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

ORDER GRANTING PETITION FOR REHEARING

Cite as: 2017 MP 2

Decided March 20, 2017

James M. Zarones, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

Michael A. Sato, Assistant Public Defender, Office of the Public Defender, Saipan, MP, for Defendant-Appellant.

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

CASTRO, C.J.:

¶ 1 Defendant-Appellant-Petitioner Carmelita M. Guiao ("Guiao") petitions for a rehearing of the Court's decision in *Commonwealth v. Guiao*, 2015 MP 1. For the reasons below, we GRANT the petition for review, REVERSE Guiao's assault with a dangerous weapon conviction and sentence, and REMAND for a new trial.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 In its 2015 opinion, the Court considered Guiao's appeal of her convictions for assault and assault with a dangerous weapon. Guiao argued the trial court's refusal to instruct the jury on assault and assault and battery as lesser included offenses of assault with a dangerous weapon constituted reversible error. Guiao also argued her convictions on both assault and assault with a dangerous weapon violated double jeopardy.

¶ 3 In its opinion, the Court held the trial court did not err in declining to provide the lesser included offense instruction because "the jury was solely responsible for deciding the greater offense of assault with a dangerous weapon . . . ." *Guiao*, 2015 MP 1 ¶ 11 (citing 7 CMC §§ 1204(b) and 3101(a)). The Court did hold, however, Guiao's convictions for assault and assault with a dangerous weapon violated double jeopardy. *Id.* ¶ 15. Accordingly, the Court affirmed Guiao's conviction for assault with a dangerous weapon but reversed her conviction for assault. *Id.* ¶ 16. Subsequently, Justice Pro Tempore Joseph N. Camacho dissented, concluding "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." *Id.* ¶ 17 (Camacho, J., dissenting, March 23, 2015).

¶ 4 Guiao now petitions for rehearing of the Court's opinion.

II. STANDARD OF REVIEW

¶ 5 Guiao raises three issues on petition: (1) whether the Court improperly submitted the case on the briefs without oral argument; (2) whether the Court erred in applying the plain error standard to review the trial court's ruling on the lesser included offense instruction; and (3) whether the Court misconstrued 7 CMC § 3101(a). A petition for rehearing "must state with particularity each point of law or fact that the petitioner believes the Court has overlooked or misapprehended and must argue in support of the petition." NMI SUP. CT. R. 40(a)(2). The petitioner cannot "raise the same issues and repeat the same arguments already heard and decided on appeal," or raise new issues not previously asserted on appeal, unless extraordinary circumstances exist. *N. Marianas Coll. v. Civil Serv. Comm'n*, 2007 MP 30 ¶ 2 (citing *In re Estate of Deleon Guerrero*, 1 NMI 324, 326 (1990)). "If the petition for rehearing is granted, the Court may . . . [m]ake a final decision of the case without re-

argument; [r]estore the case to the calendar for re-argument or resubmission; or [i]ssue any other appropriate order." NMI SUP. CT. R. 40(a)(4)(A)–(C).

III. DISCUSSION

A. Case on Briefs

¶ 6 Guiao claims for the first time on petition the Court improperly submitted the case on the briefs without oral argument. Guiao contends she was denied an opportunity to be heard, and failure to grant a rehearing results in denial of due process and fundamental fairness.

¶ 7 We find her claim procedurally improper and untimely. NMI Supreme Court Rule 27-2(d)(1) provides that a motion to reconsider an order must be filed within ten days after the party is served with the order. The Court issued its order submitting the case without argument on October 8, 2014 ("Order"). Guiao had ten days to challenge the Order under Rule 27-2(d)(1), but she did not. Because Guiao waived the opportunity to have the Order reconsidered, her claim is not proper for rehearing. Further, Guiao raises this issue for the first time on petition but does not demonstrate extraordinary circumstances exist to justify our consideration. *E.g., N. Marianas Coll.*, 2007 MP 30 ¶ 2; *In re Estate of Deleon Guerrero*, 1 NMI 324, 326 (1990). Accordingly, we decline to address her claim.

B. Plain Error Standard

¶ 8 Guiao asserts the Court improperly applied the plain error standard in reviewing the trial court's denial of the lesser included offense instruction. Guiao contends she preserved the issue for appeal by requesting and stating the grounds for the instruction, and accordingly, voicing an objection was not necessary subsequent to the trial court's denial of her request. Guiao does not indicate in her petition which standard of review is proper.

¶ 9 NMI Rule of Criminal Procedure 30 dictates that a party may not claim error in a jury instruction "unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection." Contrary to Guiao's assertion, merely requesting an instruction is insufficient; rather, a distinct objection is necessary to preserve a claim of error.[1] *Jones v. United States*, 527 U.S. 373, 388 (1999) ("[A] request for an instruction before the jury retires [does not] preserve an objection to the instruction actually given by the court."); *United States v. King*, 75 F.3d 1217, 1224 (7th Cir. 1996) (submitting "a jury instruction without a timely objection to its exclusion . . . and distinct statements on the matter to which the party objects and the grounds for the objection does not preserve a right to appeal that exclusion."); *see also Commonwealth v. Ramangmau*, 4 NMI 227, 238 (1995) ("[W]here the defendant fails to object contemporaneously to the [jury] instruction, we review for plain error."); *United States v. Estrada-Fernandez*, 150 F.3d 491, 495 (5th Cir. 1998) (applying plain error standard because the

[1] "We find interpretations of the Federal Rules of Criminal Procedure instructive, as the Commonwealth Rules of Criminal Procedure are patterned after the federal rules." *Commonwealth v. Ramangmau*, 4 NMI 227, 233 n.3 (1995).

defendant did not object to the exclusion of the lesser included instruction requested by a co-defendant).

¶ 10 Here, before closing arguments, Guiao requested the trial court to provide jury instructions on assault and assault and battery as the lesser included offenses of assault with a dangerous weapon. When the trial court denied her request, Guiao did not object, generally or distinctly. Because Guiao failed to object to the trial court's ruling, we conclude she failed to preserve her claim of error on appeal. Therefore, the Court did not err in applying the plain error standard.

C. Whether the Court Misconstrued 7 CMC § 3101(a)

¶ 11 Guiao claims the Court misconstrued Section 3101(a) to limit the jury from hearing lesser included offenses. Guiao asserts Section 3101(a) "triggers a jury trial when certain conditions are met, [but] it does not limit the jury from hearing lesser-included offenses." Pet. Reh'g 2.

¶ 12 Section 3101(a) enumerates a defendant's right to a jury trial in criminal cases. Statutory language is construed according to its plain meaning. *Commonwealth v. Kaipat*, 4 NMI 300, 304 (1995). Section 3101(a) provides: "Any person accused by information of committing a felony punishable by more than five years imprisonment or by more than $2,000 fine, or both, shall be entitled to a trial by a jury of six persons." Plainly construed, the statute discusses the parameters of a defendant's right to a jury trial, but it does not limit the jury from deciding a lesser included offense that would not otherwise meet the Section 3101(a) requirements.

¶ 13 In its opinion, the Court determined lesser included offense instruction was not necessary. Citing to Section 3101(a), it noted the jury could not have convicted Guiao of the lesser included offenses because the jury was only responsible for deciding the greater offense of assault with a dangerous weapon, a felony, while the lesser included offense of assault was to be decided by the judge. *See Guiao*, 2015 MP 1 ¶ 11. In construing Section 3101(a), the Court, in effect, bifurcated the trial so that a jury can never decide on a lesser included offense if the offense is before the bench and not the jury. Because the Court construed Section 3101(a) to limit the jury from deciding the lesser included offense, we conclude the Court erred.

¶ 14 Separation of jury and bench counts is not unusual in the Commonwealth. However, for a defendant's due process right to a lesser included offense instruction, it is immaterial whether the lesser included offense is one that would normally be before the bench. *See Commonwealth v. Camacho*, 2002 MP 6 ¶ 63 n.16 (noting due process imposes a duty on the trial court to give the lesser included offense sua sponte); *see* NMI CONST. art. I, § 5 ("No person shall be deprived of life, liberty or property without due process of law.").[2] The trial court

[2] We reject Guiao's contention that failure to provide a lesser included offense instruction in a noncapital case violates federal due process. *See, e.g.*, *Keeble v. United States*, 412 U.S. 205, 213 (1973) ("[W]e have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury

must instruct the jury on a lesser included offense when (1) "the elements of the lesser offense are such that one cannot commit the greater offense without committing the lesser" and (2) "a rational jury could find the defendant guilty of the lesser offense while acquitting him of the greater." *Camacho*, 2002 MP ¶ 67. Because the Court erred in its opinion, we grant the petition and now address Guiao's lesser included offense instruction claim.

