IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

RICHARD A. QUINATA,
Defendant-Appellant.

OPINION

Cite as: 2010 Guam 17

Supreme Court Case No.: CRA08-011
Superior Court Case No.: CF0372-04

Appeal from the Superior Court of Guam
Argued and submitted on May 21, 2009
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; RICHARD H. BENSON, Justice *Pro Tempore*.

TORRES, C.J.:

[1] Defendant-Appellant Richard Allen Quinata appeals from a final judgment convicting him of several counts of First Degree Criminal Sexual Conduct (As a 1st Degree Felony). Quinata argues that the convictions should be reversed on the grounds that they were barred by the Double Jeopardy Clause because the trial court granted his motion for judgment of acquittal on certain Second Degree Criminal Sexual Conduct charges. He also appeals the denial of his motion in limine to exclude DNA evidence and testimony of the prosecution's DNA expert. Finally, he appeals the trial court's imposition of a $50,000.00 fine.

[2] We find no violation of Quinata's rights under the Double Jeopardy Clause because the trial court's ruling on Quinata's acquittal motion did not actually constitute an "acquittal" as it is defined by the United States Supreme Court; therefore, the jury was not precluded from convicting Quinata of First Degree Criminal Sexual Conduct. Moreover, the trial court did not abuse its discretion in denying Quinata's motion in limine to exclude DNA evidence because Quinata did not demonstrate he was surprised or unfairly prejudiced by the substance of the DNA expert's testimony. The trial court, however, abused its discretion in sentencing Quinata to pay a fine of $50,000.00 without first determining whether he had the ability to pay such amount. Accordingly, we affirm Quinata's convictions but vacate the fine imposed and remand for a hearing to determine his ability to pay.

I. PROCEDURAL BACKGROUND

[3] Quinata was indicted by the grand jury on November 5, 2004, for the following charges:

Charge One:	Twenty-five (25) counts of Second Degree Criminal Sexual Conduct (As a 1st Degree Felony);
Charge Two:	Twenty-two (22) counts of First Degree Criminal Sexual Conduct (As a 1st Degree Felony);
Charge Three:	Four (4) counts of First Degree Criminal Sexual Conduct (As a 1st Degree Felony);
Charge Four:	Four (4) counts of Second Degree Criminal Sexual Conduct (As a 1st Degree Felony);
Charge Five:	One (1) count of Second Degree Criminal Sexual Conduct (As a 1st Degree Felony); and
Charge Six:	Two (2) counts of Attempted Second Degree Criminal Sexual Conduct (As a 1st Degree Felony).

Appellant's Excerpts of Record ("ER") at 2-12 (Indictment, Nov. 5, 2004). Charges One and Four alleged that Quinata had intentionally engaged in sexual contact with his minor daughter, N.M.T., by causing his penis to touch her vagina. Charges Two and Three alleged that Quinata had intentionally engaged in sexual penetration with N.M.T. on the same dates alleged in Charges One and Four, respectively, with the exception of the first three counts of Charge One.[1]

[4] Upon the Government's motion and Quinata's acquiescence, the trial court issued an Order to Compel Discovery, ordering Quinata to submit to the taking of saliva for DNA analysis for the purpose of establishing the paternity of one of N.M.T.'s children. Quinata submitted to the specimen collection the following day. Saliva swabs were also collected from N.M.T. and her child. The results of the DNA analysis were a 99.99% probability that Quinata was the biological father of N.M.T.'s child. These results were transmitted to Quinata, and his current counsel received the results when he was appointed to represent Quinata in September 2006.

[1] Prior to trial, the Government moved to dismiss Charges Five and Six of the indictment. Quinata did not object to the dismissal of those charges. These charges are not relevant to any issue raised on appeal.

[5] The Government filed its Witness List on January 27, 2005. The list did not include the name of any witnesses who would testify from the laboratory which conducted the DNA analysis.

[6] Trial was originally scheduled for May 17, 2006. After several motions and reappointments of defense counsel, trial was eventually scheduled for August 6, 2007. On August 2, 2007, the Government requested a continuance of the trial date to allow an off-island witness to become available for trial. The trial court granted the continuance and advised the Government to file a witness list of those witnesses it expected to call at trial. On August 8, 2007, the Government filed its Amended Witness List, which included Cynthia J. Taves, Ph.D., from Lab Corporation of America. That list was served upon defense counsel on August 9, 2007.

[7] Jury selection began on August 13, 2007. On August 14 and 15, the Government provided defense counsel with documents concerning the DNA testing which the Government had just received from Dr. Taves.

[8] Opening statements were delivered on August 15, 2007. After the Government had called all of its witnesses, but before it rested its case, the jurors were excused for a recess. After the recess had expired, but still outside the presence of the jury, the Government announced to the trial court that it was resting its case. The court responded, "Okay. We'll wait until the jury comes out." Tr., vol. III at 22 (Jury Trial, Aug. 20, 2007).

[9] The court then asked defense counsel whether he was going to present any witnesses. Defense counsel responded that he was going to make a motion for acquittal first. The court then called the jury back, whereupon the Government rested its case. Defense counsel was then called upon to present its case, at which point he announced that he wished to make some

motions to the court. The court responded that it would reserve hearing the motion until after the defense's case. Upon a negative response from defense counsel, the court excused the jury again.

[10] Outside the presence of the jury, defense counsel explained to the court that on a motion for judgment of acquittal, the court must rule on the motion immediately if it is made at the close of the Government's case, whereas the court can reserve ruling on the motion if it is made at the close of the defendant's case. Defense counsel continued, "I mean, I don't – I don't have a problem if the court says the court will go ahead and rule, if we just send the jury home, I mean without – and we can rest. But, I mean, from a strategic standpoint, we would obviously want a decision." Tr., vol. III at 26 (Cont. Jury Trial, Aug. 20, 2007).

[11] The court then responded, "What we'll do is we'll go ahead and call in the jury. We will give you an opportunity to rest; we'll send them home; and then if we need to rule, we'll make our ruling before we begin arguments and the like by tomorrow." *Id.* at 26-27. Defense counsel responded, "Okay." *Id.* at 27.

[12] The jury was called back in. Defense counsel then stated, "Pursuant to our comments earlier, the Defense is also prepared to rest." *Id.*

[13] The trial judge announced that the presentation of evidence had ended, and excused the jury for the remainder of the day. The court then proceeded to hear the defendant's motions. On his motion for judgment of acquittal, the defense essentially argued that the Government had not met its burden to prove any of the charges against him because the Government had not "been able to indicate with any reasonable assumption as to during what 30 to 31-day period in gen – generally, and in some what five or six-day period that there was any sexual contact or sexual

penetration." *Id.* at 33. The defense reminded the court that N.M.T. had not been able to remember any specific dates as to when the alleged offenses occurred.

[14] The Government responded to the motion by arguing that although N.M.T. had not been able to recall any specific dates, her testimony did indicate the approximate period of time in which the offenses had occurred. The Government also argued that in any case, "[i]t is sufficient that if a jury can find that the acts were committed, they can deal with the lack of specificity of the dates due to the youthful nature of the victim." *Id.* at 35.

[15] After rebuttal by the defense, the trial court ruled on the motion for judgment of acquittal as follows:

> All right, this is what the court is going to do. I'm going to reserve until tomorrow my decision on some of these counts, but I am going to grant the motion for judgment of acquittal on Counts – of the First Charge, Counts Four through Twenty-five, and the court is also going to dismiss the Fourth Charge dealing with the sexual contact. The court is going to reserve until tomorrow on the Third Charge, as well as the Second . . . Second and Third Charges.
>
> All right, so we're dismissing the sexual contact for everything after August 1st, 2002; we'll reserve on the sexual penetration on Charges . . . Charge . . . Second and Third Charge.
>
> . . . .
>
> I'll say it one more time. We deny the motion on Counts One through Three of the First Charge; we grant the motion on Counts Four through Twenty-five of the First Charge. We will issue our ruling on Counts One through Twenty-two of the Second Charge, and Counts One through Four of the Third Charge tomorrow morning.
>
> We will grant the motion to . . . of acquittal, for judgment of acquittal on the Fourth Charge, Counts One through Four; and the Fifth and Sixth Charges have previously been dismissed. Okay?

Id. at 37-38. Defense counsel then asked, "And you'll have that in the morning? I mean, if --," to which the court responded, "Yes." *Id.* at 38.

[16] The following morning, outside the presence of the jury, the court announced that it "will deny the motion for judgment of acquittal on the remaining counts." Tr., vol. IV at 2 (Jury Trial, Aug. 21, 2007). Defense counsel responded, "Thank you, Your Honor." *Id.*

[17] The parties then proceeded to discuss the issue of jury instructions. They continued the discussion after a recess. At no point during these discussions did the defense object to the submission of the First Degree Criminal Sexual Conduct charges to the jury.

[18] After the jury was called in, both sides presented their closing arguments. After closing arguments, the court read aloud all of the jury instructions. Upon conclusion of the reading of the jury instructions, the court asked the parties if they had any objections to the instructions as read, to which defense counsel answered, "No problem, Your Honor." *Id.* at 113. The trial court then excused the jury for deliberations on the three remaining charges:

> Charge One: Three (3) counts of Second Degree Criminal Sexual Conduct (As a 1st Degree Felony);
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> Charge Two: Twenty-two (22) counts of First Degree Criminal Sexual Conduct (As a 1st Degree Felony); and
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> Charge Three: Four (4) counts of First Degree Criminal Sexual Conduct (As a 1st Degree Felony).

[19] After two days of deliberations, the jury returned a verdict of Not Guilty as to all counts of Charge One; a verdict of Guilty as to counts 1-15 and 18-22 of Charge Two; and a verdict of Guilty as to all counts of Charge Three.

[20] Quinata timely filed a post-verdict Motion for Judgment of Acquittal as to all of the charges of conviction, alleging that the continuation of the trial on the First Degree Criminal Sexual Conduct charges after the trial court had granted Quinata's earlier motion for judgment of acquittal as to corresponding Second Degree Criminal Sexual Conduct charges constituted

double jeopardy.[2] The trial court later issued its Decision and Order denying Quinata's post-verdict motion.

[21] Subsequently, the trial court sentenced Quinata to a term of life imprisonment for the conviction on Charge Two, with the possibility of parole after serving fifteen (15) years. As to the conviction on Charge Three, the trial court sentenced Quinata to a term of twenty (20) years imprisonment, to run concurrently with the life sentence for Charge Two. The trial court also imposed a fine against Quinata in the amount of $50,000.00. *Id.*

[22] Judgment was entered, and Quinata timely filed his Notice of Appeal.

II. FACTUAL BACKGROUND

[23] The events giving rise to the charges against Quinata related to the sexual assault of N.M.T., Quinata's minor daughter. The precise details are irrelevant to the legal points we must decide; thus, we shall describe them only generally. Testimony at trial established that Quinata had sexually assaulted N.M.T. from the time she was twelve years old in 2002 until she ran away from home at the age of fourteen. The initial assaults involved Quinata rubbing his hands and penis on N.M.T.'s vagina. The assaults eventually involved penetration by Quinata's penis into N.M.T.'s vagina. N.M.T. testified that the assaults occurred on a seemingly daily basis for two years, with certain intervals where it did not occur while she was pregnant.

[24] The assaults resulted in two pregnancies: the first occurred while N.M.T. was twelve years old; the second while she was fourteen. With the first child, N.M.T. was instructed by Quinata to tell people that the father of the baby was a boy who had left the island. N.M.T. ran

[2] *See* 8 GCA § 100.30 (2005) ("If a jury returns a verdict of guilty . . . a motion for judgment of acquittal may be made or renewed within seven days after the jury is discharged.").

away from home when she realized she was pregnant with her second child, after which point the assaults were reported to the police.

[25] At trial, the Government's expert witness, Cynthia Taves, Ph.D., of Lab Corporation of America, testified as to the process and results of a DNA paternity test conducted by Lab Corporation in order to determine whether Quinata had fathered the second of N.M.T.'s children. Dr. Taves testified that the results indicated that Quinata was 99.99% likely to be the father of N.M.T.'s second child.

III. JURISDICTION

[26] This court has jurisdiction over appeals from a final judgment of conviction. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 111-264 (2010)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA § 130.15(a) (2005).

IV. STANDARD OF REVIEW

[27] We review a double jeopardy challenge *de novo*. *People v. Aguirre*, 2004 Guam 21 ¶ 12 (quoting *People v. San Nicolas*, 2001 Guam 4 ¶ 8).

[28] The denial of Quinata's motion in limine to exclude DNA evidence and testimony of an expert witness is reviewed for an abuse of discretion. *People v. Tuncap*, 1998 Guam 13 ¶ 11; *see also United States v. Ortega*, 150 F.3d 937, 943 (8th Cir. 1998) ("Decisions concerning the admissibility of expert testimony 'lie within the broad discretion of the trial court' and will not be reversed on appeal unless there has been an abuse of that discretion." (quoting *Jenkins v. Ark. Power & Light Co.*, 140 F.3d 1161, 1165 (8th Cir. 1998))); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997) (question of admissibility of expert testimony is reviewable under abuse of discretion standard).

[29] The trial court's imposition of a fine of $50,000.00 is reviewed for an abuse of discretion. *See People v. Mallo*, 2008 Guam 23 ¶ 12 ("[W]e review for abuse of discretion the trial court's . . . failure to hold a hearing to determine [defendant's] ability to pay the restitution award.").

V. ANALYSIS

A. Double Jeopardy

[30] The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause is extended to Guam by 48 U.S.C. § 1421b(d) and (u). 48 U.S.C.A. § 1421b(d), (u) (Westlaw current through Pub. L. 111-264 (2010)); *see also People v. Torres*, 2008 Guam 26 ¶ 16.

[31] Embodied in the Double Jeopardy Clause are protections against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Torres*, 2008 Guam 26 ¶ 16. The protections afforded by the Double Jeopardy Clause are implicated only when the accused has actually been placed in jeopardy. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). In a jury trial, jeopardy attaches when a jury is empanelled and sworn. *Id.*; *People v. Manila*, 2005 Guam 6 ¶ 6 n.4.

[32] Here, Quinata asserts the first form of protection, against "a second prosecution for the same offense after acquittal." Quinata argues that because the trial court granted his motion for judgment of acquittal on certain Second Degree Criminal Sexual Conduct ("Second Degree CSC") charges, the continuation of the trial on the corresponding First Degree Criminal Sexual

Conduct ("First Degree CSC") charges was barred as double jeopardy.[3] Quinata contends that the grant of the acquittal motion on the Second Degree CSC charges constituted an implied acquittal of the First Degree CSC charges, because if he was found "not guilty" of sexual contact under Second Degree CSC, then by definition he could not have been guilty of sexual penetration under First Degree CSC because sexual penetration cannot occur without sexual contact.

[33] Quinata also invokes the collateral estoppel component of the Double Jeopardy Clause. Collateral estoppel is the principle that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Quinata argues that once the issue of sexual contact was decided by virtue of the trial court's grant of the acquittal motion as to Second Degree CSC, the jury was precluded from deciding the issue of sexual penetration for the First Degree CSC charges.

[34] We first note that Quinata misapplies the doctrine of implied acquittal. That doctrine involves situations in which a jury is presented with both greater and lesser included offenses, and convicts on the lesser while remaining silent on the greater. The conviction on the lesser included offense is an "implied acquittal" of the greater offense. *See Ohio v. Johnson*, 467 U.S. 493, 501-02 (1984) (citations omitted); *Montana v. Hall*, 481 U.S. 400, 403 n.1 (1987) (citation omitted). The instant case does not involve an implied acquittal scenario; here, the trial court disposed of the Second Degree CSC charges and allowed the jury to decide whether Quinata was

[3] In the interest of avoiding confusion, we shall refer to the Second Degree CSC counts that were disposed of by the trial court's ruling on Quinata's acquittal motion as simply "the Second Degree CSC charges," ignoring the three counts of Second Degree CSC that were upheld and sent to the jury. Thus, when we make reference to the trial court's grant of the acquittal motion as to Second Degree CSC, we acknowledge that the grant applied to only certain Second Degree CSC counts and that the motion was denied as to three other counts of Second Degree CSC.

guilty of First Degree CSC. The jury rendered a verdict for each and every charge presented to it, so there is nothing to be implied from the jury's verdict.

[35] Instead, the relevant consideration in this situation is whether the trial court actually acquitted Quinata of "sexual contact" under Second Degree CSC, thereby barring Quinata's conviction for First Degree CSC.

[36] Title 8 GCA § 100.10 provides that "[t]he court on motion of a defendant or on its own motion shall order the entry of a 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). A judgment of acquittal based on the insufficiency of evidence is a ruling by the trial court that, as a matter of law, the evidence is insufficient to establish factual guilt on the charges in the indictment. *Cf. Smalis v. Pennsylvania*, 476 U.S. 140, 144 (1986) (grant of a demurrer is an acquittal under the Double Jeopardy Clause because what the demurring defendant seeks is a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt). Such a ruling terminates the initial jeopardy, so that any further factual proceedings on the defendant's guilt or innocence violates the Double Jeopardy Clause.[4] *Id.* at 145.

[37] What constitutes an acquittal may not be determined simply by the form or label of the trial court's action. *Martin Linen*, 430 U.S. at 571; *see also United States v. Scott*, 437 U.S. 82, 96 (1978) ("[T]he trial judge's characterization of his own action cannot control the

[4] The Government contends that "[t]he prohibition against double jeopardy only applies to future prosecutions and not simultaneous prosecutions." Appellee's Br. at 4. However, the Supreme Court has specifically held that an acquittal at the close of the government's case, because of insufficient evidence of an element of an offense, terminates the initial jeopardy and bars further prosecution either on the same count or on a different count requiring proof of the same element. *See Sanabria v. United States*, 437 U.S. 54, 71-73 (1978). Arguably, "further prosecution" would include the continuation of a single trial after the grant of a mid-trial motion for judgment of acquittal.

classification of the action." (quoting *United States v. Jorn*, 400 U.S. 470, 478 n.7 (1971)); *Sanabria v. United States*, 437 U.S. 54, 66 (1978) (form not to be exalted over substance in determining double jeopardy consequences of ruling terminating a prosecution). "Rather, a defendant is acquitted only when 'the ruling of the judge, *whatever its label*, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *Scott*, 437 U.S. at 97 (quoting *Martin Linen*, 430 U.S. at 571) (emphasis added) (insertion in original). Further proceedings are barred only when "it is plain that the [trial court] . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *Id.* (quoting *Martin Linen*, 430 U.S. at 572) (internal quotation marks omitted).

[38] We must determine whether the trial court, in considering the evidence, reviewed it for sufficiency and made the determination that the Government failed to prove an essential element of Second Degree CSC. Upon review of the facts, we cannot so conclude. Here, the trial court heard Quinata's motion for judgment of acquittal, and then immediately granted the motion as to Second Degree CSC while expressly reserving ruling on the motion as to First Degree CSC until the following day, when he denied the motion as to First Degree CSC and sent those charges for consideration by the jury. Thus, on its face, it appears that Quinata was acquitted of Second Degree CSC. However, in substance, the trial court's action did not constitute an acquittal because it is clear that the trial court did not make a factual determination that Quinata was "not guilty" of sexual contact under Second Degree CSC. Ignoring the label of the judge's ruling (i.e., grant of a motion for judgment of acquittal), the ruling did not actually constitute an acquittal because it did not resolve some or all of the factual elements of Second Degree CSC in favor of Quinata. At the time the trial court ruled on the acquittal motion, it did not address any

of the elements of either First or Second Degree CSC, nor did it provide any comment regarding the sufficiency of the evidence. *See United States v. Mackins*, 32 F.3d 134, 138 (4th Cir. 1994) (when reviewing sufficiency of evidence on a charge, trial court should compare the evidence to the elements of charged offense). Indeed, when ruling on the motion, the court remained completely silent as to the rationale behind its ruling.

[39] We decline at this time to adopt a bright-line rule that a grant of a motion for judgment of acquittal constitutes an actual acquittal only when the trial court comments on the elements of the offense when granting the motion, for there very well may be situations in which the trial court's reasons for granting the motion are plain despite its silence as to the sufficiency of the evidence. We find that in the instant case, it is not "plain that the [trial court] . . . evaluated the Government's evidence and determined that it was legally insufficient" to prove the element of sexual contact. *Scott*, 437 U.S. at 97 (quoting *Martin Linen*, 430 U.S. at 572) (internal quotation marks omitted). The trial court not only failed to comment on the sufficiency of the evidence when ruling on the motion, it also proceeded to send to the jury the issue of sexual penetration under First Degree CSC, which suggests that the court did not actually make a factual determination that the Government failed to prove that any sexual contact had taken place.[5]

[40] Indeed, the trial court's Decision & Order denying Quinata's post-verdict motion for judgment of acquittal clarifies that the trial court, in its ruling on the earlier motion, had not determined that Quinata was "not guilty" of sexual contact. The trial court explained:

> The basis for the Court's decision was that the government had not presented any evidence about touching *other than penetration*, to support the elements of the 2nd degree charges; *but that it had presented enough evidence of penetration* to

[5] We also note that the trial court neither issued a written order reflecting its ruling on the motion nor made an entry of its ruling on the case docket. We find these omissions to be further indication that the trial court's ruling was not actually an "acquittal" of any charges.

> support a conviction of the 1st degree charges. . . . [T]he Court found that there was insufficient evidence to sustain a conviction on the 2nd degree charges that had corresponding 1st degree charges. All 2nd degree charges that did not have corresponding 1st degree charges were upheld and sent to the jury.

Appellee's Supplemental Excerpts of Record ("SER"), Ex. 2 at 2 (Dec. & Order, June 26, 2008) (emphases added). Although the trial court couched its explanation in terms of there being no "evidence of touching other than penetration," this is not the same as a finding that there was no evidence of sexual contact at all, which is how Quinata encourages this court to read the decision. Instead, the trial court found the exact opposite: that there *was* evidence of sexual contact, which was in the form of sexual penetration, and that the evidence was sufficient to support a conviction on the First Degree CSC charges. Although the trial court continued to explain its ruling as a finding "that there was insufficient evidence to sustain a conviction on the 2nd degree charges that had corresponding 1st degree charges," *id.*, we find little significance in this characterization of the ruling given the clear implication in the immediately preceding sentence of the Decision & Order that there in fact *was* evidence of sexual contact in the form of sexual penetration. In sum, we find that it is not plain that the elements of Second Degree CSC were resolved in favor of Quinata, and, thus, for purposes of double jeopardy, the trial court's partial grant of the acquittal motion did not actually constitute an "acquittal" as it is defined by the Supreme Court.

[41] Because we hold that no factual determination was made that Quinata had not engaged in sexual contact, there was no collateral estoppel bar to the continued prosecution of Quinata for the offense of sexual penetration under First Degree CSC. *Cf. Ashe*, 397 U.S. at 443 ("'Collateral estoppel' . . . . means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."). Accordingly, the continuation of the trial and the convictions on

the First Degree CSC charges were not barred by the Double Jeopardy Clause, and Quinata's rights were not violated.[6]

B. Denial of Motion in Limine to Exclude DNA Evidence

[42] Quinata appeals the trial court's denial of his motion in limine to exclude DNA evidence and testimony of the Government's DNA expert. Quinata argues that his convictions should be reversed "for the failure of the Government to comply with discovery obligations as ordered by the court" and claims that he was prejudiced by the untimely disclosure of the DNA expert because he had "no ability to examine the expert and the evidence offered." Appellant's Br. at 11 (Mar. 11, 2009).

[43] "There is no general constitutional right to discovery in a criminal case . . . ." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). "In most circumstances, then, a defendant must point to a statute, rule of criminal procedure, or other entitlement to obtain discovery from the government." *United States v. Johnson*, 228 F.3d 920, 924 (8th Cir. 2000).

[44] Quinata alleges that the Government violated its obligation under 8 GCA § 70.10(a)(3) to provide him with any report or statement of an expert, including the results of scientific tests, experiments or comparisons. Appellant's Br. at 10. Quinata fails, however, to recognize that such disclosure is required by the prosecutor only when requested by the defendant.

[6] It is unnecessary to analyze whether Second Degree CSC is a lesser included offense of First Degree CSC, because even if it is, the trial court's ruling in the instant case did not constitute an acquittal, and thus it did not preclude further proceedings on the First Degree CSC charges. We observe in passing that employing the same-elements test articulated in *Blockburger v. United States*, 284 U.S. 299 (1932), Second Degree CSC is not a lesser included offense of First Degree CSC because Second Degree CSC requires proof of a fact not required by First Degree CSC, namely, proof that the touching that occurred was "for the purpose of sexual arousal or gratification." 9 GCA § 25.10(a)(8) (2005). However, it is likely that, in considering other Double Jeopardy claims that do implicate a successive prosecution or multiple punishment, this court would first apply Guam's statutory framework to define whether an offense is "included" in another before applying the *Blockburger* same-elements test. The Guam Legislature has set forth what is arguably a broader test than the same-elements test for determining whether an offense is included in another, incorporating elements from the Model Penal Code. *See* 9 GCA § 1.22(a) (2005); 8 GCA § 105.58(b) (2005). However, in the instant case, no analysis under this framework is called for. The claim was not made at the trial court, nor preserved for appellate review through adequate briefing before this court.

> **§ 70.10. Matters Generally Discoverable; Prosecutors' Obligations.**
>
> (a) [A]t any time after the first appearance *upon noticed motion by the defendant*, the court shall order the prosecuting attorney to disclose to the defendant's attorney or permit the defendant's attorney to inspect and copy the following material and information within his possession or control, the existence of which is known, or by the exercise of due diligence may become known to the prosecuting attorney:
>
> (1) the name and address of any person whom the prosecuting attorney intends to call as a witness at the trial, together with his relevant written or recorded statement;
>
> . . .
>
> (3) any report or statement of an expert, made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments or comparisons; . . . .

8 GCA § 70.10 (2005) (emphasis added). The prosecutor's obligation to disclose the identity and reports or statements of an expert is triggered only when the defendant moves the court to order such disclosure.[7] Quinata does not direct our attention to such a request, nor have we found one in the record on appeal. Accordingly, the Government's obligation to disclose expert evidence under 8 GCA § 70.10 was never triggered.

[45] Title 8 GCA § 70.10(a) is substantively similar to Rule 16(a) of the Federal Rules of Criminal Procedure.[8] Several courts hold that the government's obligation to disclose expert

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[7] The trial court alluded to this requirement when it denied Quinata's motion to exclude the DNA evidence. Tr., vol. II at 37-38 (Jury Trial, Aug. 17, 2007) ("The [c]ourt is going to deny the motion. . . . There's been no motions or requests for discovery from Defendant's [counsel] indicating that they wanted the supporting documents so that they may anticipate a challenge to the results.").

[8] *Compare* 8 GCA § 70.10(a) *with* Fed. R. Crim. P. 16(a). Rule 16(a) provides, in relevant part:

> (a) Government's Disclosure.
>
> (1) Information Subject to Disclosure.
>
> . . . .
>
> (F) Reports of Examinations and Tests. *Upon a defendant's request*, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:
>
> (i) the item is within the government's possession, custody, or control;
>
> (ii) the attorney for the government knows--or through due diligence could know--

evidence under Rule 16(a) is triggered only when such evidence is requested by the defendant. *See, e.g.*, *United States v. Garza*, 566 F.3d 1194, 1200 (10th Cir. 2009) (defendant's right to pretrial notice of expert testimony was never triggered where defendant failed to direct appellate court's attention to Rule 16 request for disclosure and no request was found in record on appeal); *Johnson*, 228 F.3d at 924 (government's obligation to disclose expert evidence was never triggered where defendant requested some discovery, but concedes that he did not ask for "expert evidence"); *United States v. Salerno*, 108 F.3d 730, 743 (7th Cir. 1997) (trial court did not abuse discretion in refusing to suppress expert evidence because "[f]rom the record, it does not appear that the defendant ever requested any expert discovery material, as Rule 16 required him to do").

[46] Even assuming that Quinata was entitled to a more timely disclosure of the DNA evidence, exclusion of the evidence was unnecessary because Quinata did not demonstrate that he suffered actual prejudice by the admission of the evidence. *See Ortega*, 150 F.3d at 944 ("Absent a showing of prejudice resulting from the district court's decision to admit evidence, we find no abuse of discretion."); *Salerno*, 108 F.3d at 743 ("To succeed in obtaining a reversal on appeal for a discovery violation, a defendant must prove both an abuse of discretion and prejudice." (citation and internal quotation marks omitted)); *Woodcox v. State*, 591 N.E.2d 1019, 1026 (Ind. 1992) (in determining whether to exclude testimony of a witness, trial court should

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> that the item exists; and
>
> (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.
>
> (G) Expert witnesses.--*At the defendant's request*, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. . . . The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.
>
> . . . .

Fed. R. Crim. P. 16(a) (emphases added).

consider, among other factors, whether opposing party would be unduly surprised and prejudiced by inclusion of the testimony).

[47] Quinata raised no objection to the qualifications of Dr. Taves or to the substance of her testimony, only to its untimely disclosure. Although Quinata argues that the untimely disclosure of the expert witness prevented him from retaining his own expert to rebut the evidence, he does not actually question the integrity of the evidence. In other words, Quinata argues that he was deprived of the opportunity of retaining an expert, who may or may not have found the DNA test results to be unreliable. *See Johnson*, 228 F.3d at 925 (claim of prejudice based on untimely disclosure is less convincing when defendant fails to object to expert's conclusions); *Ortega*, 150 F.3d at 943 (finding no abuse of discretion where defendant objected to expert testimony on basis of a lack of proper disclosure, but did not object to qualifications of witnesses or to reliability of substance of their testimony).

[48] Furthermore, Quinata failed to move for a continuance, thereby undercutting his claim of prejudice based on an inability to hire his own expert. If he felt he was entitled to more time to prepare to rebut the DNA evidence, he should have asked for the alternative remedy of a continuance rather than simply ask for the flat-out exclusion of all DNA evidence. *See Ortega*, 150 F.3d at 943 (defendant's claim of prejudice resulting from his inability to consult his own expert rings hollow in light of his failure even to request a continuance to allow him an opportunity to pursue that avenue); *Woodcox*, 591 N.E.2d at 1026 ("[W]e believe that had [defendant] truly contested the DNA results, he should have asked for a continuance in order to depose [expert] and take additional measures to meet the DNA evidence presented by the State.").

[49] Finally, Quinata was aware of the results of the DNA test three years prior to trial, and his trial counsel was aware of the results for almost a year before trial. Had Quinata truly had qualms over the reliability of the laboratory or of the test results themselves, he could have hired his own expert in those three years to rebut the results, regardless of the Government's intent to call its own expert. *See, e.g.*, *Salerno*, 108 F.3d at 744 ("[W]e note that defendant's counsel knew before trial that the government was going to use a scale model or 'mock up' of the crime scene; thus, defendant could have retained an expert at that point in case such an expert was needed later in the trial."). After all, a defendant is not limited to hiring an expert witness to those situations in which the government also intends to hire an expert. In light of these circumstances, we conclude that Quinata has demonstrated no facts indicating that he was surprised or unfairly prejudiced by the substance of the expert testimony. Accordingly, we find no abuse of discretion.

C. $50,000.00 Fine

[50] Quinata argues that the trial court abused its discretion in sentencing him to pay a fine of $50,000.00 because the court did not first determine whether he had the ability to pay such amount. Title 9 GCA § 80.52 provides the standards for imposing fines and orders of restitution.[9] It states, in relevant part:

> (c) The court shall not sentence an offender to pay a fine or make restitution *unless the offender is or, given a fair opportunity to do so, will be able to pay* the fine or restitution. The court shall not sentence an offender to pay a fine unless the fine will not prevent the offender from making restitution to the victim of the offense.
>
> (d) In determining the amount and method of payment of a fine or restitution, the court shall take into account the financial resources of the offender and the nature of the burden that its payment will impose.

[9] Title 9 GCA § 80.10(a)(5) allows the trial court to sentence a person who has been convicted of a crime to pay a fine in addition to serving a term of imprisonment. 9 GCA § 80.10(a)(5) (2005).

9 GCA § 80.52(c)-(d) (2005) (emphasis added). Quinata argues that, contrary to this statute, the trial court "made absolutely no attempt at sentencing to determine whether QUINATA would have the ability to pay such a fine." Appellant's Br. at 12.

[51] The Government asserts that "[t]he probation service of the court accomplishes the task of conducting an investigation into a defendant's ability to pay a fine and submits that information to the court in a Presentence Investigation Report."[10] Appellee's Br. at 6 (Apr. 10, 2009). The Government argues that the Presentence Investigation Report ("PSI Report") in this case "contained sufficient information for the [c]ourt to make a determination on whether [Quinata] will eventually be able to pay the $50,000 fine,"[11] and that "[t]here is no statutory requirement that the [c]ourt conduct a more extensive investigation than that already done by its probation service." Appellee's Br. at 7.

[52] Quinata argues that given his income prior to incarceration as well as the fact that he will be in his sixties before he is eligible for release on parole, "it is highly unlikely that he will be able to earn sufficient funds to pay the court $50,000.00 in fines." Appellant's Br. at 12.

[53] The District Court of Guam Appellate Division in *In re Cruz* held that 9 GCA § 80.52 requires "an evidentiary hearing conducted by the court to determine whether the offender has

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[10] Title 9 GCA § 80.12 provides, in relevant part:

> (a) The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence unless the court otherwise directs for reasons stated on the record.
>
> . . . .
>
> (c) The report of such investigation shall be in writing and so far as practicable shall include an analysis of . . . the offender's . . . social, economic and educational background, job experience and occupational skills and aptitude and personal habits, and any other matters that the probation officer deems relevant or the court directs to be included.

8 GCA § 80.12(a), (c) (2005).

[11] The PSI Report indicated that prior to his incarceration, Quinata was earning $8.00 per hour as a grocery store warehouse/stockman; that he had a pending fine with the Superior Court of Guam in excess of $3,000.00; and that he had no savings or checking accounts. Appellant's Br. at 11.

the financial means to make the payment of restitution." No. 82-00025A, 1983 WL 29938, at *2 (D. Guam App. Div. Mar. 18, 1983). We recently acknowledged this holding in *People v. Mallo*, 2008 Guam 23 ¶ 54; but we declined to apply it to the circumstances of that case. In *Mallo*, the defendant, prior to sentencing, had stipulated in his plea agreement that if given a fair chance, he would be able to pay restitution. *Id.* We found that "*Cruz* can[not] be construed to apply when the defendant stipulates that he or she has the ability to pay. A stipulation, by its very nature, indicates that no factual dispute exists, and therefore no evidentiary hearing is required." *Id.* We further noted that the trial court had considered Mallo's ability to earn money while in prison and after his eventual release in supporting its decision to impose the order of restitution.

[54] We do not believe that the instant case presents any occasion for reconsideration by this court of the Appellate Division's holding in *Cruz*. We choose not to deviate from this precedent because we believe it to be well reasoned and well supported in case law from those courts interpreting substantially similar statutes. *See, e.g.*, *State v. Martinez*, 920 A.2d 715, 724 (N.J. Super. Ct. App. Div. 2007) (defendant entitled to hearing on remand concerning his ability to pay restitution); *State v. Pessolano*, 778 A.2d 1153, 1161-62 (N.J. Super. Ct. App. Div. 2001) ("[i]n order to impose restitution . . . there must be an explicit consideration of defendant's ability to pay" (quoting *State v. Scribner*, 689 A.2d 789 (N.J. Super. Ct. App. Div. 1997))); *State v. McLaughlin*, 708 A.2d 716, 727 (N.J. Super. Ct. App. Div. 1998) (due process requires a hearing on defendant's ability to pay).[12]

[55] The relevant question in the instant case is whether the PSI Report can be used in lieu of an evidentiary hearing in order to satisfy the requirements of 9 GCA § 80.52. We hold that

[12] Title 9 GCA § 80.52 is derived from Model Penal Code § 7.02. *See* 9 GCA § 80.52, SOURCE. *Compare* 9 GCA § 80.52 *with* Model Penal Code § 7.02. Like Guam, New Jersey's penal code was adopted from the Model Penal Code. *See* N.J.S.A. § 2C:44-2, Source. New Jersey's version of 9 GCA § 80.52 is N.J.S.A. § 2C:44-2, which is substantially similar to the Guam version. *Compare* 9 GCA § 80.52 *with* N.J.S.A. § 2C:44-2.

under the specific facts of this case, it cannot. One of the purposes of an evidentiary hearing is to afford the defendant the opportunity to present evidence and argument on his ability to pay. Although the trial court in the instant case might have considered, in addition to the employment history contained in the PSI Report, Quinata's ability to earn money in prison in reaching its decision to impose the $50,000.00 fine, there is no indication in the record that it indeed had made either consideration. In fact, the Government does not direct our attention to any comments the trial court may have made during sentencing concerning defendant's financial status or ability to pay. Moreover, unlike the defendant in *Mallo*, Quinata did not stipulate to his ability to pay any fines. *See Mallo*, 2008 Guam 23 ¶ 54. Given these circumstances, we do not believe that the PSI Report, on its own, was sufficient for the trial court to find that "the offender is or, given a fair opportunity to do so, will be able to pay the fine or restitution." 9 GCA § 80.52(c). Thus, we remand for a hearing to determine Quinata's ability to pay the fine. Upon remand, the trial court can make any monetary adjustments that are required by the evidence presented.

VI. CONCLUSION

[56] For the foregoing reasons, we **AFFIRM** Quinata's convictions, but **VACATE** the fines imposed and **REMAND** for a hearing to determine Quinata's ability to pay.

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

Original Signed By: Richard H. Benson
RICHARD H. BENSON
Justice *Pro Tempore*

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