IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

KEVIN ANTHONY GUERRERO,
Defendant-Appellant.

Supreme Court Case No.: CRA15-035
Superior Court Case No.: CF0595-14

OPINION

Cite as: 2017 Guam 4

Appeal from the Superior Court of Guam
Argued and submitted on June 16, 2016
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.[1]

MARAMAN, J.:

[1] Defendant-Appellant Kevin Anthony Guerrero appeals from a judgment convicting him of Theft by Receiving (As a Second Degree Felony), a lessor included offense of Theft (As a Misdemeanor), Fraudulent Use of a Credit Card (As a Misdemeanor), and Eluding a Police Officer (As a Misdemeanor). Guerrero maintains that his convictions should be reversed because he was denied his constitutional right to: (i) an impartial jury guaranteed by the Sixth Amendment of the United States Constitution; (ii) due process in accordance with the Fifth Amendment because of prosecutorial misconduct; and (iii) a fair trial because of ineffective assistance of counsel in violation of the Sixth Amendment's right to counsel.

[2] For the reasons stated herein, we hereby affirm his convictions.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] On or about the early morning hours of November 16, 2014, a person, later discovered to be Guerrero, unlawfully entered the property of Guam AutoSpot in East Hagåtña. Surveillance video shows that Guerrero proceeded to take a silver 2010 Ford Fusion from the property. The following day, a van parked in Talofofo belonging to victims Antoinette and Gary Wells was broken into and property was stolen, including two credit cards. The victims' bank informed them that their stolen credit card was used three times. The card was used twice at the Yona Mobil and once at the Sinajana 76 Circle K. Transaction logs and surveillance videos from both establishments were reviewed, and a silver vehicle was spotted in both videos at the times stated on the receipts.

[1] The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

[4] On November 18, 2014, police officers spotted a silver 2010 Ford Fusion in Umatac and attempted to pull over the driver. The driver evaded the officers and fled the scene, but the vehicle was seized and police officers discovered a Yona Mobil receipt in the center console. The driver was apprehended later in the day and was identified to be Guerrero. Guerrero was found to be in possession of a key to the 2010 Ford Fusion.

A. Indictment

[5] Guerrero was indicted by a grand jury for one count each of Theft of a Motor Vehicle (As a Second Degree Felony), Theft by Receiving (As a Second Degree Felony), Burglary to a Motor Vehicle (As a Second Degree Felony), Theft (As a Second Degree Felony), Fraudulent Use of a Credit Card (As a Misdemeanor), Eluding a Police Officer (As a Misdemeanor), and a Special Allegation of Commission of a Felony While on Felony Release. The Special Allegation charge pursuant to 9 GCA § 80.37.1(a), states:

> Whoever commits a felony punishable under the laws of Guam while on release on a felony charge pursuant to Chapter 40 (Criminal Procedure) of Title 8, [GCA], shall, in addition to the sentence imposed for the crime committed while on release, be imprisoned for a term of not less than five (5) years nor more than twenty-five (25) years.

9 GCA § 80.37.1(a) (2005).

[6] The Public Defender Service Corporation ("PDSC") was appointed as Guerrero's defense counsel. Guerrero asserted his right to a speedy trial and requested for a jury of twelve. Trial commenced on December 29, 2014.

B. Trial and Evidence Presented

[7] After submitting testimony from numerous witnesses during its case in chief, the prosecution requested the trial court to admit into evidence the Indictment ("Exhibit 47") and the Order of Conditional Release ("Exhibit 48") in Guerrero's previous felony case, People v.

Guerrero, CF0223-13. The trial court granted the prosecution's request, and defense counsel did not object to the admissions. However, defense counsel expressed his concern over the prosecution potentially questioning Guerrero as to the contents of Exhibit 47 or Exhibit 48 for purposes of impeachment under Rule 609. A discussion ensued and the trial court did not make a definitive ruling, but stated, "I want to let [the prosecutor] go and then I'm going to let defense counsel do what he needs to do." Transcript ("Tr.") at 98 (Jury Trial, Jan. 6, 2016).

[8] During Guerrero's case-in-chief, Guerrero testified that in the morning hours of November 18, 2014, while walking to his mom's house in Agana Heights, his friend Mike Guzman, Jr. drove by in a silver car and offered him a ride. Guerrero testified that Guzman made a stop at the Cliff Hotel and that roughly over an hour later, Guzman gave him permission to borrow the vehicle. Guerrero stated that he did not think it was odd that Guzman had a new vehicle and was unemployed. On redirect, Guerrero testified that he first learned that the car was stolen when he was arrested. He also testified that after Guzman gave him permission to borrow the vehicle, he drove towards Merizo through Umatac, in order to visit his sister because he was "supposed to do a project for water blasting the roof." *Id.* at 131. Guerrero also testified that he did not stop when signaled by the police officers because he was on probation for CF0223-13 and had not checked in for probation.

[9] The People of Guam (the "People") offered two rebuttal witnesses, an investigator from the PDSC and an investigator from the Attorney General's Prosecution Division, to attempt to disprove that a Mike Guzman, Jr. from Sinajana exists. The investigator for the PDSC testified that he was informed of a residence where a Mike Guzman, Jr. was known to reside; however, the residence appeared abandoned. The investigator for the AG testified that he could not locate a Mike Guzman, Jr. from Sinajana; the investigator was able to find a Mike Guzman, Jr. from

Talofofo, but the Guzman he found did not have the same physical characteristics as described by Guerrero in his testimony.

C. Closing Arguments and Jury Instructions

[10] Guerrero asserts the prosecution engaged in prosecutorial misconduct when it made numerous statements during closing which constituted improper vouching. Defense counsel did not object to any of the statements at the time they were made. In the defense's closing, Guerrero's probation was mentioned on numerous occasions. After the defense gave its closing argument, the trial court instructed the jury. The trial court also discussed the stipulated fact of Guerrero's felony release during its enunciation of the instructions. Trial counsel did not object to the recitation.

