IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

GREGORIO TRIO DENAMARQUEZ, JR.,
Defendant-Appellant.

Supreme Court Case No. CRA24-019
Superior Court Case No. CF0260-22

OPINION

Cite as: 2025 Guam 18

Appeal from the Superior Court of Guam
Argued and submitted on May 14, 2025
Hagåtña, Guam

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

TORRES, C.J.:

[1] Defendant-Appellant Gregorio Trio Denamarquez, Jr. appeals his convictions on three counts of Second-Degree Criminal Sexual Conduct (As a First Degree Felony) ("CSC II"). Denamarquez argues that the trial court's formulation of the jury instructions resulted in structural error by relieving the prosecution of its burden to prove every element of the offense beyond a reasonable doubt. First, he contends that the instruction on the essential elements of CSC II included an incomplete definition of sexual contact as an element of CSC II, which impermissibly told the jury that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, even if the jury did not find beyond a reasonable doubt that the touching was for the *actual* purpose of sexual arousal or gratification. Second, Denamarquez challenges the instruction defining "reasonable doubt," arguing that defense counsel's request to remove the "two inference"[1] language lowered the People's burden. The "two inference" language instructs the jury that if the evidence supports inferences of both guilt and innocence, it should adopt the inference of innocence.

[2] We requested supplemental briefing on the applicability of our standard for whether a mandatory conclusive presumption violates a defendant's constitutionally protected presumption of innocence. *See People v. Cox*, 2018 Guam 16 ¶ 31. Both parties submitted supplemental briefs arguing that *Cox* does not apply.

[1] The parties refer to this language as the "alternate inference" language, Appellant's Br. at 7–9 (Feb. 27, 2025); Appellee's Br. at 15–17 (Mar. 31, 2025), but our research reveals the more common term for this language included within the instruction on reasonable doubt is "two inference." *See, e.g.*, *United States v. Blankenship*, 846 F.3d 663, 679 (4th Cir. 2017) (collecting cases); *State v. Gant*, 646 A.2d 835, 840 (Conn. 1994); *People v. Johnson*, 783 N.Y.S.2d 5, 7 (App. Div. 2004); *People v. Viloria*, No. 92-00023A, 1993 WL 470409, at *2 (D. Guam App. Div. Oct. 12, 1993), *aff'd*, 56 F.3d 73 (9th Cir. 1995). We prefer the common usage.

[3] We reiterate our prior holdings that "sexual contact" does not require intentional touching for the "actual" purpose of sexual arousal or gratification. Additionally, the trial court did not err when it removed the "two inference" language from the reasonable doubt instruction at defense counsel's request. We affirm the convictions.

I. FACTUAL AND PROCEDURAL BACKGROUND

[4] Denamarquez was indicted on five counts of CSC II for engaging in sexual contact with a minor under fourteen years of age. The indictment alleged that on five different occasions between 2014 and 2021, Denamarquez touched the buttocks or inner thigh of S.D.J., a minor. The victim testified to each such instance of sexual contact at trial.

A. Jury Instructions

1. The jury was instructed "[t]hat intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification"

[5] The People's proposed jury instruction defining the essential elements of CSC II stated that they were required to prove beyond a reasonable doubt that Denamarquez "[d]id intentionally engage in sexual contact with another." Record on Appeal ("RA"), tab 34 at 15–19 (People's Proposed Jury Instrs., Apr. 27, 2023). While discussing the proposed jury instructions, the prosecutor requested adding language from the statutory definition of sexual contact as a separate element of CSC II:

> [T]he Supreme Court basically indicated you've got to start putting that in essential elements. The jury has to know that there has to be a specific *mens rea* to sexually gratify themselves when they touch the other person, right? . . . [W]hat I suggest we could do, Your Honor, is ['did intentionally touch S.D.J., and that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.'] Or what we could do is add the entire -- the entire definition is in Element 5 . . . but I'd rather leave it the way I suggested it because it satisfies the *mens rea* thing . . . .

Transcript ("Tr.") at 101–02 (Jury Trial, Day 7, Mar. 29, 2024); *see also* 9 GCA § 25.10(a)(9) (as amended by P.L. 36-101:2 (June 15, 2022)) ("'Sexual Contact' includes the intentional touching

of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.").[2] Defense counsel agreed that it would be unnecessary to include the entire statutory definition. The trial court added the "reasonably construed" language to the instructions defining the essential elements of CSC II for all five counts. Tr. at 102–04 (Jury Trial, Day 7). Ultimately, the court instructed the jury that to find Denamarquez guilty of CSC II, the People were required to prove five elements:

> The People must prove beyond a reasonable doubt that Defendant, Gregorio Trio Denamarquez, Jr.:
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> 1. On or about the period between October 28, 2014 through October 27, 2015, inclusive;
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> 2. In Guam;
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> 3. Did intentionally;
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> 4. Engage in *sexual contact* with another, to wit: by causing his primary genital area to rub against the buttock of S.D.J., a minor under fourteen (14) years of age; and
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> 5. *That intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.*

RA, tab 79 at Instr. 7A (Jury Instrs., Apr. 2, 2024) (emphases added) (citation modified). For each of the five counts, the elements were identical, except for the time frames and acts. An additional instruction provided the statutory definition of "sexual contact."[3]

[2] Although 9 GCA § 25.10 was amended on June 15, 2022—approximately six weeks after Denamarquez was indicted on May 2, 2022—that amendment did not alter the definition of "sexual contact"; it merely renumbered it from subsection (a)(8) to (a)(9). *See* P.L. 36-101:2 (June 15, 2022). For ease of reference, we cite the current version of the law.

[3] The jury was instructed on the following definition of "sexual contact":

> "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

2. The trial court removed the "two inference" language from the reasonable doubt instruction at Denamarquez's request

[6] An additional change to the jury instructions was the removal of the "two inference" language from the instruction on reasonable doubt. Defense counsel objected to the proposed reasonable doubt instruction because it contained the following "two inference" language: "If the jury views that the evidence in the case is reasonably permitting either of two conclusions, one of innocence, the other of guilty, the jury should of course adopt the conclusion of innocence." Tr. at 87–88 (Jury Trial, Day 7). Defense counsel explained, "I think it actually hurts the Defendant. I think it implies a preponderance of the evidence standard." *Id.* at 87. The People did not object, but the prosecutor added, "I do think it's something that assists the Defendant more than it does anything else, but the standard is repeated repeatedly throughout the instruction. So I don't think the jury is going to be confused as to what the burdens are." *Id.* at 87–88. Ultimately, the trial court instructed the jury on the People's burden to prove guilt beyond a reasonable doubt, omitting any reference to the "two inference" language.[4]

Record on Appeal ("RA"), tab 79 at Instr. 6E (Jury Instrs., Apr. 2, 2024). This instruction matched the definition of "sexual contact" provided by statute. *See* 9 GCA § 25.10(a)(9).

[4] The text of the complete reasonable doubt instruction provided:

> The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate"- with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after a careful and impartial consideration of all the evidence in the case.
>
> It is not required that the People prove guilt beyond all possible doubt. The test is one of reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the mind of the trier of fact in that condition that he cannot say he feels an abiding conviction to a moral certainty, of the truth of the charge."
>
> The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture. A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation.

B. Verdict

[7] The jury found Denamarquez guilty on Counts Three to Five and not guilty on Counts One and Two. The trial court imposed a sentence of seven years of imprisonment. Denamarquez timely appealed.

II. JURISDICTION

[8] This court has jurisdiction over a criminal appeal from a final judgment of conviction. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 119-59 (2025)); 7 GCA §§ 3107, 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[9] We review "whether the proffered instructions accurately stated the relevant law under a *de novo* standard." *People v. Baluyot*, 2016 Guam 20 ¶ 9 (quoting *People v. Gargarita*, 2015 Guam 28 ¶ 12). When "the defendant fails to object to the jury instructions at trial, we will not reverse absent plain error." *Id.* (quoting *People v. Diego*, 2013 Guam 15 ¶ 23); *accord People v. Morales*, 2022 Guam 1 ¶ 11; *Cox*, 2018 Guam 16 ¶ 7. "We review jury instructions as a whole rather than in isolation." *Cox*, 2018 Guam 16 ¶ 16.

[10] "Plain error is highly prejudicial error . . . ." *Gargarita*, 2015 Guam 28 ¶ 11. We "will not reverse unless (1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or

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> 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.
>
> So if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. In other words, if after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. However, if the prosecution has proven its case beyond a reasonable doubt, the jury should of course adopt the conclusion of guilty.

RA, tab 79 at Instr. 1E (Jury Instrs.).

to maintain the integrity of the judicial process." *Id.* (quoting *People v. Felder*, 2012 Guam 8 ¶ 19). "If the charge as a whole is ambiguous, the question is 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Cox*, 2018 Guam 16 ¶ 31 (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). "The party alleging plain error has the burden of proving it." *People v. Aldan*, 2018 Guam 19 ¶ 13.

IV. ANALYSIS

A. The Trial Court Was Not Required to Instruct the Jury that Sexual Contact Requires Actual Purpose

[11] Regarding the jury instructions defining the elements of CSC II and "sexual contact," Denamarquez argues that "the jury was instructed it could find Denamarquez guilty of second degree CSC without finding as to each count beyond a reasonable doubt the essential element that Denamarquez's alleged intentional touching was for the [actual] purpose of sexual arousal or gratification." Appellant's Br. at 6 (Feb. 27, 2025) (brackets in original). Denamarquez asserts that "[a] constitutionally deficient reasonable doubt instruction amounts to structural error and cannot be harmless error," *id.* at 5 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993)), and "[a]utomatic reversal of [his] convictions is required for the structural error resulting from the trial court's constitutionally deficient reasonable doubt instructions," *id.* at 6. He "maintains that the plain error standard of review applied in Cox does not apply here because the error was structural." Appellant's Suppl. Br. at 2 (May 1, 2025). The People argue that because "there was no constitutional violation and defense counsel acquiesced in the giving of the jury instructions, this court should review the now-disputed jury instruction for plain error." Appellee's Br. at 12 (Mar. 31, 2025). Defense counsel did not object to the instruction. Therefore, we review for plain error. *See Baluyot*, 2016 Guam 20 ¶ 9; *Cox*, 2018 Guam 16 ¶ 7; *see also People v. Mendiola*, 2023 Guam

12 ¶ 42 (holding that even structural errors are reviewed under the plain error framework when unpreserved).

[12] Under the first prong of plain error review, Denamarquez has the burden of proving error. *See People v. Soram*, 2024 Guam 10 ¶ 13. "'Sexual Contact' includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." 9 GCA § 25.10(a)(9). We previously explained that "the element of sexual contact is met if the intentional touching '*can reasonably be construed* as being for the purpose of sexual arousal or gratification,' *even if the actor did not act with the specific purpose of sexual arousal or gratification*." *Morales*, 2022 Guam 1 ¶ 75 (first emphasis in original) (quoting 9 GCA § 25.10(a)(8) (now renumbered as subsection (a)(9)). Since Denamarquez's only argument regarding the instructions defining the elements of CSC II and sexual contact was that proving the actual purpose of sexual arousal or gratification is required, he is mistaken.[5] "Sexual contact" does not require proving actual purpose. *Morales*, 2022 Guam 1 ¶ 75. Thus, Denamarquez has not met his burden on the first prong of plain error. *See Baluyot*, 2016 Guam 20 ¶ 16 ("Finding no error, we need not address the remaining factors of a plain error analysis.").

[5] While the concurrence addresses other aspects of this instruction, Denamarquez's sole argument that Jury Instructions 7A–E and 6E were deficient was that they did not require the jury to find he acted with the actual purpose of sexual arousal or gratification. Appellant's Br. at 6. We address only the issues Denamarquez raised on appeal. *See United States v. Sineneng-Smith*, 590 U.S. 371, 375–76 (2020) ("[A]s a general rule, our system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'" (second alteration in original) (citation omitted)); *People v. Quinata*, 2023 Guam 25 ¶ 33 n.5 ("We remind litigators before this court to be clear in their briefs and explain *specifically* why their client is entitled to a particular outcome. This is not only fair for the opposing side, to be able to respond to the arguments at issue, but it [sic] also necessary for this court. We decide the issues that are before us in a given case, with the benefit of careful briefing by both sides to reach an outcome. This process is frustrated when we are left to make assumptions about the arguments presented by a party.").

B. The Trial Court Did Not Err in Removing the "Two Inference" Language from Jury Instruction 1E at Defense Counsel's Request

[13] Denamarquez argues—citing no case law—that by not instructing the jury to adopt inferences of innocence over guilt when the evidence is close, the trial court "suggested a lower degree of doubt than was required for conviction under the reasonable doubt standard." Appellant's Br. at 9. The People argue that even if the exclusion of the "two inference" language was an error, "review of this issue is barred under the 'invited error' doctrine" because "defense counsel affirmatively invited the error by requesting that the '[two] inference' jury instruction . . . be stricken." Appellee's Br. at 15–17. Although trial counsel had objected to including the "two inference" language and requested its removal, appellate counsel now argues that this removal resulted in structural error because "the record is silent regarding whether Denamarquez was aware of and knowingly, intentionally, and voluntarily waived his due process rights to have the language removed from the jury instructions." Appellant's Reply Br. at 14 (Apr. 14, 2025).

[14] The Ninth Circuit has held that "[w]hen the defendant himself proposes the jury instruction he later attacks on appeal, review is denied under the 'invited error' doctrine." *United States v. Staufer*, 38 F.3d 1103, 1109 (9th Cir. 1994) (quoting *United States v. Guthrie*, 931 F.2d 564, 567 (9th Cir. 1991)). *Staufer* and *Guthrie* were decided before the Ninth Circuit's reformulation of the invited error doctrine in *Perez*, where the court explained, "If the defendant has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable." *United States v. Perez*, 116 F.3d 840, 845–46 (9th Cir. 1997). The court reaffirmed in *Perez* "that jury instructions may be waived by a defendant's attorney." *Id.* at 845 n.7 (citing *Staufer*, 38 F.3d at 1109 n.4). However, the court explained, "Not all rights are waivable. 'Whether a right is waivable; whether the defendant must participate personally in the waiver; whether certain

procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.'" *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). The *Perez* court clarified that it was not suggesting "that a defendant may have jury instructions reviewed for plain error merely by claiming he did not know the instructions were flawed." *Id.* at 845. Instead, the court explained that it was "concerned with . . . evidence in the record that the defendant was aware of, *i.e.*, knew of, the relinquished or abandoned right." *Id.* In *People v. Kusterbeck*, we adopted the Ninth Circuit's formulation of the invited error doctrine. 2024 Guam 3 ¶ 24 ("'If the defendant has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable.' However, where the defendant invited the error but merely forfeited their objection, we will review for plain error." (quoting *Perez*, 116 F.3d at 845–46)).

[15] Denamarquez seems to argue that because the instruction went to the People's burden of proof beyond a reasonable doubt, *see Mendiola*, 2023 Guam 12 ¶ 69, the trial court's removal of the instruction—even at the request of his defense counsel—required his personal participation in a knowing, intentional, and voluntary manner. *See* Reply Br. at 14. Although we are dubious of this argument, we choose to first review whether Denamarquez had any "right" at all to "two inference" language before addressing whether the invited error doctrine applies. After all, for the invited error doctrine to apply, there must be an error. *Kusterbeck*, 2024 Guam 3 ¶ 24 n.7 ("'Invited error': Arises when a party seeks appellate correction for an error attributable to them.").

[16] Denamarquez is incorrect that the absence of the "two inference" language suggests a burden less than reasonable doubt. *See* Appellant's Br. at 9. Cursory research reveals that courts have found the opposite: inclusion of the instruction suggests a lower standard of proof. *See, e.g.*, *United States v. Khan*, 821 F.2d 90, 93 (2d Cir. 1987) ("The 'two-inference' language . . . by implication suggests that a preponderance of the evidence standard is relevant, when it is not.").

Both state and federal courts have found the "two inference" language problematic and have condemned it for decades. *See, e.g.*, *United States v. Blankenship*, 846 F.3d 663, 679 (4th Cir. 2017) (collecting cases); *State v. Gant*, 646 A.2d 835, 840 (Conn. 1994); *People v. Johnson*, 783 N.Y.S.2d 5, 7 (App. Div. 2004). In fact, most cases dealing with "two inference" language focus on whether *giving* such an instruction to the jury was *prejudicial*. *See Gant*, 646 A.2d at 839 n.3 (collecting cases). The consensus is that the "two inference" language is largely irrelevant: if the jury is otherwise properly instructed on reasonable doubt, it is harmless to either give the instruction or refuse to give it. *See, e.g.*, *Khan*, 821 F.2d at 92; *Blankenship*, 846 F.3d at 679 ("Although we disapprove of the two-inference instruction, the district court's use of that instruction here does not amount to reversible error because, when viewed as a whole, the court's instructions correctly stated the government's burden."); *United States v. Blackwell*, 459 F.3d 739, 766 (6th Cir. 2006) ("[T]he district court's failure to give Defendant's proposed 'two inference' jury instruction was not improper."); *People v. Cruz*, 568 N.Y.S.2d 763, 764 (App. Div. 1991) ("While such instructions have been criticized as potentially confusing to the jury, reversal is not warranted where, as here, the charge as a whole conveyed the appropriate burden of proof." (citing *Khan*, 821 F.2d 90)); *Gant*, 646 A.2d at 840 ("[T]he charge in its entirety properly and adequately informed the jury as to these fundamental concepts without the need for the defendant's requested 'two inference' instruction."); *People v. Viloria*, No. 92-00023A, 1993 WL 470409, at *2 (D. Guam App. Div. Oct. 12, 1993) ("[T]he trial court is not obligated to give the two-inference instruction, so long as it provides an adequate charge on reasonable doubt." (citation omitted)), *aff'd*, 56 F.3d 73 (9th Cir. 1995); *cf. Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("The Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury." (citation modified)).

[17] The Second Circuit disallows the "two inference" language: "the 'two-inference' language should not be used because, standing alone, such language may mislead a jury into thinking that the government's burden is somehow less than proof beyond a reasonable doubt." *Khan*, 821 F.2d at 93. The Second Circuit explains that "[i]n a charge that properly instructs the jury on reasonable doubt, the 'two-inference' language 'adds nothing.'" *Id.* The Third and Tenth Circuits have taken a similar stance. *See United States v. Jacobs*, 44 F.3d 1219, 1226 (3d Cir. 1995) ("[T]he 'two-inference' language attacked by the defendant has been criticized by the Second Circuit, and we think that this criticism should be heeded as well when it is specifically brought to the attention of trial judges in future cases." (footnote omitted)); *United States v. Dowlin*, 408 F.3d 647, 666 (10th Cir. 2005) ("We agree with the Second and Third Circuits that, standing alone, the language is imprecise and should not be used.").

[18] The New York Supreme Court, Appellate Division, has also "repeatedly expressed its disapproval of the 'two-inference'" language. *See Johnson*, 783 N.Y.S.2d at 7 (collecting cases). The court stated, "Since '[i]n a charge that properly instructs the jury on reasonable doubt, the two-inference language adds nothing,' to the extent that it does not taint the entire charge, we have held that it is not reversible error." *Id.* at 7–8 (alteration in original) (quoting *Khan*, 821 F.2d at 93) (citation omitted); *see also id.* at 8 ("[I]t is . . . better to reduce the risk, however remote, that a juror might draw the negative inference that if the scales are uneven, that is enough to convict." (citation omitted)).

[19] Denamarquez cites no cases to support his position that the removal of the "two inference" language at his request, on its own, rises to the level of structural error warranting automatic reversal. *See generally* Appellant's Br. (using "alternate inference"); *cf. Gant*, 646 A.2d at 839 ("[D]efendant refers us to no case, and our research has revealed none, in which we or any federal court have ruled in support of his position [that "two inference" language is mandatory]."). Nor

does he grapple with the fact that it was his own attorney who requested the language be deleted. *See Mendiola*, 2023 Guam 12 ¶ 42 (reviewing forfeited structural constitutional error under plain error framework). Trial counsel's concerns about the "two inference" language were well-founded. *See* Tr. at 87 (Jury Trial, Day 7) ("I think it actually hurts the Defendant. I think it implies a preponderance of the evidence standard."). Multiple state and federal appellate courts agree that the "two inference" language is unnecessary. *See Blankenship*, 846 F.3d at 679 (collecting cases); *Gant*, 646 A.2d at 839 n.3 (same); *Johnson*, 783 N.Y.S.2d at 7. We do as well. We hold that the trial court is not obligated to include the "two inference" language when instructing the jury on reasonable doubt, so long as the instructions adequately state the People's burden of proof. *See Blankenship*, 846 F.3d at 679; *Gant*, 646 A.2d at 840; *Viloria*, 1993 WL 470409, at *2; *cf. Victor*, 511 U.S. at 5. The trial court's removal of the "two inference" language from Jury Instruction 1E at defense counsel's request was not error.

[20] Because the "two-inference" language "adds nothing," *Khan*, 821 F.2d at 93, and the trial court did not err by removing it at defense counsel's request, there is no error—whether invited, plain, or structural, *see Kusterbeck*, 2024 Guam 3 ¶ 24; Appellee's Br. at 15–17.

V. CONCLUSION

[21] We **AFFIRM** the trial court's judgment because "sexual contact" does not require intentional touching for the "actual" purpose of sexual arousal or gratification. The trial court did not err when it removed the "two inference" language from the reasonable doubt jury instruction at defense counsel's request.

/s/
ROBERT J. TORRES
Chief Justice

/s/
F. PHILIP CARBULLIDO
Associate Justice

MARAMAN, J., concurring:

[22] I agree with the majority to affirm the convictions on the narrow issues presented to this court in the initial briefing. Denamarquez is incorrect that to prove sexual contact the prosecution must show intentional touching for the *actual* purpose of sexual arousal or gratification. I also believe that Denamaquez's arguments about the "two inference" language are backward—had the trial court given the instruction, it would have suggested that the People's burden was less than beyond a reasonable doubt.

[23] I write separately to address a potential error in the jury instructions, for which this court requested supplemental briefing. The trial court provided an incomplete definition of "sexual contact" within the essential elements of CSC II, which made the charge ambiguous. Denamarquez maintains that *Cox* "is not directly applicable" and infused his supplemental briefing with the incorrect arguments the majority rightly rejects. *See* Appellant's Suppl. Br. at 1–6; Appellant's Suppl. Reply Br. at 1–6 (May 9, 2025). As a result, I am unable to say whether the jury applied the instruction in a way that violates the Constitution. I therefore concur.

[24] If instructions similar to the ones in this case are given in future cases to define the essential elements of CSC II, I believe there is a risk of creating an impermissible mandatory presumption. I address this issue and, because our CSC statutes are modeled on Michigan's, I suggest that the trial courts and prosecutors use a modified version of Michigan Model Criminal Jury Instruction 20.2 to convey the essential elements of CSC II to jurors unambiguously.

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I. Analysis

A. The Partial and Conclusory Definition of "Sexual Contact" Was Ambiguous

[25] As charged in this case, CSC II was defined as sexual contact with another person under the age of fourteen. *See* 9 GCA § 25.20(a)(1).[6] The "sexual contact" charged in this case was the intentional touching of the victim's inner thigh or buttock, "*if* that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." 9 GCA § 25.10(a)(9) (emphasis added). Thus, the People had to prove beyond a reasonable doubt that: (1) Denamarquez intentionally touched S.D.J.'s inner thigh or buttock; and (2) when Denamarquez touched S.D.J., the touching could reasonably be construed as being done for sexual arousal or gratification; and (3) S.D.J. was less than fourteen years old at the time of the alleged act. *See* 9 GCA §§ 25.10(a)(9), 25.20(a)(1).

[26] The People's proposed jury instruction defining the essential elements of CSC II stated that they were required to prove beyond a reasonable doubt that Denamarquez "did intentionally engage in sexual contact with another." RA, tab 34 at 15–19 (People's Proposed Jury Instrs.). The jury would have been provided with the definition of sexual contact in a separate instruction. *Id.* at 14. These instructions would have been permissible under our precedent, although perhaps not ideal. *See People v. Castro*, 2025 Guam 9 ¶ 55 ("We reasoned that there was no error because the instructions tracked the language of the relevant statute, and the *mens rea* requirement was sufficiently expressed when the jury was given the definition of sexual contact." (citing *Baluyot*, 2016 Guam 20 ¶¶ 14–16)); *see also Baluyot*, 2016 Guam 20 ¶ 16 ("[T]he instructions when read as a whole were not erroneous.").

[6] Title 9 GCA § 25.20 has undergone several recent amendments; however, subsection (a)(1) has remained unchanged through all relevant time periods in this case. *See* P.L. 36-018:2 (Apr. 9, 2021) (amending subsection (c)); P.L. 36-101:4 (June 15, 2022) (amending subsections (a)(4)–(7)); P.L. 37-098:3 (June 5, 2024) (amending subsection (b)); P.L. 38-016:3 (June 17, 2025) (amending subsection (a)(2)).

[27] A more precise instruction would have explained the concept of "sexual contact" in plain language, without requiring the jury to cross-reference definitions in other instructions. The Michigan Model Criminal Jury Instruction 20.2 takes this approach, which correctly articulates "sexual contact" without introducing the term of art "sexual contact" to the jury or requiring jurors to cross-reference definitions:

> (1) To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (2) First, that the defendant intentionally [touched (*name complainant*)'s / made, permitted, or caused (*name complainant*) to touch (his / her)] [genital area / groin / inner thigh / buttock / (or) breast] or the clothing covering that area.
>
> (3) Second, that when the defendant [touched (*name complainant*) / made, permitted, or caused (*name complainant*) to touch (him / her)] it could reasonably be construed as being done for any of these reasons:
>
> (a) for sexual arousal or gratification.

Mich. Model Crim. Jury Instr. 20.2.[7] Thus, I believe it would also have been appropriate to provide the jury with an instruction similar to the Michigan instruction but incorporating Guam's definition and the relevant elements under 9 GCA § 25.20. In other words, rather than saying the People must prove the defendant "did intentionally engage in sexual contact with another" and asking the jury to cross-reference the definition of sexual contact, that definition could have been incorporated into the essential elements of CSC II. The Michigan instruction does not present the jury with a term of art that is defined elsewhere; instead, it explains the concept of "sexual contact" in plain language as an element of CSC II.

[28] However, the trial court took a different approach. At the People's request, the court added a partial definition of sexual contact as an additional element of CSC II: "That intentional touching

[7] I note that Mich. Comp. Laws § 750.520a(q) includes additional reasons for touching a victim that expand the definition of sexual contact beyond what our Legislature has adopted, such as touching in a sexual manner for revenge.

can reasonably be construed as being for the purpose of sexual arousal or gratification." RA, tab 79 at Instrs. 7A–7E (Jury Instrs.). Thus, the jury was instructed both that (1) the People must prove Denamarquez "[d]id intentionally[] [e]ngage in sexual contact with another" and (2) "[t]hat intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." *Id.* This formulation made the charge ambiguous and may create an impermissible mandatory presumption in future cases.[8]

[29] Adding the partial definition of sexual contact as an additional element of CSC II made the charge ambiguous because it is susceptible to multiple reasonable interpretations. *See People v. Walliby*, 2024 Guam 13 ¶ 10 ("A statute is ambiguous if, after this analysis, 'its terms remain susceptible to two or more reasonable interpretations.'" (quoting *San Agustin v. Superior Court*, 2024 Guam 2 ¶ 16)). At least two potential readings of the instruction are problematic. First, unlike the Michigan instruction, the instruction given in this case lumped together "intentional touching" and "sexual gratification." I am concerned that this language may not have adequately

[8] "Evidentiary presumptions that have 'the effect of relieving the [prosecution] of its burden of persuasion beyond a reasonable doubt of every essential element of a crime' are prohibited as a violation of the Due Process Clause." *Cox*, 2018 Guam 16 ¶ 18 (alteration in original) (quoting *Francis v. Franklin*, 471 U.S. 307, 313 (1985)). "The constitutionality of a presumption in a jury instruction depends on the nature of the presumption, which 'requires careful attention to the words actually spoken to the jury.'" *Id.* ¶ 19 (quoting *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979)). "In determining the nature of a presumption in an individual case, 'the jury instructions will generally be controlling, although their interpretation may require recourse to the statute involved and the cases decided under it.'" *Id.* (quoting *Cnty. Ct. of Ulster Cnty. v. Allen*, 442 U.S. 140, 157 n.16 (1979)). As we explained in *Cox*:

> The United States Supreme Court has delineated three types of criminal presumptions: 1) permissive, 2) mandatory rebuttable, and 3) mandatory conclusive. A permissive presumption allows—but does not require—the jury to infer proof of an elemental fact from proof of a basic fact and does not shift the burden of production or persuasion to the defendant. In contrast, a mandatory rebuttable presumption tells the jury that it must find the presumed element upon proof of the basic fact, unless the defendant provides some evidence to rebut the presumed connection between the two facts; if the defendant produces such evidence, then the ultimate burden of persuasion returns to the prosecution. A mandatory rebuttable presumption is not *per se* unconstitutional, but such a presumption may create constitutional problems if it shifts to the defendant the prosecution's burden of persuasion to prove the facts of each element of the crime beyond a reasonable doubt. A mandatory conclusive presumption goes a step further and removes the presumed element from the case after the prosecution has proven predicate facts that give rise to the presumption, effectively eliminating the jury's fact-finding role.

Id. ¶ 14 (citation modified). Because Denamarquez expressly rejects application of *Cox* to the case before us, I concur in the majority opinion affirming his convictions on the narrow grounds he presents.

conveyed to the jury that the People were required to prove beyond a reasonable doubt both that (1) the defendant intentionally touched the victim's inner thigh or buttock and (2) the intentional touching—once separately proven—could reasonably be construed as being done for the purpose of sexual arousal or gratification. In other words, one reasonable (albeit problematic) interpretation of this instruction is that if the jury finds the touching was intentional, such touching is presumed to be for the purpose of sexual arousal or gratification. This interpretation would relieve the prosecution of its burden of proof beyond a reasonable doubt on at least one element.

[30] Second, I am concerned that this language could have been interpreted by the jury as a conclusory statement. In other words, when read in isolation, the language can be read as a declaration: "[t]hat intentional touching [which is conclusively presumed to have occurred] can reasonably be construed as being for the purpose of sexual arousal or gratification." *See* RA, tab 79 at Instrs. 7A–7E (Jury Instrs.). This interpretation would have left nothing for the jury to decide, except the victim's age.

[31] Reading this language in the context of the instructions does not help resolve this ambiguity. The first four "elements" in the instructions all make sense when read together with the introductory clause: "The People must prove beyond a reasonable doubt that defendant, Gregorio Trio Denamarquez, Jr. . . ." *See id.* (emphasis omitted). Take, for example, jury instruction 7A, including the introductory clause before the first four elements:

> 1. [The People must prove beyond a reasonable doubt that defendant, Gregorio Trio Denamarquez, Jr.:] On or about the period between October 28, 2014, through October 27, 2015, inclusive;
>
> 2. [The People must prove beyond a reasonable doubt that defendant, Gregorio Trio Denamarquez, Jr.:] In Guam;
>
> 3. [The People must prove beyond a reasonable doubt that defendant, Gregorio Trio Denamarquez, Jr.:] Did intentionally;

> 4. [The People must prove beyond a reasonable doubt that defendant, Gregorio Trio Denamarquez, Jr.:] Engage in sexual contact with another, to wit: by causing his primary genital area to rub against the buttock of S.D.J., a minor under fourteen (14) years of age.

RA, tab 79 at Instr. 7A (Jury Instrs.) (emphases omitted). Each of the first four elements conveyed that the People bore the burden of proving beyond a reasonable doubt that Denamarquez did something, with some mental state, somewhere, at some time. Although it is a minor grammatical error to say Denamarquez "engage" rather than "engaged," each of these first four elements is comprehensible when read together with the introductory clause. The same cannot be said for the extra element requested by the People:

> 5. [The People must prove beyond a reasonable doubt that the defendant, Gregorio Trio Denamarquez, Jr.:] That intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

Id. I believe this language is ambiguous on its face. And, as explained in Paragraph 30 above, I am concerned that it could be interpreted as implying that intentional touching was already conclusively established. Thus, another problematic interpretation of this language is that the intentional touching presumptively occurred.

[32] After reviewing the record, I do not believe the prosecutor intended to provide the jury with a conclusive presumption. Thus, admittedly, another reasonable interpretation of the added language is that it was an inartfully worded attempt at clarifying that proof of sexual contact requires intentional touching for the purpose of sexual arousal or gratification. But part of this inartful wording was removing the conditional word "if" from the statutory definition of sexual contact. Although it would not resolve all ambiguity, the extra element would read less like a presumption had it stated: "*if* that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." However, including "if" would not resolve all issues because, when read together with the introductory clause, it still does not make sense to say:

"The People must prove beyond a reasonable doubt that defendant, Gregorio Trio Denamarquez, Jr.: *if* that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification."

[33] Despite the prosecutor stating his intent to follow the decisions of this court, it is reasonable to read the partial definition of sexual contact he requested as unintentionally creating a presumption. The charge was therefore ambiguous.

[34] To avoid ambiguity in future cases, I suggest that trial courts and prosecutors begin using a modified version of Michigan Model Criminal Jury Instruction 20.2 for CSC II, with the understanding that Michigan's definition of sexual contact is broader than Guam's and that Michigan's model instruction may not include the same elements required under our statute. For example, I would have found the following instruction unambiguous for Count Three as charged in this case:

> The defendant is charged with the crime of second-degree criminal sexual conduct, occurring in Guam, on or about the period between August 1, 2017, through May 31, 2018, *at a time separate and distinct from Count Two above, inclusive*. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the defendant intentionally touched S.D.J.'s inner thigh or the clothing covering that area.
>
> Second, that when the defendant touched S.D.J., the touching could reasonably be construed as being done for the purpose of sexual arousal or gratification.
>
> Third, that S.D.J. was less than fourteen years old at the time of the alleged act.

See Mich. Model Crim. Jury Instr. 20.2–.3. Although there is more than one way to adequately instruct a jury on the essential elements of CSC II, trial courts and prosecutors should be cautious about using instructions similar to the ones given in this case.

B. Although Ambiguous, the Jury Instructions May Not Have Been Erroneous

[35] The U.S. Supreme Court has instructed that "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (per curiam). "[I]t is not enough that there is some 'slight *possibility*' that the jury misapplied the instruction, the pertinent question "is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Waddington v. Sarausad*, 555 U.S. 179, 191 (2009) (first quoting *Weeks v. Angelone*, 528 U.S. 225, 236 (2000); and then quoting *Estelle*, 502 U.S. at 72); *Middleton*, 541 U.S. at 437 (quoting *Estelle*, 502 U.S. at 72). "If the charge as a whole is ambiguous, the question is 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.'" *Cox*, 2018 Guam 16 ¶ 31 (citation modified) (quoting *Estelle*, 502 U.S. at 72).[9] Ultimately, I concur because when invited to present supplemental briefing on this issue, Denamarquez rejected application of the *Cox* standard. *See* Appellant's Suppl. Br. at 2–3, 6.

[36] As discussed by the majority, it is true that this court held in *Morales* that "the element of sexual contact is met if the intentional touching 'can *reasonably be construed* as being for the purpose of sexual arousal or gratification,' even if the actor did not act with the specific purpose

[9] The *Estelle* Court clarified this standard in a footnote:

> We acknowledge that language in the later cases of *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), and *Yates v. Evatt*, 500 U.S. 391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), might be read as endorsing a different standard of review for jury instructions. *See Cage*, *supra*, 498 U.S. at 41, 111 S. Ct. at 329 ("In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole"); *Yates*, *supra*, 500 U.S. at 401, 111 S. Ct. at 1892 ("We think a reasonable juror would have understood the [instruction] to mean . . ."). In *Boyde*, however, we made it a point to settle on a single standard of review for jury instructions—the "reasonable likelihood" standard—after considering the many different phrasings that had previously been used by this Court. 494 U.S. at 379–380, 110 S. Ct. at 1197–98 (considering and rejecting standards that required examination of either what a reasonable juror "could" have done or "would" have done). So that we may once again speak with one voice on this issue, we now disapprove the standard of review language in *Cage* and *Yates*, and reaffirm the standard set out in *Boyde*.

Estelle v. McGuire, 502 U.S. 62, 72 n.4 (1991).

of sexual arousal or gratification." 2022 Guam 1 ¶ 75. However, this holding does not eliminate the requirement that the jury must still find beyond a reasonable doubt that the touching meets the definition of sexual contact. *See* 8 GCA § 90.21(a) (2005) ("No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.").

[37] This court has said that "instructions should be considered and reviewed as a whole" and "[a]n instruction that may seem ambiguous 'can be cured when read in conjunction with other instructions.'" *Morales*, 2022 Guam 1 ¶ 31 (quoting *People v. Jones*, 2006 Guam 13 ¶ 28). Although the jury was given the complete statutory definition of sexual contact in a separate instruction, I do not believe that cured the ambiguity caused by including an incomplete definition as an additional element of the five crimes charged in this case.

[38] Although essentially unopposed, I am not entirely convinced by the People's arguments that "the trier of fact could not have been under the erroneous impression that any element of the crime was presumed" because "both the prosecutor and the defense counsel commented that the jury had to find beyond a reasonable doubt that the touching had to be for the purpose of sexual arousal or gratification." *See* Appellee's Suppl. Br. at 4–5 (May 7, 2025). Yet despite being given the chance, Denamarquez declined the opportunity to address "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *See Cox*, 2018 Guam 16 ¶ 31 (quoting *Estelle*, 502 U.S. at 72); Appellant's Suppl. Br. at 2–3 (arguing that "the test is not directly applicable" and that "the instructions did not charge a similar presumption"). In the absence of focused adversarial briefing on the subject, I do not feel it would be appropriate to decide this constitutional issue essentially *sua sponte*, particularly where Denamarquez rejects the application of the *Cox* standard and premises his arguments on the incorrect claims rejected above by the majority. *See Perez v. Monkeypod Enters., LLC*, 2022 Guam 12 ¶ 25 ("[A]s this issue was not significantly developed in the appellate briefing, we decline to

decide the issue effectively *sua sponte*."); *see also* Appellant's Suppl. Br. at 2–3, 6 (explaining *Cox* is not "directly applicable").

II. Conclusion

[39] Adding an incomplete definition of sexual contact to jury instructions defining the elements of CSC II made the charges ambiguous. While the record is concerning, there may not be a "reasonable likelihood" that this jury applied the instruction in a way that violates the Constitution. *See Cox*, 2018 Guam 16 ¶ 31. I therefore concur in the decision affirming the convictions on the narrow issues presented in the initial briefing. I strongly suggest that the trial courts and prosecutors unambiguously present the essential elements of CSC II using Michigan Model Criminal Jury Instruction 20.2—with an understanding that Guam's definition of sexual contact under 9 GCA § 25.10 is narrower than Michigan's. The People run the risk of reversal if instructions similar to the ones given in this case are used again.

/s/
KATHERINE A. MARAMAN
Associate Justice