IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

LESTER ANASTACIO,
Defendant-Appellant.

Supreme Court Case No. CRA10-003
Superior Court Case No. CF0121-09

OPINION

Cite as: 2010 Guam 18

Appeal from the Superior Court of Guam
Argued and submitted December 3, 2010
Hagåtña, Guam

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

CARBULLIDO, J.

[1] Defendant-Appellant Lester Anastacio ("Anastacio") and his co-defendant Tyrone Teliu ("Teliu") were indicted on March 19, 2009, by a Superior Court grand jury on charges of Attempted Murder, Aggravated Assault with Possession and Use of a Deadly Weapon, Conspiracy to Commit Aggravated Assault, Criminal Facilitation, Assault, and Harassment. During a jury trial, the trial court dismissed the charge of Criminal Facilitation, and the remaining charges went to the jury for verdict. The jury found Anastacio guilty of Conspiracy to Commit Aggravated Assault, Assault, and Harassment, and found him not guilty of Attempted Murder and Aggravated Assault with Possession and Use of a Deadly Weapon in the Commission of a Felony. Anastacio was sentenced to a total of eleven years and sixty days in prison – ten years for the Conspiracy charge, one year for the Assault charge, and sixty days for the Harassment charge, all to be served consecutively.

[2] Judgment of Conviction was entered on the docket on March 22, 2010, and Anastacio timely appealed. Anastacio raises four issues on appeal: (1) that there was insufficient evidence to convict on all charges; (2) that the charge of Conspiracy to Commit Aggravated Assault does not allege a crime; (3) that the crimes for which he was convicted merge; and (4) that the trial court erred in failing to sentence him according to first offender guidelines. For the reasons set forth below, we affirm the Assault conviction and vacate the Conspiracy and Harassment convictions.

I. FACTUAL AND PROCEDURAL HISTORY

[3] At some time in the early morning hours of March 7, 2009, Johanes Temengil was found severely beaten at the home in which he was living, which belonged to Melii Diaz, Anastacio's mother. Guam Police Department officers eventually arrested and charged Teliu and Anastacio in connection with the beating.

[4] A Superior Court grand jury later returned an indictment against Teliu and Anastacio. This indictment charged Anastacio as follows:

> Charge One: ATTEMPTED MURDER
>
> Charge Two: AGGRAVATED ASSAULT, Special Allegation Possession and Use of a Deadly Weapon in the Commission of a Felony
>
> Charge Three: CONSPIRACY TO COMMIT AGGRAVATED ASSAULT
>
> Charge Four: CRIMINAL FACILITATION
>
> Charge Five: ASSAULT
>
> Charge Six: HARASSMENT

Appellant's Excerpts of Record ("ER") at 1-3 (Indictment, Mar. 19, 2009).

[5] During the course of the investigation, Anastacio's co-defendant, Teliu, allegedly made a statement to police that included statements about Anastacio. Based on this, Anastacio filed a motion to sever, arguing that Teliu's statement contained references to Anastacio, which, if offered, would affect Anastacio's rights. The People opposed the severance. The parties later came to a compromise, which the trial court accepted, that instead of a severance, the People would redact all reference to Anastacio in Teliu's statement.

[6] The trial court proceeded with a jury trial. Anastacio moved for a judgment of acquittal at the close of the People's case-in-chief, which the court granted as to the charge of Criminal

Facilitation. Anastacio also filed a motion to dismiss the charge of Conspiracy to Commit Aggravated Assault, which the court denied without a written order.

[7] The People thereafter filed an Amended Indictment deleting the Criminal Facilitation charge that the trial court acquitted. At the close of all the evidence, Anastacio renewed his motion for a judgment of acquittal, which the trial court denied. After deliberations, the jury returned its verdict, finding Anastacio not guilty of Attempted Murder and Aggravated Assault with Possession and Use of a Deadly Weapon in the Commission of a Felony. The jury found Anastacio guilty of Conspiracy to Commit Aggravated Assault, Assault, and Harassment. Thereafter, Anastacio again moved the court for an acquittal, which the court denied orally without issuing any written decision.

[8] During the sentencing hearing, Anastacio argued that certain crimes merged. The court heard some of the matters at the first sentencing hearing, but then twice continued the sentencing hearing. At the last hearing, the trial court sentenced Anastacio to a total of eleven years and sixty days in prison. Judgment was filed and entered on the docket. Anastacio filed a timely Notice of Appeal. Anastacio has been incarcerated since the time of his arrest in March 2009.

II. JURISDICTION

[9] This court has jurisdiction over this appeal from a final judgment in a criminal case. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 111-264 (2010), 7 GCA § 3107(b) (2005); *see also* 8 GCA § 130.15(a) (2005) (permitting defendant's appeal from a final judgment of conviction).

III. STANDARD OF REVIEW

[10] Where a defendant has raised the issue of sufficiency of evidence by motion for acquittal in the trial court, the denial of the motion is reviewed *de novo*. *People v. Maysho*, 2005 Guam 4

¶ 6. Whether the charge of Conspiracy to Commit Aggravated Assault lawfully alleges a crime is a question of law reviewed *de novo*. *See People v. Angoco*, 1996 WL 875777 at *3 (D. Guam A.D.); *People v. Chargualaf*, 1989 WL 265040 at *2 (D. Guam A.D.) (questions of law and issues of statutory interpretation are reviewed *de novo*). "Whether one offense merges with another for purposes of punishment is a question of statutory interpretation. . . . reviewed *de novo*." *People v. Diaz*, 2007 Guam 3 ¶ 10 (internal quotation and citations omitted). Whether 9 GCA § 80.30(b) mandates that first offenders shall not be sentenced to more than eight years for a second degree felony is an issue of statutory interpretation subject to *de novo* review. *Mendiola v. Bell*, 2009 Guam 15 ¶ 11.

IV. DISCUSSION

A. The charge of Conspiracy to Commit Aggravated Assault does not allege a crime.

[11] The crime underlying the Conspiracy charge is Aggravated Assault, which, as charged, is established by proof that a person recklessly causes or attempts to cause serious bodily injury to another in circumstances manifesting extreme indifference to the value of human life. 9 GCA § 19.20(a)(1) (2005). Anastacio argues that one cannot conspire – *which is a specific intent offense* – to commit a reckless act.

[12] Guam's conspiracy statute is based on the Model Penal Code. *See* 9 GCA § 13.30, Source, citing M.P.C. § 5.03(1). In the case of *State v. Donohue*, the New Hampshire Supreme Court addressed the conviction of a defendant for reckless second-degree assault and conspiracy to commit second-degree assault. 834 A.2d 253, 254 (N.H. 2003). There, the court discussed at length the legal impossibility of conspiring to do a reckless act, citing to commentary in the Model Penal Code. *Id.* at 256. The *Donohue* court stated:

> A person cannot be guilty of conspiracy to commit a reckless assault because an assault, like a reckless manslaughter, is controlled by the resulting harm. *Cf. Etzweiler,* 125 N.H. at 66-67, 480 A.2d 870; *Model Penal Code* § 5.03 comment 2(c)(i) at 408. In other words, a person cannot agree, in advance, to commit a reckless assault, because, by definition, a reckless assault only arises once a future harm results from reckless behavior. *See Model Penal Code* § 5.03 comment 2(c)(i) at 408. In this case, since there was no agreement to cause the particular harm that resulted, the defendant cannot be guilty of conspiracy to commit reckless assault. *See id.*
>
> Accordingly, we adopt the view of the Model Penal Code that one cannot conspire to commit a crime where the culpability is based upon the result of reckless conduct.

Id. at 257-58. See also the cases of *United States v. Mitlof*, 165 F. Supp. 2d 558, 563-64 (S.D.N.Y. 2001) and *Commonwealth v. Weimer*,[1] 977 A.2d 1103, 1112-14 (Todd, J., dissenting) (Pa. 2009), which outline and summarize the laws of various jurisdictions and the Model Penal

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[1] The *Weimer* dissent in particular offered a very persuasive review of case law from various jurisdictions – such as Colorado, New Hampshire, New Mexico, Connecticut, Arizona, Kansas, and Georgia – as well as commentary from secondary sources supporting the rationale proffered by Anastacio, that one cannot be legally charged with conspiring to commit an unintentional or reckless act. *Weimer*, 977 A.2d at 1113-14. The *Weimer* dissent stated:

> As previously noted, Pennsylvania's conspiracy statute is derived from the Model Penal Code. The American Law Institute, in its Commentary to the Model Penal Code, explained:
>
> > when recklessness or negligence suffices for the actor's culpability with respect to a result element of a substantive crime, as for example, homicide through negligence is made criminal, there could not be a conspiracy to commit that crime. This should be distinguished, however, from a crime defined in terms of conduct that creates a risk of harm, such as reckless driving or driving above a certain speed limit. In this situation the conduct rather than any result it may produce is the element of the crime, and it would suffice for guilt of conspiracy that the actor's purpose was to promote or facilitate such conduct-for example, if he urged the driver of the car to go faster and faster.
>
> Model Penal Code § 5.03 cmt. 2(c)(i) at 408 (Official Draft and Revised Comments 1985).
>
> In his treatise on criminal law, Wayne R. LaFave also opined that, because conspiracy is a specific intent crime, it is not possible to conspire to commit a crime that results from an unintended consequence:
>
> > the fact that conspiracy requires an intent to achieve a certain objective means that individuals who have together committed a certain crime have not necessarily participated in a conspiracy to commit that crime... It follows, therefore, that there is no such thing as a conspiracy to commit a crime which is defined in terms of recklessly or negligently causing a result.
>
> Wayne R. LaFave, *Criminal Law,* § 12.2(c), at 630 (4th ed. 2003).

Weimer, 977 A.2d at 1112-13.

Code with respect to the logical impossibility of conspiring to commit an act for which the mental state is recklessness.

[13] The People argue in their brief that recklessness in "circumstances manifesting extreme indifference to the value of human life," as required by the Aggravated Assault charge, is a higher mental state than mere recklessness and more akin to "knowingly" or "purposely," thus sufficing to serve as the criminal objective of the conspiracy charge. Appellee's Br. at 22-23 (Oct. 18, 2010). However, the case cited by the People as support for their contention that "circumstances manifesting extreme indifference to the value of human life" elevates the mental state to knowingly or purposely, namely *State v. Mott*, 2008 WL 2781429 (Vt. 2008), is an unpublished disposition that expressly notes that it is not to be considered as precedent before any tribunal.

[14] Other authority referenced in the People's brief on the issue of the mental state for Aggravated Assault simply stand for the conclusion that the language "circumstances manifesting extreme indifference to the value of human life" demands a higher degree of proof than mere recklessness, which would allow the defendant if convicted to be subjected to a harsher penalty. 9 GCA § 19.20(a)(1) (2005). In the case of *O'Brien v. State*, for example, wherein the defendant was convicted of aggravated assault and battery, the Wyoming Supreme Court stated:

> The Commentaries addressing aggravated assault and battery state that this special character of recklessness, or extreme recklessness, is designed to more severely punish battery where the defendant's state of mind would have justified a murder conviction had his victim not fortuitously lived. § 211.1(2)(a) cmt. 4, at 189. By adopting the Model Penal Code's term, "recklessly," to justify a lesser punishment for assault and battery, the Wyoming Legislature plainly intended to distinguish between "recklessly" and "recklessly under circumstances manifesting extreme indifference to the value of human life" in the same manner as had the Model Penal Code. We, therefore, determine that O'Brien correctly asserts that

> the jury was not properly instructed when it was provided with the statutory definition of "recklessly" without further proper instruction.

45 P.3d 225, 231-32 (Wyo. 2002). The court went on to hold:

> We hold, therefore, that, in an aggravated assault and battery trial, the jury should be given an instruction defining "reckless under circumstances manifesting extreme indifference to the value of human life" rather than just "reckless" as happened in O'Brien's trial. *That definition will provide the statutory definition of reckless but must include language explaining that if the jury determines the defendant acted recklessly, the jury must then determine whether that recklessness rose to the level of "extreme indifference to the value of human life."*

Id. at 232 (emphasis added).

[15] From this and other cases cited by the People, it cannot be said that the required mental state of recklessness in "circumstances manifesting extreme indifference to the value of human life" means something more than an elevated determination that the jury must make in order to convict. 9 GCA § 19.20(a)(1). It does not transform the offense itself from one that is "controlled by the resulting harm" into an intentional, purposeful, or knowing act for purposes of serving as a legitimate object of a criminal conspiracy. *See Donohue*, 834 A.2d at 257; 9 GCA § 4.30(a)-(c) (Guam's statute on culpable mental states); MODEL PENAL CODE § 2.02(2)(a)-(c) (Kinds of Culpability Defined). None of the cases cited by the People express any convincing rationale in support of the People's assertion on this point. Further, we find the rationale pronounced in cases such as *Donohue* and the dissent in *Weimer* to be more reasonable and more consistent with Guam's criminal statutes. We hold that, as a matter of law, one cannot conspire to commit an offense for which recklessness is the mental state. As such, the offense of Conspiracy to Commit Aggravated Assault as charged by the People in this case does not allege a crime. Accordingly, Anastacio's conviction for Aggravated Assault is reversed.

B. Sufficiency of the Evidence

[16] Because we reverse Anastacio's conviction for Conspiracy to Commit Aggravated Assault for failure to allege a crime, we need not address whether sufficient evidence was presented to sustain his conviction on this charge. Although we have previously held that even if a defendant's conviction can be vacated on other grounds, if the defendant also raises sufficiency of the evidence as one ground, the court must consider this argument because "a finding of insufficiency would result in acquittal rather than a less favorable outcome to the defendant, such as vacating the conviction and exposing him to possible retrial." *People v. Tennessen*, 2009 Guam 3 ¶ 11, citing *Justices of Boston Mun. Ct. v. Lydon*, 466 U.S. 294, 321-22 (1984). Here, however, we have found that the Conspiracy charge is a legal impossibility – a finding that would result in Anastacio's acquittal and would not expose him to retrial on that charge. Thus, our reversal of the Conspiracy conviction does not create the potential for harm to Anastacio that would require the court to evaluate the sufficiency of the evidence for this charge. We turn to whether there was sufficient evidence from which the jury could have convicted Anastacio for the offenses of Assault and Harassment.

[17] Anastacio moved for a judgment of acquittal on all charges, and argued that the People did not present sufficient evidence to convict him. We review *de novo* whether the trial court erred in denying Anastacio's motion for acquittal. *People v. Maysho*, 2005 Guam 4 ¶ 6. In doing so, our inquiry is whether, crediting all of the People's evidence and drawing every reasonable inference from it in favor of the prosecution, a rational trier of fact could find Anastacio guilty beyond a reasonable doubt. *See Maysho*, 2005 Guam 4 ¶ 8; *People v. Guerrero*, 2003 Guam 18 ¶ 13.

[18] This court does not ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. *People v. Yingling*, 2009 Guam 11 ¶ 14, citing *People v. Quintanilla*, 2001 Guam 12 ¶ 37. Rather, our review must "give [] full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *People v. Jesus,* 2009 Guam 2 ¶ 60, citing *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). While circumstantial evidence is sufficient to sustain a conviction, *see Chargualaf*, 1989 WL 265040 at *4, juries must not be allowed to convict on mere suspicion and innuendo. *United States v. Littrell,* 574 F.2d 828, 833 (5th Cir. 1978), citing *United States v. Palacios,* 556 F.2d 1359, 1365 (5th Cir. 1977). We address each conviction in turn.

1. Assault

[19] Our inquiry here is whether any rational juror could find each essential element of Assault beyond a reasonable doubt for the statutory crime of Assault. The People charged that Anastacio recklessly caused bodily injury to Temengil. ER at 1-3 (Indictment); ER at 5-7 (Amended Indictment, Sept. 17, 2009). The statutory basis for this charge is 9 GCA § 19.30(a)(1), which provides that a person is guilty of assault if he "recklessly causes or attempts to cause bodily injury to another." 9GCA § 19.30(a)(1) (2005). There was no direct evidence presented at trial from any of the People's twelve witnesses that Anastacio ever caused bodily injury to Temengil. Because there was no direct evidence to support a finding of these elements, we turn to the circumstantial evidence proffered by the People.

[20] Rolmii Aderkroi testified that she awoke in the early morning hours of March 7, 2009 and had a bad feeling. She stated that she drove to the home of her sister, Melii Diaz, before 6:00 a.m. and found that no cars were there and the door was not locked. She testified that she

entered the house to the smell of blood and eventually found Temengil beaten and bloody. She said that she gave him water to drink and then left the house to call Diaz and an ambulance. She gave a general description of the condition of the house and the appearance of Temengil.

[21] Aderkroi also testified that at about noon that day, her nephew, Anastacio, came to her house and asked her to switch cars with him because his car had no gas. She later determined that Anastacio's car was indeed out of gas. She informed Anastacio that the police were looking for him and that he should turn himself in. She said that he told her he was going to visit his wife and baby and then he would turn himself in.

[22] At about 3:20 that same afternoon, she said she was pulled over by police while driving Anastacio's car. She stated that she believes her boyfriend, who was in the car with her, told the police that Anastacio mentioned something about going to Eagle Field. Transcripts ("Tr.", at 37-61 (Jury Trial, Sept. 10, 2009).

[23] Melii Diaz, Anastacio's mother, testified that she woke up on the morning of March 7, 2009, between 5:00 and 6:00 a.m. to prepare to go to the flea market. She said that at some point in that time span, Anastacio and Teliu came to the house. She said the Teliu went to the kitchen and began to eat fish, and that Anastacio went to his bedroom initially. She said that Anastacio then came out of his room and knocked on the door of the bedroom where Temengil was staying. Tr. at 21 (Jury Trial, Sept. 11, 2009). She said she saw Temengil open the door and then heard Temengil and Anastacio talking as she left the house. *Id.* at 22.

[24] Further, Guam Police Department officer Ephraim Amaguin testified that he located Anastacio sleeping in a truck near Eagle Field, and that he placed him in handcuffs while another officer arrested him. Tr. at 71-75 (Jury Trial, Sept. 14, 2009). He stated that Anastacio's right knuckles were swollen and had some abrasions. *Id.* at 75-76. He also testified that he saw what

he thought was blood on Anastacio's forearm, and that Anastacio resisted being swabbed. *Id.* at 77.

[25] Through questioning by Anastacio's counsel, Officer Amaguin testified that another police officer was able to take swabs of areas of suspected blood on Anastacio. *Id.* at 80. Defense counsel also showed Officer Amaguin photographs taken of Anastacio's hands, depicted while still in handcuffs. Officer Amaguin agreed that the photos showed no apparent swelling of the knuckles as he earlier described, although Officer Amaguin blamed the angle of the photographs as the reason the swelling was not apparent in the photographs. Tr. at 47-50 (Jury Trial, Sept. 17, 2009).

[26] Officer Terlaje testified that he was the police officer who arrested Anastacio. He said that Anastacio denied knowing what happened. According to Officer Terlaje, Anastacio said that he was not "there" but was rather with an unidentified cousin. Tr. at 88, 96 (Jury Trial, Sept. 14, 2009). Defense counsel later elicited testimony from Officer Terlaje that Anastacio was also being questioned for another suspected assault in addition to the assault on Temengil. Officer Terlaje testified that Anastacio was initially cooperative when questioned about another suspected assault. However, when Officer Terlaje told Anastacio that he was also being questioned for assaulting Temengil, Anastacio became upset and uncooperative. *Id.* at 105-106.

[27] Officer Terlaje testified further that the knuckles on both of Anastacio's hands were swollen. Officer Terlaje requested another officer to swab areas of suspected blood on Anastacio's hands. *Id.* at 100. He said that Anastacio spit on his hands and rubbed them together, saying "you're not going to get anything from me." Tr. at 101 (Jury Trial, Sept. 14, 2009). He stated that Anastacio's hands did get swabbed and photographed. *Id.* at 106. There was no testimony that what was swabbed from Anastacio was in fact blood.

[28] Officer Jerome Andrew testified about oral statements allegedly made by Teliu. Although these statements could not be used against Anastacio, Teliu's statement was that he (Teliu) struck and beat Temengil. Tr. at 9-12; 12-13 (Jury Trial, Sept. 15, 2009).

[29] The People argue that Anastacio's presence at the scene of the assault at or around the relevant time, as testified to by Diaz and Temengil, the relatively short time frame when the beating could have taken place (between the time Diaz left the house and the time Aderkroi arrived), and Anastacio's swollen knuckles, together with his subsequent actions – such as trading cars with Aderkroi and trying to resist having his hands swabbed for suspected blood – are all circumstantial evidence from which the jury could find beyond a reasonable doubt that Anastacio assaulted Temengil. *See* Appellee's Br. at 19.

[30] Anastacio points out that the trial court at sentencing declared on the record that Anastacio did not ever actually strike Temengil. The trial court stated: "[Y]ou had influence on him (Teliu) being older and wiser. And so, the court . . . sees that you are more responsible than Mr. Telium (*sic.*). Although, you did not actually hit the victim, you used Mr. Teliu as a weapon to hit the victim. . ." Tr. at 7 (Sentencing, Jan. 26, 2010). The trial court also stated that although Anastacio did not actually hit the victim, he was charged by a jury of his peers that he conspired to hurt a person. *Id.* at 6. Even if the trial court apparently did not believe that Anastacio struck Temengil, based on the applicable standard of review deferential to the jury verdict, the circumstantial evidence presented on the entire record *could* arguably lead a rational trier of fact to deduce that Anastacio recklessly caused bodily injury to Temengil. As such, the trial court's denial of Anastacio's motion for acquittal on the Assault charge was not in error.

2. Harassment

[31] The same evidence proffered to support the charge of Assault is what arguably supports the charge of Harassment. The difference is the culpable mental state required – Assault requires only recklessness, while Harassment requires intent. An essential element of the Harassment charge is that Anastacio subjected Temengil to striking and other offensive touching *with the intent* to harass him. Tr. at 125-126 (Jury Trial, Sept. 21, 2009); ER at 1-3 (Indictment); ER at 5-7 (Amended Indictment). The jury instruction given on intent is that a "person acts intentionally, or with intent, with respect to his conduct, or to a result thereof, when it is his *conscious purpose to engage in the conduct or cause the result.*" Tr. at 116 (Jury Trial, Sept. 21, 2009) (emphasis added).

[32] The People's brief does not specify what evidence supports a finding of intent sufficient to support a conviction for Harassment, and Anastacio's argument on this point goes only to the claimed lack of evidence that Anastacio *struck* Temengil, without addressing proof (or lack thereof) of Anastacio's *intent*. *See* Appellee's Br. at 19; Appellant's Br. at 11.

[33] While there was no direct evidence of intent to harass, intent may be proved by circumstantial evidence based on a defendant's conduct leading up to the crime. In the California case of *People v. Phillips*, for example, a defendant was charged with indecent exposure and annoying or molesting a child, which required a jury to find that he intended that some child observe his conduct of masturbating in a car. 116 Cal. Rptr. 3d 401, 412 (Cal. Ct. App. 2010). There, the court found that circumstantial evidence such as the kind of vehicle in which defendant was parked, where he was parked in relation to the children, and the time of day were sufficient circumstantial evidence that defendant intended that some child observe his conduct. *Id.* at 410; *see also United States v. Castaldi*, 547 F.3d 699, 705-06 (7th Cir. 2008)

(finding that evidence of defendant's knowledge of the by-laws and procedures of the victim-organizations he allegedly defrauded, which prohibited writing checks to himself from the organizations' accounts, was sufficient circumstantial evidence to prove his intent to defraud); *People v. Mabayag,* 1984 WL 48855 at *2 (D. Guam A.D.) (finding that evidence of defendant's year-long pattern of misappropriation of public funds of an association and evidence that defendant substituted checks to thwart discovery of the misappropriation was sufficient circumstantial evidence to prove his intent to permanently deprive the association of the funds).

[34] In this case, however, there is no such circumstantial evidence of Anastacio's *intent to harass* Temengil by subjecting him to striking and other offensive touching, even crediting the People's circumstantial evidence that Anastacio *struck* Temengil. Accordingly, we find that there was insufficient evidence from which a rational juror could have found each element of the Harassment charge beyond a reasonable doubt. The trial court therefore erred in its denial of Anastacio's motion for acquittal of the Harassment charge.

V. CONCLUSION

[35] We hold as a matter of law that the charge against Anastacio of Conspiracy to Commit Aggravated Assault does not allege a crime, based on the rationale discussed in comments to the Model Penal Code and other persuasive authority that one cannot conspire to commit a reckless act. We reject the People's argument that the statutory language of "extreme indifference to the value of human life" transforms the required mental state from reckless to something more akin to intentional.

[36] We further find that there was sufficient evidence from which a rational trier of fact could find Anastacio guilty of Assault beyond a reasonable doubt, but there was insufficient evidence of Anastacio's guilt as to the Harassment charge. The Judgment of Conviction is therefore

VACATED in part and **AFFIRMED** in part. The matter is **REMANDED** with instructions to the trial court to enter an acquittal for Anastacio on the charges of Conspiracy to Commit Aggravated Assault and Harassment.

[37] Because Anastacio stands convicted of only Assault, the court need not reach Anastacio's arguments relative to the merger of offenses pursuant to 9 GCA § 1.22 and the trial court's failure to sentence Anastacio pursuant to 9 GCA § 80.31.

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Chief Justice