IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JASON JR. CRUZ BARCINAS,
Defendant-Appellant.

Supreme Court Case No.: CRA15-040
Superior Court Case No.: CF0325-14

OPINION

Cite as: 2016 Guam 38

Appeal from the Superior Court of Guam
Argued and submitted on July 6, 2016
Hagåtña, Guam

Appearing for Defendant-Appellant:
Terence E. Timblin, *Esq.*
Yanza, Flynn, Timblin, LLP
446 E. Marine Corps Dr., Ste. 201
Hagåtña, GU 96910

Appearing for Plaintiff-Appellee:
James C. Collins, *Esq.*
Assistant Attorney General
Office of the Attorney General
Prosecution Division
590 S. Marine Corps Dr., Ste. 706
Tamuning, GU 96913

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

TORRES, C.J.:

[1] Defendant-Appellant Jason Jr. Cruz Barcinas appeals from final judgment of the trial court sentencing him to seven years' incarceration for convictions on eight counts of Second Degree Criminal Sexual Conduct (As a 1st Degree Felony). Barcinas argues the charging statute—9 GCA § 25.20, subsections (a)(1)-(6)—creates six disjunctive elements, subsection (a)(7) creates an additional, mandatory element, and the People did not charge subsection (a)(7) in their Superseding Indictment. Barcinas also argues, in the alternative, the statute is ambiguous and should be interpreted in his favor. The People argue Barcinas's interpretation of the statute is "inconsistent with the scheme of the law" and this court's previous precedent.

[2] For the reasons detailed herein, we affirm the judgment of the trial court.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Barcinas was indicted on eight counts of Second Degree Criminal Sexual Conduct (As a 1st Degree Felony). After a jury trial, Barcinas was convicted on all eight counts. He was sentenced[1] to seven years' incarceration with credit for time served. Barcinas filed his Notice of Appeal following sentencing but prior to the entry of judgment.[2]

[4] Barcinas's charges stemmed from eight separate instances of sexual contact with a minor, C.N.P.C., between May 1, 2014, and June 29, 2014. Specifically, evidence was presented at trial

[1] The record reflects that sentencing was held on September 17, 2015. The trial court's Judgment states that sentencing was held on September 22, 2015. Appellant's Brief uses both dates. This likely reflects a clerical error in the Judgment and a subsequent error in drafting Appellant's Brief based on that document.

[2] Barcinas recognizes the prematurity of his Notice of Appeal and cites Guam Rules of Appellate Procedure Rule 4(b)(2) for the proposition that his appeal should be treated as filed on the date of and after the entry of Judgment. Guam R. App. P. 4(b)(2) ("A notice of appeal filed after the court announces a decision, sentence, or order -- but before the entry of the judgment or order -- is treated as filed on the date of and after the entry."). The People do not contest.

that Barcinas made contact with his exposed penis to the clothed buttocks of the minor victim on eight separate occasions. Evidence was presented that C.N.P.C. was ten years old at the time of the sexual contact. The People also submitted evidence that Barcinas pleaded guilty and was convicted on previous charges of Criminal Sexual Conduct involving minors.[3]

II. JURISDICTION

[5] This court has jurisdiction over an appeal from a final judgment of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-254 (2016)); 7 GCA §§ 3107, 3108(a) (2005).

III. STANDARD OF REVIEW

[6] We review issues of statutory interpretation *de novo*. *People v. Diaz*, 2007 Guam 3 ¶ 10 (citing *People v. Flores*, 2004 Guam 18 ¶ 8).

IV. ANALYSIS

[7] Barcinas argues that 9 GCA § 25.20(a)(1)-(6) creates six disjunctive, alternate elements and that subsection (a)(7) creates an additional, mandatory element of the offense of Second Degree Criminal Sexual Conduct and that the People did not charge that element in their Superseding Indictment. Appellant's Br. at 8 (Apr. 8, 2016); Appellant's Reply Br. at 2 (Apr. 22, 2016). He argues, in the alternative, that the statute is ambiguous and should be interpreted in his favor. Reply Br. at 2 (citing *People v. San Nicolas*, 2001 Guam 4 ¶ 13; *People v. Tenorio*, 2007 Guam 19 ¶ 14). The People argue that Barcinas's interpretation is "inconsistent with the

[3] In his Appellant's Brief, Barcinas describes the procedural history with regard to the introduction of prior sexual crimes evidence pursuant to Guam Rules of Evidence Rule 413 (Evidence of Similar Crimes in Criminal Sexual Conduct Cases). This procedural component is not relevant to the present appeal because he only raises the issue of whether the lower court erred in overruling his Motion to Dismiss Indictment based on an incorrect interpretation of 9 GCA § 25.20. Neither of the parties has briefed arguments with respect to the introduction or admissibility of the Rule 413 evidence.

scheme of the law" and our previous precedent. Appellee's Br. at 3 (Apr. 13, 2016). The People rely primarily on our reasoning in *Flores*, 2004 Guam 18. Appellee's Br. at 5-7.

[8] The People's Superseding Indictment charged Barcinas as follows:

> On or about the period between May 1, 2014 through June 29, 2014 . . . [Barcinas] did commit the offense of Second Degree Criminal Sexual Conduct, in that he did intentionally engage in sexual contact with another, to wit: by causing [his] penis to touch the buttock of C.N.P.C. (DOB: 06/24/2004), a minor under fourteen (14) years of age, in violation of 9 GCA §§ 25.20(a)(1) and (b).

Record on Appeal ("RA"), tab 60 at 1-2 (Superseding Indictment, Aug. 17, 2015) (emphasis omitted).[4] Similar charging language was included in all eight counts. *See id.* at 1-4.

[9] Title 9 GCA § 25.20(a) states:

> A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if *any of the following circumstances* exists:
>
> (1) that other person is under fourteen (14) years of age;
>
> (2) that other person is at least fourteen (14) but less than sixteen (16) years of age and the actor is a member of the same household as the victim, or is related by blood or affinity to the fourth degree to the victim, or is in a position of authority over the victim and the actor used this authority to coerce the victim to submit;
>
> (3) sexual contact occurs under circumstances involving the commission of any other felony;
>
> (4) the actor is aided or abetted by one or more other persons and either of the following circumstances exists:
>
> (A) the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or
>
> (B) the actor uses force or coercion to accomplish the sexual contact.

[4] All eight counts included this identical language, tracking 9 GCA § 25.20(a)(1).

> (5) the actor is armed with a weapon or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon;
>
> (6) the actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact; *and*
>
> (7) the actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

9 GCA § 25.20(a) (2005) (emphases added).

[10] The entirety of Barcinas's argument turns on a formalistic reading of the conjunction "and" found at the end of subsection (a)(6). Barcinas views this wording as an indication that subsection (a)(7) was intended to be viewed conjunctively, apart from the list of alternative grounds described in subsection (a)(1)-(6).

[11] Barcinas's argument contrasts the disjunctive language of subsection (a) with the conjunctive wording of subsection (a)(6). *Compare* 9 GCA § 25.20(a) ("any of the following"), *with* 9 GCA § 25.20(a)(6) ("and"). Though Barcinas's brief does not articulate more, we infer this to be an argument that the legislature chose to use the conjunctive "and" instead of the disjunctive "or" because it meant to deem the seventh element as mandatory and separate from the first six.

[12] In *Flores*, we reviewed a similar argument with respect to the Third Degree Criminal Sexual Conduct statute, 9 GCA § 25.25. *See* 2004 Guam 18 ¶ 9. There, the defendant argued the statute was ambiguous because three alternate grounds, presented in the disjunctive, were linked together with the conjunction "and." *Id.* ¶ 15. We rejected this argument, finding that such an interpretation would lead to an absurd result in the context of the statutory scheme. *Id.* ¶¶ 18, 19. We held that while plain meaning is the starting point to statutory interpretation, "such language need not be followed where the result would lead to absurd or impractical

consequences, untenable distinctions, or unreasonable results." *Id.* ¶ 18 (quoting *Sumitomo Constr. Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 17). Further, we stated that statutory language must be interpreted within the context of the statutory scheme. *Id.* ¶ 19 (quoting *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 9). We compared 9 GCA § 25.25 to the statute at issue in the present case, section 25.20, and found the statutory scheme did not allow for a conjunctive interpretation in either circumstance:

> [Q]uestions of statutory interpretation may be aided by reference to the prevailing interpretation of other statutes that share the same language and either have the same general purpose or deal with the same general subject as the statute under consideration. To determine the meaning of section 25.25, we consider language found in statutes defining other criminal sexual conduct offenses, including First Degree Criminal Sexual Conduct and Second Degree Criminal Sexual Conduct.
>
> Applying the conjunctive interpretation to sections 25.15 and 25.20 would impose an absolute bar to convictions for First Degree and Second Degree Criminal Sexual Conduct, since it would be impossible for the prosecution to establish evidence satisfying all seven circumstances listed under the subsections of each statute. Quite simply, it would be impossible for the victim to be both "under" fourteen years of age and "at least" fourteen years of age. *See* 9 GCA §§ 25.15, 25.20. As a matter of interpretation, we cannot conclude that the absurdity resulting from the conjunctive reading of these statutes was intended by the Legislature, because clearly, the senators did not intend to enact statutes that could not be prosecuted. Flores' argument pertaining to the ambiguity of section 25.25 is not persuasive and is rejected; thus, the rule of lenity does not apply.
>
> It is clear that section 25.25 was intended to be read in the disjunctive sense, allowing evidence of force alone as sufficient to convict under section 25.25.

Id. ¶¶ 19-21 (footnote, citations, and internal quotation marks omitted).

[13] Barcinas attempts to distinguish his argument from those made in *Flores*. Instead of viewing the seven grounds of subsection (a) together, he focuses on what he perceives to be a unique character assigned to subsection (a)(7). Reply Br. at 2. This is an attempt to carve out an exception to our *Flores* holding for subsection (a)(7).

[14] In *Flores*, we expressly ruled that a strictly conjunctive reading of 9 GCA § 25.20 would lead to an absurd result. In other words, it would be impossible to convict an alleged criminal under the statute if all seven elements of subsection (a) were mandatory. Here, Barcinas seeks to avoid that holding by arguing that 9 GCA § 25.20(a)(1)-(6) should be read disjunctively, as ruled in *Flores*, but that we should treat subsection (a)(7) uniquely.

[15] The People point to the repetition of the phrase "the actor causes personal injury to the victim" found in both subsection (a)(6) and subsection (a)(7) as evidence that the legislature did not intend for subsection (a)(7) to be read conjunctively. Appellee's Br. at 7. If the legislature had intended for subsection (a)(7) to be a mandatory element, as Barcinas suggests, repeating the phrase would either be redundant or signal a requirement to prove two instances of personal injury. The former would render the phrase meaningless and the latter would lead to an absurd result.

[16] The People argue the word "any," found in the umbrella paragraph to subsection (a) connotes an "expansive meaning" and anticipates a disjunctive list. *Id.* at 7-8 (citing *United States v. Ickes*, 393 F.3d 501, 504 (4th Cir. 2005); *United States v. Porter*, 745 F.3d 1035, 1042 (10th Cir. 2014)). This argument is persuasive, as the plain language of 9 GCA § 25.20(a) states that a person is guilty of the offense "if *any of the following circumstances* exists." 9 GCA § 25.20(a) (emphasis added). The statute interpreted in *Flores* used identical language to introduce a disjunctive list. *See* 9 GCA § 25.25 ("A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if *any of the following circumstances* exists: . . . ." (emphasis added)). As in *Flores*, this is not ambiguous. As in *Flores*, it is clear that the statute was intended to be read in the disjunctive sense.

[17] It is true that the particular nuance at issue here was not argued in *Flores*. However, Barcinas's interpretation achieves a similar degree of absurdity as the interpretations offered by the appellant in that case. To require an element of knowing incapacity would fundamentally alter the Second Degree Criminal Sexual Conduct offense. This interpretation is inconsistent with the plain meaning as set forth by the legislature and would set the offense apart from the statutory scheme.

V. CONCLUSION

[18] We **AFFIRM** the judgment of the trial court because it did not err in denying Barcinas's Motion to Dismiss Indictment based on an incorrect interpretation of 9 GCA § 25.20.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice