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IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

CARMELITA M. GUIAO,
Defendant-Appellant.

SUPREME COURT NO. 2013-SCC-0002-CRM
SUPERIOR COURT NO. 12-0001

SLIP OPINION

Cite as: 2015 MP 1

Decided January 30, 2015

Eden L. Schwartz, Assistant Public Defender, Office of the Public Defender, Saipan, MP, for Defendant-Appellant Carmelita M. Guiao

Joey P. San Nicolas, Attorney General, and James B. McAllister, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee Commonwealth of the Northern Mariana Islands[1]

[1] Before the case was submitted on the briefs, Joey P. San Nicolas resigned as the Commonwealth Attorney General, and this matter was reassigned to Chief Prosecutor Brian P. Flaherty.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; JOSEPH N. CAMACHO, Justice Pro Tem.

CASTRO, C.J.:

¶ 1 Defendant Carmelita M. Guiao ("Guiao") appeals her convictions for assault and assault with a dangerous weapon. Guiao contends: (1) the trial court violated her federal due process rights by failing to instruct the jury on the lesser-included offenses of assault with a dangerous weapon: (a) assault and (b) assault and battery; and (2) her convictions for assault and assault with a dangerous weapon violate double jeopardy. For the following reasons, we AFFIRM Guiao's conviction for assault with a dangerous weapon and REVERSE her assault conviction.

I. Facts and Procedural Background

¶ 2 On the morning of December 31, 2011, Guiao and her then-boyfriend, John Saimon ("Saimon"), argued over a family matter in Guiao's home. The conduct at the center of Guiao's convictions occurred during the argument. The exact sequence of events on December 31, 2011, differs based on the testimonies of Saimon, preliminary responding Officer Jason Tarkong, and Detective Jonathan Decena. However, it is undisputed that after an argument between Guiao and Saimon, Guiao repeatedly hit Saimon with a hot frying pan.[2] As Guiao swung the pan towards Saimon, he blocked the pan from targeting his head. He then took the pan away from Guiao. As a result of Guiao's attack, Saimon sustained burns, blisters, slight bruising, and swelling.

¶ 3 After the parties rested at trial, Guiao requested an instruction on the lesser-included offenses of assault, and assault and battery. The trial court rejected the instruction based on Guiao's failure to satisfy the second prong of the test to warrant a lesser-included instruction: that a rational juror could find the defendant guilty of the lesser-included offense, and not the greater.[3] The trial court concluded the lesser-included instruction was unwarranted, and added that the defendant did not have a right to the lesser-included instruction because the trial court, rather than the jury, was responsible for deciding the lesser-included offenses. After the trial court rejected the instruction, Guiao did not object to the trial court's failure to instruct on the lesser-included offenses.

¶ 4 The jury ultimately convicted Guiao of assault with a dangerous weapon, 6 CMC § 1204(a); and the trial court convicted her of assault, 6 CMC § 1201(a), criminal mischief, 6 CMC § 1803(a), and disturbing the peace, 6 CMC § 3101(a). Guiao appeals her convictions for assault and assault with a dangerous weapon.

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[2] Saimon testified to possibly being hit twice, but previously stated to Officer Jason Tarkong he was hit five times.

[3] The trial court cited *Commonwealth v. Camacho*, 2002 MP 6, in reciting the requirements of the test.

II. Jurisdiction

¶ 5 We have jurisdiction over final judgments and orders of the Superior Court. NMI CONST. art. IV, § 3; 1 CMC § 3102(a). Guiao timely appealed the Superior Court's final judgment. We therefore have jurisdiction. 1 CMC § 3105; NMI SUP. CT. R. 4(b)(1)(A)(i).

III. Standards of Review

¶ 6 We review de novo whether assault, and assault and battery are lesser-included offenses of assault with a dangerous weapon. *Commonwealth v. Kaipat*, 4 NMI 300, 303 & n.10 (1995). We review for plain error Guiao's claim that the trial court violated her federal due process rights by declining to instruct the jury on the lesser-included offenses because she failed to preserve her claim of error. *Commonwealth v. Ramangmau*, 4 NMI 227, 234 (1995). We review de novo whether Guiao's convictions for assault and assault with a dangerous weapon constitute double jeopardy. *Commonwealth v. Quitano*, 2014 MP 5 ¶ 9 (Slip Opinion, Apr. 4, 2014).

