

ROP v. Gilngachelan, 13 ROP 238 (Tr. Div. 2006)
REPUBLIC OF PALAU,
Plaintiff,

v.

MIKE GILNGACHELAN,
Defendant.

CRIMINAL ACTION NO. 04-465

Supreme Court, Trial Division
Republic of Palau

Decided: February 20, 2006

ARTHUR NGIRAKLSONG, Chief Justice:

Before the Court is Defendant's Motion for a New Trial, filed on January 4, 2006. The government responded on January 13, and the Defendant replied on January 20. The Court held a motion hearing on February 10, at which both parties were represented. For the reasons articulated below, the motion to dismiss is DENIED.

BACKGROUND

On November 18, 2004, Defendant Mike Gilngachelan and his brother John drove to the home of Ralph Isaac to look for Daphne Anastacio. Anastacio had been a long time girlfriend of John, but left him because he **1239** physically abused her.¹ After arriving at Isaac's home, the brothers knocked on the door and asked Isaac if Anastacio was there. When they were told she was not, the brothers forced themselves inside the house. John spotted Anastacio hiding under a bed. He got her out and forced her against her will to go to their car outside. While that was happening, the defendant, armed with a knife, threatened to stab Isaac and then punched him in the mouth. Once inside their car, John and Anastacio sat at the back and Mike drove the car. While driving and looking for a secluded place, John slapped Anastacio three or four times. They drove to a deserted road in Babeldaop where John took Anastacio outside of the car and began slapping her. At some point, the defendant convinced John to stop beating Anastacio, and they drove her home. On November 22, 2004, the defendant was cited with Assault for punching and threatening to stab Isaac. He pled no contest and paid a \$30 fine.

Both brothers were later charged with kidnapping, in violation of 17 PNC § 1801 and § 102. The trial was held on November 23 and December 28, 2005. The defendant was represented by Mariano Carlos, and his brother was represented by Rachael Dimitruk of the Public Defender's Office. The defendant was found guilty of kidnapping and now moves for a

¹ Some question was raised at trial regarding the status of their relationship. John's mother testified that the two were married because Anastacio came to live in the house shared by John and his mother. Nevertheless, on cross-examination she testified that the couple was never legally married.

new trial.

The source of the present motion relates to the trial testimony of Anastacio and John's mother, Claudia Gilngachelan. During the first day of the trial, Dimitruk asked Anastacio about an alleged pregnancy in the summer of 2005. Anastacio responded, "I was not pregnant."

When the trial resumed in December, Carlos called Claudia to the stand. She testified, over an objection on relevance, that Anastacio was pregnant at some point in time after the kidnapping incident. Defense counsel then called Anastacio. Although Carlos did not ask any questions on the subjects of pregnancy or hospitalization, Dimitruk asked Anastacio about a time when she had to go to the hospital after the kidnapping. Over the prosecution's objection, Anastacio testified that she did not go to the hospital because she thought she was pregnant, and she did not tell John that she thought she was pregnant. Anastacio testified, however, that she told Claudia that she thought she was pregnant. Dimitruk also asked her again about whether she had been pregnant at any time after the 2004 kidnapping. Once again, Anastacio responded "No." Shortly thereafter, the Court recessed for lunch.

Apparently, the prosecution obtained Anastacio's medical records during the lunch break. The records reveal that the victim went to the dispensary in Ngarchelong on August 17, 2005, and complained of abdominal pains. They also indicate that Anastacio had been menstruating for one week and was still bleeding. Anastacio was taken to the Belau National Hospital, where the doctors diagnosed her with an ectopic pregnancy in her right fallopian tube.

In the response to this motion, Assistant Attorney General Lori Ann Zucco states that she disclosed these medical records to Dimitruk as soon as she received them and **1240** that she disclosed them to Carlos near the end of the lunch recess, which was the first time she saw him since receiving the records. In the defendant's reply, however, Carlos states he did not have them "the whole afternoon as [the prosecution] stated." The trial resumed, and the defense continued to present its case: neither Dimitruk nor Carlos requested a recess to review the documents. At the close of trial, the Court found the defendant guilty of kidnapping.

In his original motion, Defendant argues that Anastacio falsely testified as to her pregnancy in the summer of 2005, and he contends that a conviction based on this testimony violates his due process. Such a violation, Defendant maintains, justifies ordering a new trial. In his reply, however, the defense shifts focus to the conduct of the prosecutor and argues that after learning about the false testimony during trial, the prosecutor had an obligation to inform the court.

ANALYSIS

Rule of Criminal Procedure 33 permits a court to grant a new trial "if required in the interest of justice." There are no published Palauan decisions interpreting Rule 33, but the rule closely resembles its American counterpart.² Although American case law is not binding on this

² American Rule of Criminal Procedure 33 is divided into two separate sections: one covers the standard for granting a new trial and the other discusses deadlines for filing a motion for new trial. Its

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Court, it can be looked to for assistance. *See ROP v. Tmetuchl*, 1 ROP Intrm. 443, 553 (King, J. concurring); *see also, ROP v. Wong*, Crim. Case No. 03-355, slip op. at 3 (Tr. Div. Jan. 16, 2004) (“When the legislature of a state adopts a statute which is identical or similar to one in effect in another state or country, the courts of the adopting state usually adopt the construction placed on the statute in the jurisdiction in which it originated.”) (quotations omitted).