D. Verdict, Sentencing, and Appeal

[11] The jury acquitted Guerrero of Theft of a Motor Vehicle (As a Second Degree Felony); Burglary to a Motor Vehicle (As a Second Degree Felony); and Theft (As a Second Degree Felony). Guerrero was found guilty of Theft by Receiving (As a Second Degree Felony); Theft (As a Misdemeanor), as a lesser-included offense of Theft (As a Second Degree Felony); Fraudulent Use of a Credit Card (As a Misdemeanor); Eluding a Police Officer (As a Misdemeanor); and a Special Allegation of Commission of a Felony while on Felony Release.

[12] At the sentencing hearing, the trial court asked the parties to state their positions with respect to the applicability, if any, of this court's opinion in *People v. Quitugua*, 2015 Guam 27, which was issued days before the sentencing. Defense counsel responded that the introduction of evidence showing Guerrero was on pre-trial release at the time of the incident was much more prejudicial than probative and that such evidence should not have been admitted. The People did not comment on the matter, stating that they were unfamiliar with the case. The trial court

indicated it analyzed the *Quitugua* decision applying the facts of Guerrero's case and found that "the court accepted the stipulation of the parties in this case" and that "the court in this case followed the guidance referenced in *Quitugua*." *See* Record on Appeal ("RA"), tab 70 at 1 (Mins., Sept. 1, 2015).

[13] Guerrero was sentenced to a total term of ten years, which included: (i) five years for Theft by Receiving; (ii) one year for the lesser included offense of Theft (As a Misdemeanor) to run concurrently with the sentence for Theft by Receiving; (iii) one year for Fraudulent Use of a Credit Card (As a Misdemeanor), also to run concurrently with the sentence for Theft by Receiving; and (iv) five years for the Special Allegation to run consecutively with the other five-year term.

[14] The trial court filed its judgment, and Guerrero timely appealed.

II. JURISDICTION

[15] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 115-40 (2017)); 7 GCA §§ 3107(b) and 3108(a) (2005); and 8 GCA §§ 130.10 and 130.15(a) (2005).

III. STANDARD OF REVIEW

[16] "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*." *Quitugua*, 2015 Guam 27 ¶ 32 (citing *People v. Muritok*, 2003 Guam 21 ¶ 42).

[17] "When an objection is not brought at trial, 'errors or defects affecting substantial rights' are subject to review for plain error." *Id.* ¶ 34 (quoting *People v. Quitugua*, 2009 Guam 10 ¶ 10) (citing 8 GCA § 130.50(b) (2005)). If a defendant fails to object to a prosecutor's comments at trial, we also apply a plain error standard of review. *See People v. Mendiola*, 2010 Guam 5 ¶ 11

(citing *People v. Moses*, 2007 Guam 5 ¶ 8). "Reversal for plain error is warranted if the defendant shows '(1) there was an error; (2) the error was clear or obvious under current law; (3) the error affected substantial rights[;] and (4) a miscarriage of justice would otherwise occur.'" *Moses*, 2007 Guam 5 ¶ 8 (quoting *People v. Campbell*, 2006 Guam 14 ¶ 11) (citing *People v. Evaristo*, 1999 Guam 22 ¶ 24); *see also Quitugua*, 2009 Guam 10 ¶ 11 (citations omitted). "The appellant bears the burden to demonstrate that a reversal is warranted." *Quitugua*, 2009 Guam 10 ¶ 11 (citations omitted).

[18] "Ineffective assistance of counsel claims are mixed questions of law and fact, which we review *de novo*." *People v. Meseral*, 2014 Guam 13 ¶ 13 (citing *Angoco v. Bitanga*, 2001 Guam 17 ¶ 7); *People v. Guerrero*, 2001 Guam 19 ¶ 11 (same) (citations omitted).

IV. ANALYSIS

A. Sixth Amendment – Right to an Impartial Jury

[19] On appeal, Guerrero first asserts that his Sixth Amendment right to an impartial jury was violated when the trial court improperly admitted evidence related to his prior felony release. First, Guerrero states there was prejudicial error by disclosing the stipulation in the jury instructions and reading this instruction to the jurors. *See* Appellant's Br. at 11-13 (Jan. 4, 2016). Second, Guerrero claims he was prejudiced by the admission of Exhibits 47 and 48 into evidence, by the People's discussion of these exhibits in its closing argument, and by the inclusion of the stipulation on the verdict forms. *Id.* at 12-13, 15. Guerrero maintains that since he waived his right to a jury trial regarding the fact of his felony release pursuant to a stipulation, it was plain error for the trial court to admit the stipulation into evidence. *See id.* at 13-17.

[20] The People disagree with Guerrero's assertion that he waived his right to have a jury determine whether he is guilty of every element of the crime with which he is charged.

Appellee's Br. at 10-12 (Jan. 8, 2016). The People maintain that the record does not support Guerrero's waiver of this right and the facts of the felony release were properly submitted to the jury. *Id.* The People further contend that the facts of *People v. Quitugua* are distinguishable. *Id.*

1. Realm of *Apprendi*

a. *Apprendi v. New Jersey*

[21] Pursuant to the Sixth Amendment of the United States Constitution, an accused enjoys the guarantee to be tried by an impartial jury. U.S. Const. amend. VI. This right, along with the Due Process Clause of the Fourteenth Amendment, extend to defendants tried in the courts of Guam. 48 U.S.C.A. § 1421b(u) (Westlaw current through Pub. L. 115-30 (2017)). These fundamental constitutional rights "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (alteration in original) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). In addition, "[o]ther 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." *Id.* at 490; *see also Quitugua*, 2015 Guam 27 ¶ 37 (same); *Muritok*, 2003 Guam 21 ¶ 43 (same). Therefore, facts that support a sentencing enhancement must be submitted to a jury and proved beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 494 n.19; *Quitugua*, 2015 Guam 27 ¶ 37.

