IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

RUBEN KATZUTA aka Peter John,
Defendant-Appellant.

OPINION

Cite as: 2016 Guam 25

Supreme Court Case No.: CRA15-016
Superior Court Case No.: CF0007-14

Appeal from the Superior Court of Guam
Argued and submitted on February 24, 2016
Hagåtña, Guam

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

MARAMAN, J.:

[1] Defendant-Appellant Ruben Katzuta appeals from a final judgment convicting him of Aggravated Assault (As a Second Degree Felony); Aggravated Assault (As a Third Degree Felony); Special Allegations of Possession and Use of a Deadly Weapon in the Commission of a Felony affiliated with both Aggravated Assault convictions; and Assault (As a Misdemeanor) as a lesser included offense ("LIO") of Aggravated Assault (As a Third Degree Felony). The convictions come after Katzuta was retried on charges where the jury was deadlocked and the trial court declared a mistrial.

[2] Katzuta seeks reversal of his convictions and dismissal of his charges based on his argument, raised for the first time on appeal, that the doctrine of collateral estoppel should have foreclosed relitigation on the deadlocked charges. He also claims he received ineffective assistance of counsel because his trial counsel failed to move the trial court to dismiss the charges based on the collateral estoppel claim. In the alternative, Katzuta seeks a reversal and remand because he claims it was an abuse of the trial court's discretion to *sua sponte* reduce the jury size in the retrial from twelve to six jurors.

[3] For the reasons stated herein, we affirm Katzuta's convictions.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Indictments

[4] On January 14, 2014, a Superior Court of Guam Grand Jury indicted Katzuta on one charge of Attempted Murder (as a First Degree Felony), in violation of 9 GCA §§ 16.20(a)(1) and 13.60, and a Special Allegation, Possession and Use of a Deadly Weapon in the Commission

of a Felony, in violation of 9 GCA § 80.37. At Katzuta's arraignment hearing he pleaded not guilty to the charge, denied the special allegation and orally requested for a twelve-person jury trial. This oral request for a twelve-person jury trial was recorded on the arraignment hearing minute entry sheet. Katzuta's request was also recognized by the trial court as indicated by the arraignment hearing transcripts.

[5] Plaintiff-Appellee People of Guam ("the People") filed a superseding indictment on October 9, 2014. In addition to the original charged crimes from the January 14 indictment, Katzuta was also indicted for:

> Charge 2)
>
> > Aggravated Assault (As a Second Degree Felony), in violation of 9 GCA §§ 19.20(a)(1) and (b); and
> >
> > A Special Allegation (Possession and Use of a Deadly Weapon in the Commission of a Felony), in violation of 9 GCA § 80.37.
>
> Charge 3)
>
> > Aggravated Assault (As a Third Degree Felony), in violation of 9 GCA §§ 19.20(a)(3) and (b); and
> >
> > A Special Allegation (Possession and Use of a Deadly Weapon in the Commission of a Felony), in violation of 9 GCA § 80.37.

Record on Appeal ("RA"), tab 36 at 1-3 (Superseding Indictment, Oct. 9, 2014). Katzuta was again arraigned and pleaded not guilty to all charges, denied the special allegations from the superseding indictment, and did not request for a jury trial of twelve.

B. First Trial and Deadlocked Jury

[6] Voir dire commenced on October 15, 2014, and a twelve-person jury was empaneled and sworn.

[7] In the first trial, the People called several witnesses, including the victim, T.R. Reuney; neighbors who were at or arrived shortly after the time of the criminal act; arriving medics; patrol officers arriving at the scene; the arresting officer; and the emergency medical treating physician. After the People rested their case, defense counsel called the medic who treated T.R. while en route to Guam Memorial Hospital ("GMH"). Katzuta also testified in his own defense.

[8] Throughout the trial, evidence was presented regarding the appearance of the premises where the alleged criminal act took place, alleged parties present at the time of the criminal act, and the extent of the injuries T.R. sustained.

[9] The jury found Katzuta not guilty of Attempted Murder and the related Special Allegation, but was deadlocked on the remaining charges. The trial court declared a mistrial on the hung charges, and entered a verdict of not guilty for Attempted Murder and the related Special Allegation. Katzuta was retried for the hung charges: Charge 2 – Aggravated Assault (as a Second Degree Felony), Charge 3 – Aggravated Assault (as a Third Degree Felony), and related Special Allegations.

[10] Before the retrial, trial counsel for Katzuta moved to withdraw as attorney and for appointment of new counsel. The trial court granted the motion, and appointed new counsel for the retrial.

C. Jury Size Motions and Retrial

[11] Jury selection for the retrial began on February 10, 2015. The trial court read 8 GCA § 85.15, which governs jury size, and based on this section, the trial court reduced the jury panel size from twelve to six members. Immediately after the trial judge made this decision, defense counsel made an oral request on record for a jury of twelve. Thereafter, the prosecution made an

oral motion to require a jury of twelve for the retrial.[1] The trial court asked defense counsel if he would like to respond, to which defense counsel stated, "Your Honor, obviously we support that." Tr. at 5 (Jury Trial, Feb. 10, 2015). In denying both counsels' requests for a twelve-person jury, the trial court expressed the following: "I understand the argument, but I still think that the law is clear, and I don't find that it's ambiguous. So I'm just following 85.15 of Title 8 basically." *Id.* at 6.

[12] After an amended superseding indictment was filed, which removed the Attempted Murder charge and related Special Allegation, a jury of six members was empaneled and the retrial commenced. After four days of trial, the jury returned a guilty verdict for both Aggravated Assault charges, and related Special Allegations, and the LIO of Assault (As a Misdemeanor). The six-person jury was individually polled and all concurred with the guilty verdicts.

[13] The court entered the guilty verdicts in a final judgment, and Katzuta filed a timely notice of appeal.

II. JURISDICTION

[14] This court has appellate jurisdiction over this matter pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-219 (2016)); 7 GCA §§ 3107(b) and 3108(a) (2005); and 8 GCA §§ 130.10 and 130.15(a) (2005).

[1] The prosecuting attorney cited to 8 GCA § 50.58, which governs the return of an indictment. Title 8 GCA § 50.58 states in pertinent part, "[a]n indictment may be found only upon the concurrence of twelve (12) or more jurors . . . . If the defendant has been arrested and twelve (12) jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith." 8 GCA § 50.58 (2005). The prosecution's objection used the language from 8 GCA § 50.58 and stated that "the logic doesn't follow that you would require twelve Grand Jury members to have a concurrence that there was probable cause, and yet have six people determine a defendant's guilt for a felony matter." Transcript ("Tr.") at 3-4 (Jury Trial, Feb. 10, 2015). Katzuta supported this objection.

