ma'am, I did not.
>
> Q: Okay. This is your chance to explain then.

Tr 2. 367.

¶ 37 Thus, although the exclusion of Haymer rendered Crisostomo's trial imperfect, it was nonetheless fair. We find a fair assurance of harmlessness that the error did not materially affect the verdict: had Haymer been able to testify, it is more probable than not that the same verdict would have been returned. We therefore deem the error harmless. We next consider whether admission of the Commonwealth's expert in barefoot morphology violated *Daubert* and Rule 702.

B. Barefoot Morphology Expert Testimony

¶ 38 Crisostomo contests the admission of Bodziak as an expert in barefoot morphology under *Daubert* and Rule 702.[9] He argues the court "did not establish a finding," Opening Br. 25, appearing to challenge the manner in which the court conducted the *Daubert* hearing, as opposed to the result. Crisostomo specifically challenges the court's failure to make findings as to the reliability of Bodziak's methodology, claiming the error was problematic because barefoot morphology has been deemed unreliable by other courts.[10]

¶ 39 Although Crisostomo failed to assert a contemporaneous objection to the admission of Bodziak's testimony, his claim is preserved by his motion in limine, rendering our review for abuse of discretion. *See Commonwealth v. Ramangmau*, 4 NMI 227, 236 (1995) (reviewing denial of motion in limine to exclude evidence for abuse of discretion); *Lawrey v. Good Samaritan Hosp.*, 751 F.3d 947, 952 (8th Cir. 2014) ("Because . . . the [expert] testimony . . . was the subject of a definitive motion in limine, [plaintiff's] counsel was not required to make an offer of proof at trial to preserve a claim of error on appeal. Thus, the proper standard . . . is abuse of discretion, not plain error."). We thus review whether the court's ruling is manifestly erroneous, *Joiner*, 522 U.S. at 142, or, said differently, based on an erroneous view of the law or a clearly erroneous assessment of the evidence. *Cohen*, 510 F.3d at 1123; *Taitano*, 2017 MP 19 ¶ 37.

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[9] Within his Rule 702 argument, Crisostomo also argues the admission of Bodziak's testimony violated NMI Rule of Evidence 403. Because he provides no legal authority and raises the issue in a conclusory manner, we deem the issue waived. *Calvo*, 2014 MP 10 ¶ 8.

Counsel also risks violating her duty of candor to the court, claiming Bodziak's being an expert in foot wear and tire print morphology, in additional to his work in barefoot morphology, "was not even touched upon in his testimony." Opening Br. 25. Instead, Bodziak immediately presented himself as a "forensic consultant in the areas of footwear, foot, and tire tread impression evidence," tr. 451, had made "hundreds of thousands of comparisons" of the different types of impression evidence in his career, tr. 453, and repeatedly discussed the close similarity in procedure between comparisons of the three types of evidence.

[10] The Commonwealth reads Crisostomo's argument similarly, stating his "argument on appeal is incomplete because he challenges the trial court's failure to issue findings, but he does not challenge the result. If the result was correct, a lack of findings is necessarily harmless." Opening Br. 39. It further argues that findings as to reliability are assumed sub silentio, the court made the necessary findings, and that regardless of a lack of findings, barefoot morphology has repeatedly been deemed reliable by courts.

i. Reliability

¶ 40 As previously detailed, courts have broad discretion in fulfilling their gatekeeping function under *Daubert*, but they must not abandon this function or perform it inadequately. *Kumho Tire*, 526 U.S. at 159 (Scalia, J., concurring); *see Joiner*, 522 U.S. at 148 (Breyer, J., concurring) ("[N]either the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the gatekeeper duties . . . determining, for example, whether particular expert testimony is reliable . . . ."). In particular, this requires courts to (1) allow parties to present evidence and question the purported expert as to reliability and relevance, and (2) subsequently make specific determinations as to whether the purported expert met the requisite standard. *Heer*, 589 Fed. Appx. at 856; *Mukhtar*, 299 F.3d at 1066. As to the second guideline, conclusory findings are not sufficient. *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1069 (9th Cir. 2017) ("[A] district court abuses its discretion when it fails to provide any analysis or explanation for its decision regarding expert testimony under *Daubert*.") (citation and internal quotation marks omitted); *see, e.g.*, *Pyramid Techs., Inc.*, 752 F.3d at 814 (holding court abused its discretion when it found expert's opinion was not the product of reliable principles and methods "in two conclusory sentences and without analysis or explanation").

¶ 41 In *Nease v. Ford Motor Co.*, the Fourth Circuit determined whether the judge abdicated his gatekeeping duties in assessing the plaintiff's expert's reliability. 848 F.3d 219, 230 (4th Cir. 2017). There, the defendant filed a motion in limine to exclude the expert's testimony due to a lack of reliability. *Id.* In finding the expert reliable, the district court solely stated that counsel's arguments go to weight, not admissibility, and that "the methodology [the expert] employed is consistent and trustworthy and what historically is used in failure to decelerate cases." *Id.* at 231. The *Nease* court found the district court had not performed its gatekeeping duty: "[t]he court did not use *Daubert's* guideposts or any other factors to assess the reliability of [the expert's] testimony, and the court did not make any reliability findings." *Id.* at 230. Specifically, the court instructed that "[t]he fact that an expert witness was subject to a thorough and extensive examination does not ensure the reliability of the expert's testimony; such testimony must still be assessed before it is presented to the jury." *Id.* at 231 (citation omitted and internal quotation marks omitted).

¶ 42 We find *Nease* instructive. Prior to trial, Crisostomo filed a motion in limine requesting the court exclude Bodziak from testifying and hold a *Daubert* hearing due to the questionable reliability of his methodology. In this motion, Crisostomo explained the science behind barefoot morphology and discussed two cases where courts had found barefoot impression evidence scientifically unreliable. Despite Crisostomo's contentions regarding the methodology's reliability, the court only made one comment ostensibly referencing Bodziak's methodology: "[h]e seems very straightforward to me. He explained it, there's the four quadrants, people have different characteristics, and they have class types of both, you know, balls of the feet and all other stuff and there's individual markers such as warts or scars or broken bones or whatever it is." Tr. 489–90.

The court emphasized it had no "cause for concern." Tr. 490. Further, the court's actual *Daubert* ruling contained no discussion of reliability:

> After hearing [Bodziak's] testimony in this *Daubert* hearing, as to his education and experience, training and other certification, his extensive years, years of service in the FBI and even after he is continued to be published and then various organizations certified in many sister state courts as the court finds that [Bodziak] is an expert to testify as to impressions in particular barefoot impression but the court would go once [sic] step further as to certifying him also as to the impression as to shoes as well as tires or heard enough testimony, to certify those three different areas.

Tr. 498–99. Despite both counsels having questioned Bodziak as to the methodology's error rates, acceptance in the community, testability, and other considerations, the court's ruling was limited to Bodziak's expertise. The thorough questioning does not excuse the court's lack of assessment. We must conclude that in failing to assess the reliability of Bodziak's methodology, the court inadequately performed its duty as gatekeeper under *Daubert* and Rule 702. The court's ruling was based on an erroneous view of the law and, thus, an abuse of discretion.

ii. Harmless Error

¶ 43 We now consider whether the court's failure to assess the reliability of Bodziak's methodology was harmless error. We use the standard for harmless error as to admissibility of expert testimony adopted from the Ninth Circuit: an error is harmless if "it is more probable than not that the error did not materially affect the verdict." *Cohen*, 510 F.3d at 1127 (9th Cir. 2007) (citation and internal quotation marks omitted); *Morales*, 108 F.3d at 1040 (reversing "unless there is a fair assurance of harmlessness or, stated otherwise, unless it is more probable than not that the error did not materially affect the verdict") (citation and internal quotation marks omitted).

