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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

FERNANDO C. QUITANO,
Defendant-Appellant.

SUPREME COURT NO. 2011-SCC-0022-CRM
SUPERIOR COURT NO. 09-0216E

OPINION

Cite as: 2014 MP 5

Decided April 4, 2014

Samuel I. Mok, Saipan, MP, for Defendant-Appellant Fernando C. Quitano
James B. McAllister, Assistant Attorney General, Office of the Attorney General Saipan, MP, for Plaintiff-Appellee Commonwealth of the Northern Mariana Islands

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

CASTRO, C.J.:

¶ 1 Defendant-Appellant, Fernando C. Quitano ("Quitano") appeals his convictions for: (1) attempted first-degree murder of Vivencio Martin ("Vivencio"); (2) "aggravated assault and battery" of Jung Sang So ("Jung");[1] (3) "assault and battery" of Jung;[2] (4) "assault and battery" of Vivencio;[3] and (5) theft.[4] Quitano argues: (1) the trial court erred by failing to define premeditation in its attempted first-degree murder jury instruction; (2) the evidence was insufficient to sustain his attempted first-degree murder conviction; (3) the evidence was insufficient to sustain his conviction for "aggravated assault and battery" (count 2); (4) his conviction for theft violates double jeopardy because he was also convicted of armed robbery; and (5) his convictions for "assault and battery" (counts 3 and 4) violated double jeopardy because he was also convicted of "aggravated assault and battery" (counts 1 and 2). For the reasons stated below, we AFFIRM Quitano's convictions for attempted first-degree murder and "assault and battery" (count 4) and REVERSE Quitano's convictions for theft, "aggravated assault and battery" (count 2), and "assault and battery" (count 3).

I. Factual and Procedural Background

¶ 2 Quitano, Marlon Martin ("Marlon"), and Steven Suzuki met in the morning to prepare for a robbery. Quitano and Marlon decided to rob the Pink House, a 24-hour pawnshop (the "pawnshop"). They left for the pawnshop dressed in dark, long-sleeve shirts and masks. They took a crowbar, sledgehammer, and machete with them.

¶ 3 Upon arriving at the pawnshop, Quitano and Marlon broke through a locked door. Quitano and Marlon then began hitting Vivencio, a shop employee; and Jung, the father of Vivencio's boss; before making any demands. Vivencio offered Marlon and Quitano money if they would stop beating Jung and leave. Quitano and Marlon ran out of the pawnshop after taking the money. Quitano was later apprehended by the police.

¶ 4 Both Vivencio and Jung were injured during the attack. Jung left Saipan at some point after the attack but before the trial.

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[1] This conviction will be referred to as "'aggravated assault and battery' (count 2)."

[2] This conviction will be referred to as "'assault and battery' (count 4)."

[3] This conviction will be referred to as "'assault and battery' (count 3)." Quitano's conviction for "aggravated assault and battery" of Vivencio will be referred to "'aggravated assault and battery' (count 1)."

[4] He is not appealing his convictions for "aggravated assault and battery" (count 1), armed robbery, assault with a dangerous weapon, burglary, or conspiracy to commit robbery.

¶5 Quitano was charged with: (1) two counts of "aggravated assault and battery;"[5] (2) two counts of "assault and battery;"[6] (3) two counts of assault with a dangerous weapon;[7] (4) two counts of attempted first-degree murder; (5) armed robbery; (6) theft; (7) contempt; (8) conspiracy to commit robbery; and (9) burglary. Both parties submitted proposed jury instructions.[8] The trial court reviewed the jury instructions with the attorneys. The attorneys did not object to the attempted-murder instruction that did not define willful, premeditated, or deliberated.

¶ 6 Quitano was convicted of: (1) "aggravated assault and battery" (two counts); (2) "assault and battery" (two counts); (3) assault with a dangerous weapon (two counts); (4) armed robbery; (5) attempted first-degree murder (one count);[9] (6) conspiracy to commit robbery; (7) burglary; and (8) theft.

¶ 7 He now appeals.

II. Jurisdiction

¶ 8 We have jurisdiction over Superior Court final judgments and orders, NMI CONST. art. IV, § 3; 1 CMC § 3102(a).

III. Standards of Review

¶ 9 Quitano raises three issues: improper jury instructions, insufficient evidence, and double jeopardy. First, we review for plain error the trial court's failure to define premeditation in its attempted first-degree murder instruction. *See Commonwealth v. Ramangmau*, 4 NMI 227, 234 (1995) (reviewing jury instructions for plain error when the appellant did not preserve the error). Second, we review the insufficiency of the evidence argument to support Quitano's convictions for attempted first-degree murder and "aggravated assault and battery" (count 2) by "consider[ing] the evidence in the light most favorable to the government and then determin[ing] whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Commonwealth v. Quemado*, 2013 MP 13 ¶ 4 (internal quotation marks omitted). Third, we review de novo Quitano's double-jeopardy arguments because they are questions of law. *Commonwealth v. Peter*, 2010 MP 15 ¶ 4.

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5 One count for the attack of Jung and one count for the attack of Vivencio.

6 One count for the attack of Jung and one count for the attack of Vivencio.

7 One count for the attack of Jung and one count for the attack of Vivencio.

8 The Commonwealth asserts that Quitano did not include a definition of premeditation in his proposed jury instructions. However, the trial transcript does not include the parties' proposed instructions. Consequently, we cannot assess the validity of this statement.

9 Quitano was found guilty of attempted first-degree murder of Vivencio but not guilty of attempted first-degree murder of Jung.

IV. Discussion

A. Failure to Define Premeditation

¶ 10 We must decide whether the trial court erred by failing to define premeditation in Quitano's attempted first-degree murder instruction.[10] Because Quitano did not object to the instruction at trial, we review the allegation that the trial court offered inadequate jury instructions under the plain-error standard. *Ramangmau*, 4 NMI at 234; *see also* NMI R. CRIM. P. 52(b). The plain-error standard allows the court "'to correct only particularly egregious errors, those errors that seriously affect the fairness, integrity or public reputation of judicial proceedings. In other words, the plain-error exception to the contemporaneous-objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *Commonwealth v. Saimon*, 3 NMI 365, 381 (1992) (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)).

¶ 11 To receive relief under the plain-error standard, an appellant must "show that: (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.

¶ 12 Quitano can only prevail on his argument if he demonstrates: (1) the failure to define premeditation was an error, (2) the error was obvious, and (3) the error affected the trial's outcome. We conclude that he cannot meet all three requirements. Accordingly, we will not reverse his attempted first-degree murder conviction on the basis that the jury instruction omitted a definition for premeditation.

1. Looking for an Error

¶ 13 When conducting a plain-error analysis, we must first determine whether the trial court's failure to define premeditation constituted an error. This is an issue of first impression. However, we have previously held that the "trial court's duty is not always adequately performed by merely reading to the jury the requested instructions." *Commonwealth v. Cepeda*, 2009 MP 15 ¶ 40. This means the trial court "should instruct in all essential questions of law whether requested or not." *Id.* (internal citation omitted). The Commonwealth Code and the Restatements do not address when the trial court must define premeditation. Accordingly, we look to the common law, "as generally understood and applied in the United States." 7 CMC § 3401.[11]

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[10] Premeditation is an element of first-degree murder. *See* 6 CMC § 1101(a)(1). A failure to include "premeditation" in the jury instructions would be plain error. *See Cole v. Young*, 817 F.2d 412, 423 (7th Cir. 1987) (holding that "the complete failure to give any jury instruction on an essential element" would violate due process). However, this case turns on a much narrower question: whether a definition of an essential element is also essential.

[11] Although not briefed by the parties, we acknowledge that § 3401 is located in the Commonwealth Code's civil procedure section and this ordinarily would preclude its application to a criminal case. *See generally* 7 CMC. However, there is clear legislative intent that § 3401 applies to criminal proceedings except as prohibited by the statute. Section 3401's prohibition on creating common law crimes would be unnecessary if the law only applied to civil cases. The inclusion of this prohibition shows the legislature intended that the law also apply to criminal cases. As such, we apply § 3401 in this criminal case.

a. Not Enough States Have Addressed this Issue

¶ 14 Having surveyed the law in other states, we conclude there is insufficient case law to definitively determine whether the common law requires a definition of premeditation. We have found a few cases supporting Quitano's and the Commonwealth's respective viewpoints — but we have not found enough cases on either side to convince this court that either side represents the common law.

¶ 15 Two courts have held that a definition of premeditation is required. Quitano presents one of these cases: *Anderson v. Florida*, 276 So. 2d 17 (Fla. 1973). *Anderson* held that a failure to define premeditation is a reversible error even when the error was not preserved at trial. *Id.* at 18-19. The Michigan Court of Appeals reached the same conclusion. *People v. Milton*, 265 N.W.2d 397, 399 (Mich. Ct. App. 1978) (holding that a conviction should be reversed when there was no instruction on premeditation even though the defense did not object).

¶ 16 Meanwhile, other courts have concluded that a definition of premeditation is not necessary in a jury instruction. For example, the Kansas Court of Appeals, the only court outside of Florida to address *Anderson*, held that a definition of premeditation is not required. *Kansas v. Patton*, 102 P.3d 1195, 1199-1201 (Kan. Ct. App. 2004). Despite its decision to the contrary in *Milton*, the Michigan Court of Appeals also has determined the failure to define premeditation is not an error. *People v. Bodley*, 195 N.W.2d 803, 805-06 (Mich. Ct. App. 1972). Texas also embraces this idea. *Mitchell v. Texas*, 365 S.W.2d 804, 806 (Tex. Crim. App. 1963).

¶ 17 All told, we have very few cases addressing this issue or one that is closely analogous. Without more cases, we are not convinced that either side reflects the common law as intended by § 3401. We thus step back and ask a broader question: when must a term be defined in a jury instruction.

b. When to Define Terms in Jury Instructions

¶ 18 Whether a term must be defined in a jury instruction is not addressed in our constitution, our statutes, this Court's prior cases, or the Restatements. Therefore, we begin our analysis by looking to the common law. *See* 7 CMC § 3401.

¶ 19 According to the common law, a term must be defined in a jury instruction when the word or phrase is a term of art. *See, e.g.*, *McKee v. Alaska*, 488 P.2d 1039, 1043 (Alaska 1971) ("[W]here the word is susceptible of differing interpretations, only one of which is a proper statement of the law, an instruction must be given."); *Wilhelm v. Florida*, 568 So. 2d 1, 3 (Fla. 1990) (concluding there was an error when the trial court failed to define a term of art); *Abercrombie v. Indiana*, 478 N.E.2d 1236, 1239 (Ind. 1985) ("The use of a word of art in an instruction requires a further instruction on the definition of that word."); *Iowa v. Hoffer*, 383 N.W.2d 543, 548 (Iowa 1986) (similar); *McKinney v. Heisel*, 947 S.W.2d 32, 34 (Ky. 1997) (similar); *Washington v. Brown*, 940 P.2d 546, 589 (Wash. 1997) (similar); *Compton v. Wyoming*, 931 P.2d 936, 941 (Wyo. 1997) (similar). In contrast, no definition is required

when the term carries its ordinary or natural meaning. *See, e.g.*, *Arizona v. Barnett*, 691 P.2d 683, 685 (Ariz. 1984) (explaining that terms do not need to be defined when they are "used in their ordinary sense and commonly understood"); *Connecticut v. Brown*, 792 A.2d 86, 92 (Conn. 2002) (similar); *Wilson v. United States*, 785 A.2d 321, 328 (D.C. 2001) (similar); *Hoffer*, 383 N.W.2d at 548 (similar); *McKinney*, 947 S.W.2d at 33 (similar); *Brown*, 940 P.2d at 589 (similar); *Compton*, 931 P.2d at 941 (similar); *United States v. Robinson*, 435 F.3d 1244, 1249 (10th Cir. 2006) ("A *significant* line of cases holds that it is not error . . . to fail to define a statutory term or phrase that carries its natural meaning.") (emphasis added). Therefore, we hold that a term must be defined in a jury instruction when the word or phrase is a term of art.

