IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

VALVANO ALEXANDER ERWIN,
Defendant-Appellant.

Supreme Court Case No.: CRA18-004
Superior Court Case No.: CM0306-17

OPINION

Cite as: 2019 Guam 20

Appeal from the Superior Court of Guam
Argued and submitted on February 25, 2019
Hagåtña, Guam

Appearing for Defendant-Appellant:
William C. Bischoff, *Esq.*
Assistant Public Defender
Public Defender Service Corporation
779 Rte. 4
Sinajana, GU 96910

Appearing for Plaintiff-Appellee:
Karen K. McKenzie, *Esq.*
Assistant Attorney General
Office of the Attorney General
Prosecution Division
ITC Bldg.
590 S. Marine Corps Dr., Ste. 801
Tamuning, GU 96913

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

TORRES, J.:

[1] Defendant-Appellant Valvano Alexander Erwin appeals from a final judgment convicting him of one count of Invasion of Privacy (as a Misdemeanor), in violation of 9 GCA § 70.35(a)(6). We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Around April 19, 2017, at noon, Erwin used the female restroom at the Hilton Guam Resort and Spa ("Hilton"). He was there, as part of his job with MidPac Distributors, to clean a keg machine in one of the restaurants. Erwin admitted to entering the female restroom because he felt uncomfortable when a man in the male restroom looked at him. Erwin claimed that he audibly asked if anyone was inside the female restroom before he entered.

[3] While Erwin was in a stall in the female restroom, the victim, G.A.M., entered the stall next to his. After G.A.M. entered the adjacent stall, Erwin accessed his camera on his cell phone, placed it under the stall, and angled the phone camera upward—at which point he saw G.A.M. Erwin testified that the reason he used the phone in this way was to see "how many more people was [sic] coming in to use the restroom" because he wanted to see if it was clear for him to exit the restroom without being seen. Transcript ("Tr.") at 93-96 (Jury Trial, Dec. 19, 2017). He denied taking any photos or videos. Erwin admitted that he saw G.A.M.'s ankles, calves, and outer thigh.

[4] G.A.M. testified that while in the restroom stall, she noticed from the adjacent stall a hand holding a phone in video mode, and that part of her leg was visible on the phone's screen.

Id. at 51-52. After she exited her stall, she observed that the person in the adjacent stall was wearing work boots and baggy pants. G.A.M. knocked on Erwin's stall door and demanded to know who was inside. She placed her cell phone in camera mode under Erwin's stall to see him, and expressed surprise it was a male in the stall. G.A.M. exited the restroom and confronted Erwin when he came out, before Hilton security eventually separated them and contacted the police.

[5] Hilton security confirmed by reviewing closed-circuit video that Erwin entered the female restroom. Because the recording showed Erwin in a different colored shirt, Hilton security searched both restrooms for the shirt Erwin had initially been wearing. They found the shirt in the men's restroom and transferred it to the police. Erwin testified that he had changed his shirt and tried to hide it in the men's restroom after exiting the women's restroom because he was "scared" and did not want to be fired by MidPac for the incident. *Id.* at 92-95, 103-105.

[6] Erwin and others testified that he used the female restroom for various reasons: because it was "clean and smell[ed] good," because he "liked it better because it's cleaner," and because "there was another male [in the male restroom] staring at him and it made him feel uncomfortable." *Id.* at 16, 27, 61, 92, 97-98. Erwin's fiancé testified that Erwin had a habit of using female restrooms, ostensibly at her suggestion. *See id.* at 81-82. She claimed that Erwin often used the female restroom at her work location, Denny's, and that it was her idea that he do so because the female restroom at Denny's was cleaner than the male restroom. *Id.* at 82-83.

[7] Before trial, Plaintiff-Appellee People of Guam ("People") moved to amend certain language related to the Invasion of Privacy charge in the complaint, which the court granted. Tr. at 2-3 (Jury Trial, Dec. 18, 2017). As amended, the complaint charged Erwin with:

> commit[ting] the offense of ***Invasion of Privacy***, in that, not being authorized by law, he intentionally or knowingly installed or used, or both, in any private place or in a place where an individual has a reasonable expectation of privacy, without consent of the person or persons entitled to privacy therein, namely, ***G.A.M.*** . . . , any means or device for observing, recording, amplifying, or broadcasting sounds or events in that place, including another person, namely, ***G.A.M.*** . . . , in a stage of undress or sexual activity, in violation of 9 GCA § 70.35(a)(6).

Record on Appeal ("RA"), tab 36 at 1-2 (Am. Compl., Dec. 20, 2017).[1]

[8] At the end of the People's case-in-chief, Erwin moved for a judgment of acquittal, arguing that "[o]n the [Invasion of Privacy] charge, as amended, there's no evidence that he intended to see [G.A.M.] in a state of undress or in -- or in sexual activity." Tr. at 70 (Jury Trial, Dec. 19, 2017). He argued that G.A.M. testified that the most Erwin could see was her calves, and that he had no specific intention to see her in a state of undress or sexual activity. *Id.* at 70-78. The court denied the motion and ruled that the phrase "including, in a stage of undress or sexual activity" in 9 GCA § 70.35(a)(6) was only illustrative. Tr. at 3 (Jury Trial, Dec. 20, 2017). The court held the required intent was to use a device to observe or record someone who had a reasonable expectation of privacy, not the specific intent to observe such person "in a stage of undress or sexual activity." *Id.* at 3-4.

[9] After denial of Erwin's motion for judgment of acquittal, the case proceeded to closing arguments and deliberations, after which the jury returned a verdict of guilty. In a post-trial motion for judgment of acquittal under 8 GCA § 100.10 or a new trial under 8 GCA § 110.30, Erwin renewed his argument that the evidence was insufficient to convict him of the element of intent to observe the victim "in a stage of undress or sexual activity," as charged in the Amended

[1] The elements of Invasion of Privacy that were provided in the jury instructions identically tracked the Amended Complaint. *See* Tr. at 22 (Jury Trial, Dec. 20, 2017) (instructions read in open court); RA, tab 40 at 14 (Jury Instrs., Dec. 20, 2017) (written instructions provided to jury).

Complaint and as reflected in the jury instructions. RA, tab 43 at 1-4 (Mot. Acquittal or in Alternative for New Trial, Dec. 26, 2017). After briefing on the issue, the court denied Erwin's motions. The court entered final judgment, and Erwin timely appealed.

II. JURISDICTION

[10] This court has jurisdiction over appeals from a final judgment of conviction rendered in the Superior Court of Guam. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-66 (2019)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[11] We review issues of statutory interpretation *de novo*. *People v. Diaz*, 2007 Guam 3 ¶ 10. We review the denial of a defendant's motion for a new trial for an abuse of discretion. *People v. Flores*, 2009 Guam 22 ¶ 9. "Where a defendant has raised the issue of sufficiency of the evidence by a motion for judgment of acquittal, we review the trial court's denial of the motion *de novo*." *People v. Martin*, 2018 Guam 7 ¶ 8; *see also Flores*, 2009 Guam 22 ¶ 10. "When 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." *Flores*, 2009 Guam 22 ¶ 10 (quoting *People v. Flores*, 2004 Guam 18 ¶ 6).

IV. ANALYSIS

[12] Title 9 GCA § 70.35(a)(6) makes it a misdemeanor if a person "intentionally or knowingly":

> installs or uses, or both, in any private place or in a place where an individual has a reasonable expectation of privacy, without consent of the person or persons entitled to privacy therein, any means or device for observing, recording,

> amplifying, or broadcasting sounds or events in that place, *including another person in a stage of undress or sexual activity . . . .*

9 GCA § 70.35(a)(6) (2005) (emphasis added).

[13] As framed by Erwin, the question is whether the italicized language is (1) exclusionary—meaning it requires the People to prove specific intent to observe another "in a stage of undress or sexual activity," or (2) illustrative, meaning it acts only as a non-exclusive example of observing another "in a place where an individual has a reasonable expectation of privacy." *See* Appellant's Br. at 13-16 (Aug. 24, 2018). For the sake of argument, we assume—without deciding—that the People had to prove, beyond a reasonable doubt, that Erwin specifically intended to use "any means or device for observing . . . G.A.M. in a stage of undress or sexual activity." *Id.* at 8;[2] *see also* Tr. at 22 (Jury Trial, Dec. 20, 2017) (instructions read in open court tracking quoted language); RA, tab 40 at 14 (Jury Instrs., Dec. 20, 2017) (written instructions stating same). *See generally People v. San Nicolas*, 2001 Guam 4 ¶ 29 ("An appellate court may affirm the judgment of a lower court on any ground supported by the record . . . ."); *People v. Julian*, 2012 Guam 26 ¶ 30 (same).

[14] With this assumption, the analysis turns on whether a rational trier of fact could have found this element beyond a reasonable doubt:

> In determining whether there exists sufficient evidence to sustain a defendant's conviction, we review the evidence presented at trial 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. "This is a 'highly deferential standard of review.'"

[2] In his reply, Erwin stresses that he attempted only to *see* who was in the stall next to him, not to *record* or *film* G.A.M. Appellant's Reply Br. at 1-3 (Nov. 1, 2018). This argument is unavailing because the statute also makes it an offense to *observe*—not merely record or film. *See* 9 GCA § 70.35(a)(6). Erwin does not argue against the plain language of the statute on this point. *See generally* Reply Br.

Martin, 2018 Guam 7 ¶ 23 (quoting *People v. Song*, 2012 Guam 21 ¶ 26). "In reviewing a motion for judgment of acquittal, it is not for the court '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.* (quoting *Song*, 2012 Guam 21 ¶ 29); *see also People v. Jesus*, 2009 Guam 2 ¶ 61 ("The appellate court cannot merely substitute its judgment for that of the jury." (collecting cases)). In reviewing the sufficiency of the evidence, a 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." *Song*, 2012 Guam 21 ¶ 29 (citations omitted); *see also Jesus*, 2009 Guam 2 ¶ 62 ("[E]vidence sufficient to support a guilty verdict may be entirely circumstantial, and the factfinder is free to choose among reasonable interpretations of the evidence." (quoting *United States v. Boskic*, 545 F.3d 69, 85 (1st Cir. 2008))).

[15] Even if we assumed that the People had to prove that Erwin had the specific intent to observe G.A.M. "in a stage of undress or sexual activity," the record is replete with evidence that a rational trier of fact could have found Erwin had this intent. Erwin testified that he asked whether anyone was inside the female restroom before he entered, circumstantially suggesting that he possibly understood that he was entering a location where there was a reasonable expectation of privacy because individuals might be "in a stage of undress." *See* Tr. at 92 (Jury Trial, Dec. 19, 2017). He also admitted that he saw not just G.A.M.'s ankles and calves but also up to her outer thigh. *See id.* at 103. Erwin conceded that he hid the shirt he had first been wearing, *see id.* at 93-95, 103—again providing circumstantial evidence that he may have had a motive that was not innocent. The victim also testified that she was in a stage of undress because

"just how any normal person would use the bathroom," she "went ahead and pulled down [her] shorts." *Id.* at 51. One of the security guards who questioned Erwin at the scene testified that she did not find Erwin credible when he tried to explain why he was in the female restroom:

> Q Did he appear, did he appear to you to have been sincere when he indicated he wasn't using [his phone] for any kind of a dirty purpose?
>
> A Did I believe him?
>
> Q Yeah.
>
> A No.
>
> Q You didn't?
>
> A No. I'm sorry.
>
> Q How come?
>
> A Because he stated, because he was in the female restroom and the men's restroom, I know it's as clean as the females [sic]. I've been in both sometimes when I had to do a check when I'm the only staff there, or when I'm with someone. So that's why I didn't believe him because housekeeping cleans the room every few hours, so both restrooms are pretty clean.

See id. at 28-29.

[16] Based on this cumulative testimony, a rational trier of fact could conclude that any individuals in the restroom stalls—a place where a person would reasonably expect privacy—could be "in a stage of undress," and that Erwin had the intent to observe those individuals in such "stage of undress." Thus, reviewing the evidence in the light most favorable to the People, we conclude that a rational trier of fact could have found, beyond a reasonable doubt, that Erwin had the specific intent to observe G.A.M. "in a stage of undress." *See Martin*, 2018 Guam 7 ¶ 26. "Because the evidence sufficient to support a guilty verdict may be entirely circumstantial, and the factfinder is free to choose among reasonable interpretations of the evidence, the fact that

this evidence is circumstantial does not undermine its sufficiency." *Id.* (citing *Jesus*, 2009 Guam 2 ¶ 62).

[17] In his opening brief, Erwin suggests that as a matter of due process he should be granted a new trial because "[h]e might not have gone to trial at all, and instead worked out an alternative resolution of the case, *if it had been clear* that the element in the Amended Complaint that he intended to observe the victim in a stage of undress or sexual activity did *not* have to be proven," an issue he claims was compounded by the difference in how the jury was instructed and how the statute was written. *See* Appellant's Br. at 16 (emphases added). To be clear, Erwin does not attack the amended complaint, the jury instructions, or the statute as constitutionally flawed. *See generally* Appellant's Br.; Appellant's Reply Br. (Nov. 1, 2018). Instead, he suggests that had he known that the prosecution did not need to show he had the specific intent to observe another "in a stage of undress," then he might not have proceeded to trial. Appellant's Br. at 16. The problem with this claim is that it is premised on the assumption that we first find the People did *not* need to provide evidence of Erwin's specific intent. Because we assume, without deciding, that the People had to provide such evidence—in effect we adopt, *arguendo*, the very reading advocated by Erwin. Yet even on this more limited reading of the required *mens rea*, there was sufficient evidence for a rational trier of fact to conclude that the People had proven beyond a reasonable doubt that this element was satisfied. This outcome is strongly supported by our sufficiency-of-the-evidence caselaw. *See, e.g.*, *Martin*, 2018 Guam 7 ¶ 26.

//

//

//

V. CONCLUSION

[18] Viewing the evidence in the light most favorable to the People, a rational trier of fact could have found the essential elements of Invasion of Privacy beyond a reasonable doubt. Thus, we **AFFIRM**.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice