IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

vs.

JOSEPH PEREZ FLORES,
Defendant-Appellant

Supreme Court Case No. CRA03-013
Superior Court Case No. CF122-02

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on July 15, 2004
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; ROBERT J. TORRES, Associate Justice.

TYDINGCO-GATEWOOD, J.:

[1] Defendant-Appellant Joseph Perez Flores appeals from a Superior Court Judgment convicting him of one count each of Attempted Third Degree Criminal Sexual Conduct (As a Second Degree Felony), Fourth Degree Criminal Sexual Conduct (As a Misdemeanor), Harassment (As a Petty Misdemeanor) and two counts of Assault (As a Misdemeanor). Flores argues that there was insufficient evidence to support his conviction for Attempted Third Degree Criminal Sexual Conduct and that the trial court abused its discretion in refusing to give the "missing witness" instruction to the jury. We disagree with both arguments put forth by Flores and thus, affirm the judgment.

I.

[2] On February 16, 2001, Claire Rosario, John Blas and Vincent Sablan, who had been out drinking, playing pool and singing karaoke, were driving toward Rosario's Barrigada home when they stopped at Flores' house because Rosario needed to use the bathroom. While Rosario was inside Flores' house, Blas and Sablan drove to a nearby church to wait for her, at Flores' request. When Rosario tried to go after the car, Flores blocked the doorway. Flores and Rosario struggled, with Flores touching, dragging and getting on top of Rosario. After she "tried to play along," Rosario was able to leave Flores' house. Transcript of Proceedings ("Tr.") vol. I, p. 23 (Trial, June 4, 2002). Rosario ran to the house of her friend Jesse Lewis and told him and his mother that she (Rosario) was almost raped. Rosario asked Lewis to drive her to Flores' home to retrieve her purse. When they arrived at Flores' home, they saw a truck pulling out of the driveway. Blas and Sablan testified that they saw Rosario arrive at Flores' home, and she was crying and hysterical. They also testified that she yelled at them and asked why they left her, and that Flores "practically raped" her. Tr. vol. II, pp. 29-32, 51-53 (Trial, June 5, 2002). Rosario did not report this incident until a separate incident involving Flores occurred on March 24, 2002, when Flores pulled Rosario by the neck and hair, shoved her and touched her during a barbecue at the home of Rosario's sister's boyfriend. Rosario's sister reported the March 24, 2002 incident to police, and after

an investigation of the allegations, Flores was arrested.

[3] On March 25, 2002, Flores was charged by the Attorney General's Office regarding the separate March 24, 2002 incident. On April 3, 2002, he was indicted in the case at bar for both the March 24, 2002 incident and the February 16, 2001 incident. The indictment was amended on June 3, 2002 and Flores was charged with one count of Attempted Third Degree Criminal Sexual Conduct (As a Second Degree Felony) for the February 16, 2001 incident, and one count of Terrorizing (As a Third Degree Felony), one count of Attempted Fourth Degree Criminal Sexual Conduct (As a Misdemeanor), one count of Fourth Degree Criminal Sexual Conduct (As a Misdemeanor), two counts of Assault (As a Misdemeanor) and one count of Harassment (As a Petty Misdemeanor) for the March 24, 2002 incident.

[4] Flores filed a motion for judgment of acquittal, which was denied. Subsequently, a jury found Flores guilty of four of the charges levied against him and he was thereafter sentenced by the trial court. The judgment was entered on the docket on August 5, 2003. Flores timely filed his Notice of Appeal on August 8, 2003.

II.

[5] This is an appeal from a final judgment, over which this court has jurisdiction. Title 7 GCA § 3107(b) (2002), *as amended by* Guam Pub. L. 27-31 (Oct. 31, 2003); Title 8 GCA § 130.15(a) (1996).

[6] Flores challenges the sufficiency of evidence supporting his conviction, to which we apply a highly deferential standard of review. We have stated:

> The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. When a criminal defendant asserts that there is insufficient evidence to sustain the conviction, this court reviews the evidence in the light most favorable to the prosecution to ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. "The Ninth Circuit has noted that this is a highly deferential standard."

People v. Reyes, 1998 Guam 32, ¶ 7 (citations omitted) (quoting *People v. Gill*, Crim. No. 92-00099A, 1994 WL 150934, at *6 (D. Guam App. Div April 15, 1994)).

[7] "Whether th[e missing witness] instruction should be given is a matter that lies within the discretion of the trial court." *United States v. Bautista*, 509 F.2d 675, 678 (9th Cir. 1975). Consequently, the

lower court's refusal to give the instruction is reviewed for abuse of discretion. *See id.* "An abuse of discretion has been defined as that 'exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.'" *People v. Tuncap*, 1998 Guam 13, ¶ 12 (quoting *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993)). Under this standard, "a reviewing court does not substitute its judgment for that of the trial court. Instead, we must first have a definite and firm conviction the trial court, after weighing relevant factors, committed clear error of judgment in its conclusion." *Id.*

[8] "Issues of statutory interpretation are reviewed *de novo*." *Ada v. Guam Tel. Auth.*, 1999 Guam 10, ¶ 10. "[O]ur duty is to interpret statutes in light of their terms and legislative intent." *Carlson v. Guam Tel. Auth.*, 2002 Guam 15, ¶ 46 n.7. "Absent clear legislative intent to the contrary, the plain meaning prevails." *Sumitomo Constr. Co. v. Gov't of Guam*, 2001 Guam 23, ¶ 17.

III.

A. Essential elements of section 25.25 of Title 9 of the Guam Code Annotated

[9] Flores' first argument is that there was insufficient evidence to support his conviction for Attempted Third Degree Criminal Sexual Conduct. The jury determined that the prosecution had proved beyond a reasonable doubt the elements of section 25.25 of Title 9 of the Guam Code Annotated, which provides:

> (a) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (1) that other person is at least fourteen (14) years of age and under sixteen (16) years of age;
> (2) force or coercion is used to accomplish the sexual penetration; and
> (3) the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

9 GCA § 25.25 (1998).

[10] To determine whether there was sufficient evidence to support the conviction, we examine the evidence presented at trial in light of the following elements of the offense: 1) Flores; 2) Attempted; 3) To engage in sexual penetration; 4) Of another; and 5) Force or coercion was used to accomplish the sexual penetration. Each element is discussed below.

1. Flores

[11] There is sufficient evidence to support this element. At trial, Rosario identified Flores as the person she was testifying about, noting his presence in the courtroom and the clothing he was wearing. Lewis testified that Rosario said Flores "held [her] against her will," Tr. vol. II, p. 65 (Trial, June 5, 2002), and at trial, he identified Flores as being in the courtroom.

2. Attempted

[12] Guam law defines the crime of attempt as follows: "A person is guilty of an attempt to commit a crime when, with intent to engage in conduct which would constitute such crime were the circumstances as he believes them to be, he performs or omits to perform an act which constitutes a substantial step toward commission of the crime." Title 9 GCA § 13.10 (1996). In this case, there is sufficient evidence to support this element, because there is evidence that Flores performed "an act which constitutes a substantial step toward commission of the crime." At trial, Rosario testified that Flores wanted her to go in his bedroom with him, and when she refused, Flores picked her up and tried to carry her into his room. She further testified that "when [Flores] knew that I wasn't gonna go into his room with him, he dragged me." Tr. vol. I, p. 22 (Trial, June 4, 2002).

3. To engage in sexual penetration

[13] There is sufficient evidence to support this element. At trial, Rosario testified that she told Flores to stop touching her and to let her go, but Flores told her "he wanted to have sex with me." Tr. vol. I, p. 22 (Trial, June 4, 2002). She further testified that Flores "was trying to put his hands down my pants. He was fondling my vagina . . . ." Tr. vol. I, p. 23 (Trial, June 4, 2002).

4. Of another

[14] There is sufficient evidence to support this element. At trial, Rosario testified that Flores said he wanted to have sex with her. Blas testified that Flores told them Rosario left after he "sucked" her breast. Tr. vol. II, p. 29 (Trial, June 5, 2002). Blas believed Flores was not joking because Flores repeated this statement. Blas further testified that Rosario said Flores practically raped her. Lewis testified that Rosario said "[s]he was being held against her will" and had to fight to get away. Tr. Vol II, p. 65 (Trial, June 5 2002). Lewis further testified that Rosario said Flores did these things to her. Finally, Sablan testified

that Rosario was upset with them for leaving her because Flores almost raped her.

5. Force or coercion is used to accomplish the sexual penetration

[15] On appeal, Flores argues that section 25.25 of Title 9 GCA is ambiguous. Specifically, he maintains that the word "and" between subsection (2) and (3) is part of the statute's "plain language," and section 25.25 should be interpreted as requiring evidence of all of the three circumstances listed in the subsections. Basically, he argues evidence of the use of force alone in subsection (2) was not sufficient to convict him under section 25.25. Moreover, using a conjunctive reading of the statute requires that the prosecution also prove that the victim "is at least fourteen (14) years of age and under sixteen (16) years of age" under subsection (1), and that Flores "knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless" under subsection (3). 9 GCA § 25.25. Furthermore, he argues that the court must apply the rule of lenity when a statute is ambiguous; thus, the court must adopt the interpretation of the statute that is most favorable to the defendant.

[16] The prosecution asserts that section 25.25 is not ambiguous, and should be plainly read in the disjunctive sense because the word "any" in section (a) precedes the word "and" in the text of the statute; thus, the word "and" in section (a) only shows that the subsections compose a list of circumstances. Consequently, from this disjunctive reading, evidence of force alone was sufficient to support Flores' conviction. The prosecution argues that Flores proffers an absurd interpretation of section 25.25(a) which should be avoided, further asserting that the Legislature could not have intended that the statute apply only to fourteen- and fifteen-year-old incapacitated victims of force.

[17] Since the inquiry into whether there is sufficient evidence to support Flores' conviction for Attempted Third Degree Criminal Sexual Conduct hinges on identifying the essential elements of the crime, *see Reyes*, 1998 Guam 32 at ¶ 7, this inquiry must begin with determining whether Flores' conjunctive interpretation comports with the plain meaning of section 25.25(a). Flores supports his contention by citing several cases that define the word "any" as meaning "every" and "all," and asserts that converting "and"

to "or" in the criminal context is not allowed.[1]

[18] We have stated that "[n]otwithstanding the deference due the plain-meaning of statutory language, ... such language need not be followed where the result would lead to absurd or impractical consequences, untenable distinctions, or unreasonable results." *Sumitomo*, 2001 Guam 23 at ¶ 17 (quoting *Bowlby v. Nelson*, Civ. No. 83-0096A, 1985 WL 56583, at *2 (D. Guam App. Div. Sept. 5, 1985)) (ellipses in original). Reading section 25.25(a) conjunctively as requiring evidence of all three circumstances to convict a person of Third Degree Criminal Sexual Conduct would restrict convictions under the statute to one limited situation where a victim is between the ages of 14 and 16, and force or coercion is used, and where a victim is mentally defective, mentally incapacitated or physically helpless. This interpretation imposes a new meaning on the statutory language of section 25.25 that is inconsistent with the use of identical language in other statutes.

[19] "[T]he language of the statute cannot be read in isolation, and must be examined within its context. A statute's context includes looking at other provisions of the same statute and other related statutes." *Aguon v. Gutierrez*, 2002 Guam 14, ¶ 9 (citations omitted). "[Q]uestions of statutory interpretation may be aided by reference to the prevailing interpretation of other statutes that share the same language and either have the same general purpose or deal with the same general subject as the statute under consideration." *Id.* at ¶ 11 (quoting *de los Santos v. Immigration & Naturalization Serv.*, 525 F.Supp. 655, 666 (S.D.N.Y. 1981)). To determine the meaning of section 25.25, we consider language found in statutes defining other criminal sexual conduct offenses, including First Degree Criminal Sexual Conduct and Second Degree Criminal Sexual Conduct.[2]

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[1] While Flores interprets these cases as supporting our adopting of the conjunctive interpretation of section 25.25 of Title 9 GCA; we do not find these cases, or the arguments raised therein, to be persuasive. This is especially so in light of the statutory interpretation principles in *Aguon v. Gutierrez*, 2002 Guam 14, and more significantly, because it is apparent that the Legislature would not have enacted a statute that could not be prosecuted.

[2] First Degree Criminal Sexual Conduct is defined as follows:

(a) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with the victim and if any of the following circumstances exists:

(1) the victim is under fourteen (14) years of age;

(2) the victim is at least fourteen (14) but less than sixteen (16) years of age and the actor

[20] Applying the conjunctive interpretation to sections 25.15 and 25.20 would impose an absolute bar to convictions for First Degree and Second Degree Criminal Sexual Conduct, since it would be impossible for the prosecution to establish evidence satisfying all seven circumstances listed under the subsections of each statute. Quite simply, it would be impossible for the victim to be both "under" fourteen years of age and "at least" fourteen years of age. *See* 9 GCA §§ 25.15, 25.20. As a matter of interpretation, we

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is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit;

(3) sexual penetration occurs under circumstances involving the commission of any other felony;

(4) the actor is aided or abetted by one or more other persons and either of the following circumstances exists:

(i) the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or

(ii) the actor uses force or coercion to accomplish the sexual penetration.

(5) the actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon;

(6) the actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration; and

(7) the actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

Title 9 GCA § 25.15(a) (1998). Second Degree Criminal Sexual Conduct is defined as follows:

(a) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(1) that other person is under fourteen (14) years of age;

(2) that other person is at least fourteen (14) but less than sixteen (16) years of age and the actor is a member of the same household as the victim, or is related by blood or affinity to the fourth degree to the victim, or is in a position of authority over the victim and the actor used this authority to coerce the victim to submit;

(3) sexual contact occurs under circumstances involving the commission of any other felony;

(4) the actor is aided or abetted by one or more other persons and either of the following circumstances exists:

(i) the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or

(ii) the actor uses force or coercion to accomplish the sexual contact.

(5) the actor is armed with a weapon or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon;

(6) the actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact; and

(7) the actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

Title 9 GCA § 25.20(a) (1998).

cannot conclude that the absurdity resulting from the conjunctive reading of these statutes was intended by the Legislature, because clearly, the senators did not intend to enact statutes that could not be prosecuted. Flores' argument pertaining to the ambiguity of section 25.25 is not persuasive and is rejected; thus, the rule of lenity does not apply.

[21] It is clear that section 25.25 was intended to be read in the disjunctive sense, allowing evidence of force alone as sufficient to convict under section 25.25. Thus, we consider evidence in the record on Flores' use of force.

[22] There is sufficient evidence to support this element. Rosario testified that she struggled against Flores when he picked her up and tried to carry her into his room, and that he had his hands all over her, and that Flores covered her mouth when she attempted to call out for his mother. She testified that Flores shoved her onto the bed and that he was on top of her. Further, she said that Flores "had his hand up my blouse. He was fondling my breasts. He was trying to put his hands down my pants." Tr. vol. I, p. 23 (Trial, June 4, 2002). Flores "was fondling [her] vagina" and "tried to put his mouth on [her]chest . . . ." Tr. vol. I, p. 23 (Trial, June 4, 2002). Finally, Rosario testified that she "kept struggling with him but he was so heavy. I could not push him off." Tr. vol. I, p. 23 (Trial, June 4, 2002).

[23] Overall, there was an abundance of evidence presented to the jury to support each element of Third Degree Criminal Sexual Conduct. We conclude that, viewing the evidence in the light most favorable to the prosecution, a rational jury could have found the essential elements beyond a reasonable doubt. *See People v. Sangalang*, 2001 Guam 18, ¶ 20.

B. Corroboration and its effect on the sufficiency of evidence

[24] Flores alternatively argues that even using a disjunctive reading of section 25.25 would result in insufficient evidence, because even though Guam law allows a conviction of Third Degree Criminal Sexual Conduct based upon the victim's testimony without corroboration, this lack of corroboration may result in a holding that there is insufficient evidence to support finding of guilt beyond a reasonable doubt. He points to the lack of testimony regarding signs of struggle on Rosario and the lack of physical evidence that he attempted to have sexual intercourse with Rosario, and further asserts that Rosario's version is incredible for the following reasons: she changed her statements after consulting with an investigator; more than one

year had passed when Rosario reported she was almost raped; she said she could not remember the time the incident happened; and she said she would return to Flores' home over and over again.

[25] The prosecution asserts that Rosario's testimony is credible because she had no reason to be wary of using the bathroom at Flores' house because she had visited the house when her sister had lived there, and she did not know that Flores was alone inside the house. Moreover, even if Rosario wanted to stop at Flores' home to use the bathroom, she did not consent to Flores' sexual advances, and any inconsistencies in Rosario's testimony were considered and resolved by the jury.

[26] Section 25.40 of Title 9 GCA states: "The testimony of a victim need not be corroborated in prosecutions under §§ 25.15 through 25.35." 9 GCA § 25.40 (1998). While Flores expressly recognizes section 25.40 and does not the challenge the soundness or validity of this non-corroboration statute, he asserts that the absence of such corroboration with regard to Rosario's testimony justifies a holding of insufficient evidence.

[27] However, evidence of corroboration was presented at trial, as the trial testimony of witnesses Blas, Sablan and Lewis corroborated portions of Rosario's testimony about the Feb. 16, 2001 incident. First, Rosario testified that she needed to use a bathroom and entered Flores' house through the kitchen door and used the bathroom. Blas testified that Rosario went to use the restroom at Flores' house, while Sablan testified that Rosario left the truck and went to Flores' house.

[28] Second, Rosario testified that Flores said he told Blas and Sablan to leave. Blas testified that Flores said that Rosario gave permission for them to leave and wait at the church, and that Flores would take her there. Sablan testified that Flores asked them to leave, go to the church, and wait for Rosario there.

[29] Third, Rosario testified that after she left Flores' house she ran to Lewis' house and told both Lewis and his mother that she was almost raped. Lewis testified that Rosario said she ran from the Flores' residence, that "[s]he was being held against her will" and "had to fight her way loose . . . to get away." Tr. vol. II, p. 65 (Trial, June 5, 2002).

[30] Finally, Rosario testified that when she later met up with Blas and Sablan she yelled at Blas, "Why did you leave me? He almost raped me." Tr. vol. I, p. 25 (Trial, June 4, 2002). This testimony was

corroborated by both Blas and Sablan, as both men testified that Rosario said Flores had almost raped her.

[31] Guam law does not require corroboration of a victim's testimony; thus, Rosario's testimony need not be corroborated. *See* 9 GCA § 25.40. Even in light of this statute, there was evidence presented at trial which corroborates Rosario's testimony. Therefore, we reject Flores' argument that lack of corroboration justifies a holding of insufficient evidence.[3]

C. Missing Witness Instruction

[32] Flores' second argument is that the trial court abused its discretion in refusing to permit the use of the missing witness instruction because of the following: Blas testified that a prosecution investigator doubted his account of the February 16, 2001 incident; Rosario testified that she changed her written statement during an interview with a prosecution investigator; and the prosecution did not call any of its investigators to the witness stand. Consequently, Flores maintains that the jury should have been told that they could make the presumption that the prosecution's investigators would have undercut the prosecution's position. However, Flores concedes that giving the missing witness jury instruction is within the trial court's discretion.

[33] In rebuttal, the prosecution asserts that the missing witness instruction was properly refused since the testimony of prosecution investigators is not part of the record, and thus, any irregularity in the trial requiring taking testimony outside the record, must be through collateral attack. The prosecution also argues that the testimony of Attorney General Investigator Anthony Blas ("Investigator Blas") is hearsay, and the missing witness instruction is inappropriate since Flores could have called Investigator Blas to testify.

[34] The missing witness instruction is one within the sound judicial discretion of the trial judge who must decide whether in all the circumstances shown it is reasonable for the jury to be permitted to draw an adverse inference from one party's failure to call a witness peculiarly available to him.

Morrison v. United States, 365 F.2d 521, 524 (D.C. Cir. 1966). Further, we have stated that a court

[3] Furthermore, the trial court acknowledged this presence of corroboration in its July 29, 2002 Decision and Order, noting that "[t]he testimony of Sablan and Blas establish that the victim and Defendant were alone in the Defendant's home in the early morning hours of Feb. 16, 2001," because "Sablan and Blas testify that the Defendant told them to leave the house and go wait for the victim at a nearby church -- which, when viewed in the light most favorable to the verdict, establishes the element of intent on Defendant's part" -- and "Sablan, Blas and Lewis also testified that they found the victim upset and crying after she had left the Defendant's house." Appellant's Excerpts of Record, p. 19 (Decision and Order, July 29, 2002).

abuses its discretion when there is a "definite and firm conviction" that the trial court "committed clear error." *Tuncap*, 1998 Guam 13, at ¶ 12. In its refusal to give the missing instruction, the trial court noted that "there are perils in giving that instruction if you'll read both that and Section 25. 40. It may run contrary to that particular provision." Tr. vol. IV, p. 26 (Hearing on Proposed Jury Instructions and Jury Instructions, June 7, 2002). In making this statement, the court appeared to accept the prosecutor's argument that allowing this instruction would "create a conflict between the jurors" because the instruction permits a jury to draw a negative inference from a party's failure to call a witness to testify, while section 25.40 of Title 9 GCA expressly states that victim's testimony need not be corroborated. Tr. vol. IV, pp. 8-9 (Hearing on Proposed Jury Instructions and Jury Instructions, June 7, 2002). The trial court's exercise of its "sound judicial discretion," *Morrison*, 365 F.2d at 524, in refusing the missing witness instruction does not constitute "clear error of judgment in its conclusion" because the refusal was based on a concern that the instruction would run "contrary" to the non-corroboration language of section 25.40. *Tuncap*, 1998 Guam 13 at ¶ 12.

[35] Moreover, the trial court accommodated Flores' concerns by allowing him to raise, during closing arguments, the issue of Investigator Blas' absence on the witness stand. Thus, this information had been made available to the jury members for their consideration.

[36] In light of the above, the trial court's refusal to give the missing witness instruction did not constitute an abuse of its discretion since the refusal was not "clearly against the logic and effect of the facts as are found.'" *Tuncap*, 1998 Guam 13 at ¶ 12 (quoting *Int'l Jensen*, 4 F.3d at 822).

IV.

[37] We conclude first that there is sufficient evidence to uphold Flores' conviction for Attempted Third Degree Criminal Sexual Conduct (As a Second Degree Felony). In doing so, we reject Flores' argument that section 25.25 of Title 9 GCA be interpreted in the conjunctive sense. We believe requiring proof of all three circumstances in subsections (1), (2) and (3) of section 25.25(a) would lead to an absurd result. Consequently, we hold that evidence of force alone, under subsection (2), is enough to convict under section 25.25. As review of the evidence presented to the jury reveals that there was sufficient evidence

to support each element of the charge, we affirm Flores' conviction of Attempted Third Degree Criminal Sexual Conduct (As a Second Degree Felony).

[38] We further conclude that the trial court did not abuse its discretion in refusing to give the missing witness instruction. The trial court refused on the ground that it permits a jury to draw a negative inference from a party's failure to call a witness to testify, although section 25.40 of Title 9 GCA expressly states that victim's testimony need not be corroborated. The court's refusal to give the instruction was not clearly against logic, and thus, was not an abuse of discretion.

Accordingly, the judgment is **AFFIRMED**.