



**Filed**

Supreme Court of Guam, Clerk of Court

**IN THE SUPREME COURT OF GUAM**

**PEOPLE OF GUAM,**  
Plaintiff-Appellee,

**v.**

**JOHNNY LUJAN AGUON,**  
Defendant-Appellant.

Supreme Court Case No.: CRA19-009  
Superior Court Case No.: CF0220-18

**OPINION**

**Cite as: 2020 Guam 24**

Appeal from the Superior Court of Guam  
Submitted on the briefs January 2, 2020  
Hagåtña, Guam

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

**CARBULLIDO, C.J.:**

[1] Defendant-Appellant Johnny Lujan Aguon appeals from a judgment of conviction under 9 GCA § 25.15(a)(1) of first degree criminal sexual conduct, claiming insufficient evidence on the essential element of penetration. Aguon also appeals the Superior Court’s denial of his motion for a mistrial. For the reasons below, we affirm both the conviction and denial of the motion.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

[2] Aguon was charged with first degree criminal sexual conduct (“CSC”) by intentionally engaging in sexual penetration of C.R., a minor. He was also charged with second degree CSC of C.R.

[3] The People called seven witnesses at Aguon’s jury trial, including C.R.’s mother and C.R. C.R.’s mother testified that C.R. first told her that Aguon was touching her when C.R. was in 5th grade. C.R. told her mother what Aguon was doing to her again in 8th grade. One morning, C.R.’s mother “saw [C.R.’s] pants down” and asked her “what happened with her pants.” Transcript (“Tr.”) at 66 (Jury Trial, Feb. 14, 2019). C.R. answered, “Oh, because [Aguon] was touching me.” *Id.*

[4] When C.R. was in 8th grade, she went to her school counselor to talk about her “problem.” *Id.* at 100. C.R. testified that her “problem” was that since kindergarten “[Aguon] was touching me since I was little all the way to 5th grade, and all the way to 6th.” *Id.* at 101. C.R. testified that Aguon touched her “boobs” and “vagina.” *Id.* C.R. testified that she and Aguon would pick lemai together, then they would go into the garage and “he [would] start[] asking me if I wanted to – to do it, without me saying anything he just starts taking off his clothes and I was – sometimes

he would take off my clothes.” *Id.* at 103. Incidents of disrobing in the garage occurred “maybe less than 20 or more than 10” times. *Id.*

[5] C.R. described one particular incident in the garage when Aguon “started taking off his clothes and he told me to take off my clothes, and I didn’t take off my clothes. And then he took it off for me, and he told me to lay down on the couch and then he laid down on the couch . . . he was fully naked.” *Id.* at 105. At the time, C.R. was “maybe ten or nine” years old. *Id.* Aguon got on top of C.R., and “he started rubbing – rubbing my breast and touching my vagina, and then he was . . . kissing my lip. . . . And then he started – he was trying to put his penis – penis into me, but then I pushed him away . . . .” *Id.* at 105-06.

[6] When asked “Do you know when you said he tried to put it inside you, so what ended up actually going inside?”, C.R. answered, “Like, somewhere, I don’t think it went inside, it just, the head was just pushing against my vagina,” and that “[i]t was hurting.” *Id.* at 106. C.R. testified there was never any time that Aguon’s penis went all the way inside of her. *Id.* at 108. C.R. also stated Aguon would sometimes just rub her vagina with his penis and not try to penetrate her. *Id.*

[7] On cross-examination, Aguon’s counsel asked, “[T]hese times when he tried to put his penis inside your vagina, he never got his penis into your vagina, as you said you recall, correct?” *Id.* at 124. C.R. answered, “Yes. He never did.” *Id.* C.R. also testified on cross-examination, “[H]e never put it in, it just – puts the head of his penis – he was trying to – he was trying to put it into after trying to – it really never went in.” *Id.* at 125.

[8] At the close of the People’s case-in-chief, Aguon moved for a judgment of acquittal based on insufficient evidence on the penetration element. The trial court denied the motion. On the second day of the trial, Aguon testified on his own behalf. During direct examination, he was asked, “And so is there anything about picking breadfruit that would, in your mind, want to lead

to a sexual experience?” Tr. at 40 (Jury Trial, Feb. 15, 2019). Aguon testified, “No. I am not like that. I am not a pedophile. I don’t do things like that. You know, I protect kids. I don’t violate them.” *Id.*

[9] On cross-examination, the prosecutor and Aguon had the following exchange:

Q: But isn’t it true that when Officer Castro came to talk to you about this, you said that you’ve actually been accused of similar allegations, prior, by somebody else, isn’t that correct?

A: That’s a prior.

Q: Right. And so actually you’ve been previously accused of molesting [another girl] in 2007?

A: And that didn’t happen.

Q: But you’ve been accused of molesting [another] –

A: Yes.

Q: -- [girl] in 2007?

A: Yes.

*Id.* at 69. Aguon’s counsel objected, and the trial court held a side bar. The court noted that Aguon raised the issue of his own character through a gratuitous response on direct. The court called a recess to research the admissibility of the prior accusation evidence. The court went back on the record to rule on the objection, citing *People v. Camaddu*, 2015 Guam 2. The court determined the evidence was admissible under Guam Rule of Evidence 404, but excluded it upon a Rule 403 balancing test. The parties and the court discussed the wording of a curative instruction. After the wording was approved by both parties, Aguon’s counsel moved for a mistrial based on the prejudicial prior-accusation questions. The court denied the motion. The jury was resealed, and the court gave the agreed-upon curative instruction. Neither party nor the trial court mentioned the prior-accusation evidence again. After closing arguments, the jury was again instructed that

“[t]estimony that has been excluded or stricken, or that you have been instructed to disregard” is not evidence that can be used to reach a verdict. Tr. at 122-23 (Jury Trial, Feb. 15, 2019). The jury convicted Aguon on all counts, and judgment was entered against him. Aguon timely appeals.

## II. JURISDICTION

[10] This court has jurisdiction to hear appeals from a final judgment of the Superior Court under 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-217 (2020)), 7 GCA §§ 3107 and 3108(a) (2005), and 8 GCA §§ 130.10 and 130.15(a) (2005).

## III. STANDARD OF REVIEW

[11] “Where a defendant raises 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. George*, 2012 Guam 22 ¶ 47.

[12] “The standard of review for a denial of a motion for mistrial is abuse of discretion.” *People v. Flores*, 2009 Guam 22 ¶ 9.

## IV. ANALYSIS

[13] Aguon raises two issues on appeal: first, whether there is sufficient evidence to sustain a first degree CSC conviction; and second, whether the trial court abused its discretion by denying Aguon’s motion for a mistrial due to alleged prejudice after the prosecutor questioned Aguon on a prior child molestation accusation.

### **A. The Trial Court Did Not Err by Denying Aguon’s Motion for Judgment of Acquittal Because the People Presented Sufficient Evidence to Sustain a First Degree CSC Conviction**

[14] Guam’s criminal code provides: “A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with the victim and . . . the victim is under fourteen (14) years of age.” 9 GCA § 25.15(a)(1) (2005). “Sexual [p]enetration means sexual

intercourse . . . or any other intrusion, however slight, of any part of a person’s body . . . .” 9 GCA § 25.10(a)(9). Penetration is a necessary element of a first degree CSC offense. 9 GCA § 25.15(a)(1). At the close of the People’s case-in-chief, the trial court denied Aguon’s motion for a judgment of acquittal based on insufficient evidence on the penetration element.

[15] When a defendant raises the issue of sufficiency of the evidence by a motion for judgment of acquittal, the court reviews the denial of the motion *de novo*. *George*, 2012 Guam 22 ¶ 47. A reviewing court does not determine guilt; instead, it determines “whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *People v. Song*, 2012 Guam 21 ¶ 26. Evidence is reviewed in “the light most favorable to the People.” *Id.* “In conducting this analysis, the People ‘must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom.’” *Id.* ¶ 28 (quoting *State v. Sisk*, 343 S.W.3d 60, 65 (Tenn. 2011)).

[16] Aguon argues that the People failed to present sufficient evidence to sustain a first degree CSC conviction because the penetration evidence was entirely circumstantial and lacked medical or expert testimony. We disagree.

### **1. Circumstantial evidence is sufficient to prove the element of penetration**

[17] We examined similar issues in *People v. Enriquez*, 2014 Guam 11. *Enriquez* is on-point precedent that establishes that a “breach of any part of the vagina, including the labia majora, is sufficient to constitute penetration.” 2014 Guam 11 ¶ 15.<sup>1</sup> “[P]enetration may be proved by circumstantial evidence and is not dependent on direct testimony from the victim that penetration occurred.” *Id.* ¶ 17 (quoting *Jett v. Commonwealth*, 510 S.E.2d 747, 748 (Va. Ct. App. 1999) (en

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<sup>1</sup> “The female external genitalia, starting with the outermost parts, are: ‘the mons pubis, the labia majora et minora pudendi, the clitoris, vestibule, vestibular bulb and the greater vestibular glands.’” *Enriquez*, 2014 Guam 11 ¶ 15 n.2 (quoting *Jett v. Commonwealth*, 510 S.E.2d 747, 749 (Va. Ct. App. 1999) (en banc)).

banc)). Furthermore, “sexual penetration may be inferred when the victim experiences pain as a result of the sexual touching.” *Id.* ¶ 20. “While evidence of sexual penetration must be present, there are no magic words that need to be stated at trial. The element of penetration may be inferred based on the totality of the evidence.” *Id.* ¶ 19.

[18] C.R. testified about an incident in the garage when she was nine or ten after she and Aguon picked lemai together. According to C.R., Aguon was naked, took off C.R.’s clothes, and told her to lie down on a couch. Aguon got on top of her, rubbed her breast, touched her vagina, and kissed her. C.R. testified, “He tried to put his penis – penis into me, but then I pushed him away.” Tr. at 106 (Jury Trial, Feb. 14, 2019). She further testified, “I don’t think it went inside, it just, the head was just pushing against my vagina. . . . It was hurting.” *Id.*

[19] Based on the totality of the circumstances, a reasonable jury could conclude that when Aguon was naked on top of C.R. and trying to put his penis into her, he breached C.R.’s vagina when the head of his penis was pushing against her vagina. “Sexual [p]enetration means sexual intercourse . . . or any other intrusion, however slight, of any part of a person’s body . . . .” 9 GCA § 25.10(a)(9). Viewing the evidence in the light most favorable to the People and drawing all reasonable inferences in the People’s favor, a rational jury could conclude that the head of Aguon’s penis intruded beyond the outermost parts of C.R.’s vagina. *See Enriquez*, 2014 Guam 11 ¶ 15 (“The breach of any part of the vagina . . . is sufficient to constitute penetration.”). Because “sexual penetration may be inferred when the victim experiences pain as a result of the sexual touching,” *id.* ¶ 20, a rational jury could infer penetration from C.R.’s testimony that she felt pain when the head of Aguon’s penis was pushing against her vagina. Based on the totality of circumstances and viewing the evidence in the light most favorable to the People, a rational jury could find that C.R.’s pain was caused by Aguon penetrating her.

**2. When penetration evidence is circumstantial, medical or expert testimony is not required to sustain a conviction**

[20] Aguon attempts to distinguish this case, where the People offered no medical or expert testimony of penetration, from *Enriquez* where Dr. Ellen Bez testified. *See* 2014 Guam 11 ¶¶ 8-9. In *Enriquez*, Dr. Bez testified about sexual contact and pain. *See id.* Aguon argues that when penetration evidence is entirely circumstantial, medical or expert testimony is necessary to establish penetration. However, in *Enriquez*, we determined that a jury can reasonably infer penetration when a victim experiences painful sexual contact. 2014 Guam 11 ¶ 20. The People may offer medical or expert testimony like they did in *Enriquez*, but it is unnecessary to establish penetration. *Enriquez* simply does not require such evidence. Under the highly deferential standard of review and following *Enriquez*'s precedent, a rational jury could conclude that Aguon penetrated C.R. beyond a reasonable doubt because she experienced painful sexual contact. Therefore, the trial court did not err when it denied Aguon's motion for a judgment of acquittal.

**B. The Trial Court Did Not Abuse its Discretion Because There is Evidence on the Record to Rationally Deny Aguon's Motion for a Mistrial**

[21] Aguon argues the trial court abused its discretion by denying Aguon's motion for a mistrial based on alleged incurable prejudice after the prosecutor questioned Aguon on a prior child molestation accusation. We disagree.

[22] "The trial court is in the best position to decide whether a given incident merits a mistrial." *United States v. Nace*, 561 F.2d 763, 768 (9th Cir. 1977). "A mistrial is appropriate only where a cautionary instruction is unlikely to cure the prejudicial impact of the error." *United States v. Gann*, 732 F.2d 714, 725 (9th Cir. 1984). The power to find an abuse of discretion for denial of a motion for a mistrial "ought to be used with the greatest of caution under urgent

circumstances, and for very plain and obvious causes.” *Id.* (quoting *United States v. Escalante*, 637 F.2d 1197, 1202 (9th Cir. 1980)).

[23] The trial court’s denial of a motion for mistrial is reviewed for abuse of discretion. *Flores*, 2009 Guam 22 ¶ 9. Abuse of discretion is discretion “exercised to an end not justified by the evidence.” *People v. Gutierrez*, 2005 Guam 19 ¶ 13 (quoting *People v. Tuncap*, 1998 Guam 13 ¶ 12). “By this standard, we do not substitute our judgment for that of the trial court. ‘Rather, we review the trial court’s decision to determine whether it was “based on an erroneous conclusion of law or whether the record contains no evidence on which the [trial court] could have rationally based the decision.”’” *People v. Patrick*, 2016 Guam 2 ¶ 9 (alteration in original) (quoting *People v. Perez*, 2004 Guam 4 ¶ 7).

[24] Aguon testified on direct examination, “I am not a pedophile. I don’t do things like that. You know, I protect kids. I don’t violate them.” Tr. at 40 (Jury Trial, Feb. 15, 2019). Aguon objects to the following portion of the People’s cross-examination:

Q: But isn’t it true that when Officer Castro came to talk to you about this, you said that you’ve actually been accused of similar allegations, prior, by somebody else, isn’t that correct?

A: That’s a prior.

Q: Right. And so actually you’ve been previously accused of molesting [another girl] in 2007?

A: And that didn’t happen.

Q: But you’ve been accused of molesting [another] –

A: Yes.

Q: -- [girl] in 2007?

A: Yes.

*Id.* at 69.

[25] After researching the admissibility of the evidence, the trial court ruled that Aguon’s gratuitous direct testimony opened the door to the People’s rebuttal propensity evidence because Aguon first offered evidence of his own character. Guided by *People v. Camaddu*, 2015 Guam 2, the trial court determined the objected-to exchange on cross-examination was admissible evidence under Rule 404 of the Guam Rules of Evidence, but the court sustained Aguon’s objection under Rule 403. *See* Guam R. Evid. 404(a)(1) (character evidence admissible when “[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same”). The court determined that the prejudicial effect of the testimony substantially outweighed the insignificant probative value of the evidence and thereafter ordered the jury to disregard the evidence. *See* Guam R. Evid. 403; Tr. at 76 (Jury Trial, Feb. 15, 2019) (“And so the court will order the jury to disregard the information it received with respect to other prior sexual allegations. . . . I will give them that instruction in open court, today . . .”).

[26] The parties then argued over the exact wording of the jury instruction. Eventually, the court asked for the prosecutor’s questions to be played back so the curative jury instruction would match the prosecutor’s exact phrasing. After the parties agreed to the language of the curative instruction, defense counsel moved for a mistrial. The court denied the motion. The court then reconvened the jury and gave the following instruction:

Ladies and gentlemen, I have a quick instruction to give you, and I ask for your careful attention as I give you this instruction, because it will guide you as you go through the evidence, okay.

So, ladies and gentlemen, you have heard testimony of a prior accusation of molestation of another [girl], that’s the testimony you heard just before you left. You are instructed to disregard that information, and to not consider it for any purpose or allow it to enter into your individual decision-making or collective deliberation.

I remind you that when you were sworn in and accepted as jurors, you agreed that you would be able to follow the law as I give it to you and apply it to

the facts in the case. So this is part of that. You're bound by your oaths to follow this instruction, okay.

Tr. at 87 (Feb. 15, 2019).

[27] The trial court made an evidentiary ruling, following precedent, to exclude the prior accusation evidence. The court also determined a curative instruction to the jury could cure any prejudice to Aguon. Because granting a mistrial is an extraordinary measure reserved for “plain and obvious causes,” *Gann*, 732 F.2d at 725, based on the evidence on the record, these decisions are not irrational or unjustified.

[28] Here, the trial court immediately issued the curative instruction to the jury. *See People v. Cruz*, 2016 Guam 15 ¶ 33 (finding trial court erred, in part, by delaying issuance of curative instruction to jury). Aguon argues that the curative instruction was “perfunctory.” Appellant’s Reply Br. at 6 (Jan. 2, 2020). The trial court, however, took care to craft the curative instruction with the input of the parties. The court even played back the trial recording to mirror the language of the instruction to the prosecutor’s exact words. Both counsels were consulted and actively participated in crafting the instruction.

[29] Moreover, an appropriate curative instruction to the jury can obviate the effect of improper prosecutorial comments. *See, e.g., People v. Evaristo*, 1999 Guam 22 ¶ 17. In *United States v. Allen*, 425 F.3d 1231 (9th Cir. 2005), the Ninth Circuit held the district court did not abuse its discretion by denying the defendant’s motion for a mistrial based on a witness’s “isolated reference to [the defendant’s] prior incarceration.” *Id.* at 1236. They further determined that “any resulting prejudice dissipated when the district court immediately gave a curative instruction to the jury.” *Id.*; *see also United States v. Parks*, 285 F.3d 1133, 1141 (9th Cir. 2002) (finding no abuse of discretion in denying motion for mistrial because jury was admonished to disregard prejudicial statement).

[30] After closing arguments, the jury was further instructed that “[t]estimony that has been excluded or stricken, or that you have been instructed to disregard” is not evidence that can be used to reach a verdict. Tr. at 122-23 (Jury Trial, Feb. 15, 2019). As the jury is presumed to follow the jury instructions, see *Guam Top Builders, Inc. v. Tanota Partners*, 2012 Guam 12 ¶ 51 (quoting *Weeks v. Angelone*, 528 U.S. 225, 234 (2000)), the construction and immediate issuance of the curative instruction do not indicate a manifest need to correct for a plain and obvious cause. The trial court could rationally determine that the curative instruction cured any prejudice from the excluded evidence.

[31] Aguon seemingly argues that propensity evidence of child molestation is incurably prejudicial and warrants a mistrial. Appellant’s Br. at 7-8 (Nov. 4, 2018); Reply Br. at 4-6. We see no reason, however, to find error in the trial court’s decision because the Guam Rules of Evidence and Federal Rules of Evidence allow certain kinds of propensity evidence in criminal trials where the defendant is accused of criminal sexual conduct. See Guam R. Evid. 413; Fed. R. Evid. 413. Even propensity evidence of prior child molestation is admissible if it passes a Rule 403 balancing test. See *Camaddu*, 2015 Guam 2 ¶ 11. Therefore, propensity evidence of child molestation does not categorically require granting a mistrial.

[32] The stricken evidence was the only propensity evidence offered during trial. C.R. testified at length and in detail about multiple instances where Aguon sexually contacted her. The record is far from devoid of corroborating evidence. Based on the evidence on the record, the trial court rationally excluded the prior accusation evidence and issued the curative instruction. Aguon offers no evidence or argument that meets the demanding abuse of discretion standard. Therefore, the trial court did not abuse its discretion in denying the motion for a mistrial.

**V. CONCLUSION**

[33] For all these reasons, we **AFFIRM** the first degree CSC conviction and **AFFIRM** the trial court's denial of Aguon's motion for a mistrial.

/s/

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**ROBERT J. TORRES**  
Associate Justice

/s/

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**KATHERINE A. MARAMAN**  
Associate Justice

/s/

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**F. PHILIP CARBULLIDO**  
Chief Justice