D. Lesser Included Offense Instruction

¶ 15 We reiterate that we employ a two prong test to determine whether instruction on lesser included offense is required: (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 defendant guilty of the lesser offense while acquitting him of the greater." *Id*. In its opinion, the Court determined that the first prong was satisfied, concluding assault and assault and battery are lesser offenses of assault with a dangerous weapon. *Guiao*, 2015 MP 1 ¶ 8 (citing *Kaipat*, 4 NMI at 303). It, however, did not consider the second prong. *Id.* ¶ 11. Thus, on rehearing, we review whether the trial court was required to provide lesser included offense instructions on assault and assault and battery based on the second prong.[3]

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instructed on a lesser included offense, ..."); *Bagby v. Sowders*, 894 F.2d 792, 795–97 (6th Cir. 1999) (rejecting defendant's argument that United States Constitution requires state courts to provide lesser included offense instruction in noncapital cases); *People v. Breverman*, 960 P.2d 1094, 1108 (Cal. 1998) ("At the outset, we reject any implication that the alleged error at issue in this case—the failure to instruct sua sponte on an uncharged lesser included offense, or any aspect thereof—is one which arises under the United States Constitution."). A defendant's due process right to a lesser included offense instruction is a matter of state law only, guaranteed by the Due Process Clause of the Commonwealth Constitution. NMI CONST. art. I, § 5.

[3] The NMI Rule of Criminal Procedure 31(c) states, in relevant part, a "defendant may be found guilty of an offense necessarily included in the offense charged . . . ." "In determining whether an offense is included in a greater offense, the Superior Court is not limited to consideration of only the language of the statute under which a defendant is charged." *Commonwealth v. Mitchell*, 1997 MP 4 ¶ 9; *see also Kaipat*, 4 NMI at 304 (reviewing instruction on assault for a defendant who was charged with assault with a dangerous weapon); *Kitchen v. United States*, 205 F.2d 720, 721–22 (D.C. Cir. 1953) (holding that though the indictment charged defendant with murder in the first degree, he could have been found guilty of murder in the second degree, thus instruction on second degree murder was necessary). "Since a statute may be violated in different ways, the court may consider the facts alleged in the information and the evidence presented at trial in determining whether a lesser-included offense instruction is proper." *Mitchell*, 1997 MP 4 ¶ 9.

Though Guiao was not charged with assault and battery, assault and battery is a lesser included offense of assault with a dangerous weapon. *Kaipat*, 2 NMI at 303. Accordingly, we, as a reviewing court, review whether the trial court erred in denying instruction on assault and battery.

¶ 16 We review the trial court's ruling under the plain error standard. We will find plain error when "(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 (citation omitted). "Reversal is proper only if it is necessary to safeguard the integrity and reputation of the judicial process or to forestall a miscarriage of justice." *Id.* (internal quotation marks and citation omitted).

1. Assault

¶ 17 Under the second prong, we review whether a rational jury could find Guiao guilty of the lesser offense of assault while acquitting her of the greater offense of assault with a dangerous weapon. *Camacho*, 2002 MP 6 ¶ 67. "To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, evidence from which a rational trier of fact could find beyond a reasonable doubt that the defendant committed the lesser offense [but not the greater]." *Id.* ¶ 66 (internal quotation marks omitted).

¶ 18 In light of the evidence, we find that a rational jury could not find Guiao guilty of assault while acquitting her of assault with a dangerous weapon. "A person commits the offense of assault if the person unlawfully offers or attempts, with force or violence, to strike, beat, wound, or to do bodily harm to another." 6 CMC § 1201(a). The crime of assault, as the statute provides, does not involve an injury to another person. *Kaipat*, 4 NMI at 303–04. The crime of assault with a dangerous weapon, on the other hand, "may be committed either with or without injury." *Id.* at 303; 6 CMC § 1204(a) ("A person commits the offense of assault with a dangerous weapon if he or she threatens to cause, attempts to cause, or purposely causes bodily injury to another with a dangerous weapon."). There is undisputed evidence in the record that John Saimon ("Saimon"), the alleged victim in this case, sustained injuries from Guiao striking him with a frying pan. Accordingly, a rational jury could not find Guiao guilty of assault—an offense which does not require an injury—while acquitting her of assault with a dangerous weapon. Thus, the trial court did not plainly err when it denied instruction on assault.

2. Assault and Battery

¶ 19 Next, we turn to whether a rational jury could find Guiao guilty of the lesser offense of assault and battery while acquitting her of the greater offense of assault with a dangerous weapon. "A person commits the offense of assault and battery if the person unlawfully strikes, beats, wounds, or otherwise does bodily harm to another . . . ." 6 CMC § 1202(a). A person commits assault with a dangerous weapon "if he or she . . . purposely causes bodily injury to another with a dangerous weapon." 6 CMC § 1204(a). The distinguishing element between these two offenses is a dangerous weapon; the former offense does not involve the use of a dangerous weapon, while the latter does.

¶ 20 The evidence shows that Saimon sustained burns, blisters, slight bruising and swelling due to Guiao striking him with a hot frying pan. Tr. 30, 87. Thus, a rational jury could find beyond a reasonable doubt that Guiao committed the offense of assault and battery.

¶ 21 Whether a rational jury could acquit Guiao of assault with a dangerous weapon then, boils down to whether a hot frying pan constitutes a "dangerous weapon."[4] "Whether an article should be deemed a [dangerous] weapon depends not only upon the nature of the article but the intent with which it is used or conveyed by the individual. This is ordinarily a question to be determined by the jury or the court as trier of the facts." *See United States v. Hamilton*, 626 F.2d 348, 349 (4th Cir. 1980). "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." *United States v. Bey*, 667 F.2d 7, 11 (5th Cir. 1982)

¶ 22 The record indicates the incident involving the hot frying pan stemmed from an argument between Guiao and Saimon about feeding their children. Tr. 23. At trial, Saimon testified that Guiao swung the pan slowly, Tr. 69, the strike was "not that hard," Tr. 68, and he was able to block the pan with his arm, Tr. 25, and disarm Guiao. Tr. 31. Saimon sustained minor injuries as a result of the strikes. Detective Jonathan Decena testified the pan could have caused a cracked skull if someone swung the pan hard enough or repeatedly, Tr. 210, but this testimony bore only upon the nature of the pan, not the intent with which it was used or the nature of the force. Because there is substantial evidence casting doubt on whether the frying pan in question was a dangerous weapon, a rational jury could acquit Guiao of assault with a dangerous weapon. Accordingly, the trial court erred when it denied the lesser included offense instruction of assault and battery.

¶ 23 Further, we conclude the error was plain because the trial court did not consider whether the evidence warranted instruction on assault and battery. In denying Guiao's request for a lesser included offense instruction, the court concluded "there is absolutely no right at all for [Guiao] to have the [j]ury instructed on a lesser included offense . . . where it is triable by . . . [t]he [b]ench and not by the [j]ury." Tr.243.[5] The court's ruling clearly deviated from well settled law. *Camacho*, 2002 MP 6 ¶ 63 ("It is well settled that, in a criminal case, 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 instruction has been requested.").

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[4] 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." 6 CMC § 102(f).

[5] The trial court only considered whether the evidence warranted an instruction on assault.

¶ 24 "Our courts are not gambling halls but forums for the discovery of truth." *Id.* ¶ 65 (citation and internal quotation marks omitted). Because Saimon sustained injuries, the jury could reasonably conclude Guiao was guilty of some offense. However, the jury was hamstrung in its decision as they were given an "all or nothing" choice between completely convicting or acquitting Guiao of assault with a dangerous weapon. In situations like this, "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*, 412 U.S. at 212–13. Without a lesser included offense instruction, Guiao was denied the opportunity to have a rational jury determine whether she was guilty of a lesser offense established by the evidence. *Commonwealth v. Reyes*, 2016 MP 3 ¶ 14 ("An error affects substantial rights if there is a reasonable probability it affected the outcome of the proceeding.") (quotation marks omitted). Accordingly, we conclude the trial court's error affected Guiao's due process rights, and reversal is proper to prevent a miscarriage of justice.

IV. CONCLUSION

¶ 25 For the foregoing reasons, we REVERSE Guiao's assault with a dangerous weapon conviction and sentence, and REMAND for a new trial consistent with this order.

SO ORDERED this 20th day of March, 2017.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOSEPH N. CAMACHO
Justice Pro Tem

MANGLONA, J., dissenting:

¶ 26 I respectfully dissent from the majority's determination in section IV(D)(2). I would hold that the trial court's denial of an instruction on the lesser included offense of assault and battery does not amount to plain error.

¶ 27 Because Guiao failed to object on jury instructions, plain error review applies. *See Commonwealth v. Reiong*, 2015 MP 13 ¶ 18 (citation omitted). The plain error standard is high: "Under the plain error standard, an appellant must show that: (1) there was error; (2) the error was 'plain' or 'obvious'; (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 (citation omitted). "A court errs if it deviates from a legal rule that has not been intentionally relinquished or abandoned by the appellant." *Commonwealth v. Salasiban*, 2014 MP 17 ¶ 11 (citing *United States v. Olano*, 507 U.S. 725, 732–33 (1993)). "The error is plain if it is *not subject to reasonable dispute* . . . ." *Id.* (emphasis added) (citing *Puckett v. United States*, 556 U.S. 129, 135 (2009)). "An error affects substantial rights if there is a reasonable probability it affected the outcome of the proceeding." *Commonwealth v. Reyes*, 2016 MP 3 ¶ 14 (citation and internal quotation marks omitted). Even if all of these elements are shown, "[r]eversal is proper only if it is necessary to safeguard the integrity and reputation of the judicial process or to forestall a miscarriage of justice." *Hossain*, 2010 MP 21 ¶ 29 (internal quotation marks and citation omitted); *accord United States v. Crowe*, 563 F.3d 969, 973 n.6 (9th Cir. 2009).

¶ 28 My esteemed colleagues believe the trial court plainly erred when it refused to give an instruction on assault and battery. I disagree. Because the trial court's determination is subject to reasonable dispute, it did not plainly err. The trial court must give an instruction on a lesser included offense if (1) "the elements of the lesser offense are such that one cannot commit the greater offense without committing the lesser," and (2) "a rational jury could find the defendant guilty of the lesser offense while acquitting him of the greater." *Commonwealth v. Camacho*, 2002 MP 6 ¶ 67 (citation omitted). The first prong is not in dispute; at issue is the second prong.

¶ 29 The Ninth Circuit's observation in *United States v. Rivera-Alonzo* is instructive on the operation of the second prong: a trial court "may properly refuse to give an instruction on a lesser included offense if the jury could not have convicted a defendant of the lesser-included offense without finding the element(s) that would convert the lesser offense to the greater." 584 F.3d 829, 834 (9th Cir. 2009). In this case, then, the trial court may deny an instruction on assault and battery if the jury could not have convicted Guiao of assault and battery without finding the hot frying pan to be a "dangerous weapon." A "dangerous weapon" is an "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*." 6 CMC § 102(f) (emphasis

added). Circumstantial evidence is sufficient is to show the presence of a dangerous weapon. *Commonwealth v. Kaipat*, 4 NMI 300, 304 (1995).

¶ 30 In analyzing the second prong, the trial court found "there is sufficient evidence to support a finding of Assault with a Dangerous Weapon but no such evidence . . . of a mere Assault," noting that "[t]here is undisputed evidence on the record that Mr. Saimon was hit with a frying pan," that "[p]hotos were taken of the injuries sustained and of the frying pan in question," and that "[t]he defense did not deny that a frying pan was used." Tr. 243. Indeed, the record shows that the frying pan was about six to twelve inches in diameter and two-inches deep, with a handle, Tr. 33, 146–47; that Guiao was angry, raised the frying pan with her right hand, and swung it in the general direction of the victim's head, Tr. 28, 71; and that a detective opined that one could suffer from a "crack[ed] skull if . . . struck hard enough with a frying pan. Or multiple times." Tr. 210. Based on these findings and evidence, the court could reasonably conclude that a rational jury must find the hot frying pan to be a "thing by which a fatal wound or injury may be inflicted" under section 102(f) and thus a "dangerous weapon." It could, therefore, reasonably conclude Guiao failed to meet the second prong. Because the determination is subject to reasonable dispute, error, if any, is not plain.[6] We are restricted to plain error review. *See Puckett v. United States*, 556 U.S. 129, 134 (2009) ("If an error is not properly preserved, appellate-court authority to remedy the error . . . is strictly circumscribed."). "[T]he plain error hurdle, high in all events, nowhere looms larger than in the context of alleged instructional errors." *United States v. Henry*, 848 F.3d 1, 26 (1st Cir. 2017) (internal quotation marks and citation omitted).

¶ 31 For the foregoing reasons, I would deny Guiao's petition for rehearing and affirm Guiao's conviction for assault with a dangerous weapon.

/s/
JOHN A. MANGLONA
Associate Justice

[6] My colleagues also note that the trial court ignored the request for an instruction on assault and battery. *Supra* ¶ 23. The trial court expressly applied the two-prong standard only to assault and not assault and battery. Tr. 243–44. The trial court did not, however, clearly ignore the request on assault and battery. The court acknowledged that Guiao requested an instruction on both assault and assault and battery, and thereupon stated that the same two-part test applies to both the lesser included offenses. Tr. 243. Whether or not instructions on assault and assault and battery are required *both* boils down to whether a rational jury must find the frying pan to be a "dangerous weapon," which the court essentially analyzed. Thus, the court did not clearly ignore the instructions on assault and battery.