III. STANDARD OF REVIEW

[15] "Any issues not raised by the defendant at trial or at sentencing are reviewed for plain error." *People v. Joshua*, 2015 Guam 32 ¶ 21 (citing *People v. Moses*, 2007 Guam 5 ¶¶ 8, 53). Plain error affects the defendant's substantial rights and is error that is clear or obvious under current law where reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process. *People v. Quitugua*, 2009 Guam 10 ¶ 11 (citations omitted). "The appellant bears the burden to demonstrate that reversal is warranted." *Id.* (citations omitted).

[16] We apply a *de novo* standard of review when we address issues of statutory construction. *Joshua*, 2015 Guam 32 ¶ 20 (citing *People v. Felder*, 2012 Guam 8 ¶ 9); *Sumitomo Constr., Co. v. Gov't of Guam*, 2001 Guam 23 ¶¶ 7, 17.

[17] Issues of the law of the case doctrine or rules governing reconsideration are reviewed for an abuse of discretion. *See People v. Gutierrez*, 2005 Guam 19 ¶ 42 (citation omitted) (finding that the trial court did not abuse its discretion in reconsidering a previous order); *see also United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) ("Failure to apply the doctrine of the law of the case absent one of the multiple conditions constitutes an abuse of discretion." (citing *Thomas v. Bible*, 983 F.2d 152, 155 (9th Cir. 1993))).

[18] "A trial court abuses its discretion when its decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *Gutierrez*, 2005 Guam 19 ¶ 13 (quoting *Town House Dep't Stores, Inc. v. Ahn*, 2003 Guam 6 ¶ 27). *Gutierrez* expounds upon the definition of an abuse of discretion stating that it is an abuse of discretion when the trial court's decision is not "justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Id.* (quoting

People v. Tuncap, 1998 Guam 13 ¶ 12). On review, we do not "substitute [our] judgment for that of the trial court. Instead, [we] must first have a definite and firm conviction the trial court, after weighing relevant factors, committed clear error of judgment in its conclusion." *Id.*

[19] "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); *see also People v. Leon Guerrero*, 2001 Guam 19 ¶ 11 (citations omitted).

IV. ANALYSIS

[20] Katzuta raises three issues on appeal. We initially review the argument that his convictions should be reversed and that the charges from the amended superseding indictment be dismissed because the doctrine of collateral estoppel should have barred a retrial.

A. Doctrine of Collateral Estoppel

1. Plain Error Standard of Review

[21] Katzuta did not raise the issue of collateral estoppel on double jeopardy grounds to the trial court. "As a matter of general practice, 'this court will not address an argument raised for the first time on appeal.'" *People v. Camacho*, 2013 Guam 3 ¶ 9 (quoting *Taniguchi-Ruth + Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 78). However, "we have discretion to review or disregard an argument raised for the first time on appeal." *People v. Roten*, 2012 Guam 3 ¶ 37 (citing *People v. Leslie*, 2011 Guam 23 ¶ 28). This court's "exercise of discretion to review a newly raised issue is 'reserved for extraordinary circumstances where review is necessary to address a miscarriage of justice or to clarify significant issues of law.'" *Id.* (quoting *Leslie*, 2011 Guam 23 ¶ 28). Because Katzuta's collateral estoppel claim concerns a potential violation of his basic constitutional right, this issue constitutes an extraordinary circumstance where review is necessary to address a miscarriage of justice.

[22] We will review Katzuta's appellate claim under a plain error standard. "Plain error is highly prejudicial error" affecting the defendant's substantial rights. *Quitugua*, 2009 Guam 10 ¶ 11. To warrant a reversal, Katzuta bears the burden to prove that "(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.* (citations omitted).

2. Collateral Estoppel – Whether the Trial Court Committed an Error

[23] Katzuta claims highly prejudicial error occurred because he was subjected to a retrial when charges should have been dismissed on double jeopardy grounds, specifically pursuant to the doctrine of collateral estoppel. Appellant's Br. at 17 (Sept. 25, 2015). Because the first trial resulted in an acquittal of the Attempted Murder and the accompanying Special Allegation, Katzuta contends that the People are barred from retrying him on the Aggravated Assault (as a Second Degree Felony), Aggravated Assault (as a Third Degree Felony), and related Special Allegations, and LIO of Assault (as a Misdemeanor). *Id.* at 20-21. Specifically, Katzuta asserts that the Attempted Murder acquittal proves that the jury found Katzuta "did not injure T.R., that . . . [he] did not create substantial risk of death (serious bodily injury) or cause physical pain (bodily injury)." *Id.* at 21. Katzuta also claims that the Special Allegation acquittal proves the jury found that he did not possess and use a knife at the time of the criminal episode and that this was an essential element to the remaining Special Allegations. *Id.* at 20.

[24] The People maintain that the trial court did not err in trying Katzuta for the charges in the amended superseding indictment because "the issue at hand was not an ultimate fact that was decided by the jury's acquittal of Katzuta in the first trial." Appellee's Br. at 9-10 (Nov. 30,

2015). Katzuta "failed to meet his burden of demonstrating that the jury must have grounded its verdict on the facts he wished to foreclose." *Id.* It is the People's position that:

> From a review of the first trial record, there is evidence presented by the People of Guam that could allow the jury to conclude that Katzuta lacked the *mens rea* for the offense of attempted murder, without necessarily deciding whether a deadly weapon was used in the attack on the victim.

Id. at 11.

[25] The Double Jeopardy Clause of the Fifth Amendment does not prevent re-prosecution of a charge when the previous trial results in a mistrial due to a jury failing to reach a verdict. *See Yeager v. United States*, 557 U.S. 110, 118 (2009) (citations omitted). However, under collateral estoppel principles, retrial of a certain charge may be barred if an ultimate fact has been determined by a valid and final judgment. *Id.* at 119 (footnote omitted) (citing *Ashe v. Swenson*, 397 U.S. 436 (1970). The United States Supreme Court opined that collateral estoppel applies in criminal proceedings because it "is embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe*, 397 U.S. at 444-45 (footnote omitted). Because of the vitally important interest of preservation of "the finality of judgment," collateral estoppel would bar retrial of a defendant. *Yeager*, 557 U.S. at 118-19.

