IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

DAVID VILLENA QUITUGUA, JR.,
Defendant-Appellant.

Supreme Court Case No.: CRA14-016
Superior Court Case No.: CF0198-13

OPINION

Cite as: 2015 Guam 27

Appeal from the Superior Court of Guam
Argued and submitted on February 27, 2015
Hagåtña, Guam

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

MARAMAN, J.:

[1] In December 2013, Defendant-Appellant David Villena Quitugua, Jr. was convicted on seven counts, including armed robbery and other crimes committed while fleeing from police. At trial, Quitugua stipulated to the fact that at the time of his arrest he was on pretrial release for another unrelated felony charge ("felony release"). Despite the stipulation, the court admitted evidence of Quitugua's felony release over his attorney's objection and allowed the People to submit a jury instruction on the issue. We are asked to decide whether Quitugua was unfairly prejudiced by the admission of felony release evidence and the allowance of the jury instruction and whether the lower court erred in denying Quitugua's motion to acquit based on insufficiency of the evidence. Because the lower court based its admission of the stipulation and allowance of the jury instruction on a misapplication of law, we hold that the lower court abused its discretion in violation of Guam Rules of Evidence Rule 403 and committed plain error in violation of Quitugua's Sixth Amendment right to a fair and impartial jury trial. We therefore reverse the conviction of the lower court and remand for further proceedings not inconsistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Quitugua was indicted by a grand jury for one count of Attempted Second Degree Robbery (As a 2nd Degree Felony) with a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony, one count of Aggravated Assault (As a 3rd Degree Felony), one count of Eluding a Police Officer (As a Misdemeanor), one count of Reckless

Driving with Injuries (As a Misdemeanor), two counts of Assault (As a Misdemeanor), and one count of Attempted Theft by Threatening (As a Petty Misdemeanor).

[3] The charges were subsequently altered by amended, superseding indictments. Subsequent indictments added a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony to the Aggravated Assault (As a 3rd Degree Felony) charge, reduced the Reckless Driving with Injuries (As a Misdemeanor) charge to Reckless Driving (As a Petty Misdemeanor), and included a Notice of the Commission of a Felony While on Felony Release.

[4] Quitugua entered a plea of not guilty to all charges, asserted his right to a speedy trial, and requested a jury of twelve.

[5] Jury trial commenced and at the close of the evidence offered by the People, Quitugua moved for judgment of acquittal based on insufficient evidence. The court denied Quitugua's motion. On December 19, 2013, the jury returned a verdict of guilty on all charges except one count of Assault (As a Misdemeanor).

[6] Quitugua was sentenced to a total of fifteen years imprisonment. Judgment was entered, and Quitugua timely filed an Amended Notice of Appeal on August 8, 2014.

[7] The charges against Quitugua stemmed from an alleged, attempted robbery of the A&A Pawnshop in Hagåtña, Guam, as well as other crimes allegedly committed in the course of fleeing from police officers shortly thereafter.

A. Attempted Robbery and Police Chase

[8] At approximately 4:30 p.m. on April 10, 2013, a man wearing a bandana to cover his face and sunglasses entered the A&A Pawnshop ("A&A") with a knife and demanded money from two store employees. One employee escaped, and the man fled the scene without succeeding in

his attempt to rob the store. The man entered the driver's side of a vehicle, a charcoal grey Toyota with tinted windows, and sped away. A witness described the vehicle's license plate number as MN1164.

[9] Local police officers received a radio dispatch that a robbery occurred at A&A with a description of the charcoal gray Toyota and license plate number. Shortly thereafter, Officer Benny Babauta spotted a car that matched the given description driving northbound on S. Marine Corps Drive past the Tamuning Pizza Hut. Babauta followed the car northbound with flashing lights, attempting to encourage the driver to pull over.

[10] At the intersection of S. Marine Corps Drive and Chalan San Antonio, in front of the International Trade Center ("ITC") building, Babauta pulled alongside the car and motioned the driver to pull over. The driver made a gesture with his hands as if to indicate he would pull over, only to accelerate away from the officer, continuing northbound on Marine Corps Drive. Babauta's partner, Officer Carbullido, called for backup. The driver tried to evade the officers by making an abrupt U-turn in front of the McDonald's and heading southbound on S. Marine Corps Drive. The driver then made an abrupt right turn into the UIU building parking lot entrance, colliding into the back of another vehicle that was partially blocking the entrance. That vehicle was driven by Rosa Palomo. Babauta estimated that the driver's car was travelling at approximately 40 miles per hour at the time of the collision, approximately 5:00 p.m.

[11] After the crash, the driver exited the vehicle from the driver's side and began to run southwest toward the Ypao 76 Circle K gas station. Carbullido chased after the driver. After a chase over several fences, a group of approximately four officers converged on the driver and restrained him by pulling him to the ground and handcuffing him despite his efforts to resist. The driver continued to resist even after being placed in handcuffs. He repeatedly screamed

"police brutality" and threatened to claim that the officers had beaten him. The driver was identified by the police as David Villena Quitugua, Jr.[1]

[12] Upon apprehending Quitugua, Officer Keon Pangelinan advised him of his *Miranda* rights and interviewed him at the scene. During the interview Quitugua stated that another man had been in the car with him, had threatened him, and had hit him in the face with a handgun. Specifically, Quitugua stated that when the police began to follow him, the individual threatened to kill Quitugua's children if he did not evade the police.

[13] Pangelinan interviewed Quitugua again on May 30, 2013. After being advised of his *Miranda* rights, Quitugua stated that he was under the influence of crystal methamphetamine on April 10, 2013, and chose to flee from the police because he had an outstanding warrant of arrest. He stated that he was alone in the vehicle. He also stated that he found a license plate at Ypao Beach and put it on the vehicle.

