



**Filed**

Supreme Court of Guam, Clerk of Court

**IN THE SUPREME COURT OF GUAM**

**PEOPLE OF GUAM,**

Plaintiff-Appellee,

**v.**

**MARKO OMWERE,**

Defendant-Appellant.

**OPINION**

**Cite as: 2019 Guam 17**

Supreme Court Case No.: CRA17-014

Superior Court Case No.: CF0724-16

Appeal from the Superior Court of Guam  
Argued and submitted on February 22, 2018  
Hagåtña, Guam

Appearing for Defendant-Appellant:

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

**TORRES, J.:**

[1] Defendant-Appellant Marko Omwere appeals from a judgment of conviction finding him guilty of: Home Invasion; five counts of First Degree Criminal Sexual Conduct, each with a Special Allegation of Use of a Deadly Weapon in the Commission of a Felony; Burglary; and Kidnapping. He argues his conviction for Kidnapping should be reversed because the evidence was insufficient to satisfy all elements of that offense. For the reasons below, we affirm.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

[2] One evening in December 2016, J.S.<sup>1</sup> fell asleep on the couch in the living room of her new second-floor apartment in Agana Heights. J.S. had moved in only a few weeks prior, and that evening was only her fourth night sleeping in the unit. J.S. was alone in the unit because her young daughter was spending the night at J.S.’s parents’ house.

[3] J.S. testified that she fell asleep after 9:00 p.m. Transcript (“Tr.”) at 80, 83 (Cont’d Jury Trial, Mar. 31, 2017). She awoke later that night to a man—later identified as Defendant-Appellant Marko Omwere—on top of her, holding a knife. J.S. had never seen Omwere before; he initially wore a black shirt over his face, revealing only his eyes, but later removed the shirt from his face. J.S. believes she may have let out a scream in panic. *Id.* at 83. Omwere told her to “[s]hut the fuck up.” *Id.* He then used the knife to rip her clothes off. Omwere proceeded to sexually assault J.S. in several ways. First, he digitally penetrated her vagina, and then he performed cunnilingus. He then engaged in sexual intercourse with the victim, inserting his penis into her vagina. The entire time, the knife was at his side, Omwere having stabbed it into

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<sup>1</sup> We refer to victims of sex crimes by initials only. Guam R. App. P. 3(e)(3)(B) (“All motions, briefs, opinions, and orders of the court shall refer to . . . a victim of a sex crime . . . by initials only.”).

the couch, and he persisted in telling J.S. to “shut up.” *Id.* at 89. J.S. testified that throughout, she took “any means to survive.” *Id.* at 90.

[4] After washing her mouth and body, Omwere took J.S. back to the kitchen, leaned against the stove, and forced her to give him oral sex. Next, he took J.S. back to the living room and put the knife against her side, started to puncture her, and demanded “cash money or jewelry, just something of value.” *Id.* at 93. After J.S. showed that she had nothing to give him, Omwere asked her for the keys to her car. J.S. begged him not to take it. Omwere took J.S. to the couch again and forced her to give him oral sex a second time. J.S. testified, “I kept moving my head back so many times, and he told me, ‘If you don’t do this, I’m going to take your car away from you.’” *Id.* at 95.

[5] Omwere then took J.S. back to the bathroom to shampoo her hair and wash her. Afterward, he brought her to the living room, put a blanket over her shoulders, and told her to “take him somewhere.” *Id.* at 99-100. Because she had only a blanket on, J.S. asked Omwere, “Can I at least put clothes on?” *Id.* at 100. And so, knife in hand, Omwere “directed [J.S.] wherever [she] needed to go to get clothes, and [she] put it on.” *Id.*

[6] Omwere then directed J.S. down a stairwell at the rear of the apartment complex, through a narrow hallway, and around to her car in front. Omwere sat in the front passenger seat while J.S. drove. Omwere directed J.S. to take him to several places. First, a grocery store; then, a gas station; and third, a secluded beach. At the beach, Omwere raped J.S. over the hood of her car.

[7] From the beach, Omwere directed J.S. to drop him off in front of a store in Hagåtña. J.S. then immediately drove to her ex-boyfriend’s residence in Mangilao, where she used his phone to call 911.

[8] J.S. provided police with a description of her attacker. The police obtained video footage from the various stores, and footage taken a day before the incident by a doorbell camera of one

of J.S.'s neighbors showing a man who J.S. positively identified as the perpetrator. Semen taken from J.S.'s vagina after the incident was later matched with a DNA sample provided by Omwere.

[9] A day after the incident, police arrested Omwere after finding him in front of a former thrift store in Hagåtña. Omwere was charged with: (1) Home Invasion (as a First Degree Felony); (2) five counts of First Degree Criminal Sexual Conduct (“CSC”) (As a First Degree Felony), each with a Special Allegation of Use of a Deadly Weapon in the Commission of a Felony; (3) five counts of First Degree CSC (As a First Degree Felony); (4) First Degree CSC (As a First Degree Felony); (5) Burglary (As a Second Degree Felony); and (6) Kidnapping (As a Second Degree Felony). Record on Appeal, tab 7 at 1-6 (Indictment, Dec. 19, 2016).

[10] At trial, after the People’s case-in-chief, Omwere moved for a judgment of acquittal on the Kidnapping charge. The court denied the motion.

[11] The jury found Omwere guilty of (1) the first charge, Home Invasion; (2) the second charge, five counts of First Degree CSC, each with a Special Allegation of Use of a Deadly Weapon in the Commission of a Felony; (3) the fifth charge, Burglary; and (4) the sixth charge, Kidnapping. Omwere was sentenced to serve 30 years plus life imprisonment, to be served consecutively. Omwere timely filed a Notice of Appeal.

## II. JURISDICTION

[12] This court has jurisdiction over an appeal from a final judgment of conviction under 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-58 (2019)), 7 GCA §§ 3107 and 3108(a) (2005), and 8 GCA § 130.15(a) (2005).

## III. STANDARD OF REVIEW

[13] When a defendant moves for a judgment of acquittal on the basis of insufficiency of the evidence, we review the trial court’s denial of the motion *de novo*. *People v. Song*, 2012 Guam 21 ¶ 26 (citing *People v. Anastacio*, 2010 Guam 18 ¶ 10).

#### IV. ANALYSIS

[14] In determining whether there is sufficient evidence to sustain a defendant’s conviction, 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.* ¶ 26 (citing *People v. Tennesen*, 2009 Guam 3 ¶ 14); *see also* 8 GCA § 90.21 (2005) (“No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.”). “This is a ‘highly deferential standard of review.’” *People v. Tenorio*, 2007 Guam 19 ¶ 9 (quoting *People v. Sangalang*, 2001 Guam 18 ¶ 20). “[T]he People ‘must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom.’” *Song*, 2012 Guam 21 ¶ 28 (quoting *State v. Sisk*, 343 S.W.3d 60, 65 (Tenn. 2011)).

[15] “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.” *Id.* ¶ 29 (alteration in original) (quoting *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005)). The “court is concerned with the existence or nonexistence of evidence, not its weight, and this standard remains constant even when the People rely exclusively on circumstantial evidence.” *Id.* (first citing *State v. Weston*, 625 S.E.2d 641, 648 (S.C. 2006); and then citing *State v. Elmore*, 628 S.E.2d 271, 273 (S.C. Ct. App. 2006)).

[16] Guam law defines “kidnapping” as follows:

(a) 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, or if he unlawfully confines another for a substantial period, with any of the following purposes:

(1) to hold for ransom or reward;

(2) to facilitate commission of any felony or flight thereafter;

(3) to inflict bodily injury on or to terrorize the victim or another;

or

(4) to interfere with the performance of any governmental or political function.

....

(c) A removal or confinement is unlawful within the meaning of this section if it is accomplished by force, threat or deception, or, in the case of a person who is under the age of fourteen (14) or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare.

9 GCA § 22.20 (2005).

[17] Omwere argues that the evidence was insufficient to prove three elements of his Kidnapping conviction: (1) that J.S. was removed by “force, threat or deception,” (2) that Omwere took J.S. with intent to commit another sexual assault, and (3) that J.S. was “found” within the meaning of 9 GCA § 22.20(a). Each element is discussed in turn.

**A. The “Force, Threat or Deception” Element of Kidnapping**

[18] In his opening brief, Omwere first argued that the evidence was insufficient to support the “force, threat or deception” element of Kidnapping. Appellant’s Br. at 4 (Nov. 13, 2017). He argued that J.S.’s testimony showed that Omwere did not remove her from the apartment by force, but rather, J.S. volunteered to drive him around because she did not want him to take her car. *Id.* at 5-6.

[19] Plaintiff-Appellee People of Guam countered Omwere’s argument by citing to portions of J.S.’s testimony showing she did not leave her home voluntarily, Appellee’s Br. at 14-15 (Dec. 27, 2017), including her testimony she “was instructed by him at knifepoint to take him wherever he needed to go,” *id.* at 15 (quoting Tr. at 140-41 (Cont’d Jury Trial, Mar. 31, 2017)).

[20] In his reply brief, Omwere concedes that the testimony of J.S. cited by the People was sufficient for a rational trier of fact to have found the element of force beyond a reasonable doubt. Appellant’s Reply Br. at 3 (Jan. 10, 2018). He withdrew his argument as it pertains to 9 GCA § 22.20(c) because of this concession. *Id.* Because this issue has been withdrawn, we do not address it.

### **B. The “Purpose” Element of Kidnapping**

[21] Under 9 GCA § 22.20(a), a defendant’s conduct constitutes kidnapping only if that conduct was engaged in with one of four listed purposes (often referred to as the “purpose” element of kidnapping), one of which is “to facilitate commission of any felony or flight thereafter.” 9 GCA § 22.20(a)(2). Here, the jury was instructed that, among other elements, the People had the burden of proving beyond a reasonable doubt that Omwere intentionally and unlawfully removed J.S. a substantial distance from the vicinity where she was found, to facilitate the commission of criminal sexual conduct.

[22] Omwere argues that the evidence was insufficient to prove the purpose element of kidnapping “[b]ecause the intention, the conscious purpose to engage in conduct was not to kidnap J.S. or commit further crimes other than to end the encounter and leave with the vehicle.” Appellant’s Br. at 7; *see also* Reply Br. at 4. Omwere argues that the People failed to prove that when J.S. was moved, Omwere intended to commit Criminal Sexual Conduct. *See* Reply Br. at 4. Instead, he argues, the evidence showed that any intention to commit sexual assault was formulated after Omwere and J.S. were already traveling. *Id.* at 5.

[23] The People respond that the evidence proved the purpose element of kidnapping. The People point to J.S.’s testimony that Omwere forced her into her car and ordered her to drive him to multiple places. Appellee’s Br. at 16. One place was a beach accessed through a road full of potholes. *Id.* It was still dark out, and no one was at the beach. *Id.* It was “a place that [J.S.]

was unfamiliar with and where detection would be unlikely.” *Id.* Omwere then raped J.S. and recorded the assault with his phone. The People argue that because Omwere had already sexually assaulted J.S. multiple times that night, “it can be inferred that his intent here was to do the same.” *Id.*

[24] Because defendants rarely expressly state their intent at the time of committing a crime, intent is often inferred from the circumstances of a case. *See People v. Yingling*, 2009 Guam 11 ¶ 18 (“[I]ntent, being a state or condition of the mind, is rarely, if ever, susceptible of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence.”); *In re William G.*, 963 P.2d 287, 292 (Ariz. Ct. App. 1997) (“[A]bsent a person’s outright admission regarding his state of mind, his mental state must necessarily be ascertained by inference from all relevant surrounding circumstances.”); *cf. People v. Diego*, 2013 Guam 15 ¶ 34 (recognizing that intent may be inferred from defendant’s actions prior to the crime).

[25] The circumstances, when viewed in the light most favorable to the People, support an inference that Omwere removed J.S. to commit another sexual assault against her. Although some testimony suggests that Omwere would have absconded with the vehicle on his own had J.S. not pleaded with him to leave the vehicle, this does not, even if true, demonstrate that when Omwere took J.S. from her apartment, he had no intent to rape her again. Rather, the circumstantial evidence sufficiently proved that Omwere intended to commit another sexual assault.

[26] The facts are not simply that Omwere tried to take the car on his own and decided not to after J.S. pleaded with him not to take it. Rather, J.S. testified that after Omwere had raped her on the couch and forced her to perform oral sex on him by the stove, he took her to the living room, put the knife against her side and started to puncture her, demanding cash or jewelry. Tr.

at 93 (Cont'd Jury Trial, Mar. 31, 2017). After showing him around her apartment to prove that she had nothing of value to give him, Omwere "asked [J.S.] for the keys to [her] car, and [she] begged him not to take it." *Id.* at 94. J.S. testified that Omwere then "took me to the couch again, and I was forced to give him oral sex again, and I kept moving my head back so many times, and he told me, 'If you don't do this, I'm going to take your car away from you.'" *Id.* at 95. The knife was in his hand the entire time.

[27] Omwere then took J.S. to the bathroom again and shampooed and washed her. Back in the living room, he put a blanket over her. J.S. recounted:

A: He tells me to take him somewhere.

Q: Okay.

A: And then I only had a blanket on, or you know, and he wrapped the blanket around me, so, I asked him, I said, "Can I at least put clothes on?" And that's what I did, he took me with the knife, of course, directed me wherever I needed to go to get clothes, and I put it on . . . .

*Id.* at 99-100. Omwere then directed J.S. down the back stairwell, through a narrow hallway, and around the apartment complex to her car. She was unfamiliar with this area of the complex. The People asked J.S.:

Q: So, why did you agree to take him places with your car?

A: I didn't want him taking the car.

Q: Okay. Without the knife or would you say you're going freely with him or -- do you believe that you were forced?

A: I was forced.

*Id.* at 103.

[28] From the apartment, J.S. drove while Omwere directed J.S. where to go, including where to turn. He had her stop at Toves Mart in Piti. He went into the store, taking the keys with him.

J.S. pleaded with him not to hurt anybody in the store. When asked why she remained in the car, J.S. responded,

Because I know there was only one car outside the store, and I wasn't -- I didn't want to put that person's life in danger if I had to run in there and ask for help. I didn't want to put anyone -- anyone in danger, so, I did what I had to do. I was already a victim, so, I mean, as long as he, like, do what he needs to do and get it over and done with.

*Id.* at 106. When Omwere came back to the car, he did not appear to have purchased anything. He then directed J.S. to drive to the 76/Circle K gas station further down the road. Upon approaching the gas station, J.S. saw more vehicles, which made her feel more relieved. But rather than allow J.S. to park at the gas station, Omwere directed J.S. to park on the opposite side of Marine Corps Drive, across the gas station. There was nothing nearby. Omwere then jaywalked to the gas station, taking his bag and the car keys with him.

[29] When he returned to the vehicle, Omwere directed J.S. to drive to a beach area she had never been to before. It was still dark out. J.S. described the road leading to the beach as “a slight little hill going down and it's -- it's like gravel, it's, like, also, like, holes -- potholes and stuff going down and my car is very low, so, I just remembered going down that hill and then turning right, and I went straight in, so, I parked in the end.” *Id.* at 113. No one was at the beach. She parked in front of a tree, pulling in as instructed by Omwere.

[30] J.S. testified that as she was driving down the gravel road to the secluded beach, “I was praying out loud and I was crying because I thought I was going to die that night.” *Id.* at 114. Omwere responded by telling J.S. to pray for him.

[31] After parking in front of the tree, Omwere took J.S.'s keys and instructed her to get out of the vehicle. At the front of the vehicle, Omwere undressed J.S. again. J.S. testified:

A: And then I had to lean on the hood of it, and he raped me again. And then -- (pause – sniffles heard) and he recorded it.

Q: And how did you know he recorded it?

A: It was dark, it was -- (crying heard) it was pitch dark and then I saw the light from the phone, I knew he was recording me, I just knew it. And then I know he snapped photos too, because I can hear it, you know, like, from the phone going off and everything.

*Id.* at 115. J.S. was crying during the assault. Afterward, they returned to the vehicle, and Omwere directed J.S. to drive to Q Mart, a store next to the Bank of Guam in Hagåtña. He got out of the vehicle, waved at J.S., and walked from the store.

[32] Omwere had sat in the front passenger seat the entire time he was in the vehicle with J.S.

The People asked J.S.:

Q: Did [Omwere] have any permission to be inside your car with you driving him around?

A: No.

Q: Did you want to drive him around to Toves Mart, Circle K, that beach, and then Q-Mart

A: No.

Q: And while he was inside your car, the knife you spoke of, where was that?

A: While he was in the car with me, it was with him the whole time. He always had the knife with him.

*Id.* at 126.

[33] On cross-examination, defense counsel asked J.S. what she meant when she said she was not in the right state of mind at the time of the incident. *Id.* at 139. She responded:

Um, what I mean by “I wasn’t in the right state of mind,” what I meant was I was very traumatized, I was in a state of shock, you know, where I did anything I could, you know, to survive, and I cooperated in any way possible. Because I’m a single mother, I was thinking of my child, that was the only thing I was thinking of.

*Id.* at 140. Defense counsel then asked:

Q: As I understand from your statements, he demanded of you the key, he was going to take the vehicle himself and leave?

A: Yes.

Q: But you told him, no, that you would drive, you would take him wherever he wanted to go.

A: No, not necessarily. Um, he wanted to get the key away from me, this is why he did what he did to me, he wanted me to perform oral sex, like I said, and at that time I was telling -- I was telling him, no, you can't take my key, I need it. I didn't have a working phone, I didn't know how to get out of the situation, out of the apartment, and I was told by him -- I was instructed by him at knifepoint to take him wherever he needed to go. So, I didn't offer to take him around if, you know, he didn't take the car away from me, I didn't offer that at all. He instructed me to do that.

*Id.* She believed she would only drop Omwere off somewhere, not drive him to different places.

*See id.* at 141-42.

[34] From this evidence taken as a whole, a rational trier of fact, viewing the evidence in the light most favorable to the People, could have found the “purpose” element of kidnapping beyond a reasonable doubt. The evidence shows that while J.S. did plead with Omwere not to take the car, he did not simply agree on the condition she drive him around. Neither did they leave the apartment soon after this plea. Instead, after J.S. had already endured a series of sexual assaults before pleading with him to leave her car, Omwere went on to sexually assault her yet again, forcing her to give him oral sex. He then tried to have her leave the apartment with only a blanket on. While he first directed her to drive to two stores, it did not appear that he purchased anything at these stores. Rather than simply end the encounter there and have J.S. drop him off, he instructed her to drive to a secluded beach, greatly decreasing the likelihood of escape or of detection by others. There, he raped her again—the final act of sexual assault against J.S. All the while, Omwere held the knife. Despite the evidence that suggests that Omwere might have taken the vehicle on his own had J.S. not pleaded with him, a rational trier of fact could have

found that when Omwere removed J.S. from her home, he intended to commit at least one more act of sexual violence against her.

### C. The “Found” Element of Kidnapping

[35] Omwere argues for the first time in his reply brief that acquittal is proper because J.S. was not “found” as contemplated in the indictment. Reply Br. at 5. Under 9 GCA § 22.20(a), “[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 . . . .” 9 GCA § 22.20(a). Citing to the dictionary definition of “found” as meaning “[t]o come upon by seeking or by effort,” Reply Br. at 5 (quoting *Black’s Law Dictionary* 631 (6th ed. 1991)), Omwere argues that J.S. was not “found” because after the sexual assault at the beach, she drove herself to her ex-boyfriend’s residence, *id.* at 6.

[36] Not only did Omwere potentially waive this issue by raising it for the first time in his reply brief, *see People v. Borja*, 2017 Guam 20 ¶ 28 (“Issues raised for the first time in a reply brief are deemed waived unless we decide to review them in the exercise of our discretion.”), he misunderstands the meaning of “found” as it is used in the kidnapping statute. His interpretation contradicts the plain meaning of the statute and leads to an absurd result. *Cf. People v. Flores*, 2004 Guam 18 ¶ 20 (rejecting appellant’s reading of statute because legislature could not have intended absurd result). Omwere bases his argument on one dictionary definition of a single word in the statute—“found”—while ignoring the remaining language and context of the statute. *See id.* ¶ 19 (“[T]he language of the statute cannot be read in isolation, and must be examined within its context.” (alteration in original) (quoting *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 9)). By defining as a method of kidnapping the removal of the victim “a substantial distance from the vicinity where he is found,” the legislature could not have meant to criminalize under this method only situations when the victim did not know her location or had to be found by law

enforcement. Rather, defining kidnapping to include the unlawful removal of another person “a substantial distance from the vicinity where he is found” refers to the place where an accused comes upon the victim of the kidnapping, before the kidnapping has taken place.

[37] As for the sufficiency of the evidence on this element, we determine that, viewing the evidence recited above in the light most favorable to the People, a rational trier of fact could have found, beyond a reasonable doubt, that Omwere removed J.S. a substantial distance from the vicinity where he found her. *Cf. People v. Camacho*, 2015 Guam 37 ¶ 14 (finding sufficient evidence of kidnapping where victim was removed “a substantial distance from the vicinity *where she was found*,” pointing to her removal from Micronesia Mall parking lot to Marbo Cave, approximately six miles away).

## V. CONCLUSION

[38] Because the evidence was sufficient to sustain Omwere’s conviction for Kidnapping, we **AFFIRM.**

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/s/  
F. PHILIP CARBULLIDO  
Associate Justice

\_\_\_\_\_  
/s/  
ROBERT J. TORRES  
Associate Justice

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/s/  
KATHERINE A. MARAMAN  
Chief Justice