[26] Collateral estoppel means that "when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *People v. Angoco*, 2004 Guam 11 ¶ 9 (quoting *People v. San Nicolas*, 1999 Guam 19 ¶ 12). To illustrate, in the United States Supreme Court case, *Ashe v. Swenson*, the jury acquitted the defendant of a single offense of robbery because there was insufficient evidence to prove the only contested issue at trial – identity. 397 U.S. at 440, 445. The Court held that the acquittal collaterally estopped subsequent prosecution of the defendant for the alleged robbery of

a different victim during the same criminal episode. *Id.* at 446. The *Ashe* Court ruled that "where a previous judgment of acquittal was based upon a general verdict," courts must:

> "[E]xamine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all circumstances of the proceedings."

Id. (footnote omitted) (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)). The law as expressed in *Ashe* is controlling when analyzing a collateral estoppel claim under the Double Jeopardy Clause. However, the *Ashe* Court addressed a collateral estoppel claim as applied to a single charge. Here, Katzuta faced multiple charges for violation of different crimes. The Court's analysis in *Yeager* provides further guidance on when a retrial against a defendant is barred if a jury, in the same trial, acquitted a defendant on certain counts and was deadlocked on others. *Yeager*, 557 U.S. at 119-20.

[27] In *Yeager*, the jury acquitted the defendant on fraud charges but was deadlocked as to insider trading charges that stemmed from the same criminal episode. *Id.* at 114-15. The Court concluded that "acquittals can preclude retrial on counts on which the same jury hangs" and held that "consideration of hung counts has no place in the issue-preclusion analysis." *Id.* at 122, 125.

[28] Instead the proper inquiry, as the Court held, is to determine whether the issue which a defendant wishes to preclude "was a critical issue of ultimate fact in *all of the charges against* [a defendant]" and if "a jury verdict that necessarily decided that issue in [the defendant's] favor protects him from prosecution for any charge for which that is an essential element." *Id.* at 123 (emphasis added).

[29] The *Yeager* case was remanded to the Fifth Circuit Court of Appeals. *United States v. Yeager*, 334 F. App'x. 707, 708-09 (5th Cir. 2009). The Fifth Circuit upheld its previous

decision finding that a proper *de novo* factual determination of the entire record was conducted, as required by *Ashe*, and found that in acquitting the defendant, the jury must have made a finding that the defendant did not have any insider information. *Id.* The Fifth Circuit determined that reprosecution on the deadlocked charges for insider trading and money laundering was precluded because of the jury's finding. *Id.*

[30] We note that, based on *Yeager*, the charges on which the jury was deadlocked cannot be considered in our analysis under the doctrine of collateral estoppel. *See Yeager*, 557 U.S. at 123, 125.

[31] Whether the doctrine of collateral estoppel applies and bars future litigation has been addressed by this jurisdiction in the *San Nicolas* and *Angoco* cases. This jurisdiction addressed a simplified approach to the *Yeager* inquiry by using a three-part test, otherwise referred to as the "*San Nicolas* test." *See Angoco*, 2004 Guam 11 ¶ 10 (citing *San Nicolas*, 1999 Guam 19 ¶ 13). The three-part test is the following:

> (1) An identification of the issues in the two actions for the purpose of determining whether the issues are *sufficiently similar and sufficiently material* in both actions to justify invoking the doctrine [of collateral estoppel];
>
> (2) an examination of the record of the prior case to decide whether the issue was '*litigated*' in the first case; and
>
> (3) an examination of the record of the prior proceeding to ascertain whether the issue was *necessarily decided* [in the defendant's favor].

Id. (emphases added) (footnote omitted) (citing *San Nicolas*, 1999 Guam 19 ¶ 13). The defendant holds the burden to demonstrate that the issue sought to be foreclosed for relitigation was actually decided in the first trial. *See Dowling v. United States*, 493 U.S. 342, 350 (1990) (citations omitted).

[32] Katzuta advances that the following issues have been previously litigated and decided by his acquittal of the Attempted Murder (as a First Degree Felony) and Special Allegation (Possession and Use of a Deadly Weapon in the Commission of a Felony), and therefore he cannot be retried based on collateral estoppel – that he did not: (1) injure T.R; (2) cause bodily injury to T.R.; (3) create serious bodily injury to T.R.; and (4) possess and use a knife on the day of the incident. Appellant's Br. at 20-21. We must now conduct a review of the entire record from the first trial and determine, in acquitting Katzuta of the charges of Attempted Murder (as a First Degree Felony) and Special Allegation (related to Attempted Murder) by a general verdict, whether the jury found that Katzuta did not injure, or cause bodily injury, or create serious bodily injury to T.R.; or that he did not possess and use a knife the day of the criminal episode.

a. Collateral estoppel as applied to the attempted murder acquittal

[33] Part one of the *San Nicolas* test requires Katzuta to prove that the issues he seeks to foreclose were considered in the first trial, were sufficiently similar, and sufficiently material in both trials. *See Angoco*, 2004 Guam 11 ¶ 10. To sustain a guilty verdict for Attempted Murder, the prosecution must have proven that Katzuta "intentionally attempted to cause the *death*" of T.R. on or about January 1, 2014, in Guam. RA, tab 60 at 3L (Jury Instructions, Oct. 22, 2014) (emphasis added).

[34] The issues which Katzuta wishes to foreclose were considered in the first trial. However, what is readily apparent and highly distinguishable from *Yeager*, is that Katzuta raises issues that are not sufficiently similar, and he raises issues with respect to the elements of the deadlocked charges rather than issues related to the acquitted charges.[2] In acquitting Katzuta of Attempted

[2] The issues are elements of the deadlocked charges, Aggravated Assault (as a Second Degree Felony) ("serious bodily injury"); Aggravated Assault (as a Third Degree Felony) ("bodily injury"); and the LIO of Assault (as a Misdemeanor) ("bodily injury"). *See* RA, tab 60 at 3N, 3P, 3R (Jury Instructions, Oct. 22, 2014).

Murder (as a First Degree Felony), the jury must have found that Katzuta did not "attempt to cause the *death*" of T.R. or that Katzuta did not commit such an act "intentionally." *See* 9 GCA §§ 13.60, 16.20(a)(1) (2005) (Attempted Murder (As a First Degree Felony) statutes); RA, tab 8 at 1 (Indictment, Jan. 14, 2014).

