



IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ZARACKAI PHILLIPPE PATRICK,
Defendant-Appellant.

Supreme Court Case No.: CRA15-003
Superior Court Case No.: CF0546-12

OPINION

Cite as: 2016 Guam 2

Appeal from the Superior Court of Guam
Argued and submitted on July 22, 2015
Hagåtña, Guam

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

CARBULLIDO, J.:

[1] Defendant-Appellant Zarackai Phillippe Patrick appeals from a final judgment convicting him of one count of second degree criminal sexual conduct (“CSC”) and one count of child abuse. On appeal, Patrick argues that the trial court erred in (1) refusing to declare a hung jury after extended deliberations, and (2) denying his motion to introduce evidence of the victim’s past sexual conduct. For the reasons discussed herein, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] In September 2012, Zarackai Phillippe Patrick was hosting A.Q.,¹ his wife’s niece, at his home while her mother was off-island. She was fifteen years old at the time.² One day during her stay, A.Q. called her aunt to ask for an early ride home from school. When she got to her aunt’s house, she told her aunt that Patrick had sexually assaulted her the night before, digitally penetrating her vagina and performing cunnilingus. Her aunt notified the police, and Patrick was arrested.

[3] That same day, A.Q. was physically examined by a nurse at Healing Hearts Crisis Center. The examination revealed vaginal redness, which could not be conclusively linked to sexual assault. A follow-up examination was conducted two weeks later that again showed vaginal redness among other findings. A.Q. told the nurse that she had been raped in 2011, which

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

² A.Q. testified she was seventeen at the time of trial in 2014.

resulted in the tearing of her hymen. The nurse reported the alleged rape to the police. When the police interviewed A.Q. regarding the 2011 rape, she recanted and stated that sexual intercourse in 2011 was consensual.

[4] Patrick was charged with three counts of first degree CSC, three counts of second degree CSC, and one count of child abuse. Patrick pleaded not guilty. Prior to trial, he filed a motion to introduce evidence of A.Q.'s past sexual behavior pursuant to Rule 412(c) of the Guam Rules of Evidence ("GRE"). He sought admission of the results of the follow-up examination in order to show that the person with whom A.Q. had previously engaged in sexual intercourse was responsible for any injuries discovered during the physical examination. The motion was denied. At trial, the nurse testified that redness was found in both examinations and that this finding was non-specific, as it was consistent with the alleged digital penetration and cunnilingus but could also have been explained by a variety of other causes, such as using an irritating soap, riding a bike, or masturbation.

[5] Following trial, the jury was charged and instructed to attempt to reach a unanimous verdict. The jury began deliberating on Monday, September 15, 2014. On Wednesday, after two days of deliberations, the jury still had not reached a decision, and sent a note to the judge seeking further direction. The trial court repeated its instruction that the jury must attempt to reach a unanimous verdict, and directed the jurors to continue deliberating. After the jury failed to reach a verdict that day, the court recessed until the following Monday to accommodate one of the juror's schedules. On Monday afternoon, with no verdict yet reached, Patrick filed a motion to declare a mistrial due to a hung jury. The next morning, the court denied that motion from the

bench. Later that afternoon, the jury returned a verdict. In total, the jury had deliberated for four and a half days.

[6] The jury acquitted Patrick of the first-degree CSC charges, two counts of second-degree CSC, and lesser-included third-degree CSC charges, but found him guilty of one count of second-degree CSC and one count of child abuse. He was sentenced to four years imprisonment for second degree CSC and one year imprisonment for child abuse, to be served concurrently.

[7] This appeal followed.

II. JURISDICTION

[8] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-93 (2015)) and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[9] The standard of review for a denial of a motion for mistrial is abuse of discretion. *People v. Flores*, 2009 Guam 22 ¶ 9 (citing *Caston v. State*, 823 So. 2d 473, 492 (Miss. 2002)); *see also United States v. Stevens*, 177 F.3d 579, 583 (6th Cir. 1999) (“In deciding at what point further deliberations by a particular jury would be fruitless or unduly coercive, the trial judge has wide discretion.”). By this standard, we do not substitute our judgment for that of the trial court. “Rather, we review the trial court’s decision to determine whether it was ‘based on an erroneous conclusion of law or whether the record contains no evidence on which the [trial court] could have rationally based the decision.’” *People v. Perez*, 2004 Guam 4 ¶ 7 (alteration in original) (quoting *Lujan v. Lujan*, 2002 Guam 11 ¶ 7) (citation omitted).

[10] A trial court’s evidentiary rulings are reviewed for abuse of discretion, and will only be reversed if the rulings resulted in prejudice affecting the verdict. *People v. Roten*, 2012 Guam 3

¶ 13 (citing *People v. Muritok*, 2003 Guam 21 ¶ 32). “This court has defined an abuse of discretion 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.’” *Id.* (quoting *People v. Evaristo*, 1999 Guam 22 ¶ 6) (citation omitted).

IV. ANALYSIS

A. Motion to Declare a Hung Jury

[11] Patrick first claims that the trial court abused its discretion in refusing to declare a hung jury. Appellant’s Br. at 10 (May 11, 2015). He argues a mistrial on this ground was appropriate given the length of time the jury was deliberating and its communications to the court. *Id.* at 12-13. He also maintains that the court indirectly threatened to require the jury to deliberate for an unreasonable length of time by repeating the previous jury instruction on deliberating, and by directing the jury to continue deliberation after it had been unable to reach a verdict. *Id.* at 13.

[12] The trial court initially gave the following instruction to the jury regarding its duty to deliberate:

The verdict form must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

RA, tab 109 at No. 8B (Jury Instructions). After two days of deliberations, the jury submitted the following note to the trial court: “Your Honor, respectfully requesting direction on deliberation shortcomings. After two days the jury still unanimously agree[s] to disagree.” Tr. at 2 (Deliberations – Day 3, Sept. 17, 2014). In response, the trial court repeated its previous instructions regarding the duty to deliberate and stated: “The Court is going to ask you to continue with your deliberations pursuant to this jury instruction” *Id.* at 3. Subsequently, Patrick filed a motion for a mistrial on the basis of a hung jury. RA, tab 96 at 1 (Mot. to Declare Hung Jury, Sept. 22, 2014). The court ruled orally, stating that “in light of the fact that they, the jurors, are deliberating, and due to the gravity of the motion, herein, at this time . . . the Court is going to deny [the] motion to declare a hung jury.” Transcript (“Tr.”) at 5 (Mot. & Verdict, Sept. 23, 2014).

[13] On appeal, Patrick argues that the court erred in two instances: first, in failing to declare a mistrial *sua sponte* following the jury’s communication to the court regarding its inability to reach a verdict, and second, in denying Patrick’s subsequent motion to declare a hung jury. Appellant’s Br. at 10-13. However, as Patrick did not move for a hung jury at the time of the jury’s note and did not object to the trial court’s instructions or direction to the jury to continue deliberations, we review on appeal only the trial court’s denial of the September 22, 2014, motion to declare a hung jury. As this review requires a consideration of the totality of the circumstances, the jury’s communications to the court and the court’s instructions are nonetheless important considerations in our analysis.

[14] Guam law provides the following with regard to jury deliberations:

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(1) that in order to return a verdict, each juror must agree thereto;

(2) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(3) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(4) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(5) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in Subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals and shall not inquire as to the division of the jury.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

8 GCA § 105.24 (2005). The Compiler's comment to this statute notes that it was derived from the American Bar Association's ("ABA") Project on Standards for Criminal Justice, Trial by Jury § 5.4. *Id.* at note. North Carolina's statute dealing with deliberations was also derived from this source material and is in substance virtually identical to Guam's. *See* N.C. Gen. Stat. Ann. § 15A-1235 (West, 2015). Other courts have adopted the ABA's guidelines through case law. *See, e.g., State v. Martin*, 211 N.W.2d 765, 772 (Minn. 1973); *People v. Sullivan*, 220 N.W.2d 441, 450 (Mich. 1974); *Kersey v. State*, 525 S.W.2d 139, 144-45 (Tenn. 1975).

[15] Title 8 GCA § 105.25 provides the lens through which we view Patrick's claims, as it prohibits the trial court from either requiring the jury to deliberate for an unreasonable length of time or threatening to require the jury to deliberate for an unreasonable length of time.

1. Whether the trial court required the jury to deliberate for an unreasonable period of time.

[16] We first consider whether the jury was required to deliberate for an unreasonable length of time. No Guam appellate court has opined as to what constitutes an unreasonable length of time as applicable under 8 GCA § 105.25(b). Therefore, we look to the following commentary provided by the ABA in promulgating the provision that was adopted by Guam as 8 GCA § 105.25:

The general rule is that the length of time a jury may be kept deliberating is a matter within the discretion of the trial judge, but abuse of that discretion requires reversal. The reasonableness of the deliberation period depends on such factors as the length of the trial, the nature or complexity of the case, the volume and nature of the evidence, the presence of multiple counts or multiple defendants, and the jurors' statements to the court concerning the probability of agreement.

State v. Kelley, 517 N.W.2d 905, 909 (Minn. 1994) (quoting Standards for Criminal Justice § 5-4.4(b) (1986)). As we view this claim under an abuse of discretion standard, we do not substitute our own judgment for that of the trial court, but instead defer to the trial court's view of reasonableness unless we "have a definite and firm conviction the trial court, after weighing relevant factors, committed clear error of judgment in its conclusion." *People v. Tuncap*, 1998 Guam 13 ¶ 12 (citing *United States v. Plainbull*, 957 F.2d 724, 725 (9th Cir. 1992)).

[17] In this case, the trial lasted for three days and featured ten prosecution witnesses and three defense witnesses. Tr. at 214 (Jury Trial, Sept. 5, 2014); Tr. at 129 (Jury Trial, Sept. 8, 2014); Tr. at 82 (Jury Trial, Sept. 9, 2014). Six documents were admitted into evidence. Tr. at

215 (Jury Trial, Sept. 5, 2014; Tr. at 129 (Jury Trial, Sept. 8, 2014); Tr. at 82 (Jury Trial, Sept. 9, 2014). The jury had to consider three counts of first degree CSC, three counts of second degree CSC, and a count of child abuse, along with three counts of lesser-included third degree CSC. RA, tab 109 at Nos. 7A-7M (Jury Instructions). Patrick was the sole defendant. The jurors sent one note after two days of deliberation informing the trial court they had been unable to reach a verdict. Tr. at 2 (Deliberations – Day 3). The note did not state that there was no possibility of unanimity and no further notes were sent.

[18] Considering these factors, the deliberation period of four and a half days was not an unreasonable period of time or clearly contrary to good judgment so as to constitute an abuse of discretion. The trial court was in the best position to evaluate the complexity of the case, the volume and nature of the evidence, and the jurors' statements in determining the appropriate amount of time to allow the jury to deliberate before concluding that there was no reasonable possibility of agreement. Accordingly, we conclude that the trial court did not abuse its discretion in allowing deliberations to continue.

2. Whether the trial court threatened the jury to deliberate for an unreasonable period of time or otherwise coerced the jury into reaching a verdict.

[19] Second, we must consider whether the court's actions after receiving the note from the jury can be considered as a threat to the jury to deliberate for an unreasonable period of time or otherwise constituted improper coercion. North Carolina courts, in applying their statute based on the ABA standards, have set forth the following test for determining whether a court has improperly coerced the jury to reach a verdict:

[T]he trial court "may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." In determining whether a trial court's actions are coercive, an appellate court must look to the

totality of the circumstances. Thus, the defendant is entitled to a new trial if the circumstances surrounding jury deliberations “might reasonably be construed by [a] member of the jury unwilling to find the defendant guilty as charged as coercive, suggesting to him that he should surrender his well-founded convictions conscientiously held or his own free will and judgment in deference to the views of the majority and concur in what is really a majority verdict rather than a unanimous verdict.”

State v. Dexter, 566 S.E.2d 493, 496 (N.C. Ct. App.), *aff'd*, 572 S.E.2d 782 (N.C. 2002) (citations omitted). The Michigan Supreme Court has considered a trial court’s instructions regarding deliberation to be coercive so as to violate the ABA standards if they include “undue pressure, threats, embarrassing assertions, or other wording that would tend to force a decision or cause a juror to abandon his conscientious dissent and defer to the majority.” *People v. Hardin*, 365 N.W.2d 101, 112 (Mich. 1984) (citing *People v. Holmes*, 349 N.W.2d 230, 238 (Mich. 1984)).

[20] Here, the trial court’s actions cannot be considered threatening or improperly coercive. The court adhered strictly to the dictates of 8 GCA § 105.24(b) by repeating an instruction conforming with 8 GCA § 105.24(a), including specific directives to only reach an agreement “if you can do so without violence to individual judgment” and “not [to] surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.” Tr. at 2 (Deliberations – Day 3). The court did not include any additional language that might be considered coercive or suggest that deliberations would continue indefinitely in the absence of a verdict.

[21] Further, Patrick argues that the trial court was indirectly threatening in that it had previously scheduled a continued deliberation around one juror’s work demand. Thus, Patrick argues, because the jurors witnessed the trial court schedule deliberations around important life

events, then “[i]t was reasonable for the jury to deduce, accurately or not, that the trial court might keep them in deliberations until it reached a verdict.” Appellant’s Br. at 13. We find this argument without merit. Accordingly, we conclude that the trial did not improperly threaten the jurors to deliberate for an unreasonable length of time or otherwise coerce the jury into reaching a verdict.

[22] As the court did not require the jury to deliberate for an unreasonable period of time or improperly coerce the jury into reaching a verdict, we conclude that the court did not abuse its discretion in denying Patrick’s motion to declare a mistrial.

B. Motion to Introduce Evidence of Past Sexual Conduct

[23] Patrick next claims that the trial court abused its discretion in denying his motion to introduce evidence of A.Q.’s past sexual conduct. *Id.* He argues that such evidence should have been admitted for the purpose of showing that the vaginal redness found during A.Q.’s physical examination was caused by a former sexual partner and not Patrick. *Id.* at 16.

[24] Prior to trial, Patrick filed a motion to introduce evidence of past sexual conduct pursuant to GRE 412. RA, tab 62 at 1 (Dec. & Order, Jan. 7, 2014). He sought the introduction of the results of A.Q.’s second physical examination, along with her explanations regarding the causes of the torn hymen and recent laceration. *Id.* at 2. He argued that the injuries discovered for the first time in the follow-up examination may have been the result of sexual contact occurring in the interim between the two examinations, a period in which he was incarcerated. *Id.* He argued that the evidence would support the theory that someone other than himself had caused the vaginal redness found in the first examination and, in a second incident, caused the redness and additional injuries found in the follow-up examination. *Id.*

[25] In opposing the motion, the People argued, first, that the evidence was irrelevant and outside the ambit of the exception to GRE 412 on which Patrick relied. RA, tab 58 at 2 (Opp'n to Present Certain Evid. Past Sexual Conduct, Oct. 9, 2013). They maintained that there was no contention that Patrick had caused the injuries discovered in the second physical examination, as they were not consistent with the alleged digital penetration and cunnilingus. *Id.* at 4. Second, the People argued that, even if relevant, the evidence should be suppressed under GRE 403 because it would confuse the jury, unfairly prejudice the victim by disclosing past sexual history, or both. *Id.* The People conceded that the statements made by A.Q. at the follow-up examination claiming that she had been raped and her subsequent recantation were admissible for credibility purposes. *Id.* at 4-5.

[26] The trial court agreed with the People, concluding that the evidence offered by Patrick was irrelevant because “the injury suffered by the victim is not indicative of the conduct alleged and occurred at a different time from the alleged crime” and therefore did not make the allegations more or less probable. RA, tab 62 at 5 (Dec. & Order). The court also agreed with the People that the evidence was unfairly prejudicial, stating that “its introduction would serve only to prejudice the victim by attacking her sexual character in a manner explicitly prohibited by [GRE] 412” and “the location and sexual source of the injury is likely to cause unnecessary jury confusion regarding the unrelated criminal allegation of a similar subject matter.” *Id.*

[27] Pursuant to the GRE, in any criminal proceeding involving alleged sexual misconduct, evidence offered to prove that an alleged victim engaged in other sexual behavior is inadmissible, with limited exceptions. Guam R. Evid. 412. One exception is the introduction of “evidence of specific instances of sexual behavior by the alleged victim offered to prove that a

person other than the accused was the source of semen, injury, or other physical evidence.” GRE 412(b)(1)(A). The introduction of such evidence remains subject to the other rules of evidence, and therefore, it must be relevant and may be excluded pursuant to GRE 403 if its probative value is substantially outweighed by other dangers. GRE 402, 403. We review a trial court’s ruling on the introduction of such evidence for an abuse of discretion. *See Roten*, 2012 Guam 3 ¶ 13 (“Evidentiary rulings of the trial court are reviewed for abuse of discretion.”)

[28] Rule 412 of the GRE was adopted from Rule 412 of the Federal Rules of Evidence (“FRE”). GRE 412. Rule 412 of the FRE “aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details.” *Wilson v. City of Des Moines*, 442 F.3d 637, 643-44 (8th Cir. 2006) (quoting Fed. R. Evid. 412 advisory committee’s notes). It does so by “preclud[ing] the routine use of evidence of specific instances of a rape victim’s prior sexual behavior.” *United States v. Azure*, 845 F.2d 1503, 1506 (8th Cir. 1988) (quoting *United States v. Shaw*, 824 F.2d 601, 607 (8th Cir. 1987), *abrogated by United States v. Spotted War Bonnet*, 933 F.2d 1471, 76 n.3 (8th Cir. 1991)).

[29] Patrick relied on GRE 412(b)(1)(A), otherwise known as the “injury exception,” in his attempt to introduce evidence of the follow-up examination. Appellant’s Br. at 13-14. The Tenth Circuit case *United States v. Begay*, 937 F.2d 515 (10th Cir. 1991), illustrates a textbook example of the injury exception at play. In *Begay*, the prosecution introduced evidence that the victim had an abrasion and enlarged hymenal opening. 937 F.2d at 520. Pursuant to the injury exception for FRE 412, the defendant attempted to introduce evidence that the victim had been assaulted by another person shortly before the time he was alleged to have assaulted her. *Id.* at

519. The trial court denied him the opportunity to do so, concluding that the evidence was irrelevant and unduly prejudicial. *Id.* at 521-22. On appeal, the Tenth Circuit Court of Appeals reversed, holding that the trial court abused its discretion in doing so, as the evidence was necessary “to counter the damaging evidence of the child’s physical condition.” *Id.* at 523.

[30] In accordance with this intended use, federal courts have stated that “[t]he ‘injury’ exception allows a court to deviate from Rule 412’s general rule only when the evidence establishes an injury . . . that was sustained reasonably close in time to the alleged rape.” *United States v. Eagle Thunder*, 893 F.2d 950, 954 (8th Cir. 1990) (quoting *Shaw*, 824 F.2d at 608). Furthermore, the exception does not apply where the prosecution does not allege that the defendant caused the injuries in question. *See United States v. Elbert*, 561 F.3d 771, 776 (8th Cir. 2009).

[31] In this case, the purposes for which Patrick sought to admit evidence under GRE 412 do not fit the intended use of the injury exception as described above. Because the People did not allege that Patrick caused the laceration and the torn hymen revealed in the follow-up examination, it was not necessary for Patrick to prove that another person caused them. As for the vaginal redness found in the first examination in September 2012, the only specific instance of sexual behavior that Patrick has identified and attempted to introduce evidence of occurred in 2011. The redness in the first examination in September 2012 could not plausibly be explained by that incident in 2011. Further, the nurse explained that the redness in the first examination could not be conclusively linked to the type of sexual contact of which Patrick was accused, as it was non-specific and could be explained by any number of possible stimuli such as using an irritating soap, riding a bike, or masturbation. Tr. at 181-83, 196 (Jury Trial, Sept. 5, 2014).

Thus, it was also unnecessary for Patrick to show that the redness could have been caused by someone other than himself. We note that the defense was not precluded from cross-examining A.Q. regarding any of the possible non-sexual causes of the redness.

[32] Patrick additionally appears to argue that evidence of A.Q.'s prior sexual conduct was relevant to show that she was sexually active, and therefore, that the redness could have been caused by another sexual partner. *See* Appellant's Br. at 16. This attempt to cast doubt on the victim's testimony through innuendo is exactly what GRE 412 was enacted to prevent. Had Patrick sought to introduce evidence of a specific instance of sexual conduct occurring shortly before the first examination, such evidence may have been admissible, but under the circumstances of this case, we agree with the trial court's determination that the evidence was irrelevant under the scope of GRE 412(b)(1)(A). Furthermore, even if the evidence were relevant, we also agree with the trial court that the evidence would be inadmissible under GRE 403, as the probative value is minimal given the nurse's testimony that any manner of stimuli could have caused the redness.

[33] Accordingly, we hold that the trial court did not abuse its discretion in denying Patrick's motion to introduce evidence of past sexual conduct.

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V. CONCLUSION

[34] The trial court did not abuse its discretion in denying Patrick's motion to declare a hung jury, as the jury was not required to deliberate for an unreasonable length of time and the trial court did not improperly coerce the jury into reaching a verdict. Further, the trial court did not abuse its discretion in denying Patrick's motion to introduce evidence of the victim's past sexual conduct. Accordingly, we **AFFIRM** the judgment of conviction.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice