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SUPREME COURT  
OF GUAM

**IN THE SUPREME COURT OF GUAM**

**PEOPLE OF GUAM,**  
Plaintiff-Appellee,

v.

**ANTHONY L.G. CAMPOS, JR.,**  
Defendant-Appellant.

**OPINION**

**Cite as: 2015 Guam 11**

Supreme Court Case No.: CRA14-005  
Superior Court Case No.: CF0553-13

Appeal from the Superior Court of Guam  
Argued and submitted on October 13, 2014  
Hagåtña, Guam

Appearing for Defendant-Appellant:

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

**TORRES, C.J.:**

[1] Defendant-Appellant Anthony L.G. Campos (“Campos”) appeals from a judgment of conviction following a jury trial. Campos initially was charged with one count of Second Degree Robbery, with a special allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony, for a robbery taking place at Route 8 Mini-Mart in Barrigada. On the same day, in a separate indictment, Campos was charged with three additional counts of Second Degree Robbery, each with a special allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony, for a robbery taking place outside Payless Sinajana. The day before the trials in the two separate cases were to commence, the People filed a superseding indictment consolidating the two cases into a single indictment. At the conclusion of trial, the jury convicted Campos of all four counts of Second Degree Robbery and the special allegations associated with them.

[2] On appeal Campos argues that (1) he was prejudiced by the consolidation of the cases on the eve of trial, (2) the trial court should have granted a mistrial because the People did not provide all discovery, (3) the trial court erred in not suppressing evidence of a photographic lineup used by the police, and (4) the trial court erred in not instructing the jury on a charge of Third Degree Robbery as a lesser included offense.

[3] For the reasons herein, we affirm.

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## I. FACTUAL AND PROCEDURAL BACKGROUND

[4] On October 1, 2013, three men robbed three employees of Payless Supermarket in Sinajana as they were closing the store for the night. At least one of the men was armed with a pistol and fired shots into the air before robbing the employees of their personal effects. Although the robbers covered their faces during the crime, the victims were able to see the armed man's face.

[5] The next day, one man robbed the Route 8 Mini-Mart in Barrigada at gunpoint, stealing cash from the store's cash register. The man wore a mask during the crime, but it fell down at times, allowing the cashier to see his face. The crime was also caught on the store's security cameras.

[6] The police investigating the robberies used photographic lineups to determine the identity of the perpetrators. The victims of the Payless robbery were able to identify the armed man as Anthony Campos, Jr. using a photographic lineup. The cashier working during the Mini-Mart robbery identified the robber as Campos, as well.

[7] The police later executed a search warrant at Campos's residence. No evidence of either crime was recovered. On the same day, Campos was arrested. The grand jury charged Campos with three counts of second degree robbery, each with a special allegation of possession and use of a deadly weapon in the commission of a felony, for the Payless robbery. In a separate indictment issued on the same day, Campos was charged with an additional count of second degree robbery with a special allegation of possession and use of a deadly weapon in the commission of a felony for the Mini-Mart robbery.

[8] The day before the trials in both cases were to commence, the People resubmitted the matter to the grand jury, seeking to consolidate the two cases. Campos was charged with all previous counts related to both crimes in a single superseding indictment. He was then arraigned on the superseding indictment. Although Campos's counsel had previously indicated that he had "no objection . . . whatsoever" to the filing of the superseding indictment, Transcripts ("Tr.") at 4 (Pretrial Conf., Dec. 2, 2013), he raised an objection during arraignment proceedings on the ground that the consolidation of the two cases was prejudicial to his client. The objection was overruled.

[9] Following the commencement of trial, the People called the cashier who was working at the Mini-Mart at the time of the robbery. She testified that when identifying Campos she was shown two different photographic lineups by the police. She did not testify that Campos appeared in both lineups. The People also called the victims of the Payless robbery. One of the victims testified that the police showed her three different photographic lineups. She did not testify that Campos appeared in more than one lineup. Another victim testified that the police showed her a single black and white photograph before showing her a photographic lineup. She did not testify that the photograph was of Campos.

[10] Following the victim testimony, Campos moved for a mistrial. Campos's counsel explained that the People had disclosed only a single photographic lineup and that the defense was unaware of any additional lineups or photographs used by the police until they were mentioned during the witnesses' testimony. He argued that without disclosure of the additional identification materials shown to the witnesses, the defense could not know if they contained exculpatory evidence. Before ruling on the motion, the court asked the prosecution to confer

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with the detectives who had investigated the crimes and determine if additional material had been used and whether it could be produced. After doing so, the prosecutor reported to the court that the investigating detectives continued to maintain that only a single lineup had been used and that no additional identification material was in evidence. The court then denied the motion for a mistrial.

[11] Immediately thereafter, Campos moved to suppress the one photographic lineup that was in evidence. He argued that the People had failed to disclose all the material related to the lineup and that exculpatory evidence may have been withheld. The court denied the motion to suppress as well.

[12] Following the conclusion of testimony, the People submitted amended proposed jury instructions. Defense counsel reviewed the instructions and stated that he had no objections. Campos did not request that instructions be given on lesser-included offenses, and the court instructed the jury only on the elements of second degree robbery.

[13] Subsequently, the jury found Campos guilty of all charges. Campos was sentenced to a total sentence of forty-six years of incarceration followed by three years of parole. This appeal followed.

## II. JURISDICTION

[14] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-296 (2014)), and 7 GCA §§ 3107 and 3108(a) (2005).

## III. STANDARD OF REVIEW

[15] A court's decision to allow the filing of a superseding indictment is reviewed *de novo*. See *United States v. Eshkol*, 108 F.3d 1025, 1027 (9th Cir. 1997) (reviewing *de novo* whether

superseding indictment violated defendant's due process).

[16] This court reviews the trial court's denial of a motion for a new trial based on purported discovery violations for abuse of discretion. *People v. Flores*, 2009 Guam 22 ¶ 59 (citing *United States v. Brandao*, 539 F.3d 44, 64 (1st Cir. 2008)). The trial court's legal conclusions regarding alleged *Brady* violations are reviewed *de novo*. See *People v. Fisher*, 2001 Guam 2 ¶ 12. The findings of fact relied upon by the trial judge in drawing legal conclusions as to whether a *Brady* violation occurred are reviewed for clear error. See *People v. Camacho*, 2004 Guam 6 ¶ 13 (findings of fact relied on by trial judge in drawing legal conclusion as to alleged Fourth Amendment violation reviewed for clear error). This court reviews a trial court's decision on a defendant's motion to suppress evidence *de novo*. *People v. Tuncap*, 2014 Guam 1 ¶ 12.

[17] If no objections to jury instructions are made at the time of trial, the standard of review is plain error. *People v. Perry*, 2009 Guam 4 ¶ 9. "Plain error is highly prejudicial error." *People v. Quitugua*, 2009 Guam 10 ¶ 11. Thus, "[w]e will not reverse unless (1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Id.*

#### IV. ANALYSIS

##### A. The Superseding Indictment

[18] Campos first claims that the court erred in allowing the People to file a superseding indictment consolidating the two cases shortly before commencement of trial in the two separate cases. He argues that he was prejudiced by the consolidation of two previous indictments charging him in relation to each robbery.

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[19] “A superseding indictment is an indictment filed before the original or underlying indictment is dismissed.” *Flores*, 2009 Guam 22 ¶ 18. “The Guam Code does not provide any specific procedure for the issuance of superseding indictments. . . .” *People v. Rios*, 2011 Guam 6 ¶ 23 n.9 (internal quotation marks omitted). Although we have previously addressed the effect of a superseding indictment on the speedy trial clock, *see generally Ungacta v. Superior Court*, 2013 Guam 29, we have not considered what limitations, if any, apply to the filing of a superseding indictment by the People. We take this opportunity to adopt what has been described by the Tenth Circuit as “the well established rule that, ‘[a]bsent prejudice to the defendant, a superseding indictment may be filed at any time before trial.’” *United States v. Begay*, 602 F.3d 1150, 1154 (10th Cir. 2010) (alteration in original).

[20] As we have not previously established guidelines for determining whether a defendant is prejudiced by the filing of a superseding indictment, we look by way of analogy to our precedent concerning prejudice in the context of an indictment amended pursuant to 8 GCA § 55.20. In *People v. Riocne*, we identified two tests to determine whether the filing of an amended indictment prejudiced a defendant. 2012 Guam 5 ¶¶ 13-14.

[21] The first test requires a determination of “whether a defense under an indictment as it originally stood would be equally available after the [superseding indictment] is made, and whether any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other.” *Id.* ¶ 13. If a defense or evidence in support of the defendant has not been adversely affected by the filing of the superseding indictment, no prejudice has occurred. In the present case, Campos has not identified any such adverse effect caused by the filing of the superseding indictment, nor is any apparent from the record. Campos’s primary

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defense, a theory of alibi, was equally available to him for both crimes after consolidation. Furthermore, Campos has not identified any evidence available for his defense that was affected by resolving the two crimes in a single trial.<sup>1</sup>

[22] The second test requires a determination of:

[W]hether the crimes specified in the original charging pleading . . . “[i]nvolve the same basic elements and evolved out of the same factual situation as the crimes specified in the amended indictment or information. If so, then the defendant is deemed to have been placed on notice regarding his alleged criminal conduct. If, however, the amended provision alleges a different set of events, or the elements or defenses to the amended crime are materially different from the elements or defenses to the crime originally charged, such that the defendant would be prejudiced by the change, then the amendment is not permitted.”

*Id.* ¶ 14 (quoting *Commonwealth v. Stanley*, 401 A.2d 1166, 1175 (Pa. Super. Ct. 1979)). In the present case, it cannot be questioned that Campos was put on notice regarding all of the charges contained in the superseding indictment, as it merely consolidated two previous indictments, originally filed on the same day. Thus, Campos cannot demonstrate prejudice under either test.<sup>2</sup>

[23] As Campos was not prejudiced by the superseding indictment, the court acted properly in overruling his objection to its filing.

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<sup>1</sup> Campos argues that the consolidation of the two cases acted to circumvent Guam Rules of Evidence Rule 404(b), which provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” Guam R. Evid. 404(b). There is no Rule 404(b) issue in this case, as the evidentiary rules do not provide a basis for objecting to the filing of a superseding indictment, and no objection was raised on those grounds.

<sup>2</sup> Campos also argues, for the first time in his reply brief, that the superseding indictment amounted to an impermissible joinder in that the two offenses are not of the same or similar character. As this argument was not raised in Campos’s initial brief, we decline to address it. Furthermore, we note that Campos never filed a motion to sever the offenses. See 8 GCA § 65.35 (2005) (“If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.”).



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## **B. Alleged Discovery Violations**

[24] Campos's next two claims relate to alleged violations of the discovery rules under 8 GCA § 70.10(a)(7) and *Brady v. Maryland*, 373 U.S. 83 (1965). At trial, certain government witnesses testified that the police showed them multiple photographic lineups during identification procedures, and one witness recalled a single black and white photograph being presented to her prior to being shown the lineup which was used to identify Campos. As the People produced only a single lineup in discovery, Campos argued that a *Brady* violation had occurred and moved for a mistrial and to suppress the lineup evidence used by the police, successively. Both motions were denied. On appeal, Campos challenges those decisions.

### **1. Motion for Mistrial**

[25] We first consider the motion for mistrial. Campos argues that the court erred in denying his motion for a mistrial because the People violated *Brady* in failing to produce additional lineup materials used by the police.

[26] The prosecution's failure to abide by the dictates of *Brady* and make necessary disclosures is grounds for a mistrial. *See United States v. Chapman*, 524 F.3d 1073, 1083 (9th Cir. 2008). We review the trial court's denial of a motion for a mistrial based on alleged discovery violations for an abuse of discretion. *Flores*, 2009 Guam 22 ¶ 59. To determine whether the court abused its discretion, we first must ascertain whether a discovery violation involving *Brady* material occurred. *Id.* If such a violation took place, we then "examine whether in denying the motion for a new trial, the trial court denied [an] appropriate remedy to the defendant." *Id.*

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[27] First, we must determine whether the prosecution violated *Brady* by producing only a single photographic lineup. In *Brady*, the Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.” *Brady*, 373 U.S. at 87; *see also People v. Tuncap*, 1998 Guam 13 ¶ 17. This rule is codified in Guam’s discovery statute, which requires the prosecuting attorney to disclose “any material or information which tends to negate the guilt of the defendant as to the offense charged.” 8 GCA § 70.10(a)(7) (2005). We have interpreted this section to afford protection “equal to and not greater than those afforded by the Constitutional guarantee articulated by *Brady* and its progeny.” *Flores*, 2009 Guam 22 ¶ 60.