[35] Under the logic from *Yeager* and the requirement from the first prong of the *San Nicolas* test, the issues which Katzuta wishes to foreclose (bodily injury/serious bodily injury) were not critical issues in all charges against him and were not essential elements of the acquitted charge. Katzuta fails to meet his burden under the *San Nicolas* test as applied to the Attempted Murder acquittal. Thus, as it is related to the Attempted Murder acquittal, there is no error to satisfy the first prong of the plain error inquiry.

b. Collateral estoppel as applied to the special allegation (possession and use of a deadly weapon in the commission of a felony) acquittal

[36] The jury in the first trial reached a unanimous general verdict finding Katzuta not guilty of both the Attempted Murder and Special Allegation. Tr. at 5 (Status Hr'g, Nov. 5, 2014). To sustain a guilty verdict for the Special Allegation, it must be proven that Katzuta "did knowingly and unlawfully possess and use a deadly weapon, that is, *a knife*" and did this "in the commission of *Attempted Murder*" on or about January 1, 2014, in Guam. *See* RA, tab 60 at 3M (Jury Instructions, Oct. 22, 2014); RA, tab 8 at 2 (Indictment); 9 GCA § 80.37 (2005). It is reasonable to conclude that because the jury acquitted Katzuta of the Attempted Murder charge, the jury must have acquitted Katzuta of the related Special Allegation. However, such a conclusion should not foreclose our analysis under the *San Nicolas* test when Katzuta's constitutional rights are potentially affected. If it is found that collateral estoppel applies to the issue of whether Katzuta possessed and used a weapon at the time of the criminal act, this would have barred retrial of the additional Special Allegations.

i. *San Nicolas* first prong – issues sufficiently similar and material

[37] Katzuta contends the issue that he allegedly used and possessed a deadly weapon/knife the day of the incident was foreclosed from reprosecution. Appellant's Br. at 20. He is correct in his claim that this issue was an essential element to the remaining Special Allegations and Aggravated Assault (as a Third Degree Felony) charge. *Compare id., with* RA, tab 116 at 3K-M (Jury Instructions, Feb. 17, 2015). *See also* RA, tab 8 at 2 (Indictment); 9 GCA § 80.37. Both Special Allegations and the Aggravated Assault (as a Third Degree Felony) charge required the prosecution prove that Katzuta possessed and used a knife. *Id.* As such, under the first prong of the *San Nicolas* test ("issues are sufficiently similar and sufficiently material in both actions"), Katzuta has met his burden to demonstrate the issues are sufficiently similar and material in both actions.

ii. *San Nicolas* second prong – issue previously litigated

[38] Under the second prong of the *San Nicolas* test, we must conduct an examination of the record to resolve whether the People adequately litigated the issue of possession and use of a deadly weapon/knife the day of the alleged crime in the first trial. *See San Nicolas*, 1999 Guam 19 ¶ 13 (citations omitted).

[39] The People called several witnesses, most of whom offered testimony to establish that a deadly weapon/knife was used. First to testify for the People was Officer Arthur B. Diola, Jr., who was called to the scene and who assessed the extent of T.R.'s injuries and appearance of the premises. Tr. at 29-45 (Jury Trial, Oct. 17, 2014). Officer Diola testified that he found T.R. in the grassy area of the duplex and that T.R. had sustained what "looked to be a cut" on both his forehead and chest. *Id.* at 32-33. He also indicated that he assessed the demeanor of and spoke

with Sam Kosam, an eye-witness to the crime, and conducted a suspect check through other duplexes that were in close proximity to the scene. *Id.* at 46-47, 59.

[40] The People then called Officer Eric Asanoma who was also dispatched to the scene, which was reported as a stabbing incident. Tr. at 7, 9 (Jury Trial, Oct. 20, 2014). He was not able to obtain a proper look at T.R.'s wounds. *Id.* at 11-12. Officer Asanoma also conducted a suspect check and inspected the surrounding area for weapons/sharp objects, but could not recall whether he found any. *Id.* at 16-20.

[41] Next to testify for the People was Firefighter James Invencion, who was assigned to the ambulance unit that arrived at the scene and transported T.R. to GMH. *Id.* at 23, 29. Firefighter Invencion testified that the nature of the call was a stabbing and T.R. sustained a laceration to his chest and avulsion to his head. *Id.* at 27.

[42] Also testifying was Aimy Francis, who lives next door to where the incident occurred and was called to help T.R. *Id.* at 51-56. She testified that she was called to assist T.R. because he was the individual that "got chopped." *Id.* at 57-58. Francis was the individual who placed a shirt on the wounds to suppress the bleeding. *Id.* at 58.

[43] The People then called Rosenin Kosam, who lives with Francis and was friends with T.R. *Id.* at 64, 68-69. She testified that she called the police "because that's when T.R. was chopped by the machete." *Id.* at 73. Although, Rosenin did not see the machete, she stated that T.R. sustained a "big cut" and that "it was pretty obvious it was a machete because [T.R.'s injury] was a big cut." *Id.* at 73, 83.

[44] The victim, T.R. Reuney, also testified for the People. *Id.* at 91. T.R. testified that he was "hit by some sort of sharp object" in the head and chest. *Id.* at 99-100. On cross-examination, defense counsel attempted to discredit T.R. because he was intoxicated the night of

the incident, but T.R. testified that he sustained no other injury that would lead him to believe that his injuries came as a result of punching or kicking. *Id.* at 119. Defense counsel also asked T.R. whether Katzuta slashed him with a knife/sharp object, to which T.R. replied in the affirmative. *Id.* at 120.

[45] John Fegurgur, a medical doctor who initially treated T.R.'s stab wound in the GMH emergency room, testified as to the severity of T.R.'s injuries. *Id.* at 133-35. Doctor Fegurgur testified that T.R. sustained a large laceration, his ribs were cut, and his head and lungs were both lacerated. *Id.* at 140, 150. In clarifying what type of wounds T.R. received, Doctor Fegurgur testified that it was "a stab wound, I mean basically pretty common it's a jab with a knife . . . it didn't seem like a stab wound more so than like a cut." *Id.* at 151.

[46] Armando Aquila was the next individual to testify for the People. *Id.* at 158. His sister is in a relationship with Katzuta. *Id.* at 161. Aquila stated he gave Katzuta a ride to a local store in Dededo, and that he observed Katzuta's demeanor and asked him if he did something wrong. *Id.* at 166. Katzuta informed Aquila that "[h]e chopped someone." *Id.* at 166.

[47] Officer Keane Pangelinan was next to testify. *Id.* at 206. He conducted a follow-up investigation on the matter, verified T.R.'s conditions, and was the arresting officer. *Id.* at 208, 216. Officer Pangelinan testified that after advising Katzuta of his *Miranda* rights and while transporting Katzuta to the police department, Katzuta spontaneously stated the following: "You weren't there when I stabbed the guy in Yigo." *Id.* at 216-17.

[48] Lastly, the People called eye-witness Sam Kosam, who was one of the individuals drinking with T.R. and Katzuta. Tr. at 7, 12, 14 (Jury Trial, Oct. 21, 2014). Kosam witnessed Katzuta and T.R. engage in a verbal altercation and witnessed Katzuta disappear from the place where they were drinking, to return moments later with a knife. *Id.* at 15-17. Sam testified that

T.R. was "[c]hopped by a butcher knife" and described the type of knife. *Id.* at 18-19. He also stated that Katzuta took the knife with him when he left the scene. *Id.* at 21.

[49] Based on the evidence presented at the first trial, it is evident that the People fully presented their case on the issue of whether a deadly weapon/knife was used and in possession at the time of the criminal act. Therefore, the requirements under the second prong of the *San Nicolas* test are satisfied.

iii. *San Nicolas* third prong – issue previously determined

[50] Under the third prong of the *San Nicolas* inquiry, we must examine the first trial's record to determine whether the issue was not only decided in the first case, but was decided in Katzuta's favor. *See San Nicolas*, 1999 Guam 19 ¶ 13 (citations omitted); *Hernandez*, 572 F.2d at 218, 221.

[51] In *Yeager* on remand, the Fifth Circuit explained that based on the acquittal of the fraud charges, the jury must have decided that the defendant did not know insider information, which was an essential element to convict the defendant of the fraud charges in the retrial. 334 F. App'x. at 708-09. In *San Nicolas*, we determined that the issue of *mens rea*, the issue which the defendant sought to foreclose, was decided when the jury acquitted him of certain criminal homicide charges. 1999 Guam 19 ¶¶ 47-54. Therefore, the issue foreclosed a retrial on those charges. *Id.* ¶ 53.

[52] Based on the record on appeal, it is apparent that the People presented overwhelming evidence that a knife/deadly weapon *was* used, an essential element of the Special Allegations. The issue, however, was not decided in Katzuta's favor. Because the record clearly establishes that a knife/deadly weapon was in possession and used at the time of the criminal act, the jury must have acquitted Katzuta for an alternative reason. This alternative reason is one this court

need not determine, as courts should refrain from speculating what transpires in the jury room because it is the jury's sovereign space. *See Yeager*, 557 U.S. at 122 (citing *United States v. Powell*, 469 U.S. 57, 66 (1984); Fed. Rule Evid. 606(b)).

[53] Katzuta fails to meet his burden to prove that the issue of possession and use of a knife/deadly weapon should be barred from retrial because the issue was not decided in his favor in the first trial. It is apparent that a knife/deadly weapon *was* used at the time of the criminal episode rather than *was not* used, and the jury's general verdict of acquittal must have been for an alternative reason. We do not find an error necessary to satisfy the first element of the plain error test.

[54] Thus, Katzuta's convictions will not be reversed on the claim that the trial court committed plain error by failing to dismiss the case on the grounds of collateral estoppel. The trial court did not err because collateral estoppel would not have barred retrial of the charges.

B. *Sua Sponte* Reducing Jury Size

[55] We will now address Katzuta's alternative argument, that the trial court abused its discretion because it failed to follow the law of the case when it failed to follow the requirements of 8 GCA § 85.15, which governs jury size. Appellant's Br. at 14-16.

1. Standard of Review – Whether Katzuta Objected to the Trial Court's Action

[56] Katzuta contends that the plain error standard of review does not apply to this issue. Appellant's Reply Br. at 3 (Dec. 23, 2015). Katzuta believes he made a proper objection, and, therefore, an abuse of discretion standard of review applies. Appellant's Br. at 14. The People urge this court to apply the heightened plain error standard of review due to Katzuta's failure to make a proper objection. Appellee's Br. at 4. The People claim that Katzuta merely expressed his support for the prosecution's pre-trial motion to empanel a twelve-person jury. *Id.* at 5.

Additionally, the People contend that "[h]e plainly failed to put the trial court on notice that he would challenge the court's statutory construction of 8 GCA § 85.15, or that he would challenge the court's departure from the law of the case established at the first trial." *Id.*

[57] The trial court made the decision to reduce the jury panel size from twelve to six members based on the language of 8 GCA § 85.15. *See* RA, tab 98 at 1 (Mins. 2-10-15 (Jury Selection & Trial, Selection Day 1)). Immediately after the trial court made this decision, defense counsel made an oral request on record for a jury of twelve. *See id.* Thereafter, the prosecution made an oral motion to require a jury of twelve. *Id.* at 2. The trial court asked defense counsel if they would like to respond, to which defense counsel stated, "Your Honor, obviously we support that." Tr. at 5 (Jury Trial, Feb. 10, 2015).

[58] A party must make an objection to the trial court to preserve a claim of error, and so that claim of error is addressed on a standard of review other than plain error. *See* 8 GCA § 130.50 (2005) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). "[I]t is sufficient that a party at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and grounds therefor . . . ." 8 GCA § 130.55 (2005). "A party 'must object with that reasonable degree of specificity which would have adequately apprised the trial court of the true basis for his objection.'" *United States v. Bostic*, 371 F.3d 865, 871 (6th Cir. 2004) (quoting *United States v. LeBlanc*, 612 F.2d 1012, 1014 (6th Cir. 1980)) (counsel made a statement indicating only that he "wished to speak," but did not inform the court or the opposition of his "position" regarding a motion and the reviewing court applied a plain error standard of review).

[59] Here, it appears on the record that Katzuta did make a sufficient objection to the trial court's decision to empanel six rather than twelve jury members. He made it known to the trial court what action he desired the trial court to take, to empanel twelve jurors. *See* RA, tab 98 at 1 (Mins. 2-10-15 (Jury Selection & Trial, Selection Day 1)). Although Katzuta did not specifically cite to 8 GCA § 85.15, he did orally request for a twelve-person jury for the retrial, which was more than likely pursuant to 8 GCA § 85.15. *See* RA, tab 98 at 1 (Mins. 2-10-15 (Jury Selection & Trial, Selection Day 1)). We find that this request satisfies a sufficient objection because making a request for twelve jurors after the trial court reads 8 GCA § 85.15, should have given the trial court a reasonable degree of specificity for the basis of Katzuta's objection. More so, in response to the People's motion for a twelve-person jury, Katzuta made his position known to the trial court because he informed the court that he supported the motion to empanel a jury of twelve. Tr. at 5 (Jury Trial, Feb. 10, 2015). Although he did not specifically say "I object" in his request for a twelve-person jury immediately after the trial court reduced the jury panel size, he supported the People's motion to empanel a twelve-person jury and his additional actions were sufficient to satisfy the requirements of making a proper objection. Therefore, Katzuta properly preserved the claimed error for appellate review under a standard other than plain error.

[60] Because, Katzuta objected to the trial court's decision to empanel a jury of six rather than twelve members, an abuse of discretion standard of review applies to Katzuta's raised issue of the doctrine of the law of the case.

2. Whether Katzuta Invoked His Statutory Right, Pursuant to 8 GCA § 85.15, to be Tried by a Twelve-Person Jury

a. 8 GCA § 85.15 – Six Member Juries; When Twelve May be Requested

[61] Jury size determination is predicated by statute. *See* 8 GCA § 85.15 (2005). The issue of jury size determination requires statutory interpretation, which we review under a *de novo*

standard. *See Joshua*, 2015 Guam 32 ¶ 20 (citing *Felder*, 2012 Guam 8 ¶ 9); *see also Sumitomo*, 2001 Guam 23 ¶ 7 (citations omitted). "It is a cardinal rule of statutory construction that courts must look first to the language of the statute itself. Absent clear legislative intent to the contrary, the plain meaning prevails." *People v. Camacho*, 2015 Guam 37 ¶ 31 (quoting *Enriquez v. Smith*, 2012 Guam 15 ¶ 11). "[I]n determining legislative intent, a statute should be read as a whole . . . . Accordingly, '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Sumitomo*, 2001 Guam 23 ¶ 17 (second alteration in original) (citing *Kelly v. Robinson*, 479 U.S. 36, 43 (1986)).

[62] Title 8 GCA § 85.15 governs jury size. *See* 8 GCA § 85.15. The interpretation of 8 GCA § 85.15 presents an issue of first impression for this court. Pursuant to this section, a defendant may invoke his statutory right to be tried by a twelve-person jury. *See id.* Section 85.15 states in its entirety:

> Juries shall be of six. However, in a prosecution by *indictment* or information, *the defendant shall be entitled to a jury of twelve upon his written request filed with the court prior to the date of trial.* In any case where a jury of twelve is demanded, at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than twelve but not less than six.

Id. (emphasis added). Given its plain meaning, section 85.15 grants a defendant a statutory right to a twelve-person jury, but only upon his written demand that is filed prior to the start of trial. *See id.* Otherwise, the default jury size is six persons. *See id.*

[63] The United States Supreme Court held in *Williams v. Florida* that a six-person jury satisfies a defendant's Sixth Amendment right to a jury trial and that states are free to dictate the precise number that may constitute a jury, provided that it is not less than six. 399 U.S. 78, 100-03. Allowing a defendant to be tried by a six-person jury will not violate a defendant's

constitutional rights and will not have negative implications on the court's, or jurors', or parties' resources and time. *See id.* at 100.

b. Whether Katzuta invoked his statutory right

[64] The parties have conflicting opinions on whether Katzuta filed a written request demanding a twelve-person jury for the retrial. Katzuta claims that the record contained evidence that he had made a written request for a jury of twelve and that this request was "memorialized immediately afterwards in the minutes prepared by [the] clerk." Reply Br. at 5; *see also* Appellant's Br. at 15. He urges this court to recognize a liberal interpretation of the term "written request" because it "promotes fairness." Reply Br. at 4 (citing 8 GCA § 1.07(b)). He claims that "it was unfair to acknowledge [Katzuta's] request for a jury of twelve in the first trial and then deny that request in the second trial." *Id.* Katzuta also claims that by "[r]ecognizing that a Defendant has made a written assertion of a right when immediately memorialized simplifies procedure because it puts the court on notice of the Defendant's assertion, and it avoids duplicity." *Id.*

[65] The People assert that Katzuta did not file a written request for a twelve-person jury. *See* Appellee's Br. at 8. "[T]he parties and the court all assumed that Katzuta had filed a written request, and simply overlooked the absence of such a written request. . . . Therefore, all Katzuta can show is that the trial court implicitly found as a matter of fact that Katzuta had filed a written request." *Id.* The People claim that a liberal interpretation of the term "written request" would undermine the purpose of the statute which is an interest in economy. *Id.* at 6.

[66] Katzuta was originally prosecuted by a superseding indictment. RA, tab 36 at 1-3 (Superseding Indictment); *see People v. San Nicolas*, 2016 Guam 21 ¶ 17 (quoting *People v. Flores*, 2009 Guam 22 ¶ 18) ("A superseding indictment is an indictment filed before the original

or underlying indictment is dismissed."). As such, Katzuta should be entitled to a twelve-person jury if he filed a written request before the start of the first trial or retrial. *See* 8 GCA § 85.15. A request for a jury of twelve was recorded on the minute entry of his arraignment on January 22, 2014. RA, tab 13 at 1 (Min. 1-22-14 (Arraignment Hr'g)). This minute entry was also filed before the start of the retrial. *See id.* However, we find and now conclude that such a request is not sufficient to satisfy the requirements of section 85.15.

[67] The language from section 85.15 states "*his* written request." *See* 8 GCA § 85.15 (emphasis added). Based on statutory interpretation rules, the plain meaning of "written request" should prevail because section 85.15 lacks clear legislative intent of what constitutes a defendant's "written request." *See Camacho*, 2015 Guam 37 ¶ 31 (citations omitted); *Sumitomo*, 2001 Guam 23 ¶ 17 (citations omitted). Given a literal interpretation of section 85.15, it is clear that it must be the defendant's own and separate written request for a twelve-person jury. Because a minute entry is completed and filed by the court, this document would not qualify as a defendant's own written request to invoke his statutory right to be tried by a twelve-person jury.

[68] Katzuta cites to the case, *United States v. Lane*, to support his argument that his oral request for a jury of twelve that was later recorded in the court's minute entry sheet constitutes a written demand for twelve jurors. *See* Appellant's Br. at 15. In *Lane*, at the midst of trial, the defendant stipulated in open court to proceed with an eleven-person jury because a juror became ill. 479 F.2d 1134, 1136 (6th Cir. 1973). Because his oral stipulation was immediately recorded in the reporter's shorthand notes, it met the test of "stipulate[d] in writing" as required by Federal Rules of Criminal Procedure ("FRCP") Rule 23(b). *Id.* (alteration in original). The concern in *Lane* was the application of FRCP 23(b), where the default number of jurors is twelve but provides for less than twelve if stipulated in writing by a defendant. *Id.*; *see also* FRCP 23(b).

[69] We find the *Lane* case distinguishable from Katzuta's in several respects. The default number of empaneled jurors pursuant to FRCP 23(b) is twelve, while the default number in 8 GCA § 85.15 is six. In this regard, the *Lane* court analyzed whether a *waiver* made orally would suffice to *reduce* the number of jurors in accordance with FRCP 23(b). Unlike this instance, where the main concern is whether there was a proper *invocation* of a statutory right in order to *increase* the default jury size in accordance with 8 GCA § 85.15. More so, the oral stipulation in *Lane* was made known while in the middle of trial, not at the start of trial. Here, Katzuta was afforded the opportunity from after his arraignment hearing until the time the retrial commenced to file a written request invoking his statutory right to be tried by a twelve-person jury. Contrary to what Katzuta proposes, *Lane* is unpersuasive, and we will not use the logic from *Lane* to conclude that a post-arraignment minute entry sheet memorializing an oral request to be tried by a twelve-person jury satisfies the written requirement of 8 GCA § 85.15.

[70] The People argue that applying a liberal interpretation of what constitutes a "written request" does not serve the purpose of 8 GCA § 85.15. Appellee's Br. at 6. The People's argument is convincing. If liberally applying "written request" to mean that any written document requesting twelve jurors satisfies the requirements of section 85.15, then for every felony case, twelve jurors will be empaneled when the default size of six jurors may otherwise be used. This occurrence would not serve the purpose of section 85.15, that is economic concerns because court resources and time would be used to conduct voir dire for the extra six jurors, extra supplies would be provided in order for the jury to function (extra notebooks, lunch, etc. provided to the additional six jurors), and jury per diem for the additional six jurors for each day of trial and deliberations would be paid. As such, applying the plain meaning of what constitutes a "written request" under section 85.15 will best serve the purpose of section 85.15.

[71] Katzuta cites to the language of 8 GCA § 1.07(a), which governs the general applicability of the Guam Criminal Procedure Code. *See* Reply Br. at 4 (Katzuta erroneously cites to 8 GCA § 1.07(b), however, the language he quotes is from subsection (a)). According to 8 GCA § 1.07(a), provisions in the Code "are intended to provide for the just determination of every criminal proceeding and shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." 8 GCA § 1.07(a). There is no clear legislative intent that contradicts what constitutes "his written request" and therefore, the plain meaning of "his written request" will be applied, albeit the provision of section 1.07(a).

[72] We find that Katzuta did not file a separate pleading that requested a trial by a twelve-person jury. Because of his failure to file a separate pleading making such a request, we conclude that Katzuta did not invoke his statutory right to be tried by a twelve-person jury for the first trial or the retrial. It was the trial court's decision to empanel a twelve-person jury for Katzuta's first trial. Therefore, we now address the issue of whether it was an abuse of the trial court's discretion to depart from the previous decision to empanel a jury size of twelve for the first trial, and subsequently empanel a six-person jury for the retrial.

3. Doctrine of the Law of the Case and Principles Governing Reconsideration

[73] The doctrine of the law of the case, as applied to a trial court's decision on jury size, is also a matter of first impression for this court.[3] "Under the 'law of the case' doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court

[3] *See People v. Rios*, 2011 Guam 6 ¶ 43 (legal conclusions reached in the trial court's decision and order, based on its application of the law of the case doctrine, were not clearly erroneous and the trial court did not err in its application of the law of the case doctrine in dismissing charges against defendants); *People v. Tennessen*, 2009 Guam 3 ¶ 41 (doctrine of the law of the case was not used to reconsider a denial of a defendant's renewed motion to disqualify entire office of the attorney general); *People v. Orallo*, 2006 Guam 8 ¶¶ 5-6 (doctrine of the law of the case as applied to a court's holding on what constitutes relevant evidence at trial); *Gutierrez*, 2005 Guam 19 ¶ 42 (doctrine was used to reconsider a trial court's order to dismiss a case without prejudice because new evidence was presented and there were changed circumstances); *People v. Hualde*, 1999 Guam 3 ¶ 13 (doctrine was used to reconsider a trial court's denial of a motion to suppress evidence pursuant to 8 GCA § 130.20(a)(6)).

. . . ." *People v. Orallo*, 2006 Guam 8 ¶ 5 (citations omitted). Court's decisions upon a rule of law "should continue to govern the same issues in subsequent stages in the same case." *Id.* (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816-17 (1988)). Rulings made in a proceeding are considered the law of the case and are binding in later proceedings. *See Gutierrez*, 2005 Guam 19 ¶¶ 30, 37. A trial court's failure to apply the doctrine of the law of the case absent one of the limited circumstances constitutes an abuse of discretion. *See id.* ¶¶ 40, 42.

> It is clear, however, that courts accepting the applicability of the doctrine in reconsidering orders made by the same judge have harmonized the law of the case doctrine with the general rule regarding reconsideration. Thus, whether or not proceeding under [the] law of the case doctrine, a judge is nonetheless constrained by principles governing reconsideration. Whether or not the issue is precisely one of departing from the law of the case, the underlying inquiry nonetheless focuses on whether the trial court was acting appropriately in reconsidering the prior decision.

Id. ¶¶ 39-40 (footnote omitted). When reviewing whether it was an abuse of a trial court's discretion to depart from the law of the case, a review of both the doctrine of the law of the case and principles governing reconsideration is required. *See id.*

[74] As we expressed in *Gutierrez*, a court may depart from the law of the case in limited circumstances, including where: "1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *Id.* ¶ 40 (quoting *Hualde*, 1999 Guam 3 ¶ 13) (citing *Lujan v. Lujan*, 2002 Guam 11 ¶ 7). Also in *Gutierrez*, we discussed factors which justify a trial court's reconsideration of a previous decision. *Id.* ¶ 41. The factors justifying a court's reconsideration of a previous decision include "where the trial court: (1) is presented with new evidence; (2) committed clear error or the decision was manifestly unjust; or (3) if there is an intervening change in controlling law." *Id.*

(quoting *Quitugua v. Flores*, 2004 Guam 19 ¶ 38). Only one circumstance or factor must be present in order to justify a departure from the law of the case. *See id.*

[75] To illustrate, in *Gutierrez*, the trial court revisited its previous decision that dismissed the case without prejudice and changed its ruling so that the case was dismissed with prejudice. *Id.* ¶ 42. On appellate review, we applied both the doctrine of the law of the case factors and the factors that justify reconsideration of the trial court's subsequent order dismissing the case with prejudice. *Id.* We concluded that the trial court did not abuse its discretion in revisiting its previous decision because the trial court found the People acted in bad faith. *Id.* The factors, new evidence and changed circumstances, were therefore satisfied to justify the trial court's later decision to dismiss the case with prejudice. *Id.*

[76] Katzuta argues that the trial court abused its discretion in failing to follow the law of the case regarding another judge's finding from an arraignment hearing that Katzuta demanded a jury of twelve, and failed to empanel a twelve-person jury for his retrial. Appellant's Br. at 14-16. The People counter, arguing that "[t]he trial court's determination that its previous finding was clearly erroneous is not itself clearly erroneous" to warrant reversal of Katzuta's convictions. Appellee's Br. at 8. The People contend that the trial court found its previous decision, to empanel twelve jurors, to be clearly erroneous and the exception to the doctrine of the law of the case applies. *See id.*

[77] Here, invocation of a twelve-member jury is predicated by statute, not by a judge's determination. *See* 8 GCA § 85.15. We find that the record does not prove that Katzuta made a written request invoking such a right. As such, the arraigning judge's finding (that he demanded a jury size of twelve) was not "the law of the case," and a court would be free to depart from this previous finding. *See generally Gutierrez*, 2005 Guam 19. More so, if the arraigning judge's

finding did become "the law of the case," then that finding was "clearly erroneous" because Katzuta did not demand for a twelve-person jury since he did not file a separate pleading making such a demand, and therefore did not meet the requirements of 8 GCA § 85.15. *See Rios*, 2011 Guam 6 ¶ 33 ("The law of the case will be disregarded only when the court has 'a clear conviction of error' with respect to a point of law . . . .'" (alteration in original) (quoting *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d. Cir. 1981))); *see also Alexander*, 106 F.3d at 877 ("[I]n reviewing a [trial] court's factual finding for clear error, [the reviewing court] must not reverse as long as the findings are plausible in light of the record viewed in its entirety . . . .").

[78] In *Alexander*, the Ninth Circuit also analyzed a district court's decision to depart from the law of the case. 106 F.3d at 876. The prosecution argued in part that a trial court's reconsideration of a motion to suppress evidence was justified because the "clear error" exception to the law of the case doctrine applied. *Id.* at 877. The reviewing court analyzed the first exception of the doctrine, and stated that a reviewing court should not reverse a district court's finding for clear error, "as long as the findings are plausible in light of the record viewed in its entirety." *Id.* at 877. The Ninth Circuit found that the trial judge's finding was plausible in light of the evidence and held that the exception did not apply because the trial court's finding was not clearly erroneous; the trial court abused its discretion in departing from the law of the case. *Id.* at 878.

[79] The facts from *Alexander* are distinguishable from this case. The trial court's finding in the first trial that Katzuta invoked his statutory right to be tried by a twelve-person jury was not plausible in light of the filings in the record, because as previously stressed upon, Katzuta did not file a separate written request. Therefore, the trial court's finding in the first trial was clearly erroneous. Because this finding was not plausible, the trial court's departure from the law of the

case in the retrial was justified based on the first exception to the doctrine, which is that the "first decision was clearly erroneous." Because the "clear error" exception to the law of the case doctrine applies, we will not reverse the trial court's application of the doctrine. *Contra Alexander*, 106 F.3d at 876-78.

[80] Therefore, the first exception to the law of the case doctrine is applicable in this instance and the trial court was permitted to depart from the first decision to empanel twelve jurors.[4] The trial court properly exercised its discretion in empaneling six jurors for the retrial because Katzuta did not invoke his statutory right for a jury size of twelve. His retrial by a six-person jury was not in violation of 8 GCA § 85.15.

[81] The trial court was justified in departing from the law of the case because the doctrine's exception applies and we do not have a firm and definite conviction that the trial court committed a clear error of judgment in concluding that it was permitted to empanel six jurors. Thus, we affirm Katzuta's convictions.

C. Ineffective Assistance of Counsel

[82] Lastly, Katzuta claims his convictions should be reversed because he received ineffective assistance of counsel when his attorney did not move for a dismissal of the charges based on the collateral estoppel grounds discussed above. Appellant's Br. at 24. The People oppose by using their previous argument that collateral estoppel does not apply in Katzuta's case. Appellee's Br. at 14.

[83] Generally, this court employs the *Strickland* two-part test established by the United States Supreme Court, to determine whether a defendant was deprived of the effective assistance of

[4] Because we find that the first exception to the law of the case doctrine is applicable, we do not need to consider the remaining factors since one circumstance or factor must be present in order to justify a departure from the law of the case. *See Gutierrez*, 2005 Guam 19 ¶ 41.

counsel. *See People v. Damian*, 2016 Guam 8 ¶ 28 (citing *Meseral*, 2014 Guam 13 ¶ 45; *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Under the *Strickland* test, a defendant must prove that: (1) trial counsel's performance was deficient so as to fall below the prevailing professional norms; and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. 466 U.S. at 687, 694 ("[C]ounsel's errors were so serious as to deprive the defendant of a fair trial . . . that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); *see also Damian*, 2016 Guam 8 ¶ 28; *Meseral*, 2014 Guam 13 ¶¶ 45, 46.

[84] As indicated above, Katzuta's collateral estoppel claim will not warrant a reversal of his convictions. As such, his trial attorney did not perform inadequately by not raising a motion to dismiss the charges based on collateral estoppel and double jeopardy.

[85] Thus, Katzuta's ineffective assistance of counsel claim on appeal will not warrant reversal of his convictions because it was not necessary for his trial counsel to move the court to dismiss his charges on retrial due to collateral estoppel grounds because collateral estoppel does not apply.

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V. CONCLUSION

[86] Based on the foregoing, we find that the collateral estoppel doctrine did not bar retrial on the charges for which the jury was deadlocked in the first trial; that Katzuta did not receive ineffective assistance of counsel; and that the trial court's reduction of the jury size for the retrial was not an abuse of discretion. Therefore, we **AFFIRM** Katzuta's convictions.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice