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1 FOR PUBLICATION

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5 **IN THE SUPERIOR COURT**
6 **OF THE**
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8 **COMMONWEALTH OF THE**
9 **NORTHERN MARIANA ISLANDS,**

10 **Plaintiff,**

11 **v.**

12 **MATT SOUNENG,**

13 **Defendant.**
14

) **CRIMINAL CASE NO. 13-0238(E)**
) **DPS CASE NO. 13-008530**

) **ORDER DENYING DEFENDANT'S**
) **MOTION TO DISMISS**

) **ON GROUNDS OF**
) **DOUBLE JEOPARDY**

15
16 **INTRODUCTION**

17 **THIS MATTER** came before the Court for a hearing on March 12, 2014 at 1:30 p.m., on Matt
18 Souneng's ("Defendant") Motion to Dismiss Counts III, V, and VIII of the Second Amended
19 Information filed against him on February 10, 2014. Defendant was present, in custody, and represented
20 by Assistant Public Defender Eden Schwartz, Esq. The Commonwealth was represented by Assistant
21 Attorney General Heather P. Barcinas, Esq. After reviewing the written and oral arguments of the
22 parties, the Court **DENIES** Defendant's Motion to Dismiss.

23 **BACKGROUND**

24 On December 3, 2013, the Commonwealth filed an Amended Information charging Defendant
25 with Counts: (I) aggravated assault and battery, in violation of 6 CMC § 1203(a); (II) assault with a
26 dangerous weapon, to wit: a PVC pipe, in violation of 6 CMC § 1204(a); (III) assault with a dangerous
27 weapon, to wit: a metal drum can, in violation of 6 CMC § 1204(a); (IV) assault and battery, to wit:
28 using a PVC pipe, in violation of 6 CMC § 1202(a); (V) assault and battery, to wit: using a metal drum

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1 can, in violation of 6 CMC § 1202(a); (VI) senior citizen physical abuse, in violation of 6 CMC §
2 1453(a); (VII) obstructing justice, in violation of 6 CMC § 3302; and (VIII) resisting arrest, in violation
3 of 6 CMC § 1434(a). (Amended Information, at 1-3.)

4 On January 28, 2014, Defendant moved this Court to dismiss Counts III, V, and VIII as
5 multiplicitous, pursuant to the Fifth Amendment to the United States Constitution, Article I, § 4(e) of
6 the Commonwealth Constitution, and Rule 7, 12(b) and 47 of the Commonwealth Rules of Criminal
7 Procedure. (Def.'s Mot. to Dismiss, at 1.) Defendant alleges that Counts II and III, as well as Counts
8 IV and V, violate Defendant's double jeopardy guarantees because they are part of the same course of
9 conduct, and thus must be charged as a single offense. (*Id.* at 2.) Similarly, Defendant also alleges that
10 Counts VII and VIII violate Defendant's double jeopardy guarantees because each is based on the same
11 conduct and do not survive the "same-elements" test established by *Blockburger v. United States*, 284
12 U.S. 299, 304 (1931). (*Id.*)

13 On February 10, 2014, the Commonwealth filed a Leave to Amend the Information pursuant to
14 Rule 7(e) of the Commonwealth Rules of Criminal Procedure, dismissing Counts II, VI, and VII in the
15 best interests of the Commonwealth, and decreasing the maximum exposure to imprisonment Defendant
16 is faced with. The remaining charges at issue are Counts: (I) assault with a dangerous weapon, to wit:
17 a metal drum can, in violation of 6 CMC § 1204(a); (II) aggravated assault and battery, in violation of
18 6 CMC § 1203(a); (III) assault and battery, to wit: using a metal drum can, in violation of 6 CMC §
19 1202(a); (IV) assault and battery, to wit: using a PVC pipe, in violation of 6 CMC § 1202(a); and (V)
20 resisting arrest, in violation of 6 CMC § 1434(a). (Second Amended Information, at 1-2.)

21 On March 11, 2014, the Commonwealth opposed Defendant's motion to dismiss, specifying the
22 charges remaining after the Second Amended Complaint was filed and narrowing the scope of
23 Defendant's motion for the Court. (Pl.'s Opp., at 2.) As Counts II, VI, and VII of the Amended
24 Complaint were dismissed by the Commonwealth, the sole Counts at issue under the Double Jeopardy
25 Clause are Counts III and IV of the Second Amended Complaint. (*Id.*) As to these two counts of
26 assault and battery, the Commonwealth argued that Defendant's assaultive conduct clearly sets forth
27 two distinct impulses, separated by sufficient breaks in conduct and time, that justify two separate
28 assaultive conduct charges pursuant to 6 CMC § 1202(a). (*Id.* at 4.)

1 DISCUSSION

2 **I. THE DOUBLE JEOPARDY CLAUSE**

3 The Double Jeopardy Clause protects an individual against: (1) a second prosecution for the
4 same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3)
5 multiple punishments for the same offense. *Commonwealth v. Peter*, 2010 MP 15 ¶ 5 (citing
6 *Commonwealth v. Milliondaga*, 2007 MP 6 ¶ 5). The rule against multiplicity, which Defendant asserts
7 is violated here, derives from the third protection.
8

9 Generally, an information that charges a single offense in two counts violates the rule against
10 multiplicity. *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976). However, there is “no
11 bright line rule . . . dividing charges comprising a single offense from those comprising separate and
12 distinct offenses.” *Id.* at 836, fn. 2.

13 **A. Legislative Intent**

14 First, where there are two alleged violations of the same statute, courts look to what the
15 legislature intended as a “unit of prosecution” in the statute to determine whether multiple charges for
16 the same offense violated double jeopardy. *See, e.g., State v. Turner*, 6 P.3d 1226, 1228 (Wa. App.
17 2000).

18 Here, the CNMI Legislature provided that a person violates 6 CMC § 1202(a) where that person
19 “unlawfully strikes, beats, wounds, or otherwise does bodily harm to another.” Thus, the statute clearly
20 and unambiguously provides the elements the prosecution needs to prove to establish a violation, and
21 in no way can the statute be interpreted to read that a second charge of assault is precluded where
22 multiple violations actually occur.
23

24 Therefore, the Court must look to the Commonwealth Supreme Court case interpreting the
25 double jeopardy clause in the context of assaultive conduct in order to determine whether the
26 prosecution charging two separate counts of the same statute for conduct that occurred within minutes
27 violates Defendant’s constitutional guarantees.
28

1 **B. Impulse Test**

2 In the Commonwealth, assaultive conduct that forms part of a continuous course of conduct may
3 not be charged as multiple violations of the same statute. *See Commonwealth v. Milliondaga*, 2007 MP
4 6 ¶9. The Court in *Milliondaga* held the defendant’s actions to be continuous, stemming from “a single
5 criminal impulse.” *Id.* Put another way, this “impulse test” determines how many courses of conduct
6 defendant undertook. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 224 (1952). Under
7 the impulse test, the Court “treats as one offense all violations that arise from that singleness of thought,
8 purpose or action, which may be deemed a single ‘impulse.’” *Id.* For example, the Ninth Circuit has
9 held that when a defendant commits multiple statutory violations on the same day, each transaction
10 constitutes a separate crime. *See U.S. v. Miller*, 650 F.2d 169, 171 (9th Cir. 1980); *U.S. v. Long*, 524
11 F.2d 660, 662 (9th Cir. 1975).
12

13 Defendant relies heavily on the Supreme Court’s holding in *Milliondaga*. In *Milliondaga*, the
14 defendant “pushed his wife continuously from the living room into the bedroom, where he then pushed
15 her onto the bed and choked her.” *Milliondaga*, 2007 MP 6 ¶9. The Court held the defendant’s conduct
16 to be a single criminal impulse in that his course of conduct involved “the same victim . . . [and the]
17 same time and place.” *Id.* However, the Court recognizes the factual scenario presented here is
18 distinguishable from *Milliondaga*, in that the assaultive conduct in that case occurred within seconds,
19 at the same location, and with the same victim.
20

21 Here, Defendant struck the victim with a PVC pipe to his head and threw the same at his back
22 when the victim attempted to escape, then ran away. This constitutes the first of assaultive conduct
23 violative of § 1202(a). Then, however, after the defendant ran away across the street, the victim chased
24 him around a parked van at least twice, and the victim lost sight of the defendant. At this point, while
25 the victim had his back turned, defendant came out from hiding and struck the victim on the back of
26 his head with a metal drum can cover, causing him to fall to the ground and lose consciousness. This
27 constitutes a second violation of § 1202(a), with sufficient intervening conduct to indicate a separate
28 criminal impulse as envisioned by the Supreme Court.

1 Defendant argues that, “[j]ust as in *Milliondaga* the means of accomplishing the battery may be
2 different but the criminal impulse is the same.” (Def.’s Mot. to Dismiss, at 6.) Conversely, the
3 Commonwealth asserts that “significant intervening acts [occur] between the assaultive conduct,” and
4 that the “assaultive conduct [was] separated by a sufficient break in conduct and time that constitute
5 separate and distinct charges . . .” (Opp., at 4-5.) Specifically, the Commonwealth cites: “(1) defendant
6 ran away after throwing a PVC pipe to [the victim’s] back; (2) the victim . . . picked up the PVC pipe;
7 (3) victim chased the defendant across the street; (4) victim chased the defendant around a parked van
8 twice; and (5) victim lost sight of the defendant.” (*Id.*)


9
10 Such intervening acts serve to break up the assaultive conduct in space and time, creating two
11 separate violations in the present case. Sufficient separation in both space (the location of the attacks)
12 and time (the minutes between the attacks) exist such that the assaultive conduct could have been
13 abandoned at any moment, eliminating the possibility of two violations for the same course of conduct.
14 However, the assaultive conduct continued in such a way that separated the initial attack from the
15 second attack, much unlike the ongoing and uninterrupted nature of the attacks in *Milliondaga*. The
16 second criminal impulse was separate and distinct from the first, which occurred across the street after
17 significant time had passed.

18 Thus, the Court finds that the assaultive conduct in this case was not part of a single criminal
19 impulse, and that the prosecution does not violate the double jeopardy clause by charging two separate
20 violations of the same statute.

21 **CONCLUSION**

22 In view of the foregoing, the Court finds that the double jeopardy clause is not offended by the
23 prosecution charging Defendant with two counts of assault and battery, based on multiple and distinct
24 criminal impulses separated by sufficient intervening events. As such, Defendant’s Motion to dismiss
25 Count III or IV pursuant to the Double Jeopardy Clause is hereby **DENIED**.

26 SO ORDERED this 2nd day of April 2014,

27 
28 _____
David A. Wiseman, Associate Judge