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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

ARINNA REIONG AND NORNA TIPINGENI,
Defendants-Appellants.

Supreme Court No. 2012-SCC-0021-CRM

Superior Court No. 11-0251

OPINION

Cite as: 2015 MP 13

Decided December 28, 2015

Edward E. Manibusan and Emily Cohen, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

Michael N. Evangelista and Sean E. Frink, Saipan, MP, for Defendants-Appellants.

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

MANGLONA, J.:

¶ 1 Defendants-Appellants Arinna Reiong and Norna Tipingeni ("Appellants") seek reversal of their convictions, arguing three issues: (1) whether the evidence is sufficient to support their conviction of Aggravated Assault and Battery, (2) whether the trial court erred by failing to instruct the jury on lesser-included offenses, and (3) whether the trial court erred when it denied the defendants' motion for mistrial.[1] For the reasons below, we AFFIRM the trial court's judgment.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 Appellants had a seven-day trial on the charges of Disturbing the Peace, Assault and Battery, Aggravated Assault and Battery, and Assault with a Dangerous Weapon.

¶ 3 Before the trial court gave an opening jury instruction, Appellants requested the lesser-included offense instructions of Assault and Battery and Disturbing the Peace be read to the jury. The trial court denied the request and instructed the jury on the Assault with a Dangerous Weapon and Aggravated Assault and Battery charges. Likewise, the lesser-included offenses were excluded from the closing jury instructions.

¶ 4 Appellants were acquitted of the Assault with a Dangerous Weapon charge but found guilty of Aggravated Assault and Battery. On the bench counts, the trial court found Appellants guilty of Assault and Battery and Disturbing the Peace. Appellants were sentenced to six and a half years imprisonment, all suspended except two and a half years with credit for time served.

¶ 5 Appellants challenge their Aggravated Assault and Battery convictions, arguing that the evidence is insufficient to support their convictions. Further, they argue the trial court erred by failing to read the lesser-included offense instructions to the jury.

II. JURISDICTION

¶ 6 We have jurisdiction over Superior Court final judgments and orders. NMI CONST. art. IV, § 3.

III. DISCUSSION

A. Sufficiency of the Evidence

¶ 7 Sufficiency of the evidence allegations are reviewed under a highly deferential standard. *Commonwealth v. Taman*, 2014 MP 8 ¶ 17 (citing *Commonwealth v. Camacho*, 2002 MP 6 ¶ 108; *Commonwealth v. Minto*, 2011

[1] Because the Appellants do not brief the third issue, we do not consider that issue on appeal. *Shinji Fujie v. Atalig*, 2014 MP 14 ¶ 10 n.5 (citations omitted).

MP 14 ¶ 38). "We do not weigh conflicting evidence or consider the credibility of witnesses. 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." *Taman*, 2014 MP 8 ¶ 17 (internal quotation marks and citations omitted).

¶ 8 Appellants assert their Aggravated Assault and Battery convictions must be reversed because the "serious bodily injury" element of that offense is wholly unsupported by the record.[2] They argue that the injuries sustained by the victim do not constitute serious bodily injury as defined by 6 CMC § 103(o), which defines such injury as 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." Importantly, our Aggravated Assault and Battery statute differs from analogous statutes in the majority of other jurisdictions because it includes the phrase "other bodily injury of like severity." *Cf., e.g.*, Haw. Rev. Stat. § 707-700 (2015) (defining "serious bodily injury" as bodily injury that "creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ"); Model Penal Code § 210.0 (same).

¶ 9 Appellants assert the phrase "other bodily injury of like severity" does not broaden the definition of serious bodily injury, arguing serious bodily injury only occurs if the victim suffers from an injury explicitly listed within the statute. In other words, according to Appellants, serious bodily injury only occurs if the victim suffers an injury that (1) creates a high probability of death, (2) causes serious disfigurement, or (3) causes a prolonged impairment of a bodily member or organ. However, Appellants' statutory interpretation runs afoul of the rule against surplusage, a common law canon of construction, which embodies the well-established principle that the proper interpretation of a legislative enactment seeks to provide meaning to every word of the statute—not render language of the enactment redundant. *E.g., Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033, 1039 (10th Cir. 2006); *State v. Clemente-Perez*, 357 Or. 745, 755 (Or. 2015). The Legislature would not have included the "other bodily injury of like severity" phrase if it intended for that phrase to be meaningless. Thus, we reject Appellants' interpretation of § 103(o) and hold that "serious bodily injury" encompasses not only the injuries explicitly set forth in § 103(o) but also other injuries that are of similar severity.

¶ 10 Injuries like those suffered by the victim have satisfied the more demanding injury element of elevated assault and battery convictions in other

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[2] "A person commits 'aggravated assault and battery' when 'he or she causes serious bodily injury, purposefully, knowingly or recklessly.'" *Commonwealth v. Quitano*, 2014 MP 5 ¶ 37 (quoting 6 CMC § 1203(a)).

jurisdictions. *See, e.g.*, *State v. Poteet*, 692 P.2d 760, 764 (Utah 1985) (finding sufficient evidence to uphold aggravated assault conviction requiring serious bodily injury when the attending physician testified that the victim was in a very serious condition, the victim did not regain consciousness for up to fifteen hours after the assault, and the victim had dried blood on in his nose and throat), *superseded on other grounds*; *see also State v. Daniels*, 469 N.E.2d 1338, 1339 (Ohio Ct. App. 1984) (stating the record contained sufficient evidence of serious physical harm, which was defined as an "acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain," when the victim suffered from a broken nose; injuries to her back, hands, and leg; was treated at a hospital; was unable to sleep several nights; and had recurring headaches as a result of the attack).

¶ 11 For example, in *United States v. Wilson*, the appellant challenged his "assault resulting in serious bodily injury" conviction, asserting that no reasonable jury could have found the injuries he inflicted as "serious" under the relevant statutory definition. 698 F.3d 969, 970 (7th Cir. 2012). There, "serious bodily injury" was defined as involving "a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." *Id.* (quoting 18 U.S.C. § 1365(h)(3)) (internal quotation marks omitted).

¶ 12 The defendant in *Wilson* punched the victim, kicked him in the head, stomped on his face, and slammed his head into a bunk. *Id.* As a result, the victim suffered from a probable concussion; incurred two large lacerations on his face, multiple bruises and scratches, a broken nose, swollen eyes; experienced recurring headaches, pains in his face, loose teeth, difficulty sleeping and thinking; and showed signs of post-traumatic stress disorder. *Id.* The court held that a reasonable jury could have found that the victim suffered a serious bodily injury, noting, amongst other things, that "[t]he beating, and the stomping with steel-toe boots, could well be found to have inflicted extreme pain until [the victim] lost consciousness," and the impairment of the victim's "mental faculty also had not dissipated over that period." *Id.* at 971.

¶ 13 Here, a reasonable juror could have found the evidence sufficient to find the victim's injuries were "of like severity" to those listed in 6 CMC § 103(o).

¶ 14 First, the victim testified that after the attack her mouth and nose were bleeding, she had difficulty breathing, she had problems understanding, she was unable to walk, she had to be carried onto the toilet, and she suffered from pain when moving her head. Moreover, she testified that she continues to suffer from headaches and dizziness months after the attack, three to four days a week; has memory loss; and lost hair.

¶ 15 Second, the treating physician's assistant testified that the victim broke her nose; had a swollen and possibly fractured jaw;[3] that although the victim

[3] The physician's assistant suspected that the victim had fractured her jaw because the computerized tomography scan revealed "plenty of darkness on the left mandible . . .

did not suffer lacerations, lacerations are not required for serious injuries to the body to occur; that in his six and a half years of medical practice the victim's injuries were the worst he had seen as a result of an assault; that upon the victim's arrival to the hospital, the victim was a ten on the Glasgow Coma Scale—meaning she was only responsive to physical pain; that she was unable to walk when she left the hospital; and that she was prescribed Tylenol No. 3, which contains codeine, a narcotic.

¶ 16 Third, the video exhibit published to the jury contained footage of the victim sprawled on the floor of the convenience store surrounded by blood stains and clumps of hair.

¶ 17 In light of this evidence, a reasonable trier of fact could have found "serious bodily injury" under 6 CMC § 103(o). Thus, there is sufficient evidence to support the conviction of Aggravated Assault and Battery.

B. Lesser-included Offenses

¶ 18 "An instruction on a lesser-included offense must be given 'when warranted by the evidence,' even if not requested." *Commonwealth v. Guiao*, 2015 MP 1 ¶ 7 (citing *Camacho*, 2002 MP 6 ¶¶ 63, 66). We utilize a two-prong test to determine the necessity of the instruction. *Id.* The first prong is a legal inquiry: "whether the elements of the lesser offense are such that one cannot commit the greater offense without committing the lesser . . . ." *Id.* (quoting *Camacho*, 2002 MP 6 ¶ 67) (internal quotation marks omitted). The second prong is a factual inquiry: "whether a rational juror could find the defendant guilty of the lesser offense while acquitting him of the greater . . . ." *Id.* (quoting *Camacho*, 2002 MP 6 ¶ 67) (internal quotation marks omitted). The first prong is reviewed de novo and the second prong is reviewed for abuse of discretion. *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007) (citing *United States v. Naghani*, 361 F.3d 1255, 1262 (9th Cir. 2004)). However, absent a proper objection to jury instructions, plain error review applies. *Guiao*, 2015 MP 1 ¶ 9 (citing *Commonwealth v. Quitano*, 2014 MP 5 ¶ 10); *United States v. Bey*, 667 F.2d 7, 10 (Former 5th Cir. 1982); *see Commonwealth v. Hossain*, 2010 MP 21 ¶ 28 (stating that when a claimed error is not properly preserved, we review for plain error).

¶ 19 Under NMI Rule of Criminal Procedure 30, in order to properly preserve an objection to jury instructions on appeal, the party must state the grounds of their objection:

> No party may assign as error any portion of the charge or omission therefrom 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.

In other words, a proper objection requires a party to specifically state the error

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." Tr. 400. However, because there was no radiologist on staff, that diagnosis was never confirmed. *Id*.

the trial court commits if it refuses a particular instruction. *Tomley v. United States*, 250 F.2d 549, 550–51 (5th Cir. 1957).[4]

¶ 20 In *Bey*, the appellant argued the district court's refusal to include the proposed instructions was error. 667 F.2d 7 at 10. There, the purpose of the proposed instructions was to mitigate prejudice "inherent in defendant's being a prisoner" and having committed prior crimes. *Id.* The court acknowledged the purported significance of the proposed instruction but also noted the defendant's failure to articulate that purpose at the time of his objection. *Id.* Because the defendant failed to present that purpose when he raised his objection, the court found that he did not adequately preserve the issue on appeal, holding that Rule 30 "require[s] a precise statement of the grounds of the objection," and "[a] general objection to the trial judge's refusal to adopt defendant's requests will not satisfy Rule 30." *Id.* (citations omitted); *see United States v. Phillips*, 522 F.2d 388, 390–391 (8th Cir. 1975) ("It is advisable, if counsel intends seriously to challenge an instruction, to indicate specifically why the court's instruction is erroneous and what should be done to conform the instruction to the law."). Concluding that the objection was not properly raised, the court examined the failure to include the instruction under plain error review. *Bey*, 667 F.2d 7 at 10.

¶ 21 Here, Appellants point to one instance, which occurred before opening instructions, of the trial court refusing to read the lesser-included offense instruction. In that instance, the trial court began by informing the parties that after the jurors are called in, opening instructions will be read and counsel will be permitted to give their opening statement:

> THE COURT: Okay, we are going to be calling the jurors in shortly and the court will be . . . giving its opening instructions . . . and then counsel . . . may give an opening statement.

Tr. 26–27. Appellants' counsel then asked whether the trial court or the jury should be addressed in the opening statement:

> MR QUICHOCHO: Yes, Your Honor . . . we would like to clarify the procedure, Your Honor. This is a jury and bench trial Your Honor, to clarify you would expect us to address the court in opening, or it would be kind of proper to leave the jury and address, Your Honor.

Tr. 27. Instead of directly answering the question, the trial court stated that it would not read the lesser-included charges as part of the opening jury instructions:

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[4] When our rules are patterned after the federal rules, it is appropriate to look to federal precedent for guidance. *Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 60. Prior to the 2002 amendment, Federal Rule of Criminal Procedure Rule 30 and NMI Rule of Criminal Procedure Rule 30 were substantially similar. *Compare* FED. R. CRIM. P. 30 (1988) (amended 2002), *with* NMI R. CRIM. P. 30.

> THE COURT: No . . . the bench charges are sort of all part of all the alleged other charges. So, it doesn't matter. In the . . . jury instructions that were given to counsel, I won't be reading the bench charges that are still in the printed form, okay? . . . The printed copy you have still includes the assault and battery and disturbing the peace. I won't be reading those to the jurors, okay.

Tr. 27–28. After that response, Appellants, for the first time, requested the lesser-included offense instructions be read to the jury:

> MR QUICHOCHO: Well . . . can Your Honor go and read that but then explain that only the—

Tr. 28. The trial court then denied that request:

> THE COURT: No, I am not going to read it. Instructions to jurors should be as least confusing as possible. . . . [I]t's consistent with what I gave in summary, the charges at the outset.

Id. Appellants then asked whether the request was denied, and the court confirmed the denial of the request:

> MR QUICHOCHO: And the request, Your Honor, we understand that you denied the request for the charges . . . if I may just advise the court—
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> THE COURT: Wait, what are you saying I denied?
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> MR QUICHOCHO: The request to read the—
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> THE COURT: The whole charge?
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> MR. QUICHOCHO: Correct. And explain that only two charges the assault with a dangerous weapon and aggravated assault are by the jury.
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> THE COURT: Alright, noted. What else? Anything else?

Id. Appellants then addressed an evidentiary issue, ending their dialogue with the trial court concerning the lesser-included instruction. Other than this exchange, the parties do not point to, and we cannot find, another instance regarding the lesser-included instruction.

¶ 22 Here, like *Bey*, Appellants have failed to properly raise an objection to jury instructions because a precise statement of the grounds of the objection was not provided. In their opening brief, Appellants argue the importance of providing the lesser-included instruction as a means to discourage juries from convicting for impermissible reasons. However, Appellants did not articulate that purpose in their objection to the trial court's denial of their request. Appellants merely confirmed that the trial court was denying their request to read the lesser-included offense instruction. Because Appellants did not properly object to the jury instruction, we review the failure to provide the

lesser-included offense instruction for plain error.

¶ 23 To prevail under plain error, Appellants must satisfy three prongs: "(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." *Hossain*, 2010 MP 21 ¶ 29 (citing *United States v. Olano*, 507 U.S. 725, 732–34 (1993)). "If each element is met, we have 'the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Commonwealth v. Salasiban*, 2014 MP 17 ¶ 10 (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

¶ 24 The exclusion of a lesser-included offense instruction is not error unless "a rational juror could have found the evidence sufficient to acquit the defendant of the greater offense and [convict on the] lesser-included offense." *Guiao*, 2015 MP 1 ¶ 10.

¶ 25 In *Guiao*, the appellant challenged her Assault with a Dangerous Weapon conviction, arguing that the trial court erred by failing to provide an instruction on the lesser-included offenses of Assault and Assault and Battery. *Id.* ¶ 8. There, we stated that a rational juror could not have convicted the appellant of the lesser-included offense charges because those charges were to be determined by the bench—not the jury. *Id.* ¶ 11. Therefore, we concluded that the court did not err by failing to provide those instructions. *Id*.

¶ 26 Here, like *Guiao*, a rational juror could not have found sufficient evidence to convict the defendant of a lesser-included offense because the jury was solely responsible for deciding the greater offense of Aggravated Assault and Battery. It was not plain error for the trial court to decline to read jury instructions on lesser-included offenses that were also bench charges.

IV. CONCLUSION

¶ 27 We AFFIRM the trial court's judgment because (1) the evidence is sufficient to uphold the guilty verdict of Aggravated Assault and Battery, and (2) the trial court did not plainly err in declining to read a lesser-included offense instruction on a charge outside the province of the jury.

SO ORDERED this 28th day of December, 2015.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice