

**COMMONWEALTH OF THE
NORTHERN MARIANA
ISLANDS**

vs.

Jose Taisacan WABOL

**Criminal Case No. 81-0021
Appellate No. 82-90i0
District Court NMI
Appellate Division**

Decided October 18, 1983

**Affirmed by unpublished
memorandum
April 5, 1984
(9th Cir.)**

**1. Appeal and Error - Expert
Testimony**

Whether a witness may testify as an expert is a determination which is within the sound discretion of the trial court and will not be overturned unless there is an abuse of discretion.

2. Witnesses - Expert

The trial court did not abuse its discretion by allowing an Assistant Attorney General to testify as an expert where the defense called him as an expert witness, elicited during the course of direct and re-direct examination the extent of his knowledge, experience, and expertise in the area of rape and sexual assault cases, and where the defense did not object to his qualifications as an expert witness on the emotional and mental state of rape victims.

3. Witnesses - Expert

The test of admissibility of expert testimony is not whether a jury is capable of drawing its own inferences from the evidence presented; rather, the test is

whether the expert's testimony, if believed, will be of help or assistance to the jury.

4. Witnesses - Expert

The trial judge committed no error by allowing an Assistant Attorney General to testify as an expert witness on the subject of Rape Trauma Syndrome where that testimony was helpful to the jury, the average layman would not have experience dealing with rape victims - especially children - and might question accounts of this nature, and where the case falls into the "unusual case" category because the victim was only 15 years of age at the time of the trial.

**5. Appeal and Error - Criminal
Conviction**

Even if it was error to allow an expert witness' testimony on the subject of Rape Trauma Syndrome, it was not prejudicial error warranting a reversal of defendant's conviction since the court was of the firm belief that even without this testimony the jury would have found defendant guilty beyond a reasonable doubt.

**6. Jury Instructions - Sex
Offense Cases**

The cautionary instruction in sex offense cases that the charge is easily made but difficult to prove, and, therefore, the jury should exercise care in examining the testimony of the complaining witnesses is no longer mandatory.

**7. Jury Instructions - Sex
Offense Cases**

The trial court did not err by failing to give a special cautionary instruction in a sex offense case where the trial court re-affirmed and reinforced the general jury instruction dealing with the credibility of a witness.

8. Appeal & Error - Criminal Conviction - Sufficiency of Evidence

For the defendant to prevail on a challenge to a conviction based on insufficiency of the evidence, it must appear that after viewing the evidence and the inferences to be made therefrom in the light most favorable to the verdict, reasonable minds could not believe him to be guilty beyond a reasonable doubt.

9. Appeal & Error - Criminal Conviction - Sufficiency of Evidence

The testimony of the victim, together with the corroborating evidence, is sufficient to sustain the defendant's conviction where, although the testimony of the victim is conflicting in some respects, it was consistent as to what happened, and actions of the defendant during the attempt are corroborated by the testimony of witnesses who saw the victim immediately before and after the incident, by the testimony of the physician who interviewed, examined, and treated the victim that same afternoon, and by the testimony of a prison mate of the defendant.

10. Appeal & Error - Issues Not Presented Below

Where the defendant challenged for the first time on appeal the competency of the victim to testify, failed to object at the time the victim took the oath, and objected to the government's line of questioning when it attempted to lay a foundation regarding the victim's competency, the trial court did not abuse its discretion by allowing the victim to testify, and the appellate court will refuse to address the issue when it appears for the first time on appeal.

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

FILED
Clerk
District Court
OCT 18 1983

APPELLATE DIVISION

For The Northern Mariana Islands
By [Signature]
(Deputy Clerk)

COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS,)
)
Plaintiff-Appellee,)
)
vs.)
)
JOSE TAISACAN WABOL,)
)
Defendant-Appellant.)
_____)

D.C. CRIMINAL CASE 81-0021
D. C. APPEAL No. 82-9010

O P I N I O N

Before: DUENAS and ENRIGST, District Judges and MOORE*
DUENAS, District Judge:

This is an appeal from a jury verdict entered April 1, 1982, in the Trial Division of the District Court for the Northern Mariana Islands (Criminal Action No. 81-0021) finding Defendant-Appellant Jose Taisacan Wabol guilty of Kidnapping, Attempted Rape, and Assault and Battery. The Defendant was acquitted of the charge of Indecent Liberties with a child. On May 14, 1982, the Defendant-Appellant was sentenced to two ten-year terms with eight years of such sentence suspended and one six-month prison term, said sentences running concurrently.

*Honorable Robert E. Moore, Commonwealth Trial Court Associate Judge, sitting by designation pursuant to 48 U.S.C. § 1694b.

After Alicia got into the Defendant's car, the Defendant continued driving in a southerly direction on 2-W Highway until they reached the monument. The monument is situated at an intersection that connects the 2-W Highway and the road to Dr. Torres Hospital. When the Defendant reached the monument, he executed a right turn. At this time, the car was traveling west toward Microl Corporation. The next brief stop was at the stop sign located in front of Microl Corporation. The San Jose Church is situated on the left-hand side when traveling from the monument to Microl Corporation. The Defendant drove past the three possible routes to the church. At that time, Alicia repeatedly asked the Defendant why he did not drop her off. Initially, the Defendant did not respond. He finally told Alicia to shut her mouth or else he would beat her. Alicia testified that she became afraid of the Defendant at that time.

At the stop sign in front of Microl Corporation, the Defendant executed another right turn and continued driving in a northerly direction on Beach Road. Alicia remembered passing Hafa Dai Hotel, Garapan Supermarket, and the movie theater in Garapan. Alicia also remembered passing the dump site in Puerto Rico and then Charlie Dock.

Shortly after passing Charlie Dock, the Defendant veered the car to the left and entered the Lower Base area. This testimony is contradicted by the fact that Alicia told Detective Kapileo that the incident had taken place at Garapan Beach. During the drive from Microl Corporation to Charlie

1 Dock, Alicia was slapped on the face and was forced to drink
2 beer by the Defendant. When the Defendant parked the car, Alicia
3 remembered that the front portion of the car was facing the
4 ocean and that the ocean was not very far from them.

5 Immediately after Defendant parked the car at a beach
6 in Lower Base, Alicia tried to open the lock of the passenger
7 door. The Defendant prevented her from doing so, slapped her
8 on the face and threatened to beat her if she ran away. Then
9 Defendant got out of the car, opened Alicia's door, grabbed
10 Alicia by the hair, and pulled her out of the car. The Defendant
11 dragged Alicia to a nearby bush and pushed her to the ground.
12 The Defendant attempted to unzip Alicia's Levi's pants. During
13 the first few minutes Alicia struggled and the Defendant finally
14 kicked her on the right side of her body. When Alicia could
15 no longer resist, the Defendant unzipped her pants and pulled
16 her pants and underwear down to her knees. Shortly thereafter,
17 Alicia lost consciousness. When Alicia regained consciousness,
18 she found herself under a tree at Garapan Beach immediately
19 south of the Seaside Tavern. This testimony is contradicted
20 by her own following testimony;

21 1) She testifies that she woke up at Lower Base
22 in Tanapag and walked along Beach Road all the
23 way to a place near Benavente's Store in
24 Garapan.

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- 1 2) She testifies she told Detective Kapileo that
2 she woke up in Lower Base in Tanapag and walked
3 to Garapan, but that she began walking on the
4 beach rather than on the road.
5 3) She testifies that she both walked from Lower
6 Base to Garapan and that she did not walk.
7 4) She testifies that Defendant-Appellant drove
8 her to Garapan after the rape attempt.
9 5) She explains that she does not know the
10 difference between truth and untruth.

11 When Alicia awoke, she felt pain all over her body;
12 particularly in her vaginal area. She also discovered that
13 her underwear was missing. She got up and started walking down
14 the road in Garapan in a southerly direction where she met Elaine
15 P. Kileleman, Arnold F. Rabauliman and Julie Peters. She was
16 then transported to Dr. Torres Hospital in a police vehicle
17 driven by Edward Pua. At the hospital, she was interviewed
18 and examined by a physician.

19 The Prosecution called six witnesses to corroborate
20 the testimony of the victim. The Prosecution then rested its
21 case. The Defense failed to make a motion for a directed verdict
22 of acquittal. The Defense called three witnesses. One such
23 witness was Assistant Attorney General, Rexford C. Kosack, who
24 had been directly involved in the prosecution of this case.

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1 The Prosecutio~~a~~ attempted to preclude him from testifying but
2 was unable to do so. Mr. Kosack was permitted to testify as
3 to what Rape Trauma Syndrome is and its effect on rape victims.

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5 ISSUES PRESENTED

6 1. Did the trial court prejudicially err in allowing
7 Assistant Attorney General Rexford Kosack to testify as an expert
8 witness on the emotional and mental state of rape victims?

9 2. Did the trial court prejudicially err in failing
10 to give a cautionary instruction to the jury that the charges
11 made against the Defendant are easy to make but difficult to
12 prove?

13 3. Is there sufficient evidence to support the
14 Defendant's conviction?

15 I.

16 The first issue raised on appeal by Defendant-Appellant
17 is that the trial court committed prejudicial error by allowing
18 Assistant Attorney General Rexford Kosack to testify as an expert
19 witness on the emotional and mental state of rape victims.

20 Mr. Kosack was called by the defense to testify in
21 order to expose to the jury that the victim had made
22 prior inconsistent statements. Upon cross-examination by
23 Assistant Attorney General Castro, Mr. Kosack said that he felt
24 the victim was suffering from "Rape Trauma Syndrome". Mr. Kosack
25 then began a narrative of what Rape Trauma Syndrome is and its
26 effect on rape victims. The Defense counsel objected that the

1 answer was narrative and the questioning was beyond the scope
2 of direct examination. Such objections were overruled.

3 [1,2] In addressing whether the trial court committed
4 prejudicial error in permitting Kosack to testify as an expert
5 witness we must remember that such determination is within the
6 sound discretion of the trial court and will not be overturned
7 by an Appellate Court unless there is an abuse of discretion.
8 State v. LeBrun, 37 Or. App. 411, 587 P.2d 1044, 1047 (Ct. App.
9 Or., 1978). We do not believe that there has been an abuse of
10 discretion in this case. The Defense called Kosack as a witness
11 and even elicited during the course of direct and redirect
12 examination the extent of Kosack's knowledge, experience and
13 expertise in the area of rape and sexual assault cases. Kosack
14 further testified on cross-examination that he had prosecuted
15 over 100 sexual assault cases and had been a supervisor for a unit
16 of attorneys who handled sexual assault cases. It must further be
17 noted that the defense did not object to the qualification of
18 Kosack as an expert witness on the emotional and mental state
19 of rape victims.

20 We now turn to the Defendant's contention that the
21 trial court committed prejudicial error in allowing Kosack to
22 testify concerning Rape Trauma Syndrome. The Defendant argues
23 that such testimony invaded the province of the jury since the
24 result of his testimony swayed the jury to overlook the victim's
25 inconsistent testimony.

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1 Kosack testified that in his opinion many rape victims
2 suffer a loss of memory because of stress and that Rape Trauma
3 Syndrome effects a woman so she is no longer aware of what is
4 really happening to her and that victims will attempt to fabricate
5 the answers to questions when they no longer remember what
6 occurred.

7 [9] It is well-settled that the test of admissibility
8 of expert testimony "is not whether a jury is capable of drawing
9 its own inferences from the evidence presented. Rather, the
10 test is whether the expert's testimony, if believed, will be
11 of help or assistance to the jury." State v. Middleton, 58
12 Or. App. 447, 648 P.2d 1296, 1300 (Ct. App., 1982), aff'd on
13 review at 657 P.2d 1215 (Or., 1983), quoting State v. Stringer,
14 292 Or. 388, 391, 639 P.2d 1264 (Or., 1982).

15 In State v. Middleton, supra, the Defendant was
16 convicted of first degree rape of his fourteen-year-old daughter.
17 The court held admissible the expert testimony of a county
18 juvenile counselor and a Children's Services Division social
19 worker, both of whom compared the behavior of the victim with
20 that of other sexually-abused children. The court noted that
21 although the challenged testimony bore some relationship to
22 the victim's credibility it was nevertheless admissible since
23 it could be helpful to the trier of fact. The court analogized
24 the expert's testimony to that of a "doctor's testimony in a
25 personal injury case that a party's physical behavior was
26 consistent with a claimed soft tissue injury, although such

1 an injury was not objectively verifiable." Middleton, supra at
2 1300.

3 In the case at bar, we are convinced that Kosack's
4 testimony was helpful to the jury since the average layman would
5 not have experience dealing with rape victims, especially
6 children, and may question accounts of this nature.

7 The Defendant, in support of his contention, cites
8 the case of State v. Saldana, 324 N.W. 2d 227 (Minn., 1982)
9 in which the court reversed the conviction for rape where the
10 issue was consent, because of improperly admitted testimony
11 concerning "rape trauma syndrome". In Saldana, Id., the expert
12 witness, a counselor for sexual assault victims, described "rape
13 trauma syndrome", testified whether the witness fit the descrip-
14 tion of the typical victim, and gave an opinion that the victim
15 had been raped. The court in Saldana, Id., at 231, however,
16 noted that this type of testimony could be admitted in "unusual
17 cases" such as where there has been a sexual assault on a child.
18 This court is of the opinion that the case before it fits into
19 the "unusual case" category since the victim was only 15 years
20 of age at the time of the trial.

21 [4] Based on the foregoing, it is our opinion that the
22 trial judge committed no error in allowing Kosack to testify
23 as an expert witness on the subject of Rape Trauma Syndrome.

24 [5] Even if it was error to admit such testimony, we do
25 not feel that it was prejudicial error warranting a reversal
26 of the Defendant's conviction since we are of the firm belief

1 that even without Kosack's testimony the jury would have found
2 the Defendant guilty beyond a reasonable doubt.

3 II.

4 [6] The next issue raised by Defendant-Appellant on appeal
5 is that the trial court committed reversible error by failing
6 to give the jury a cautionary instruction. The
7 Defendant-Appellant argues that the jury should have been
8 instructed that the charge is easily made but difficult to prove
9 and, therefore, the jury should exercise care in examining the
10 testimony of the complaining witness.

11 Both the Defendant-Appellant and the Government
12 recognize that this instruction is no longer mandatory. People
13 v. Rincon-Pineda, 14 Cal. 3d. 864, 123 Cal. Rptr. 119, 538 P.2d.
14 247, 262 (Cal., 1975) (In Bank). In People v. Rincon-Pineda,
15 Id., the pre-1975 requirement that the cautionary instruction
16 had to be given sua sponte in sex offense cases in California
17 was overturned. The court noted that the 300-year-old legal
18 concept had worn out its usefulness and was no longer mandatory.

19 [7] The Defendant-Appellant argues, however, that the
20 cautionary instruction should have been given in this case since
21 [he alleges] the victim's testimony was totally inconsistent
22 and at times incoherent and there was no corroboration of the
23 victim's testimony. We do not agree. The trial court did not
24 err in failing to give the cautionary instruction. It was suffi-
25 cient to reaffirm and reinforce the general jury instruction
26 dealing with the credibility of a witness, which it did.

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III.

The Defendant-Appellant's final contention on appeal is that the evidence is insufficient to sustain the Defendant's conviction due to the victim's^{1/} inconsistent testimony and the lack of corroborating evidence.

The Defendant-Appellant points out the following variations of the victim's testimony:

First, the victim testified that Defendant-Appellant drove her to Lower Base, Tanapag, and made the attempt to rape her near the beach with the exact location never specifically identified.

Then, the victim admits telling the police that the Defendant drove her to an area near Benavente's Store in Garapan and made the attempt there.

The Defendant-Appellant then lists the different locations the victim stated she woke up after being "knocked unconscious" during the attempted rape:

- 1) She woke up in Garapan under a tree near Seaside Tavern.
- 2) She woke up at Lower Base in Tanapag and walked along Beach Road all the way to a place near Benavente's Store in Garapan.
- 3) She woke up in Lower Base in Tanapag and began to walk on the beach to Garapan (not on the road).

- 1 4) She testifies that she both walked from Lower
2 Base to Garapan and that she did not walk.
3 5) She testifies that the Defendant drove her
4 to Garapan after the rape attempt.

5 [8] The question now becomes whether the victim's
6 inconsistent testimony can be considered insufficient to uphold
7 the Defendant's conviction. The following test governs the
8 challenge of sufficiency of evidence on appeal:

9 "For the Appellant to prevail on a challenge
10 of insufficiency of the evidence, it must
11 appear that after viewing the evidence and the
12 inferences to be made from that evidence in
13 the light most favorable to the verdict,
14 reasonable minds could not believe him to be
15 guilty beyond a reasonable doubt."
16 State v. Middelstadt, 579 P.2d 908, 910
17 (Utah, 1978).

18 [9] The Defendant-Appellant argues that this court must
19 overturn the Defendant's conviction since the victim's inconsis-
20 tent testimony lacked corroboration and was so improbable that it
21 was completely unbelievable. We do not agree. It is true that the
22 testimony of the witness is conflicting in some respects but it was
23 consistent as to what happened and the actions of the Defendant
24 during the attempt. Furthermore, the victim's testimony is
25 corroborated by the testimony of witnesses who saw the victim
26 immediately before and after the incident, by the testimony of the
27 physician who interviewed, examined and treated the victim at
28 3:00 p.m. that same afternoon, and by the testimony of a prison
29 mate of the Defendant.

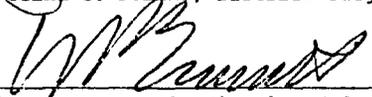
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1 We, therefore, determine that the testimony of the victim,
2 together with the corroborating evidence, is sufficient to sustain
3 the Defendant-Appellant's conviction.

4 [10] The Defendant also challenges the competency of the
5 victim to testify. It must initially be noted that the Defendant-
6 Appellant raises this issue for the first time on appeal. Not
7 only did the Defendant-Appellant fail to object to the competency
8 of the victim at the time she took the oath, but he objected to the
9 Government's line of questioning when it attempted to lay a founda-
10 tion regarding the victim's competency. We are of the opinion that
11 the trial court did not abuse its discretion in allowing the victim
12 to testify and we refuse to address this issue for the first time
13 on appeal. State v. Manlove, 79 N.M. 189, 441 P.2d 229, 232
14 (Ct. App., 1968).

15 On the basis of the foregoing, the judgment of the Trial
16 Division of the District Court for the Northern Mariana Islands
17 is affirmed.

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20 CRISOBAL C. DUENAS, District Judge

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23 WILLIAM B. INRIGHT, District Judge

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26 ROBERT E. MOORE, Designated Judge

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FOOTNOTE

1/ The victim is Carolinian. Her first language is Carolinian; her second is Chamorro; and her third is English. The use of an interpreter was required throughout the duration of the trial.