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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

ERROL JAMES WUSSTIG,
Defendant-Appellant.

Supreme Court Case No. CRA14-013
Superior Court Case No. CF0566-11

OPINION

Cite as: 2015 Guam 21

Appeal from the Superior Court of Guam
Argued and submitted February 18, 2015
Hagåtña, Guam

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

TORRES, C.J.:

[1] Defendant-Appellant Errol James Wusstig was indicted by a Superior Court grand jury on one charge of Second Degree Criminal Sexual Conduct (As a 1st Degree Felony) and one charge of Child Abuse (As a Misdemeanor). The matter proceeded to trial, and after the close of the prosecution's case, Wusstig orally moved for a judgment of acquittal, which the trial court denied. The jury later rendered its verdict, finding Wusstig guilty of both charges. On appeal, Wusstig argues that the trial court erred in denying his motion for judgment of acquittal for failure of the prosecution to present evidence from which Wusstig could be found guilty beyond a reasonable doubt. For the reasons set forth below, we affirm Wusstig's conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Wusstig was indicted by a Superior Court grand jury on one charge of Second Degree Criminal Sexual Conduct (As a 1st Degree Felony) and one charge of Child Abuse (As a Misdemeanor). The allegations presented in the indictment are that Wusstig caused his hand and penis to touch the genital area of a minor, K.S.W., forming the basis of the criminal sexual conduct charge. Further, the indictment alleges that, on or about this same time period, Wusstig intentionally subjected K.S.W. to cruel mistreatment, which was the basis of the child abuse charge.

[3] The victim, K.S.W., testified as to the sexual contact she alleged Wusstig had with her. Among other prosecution witnesses, K.S.W.'s mother, who had previously been in a relationship with Wusstig, testified about her daughter's demeanor when she first came forward with these

allegations, describing K.S.W. as crying and hesitant. Wusstig also called multiple witnesses, and testified in his own defense. He denied all allegations against him.

[4] After the Plaintiff-Appellee People of Guam (“People”) rested their case, Wusstig, through counsel, orally moved for a judgment of acquittal. Wusstig’s counsel asserted during his oral motion that:

[t]he only evidence presented to the Court thus far directly attributable to my client’s guilt is the testimony of [K.S.W.]. There is no other eyewitness testimony that corroborates or supports her story. It’s an instance in which the allegations were made some two years after the alleged instances took place, only upon the insistence of family members who were harassing and accosting the victim after she had been found to have skipped school and it was her response to then point blame to my client. Even the mother herself has indicated that when the allegations initially occurred she didn’t necessarily believe that they had happened.

Transcript (Tr.) at 64-66 (Jury Trial, Jan. 29, 2014). The People countered that a victim’s statements need not be corroborated, that K.S.W. identified Wusstig as the perpetrator of the sexual contact, described the contact, and established that she was under the age of fourteen at the time of the alleged incident. Therefore, the People argued, a rational trier of fact could find the elements of the charged offenses beyond a reasonable doubt.

[5] After the motion was argued, the trial court made an oral ruling, stating:

The Court’s review is not whether the evidence established guilt *beyond a reasonable doubt*, instead the Court’s review shall give full weight to the responsibility of the trier of fact to fairly resolve the conflicts in the testimony to weigh the evidence and to draw reasonable inferences from basic fact to ultimate facts.

The Court, after hearing the arguments and reviewing the testimony, the evidence in light most favorable to the People the Court at this time is satisfied that any rational trier of fact could have found that the essential elements of the crime beyond a reasonable doubt exists and therefore the Court is denying the motion at this time, all right.

Id. at 69-70.

[6] The trial proceeded to verdict, with the jury finding Wusstig guilty of both offenses with which he was charged. Wusstig was sentenced to seven years imprisonment for the second degree criminal sexual conduct charge and one year imprisonment for the child abuse charge, to be served concurrently. Judgment was entered on the docket, and Wusstig timely appealed.

II. JURISDICTION

[7] This court has jurisdiction over the appeal from a final judgment in a criminal case. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-9 (2015)); 7 GCA § 3107(b) (2005); *see also* 8 GCA § 130.15(a) (2005) (permitting defendant's appeal from a final judgment of conviction).

III. STANDARD OF REVIEW

[8] Where a defendant has raised the issue of sufficiency of the evidence by motion for acquittal in the trial court, the denial of the motion is reviewed *de novo*. *See People v. Diego*, 2013 Guam 15 ¶¶ 9, 30. A court determines whether a judgment of acquittal should be granted by applying the same standards used to evaluate a challenge to the sufficiency of the evidence. *Id.* ¶ 30. "Thus, on appeal we review the evidence in the light most favorable to the People and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *People v. George*, 2012 Guam 22 ¶ 49). "This is a 'highly deferential standard of review.'" *People v. Tenorio*, 2007 Guam 19 ¶ 9 (quoting *People v. Sangalang*, 2001 Guam 18 ¶ 20).

IV. ANALYSIS

Whether There Was Sufficient Evidence to Convict Wusstig

[9] Wusstig asserts on appeal that the evidence was insufficient to support his convictions, and therefore the trial court erred in denying his motion for judgment of acquittal. Under Guam

law, the trial court “on motion of a defendant or on its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.” 8 GCA § 100.10 (2005).

A verdict of guilty removes the presumption of innocence to which a defendant had formerly been entitled and replaces it with a presumption of guilt. Accordingly, the defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict. In conducting this analysis, the People must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom.

George, 2012 Guam 22 ¶ 50 (citations and internal quotation marks omitted).

[10] Wusstig makes a very tenuous argument in support of his assignment of error.¹ His arguments go primarily, if not entirely, to the weight of the evidence presented – something which neither the trial court nor the reviewing court exercising *de novo* review may consider. Wusstig argues on appeal that “the evidence presented against him is inherently implausible due to the constant presence” of K.S.W.’s siblings during the time the alleged sexual contact took place. Appellant’s Br. at 9 (Dec. 9, 2014). He asserts that the two-year delay in K.S.W.’s reporting of the incident coupled with her refusal to submit to a physical examination hindered any effort to obtain physical evidence that could have refuted or confirmed her allegations. *Id.* He calls into question K.S.W.’s credibility because, although K.S.W. said that she knew the difference between a circumcised and uncircumcised penis, she could not state whether Wusstig’s was circumcised or not. *Id.* Finally, Wusstig argues that K.S.W. had a strong motive

¹ Wusstig’s appellate counsel stated in a footnote in his opening brief that he considered moving to withdraw from his representation pursuant to *Anders v. California*, 386 U.S. 738 (1967), acknowledging that Wusstig’s challenges to the evidence turn “primarily on the credibility of the witnesses.” Appellant’s Br. at 9 n.1.

to fabricate the allegations because she was angry at Wusstig for scolding her about texting an older man. *Id.*

[11] However, in consideration of the “rational trier of fact” standard, viewing the evidence presented in the light most favorable to the People, Wusstig’s challenges are without merit. He is, in essence, asking this court to weigh the evidence and witness credibility to determine whether it believes the evidence establishes guilt beyond a reasonable doubt. This is not the proper scope of this court’s review. *See People v. Quintanilla*, 2001 Guam 12 ¶ 37. On the contrary, this court’s review must “give full play to the responsibility of the jury to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts.” *Id.* “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.” 75A Am. Jur. 2d *Trial* § 893 (citing *State v. Musser*, 722 N.W.2d 419 (Iowa 2006)).

[12] Rather, this court’s consideration, as was the trial court’s scope of consideration, is limited to simply determining “whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Diego*, 2013 Guam 15 ¶ 30 (quoting *George*, 2012 Guam 22 ¶ 49 (internal quotation marks omitted)). We now consider each charge.

[13] The elements of the crime of second degree criminal sexual conduct with which Wusstig was charged are as follows:

(a) 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[.]

9 GCA § 25.20(a)(1) (as amended by P.L. 32-012:2 (Apr. 11, 2013)). The People, therefore, needed to establish that Wusstig had sexual contact with K.S.W. and that, at the time of this sexual contact, K.S.W. was under the age of fourteen.

[14] The pertinent section of the statute relative to the child abuse charge states that a “[p]erson is guilty of *child abuse* when: . . . he subjects a child to cruel mistreatment[.]” 9 GCA § 31.30(a)(1) (2005). Wusstig was convicted of child abuse as a misdemeanor. All that the People needed to establish was that Wusstig subjected K.S.W. to cruel mistreatment – which, if the sexual conduct charges were proven, would arguably suffice to establish this sole element of the child abuse charge.

[15] The victim, K.S.W., testified that she was fifteen years old and a sophomore in high school at the time of the trial. Tr. at 10-11 (Jury Trial, Jan. 28, 2014). She testified that the alleged sexual contact with Wusstig occurred about six years earlier in the summer after she was a fifth-grader at Finegayan Elementary School. *Id.* at 21-28. She was thus under the age of fourteen at the time of the alleged sexual contact. She testified that Wusstig lived in a converted bus, where she and her siblings slept whenever they were spending time with Wusstig. *Id.* at 29.

[16] K.S.W. further testified that, on multiple instances during that summer when she was a student at Finegayan Elementary School, Wusstig touched her on her breast and vagina areas while she was sleeping at his residence. *Id.* at 24-26. She testified that her siblings were present in the bus and were sleeping at the time these incidents occurred. *Id.* at 24-25. She further testified that on one occasion, she awoke to find Wusstig pulling off her clothes. *Id.* at 26. She said that Wusstig would push her head down and force her to suck his penis, and that he ejaculated in her mouth. *Id.* at 26-27. She also testified to an incident where Wusstig was lying

on top of her and attempted to insert his penis into her vagina, but then told her that she was “not ready.” *Id.* at 27-28.

[17] K.S.W. stated further that Wusstig put his mouth near her vagina on more than one occasion. *Id.* at 28. She said that Wusstig told her not to tell anyone about what he had done because he could go to jail. *Id.* K.S.W. stated that she did not report the incident to anyone until about two years later, testifying that she only did so after she learned about sex and understood what kind of a secret she was keeping. *Id.* at 30-31.

[18] Wusstig, through counsel, extensively cross-examined K.S.W. He had the opportunity to question her as to the same theories he presented to this court on appeal – namely her motivation to lie, Tr. at 45-47, 60-63 (Jan. 28, 2014); her inability to describe the physical characteristics of Wusstig’s penis as being uncircumcised and having two cysts on his scrotum, *id.* at 54-55; and the implausibility of her allegations given the fact that her siblings were reportedly sleeping in the same bus in close proximity to her when Wusstig engaged in the sexual contact, *id.* at 41-45. Wusstig’s counsel grilled K.S.W. on the details of her allegations and pointed out arguable inconsistencies in her various statements to others. *Id.* at 47-50.

[19] K.S.W.’s mother also testified about her daughter’s behavior and demeanor when she first told her about what she claimed Wusstig had done to her, describing K.S.W. as crying and hesitating. Tr. at 42 (Jury Trial, Jan. 23, 2014). K.S.W.’s mother was thoroughly cross-examined by Wusstig’s counsel. *Id.* at 54-74. Clarissa Maniebo, a social worker with Healing Hearts Crisis Center, testified about her interactions with K.S.W. after she reported her sexual abuse. Tr. at 74-78 (Jury Trial, Jan. 28, 2014).

[20] During the defense’s case, Wusstig called multiple witnesses, and even chose to testify in his own defense. Wusstig testified that he had a very close and good relationship with K.S.W.

and her siblings. Tr. at 12 (Jury Trial, Jan. 30, 2014). Wusstig testified that the only time he ever experienced behavioral issues with K.S.W. was when he scolded her after finding out she had a crush on an older man named Vince (“Gino”) Petros. *Id.* at 14. He stated that K.S.W. often spent nights in his home, but always with her siblings there as well. *Id.* at 12. Wusstig denied that he ever engaged in any sexual contact with K.S.W. *Id.* at 20.

[21] Further, he gave details about the physical appearance of his penis – i.e., that he was not circumcised and that he had two cysts on his testicle, which went to Wusstig’s counsel’s earlier challenge to K.S.W.’s credibility based on her inability to say whether Wusstig was circumcised or if he had any “unusual marks.” *Id.* at 21; Tr. at 55 (Jan. 28, 2014).

[22] Other witnesses were called by Wusstig’s defense counsel, presumably to bolster Wusstig’s credibility or to call into doubt K.S.W.’s. Petros, for instance, testified that he worked off-and-on for the Wusstig family and had many opportunities to observe the interactions between Wusstig and K.S.W. Tr. at 28-30 (Jury Trial, Jan. 30, 2014). Petros described them as “really close,” stating that he noticed no difference in their closeness from the time period before the alleged sexual contact and the time period after. *Id.* at 30.

[23] Petros testified that he had exchanged text messages with K.S.W., and that Wusstig and others questioned him as to whether there was any relationship between them. *Id.* at 31-33. Petros said that he understood Wusstig’s concern about K.S.W. texting an older man, given that Petros himself had a thirteen-year-old daughter. *Id.* at 32. He said whenever K.S.W. continued to text him, he would tell Wusstig, and Wusstig would then “get mad at her to stop.” *Id.* at 33.

[24] Petros even suggested that K.S.W.’s behavior only changed noticeably for the worse when Wusstig’s son, Kegan,² moved to Guam in 2011. *Id.* at 33. Petros said K.S.W. began

² Kegan’s age is not given, nor is a last name specified.

smoking with Kegan and that Petros once caught Kegan with his hands between K.S.W.'s legs after hearing K.S.W. scream. *Id.* at 33-34. He said that someone called the police to report the incident and that "they took [Kegan]," although he was unsure of what happened from then. *Id.* at 34-35. Finally, Petros testified that he had slept in Wusstig's bus before, and that when Wusstig walked around in the bus, the whole bus shook like an "earthquake" and it woke him from his sleep. *Id.* at 35-36.

[25] K.S.W.'s brother also testified that he would be present in the bus whenever K.S.W. would spend the night, and that he never saw Wusstig touch K.S.W. *Id.* at 41-42. Wusstig's father testified as to the close relationship Wusstig had with K.S.W. and her siblings, and stated that K.S.W. appeared "[n]ormal as can be" even after the allegations were made. *Id.* at 54-55, 59.

[26] With all the witnesses Wusstig called, as well as his counsel's cross-examination of the People's witnesses, the jury had ample evidence before it and an opportunity to evaluate and weigh the evidence and the credibility of the witnesses. It had the chance to hear directly from K.S.W. and from Wusstig. It was not deprived of hearing the very same theories Wusstig now advances on appeal – that K.S.W. was not credible, that her allegations were inherently implausible, that she had a motive to lie – and by its verdict, the jury clearly rejected those theories. The job of evaluating and weighing evidence is squarely and exclusively the province of the jury, and not of the trial court determining a motion for acquittal or an appellate court reviewing that determination.

V. CONCLUSION

[27] Reviewing the evidence in the light most favorable to the People, we hold that a rational trier of fact had sufficient evidence from which it could have found Wusstig guilty of second

degree criminal sexual conduct and child abuse as charged, and thus that the trial court did not err in denying Wusstig's motion for judgment of acquittal. We therefore **AFFIRM** Wusstig's judgment of conviction.

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

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

F. PHILIP CARBULLIDO
Associate Justice

KATHERINE A. MARAMAN
Associate Justice

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

ROBERT J. TORRES
Chief Justice

I do hereby certify that the foregoing
is a full true and correct copy of the
original on file in the office of the
clerk of the Supreme Court of Guam
Dated at Hagatña Guam

JUL 09 2015


Deputy Clerk, Supreme Court of Guam