IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

DUANE DIEGO,
Defendant-Appellant.

Supreme Court Case No. CRA12-020
Superior Court Case No. CF0398-07

OPINION

Cite as: 2013 Guam 15

Appeal from the Superior Court of Guam
Argued and submitted on February 18, 2013
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.

TORRES, J.:

[1] Defendant-Appellant Duane Diego appeals his conviction for criminal sexual conduct, kidnapping, and various related charges. At trial, the victim, A.M.,[1] was unable to identify Diego as her attacker; but while still on the witness stand, she was able to select his picture from the same photo array she previously used to identify him shortly after the attack. Diego challenges the admission into evidence of A.M.'s out-of-court identification, the jury instructions on the kidnapping charges, and the denial of his motion for judgment of acquittal. For the following reasons, the trial court's decisions were not erroneous, and Diego's conviction is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] A.M., a 20-year-old Japanese student, arrived at the McDonald's in Tumon on the evening of August 12, 2007, to meet a friend. A.M. arrived at approximately 6:00 p.m., ordered a burger, and sat and waited for her friend. While she waited, a bus driver from the red trolley route she often rode asked to join her. She consented, and they sat and talked. At approximately 6:35 p.m. and with no word from her friend, A.M. decided to return to the Guam Reef Hotel where she was residing and working during a year-long internship with the hotel. It was raining outside, and the bus driver offered to give her a ride back to the Guam Reef Hotel. A.M. agreed. She sat behind the driver's seat as the bus drove past the Guam Reef Hotel and to the parking lot of the Okura Hotel. Once there, the bus driver pulled the shade down and instructed her to go to

[1] Pursuant to Guam Rules of Appellate Procedure Rule 3(d)(3)(B), we shall refer to the victim by initials only. *See* Guam R. App. P. 3(d)(3)(B) ("All motions, briefs, opinions, and orders of the court shall refer to . . . a victim of a sex crime . . . by initials only.").

the back of bus. A.M. was hesitant, but the driver blocked her path and pushed her shoulder to the back of the bus. Once in the back, the driver sexually assaulted her. He dropped her off at the Westin bus stop at approximately 7:10 p.m. A.M. testified that she boarded the bus about 6:40 p.m.

[3] A.M. called a friend and went straight to her room to take a shower. At approximately 9:00 p.m. that same night, A.M. and an adult who oversees the student interns went to the police. A.M. described her attacker as "kind of fat" with a mustache and a ponytail. Transcripts ("Tr.") at 62 (Jury Trial – Day 1, Aug. 23, 2010). She stated the bus was a LamLam tour bus with TVs, and it had an A4-sized placard that read "SandCastle Number 4" in the front window. *Id.* at 63.

[4] A.M. testified that she participated in two showups[2] with two different suspects but did not identify either of them as her attacker. She informed the police after the second showup that her attacker was white. On August 21, a police officer came to the Guam Reef Hotel to present A.M. a photo line-up. A.M. indicated in the Photographic Line Admonition form that she knew "his face and [i]t's Number 3 [b]ecause [she] met him 3-5 times and [she] talked with him at least 1 hour." *Id.* at 74 (noting that this is the statement A.M. wrote on the back of the photo array). At trial, she testified that Number 3 was her attacker, but could not identify the man who was Number 3 in the photo—Duane Diego—in the courtroom even though he was sitting at the defense table.

[5] No physical evidence was recovered from the bus or from A.M. Supervisors and other bus drivers testified that Diego was assigned to the bus labeled "Sand Castle Number 4" on the night of the attack. Tr. at 63 (Jury Trial – Day 1); Tr. at 47-48 (Jury Trial – Day 2, Aug. 24,

[2] A showup is a "pretrial identification procedure in which a suspect is confronted with a witness to or the victim of a crime. Unlike a lineup, a showup is a one-on-one confrontation." *Black's Law Dictionary* 1413 (8th ed. 2004).

2010)). The photo array featured six persons with round faces and thin mustaches; Diego had a lighter complexion than the other persons in the array. Shortly after the attack, Diego was terminated from his bus driver position because he did not remain on standby in the parking lot near the Sand Castle on the night of the incident and because he used the bus without authorization, which resulted in a serious incident. Tr. at 50 (Jury Trial – Day 2).

