# IN THE SUPREME COURT OF GUAM

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

**v.**

**MICHAEL BLAIR EHLERT,**
Defendant-Appellant.

Supreme Court Case No.: CRA17-018
Superior Court Case No.: CF0011-16
(consolidated with CF0081-17)

## OPINION

## Cite as: 2019 Guam 3

Appeal from the Superior Court of Guam
Argued and submitted on May 17, 2018
Hagåtña, Guam

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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 Michael Blair Ehlert appeals his convictions of (1) Third Degree Criminal Sexual Conduct ("CSC") against victim H.R., and (2) Attempted Third Degree CSC against victim F.R. Ehlert was charged with Third Degree CSC through the use of force or coercion. Ehlert alleges three principal errors. First, he argues there was insufficient evidence to support the element of "force or coercion." Second, Ehlert argues that the trial court erred in admitting evidence under Guam Rule of Evidence ("GRE") 413 about past uncharged sexual misconduct and in instructing the jury on this evidence. Third, Ehlert asserts that because he should have been entitled to a judgment of acquittal on the Third Degree CSC charge regarding F.R., the jury should have never been instructed on the included offense of Attempted Third Degree CSC.

**[2]** For the following reasons, we affirm Ehlert's judgment of conviction.

## I. FACTUAL & PROCEDURAL BACKGROUND

**[3]** Ehlert was a professor at the University of Guam. He hosted a party at his house in Ipan, Talofofo, for students in his psychology class. Approximately twenty people attended the party, and the students brought food and alcohol to share.

**[4]** Late in the evening, the remaining party-goers went swimming at the beach, which was within walking distance of Ehlert's home. It was dark. H.R. testified that, while in the ocean, Ehlert approached her from behind while she was sitting or crouching in the water, put his hand inside her bathing suit, and put his finger in her vagina. F.R. testified that, after realizing H.R. was "very drunk," earlier hearing Ehlert say he would "screw one of his students," she

approached H.R. and Ehlert in the water and pulled H.R. away by the arm. Transcript ("Tr.") at 33-35 (Jury Trial, July 19, 2017). F.R. then gave H.R. a piggyback ride toward shore. While she had H.R. on her back, a finger was placed up one of the leg holes on F.R.'s jean shorts. The finger ended up at the edge of F.R.'s vulva—between her anus and actual vaginal opening. The only people near F.R. at this time were H.R., who was on her back, and Ehlert.

**[5]** Soon thereafter, all the party-goers left the beach and went back to the house. After returning to the house, some of the women showered to get the salt off and changed into dry clothes. After leaving Ehlert's house, several party-goers met outside a local mall and discussed what happened. Tr. at 11-12 (Jury Trial, July 14, 2017).

**[6]** F.R. reported the incident to the University of Guam ("University") within three days. The University reported learning of the incident from a different alleged victim—K.P. K.P. also reported that Ehlert had touched her breasts and digitally penetrated her vagina. After the reports, the University investigated the matter. Because of the accusations and investigation, the University modified Ehlert's teaching duties to prohibit him from having any contact with students. He was allowed to continue his research and committee and service activities, but he remained on administrative leave from campus after the incident.

**[7]** Plaintiff-Appellee People of Guam (the "People") filed an indictment in Superior Court Case No. CF0011-16, which charged Ehlert with two counts of Third Degree CSC, and eight misdemeanor charges, related to the allegations made by F.R. and K.P. A second indictment was filed in Superior Court Case No. CF0081-17, which charged Ehlert with one charge of Third Degree CSC for allegations made by H.R. Upon agreement of the parties, the trial court consolidated the cases. The trial court dismissed with prejudice the misdemeanor charges as barred by the statute of limitations, and the matter proceeded to trial.

**[8]** At the close of the People's case, Ehlert moved for a judgment of acquittal, which the trial court denied. The jury found Ehlert not guilty of the first count of the indictment—both the penetration and attempted penetration allegations made by K.P. Ehlert was also acquitted of the second count of the indictment for the penetration of F.R., but was found guilty of the included offense of attempted penetration on this count. The jury further convicted Ehlert on the third count of the indictment for penetration of H.R. The defense renewed its motion for judgment of acquittal, which the trial court denied.

**[9]** The trial court sentenced Ehlert to 24-months incarceration on each conviction to be served consecutively—a total of 48 months—but suspended 30 months of the sentence. The trial court ordered a three-year term of parole subject to conditions, upon Ehlert's completion of his term of incarceration. Ehlert timely appealed.

## II. JURISDICTION

**[10]** This court has jurisdiction over appeals from final judgments of conviction. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-18 (2019)); 7 GCA §§ 3107, 3108(a) (2005); 8 GCA § 130.15(a) (2005).

## III. STANDARD OF REVIEW

**[11]** "[C]laims of insufficient evidence are matters of law that are reviewed *de novo*." *People v. Flores*, 2009 Guam 22 ¶ 10 (citing *People v. Maysho*, 2005 Guam 4 ¶ 6).

**[12]** Under the GRE, the admission or exclusion of evidence is generally reviewed for an abuse of discretion. *See People v. Palisoc*, 2002 Guam 9 ¶ 28. When no objection is made at trial, erroneous jury instructions are reviewed for plain error. *People v. Felder*, 2012 Guam 8 ¶

8. When an objection is made at trial, we review for harmless error. *See People v. Evaristo*, 1999 Guam 22 ¶ 18.[1]

**[13]** We review *de novo* the legal question presented by the trial court's decision on a motion for a judgment of acquittal. *People v. Jesus*, 2009 Guam 2 ¶ 19; *see also Maysho*, 2005 Guam 4 ¶ 6. We review the evidence in the light most favorable to the prosecution. *Jesus*, 2009 Guam 2 ¶ 19. We are highly deferential to the jury's verdict, but we do not defer to the trial court's decision to deny the motion for judgment of acquittal. *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

## IV. ANALYSIS

**[14]** Ehlert's three allegations of error consist of whether there was sufficient evidence of force or coercion, whether the evidence admitted under GRE 413 was proper, and whether the jury was properly instructed on an included attempt offense. Ultimately, we find no merit to any of Ehlert's complaints.

### A. The Record Contains Sufficient Evidence that Ehlert Overcame His Victims By Force or Coercion

**[15]** The Guam Code Annotated defines "force or coercion" to include: "when the actor, through concealment or by the element of surprise, is able to overcome the victim." 9 GCA § 25.10(a)(2)(E) (2005). In *People v. Tenorio*, this court found this "force or coercion" element was not satisfied where any alleged force was nonviolent and "incidental to the act of sexual penetration." 2007 Guam 19 ¶ 48 (quoting *People v. Carlson*, 644 N.W.2d 704, 709 (Mich. 2002)).

[1] Ehlert argues that plain error applies to our review of the jury instruction. However, it appears that his trial counsel raised similar substantive concerns in the Superior Court. *See, e.g.*, Tr. at 11:24-12:15, 20:4-16 (Jury Trial, July 18, 2017). The first step under both standards is that the defendant must establish error. Because we conclude that the instruction was not error, Ehlert's appeal fails under both standards, and we need not determine which applies here.

**[16]** Ehlert argues that the evidence he placed a finger in the back of F.R.'s shorts toward her "butt crack" and touched her between her anus and vagina does not constitute force or coercion under the statute and our prior precedent. Appellant's Br. at 7-8 (Feb. 19, 2018). He similarly contends that H.R.'s testimony that Ehlert put his hand inside her bathing suit and put his finger in her vagina does not constitute sufficient evidence of force or coercion. *Id.* Ehlert relies on *Tenorio* and characterizes his actions as part and parcel of the penetration or attempted penetration. The People counter that sufficient evidence existed to support that Ehlert overcame his victims by the element of surprise when he unexpectedly approached them in the ocean. Appellee's Br. at 5 (Apr. 4, 2018).

**[17]** In *Tenorio*, we concluded there was insufficient evidence of force or coercion where the defendant pulled down the pants of a sleeping victim and performed oral sex. 2007 Guam 19 ¶¶ 1-2. We found these actions non-violent and incidental to the act of penetration and held that, standing alone, they were insufficient to overcome the victim. *Id.* ¶ 48. The wrongful acts identified by the People in *Tenorio* included the pulling down of the victim's pants and the fellatio itself. *Id.* ¶ 43. The People also alleged that Tenorio abused a position of trust he held over the victim. *Id.* ¶ 13. The incident occurred at a youth sleepover retreat where Tenorio was an adult advisor and the victim was President of the group. *Id.* ¶¶ 2, 13. The incident ended when the victim turned over on his side. *Id.* ¶ 2. Notably, the People never argued that Tenorio's victim was overcome through the element of surprise, but instead they essentially advanced common law theories of rape. *See id.* ¶¶ 12-37, 43-50.

**[18]** At common law, overcoming a victim through the element of surprise was not sufficient to constitute rape because "force" was an essential element. *See, e.g.*, *McNair v. State*, 53 Ala. 453, 456 (1875). The law on this point diverged in two directions. In some jurisdictions, the

victim's resistance became the necessary component in assessing a rape claim. *See, e.g.,* Tex. Penal Code Ann. Art. 1183-1184 (Vernon's 1948) (requiring force sufficient to "overcome resistance"). Other jurisdictions, however, came to recognize surprise as sufficient force. *See, e.g., State v. Atkins*, 292 S.W. 422, 426 (Mo. 1926) ("If it is rape under our statutes for a man to have illicit sexual connection with a woman while she is asleep, and incapable of consenting, when no more force is used than is necessary to effect penetration with the consent of the woman, we are unable to see why it is not also rape for a man to have improper sexual connection with a woman by accomplishing penetration through surprise, when she is awake, but utterly unaware of his intention in that regard."). In the modern legal era, the requirement of resistance has been removed from most jurisdictions. *See In re M.T.S.*, 609 A.2d 1266, 1270-74 (N.J. 1992) (detailing history and removal of resistance as element of rape); *see also People v. Barnes*, 721 P.2d 110, 121 (Cal. 1986) (recognizing legislative removal of "resistance" as element of rape).

**[19]** While some jurisdictions, like Guam, still require an element of force or coercion in certain instances, the statutory definitions and jurisprudence of other jurisdictions have been expanded and no longer require a perpetrator to overcome a victim's physical resistance. *See, e.g., State v. McKnight*, 774 P.2d 532, 534 (Wash. Ct. App. 1989) ("We decline to hold that forcible compulsion requires, in all cases, a showing that the victim offered physical resistance."); *State v. Jones*, -- P.3d --, 2013 WL 1339107 (Idaho 2013) ("[W]e hold the statute does not require that rape victims resist to their utmost physical ability and that verbal resistance is sufficient resistance to substantiate a charge of forcible rape."). The common law no longer requires a victim's physical resistance as a mandatory element.

**[20]** Relevant to Ehlert's claim, 9 GCA § 25.10(a)(2)(E) defines "force or coercion" to include: "when the actor, through concealment or by the element of surprise, is able to overcome the victim." Surprise is not defined in Guam's statutes, but other courts have addressed the issue. In *Alman v. Reed*, the Sixth Circuit analyzed Michigan's fourth degree criminal sexual conduct statute. *See generally* 703 F.3d 887 (6th Cir. 2013) (finding surprise based on "objective nature of the defendant's approach"). Cases interpreting Michigan law are persuasive because Guam's CSC statutes were patterned after Michigan's. *People v. Cummins*, 2010 Guam 19 ¶ 21. The Sixth Circuit found that "the statute typically prohibits someone from achieving sexual contact by sneaking up on someone while they are unaware, facing another direction, or sleeping." *Alman*, 703 F.3d at 898. Surprise is not limited to circumstances where the victim is unaware of the perpetrator's presence, and it includes circumstances involving the perpetrator's "surreptitious approach." *Id.*

**[21]** Here, the evidence presented at trial supported surprise through surreptitious approach. Regarding the Third Degree CSC conviction for penetrating H.R., the record reflects that H.R. was intoxicated and Ehlert approached her from behind. Tr. at 34-35 (Jury Trial, July 19, 2017); Tr. at 95 (Jury Trial, July 20, 2017). It was also dark outside, but with enough moonlight to discern faces. Tr. at 91 (Jury Trial, July 20, 2017). H.R. testified that she was shocked and scared. *See id.* at 116. Regarding the Attempted Third Degree CSC conviction for attempting to penetrate F.R., the record reflects that F.R. had H.R. on her back and was walking away from Ehlert. Tr. at 35 (Jury Trial, July 19, 2017). A finger was placed into the "back" of her shorts through one of the leg holes. *Id.* at 35-36. F.R. testified that she screamed and jumped away immediately. Tr. at 39 (Jury Trial, July 19, 2017). Based on this evidence, a reasonable jury

could conclude that Ehlert surreptitiously approached both F.R. and H.R. and this satisfied the element of surprise.

**[22]** While our law, as described in *Tenorio*, requires the force or coercion to rise to the level of an action that is more than incidental to the penetration, 2007 Guam 19 ¶ 48, based on a *de novo* review of the record before us, we find the evidence, in its totality, was sufficient to show that Ehlert's surreptitious approach before touching his victims constituted surprise that was separate from the actual or attempted penetration or touching itself. Based on the evidence, Ehlert can find no relief under *Tenorio*. We conclude there was sufficient evidence to support Ehlert's convictions.

### B. The Superior Court Did Not Err in Admitting Evidence Pursuant to Guam Rule of Evidence 413

**[23]** "In a criminal case in which the defendant is accused of an offense of criminal sexual conduct, evidence of the defendant's commission of another offense or offenses of criminal sexual conduct is admissible, and may be considered for its bearing on any matter to which it is relevant." Guam R. Evid. 413(a). Under GRE 413, like its federal counterpart, evidence of prior sexual misconduct may be admitted to infer the defendant's propensity to commit the charged acts. *Cf. United States v. Erramilli*, 788 F.3d 723, 730 (7th Cir. 2015).

**[24]** Under this rule, two of Elhert's former students—L.R. and R.H.—testified about incidents involving alleged sexual assaults against them by Ehlert. RA, tab 87 (Dec. & Order, June 9, 2017); *see also* Tr. at 28-144 (Jury Trial, July 18, 2017). When providing notice of the GRE 413 evidence before trial, the People included a general statement of the allegations by each person they intended to have testify under the rule.

**[25]** L.R. alleged that Ehlert hugged her and licked the inside of her ear at the end of a "class" get-together at a local bar, which only L.R. and Ehlert actually attended. RA, tab 52 at 2 (People's Notice of GRE 413 Evid., Oct. 19, 2016). L.R. also alleged that she attended a student party at Ehlert's house at the end of the 2011 spring semester, during which Ehlert "made sexual comments" toward her and "touched her butt." *Id.*

**[26]** R.H. was one of Ehlert's students in the spring semester of 2009 and attended an end-of-the-semester student party at Ehlert's house. *Id.* R.H. alleged that Ehlert gave her several drinks of alcohol and guided her into the water at the beach near Ehlert's residence. *Id.* In the water, R.H. rebuffed Ehlert's initial physical advances. *Id.* Ehlert then stood behind R.H., placed his hand around her rib area, and inserted his fingers between her clothing trying to penetrate her vagina. *Id.* While walking near Ehlert's residence, R.H. alleges that Ehlert pushed her to her knees "forcing her to perform oral sex" with sufficient thrusting to make her gag. *Id.* She bit Ehlert's penis, causing him to push her away. *Id.* R.H. also stated that, back at Ehlert's house, he forced her to have sex with him in his bedroom by pinning her down. *Id.* at 2-3.

### 1. The trial court did not abuse its discretion in finding the prior acts of sexual misconduct to be similar to the crime charged

**[27]** Guam's courts evaluate the admissibility of other misconduct evidence under a five-part balancing test. *People v. Chinel*, 2013 Guam 24 ¶¶ 36, 39 (citing *United States v. LeMay*, 260 F.3d 1018, 1027-28 (9th Cir 2001)). Under the test, trial courts must consider: (1) the similarity of the prior acts to the acts charged; (2) the closeness in time of the prior acts to the acts charged; (3) the frequency of the prior acts; (4) the presence or lack of intervening circumstances; and (5) the necessity of the evidence beyond the testimonies already offered. *Id.* ¶ 36.

**[28]** Ehlert concedes that the trial court analyzed the five factors, but argues that the trial judge failed to adequately distinguish between similar and dissimilar acts for purposes of admission. Appellant's Br. at 9-10. Specifically, Ehlert argues that the admission of R.H.'s testimony regarding an incident of forced sex in the bedroom of Ehlert's house is not similar to the incidents of touching in the ocean, as alleged in the indictment. *Id.* at 10.

**[29]** In considering admissibility, the trial court plainly analyzed the similarities between R.H.'s account and the conduct charged in the indictment. RA, tab 58 at 5-6 (Dec. & Order, June 9, 2017). The trial court noted that R.H.'s account occurred at an end-of-the-semester student party and involved Ehlert's touching of her primary genital area. *Id.* at 5. R.H.'s incident also began in the water at the beach behind Ehlert's house. *Id.* The trial court noted that the evidence could be used by the prosecution to show that the touching in the indictment was purposeful and not accidental. *Id.* at 6. Citing *Lemay*, the trial court also found that the GRE 413 evidence could demonstrate that Ehlert's actions were "not an isolated occurrence." *Id.* at 6. This analysis was not cursory, but instead met the "searching inquiry" standard previously adopted by this court. *See People v. Camaddu*, 2015 Guam 2 ¶¶ 19-20. When analyzing the differences, the trial court excluded L.R.'s testimony about her ear being licked because this was not "sexual contact" within the meaning of the statute and occurred away from Ehlert's residence. RA, tab 58 at 4 (Dec. & Order).

**[30]** Therefore, we are persuaded that the alleged misconduct is sufficiently similar to the acts charged, and the trial court did not abuse its discretion in admitting L.R.'s and R.H.'s testimony under GRE 413.

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**2. We will not consider Ehlert's argument, raised for the first time on appeal, that he is entitled to a live-testimony hearing to consider the prejudice of the GRE 413 evidence**

**[31]** Ehlert also argues he is entitled to a live-testimony hearing outside the jury's presence for the trial judge to determine the admissibility of the GRE 413 evidence, because he was not convicted of the prior incidents. Appellant's Br. at 10-11. Ehlert never requested a live-testimony hearing before the trial court. This court does not normally address arguments raised for the first time on appeal. *See People v. Leslie*, 2011 Guam 23 ¶ 28. We reserve our exercise of discretion to review an issue raised for the first time on appeal "for extraordinary circumstances where review is necessary to address a miscarriage of justice or clarify significant issues of law." *Id.* (quoting *Cho v. Fujita Kanko Guam, Inc.*, 2009 Guam 21 ¶ 40). Because Ehlert failed to previously raise the issue of holding a live hearing to consider prejudice, we decline to exercise our discretion and hold he waived the argument.

**3. The jury instruction regarding the GRE 413 evidence was sufficient**

**[32]** In Guam, jury instructions that track the language of the applicable statute are generally sufficient, *see, e.g.*, *People v. Diego*, 2013 Guam 15 ¶¶ 24-28; *People v. Jones*, 2006 Guam 13 ¶¶ 26-33, unless they present some other constitutional infirmity, *see People v. Cox*, 2018 Guam 16 ¶¶ 20, 41; *People v. Aldan*, 2018 Guam 19 ¶ 14. Ehlert argues that the instruction the trial court gave to the jury about the GRE 413 evidence was insufficient to protect Ehlert's right to a fair trial. Appellant's Br. at 11-13. He does not challenge the facial validity of GRE 413, but focuses on the fairness of the substance and form of the corresponding jury instructions. *Id.*

**[33]** Jury Instruction 3L, given when the evidence was presented and at the close of trial, reads:

> You have heard evidence that the Defendant allegedly committed other offenses of criminal sexual conduct not charged here.
>
> Specifically, evidence from [R.H.] and [L.R.].
>
> You may consider it for its bearing on any matter that is relevant. However, the evidence in and of itself is insufficient to prove the Defendant guilty beyond a reasonable doubt for the crimes charged in the Indictment.

RA, tab 126 (Jury Instr. 3L (July 31, 2017)); *see also* Tr. at 56 (Jury Trial, July 18, 2017) (omitting the second sentence). The trial court also provided two other relevant jury instructions at the close of trial. First, the trial court instructed: "The Defendant is on trial only for the crimes charged in the Indictment, not for any other activities." RA, tab 126 (Jury Instr. 3M). Second, the trial court instructed: "The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence." *Id.* (Jury Instr. 1E). Ehlert points to two other courts that have approved different instructions based on the analogous Federal Rule of Evidence 413 and argues that we should adopt similar instructions. S*ee* Appellant's Br. at 12-13 (quoting *Erramilli*, 788 F.3d at 731; *United States v. McHorse*, 179 F.3d 889, 903 (10th Cir. 1999)).

**[34]** In *Erramilli*, the trial court employed a jury instruction that merged the language of FRE 404 and FRE 413. 788 F.3d at 732. While the *Erramilli* court held that the instruction did not amount to an abuse of discretion, we are not persuaded that *Erramilli*'s holding requires us to adopt an instruction that conflates two separate evidentiary rules. We decline to require a trial court to instruct under GRE 404, when the evidence is admitted solely under GRE 413.

**[35]** In *McHorse*, the Tenth Circuit Court of Appeals approved the following jury instruction under FRE 414, regarding evidence of child molestation:

> In a criminal case in which the defendant is accused of . . . an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crimes charged in the indictment. Bear in mind as you consider this evidence at all times, the government has the burden of proving that the defendant committed each of the elements of the offense charged in the indictment. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the indictment.

179 F.3d at 903. This instruction was given to the jury on more than one occasion. *Id.* at 896-97. While it may be a reasonable and advisable practice, like in *McHorse*, for the trial court to give the complete limiting instruction on more than one occasion—particularly when the evidence is being introduced and at the close of trial—we observe that the jury in Ehlert's trial was given substantively the same instructions as the jury in *McHorse*. *See* RA, tab 126 (Jury Instrs. 3L, 3M, 1E). And the trial court provided the substance of Instruction 3L when L.R. and R.H. testified. *See* Tr. at 56 (Jury Trial, July 18, 2017). Thus, we find that neither *Erramilli* nor *McHorse* supports Ehlert's claim of error.

**[36]** We find the jury instructions on the GRE 413 evidence to be sufficient, and they do not constitute error.

**C. The Trial Court Properly Instructed the Jury on the Included "Attempt" Offenses**

**[37]** Ehlert's final claim of error involves a nuanced question of when it is proper to instruct a jury on offenses included within those charged in the indictment. Ehlert alleges that he was entitled to a judgment of acquittal on the charge of committing—as opposed to attempting—Third Degree CSC against F.R. because there was insufficient evidence of penetration. Appellant's Br. at 14. He argues that if the judgment of acquittal was properly granted, there would have been no possibility of an instruction on the included attempt offense, because an

included charge must coexist with the charge in the indictment. *Id.* at 14-16. He also argues that the attempt charge has the added element of specific intent, which is not included in the Third Degree CSC charge. *Id.* at 16-17.

**1. Ehlert was entitled to a judgment of acquittal on the Third Degree CSC charge against F.R.**

**[38]** As a threshold determination, we find that Ehlert was likely entitled to a judgment of acquittal on the Third Degree CSC charge against F.R. The trial court denied the motion for judgment of acquittal because it determined that a jury could conclude that Ehlert even slightly penetrated F.R. because F.R. testified using the words "edge," "entrance," and "vulva." Tr. at 48 (Jury Trial, July 25, 2017). F.R. testified, however, that Ehlert "got as far as" the "vulva." *Id.* at 37 (Jury Trial, July 19, 2017). F.R. stated this was the area "between your anus and your actual vagina opening." *Id.* The definition of "sexual penetration" requires "any other intrusion, however slight . . . into the genital or anal openings of another person's body." 9 GCA § 25.10(a)(9). F.R. testified that Ehlert's finger only got as far as between her anus and vaginal opening. While the intrusion need not be significant, it must be into an "opening," and there was no testimony he intruded into either F.R.'s genital or anal openings.

**[39]** Nonetheless, there was no prejudice to Ehlert in the denial of the motion for judgment of acquittal on this count of the indictment because the jury actually acquitted Ehlert of this charge. *See* RA, tab 129 (Verdict Form 2, July 31, 2017). However, Ehlert argues that failing to grant a judgment of acquittal prejudiced him in that the jury should have never been instructed on the included offense of Attempted Third Degree CSC.

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**2. The trial court had to instruct the jury on the included offense of attempted Third Degree CSC against F.R. even after Ehlert became entitled to a judgment of acquittal on the charged offense**

**[40]** Ehlert contends that once he was entitled to a judgment of acquittal on the charged offense, it extinguished the possibility of instructing the jury on any offenses included within that charge. We disagree. Title 8 GCA § 105.58 provides:

> (a) The jury . . . may find the defendant guilty of any offense, the commission of which is included in that with which he is charged.
>
> (b) An offense is included under Subsection (a) when:
>
> . . .
>
> (2) It consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; . . .

8 GCA § 105.58(a), (b)(2) (2005). "When there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of an included offense, the court shall charge the jury with respect to the included offense." 8 GCA § 90.27 (2005). Therefore, because Ehlert was charged with Third Degree CSC, the jury could be instructed on the included offense of Attempted Third Degree CSC. Although there was a rational basis for a verdict acquitting Ehlert of Third Degree CSC—*i.e.*, there was not sufficient evidence to support the offense charged—there was a rational basis for a verdict convicting him of the included attempt. The trial court did not err in instructing the jury on the included offense of Attempted Third Degree CSC. *See, e.g.*, *Angoco v. Bitanga*, 2001 Guam 17 ¶ 21 ("[T]rial courts must issue lesser-included offense instructions if there is a rational basis for such as shown by substantial evidence . . . .").

**[41]** Ehlert also argues that the attempt charge requires an additional element beyond what is required in the non-attempt charge, for which Ehlert was indicted. *See* Appellant's Reply Br. at

6 (Apr. 25, 2018). This argument seems to be an attempt to extend our holding from *People v. Tedtaotao*, 2015 Guam 31, where we determined that attempted reckless murder is not a cognizable offense, *id.* ¶ 24. Attempt crimes require specific intent. *See id.* ¶¶ 23-24; *see also* 9 GCA § 13.10 (2005). Because of this requirement, we held that a person cannot act both intentionally and recklessly at the same time. *See Tedtaotao*, 2015 Guam 31 ¶ 24. These are mutually exclusive mental states.

**[42]** However, *Tedtaotao* is of no assistance to Ehlert. Guam's statutes criminalizing CSC by "sexual penetration" do not contain a specific mental state. *See* 9 GCA §§ 25.10(a)(9), 25.15(a), 25.25(a) (2005). However, when "a crime does not expressly prescribe a culpable mental state, a culpable mental state is nonetheless required and is established only if a person acts intentionally, knowingly or recklessly." 9 GCA § 4.40 (2005). Under 9 GCA § 4.40, the People had to prove that Ehlert's Third Degree CSC charge related to sexual conduct toward F.R. was committed with one of those three mental states. In the indictment, the People charged that the Third Degree CSC against F.R. was committed "intentionally." RA, tab 2, CF0011-16 (Indictment at 2, Jan. 11, 2016); RA, tab 76 (Am. Indictment at 2, Apr. 7, 2017). Therefore, as charged, the People had to show that Ehlert acted "intentionally" regarding F.R.—which is a mental state consistent with the specific intent required to prove Ehlert's attempt. Stated otherwise, the attempt charge did not contain an additional or different *mens rea* element—as charged, it contained the same *mens rea* element. The law, therefore, required the trial court to instruct on the included offense of attempt. *See* 8 GCA § 90.27 (2005); *see also Angoco*, 2001 Guam 17 ¶ 21.

**[43]** The trial court properly instructed the jury on Attempted Third Degree Criminal Sexual Conduct. We find no error on this point.

## V. CONCLUSION

**[44]** For the above reasons, we **AFFIRM** the judgment of conviction.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice