



**Filed**

Supreme Court of Guam, Clerk of Court

**IN THE SUPREME COURT OF GUAM**

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

**v.**

**TRESEAN DARELL RAMEY,**  
**aka Tresean Durell Ramy, aka Tressean Darrel Ramey,**  
Defendant-Appellant.

**OPINION**

**Cite as: 2019 Guam 11**

Supreme Court Case No.: CRA17-017  
Superior Court Case No.: CF0672-15

Appeal from the Superior Court of Guam  
Argued and submitted on July 9, 2018  
Hagåtña, Guam

Appearing for Defendant-Appellant:  
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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.

**TORRES, J.:**

[1] Defendant-Appellant Tresean Darell Ramey appeals from a final judgment finding him guilty of Second Degree Robbery (As a Second Degree Felony).<sup>1</sup> Ramey seeks reversal of his conviction and alleges that the trial court erred in not instructing the jury that third degree robbery is an included offense of second degree robbery. For the reasons discussed below, we vacate the Judgment of Conviction and remand.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

[2] This criminal appeal arises from a physical altercation between Ramey and the victim, John Louis Thompson. It is undisputed that Ramey hit Thompson. However, the two men recall differently the circumstances surrounding this interaction. Thompson’s recollection of the events the night in question is as follows. While at Thompson’s apartment, Ramey’s co-defendant, Brandy Black, asked Thompson for \$500.00, which he refused to give to her. Black then asked Thompson, “Well, don’t you want me?” which Thompson took to mean she was offering him sex for money. Transcripts (“Tr.”) at 31 (Opening Statements/Testimony, Apr. 14, 2017). Thompson refused her offer. After this conversation with Black, Ramey punched Thompson from behind, striking Thompson’s temple and causing him to collapse.

[3] While Thompson was on the ground, Ramey and Black struck Thompson multiple times in the face. Thompson asked Ramey why he was punching him, and Ramey said, “You know what this is about.” *Id.* at 32. Thompson thought that Ramey intended to rob him, so he told Ramey that his wallet was in his pocket. Black searched Thompson and removed the wallet from his pocket. *Id.* at 33. Black and Ramey punched Thompson “a few more times,” then

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<sup>1</sup> This court appointed Attorney Leevin Camacho to represent Ramey in this appeal. After briefing and oral argument in this case, Attorney Camacho was elected and subsequently sworn in as the Attorney General of Guam.

stopped. *Id.* As Ramey and Black were leaving the apartment, Thompson saw Ramey grab Thompson's cellphone from a countertop. Thompson followed Black and Ramey to lock the door behind them. Ramey noticed Thompson and returned to the apartment, tackled Thompson to the ground, and punched him "a few more times." *Id.*

[4] Once Thompson was sure that Ramey and Black had left, he went to the balcony and called down to the security guard. The guard called the police and Emergency Medical Technicians ("EMTs"). Thompson received on-site treatment from the EMTs. Firefighter Jeffrey Borja testified that Thompson "complained of pain to his head, and he also had, like, an abrasion on the side of his head with some swelling and very minor bleeding. It pretty much stopped already by the time we got there." *Id.* at 72. When asked about Thompson's demeanor, Borja testified that Thompson "was conscious and alert. He was answering all the questions; a little upset, but other than that, he was -- seemed really fine." *Id.* Officer John Hattig testified that Thompson had a hematoma and "had a cut -- minor cuts to his right -- his right eye area. Also, behind his ear it was a little bit bloody. His mouth and his lip were swollen." Tr. at 7-8 (Cont'd Jury Trial, Apr. 17, 2017).

[5] Thompson requested to be taken to Naval Hospital by ambulance. At the hospital, Thompson was diagnosed with a partial facial fracture and with multiple contusions across his head. Thompson was at the hospital for three hours and was given ibuprofen and Tylenol as pain medication. Thompson described the facial fracture as "remarkably painful" and testified that when he "checked the injury" upon his return from the hospital, he "could actually feel as if the fragment of the bone was not attached to the rest of [his] skull." *Id.* at 36. Thompson also testified that he could "still tell that the injury was there" at the time of trial, more than a year after he was injured. *Id.* at 37.

[6] At trial, Ramey testified in his defense. His recollection of the night is as follows. Black asked Ramey if he wanted to join her at an after-party that Thompson was throwing at his house. When the three got to Thompson's apartment, Ramey stayed in the living room while Black and Thompson went to the balcony. Ramey joined Black and Thompson on the balcony to smoke a cigarette and noticed that Thompson was "rather close to [Black] . . . kind of invading her space." *Id.* at 63. Black gave Ramey "kind of a disgusted look, like, maybe she felt uncomfortable." *Id.* Ramey confronted Thompson and asked him to give Black some space. Thompson replied with a disrespectful comment, the exact details of which Ramey could not recall, and Ramey punched Thompson on the left side of the face. Thompson then grabbed Ramey and the two tumbled to the ground with Ramey landing on his side. Ramey did not see Black go through Thompson's pants looking for a wallet and denied that he took anything from Thompson's apartment.

[7] The People of Guam charged Ramey with: (1) Second Degree Robbery, (2) Aggravated Assault, (3) Theft of Property, and (4) Theft by Threatening (As a Misdemeanor). During the jury instruction conference, Black's counsel argued that third degree robbery was an uncharged offense and the People's attempt to insert a third degree robbery instruction would constitute an impermissible amendment to the indictment. In response, the trial court requested argument on whether third degree robbery was an included offense of second degree robbery. The People argued that third degree robbery was an included offense. While Ramey's co-defendant argued that it was not an included offense, Ramey took no position on the issue. The trial court rejected the People's argument and did not instruct the jury that third degree robbery is an included offense of second degree robbery.

[8] The jury failed to return verdicts for the charges of aggravated assault, theft of property, and theft by threatening; therefore, the trial court dismissed those charges. The jury found

Ramey guilty of second degree robbery, and the trial court sentenced him to six years of incarceration with credit for time served. Ramey timely filed a Notice of Appeal.

## II. JURISDICTION

[9] This court has jurisdiction over an appeal from a final judgment of conviction. *See* 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-29 (2019)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

## III. STANDARD OF REVIEW

[10] When a party fails to object to a jury instruction at trial, we review the instruction for plain error. *See People v. Kanistus*, 2017 Guam 26 ¶ 9. Under plain error review, we “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.* (quoting *People v. Gargarita*, 2015 Guam 28 ¶ 11). We review *de novo* the question of whether one offense is an included offense of another. *See People v. Diaz*, 2007 Guam 3 ¶ 10. In determining whether a rational jury could find a defendant guilty of an included offense and acquit on the greater offense, we conduct a *de novo* review of the record. *People v. Campos*, 2015 Guam 11 ¶ 41.

## IV. ANALYSIS

[11] Ramey argues that the trial court should have instructed the jury on third degree robbery as an included offense of second degree robbery. Although the People concede that the trial court erred in not giving such an instruction, they argue that Ramey’s trial counsel invited the error below, rendering it forfeited on appeal.

### A. The Invited Error Doctrine Does Not Apply

[12] We have previously recognized that the invited error doctrine may bar a party from raising certain issues on appeal. *See People v. Finik*, 2017 Guam 21 ¶ 42 (noting the invited

error doctrine but refusing to apply it on the facts of case). To support their argument that an invited error is forfeited on appeal, the People cite *United States v. Love*, 449 F.3d 1154 (11th Cir. 2006) (per curiam). However, *Love* differs from this case. In *Love*, the court held that a defendant was precluded from claiming that the trial court erred in imposing a sentence that included a period of supervised release. 449 F.3d at 1157. The court reasoned that the defendant induced or invited the purported error because at his sentencing, his counsel “repeatedly requested that . . . the court sentence [the defendant] to time served followed by supervised release, and even suggested the court impose a term of two years’ supervised release.” *Id.* Here, Ramey’s counsel did not expressly argue that third degree robbery was *not* an included offense of second degree robbery.

[13] Although the People argue that Ramey adopted a position at trial that is contradictory to what Ramey advocates on appeal, this is an exaggeration. The discussion regarding the specific issue of whether third degree robbery is an included offense of second degree robbery only involved statements by the trial court, the People’s counsel, and co-defendant Black’s counsel. While Ramey’s counsel was present during this discussion and did not object, he did not expressly join or adopt the argument made by Black’s counsel, and such silence does not rise to the level of inducement in *Love*. We cannot apply the invited error doctrine based upon a defendant’s silence on an issue; rather, for the doctrine to apply, a defendant “must affirmatively invite the error.” *Finik*, 2017 Guam 21 ¶ 42 (finding that “the ‘invited error’ doctrine cannot be applied where a defendant simply failed to object”). The fact that Ramey’s counsel argued for instructions on aggravated assault and theft as included offenses without mentioning third degree robbery in his argument is not sufficiently clear evidence that Ramey invited the error. *See People v. Sakura*, No. CR 94-00131A, 1996 WL 104533, at \*2 n.3 (D. Guam App. Div. Mar. 6, 1996). Defense counsel did not state these were the only included offense instructions that were

appropriate. *Cf. People v. O'Malley*, 365 P.3d 790, 822 (Cal. 2016) (finding invited error where “defense counsel stated at trial that, as a tactical decision, the *only* lesser included offense instructions he sought with respect to the robbery charge were regarding receiving stolen property” (emphasis added)). It appears that defense counsel’s aim was to ensure that the court instructed the jury that the other charges that Ramey faced were included offenses of second degree robbery. Ramey was not charged with third degree robbery, so it is reasonable that counsel did not request an instruction on it when counsel was focused on the charged offenses.

[14] As Ramey’s counsel did not affirmatively argue that third degree robbery was not an included offense of second degree robbery and did not state that the *only* included offense instructions that were appropriate were on aggravated assault and theft, the invited error doctrine does not apply.

**B. The Failure of the Trial Court to Instruct on Third Degree Robbery as an Included Offense was Clear or Obvious Error Under Current Law**

[15] Ramey did not object to the lack of the instruction. Therefore, we review for plain error. *See Kanistus*, 2017 Guam 26 ¶ 9. Under plain error review, we first determine whether the trial court committed an error. *Id.* ¶ 11. As set forth by our decision in *People v. Perez*, 1999 Guam 2, we conduct a two-step analysis to make this determination. *See* 1999 Guam 2 ¶ 24, *overruled on other grounds by People v. Shimizu*, 2017 Guam 11 ¶ 40; *see also People v. Ehlert*, 2019 Guam 3 ¶ 40. First, we must determine whether third degree robbery is an included offense of second degree robbery. *See Perez*, 1999 Guam 2 ¶ 22. Then, in accordance with 8 GCA § 90.27, we must determine whether there is a “rational basis” in the evidence to give the included offense instruction. *See Perez*, 1999 Guam 2 ¶ 24; *see also Angoco v. Bitanga*, 2001 Guam 17 ¶ 14 (referring to “the second part of the *Perez* test”). “When 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). We

have held that 8 GCA § 90.27 “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*.” *Campos*, 2015 Guam 11 ¶ 37.

**1. Third degree robbery is an included offense of second degree robbery**

[16] In *People v. Campos*, 2015 Guam 11, we held that third degree robbery was an included offense of second degree robbery under 8 GCA § 105.58(b)(3)—Guam’s included offense statute—because “[t]he 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.” 2015 Guam 11 ¶ 40. Even though *Campos* was decided after *People v. Cummins*, 2010 Guam 19, and *People v. Songeni*, 2010 Guam 20, the People ask this court to reconsider *Campos*, given our holdings in *Cummins* and *Songeni*, where we held that second degree criminal sexual conduct (“CSC”) is not an included offense of first degree CSC. *Cummins*, 2010 Guam 19 ¶¶ 19, 24; *Songeni*, 2010 Guam 20 ¶ 23. In concluding that second degree CSC is not an included offense of first degree CSC, we recognized that second degree CSC included a scienter element not found in first degree CSC and was not an included offense under the remaining subsections of 8 GCA § 105.58(b). See *Cummins*, 2010 Guam 19 ¶ 19; see also *Songeni*, 2010 Guam 20 ¶ 12. The People concede that the *Campos* decision correctly recognized there is a difference between second degree robbery and third degree robbery based on a less serious injury or risk of injury. They argue, however, that this is not the only difference and that an additional *mens rea* element in the third degree robbery statute further differentiates that offense from second degree robbery. They believe *Campos* was not correctly decided and ask that we overrule this specific holding in *Campos*.

[17] We have noted:

It is, of course, a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew,

might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system . . . .

*Duenas v. Brady*, 2008 Guam 27 ¶ 17 n.4 (quoting *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 758 P.2d 58, 62-63 (Cal. 1988) (in bank)). Yet, *stare decisis* does not prevent us from overturning precedent, as it is a “‘principle of policy,’ and not . . . an ‘inexorable command.’” See *San Miguel v. Dep’t of Pub. Works*, 2008 Guam 3 ¶ 40 (omission in original) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996)). The doctrine of *stare decisis* is “flexible and permits us to depart from our own precedent in an appropriate case. In deciding whether to depart from precedent, this court may consider whether the prior decision was ‘unsound in principle.’” *Id.* (citation omitted) (quoting *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 783 (1992)).

[18] Although our reasoning in *Cummins* and *Songeni* may appear to be in some tension with that of *Campos*, our holdings in these cases are clear and not unsound in principle. Therefore, we decline the invitation to overrule *Campos*, given the major objectives of the legal system to provide certainty, predictability, and stability in the law. Having determined that third degree robbery is an included offense of second degree robbery, we must next consider whether a rational jury could have acquitted Ramey of second degree robbery and convicted him of third degree robbery.

**2. Based on the evidence, a rational jury could have acquitted Ramey of second degree robbery and convicted him of third degree robbery**

[19] Under 8 GCA § 90.27, a court must provide an included offense instruction “[w]hen there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of an included offense.” 8 GCA § 90.27; see *Perez*, 1999 Guam 2 ¶ 24; see also *Ehlert*, 2019 Guam 3 ¶ 40. As third degree robbery is an included offense of second degree robbery, we must decide whether, “based on the evidence presented at trial, a rational jury could find the

defendant guilty of the lesser offense but not the greater.” *Campos*, 2015 Guam 11 ¶ 37 (quoting *People v. Demapan*, 2004 Guam 24 ¶ 7). In so deciding, we conduct a *de novo* review of the record. *Id.* ¶ 41.

[20] To acquit Ramey of second degree robbery and convict him of third degree robbery, the jury would have had to conclude that Ramey committed the robbery but did not inflict serious bodily injury. Compare 9 GCA § 40.30 (2005), with 9 GCA § 40.20 (2005), and Record on Appeal (“RA”), tab 114 at 2 (2d Am. Superseding Indictment, Apr. 18, 2017). Title 9 GCA § 16.10 defines “serious bodily injury” as “bodily injury which creates: serious permanent disfigurement; a substantial risk of death or serious, permanent disfigurement, severe or intense physical pain; or protracted loss or impairment of consciousness or of the function of any bodily member or organ.” 9 GCA § 16.10 (2005); cf. *People v. Quitugua*, 2015 Guam 27 ¶ 74 (using section 16.10 to define “deadly weapon” term in robbery statute). Thompson testified that he “was diagnosed with a partial facial fracture . . . and also with multiple contusions across [his] head.” Tr. at 36 (Opening Statements/Testimony, Apr. 14, 2017). He described the facial fracture as “remarkably painful” and testified that when he “checked the injury” upon his return from the hospital, he “could actually feel as if the fragment of the bone was not attached to the rest of [his] skull.” *Id.* Thompson also testified that he could “still tell that the injury was there” at the time of trial, more than a year after he was injured. *Id.* at 37. The People argue these facts establish “serious bodily injury” in the form of “severe or intense physical pain” or “serious permanent disfigurement.” Appellee’s Br. at 27-28 (Mar. 29, 2018); see also 9 GCA § 16.10.

[21] Contrary to the People’s contention otherwise, there was evidence adduced at trial that suggested Thompson did not experience serious bodily injury. For example, Thompson himself testified that he was at the hospital for only three hours. He also testified that he was given only ibuprofen and Tylenol, both over-the-counter drugs, as pain medication. Witnesses testified

about the extent of Thompson's injuries and suggested that the injuries were minor. For example, Firefighter Borja testified that Thompson "complained of pain to his head, and he also had, like, an abrasion on the side of his head with some swelling and very minor bleeding. It pretty much stopped already by the time we got there." Tr. at 72 (Opening Statements/Testimony), Apr. 14, 2017). When asked about Thompson's demeanor, Borja testified that Thompson "was conscious and alert. He was answering all the questions; a little upset, but other than that, he was -- seemed really fine." *Id.* Officer Hattig testified that Thompson had a hematoma and "had a cut -- minor cuts to his right -- his right eye area. Also, behind his ear it was a little bit bloody. His mouth and his lip were swollen." Tr. at 7-8 (Cont'd Jury Trial, Apr. 17, 2017).

[22] Based on this record, there is a rational basis for a jury to acquit Ramey of second degree robbery and convict him of third degree robbery because a rational juror could have concluded that Ramey used force in robbing Thompson but did not cause serious bodily injury. *See* 9 GCA § 16.10. While there is a rational basis, we do not opine on the seriousness of Thompson's injuries but merely note there was conflicting evidence that the jury was not given an opportunity to resolve. Because there is a rational basis for a jury to acquit Ramey of the greater offense and convict him of the lesser offense, the trial court erred in not instructing the jury on third degree robbery as an included offense. Given this court's precedent in *Campos*, the error was clear and obvious under current law, satisfying the first two prongs of the plain error test. *See Kanistus*, 2017 Guam 26 ¶ 9.

### **C. The Error Affected Ramey's Substantial Rights**

[23] Under the third prong of the plain error test, we consider whether the error alleged affected the defendant's substantial rights. *Kanistus*, 2017 Guam 26 ¶ 28. "Once a clear error

has been found, the burden lies with the defendant to demonstrate that the error was prejudicial (i.e., that it affected the outcome of the case).” *People v. Mendiola*, 2010 Guam 5 ¶ 24.

[24] Had the trial court properly instructed the jury on the included offense, it is reasonably probable Ramey would have been acquitted of second degree robbery and convicted of third degree robbery. After reviewing the record, we cannot say the evidence that Ramey caused serious bodily injury was comparatively stronger than the evidence that he used force with intent to overcome the victim’s physical resistance or physical power of resistance. *See, e.g., People v. Breverman*, 960 P.2d 1094, 1116-17 (Cal. 1998); *see also People v. Campbell*, 182 Cal. Rptr. 3d 491, 505 (Ct. App. 2015). While Thompson testified that he “was diagnosed with a partial facial fracture . . . and also with multiple contusions across [his] head,” Tr. at 36 (Opening Statements/Testimony, Apr. 14, 2017), witnesses testified and suggested that Thompson’s injuries were minor, *see, e.g., id.* at 72; Tr. at 7-8 (Cont’d Jury Trial, Apr. 17, 2017). Accordingly, we find that the trial court’s failure to instruct the jury on third degree robbery as an included offense affected Ramey’s substantial rights.

#### **D. Reversal is Necessary to Prevent a Miscarriage of Justice or Maintain the Integrity of the Judicial Process**

[25] Under the final prong of the plain error test, we consider whether reversal is necessary to prevent a miscarriage of justice or maintain the integrity of the judicial process. *People v. Quitugua*, 2009 Guam 10 ¶ 46. “Reversal for plain error is permissive, not mandatory.” *Id.* ¶ 47. “The administration of justice can only be accomplished if the jury has before it the full range of possible verdicts thus ensuring that the most accurate judgment is rendered.” *Angoco*, 2001 Guam 17 ¶ 19 (citing *Breverman*, 960 P.2d at 1101). Here, the jury was not given the full range of possible verdicts based on the evidence. This impaired the jury’s truth-ascertainment function, and reversal is necessary to prevent a miscarriage of justice and maintain the integrity of the judicial process.

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**V. CONCLUSION**

[26] The trial court erred when it did not instruct the jury that third degree robbery is an included offense of second degree robbery, this error is clear and obvious under our decision in *Campos*, the error affected Ramey’s substantial rights, and reversal is necessary to prevent a miscarriage of justice and maintain the integrity of the judicial process. We **VACATE** the Judgment of Conviction and **REMAND** for further proceedings not inconsistent with this Opinion.

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/s/  
F. PHILIP CARBULLIDO  
Associate Justice

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/s/  
ROBERT J. TORRES  
Associate Justice

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/s/  
KATHERINE A. MARAMAN  
Chief Justice