In analyzing motions brought under Rule 33, American courts have distinguished justifications for a new trial based on newly discovered evidence and on all other grounds. In order to prevail on a motion for new trial based on newly discovered evidence, defendants must often show that the evidence “could not have been discovered with due diligence prior to trial, that it is material to the issue and not merely cumulative or impeaching, and that it is of such a nature that a different verdict would probably result if a new trial were granted.” 58 Am. Jur. 2d *New Trial* § 321; *accord* Charles Alan Wright et al., *Federal Practice & Procedure* § 557 (3d ed. 2004) (“*Fed. Prac. & Proc.*”). In addition to these requirements, “a new trial in a criminal case should not be granted unless the newly discovered evidence is of such a nature that, on a new trial, it would probably produce an acquittal.” 58 Am. Jur. 2d *New Trial* § 325.

The defendant has not demonstrated these elements. First, there is a question as to whether the medical records were, in fact, newly discovered, specifically “unknown to him . . . until after trial.” *Id.* § 326. Zucco contends that she gave defendant’s attorney a copy of the medical records at the end of the lunch recess on the second day of trial. Carlos, however, states that he did not have the records “the whole afternoon,” but he does not specify when he received them. Carlos also admitted he did not review the records. The Court is inclined to believe Zucco **1241** because of her more specific contention, but the Court need not rely on this element to deny the defendant’s claim.

Even if this evidence were newly discovered after trial, the issue of whether Anastacio was pregnant during the summer of 2005 merely goes to her credibility. It does not specifically relate to the charge of kidnapping. “In a criminal prosecution, an application for a new trial will generally be denied where it appears that the only tendency of the newly discovered evidence is to contradict, impeach, or discredit the prosecuting witness or other witness for the state.” *Id.* § 340; *accord Mesarosh v. United States*, 352 U.S. 1, 9 (1956). To the extent that the medical records attached to defendant’s motion serve as evidence that Anastacio was pregnant in 2005 and testified falsely at trial, it would only discredit her testimony. Thus, it is insufficient to justify a new trial based on the newly discovered evidence.

Moreover, the medical records were not of such a nature that, on a new trial, they would probably produce an acquittal. The relevance of whether Anastacio was pregnant was not material to the kidnapping charge. In his reply, the defendant argues that “it does not matter whether the witness lied concerning relevant or irrelevant matter in the trial,” but he failed to cite any authority for this proposition. The court found similar language in *People v. Savvides*, 136 N.E.2d 853, 854-855, as quoted in *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959). Nevertheless, the great weight of American cases require that the evidence be “material to issues which are

substance, however, is identical to that of the Palauan Rule, with the one exception that the American Rule permits an extra year to file a motion based on newly discovered evidence.

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determinative of the controversy.” 58 Am. Jur. 2d *New Trial* § 338. Thus, the defendant has not established the newly discovered evidence basis to justify a new trial.

The second category of analysis American courts use to determine whether a new trial should be permitted is more generalized, and most courts rely only on their interpretation of the phrase “if the interest of justice so requires.” Some courts interpret this phrase to permit a new trial only if the substantial rights of the defendant were affected. *See Fed. Prac. & Proc.* § 551. Other courts look to whether the error was of “sufficient magnitude to warrant a new trial.” *See* 58 Am. Jur. 2d *New Trial* § 67. As one might expect with such broad standards, a trial court has great discretion in determining whether a new trial should be granted. *Id.* § 62.

Significant factors to be considered under this analysis include “the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effect of the error.” *Id.* § 67. These facts suggest that, even if there was an error, that a new trial is not warranted. As discussed above on the issue of materiality, the question of whether Anastacio was pregnant is not important in determining whether the defendant was guilty of kidnapping. In addition, if any error were committed by the prosecution, it was certainly mitigated by the fact that Zucco distributed the medical records to the defense counsel shortly after receiving them.

Defendant argues that the principles discussed in *Napue v. Illinois*, 360 U.S. 264 (1959), should control in this case. In *Napue*, the principle witness for the prosecution responded to a question by the prosecution and stated that he had not received a promise of consideration in return for his testimony. This was a false statement, and the examining attorney did nothing to correct the witness’s error. The court cited cases that suggested that when the prosecution allows false **L242** testimony to go uncorrected, even where the prosecution did not solicit the evidence, there is a due process violation. *Id.* at 269. The court ultimately reversed the conviction. *Id.* at 272.

The reasoning articulated in *Napue*, however, does not necessarily apply in the Palauan legal system. The *Napue* court argued that the “jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend.” *Id.* at 269. Palau does not have a jury system. Thus, the trial court judge—who rules on a motion for new trial—has the ability to review the evidence presented at trial and determine if, in the interest of justice, a new trial should be granted, based on the allegations in the motion. To that extent, Palauan courts may deviate slightly from American courts, and it is appropriate for our courts to consider whether the errors alleged would have probably produced an acquittal if they had been known at the time of trial. As discussed above, this Court finds that even if the defense had presented the medical records that indicate that Anastacio had an ectopic pregnancy in 2005, the defendant would have still been convicted.

In no way does this decision abdicate the ethical obligations of a prosecuting attorney to disclose evidence tending to favor a defendant or to correct knowingly false testimony. This Court finds that in this particular case, the defendant’s due process rights were not violated, and a new case is not required in the interest of justice.

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CONCLUSION

For the reasons set forth above, the Defendant's Motion for New Trial is DENIED.