B. Pretrial Conference

[14] Just after the court clerk called the case, before opening statements, defense counsel notified the court of an agreement to stipulate to the fact that Quitugua was released on bail for felony charges at the time of the alleged crimes ("fact of felony release"):

> It's my understanding, Your Honor, that the [People] and the defense at this time are stipulating that at the time of the offenses of the subject matter of this indictment that the defendant was on pretrial release in felony CF0691-12, as indicated on the final page of the indictment captioned Notice Commission of a Felony while on Felony Release.

Transcript ("Tr."), vol. 1 at 4 (Jury Trial, Dec. 12, 2013).

[1] The fact that Quitugua was the driver of the vehicle is undisputed and not at issue in this case.

[15] The People confirmed that an agreement to stipulate to facts had been reached but signaled that they nonetheless intended to submit the stipulation to the jury during their opening statement:

> That's correct. And with that on the record, I think we can work out the precise wording of the stipulation later, but I will not be talking about [sic] we would have introduced it into evidence during my opening as anticipated.

Id.

[16] Defense counsel informally objected to the admission of any reference to the stipulated fact of felony release on the basis that it would prejudice the jury. Defense counsel also requested that the court redact the indictment to strike the felony release charge:[2]

> Your Honor, the parties having stipulated that the defendant was on pretrial release then the statute kicks in as strictly a penalty statute. I think it would be prejudicial to the defendant to have the jury be aware of his pretrial release status. It's not a matter for them to decide and we'd ask the [c]ourt to redact that portion of the notice that's per the indictment so that the jury doesn't see it.

Id. at 4-5.

[17] The People agreed to redact the indictment but insisted on, at minimum, a jury instruction. Specifically, the People sought to admit a recitation of the stipulation. By reading the stipulation to the jury, the People would accomplish their goal of submitting the fact of felony release to the factfinder:

> [I]t's not my understanding that the jury ever really gets to see the actual physical indictment in most cases. As long as there is a jury instruction to that effect that this is something that they are going to have to consider and that we have the

[2] The indictment contained a Notice, titled "Commission of a Felony While on Felony Release," that charged Quitugua with being released on bail for having committed two previous felonies. Record on Appeal ("RA"), tab 63 at 26 (2d Am. Superceding Indictment, Dec. 17, 2013). The Notice named the felonies: Possession of Schedule II Controlled Substance (As a 3rd Degree Felony), and Theft of Property (As a 3rd Degree Felony). The Notice also provided the code sections for the previous charges and the case number for the corresponding criminal case. Also of note, the People charged Quitugua with Commission of Felony While on Felony Release "within the meaning of 9 GCA § 80.37.5." *Id.* However, the current statute is found under 9 GCA § 80.37.1. This discrepancy is explained by the fact that the Compiler of Laws renumbered the statute in 2014. 9 GCA § 80.37.1 (originally enacted as section 80.37.5 by P.L. 20-111:2 (Oct. 19, 1989)).

> stipulation in place, I'm not opposed to having the actual superceding [sic] indictment. Have some of that language removed. . . . [T]o make it clear that this is something, just like all of the other things of [sic] that are in the indictment that they're going to have to pass on.

Id.

[18] The court expressed concern with submitting the fact of felony release to the jury. Specifically, it questioned whether or not submission to the jury was necessary when the defense had agreed to stipulate to the fact in question. For guidance, the court sought clarification of the potentially controlling precedent established by *Apprendi v. New Jersey*, 530 U.S. 466 (2000):

> But that's the argument of the defense . . . that they're not going to have to pass on it anymore. The statute is a sentence enhancement statute and as I understand *Apprendi* it was that even on those facts which would require the enhancement, before you can get to the enhancement the jury would have to decide that, and not that the fact is stipulated to and agreed upon then there's no need to send it to the jury. Otherwise, I run into other bad acts . . . without a reason for it or an exception.

Tr., vol. 1 at 5-6 (Jury Trial, Dec. 12, 2013).

[19] Without a full explication of *Apprendi*, the People argued that *Apprendi* required the court to present the fact of felony release to the jury. The People again proposed to submit the stipulation as a means of submitting these facts:

> I think under *Apprendi* and my understanding of this is that no matter what it is the jury does have to make a factual finding if it's going to enhance the penalty, even if it's just saying, yes, we accept this stipulation and that's it. I mean, it doesn't have to be anything extremely complicated, and without testimony it really shouldn't be, but I do believe they will have to be the ones who make that finding.

Id. at 6.

[20] After hearing the People's argument, the court considered allowing the People to mention the fact of felony release in their opening. Before ruling on defense counsel's objection, the

court gave the defense an opportunity to rebut the assertion that *Apprendi* required submission of the fact of felony release:

> Okay . . . I guess [the People] can reference it in [their] opening statement that [Quitugua] was on felony release, but that's about it, and I can – I can't stop and research that issue right now unless you [defense counsel] know the *Apprendi* law sufficient to rebut that.

Id.

[21] When presented with the opportunity to rebut the *Apprendi* argument, defense counsel stated that he was "not familiar" with the *Apprendi* decision. He again requested that the evidence be excluded from opening statements. In light of his lack of familiarity with *Apprendi*, he also requested that the court grant additional time to research the issue:

> I would say that if it's something that we can research out and then present to the court later, once you ring that bell you can't unring it. . . . I hate to have the defendant . . . prejudiced on this matter, so I'd ask the court to advise [the People] to refrain from mentioning that in opening and then we can sort that out as to whether there's case law to decide that issue.

Id. at 6-7.

[22] In lieu of a recess, the court researched the *Apprendi* decision from the bench. Based on its brief review of the holding, it overruled Quitugua's objection and allowed the People to reference the fact of felony release and the stipulation in their opening statement:

> The holding in *Apprendi* is that the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed section of statutory maximum, other than the fact of . . . a prior conviction, must be submitted to a jury, and so I don't think the stipulation would be sufficient, so I will allow the Government to make reference to the stipulation and inform them of their duty to find that [fact].

Id. at 8.

C. Presentation of Evidence

[23] At trial, the People called Pangelinan to testify. Pangelinan testified that Quitugua was a suspect in a previous, unrelated criminal investigation, that he interviewed Quitugua

approximately one month after his arrest for the crimes alleged in this case, that Quitugua was in custody at the Department of Corrections at the time of the interview, that Quitugua stated that he was a user of crystal methamphetamine, and that Quitugua stated that he was under the influence of methamphetamine and had an outstanding warrant of arrest at the time he was arrested for the crimes alleged in this case.

[24] Prior to resting its case, the People requested to read to the jury the stipulation of the parties concerning the fact of felony release:

> So I think we're ready to rest. The only thing I would like to actually discuss before doing that officially is the issue of the stipulation concerning the felony and felony release. Now, it's my position that I prefer to have that answered during our case-in-chief so it's all before the jury before we rest.

Id. at 49.

[25] The court allowed the People to read the agreement to the jury and granted a recess for the People and defense counsel to finalize the stipulation. "I'll ask you guys to go ahead and use the break to draft the language. I'll allow you to read the stipulation to the jury." *Id.* at 50. Defense counsel did not object. After the recess, the court instructed the jury on how to treat the stipulation:

> Ladies and gentlemen, in your – you recall in your preliminary instructions I told you what stipulations are. I will instruct you further in the law how to treat stipulations. They're nothing more than an agreement between the parties about certain things in the trial. And so that agreement is going to be read to you by the [People] today.

Id. at 51.

[26] The People proceeded to read the stipulation, which included the fact of felony release and Quitugua's prior case number:

> The events referred to in the indictment occurred while David Villena Quitugua was on release pursuant to Chapter 40, Title 8, Guam Code Annotated on a

pending felony charge filed under Superior Court Criminal Case Number CF0691-12 within the meaning of 9 GCA § 80.37.5.[3]

Id. at 52.

[27] During the presentation of its case, the defense called Quitugua to testify on his own behalf. On cross-examination of Quitugua, the People elicited testimony of past criminal acts over the objection of Defense Counsel:

THE PEOPLE:	And had you ever gotten in trouble with the law concerning your methamphetamine use?
QUITUGUA:	Yes.
DEFENSE COUNSEL:	Objection, Your Honor, relevancy. . . . There's no notice to introduce evidence of prior bad acts, Your Honor. It's not appropriate for the prosecution to bring in other evidence of other things that are – don't go to the proof of this case.
THE PEOPLE:	Your Honor, I believe the testimony from one of the previous witnesses was that [Quitugua] did admit he was on a warrant when he was picked up for this case. The existence of that warrant is in itself a possible motivation for his activities that day. . . .
COURT:	[T]he court will . . . overrule the objection. And on the question of prior bad acts, you're making an objection under 403?
DEFENSE COUNSEL:	Yes, Your Honor.
COURT:	403 is not necessarily applicable in this case, counsel. I think 609 is. . . . And so, the court will overrule the 403 objection as well. . . .
THE PEOPLE:	And so, what sort of legal trouble had you gotten into from use of meth? . . .
QUITUGUA:	I was in trouble for possession of paraphernalia. . . .

[3] Now 9 GCA § 80.37.1.

THE PEOPLE:	Would it surprise you to learn that it may have happened in 2012?
QUITUGUA:	Late part 2012, early part 2013, something, yeah. . . .
THE PEOPLE:	But you had been arrested for this, right?
QUITUGUA:	Yes, I was booked and released.

Id. at 104-06.

[28] Prior to calling rebuttal witnesses, outside the presence of the jury, the People requested a jury instruction and verdict form for the fact of felony release. Defense counsel did not object:

> I would also note that there does not appear to be a verdict form provided for the felony on felony release, special condition, and as previously discussed, I believe that legally the jury does have to make a finding to that effect so I think there should be an instruction and a verdict form provided on that, on those two. . . . Before we move on, Your Honor, again, I would be requesting a verdict form and a special instruction for the felony on felony release as well.

Tr., vol. 4 at 3-5 (Jury Trial, Dec. 17, 2013).

[29] After closing arguments, the court gave the following jury instruction on felony release:

> Notice of felony on felony release. There is a special notice that accompanies the indictment. The special allegation is that the defendant committed a felony while on release for a separate felony charge. The People must prove beyond a reasonable doubt that the defendant, David Villena Quitugua, on or about the tenth day of April, 2013, in Guam, did commit a felony while on release for a separate felony charge. The felony charges in this case are Charge 1, Attempted Second Degree Robbery, and Charge 2, Aggravated Assault. If the People have not proven the defendant guilty of either of the charges or if the People have not proven these elements beyond a reasonable doubt, you must find the defendant not guilty.

Id. at 82.

[30] When reading its verdict, the jury stated its finding of the fact of felony release beyond a reasonable doubt.

II. JURISDICTION

[31] This court has jurisdiction over appeals from final judgment pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 114-18 (2015)); 7 GCA §§ 3105, 3107(b), and 3108(a) (2005); and 8 GCA §§ 130.10 and 130.15(a) (2005).

III. STANDARD OF REVIEW

[32] The issue of whether the lower court violated the constitutional rule established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is a question of law that is reviewed *de novo*. *People v. Muritok*, 2003 Guam 21 ¶ 42 (citing *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002)).

[33] The lower court's decision to admit evidence is reviewed for an abuse of discretion. *People v. Fisher*, 2001 Guam 2 ¶ 7.

[34] When an objection is not brought at trial, "errors or defects affecting substantial rights" are subject to review for plain error. *People v. Quitugua*, 2009 Guam 10 ¶ 10; *see also* 8 GCA § 130.50(b) (2005).

[35] "Where a defendant raises the issue of sufficiency of the evidence by a motion for judgment of acquittal, we review the trial court's denial of the motion *de novo*." *People v. George*, 2012 Guam 22 ¶ 47 (citing *People v. Song*, 2012 Guam 21 ¶ 26).

IV. ANALYSIS

A. *Apprendi v. New Jersey*

[36] The first issue raised by this appeal is whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requires submission to the jury of stipulated facts when the defendant waives his Sixth Amendment right to trial by jury with regard to a sentence enhancement.

[37] The lower court allowed the People to submit to the jury the fact of felony release based on its reading of *Apprendi*. The court correctly identified the bright-line rule established by *Apprendi*: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490 (applying the "maximum penalty" test established by *Jones v. United States*, 526 U.S. 227, 243 (1999), to the states); *see also Jones*, 526 U.S. at 243 n.6 (holding that any fact that increases the maximum penalty for crime must be charged in indictment, submitted to jury, and proven beyond reasonable doubt, as required by Due Process Clause of Fifth Amendment and notice and jury trial guarantees of Sixth Amendment). This removes from the legislature the power to arbitrarily differentiate between sentence enhancements and elements of a crime:

> [W]hen the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.

Apprendi, 530 U.S. at 494 n.19. "[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494.

[38] The bright-line *Apprendi* rule has been supported and interpreted by a line of subsequent cases, which like *Apprendi* determine the constitutionality of sentencing statutes. *See Oregon v. Ice*, 555 U.S. 160 (2009) (holding that a statute authorizing a judge to find facts necessary to impose multiple sentences consecutively or concurrently does not violate a defendant's Sixth Amendment rights); *Cunningham v. California*, 549 U.S. 270 (2007) (holding that a statute authorizing a judge to find facts necessary to expose a defendant to an elevated upper term

sentence violates a defendant's Sixth Amendment right); *United States v. Booker*, 543 U.S. 220 (2005) (holding that a statute authorizing a judge to find facts that determine the mandatory sentencing range of a defendant violates a defendant's Sixth Amendment right); *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that a statute authorizing a judge to find facts that increase a defendant's "maximum sentence" violates the defendant's Sixth Amendment right).

[39] We have previously acknowledged *Apprendi* and the unconstitutionality of sentencing statutes that remove factfinding from the jury. *See People v. Muritok*, 2003 Guam 21 ¶ 47 (holding that a sentencing statute that granted the court authority to extend the term of a sentence beyond the statutory maximum without jury factfinding was unconstitutional). We have also acknowledged the inherently prejudicial nature of a jury becoming apprised of aggravating facts before a conviction has been obtained. *Id.* n.8 (requiring trial bifurcation "for sentencing schemes that fall within the realm of *Apprendi*").

[40] A problem presented by Quitugua's appeal is that previous cases have not addressed situations in which the People seek to use *Apprendi* against a defendant. Unlike the facts of the cases that flow from *Apprendi*, Quitugua waived his constitutional *Apprendi* protections and the lower court did not effectuate his waiver.

[41] Of the cases that have interpreted *Apprendi*, only *Blakely v. Washington*, 542 U.S. 296 (2004), speaks to whether a defendant may waive a Sixth Amendment *Apprendi* right by stipulation. Writing for the majority in *Blakely*, Justice Scalia states that "nothing prevents a defendant from waiving his *Apprendi* rights."[4] 542 U.S. at 310. When defendants plead guilty, "the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." *Id.* (citing *Apprendi*, 530 U.S.

[4] Although Justice Scalia's comments do not embody the resolution of the specific facts in *Blakely*, they are nonetheless persuasive when addressing the novel circumstances before this court.

at 488; *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968)). "If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." *Id.* "Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial." *Id.* Here, Quitugua waived his *Apprendi* right by stipulation. He consented to judicial factfinding on the fact of felony release.

[42] Justice Scalia's comments in *Blakely* flow from the longstanding proposition that an accused in a criminal trial may waive his Sixth Amendment right to trial by jury if the waiver is made with express, intelligent consent, and agreed to by the People and the lower court. *Duncan*, 391 U.S. at 158 ("We hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial . . . ."); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-78 (1942) ("We have already held that one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the trial court.").

[43] It is clear that Quitugua desired to keep the fact of felony release from the jury, as shown by his stipulation, remarks made during the pre-trial conference, and his initial objection to any reference to the stipulation. There is little doubt that he expressly and intelligently waived his *Apprendi* right as to the sentence enhancement. No challenge was made at trial or on appeal as to the validity of Quitugua's waiver; only the court's interpretation of *Apprendi* and its subsequent application to Quitugua's waiver have been placed at issue.

[44] Justice Scalia's comments suggest that waiver of Quitugua's Sixth Amendment *Apprendi* right to trial by jury was not prohibited by the *Apprendi* ruling. Stated another way, *Apprendi*

did not require submission to the jury of the stipulated fact of felony release because Quitugua knowingly and intelligently waived his Sixth Amendment right to trial by jury as to that fact. Therefore, our analysis must now turn to whether the court's refusal to approve Quitugua's waiver constitutes reversible error.

B. Unfair Prejudice: Admission of Stipulation

[45] The second issue raised by this appeal is whether the lower court's decision to admit Quitugua's stipulation over the objection of defense counsel is an abuse of discretion when considering the danger of unfair prejudice under Guam Rules of Evidence ("GRE") Rule 403.

[46] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Guam R. Evid. 403; *see also* Fed. R. Evid. 403. "The court's application of Rule 403 . . . [is] reviewed for an abuse of discretion." *People v. Evaristo*, 1999 Guam 22 ¶ 6 (citing *United States v. Houser*, 929 F.2d 1369, 1373 (1990)). The lower court's decision to admit evidence is reviewed for an abuse of discretion. *See Fisher*, 2001 Guam 2 ¶ 7 (quoting *J.J. Moving Serv., Inc. v. Sanko Bussan (GUAM) Co.*, 1998 Guam 19 ¶ 31); *see also People v. Cepeda*, 69 F.3d 369, 371 (9th Cir. 1995).

[47] "A court abuses its discretion by basing its decision on an erroneous legal standard or clearly erroneous factual findings, or if, in applying the appropriate legal standards, the [trial] court misapprehended the law with respect to the underlying issues in the litigation." *People v. Jesus*, 2009 Guam 2 ¶ 18 (alteration in original) (quoting *San Miguel v. Dep't of Pub. Works*, 2008 Guam 3 ¶ 18).

[48] "[W]here the trial court has abused its discretion in admitting certain evidence, the proper standard for evaluating whether reversal is required is the harmless error standard."

People v. Roten, 2012 Guam 3 ¶ 41. "[T]he test for harmless error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.*

[49] When ruling on Quitugua's pre-trial Rule 403 objection to the admission of his felony release stipulation, the court based its decision solely on a misreading of *Apprendi*. We now hold that *Apprendi* did not require the jury to find the fact of felony release when Quitugua waived his Sixth Amendment right to trial on that issue. Because the court incorrectly ruled that *Apprendi* required the admission of the stipulation, it misapprehended the law with respect to the underlying issues in the litigation.

[50] Relying solely on a misreading of *Apprendi*, the lower court did not properly weigh the danger of unfair prejudice the stipulation would create against its probative value pursuant to Rule 403. Because Quitugua stipulated to the fact of felony release, there was no need to prove that fact at trial. Therefore, the stipulation had no probative value and any amount of unfair prejudice resulting from the evidence would provide grounds for exclusion under GRE 403. However, the lower court did not undertake a GRE 403 analysis. Failure to undertake this analysis unfairly prejudiced Quitugua because the prior bad acts evidence admitted as a result portrayed Quitugua as a habitual criminal offender.

[51] This is the type of scenario envisioned by Justice Scalia in *Blakely*. 542 U.S. at 310. Quitugua's stipulation to the fact of felony release was an act of consent to judicial factfinding as to the sentence enhancement. The record reflects that he stipulated in order to avoid the harmful effects of admitting evidence that would portray him as a repeat felon. By allowing the People to introduce the stipulation, the court allowed the evidence to taint the jury.

[52] The People argue that the decision to admit the stipulation was harmless error because other evidence was presented that revealed the fact of felony release. In particular, the People

point to testimony by Pangelinan and Quitugua. Tr., vol. 3 at 29, 104-06 (Jury Trial, Dec. 16, 2013). We disagree.

[53] The lower court's decision to admit the stipulation was not harmless error because it does not appear beyond a reasonable doubt that the error did not contribute to the verdict obtained. "The test for harmless error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *People v. Flores*, 2009 Guam 22 ¶ 112 (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)) (internal quotation marks omitted). The People are correct in the assertion that the testimony revealed the fact of felony release to the jury. However, the court ruled on the People's motion to admit evidence of the stipulation during a pre-trial conference. Because the court made its ruling prior to the instances of testimony, it cannot be said that the testimony would have been permitted had the court correctly applied *Apprendi* and denied evidence of the stipulation. Both parties approached the trial aware that a recitation of the stipulation would ultimately be submitted to the jury. Tr., vol. 1 at 8 (Jury Trial, Dec. 12, 2013). It is likely that at least some of the decisions made by defense counsel were the result of the court's ruling. It is also likely that at least some of the prejudicial evidence later admitted was admitted as a result of the ruling. For example, defense counsel may have objected to the admission of Pangelinan's testimony or dissuaded Quitugua from taking the stand. Therefore, it is unclear that the other testimony of the fact of felony release would have been permitted under different circumstances.

[54] Nevertheless, the cumulative effect of submitting the stipulation to the jury was to create a significant danger of unfair prejudice, substantially outweighing any probative value. It does not appear beyond a reasonable doubt that the court's error did not contribute to the guilty verdict. Therefore, the lower court's decision to admit Quitugua's stipulation was an abuse of

discretion because the court misapprehended the law with respect to the underlying issues of the case and admitted evidence in violation of GRE 403.

C. Plain Error: Jury Instruction

[55] The third issue raised by this appeal is whether allowing a jury instruction regarding a sentence enhancement is plain error when it is based on a misapplication of *Apprendi* and results in extreme prejudice in violation of Quitugua's Sixth Amendment right to a fair and impartial jury.

[56] "[N]o party may assign as error any portion of an instruction or omission therefrom unless he objects thereto stating distinctly the matter to which he objects and the grounds of his objection." 8 GCA § 90.19(c) (2005). When an objection is not brought at trial, "errors or defects affecting substantial rights" are subject to review for plain error. *Quitugua*, 2009 Guam 10 ¶ 10; *see also* 8 GCA § 130.50(b).

[57] Plain error is a highly prejudicial error, which will not result in reversal "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 to maintain the integrity of the judicial process." *Quitugua*, 2009 Guam 10 ¶ 11. "The appellant bears the burden to demonstrate that reversal is warranted." *Id.* (citing *People v. Van Bui*, 2008 Guam 8 ¶ 10; *People v. Chung*, 2004 Guam 2 ¶ 9). "The reviewing court's discretion to reverse for plain error should be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Evaristo*, 1999 Guam 22 ¶ 24 (quoting *People v. Ueki*, 1999 Guam 4 ¶ 17) (internal quotation marks omitted).

[58] "The Sixth Amendment guarantees a criminal defendant the right to a trial by a fair and impartial jury." *Flores*, 2009 Guam 22 ¶ 89; *see also* U.S. Const. amend. VI; *Neb. Press Ass'n*

v. Stuart, 427 U.S. 539, 551 (1976) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors . . . ."); *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

[59] Quitugua did not object at trial to the submission to the jury of an instruction on the felony release sentence enhancement although he raised concern before trial about the stipulation's admission. Nevertheless, since the lower court's decision to submit the instruction implicates the substantial right to a fair trial, this decision is subject to review for plain error. *See Quitugua*, 2009 Guam 10 ¶ 10; 8 GCA § 130.50(b).

[60] The first prong of review under the plain error standard is to determine whether the lower court erred. *Quitugua*, 2009 Guam 10 ¶ 12. As discussed in section IV.A above, the court erred in denying Quitugua the ability to waive his Sixth Amendment *Apprendi* right to have the jury find the fact of felony release. The error is first manifested by the court's decision to admit evidence of the stipulation, resulting in an abuse of discretion. The error is manifested a second time by the decision to submit to the jury an instruction asking it to make findings of fact on the felony release special allegation.

[61] The second prong of plain error analysis is whether the lower court's error was "clear and obvious" under current law. *Quitugua*, 2009 Guam 10 ¶ 29; *People v. Jones*, 2006 Guam 13 ¶ 24. Here, the error was "clear and obvious" under current law because the court disregarded *Blakely* in its misreading of *Apprendi*.

[62] The lower court's decision to issue a felony release instruction was based on its general decision that *Apprendi* required submission of the fact of felony release. While there is an abundance of case law on the effect of *Apprendi* with regard to the constitutionality of

sentencing statutes, there is a dearth of case law on the possibility of waiving a Sixth Amendment *Apprendi* right. In light of this lack of authority, Justice Scalia's comments in *Blakely* are instructive.[5]

[63] At trial, the court made its ruling to admit evidence based on its limited understanding of *Apprendi* and the bright-line rule it established. The court did not consider the *Blakely* opinion. Therefore, whether or not the court's decision was a "clear and obvious" error under current law turns on whether Justice Scalia's comments in *Blakely* are authoritative.

[64] It is our view that Justice Scalia's comments are highly persuasive because they flow from the longstanding proposition that an accused in a criminal trial may waive his Sixth Amendment right to trial by jury. The proposition that an accused may waive this right supports the purpose of *Apprendi*—safeguarding the defendant's constitutional rights—as opposed to a perverse application of the precedent to prejudice a criminal defendant. In this case, allowing Quitugua to waive his right to trial by jury as to his sentence enhancement would have avoided the admission of evidence that unfairly prejudiced him.

[65] The third prong is "whether the defendant's substantial rights were affected by the error." *Quitugua*, 2009 Guam 10 ¶ 30; *Jones*, 2006 Guam 13 ¶ 24. Quitugua's substantial rights were affected by the error because the decision to submit the felony release instruction to the jury created a climate of extreme prejudice in violation of his Sixth Amendment right to a fair and impartial jury trial. The decision to submit a jury instruction on the felony release sentence enhancement was a fundamentally prejudicial error that violated Quitugua's Sixth Amendment right to an impartial jury. This stems from the same nucleus of error as the decision to admit the stipulation.

[5] "Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial." *Blakely*, 542 U.S. at 310.

[66] The fourth prong is whether a reversal of the lower court's error is necessary to "prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Quitugua*, 2009 Guam 10 ¶ 46; *Demapan*, 2004 Guam 24 ¶ 5. Here, reversal of the lower court's error is necessary to prevent a miscarriage of justice because to rule otherwise would violate Quitugua's constitutional right to an impartial jury.

[67] This prong, like the second, turns upon this court's interpretation of *Apprendi* in light of Justice Scalia's comments in *Blakely*. Allowing this error to stand would create a dangerous precedent, threatening the integrity of the judicial process. Prosecutors must not be permitted to use the bright-line *Apprendi* rule to achieve ends contrary to the principle's purpose. With *Apprendi*, the United States Supreme Court sought to expand the protections afforded to criminal defendants by allowing them to assert their Sixth Amendment right to a jury trial. Prosecutors must not be permitted to use this holding affirmatively against a defendant to admit otherwise inadmissible, unduly prejudicial evidence. Such a tactic is contrary to the Sixth Amendment rights *Apprendi* was meant to protect.

[68] The lower court's decision to allow a jury instruction regarding the felony release sentence enhancement was plain error because it was based on a misapplication of *Apprendi* that resulted in extreme prejudice in violation of Quitugua's Sixth Amendment right to a fair and impartial jury.

D. Sufficiency of the Evidence

[69] The fourth issue raised by this appeal is whether the lower court erred in denying Quitugua's motion to acquit based on insufficiency of the evidence.[6] Quitugua argues that the People failed to provide sufficient evidence to sustain a conviction for Attempted Second Degree

[6] We have previously held that even if a defendant's "conviction can be vacated on other grounds, his arguments relating to the sufficiency of the evidence must be considered." *People v. Tennessen*, 2009 Guam 3 ¶ 11.

Robbery (As a 2nd Degree Felony) with a Special Allegation of Possession and Use of a Deadly Weapon in Commission of a Felony, Aggravated Assault (As a 3rd Degree Felony) with a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony, two counts of Assault (As a Misdemeanor), and Attempted Theft by Threatening (As a Petty Misdemeanor). Appellant's Br. at 8, 12, 15 (Dec. 15, 2014).

[70] "The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." 8 GCA § 100.10 (2005). In his motion on December 16, 2013, Quitugua moved to "dismiss" the charges of Attempted Second Degree Robbery, Aggravated Assault, and Attempted Theft by Threatening. *See* Tr., vol. 3 at 53 (Jury Trial). The trial court denied his motion. *Id.* at 59.

[71] Quitugua did not move for a judgment of acquittal on all of the charges included in the indictment. Quitugua also did not move for a judgment of acquittal on the two counts of Assault, which he now argues were not supported by the People's evidence. Appellant's Br. at 15. This is not fatal to his argument on appeal, however, because the language of 8 GCA § 100.10 requires the trial court judge to enter judgment of acquittal—even if the defendant fails to do so—with regard to any offense charged in the indictment if the evidence is insufficient to sustain a conviction. Here, the trial judge elected not to enter such a judgment of acquittal with regard to the two counts of Assault. Therefore, it must be assumed that the trial court judge viewed the evidence as sufficient and agreed with the jury that the two counts of Assault were sufficiently supported by the People's evidence.

[72] "A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 132 S. Ct. 2 (2011). Evidence is sufficient if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also United States v. Chung*, 659 F.3d 815 (9th Cir. 2011); *Tennessen*, 2009 Guam 3 ¶ 14 (citing *People v. Cruz*, 1998 Guam 18 ¶ 9). When faced with a record of facts that supports conflicting inferences, a reviewing court "must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326. "[I]t is not the province of the court . . . to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury." *George*, 2012 Guam 22 ¶ 51 (quoting *Song*, 2012 Guam 21 ¶ 29). "This is a highly deferential standard of review." *Song*, 2012 Guam 21 ¶ 26 (quoting *People v. Tenorio*, 2007 Guam 19 ¶ 9) (internal quotation marks omitted).

1. Attempted Second Degree Robbery

[73] Quitugua was convicted, under 9 GCA §§ 40.20(a)(3), (b), 40.40, and 80.37, of using a deadly weapon in the commission of an Attempted Second Degree Robbery, for entering A&A wielding a knife and attempting to commit theft of U.S. currency. *See* RA, tab 63 at 2 (2d Am. Superceding Indictment, Dec. 17, 2013).

[74] "A person is guilty of robbery in the second degree if, in the course of committing a theft, he . . . is armed with or displays . . . a deadly weapon." 9 GCA § 40.20(a)(3) (2005) (emphasis omitted). "*Deadly Weapon* means any firearm, or other weapon, device, instrument,

material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to the defendant to be capable of producing death or serious bodily injury." 9 GCA § 16.10(d) (2005). Attempt is defined by 9 GCA § 13.10:

> A person is guilty of an attempt to commit a crime when, with intent to engage in conduct which would constitute such crime were the circumstances as he believes them to be, he performs or omits to perform an act which constitutes a substantial step toward commission of the crime.

9 GCA § 13.10 (2005).

[75] Quitugua argues that the People have not met their burden in proving that he was the individual who entered A&A with a knife and demanded money. Appellant's Br. at 13 ("What is conspicuously absent, however, is any evidentiary link to Mr. Quitugua as being the perpetrator of the crime."). He argues that the People offer only "circumstantial evidence." *Id.*

[76] "When ruling on a motion for judgment of acquittal, the trial court is concerned with the existence or nonexistence of evidence, not its weight, and this standard remains constant even when the People rely exclusively on circumstantial evidence." *George*, 2012 Guam 22 ¶ 51 (quoting *Song*, 2012 Guam 21 ¶ 29). Consequently, Quitugua's dismissal of the People's evidence as "circumstantial" is unpersuasive.

[77] The People presented an abundance of evidence at trial to establish an evidentiary link to Quitugua as the perpetrator of the crime. For example, the People called Jessica Tulabut as a witness. Tr., vol 1 at 26 (Jury Trial, Dec. 12, 2013). Tulabut is an employee of A&A and testified that the perpetrator was wearing a bandana and sunglasses. *See id.* at 31. A bandana and a pair of sunglasses were found in the vehicle Quitugua was driving when fleeing the police prior to arrest. *See* Tr., vol. 2, at 88-90 (Jury Trial, Dec. 13, 2013). Tulabut testified that the robber was carrying a metal knife with which he threatened her. *See* Tr., vol. 1 at 31 (Jury Trial). Two knives were found in Quitugua's vehicle. *See* Tr., vol. 2 at 88-89, 92 (Jury Trial). Tulabut

testified that the robber was carrying a small, multi-colored bag. *See* Tr., vol. 1 at 32 (Jury Trial). A similar bag was found in Quitugua's vehicle. *See* Tr., vol 2 at 90 (Jury Trial). The People presented evidence that the robber fled the crime scene by entering the driver side of a new model, charcoal gray Toyota with tinted windows. *See* Tr., vol. 1 at 45, 46-47 (Jury Trial). When apprehended, Quitugua was driving a gray 2013 Toyota Camry, with tinted windows. *See* Tr., vol. 3 at 24-25, 28, 77 (Jury Trial); Tr., vol. 2 at 10, 31 (Jury Trial).

[78] The People presented evidence that Quitugua had "dirty laundry" in his vehicle which they argued could have been the clothes worn at the scene of the crime. *See* Tr., vol. 3 at 8, 10-11 (Jury Trial); Appellee's Br. at 36 (Dec. 22, 2014). The People presented evidence that Quitugua had a receipt from A&A Pawnshop, Hagåtña branch, from April 10, 2013, with Quitugua's name on it, which they argued showed that he had scouted the location prior to committing the crime. *See* Tr., vol. 2 at 93 (Jury Trial); Appellee's Br. at 37. The People presented evidence that the license plate on Quitugua's vehicle had been changed, with the registered plate kept in the trunk of the car which they argued showed that Quitugua was attempting to conceal the vehicle's identity. *See* Tr., vol. 3 at 19-20 (Jury Trial); Appellee's Br. at 38.

[79] In addition to the evidence found inside of Quitugua's car, the People presented testimony of nine police officers who individually corroborated the fact that Quitugua fled from pursuing officers. *See* Tr., vol. 1 at 55, 68, 78 (Jury Trial); Tr., vol. 2 at 7, 30, 62, 80 (Jury Trial); Tr., vol. 3 at 22, 30 (Jury Trial). The testimony of these officers shows that Quitugua was given an opportunity to stop his car and speak with police but instead chose to flee, abandon his car, flee on foot, climb over fences, and resist arrest when ultimately subdued. *See generally id.*

Evidence that Quitugua chose to flee from the police is admissible and competent to show guilt. *See Allen v. United States*, 164 U.S. 492, 499 (1896).

[80] Based on the evidence, a reasonable jury could find that Quitugua was the same individual who entered the A&A Pawnshop on April 10, 2013, wielding a knife, and attempted to commit theft of U.S. currency. Given the "highly deferential" nature of the standard of review applicable to this issue, the evidence is sufficient. *See Song*, 2012 Guam 21 ¶ 26.

2. Aggravated Assault

[81] Quitugua was charged and convicted, under 9 GCA §§ 19.20(a)(3), (b), 80.30, and 80.37, with using a vehicle as a deadly weapon in the commission of an Aggravated Assault for crashing into the rear of another vehicle while running from the police. *See* RA, tab 63 at 2 (2d Am. Superceding Indictment).

[82] "A person is guilty of aggravated assault if he either recklessly causes or attempts to cause . . . bodily injury to another with a deadly weapon." 9 GCA § 19.20(a)(3) (2005). "*Deadly Weapon* means any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to the defendant to be capable of producing death or serious bodily injury." 9 GCA § 16.10(d).

[83] The Aggravated Assault statute creates two alternative theories of culpability. The first theory is that a defendant recklessly caused actual, bodily injury. The second is that a defendant "attempted" to cause bodily injury, regardless of whether injury actually occurred. In the present case, the automobile crash resulted in no injuries. *See* Tr., vol. 1 at 115 (Jury Trial); Tr., vol. 4 at 19 (Jury Trial). Neither of the two occupants of the vehicle hit by Quitugua suffered bodily harm. *Id.* Therefore, it was the People's burden at trial to prove that Quitugua "attempted" to

cause such harm, under the second theory, when he drove into Palomo while turning right into the UIU building parking lot.

[84] Quitugua argues that there was insufficient evidence to support a conviction of Aggravated Assault because the People failed to meet their burden of proof. *See* Appellant's Br. at 8. He argues that they failed to prove beyond a reasonable doubt that he attempted to cause harm to the occupants of the vehicle. *See id.* Attempt is defined by 9 GCA § 13.10:

> A person is guilty of an attempt to commit a crime when, with intent to engage in conduct which would constitute such crime were the circumstances as he believes them to be, he performs or omits to perform an act which constitutes a substantial step toward commission of the crime.

9 GCA § 13.10. "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." 9 GCA § 4.30(a) (2005).

[85] Quitugua argues that the People did not present sufficient evidence that it was his "conscious purpose" to engage in conduct that would result in bodily injury. Appellant's Br. at 10. The People argue that sufficient evidence was submitted to find that Quitugua's conscious purpose was to make a right turn into the UIU parking lot and that this act constituted a "substantial step" toward the Aggravated Assault. Appellee's Br. at 29-30. The People also argue that the circumstances as they believed them to be were that: (1) there was traffic in front of him, (2) Palomo's vehicle was blocking his access to the parking lot, (3) he could assume that Palomo's vehicle was operated by a driver, (4) he decided to drive through Palomo's vehicle, (5) he was aware that injury to the driver of Palomo's vehicle was a possibility, and (6) he did perform the act. Appellee's Br. at 29-30.

[86] The People also had the burden of proving that Quitugua's vehicle was a "deadly weapon." Quitugua argues that the People did not present any evidence that he knew or was

aware that the manner in which he operated his vehicle on April 10, 2013, was capable of producing death or serious bodily injury. Appellant's Br. at 11. The People argue that *mens rea* issues must be inferred from the facts of the case since direct evidence of a state of mind is rarely available. Appellee's Br. at 33 (citing *People v. Yingling*, 2009 Guam 11 ¶ 18).

[87] The evidence shows that Quitugua was fleeing the police, operating a motor vehicle hastily through traffic, turned right into the UIU building parking lot while going southbound on S. Marine Corps Drive, and collided with the vehicle operated by Palomo. *See generally supra* I.A, B, C.

[88] Based on the evidence, a reasonable jury could find that Quitugua used his vehicle in a dangerous manner to attempt to inflict bodily injuries on Palomo or her passenger and that, under the circumstances, the automobile was used as a deadly weapon. It is plausible to assume that Quitugua recognized the dangerous nature of his activity and chose to partake despite the risks. Given the "highly deferential" nature of the standard of review applicable to this issue, the evidence is sufficient. *Song*, 2012 Guam 21 ¶ 26.

3. Assault and Attempted Theft by Threatening

[89] Quitugua was convicted, under 9 GCA § 19.30(a)(3) and (e), of two counts of Assault, for intentionally putting two A&A Pawnshop employees in fear of imminent bodily injury by physical menace. *See* RA, tab 63 at 2 (2d Am. Superceding Indictment). Quitugua was charged, under 9 GCA §§ 43.40(a)(1) and 13.10, with Attempted Theft by Threatening, for allegedly attempting to take property of the A&A Pawnshop by threatening to inflict bodily injury on its employees. *See* RA, tab 63 at 2 (2d Am. Superceding Indictment).

[90] "A person is guilty of assault if he . . . by physical menace intentionally puts or attempts to put another in fear of imminent bodily injury." 9 GCA § 19.30(a)(3) (2005). "A person is

guilty of *theft* if he intentionally obtains property of another by threatening to . . . inflict bodily injury on anyone or commit any other criminal offense[.]" 9 GCA § 43.40(a)(1) (2005).

[91] As with the Second Degree Robbery charge, Quitugua argues that the People have not met their burden in proving that he was the perpetrator of the crime. Appellant's Br. at 16. The same reasoning applies to these charges. He concedes in his brief that "these charges are subsets of the attempted robbery charge . . . [.]" *Id.* For the same reasons provided above, the circumstantial evidence is sufficient and his arguments are unpersuasive.

[92] A judgment of acquittal is not in order as the People presented sufficient evidence on the various charges challenged by Quitugua. The trial court did not err in denying his motion for acquittal.

E. Other Issues

[93] Quitugua also raised issues on appeal not addressed within this opinion. First, he claimed the lower court erred when allowing a jury instruction for complicity as a theory of liability not charged in the indictment. Second, he claimed he was prejudiced by ineffective assistance of counsel. Because we now reverse on other grounds, we need not reach these issues.

V. CONCLUSION

[94] We hold that a defendant may waive his Sixth Amendment *Apprendi* right to trial by jury as to facts necessary to a sentence enhancement. When a court refuses to approve a defendant's waiver and that refusal gives rise to reversible error, we must vacate the conviction and remand for a new trial. Because the lower court did not approve Quitugua's waiver, evidence was admitted in violation of GRE 403 and Quitugua's Sixth Amendment right to a fair and impartial jury. It was an abuse of discretion and plain error to admit this evidence and submit the subsequent jury instruction.

[95] For the reasons set forth above, the lower court's judgment is **REVERSED**, the sentences are **VACATED**, and the case is **REMANDED** for further proceedings not inconsistent with this opinion.

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

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam.

AUG 25 2015

By: Charlene T. Santos
Deputy Clerk