¶ 44 We review whether the failure to properly conduct the analysis as to reliability under *Daubert* was harmless. In such a review, we examine "what the jury would have been permitted to hear had the [lower] court properly discharged its gatekeeping duties." *Estate of Barabin*, 740 F.3d at 469 (Nguyen, J., dissenting); *see StorageCraft Tech. Corp. v. Kirby*, 744 F.3d 1183, 1191 (10th Cir. 2014) ("If, for example, it is readily apparent from the record that the expert testimony was admissible, it would be pointless to require a new trial at which the very same evidence can and will be presented again."). Because we are provided with a thorough record of the expert's testimony, we may assess whether there is a fair assurance that the court would have deemed the methodology reliable had a proper determination been made. *See United States v. Mendoza*, 244 F.3d 1037, 1046 (9th Cir. 2001) ("Although the district court did not require [the expert] to be formally qualified as an expert witness, we can discern from the record that the witness could have been qualified as an expert under [FRE 702]."); *see, e.g., United States v. Maher*, 645 F.2d 780, 784 (9th Cir. 1981) ("Since the testimony was admissible expert opinion, any alleged error

committed by the trial judge in admitting the evidence . . . was harmless.").

¶ 45 Here, the record, permeated with extensive questioning of Bodziak, allows us to determine whether the court's error was harmless. Bodziak's *Daubert* hearing and subsequent testimony spans over 100 pages of the record, containing a multitude of questions as to the reliability of barefoot morphology from both counsels and the court itself. In particular, in the *Daubert* hearing, Bodziak thoroughly explained the methodology's notable studies, error rates, acceptance in the community, testability, standard protocols, and other considerations. He was forthcoming as to the relative rarity of barefoot morphology's use, the reproducibility of his examination, the specificity with which he could analyze his results, and other measures of reliability. Pursuant to this examination, the court indicated that "he seems very straightforward to me" and that it had no "cause for concern." Tr. 489–90. We can discern from the record that reliability was sufficiently proven and that the jury would have heard the same testimony had the court properly discharged its gatekeeping duties. We find it evident—and certainly more probable than not—that the court would have nonetheless admitted Bodziak as an expert after a proper reliability determination. As such, we deem the failure to make findings as to the reliability of barefoot morphology harmless.

C. Change of Venue

¶ 46 Crisostomo argues the court's denial of his motion to either transfer the trial's venue or hold the trial on Saipan with jurors from Rota and/or Tinian violated his right to a fair trial. He claims the circumstances of his trial established both presumed and actual prejudice, and that the court violated his rights in failing to take steps to cure the unfairness.

¶ 47 We review a court's ruling on a motion regarding venue for abuse of discretion. *Guerrero v. Tinian Dynasty Hotel & Casino*, 2006 MP 26 ¶ 10; *United States v. Stinson*, 647 F.3d 1196, 1204 (9th Cir. 2011) ("a [lower] court's ruling on a motion for change of venue is reviewed for abuse of discretion"). "A trial court abuses its discretion when [its] decision is based on an erroneous conclusion of law or . . . the record contains no evidence on which the judge could have rationally based the decision." *Commonwealth v. Borja*, 2015 MP 8 ¶ 21 (citation and internal quotation marks omitted).

¶ 48 "Under section 501 of the Covenant and Article I, [S]ection 5 of our constitution, CNMI residents are afforded the same Fourteenth Amendment Due Process protections as mainland U.S. citizens." *Commonwealth v. Hossain*, 2010 MP 21 ¶ 13; *see* NMI CONST. art. I, § 5 ("[n]o person shall be deprived of life, liberty or property without due process of law"). Accordingly, "we interpret the Commonwealth Constitution's Due Process Clause as in line with the United States Constitution's Due Process Clause." *Pac. Fin. Corp. v. Muna*, 2008 MP 21 ¶ 5 n.1. Our precedent, along with Commonwealth rules and statutes, must thus comport with due process guarantees, including that of the Sixth Amendment's guarantee of a fair jury trial. *Guerrero*, 2006 MP 26 ¶ 16 (noting that "[o]ne touchstone of a fair trial

is an impartial trier of fact") (quoting *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984)).

¶ 49 In criminal trials, "[a] defendant or the Commonwealth may petition the court for a change of location of trial for good cause." 6 CMC § 108(c).[11] We have previously stated that "[i]f fairness considerations are implicated . . . the court should, in its discretion, consider whether there is good cause to change venue upon a motion by either party." *Guerrero*, 2006 MP 26 ¶ 13. We have also discussed the test applicable in making such a determination:

> To show that the constitutional right to a fair trial was violated, [the appellant] must show either actual or presumed prejudice. Prejudice may be presumed if the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity. Actual prejudice must be demonstrated by showing that jurors exhibited actual partiality or hostility that could not be laid aside.

Id. ¶ 14 (citations and internal quotation marks omitted). Given that over a decade has elapsed since our decision in *Guerrero*, we review our standard for when a change of venue is needed to facilitate a fair trial in light of the United States Supreme Court's recent decision in *Skilling v. United States*, 561 U.S. 358 (2010). We evaluate whether the court abused its discretion in determining presumed prejudice and actual prejudice.

1. Presumed Prejudice

¶ 50 Crisostomo cites the factors emphasized in *Skilling*, arguing he has properly shown a presumption of prejudice. First, he points to Saipan's small size, resulting in witnesses' familiarity with the case. He also points to a potentially prejudicial news article linking him to a 2006 murder, claiming the court was mistaken in deeming it essentially irrelevant as public information. Third, he emphasizes that even though over two years passed between the crime and the trial, numerous newspaper, media, and press releases kept the incident fresh in the minds of the public. Fourth, Crisostomo indicates his conviction of every count further evinces juror bias. Finally, he claims the court failed to cure the high potential for prejudice, as it denied his motions to use a jury questionnaire and hire an expert to poll the jury.[12]

¶ 51 A jury is presumed to be impartial until the challenger raises a presumption

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[11] NMI Rule of Criminal Procedure 18 ("Rule 18") also governs venue, stating that "[e]xcept as otherwise permitted by statute or by these rules, the court shall fix the place of trial with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice."

[12] The Commonwealth argues that given our ruling in *Guerrero*, "citations to other jurisdictions which appear not to impose a saturation requirement are not persuasive," Resp. Br. 28, and that prejudice may be presumed only when "the record demonstrates that the community where the trial was held was saturated with prejudicial and

of partiality. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Importantly, "[p]rominence does not necessarily produce prejudice, and juror *impartiality* . . . does not require *ignorance*." *Skilling*, 561 U.S. at 381. A defendant is not presumptively deprived of due process simply due to "juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged . . . ." *Murphy v. Florida*, 421 U.S. 794, 799 (1975).

¶ 52 In *Skilling*, the United States Supreme Court discussed the proper standard in determining a presumption of prejudice in the jury pool such that would entitle the challenger to a change of venue. 561 U.S. at 358. There, a longtime Enron executive on trial for crimes contributing to the corporation's collapse requested a change of venue, claiming pretrial publicity and community prejudice prevented him from obtaining a fair trial. *Id.* The *Skilling* Court emphasized four factors in determining whether such a transfer was warranted. *Id.* 382–84. First, the size and characteristics of the area where the crime occurred: a more populous jury pool necessarily increased the potential of empanelling an unbiased jury. *Id.* at 382. Second, whether the news stories discussing the case contained the defendant's confession or other "evidence of the smoking gun variety [that] invited prejudgment of [a defendant's] culpability." *Id.* at 383. Third, the amount of time and publicity between the crime and trial. *Id.* And fourth, whether the jury acquitted the defendant of any counts such that would undermine the supposition of bias. *Id.*

¶ 53 Importantly, the Court also noted that the "magnitude and negative tone of media attention directed at Enron," the company's "sheer number of victims," and the co-defendant's "well-publicized decision to plead guilty" did not create a presumption of juror prejudice. *Id.* at 384–85 (citation and internal quotation marks omitted). However, where circumstances create a potential of prejudicing the jury pool, courts should take steps to mitigate such a risk. *See id.* In *Skilling*, the trial court properly reduced such a risk by delaying jury selection by two weeks, asking about jurors' exposure to recent publicity during voir dire, examining each prospective juror individually, proposing questions in a manner encouraging candor, and eliciting responses to a jury questionnaire drafted by the defendant. *Id.*

¶ 54 Here, the court properly cited the law and considered the relevant facts in denying Crisostomo's motion to change venue. First, the court properly

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inflammatory media publicity." *Id.* at 27. We are not persuaded. First, *Guerrero* interpreted fairness standards under the Seventh Amendment, while Crisostomo's challenge is pursuant to the Sixth Amendment. Second, although we may provide greater due process protections than the United States Constitution, we may not provide less. *See Simmons v. South Carolina*, 512 U.S. 154, 174 (1994) ("While States are, of course, free to provide more protection for the accused than the Constitution requires, they may not provide less.") (citation omitted). We thus read *Guerrero's* saturation requirement in conjunction with the standard in *Skilling*.

discussed the applicable United States Supreme Court precedent, noting in particular that although an impartial jury must be free from outside influences, it does not need to be "totally ignorant of the facts and issues involved in the case." Appellant's App. 0233 (quoting *Dowd*, 366 U.S. 717, 722 (1961)). The court then discussed the three cases where the Supreme Court has found presumed prejudice and used the *Skilling* factors to evaluate why the present case was distinguishable. Notably, the court considered the community's size, the extent of any potentially prejudicial news articles, and the length of time between the trial and crime.[13] Although the court found no presumption of prejudice, the court properly followed *Skilling's* instruction to take steps to reduce the risk of potential juror prejudice. It allowed Crisostomo to renew his motion at a later time, and subsequently ordered: the Office of the Attorney General ("OAG") to follow Model Rule of Professional Conduct 3.6, a larger jury pool, extra time for voir dire, bench conference screening, and two additional peremptory challenges per side. The court's order exemplifies a thorough and thoughtful analysis, far from an erroneous conclusion of law or lack of factual support in the record. We find no abuse of discretion in the court's denial of Crisostomo's motions.

2. Actual Prejudice

¶ 55 Crisostomo correctly cites the showing required to establish actual prejudice, but fails to present any facts to establish such prejudice. Indeed, the only part of his argument that could be seen as establishing actual prejudice is that "[f]or over fifty pages of transcript, jurors went on and on about knowing the defendant, knowing the victim, knowing witnesses, reading about it in newspaper articles [and] watching it on the news . . . ." Opening Br. 19.

¶ 56 As we noted in *Guerrero*, actual prejudice is shown by demonstrating that jurors "exhibited actual partiality or hostility that could not be laid aside." 2006 MP 26 ¶ 14. Such a claim focuses on voir dire, dictating a showing such that would "require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected." *Dobbert v. Florida*, 432 U.S. 282, 303 (1977). The United States Supreme Court has repeatedly emphasized—and we have followed—the principle that "[t]rial courts have broad discretion over the conduct of voir dire." *Commonwealth v. Hocog*, 2015 MP 19 ¶ 16; *see Skilling*, 561 U.S. at 386 ("No hard-and-fast formula dictates the necessary depth or breadth of voir dire."); *United States v. Wood*, 299 U.S. 123, 146 (1936) ("Impartiality is not a technical conception . . . . the

[13] The fourth factor mentioned in *Skilling*, whether the jury acquitted the defendant of any charges, is determined on appellate review. Although the Court mentioned that a "jury's ability to discern a failure of proof of guilt of some of the alleged crimes indicates a fair minded consideration of the issues," *Skilling*, 561 U.S. at 384, it did not find that the reverse would necessarily contribute to a presumption of juror bias. *Id.* at 383. Here, the jury convicted Crisostomo of every count. However, review of the verdict form shows that although the jury found Crisostomo guilty of robbery, it found that he did not use a dangerous weapon in its commission. Thus, our consideration of this factor does not change the court's determination.

Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.") (citation and internal quotation marks omitted). Moreover, "extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair." *Dobbert*, 432 U.S. at 303.

¶ 57 Crisostomo's vague claim is insufficient. He points to no specific comments or questions by the court, attorneys, or jurors themselves such that would exhibit actual prejudice. And our independent review of the record renders the same result. Discussion of certain jurors' knowledge of the case in the news is insufficient; the Constitution requires the trier of fact to be impartial, not ignorant. We thus defer to the province of the trial judge and find no abuse of discretion.

D. Jury Instructions

¶ 58 Crisostomo asserts the court erred by instructing the jury on the substantive offenses at issue before evidence was presented, as well as by failing to repeat the previously presented jury instructions at the close of the case. He claims NMI Rule of Criminal Procedure 30 ("Rule 30") dictates that the court must re-instruct the jury prior to or immediately after closing arguments.[14] Conceding the standard of review is plain error, Crisostomo argues it was error not to reinstruct the jury on the substantive offenses presented earlier, and that this error was plain. Finally, Crisostomo claims the error affected his substantial rights because the verdict would have been different had substantive instructions been read at the close of the evidence.

¶ 59 Absent an objection, we review the court's failure to reread jury instructions at the case's close for plain error. *Commonwealth v. Reyes*, 2016 MP 3 ¶ 9. Under plain error review, "we examine whether: (1) there was error; (2) the error was plain or obvious; [and] (3) the error affected the appellant's substantial rights." *Id.* ¶ 11 (citation and internal quotation marks omitted). The court errs "when is [sic] deviates from a legal rule that has not been intentionally relinquished or abandoned by the appellant," and such an error "is plain if it is not subject to reasonable dispute at the time of review." *Id.* ¶ 12 (citation and internal quotation marks omitted). The plain error affects the appellant's substantial rights "if there is a reasonable probability it affected the outcome of the proceeding." *Hocog*, 2015 MP 19 ¶ 27 (citation and internal quotation marks omitted). If all three prongs are met, we may exercise our discretion to remedy

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[14] In relevant part, Rule 30 instructs:

> The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection.

NMI R. CRIM. P. 30. If an objection is not made pursuant to Rule 30, plain error review applies. NMI R. CRIM. P. 52(b).

the plain error "only if [it] seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* ¶ 24 (citation and internal quotation marks omitted).

¶ 60 The Commonwealth concedes that not rereading all instructions to the jury was plain error, and we agree. *See Commonwealth v. Monkeya*, 2017 MP 7 ¶ 18 (Slip Op., Sept. 5, 2017) (concluding that "[b]ecause the trial court failed to reiterate substantive jury instructions at the close of trial, the first two prongs of [the plain error] standard are satisfied"). Thus, we are left to examine whether the plain error affected Crisostomo's substantial rights.

¶ 61 The appellant bears the burden of demonstrating the plain error affected their substantial rights, that is, that there is "a reasonable probability the trial court's failure to read jury instructions at the close of evidence affected the outcome." *Id.* ¶ 19 (citation and internal quotation marks omitted). Specifically, "[a]n appellant must show why the jury would be more inclined to find him not guilty if the instructions had been read after the close of evidence." *Id.* (citation and internal quotation marks omitted). Our precedent indicates appellant's contentions as to jury instructions must be specific and supported by evidence. *See, e.g.*, *id.* ¶ 20 (finding arguments that "evidence was underwhelming, the jury expected more instructions to be forthcoming, and the exact contents of the written instructions provided to the jury [were] unknown" speculative and unsatisfactory); *Reyes*, 2016 MP 3 ¶ 15 (concluding potential juror confusion due to dismissal of multiple charges was speculative as "instructions for the dismissed charges were removed from the jurors' packets and the jury was twice instructed to disregard those charges"); *Hocog*, 2015 MP 19 ¶ 28 (finding failure to repeat instructions as leading to jury confusion did not demonstrate the "jury would be more inclined to find him not guilty if the instructions had been read after the close of evidence"). With our precedent in mind, we review Crisostomo's arguments as to why there is a reasonable probability the court's error affected the outcome.

¶ 62 Crisostomo fails to demonstrate a reasonable probability that the outcome of the trial would have been affected had the court reread its earlier instructions. He attempts to distinguish his claim from that in *Hocog* on the grounds that his trial was very long and certain instructions were added and changed at its end. However, the court specifically instructed the jury to read any new instructions in conjunction with the instructions given at the start of the trial. Additionally, the court provided jurors with copies of the jury instructions, which included all instructions. Crisostomo's conclusory and speculative argument does not convince us that he has carried his burden of demonstrating there is a reasonable probability the court's failure to read certain jury instructions at the close of evidence affected the outcome. He fails to demonstrate the plain error affected his substantial rights. As he fails to satisfy the third prong of our review, reversal is not warranted.

E. Use of Prior Record

¶ 63 Crisostomo argues the court erred in failing to sua sponte declare a mistrial

after multiple witnesses mentioned Crisostomo's prior criminal record in their testimony. He specifically contends that because the court granted his motion to exclude evidence of his potential involvement in a 2006 murder and "made it clear in its order that under NMI Rule of Evidence 404(b), none of [his] prior bad acts are to come in," Opening Br. 23, it erred in admitting evidence of his jail time and prior violent behavior.

¶ 64 The Commonwealth correctly points out that the court did not exclude all of Crisostomo's prior bad acts. Indeed, its in limine order was solely limited to excluding evidence that Crisostomo was a suspect in a 2006 murder. *See* Appellant's App. 0296 ("The Commonwealth intends to introduce evidence that on or around November 23, 2006 [Crisostomo] kidnapped, murdered and robbed another woman, Bao Ying Chen."). Additionally, although Crisostomo claims multiple witnesses testified regarding his prior bad acts, his brief on appeal only references Castro's testimony. The Commonwealth's discussion similarly only references Castro's testimony; we thus review whether the court erred in failing to declare a mistrial due to Castro's references to Crisostomo's prior violent behavior and time in jail.

¶ 65 Because Crisostomo failed to object and specifically request a mistrial, we review the court's failure to declare a mistrial sua sponte for plain error. *See Togawa*, 2016 MP 13 ¶ 20 (explaining that party must object and objection must be specific and accurate to preserve review); *Abakar*, 573 Fed. Appx. at 614 ("When defense counsel fails to move for a mistrial, this court reviews the district court's decision not to sua sponte order a mistrial for plain error."). Under plain error review, we first examine whether there was error; "[t]he trial court errs when i[t] deviates from a legal rule that has not been intentionally relinquished or abandoned by the appellant." *Reyes*, 2016 MP 3 ¶ 11–12 (citation and internal quotation marks omitted). "[A] trial court may grant a new trial to a defendant 'if required in the interest of justice.'" *Commonwealth v. Calvo*, 2014 MP 7 ¶ 36 (quoting NMI R. CRIM. P. 33); *see United States v. Adkins*, 743 F.3d 176, 186 (7th Cir. 2014) (emphasizing that "district courts are in the best position to evaluate the effect that an error may have on . . . proceedings, as well as whether a limiting instruction can cure any potential prejudice. . . . judges have broad discretion in deciding to give a cautionary instruction rather than to declare a mistrial.") (citation and internal quotation marks omitted). We first review Castro's mention of Crisostomo's past violent behavior, then discuss her three references to Crisostomo's being in jail.

1. Identification Testimony

¶ 66 At trial, the Commonwealth questioned Castro regarding the 911 call. In particular, the Commonwealth asked what was special about the perpetrator's relaxed voice, to which Castro responded: "from my experience with him, he…if he's beating me up, he's so relaxed. He doesn't care that he's hurting me, just like that lady." Tr. 1090.

¶ 67 NMI Rule of Evidence 404(b) ("Rule 404(b)") provides that although evidence of a prior bad act may not be admitted to show that on a particular

occasion the defendant acted in accordance with his or her character, it may be permissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." NMI R. EVID. 404(b)(1)–(2). Admissibility of a prior bad act is determined as follows:

> First, the evidence of other crimes must tend to prove a material issue in the case. Second, the other crime must be similar to the offense charged. Third, proof of the other crime must be based on sufficient evidence. Fourth, commission of the other crime must not be too remote in time.

Commonwealth v. Blas, 2018 MP 2 ¶ 23 (Slip Op., April 30, 2018) (citing *United States v. Montogomery*, 150 F.3d 983, 1000 (9th Cir. 1982)). Under this test, evidence of Crisostomo's prior violent behavior likely would have been admissible.

¶ 68 The court did not err in failing to take issue with Castro's response. Evidence of Crisostomo's demeanor when abusing Castro was not admitted to show propensity. Rather, it was used to prove Crisostomo's identity as the perpetrator, demonstrating that being quiet, calm, and relaxed while engaging in violence were unique to him. Furthermore, the prior act also satisfies the four-factor admissibility test. First, Castro's testimony was meant to show that the voice in the 911 call was Crisostomo's; his identity as the perpetrator was central to the case. Second, physical abuse is similar to the crimes he was charged with. Murder, sexual assault, and assault and battery all relate to violent conduct. Third, because Castro was the victim of Crisostomo's prior abuse, her testimony provides sufficient evidence for the jury to be able to "reasonably conclude that the act occurred and that the defendant was the actor." *Blas*, 2018 MP 2 ¶ 25 (citation and internal quotation marks omitted). Fourth, although Castro's relationship with Crisostomo ended in December 2006, approximately six years before the present offense, courts have found ten and even thirteen years not to be too remote in time to admit a prior bad act. *See, e.g.*, *United States v. Estrada*, 453 F.3d 1208, 1213 (9th Cir. 2006) (ten years); *United States v. Ross*, 886 F.2d 264, 267 (9th Cir. 1989) (thirteen years). Given the testimony's permissible purpose and satisfaction of the four-factor admissibility test, Castro's testimony was admissible under Rule 404(b). Thus, the court did not deviate from a legal rule in admitting Castro's testimony regarding Crisostomo prior violent behavior. It follows that the court did not plainly err in failing to declare a mistrial sua sponte.

2. Jail References

¶ 69 During Castro's testimony, she referenced Crisostomo's having gone to jail three times. First, in response to the Commonwealth asking: "[d]o you happen to know if he has a driver's license?", tr. 1080, Castro responded: "[h]e used to have a driver's license but when he was in jail I think it expired." *Id.* Only a few seconds later, in response to being asked whether she had been in communication with Crisostomo, Castro answered: "[o]h, yeah when he got out from jail . . . ." *Id.* At this point, counsel made a general objection without stating

the grounds, and the court instructed the jury: "[l]adies and gentlemen the last statement from the witness, can I instruct you to disregard that statement? The defendant is on trial for these charges in this case and only the charges in this case . . . ." *Id.* Shortly after, the Commonwealth asked again about Crisostomo's driver's license, and Castro answered: "I know that I had his old driver's license and it was expired and that he just got out from jail." *Id.* at 1082. At this point, even though counsel did not object, the court called a recess. The Commonwealth explained the proper boundaries of Castro's testimony, and the court warned her that if she continued such behavior, the court could hold her in contempt and be forced to declare a mistrial.[15]

¶ 70 The court did not err in failing to declare a mistrial after Castro referenced Crisostomo's being in jail. Where a court provides a curative instruction, we presume it was followed, *Commonwealth v. Calvo*, 2014 MP 7 ¶ 33, and "consider the [lower] court's corrective action to have overcome the prejudicial effect of the witness' statement." *United States v. Harris*, 325 F.3d 865, 871, (7th Cir. 2003). Here, Castro's references to Crisostomo's jail time were minor and innocuous, meant more as a time reference than a reference to any prior criminal event. In addition, the court took corrective action: it issued a curative instruction to the jury, reprimanded the witness, and reminded the prosecutor of the proper scope of the testimony. Because the court has broad discretion in deciding to give a cautionary instruction rather than declare a mistrial and we assume the court's curative instruction was followed so as to overcome any prejudicial effect of Castro's statement, we find no error. It follows that no plain error occurred.

F. Identification of 911 Call

¶ 71 Crisostomo argues the court erred in denying his motion to suppress Castro's testimony identifying him on the 911 call. He argues the court correctly determined the 911 call was unduly suggestive, but was mistaken in its conclusion that the 911 identification was nonetheless reliable based on the totality of the circumstances.[16] Crisostomo asserts admitting Castro's

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[15] Specifically, the court instructed:

> "Ms. Castro, you understand that if you continue down this path. Okay, cause I'm going to instruct you now, okay? If you continue to inject any past criminal history of the defendant, any convictions, any arrest, okay . . . That the court may hold you in contempt. Okay, cause I'm going to instruct you now . . . . In addition to that, if you continue to inject his past criminal history, it may prejudice the jury because he's on trial for just this case not all those other cases, that it may be grounds for a mistrial. You understand what that means?"

Tr. 1083.

[16] Counsel risks waiving another argument on behalf of her client. Counsel's entire argument includes one citation to the transcript and two cases, neither of which are the controlling authority on this issue. We remind counsel of our clear warning in

identification resulted in a denial of due process.

¶ 72 Without any explanation or authority, counsel for Crisostomo claims we should review for abuse of discretion. However, we review the denial of a motion to suppress de novo. *Commonwealth v. Suda*, 1999 MP 17 ¶ 2. Furthermore, constitutional claims are also subject to de novo review. *J.G. Sablan Rock Quarry, Inc.*, 2012 MP 2 ¶ 17. We thus review de novo whether admission of Castro's identification of Crisostomo on the 911 call violated his right to due process.

¶ 73 The Fourteenth Amendment's Due Process Clause applies to the CNMI as if it were one of the several states.[17] In discussing due process protections, the United States Supreme Court has stated that "[t]he Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012). The Court has expressed a two-step test in determining whether an out-of-court identification procedure violates due process. *Neil v. Biggers*, 409 U.S. 188, 198 (1972). The test is based on the theory that "[t]he admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability." *Manson v. Brathwaite*, 432 U.S. 98, 106 (1977); *see Perry*, 565 U.S. at 232 ("[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.").

¶ 74 First, the court must determine whether the out-of-court identification is unduly suggestive, that is, whether the procedure created a very substantial likelihood of misidentification. *Biggers*, 409 U.S. at 198. If the procedure is suggestive, the court then examines "the central question [of] whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." *Id.* at 199 (internal quotation marks omitted). In evaluating the second step, courts should consider factors such as

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Commonwealth v. Quemado: "ignoring binding precedent that squarely addresses a legal issue before this Court is sanctionable conduct." 2013 MP 13 ¶ 19 n. 2.

[17] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, § 501 (48 U.S.C. § 1801 note) ("To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: . . . Amendment 14."). In addition, because "Article I, [S]ection 5 of the [NMI] Constitution is taken directly from [S]ection 1 of the Fourteenth Amendment to the United States Constitution . . . . federal case law interpreting the Fourteenth Amendment is analogous to Article I, [S]ection 5 and directly applicable to the Commonwealth." *Commonwealth v. Minto*, 2011 MP 14 ¶ 23 (citations omitted).

"the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description . . . the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199–200. Only "[w]here the 'indicators of [a witness'] ability to make an accurate identification' are 'outweighed by the corrupting effect' of law enforcement suggestion," should the identification be suppressed. *Perry*, 565 U.S. at 239 (quoting *Manson*, 432 U.S. at 114, 116).

¶ 75 Since both Crisostomo and the Commonwealth agree that the identification procedure used was unduly suggestive, we focus our inquiry on whether the identification was nonetheless reliable under the totality of the circumstances.[18] Although Castro was not a witness to the crime, she had opportunity to witness Crisostomo during the former couple's many years of courtship. Because Castro had ample opportunity to listen to Crisostomo's voice, this weighs in favor of admissibility. Additionally, Castro demonstrated a high level of certainty in her identification, rating it as a ten on a scale of one to ten and even experiencing a physical reaction after the voice spurred memories from her past relationship. Regarding the last factor, Castro had not heard Crisostomo's voice since their relationship in 2006. Being that the identification procedure occurred in 2012, this length of time weighs against reliability.

