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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

CARMELO A.Q. MENDIOLA,
Defendant-Appellant.

Supreme Court Case No. CRA13-017
Superior Court Case No. CF0196-07

OPINION

Cite as: 2014 Guam 17

Appeal from the Superior Court of Guam
Argued and submitted February 10, 2014
Hagåtña, Guam

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

CARBULLIDO, J.:

[1] A jury convicted Defendant-Appellant Carmelo A.Q. Mendiola on five criminal charges stemming from the sexual assault of his minor niece. On appeal, Mendiola challenges only his conviction of First Degree Criminal Sexual Conduct. Mendiola argues that his conviction should be reversed because insufficient evidence was presented at trial to support a finding of sexual penetration—a necessary element of First Degree Criminal Sexual Conduct. For the reasons set forth below, we affirm the First Degree Criminal Sexual Conduct conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The following evidence was presented at trial. K.M.,[1] the minor victim in this case, lived with her uncle Carmelo A.Q. Mendiola, his wife and children, and K.M.'s brothers and sisters. All persons lived at K.M.'s father's house while he was off-island. K.M. slept in the living room with her brothers and sisters.

[3] At the time of the incident, K.M. was nine years old and attended elementary school. While at school, K.M. experienced pain in her ear and was taken to the school nurse. In accordance with the school nurse's recommendation that K.M. be sent home, Auntie Mel (Mendiola's wife) retrieved K.M. from school and transported her home. When K.M. and Auntie Mel arrived, Mendiola and his children were at the house. That afternoon Auntie Mel planned to take her children to Santa Rita and asked K.M. if she would like to join them.

[1] Pursuant to Rule 3 of the Guam Rules of Appellate Procedure, 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 child [or] a victim of a sex crime . . . by initials only.").

Mendiola said that K.M. was not allowed to go to Santa Rita with the others and instructed her to stay at the house with him.

[4] Following Auntie Mel and the children's departure, K.M. asked Mendiola if she may have some candy. Mendiola said that K.M. may have candy but only if she lay next to him. While they lay on the bed, Mendiola received a phone call from the school nurse stating that K.M. had bruises on her body. Mendiola instructed K.M. to remove her shirt so he may see if she had bruises. After K.M. complied, Mendiola had K.M. remove her pants as well. Mendiola paused to look at K.M. while she stood naked in front of him before telling her to lie on the bed in the room. K.M. lay on her back on the bed, and Mendiola climbed on top. Mendiola then placed a pillow over K.M.'s face, spread her legs and leaned against her.

[5] As K.M. lay on the bed with her legs spread and a pillow covering her face, she could feel pressure on her vagina. K.M. stated that "when [Mendiola] leaned against me he put pressure on my body with his private against my . . . private." Transcripts ("Tr.") at 30 (Jury Trial – Day 1, Nov. 16, 2011). K.M. explained that Mendiola was not clothed and was applying the pressure with his penis. K.M. knew it was Mendiola's penis because she could feel his skin on her body. According to K.M., she felt too frightened to move and lay on the bed gripping a blanket until the incident ceased. After an unknown length of time, Mendiola stopped what he was doing, said nothing, and left. K.M. got up, put her clothes back on, and went outside to draw.

[6] K.M. did not mention the incident to anyone until she was caught acting out sexually with her cousin approximately six months later. At the instruction of another aunt, Auntie Rachel, K.M.'s brother questioned K.M. about the sexual behavior. K.M. revealed to her brother that Mendiola had touched her in an inappropriate manner. The next day, Auntie Rachel took

K.M. to the police station to report the incident and later to Healing Hearts Crisis Center for an examination.

[7] Ann Rios, a nurse examiner at Healing Hearts, interviewed and physically examined K.M. when she arrived at Healing Hearts. At trial, Ms. Rios provided testimony as to K.M.'s visit. Ms. Rios stated that generally she lets the patient dictate the type of examination she conducts. For example, if a patient explained "[h]e pulled my hair here" or "I hurt here," forensic evidence would be obtained from the particular areas described by the patient. Tr. at 6 (Jury Trial – Day 2, Nov. 17, 2011). During K.M.'s visit to Healing Hearts, Ms. Rios conducted a variety of external and internal examinations of K.M.'s vagina.

[8] Ms. Rios also provided testimony concerning her interview of K.M. about the incident involving Mendiola. When asked what information was gained during the interview, Ms. Rios consulted K.M.'s health history form which indicated that she had been sexually abused and experienced vaginal discomfort or pain on urination. Ms. Rios further testified that K.M. indicated to her that K.M. had been sexually penetrated.

[9] Ms. Rios testified to the following:

> Q: On the two things you've indicated that were yes, "Private parts discomfort, pain," and "Pain in urination," do you recall if that would be something you showed that you got only from the -- from [K.M.] or from someone else (indiscernible)?
>
> A: No, this was actually from [K.M.]. If you look at my progress notes, you'll find it in another form.
>
> . . . .
>
> Q: Now [K.M.], in her history, indication that there'd been sexual penetration, in the history?
>
> A: (Indiscernible), she said yes.
>
> Q: All right. And was this general examination consistent with that history?
>
> A: Yes, it is.

Id. at 15, 26.

[10] Stemming from the incident, Mendiola was indicted and charged with one count of First Degree Criminal Sexual Conduct ("CSC") as a first degree felony, one count of Second Degree CSC as a first degree felony, one count of Assault as a misdemeanor, one count of Family Violence as a misdemeanor, and one count of Child Abuse as a misdemeanor. After a jury trial, Mendiola was convicted on all charges. On appeal, this court reversed Mendiola's convictions because of prosecutorial misconduct and ordered a new trial. *See People v. Mendiola*, 2010 Guam 5. The new trial commenced in August 2011 and resulted in a hung jury on all charges. The third trial on the same five charges began on November 16, 2011.

[11] After the close of the People's case in the third trial, Mendiola moved for a judgment of acquittal on all five counts. The trial court denied the motion, stating that the People "met its burden to provide enough factual evidence in each of the elements, in all the five charges, for the court to consider." Tr. at 37 (Jury Trial – Day 2). The jury returned a guilty verdict against Mendiola on all five charges.

[12] The trial court sentenced Mendiola to: life imprisonment, with a possibility of parole, for the First Degree CSC charge; fifteen years of imprisonment for the Second Degree CSC charge; one year of imprisonment for the Assault charge; one year of imprisonment for the Family Violence charge; and one year of imprisonment for the Child Abuse charge. All terms are to run concurrently. Mendiola filed a timely appeal as to his conviction of First Degree CSC.

II. JURISDICTION

[13] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-93 (2014)) and 7 GCA §§ 3107 and 3108(a) (2005). The defendant may appeal his conviction in accordance with 8 GCA § 130.15(a) (2005).

III. STANDARD OF REVIEW

[14] When a defendant appeals a motion for judgment of acquittal based on an insufficiency of the evidence, we review the trial court's denial of the motion *de novo*. *People v. George*, 2012 Guam 22 ¶ 47. "When ruling on a motion for judgment of acquittal, the trial court is concerned with the existence or nonexistence of evidence, not its weight, and this standard remains constant even when the People rely exclusively on circumstantial evidence." *Id.* ¶ 51 (quoting *People v. Song*, 2012 Guam 21 ¶ 29).

[15] On appeal, the standard is not whether the prosecution proved each element of the offense beyond a reasonable doubt because at this stage the trier of fact has previously determined the defendant to be guilty beyond a reasonable doubt. Thus, the reviewing court is not charged with making a determination as to the defendant's guilt. Instead, the reviewing court must determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Tennessen*, 2009 Guam 3 ¶ 14. Upon review, the evidence shall be viewed in a light most favorable to the prosecution. *George*, 2012 Guam 22 ¶ 49; *Song*, 2012 Guam 21 ¶ 26; *Tennessen*, 2009 Guam 3 ¶ 14; *People v. Tenorio*, 2007 Guam 19 ¶ 9; *People v. Sangalang*, 2001 Guam 18 ¶ 20. This standard is highly deferential. *See, e.g.*, *Song*, 2012 Guam 21 ¶ 26.

IV. ANALYSIS

[16] Although the jury returned a guilty verdict on all five charges, Mendiola is appealing only the First Degree CSC conviction. Appellant's Br. at 1 (Sept. 18, 2013). Mendiola argues the government did not meet its burden in providing sufficient evidence to show sexual penetration. *Id.*

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

[18] In making a determination on penetration, even the slightest breach of any part of the vagina, including the labia majora, is sufficient. *People v. Enriquez*, 2014 Guam 11 ¶ 15; *see also United States v. Reddest*, 512 F.3d 1067, 1072 (8th Cir. 2008) (citing *United States v. Jahagirdar*, 466 F.3d 149, 154-55 (1st Cir. 2006)); *People v. Lockett*, 814 N.W.2d 295, 307 (Mich. Ct. App. 2012); *People v. Karsai*, 182 Cal. Rptr. 406, 410 (Ct. App. 1982); *Jett v. Commonwealth*, 510 S.E.2d 747, 749 (Va. Ct. App. 1999) (en banc).

[19] To support his contention that there was insufficient evidence of sexual penetration, Mendiola points to the lack of testimony from K.M. about penetration. Appellant's Br. at 7 ("K.M. did not offer any testimony that Mendiola placed his 'private' into or inside her vagina."). Mendiola also points to the lack of any physical evidence to corroborate any allegations of sexual penetration. *Id.* Mendiola relies on Virginia and Illinois precedent to highlight occasions when courts have overturned convictions for a lack of sufficient evidence concerning the element of penetration. *See Moore v. Commonwealth*, 491 S.E.2d 739, 740 (Va. 1997) (holding the victim's equivocal testimony and her lack of knowledge of the intricacies of the female genitalia created doubt as to the merits of the facts, causing the court to ultimately decide the evidence was insufficient to show penetration); *People v. Garrett*, 667 N.E.2d 130,

136 (Ill. App. Ct. 1996) (ruling that while the record on appeal clearly showed the woman had been raped vaginally, the record was not definitive as to whether the defendant penetrated the woman's anus); *People v. Maggette*, 747 N.E.2d 339 (Ill. 2001) (determining that although the defendant touched the victim's vaginal area without her consent, penetration did not occur because the defendant kept his hand on the outside of the victim's clothing).

[20] In response, the People contend that when the evidence—both direct and circumstantial—and all reasonable inferences drawn therefrom are viewed in a light most favorable to the People, Mendiola fails to meet his burden to demonstrate that there was insufficient evidence to sustain his conviction. Appellee's Br. at 14 (Oct. 16, 2013).

[21] In her testimony, K.M. stated that while Mendiola lay naked on top of her, he put "pressure" on her vagina with his penis. "While evidence of sexual penetration must be present, there are no magic words that need to be stated at trial." *People v. Enriquez*, 2014 Guam 11 ¶ 19 (explaining that a totality of the evidence may be used to infer the element of penetration); *see also Commonwealth v. Rodriguez*, 918 N.E.2d 865, 869 (Mass. App. Ct. 2009); *Commonwealth v. Fowler*, 725 N.E.2d 199, 203 (Mass. 2000); *Commonwealth v. Martino*, 588 N.E.2d 651, 655 (Mass. 1992). As we have previously recognized, "[w]hen ruling on a motion for judgment of acquittal, the trial court is concerned with the existence or nonexistence of evidence, not its weight, and this standard remains constant even when the People rely exclusively on circumstantial evidence." *People v. Song*, 2012 Guam 21 ¶ 29 (citations omitted); *see also Jett*, 510 S.E.2d at 748-49 ("[C]ircumstantial evidence may be more compelling and persuasive than direct evidence, and when convincing, it is entitled to as much weight as direct evidence." (quoting *Bridgeman v. Commonwealth*, 351 S.E.2d 598, 600 (1986))); *Rodriguez*, 918 N.E.2d at 868 ("While there [must] be some degree of penetration, it may be inferred from circumstantial

evidence." (alteration in original) (citations and internal quotation marks omitted)). Thus, the element of penetration can be established by circumstantial evidence.

[22] Moreover, often child victims do not have an intricate knowledge of their genitalia to sufficiently describe a sexual encounter. *See generally Moore*, 491 S.E.2d 739. As seen in many cases, child victims will use general or slang terms when describing their genitalia during testimony. *See, e.g.*, *id.* at 740 (victim testified using anatomical dolls); *Jett*, 510 S.E.2d at 748 (victim referred to her private parts as her "pookie"); *George*, 2012 Guam 22 ¶ 4 ("I just call it my 'thing.'"). Although specificity when testifying is always preferable, a general description of the events does not necessarily defeat any possibility that penetration occurred. It is not reasonable to expect a fourteen-year-old victim to speak as knowledgeably about her anatomical structure as an adult. However, just as K.M's lack of specificity does not absolve Mendiola of guilt, it does not single-handedly affirm his conviction either. Thus, because K.M. spoke generally while testifying, the testimony of Ms. Rios becomes vital evidence.

[23] Mendiola argues that Ms. Rios's testimony concerning the information on K.M.'s health history form constituted "inadmissible hearsay that the defense had objected to several times." Appellant's Reply Br. at 4 (Oct. 30, 2013). At trial, Mendiola objected to the admission of the health history form into evidence on hearsay grounds, causing the People to withdraw its request for admission. Tr. at 15 (Jury Trial – Day 2). Because the People withdrew its request to admit the form into evidence, the health history form was not evidence at trial. Importantly, however, Mendiola did not object to Ms. Rios's testimony regarding the information on the health history

form.[2] *Id.* at 3-28. Thus, although the form itself was not admitted into evidence, the testimony of Ms. Rios concerning the form was heard by the jury and is part of the record.

[24] Ms. Rios testified that when examining an alleged victim of sexual assault, the type of forensic evidence she gathers is dictated by the victim's description of the alleged assault:

> Q: The forensic evidence is an acute exam you might gather would include what type of things?
>
> A: Oh. Hair samples, nail swabs, swabs from the lips. Depending on what they say. If they say that, you know, "He only touched my vagina with his fingers," then I would do a vaginal swab, but if they say, "Oh, he kissed me here," "He pulled my hair here," "He kissed my breasts," or there's -- You know, "I hurt here," we examine every part of the history that is provided. And I say "history," as their story. That's what they're coming in, and what they're telling us. So whatever is told to us is what we kind of use.

Id. at 6.

[25] During K.M's physical examination at Healing Hearts, Ms. Rios examined external and internal parts of K.M's vagina, including her hymen. *Id.* at 20-26. Ms. Rios confirmed that this type of examination was conducted because K.M.'s health history—i.e., the information that was provided to Healing Hearts during K.M.'s intake interview—indicated that K.M. had been sexually penetrated. *See id.* at 26. Thus, although at trial K.M. did not directly state that she had been sexually penetrated by Mendiola, a rational trier of fact could have inferred that the reason

[2] Contrary to Mendiola's assertion that "Rios's statement was inadmissible hearsay that the defense had objected to several times," Reply Br. at 4, at trial, Mendiola objected only to the People's attempt to admit the health history form into evidence, not to Rios's testimony concerning the information on the form. *See* Tr. at 13-15, 26 (Jury Trial – Day 2). Thus, Mendiola raises for the first time on appeal the issue of whether Ms. Rios's testimony constituted hearsay. Reply Br. at 1-5. Where no objection is made to the statements at trial, we review for plain error. *See People v. Mendiola*, 2010 Guam 5 ¶¶ 11, 13 (citing *People v. Moses*, 2007 Guam 5 ¶ 8) (reviewing unobjected-to prosecutorial comments for plain error). Because Mendiola does not provide a plain error analysis of the issue, we exercise our discretion to not address the issue. *See* 8 GCA § 130.50(b) ("Plain errors or defects affecting substantial rights *may* be noticed although they were not brought to the attention of the court." (emphasis added)).

Ms. Rios examined K.M.'s vagina for signs of penetration was that K.M. had reported to Healing Hearts that she had been sexually penetrated.[3]

[26] Several other pieces of circumstantial evidence were presented to the jury which, as a whole, could have convinced a rational tier of fact beyond a reasonable doubt that Mendiola sexually penetrated K.M. Mendiola instructed K.M. to take off her clothes, told her to lie on the bed, placed a pillow over her face, removed his pants, spread her legs, and climbed on top of K.M. in between her legs. While Mendiola lay on top of K.M., she felt skin on skin, and pressure on her vagina from Mendiola's penis. While at Healing Hearts, K.M. indicated that she had discomfort in her private parts and felt pain on urination.

[27] Review of the evidence presented in its entirety suggests that the jury did not act irrationally. The testimony of K.M. in combination with the testimony of Ms. Rios gave the trier of fact a complete description of the incident, including the moment when K.M. was sexually penetrated by Mendiola. Although K.M. did not explicitly testify during trial that she was penetrated, the jury may consider all evidence to infer the occurrence of sexual penetration. *See Enriquez*, 2014 Guam 11 ¶ 19; *Jett*, 510 S.E.2d at 749 ("[A]lthough the victim's testimony that appellant taught her to rub the hairbrush or the Barbie doll 'on the outside of my pookie' did not establish penetration, the Commonwealth also introduced circumstantial evidence from which the jury could reasonably conclude penetration had occurred."); *Rodriguez*, 918 N.E.2d at 869 ("Here, the victim testified, 'I remember coming back into consciousness and there's a penis in my face.' The defendant also admitted . . . that he placed his penis 'on [the victim's] mouth.' The defendant added that at that point, he was lying down on his back and the victim was in front

[3] At trial, there was no accusation that someone other than Mendiola may have violated K.M.; therefore, it was reasonable for the jury to infer that K.M. spoke of Mendiola when reporting to Healing Hearts that she had been sexually penetrated.

of him, between his legs. The jury were [sic] permitted to infer penetration from all the evidence.").

[28] Mendiola's claim that the record is devoid of evidence showing penetration is incorrect. As explained, the record contains multiple testimonial statements from which, when viewed as a whole, a reasonable inference of penetration may be drawn. "It is not the province of the court, in determining [a motion for a judgment of acquittal], to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury." *George*, 2012 Guam 22 ¶ 51 (alteration in original); *see also Enriquez*, 2014 Guam 11 ¶ 22. Viewing the evidence in a light most favorable to the People, we conclude that a rational trier of fact could have found sexual penetration, an essential element of First Degree CSC, beyond a reasonable doubt.

V. CONCLUSION

[29] We are convinced the record contains sufficient evidence to support a finding of sexual penetration. Because sufficient evidence of penetration was presented at trial, the trial court did not err in denying Mendiola's motion for judgment of acquittal. Accordingly, we **AFFIRM** the judgment of conviction as to the charge of First Degree Criminal Sexual Conduct.

Original Signed By: **F. Philip Carbullido**

F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Katherine A. Maraman**

KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **Robert J. Torres**

ROBERT J. TORRES
Chief Justice