[29] A defendant must prove three elements in order to demonstrate that a *Brady* violation has occurred: (1) the evidence at issue must be favorable to the defendant, (2) the government must have suppressed the evidence, either willfully or inadvertently, and (3) the suppression of the evidence must have prejudiced the defendant in that it deprived him or her of a fair trial. *People v. Kitano*, 2011 Guam 11 ¶ 21.

[30] In this case, the second element is dispositive. In order for a *Brady* violation to take place, the prosecution must fail to produce evidence to the defendant. Whether that occurred in this case was a question of fact considered by the trial court in assessing Campos’s motion for a mistrial. The trial court conducted a hearing on this issue and, after hearing from both parties, evidently found that no documents were suppressed by the prosecution. This finding has support in the record, as one of the investigating officers testified that only a single lineup was used and that no single photograph was ever displayed to the witnesses. Tr. at 129 (Jury Trial – Day 4, Dec. 10, 2013). It was within the trial court’s discretion to discredit witness testimony that more

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than one lineup was used. Thus, the court's finding that no evidence was suppressed by the government was not clear error, and we must defer to it in considering whether a *Brady* violation occurred as a matter of law.

[31] Given these facts, Campos has failed to demonstrate that a *Brady* violation occurred. He has not satisfied the second element of the aforementioned test, as no evidence was suppressed by the government, either willfully or inadvertently. Accordingly, the court did not err in denying Campos's motion for a mistrial.

## 2. Motion to Suppress

[32] Next, we consider the motion to suppress. Following witness testimony regarding additional lineup materials, Campos sought to suppress the lineup evidence introduced by the government on the ground that any additional lineups shown to the witnesses may have contained his photo, causing the lineup procedure to be impermissibly suggestive.<sup>3</sup>

[33] Identification evidence may be inadmissible if it is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *People v. Diego*, 2013 Guam 15 ¶ 16 (quoting *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (internal quotation marks omitted)). "The application of this rule depends on the circumstances of each case, including whether the suggestiveness made the defendant 'stand out' from others in the lineup and whether the identification procedure was unnecessary." *Id.* (quoting *People v. Carlos*, 41 Cal. Rptr. 3d 873, 876 (2006) (citations omitted)). The defendant bears the burden of demonstrating that an identification procedure was impermissibly suggestive. *United States v. Pineda-Torres*, 94 F.

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<sup>3</sup> Although motions to suppress ordinarily must be made prior to trial or result in a waiver of the issue, *see* 8 GCA §§ 65.15, 65.45 (2005), the fact that defense counsel was not aware of the possibility of additional lineups until witnesses testified at trial constituted good cause to allow the motion to be made during trial.

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App’x 453, 456 (9th Cir. 2004). We review a trial court’s decision on a defendant’s motion to suppress evidence *de novo*. *Tuncap*, 2014 Guam 1 ¶ 12.

[34] As discussed previously, the trial court found that that no lineup evidence was withheld by the prosecution. Further, none of the witnesses testified that Campos’s likeness appeared in multiple lineups. Nor did any testimony indicate that witnesses were shown a picture of Campos prior to identifying him in the lineup. Thus, Campos relies on mere speculation that impermissibly suggestive tactics were utilized by the police. Speculation alone is insufficient to carry Campos’s burden. *See People v. Contreras*, 21 Cal. Rptr. 2d 496, 500 (Ct. App. 1993) (“The defendant bears the burden of proving unfairness [of pretrial identification procedures] as a ‘demonstrable reality,’ not just speculation.”). Accordingly, the court did not err in denying Campos’s motion to suppress the lineup evidence.

### **C. Instruction on Lesser Included Offenses**

[35] Finally, Campos claims that the trial court’s failure to instruct the jury on third degree robbery warrants reversal. He argues that third degree robbery is a lesser included offense of second degree robbery and therefore such an instruction was mandatory. Neither the People nor Campos requested the jury be instructed on a lesser included offense.

[36] “[W]e adhere to the settled rule that failure to object to a jury instruction before the jury retires to consider its verdict precludes reversal except where there is a plain error affecting substantial rights.” *People v. Felder*, 2012 Guam 8 ¶ 18. Under the plain error standard of review, this court “will not reverse unless (1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.” *Id.* ¶ 19.