[6] A jury found Diego guilty on a number of charges including first and second degree criminal sexual conduct, kidnapping, and felonious restraint. The judge sentenced him to twenty years imprisonment. Diego timely filed a notice of appeal.

II. JURISDICTION

[7] This court has jurisdiction over an appeal from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-3 (2013)); 7 GCA §§ 3107, 3108(a) (2005); 8 GCA § 130.15(a) (2005).

III. STANDARD OF REVIEW

[8] Evidentiary rulings which infringe on constitutional rights are reviewed *de novo*. *See People v. Kitano*, 2011 Guam 11 ¶¶ 16-17. Whether a pretrial identification procedure was impermissibly suggestive is reviewed *de novo*. *People v. Carlos*, 41 Cal. Rptr. 3d 873, 876 (2006).

[9] "[W]e review jury instructions *de novo* when they are challenged as a misstatement of the law." *Guam Top Builders, Inc. v. Tanota Partners*, 2012 Guam 12 ¶ 9 (citing *People v. Songeni*, 2010 Guam 20 ¶ 9 & n.1). The trial court's jury instructions are reviewed for plain error where no objection to the instructions was made at trial. *People v. Felder*, 2012 Guam 8 ¶ 8 (citing *People v. Perry*, 2009 Guam 4 ¶ 9). A denial of a motion for judgment of acquittal is

reviewed *de novo*. *People v. Tennessen*, 2009 Guam 3 ¶ 10 (citing *People v. Jung*, 2001 Guam 15 ¶ 21).

IV. ANALYSIS

[10] Diego challenges the admission into evidence of A.M.'s out-of-court identification, the jury instructions on the kidnapping charge, and the denial of his motion for judgment of acquittal. Appellant's Br. at 1 (Sept. 17, 2012).

A. Admission of Photo-Array

[11] Diego appeals the trial court's denial of his motion to strike A.M.'s out-of-court identification of Diego, arguing that the photo array from which he was identified as A.M.'s attacker was impermissibly suggestive. *Id.* at 6, 8.

[12] Diego argues the motion to strike the out-of-court identification and related exhibits are essentially a motion to suppress, and motions to suppress are reviewed *de novo*. *Id.* at 5-6. He argues further that evidentiary rulings which infringe on constitutional rights are reviewed *de novo*. *Id.* at 6 (citing *Kitano*, 2011 Guam 11 ¶¶ 16-17). Plaintiff-Appellee People of Guam ("the People") disagree and argue the motion is actually a motion to strike and believe it is distinguishable from a motion to suppress, because the suppression motion must be made before trial, which Diego did not do, and therefore he is precluded from challenging it. Appellee's Br. at 20-21 (Oct. 18, 2012). In the alternative, the People argue the motion should be reviewed under an abuse of discretion standard as an ordinary evidence issue. *Id.* at 12.

[13] We view Diego's appeal of the admission of the testimony and the array as a constitutional challenge, because he argues that the photo array was unduly suggestive and therefore violated his right to due process. Claims of constitutional violations, including due

process challenges, are reviewed *de novo*. *Kitano*, 2011 Guam 11 ¶ 17 (quoting *United States v. Gordon*, 290 F.3d 539, 546 (3d Cir. 2002)); *Carlos*, 41 Cal. Rptr. 3d at 912.

[14] In *Simmons v. United States*, the U.S. Supreme Court laid out the governing test to determine whether a defendant's due process rights have been violated where a witness makes an in-court identification stemming from previous exposure to a suggestive photographic array:

> [W]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

390 U.S. 377, 384 (1968).

[15] In *Neil v. Biggers*, the Court revisited the *Simmons* test, stating that "with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself." 409 U.S. 188, 198 (1972). The Court went on further to hold that unnecessary suggestiveness alone does not require exclusion of evidence. *Id.* at 198-99. In that instance, the "central" question is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Id.* at 199.

[16] Although the cases leading up to *Biggers* generally concerned the admissibility of an in-court identification stemming from prior exposure to a suggestive out-of-court identification, *Biggers* makes clear that the same standard applies for determining the admissibility of testimony concerning the out-of-court identification itself.[3] *See id.* at 198. In other words, the admissibility of an out-of-court identification turns on whether the procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable

[3] In footnote 5 of the Court's opinion, the Court noted that it was irrelevant whether the victim in that case actually made an in-court identification. *Biggers*, 409 U.S. at 198 n.5; *see also Carlos*, 41 Cal. Rptr. 3d at 876 (applying *Simmons* standard even though there was no in-court identification of defendant).

misidentification." *Id.* at 197 (quoting *Simmons*, 390 U.S. at 384); *see also Carlos*, 41 Cal. Rptr. 3d at 876 (same). "The application of this rule depends on the circumstances of each case, including whether the suggestiveness made the defendant 'stand out' from others in the lineup and whether the identification procedure was unnecessary." *Carlos*, 41 Cal. Rptr. 3d at 876 (citations omitted).

[17] With these principles in mind, we turn to Diego's particular claim, that the photo array from which he was identified was unduly suggestive and violated his right to due process.

[18] Diego argues his photo "definitely stood out" from the others in the array because he had the lightest complexion and the other photos had the "contrast altered to make the individuals appear darker." Appellant's Br. at 10. The trial court determined that despite Diego having the lightest complexion of the six photographed individuals, the array was not unduly suggestive. RA, Dec. & Order at 5 (Sept. 7, 2010). We agree. As noted by the trial court, Diego "does share many physical characteristics with those other persons pictured." *Id.* Each of the individuals in the array had round faces, short hair, and thin moustaches. *See* Tr. at 73 (Jury Trial – Day 1). Additionally, the photographs were uniform in size, shape, and background and included no identification other than numbers. *Id.*; *see also* Appellant's Br. at 9-10.

[19] While Diego did have the lightest complexion and the contrast may have been darker on two of the photos, we cannot say these small differences rendered the photo array impermissibly suggestive. "The due process clause does not require law enforcement officers to scour about for a selection of photographs so similar in their subject matter and composition as to make subconscious influences on witnesses an objective impossibility." *United States v. Bubar*, 567 F.2d 192, 199 (2d Cir. 1977) (citing *United States v. Harrington*, 490 F.2d 487, 494-95 (2d Cir. 1973)).

[20] Because we hold the photo array did not violate Diego's due process rights because it was not impermissibly suggestive,[4] we need not reach whether the identification was reliable under the totality of the circumstances test and the factors set forth in *Biggers*. *See Biggers*, 409 U.S. at 199; *Bubar*, 490 F.2d at 199. That being said, we note that prior to viewing the photo array, A.M. participated in two different showups, and she did not identify either man as her attacker. Tr. at 66-67 (Jury Trial – Day 1). The fact that A.M. made no identification prior to her selection of Diego from the photo array lends credibility to her identification, "as she had previously resisted whatever suggestiveness inheres in a showup." *Biggers*, 409 U.S. at 201.

[21] Finally, we address Diego's argument that A.M. never definitively identified him as her attacker. He argues the questioning by the police regarding the photo array was "vague," her answer was "cryptic" because she only replied that she had seen the person in the array three to five times, and she failed to identify Diego in court. Appellant's Br. at 10-11. While those contentions are not completely incorrect, A.M. conclusively identified Diego when on the witness stand via the photo array. She replied "Number 3" when asked if she was able to pick

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[4] In his reply brief, Diego argues that the police officer who presented the photo array to A.M. "informed her that a suspect was one of the six individuals in the line up," and that this fact alone rendered the photo array unduly suggestive. Reply Br. at 4 (Nov. 5, 2012). During cross-examination, the following exchange took place between defense counsel and A.M.:

> Q: And did the officer tell you that there was a suspect included in those pictures?
>
> A: Yes.
>
> Q: He did?
>
> A: He ma--
>
> The first officer told me to look at the picture, and then they ask me if I know any guy in this picture.
>
> Q: And what did you say?
>
> A: I told him . . . told him that that's the bus driver, the number 3.

Tr. at 80 (Jury Trial – Day 1).

Although initially, A.M. responded "Yes" to defense counsel's question, when he followed up on her response, she did not confirm that the officer indeed indicated that one of the six photographed individuals was a suspect. In light of this testimony as a whole, we do not find her initial one-word response to be conclusive evidence that the police officer in fact informed A.M. that one of the individuals was a suspect in the case.

out the bus driver – her attacker – from the photo array when it was presented to her approximately ten days after the attack. Tr. at 73 (Jury Trial – Day 1).[5] On cross-examination, she again confirmed that when the police presented her with the photo array, she identified photo number 3 as the bus driver. *Id.* at 80 ("I told him . . . told him that that's the bus driver, the number 3."). Based on these statements, the jury could infer that A.M. identified the individual in photo number 3 as her attacker, and that she made this identification shortly after the attack and again on the witness stand. Diego's argument is without merit.

B. Kidnapping Jury Instructions

[22] Diego argues the trial court committed reversible error by failing to instruct the jury that in order for kidnapping to rise to a separate offense, the movement must not be incidental to another crime and must be substantial. Appellant's Br. at 13-14.

[23] While normally we review the trial court's formulation of jury instructions for abuse of discretion, we review the instructions *de novo* when they are challenged as a misstatement of the law. *Guam Top Builders*, 2012 Guam 12 ¶ 9 (citation omitted); *see also Songeni*, 2010 Guam 20 ¶ 9 n.1 ("Traditionally, courts review the question of whether a proffered jury instruction misstated the elements of a charged crime under a *de novo* standard." (citations omitted)). However, where, as in Diego's case, the defendant fails to object to the jury instructions at trial, we will not reverse absent plain error.[6] *Felder*, 2012 Guam 8 ¶ 8 (citing *Perry*, 2009 Guam 4 ¶ 9). "Plain error is highly prejudicial error." *Id.* ¶ 19 (quoting *People v. Quitugua*, 2009 Guam 10 ¶ 11). The plain error standard is met when: "(1) there was an error; (2) the error is clear or

[5] Diego's picture was labeled number 3 in the photo array. *See* Tr. at 73 (Jury Trial – Day 1).

[6] Guam statutory law is straightforward regarding jury instructions. Title 8 GCA § 90.19(c) provides that opportunity to object to proposed instructions shall be given, but "no party may assign as error any portion of an instruction or omission therefrom unless he objects thereto stating distinctly the matter to which he objects and the grounds of his objection." 8 GCA § 90.19(c) (2005).

obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Id.* (quoting *People v. Quitugua*, 2009 Guam 10 ¶ 11) (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). We need not decide whether the alleged instructional error is more properly viewed as a misstatement of the elements of the crime or as a formulation error, because either way, reversal is not required.

[24] Diego argues the elements of the statutory offense were not properly defined, specifically the word "substantial." He contends, based on a California Supreme Court case, when movements are "merely incidental" to the commission of the crime, the rule of kidnapping does not apply. Appellant's Br. at 15 (quoting *People v. Daniels*, 459 P.2d 225, 238 (Cal. 1969)). The People argue the instruction did not misstate the law because it tracked the language of the kidnapping statute, and it was unnecessary to further define "substantial distance" because its meaning was plain. Appellee's Br. at 25. Additionally, the People argue that applying a three-part test to the facts of the case, Diego's movement of A.M. amounted to a separate crime. *Id.* at 23-27.

[25] The trial court in this case properly stated the elements of the crime. Guam's kidnapping statute reads: "A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found . . . to facilitate commission of any felony . . . ." 9 GCA § 22.20(a)(2) (2005). The jury instruction in question stated:

> The People must prove beyond a reasonable doubt that the Defendant, Duane P. Diego: (1) On or about the 12th day of August, 2007; (2) In Guam; (3) Intentionally and unlawfully removed another, namely, [A.M.]; (4) A substantial distance from the vicinity where she was found; (5) To facilitate the commission of a felony, to wit, Criminal Sexual Conduct.

Tr. at 34-35 (Jury Instructions, Aug. 27, 2010).

[26] The instruction, on its face, mirrors the kidnapping statute. The instruction clearly states "[i]ntentionally and unlawfully removed another . . . [a] substantial distance," *id.* at 35, which is the same language used in 9 GCA § 22.20(a). *See* 9 GCA § 22.20(a); *cf. People v. Jones*, 2006 Guam 13 ¶ 33 (warning "judges [to] be diligent in preparing thorough and comprehensive jury instructions which track the requisite statutory elements."); *Demapan*, 2004 Guam 24 ¶ 20 (finding no plain error where trial court's instructions accurately tracked language of statute and were sufficient to inform jury as to elements that the People needed to prove).

[27] Furthermore, the trial court "need not define common terms that are readily understandable by the jury." *United States v. Hicks*, 217 F.3d 1038, 1045 (9th Cir. 2000); *see also United States v. Dixon*, 201 F.3d 1223, 1231–32 (9th Cir. 2000) ("[T]he court did not err by failing to define 'commercial advantage' and 'private financial gain' because these are common terms, whose meanings are within the comprehension of the average juror."); *United States v. Moore*, 921 F.2d 207, 210 (9th Cir. 1990) ("Since 'violence' is a concept within the jury's ordinary experience, there is no prejudice in failing to define it."). The word "substantial," as it is used in 9 GCA § 22.20(a), is a term readily understandable by the jury.

[28] Accordingly, the kidnapping instruction did not constitute a misstatement of the law because it not only included all of the essential elements of 9 GCA § 22.20(a)(2), but tracked the language of the statute. Moreover, we find no error in the formulation of the instruction. The element of removing another person a "substantial distance" was readily understandable by the jury; thus, further definition was unnecessary as the language of the instruction was adequate to guide the jury's deliberations. There being no actual error in the instruction, Diego fails the first

prong of the plain error test. *See Felder*, 2012 Guam 8 ¶ 19 (citations omitted). Therefore, we affirm the trial court's instruction.[7]

C. Motion to Acquit

[29] Diego also appeals the trial court's denial of his motion for judgment of acquittal. Appellant's Br. at 17. A defendant may move for judgment of acquittal pursuant to 8 GCA § 100.10. The statute states that the trial court "shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." 8 GCA § 100.10 (2005).

[30] We review the trial court's denial of a motion for judgment of acquittal *de novo*. *People v. George*, 2012 Guam 22 ¶ 47 (citing *People v. Song*, 2012 Guam 21 ¶ 26). In *George*, we held:

> [A] court determines whether a motion for judgment of acquittal should be granted by applying the same test used when the sufficiency of the evidence is challenged. Thus, on appeal we review the evidence in the light most favorable to the People and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id. ¶ 49 (citing *Song*, 2012 Guam 21 ¶ 27).

[31] Diego believes an acquittal is necessary because A.M. could not identify her attacker in open court, police found no physical evidence linking Diego to the crime, and A.M.'s description of her attacker and of the bus shortly after the incident were inconsistent with the testimonies of other witnesses. Appellant's Br. at 18. Diego also argues the People presented no direct evidence showing he intended to kidnap A.M. *Id.* He states, "intent may be proved by circumstantial evidence based on a defendant's conduct leading up to the crime." *Id.* at 19

[7] Diego's argument that the evidence demonstrates that the movement of A.M. was merely incidental to the criminal sexual conduct is akin to an argument that the evidence was insufficient to support the element of "substantial distance" required by the kidnapping charge. Thus, we address this argument in the motion to acquit section below.

(quoting *People v. Anastacio*, 2010 Guam 18 ¶ 33). Diego then points to certain parts of the evidence—such as the testimony that the driver and A.M. talked for thirty minutes before he offered her a ride, that A.M. accepted the ride, and that the driver eventually dropped A.M. off at a hotel bus stop—to support his contention that the People failed to prove he intended to kidnap A.M. *Id.* at 18. Finally, Diego argues that the evidence was insufficient to support the "substantial distance" element of the kidnapping charge. *Id.* at 19.

[32] The People counter that parts of A.M.'s story were correct, and the jury must decide on the discrepancies and possible kidnapping intent. Appellee's Br. at 28. The trial court agreed with the People, stating it "cannot say that a rational trier of fact *could not* find that the evidence produced here is sufficient to support a conviction." RA, Dec. & Order at 7 (Sept. 7, 2010).

[33] We begin by reviewing the evidence in total under 8 GCA § 100.10 in the light most favorable to the People. *George*, 2012 Guam 22 ¶ 47. The trial court's determination that the evidence presented was sufficient to support a conviction stands firm. Although A.M. was unable to point out Diego as her attacker in open court, her photo array identification of Diego was unequivocal in both instances. Furthermore, not mentioned in the briefs or the trial court's decision and order is evidence that on the night of the incident, Diego was assigned to the bus A.M. testified was used in the attack. A.M. testified the bus she was attacked on was Sandcastle 4, and a supervisor testified Diego was assigned to that bus on the night of the incident. Tr. at 63 (Jury Trial – Day 1); Tr. at 47-48 (Jury Trial – Day 2). Diego was also fired from his job as a bus driver because he used a bus "for other than its intended purpose" and was dishonest. Tr. at 50 (Jury Trial – Day 2). In addition, one witness testified that Diego had a thin moustache at the time of the incident and had lost a little weight since then. Tr. at 86 (Jury Trial – Day 2). The

jury could have used these facts to determine the identity of A.M.'s attacker in light of her failed in-court identification.

[34] Additionally, the evidence was sufficient for a rational trier of fact to have found that Diego intended to kidnap A.M. The jury could have determined that Diego intended to kidnap A.M. because his actions prior to the crime—luring A.M. onto the bus and driving past her stop—could be viewed as circumstantial evidence showing intent. *See Anastacio*, 2010 Guam 18 ¶ 33.

[35] Finally, a rational trier of fact could have determined beyond a reasonable doubt that Diego moved A.M. a substantial distance, thus satisfying that element of the kidnapping charge. Diego argues that because A.M. willingly accepted the bus driver's offer of a ride and A.M. did not wish to end the encounter until after the bus driver had pulled into the parking lot where the assault took place, any movement of A.M. occurred within the bus itself (i.e., from the front of the bus to the back of the bus) and, thus, was not substantial. Appellant's Br. at 16-17; Reply Br. at 5-6. Diego cites to *State v. Cabral*, 619 P.2d 1163 (Kan. 1980), to support his contention that the movement of A.M. was merely incidental to the criminal sexual conduct. Appellant's Br. at 17; Reply Br. at 6. We do not find *Cabral* to be analogous to this case. In *Cabral*, the defendant raped the victim in a parked automobile. 619 P.2d at 1165. The defendant argued that the evidence was insufficient to support a conviction of kidnapping as a crime separate and distinct from forcible rape because the confinement of the victim in the automobile was incidental to and a necessary part of the force used in the commission of forcible rape. *Id.* at 1165-66.

[36] The Supreme Court of Kansas agreed with the defendant, pointing to the particular facts of the case:

> We have concluded that, under all the factual circumstances presented in the record, a separate and independent crime of kidnapping was not established.

> Here the defendant and his victim had been together all evening, driving around Hutchinson and stopping at various places by mutual consent. After leaving the first park and on the way to the dormitory where the victim resided, the defendant simply turned into the second park, locked the door, and proceeded to rape his victim. When forcible rape occurs in an automobile, of necessity, some confinement of the woman is a necessary part of the force required in the commission of the rape. Such a confinement is of a kind inherent in the nature of forcible rape and incidental to the commission of the rape.

Id. at 1166.

[37] First, the kidnapping element at issue in *Cabral* was confinement, not "substantial distance." Even if the *Cabral* analysis could be useful in the "substantial distance" context, the facts in the present case are significantly different from those in *Cabral*. Although A.M. willingly accepted the ride from Diego, she did not agree to detour or make any stops along the way to her hotel. Under these circumstances, a rational trier of fact could have determined beyond a reasonable doubt that taking A.M. to the Okura parking lot rather than directly to the Guam Reef Hotel, her desired destination, constituted movement of A.M. a "substantial distance," satisfying this element of the kidnapping charge. This is so even if another trier of fact could have found differently. *Song*, 2012 Guam 21 ¶ 58 (citing *People v. Jesus*, 2009 Guam 2 ¶ 61).

[38] "It is not the province of the court, in determining [a motion for a judgment of acquittal], to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury." *George*, 2012 Guam 22 ¶ 51 (alteration in original) (quoting *Song*, 2012 Guam 21 ¶ 29). Instead, "[w]hen ruling on a motion for judgment of acquittal, the trial court is concerned with the existence or nonexistence of evidence, not its weight . . . ." *Id.* (quoting *Song*, 2012 Guam 21 ¶ 29). Viewing the evidence in the light most favorable to the People, we hold that sufficient

evidence existed for a rational trier of fact to have found the aforementioned facts necessary to satisfy the elements in support of Diego's convictions.

V. CONCLUSION

[39] The trial court properly admitted the evidence concerning A.M.'s out-of-court identification of Diego because the photo array was not impermissibly suggestive. The trial court's jury instruction regarding the kidnapping charge contained no error. The essential elements were included, and further definition of the term "substantial" was unnecessary because it was readily understandable by the jury. Finally, the trial court's denial of Diego's motion for judgment of acquittal was proper because a rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt. For the reasons set forth above, we **AFFIRM** the trial court's judgment.

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Associate Justice

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Chief Justice