IV. Discussion

A. Jury Instruction on Lesser-Included Offenses

¶ 7 Guiao argues her due process rights were violated because the trial court declined to instruct the jury on the lesser-included offenses of assault, and assault and battery.[4] An instruction on a lesser-included offense must be given "when warranted by the evidence," *Camacho*, 2002 MP 6 ¶ 66, even if not requested, *id.* ¶ 63. We employ a two-prong test to decide the necessity of the instruction: (1) "whether the elements of the lesser offense are such that one cannot commit the greater offense without committing the lesser," a legal inquiry; and (2) "whether a rational juror could find the defendant guilty of the lesser offense while acquitting him of the greater," a factual inquiry. *Id.* ¶ 67; *see also id.* ¶ 66 (noting that there must be substantial evidence of the lesser-included offense to warrant an instruction). We will only reach the second prong if the answer to the first prong is affirmative.

¶ 8 Given this rule, Guiao asserts the trial court should have provided the jury instruction on assault, and assault and battery. As *Kaipat* articulated, assault with a dangerous weapon transpires when a person uses a dangerous weapon in the course of an assault,[5] or assault and battery.[6] 4 NMI at 303–04. Because the elements of assault, and assault and battery are a subset of assault with a dangerous weapon, they are lesser-included offenses of assault with a dangerous weapon.[7] *Id.* at 303 ("[Assault and assault and

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[4] The Commonwealth did not charge Guiao of assault and battery.

[5] Assault requires that a person "unlawfully offers or attempts, with force or violence, to strike, beat, wound, or to do bodily harm to another." 6 CMC § 1201(a).

[6] Assault and battery occurs when a person "unlawfully strikes, beats, wounds, or otherwise does bodily harm to another." 6 CMC § 1202(a).

[7] The trial court acknowledged that assault was a lesser-included offense of assault with a dangerous weapon. A "dangerous weapon" is an "automatic weapon, dangerous device, firearm, gun, handgun, long gun,

battery] contain[] a dispositive set of elements which is a subset of one of the alternative sets of elements of assault with a dangerous weapon."). Thus, the first prong is satisfied, and the inquiry turns on the second prong: whether a rational juror could have found Guiao guilty of the assault, or assault and battery while acquitting her of assault with a dangerous weapon.

¶ 9 Even though Guiao proposed a lesser-included instruction and reviewed the instruction with the trial court, Guiao did not object to the trial court's denial of the lesser-included instruction. Because Guiao failed to object, we review her claim that the trial court erred in declining to give a lesser-included instruction for plain error. *Quitano*, 2014 MP 5 ¶ 10 (applying the plain error standard in determining whether the trial court erred in failing to define a term in a jury instruction because the appellant did not object after the trial court reviewed the jury instructions); *see also Ramangmau*, 4 NMI at 234, 238 (similar). We will only correct egregious errors "that seriously affect the fairness, integrity or public reputation of judicial proceedings," resulting in a miscarriage of justice. *Commonwealth v. Saimon*, 3 NMI 365 (1992) (citation omitted). The plain error standard requires that the appellant show: "(1) there was error; (2) the error was 'plain' or 'obvious'; [and] (3) the error affected the appellant's 'substantial rights,' or put differently, affected the outcome of the proceeding." *Commonwealth v. Hossain*, 2010 MP 21 ¶ 29.

¶ 10 Thus, we consider whether the trial court's failure to instruct on the lesser-included offenses constituted error. Merely failing to instruct on lesser-included offenses is not erroneous unless, after establishing the offenses are lesser-included, a rational juror could have found the evidence sufficient to acquit the defendant of the greater offense and guilty of a lesser-included offense. *Camacho*, 2002 MP 6 ¶ 67.

¶ 11 Here, the jury could not have convicted Guiao of the lesser-included offenses because it was not within their province: the jury was solely responsible for deciding the greater offense of assault with a dangerous weapon because the conviction resulted in "imprisonment for not more than 10 years." 6 CMC § 1204(b); *see* 7 CMC § 3101(a) (requiring the jury to decide on "a felony punishable by more than five years imprisonment"). At the beginning of trial, the Commonwealth notified the jury that they were only to decide the assault with a dangerous weapon charge while the judge would determine the rest of the charges,[8] which included the lesser-included charge of assault.[9] Because the jury could not decide the

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semiautomatic weapon, knife, machete, or other thing by which a fatal wound or injury *may* be inflicted." 6 CMC § 102(f) (emphasis added).

[8] The jury was given the information with the list of charges against Guiao.

[9] The trial court determined the assault charge because a maximum six-month imprisonment is imposed upon conviction of the offense. 6 CMC § 1201(b); *cf.* 7 CMC § 3101(a) (requiring only that a jury decide on "a felony punishable by more than five years imprisonment").

lesser-included offenses, it was not plain error for the trial court to decline to give the lesser-included instruction.

B. Double Jeopardy

¶ 12 Guiao contends her convictions for assault and assault with a dangerous weapon violate double jeopardy. "Double jeopardy 'protects an individual against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after convictions; and (3) multiple punishments for the same offense.'" *Quitano*, 2014 MP 5 ¶ 40 (quoting *Commonwealth v. Peter*, 2010 MP 15 ¶ 5). Under this standard, Guiao's claim is properly construed as an assertion that her convictions violate double jeopardy because she incurred multiple punishments for the same offense. We review this claims under a two-part test.

¶ 13 We first consider whether there is clear legislative intent to impose multiple punishments for the same conduct. *Peter*, 2010 MP 15 ¶ 10. The legislative-intent inquiry begins by looking to the plain meaning of the statute, *Commonwealth v. Jin Fu Lin*, 2010 MP 2 ¶ 5, and determining "whether the legislature intended to impose multiple sanctions for the same conduct," *Peter*, 2010 MP 15 ¶ 5. "This Court presumes that 'where two statutory provisions proscribe the same offense, [the] legislature does not intend to impose two punishments for that offense.'" *Peter*, 2010 MP 15 ¶ 10 (quoting *Rutledge v. United States*, 517 U.S. 292, 297 (1996)) (alteration in original). If we do not find clear legislative intent to impose multiple punishments, we apply the *Blockburger* test. *Peter*, 2010 MP 15 ¶ 10. That is, where there is a violation of two statutes, the Court decides "whether each provision requires proof of fact which the other does not," *Blockburger v. United States*, 284 U.S. 299, 304 (1932), by focusing on the elements that must be proven rather than the evidence adduced at trial, *Peter*, 2010 MP 15 ¶ 6. This statutory analysis "requires us to engage in a 'textual comparison of the pertinent statutes' to determine if the lesser-included elements are 'a subset of the charged offense[s].'" *Quitano*, 2014 MP 5 ¶ 43 (quoting *Kaipat*, 4 NMI at 303) (alteration in original).

¶ 14 Here, the applicable statutes, 6 CMC §§ 1201 and 1204, are silent on cumulative punishments. Therefore, we presume that the Commonwealth Legislature did not intend to impose multiple punishments for the same assaultive conduct. *Peter*, 2010 MP 15 ¶ 10.

¶ 15 Because we find no legislative intent for multiple punishments, we turn to the second step: applying the *Blockburger* test. *Kaipat*, 4 NMI at 303. Where a defendant is convicted of a greater and lesser-included offense, a double-jeopardy violation exists. *Quitano*, 2014 MP 5 ¶¶ 41–43. Here, assault is a lesser-included offense of assault with a dangerous weapon.[10] *Supra* ¶ 8. Thus, Guiao's convictions for

[10] The Commonwealth's contention that the convictions arise from separate events is not compelling. First, the evidence demonstrates the continuous nature of the assault. Second, the Commonwealth failed to support its contention that a continuous attack in multiple locations of the house creates separate offenses. Third, the

assault and assault with a dangerous weapon violate double jeopardy.[11] Accordingly, we reverse Guiao's assault conviction. *See Quitano*, 2014 MP 5 ¶ 44 (explaining the lesser-included conviction is reversed when it violates double jeopardy).

V. Conclusion

¶ 16 For the preceding reasons, we hold (1) the trial court did not commit plain error by declining to give a lesser-included instruction; and (2) Guiao's assault and assault with a dangerous weapon convictions violate double jeopardy. Accordingly, we AFFIRM Guiao's assault with a dangerous weapon conviction and REVERSE her assault conviction.

SO ORDERED this 30th day of January, 2015.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

CAMACHO, J.P.T., concurring in part and dissenting in part[12]

Commonwealth, in its response brief, conceded that Guiao's assault conviction arises from a single, continuous dispute. *See* Resp. Br. at 5 (indicating that Guiao's assault conviction arises from a "single, ongoing altercation").

[11] Resentencing is unnecessary because Guiao's sentence for assault and assault with a dangerous weapon run concurrently. *See Commonwealth v. Milliondaga*, 2007 MP 6 ¶ 8 (citing *United States v. Chipps*, 410 F.3d 438, 449 (8th Cir. 2005)).

[12] A concurrence and dissent will be issued separately.

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

CARMELITA M. GUIAO,
Defendant-Appellant.

SUPREME COURT NO. 2013-SCC-0002-CRM
SUPERIOR COURT NO. 12-0001

SLIP OPINION

Cite as: 2015 MP 1

Decided January 30, 2015
Concurred and Dissented March 23, 2015

Eden L. Schwartz, Assistant Public Defender, Office of the Public Defender, Saipan, MP, for Defendant-Appellant Carmelita M. Guiao

Joey P. San Nicolas, Attorney General, and James B. McAllister, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee Commonwealth of the Northern Mariana Islands[1]

[1] Before the case was submitted on the briefs, Joey P. San Nicolas resigned as the Commonwealth Attorney General, and this matter was reassigned to Chief Prosecutor Brian P. Flaherty.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; JOSEPH N. CAMACHO, Justice Pro Tem.

CASTRO, C.J.:

¶ 1 Defendant Carmelita M. Guiao ("Guiao") appeals her convictions for assault and assault with a dangerous weapon. Guiao contends: (1) the trial court violated her federal due process rights by failing to instruct the jury on the lesser-included offenses of assault with a dangerous weapon: (a) assault and (b) assault and battery; and (2) her convictions for assault and assault with a dangerous weapon violate double jeopardy. For the following reasons, we AFFIRM Guiao's conviction for assault with a dangerous weapon and REVERSE her assault conviction.

I. Facts and Procedural Background

¶ 2 On the morning of December 31, 2011, Guiao and her then-boyfriend, John Saimon ("Saimon"), argued over a family matter in Guiao's home. The conduct at the center of Guiao's convictions occurred during the argument. The exact sequence of events on December 31, 2011, differs based on the testimonies of Saimon, preliminary responding Officer Jason Tarkong, and Detective Jonathan Decena. However, it is undisputed that after an argument between Guiao and Saimon, Guiao repeatedly hit Saimon with a hot frying pan.[2] As Guiao swung the pan towards Saimon, he blocked the pan from targeting his head. He then took the pan away from Guiao. As a result of Guiao's attack, Saimon sustained burns, blisters, slight bruising, and swelling.

¶ 3 After the parties rested at trial, Guiao requested an instruction on the lesser-included offenses of assault, and assault and battery. The trial court rejected the instruction based on Guiao's failure to satisfy the second prong of the test to warrant a lesser-included instruction: that a rational juror could find the defendant guilty of the lesser-included offense, and not the greater.[3] The trial court concluded the lesser-included instruction was unwarranted, and added that the defendant did not have a right to the lesser-included instruction because the trial court, rather than the jury, was responsible for deciding the lesser-included offenses. After the trial court rejected the instruction, Guiao did not object to the trial court's failure to instruct on the lesser-included offenses.

¶ 4 The jury ultimately convicted Guiao of assault with a dangerous weapon, 6 CMC § 1204(a); and the trial court convicted her of assault, 6 CMC § 1201(a), criminal mischief, 6 CMC § 1803(a), and disturbing the peace, 6 CMC § 3101(a). Guiao appeals her convictions for assault and assault with a dangerous weapon.

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[2] Saimon testified to possibly being hit twice, but previously stated to Officer Jason Tarkong he was hit five times.

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II. Jurisdiction

¶ 5 We have jurisdiction over final judgments and orders of the Superior Court. NMI CONST. art. IV, § 3; 1 CMC § 3102(a). Guiao timely appealed the Superior Court's final judgment. We therefore have jurisdiction. 1 CMC § 3105; NMI SUP. CT. R. 4(b)(1)(A)(i).

III. Standards of Review

¶ 6 We review de novo whether assault, and assault and battery are lesser-included offenses of assault with a dangerous weapon. *Commonwealth v. Kaipat*, 4 NMI 300, 303 & n.10 (1995). We review for plain error Guiao's claim that the trial court violated her federal due process rights by declining to instruct the jury on the lesser-included offenses because she failed to preserve her claim of error. *Commonwealth v. Ramangmau*, 4 NMI 227, 234 (1995). We review de novo whether Guiao's convictions for assault and assault with a dangerous weapon constitute double jeopardy. *Commonwealth v. Quitano*, 2014 MP 5 ¶ 9 (Slip Opinion, Apr. 4, 2014).

IV. Discussion

A. Jury Instruction on Lesser-Included Offenses

¶ 7 Guiao argues her due process rights were violated because the trial court declined to instruct the jury on the lesser-included offenses of assault, and assault and battery.[4] An instruction on a lesser-included offense must be given "when warranted by the evidence," *Camacho*, 2002 MP 6 ¶ 66, even if not requested, *id.* ¶ 63. We employ a two-prong test to decide the necessity of the instruction: (1) "whether the elements of the lesser offense are such that one cannot commit the greater offense without committing the lesser," a legal inquiry; and (2) "whether a rational juror could find the defendant guilty of the lesser offense while acquitting him of the greater," a factual inquiry. *Id.* ¶ 67; *see also id.* ¶ 66 (noting that there must be substantial evidence of the lesser-included offense to warrant an instruction). We will only reach the second prong if the answer to the first prong is affirmative.

¶ 8 Given this rule, Guiao asserts the trial court should have provided the jury instruction on assault, and assault and battery. As *Kaipat* articulated, assault with a dangerous weapon transpires when a person uses a dangerous weapon in the course of an assault,[5] or assault and battery.[6] 4 NMI at 303–04. Because the elements of assault, and assault and battery are a subset of assault with a dangerous weapon, they are lesser-included offenses of assault with a dangerous weapon.[7] *Id.* at 303 ("[Assault and assault and

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[4] The Commonwealth did not charge Guiao of assault and battery.

[5] Assault requires that a person "unlawfully offers or attempts, with force or violence, to strike, beat, wound, or to do bodily harm to another." 6 CMC § 1201(a).

[6] Assault and battery occurs when a person "unlawfully strikes, beats, wounds, or otherwise does bodily harm to another." 6 CMC § 1202(a).

[7] The trial court acknowledged that assault was a lesser-included offense of assault with a dangerous weapon. A "dangerous weapon" is an "automatic weapon, dangerous device, firearm, gun, handgun, long gun,

battery] contain[] a dispositive set of elements which is a subset of one of the alternative sets of elements of assault with a dangerous weapon."). Thus, the first prong is satisfied, and the inquiry turns on the second prong: whether a rational juror could have found Guiao guilty of the assault, or assault and battery while acquitting her of assault with a dangerous weapon.

¶ 9 Even though Guiao proposed a lesser-included instruction and reviewed the instruction with the trial court, Guiao did not object to the trial court's denial of the lesser-included instruction. Because Guiao failed to object, we review her claim that the trial court erred in declining to give a lesser-included instruction for plain error. *Quitano*, 2014 MP 5 ¶ 10 (applying the plain error standard in determining whether the trial court erred in failing to define a term in a jury instruction because the appellant did not object after the trial court reviewed the jury instructions); *see also Ramangmau*, 4 NMI at 234, 238 (similar). We will only correct egregious errors "that seriously affect the fairness, integrity or public reputation of judicial proceedings," resulting in a miscarriage of justice. *Commonwealth v. Saimon*, 3 NMI 365 (1992) (citation omitted). The plain error standard requires that the appellant show: "(1) there was error; (2) the error was 'plain' or 'obvious'; [and] (3) the error affected the appellant's 'substantial rights,' or put differently, affected the outcome of the proceeding." *Commonwealth v. Hossain*, 2010 MP 21 ¶ 29.

¶ 10 Thus, we consider whether the trial court's failure to instruct on the lesser-included offenses constituted error. Merely failing to instruct on lesser-included offenses is not erroneous unless, after establishing the offenses are lesser-included, a rational juror could have found the evidence sufficient to acquit the defendant of the greater offense and guilty of a lesser-included offense. *Camacho*, 2002 MP 6 ¶ 67.

¶ 11 Here, the jury could not have convicted Guiao of the lesser-included offenses because it was not within their province: the jury was solely responsible for deciding the greater offense of assault with a dangerous weapon because the conviction resulted in "imprisonment for not more than 10 years." 6 CMC § 1204(b); *see* 7 CMC § 3101(a) (requiring the jury to decide on "a felony punishable by more than five years imprisonment"). At the beginning of trial, the Commonwealth notified the jury that they were only to decide the assault with a dangerous weapon charge while the judge would determine the rest of the charges,[8] which included the lesser-included charge of assault.[9] Because the jury could not decide the

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semiautomatic weapon, knife, machete, or other thing by which a fatal wound or injury *may* be inflicted." 6 CMC § 102(f) (emphasis added).

[8] The jury was given the information with the list of charges against Guiao.

[9] The trial court determined the assault charge because a maximum six-month imprisonment is imposed upon conviction of the offense. 6 CMC § 1201(b); *cf.* 7 CMC § 3101(a) (requiring only that a jury decide on "a felony punishable by more than five years imprisonment").

lesser-included offenses, it was not plain error for the trial court to decline to give the lesser-included instruction.

B. Double Jeopardy

¶ 12 Guiao contends her convictions for assault and assault with a dangerous weapon violate double jeopardy. "Double jeopardy 'protects an individual against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after convictions; and (3) multiple punishments for the same offense.'" *Quitano*, 2014 MP 5 ¶ 40 (quoting *Commonwealth v. Peter*, 2010 MP 15 ¶ 5). Under this standard, Guiao's claim is properly construed as an assertion that her convictions violate double jeopardy because she incurred multiple punishments for the same offense. We review this claims under a two-part test.

¶ 13 We first consider whether there is clear legislative intent to impose multiple punishments for the same conduct. *Peter*, 2010 MP 15 ¶ 10. The legislative-intent inquiry begins by looking to the plain meaning of the statute, *Commonwealth v. Jin Fu Lin*, 2010 MP 2 ¶ 5, and determining "whether the legislature intended to impose multiple sanctions for the same conduct," *Peter*, 2010 MP 15 ¶ 5. "This Court presumes that 'where two statutory provisions proscribe the same offense, [the] legislature does not intend to impose two punishments for that offense.'" *Peter*, 2010 MP 15 ¶ 10 (quoting *Rutledge v. United States*, 517 U.S. 292, 297 (1996)) (alteration in original). If we do not find clear legislative intent to impose multiple punishments, we apply the *Blockburger* test. *Peter*, 2010 MP 15 ¶ 10. That is, where there is a violation of two statutes, the Court decides "whether each provision requires proof of fact which the other does not," *Blockburger v. United States*, 284 U.S. 299, 304 (1932), by focusing on the elements that must be proven rather than the evidence adduced at trial, *Peter*, 2010 MP 15 ¶ 6. This statutory analysis "requires us to engage in a 'textual comparison of the pertinent statutes' to determine if the lesser-included elements are 'a subset of the charged offense[s].'" *Quitano*, 2014 MP 5 ¶ 43 (quoting *Kaipat*, 4 NMI at 303) (alteration in original).

¶ 14 Here, the applicable statutes, 6 CMC §§ 1201 and 1204, are silent on cumulative punishments. Therefore, we presume that the Commonwealth Legislature did not intend to impose multiple punishments for the same assaultive conduct. *Peter*, 2010 MP 15 ¶ 10.

¶ 15 Because we find no legislative intent for multiple punishments, we turn to the second step: applying the *Blockburger* test. *Kaipat*, 4 NMI at 303. Where a defendant is convicted of a greater and lesser-included offense, a double-jeopardy violation exists. *Quitano*, 2014 MP 5 ¶¶ 41–43. Here, assault is a lesser-included offense of assault with a dangerous weapon.[10] *Supra* ¶ 8. Thus, Guiao's convictions for

[10] The Commonwealth's contention that the convictions arise from separate events is not compelling. First, the evidence demonstrates the continuous nature of the assault. Second, the Commonwealth failed to support its contention that a continuous attack in multiple locations of the house creates separate offenses. Third, the

assault and assault with a dangerous weapon violate double jeopardy.[11] Accordingly, we reverse Guiao's assault conviction. *See Quitano*, 2014 MP 5 ¶ 44 (explaining the lesser-included conviction is reversed when it violates double jeopardy).

V. Conclusion

¶ 16 For the preceding reasons, we hold (1) the trial court did not commit plain error by declining to give a lesser-included instruction; and (2) Guiao's assault and assault with a dangerous weapon convictions violate double jeopardy. Accordingly, we AFFIRM Guiao's assault with a dangerous weapon conviction and REVERSE her assault conviction.

SO ORDERED this 30th day of January, 2015.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

CAMACHO, J.P.T., concurring in part and dissenting in part:

¶ 17 I concur with sections I-III and IV(B) of the majority's opinion, but partially dissent from sections IV(A) and V. I would hold that the trial court should have given the lesser-included instruction on assault and battery because a rational jury could have found the evidence sufficient to support a conviction for the offense.

¶ 18 In determining whether to include jury instructions on lesser-included offenses, the Court applies *Camacho*'s two-prong test: (1) "whether the elements of the lesser offense are such that one cannot commit the greater offense without committing the lesser," and (2) "whether a rational jury could find the

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Commonwealth, in its response brief, conceded that Guiao's assault conviction arises from a single, continuous dispute. *See* Resp. Br. at 5 (indicating that Guiao's assault conviction arises from a "single, ongoing altercation").

[11] Resentencing is unnecessary because Guiao's sentence for assault and assault with a dangerous weapon run concurrently. *See Commonwealth v. Milliondaga*, 2007 MP 6 ¶ 8 (citing *United States v. Chipps*, 410 F.3d 438, 449 (8th Cir. 2005)).

defendant guilty of the lesser offense while acquitting him of the greater." 2002 MP 6 ¶ 67 (citing *Kaipat*, 4 NMI at 303). The trial court "must instruct on lesser[-]included offenses where there is evidence from which a rational jury could find the defendant guilty of the lesser offense and acquit him of the greater, regardless of whether such instruction has been requested." *Camacho*, 2002 MP 6 ¶ 63. Instructions on lesser-included offenses are required "only when warranted by the evidence." *Id.* ¶ 66 (citing *Hopper v. Evans*, 456 U.S. 605, 611 (1982)); *see also United States v. Arnt*, 474 F.3d 1159, 1164-65 (9th Cir. 2007) ("If there is some evidence to support the jury instruction, it is the jury's province to determine which evidence it believed most accurately reflected the events.").

¶ 19 Although the issue of assault was within the province of the trial court rather than the jury, the jury should have been instructed on assault and battery as a lesser-included offense of assault with a dangerous weapon.[12] To warrant a lesser-included instruction, assault and battery must be a lesser-included offense of assault with a dangerous weapon. *Kaipat*, 4 NMI at 303. Both assault and battery and assault have "a dispositive set of elements which is a subset of one of the alternative sets of elements of assault with a dangerous weapon." *Id.* The difference between assault and battery and assault with a dangerous weapon is "the use of a dangerous weapon." *Id.* at 303-04. Therefore, Guiao meets the first prong of the *Camacho* test. *Id.* ¶ 67.

¶ 20 The second prong of *Camacho*—whether a rational jury could find Guiao guilty of the lesser-included offense of assault and battery, while acquitting her of assault with a dangerous weapon—is also met. Assault and battery is committed when an individual "unlawfully strikes, beats, wounds, or otherwise does bodily harm to another, or has sexual contact with another without the other person's consent." 6 CMC § 1202(a). Here, Guiao struck Saimon's arm with a hot frying pan. A rational jury could find Guiao guilty of assault and battery by the nature of her physical contact with Saimon, regardless of whether she used her fists or a frying pan. Thus, a jury could convict Guiao of assault and battery.

¶ 21 Assault with a dangerous weapon is committed when an individual "threatens to cause, attempts to cause, or purposely causes bodily injury to another with a dangerous weapon." 6 CMC § 1204(a). Whether a rational jury could acquit Guiao of assault with a dangerous weapon depends on whether a frying pan qualifies as a "dangerous weapon." Under 6 CMC § 102(f), a "dangerous weapon" is "any automatic weapon, dangerous device, firearm, gun, handgun, long gun, semiautomatic weapon, knife, machete, or other thing by which a fatal wound or injury may be inflicted." While a frying pan is not one of the enumerated weapons listed in the statute, it could still be deemed a dangerous weapon.

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[12] As Guiao was charged with assault under 6 CMC § 1201, it was properly within the trial court's province. Guiao was not charged with assault and battery.

> [W]hat constitutes a dangerous weapon depends not on the nature of the object itself but on its capacity, given the manner of its use, to endanger life or inflict great bodily harm. Factors relevant to this determination include the circumstances under which the object is used and the size and condition of the assaulting and assaulted persons. A dangerous weapon is an object capable of doing serious damage to the victim of the assault.

United States v. Estrada-Fernandez, 150 F.3d 491, 497 (5th Cir. 1998) (citation omitted) (internal quotation marks omitted). Whether a frying pan is a dangerous weapon is a factual inquiry for the jury to determine based on the manner in which the frying pan was used and the surrounding circumstances. The jury was not given the lesser-included instruction on assault and battery, which was necessary to make this factual determination.

¶ 22 Moreover, there is no evidence that the frying pan was used as a dangerous weapon—a "thing by which a fatal wound or injury may be inflicted." 6 CMC § 102(f). Saimon sustained minor injuries from Guiao's strike: minor burns, blisters, and bruising. No medical experts were provided at trial to show that his wounds had been life threatening or fatal. Even Saimon testified that he was not struck with the frying pan very hard; he was able to disarm Guiao; and he did not seek medical attention for his injuries. If a slow-moving frying pan, which caused only minor injuries, could be construed as a "thing by which a fatal wound or injury may be inflicted," then just about anything could be held to be a "dangerous weapon" under 6 CMC § 102(f).

¶ 23 The circumstances in *Kaipat* contrast with this case. In *Kaipat*, the defendant attacked the victim with an axe, and later appealed the trial court's decision not to provide a jury instruction on assault as a lesser-included offense of assault with a dangerous weapon. 4 NMI at 302. Applying the *Camacho* two-prong test, *Kaipat* held that the defendant was not entitled to a jury instruction on the lesser-included offense of assault because a rational jury could not have found the defendant guilty of assault while also acquitting him of assault with a dangerous weapon. *Id*. at 304. No rational jury could find a defendant guilty of assault for harming someone with an axe and slashing open their hand, while also acquitting the defendant of assault with a dangerous weapon. *Id*.

¶ 24 While lesser-included instructions were not warranted in *Kaipat*, they are required in the present case. Here, the "weapon" in question is a frying pan, and Saimon's injuries were minor burns, blisters, and bruises—a far cry from a deep cut to the hand, fractured finger, and slashed tendon as in *Kaipat*. In addition, an axe is a type of knife, an enumerated weapon under the statute, 6 CMC § 102(f), while a frying pan is a cooking utensil. Because a rational jury could have found that the frying pan was not a dangerous weapon, Guiao could have been acquitted of assault with a dangerous weapon and guilty of

assault and battery. Therefore, the instruction on assault and battery as a lesser-included offense of assault with a dangerous weapon should have been given.[13]

¶ 25 "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." *Keeble v. United States*, 412 U.S. 205, 212-13 (1973) (emphasis in original). It is unreasonable to expect the jury to know that the lesser-included offense will be decided by the trial court. In the jury's eyes, it looks like an all or nothing choice: whether to convict the defendant of assault with a dangerous weapon or let the defendant go free. If any offense punishable by less than five years imprisonment cannot be given to the jury as a lesser-included offense, then *Camacho*'s holding on lesser-included offenses serves no purpose. Trial courts must either give instructions for the jury to decide the lesser-included offense, or instructions that the jury should not consider the lesser offense because the trial court will decide those charges. Either scenario requires jury instructions. Here, because there was some evidence to support a jury instruction of assault and battery, the trial court should have instructed accordingly.

¶ 26 For the foregoing reasons, I concur with the majority on the issue of assault, but respectfully dissent from their holding on the issue of assault and battery. I would therefore reverse Guiao's conviction for assault with a dangerous weapon and remand for a new trial.

Dated this 23rd day of March, 2015.

/s/
JOSEPH N. CAMACHO
Justice Pro Tem

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[13] The trial court "must instruct on lesser-included offenses … regardless of whether such instruction has been requested," if the two-prong *Camacho* test is satisfied. 2002 MP 6 ¶ 63. *Camacho*'s use of the word "must" is particularly telling, as the Court has held that "shall" is to be interpreted as "must," and has the "effect of *creating a duty*." *Aquino v. Tinian Cockfighting Bd.*, 3 NMI 284, 293 (1992) (emphasis in original). Although this interpretation of "shall" meaning "must" was targeted at legislative intent, "must" was the word selected by this Court to create a duty. Given the Court's past use of "must," the Court's intent, in stating the trial court "must instruct on lesser-included offenses," *Camacho*, 2002 MP 6 ¶ 63, was to create a duty to do so. In addition, *Camacho* goes further than a mere "must," to state that this instruction must be given "regardless of whether such instruction has been requested." *Id*. Providing these instructions to the jury is not discretionary; it is a mandate.

Although the United States Supreme Court has declined to address whether there is a due process requirement for lesser-included instructions in a noncapital case, *Beck v. Alabama*, 447 U.S. 625, 638 n.14 (1980), such a right would and does extend to noncapital cases in the Commonwealth. Limiting this right to capital cases would render *Camacho* practically useless in the Commonwealth because there are no capital cases here. NMI Const. art. I, § 4. *Camacho* extended this right to non-capital cases because otherwise, *Camacho* would not apply to any criminal cases in the Commonwealth. 2002 MP 6; *see also, e.g.*, *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (3d. Cir. 1988) (noting that the right to a lesser-included offense instruction applies in a non-capital case); *Ferrazza v. Mintzes*, 735 F.2d 967, 968 (6th Cir. 1984) (same).

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IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

CARMELITA M. GUIAO,
Defendant-Appellant.

SUPREME COURT NO. 2013-SCC-0002-CRM
SUPERIOR COURT NO. 12-0001

JUDGMENT

Defendant Carmelita M. Guiao ("Guiao") appeals her convictions for assault and assault with a dangerous weapon. Guiao argues that the trial court violated her federal due process rights by declining to instruct the jury on the lesser-included offenses of assault with a dangerous weapon; and her assault and assault with a dangerous weapon convictions violate double jeopardy. For the reasons set forth in the accompanying opinion, we AFFIRM Guiao's conviction for assault with a dangerous weapon and REVERSE her assault conviction.

ENTERED this 30th day of January, 2015.

/s/
DEANNA M. OGO
Clerk of the Supreme Court