IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ANDREW M. TENORIO,
Defendant-Appellant.

OPINION

Cite as: 2007 Guam 19

Supreme Court Case No. CRA07-002
Superior Court Case No. CF0243-06

Appeal from the Superior Court of Guam
Argued and submitted on October 15, 2007
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, JR., Associate Justice; RICHARD H. BENSON, Justice *Pro Tempore*.

TORRES, J.:

[1] Defendant-Appellant Andrew Tenorio ("Tenorio") appeals from a final judgment convicting him of Third and Fourth Degree Criminal Sexual Conduct, and the denial of a motion for judgment of acquittal related to the same offenses. Tenorio argues that Plaintiff-Appellee People of Guam failed to present sufficient competent evidence at trial of the "force or coercion" element of Third Degree Criminal Sexual Conduct ("CSC III"), and of the "physical helplessness" element of Fourth Degree Criminal Sexual Conduct ("CSC IV"). We agree that there was insufficient evidence of force or coercion and reverse his conviction for CSC III, but affirm the conviction for CSC IV.

I.

[2] In May 2006, the Mangilao Youth Crime Watch held a sleepover retreat at the Mangilao community recreation center. The sleepover was attended by: Tenorio, who served as an adult advisor to the youth group, Complainant T.Q.,[1] the 19-year-old President of the group, and four or five minors. During the middle of the night, T.Q. awoke and felt Tenorio rubbing his chest. T.Q. thought Tenorio was just moving around in his sleep, so T.Q. went back to sleep. When T.Q. woke up again, Tenorio's hand was in his pants touching his penis. Tenorio moved his hand under T.Q.'s boxers, pulled down his pants, touched his penis until erect, and performed oral sex for about a minute. T.Q. then turned over on his side. After T.Q. turned over, Tenorio pulled up T.Q.'s pants and T.Q. went back to sleep.

[3] After the incident, T.Q. found it difficult to deal with Tenorio. On the afternoon of June 6, about three weeks after the incident occurred, the Mayor fired T.Q., citing dissatisfaction with T.Q.'s leadership skills. T.Q. returned that evening to pack up some of his belongings, and argued with

[1] In accordance with Rule 3(d)(3)(B) of the Guam Rules of Appellate Procedure, the court refers to the complainant by initials only.

Tenorio. After T.Q. left, someone at the recreation center asked the police to stop T.Q. to recover his set of keys to the office. After being stopped by police, T.Q. accused Tenorio of the alleged conduct.

[4] A grand jury issued a four-charge indictment against Tenorio on June 15, 2006 for the alleged offenses against T.Q., as well as sexual offenses against two minors who were with T.Q. when he was stopped by the police, and who subsequently accused Tenorio.

[5] Tenorio was tried by a jury in August 2006. At the close of the evidence, Tenorio made a motion for a directed verdict, which the court took under advisement. On August 31, 2006, the jury convicted Tenorio on all counts. Among the elements required for conviction for CSC III was "force and coercion" to accomplish sexual penetration. Conviction for CSC IV required sexual contact when the defendant knew or had reason to know that the victim was "physically helpless."

[6] The trial court treated defendant's motion for a directed verdict as a motion for judgment of acquittal, and denied the motion on November 30, 2006, finding, without any written analysis of the elements or the record, that "there was sufficient evidence to establish the essential elements of the crimes beyond reasonable doubt." Appellant's Excerpts of Record ("ER"), Tab 66, p. 3 (Decision & Order).

[7] Tenorio was sentenced on January 18, 2007, and judgment was entered on the docket on February 9, 2007. Tenorio timely filed his notice of appeal on January 19, 2007.

II.

[8] This court has jurisdiction over this appeal from a final judgment entered by the Superior Court pursuant to 7 GCA §§ 3107 and 3108(a) (2005).

III.

[9] When reviewing the sufficiency of the evidence to support a conviction, this Court must determine "whether the evidence in the record could reasonably support a finding of guilt beyond a reasonable doubt." *People v. Sangalang*, 2001 Guam 18 ¶ 20. "'[T]his court reviews the evidence

in the light most favorable to the prosecution to ascertain whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *People v. Reyes*, 1998 Guam 32 ¶ 7). This is a "highly deferential standard of review." *Id.*

[10] "A court determines whether a judgment of acquittal should be granted by applying the same test used when the sufficiency of the evidence is challenged." *People v. Cruz*, 1998 Guam 18 ¶ 9.[2]

IV.

[11] The parties dispute whether there was sufficient evidence of: (a) force or coercion used to accomplish sexual penetration, as required for Third Degree Criminal Sexual Conduct; and (b) physical helplessness of the victim at the time of sexual contact, as required for Fourth Degree Criminal Sexual Conduct.

A. Force or Coercion Requirement for Third Degree Criminal Sexual Conduct

[12] A defendant is guilty of CSC III if "the person engages in sexual penetration with another person and if . . . *force or coercion is used to accomplish the sexual penetration.*"[3] 9 GCA § 25.25(a)(2) (2005) (emphasis added). While penetration is undisputed, there is a disagreement as to whether there was "force or coercion," and whether such force or coercion was used "to accomplish the sexual penetration."[4] Force or coercion is statutorily defined to:

> include[,] but *is not limited to*[,] any of the following circumstances:

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[2] "Thus, an appellate court reviews the evidence presented in a light most favorable to the government and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Cruz*, 1998 Guam 18 ¶ 9.

[3] Only a few cases have addressed the force or coercion requirement of the Guam statute, and they focused on issues not raised here. *See Guam v. Agualo*, 948 F.2d 1116, 1118 (9th Cir. 1991) (holding that nonconsent is not an element of first degree criminal sexual conduct); *People v. Flores*, 2004 Guam 18 ¶¶ 18-21 (rejecting argument that statute required force or coercion *and* physical helplessness or mental incapacity *and* an underage victim); *Guam v. Winkler*, No. 86-060A, 1988 WL 242599, at *2-3 (D. Guam App. Div. Aug. 2, 1988) (holding that provision of criminal sexual conduct statute defining medically unethical treatment as coercion was not unconstitutionally vague).

[4] The element of sexual penetration is supported by the record, and Tenorio does not dispute the sufficiency of the evidence of penetration. Appellee's Supplemental Excerpts of Record ("SER"), p. 9 (Trial Tr. p. 32:16, Aug. 29, 2006).

> (i) when the actor overcomes the victim through the *actual application of physical force or physical violence*;
>
> (ii) when the actor *coerces the victim to submit by threatening to use force or violence on the victim* and the victim believes that the actor has the present ability to execute these threats;
>
> (iii) when the actor coerces the victim to submit by threatening to retaliate in the future against the victim or any other person and the victim believes that the actor has the ability to execute this threat. . . .
>
> (iv) when the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable; or
>
> (v) when the actor, through concealment or by the element of surprise, is able to overcome the victim.

9 GCA § 25.10(a)(2) (2005) (emphasis added).[5] While the evidence indicates that T.Q. did not resist the Defendant's actions,[6] the government argues that force or coercion was used to accomplish penetration because either: (1) defendant's abuse of a position of trust constituted coercion; or (2) the defendant's removal of the complainant's boxer shorts and act of oral penetration constituted actual application of physical force.

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[5] The jury was only instructed as to definitions (i), (ii), and (v), and not (iii) or (iv). SER, p. 35 (Trial Tr. p. 208:3-11, Aug. 30, 2006).

[6] T.Q. testified:

> Q. And did you ever say *"Stop"*, or *"Get away from me"*, or *"What are you doing?"*
> A. No.
> . . .
> Q. And you never pushed him away? And you never yelled out and told anyone else at the mayor's office?
> A. No.
> . . .
> Q. But you did nothing to stop him?
> A. Yes.
> . . .
> Q. You're an adult?
> A. Yes.

ER (Trial Tr. pp. 41-42, Aug. 25, 2006) (emphases added).

1. Whether Coercive Circumstances Existed That Satisfy the Force or Coercion Element

[13] The government argues that "Tenorio accomplished the sexual penetration under coercive circumstances," where Tenorio "held a position of trust and that he abused that trust," and because "the incidents occurred on mayoral property during a youth sleepover event while other [sic] children were present." Appellee's Br., pp. 13, 15-16 (July 23, 2007). In order to support a conviction for CSC III based on abuse of a position of trust, such abuse must: (a) constitute "coercion"; and (b) be used "to accomplish the sexual penetration." 9 GCA § 25.25(a).

a. Sufficiency of the evidence of "coercion"

[14] The government contends that abuse of a position of trust is "coercion." Abuse of a position of trust – except in the medical context – is not an example of "coercion" enumerated in 9 GCA § 25.10(a)(2). The criminal sexual conduct statute provides that force or coercion "is not limited to" the enumerated circumstances, but provides no guidance on what constitutes coercion beyond the enumerated examples. 9 GCA § 25.10(a)(2). Where a criminal statute is ambiguous, the rule of lenity requires us to construe the statute in favor of the defendant. *See People v. Robinson*, 264 N.W.2d 58, 61 (Mich. Ct. App. 1978) (holding that ambiguity in a criminal sexual conduct statute should be construed in favor of lenity) (citing *Bell v. United States*, 349 U.S. 81, 83-84 (1955)); *see also People v. Lau*, 2007 Guam 4 ¶ 11 n.5 (noting that the rule of lenity only applies when a statute remains ambiguous after resort to the canons of statutory construction).[7] In determining whether abuse of a position of trust constitutes an unenumerated circumstance of coercion, we find it helpful

[7] There do not appear to be any reported Guam cases applying the rule of lenity, and 1 GCA § 700 suggests that the rule may not apply on Guam. Section 700 states that "common law rules that . . . penal statutes shall be strictly construed shall not apply" to the interpretation of the Guam Code. Insofar as the rule of lenity is based on the constitutional right to due process, however, the rule cannot be overturned by statute. *See United States v. Lanier*, 520 U.S. 259, 265-66 (1997) (finding a constitutional due process right to fair notice, including "the canon of strict construction of criminal statutes, or rule of lenity, [which] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered").

to examine: (i) the enumerated statutory definitions; (ii) the totality of circumstances; (iii) the plain meaning; and (iv) statutory history and policy.

i. Abuse of a position of trust and the enumerated examples of coercion

[15] The statutory definition of "force or coercion" provides only one enumerated example of the abuse of a position of trust being inherently coercive. 9 GCA § 25.10(a)(2)(iv). Subsection (iv) provides that force or coercion includes, but is not limited to, "when the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable." *Id.* Other positions of trust, including a youth group advisor, are not statutorily defined as inherently coercive. *Id.* A similar situation was presented in a Pennsylvania case, *Commonwealth v. Titus*, where the government argued that a father-daughter relationship inherently satisfied the force or forcible compulsion element of rape. 556 A.2d 425, 430 (Pa. Super. Ct. 1989). The court disagreed, finding that the "absence of any such legislative presumption argues against its establishment by judicial fiat." *Id.* By the same token, the Guam Legislature's failure to define the position of youth group advisor as inherently coercive, while not dispositive, "argues against its establishment by judicial fiat." *Id.*

[16] Other than the medical treatment provision, each of the enumerated examples of "coercion" in Guam's CSC statute, 9 GCA § 25.10, requires threats of force or retaliation, suggesting that the level of coercion required must be equivalent to such a threat. *See also People v. Berlin*, 507 N.W.2d 816, 817 (Mich. Ct. App. 1993) ("[W]here examples of what is included in a definition are given, the word is presumed to include only things of the same kind, class, character, or nature unless a contrary intent is evident.").[8] Tenorio, however, made no such threats, and his position as advisor

[8] *See also Hamilton v. Madigan*, 961 F.2d 838, 840 (9th Cir. 1992) ("[W]hen general and specific words are associated, as in the statutory definition . . . and [an] accompanying list of examples, then the general words are construed to embrace things similar to those enumerated by the specific words."); 2A Norman J. Singer, *Statutes & Statutory Construction* § 47:17 (6th ed. 2000) ("Where specific words follow[] general ones, . . . the doctrine of *ejusdem generis*] restricts application of the general term to things that are similar to those enumerated. . . . The doctrine of *ejusdem generis* has been said to be 'especially applicable to penal statutes.'").

to a volunteer youth group leader would not rise to the same level of coerciveness as threats of force or retaliation.

[17] Moreover, a youth group advisor is not among the various positions of trust that statutes in other jurisdictions have recognized as inherently coercive. Those statutes focus most often on guardians, medical personnel, or clergy – not a youth advisor.[9] Utah's statute governing sexual abuse of a child includes numerous positions of trust, including an adult youth leader and an employer, but the statute only applies when the victim is a child less than fourteen, whereas T.Q. was nineteen. Utah Code Ann. § 76-5-404.1(1), (4)(h). In addition, the Utah statute treats the position of special trust as an aggravating factor – it does not define "force" or "coercion" to include positions of trust. *Id.* § 76-5-404.1(4)(a), (h).

[18] Even if Tenorio's role could be considered a "position of trust," abuse of such a position alone is not "coercion" within the meaning of the statute. For example, a guardianship position over a minor – likely one of the most coercive relationships possible – has been held to be insufficient on its own. *See Commonwealth v. Milnarich*, 542 A.2d 1335, 1342 (Pa. 1988) (affirming by an equally divided court a holding that the "forcible compulsion" element of a rape conviction was not met where an adult guardian threatened to return a 14-year-old girl to a juvenile detention facility if she did not consent to sex); *Commonwealth v. Titus*, 556 A.2d 425, 427 (Pa. Super. Ct. 1989) (reversing

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[9] *See, e.g.*, Mich. Comp. Laws Ann. § 750.520d(1)(e) (Westlaw through P.A. 2007 No. 1-145) (stating that sexual penetration by a teacher of a sixteen or seventeen year old student constitutes CSC III); Minn. Stat. Ann. § 609.344(h), (*l*), (m), (n) (Westlaw through 2007 1st Special Sess.) (stating that sexual penetration by a psychotherapist of a patient, by a member of the clergy of an individual receiving religious or spiritual advice, by a jail or prison employee of an inmate, or an agent of a special transportation service of a transportee, constitutes CSC III); Fla. St. Ann. § 794.011(8) (Westlaw through 2007 Special D Sess.) (actor in a position of familial or custodial authority over a person under eighteen); N.J. Stat. Ann. § 2C:14-2(a)(2)(b)-(c) (Westlaw through L. 2007, c. 203, & J.R. No. 12) (actor has "supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status" or is a guardian); S.C. Code Ann. § 16-3-655(B)(2) (Westlaw through 2007) (actor in position of familial, custodial, or official authority over minor); Tenn. Code Ann. § 39-13-501 (Westlaw through 2007 1st Regular Sess.) (actor in position of parental, custodial, or official authority over a child under 15); Utah Code Ann. § 76-5-404.1(4)(h) (Westlaw through 2007 1st Special Sess.) (actor was in "position of special trust" over victim *under fourteen*, including a "youth leader . . . who is an adult," adult coach, teacher, counselors, religious leader, doctor, *employer*, parent or guardian); Model Penal Code § 213.3(1)(b) (actor is victim's guardian or otherwise generally responsible for victim's welfare).

a trial court's finding that a "'father/daughter relationship created a psychological and emotional atmosphere in which the victim was prevented from resisting'"); *Commonwealth v. Ables*, 590 A.2d 334, 338 (Pa. Super. Ct. 1991) (stating that an "uncle-niece relationship . . . alone . . . will not suffice to find forcible compulsion," but finding compulsion where the victim resisted on at least the first occasion and defendant intimidated the victim). Rather, the coercive position is only one circumstance that may contribute to a finding of coercion.

[19] Thus, because a youth group advisor is not statutorily defined as an inherently coercive position of trust, and the coerciveness of that position is less than the coerciveness inherent in the enumerated examples, we find that Tenorio's abuse of his position of trust alone is insufficient to constitute coercion.[10]

ii. Totality of the circumstances

[20] Some courts have determined whether the coercion element is satisfied "in light of the totality of the circumstances." *People v. McGill*, 346 N.W.2d 572, 576 (Mich. Ct. App. 1984); *accord People v. Brown*, 495 N.W.2d 812, 813 (Mich. Ct. App. 1992) ("Force or coercion is not limited to physical violence but is instead determined in light of all the circumstances.").[11] In *Commonwealth v. Titus*, the court stated that factors indicative of forcible compulsion (or the threat of forcible compulsion) include, but are not limited to, "the respective ages of the victim and the accused, the respective mental and physical conditions of the victim and the accused, the atmosphere and physical

[10] The Guam Legislature clearly did not intend to limit the definition of "coercion" to the enumerated examples, and we recognize that there likely are factual circumstances beyond the enumerated examples that are inherently coercive. We are cautious, however, in exercising our power to recognize additional examples of conduct that inherently constitutes coercion, and we find that the factual circumstances presented here do not warrant such recognition.

[11] Michigan and Minnesota have criminal sexual conduct statutes that are very similar to Guam's, and their decisions interpreting identical statutory language are persuasive here. *Guam v. Agualo*, 948 F.2d 1116, 1118 (9th Cir. 1991) ("Because the Guam statute is identical to the Michigan statute after which it is patterned, we view Michigan law to be persuasive in this circumstance."); *cf. Guam v. Torre*, 68 F.3d 1177, 1180 (9th Cir. 1995) ("applying the law of Guam as it is written. . . . but not[ing] [that the court's] conclusion is harmonious with the interpretation that Michigan courts have given the identical words"). *Compare, e.g.*, 9 GCA § 25.25 (defining CSC III), *with* Mich. Comp. Laws Ann. § 750.520d (providing an almost identical definition), *and* Minn. Stat. § 609.344 (providing a similar definition).

setting in which the incident was alleged to have taken place, the extent to which the accused may have been in a position of authority, domination or custodial control over the victim, and whether the victim was under duress." 556 A.2d at 427 (addressing forcible compulsion sufficient to prevent resistance by a person of reasonable resolution). The same factors may be appropriate here, and similar factors have been considered in Michigan cases interpreting a statute very similar to ours. *E.g.*, *McGill*, 346 N.W.2d at 576; *People v. Premo*, 540 N.W.2d 715, 716-18 (Mich. Ct. App. 1995); *People v. Reid*, 592 N.W.2d 767, 774-75 (Mich. Ct. App. 1999).

[21] In *McGill*, the Michigan Court of Appeals found coercion existed in a CSC IV case where a 13-year-old girl was taken to "an isolated and distant location by an older and stronger adult male," the victim "knew no one who lived nearby and testified that she was frightened," the defendant promised her a modeling career, a home, and a trip to Arizona, and the victim repeatedly told the defendant to remove his hands. 346 N.W.2d at 574-77.[12] The court observed that coercion might *not* have existed "[w]ere the victim older or had the undesired touching occurred in a place from which the victim could easily leave or from which she could summon help." *Id.* at 577.

[22] In *People v. Premo*, the Michigan Court of Appeals examined coercion in light of all the circumstances, and found coercion in a teacher-student relationship, even though such relations were not one of the enumerated statutory prohibitions at the time.[13] 540 N.W.2d at 717-18. In *Premo*, the defendant-teacher was charged with CSC IV for pinching the student victims' buttocks. The appellate court upheld the lower court's denial of the defendant's motion to quash the charges, stating, in dicta, that "defendant's actions constituted implied, legal, or constructive coercion

[12] *See also State v. Carter*, 289 N.W.2d 454, 455 (Minn. 1979) (finding force or coercion where defendant drove the minor victim to an isolated area and intentionally created an atmosphere of fear); *Brown*, 495 N.W.2d at 813 (finding force or coercion where the defendant found the victim "sitting in a bedroom, alone, naked, and crying," and he "disregarded her requests to go home and her statements that she did not want to be there and did not want to have intercourse").

[13] Michigan subsequently revised its statute to explicitly make sexual penetration by a teacher of a student under eighteen years old criminal sexual conduct. *See* 2002 Mich. Legis. Serv. 714 (West) (enacting Mich. Comp. Laws §§ 750.520b(1)(b)(iv), 750.520c(1)(b)(iv), 750.520d(1)(e)).

because, as a teacher, defendant was in a position of authority over the student victims and the incidents occurred on school property." *Id.* at 718.[14]

[23] Likewise, a Michigan Court of Appeals found coercion under CSC I in *People v. Reid*, in which the defendant served in a position of authority as counselor to a fifteen-year-old victim "in a role highly analogous . . . to that of psychotherapist with a patient." 592 N.W.2d at 774. Defendant explained to the victim's father that he had acted as a youth counselor, and defendant took the victim to spend the night in the basement of the home of defendant's parents. *Id.* at 771. Defendant spiked the victim's drinks, causing the victim to become drunk and "disoriented," then performed oral sex on the victim and successfully instructed the victim to reciprocate. *Id.* at 774-75. The victim was thereby "constrained by subjugation" and "coerced into submitting to these acts of penetration." *Id.* at 774-75.[15]

[24] A Michigan Appellate Court also found coercion in *People v. Welsh*, No. 252561, 2006 WL 119158, at *2 (Mich. Ct. App. Jan. 17, 2006) (unpublished). Defendant was a distant relative of the victim, but he considered himself an uncle and the victim went to his house "about every weekend" and occasionally stayed overnight. *Id.* at *3. The day before the incident, defendant took the 16-year-old victim to a rock concert and furnished him with alcohol. *Id.* While at the defendant's house the next day, the defendant "put his mouth on the victim's penis," and the victim did not resist or say anything because he was "too embarrassed." *Id.* The court found sufficient evidence of coercion in defendant's abuse of a position of authority and trust. *Id.*

[25] Here, some circumstances suggest Tenorio occupied a position of trust, which could contribute to the existence of coercion. Tenorio was elected to the volunteer position of an adult

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[14] *But cf. State v. Thompson*, 792 P.2d 1103, 1107 (Mont. 1990) (reversing rape conviction of high school principal who threatened to prevent graduation of victim if she did not consent because statute required force or threat of force).

[15] Michigan's CSC I statute differs from the present statute insofar as there is an explicit prohibition against using a position of authority to coerce submission of a minor under 16. Mich. Comp. Laws § 750.520b(1)(b)(iii).

advisor to the youth group by the members of the group, and he worked closely with the Mayor and his staff. T.Q. testified that he felt "'betrayed because it's–you know, he's an advisor, someone we trust.'" Appellee's Br., p. 15 (quoting ER, p. 10). T.Q. had just been awakened at the time of the incident. He testified that he did not tell Tenorio to stop touching his penis because he was "scared" because "[he] didn't know what, you know, [Tenorio's] reaction would be." SER, p. 9 (Trial Tr. 32:6-8, Aug. 25, 2006); *accord* ER (Trial Tr. 42:2-4, Aug. 25, 2006).

[26] Other circumstances suggest the absence of coercion – the victim was an adult male, and he could easily have left or summoned help. *See McGill*, 346 N.W.2d at 577. There were four or five other individuals present in the office who could have helped him. Moreover, T.Q. never testified that he felt coerced or that Tenorio's position of trust influenced T.Q.'s response during the incident. T.Q. did not resist Tenorio's advances and testified that at the time he felt "embarrassed to . . . even talk about it." SER, p. 10 (Trial Tr: 33:8); *see State v. Gamez*, 494 N.W.2d 84, 88 (Minn. Ct. App. 1993) (Davies, J. dissenting) (arguing that coercion was not present where victim was prevented by "embarrassment" from calling to her sister in the adjacent room for help, and disagreeing with the majority regarding whether other factors suggested coercion); *People v. Patterson*, 410 N.W.2d 733, 746 (Mich. 1987) (Brickley, J. concurring) ("References to no physical overpowering or no resistance are . . . examples of circumstances that will aid in determining whether the act was accomplished by force or coercion."). *But see Welsh*, 2006 WL 119158, at *3 (affirming conviction where minor victim was "too embarrassed" to resist defendant in position of trust and there were other coercive circumstances). When T.Q. eventually turned away from Tenorio onto his side, Tenorio ceased sexual contact. ER (Trial Tr. 41:24-42:1, Aug. 25, 2006) ("Q. So, then you turn over and you went to sleep? A. Turned over, you know, for him to stop. And it did; he pulled up my pants and I went back to sleep."). Furthermore, while Tenorio was an advisor to the youth group, he was not T.Q.'s boss, both were volunteers, and Tenorio was "new to the organization." SER, p. 10 (Trial Tr. 33:5, Aug. 25, 2006) (testimony of T.Q.).

[27] The government relies almost entirely on *Premo*, but *Premo* is distinguishable as involving pinching rather than penetration, a stronger position of authority – teacher-student rather than an adult advisor to a leader of a youth group, and events on school property (where attendance was mandatory) rather than a recreation center at night (where attendance was voluntary). The unpublished *Welsh* case provides a somewhat closer analogy as it involved unresisted oral sex, but it also involved more coercive circumstances than the present case – the victim there was a 16-year-old minor at the home of the defendant. None of the cases we have located found coercion where, as here, the victim was an adult and there was no prior or contemporaneous threat or use of force.

[28] We therefore find that the totality of the circumstances indicates that there was insufficient evidence of coercion.

iii. Plain meaning

[29] The plain meaning of "coercion" also suggests that there was insufficient evidence of coercion. "[T]he courts are bound to give effect to the expressed intent of the legislature." 2A Norman J. Singer, *Statutes & Statutory Construction* § 46:03 (6th ed. 2000). Black's Law Dictionary defines coercion as "[c]ompulsion by physical force or threat of physical force," or "[c]onduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it." *Black's Law Dictionary* 252 (7th ed. 1999). Michigan has defined the coercion requirement slightly more broadly, stating that "force or coercion means that 'the defendant either used physical force or did something to make [the complainant] reasonably afraid of present or future danger.'" *People v. Kline*, 494 N.W.2d 756, 758 (Mich. Ct. App. 1992) (alteration in original) (quoting Mich. Crim. Jury Instructions 2d § 20.15). Tenorio did not threaten force or do anything to make T.Q. reasonably afraid of any danger, and abuse of a position of trust, standing alone, does not seem to fall within these definitions.

[30] The Michigan *Premo* case quotes an older, broader, definition of coercion:

> Coercion may be actual, direct, or positive, as where physical force is used to compel act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse.

Premo, 540 N.W.2d at 717 (quoting Black's Law Dictionary 234 (5th ed.)).[16] Here, there is no evidence indicating that T.Q. was "constrained by subjugation to [Tenorio] to do what his free will would refuse." *See id.* T.Q. testified that he was afraid of what Tenorio's reaction might be if he resisted, and that he was embarrassed, but there was no evidence that he was "constrained by subjugation" or that T.Q.'s arguably subordinate position in the youth group in any way affected his actions or inactions. To the contrary, testimony indicated that his position in the youth group was voluntary, and that he intended to seek other employment. SER, p. 20 (Trial Tr. 112:23-24, Aug. 29, 2006) (testimony of N. Blas) ("[H]e volunteered and he was elected to be president."); *id.* at 7 (Trial Tr. 30:1-3, Aug. 25, 2006) (T.Q. testifying that he was "hoping to seek a temporary position as a substitute teacher for [GPSS] until January when I join the Navy"). Moreover, T.Q. eventually used his free will to turn away from Tenorio, and there is no evidence in the record to suggest why he could not have done so earlier.

[31] The plain meaning of "coercion," therefore, weighs against a finding of coercion here.

iv. Statutory history and policy

[32] We next examine the history and policy behind the coercion requirement of CSC III. Common law rape required "carnal knowledge of a woman forcibly and against her will." Nicole Fusilli, Note, *New York State of Mind: Rape & Mens Rea*, 76 St. John's L. Rev. 603, 609 (2002)

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[16] Minnesota defines "coercion" in its CSC statute as:

> [T]he use by the actor of words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon the complainant or another, or the use by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant's will. Proof of coercion does not require proof of a specific act or threat.

Minn. Stat. § 609.341(14). The statute prohibits sexual penetration by persons in certain specific positions of trust, it prohibits older persons in positions of trust from penetrating minors, and it separately prohibits the use of force or coercion. Minn. Stat. § 609.344. Thus, the definition and statutory structure suggest that a position of trust, without more, is not "coercion" in Minnesota.

(quoting 4 William Blackstone, Commentaries at 210). Conviction also required prompt reporting of the incident, corroboration, and utmost resistance. *Id.* at 609-10. Because of the low rate of conviction and the focus on the victim's actions, reforms were proposed by the American Law Institute to eliminate the resistance requirement and the non-consent requirement, and to focus on the forcible compulsion element. *Id.* at 611; *see also* 3 Charles E. Torcia, *Wharton's Criminal Law* § 281 (15th ed. 1995) (stating that because resistance might cause the aggressor to become more violent and cause further injury to the victim, the requirement has changed to require that the victim resist only "to the extent that it is necessary reasonably to manifest her refusal to consent," and resistance is entirely unnecessary if it would be "futile or foolhardy."). While many states made such reforms to their statutes, courts have continued to use resistance as a measure of the force used by the defendant. *See* Fusilli, *supra*, at 615-16; *Patterson*, 410 N.W.2d at 746 (Brickley, J. concurring).

[33] The coercion requirement of CSC III is presumably intended to replace the requirement of resistance or affirmative non-consent that was traditionally an element of rape.[17] There is no consent if the defendant uses "force" or threatened force, where "force" is "not the force inherent in the act of penetration but the force used or threatened to prevent or overcome resistance by the victim." Torcia, *supra*, § 281; *see also People v. Cicero*, 157 Cal. App. 3d 465, 475-76 (Ct. App. 1984) ("'[F]orce' plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will."). Thus, even though affirmative non-consent is not required in Guam and a number of other states, the force or coercion requirement may be interpreted in the context of replacing the non-consent requirement. In other words, the force or coercion should be strong enough to demonstrate that the complainant did not consent.

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[17] Guam's previous statute governing rape by force or coercion required that a male defendant "compel[] [a female not his wife] to submit [to sexual intercourse] by force or threat of imminent death, serious bodily injury or kidnaping," or "compel[] her to submit by any threat that he knows would be likely to prevent resistance by a woman of ordinary resolution." Guam Crim. & Corrections Code §§ 25.15, 25.20 (1977). According to a comment to the Model Penal Code, which was a source of the old Guam statute, the phrase "compels to submit" in this context required more than "a token initial resistance," though it did not require "additional struggle [that] would obviously be useless." *Model Penal Code*, Part II, Rape and Related Offenses, § 207.4, cmt. at 246-47 (Tent. Draft No. 4, 1955).

[34] Here, T.Q. never indicated to Tenorio his lack of consent to receive oral sex. Rather, T.Q. permitted Tenorio to touch his chest, touch his penis until erect, partially remove his clothing, and perform oral sex. When T.Q. rolled over, Tenorio pulled T.Q.'s pants back up and ceased sexual contact. While Tenorio may have held a position of trust, the coercion inherent in his position was limited, such that, arguably, he could reasonably have expected that someone in T.Q.'s position, if they did not consent, would have verbalized their lack of consent or resisted his sexual advances.

[35] The CSC III statute is designed to deter non-consensual sexual penetration. In most instances, the best first step in avoiding non-consensual sexual relations is presumably for the non-consenting party to indicate a lack of consent. While the law no longer requires "utmost resistance" or any resistance to ensure that the defendant was aware of the victim's non-consent, the court is wary of applying criminal sexual conduct statutes where the complainant never expressed a lack of consent. *See* Fusilli, *supra*, at 627 (advocating an exception to rape for reasonable mistake of fact as to the complainant's consent).

[36] Traditional statutory rape laws (such as those prohibiting sex with underage victims), meanwhile, do not require the use of force or coercion, but assume that the victim is unable to make rational or mature decisions about whether to engage in sexual relations. A similar rationale applies to sexual penetration by someone in a position of trust or authority, as the victim "might be either physically or mentally vulnerable." Patricia J. Falk, *Rape by Fraud & Rape by Coercion*, 64 Brook. L. Rev. 39, 92 (1998). Some relationships are so inherently coercive that the victim may not be in a position to provide knowing and voluntary consent. The current facts, however, do not seem to fall within that category, and nothing in the statute suggests otherwise. To find that a supervisor - supervisee relationship between two adults was so inherently coercive as to overcome the supervisee's will to resist would criminalize numerous consensual relationships.

[37] In sum, each of the factors we have examined – enumerated statutory examples, totality of the circumstances, plain meaning, and policy reasons – leads us to the conclusion that the evidence presented here was insufficient to support a finding of coercion.

b. Evidence that the coercion was used to accomplish the penetration

[38] Furthermore, even if there were coercion, the existence of coercion alone is insufficient for a CSC III conviction. Rather, the coercion must be "used to accomplish the sexual penetration." 9 GCA § 25.25(a)(2). Thus, even if the defendant held a position of trust and authority, the statute requires "evidence that the complainant was coerced to engage in sexual relations with defendant *because of* his position of authority." *People v. McNeal*, No. 248323, 2005 WL 321001, at *2 (Mich. Ct. App. Feb. 10, 2005); *see also State v. Hanson*, 514 N.W.2d 600, 603 (Minn. Ct. App. 1994) (stating that Minnesota CSC IV statute criminalizing sexual contact with a minor by a person in a position of authority requires that the minor victim submit to sexual contact "because of" the defendant's position of authority).

[39] In *McNeal*, the court reversed the conviction of a high school wrestling coach who had oral sex with a female student assistant manager after practice because there was no evidence that the defendant's position of authority caused the complainant to submit (and there was no evidence of any force or resistance). 2005 WL 321001, at *1-3.

[40] In *Hanson*, meanwhile, the court affirmed a CSC IV conviction where there was evidence that the defendant used his position of authority to get the victim to submit. 514 N.W.2d at 604. The victim was a 17-year-old employee of the 40-year-old defendant, the defendant was "operating within the employment relationship" when he approached the victim, and the victim testified that the defendant "thought he could get away with it." *Id.* at 603-04. The victim also testified that she liked her job and did not want anyone to know about the incident. *Id.* at 604.

[41] Here, T.Q. testified that he felt "scared" because he "didn't know what . . . [Tenorio's] reaction would be" if he told him to stop, and that during the incident he felt "[l]ike, betrayed" by

Tenorio, who was an advisor to the youth group. SER, p. 9-10 (Trial Tr. 32-33, Aug. 25, 2006) But T.Q. did not indicate that he felt compelled to submit "because of" Tenorio's position, and nothing in the record so indicates. *See McNeal*, 2005 WL 321001, at *2.

[42] In sum, we find that there was insufficient evidence that coercion was used *to accomplish* the penetration.

2. Whether Penetration Was Accomplished by the Actual Application of Physical Force

[43] As an alternative to *coercion* "used to accomplish the sexual penetration," 9 GCA § 25.25(a)(2), the government argues that the actual application of *physical force* was used to accomplish the sexual penetration where Tenorio physically removed T.Q.'s pants and performed oral sex. Appellee's Brief, p. 16.

[44] There is some ambiguity regarding the level of force required by the statute. The enumerated statutory definition provides that "[f]orce . . . includes but is not limited to . . . when the actor *overcomes the victim* through the actual application of physical force or physical violence." 9 GCA § 25.10(a)(2)(i) (emphasis added). Similarly, in *People v. Kusumoto*, the California Court of Appeals held that the force requirement in a California rape statute was not met where "the victim's will was not overcome by any physical force substantially different from or greater than that necessary to accomplish the act itself." 169 Cal. App. 3d 487, 494 (Ct. App. 1985). Rather, the force must be used to prevent or overcome resistance. *Id.* at 493.[18] If the "force" requirement of CSC III

[18] The *Kusumoto* Court relied in part on an analysis of rape from a criminal law treatise:

> "The act of sexual intercourse must be accomplished . . . without [the victim's] consent . . . . Conceptually, 'lack of consent' results either from the defendant's use of force or threatened force, or from the female's incapacity to consent. . . . If the defendant uses force or threatened force to accomplish the act of sexual intercourse, there is no consent. *The force to which reference is made is not the force inherent in the act of penetration but the force used or threatened to overcome or prevent resistance by the female.*"

169 Cal. App. 3d at 493 (quoting 3 Wharton, Criminal Law §§ 287, 288, at 30-34 (14th ed. 1980) (alterations in original)).

could be satisfied by the physical force inherent in any act of sexual penetration, then the "force" requirement in the statute would be superfluous. *Cf. Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 609 (1998) ("Statutory interpretations that 'render superfluous other provisions in the same enactment' are strongly disfavored.").

[45] Thus, in *People v. Berlin*, the Michigan Court of Appeals found that no force was used where the defendant took the victim's hand and, without resistance, placed it on his crotch. 507 N.W.2d 816, 819 (Mich. Ct. App. 1993). Similarly, in *Patterson* the court found insufficient evidence of physical force where the defendant placed his hand on the outside of the victim's underwear, but removed it when she turned away. 410 N.W.2d at 734.

[46] In *People v. Carlson*, however, the Michigan Supreme Court rejected *Kusumoto* and held that the equivalent Michigan statute for CSC III does *not* require the use of force to "overcome" the victim. 644 N.W.2d 704, 709 (Mich. 2002) (vacating decision not to bind over defendant who had intercourse with minor who expressed a lack of consent but did not resist). The court did not address the statutory language requiring that "force or coercion" based on actual physical force be sufficient to "overcome[] the victim." Mich. Comp. Laws Ann. § 750.520b(1)(f)(i); *accord* 9 GCA § 25.10(a)(2)(i). The *Carlson* Court noted that the definition of "force or coercion" is not limited to the enumerated examples, but gave no indication for why the requirement of "overcoming the victim" could be ignored. To the contrary, the court made the puzzling statement that the "overcoming the victim" requirement would amount to the "improper insertion of an additional element beyond that required by the statutory language." 644 N.W.2d at 709 (citing Mich. Code § 750.520d(1)(b)).[19]

[19] The dissent in *Carlson* pointed out that the decision was reached without briefing or oral argument. 644 N.W.2d at 710 ("[I]f the Court is going to decide what is meant by the words 'force or coercion,' as used in M.C.L. 750.520d(1)(b), it should do so after the benefit of briefing and oral argument") (Weaver, J. dissenting).

[47] Nonetheless, the *Carlson* court clarified that the force must be greater than what is inherently required to accomplish penetration and must be sufficient to allow the defendant to control the victim:

> [T]he requisite "force" for [third degree criminal sexual conduct] does not encompass nonviolent physical interaction in a mechanical sense that is merely incidental to an act of sexual penetration. Rather, the prohibited "force" encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes.

644 N.W.2d at 709.

[48] The government argues that Tenorio applied physical force to the victim "by pulling down the front of his pants and putting his penis in his mouth," and that such force was sufficient under the statute. Appellee's Brief, p. 16. But the force used by Tenorio was not sufficient to "overcome[] the victim," 9 GCA § 25.10(a)(2)(i), and was "nonviolent" and "incidental to [the] act of sexual penetration." *Carlson*, 644 N.W.2d at 709.

[49] The government relies on *Premo*, a Michigan Court of Appeals decision holding that a teacher who pinched students on the buttocks exerted physical force as required under CSC IV because "the act of pinching requires 'the actual application of physical force.'" 540 N.W.2d at 717 (quoting Mich. Comp. Laws § 750.520b(1)(f)(i)). The *Premo* decision, however is inapposite because it involved CSC IV rather than CSC III, is inconsistent with the Michigan Supreme Court's subsequent requirement in *Carlson* that force is used to "seize control of the victim in a manner to facilitate the accomplishment of sexual penetration," 644 N.W.2d at 709, and is inconsistent with the statutory language requiring that the force be "used to accomplish the penetration" and "overcome[] the victim." 9 GCA §§ 25.10(a)(2)(i), 25.25(a)(2).

[50] In short, the statute and the better reasoned cases indicate that the force applied by Tenorio was not sufficient. We therefore hold that the record does not support a finding of physical force to accomplish the penetration.

B. Physical Helplessness Requirement for Fourth Degree Criminal Sexual Conduct

[51] Tenorio also appeals the sufficiency of the evidence for his conviction of Fourth Degree Criminal Sexual Conduct, 9 GCA § 25.30(a), which prohibits, *inter alia*, sexual contact[20] with a physically helpless victim:

> A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if either of the following circumstances exists:
>
> > (1) force or coercion is used to accomplish the sexual contact;
> > (2) the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

9 GCA § 25.30(a) (2005).

[52] The government argues that Tenorio touched the victim when he was "physically helpless" because "the victim was asleep when Tenorio engaged in sexual contact with him." Appellee's Brief, p. 9. Guam law defines "[p]hysically [h]elpless" as "unconscious, *asleep* or for any other reason is physically unable to communicate unwillingness to an act." 9 GCA § 25.10(6) (emphasis added).

[53] T.Q. testified that Tenorio touched his penis while he was asleep. SER, pp. 8-9 (Trial Tr. 31:24-32:2, Aug. 25, 2006) ("So I went back to sleep and woke up again, and his hands was in my pants over my boxers, and he was just touching . . . . [m]y penis.").

[54] Thus, the record provides sufficient evidence to convict Tenorio of CSC IV.

C. Judgment of Acquittal

[55] Tenorio also argues that the lower court erred in denying Tenorio's motion for judgment of acquittal. Because the same standard of review applies, an identical analysis applies and we reach the same conclusions regarding both CSC III and CSC IV. *See People v. Cruz*, 1998 Guam 18 ¶ 9

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[20] Sexual contact includes touching a penis for purposes of arousal. 9 GCA § 25.10(a)(8) (defining sexual contact to include "touching of the victim's . . . intimate parts . . . for the purpose of sexual arousal or gratification"); 9 GCA § 25.10(3) ("*Intimate Parts* includes the primary genital area . . . ."). Tenorio continued touching T.Q. until he was erect, after which he performed oral sex, leaving no doubt that the touching was "for the purpose of sexual arousal or gratification." *See* 9 GCA § 25.10(a)(8).

("A court determines whether a judgment of acquittal should be granted by applying the same test used when the sufficiency of the evidence is challenged.").

V.

[56] While there may be some ambiguity in the CSC III statute regarding the precise level of force or coercion required, the requisite level of force or coercion was not present here. Tenorio never had reason to believe that the penetration was anything but consensual, as T.Q. never expressed a lack of consent either verbally or physically. While Tenorio's position as an advisor may have made T.Q. less likely to resist, there is no evidence that his position alone overcame the adult complainant or prevented him from resisting. The purpose of the CSC III statute is to discourage non-consensual penetration, and in order to minimize the occurrence of non-consensual penetration, complainants should somehow indicate their lack of consent if they are able to do so. The CSC IV conviction, meanwhile, is supported by the evidence.

[57] We therefore **REVERSE** the conviction for CSC III, and **AFFIRM** the conviction for CSC IV.

Richard H. Benson

RICHARD H. BENSON
Justice *Pro Tempore*

Robert J. Torres

ROBERT J. TORRES, JR.
Associate Justice

F. Philip Carbullido

F. PHILIP CARBULLIDO
Chief Justice