¶ 20 Having established that a term must be defined in a jury instruction if the word or phrase is a term of art, we ask whether premeditation is a term of art. A majority of states treat premeditation as a term of art. *See, e.g.*, *North Carolina v. Mash*, 399 S.E.2d 307, 310 (N.C. 1991) (noting that "premeditation" is a term of art); *People v. Bernard*, 656 P.2d 695, 697 (Colo. 1983) (noting that premeditated malice aforethought is a term of art); *Missouri v. McNamara*, 110 S.W. 1067, 1070 (Mo. 1908) (noting that "premeditatedly" is a term of art); *Ex parte Resler*, 212 N.W. 765, 766 (Neb. 1927) (calling "premeditation" a technical term). *But see Mitchell*, 365 S.W.2d at 806 (noting Texas cases have concluded that premeditated is not a "technical word[]" and that "'premeditated design' [is] . . . commonly used and accepted"). The conclusion that premeditation has a technical meaning is reinforced by the difficulty that courts have providing a precise definition for the term. *See United States v. Begay*, 567 F.3d 540, 545-46 (9th Cir. 2009) (collecting sources), *vacated on other grounds*, 673 F.3d 1038 (9th Cir. 2011). In fact, the term "is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it." BENJAMIN N. CARDOZO, *What Medicine Can Do For Law*, *in* LAW AND LITERATURE 97-100 (1931). Therefore, pursuant to § 3401, we follow the common law position and treat premeditation as a term of art.

¶ 21 Because premeditation is a term of art and terms of art must be defined in jury instructions, we hold the trial court's instruction omitting the definition of premeditation is an error under plain error's first analytical step.

2. Plain or Obvious Error

¶ 22 We now turn our attention to the second step of the plain-error analysis — whether the error identified in step one is plain or obvious.[12] *Hossain*, 2010 MP 21 ¶ 29. To answer this question, we identify the origins of our plain-error framework, look to a recent case clarifying the doctrine, and explain how that case helps resolve the issue before our Court.

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[12] The error must be "clearly inconsistent" with the law. *United States v. Garrido*, 713 F.3d 985, 994-95 (9th Cir. 2013).

¶ 23 In *Hossain*, we derived our plain-error framework from the United States Supreme Court. *Hossain*, 2010 MP 21 ¶ 29 (citing *United States v. Olano*, 507 U.S. 725, 732-34 (1993)). The Supreme Court recently clarified the plain-error doctrine in *Henderson v. United States*, __ U.S. __, 133 S. Ct. 1121, 1129-30 (2013). We find their analysis compelling and adopt it to the extent discussed below.

¶ 24 In *Henderson*, the Supreme Court adopted the time-of-review rule for the plain-error analysis. This rule establishes that an error must be clear when the appellate court reviews for the error rather than when the trial court made the allegedly erroneous decision.[13] *Id*. at 1128-29. This allows an appellate court to find an error was plain even though the error only existed because an intervening opinion changed the law between the trial court's decision and the appellate review.[14] *Id*.

¶ 25 *Henderson* adopted the time-of-review rule for two reasons. First, *Henderson* explained a time-of-review rule is preferable because it prevents the appellate court from having to engage in "temporal ping-pong." *Id.* at 1128. This occurs when a court has to look "at *the law that then was* to decide whether the error was 'plain' and look[] *at the circumstances that now are* to decide [the rest of the plain error test]." *Id.* (emphasis in original). Second, *Henderson* held that the time-of-review rule should be used because the plain-error analysis applies to issues of law that are unsettled when the trial court issues an opinion.[15] *Id*. at 1127. A time-of-review rule, unlike a time-of-error standard, allows a court to find plain error when the law was unsettled at the time the trial court ruled. *Id.* at 1127-28. This prevents unjustifiably treating similarly situated individuals differently.[16] *Id.*

¶ 26 *Henderson* does not address the issue we face today — can an error be plain or obvious when the case law creating the recognition of the error is developed earlier in the opinion.[17] *See generally Henderson*, 133 S. Ct. 1121. However, *Henderson*'s two guiding principles — the time-of-review rule

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[13] This latter option is commonly referred to as the time-of-error rule because it focuses on whether the error was plain when the trial court made its decision.

[14] In other words, a trial court's action that was not in error when made nonetheless could be labeled plain error by the appellate court because a new decision was issued between when the trial court made its decision and when the appellate court reviewed the matter. *Henderson*, 133 S. Ct. at 1128-29.

[15] If the Court adopted a time-of-error analysis then there could never be "plain" error when the trial court ruled on unsettled law. *Henderson*, 133 S. Ct. at 1127-28. This concerned the Supreme Court. *Id.* at 1127.

[16] The Supreme Court stated that plain error covers "trial court decisions that were plainly correct at the time when the judge made the decision" and "trial court decisions that were plainly *in*correct at the time when the judge made the decision." *Henderson*, 133 S. Ct. at 1127 (emphasis in original). It then asked rhetorically: "why should [plain error] not also cover [] cases in the middle--*i.e.*, where the law at the time of the trial judge's decision was neither clearly correct nor incorrect, but unsettled?" *Id.* The Supreme Court concluded there is no practical reason to treat these three scenarios differently and that applying a time-of-review analysis would treat all three cases alike. *Id.* at 1127-28.

[17] As we held above, the trial court committed an error by not defining premeditation. However, this rule was not known when the trial court acted.

and avoiding temporal ping-pong — support the conclusion that an error can be plain when the law allowing a court to recognize the error was developed in the same opinion.

¶ 27 We are applying *Henderson*'s time-of-review rule, which requires evaluating the error's plainness according to the most current understanding of the law, by asking whether the error was apparent under the standard established earlier in this opinion for what constitutes an error. In contrast, we would be using the disfavored time-of-error standard if we evaluated whether the error is plain by ignoring the earlier work in this opinion and looking only to our prior case law. Additionally, we are avoiding temporal ping-pong by applying the same rule for both finding the error and evaluating its plainness. If we did not apply the same rule, we would be looking to our new rule for whether the trial court's action was an error and our prior law for whether the error is plain. The Supreme Court castigated this type of jumping around between standards from different times. *Id.* at 1128.

¶ 28 Following this natural extension of *Henderson*, we conclude that the error found in Part IV.A.1.b is plain or obvious. In light of the rule we established in Part IV.A.1.b — requiring that a term of art be defined in jury instructions — the error is readily apparent. It is generally accepted that premeditation is a term of art. *See supra* Part IV.A.1.b. Consequently, it is obvious that not defining premeditation is inconsistent with our new standard for jury instructions. This is sufficient to declare the error obvious for the purposes of the plain error analysis' second step.

3. Substantial Rights Analysis

¶ 29 Having concluded there is an error and that it is plain or obvious, we turn to the final prong of the plain-error analysis: whether the error affected Quitano's substantial rights. To answer this question, we ask whether the error affected the outcome of the proceeding. *Hossain*, 2010 MP 21 ¶ 29; *see also* 5 AM. JUR. 2d *Appellate Review* § 720 ("The error must have been prejudicial, in the sense that it must have affected the outcome of proceedings in the lower court."). If the jury had sufficient evidence to find premeditation under both the legal and the layman definition, then the error did not affect the outcome of Quitano's trial. Accordingly, we (1) identify the layman and legal definition and (2) determine whether the layman definition is more demanding than the legal definition. No substantial right is affected if the layman definition is equally or more demanding than the legal definition.[18] Here, the layman definition of

[18] We find it helpful to clarify this point. Assume the legal definition allowed premeditation to be formulated "virtually instantaneously" and the layman definition could not — i.e., the layman definition required some type of reflection or planning. This layman definition would be more demanding because a jury must find more than is necessary to convict under the legal definition. In this scenario, anytime a jury found premeditation under the layman definition, the jury would also find it under the legal definition (whereas finding premeditation under the legal definition would not necessarily satisfy the laymen definition). This is because a jury finding sufficient reflection would always have enough evidence to convict under a definition allowing premeditation to be found where the *mens rea* can develop nearly simultaneously with the action. As such, the trial's result is not altered where the layman definition is used and that definition is more demanding than the legal definition.

premeditation is more demanding than the legal definition. We therefore conclude the error did not affect Quitano's substantial rights.

a. Legal Definition of Premeditation

¶ 30 We note that our laws and our cases have not defined premeditation and there is not a uniform or widely accepted legal definition. *See Begay*, 567 F.3d at 545-46. Thus, we focus on all reasonable definitions. One permutation is that premeditation can be formed nearly instantaneously. *See, e.g.*, *Bates v. United States*, 834 A.2d 85, 94 (D.C. 2003) ("[P]remeditation, the formation of a design to kill, may be instantaneous, as quick as thought itself . . . ."). *Minnesota v. Thomas*, 590 N.W.2d 755, 758 (Minn. 1999) ("Premeditation need not involve extensive planning and calculated deliberation . . . [and] can be formulated virtually instantaneously . . . .") (internal quotation marks omitted); *Cigainero v. Arkansas*, 838 S.W.2.d. 361, 363 (Ark. 1992) (similar). Other courts require some antecedent period where the defendant had time to reflect and in fact did so before acting. *See Begay*, 567 F.3d at 546 (explaining that requiring reflection is "consistent with many state courts"); *Arizona v. Thompson*, 65 P.3d 420, 425 (Ariz. 2003) (noting the state must show actual reflection). These two theories capture the extremes: on the one hand, premeditation can be formed nearly instantaneously; on the other hand, premeditation can require a period of reflection before acting. Some courts have adopted each extreme while many others fall somewhere in the middle.

b. Layman Definition of Premeditation

¶ 31 While case law provides us the legal definition of premeditation, we look to common, non-legal dictionaries for the layman definition. *Commonwealth v. Inos*, 2013 MP 14 ¶ 12 (referring to dictionary for plain meaning). These dictionaries consistently define "premeditation" as an act made after planning or consideration. The layman definition focuses on having sufficient time for "planning." *See Premeditation*, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/premeditation (last visited Feb. 6, 2014) ("consideration or planning of an act beforehand that shows intent to commit that act"); *Premeditated*, CAMBRIDGE DICTIONARIES, http://dictionary.cambridge.org/dictionary/british/premeditated?q=premeditation (last visited Feb. 6, 2014) ("done after being thought about or carefully planned"); *Premeditation*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/definition/english/premeditation?q=premeditation (last visited Feb. 6, 2014) ("[t]he action of planning something (especially a crime) beforehand").

c. Identifying the More Demanding Definition

¶ 32 We now must determine whether the layman or legal definition is more demanding. Whereas the most demanding legal definition requires some time to reflect, the layman definitions incorporate this reflection time and goes farther by emphasizing a planning component. Accordingly, we conclude that the layman definition is at least as demanding, if not more so, than the legal definition.

d. Effect of the Failure to Define Premeditation

¶ 33 We hold that the failure to define premeditation does not affect a substantial right because the layman definition of premeditation is at least as demanding as the legal definition. Quitano's rights were not affected by the omission of a definition. Consequently, he cannot meet the third and final requirement of the plain-error analysis. Therefore, the trial court's failure to define premeditation in the jury instruction does not offer a basis for reversing Quitano's conviction for attempted first-degree murder.

B. Sufficiency of the Evidence: Attempted First-Degree Murder

¶ 34 Having rejected Quitano's plain-error argument, we turn to Quitano's argument that there was insufficient evidence of premeditation to sustain his attempted first-degree murder conviction. We review sufficiency of the evidence allegations under a highly deferential standard. We do not "weigh conflicting evidence or consider the credibility of witnesses." *Commonwealth v. Camacho*, 2002 MP 6 ¶ 108. Rather, we "'consider the evidence in the light most favorable to the government and [then] determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Commonwealth v. Islam*, 2013 MP 4 ¶ 7 (quoting *Commonwealth v. Minto*, 2011 MP 14 ¶ 38).

¶ 35 We conclude there is sufficient evidence for a reasonable juror to find Quitano acted with premeditation under even the most demanding legal[19] definitions.[20] Vivencio testified that Quitano and Marlon broke into the store and immediately started hitting Jung and Vivencio. Trial Tr. at 24. Quitano and Marlon began the beatings without even asking for money. *Id.* at 31. Simultaneous beatings with a crowbar and sledgehammer directed at the victims' heads, without any provocation by the victims or signal by Quitano to Marlon (or vice versa), could suggest to a reasonable juror that Quitano and Marlon planned in advance to kill whomever they encountered in the pawnshop. This evidence satisfies the most demanding permutation of premeditation because a juror could find it shows Quitano reflected before acting. Therefore, the evidence is sufficient under any reasonable definition of premeditation. Consequently, we conclude the evidence is sufficient to sustain the attempted first-degree murder conviction.

C. Sufficiency of the Evidence: "Aggravated Assault and Battery" (Count 2)

¶ 36 We now address Quitano's argument that the evidence of "aggravated assault and battery" (count 2) is insufficient to sustain his conviction. He contends the injuries he inflicted on Jung do not satisfy the "serious bodily injury" requirement. As discussed above, we review sufficiency of the evidence claims under a highly deferential standard. *See Camacho*, 2002 MP 6 ¶ 108; *Islam*, 2013 MP 4 ¶ 7.

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[19] We do not address the layman definition here because premeditation is a term of art. *Supra* Part IV.A.1.b.

[20] The most demanding legal definitions require sufficient reflection time. *See supra* Part IV.A.3.a. In contrast, some states allow premeditation to be found nearly instantaneously. *See supra* Part IV.A.3.A. These definitions are less favorable to Quitano because it makes it easier to find premeditation. *See supra* note 18.

¶ 37 A person commits "aggravated assault and battery" when "he or she causes serious bodily injury, purposely, knowingly or recklessly." 6 CMC § 1203(a). Serious bodily injury is an "injury which creates a high probability of death or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other bodily injury of like severity." *Id.* § 103(o). Therefore, we focus on the injuries rather than the weapon used.

¶ 38 We conclude the evidence introduced at trial does not support Quitano's conviction for "aggravated assault and battery" (count 2). We have no evidence before us that would allow a reasonable juror to find Jung suffered a serious bodily injury. Detective Ozawa testified that Jung had injuries to his hands, arms, and chest. The detective also said that Jung had bruises or abrasions. Detective Ozawa did not testify about the severity of Jung's injuries, whether he required stitches, or what (if any) treatment Jung received — all of which could support a serious injury. In contrast, Detective Ozawa testified in vivid detail about the severity of Vivencio's injuries — the detective explained that there were staples in Vivencio's scalp. If Jung's injuries were serious, we would expect Detective Ozawa's testimony to focus on the extent of Jung's injuries as she did with Vivencio's injuries. The contrast in her descriptions, in conjunction with a lack of other evidence, is telling. With that in mind, we agree with Quitano that the evidence at trial could not lead any reasonable person to conclude that Jung suffered a serious bodily injury. Accordingly, we reverse Quitano's conviction for "aggravated assault and battery" (count 2) because there was insufficient evidence to sustain the conviction.

D. Double Jeopardy

¶ 39 Quitano argues three of his convictions violate double jeopardy: (1) theft; (2) "assault and battery" (count 3); and (3) "assault and battery" (count 4). We address each in turn.

¶ 40 We review a double-jeopardy challenge de novo because it is a question of law. *Peter*, 2010 MP 15 ¶ 4. 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 conviction; and (3) multiple punishments for the same offense." *Id.* ¶ 5.

¶ 41 If we are in the third category, we ask whether the legislature intended to impose multiple sanctions for the same conduct. *Id.* If the answer is yes, our inquiry is over, and there is no double jeopardy violation. *Id.* If the answer is no, we apply the *Blockburger* test. *Id.*

¶ 42 Under the legislative-intent test, a trial court's proceedings do not violate double jeopardy if there is a *clear* legislative intent to impose multiple punishments for the same conduct. *Id.* ¶ 10. We presume "that where two statutory provisions proscribe the same offense, [the] legislature does not intend to impose two punishments for that offense." *Id.* (internal quotations omitted). Legislative intent can be derived from the words of the statute, *see id.* ¶ 12 (examining the words of a statute for legislative intent),

or legislative history, *Pac. Fin. Corp. v. Sablan*, 2011 MP 19 ¶ 9 n.9. When we are looking at a statute, we interpret the Commonwealth Code "according to the reasonable construction of their terms with a view to effect the plain meaning of their object." *Commonwealth v. Lin*, 2010 MP 2 ¶ 5.

¶ 43 Under *Blockburger*, "'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'" *Peter*, 2010 MP 15 ¶ 6 (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). This 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]." *Commonwealth v. Kaipat*, 4 NMI 300, 303 (1995) (internal quotation omitted). Consequently, we focus on the elements required for each offense rather than the actual evidence presented at trial. *Peter*, 2010 MP 15 ¶ 6.

¶ 44 We reverse the conviction of the lesser-included offense when a defendant, in violation of double jeopardy, is convicted of an offense and the lesser-included offense. *See Tuckfield v. Alaska*, 621 P.2d 1350, 1352 (Alaska 1981) (vacating lesser-included offense when concluding the defendant's two convictions violated double jeopardy); *Patton v. People*, 35 P.3d 124, 127-128 (Colo. 2001) (same).

1. Theft and Armed Robbery

¶ 45 We agree that Quitano's convictions for theft and armed robbery violate double jeopardy. Quitano's convictions for both theft and armed robbery raise a double jeopardy issue that falls into the third category — multiple punishments for the same offense. Our first step is the legislative-intent test. We look at the applicable statutes and determine whether the legislature intended to permit multiple punishments. Neither statute mentions cumulative punishments, *see* 6 CMC §§ 1411 (armed robbery), 1601 (theft), which creates the presumption that the legislature did not intend to subject a defendant to multiple punishments for their violation, *see Peter*, 2010 MP 15 ¶ 12 (explaining that presumption arises when the law does not mention cumulative punishments). The Commonwealth would have us find legislative intent for multiple punishments because the statutes have different sentencing schemes.[21] We believe this *may* indicate legislative intent. However, we need more; we need *clear* legislative intent. *Id.* ¶ 5. Because different sentencing schemes are not sufficient to rebut the presumption and establish *clear* legislative intent, we turn to the *Blockburger* test.

¶ 46 Looking to *Blockburger*, we conclude that Quitano's conviction for armed robbery and theft violate double jeopardy. Theft is a lesser-included offense of armed robbery — all the elements required

[21] Theft focuses on property value and financial injury, while armed robbery focuses on the use of force and infliction of injury. *See generally* 6 CMC §§ 1411, 1601.

to prove theft are also required to prove robbery.[22] *See Commonwealth v. Crisostomo*, 2007 MP 7 ¶ 17 ("[A]n offense is a lesser included offense if its elements are a subset of the charged offense.") (internal quotations omitted); 6 CMC §§ 1411 (defining armed robbery), 1601 (defining theft). This means that Quitano's convictions for theft and armed robbery cannot satisfy *Blockburger*'s requirement that each conviction requires proof of a fact that the other does not. *See Peter*, 2010 MP 15 ¶ 6 (explaining *Blockburger*). Having satisfied neither the legislative intent nor the *Blockburger* test, we reverse Quitano's theft conviction. *See Tuckfield*, 621 P.2d at 1352.

2. "Aggravated Assault and Battery" (Count 1) and "Assault and Battery" (Count 3)

¶ 47 We also agree with Quitano, and the Commonwealth, that Quitano's convictions for "assault and battery" (counts 3) and "aggravated assault and battery" (count 1) violate double jeopardy. Quitano's argument also falls into the third category of double jeopardy — multiple punishments for the same conduct. As before, we turn first to the legislative-intent test. The applicable statutes are silent on cumulative punishments. *See generally* 6 CMC §§ 1202 (defining assault and battery), 1203 (defining aggravated assault and battery). Thus, we presume the legislature did not intend to impose multiple punishments for the same conduct. *See Peter*, 2010 MP 15 ¶ 10. We find nothing in the law or surrounding history to rebut this presumption.[23] Unable to satisfy the legislative-intent test, we turn to *Blockburger*. Because "assault and battery" is a lesser-included offense of "aggravated assault and battery," *see Commonwealth v. Mitchell*, 1997 MP 4 ¶ 11 ("The elements of assault and battery are a subset of the elements of aggravated assault and battery."), Quitano's convictions for both do not satisfy *Blockburger*, *see Peter*, 2010 MP 15 ¶ 6 (explaining *Blockburger* test). Consequently, we reverse Quitano's conviction for "assault and battery" (count 3). *See Tuckfield*, 621 P.2d at 1352.

3. Aggravated Assault and Battery" (Count 2) and "Assault and Battery" (Count 4)

¶ 48 Quitano's conviction for "assault and battery" (count 4) does not violate double jeopardy because we reversed his "aggravated assault and battery" (count 2) conviction, *see supra* Part IV.C; thus, he is no longer being punished twice for the same conduct.

V. Conclusion

¶ 49 For the reasons discussed above, we AFFIRM Quitano's convictions for attempted first-degree murder and "assault and battery" (count 4). We REVERSE Quitano's convictions for theft, "aggravated assault and battery" (count 2), and "assault and battery" (count 3).

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[22] Robbery is committed if a person "takes property from the person of another, or from the immediate control of another, by use or threatened use of immediate force or violence." 6 CMC § 1411. Whereas, theft is committed if a person "unlawfully takes, uses or consumes the property or services of another with intent to permanently deprive the owner of his or her rights to the property or services." 6 CMC § 1601.

[23] The Commonwealth agrees with this conclusion. Commonwealth Resp. Br. at 9.

SO ORDERED this 4th day of April, 2014.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice