IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JESHUA JOSHUA aka JESS JOSHUA,
Defendant-Appellant.

Supreme Court Case No.: CRA14-022
Superior Court Case No.: CF0629-13

OPINION

Cite as: 2015 Guam 32

Appeal from the Superior Court of Guam
Argued and submitted on May 12, 2015
Hagåtña, Guam

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

TORRES, C.J.:

[1] Defendant-Appellant Jeshua Joshua appeals his conviction on the charges of Home Invasion, Burglary, and Second Degree Criminal Sexual Conduct. He was sentenced to ten years of imprisonment for the Home Invasion charge and five years for the Criminal Sexual Conduct charge, which were to run consecutively. The Superior Court merged the Burglary charge with the Home Invasion charge.

[2] For the reasons stated herein, we find no grounds to reverse, and we affirm the convictions and sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] In the early hours of November 15, 2013, sometime after midnight, Victoria Mutuk was awoken by someone trying to open the locked bedroom door of her Agat residence. After waking her sleeping boyfriend, she got up and entered the hallway to find Joshua standing in the living room and L.R.T., the child of the woman who also lives at the Agat residence with her, telling Joshua to leave. L.R.T's mother, V.P., was off-island at the time, and Mutuk was taking care of L.R.T. and her brother.

[4] L.R.T., who was nine years old the night of the incident, was awoken that night by a man putting his hand in her pants while she lay in her bed. She told him to leave and he exited by jumping out of her bedroom window. The same man returned later in the night, and L.R.T. awoke to him trying to pull off her blanket. Again, she told him to leave and this time, he left through her bedroom door that led into the hallway of the residence.

[5] L.R.T. followed him into the hallway, where she turned on the light and told him again to leave. It was at this time that Mutuk entered the hallway and saw them both. Mutuk testified that the man left the residence and she called the police. Both L.R.T. and Mutuk identified the man they saw in their lit hallway as Joshua.

[6] Guam Police Officer Christopher Champion responded to Mutuk's residence at about 3:00 a.m. on November 15, 2013. Mutuk reported to Officer Champion that a male had entered her house and attempted to pull down L.R.T.'s pants. She also told him that they knew the intruder, calling him Jess. She informed the officer that he was wearing black and white plaid shorts and that he lived across the street and down two houses. Officer Champion proceeded to the specified residence and spoke to Joshua, who admitted to having entered Mutuk's residence to use the restroom. Officer Champion noted that he was wearing black and white patterned shorts and that there was a black t-shirt draped on a chair inside Joshua's residence.

[7] Joshua was indicted on one charge of Home Invasion, one charge of Burglary, and one charge of Second Degree Criminal Sexual Conduct. Prior to trial, the People notified Joshua of their intent to introduce character evidence pursuant to 6 GCA § 404(b) "relevant to show intent, preparation, plan or an absence of mistake or accident." Record on Appeal ("RA"), tab 36 at 1-3 (People's Notice of Intent to Introduce Prior Crimes, Wrongs or Acts Pursuant to 6 GCA, subsection 404(b), July 22, 2014). After a hearing on admissibility, the court allowed T.P., also a minor, to testify about a similar incident that she had witnessed involving Joshua.

[8] At trial, L.R.T. testified that the same man came into her room twice in the same night. She referred to the man as "he" repeatedly throughout her testimony and said she knew it was the same person because he was wearing the same black shirt. Eventually, she identified the man as

Joshua. On cross-examination, L.R.T. maintained that it was the same man that came into her room both times and that she saw that man's face when she followed him into the hallway and turned the light on. Mutuk also identified the man in the hallway as Joshua.

[9] During the defense's case, Mutuk was called to testify about an accusation that L.R.T. had made to her mother about Mutuk's brother, Donovan, touching her. On cross-examination, the prosecution asked Mutuk if Donovan was at the house at all on the night of the alleged Home Invasion. Mutuk answered that he was not there that night and that it was Joshua that she saw that night in their hallway when L.R.T. turned on the light.

[10] The prosecution sought to further clarify this issue by calling L.R.T. as a rebuttal witness. On rebuttal, L.R.T. was asked to recall the night of November 15, 2014, and she was then asked to recall that she told the court that someone came into her room and touched her. L.R.T. answered that she remembered that testimony. The prosecution then asked if she had said it was Joshua, and L.R.T. answered in the affirmative. The defense immediately objected stating that this was a mischaracterization of L.R.T.'s former testimony. The prosecution maintained that it was based on L.R.T.'s previous testimony. The court sustained the objection and questioning resumed.

[11] The prosecution then asked L.R.T. who touched her and she answered that it was Joshua who touched her on November 15, 2013. She was also asked if she had ever told anyone that it was someone other than Joshua that had touched her the night of November 15, 2013, and she said she had not. At this point, the defense moved to strike all of L.R.T.'s rebuttal testimony, and in the alternative, a mistrial for prosecutorial misconduct. Defense counsel argued that the prosecution "fed information to the witness." Transcript ("Tr.") at 42 (Jury Trial, Aug. 13,

2014). The defense also claimed that during "[L.R.T.]'s examination on direct and cross examination when she was first called, she never, ever identified [his] client." *Id.* The prosecution asserted that L.R.T. did identify that she saw Joshua in the hallway when she turned the light on and that he was the same man that had come into her room that night, twice, wearing the black t-shirt. The court found that the questioning was outside the limited scope of rebuttal because the questions did not relate to the alleged accusations of Donovan and granted Joshua's motion to strike the testimony.

[12] T.P., whose testimony had earlier been deemed admissible by the court, testified that in 2012, when she was 13 years of age, she woke up and saw Joshua pulling her younger cousin's leg. At the time of T.P.'s testimony, no limiting instruction was given to the jury. However, during general closing instructions, the jury was instructed that the 404(b) evidence of T.P. could not be considered "to prove that the defendant is a person of bad character or that he has a disposition to commit crimes." Tr. at 60 (Jury Trial, Aug. 14, 2014). The court then directed the jury that they could consider that evidence only for the limited purpose of intent and absence of mistake.

[13] The jury convicted Joshua of all three charges, one charge of Home Invasion, one charge of Burglary, and one charge of 2nd Degree Criminal Sexual Conduct, on August 15, 2014. At sentencing, the court recognized that Joshua was on pre-trial release for disorderly conduct as a petty misdemeanor and public drunkenness as a violation at the time he committed the present offenses.[1]

[1] Those two prior offenses occurred on August 15, 2013. Appellee's Br. at 4 (Feb. 11, 2015). Joshua was convicted on June 27, 2014, for both disorderly conduct and public drunkenness and given the maximum sentence for those prior offenses. Tr. at 3 (Sept. 15, 2014).

[14] Prior to the determination of his sentence in this case, Joshua pointed out three issues. First, Joshua argued that because he had never committed a felony and because he had no convictions at the time of committing these offenses, he should be sentenced as a first-time offender under 9 GCA § 80.31. Next, he maintained that the Home Invasion statute, 9 GCA § 37.240(b), should be interpreted to instruct the court that it may not suspend or reduce ten years of the sentence, not that there was a mandatory minimum sentence of ten years. Finally, he asserted that the Burglary offense should be merged with the Home Invasion offense because the crime of Home Invasion is essentially a Burglary with the additional element of a person being present in the dwelling during the commission of the Burglary.

[15] The court determined that Joshua "d[id] not qualify as a first offender under 9 GCA [§] 80.31(a) because he has previously been convicted of a criminal offense, notwithstanding the argument that he was – this conviction did not – was not in place at the time of the current offenses." Tr. at 33 (Sept. 15, 2014). The court refused to accept Joshua's interpretation of the Home Invasion statute and decided that the statute mandated a ten-year minimum for that offense. The court did merge the Burglary offense with the Home Invasion offense because it agreed that Burglary was a lesser included offense of Home Invasion.

[16] The court sentenced Joshua to serve ten years for the Home Invasion offense and five for the Criminal Sexual Conduct offense to run consecutively. Joshua timely appealed.

II. JURISDICTION

[17] This court has jurisdiction over appeals from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-49 (2015)); 7 GCA §§ 3107, 3108(a) (2005); *see also* 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[18] The trial court's admission of prior bad acts under Rule 404(b) of the Guam Rules of Evidence ("GRE") is reviewed for an abuse of discretion. *People v. Torres*, 2014 Guam 8 ¶ 18 (citing *People v. Quintanilla*, 2001 Guam 12 ¶ 9). When determining whether the failure to give a limiting instruction at the time 404(b) evidence is introduced warrants reversal, the court uses the harmless error standard. *See People v. Palisoc*, 2002 Guam 9 ¶ 31.

[19] Prosecutorial misconduct claims are reviewed for harmless error. *Torres*, 2014 Guam 8 ¶ 18 (citing *People v. Moses*, 2007 Guam 5 ¶ 30). The conduct "must taint the underlying fairness of the proceedings[]" to warrant reversal. *Moses*, 2007 Guam 5 ¶ 7 (citing *People v. Evaristo*, 1999 Guam 22 ¶ 18).

[20] "Issues of statutory interpretation are reviewed *de novo*." *People v. Felder*, 2012 Guam 8 ¶ 9 (citing *People v. Manley*, 2010 Guam 15 ¶ 12). The imposition of a sentence by the trial court is reviewed for an abuse of discretion. *People v. Diaz*, 2007 Guam 3 ¶ 10 (citing *People v. Superior Court (Chiguina)*, 2003 Guam 11 ¶ 12).

[21] Any issues not raised by the defendant at trial or at sentencing are reviewed for plain error. *See Moses*, 2007 Guam 5 ¶¶ 8, 53.

IV. ANALYSIS

A. Failure to Provide Limiting Jury Instruction at Time of Testimony

[22] Joshua's first issue on appeal is the lack of a jury instruction limiting the use for which the GRE 404(b) testimony given by T.P. can be considered at the time of the testimony.

Appellant's Br. at 14 (Jan. 12, 2015).[2] We recognized that while evidence of prior bad acts "is prejudicial, the issuance of a proper limiting instruction can prevent that prejudice from being unfair." *Palisoc*, 2002 Guam 9 ¶ 29 (citing *Evaristo*, 1999 Guam 22 ¶ 17). A limiting instruction "should be given both at the time the evidence is offered and during closing jury instructions prior to jury deliberation." *Id.* GRE 105 requires such instruction "upon request" by one of the parties.

[23] This court, however, still found harmless error where such prior bad acts evidence was offered for both a proper and improper purpose and a limiting jury instruction was given only during the closing instructions. *Palisoc*, 2002 Guam 9 ¶¶ 29-33. The court stated that non-constitutional errors by the trial court require reversal only if "'it is more probable than not that the erroneous admission of the evidence materially affected the jurors' verdict.'" *Id.* ¶ 31 (quoting *United States v. Arambula-Ruiz*, 987 F.2d 599, 605 (9th Cir. 1993)). It is more likely than not that the failure to give the jury instruction at the time the evidence was offered did not "materially affect[] the jury's verdict." *See Palisoc*, 2002 Guam 9 ¶ 33.

[24] The trial court in this case did not give any jury instruction at the time the evidence was offered, but it did give a proper limiting jury instruction at the conclusion of the trial. Tr. at 60 (Aug. 14, 2014). The jury was instructed that it could only consider the 404(b) testimony for the limited purpose of determining whether there was intent to commit the offenses or lack of mistake and the 404(b) evidence of T.P. could not be considered "to prove that [Joshua] is a

[2] When reviewing any prejudice caused by the trial court's admission of 404(b) evidence, we would normally conduct a 404(b) analysis that looks for an abuse of discretion in the admission of the evidence followed by a GRE 403 analysis to ensure any prejudice is not unfair. *Palisoc*, 2002 Guam 9 ¶¶ 7-8. However, Joshua only hints that he has been prejudiced but does not explicitly argue that the 404(b) evidence was improperly admitted. Appellant's Br. at 13-14. Therefore, we are reviewing only the sufficiency of the limiting instructions given to the jury regarding this evidence.

person of bad character or that he has a disposition to commit crimes." *Id.* L.R.T. and Mutuk both identified Joshua as the man they found in the home that night. Tr. at 27, 116 (Aug. 4, 2014). L.R.T. testified she was asleep and woke up because someone was in the bed and "put[] his hand in [her] pants." *Id.* at 113. She also testified she awoke a second time when she felt her blanket being pulled off, and it was the same man as before wearing the same black t-shirt. *Id.* at 115. Joshua also admitted to Officer Champion that he entered the Mutuk home that evening. The evidence linking Joshua to each of the convicted offenses is overwhelming. We are not convinced that the trial court's failure to give the limiting instruction at the time the evidence was offered materially affected the jury's verdict, and therefore conclude any error was harmless.

B. Rebuttal Testimony as Prosecutorial Misconduct

[25] Joshua asserts that the acts of the prosecutor during the rebuttal testimony of L.R.T. constituted prosecutorial misconduct and the trial court should have ordered a mistrial. Appellant's Br. at 14-15. Prosecutorial misconduct that is objected to by the defense counsel during trial is subject to a harmless error review. *People v. Mendiola*, 2010 Guam 5 ¶ 13 (citing *Moses*, 2007 Guam 5 ¶ 7). This court has identified that in order for a prosecutorial misconduct claim to succeed, the appellant must be able to show that the "prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* ¶ 12 (quoting *Evaristo*, 1999 Guam 22 ¶ 20) (internal quotation marks omitted). To warrant reversal, it must be demonstrated that it is "more probable than not that the misconduct affected the jury's verdict." *Evaristo*, 1999 Guam 22 ¶ 18 (citing *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1377-78 (9th Cir. 1987)). "A trial judge may cure the effect of improper prosecutorial

misconduct by giving appropriate curative instructions to the jury." *Id.* ¶ 21 (citing *United States v. Endicott*, 803 F.2d 506, 513 (9th Cir. 1986)).

[26] Though it may have been improper to directly ask L.R.T. if it was Joshua who had touched her that night, this question did not amount to prosecutorial misconduct. The questioning does not constitute a gross mischaracterization of the previous testimony given by L.R.T. During L.R.T.'s testimony on direct examination, she specifically claimed that it was Joshua that she saw in the hallway after she turned on the light. Tr. at 116 (Aug. 4, 2014). Mutuk also identified Joshua as the man in her house that night. *Id.* at 27. Throughout L.R.T.'s testimony, she made it clear that she believed that the same man came into her room twice, and that she followed him into the hallway where she turned on the light and was able to identify him as Joshua at that point, which was corroborated by Mutuk's testimony. *Id.* at 113-116, 127; Tr. at 38 (Aug. 13, 2014). The reiteration of this by the prosecution did not "put patently false words into L.R.T.'s mouth." Appellant's Br. at 14.

[27] Even if the questions asked of L.R.T. on rebuttal constituted prosecutorial misconduct, the lower court struck the contested line of questioning and instructed the jury not to consider L.R.T.'s rebuttal testimony. Tr. at 53 (Aug. 13, 2014). Joshua argues that striking the testimony was insufficient to cure the prejudice because the jury could not have been able to "perform the mental gymnastics necessary to follow that order." Appellant's Br. at 15. He contends that prior to the rebuttal testimony, L.R.T. could not identify who had touched her that night. Appellant's Reply Br. at 2 (Feb. 25, 2015). This is not convincing because L.R.T. repeatedly testified that the man who was in her room twice that night was the same man whose face she saw in the

hallway. L.R.T. then identified Joshua during direct examination as the man she followed from her room into the hallway. Tr. at 116 (Aug. 4, 2014).

[28] A leading question by the prosecution in which she asks the victim to identify the defendant as the man who touched her is not synonymous with a defendant's confession as Joshua now argues. Reply Br. at 1-2 (citing *Jackson v. Denno*, 378 U.S. 368, 388 (1964) (finding that a confession revealed to the jury would be "solidly implanted in the jury's mind")). When a defendant confesses, the jury is asked to not only consider the confession's truth but also its voluntariness, and then they are required to consider the defendant's guilt. *Jackson*, 378 U.S. at 388. That issue is not present for other witnesses. The jury is still asked to weigh each witness's credibility, but they are not also asked to decide the witness's guilt or innocence. The court pointed out in *Jackson* that even if the jury finds a confession involuntary, it would be difficult for the jury to completely disregard it and consider only the other evidence presented to it. *Id.* at 388-89.

[29] Because it is more likely than not that the jury could have reached the same verdict without the rebuttal questioning by the prosecution, this court finds harmless error. The trial court also sufficiently cured any prejudice when it sustained Joshua's objection and struck the testimony.

C. First Offender Status

[30] Joshua next takes issue with the court's refusal to sentence him as a first-time offender according to 9 GCA § 80.31,[3] arguing that he had no convictions, only other charges, at the time

[3] Title 9 GCA § 80.31 puts forth sentencing guidelines for first-time offenders, providing:

that the present offenses occurred. Appellant's Br. at 16-17. The conviction for the prior charges was entered before the trial for the present charges began. Tr. at 3 (Sept. 15, 2014). He maintains that this statute requires a defendant to be sentenced as a first-time offender if at the time of the commission of the second offense, he has no previous convictions. Appellant's Br. at 16. The People argue, however, that the court may sentence the defendant as a first-time offender if at the time of sentencing, the defendant has no prior convictions, which would exclude Joshua from being afforded this status. Appellee's Br. at 13 (Feb. 11, 2015).

[31] As a matter of statutory interpretation, this court must look first to the plain meaning of the statute. *People v. Lau*, 2007 Guam 4 ¶ 14 ("If a statute is unambiguous, then the judicial inquiry into the meaning of the statute is complete." (citing *People v. Quichocho*, 1997 Guam 13 ¶ 5)). "The plainness or ambiguity of statutory language is determined by reference to the

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> In the cases to which § 80.30 is applicable as to the sentencing of the person, a person who has not previously been convicted of a criminal offense and has been convicted of a felony for the first time may be sentenced to imprisonment as follows:
>
> (a) In the case of a felony of the first degree, the court shall impose a sentence of not less than three (3) years and not more than fifteen (15) years;
>
> (b) In the case of a felony of the second degree, the court shall impose a sentence of not less than one (1) year and not more than eight (8) years; and
>
> (c) In the case of a felony of the third degree, the court may impose a sentence of not more than three (3) years.

9 GCA § 80.31 (2005). Title 9 GCA § 80.30, which this court has referred to as the "standard sentencing guidelines," *Felder*, 2012 Guam 8 ¶ 54, provides:

> Except as otherwise provided by law, a person who has been convicted of a felony may be sentenced to imprisonment as follows:
>
> (a) In the case of a felony of the first degree, the court shall impose a sentence of not less than five (5) years and not more than twenty (20) years;
>
> (b) In the case of a felony of the second degree, the court shall impose a sentence of not less than three (3) years and not more than ten (10) years; and
>
> (c) In the case of a felony of the third degree, the court may impose a sentence of not more than five (5) years.

9 GCA § 80.30 (2005).

language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 6 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (internal quotation marks omitted).

[32] When looking at section 80.31, it is important to realize that it instructs that a person "may" be sentenced under the scheme if that person "has not previously been convicted of a criminal offense and has been convicted of a felony for the first time." 9 GCA § 80.31. Plainly, this means that if a person meets the criteria, the court has the option to sentence that person according to the first offender statutory scheme, but the statute does not require them to be sentenced according to that scheme. This part of the statute is unambiguous and leaves sentencing up to the discretion of the court. Unless "absurd consequences" result from a plain reading of the statutory scheme, this court should not deviate from that interpretation. *People v. Tedtaotao*, 2015 Guam 9 ¶ 16 (quoting *Sumitomo Constr., Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 17). Because of this discretionary language, we need not address how the remainder of the statute is to be interpreted.

[33] After examining the statute's meaning, this court must determine if the trial court abused its discretion in sentencing Joshua. An abuse of discretion results where the sentence "is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *Tedtaotao*, 2015 Guam 9 ¶ 8 (quoting *People v. Gutierrez*, 2005 Guam 19 ¶ 13) (internal quotation marks omitted). Regardless of the court's statutory interpretation, the court still sentenced Joshua within the first offender durational guidelines of section 80.31. *See* 9 GCA § 80.31. For the Home Invasion charge, he was sentenced to ten years, and for the Second Degree Criminal Sexual Conduct charge, he was

given five years. Tr. at 34 (Sept. 15, 2014). Both are felonies in the first degree and both sentences are within the first offender guidelines. *See* 9 GCA §§ 25.20(b), 80.31(a) (2005); 9 GCA § 37.240(a) (added by Pub. L. 32-047:2 (July 5, 2013). Based on the foregoing, any error the trial court may have made in its interpretation of the statute is harmless because the sentence imposed on Joshua was still within the first offender guidelines. We now turn to Joshua's argument concerning the mandatory minimum punishment for Home Invasion.

D. Punishment for Home Invasion

[34] Several statutes govern the Home Invasion offense, but the particular one that gave rise to this issue is 9 GCA § 37.240,[4] which outlines the punishment for Home Invasion. This statute states:

> **§ 37.240. Home Invasion Punished.**
>
> (a) Home invasion is a first degree felony, and any person found guilty under this Section shall be sentenced to a term of imprisonment of which at least ten years may not be suspended or reduced by the court.
>
> (b) The sentence imposed for home invasion shall run consecutively to any sentence for other crimes committed in conjunction with the home invasion.

9 GCA § 37.240.

[35] When reading this statute for its plain meaning, it instructs that the sentence imposed for a Home Invasion conviction must have at least ten years that cannot be suspended or reduced. We interpret this to require a mandatory minimum of ten years for a conviction under this statute.

[4] In Joshua's brief, he argues that the statute he takes issue with is 9 GCA § 37.110; however, this statute has been renumbered to section 37.240 "to maintain the Compiler's general codification scheme" and has the exact same language that Joshua quotes in his brief. *See* Appellant's Br. at 18; 9 GCA § 37.240.

[36] Joshua argues that either 9 GCA §§ 80.30 or 80.31 applies to this offense in terms of sentencing.[5] He asserts that the court is given instruction to sentence first degree felonies for a period between five and twenty years (if section 80.30 applies) or three to ten years (if section 80.31 applies), and that section 37.240 requires that any portion of that sentence, up to ten years, may not be suspended or reduced. Appellant's Br. at 19. Further, Joshua asserts that if the Legislature had intended to impose a mandatory minimum, it would have explicitly done so as it has in 9 GCA § 25.15, for example.[6] *Id.*

[37] The People argue that section 37.240, when read with the code as a whole and specifically with sections 80.30 and 80.31, imposes a mandatory minimum of ten years for the crime of Home Invasion and that this mandatory minimum is not in conflict with the range provided by the general sentencing statute of section 80.30. Appellee's Br. at 15. The People also maintain that certain criminal statutes impose maximum sentences that exceed those outlined by section 80.30, which means that statutes may also impose minimum sentences for different crimes that are greater than those minimum sentences found in section 80.30. *Id.* The People use 9 GCA § 16.40(a), which states that Murder has a maximum sentence of life, to demonstrate this point. *Id.* The People also point to Burglary as another example. *Id.* Burglary is a second degree felony that imposes a mandatory minimum sentence of five years, while section 80.30 suggests a minimum of three years for a second degree felony. *Compare* 9 GCA § 37.20(b) (as amended by Pub. L. 32-152:4 (May 23, 2014)), *with* 9 GCA § 80.30(b).

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[5] Joshua maintains that section 80.31 is the applicable sentencing statute per his argument in section IV.C. Appellant's Br. at 18.

[6] *First Degree Criminal Sexual Conduct offenders "shall be sentenced to a minimum of fifteen (15) years* imprisonment, and may be sentenced to a maximum of life imprisonment without the possibility of parole." 9 GCA § 25.15(b) (as amended by Pub. L. 32-012:2 (Apr. 11, 2013)).

[38] This court has held that 9 GCA § 25.15, First Degree Criminal Sexual Conduct, imposes a mandatory minimum sentence by utilizing the phrase "shall sentence." *People v. Enriquez*, 2014 Guam 11 ¶ 36. This court identified an ambiguity in whether a mandatory minimum sentence required that the minimum sentence actually be served, or whether a portion of it could be suspended. *Id.* ¶ 37. The Home Invasion statute clearly requires that ten years of the sentence not be suspended, implying that at least ten years of the sentence imposed actually be served. *See* 9 GCA § 37.240.

[39] Because this is not explicitly set out in the statute, the legislative intent can "be inferred by looking at other statutes passed by the same body." *Enriquez*, 2014 Guam 11 ¶ 38. Because Burglary, a second degree felony and a lesser included offense of Home Invasion, has a specific sentence range from five to ten years, it can be inferred that Home Invasion was intended to have a higher mandatory minimum sentence because it was deemed a first degree felony. *Compare* 9 GCA § 37.20(b), *with* 9 GCA § 37.240(a). We agree with the trial court's interpretation of the statute as requiring at least ten years be served for Home Invasion.

[40] Next, the court must look to the actual sentence imposed to determine if there was an abuse of discretion. *See Diaz*, 2007 Guam 3 ¶ 10 (citing *People v. Superior Court (Chiguina)*, 2003 Guam 11 ¶ 12). Joshua was sentenced to ten years for the Home Invasion charge. We have already determined that the imposition of this sentence was not an abuse of discretion.

E. Merger

[41] Joshua's final argument urges merging the Criminal Sexual Conduct charge with the Burglary charge. Appellant's Br. at 20. The trial court merged the Home Invasion charge with the Burglary charge, but Joshua claims that the court should have gone further and merged the

Criminal Sexual Conduct Charge with the Burglary Charge as the Burglary "is simply a Criminal Sexual Conduct with the additional elements that it took place in habitable property upon which the defendant trespassed." *Id.* at 22. Title 9 GCA § 1.22(a) states that a defendant cannot be convicted of more than one offense where "one is included in the other as defined by § 105.58 of the Criminal Procedure Code." 9 GCA § 1.22(a) (2005). Title 8 GCA § 105.58(b)(1) provides that an offense is included in another where "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged." 8 GCA § 105.58(b)(1) (2005). "Whether one offense merges with another is a question of statutory interpretation" which is reviewed *de novo*. *Diaz*, 2007 Guam 3 ¶ 55 (citations omitted).

[42] Guam's Burglary statute provides in relevant part that "[a] person is guilty of burglary if he enters or surreptitiously remains in any habitable property, building, or a separately secured or occupied portion thereof" and has "intent to commit a crime therein." 9 GCA § 37.20. Guam's Second Degree Criminal Sexual Conduct statute requires elements of "sexual contact with another person" under certain circumstances.[7] 9 GCA § 25.20. There is actually no overlap of elements from either crime. Joshua's contention that, in this case, proof of the Criminal Sexual Conduct requires "proof of less than all the facts required to establish Burglary" does not consider that Burglary actually only requires proof of an intent to commit a crime and not a full

[7] These circumstances include but are not limited to:

> (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. . . .

9 GCA § 25.20.

commission of a crime. Appellant's Br. at 22. This logic would allow the merger of any crime committed during a Burglary with the Burglary charge simply because Burglary requires the intent to commit a crime therein. Further, a Criminal Sexual Conduct crime can be committed anywhere, but entering someone's home to commit that crime adds greatly to the culpability.

[43] It is clear that the Legislature intended for Burglary to be a lesser included offense of Home Invasion, because the statute for Home Invasion sets out that it is a Burglary with the additional element of a person being present in the dwelling. 9 GCA § 37.210. Therefore, the Superior Court was correct in merging the Burglary conviction with the Home Invasion conviction. The same argument cannot be made for a Criminal Sexual Conduct conviction and a Burglary conviction, which are clearly entirely distinct offenses. These two convictions should not be merged.

V. CONCLUSION

[44] Based on the foregoing, we find no reason to reverse the Superior Court's decision and **AFFIRM** all portions of Joshua's conviction and the sentence imposed.

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