¶ 76 In applying the factors from *Biggers* to this case, we conclude the indicators of Castro's ability to accurately identify Crisostomo's voice are not outweighed by the corrupting effect of the procedure. Castro had been acquainted with Crisostomo for many years: she knew him intimately and had heard his voice express a variety of different emotions. Additionally, concerns as to Castro's motives were addressed through cross-examination and weighed by the jury. Thus, despite the officers' suggestive setup, Castro was able to give a reliable identification, rendering the out-of-court identification admissible. We find no due process violation.

G. Footprint Evidence

¶ 77 Crisostomo argues the court violated his Sixth Amendment right to counsel in admitting evidence of his footprints at trial. He argues the court erred

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[18] Our case differs from the United States Supreme Court's in that the identification was by voice, as opposed to by sight, and that Castro was an individual already acquainted with Crisostomo, as opposed to a victim of the crime. Courts, however, have not found either distinction material. *See United States v. Pheaster*, 544 F.2d 353, 369 (9th Cir. 1976) ("Because the possibility of 'irreparable misidentification' is as great when the identification is from a tape-recording as when it is from a photograph or a line-up, we hold that the same due process protection should apply to either method."); *United States v. Dobbs*, 449 F.3d 904, 909–910 (8th Cir. 2006) ("The women who identified [the defendants] on the tape were not eyewitnesses being asked to recall their impression of a stranger during a short encounter in the emotionally charged context of an armed robbery. Rather, the three women who testified were individuals already acquainted with [the defendants]."). We similarly hold that the same analysis applies.

in equating the taking of the footprint evidence to that of a hair or blood sample, and instead deems it closer to that of a line-up, constituting a 'critical stage' of proceedings.[19]

¶ 78 Under NMI Rule of Evidence 103(a) ("Rule 103(a)"), in order to preserve a claim of error pertaining to the admission of evidence a party must timely object and state a specific ground for doing so. Further, we have determined that this rule applies even "when a trial court conditionally denies a pre-trial objection, [in which case] the objecting party must renew his or her objection at trial or waive it on appeal." *Commonwealth v. Mettao*, 2008 MP 7 ¶ 23. Objections must be renewed at trial even if conditionally denied in a pre-trial motion, as this allows the judge to reconsider the ruling after witnessing events unfold at trial. *Id.; see also Wilson v. Waggener*, 837 F.2d 220, 222 (5th Cir. 1988) ("A party whose motion in limine is overruled must renew his objection when the evidence is about to be introduced at trial."). When a claim is not properly preserved, we may only review for plain error. NMI R. EVID. 103(e).

¶ 79 The claim of error was not properly preserved. Prior to trial, Crisostomo filed a motion in limine to suppress the footprint evidence pursuant to the Sixth Amendment of the U.S. Constitution. Although the court denied his motion, its denial was without prejudice. At trial, Crisostomo had multiple opportunities to renew the objection, but failed to do so. We thus review for plain error, examining whether: "(1) there was error; (2) the error was plain or obvious; [and] (3) the error affected the appellant's substantial rights." *Reyes*, 2016 MP 3 ¶ 11 (citation and internal quotation marks omitted).

¶ 80 In all criminal prosecutions, Article I, Section 4(a) of the NMI Constitution and the Sixth Amendment of the U.S. Constitution provide the accused with the right to the assistance of counsel in presenting a defense. U.S. CONST. amend. VI; *see also Perez*, 2006 MP 24 ¶ 11 ("[T]he Sixth Amendment to the United States Constitution applies in the Commonwealth."). We have recognized that

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[19] For the first time, Crisostomo also raises claims against admission of his footprints under the Fourth and Fifth Amendments. NMI Criminal Procedure Rule 12(b)(2) ("Rule 12(b)(2)") states that motions to suppress evidence "must be raised prior to trial." Indeed, we have repeatedly stated that we do not review issues raised for the first time on appeal. *Commonwealth v. Suda*, 1999 MP 17 ¶ 36; *Commonwealth v. Qu Yun*, 2016 MP 19 n.4; *see also Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1284 (10th Cir. 2013) (stating waiver applies "when a litigant changes to a new theory on appeal that falls under the same general category as an argument presented at trial") (citation and internal quotation marks omitted). And although three narrow exceptions do apply to this rule, *see Commonwealth v. Santos*, 4 NMI 348, 350 (1996), none are applicable here. We deem the Fourth and Fifth Amendment claims waived.

Further, Crisostomo claims "counsel did not have an opportunity to challenge the validity of the search warrant." Opening Br. 16. We disagree. Not only was counsel warned prior to the search warrant's execution, but counsel herself mentioned the search warrant in her motion in limine challenging the footprints under the Sixth Amendment.

the Sixth Amendment guarantees the right to counsel at critical stages of a proceeding. *Suda*, 1999 MP 17 ¶ 17. A critical stage of a proceeding is one where counsel's absence may result in derogation of a defendant's right to a fair trial. *United States v. Wade*, 388 U.S. 218, 227 (1967) (describing a critical stage as "whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself"). While a post-indictment lineup is a critical stage, *id.* at 237, the taking of a handwriting exemplar, blood sample, or blood alcohol test, are not. *Gilbert v. California*, 388 U.S. 263, 267 (1967); *Schmerber v. California*, 384 U.S. 757, 766 (1966); *Suda*, 1999 MP 17 ¶ 18. In addition, various circuits have noted the taking of fingerprints not to be a critical stage of proceedings. *E.g.*, *United States v. Kon Yu-Leung*, 910 F.2d 33, 39 (2nd Cir. 1990); *United States v. Jackson*, 448 F.2d 963, 971 (9th Cir. 1971); *Pearson v. United States*, 389 F.2d 684, 686 (5th Cir 1968).

¶ 81 We are left to determine whether the taking of footprints differs from those procedures deemed not to constitute critical stages. Guided by our decision in *Suda*, as well as those of the United States Supreme Court and federal circuit courts, we find the taking of footprints similar to the taking of fingerprints, handwriting exemplars, blood samples, and blood alcohol tests. We conclude the taking of Crisostomo's footprints was not a critical stage of the proceeding and that subsequently admitting evidence of Crisostomo's footprints did not violate his Sixth Amendment right to counsel. We find no error in admitting the footprint evidence and consequently hold that no plain error occurred.

H. Skype Testimony

¶ 82 Crisostomo asserts that the court's decisions regarding two witnesses violated his Sixth Amendment and Due Process rights. First, Crisostomo argues that the court's refusal to allow testimony from Vernon Wesley ("Wesley"), a forensic podiatrist and foot morphologist, pursuant to NMI Rule of Practice 30 ("Rule 30") violated his right to present his defense.[20] Second, he argues the court

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[20] Rule 30 discusses the circumstances in which testimony may be taken by closed-circuit television, instead of in open court. NMI. R. PRAC. 30. Although the court may have misinterpreted the application of Rule 30—discussing it in the context of testimony over Skype—this argument is not properly before us.

After the Commonwealth rested its case, Crisostomo sought to allow its rebuttal experts, Haymer and Wesley, to testify by Skype. The Commonwealth opposed the testimony, citing Rule 30; Crisostomo admitted this was the relevant rule. Although, the court first denied Haymer's Skype testimony, it shortly reconsidered its ruling, citing NMI Rule of Practice 2(c) ("Rule 2(c)") and stating that it would allow his testimony through Skype due to exceptional circumstances. After this ruling, the court specifically asked counsel: "[i]s [Haymer] your last witness as—as far as we can tell at this time?" tr 2. 405, to which counsel responded: "[y]es, Your Honor, he is and, uh, after that the defense expects to rest its case and . . . prepare for closing arguments." Tr 2. 405–06. After its ruling, the court confirmed that its order was solely regarding

permitting David Snyder ("Snyder"), the forensic audio examiner who enhanced the 911 call, to testify via Skype violated his right to confrontation under the NMI and United States Constitutions.

¶ 83 We review constitutional claims for plain error where the defendant fails to raise a timely objection. *Xiao*, 2013 MP 12 ¶ 16. Here, not only did Crisostomo fail to object to Snyder's testifying over Skype, he agreed to allow the witness to testify telephonically. The Commonwealth reminded opposing counsel that "[i]t's up to you. We could, we could do that but we're doing Skype for the . . . defendant's rights of confrontation." Tr. 964. We thus first examine whether the court erred, deviating "from a legal rule that has not been intentionally relinquished or abandoned by the appellant." *Reyes*, 2016 MP 3 ¶ 12 (citation and internal quotation marks omitted).

¶ 84 We thus examine whether Snyder's Skype testimony violated Crisostomo's right to confrontation. Article I, Section 4(b) of the NMI Constitution states that in all criminal prosecutions, "[t]he accused has the right to be confronted with adverse witnesses . . . ."[21] The Sixth Amendment of the United States Constitution similarly provides a right to confrontation. U.S. CONST. amend. VI.[22] We have not had occasion to decide such an issue. Although the United States Supreme Court approved a standard for allowing a victim of child abuse to testify via one-way closed-circuit television, *see Maryland v. Craig*, 497 U.S. 836, 855 (1990), it has not ruled on whether two-way videoconferencing violates the Confrontation Clause. *See Wrotten v. New York*, 560 U.S. 959, 960 (2010) (Sotomayor, J.) (discussing the question of whether two-way video violates a defendant's Sixth Amendment rights, mentioning "[b]ecause the use of video testimony in this case arose in a strikingly different context than in *Craig*, it is not clear that the latter is controlling"). Circuit courts are also split on the applicability of *Craig*. *See, e.g.*, *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006) ("Our circuit precedent acknowledges that *Craig* supplies the proper test for admissibility of two-way video conference testimony."); *United States v. Gigante*, 166 F.3d 75, 81 (2nd Cir. 1999) (finding that "two-way closed-circuit television testimony does not necessarily violate

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Haymer, to which counsel responded "[i]t's just [Haymer], Your Honor. Yup." Tr 2. 406. After Haymer's testimony, the court again clarified that "Ms. King represented yesterday that [Haymer] was her last witness that she was going to call," tr 2. 459, to which counsel simply responded: "[y]es, Your Honor." Tr 2. 459. Because the court was never asked to rule as to Wesley's potential Skype testimony, this argument is waived.

[21] Because the Confrontation Clause of the NMI Constitution is patterned after the Sixth Amendment to the United States Constitution, federal case law is instructive to our interpretation. *Commonwealth v. Attao*, 2005 MP 8 ¶ 21.

[22] The Sixth Amendment of the United States Constitution is applicable in the Commonwealth via the Covenant. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. § 1801 note.

the Sixth Amendment" and deciding "[i]t is not necessary to enforce the *Craig* standard in this case"). In addition to a lack of guidance from federal courts, the Commonwealth does not have a rule directly on point.

¶ 85 As such, we determine there was no error. First, the law was ambiguous. We have no legal rule or binding precedent squarely addressing the parameters of testimony over two-way videoconference. Second, Crisostomo indicated he was intentionally relinquishing his right, if any. After the Commonwealth's reminder that Snyder's testifying over Skype was for Crisostomo's right to confrontation, counsel notified the court that "[i]f the Skype doesn't go through, the defendant is okay with just a telephonic." Tr. 964. Thus, legal guidance was unclear and the right was nonetheless relinquished. Given that the court did not err in allowing Snyder to testify via Skype, we find no plain error occurred.

I. Polygraph Testimony

¶ 86 Next, Crisostomo takes issue with testimony regarding his refusal to take a polygraph test.[23] He asserts that allowing such testimony was improper, and

[23] Testimony regarding Crisostomo's refusal to take a polygraph test was as follows:

> MS. KING: You had seen Mr. Crisostomo earlier during the investigation of Ms. Romero's disappearance. Is that right?
>
> OFFICER MARATITA: One time. Yes.
>
> MS. KING: One time when?
>
> OFFICER MARATITA: One time when he was supposed to take a polygraph.
>
> . . . . . .
>
> MR. FLAHERTY: The question I wanted to ask is with regards to the answer you gave Ms. King with regards to when you saw the defendant prior to December 24th last year. You said that when he was supposed to take a polygraph.
>
> OFFICER MARATITA: Yes.
>
> MR. FLAHERTY: What happened on that day?
>
> MS. KING: Objection, relevance.
>
> THE COURT: Overruled. We're talking about the actual result of the, or just in a general sense?
>
> MR. FLAHERTY: I've asked what happened that day Your Honor. I could be more specific if you would like.
>
> THE COURT: Okay, alright, ask your question.
>
> MR. FLAHERTY: That day, was that in regards to the investigation of the disappearance of the murder of Emie Romero?
>
> OFFICER MARATITA: Yes.

that the court's failure to instruct the jury to disregard the testimony violates his constitutional rights.

¶ 87 Generally, we review a court's decision to admit evidence for abuse of discretion. *Commonwealth v. Quemado*, 2013 MP 13 ¶ 14. However, to preserve such a claim of error, counsel must timely object to the evidence's admission, stating the specific ground for their objection. NMI R. EVID. 103(a). When counsel fails to specifically state the legal basis for their objection, or states the wrong legal basis, their claim is not preserved and plain error review applies. *See Togawa*, 2016 MP 13 ¶ 20 (noting specific objection must be correct to preserve issue)*; see also United States v. O'Brien*, 435 F.3d 36, 39 (1st Cir. 2006) (noting the court reviews for plain error "[i]f the wrong objection or none at all is offered"); *United States v. Field*, 875 F.2d 130, 134 (3rd Cir. 1989) ("Neither a general objection to the evidence nor a specific objection on other grounds will preserve the issue on review."). Because Crisostomo failed to object to the line of questioning on Fifth Amendment grounds, we review for plain error. We first examine whether there was error, then review whether the error was plain or obvious. *See Reyes*, 2016 MP 3 ¶ 11.

¶ 88 Article I, Section 4(c) of the NMI Constitution ("Section 4(c)") states that "no person shall be compelled to give self-incriminating testimony." NMI CONST. art. I, § 4(c).[24] This provision "prevent[s] a person from being compelled in any criminal case to be a witness against himself." *Calvo*, 2014 MP 7 ¶ 46 (citation and internal quotation marks omitted). We have stated that because criminal defendants have the right not to testify, "[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." *Commonwealth v. Rabauliman*, 2004 MP 12 ¶¶ 31, 52. We further elaborated upon these protections:

> Direct reference by a prosecutor to a defendant's decision not to

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> MR. FLAHERTY: Okay, and what happened that day?
>
> OFFICER MARATITA: We already set up the polygraph machine as soon as Mr. or the defendant came in, he was shocked and then he just told us that.
>
> MS. KING: Objection, hearsay.
>
> MR. FLAHERTY: The defendant's statement Your Honor.
>
> THE COURT: Okay, yeah, overruled.
>
> OFFICER MARATITA: As soon as he saw the machine and he saw myself and one of the FBI agents, he said "I just spoke to my lawyer?, I don't wanna do this."

Tr. 445–46; 448–49.

[24] Because Section 4(c) is based on the Fifth Amendment of the United States Constitution, we look to federal case law in interpreting the protections provided by Section 4(c). *Commonwealth v. Suda*, 1999 MP 17 ¶ 22.

> testify is always a violation of the defendant's Fifth Amendment right against self-incrimination. *Griffin v. California*, 380 U.S. 609 (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).

Id. ¶ 52 (internal quotation marks omitted).

¶ 89 Although the United States Supreme Court has not addressed the issue, circuit courts have applied similar analyses to comment on a defendant's refusal to take a polygraph test. *See United States v. Walton*, 908 F.2d 1289, 1293 (6th Cir. 1990) (explaining that "a statement suggesting that a criminal defendant either took and failed a polygraph examination or refused to take an examination directly relates to guilt and implicates a defendant's [F]ifth [A]mendment right not to incriminate himself"); *Garmon v. Lumpkin County*, 878 F.2d 1406, 1410 (11th Cir. 1989) (finding that "a defendant's refusal to submit to a polygraph examination cannot be used as incriminating evidence" was a natural corollary to the rule that "absent a waiver of [F]ifth [A]mendment rights, a person may not be compelled to submit to a polygraph examination"). However, the rule has not been adopted uniformly. *See United States v. Resnick*, 823 F.3d 888, 898 (7th Cir. 2016) (avoiding determination of whether comment on a defendant's refusal to submit to polygraph testing violated his Fifth Amendment rights); *United States v. Matthews*, 20 F.3d 538, 552 (2nd Cir. 1994) (allowing comment on a defendant's refusal to submit to polygraph because defendant opened the door to his post-arrest behavior).

¶ 90 We apply these principles to determine whether admission of Crisostomo's refusal to take a polygraph test violated his Fifth Amendment rights—an issue of first impression. We echo the Sixth and Eleventh Circuits in deciding such commentary directly implicates the defendant's right against self-incrimination. Just as we have stated that a prosecutor may not directly comment upon a defendant's decision not to testify, it is error for a prosecutor to make direct reference to a defendant's decision not to take a polygraph test. Here, the prosecution's questioning as to what occurred on the day of the polygraph examination specifically solicited Officer Maratita's testimony that "[a]s soon as he saw the machine and he saw myself and one of the FBI agents, he said 'I just spoke to my lawyer?, I don't wanna do this.'" Tr. 448–49. As Crisostomo had not opened the door to this issue, the Commonwealth had no alternative purpose for soliciting such testimony. As such, it was error to admit the testimony.

¶ 91 Although we find error, the error was admittedly subject to reasonable dispute. First, the law was not clear as to the admissibility of such testimony. We do not have binding authority on the matter, nor has the United States Supreme Court spoken directly on this issue. Second, although the reference to defendant's refusal was direct, it was only brought up once, constituting a minor component

in a trial that lasted almost three weeks. And third, contrary to Crisostomo's claim that the court "fail[ed] to give the instruction to disregard the testimony," Opening Br. 28, the court recognized the problem with such testimony. Indeed, the court asked counsels to craft and subsequently delivered a jury instruction that "the refusing to take a polygraph upon advice of an attorney is an exercise of the Fifth Amendment and not to be considered as a sign of guilt." Tr 2. 511. Thus, although we recognize the potential of such testimony in prejudicing the exercise of a defendant's constitutional rights, Crisostomo has not demonstrated that the error here was obvious. Any error in admitting the testimony about his refusal to submit to a polygraph was not plain in light of the record as a whole. Accordingly, we find no plain error.

J. Cumulative Error

¶ 92 Finally, Crisostomo argues that the combination of errors in his case violated his right to a fair trial. He asserts analyzing the cumulative effect of the errors in the context of the sum of evidence introduced at trial evince that reversal is required. The Commonwealth correctly points out that Crisostomo "presents no cases or legal analysis regarding why he has successfully alleged cumulative error." Resp. Br. 45.

¶ 93 "Under the cumulative error doctrine, a criminal defendant may challenge the aggregative, prejudicial effect of multiple trial errors." *Xiao*, 2013 MP 12 ¶ 82. When reviewing for cumulative error, we consider all errors, including preserved and plain errors. *Commonwealth v. Johnson*, 2015 MP 17 ¶ 35; *see United States v. Mitchell*, 502 F.3d 931, 1014 (9th Cir. 2007) ("Cumulative error may include violations that fail the plain error test, but are nevertheless errors."). We reverse "if it is more probable than not that, taken together, the errors materially affected the verdict," *Johnson*, 2015 MP 17 ¶ 35, but "decline to reverse when we find sufficiently strong un-refuted evidence supporting the conviction." *Commonwealth v. Cepeda*, 2014 MP 12 ¶ 37. Importantly, in cases "where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors." *Commonwealth v. Cepeda*, 2009 MP 15 ¶ 64 (citation and internal quotation marks omitted).

¶ 94 We weigh the aggregate prejudicial effect of the trial errors against the sum of the evidence presented against Crisostomo. We found the court erred in: 1) denying Haymer's rebuttal testimony; 2) failing to examine Bodziak's reliability before admitting his expert testimony; 3) not rereading the jury instructions at the end of the case; and 4) allowing testimony on Crisostomo's refusal of a polygraph test. Such errors, particularly the court's denial of Crisostomo's DNA rebuttal expert, were undeniably prejudicial. At the same time, however, the Commonwealth's evidence pointing to Crisostomo as the perpetrator was undeniably strong.

¶ 95 We highlight some of this evidence. In particular, Kintaro, Shaine, Castro—and Crisostomo himself—all identified Crisostomo as driving a vehicle matching the description of that seen by Ocon. Hair and fiber in the rented vehicle were consistent with Romero's hair, leggings, and fibers found on her shoe.

Three individuals separately identified Crisostomo's voice on a 911 call where Romero was heard pleading to be released, complaining that her neck hurt, and asking to pick up her pants. Without knowing either party, the 911 operator identified the female voice as Filipina and the male voice as local. Cell tower records matched Romero and Crisostomo's movement, including pinging Crisostomo's borrowed phone in Marpi at 6:00 a.m. on February 5. Footprints matching Crisostomo's were found at La Fiesta next to drag marks. Crisostomo was seen by a witness attempting to sell a Blackberry Torch shortly after. And of course, Kehl's testimony of a 1 in 960 million probability that the DNA found in Romero belonged to someone in the Chamorro population other than Crisostomo. Even after omitting the errors, numerous evidence remains. We find sufficiently strong, unrefuted evidence supporting Crisostomo's conviction, and are unable to say, even when taken together, that it is more probable than not that the errors materially affected the verdict. We decline to reverse for cumulative error.

V. CONCLUSION

¶ 96 For the foregoing reasons, we AFFIRM Crisostomo's convictions.

SO ORDERED this 13th day of July, 2018.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice