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SUPREME COURT
OF GUAM

MEMORANDUM FOR FILING

From: Hannah G. Arroyo *HGA*
Clerk of Court, Supreme Court of Guam

Date: November 24, 2015

Re: Correction of clerical and formatting errors in *People v. Camacho*, 2015 Guam 37

Please take note that the Opinion issued by the Supreme Court of Guam on November 20, 2015, has been amended to correct certain clerical errors pertaining to formatting. The portions of the Opinion containing formatting errors have been amended to reflect the corrections, and those pages have been replaced. Nothing else in the Opinion has been affected or altered from its originally published form.

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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

KYLE J. INDALECIO CAMACHO,
Defendant-Appellant.

Supreme Court Case No.: CRA14-024
Superior Court Case No.: CF0010-13

OPINION

Cite as: 2015 Guam 37

Appeal from the Superior Court of Guam
Argued and submitted on May 21, 2015
Hagåtña, Guam

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

MARAMAN, J.:

[1] This case comes before the court on Defendant-Appellant Kyle J. Indalecio Camacho's appeal of his judgment of conviction following a jury trial, claiming that the trial court erred in denying his Motion for Judgment of Acquittal. Camacho asserts that Plaintiff-Appellee People of Guam ("People") presented insufficient evidence to establish Camacho's guilt for the crimes of kidnapping, second degree robbery, and terrorizing, and that his rights to protection from double jeopardy were violated by the imposition of separate sentences for kidnapping and robbery along with a sentence enhancement for possession of a deadly weapon. For the reasons stated herein, we reverse in part and hold that the trial court erred in not dismissing the special allegations of unlawful possession of a deadly weapon in the commission of a felony for lack of sufficient evidence as charged in the indictment, but affirm the judgment in all other respects.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] The case arises from criminal convictions for kidnapping, second degree robbery, and terrorizing. The conduct underlying these charges involved a January 5, 2013 encounter between Camacho and the alleged victim, Bobbie Jo Fausto, in which Camacho purportedly stole her phone, restrained her, and abducted her with her own vehicle, holding her against her will from 8:18 p.m. until 9:30 p.m., when she was rescued by police. Camacho was indicted on one count each of kidnapping, second degree robbery, and terrorizing, as well as two special allegations of unlawful possession of a deadly weapon in the commission of a felony.

[3] During the People's case-in-chief, Fausto was called to testify. Her testimony described in detail how she was attacked by Camacho while entering her vehicle at Micronesia Mall. She testified that Camacho shoved her, punched her in the head, and slammed the car door on her foot while forcing his way into her car and trying to take her cell phone. When Fausto resisted his demand to surrender the phone, Camacho punched her, causing her to drop the phone inside the car. Fausto then stated that as she opened the door to scream for help, Camacho punched and bit her. He subsequently restrained her with handcuffs.

[4] Fausto's sister, Shienna Macario, approached the vehicle and opened the door. According to Fausto, Camacho instructed her to tell Macario that if she called the police, Fausto would be killed. According to testimony from both Fausto and Macario, Fausto told her sister to relinquish her phone and warned that Fausto would be killed if Macario called the police. Camacho then drove away in Fausto's car. They made short stops at several locations so that Camacho could smoke and Fausto could use the restroom. During this time, Fausto managed to obtain her cell phone and to hide it in her waistband, though she was unable to contact anyone.

[5] Fausto further testified that, at one point, Camacho placed her in the back of the vehicle while it was stopped. He displayed an open pocketknife. Fausto testified that Camacho told her that "if [she] resisted even more from how [she] was earlier, he would have used it against [her], he would have killed [her]." Transcript ("Tr.") at 16 (Jury Trial, Day 2, Oct. 23, 2013). She identified the knife introduced into evidence as the one used to threaten her. Shortly after Camacho displayed his knife, police arrived, arresting Camacho and freeing Fausto. Officers testified that Fausto was rescued at Marbo Cave, approximately six miles from Micronesia Mall,

and over an hour after her initial abduction. Tr. at 16, 24 (Jury Trial, Day 1, Oct. 22, 2013).

Police testimony also confirmed that Camacho's knife was recovered at the scene.

[6] At the conclusion of the trial, the jury returned a verdict, finding Camacho guilty on all charges and special allegations. Adjusted for concurrent sentences, the court sentenced Camacho to a total of 30 years of incarceration.

[7] Camacho timely filed the notice of appeal.

II. JURISDICTION

[8] This court has jurisdiction over appeals from final judgment of the Superior Court pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-49 (2015)), and 7 GCA §§ 3107(b) and 3108 (2005). This is an appeal of a final judgment issued by the Superior Court on October 15, 2014.

III. STANDARD OF REVIEW

[9] Claims of insufficient evidence are matters of law reviewed *de novo*. *People v. Flores*, 2009 Guam 22 ¶ 10 (citing *People v. Maysho*, 2005 Guam 4 ¶ 6; *United States v. Shipsey*, 363 F.3d 962, 971 n.8 (9th Cir. 2004)). "In reviewing the sufficiency of the evidence to support a criminal conviction, this court inquires as to whether the evidence in the record could reasonably support a finding of guilty beyond a reasonable doubt." *People v. Root*, 2005 Guam 16 ¶ 33 (citations and internal quotation marks omitted).

[10] A claim of double jeopardy is a question of law, and thus reviewed *de novo*. *People v. San Nicolas*, 2001 Guam 4 ¶ 8. Further, determining whether the legislature has authorized the defendant to be punished twice for two violations of the same statute is an issue of statutory interpretation, reviewed *de novo*. *Id.* ¶ 9; *see also Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 7.

IV. ANALYSIS

A. Whether there was Sufficient Evidence of the First Charge of Kidnapping

[11] Camacho challenges the sufficiency of evidence used to convict him of the charge of kidnapping. Appellant's Br. at 6-7 (Feb. 27, 2015). This court has previously addressed the proper standard of analysis for evaluating a sufficiency of evidence challenge, explaining that:

"[i]n reviewing the sufficiency of the evidence to support a criminal conviction," this court inquires as to "whether the evidence in the record could reasonably support a finding of guilt beyond a reasonable doubt." *People v. Sangalang*, 2001 Guam 18 ¶ 20 (citations omitted); *People v. Reyes*, 1998 Guam 32 ¶ 7; *People v. Leon Guerrero*, 2001 Guam 19 ¶ 32. Because "this is a highly deferential standard of review," "[w]hen a criminal defendant asserts that there is insufficient evidence to sustain the conviction, this 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.*" *Sangalang*, 2001 Guam 18 ¶ 20 (emphasis added) (citations and internal quotation marks omitted); see also *United States v. Birges*, 723 F.2d 666, 672 (9th Cir. 1984).

People v. Guerrero, 2003 Guam 18 ¶ 13. Thus, when reviewing a jury conviction for sufficiency, the only relevant question is "whether that finding was so insupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, 132 S. Ct. 2060, 2065 (2012).

1. Kidnapping

[12] The first charge for which Camacho was indicted was kidnapping. Specifically, the indictment alleged that:

On or about the 5th day of January 2013, in Guam, **KYLE J. INDALECIO CAMACHO** did commit the offense of ***Kidnapping***, in that he intentionally and unlawfully removed another, namely ***Bobbie Jo Fausto***, a substantial distance from the vicinity where he [sic] was found, to facilitate the commission of a felony, that is, robbery, in violation of 9 GCA § 22.20(a)(2) and (b), as amended.

Record on Appeal ("RA"), tab 8 (Indictment, Jan. 16, 2013). The indictment is consistent with the essential elements of the kidnapping statute, which states that "[a] person is guilty of

kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found . . . with any of the following purposes: . . . (2) to facilitate commission of any felony or flight thereafter.” 9 GCA § 22.20 (2005). Thus, the proper question is whether, viewing the evidence in the light most favorable to the prosecution, any reasonable trier of fact could have found, beyond a reasonable doubt, that on or about January 5, 2013, Camacho unlawfully removed Fausto a substantial distance in order to facilitate the commission of a robbery .

[13] The basis of Camacho’s claim seems to stem from a challenge to the sufficiency of evidence for the underlying felony of robbery. Camacho claims that because insufficient evidence existed to convict him of robbery, he cannot be convicted of kidnapping. Appellant’s Br. at 1-3. This assumption is incorrect. Kidnapping requires proof that the defendant unlawfully removed a victim a substantial distance for the purpose of facilitating any other felony or flight thereafter. 9 GCA § 22.20(a)(2). Proof of the elements of the underlying felony is not required so long as the People present sufficient evidence that the victim was moved for the purpose of facilitating that felony.¹

[14] Evidence in the record clearly establishes that Camacho intentionally and unlawfully removed Fausto a substantial distance from the vicinity where she was found. Testimony provided proof that Camacho forcefully restrained Fausto in her vehicle and drove the vehicle from Micronesia Mall to the parking lot of Marbo Cave, approximately six miles away. Tr. at 43, 63 (Jury Trial, Day 2); Tr. at 16, 24 (Jury Trial, Day 1, Oct. 22, 2013). Evidence further established that this abduction lasted over an hour until her rescue by police. Tr. at 24 (Jury

¹ This point will be analyzed in greater detail in section B regarding whether robbery is an included offense of kidnapping.

Trial, Day 1). Further, the proof presented at trial was sufficient for a reasonable trier of fact to conclude that removal of the victim was done to facilitate the robbery and flight thereafter. Fausto's testimony established that Camacho attacked her in an attempt to get her phone, pulling her into the vehicle and restraining her when she fought back and screamed for help. Tr. at 21-24, 42-44 (Jury Trial, Day 2). The jury could conclude from these facts that her removal to a different location was intended to facilitate the robbery by preventing Fausto from alerting others to come to her aid. This conclusion is further supported by Camacho's threats to Macario that Fausto would be harmed if she called the police. *Id.* at 8, 44-45. A rational jury could infer that the kidnapping was intended to facilitate the robbery by discouraging others from contacting police, increasing the chances of successful completion of his crime.

[15] For these reasons, we hold that evidence in the record could have led a reasonable jury to find that all elements of the kidnapping charge were satisfied beyond a reasonable doubt.

2. Robbery

[16] Though Camacho does not explicitly assert this ground for relief, the court may more appropriately interpret the substance of his first argument as a challenge to the sufficiency of evidence regarding his conviction for second degree robbery. "A person is guilty of *robbery in the second degree* if, in the course of committing a theft, he . . . (3) is armed with or displays what appears to be explosives or a deadly weapon." 9 GCA § 40.20(a)(3) (2005). These elements are mirrored in the People's indictment, which charges "that he intentionally was armed with and displayed what appeared to be a deadly weapon, while in the course of committing theft of a cell phone, in violation of 9 GCA § 40.20(a)(3) and (b)." RA, tab 8 at 2 (Indictment). In essence, Camacho is claiming that his robbery conviction cannot stand because he did not

display the deadly weapon in his possession while taking Fausto's cell phone and did not possess the phone after brandishing his knife, as Fausto had managed to take it back. Appellant's Br. at 7. These factual allegations appear supported by the record. Tr. at 21-24, 42-44, 55-59, 65-72 (Jury Trial, Day 2). The People counter that the robbery was ongoing from Fausto's initial assault until the police arrived, since Camacho possessed unlawful control over Fausto's car and phone the entire time, including when the phone returned to Fausto's custody. Appellee's Br. at 7-8 (Mar. 30, 2015). As such, the People argue that Camacho's act of displaying the knife occurred during the ongoing theft. *Id.* at 7-9. However, this court need not reach the People's argument since Camacho's claim, even if true, does not impugn the sufficiency of evidence to support his conviction.

[17] According to the statute, guilt is proven by showing that Camacho was either armed with or displayed what appeared to be a deadly weapon. 9 GCA § 40.20(a)(3). Though the People alleged that Camacho was both armed with and displayed a weapon in the course of committing the theft, *see* RA, tab 8 at 2 (Indictment), it is well settled that "[w]hen a statute specifies two or more ways in which an offense may be committed, all may be alleged in the conjunctive in one count and proof of any one of those conjunctively charged acts may establish guilt." *People v. Torres*, 2014 Guam 8 ¶ 52 (quoting *United States v. Booth*, 309 F.3d 566, 572 (9th Cir. 2002)). In analyzing the phrase "armed with" a deadly weapon, many jurisdictions have found a defendant to be armed if the weapon is possessed, accessible, and readily available to the defendant for offensive or defensive purposes. *See, e.g., State v. Romero*, 659 P.2d 655, 658 (Ariz. Ct. App. 1982); *People v. Miley*, 204 Cal. Rptr. 347, 351 (Ct. App. 1984); *State v. Anderson*, 422 A.2d 323, 327 (Conn. 1979); *Commonwealth v. King*, 866 N.E.2d 938, 941

(Mass. App. Ct. 2007); *State v. Farmer*, 324 A.2d 739, 743 (Me. 1974); *State v. Merritt*, 589 A.2d 648, 650 (N.J. Super. Ct. App. Div. 1991);² *People v. Tracey A.*, 413 N.Y.S.2d 92, 95 (Co. Ct. 1979); *State v. Gurske*, 118 P.3d 333, 335 (Wash. 2005). Thus, Camacho's claim that he did not display his knife until after he had taken and subsequently lost possession of Fausto's cell phone is immaterial if sufficient evidence demonstrated that the knife was in his possession and readily available to him during the theft.

[18] Examination of the record reveals satisfactory evidence to support the conclusion that Camacho was armed with what appeared to be a deadly weapon in the course of committing a theft, as alleged in the indictment. Fausto testified that while she was being held by Camacho, he showed her a pocket knife, which he opened, while telling her that if she had resisted more than she had during the theft of her phone, he would have used the knife to kill her. Tr. at 55-56 (Jury Trial, Day 2). This display, coupled with his statement, would allow a rational jury to conclude that during the course of the theft, Camacho possessed and had readily available what appeared to be, and in fact was, a pocket knife. Further, the evidence presented was sufficient for a jury to find that the knife appeared to be a deadly weapon. This court has held that, with respect to 9 GCA § 40.20(a)(3), sufficient evidence may support the jury's finding that a knife is a deadly weapon where the jury was able to evaluate its "manner of use, its size and shape, and its capacity to produce death or serious bodily injury." *People v. Cruz*, 1998 Guam 18 ¶ 16 (citing *Davidson v. State*, 602 S.W.2d 272 (Tex. 1980)). In this case, the People entered the opened folding knife into evidence, demonstrating its size and appearance, and had Fausto imitate the

² New Jersey limits this definition to firearms, having interpreted their "deadly weapon" provision to require a showing of intent to use for knives. *State v. Rolon*, 974 A.2d 1021, 1027-28 (N.J. 2009). Our case law imposes no such requirement on knives, so long as its capacity to produce death can be demonstrated. *People v. Cruz*, 1998 Guam 18 ¶ 16.

manner in which it was handled by Camacho. Tr. at 58-59 (Jury Trial, Day 2). These presentations provide adequate evidence for a jury to infer the knife's capacity to produce death or bodily injury, particularly when coupled with Camacho's statement to Fausto that he would use the knife to kill her. *Id.* at 55-56.

[19] The court finds that sufficient evidence supported Camacho's conviction for second degree robbery. We decline to address the People's assertion that the robbery constituted a single continuous act from the time of the initial assault until the intervention of the police, as it is unnecessary to adjudicating this claim. *See Hemlani v. Hemlani*, 2015 Guam 16 ¶ 33; *Flores*, 2009 Guam 22 ¶ 85.

B. Whether Second Degree Robbery is an Included Offense of Kidnapping

[20] Camacho next claims that the trial court erred in allowing him to be convicted of both kidnapping and what he alleges is the included offense of robbery, as that result would unlawfully constitute multiple convictions for the same offense. Appellant's Br. at 7-9. The protection of an individual against double jeopardy is embodied in the Fifth Amendment of the Constitution, drawn from the deep-rooted legal principle that "an accused should not be tried twice for the same offense." *Benton v. Maryland*, 395 U.S. 784, 809 (1969); *see also United States v. Ursery*, 518 U.S. 267, 273 (1996). These protections have been specifically applied to Guam through the Organic Act and codified by local statutes. 48 U.S.C.A. § 1421b(d) (Westlaw through Pub. L. 114-61 (2015); 9 GCA §§ 1.22-1.26 (2005); *see also People v. Reyes*, 1998 Guam 32 ¶ 23. "In determining whether multiple punishments violate the Double Jeopardy Clause courts look to the punishment authorized by the legislative branch." *San Nicolas*, 2001 Guam 4 ¶ 9; *see also Whalen v. United States*, 445 U.S. 684, 688 (1980). This court has

previously applied the *Blockburger* test in resolving ambiguous legislative intent with regard to multiple punishments, stating:

When a statute is ambiguous regarding whether a violation of two different statutes constitutes separate offenses allowing for multiple punishments, courts employ the rule of statutory construction set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932). See *Whalen*, 445 U.S. at 691-92, 100 S. Ct. at 1437-38. The *Blockburger* Court provided that “[w]here the same act or transaction constitutes a violation of *two distinct statutory provisions*, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” *Blockburger*, 284 U.S. at 304, 52 S. Ct. at 182 (emphasis added). The *Blockburger* test embodies the presumption that the Legislature “ordinarily does not intend to punish the same offense under two different statutes.” *Whalen*, 445 U.S. at 691-92, 100 S. Ct. at 1437-38. In other words, the test is used to determine whether the violation of two distinct statutes constitutes the “same offense”, and if so, courts presume that the Legislature intends only one punishment for the violations. *Id.* at 692, 100 S. Ct. at 1438.

San Nicolas, 2001 Guam 4 ¶ 11. The relevant task in this case is to determine whether the crimes of kidnapping and robbery as charged each require proof of an additional fact that the other does not. See *id.* It is clear that kidnapping possesses a distinct element from robbery, because it requires the prosecution to prove that a defendant “unlawfully remove[d] another from his place of residence or business, or a substantial distance from the vicinity where he is found.” 9 GCA § 22.20(a). The crime of robbery as charged contains no such requirement. See 9 GCA § 40.20. The more difficult question, however, is whether second degree robbery contains a separate factual element from kidnapping in this case.

[21] Camacho correctly notes that, in the indictment, the People specified that the underlying felony for which Camacho allegedly removed Fausto was robbery. RA, tab 8 at 1 (Indictment). Camacho claims that robbery has become an essential element of kidnapping, as pled, meaning that it is entirely included within the offense and cannot be separately punished. Appellant’s Br. at 8. In support of this proposition, Camacho cites this court’s decision in *People v. Aguirre*,

2004 Guam 21. *Id.* In *Aguirre*, we held that because the indictment on a felony murder charge specified the underlying felony as robbery, the robbery became a lesser included offense such that the defendant could not be convicted of a separate robbery charge. *Aguirre*, 2004 Guam 21 ¶ 24. While this holding initially appears to control the outcome of the present dispute, comparison of the statutory elements of aggravated felony murder to those of kidnapping reveal material distinctions justifying disparate outcomes.

[22] Guam’s aggravated murder statute defines the crime as “(1) causing the death of another; (2) either intentionally and with premeditation, intentionally, knowingly, recklessly, or by criminal negligence; and (3) *during the commission* or attempt to commit a felony.” *Angoco v. Bitanga*, 2001 Guam 17 ¶ 13 (emphasis added); 9 GCA §§ 16.20, 16.30(a)(2) (2005). This statute requires proof that the underlying felony was committed or that its commission was attempted, making its elements a lesser included offense. By contrast, the kidnapping statute requires only that a defendant remove another a substantial distance *for the purpose of* “facilitat[ing] commission of any felony or flight thereafter.” 9 GCA § 22.20(a). Under this statute, none of the essential elements of the underlying felony necessarily need to be proven, so long as the prosecution can demonstrate that the victim was transported by a defendant with the purpose of facilitating said felony. Indeed, this precise distinction has been articulated by the Florida Court of Appeals and Supreme Court of Washington. In *Dowdell v. State*, 415 So. 2d 144 (Fla. Dist. Ct. App. 1982), the defendant contended, as here, that

since the offense of kidnapping involves the confinement or movement of another person against his will with intent to commit or facilitate the commission of any felony and since he was charged with kidnapping “with the intent to commit or facilitate the commission of robbery,” the robbery was necessarily included within the kidnapping.

415 So. 2d at 145-46. Like Camacho, the defendant in *Dowdell* supported his position by citing to a felony murder case, *State v. Hegstrom*, 401 So. 2d 1343 (Fla. 1981), which mirrors our holding in *Aguirre* that robbery was an included offense. *Id.* at 146. The Florida court rejected this contention, explaining:

The flaw in this argument is that the offense of kidnapping does not require that the underlying felony be completed; it only requires that the perpetrator *intend* to commit or to facilitate the commission of the felony. . . . Thus, it is distinguishable from the situation in the *Hegstrom* case involving a felony murder wherein the actual commission of a felony must be proved. Accordingly, we find the sentences to be authorized.

Id. (citations omitted). Similarly, the Washington Supreme Court held that kidnapping does not merge with first degree robbery to preclude multiple convictions, explaining that “a ‘person who intentionally abducts another need do so only with the *intent* to carry out [the robbery];’ not that the person actually complete the action.” *State v. Louis*, 120 P.3d 936, 940 (Wash. 2005) (quoting *Petition of Fletcher*, 776 P.2d 114, 120 (Wash. 1989)).

[23] Accordingly, we distinguish our decision in *Aguirre* and hold that, with regard to the crime of kidnapping, robbery is not an included offense that would prevent a defendant from being convicted of both crimes.

C. Whether Sufficient Evidence Existed to Support Terrorizing

[24] Camacho also alleges that insufficient evidence existed to support his conviction of terrorizing. The statute defines the crime of terrorizing in the following manner:

A person is guilty of terrorizing if he communicates to any person a threat to commit or to cause to be committed a crime of violence dangerous to human life, against the person to whom the communication is made or another, and the natural and probable consequence of such a threat, is to place the person to whom the threat is communicated or the person threatened in reasonable fear that crime will be committed.

9 GCA § 19.60(a) (2005). In their indictment, the People charged Camacho for this crime as follows:

On or about the 5th day of January 2013, in Guam, **KYLE J. INDALECIO CAMACHO** did commit the offense of **Terrorizing**, in that he did knowingly communicate a threat to another person, that is, **Shienna Maracio**, to commit a crime of violence dangerous to human life against **Bobbie Jo Fausto**, the natural and probable consequence of such threat being to place **Shienna Maracio** in reasonable fear that the crime would be committed, in violation of 9 GCA §§ 19.60(a) and (b).

RA, tab 8 at 2 (Indictment). The basis of Camacho’s challenge to the sufficiency of evidence is two-fold. First, he argues that because he never directly spoke to Macario, the recipient of the threat, the People could not prove that any such threat was actually communicated by Camacho to Macario. Appellant’s Br. at 10. Second, he claims that his conviction cannot stand because the People presented no evidence that Macario was actually placed in fear that a crime would be committed. *Id.* at 10-11. Both of these arguments are unpersuasive.

[25] “Although the Guam Legislature used the term ‘terrorizing,’ in drafting 9 GCA section 19.60(a) and (b), other jurisdictions use the term ‘terroristic threat’ in statutes that seek to prohibit the same conduct.” *People v. Root*, 1999 Guam 25 ¶ 7. We may look to the persuasive authority of case law interpreting similar statutes for guidance. *Amerault v. Intelcom Support Servs., Inc.*, 2004 Guam 23 ¶ 16. Other jurisdictions have held that the indirect or nonverbal acts satisfy the communication requirement if a threat can be gleaned from context. *See, e.g., People v. Mendoza*, 69 Cal. Rptr. 2d 728, 737 (Ct. App. 1997) (“If the communication, by whatever means, was intended to convey and did convey an unequivocal, unconditional, immediate, and specific threat of great bodily injury or death, the statute has been violated.”); *State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996). Further, other courts addressing this very issue have found that “the fact that [the defendant] did not communicate the threats directly to the victims does not

alone preclude a conviction if the threat is stated in a manner which will support the inference that the speaker intended or expected the threat to be conveyed to the victim.” *Brown v. State*, 680 S.E.2d 579, 582 (Ga. Ct. App. 2009); *see also Commonwealth v. Kelley*, 664 A.2d 123, 127 (Pa. Super. Ct. 1995) (“Contrary to Appellant’s assertion, direct communication of threat between the perpetrator and the victim is not a requisite element of the crime of terroristic threats.”). Here, there can be no doubt that Camacho expected the threat to be conveyed to Macario, because evidence established that he explicitly told the victim, Fausto, to convey the threat to her. Tr. at 44-45 (Jury Trial, Day 2). Such testimony is therefore sufficient to satisfy the communication element of terrorizing.

[26] Camacho’s second argument regarding the lack of evidence that Macario was actually placed in fear is similarly unconvincing. Other courts analyzing this issue have explicitly held that the recipient of the threat need not be placed in actual fear, so long as such apprehension that a crime will be committed is the natural and probable consequence of the threat. *See, e.g., Smith v. State*, 757 S.W.2d 554, 556 (Ark. 1988) (“It is not necessary that the recipient of the threat actually be terrorized.”); *Martin v. State*, 692 S.E.2d 741, 744 (Ga. Ct. App. 2010) (holding that, in terroristic threats prosecution, it was not incumbent on the state to prove victim was actually put in fear); *Williams v. State*, 194 S.W.3d 568, 575 (Tex. App. 2006), *aff’d*, 252 S.W.3d 353 (Tex. Crim. App. 2008) (“It is not necessary for the victim to actually be placed in fear of imminent serious bodily injury or for the accused to have the capability or the intention to actually carry out the threat.”).

[27] In this case, the record strongly supports a finding that the threat conveyed by Camacho would naturally and probably result in reasonable fear. In the content of the threat, Camacho

told Fausto to tell her sister that she, Fausto, would get hurt and be killed if Macario called the police. Tr. at 44-45 (Jury Trial, Day 2). Macario confirmed that this is what Fausto relayed to her. *Id.* at 8. In addition, the threat came immediately following Camacho's physical assault and forceful restraint of Fausto. *Id.* at 21-24, 42-44. Given the substance and context of the threat, a rational trier of fact could easily conclude that the natural and probable consequence of Camacho's threat would be to create reasonable fear in Macario.

[28] Finally, evidence presented at trial adequately demonstrated that the victim receiving the threat was actually placed in fear as a result of the terrorizing. The record indicates that Macario was crying immediately after the threat was conveyed to her. *Id.* at 8-9. A rational conclusion of this was that she was distraught and fearful as a result of the threatened harm to her sister. *See Godbouldt v. LaMarque*, No. CIVS03-1683GEBGGHP, 2008 WL 686119, at *11 (E.D. Cal. Mar. 13, 2008), *report and recommendation adopted*, No. 203CV1683GEBGGHP, 2008 WL 1990454 (E.D. Cal. May 7, 2008), *aff'd*, 327 F. App'x 745 (9th Cir. 2009) (holding that testimony of crying indicates fear). Accordingly, sufficient evidence demonstrated that Macario was actually placed in fear as a result of Camacho's threat.

D. Whether the Special Allegations of Unlawful Possession of a Deadly Weapon are Applicable to the Charges

[29] Camacho's fourth contention is that insufficient evidence existed to impose a sentence enhancement under the special allegation of possession of a deadly weapon. This enhancement states:

Whoever unlawfully possesses or uses a deadly weapon in the commission of a felony punishable under the laws of Guam shall, in addition to the punishment imposed for the commission of such felony, be imprisoned for a term of not less than five (5) years nor more than twenty-five (25) years.

9 GCA § 80.37 (2005). In the indictment against Camacho, the People elected to pursue this enhancement based solely on the theory that he “did knowingly and unlawfully possess a deadly weapon, that is, a **folding knife**, in the commission of a felony.” RA, tab 8 at 2 (Indictment).

[30] Camacho interprets this statutory provision to mean that in order for the special allegation to apply, the deadly weapon possessed or used in the commission of a felony must be in the defendant’s possession unlawfully. Appellant’s Br. at 11-12. He further claims that because no evidence in the record establishes that it was unlawful for him to possess his pocket knife, the sentence enhancement cannot be imposed. *Id.*

[31] When determining the meaning and applicability of statutes, the court’s primary task is to determine the legislature’s intent. *Big Creek Lumber Co. v. Cnty. of Santa Cruz*, 136 P.3d 821, 829 (Cal. 2006). “It is a cardinal rule of statutory construction that courts must look first to the language of the statute itself. Absent clear legislative intent to the contrary, the plain meaning prevails.” *Enriquez v. Smith*, 2012 Guam 15 ¶ 11 (quoting *Sumitomo Constr. Co. v. Gov’t of Guam*, 2001 Guam 23 ¶ 17) (internal quotation marks omitted); *see also Pangelinan*, 2000 Guam 11 ¶ 23. Analysis of the text reveals ambiguity in its meaning. A narrow reading of the language could indeed support Camacho’s claim that the statute punishes only those who commit felonies with weapons which it is unlawful for them to possess. However, the statute can also be read to mean that it applies in all situations where a deadly weapon is used or possessed during the commission of a felony, as such conduct would itself be unlawful. This is the interpretation advanced by the People. Appellee’s Br. at 14. Unfortunately, the legislative history offers little guidance in resolving this ambiguity. Title 9 GCA § 80.37 was enacted in 1978 through Guam Public Law 14-143:1. *See* Pub. L. 14-143 (Sept. 29, 1978). However, this public law contains

only the adopted language of the statute, and includes no factual background, statement of legislative intent, or guidance on applicable statutory construction. *See* Pub. L. 14-143.

[32] In analyzing similar statutes, however, courts in other jurisdictions have emphasized the distinction between possession and use of a deadly weapon in the commission of a felony, finding that the latter requires a weapon to be utilized in a way which advances the underlying crime, apart from mere possession. *Narron v. State*, 835 S.W.2d 642, 644 (Tex. Crim. App. 1992); *State v. Gozzola*, 729 N.W.2d 87, 90 n.7 (Neb. 2007). It follows that the standard of evaluation must be different for possession than for use. Accordingly, we reject the contention that imposition of the enhancement under the “use” prong of the special allegation requires a showing that the deadly weapon used was unlawfully in the possession of the defendant. Such a holding would undermine the intent of the legislature to punish the use of deadly weapons whose possession is not otherwise regulated by law, including all knives and blunt objects that the defendant uses knowing they are capable of producing death or serious bodily injury. *See* 9 GCA § 16.10(d) (2005).

[33] On this issue, this court has on several occasions upheld the imposition of the special allegation under section 80.37 where a defendant has used a lawfully possessed knife. *See People v. Van Bui*, 2008 Guam 8 ¶ 3; *People v. Camacho*, 1999 Guam 27 ¶¶ 1-3; *People v. Evaristo*, 1999 Guam 22 ¶¶ 1-5. We hold that where a defendant is charged with the use of a deadly weapon in the commission of a felony, the special allegation may be imposed whether or not the possession of such a weapon is otherwise unlawful. However, in this case, Camacho was not indicted for the use of a deadly weapon. Rather, the People chose to charge him with the special allegation under the theory of unlawful possession. Thus, this court limits its inquiry to

whether sufficient evidence was presented to demonstrate Camacho's unlawful possession of the folding knife, whether or not the underlying facts would have supported a sentencing enhancement for use of a deadly weapon in the commission of a felony.

[34] The text of the statute does make clear that, in addition to use, mere possession of a weapon may form the basis of a sentencing enhancement. 9 GCA § 80.37. However, where the enhancement is not sought on the basis that the weapon was used in furtherance of the felony, the plain language seems to indicate that possession itself must be unlawful. *Id.* ("Whoever *unlawfully possesses* or uses a deadly weapon . . .") (emphasis added)). If the legislature had so desired, it could have written the statute to prohibit all possession of a weapon during the commission of a felony, as other jurisdictions have done. *See, e.g.*, 11 Del. C. § 1447 (Westlaw through 80 Laws 2015, ch. 194) ("A person *who is in possession of a deadly weapon* during the commission of a felony is guilty of possession of a deadly weapon during commission of a felony." (emphasis added)); Ga. Code Ann. § 16-11-106 (Westlaw through Regular Session of the 2015 Legislative Session) ("Any person *who shall have on or within arm's reach of his or her person a firearm or a knife* having a blade of three or more inches in length during the commission of, or the attempt to commit [a felony], commits a felony . . .") (emphasis added)).

[35] As a principle of statutory construction, this court will not adopt an interpretation that renders the additional words and phrases in this statute superfluous or presumes the legislature was ignorant of the meaning of the language it employed. *See, e.g., Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991); *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 186-87 (2004). Further, holding that the use of any deadly weapon may trigger the sentencing enhancement under 9 GCA § 80.37, while mere possession may only be punished if such

possession is unlawful, is the clearest way to provide meaning to the plain language of the statute while simultaneously respecting the intent of the legislature to punish those who endanger victims through the use of weapons. See *People v. Borja*, 732 F.2d 733, 736 (9th Cir. 1984) (“Section 80.37 is an unambiguous expression of the Guam legislature's intent to impose additional punishment on those who use weapons during the commission of felonies.”); *State v. Mello*, 688 A.2d 622, 629 (N.J. Super. Ct. App. Div. 1997) (distinguishing between mere possession with an unlawful intent and unlawful possession of a weapon). Finally, this interpretation best comports with the statutory rule of lenity, which requires that “[w]here a criminal statute is ambiguous, . . . [we must] construe the statute in favor of the defendant.” *People v. Tenorio*, 2007 Guam 19 ¶ 14; see also *United States v. Castro*, No. 12-00018, 2013 WL 829046, at *6 (D. Guam Feb. 28, 2013).

[36] In contrast to simple possession, the concept of unlawful possession of a deadly weapon can refer, for example, to types of weapons that are prohibited or that require registration, such as certain firearms or explosives, as well as prohibitions against certain persons owning types of weapons as a result of their status as convicted felons. See, e.g., 10 GCA § 61110 (2005) (prohibiting unlawful possession of explosives); 10 GCA Chapter 60 (2005) (prohibiting certain firearm ownership, imposing registration and licensing requirements for concealed carry; prohibiting certain persons from possessing firearms based on mental capacity or criminal history). Here, the People presented no evidence as to whether the deadly weapon present during the commission of the robbery and kidnapping was in Camacho's possession unlawfully. In fact, it is unlikely that they could have done so, as Guam does not regulate the personal possession of knives as it does for firearms, for example. As such, there was insufficient evidence in the

record to establish the elements of the special allegation for which Camacho was indicted, and such enhancement must therefore be vacated.

E. Whether Imposition of the Special Allegation of Unlawful Possession of a Deadly Weapon in a Conviction for Second Degree Robbery Violates Constitutional Double Jeopardy Principles

[37] Camacho's final argument on appeal is that his constitutional protection against multiple punishments for the same offense was violated by the imposition of the special allegation of unlawful possession of a deadly weapon in a conviction for second degree robbery. Appellant's Br. at 12. Camacho asserts that the effect of applying the weapons enhancement to a robbery conviction, which itself requires possession or display of a deadly weapon, amounts to multiple punishments for the same act, in violation of 9 GCA § 1.22. *Id.* at 12-13. The People assert in response that second degree robbery actually contains a separate element from the special allegation, in that 9 GCA § 40.20(3) does not require the possession of a deadly weapon, but only that which appears to be a deadly weapon, while 9 GCA § 80.37 requires an actual deadly weapon. Appellee's Br. at 15. However, the court need not resolve this question.

[38] As discussed above, imposition of the sentencing enhancement for unlawful possession of a deadly weapon in the commission of a felony was improper and must be vacated. There is no longer any possibility that Camacho is facing multiple consequences stemming from his possession of, and conduct with, the folding knife. Accordingly, this issue is rendered moot and need not be addressed. *See Taitano v. Lujan*, 2005 Guam 26 ¶ 27 (holding that a court lacks jurisdiction to resolve issues that have become moot by intervening events); *Soliman v. United States ex rel. INS*, 296 F.3d 1237, 1242 (11th Cir. 2002).

V. CONCLUSION

[39] In light of the facts and arguments presented, we hold that the trial court erred in part in denying Camacho's motion for judgment of acquittal. Specifically, we find sufficient evidence in the record to support his convictions for kidnapping, second degree robbery, and terrorizing. Further, we conclude that principles of double jeopardy do not require merger or preclude convictions on both the kidnapping and second degree robbery charges. However, we hold that the trial court erred in not dismissing the special allegations of unlawful possession of a deadly weapon in the commission of a felony, for lack of sufficient evidence to support this enhancement as it was charged in the indictment.

[40] Accordingly, we **REVERSE** in part and **AFFIRM** in part the judgment, and **REMAND** for proceedings not inconsistent with this opinion.

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