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[37] We must initially determine whether the court erred in failing to instruct the jury on robbery in the third degree. Title 8 GCA § 90.27 provides that “[w]hen there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of an included offense, the court shall charge the jury with respect to the included offense.” 8 GCA § 90.27 (2005). In *Angoco v. Bitanga*, we held that this statute affords no discretion to the trial judge and, therefore, when there is a rational basis for a lesser-included offense instruction as shown by substantial evidence, the court must issue such an instruction *sua sponte*, “without regard to whether such instructions were requested or objected to by the parties.” 2001 Guam 17 ¶ 21. In order to determine whether a trial court’s failure to instruct on a given charge amounts to error under *Angoco*, we must perform a two-step analysis. “*Angoco* first requires a determination of whether the ‘lesser offense is within the offense charged,’ and if so, whether ‘based on the evidence presented at trial, a rational jury could find the defendant guilty of the lesser offense but not the greater.’” *People v. Demapan*, 2004 Guam 24 ¶ 7 (quoting *Angoco*, 2001 Guam 17 ¶ 12). Thus, in this case, the court’s failure to instruct on robbery in the third degree amounted to error if (1) robbery in the third degree is a lesser included offense of robbery in the second degree, and (2) there was a rational basis for a verdict acquitting Campos of robbery in the second degree and convicting him of robbery in the third degree.

[38] We now consider whether robbery in the third degree is a lesser included offense of robbery in the second degree. An offense is “included” when:

- (1) [i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
- (2) [i]t consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or

(3) [i]t differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

8 GCA § 105.58(b)(1)-(3) (2005). We look to the statutory language defining the relevant offenses to resolve this question. See, e.g., *People v. Cummins*, 2010 Guam 19 ¶¶ 19-20 (considering whether second degree criminal sexual conduct is a lesser included offense of first degree criminal sexual conduct).

[39] A person is guilty of second degree robbery if, “in the course of committing a theft, he: (1) inflicts serious bodily injury upon another; or (2) threatens another with or intentionally puts him in fear of immediate serious bodily injury; or (3) is armed with or displays what appears to be explosives or a deadly weapon.” 9 GCA § 40.20(a)(1)-(3) (2005). A person is guilty of third degree robbery if:

in the course of committing a theft, he:

(1) uses force against another with intent to overcome his physical resistance or physical power of resistance; or

(2) threatens another with or intentionally puts him in fear of the imminent use of force against the person of anyone with intent to compel acquiescence to the taking of or escaping with property.

9 GCA § 40.30(a)(1)-(2) (2005).

[40] Comparing the elements of each offense, we conclude that robbery in the third degree is a lesser included offense of robbery in the second degree.<sup>4</sup> Under 8 GCA § 105.58(b)(3), robbery in the third degree differs from robbery in the second degree only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of

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<sup>4</sup> Hawaii’s penal code distinguishes between the degrees of robbery in a similar fashion to Guam’s and Hawaii courts have reached the same conclusion with respect to lesser included offenses. See *State v. Brooks*, 235 P.3d 1168, 1184-85 (Haw. Ct. App. 2010).

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culpability suffices to establish its commission. The only difference between a robber using force against the victim and a robber seriously injuring the victim is the seriousness of the injury caused and the culpability assigned to the act. The same is true for a robber threatening to use force against the victim and a robber threatening to inflict serious bodily injury against the victim, whether utilizing a deadly weapon or otherwise.<sup>5</sup>

[41] Our inquiry does not end there, however, as instructions on lesser included offenses need not be given in every case:

Due process does not automatically require the giving of lesser included offense instructions. Due process requires the giving of a lesser included instruction only when the evidence warrants it. There must be evidence which would permit the jury rationally to find a defendant guilty of the lesser included offense and to acquit on the greater offense before he or she is entitled to a lesser-included offense instruction.

*People v. Perez*, 1999 Guam 2 ¶ 24 (citations omitted). In order to determine whether there was a rational basis for such a verdict, we conduct a *de novo* review of the record. *See Angoco*, 2001 Guam 17 ¶ 15.

[42] The question before us is whether the jury could have rationally acquitted Campos of robbery in the second degree and convicted him of robbery in the third degree. Campos was charged under the third prong of robbery in the second degree, wherein, in the course of committing a theft, he was “armed with or display[ed] what appear[ed] to be explosives or a deadly weapon.” 9 GCA § 40.20(a)(3). In order to acquit Campos of robbery in the second degree and convict him of robbery in the third degree, the jury would have had to conclude that

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<sup>5</sup> We also note that the comment to Guam’s robbery statute states that “[t]he degrees of robbery relate to the seriousness of the injury threatened or inflicted upon the victim.” 9 GCA § 40.10 cmt. (2005).

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Campos committed the robbery but was not armed at the time. We must consider whether there was a rational basis for such a conclusion based on the record.

[43] All evidence at trial suggested that the perpetrator of the robberies was armed during the commission of the crimes. With regard to the Payless robbery, all three victims and the two witnesses present testified that a gun was brandished and fired during the crime. Tr. at 59-60, 116, 128, 141 (Jury Trial – Day 3, Dec. 6, 2013); Tr. at 17-18, 50, 53 (Jury Trial – Day 4). With regard to the Mini-Mart robbery, the cashier working at the time testified that the robber was carrying a gun and fired it during the robbery. Tr. at 27-28 (Jury Trial – Day 3). Another employee who was in the back of the store while the robbery took place testified that she heard a “crack” at that same time. *Id.* at 18-19. The jury was shown a security video from the Mini-Mart that showed the robber holding a gun. *Id.* at 38. Finally, a projectile was recovered from the store’s counter. Tr. at 75 (Jury Trial – Day 4).

[44] Furthermore, Campos did not contest the presence of a gun at the robberies. The defense presented witnesses who testified that they were in the defendant’s company at the time of the robberies. This defense hinged on the idea that the crime as reported was committed by another person. It did not seek to discredit the idea that a gun was used during the crimes. Nor did Campos’s counsel during his opening or closing arguments ask the jury to conclude that a gun was not present.

[45] On appeal, Campos argues that the jury could have rationally concluded that no weapon was present because no weapon was found in Campos’s residence or otherwise recovered by the police. That no weapon was found in Campos’s residence may have supported the conclusion that he was not the robber, but it does not provide a rational basis for a finding that the robber



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was unarmed. Nor does the fact that no gun was recovered by the police do so, in the face of ample, uncontradicted evidence that a gun was used during the robberies.

[46] Based on the record before us, we conclude that there was no rational basis for the jury to acquit Campos of robbery in the second degree and convict him of robbery in the third degree. Accordingly, the trial court was not required to instruct the jury on robbery in the third degree under 8 GCA § 90.27 and *Angoco*, and, therefore, there was no error in this regard. As no error occurred, the first prong of the plain error standard of review is not satisfied, and we need not consider the doctrine's additional criteria.

#### V. CONCLUSION

[47] Campos was not prejudiced by the superseding indictment consolidating the two felony cases, and the trial court properly overruled Campos's objection to the filing of the superseding indictment. The trial court did not err in denying Campos's motion for a mistrial based on alleged discovery violations because Campos failed to demonstrate that a *Brady* violation occurred. The trial court's denial of Campos's motion to suppress the evidence of the photographic lineup used by the police was proper since Campos did not meet his burden of showing that the identification procedure was impermissibly suggestive. Finally, we reject Campos's claim of plain error with regard to instruction on the lesser included offense of Third Degree Robbery. Although Third Degree Robbery is a lesser included offense of Second Degree Robbery, the trial's court failure to include a charge of Third Degree Robbery in its jury instructions was not error, as there was no rational basis for the jury to acquit Campos of Second Degree Robbery and convict him of Third Degree Robbery. As there was no error, the claim

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fails under the first prong of the plain error standard of review. Therefore, we **AFFIRM** the judgment of conviction.

**Original Signed : F. Philip Carbullido**  
By

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F. PHILIP CARBULLIDO  
Associate Justice

**Original Signed : Katherine A. Maraman**  
By

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KATHERINE A. MARAMAN  
Associate Justice

**Original Signed : Robert J. Torres**  
By

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ROBERT J. TORRES  
Chief Justice

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

APR 13 2015

By: Charlene T. Santos  
Deputy Clerk  
Supreme Court of Guam