IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellant,

v.

ERVIN RIVAMONTE ENRIQUEZ,
Defendant-Appellee.

Supreme Court Case No. CRA13-006
(consolidated with CRA13-011)
Superior Court Case No. CF0231-11

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted November 6, 2013
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.[1]

CARBULLIDO, C.J.:

[1] Defendant-Appellee Ervin Rivamonte Enriquez appeals from a final judgment convicting him of one count of First Degree Criminal Sexual Conduct and one count of Second Degree Criminal Sexual Conduct. Enriquez argues the People provided insufficient evidence at trial to support a conviction of either count. Plaintiff-Appellant The People of Guam ("People") appeal from the post-conviction sentencing order. Enriquez was sentenced to fifteen years of imprisonment for the First Degree Criminal Sexual Conduct charge with five years suspended and five years of imprisonment for the Second Degree Criminal Sexual Conduct charge, to be served concurrently. The People contend the suspension of five years is statutorily impermissible. For the reasons set forth below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Defendant-Appellee Ervin Rivamonte Enriquez was indicted on charges of First Degree Criminal Sexual Conduct ("CSC") and Second Degree CSC. During the trial, at the close of the People's case-in-chief, Enriquez moved for a judgment of acquittal. The motion was argued by the parties and denied by the trial court. The jury returned a guilty verdict for both First Degree CSC as a First Degree Felony and Second Degree CSC as a First Degree Felony. Enriquez received a sentence of fifteen years for the First Degree CSC charge and five years for the Second Degree CSC charge with the sentences to be served concurrently. Of the fifteen-year imprisonment term, five years were suspended by the trial court. The People appealed Enriquez's sentence, alleging that the trial court erred when it suspended five years of the fifteen-

[1] The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

year minimum imprisonment term for the First Degree CSC conviction. Subsequently, Enriquez appealed both his convictions on insufficiency of the evidence grounds. The appeals were consolidated and proceeded under case number CRA13-006.

[3] The charges against Enriquez originate from a single incident involving his stepdaughter, J.T., in the front seat of his car. In 2011, nine-year-old J.T. was living with her mother, her younger sister M.T., her stepfather Enriquez, and her grandparents. At the time of the incident, J.T. was in the third grade, M.T. was in the second grade, and both children attended the same school.

[4] On the day of the incident, Enriquez picked the girls up from school. J.T. sat in the front seat, and M.T. sat in the back. On the way home, Enriquez stopped at his Uncle Rufo's work to give him a ride home. Uncle Rufo worked at the Tumon Driving Range. Enriquez parked the car in the parking lot and instructed M.T. to go in and get Uncle Rufo. M.T. would usually go get Uncle Rufo during these pick-ups; the trip from the car to Uncle Rufo's work and back averaged about five minutes.

[5] J.T. testified that once M.T. left the car, Enriquez placed his hand under her clothes and touched her vagina. During trial, J.T. stated that Enriquez "just touched" her vagina. Transcript ("Tr.") at 124 (Jury Trial, Sept. 13, 2012). However, two days after the incident, J.T. was taken to Dr. Ellen Bez, a rape management doctor at Healing Hearts Crisis Center. During the meeting with Dr. Bez, J.T. demonstrated that while Enriquez was touching her vagina, he moved his fingers back and forth in a rubbing motion.

[6] Upon the return of Uncle Rufo and M.T. to the car, the touching stopped, and Enriquez drove everyone home. J.T. did not mention the incident to anyone that evening or the next day.

Two days after the encounter, J.T. approached Ms. Cruz, her teacher, and explained what happened in the front seat of the car.

[7] Ms. Cruz followed the mandatory reporting procedures by making an official report and taking J.T. to see the school nurse. Child Protective Services ("CPS") was notified, and a representative arrived as school was letting out. CPS then transported J.T. to Healing Hearts for an interview and examination; however, Dr. Bez was gone for the afternoon. J.T. returned to Healing Hearts with her mother the next day for a more extensive interview and examination with Dr. Bez.

[8] It was at this time J.T. gave a detailed account of the event to Dr. Bez. J.T. explained the back and forth rubbing motion on her labia and stated that she felt pain while her vagina was being touched. During the visit, Dr. Bez conducted a physical examination and noted redness on the inside of J.T.'s labia. The finding for the cause of the redness was non-specific, meaning Dr. Bez could not determine whether Enriquez's fingers were the source.

[9] Dr. Bez further testified as to the sensitivity of prepubescent girls. Dr. Bez explained that the hymen and the tissues that protect the clitoris are more sensitive until they become estrogenized during puberty. She stated, "A pre-pubertal child will have more vascular . . . the membrane's thinner, and it has more blood vessels, and it's more painful to touch." Tr. at 59 (Jury Trial, Sept. 13, 2012). Dr. Bez continued, "[J.T.] said it was painful to her . . . to touch, or to have that area manipulated in a pre-pubertal child, perhaps more than an adult, because that tissue's not estrogenized yet." *Id.*

II. JURISDICTION

[10] The Supreme Court of Guam has appellate jurisdiction of this matter pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-92 (2014)) and 7 GCA § 3107(b) (2005),

which state that the Supreme Court has jurisdiction over appeals from the Superior Court of Guam. Review upon final judgment is granted by 7 GCA § 3108(a) (2005). The defendant may appeal his conviction in accordance with 8 GCA § 130.15(a) (2005).

III. STANDARD OF REVIEW

[11] Enriquez raises the issue of insufficiency of the evidence to contest his conviction. "Where a defendant raised the issue of sufficiency of the evidence by a motion for judgment of acquittal, we review the trial court's denial of the motion *de novo*." *People v. Song*, 2012 Guam 21 ¶ 26; *People v. Anastacio*, 2010 Guam 18 ¶ 10. The reviewing court is not charged with making a determination as to the defendant's guilt. Rather, the court determines "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Song*, 2012 Guam 21 ¶ 26; *see also People v. George*, 2012 Guam 22 ¶ 49; *People v. Tennessen*, 2009 Guam 3 ¶ 14; *People v. Cruz*, 1998 Guam 18 ¶ 9. "In conducting this analysis, the People must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom." *Song*, 2012 Guam 21 ¶ 28 (quoting *State v. Sisk*, 343 S.W.3d 60, 65 (Tenn. 2011)) (internal quotation marks omitted). The evidence presented at trial is reviewed in "the light most favorable to the People." *Id.* ¶ 26.

[12] Issues of statutory interpretation are reviewed *de novo*. *Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 7; *Ada v. Guam Tel. Auth.*, 1999 Guam 10 ¶ 10.

IV. ANALYSIS

[13] Enriquez appeals from the denial of his motion for acquittal, challenging the sufficiency of the evidence to sustain either conviction. Appellee's Supplemental Br. at 5-6 (July 29, 2013). The Guam code provides for a judgment of acquittal as a matter of law if insufficient evidence is presented during trial. 8 GCA § 100.10 (2005). Each conviction is reviewed to make a

determination of the sufficiency of the evidence. The determination is based on whether the essential elements of the crime could have been found beyond a reasonable doubt by a rational trier of fact. *Tennessen*, 2009 Guam 3 ¶ 14. Consideration of the evidence is made with great deference to the prosecution. *Id.*

A. First Degree Criminal Sexual Conduct

[14] Title 9 GCA § 25.15 states, "A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with the victim and . . . the victim is under fourteen (14) years of age." 9 GCA § 25.15(a)(1) (2005). Sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." 9 GCA § 25.10(a)(9) (2005).

[15] First Degree CSC necessarily entails the element of penetration. 9 GCA § 25.15(a). The breach of any part of the vagina, including the labia majora, is sufficient to constitute penetration.[2] *United States v. Jahagirdar*, 466 F.3d 149, 154-55 (1st Cir. 2006); *People v. Lockett*, 814 N.W.2d 295, 307 (Mich. Ct. App. 2012); *People v. Karsai*, 182 Cal. Rptr. 406, 411 (Ct. App. 1982), *overruled on other grounds by People v. Jones*, 758 P.2d 1165, 1181 (Cal. 1988); *Jett v. Commonwealth*, 510 S.E.2d 747, 749 (Va. Ct. App. 1999) (en banc). Enriquez argues that the evidence presented at trial does not prove even the slightest occurrence of penetration. Appellee's Supplemental Br. at 12. He maintains that without a showing of the element of penetration, the First Degree CSC conviction was not supported by the evidence. *Id.*

[2] "The female external genitalia, starting with the outermost parts, are: 'the mons pubis, the labia majora et minora pudendi, the clitoris, vestibule, vestibular bulb and the greater vestibular glands. The term 'vulva' . . . includes all these parts.'" *Jett v. Commonwealth*, 510 S.E.2d 747, 749 (Va. Ct. App. 1999) (en banc) (quoting *Horton v. Commonwealth*, 499 S.E.2d 258, 261 (Va. 1998)).

[16] To support his claim, Enriquez refers to Virginia Supreme and Appellate Court decisions which discuss the element of penetration involving young victims. Enriquez argues the Virginia courts overturned convictions for a lack of sufficient evidence in similar instances. Appellee's Supplemental Br. at 14-16 (citing *Moore v. Commonwealth*, 491 S.E.2d 739, 741-43 (Va. 1997) (holding that although the victim stated the defendant rubbed her vagina with his penis, there was no additional evidence to suggest that the defendant breached the outer layers of her vagina); *Carter v. Commonwealth*, 2002 WL 31414761 (Va. Ct. App. Oct. 29, 2002) (ruling that the victim's testimony establishes contact, but does not establish penetration)).

[17] Alternatively, in *Jett v. Commonwealth*, a minor was taught how to use a hairbrush to touch her vagina. *Jett*, 510 S.E.2d at 748. The court stated that "[p]enetration may be proved by circumstantial evidence and is not dependent on direct testimony from the victim that penetration occurred." *Id.* (quoting *Morrison v. Commonwealth*, 391 S.E.2d 612, 612 (Va. Ct. App. 1990)). Although the victim's testimony did not establish penetration, her mother testified that her clitoris was often irritated. *Id.* at 749. The court considered this sufficient evidence of penetration because the clitoris is within the inner area of a woman's vagina. *Id.* at 749-50. Thus, the victim's testimony coupled with the medical evidence led to an affirmation of the conviction. *Id.* at 750.

[18] According to the People, the evidence cumulatively proves the element of penetration. Appellant's Supplemental Br. at 13-14 (Aug. 29, 2013). Evidence presented at trial showed that Enriquez and J.T. were alone in the front seat of his car and waiting for M.T. to return with Uncle Rufo. Tr. at 127 (Jury Trial, Sept. 13, 2012). J.T. testified that while in the car, Enriquez placed his hand under her shorts and touched her vagina. *Id.* at 124. Three days later, J.T. told Dr. Bez of the incident. According to Dr. Bez's testimony, J.T. demonstrated that Enriquez

placed his fingers on her vagina and rubbed back and forth. *Id.* at 55. J.T. explained that she felt scared and experienced pain during the incident in the car. *Id.* at 124.

[19] While evidence of sexual penetration must be present, there are no magic words that need to be stated at trial. The element of penetration may be inferred based on the totality of evidence. *Commonwealth v. Rodriguez*, 918 N.E.2d 865, 869 (Mass. App. Ct. 2009); *see also Commonwealth v. Fowler*, 725 N.E.2d 199, 203 (Mass. 2000) ("Penetration can be inferred from circumstantial evidence."); *Commonwealth v. Martino*, 588 N.E.2d 651, 655 (Mass. 1992) (reasonable and possible inferences may be drawn from largely circumstantial evidence).

[20] According to many jurisdictions, sexual penetration may be inferred when the victim experiences pain as a result of the sexual touching. *State v. Toohey*, 816 N.W.2d 120, 130-31 (S.D. 2012); *State v. Mathis*, 340 S.E.2d 538, 541 (S.C. 1986) (ruling that penetration had occurred when a six-year-old testified that she felt pain because of the defendant's penis on her genitals); *Swain v. State*, 629 So. 2d 699, 701 (Ala. 1993) ("[T]he victim's testimony that Swain had 'stuck' his penis between her legs and that it hurt is sufficient evidence from which the jury could have inferred that Swain had actually penetrated the victim's labia pudendum."); *Velazquez v. Commonwealth*, 557 S.E.2d 213, 220 (Va. 2002) (concluding that although the victim could not offer specific details, the fact that she experienced a sharp pain in her vagina area was sufficient to prove penile penetration).

[21] Dr. Bez testified that the hymen tissues as well as the tissues around the clitoris are more sensitive in pre-pubertal girls. Because the touching was painful to J.T., it suggests Enriquez touched the hymen tissues or the surrounding ones. The hymen and the clitoris are within the outer layers of the vagina, and a touching of these areas would constitute sexual penetration. 9 GCA § 25.10(a)(9) (sexual penetration is any intrusion, however slight). Thus, the associated

pain with the touching indicates a more sensitive area was touched, and it was not unreasonable for the jury to conclude from a finding of guilt that the pain was a result of penetration.

[22] Moreover, the standard of review is highly deferential to the prosecution in a post-conviction appeal. *Song*, 2012 Guam 21 ¶ 26; *People v. Tenorio*, 2007 Guam 19 ¶ 9. The reviewing court is not concerned with the weight of the evidence, but with its existence or non-existence. *George*, 2012 Guam 22 ¶ 51 ("[T]his standard remains constant even when the People rely exclusively on circumstantial evidence." (quoting *Song*, 2012 Guam 21 ¶ 29)). Here, the record is not devoid of corroborating evidence; the testimony of J.T. and Dr. Bez describing the incident coupled with the associated pain during the touching provides evidence of penetration. Upon review of the evidence, it is apparent that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Thus, the First Degree CSC conviction is upheld.

B. Second Degree Criminal Sexual Conduct

[23] Title 9 GCA § 25.20 states, "A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and . . . that other person is under fourteen (14) years of age." 9 GCA § 25.20(a)(1) (2005). Sexual contact is defined as the "intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." 9 GCA § 25.10(a)(8).

[24] The People point out that in cases where it is the victim's word against the defendant's, it is not for this court to assess the credibility of the witnesses. Appellant's Supplemental Br. at 16 (citing *State v. Moore*, 438 N.W.2d 101, 107-08 (Minn. 1989); *Kennedy v. Thomas*, 784 So. 2d

692, 698 (La. Ct. App. 2001) ("Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on review, even though the appellate court may feel that its own evaluations and inferences are as reasonable.")). Determining the credibility of the witness is the job of the fact-finding court. *People v. Perry*, 2009 Guam 4 ¶ 49. In *Perry*, the only direct evidence of the sexual assault was the victim's own testimony and her statements to a doctor. *Id.* ¶ 48. We concluded there that the jury must have found the victim's recitation of what happened at the crime scene to be "wholly credible" because the defendant was convicted on all accounts. *Id.* Upon reviewing the record, we determined that "the jury was free to judge for itself the weight of the evidence presented and the credibility of the testifying witnesses." *Id.* ¶ 49 (quoting *People v. Moses*, 2007 Guam 5 ¶ 21).

[25] At trial, Enriquez testified that he never touched J.T. on her vagina. Tr. at 33 (Jury Trial, Sept. 17, 2012). He suggested that the incident was a misconstrued tickle fight, noting that he tickled J.T. four times on the day in question. *Id.* at 48. Enriquez claims to have grabbed J.T.'s leg as he was teasing her about not being able to see a movie with the family. *Id.* at 32-33. He contends, therefore, that he did not gain any gratification from the touching because it was not sexual in nature, but playful in nature. Appellee's Supplemental Br. at 16-17. Thus, Enriquez maintains that he should not be convicted of Second Degree CSC because touching for the purpose of sexual arousal or gratification is necessary for the crime. *Id.* at 17.

[26] J.T. consistently recounted the same set of facts to multiple persons on different occasions. She spoke of the incident to her teacher during school, to Dr. Bez at Healing Hearts, and to the court during her testimony. Tr. at 112-36 (Jury Trial, Sept. 13, 2012). J.T. stated that Enriquez placed his hands under her shorts and touched her vagina. *Id.* at 123-24. She demonstrated to Dr. Bez a back and forth movement on her vagina when asked what Enriquez

did with his hand. *Id.* at 55. While being cross-examined, J.T. was asked twice if Enriquez tickled her during the time of the incident, and J.T. responded in the negative both times. *Id.* at 129.

[27] The jury was presented with two differing versions of what transpired in the front seat of Enriquez's car. It may be presumed that the jury in this case assessed the credibility of the witnesses and weighed the evidence. And because Enriquez was found guilty of Second Degree CSC, we may conclude that the jury found the victim's testimony more credible than Enriquez's. Moreover, as stated earlier, it is not for appellate courts to assess the credibility of witnesses unless given a reason. *Perry*, 2009 Guam 4 ¶ 49. Upon review of the record, there is no reason to doubt the truthfulness of the victim's statements.

[28] In determining whether actions are done for sexual arousal or gratification, the trier of fact may infer motivation based on the defendant's actions. *State v. Cobb*, 610 N.E.2d 1009, 1013 (Ohio Ct. App. 1991). If the trier of fact finds that the "defendant was motivated by desires of sexual arousal or gratification, and that the contact occurred, then the trier of fact may conclude that the object of the defendant's motivation was achieved." *Id.* The evidence at trial showed that on the day in question, when Enriquez was alone with J.T., he began touching her. Once M.T. left the car, he shoved his hand underneath J.T.'s clothing and began rubbing her genitalia. Enriquez immediately ceased all contact when M.T. returned to the car. Based on these facts, it is reasonable for a jury to conclude that Enriquez acted for the purpose of sexual gratification.

C. Sentencing

[29] Enriquez was found guilty of First and Second Degree CSC under 9 GCA §§ 25.15(a) and 25.20(a) respectively. RA, tab 87 at 1-2 (Judgment, Feb. 18, 2013). For First Degree CSC,

the trial court sentenced Enriquez to fifteen years of imprisonment—the minimum allowable under the statute— with five years of the sentence suspended. *Id.* The People argue that the trial court erred when issuing the five years of suspended sentence. In determining the proper resolution to this conflict in statutory interpretation, the court first reviews the plain meaning of the statutes in connection with each other, but if the ambiguity remains after such review, we must then examine the legislature's intent when passing the law, and/or review case law for past precedent. *See generally Castro v. G.C. Corp.*, 2012 Guam 6 ¶ 20.

1. Plain Meaning

[30] The sentencing portion of the statute states, "Any person convicted of criminal sexual conduct under § 25.15(a) shall be sentenced to a minimum of fifteen (15) years imprisonment, and may be sentenced to a maximum of life imprisonment without the possibility of parole." 9 GCA § 25.15(b). It continues by stating that any person guilty under section 25.15(a) shall not be "eligible for work release or educational programs outside the confines of prison . . . ." *Id.*

[31] The trial court justifies its ability to suspend sentences based on 9 GCA §§ 80.10, 80.60 and 80.64 of the criminal code. Section 80.10 states, "Unless otherwise provided by law, the court may suspend the imposition of sentence of a person who has been convicted of a crime in accordance with § 80.60 . . . ." 9 GCA § 80.10(a) (2005). "The court, in its discretion, may make disposition in respect to any person who has been convicted of a crime without imposing sentence of imprisonment unless a minimum term is made *mandatory* by a provision of [sic] Guam Codes." 9 GCA § 80.60(a) (2005) (emphasis added).

[32] Under section 80.60, the court shall not suspend a sentence for such reasons as:

> (1) there is undue risk that during the period of a suspended sentence or probation the offender would commit another crime;

> (2) the offender is in need of correctional treatment that can be provided most effectively by commitment to an institution; or
>
> (3) a lesser sentence would depreciate the seriousness of the offender's crime.

9 GCA § 80.60(b). When making the determination to suspend a sentence, the court should take into account the "nature and circumstances of the crime and the history, character and condition of the offender." *Id.*

[33] Section 80.60(c) provides non-controlling factors to consider when suspending a sentence. 9 GCA § 80.60(c). In the instant case, the trial court relied on these factors when making its sentencing determination. RA, tab 81 at 3-4 (Order After Hr'g, Jan. 18, 2013). The factors are:

> (1) The offender's criminal conduct neither caused nor threatened serious harm.
>
> (2) The offender did not contemplate that his criminal conduct would cause or threaten serious harm.
>
> (3) There were substantial grounds tending to excuse or justify the offender's criminal conduct, though failing to establish a defense.
>
> (4) The offender has compensated or will compensate the victim of his criminal conduct for the damage or injury which was sustained.
>
> (5) The offender has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime.
>
> (6) The offender is particularly likely to respond affirmatively to probationary treatment.

9 GCA § 80.60(c). In evaluating the factors, the trial court explains that Enriquez has no prior history, he appears unlikely to recommit the crime, and the penetration element in this case could be characterized as slight. RA, tab 81 at 4 (Order After Hr'g). The trial court mentioned that the five-year suspension does not eliminate the time suspended and the five years of suspended

incarceration will remain with the defendant upon his release in the event of additional misconduct. *Id.*

[34] Section 80.64 sets out maximum suspension times of two years for misdemeanors and five years for felonies. 9 GCA § 80.64(a) (2005). After a sentence has been suspended, the statute allows for modification in the interest of justice: "At any time during the period of suspension or probation, upon a showing that such action will best satisfy the ends of justice and the best interests of the public and the offender, the court may modify or terminate the conditions to which the offender is presently subject." 9 GCA § 80.64(b).

[35] Enriquez was sentenced in accordance with 9 GCA § 25.15(b) to fifteen years of imprisonment. Enriquez's sentence was suspended in accordance with sections 80.10 and 80.60 (with the trial court giving specific reasons for the sentence suspension under the section 80.60 guidelines). Moreover, five years of Enriquez's sentence was suspended, the maximum allowable under section 80.64. Thus, the trial court did not misinterpret any of the statutes individually. A potential conflict arises only if section 25.15(b) can be seen to expressly limit the trial court's ability to suspend sentences under sections 80.10 and 80.60.

[36] To resolve this issue, the sentencing statutes are reviewed together. *Benavente v. Taitano*, 2006 Guam 16 ¶ 19 ("Where statutes relate to the same subject matter they must be read together and applied harmoniously and consistently." (citing *Benavente v. Taitano*, 2006 Guam 15 ¶ 36)). Sections 25.15(b), 80.10, and 80.60 appear in the criminal code section for reasons of sentencing. The statutes may be seen as harmonious to each other and not hostile. The plain meaning of section 25.15(b) clearly states that a conviction of First Degree CSC requires a minimum sentence of fifteen years. This is evidenced by the terms "shall sentence" to indicate

the required minimum. Sections 80.10 and 80.60 indicate that sentences may be suspended at the discretion of the court, unless the sentence is mandatory.

[37] The question becomes whether the terms "shall sentence" makes the sentence mandatory so that "shall sentence" is the same as "shall serve." Upon a plain meaning interpretation, it is unclear if the fifteen-year minimum sentence was enacted to be impervious to a partial suspension. The People argue that 9 GCA § 25.15(b) prohibits the suspension of sentences. However, the statute does not expressly state that the guilty party "shall serve" his entire sentence in prison or that suspension of the sentence is prohibited, and 9 GCA §§ 80.10 and 80.60 suggest that the sentence may be suspended. Because of the ambiguity, the court turns to legislative intent and case law to help answer this question.

2. Legislative Intent

a. Comparative Statutes

[38] The intent of the legislature may be inferred by looking at other statutes passed by the same body. Multiple statutes in the Guam Criminal Code use express language limiting the sentencing discretion of the trial court judge. For example, 9 GCA §§ 16.30, 22.20, 34.20, 37.20, 40.10, and 43.20 all contain language requiring incarceration for the entirety of the sentence as opposed to probation or suspension. 9 GCA § 16.30(b) (1978) ("[A]ny person convicted of aggravated murder shall *not* be eligible for parole, work release, educational programs outside the confines of prison *nor shall his sentence be suspended.*" (second emphasis added)); 9 GCA § 22.20(b) (1978) (kidnapping) ("[S]aid minimum term *shall not be suspended* nor probation be imposed in lieu of such minimum term nor shall parole or work release be granted before completion of the minimum term." (emphasis added)); 9 GCA § 34.20(b) (1978) (aggravated arson) ("[T]he minimum term imposed *shall not be suspended* nor may probation be

imposed in lieu of the minimum term nor shall parole or work release be granted before completion of the minimum term." (emphasis added)); 9 GCA § 37.20(b) (1978) (burglary) (same as section 34.20); 9 GCA § 40.10(b) (1978) (first degree robbery) ("The minimum term imposed *shall not be suspended* nor probation be imposed in lieu of said minimum term nor shall parole, work release or educational programs outside the confines of prison be granted before completion of the minimum term." (emphasis added)); 9 GCA § 43.20(a) (1978) (theft) (same as section 34.20).

[39] The statutes restricting the court's ability to suspend certain sentences at least shows the legislature is aware of its power to control sentencing guidelines. To show the legislature had more than a mere awareness, it should be noted that each of the above statutes were enacted prior to 1979, when 9 GCA § 25.15(b) was enacted. The fact that these statutes were enacted prior to section 25.15(b) would suggest that the legislature intended not to make the minimum sentence in section 25.15(b) to also be a mandatory minimum time served.

b. Legislative History

[40] The People also argue that based on legislative history, the legislature intended to make section 25.15(b) a mandatory minimum sentence. Appellant's Br. at 13. On July 26, 1996, the Governor signed into law Public Law 23-114, which amended the sentencing in section 25.15(b). *People v. Ueki*, 1999 Guam 4 ¶ 3 n.2. Prior to the new law, the sentencing range was five to fifteen years of imprisonment; the range under the new law is fifteen years to life imprisonment without the possibility of parole. *Id.*

[41] The People note the use of the word "mandatory" when the court refers to the change in the sentencing guidelines. *See* Appellant's Supplemental Br. at 19. Bill no. 449, the act to repeal and reenact section 25.15(b), refers to the fifteen-year sentence as a "mandatory minimum"

sentence. Guam Pub. L. 23-114 (July 26, 1996). However, the word "mandatory" was not placed in the statutory language of Public Law 23-114. The reenactment of section 25.15(b) that passed in 1996 contains that same language as it does today, which refers to a "minimum" sentence and does not contain the word "mandatory." *Id.*

[42] The People appear to argue that we have already interpreted the legislative intent with the use of the term "mandatory minimum sentencing" in footnote 2 of the *Ueki* opinion. *Ueki*, 1999 Guam 4 ¶ 3 n.2. However, in *Ueki*, "mandatory minimum sentencing" is used only twice in a descriptive manner. *Id.* ¶¶ 1, 3 n.2. The court in *Ueki* was not suggesting that section 25.15(b) requires the offender to serve a minimum of fifteen years in prison.

[43] The use of "mandatory" in a descriptive fashion can be explained by the court's reference to the passage of Public Law 23-114. As stated above, the title of bill no. 449 uses the term "mandatory minimum sentence," but the statutory language in the bill does not use the word "mandatory." Thus, when describing the passage of bill no. 449, the court in *Ueki* is merely referring to the title of the bill and not making a judgment about the sentencing guidelines.

3. Case Law

[44] In making its ruling, the trial court relied on *Rodriquez v. United States*, 480 U.S. 522 (1987), and *United States v. Mueller*, 463 F.3d 887 (9th Cir. 2006). In *Rodriquez*, a statute indicated that the courts shall sentence a person convicted of an offense that was committed while on release to a minimum of two years. 480 U.S. at 523. While on release, after her conviction, Rodriquez was sentenced to two years of imprisonment; however, the judge suspended execution of the sentence and gave her two years of probation instead. *Id.* The United States Supreme Court ruled that absent specific language precluding suspension, the trial courts may exercise such discretion. *Id.* at 524.

[45] In *Mueller*, the court ruled that probation could not be given in lieu of a jail term because of clear congressional intent shown to specifically limit the option of probation. 463 F.3d at 888. In passing sentencing guidelines, Congress removed the possibility of probation for the crime for which Mueller was convicted, thus removing the ambiguity in deciphering legislative intent and leading to the affirmation of Mueller's conviction sentence. *Id.* at 891-93.

[46] The People mistakenly point to *State v. Batson*, 53 P.3d 257 (Haw. 2002), in support of its appeal. In *Batson*, the judge suspended part of a 30-day sentence. *Id.* at 258. The relevant statute stated that "the court shall, at a minimum, sentence the person who has been convicted of this offense to imprisonment for no less than thirty days." *Id.* at 259-60. The court explained that "shall sentence" is different than "shall serve." *Id.* at 260. The court remained consistent with the statute by sentencing Batson to the minimum 30 days. *Id.* This sentence was also consistent with the probationary statutes allowing for the partial suspension of incarceration in favor of probation instead. *Id.* Because of the absence of express language mandating a minimum time "served," the court ruled that it is "not prohibited from suspending part of the minimum jail sentence . . . ." *Id.* at 262.

[47] In *State v. Fauque*, 4 P.3d 651 (Mont. 2000), the defendant was convicted under a Montana statute and received concurrent 25-year sentences, with all but four years suspended. The relevant statute stated that an offender convicted for non-consensual intercourse with a minor under the age of sixteen shall be punished by "imprisonment in the state prison for a term not less than 4 years." *Id.* at 653. It was ruled that the trial court did not err in suspending all but four years of the sentence. *Id.* Thus, it was not necessary for the reviewing court to decide if part of the minimum sentence could be suspended or not. *Id.*

[48] In the cases above, courts have the discretion to suspend part of a statutory minimum sentence, unless the statute specifically states otherwise. The use of the word "shall" indicates that the sentence must be a certain length. However it does not limit the court's ability to suspend that sentence or order probation.

[49] Enriquez was sentenced to fifteen years, the minimum length of time under the statute. Similar to *Batson* and *Rodriquez*, Enriquez was sentenced under a statute that did not expressly limit the trial court's ability to suspend the sentence. Additionally, each case highlighted had similar statutes within the jurisdiction where the legislature provided express language to prohibit suspension or probation. Accordingly, we find that the statutory language of 9 GCA § 25.15(b) does not prohibit a partial suspension of the minimum sentence so long as the suspension remains in accordance with 9 GCA §§ 80.10, 80.60, and 80.64.

4. Abuse of Discretion

[50] Although suspension of a portion of Enriquez's sentence is permissible, we must still determine whether the suspension was an abuse of discretion.

[51] Title 9 GCA § 80.60(b) provides three reasons a court should not suspend a sentence and six additional factors to consider when sentencing a defendant. As stated, the court should not suspend a sentence if: (1) there is undue risk that during the period of a suspended sentence or probation the offender would commit another crime, (2) the offender is in need of correctional treatment that can be provided most effectively by commitment to an institution, or (3) a lesser sentence would depreciate the seriousness of the offender's crime. 9 GCA § 80.60(b).

[52] The sentencing order provides evidence of the trial court weighing the factors to determine if suspension is proper. The trial court observes that Enriquez does not have any prior history of criminal activity, does not appear likely to recommit a crime during the period of the

suspended sentence, and there appears to be no serious bodily injury to the victim. The trial court acknowledges that a suspended sentence may depreciate the seriousness of the crime, but concluded that the balance of factors did not require a sentence of fifteen years. Furthermore, the trial court found that the victim does not appear to be suffering long-term psychological trauma and states "the penetration element of first degree CSC was met in this case to a degree, that could be characterized as slight and the victim alleged only one occurrence of misconduct at trial." RA, tab 81 at 4 (Order After Hr'g). Additionally, the trial court specifies that the suspended sentence does not eliminate the time suspended and will ideally encourage Enriquez to remain in good behavior. In consideration of all factors, we do not believe the trial court abused its discretion in suspending Enriquez's sentence by five years.

V. CONCLUSION

[53] We are convinced the record contains sufficient evidence to satisfy the element of sexual penetration and sexual gratification. Accordingly, we **AFFIRM** the First and Second Degree Criminal Sexual Conduct convictions. Moreover, the sentencing statute for First Degree Criminal Sexual Conduct does not state that the minimum sentence is mandatory incarceration. Thus, we **AFFIRM** the five-year suspension of the sentence.

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