[22] In addition to the six listed charges in the superseding indictment, Guerrero was also charged with a "Special Allegation" pursuant to 9 GCA § 80.37.1. RA, tab 24 at 3 (Superseding Indictment, Dec. 23, 2014). Title 9 GCA § 80.37.1(a) states that "[w]hoever commits a felony punishable under the laws of Guam while on release on a felony charge . . . shall, *in addition to the sentence imposed for the crime committed while on release*, be imprisoned for a term of not

less than five (5) years nor more than twenty-five (25) years." 9 GCA § 80.37.1(a) (emphasis added). Because a conviction under this special allegation increases a sentence term, any facts that support the sentencing enhancement under 9 GCA § 80.37.1(a) fall within the province of *Apprendi*. *See Apprendi*, 430 U.S. at 490. In order for a conviction under the sentencing enhancement to pass constitutional muster, the prosecution had the burden to prove Guerrero was on felony release when he committed the alleged felonies. Introduction and admission of evidence related to his felony release would generally be proper.

[23] Introduction of evidence related to the felony release may be improper, however, if Guerrero exercised a valid waiver of his *Apprendi* right—what numerous courts have termed a "*Blakely* waiver." *See Blakely v. Washington*, 542 U.S. 296, 313 (2004); *see also Untied States v. Gil-Quezada*, 445 F.3d 33, 35 (1st Cir. 2006); *United States v. Leach*, 417 F.3d 1099, 1102 (10th Cir. 2005).

b. *Blakely* Waiver

[24] Four years after *Apprendi*, the Court reaffirmed that a prosecutor must prove to the jury "all facts legally essential to the punishment." *Blakely*, 542 U.S. at 313. In *Blakely*, the Court pronounced that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 302 (citing *Ring v. Arizona*, 536 U.S. 584, 602 (2002); *Harris v. United States*, 536 U.S. 545, 563 (2002) (plurality opinion), *overruled by Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013)); *see also United States v. Booker*, 543 U.S. 220, 231 (2005) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable

doubt." (quoting *Ring*, 536 U.S. at 602)). The Court rejected the argument that "*Apprendi* works to the detriment of criminal defendants" by expressing that

> nothing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads 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. . . . 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 (citations omitted). A requisite valid waiver must be procured in order for a defendant to enjoy the benefits of waiving his or her *Apprendi* rights. *See id.* ("If appropriate waivers are procured, States may continue to offer judicial factfinding . . . .").

[25] It is deeply rooted in United States jurisprudence that a waiver of a constitutional right must be done knowingly, intelligently, and voluntarily. *See, e.g.*, *Barker v. Wingo*, 407 U.S. 514, 529 (1972) (finding waiver of the fundamental right to a speedy trial must be made knowingly and voluntarily); *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969) (finding plain error when trial judge accepted guilty plea without a showing that it was intelligent and voluntary); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (holding that if government solicits incriminating statements from an accused without an attorney present, government must demonstrate the defendant knowingly and intelligently waived his privilege against self-incrimination and right to counsel).[2] As a result, as the United States Supreme Court stated in *Johnson v. Zerbst*, "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional

[2] "[T]he constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

relinquishment or abandonment of a known right or privilege." 304 U.S. at 464 (footnotes and internal quotation marks omitted).

[26] Because the Sixth Amendment protects a defendant's fundamental right to have a jury determination of facts that may alter the defendant's sentence, waiver of the right must also be made with "express, intelligent consent, and agreed to by the People and the lower court." *Quitugua*, 2015 Guam 27 ¶ 42 (citing *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-78 (1942)). Once a waiver is made with express and intelligent consent, the defendant has procured a valid *Blakely* waiver and may utilize the benefits therefrom. *See Blakely*, 542 U.S. at 310 ("Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements . . . .").

c. *People v. Quitugua*

[27] In *Quitugua*, we addressed the issue of effectuating a *Blakely* waiver. *See generally Quitugua*, 2015 Guam 27. The defendant in *Quitugua* stipulated to the fact that at the time he committed the alleged crimes, he was released on bail for felony charges. *See id.* ¶ 14. Faced with the dilemma of whether to submit the stipulated facts to the jury, the trial court discussed the issue at length with trial counsel. *See id.* ¶¶ 14-22. Over the defense counsel's objection, the trial court permitted "the People to reference the fact of felony release and the stipulation." *Id.* ¶ 22.

[28] On appeal, we framed the issue as "whether *Apprendi v. New Jersey*, 430 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*." *Id.* ¶ 36 (emphasis added). We noted the bright-line rule from *Apprendi* and discussed a *Blakely* waiver. *See id.* ¶¶

37, 41 (quoting *Apprendi*, 530 U.S. at 490; *Blakely*, 542 U.S. at 310). In finding the defendant waived his *Apprendi* right, we reasoned:

> It is clear that [the defendant] 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.

Id. ¶ 43 (emphasis added). As a result, we found that the cumulative effect of these facts supported defendant's position that he had entered a valid waiver. *Id.* We concluded that the trial court committed error by not effectuating that waiver and permitting evidence of the felony release to be introduced to the jury. *Id.* ¶¶ 43-44.

2. Whether Guerrero Expressly and Intelligently Waived His *Apprendi* Right

[29] Guerrero maintains that the facts in his case are identical to the facts in *Quitugua*, and the Superior Court therefore abused its discretion and committed prejudicial error by allowing the disclosure of the parties' stipulation and other evidence concerning Guerrero's felony to be released to the jury. Appellant's Br. 15-17; Reply Br. at 6-7 (Jan. 22, 2016).

[30] The People rebut Guerrero's argument by emphasizing that Guerrero did not attempt to waive his *Apprendi* right. *See* Appellee's Br. at 6, 11-12. The People maintain that Guerrero's case is highly distinguishable from *Quitugua* and that "Guerrero's interpretation also suggests that rights under *Apprendi* can be waived by conduct, rather than through explicit knowing, voluntary and intelligent waiver. . . ." *Id.* at 11.

[31] We must therefore determine whether Guerrero expressly and intelligently waived his *Apprendi* right by entering into the stipulation. More specifically, by stipulating to the fact of the felony release, we must determine whether Guerrero knew of his *Apprendi* right and whether he intended to waive his right to have the jury deliberate over the stipulated fact of the felony

release and provide a verdict regarding the special allegation. *See generally Apprendi*, 530 U.S. 466; *see also Johnson*, 304 U.S. at 464.

[32] A review of the record indicates several distinguishing factors from *Quitugua*. The record is silent on whether Guerrero made an objection to the admission of facts relating to the felony release in the pre-trial phase, unlike the pre-trial conference objection made in *Quitugua*. *See, e.g.*, RA, tab 26 (Arraignment Hr'g, Dec. 24, 2014); RA, tab 27 (Pre-Trial Conference, Dec. 24, 2014); RA, tab 29 (Trial Mem., Dec. 24, 2014); *see generally Quitugua*, 2015 Guam 27 ¶¶ 14-22 (analyzing pretrial conference discussing stipulation between parties). During the trial court's admonitions to the jury, the court explained the effects of a stipulation whereby the jury was to believe that such facts are proven by a stipulated fact. Tr. at 5 (Jury Trial, Dec. 29, 2014). Guerrero did not comment or object to the notion that the jury would consider the stipulated facts. *See id.* At the end of the prosecution's case-in-chief, trial counsel moved to admit into evidence Exhibits 47 and 48, both evidencing that Guerrero was on felony release. Tr. at 88 (Jury Trial, Jan. 6, 2015). Guerrero did not object. *Id.* In fact, after the trial court allowed both exhibits into evidence, the trial court informed the jury of the purpose of the stipulated facts. *Id.* The court stated:

> The parties have agreed to certain records that are contained within the Superior Court of Guam that are relevant to the charges and that will be explained to you further with your jury instructions, okay? *So there's no need to put on witnesses to say these are the records of the Superior Court is really what they're doing*.

Id. (emphasis added). Stipulating to the fact of the felony release was for the purpose of eliminating the prosecution's obligation to prove the contents of and authenticate Exhibits 47 and 48. *Id.* Furthermore, the prosecution discussed the special allegation and reminded the jury of the contents of Exhibits 47 and 48 during its closing arguments. Tr. at 13-14 (Jury Trial, Jan. 8, 2015). Again, defense counsel did not object. *Id.* Instead, defense counsel in his closing

arguments also reminded the jury of the fact that Guerrero was on probation at the time of the alleged felonies. *Id.* at 33-34.

[33] Lastly, jury Verdict Forms 2, 4, 6, 8, and 10 required the jury to deliberate over the stipulated fact of the felony release and provide a verdict regarding the special allegation. *See, e.g.*, RA, tab 48 at 1 (Verdict Form 2, Jan. 12, 2015); RA, tab 50 at 1 (Verdict Form 4, Jan. 12, 2015); RA, tab 52 at 1 (Verdict Form 6, Jan. 12, 2015); RA, tab 54 at 1 (Verdict Form 8, Jan. 12, 2015); RA, tab 56 at 1 (Verdict Form 10, Jan. 12, 2015). There is no indication that defense counsel objected to the content of the verdict forms. This evidences that Guerrero had knowledge of the fact that the jury would deliberate on the stipulated fact of the felony release and that he did not consent to judicial fact-finding. The record also does not indicate that the court and the parties contemplated the effects of *Apprendi*, nor mentioned anything *Apprendi*-related other than at the sentencing hearing. This fact is highly distinguishable from the facts of *Quitugua* where both parties and the trial court specifically discussed *Apprendi* and its correlation to the stipulated fact of that defendant's felony release. *See Quitugua*, 2015 Guam 27 ¶¶ 16-22.

[34] Guerrero's Reply Brief points to three instances that support his argument that he procured a valid *Blakely* waiver. Reply Br. at 5-6. Guerrero first points to the fact that he made an oral motion *in limine*, outside of the jury's presence, to suppress any statement by Officer Manley indicating that he recognized Guerrero from Guerrero's criminal history. Reply Br. at 5; Tr. at 68-71 (Jury Trial Day 2, Dec. 30, 2014). The purpose of this motion was to prevent Officer Manley's testimony from implying Guerrero had a criminal past. Tr. at 68-71 (Jury Trial Day 2, Dec. 30, 2014). The trial court recognized the concern, and both the court and the prosecution resolved it in a manner that was acceptable to Guerrero. *Id.* Specifically, the

prosecution did not object to omitting the fact that Officer Manley recognized Guerrero from the Department of Corrections and agreed that the officer may simply say he recognized Guerrero from work. *Id.* We cannot say that Guerrero intended for this oral motion *in limine* to be a waiver of his *Apprendi* rights since it was simply a motion to suppress a certain part of Officer Manley's testimony for this isolated incident.

[35] Next, and perhaps Guerrero's strongest argument as to why the stipulation may have been for the purpose of waiving his *Apprendi* rights, is the fact that Guerrero objected to the prosecution discussing the indictment from Guerrero's other pending criminal case during the prosecution's cross-examination of Guerrero. Reply Br. at 5-6; Tr. at 96-98 (Jury Trial, Jan. 6, 2015). After the court questioned the prosecution on the value of the stipulation for the defense, defense counsel stated, "I don't want to stipulate to it, then." Tr. at 98 (Jury Trial, Jan. 6, 2015). Defense counsel's statement unambiguously shows that he did not want facts related to the indictment in Guerrero's other pending criminal case to be discussed during Guerrero's testimony. However, the purpose of this tactic illustrates that it was not for the intent of waiving Guerrero's *Apprendi* rights. *Id.* at 96-98. Before Guerrero was sworn in to testify, defense counsel explicitly stated that he objected to its introduction for purposes of "impeachment by evidence of a criminal conviction." *Id.* at 96-97. Discussion of the indictment and the defense counsel's statement about withdrawing the stipulation ensued thereafter. *Id.* at 98. Therefore, the reason for defense counsel's statement with respect to withdrawing the stipulation (made after the prosecution stated it would likely bring in the indictment) was because he did not want Guerrero's testimony to be impeached. *Id.* at 96-97. Again, this objection does not allude to any waiver of the *Apprendi* right, and we cannot conclude as much.

[36] Lastly, Guerrero relies on another objection made during the prosecution's cross-examination of Guerrero. Reply Br. at 6; Tr. at 125-26 (Jury Trial Day 5, Jan. 6, 2015). In response to the prosecution's question regarding why he did not pull over when the police tried to stop him, Guerrero testified that "I didn't check in for probation." *See* Tr. at 125-26 (Jury Trial Day 5, Jan. 6, 2015). In the middle of the prosecution's follow-up question—"And when you mention probation, is your probation for CF-," *id.*—defense counsel objected on the grounds of redundancy, implicitly indicating that Guerrero already stipulated to the fact of the felony release. *Id.* The trial court overruled the objection since Guerrero offered it as testimony and permitted the prosecution to clarify "what probation is." *Id.* at 126. A review of this objection indicates that when Guerrero used "redundancy" as grounds for the objection, his intent for excluding such evidence was in relation to Exhibits 47 and 48's previous admission into evidence. Therefore, we cannot reasonably presume Guerrero's objection was a waiver of his *Apprendi* rights when he advanced redundancy as the grounds for objection.

[37] Despite Guerrero's contentions, the cumulative effect of these three objections along with the facts discussed in the preceding paragraphs do not support the conclusion that Guerrero expressly and intelligently waived the right to a jury trial as to the sentencing enhancement.

[38] Based on the record, we cannot conclude that Guerrero intended to waive his *Apprendi* rights by simply stipulating to the fact of the felony release without any indication that it was his conscious objective that all such facts not be brought to the jury's attention. In other words, the record does not support a holding that Guerrero waived his *Apprendi* rights intelligently, knowingly, and voluntarily. The conclusion in this matter is not aimed at punishing a defendant by affirming the admission of evidence of what may otherwise be a prejudicial fact against an accused. Rather, the court reaffirms longstanding precedent that a defendant's waiver of a

constitutional right must be done expressly and intelligently and agreed to by the People and the trial court. *See Barker*, 407 U.S. at 529; *see also Adams*, 317 U.S. at 277-80; *Quitugua*, 2015 Guam 27 ¶ 42. It would seem imprudent for us to conclude that Guerrero waived his *Apprendi* right simply based on Guerrero's three objections that, in effect, do not speak to any intentions regarding *Apprendi* or forgoing the jury's knowledge or determination of the stipulated facts. *See Boykin*, 395 U.S. at 242-43 ("Presuming waiver from a silent record is impermissible. . . . We cannot presume a waiver of [the right to a jury trial] from a silent record." (citations and internal quotation marks omitted)).

[39] Therefore, we find that Guerrero did not expressly and intelligently waive his *Apprendi* rights, where such facts of the felony release were still required to be submitted to the jury in accordance with *Apprendi*. The prosecution's presentation of those facts and the trial court permitting such facts to be disclosed to the jury for deliberations did not deprive Guerrero of his Sixth Amendment right to an impartial jury.

B. Fifth Amendment – Right to Due Process and Prosecutorial Misconduct

[40] Guerrero alleges he was denied his Fifth Amendment right to due process when the prosecution made nine statements during its closing argument that allegedly constitute improper prosecutorial misconduct by vouching. *See* Appellant's Br. at 10-11, 17-21.

[41] The People contend that since counsel properly discussed the inferences that could have been drawn from the evidence that was presented to the jury at trial, the prosecutor did not engage in improper evidentiary summation. Appellee's Br. at 12, 14. "The fact that the People's counsel used a first person pronoun in suggesting what inferences should be drawn from the evidence presented in the case" only comments on the evidence presented at trial and is not prosecutorial misconduct. *Id.* at 13.

[42] Because Guerrero failed to raise this objection at trial, we review for plain error. *See Mendiola*, 2010 Guam 5 ¶ 13 (citing *Moses*, 2007 Guam 5 ¶ 8); *People v. Ueki*, 1999 Guam 4 ¶ 17. "Plain error is highly prejudicial error." *Mendiola*, 2010 Guam 5 ¶ 14 (quoting *Quitugua*, 2009 Guam 10 ¶ 11); *see also Evaristo*, 1999 Guam 22 ¶ 23. Reversal is "warranted when the errors seriously affect the fairness, integrity or public reputation of judicial proceedings." *Mendiola*, 2010 Guam 5 ¶ 14 (citing *Evaristo*, 1999 Guam 22 ¶ 23). To prevail on his prosecutorial misconduct claim, Guerrero must prove that the prosecutor's comments "so infected the trial with unfairness as to make [his] resulting conviction a denial of due process." *People v. Blas*, 2015 Guam 30 ¶ 30 (quoting *Evaristo*, 1999 Guam 22 ¶ 20) (internal quotation marks omitted); *see also People v. Torres*, 2014 Guam 8 ¶ 58; *Mendiola*, 2010 Guam 5 ¶ 12. "The fact that the prosecutor's remarks to a jury may have been undesirable or even universally condemned is not tantamount to a constitutional violation." *Torres*, 2014 Guam 8 ¶ 58 (quoting *Moses*, 2007 Guam 5 ¶ 28) (internal quotation marks omitted).

[43] Under plain error review, we must first determine whether the People committed prosecutorial misconduct. To do so, it is necessary that we begin by analyzing whether the prosecutor's statements constitute vouching. "Improper '[v]ouching occurs when the government places the prestige of the government behind the witnesses through personal assurances of their veracity. . . .'" *Mendiola*, 2010 Guam 5 ¶ 16 (alteration in original) (quoting *Moses*, 2007 Guam 5 ¶ 16); *see also Ueki*, 1999 Guam 4 ¶ 19. "Vouching of that sort is dangerous precisely because a jury 'may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled.'" *Mendiola*, 2010 Guam 5 ¶ 16 (quoting *United States v. Weatherspoon*, 410 F.3d 1142, 1147 (9th Cir. 2005)).

[44] The People's statements during closing which Guerrero alleges constitute improper vouching include the following:

(A) "On the surveillance video in Sinajana 76 you can see a man with a slim build walk up to another guy of like a heavier build next to the pump. I submit to you the Defendant, walking from the silver Ford Fusion is the Defendant, Kevin Guerrero." Tr. at 11-12 (Jury Trial Day 7, Jan. 8, 2015).

(B) "I submit to you they just forgot what the last four digits of that particular credit card number was." *Id.* at 15.

(C) "I submit that it is a person of slim build which matches the description of Mr. Guerrero." *Id.*

(D) "So if for some reason the Defendant's trying to say that the police officers did a poor or shoddy investigation, I submit that they're investigation actually worked because they actually found the car with the Yona Mobile Receipt in it, which means that was the vehicle used in both gas stations." *Id.* at 16.

(E) "I submit to you that Mike Guzman, Jr. does not exist. This is the evidence that we put forth that Mike Guzman, Jr. does not exist." *Id.* at 17.

(F) "Also, if you look at the surveillance, the individual who has the slim build, I submit that that's not Mike Guzman, Jr., because he's shorter than five seven." *Id.* at 18.

(G) "[Guerrero] said he took it back later, but I recall because I wrote it down, . . . that he said he was going to Merizo to water blast the roof. He said that he didn't know anything was stolen because he didn't make a check of the vehicle which had the Yona Mobil receipt in the inside, the broken spark plugs everywhere, the three gas containers in the trunk. He didn't make a check because he didn't ask his [Mike Guzman Jr.] whether the cars were stolen." *Id.* at 19.

(H) "Again, I submit to you that we submitted enough evidence that the Defendant did indeed know that the car was stolen in the event that you don't think he was actually the one that stole the car." *Id.*

(I) "I submit to you that all the evidence has shown in this case that the Government has proven beyond a reasonable doubt, has unlocked the facts to this case to connect all the dots together to put the pieces of the puzzle together and prove to you that the Defendant, Kevin Anthony Guerrero, did commit the offense of theft of a motor vehicle, burglary to a motor vehicle, theft of property, eluding a police officer, fraudulent use of a credit card, all while he was on felony release for other felonies." *Id.* at 20.

Appellant's Br. at 18-19. For statements (B), (D), (H), and (I), Guerrero contends that the "prosecutor injected her personal opinion to cover up holes in the testimony of the Government witnesses." *Id.* at 20. For these statements, other than (H), he also claims that the "prosecutor does not reference any corroborating evidence or ask for reasonable inferences, instead [the prosecutor] specifically states that in her opinion, some of the government's witnesses could not remember specific facts because they forgot them and she gives her personal opinion that GPD's investigation was sufficient . . . ." Reply Br. at 8.

[45] For statements (A), (C), and (F), Guerrero maintains that the "prosecutor injected her personal opinion that the barely visible image in the surveillance [video] was Guerrero" and did not reference any corroborating evidence or ask the jury to draw any inferences. Appellant's Br. at 20; Reply Br. at 7-8.

[46] For statements (E), (F), and (G), Guerrero alleges that the prosecutor inserted her personal opinion that Guzman, Jr. did not exist and made those statements to discredit Guerrero's testimony that he received the silver Ford Fusion from Mike Guzman, Jr. *See* Appellant's Br. at 20. He also claims that the prosecutor states her opinion that Guerrero "lied during his testimony without any discussion of the evidence and without asking the jury to draw reasonable inferences." Reply Br. at 8.

1. "I submit" Cases

[47] A common theme in the prosecutor's statements was the use of the phrase, "I submit." *See* Tr. at 11-20 (Jury Trial Day 7, Jan. 8, 2015). A number of courts have addressed the issue of whether the prosecution's use of the phrase "I submit" during closing arguments constitutes improper vouching and therefore interjects error.

[48] In *United States v. Bentley*, the Eight Circuit did not find plain error when the prosecution stated, "You have to decide whether you believe these witnesses . . . . Is it more likely than not that those witnesses were telling the truth? And I submit that it is more likely that they were telling the truth . . . ." 561 F.3d 803, 814 (8th Cir. 2009), *cert. denied*, 558 U.S. 865 (2009). The court reasoned that "[w]hile [the court] ha[s] expressed concern about the prosecutor's use of the phrase 'I submit,' here the prosecutor's argument focused on credibility evidence and the jury's role in determining credibility, not the prosecutor's personal opinion of the witness' credibility." *Id.*

[49] Another case, *United States v. Eltayib*, also provides guidance on this issue. *See* 88 F.3d 157 (2d Cir. 1996), *cert. denied*, 519 U.S. 1045 (1996). In *Eltayib*, the defendant alleged prosecutorial misconduct when prosecutor's summation prefaced arguments that witnesses' testimonies were reliable and credible with the phrase, "I submit that." *Id.* at 172. After cautioning on a prosecutor's use of the word "I" in closing arguments,[3] the court stated that using the pronoun "I" does not automatically imply improper vouching. *Id.* at 173. The court reviewed its precedent[4] and determined that the prosecutor's use of the phrase "I submit that"

[3] The *Eltayib* court stated that "[t]he problem with a prosecutor's use of the pronoun 'I' is that it 'tends to make an issue of [the prosecutor's] own credibility, or to imply the existence of extraneous proof.'" 88 F.3d at 172 (second alteration in original) (quoting *United States v. Rivera*, 22 F.3d 430, 438 (2d Cir. 1994)). "It is strictly 'improper for a prosecutor to interject personal beliefs into a summation,' and we have therefore stressed that 'it is a poor practice for prosecutors to frequently use rhetorical statements punctuated with excessive use of the personal pronoun 'I.'" *Id.* (quoting *United States v. Nersesian*, 824 F.2d 1294, 1328 (2d Cir. 1987), *cert. denied*, 484 U.S. 958 (1987)).

[4] The court discussed several cases where the prosecution used the pronoun "I" in its closing arguments. *See Eltayib*, 88 F.3d at 173. The court cited *Nersesian*, 824 F.2d at 1328, which indicated that phrases such as "I think it is clear" or "Does it make sense – I think it does," although not acceptable, do not merit reversal unless the summation when viewed as a whole reflects improper vouching. *Id.* Turning to the case *United States v. Modica*, 663 F.2d 1173, 1177-78 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982), the court noted its previous finding that "I suggest that" was proper, "because it shied away from outright endorsement[,]" but the use of the phrase "I'm here to tell you that" was impermissible because it "conveyed to the jurors [the prosecutor's] personal view that a witness spoke the truth." *Id.* (internal quotation marks omitted). Lastly, the court cited *Rivera*, 22 F.3d at 438, which found the use of the phrase "I submit to you that" acceptable because defense counsel accused a government witness of fabrication and the prosecution was permitted to counter any challenge to its integrity or the integrity of its case. *Id.*

was not improper because defense counsel attacked the witness's credibility in its closing argument and the prosecution was entitled to respond with counter-arguments. *Id.* The court reasoned that the prosecution followed its use of the phrase "I submit that" by either relying on evidence in the case to corroborate the witness's testimony or by asking the jurors to draw inferences based on their common sense. *See id.* The follow-up statements indicated that the prosecution did not interject the prosecutor's personal beliefs or opinions into the argument. *See id.* The court concluded that "the phrase 'I submit' expresses not a personal belief but a contention, an argument, which, after all, is what a summation to the jury is meant to be. . . . [T]he phrase 'I submit' is not improper in these circumstances." *Id.*[5]

2. Statements (A)-(I)

[50] In the instant appeal, the prosecutor either prefaced or followed her use of the phrase "I submit that" with reference to evidence that was presented at trial. The prosecutor engaged in what appears as offering an interpretation of the evidence, where the jury may have drawn its own reasonable inference.

[51] For statement (A), the prosecutor said immediately thereafter:

> Again, you will have that surveillance [video] to view for yourself. And again, [Guerrero] was indeed caught in a silver sedan one day later. . . . Officer Manley

[5] The Supreme Court of Wyoming has addressed similar issues. For example, in *Mayer v. Wyoming*, during the prosecution's rebuttal closing argument, the prosecutor said, "I submit that the defendant . . . had a license to kill anybody who could have driven by at that time that night . . . ." 618 P.2d 127, 131 (Wyo. 1980). The court did not find reversible error, opining that the comment was not repeated or given other emphasis, the court instructed the jury to disregard as evidence any statement made by counsel and that "[i]n closing arguments, counsel may comment on the state of the evidence as a help to the jury in understanding it and applying the law to it." *Id.* at 131-32 (citations omitted).

In *Barnes v. Wyoming*, the same court also did not find error when the prosecution said the following: "I submit to you that simply is not true" and "I submit to you that [defendant] has been a thief, is a thief. He stole these items and not only that, I submit that he's a liar and we have shown everything necessary to prove that he's a thief and that you should convict him . . . ." 642 P.2d 1263, 1265 (Wyo. 1982). The court stated that the prosecutor's statements "were no more than comments on the state of the evidence . . . [and] the evidence discloses a reasonable inference that he was not truthful in his testimony and he was in fact a thief." *Id.* at 1265-66 (citing *Mayer*, 618 P.2d at 127).

> testified to you that we all know that the person who was driving the Ford Fusion was involved because the Yona Mobile gas receipt is [sic] in the center console.

Tr. at 12 (Jury Trial Day 7, Jan. 8, 2015). The prosecutor made statement (A) as part of a discussion of the evidence.

[52] Before statement (C), the prosecutor again pointed to the evidence already offered, stating, "I really urge you to look at the build of the person in the Sinajana 76 [surveillance] footage and the build of the person in the Guam AutoSpot footage and match them, because I submit that it is a person of slim build which matches the description of Mr. Guerrero." *Id.* at 15.

[53] The prosecutor preceded statement (B) with "because you are allowed to evaluate the credibility of the witnesses to see whether they're lying or not, or you can just judge it as an innocent lapse of memory, which I submit to you they just forgot what the last four digits of that particular credit card number was." *Id.* at 15. The prosecutor was acknowledging the jury's role as factfinder when she asked the jurors to draw their own inferences.

[54] We also cannot conclude that statement (E) was improper vouching because after making this statement the prosecutor summarized testimony from both Mr. Marquez (the PDSC investigator) and Mr. Macalma (the Office of the Attorney General investigator) indicating they each individually attempted to locate, and failed to find, a Mike Guzman, Jr. *Id.* at 17. The prosecutor articulated:

> This is the evidence that we put forth that Mike Guzman, Jr. does not exist. Mr. Marquez, who is the investigator for Public Defender, he said to you that he tried to locate Mr. Guzman on December 29, 2014, the first day we started trial. He went out to the house and it was abandoned. The Defendant had told everyone that the -- Mike Guzman was located in Afame, Sinajana. But there was no Michael Guzman, Jr. from Afame, Sinajana. Mr. [Macalma] also -- from the AG's office -- also told you he ran names on the system that we use at the office, and there is no Mike Guzman, Jr. that fits the description of what the Defendant was saying, which is -- I believe the Defendant is saying he is 5'7", about 140 to 150 pounds. There is no Mike Guzman, Jr., nobody has found Mike Guzman, Jr., and the only person who could -- we could link to all the crimes charged in this

> indictment was [Guerrero]. Also, if you look at the surveillance, the individual who has the slim build, I submit that that's not Mike Guzman, Jr., because he's shorter than 5'7". So again, just look at that video surveillance.

Id. at 17-18. The prosecutor was referring to the evidence and summarizing what the jury had already heard. Furthermore, the jury may have drawn this reasonable inference.

[55] With regards to (D), (H), and (I), the prosecution made these statements as part of a longer discussion of evidence already presented to the jury. These statements consist of reasonable inferences the jury may have made when considering such evidence. The prosecution also discussed as part of statement (F) admitted evidence and the People drew a reasonable inference from that evidence. The prosecutor also informed the jury to look to the evidence so that it may draw its own inferences. *See id.* at 17-18.

[56] Lastly, Guerrero omitted a vital portion of statement (G) in his brief. *See* Appellant's Br. at 18-19. In context, statement (G) should state in its entirety:

> [Guerrero] said he took it back later, but I recall because I wrote it down, *but your memory and your notes control*, that he said he was going to Merizo to water blast the roof. He said that he didn't know anything was stolen because he didn't make a check of the vehicle which had the Yona Mobil receipt in the inside, the broken spark plugs everywhere, the three gas containers in the trunk. He didn't make a check because he didn't ask his friend (Mike Guzman Jr.) whether the cars were stolen.

Id. (emphasis added). The prosecution not only made a reasonable inference from the evidence presented at trial, but also prefaced its comments by reminding the jury of its role as factfinder and that its collective memory and notes control, not what the prosecution states.[6] *Id.* For these

[6] We also note that when the prosecution began her closing arguments, she reminded the jurors that they were to draw their own inferences, and not take the prosecutor's statements as controlling. The prosecutor stated the following:

> Now you will be instructed that your memory controls, not mine. So whenever -- if I state [a] fact and you don't recall that, then use your memory because your memory controls. You will also be allowed to make inferences. If there's a disputed fact, you can infer that disputed fact goes a certain way based on your knowledge of another fact.

reasons, we find that none of the prosecutor's comments offered personal opinion. Rather, each offered an interpretation of the evidence that the jury was free to accept or reject.

[57] We do not condone the use of the pronoun "I" in a prosecutor's closing statements, and it is not good practice for prosecutors to continually use that pronoun. In the instant case, however, the prosecutor's statements using the phrase "I submit that" do not constitute improper vouching. Accordingly, under plain error review, we find no error by prosecutorial misconduct. Therefore, Guerrero was not deprived of his constitutional right to due process and a fair trial.

C. Ineffective Assistance of Counsel

[58] The Sixth Amendment provides that an accused shall enjoy the right to have the "Assistance of Counsel for his defen[s]e." U.S. Const. amend. VI. Guerrero claims on appeal that this right was violated because his convictions were largely due to his trial counsel providing ineffective assistance. Appellant's Br. at 21.

[59] Generally, we employ the *Strickland* two-part test established by the United States Supreme Court to determine whether a defendant was deprived of the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also People v. Damian*, 2016 Guam 8 ¶ 28 (citations omitted); *Meseral*, 2014 Guam 13 ¶ 45 (citations omitted). Under the *Strickland* test, a defendant must prove that: (1) trial counsel's performance was so deficient as to fall below the prevailing professional norms; and (2) the deficient performance so prejudiced the defendant as to deprive him of a fair trial. *Strickland*, 466 U.S. at 687, 694; *see also Damian*, 2016 Guam 8 ¶ 28; *Meseral*, 2014 Guam 13 ¶¶ 45-46.

[60] An ineffective assistance of counsel claim may be brought on direct appeal if the record is sufficiently complete to make a proper finding. *See Damian*, 2016 Guam 8 ¶ 29 (citation

Tr. at 3 (Jury Trial Day 7, Jan. 8, 2015).

omitted); *see also Meseral*, 2014 Guam 13 ¶ 13 (citing *Moses*, 2007 Guam 5 ¶ 9). Such claims, however, are more properly brought as a writ of habeas corpus. *See Damian*, 2016 Guam 8 ¶ 29; *see also Meseral*, 2014 Guam 13 ¶ 13 (citing *Ueki*, 1999 Guam 4 ¶ 5). "Courts will often decline to reach the merits of ineffective assistance of counsel claims because such claims are 'more appropriately addressed in a habeas corpus proceeding because it requires an evidentiary inquiry beyond the official record.'" *Meseral*, 2014 Guam 13 ¶ 13 (quoting *Ueki*, 1999 Guam 4 ¶ 5).

[61] Guerrero maintains that the record was sufficient to show his convictions are largely due to the ineffective assistance of counsel because 41 days passed between the arrest and the start of trial. *See* Appellant's Br. at 21; *see also* Reply Br. at 8-9. He claims that in this short period of time, defense counsel did not meet with him to discuss the defenses for trial and did not list Mike Guzman, Jr. as a witness or locate him prior to trial. *See* Appellant's Br. at 22; *see also* Reply Br. at 8-9. Guerrero also claims defense counsel's failure to object to each instance of the prosecution's alleged inappropriate vouching constituted conduct that fell below the prevailing professional norms. *See* Appellant's Br. at 22.

[62] "In reviewing a claim of ineffective assistance of counsel, the decisions of trial counsel are accorded much deference." *Guerrero*, 2001 Guam 19 ¶ 11 (citations omitted). "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *People v. Quintanilla*, 1998 Guam 17 ¶ 9 (quoting *Strickland*, 466 U.S. at 690). Also, "[i]n rendering effective assistance, counsel is not required to put forth every conceivable argument 'regardless of merit.'" *Angoco*, 2001 Guam 17 ¶ 9 (citing *Evitts v. Lucey*, 469 U.S. 387, 394 (1985)). In addition, we have previously stated that "where counsel consciously decides to omit a defense or pursue a certain argument, such conduct is deliberate strategy, and a choice of strategy that

backfires is not the equivalent of ineffective assistance of counsel." *Id.* (citations omitted); *see also Damian*, 2016 Guam 8 ¶ 31.

[63] We have already determined that the prosecutor's statements were not improper vouching. The prosecution was engaged in summation of the evidence and encouraged the jurors to draw their own inferences based on the evidence already presented before them. Therefore, it was not improper or ineffective for defense counsel to not object to the prosecutor's statements. Thus, with respect to this claimed error, Guerrero did not receive prejudicial ineffective assistance of counsel. As for the other alleged deficiencies involving trial counsel's performance, the record is not sufficient to make a finding.

V. CONCLUSION

[64] We find that Guerrero did not exercise a proper waiver of his *Apprendi* right to have the jury determine beyond a reasonable doubt the facts required to impose the sentencing enhancement at issue during trial. Introduction and admission of evidence regarding the stipulated facts of his felony release were not improper, and Guerrero was therefore not denied his Sixth Amendment right to an impartial jury in this regard.

[65] We also find that the prosecution's statements during closing were not vouching. The prosecutor directed the jurors' attention to evidentiary discussions, drew reasonable inferences from the evidence already presented at trial, and reminded the jurors of their role as factfinders and that they must draw their own conclusions from the evidence. The statements constitute summation of the evidence, not improper vouching. The prosecutor did not engage in misconduct, and thus, Guerrero was not denied his rights to due process and a fair trial.

[66] Guerrero's ineffective assistance of counsel claim regarding defense counsel's failure to object to the prosecution's alleged vouching fails because those statements were not

inappropriate. The remainder of Guerrero's ineffective assistance claim, however, is best brought in a habeas corpus proceeding. The record is not sufficient to make a finding on the remaining issues presented by Guerrero in this appeal.

[67] Accordingly, Guerrero's convictions are **AFFIRMED**.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice