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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

FRANCISCO R. DEMAPAN,
Defendant-Appellant.

SUPREME COURT NO. 04-0006-GA
SUPERIOR COURT NO. 02-0225

Cite as: 2008 MP 16

Decided August 15, 2008

Jeanne H. Rayphand, Assistant Attorney General, Commonwealth Attorney General's Office, for Plaintiff-Appellee.
Douglas W. Hartig, Assistant Public Defender, Commonwealth Public Defender's Office, for Defendant-Appellant.

BEFORE: JOHN A. MANGLONA, Associate Justice; TIMOTHY H. BELLAS, Justice Pro Tem; HERBERT D. SOLL, Justice Pro Tem

MANGLONA, J.:

¶ 1 Defendant Francisco R. Demapan appeals his convictions of assault with a dangerous weapon, assault and battery, and disturbing the peace arguing (1) the trial court erroneously instructed the jury on the law of self-defense; (2) there is insufficient evidence to sustain the assault and battery and disturbing the peace convictions; and (3) the trial court erred in applying the forty-month mandatory minimum sentence to his assault with a dangerous weapon conviction. We find that the trial court misinstructed the jury on the law of self-defense when it failed to state that a person threatened with an attack of either non-deadly or deadly force that justifies the right of self-defense has no duty to retreat. Additionally, we find that the trial court erred in presuming that Demapan used deadly force in self-defense rather than allowing the jury to determine whether he used non-deadly or deadly force. In misinstructing the jury, the trial court imposed a retreat requirement that we decline to adopt, which, in turn, adversely affected its ability to accurately rule on the assault and battery and disturbing the peace charges. Furthermore, the trial court erred in applying the statutory mandatory minimum sentence to Demapan's assault with a dangerous weapon conviction. Accordingly, Demapan's convictions for assault with a dangerous weapon, assault and battery, and disturbing the peace are VACATED, and this case is REMANDED to the trial court for proceedings consistent with this opinion.

I

¶ 2 On July 27, 2002, Joann A. Cabrera hosted a barbeque at her parents' residence in Capital Hill. She invited a number of people to attend, including her cousin, Allen B. Aldan, and his friend, Demapan. After arriving, Demapan and Aldan got into an argument with another guest, Daniel Johnny. During the argument, Johnny's friends, Anthony J. Benavente, Jr. and Jonathan J. Benavente (collectively, "Benaventes"), arrived at the barbeque and the dispute quickly escalated into a physical confrontation.

¶ 3 Meanwhile, Joann Cabrera's father, Juan S. Cabrera, was sleeping inside. As a result of the ongoing fracas, Juan Cabrera's wife, Juliana Cabrera, woke him up and told him that their daughter's barbeque was quickly becoming a brawl. Juan Cabrera went outside and found the Benaventes fighting Aldan. After stopping the fight, the Cabreras told Johnny and the Benaventes to go home and Aldan to go inside. Johnny and the Benaventes began walking to their vehicle, while Aldan went into the Cabrera's kitchen and got two knives. Aldan then returned to the barbeque and gave one of the knives to Demapan, who put it in his pocket.

¶ 4 Rather than leaving, Johnny charged both Aldan and Demapan, which resulted in another melee. Anthony Benavente removed his belt and wrapped one end around his hand. He then swung the belt buckle at Demapan, striking him in the face. Demapan turned away from Anthony Benavente and began walking away. However, Anthony Benavente swung his belt again and struck Demapan in the back of the head. Demapan turned to face Anthony Benavente, who swung his belt a third time and struck Demapan in the face before the belt buckle flew off the belt. Demapan took the knife out of his pocket, and allegedly told Anthony Benavente in Chamorro, "Bi puno," which means, "I am going to kill you." Appellant's Excerpts of Record ("ER") at 13. Demapan swung his knife at Anthony Benavente, cutting his lower abdomen. Demapan then turned around and walked toward Aldan and Jonathan Benavente, who were still fighting. As Demapan approached them, the two stopped fighting and Jonathan Benavente ran to his vehicle, where Anthony Benavente and Johnny were waiting for him.

¶ 5 Johnny and the Benaventes got into their vehicle and drove away. Thereafter, Anthony Benavente noticed he was bleeding around his lower abdomen. However, he did not seek medical treatment until after driving home and returning to the Cabrera residence to briefly meet with police. When Anthony Benavente went to the hospital, a nurse determined he had a "superficial" laceration on his lower abdomen that was about two inches in length. ER at 148-49.

¶ 6 In December 2003, the Commonwealth charged Demapan with one count of rioting, in violation of 6 CMC § 3102(a); three counts of assault with a dangerous weapon, in violation of 6 CMC §§ 1204(a) and 201; three counts of assault and battery, in violation of 6 CMC § 1202(a); and three counts of disturbing the peace, in violation of 6 CMC 3101(a).[1] Demapan pled not guilty to all charges, arguing that he acted in self-defense.

¶ 7 Prior to jury deliberation,[2] the trial court instructed the jury on the elements of assault with a dangerous weapon, but provided a separate instruction on self-defense. The trial court provided the following self-defense instruction:

> The defendant has offered evidence of having acted in self-defense. Use of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary under the circumstances.

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[1] The Commonwealth also charged Aldan with rioting, in violation of 6 CMC § 3102(a); three counts of assault with a dangerous weapon, in violation of 6 CMC § 1204(a); three counts of assault and battery, in violation of 6 CMC § 1202(a); three counts disturbing the peace, in violation of 6 CMC 3101(a); and one count of attempted aggravated assault and battery, in violation of 6 CMC § 1203(a). However, Aldan entered into a plea agreement with the Commonwealth in exchange for testifying against Demapan.

[2] Demapan's charges of assault with a dangerous weapon were tried before a jury, while all other charges were tried before the trial court.

> *Force likely to cause death or great bodily harm* is justified in self-defense only if a person reasonably believes that such force is necessary to prevent death or great bodily harm. *It is never reasonable to use deadly force against a non-deadly attack.*
>
> . . . .
>
> The government must prove beyond a reasonable doubt that the defendant did not act in self-defense.

ER at 361 (emphasis added).[3] Demapan objected to the instruction, arguing it presumed he used deadly force in fighting Johnny and the Benaventes. Demapan asserted that the jury should be instructed on both non-deadly and deadly force, and that the instruction should clearly indicate that the jury must determine whether Demapan used non-deadly or deadly force. The trial court rejected his arguments and did not specifically instruct the jury on the use of non-deadly force.

¶ 8 Demapan also requested a jury instruction indicating that he did not have a duty to retreat before defending himself.[4] The trial court, however, rejected the request and instead provided the following instruction: "A person threatened with an attack of deadly force that justifies the right of self-defense need not retreat." ER at 295. Demapan objected to this instruction, arguing it implies that a person threatened with non-deadly force must retreat before acting in self-defense. This implication was made explicit when the prosecution specifically asked the jury to make such an inference.[5] However, the trial court overruled Demapan's objection.

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[3] This instruction was later reinforced when the trial court, in instructing the jury on the "use of force in defense of another," provided:

> It is lawful for a person, who as a reasonable person, has grounds for believing and does believe that bodily injury is about to be inflicted upon another person to protect that individual from attack.
>
> In doing so, he may use all force and means which that person believes to be reasonably necessary to prevent the injury which appears to be imminent.
>
> Force likely to cause death or great bodily harm is justified in defense of another only if a person reasonably believes that such force is necessary to prevent death or great bodily harm. *It is never reasonable to use deadly force against a non-deadly attack.*

ER at 363 (emphasis added). The defense objected to the last sentence of this instruction.

[4] Demapan proposed the following jury instruction:

> A person threatened with an attack that justifies the exercise of the right of self-defense need not retreat. In the exercise of his right of self-defense a person may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with a similar knowledge; and a person may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.

ER at 298 (citing 1 Cal. Jury Instr., Crim. 5.50 (7th ed. 2003)).

[5] Over Demapan's objection, Assistant Attorney General Karen L. Severy told the jury, "[y]ou're going to hear an instruction from the judge that if you're threatened with deadly force, you may not retreat

¶ 9 Demapan was convicted of one count of assault with a dangerous weapon, one count of assault and battery, and one count of disturbing the peace. The jury found Demapan guilty of assault with a dangerous weapon against Anthony Benavente, but acquitted Demapan of assault with a dangerous weapon against Jonathan Benavente and Johnny. The trial court convicted Demapan of assault and battery against Anthony Benavente, but acquitted him of assault and battery against Jonathan Benavente and Johnny. Additionally, the trial court convicted Demapan of disturbing the peace of Juan Cabrera, but acquitted him of disturbing the peace of Joann and Juliana Cabrera. Finally, the trial court acquitted Demapan of rioting.

¶ 10 In March 2004, the trial court, over Demapan's objection, sentenced Demapan in accordance with the mandatory minimum sentencing provisions set forth in 6 CMC § 4102(a). The trial court sentenced Demapan to five years imprisonment with all but forty months suspended for his assault with a dangerous weapon conviction. The trial court also sentenced Demapan to twelve months imprisonment for his assault and battery conviction and six months imprisonment for his disturbing the peace conviction.[6] The trial court allowed Demapan to serve his sentences concurrently.

¶ 11 Demapan appealed,[7] arguing: (1) the trial court erroneously instructed the jury on the law of self-defense; (2) there is insufficient evidence to sustain his assault and battery and disturbing the peace convictions; and (3) the trial court erred in applying the forty-month mandatory minimum sentence to his assault with a dangerous weapon conviction.

II

Self-Defense Jury Instruction

¶ 12 The trial court has a duty to instruct the jury "in all essential questions of law whether requested or not." *Commonwealth v. Esteves*, 3 NMI 447, 454 (1993). In reviewing the sufficiency of a jury instruction, this Court must "consider whether the instructions as a whole were misleading or inadequate to guide the jury's determination." *Id.* (quoting *Stoker v. United States*, 587 F.2d 438, 440 (9th Cir. 1987)). Whether the trial court erroneously instructed the jury on the law of self-defense is a question of law reviewed de novo. *Commonwealth v. Ramangmau*,

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first. *But that also mean[s] that [if] you're threaten[ed] with non deadly force, you must retreat*." ER at 320 (emphasis added).

[6] The trial court also sentenced Demapan to supervised probation for the remaining term of his suspended sentences. Additionally, the trial court ordered him to attend anger management counseling and pay probation and court assessment fees.

[7] Demapan appealed his convictions in March 18, 2004, as well as filed an emergency motion under Com. R. App. P. 27(f) seeking to stay the imposition of his sentence pending appeal before this Court. This motion was denied.

4 NMI 227, 238 (1995); *see also United States v. Petrosian*, 126 F.3d 1232, 1233 n.1 (9th Cir. 1997) ("Whether a jury instruction misstates an element of a statutory crime is a question of law that we must review de novo."); *United States v. Joetzki*, 952 F.2d 1090, 1095 (9th Cir. 1991) (stating that a defendant is entitled to jury instructions on his or her theory of defense, and if the court rejects the defendant's proposed instructions, "we review the instructions actually given de novo to determine if they adequately covered the defense theory").

¶ 13 In the Commonwealth, criminal defendants are entitled to a jury finding of guilt beyond a reasonable doubt when charged with "a felony punishable by more than five years imprisonment or by more than $2,000 fine, or both . . . ." 7 CMC § 3101(a). To convict a defendant of assault with a dangerous weapon in the Commonwealth, the prosecution must prove that the defendant (1) threatened to cause, attempted to cause, or purposely caused, (2) bodily injury to another, (3) with a dangerous weapon. 6 CMC § 1204(a). Additionally, when evidence of self-defense is presented to the jury, the prosecution has the burden of proving, beyond a reasonable doubt, that the defendant did not act in self-defense. 6 CMC § 251(b).

¶ 14 Demapan acknowledges that the trial court instructed the jury on the elements of assault with a dangerous weapon as well the law of self-defense, but argues that the instructions were flawed. First, Demapan maintains that the jury instructions erroneously implied that a person attacked with non-deadly force has a duty to retreat before acting in self-defense. Additionally, Demapan argues that there was insufficient evidence to support the trial court's instruction on the use of deadly force. Finally, Demapan asserts that even if there was sufficient evidence to warrant the deadly force instruction, the trial court erred in failing to have the jury, as fact-finder, determine whether Demapan's use of force constituted deadly or non-deadly force.

A

Self-Defense and the Duty to Retreat

¶ 15 Whether a person has a duty to retreat before acting in self-defense is an issue of first impression in the Commonwealth, as both our statutory law and case law are silent on the issue. In order to determine whether the trial court erroneously instructed the jury on the law of self-defense, we review the law of self-defense in other United States jurisdictions.[8] 7 CMC § 3401; *Rosario v. Camacho*, 2001 MP 3 ¶ 10 n.2 ("It is well established that the Commonwealth may

[8] In defining the duty to retreat in the Commonwealth, the prosecution suggests that this Court adopt the standards set forth in the Restatement (Second) of Torts. *See* Appellee's Response Br. at 10-11 (citing Restatement (Second) of Torts § 65 cmt. g, § 63 cmt. m (1965)). Although we look to the restatements in the absence of local statutory and customary law, we find it inappropriate to base Commonwealth criminal law solely on common law tort principles.

look to the law of other United States jurisdictions where the Commonwealth's written law, local customary law, and the restatements lack guidance.").

¶ 16 Individuals are generally allowed to use force to protect themselves, or others, from the use of force by a third party. The doctrine of self-defense arose to prevent punishment for actions that are necessary under the circumstances. *United States v. Peterson*, 483 F.2d 1222, 1229 (D.C. Cir. 1973). Statutes and case law from other United States jurisdictions reveal significant commonality among the states regarding self-defense. Among the most universal and long-standing requirements of justified self-defense are the following: (1) the defendant must have a reasonable fear of imminent danger; (2) the defendant may only use force against an unlawful aggressor; (3) the defendant's use of force must be necessary; and (4) the defendant's use of force must be proportional to the aggressor's use of force.

¶ 17 Most states have enacted statutes requiring a defendant to have a reasonable fear of imminent danger in order to successfully claim self-defense. Colorado's statute concerning self-defense typifies this principle: "A person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person . . . ." Colo. Rev. Stat. § 18-1-704(1) (2006). Implicit in the principle of reasonable fear of imminent danger is the assumption that those acting in self-defense are engaged in a legal activity in a place where they are legally authorized to be. *See, e.g.*, Ind. Code § 35-41-3-2 (2006) (stating that for self-defense to be justified, the person has to be "in a place she has the right to be").

¶ 18 Another commonly-held principle of self-defense dictates that a person may only use force against an unlawful aggressor. *See, e.g.*, *Bellcourt v. State*, 390 N.W.2d 269, 272 (Minn. 1986) (noting that an aggressor "has no right to a claim of self-defense"). As such, initial aggressors generally may not claim self-defense. *Id*. Additionally, if undisputed evidence establishes that the defendant was the initial aggressor, a court may properly deny a self-defense instruction. *See, e.g.*, *Gray v. State*, 463 P.2d 897, 908 (Alaska 1970). Initial aggressors do not have a self-defense claim unless they abandon the attack and give the initial victim reasonable notice of their intention to withdraw from the conflict. *See, e.g.*, *Commonwealth v. Naylor*, 407 Mass. 333, 335 (1990); *see also Castillo v. State*, 614 P.2d 756, 766 (Alaska 1980) (stating it is a "well-established rule of law" that initial aggressors cannot claim self-defense unless they began an encounter with non-deadly force but are met with deadly force, or if they effectively withdraw from the encounter and the initial victim continues the assault).

¶ 19 Another principle of self-defense requires the use of force to be necessary. One common formulation of the necessity requirement gives a person the right to act when "such force is

necessary to defend himself." *E.g.*, Iowa Code Ann. §§ 704.1, 704.3 (West 1979 & West Cu.Supp. 1983 to 1984); *accord* Fla. Stat. Ann. § 776.012 (West 1976); Ga. Code Ann. § 16-3-21(a) (Michie 1982); Ill. Comp Stat. ch. 38, ¶ 7-1 (1972); Kan. Stat. Ann. § 21-3211 (1981); Mont. Code Ann. § 45-3-102 (1981); N.Y. Penal Law § 35.15(1) (McKinney 1975); Utah Code Ann. § 76-2-402(1) (1978). Thus, a person acting in self-defense is not permitted to use force when such force would be equally effective at a later time and the person would suffer no harm or risk by waiting. *See, e.g.*, *Commonwealth v. Jones*, 332 A.2d 464 (Pa. Super. Ct. 1974) (where defendant previously called the police and then left the safety of his home to confront trespassers on his porch, defendant's act is not considered necessary for the purpose of self-defense). As such, once a victim reasonably believes an original attack has ceased, the victim's use of force must also cease. Additionally, persons acting in self-defense are not permitted to use more force than is necessary to defend themselves. *See, e.g.*, *People v. Seiber*, 394 N.E.2d 1044 (Ill. App. Ct. 1979) (force must be of the amount and kind necessary to avoid the harm); *People v. Glenn*, 68 A.D.2d 626 (N.Y. App. Div. 1979) (jury properly rejected self-defense claim where attacker was shot three times and the force was more than reasonably necessary), *rev'd on other grounds*, 52 N.Y.2d 880. In evaluating the necessity of a defendant's force, physical characteristics, such as special skills and attributes or special handicaps, are typically considered. *See, e.g.*, *State v. Wanrow*, 559 P.2d 548, 558 (Wash. 1977).

¶ 20 Self-defense also requires proportionality. Once a reasonable justification for the use of force is established, a person "may use a degree of force which he reasonably believes to be necessary for such purpose." N.H. Rev. Stat. § 627:4 (2007). Thus, the amount of force exerted in self-defense must be proportional to the force being threatened. *See, e.g.*, *People v. Robertson*, 34 Cal.4th 156, 167 (2004) ("One is entitled to use such force as is reasonable under the circumstances to repel what is honestly and reasonably perceived to be a threat of imminent harm.").

¶ 21 Much of the discussion surrounding the theory of self-defense focuses upon the necessity and reasonableness of a person's actions. Although the definition of both necessity and reasonableness vary according to the jurisdiction, the terms are often shaped by a jurisdiction's stance on the duty to retreat. In general terms, duty to retreat laws impose an obligation to retreat before exercising physical force in self-defense, so long as retreating would not impose a reasonable risk of harm.

¶ 22 Jurisdictions typically apply duty to retreat laws differently depending on whether the defendant used non-deadly or deadly force in exercising the right of self-defense. Due to the less serious consequences associated with non-deadly encounters, nearly all jurisdictions allow

defendants to use non-deadly force without imposing a duty to retreat.[9] Even states that require defendants to retreat before exercising deadly force typically do not require them to retreat before using non-deadly force.[10] In fact, "[i]t seems everywhere agreed that one who can safely retreat need not do so before using non-deadly force." *Redondo v. State*, 380 So.2d 1107, 1110 n.1 (Fla. App. 1980) (quoting Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* 155, 395 (2d ed. 2003)).

¶ 23 Conversely, there is a split of authority regarding the duty to retreat before using deadly force. Under the English common law, before defendants could claim that their use of deadly force was justified, they had to show (1) they retreated "to the wall," and (2) they were threatened with death or serious bodily injury.[11] This English duty to retreat rule has survived among a minority of United States jurisdictions. Today, twenty jurisdictions impose a retreat requirement before a defendant may justifiably use deadly force in self-defense.[12] These duty to retreat jurisdictions are supported by the Model Penal Code, which also requires defendants to prove that

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[9] *See, e.g.*, Del. Code tit. 11, § 464 (2007) (stating that defendants have no duty to retreat unless they resort to deadly force); *People v. Riddle*, 649 N.W.2d 30, 34 (Mich. 2002) (stating that before a defendant uses deadly force in self-defense, he must first try and retreat or apply non-deadly force); *People v. Toler*, 9 P.3d 341, 347 (Colo. 2000) ("[A] person does not have to try to escape before using reasonable non-deadly physical force to defend against unlawful force by an aggressor); *State v. Abbott*, 174 A.2d 881, 885 (N.J. 1961) (stating that even when a safe retreat is available, "one who is assailed may hold his ground" so long as "he does not resort to deadly force"); *Cleveland v. Welms*, 863 N.E.2d 1125, 1128 (Ohio Ct. App. 2006) ("[T]here is no duty to retreat, even if it is possible to do so, before using nondeadly force in self-defense."); *Young v. State*, 530 S.W.2d 120, 123 (Tex. Crim. App. 1975) ("[T]he requirement to retreat is not applicable in the use of non-deadly force and only comes into play before the use of deadly force.").

[10] *See, e.g.*, Delaware, Del. Code tit. 11, § 464 (2007); Maine, Me. Rev. Stat. tit. 17-A, § 108 (2007); Nebraska, Neb. Rev. Stat. § 28-1409(4)(b) (2007); New Hampshire, N.H. Rev. Stat. § 627:4 (2007); New York, N.Y. Penal Law § 35.15 (2008); Ohio, *Cleveland v. Welms*, 863 N.E.2d 1125, 1128 (Ohio Ct. App. 2006); Pennsylvania, *Dunlavey v. Court of Common Pleas*, 2004 WL 1563012 at 10-11, 12 (E.D. Pa.); Rhode Island, *State v. Silvia*, 836 A.2d 197, 199-200 (R.I. 2003).

[11] M. Jaffe, *Up in Arms Over Florida's New "Stand Your Ground" Law*, 30 Nova L. Rev. 155, 160 (2005).

[12] These twenty states are: Alaska, Alaska. Stat. § 11.81.335 (2008); Arkansas, Ark. Code § 5-2-607 (2008); Connecticut, Conn. Gen. Stat. § 53a-19 (2007); Delaware, Del. Code tit. 11, § 464; Idaho, *State v. Carter*, 655 P.2d 434, 436 (Idaho 1981); Iowa, *State v. Sedig*, 16 N.W.2d 247, 250 (Iowa 1944); Maine, Me. Rev. Stat. tit. 17-A, § 108 (2007); Maryland, *Dawson v. State*, 395 A.2d 160, 163 (Md. Ct. Spec. App. 1978); Massachusetts, *Commonwealth v. Toon*, 773 N.E.2d 993, 1004 (Mass. App. Ct. 2002); Minnesota, *State v. Edwards*, 717 N.W.2d 405, 413 (Minn. 2006); Nebraska, Neb. Rev. Stat. § 28-1409(4)(b) (2007); New Hampshire, N.H. Rev. Stat. § 627:4 (2007); New Jersey, *State v. Rodriguez*, 920 A.2d 101, 114 (N.J. Super. Ct. App. Div. 2007); New York, *People v. Chung*, 835 N.Y.S.2d 223, 224 (N.Y. App. Div. 2007); North Dakota, N.D. Cent. Code § 12.1-05-07 (2007); Ohio, Ohio Rev. Code Ann. § 2901.09 (West 2008); Pennsylvania, *Commonwealth v. Serge*, 837 A.2d 1255, 1266-67 (Pa. Super. Ct. 2003); Rhode Island, *State v. Silvia*, 836 A.2d 197, 199-200 (R.I. 2003); Vermont, *State v. Albano*, 102 A. 333, 334-35 (Vt. 1917); and Wyoming, *Small v. State*, 689 P.2d 420, 424 (Wyo. 1984).

they could not have safely retreated before using deadly force against an aggressor. Model Penal Code § 3.04(2)(b)(ii) (1985).

¶ 24 Duty to retreat jurisdictions espouse the idea that "[a]ll human life, even that of an aggressor, should be preserved if at all possible," and that lethal self-defense should only be allowed as a non-aggressor's last resort.[13] Nonetheless, even in jurisdictions that impose a duty to retreat, the retreat requirement is typically tempered with conditions. For instance, retreat is usually required only where non-aggressors can attempt escape without increasing their own risk of harm. *E.g.*, N.Y. Penal Law § 35.15(2)(a) (McKinney 2007). This subjective standard focuses on what a person knew at the time of the attack, rather than whether a person, with the benefit of hindsight, "could have retreated with complete safety." *People v. Doctor*, 98 A.D.2d 780, 781 (N.Y. App. Div. 1983) (quotation omitted). Additionally, fleeing is rarely, if ever, required when a person is threatened with a firearm. *Laney v. United States*, 294 F. 412, 414-15 (D.C. Cir. 1923) ("Indeed, to retreat [from a firearm] would be to invite almost certain death."). Furthermore, nearly all jurisdictions follow the "castle doctrine" exception, which allows a person in his or her own home to use deadly force in self-defense without first retreating, even if a reasonably safe means of escape exists. *See, e.g.*, *People v. Toler*, 9 P.3d 341, 347 (Colo. 2000).

¶ 25 Although the duty to retreat rule found root in a number of jurisdictions, many jurisdictions began rejecting it in the late nineteenth and early twentieth century. *See, e.g.*, *Boykin v. People*, 45 P. 419, 422 (Colo. 1896); *Runyan v. State*, 57 Ind. 80, 84 (1877); *State v. Gardner*, 104 N.W. 971, 974-75 (Minn. 1905); *Erwin v. State*, 29 Ohio St. 186, 199-200 (1876). This rejection was hastened after the doctrine fell out of favor with the United States Supreme Court. The earliest United States Supreme Court case addressing the duty to retreat is *Beard v. United States*. 158 U.S. 550 (1895). In *Beard*, the defendant was convicted of murdering a trespasser after the trial court instructed the jury that the defendant had a duty to retreat, even when on his own property, before using deadly force. *Id*. at 555. However, the United States Supreme Court reversed the conviction on appeal, holding that the trial court improperly instructed the jury on self-defense. *Id*. at 563. In so holding, the Court refused to recognize any common law duty to retreat when defendants are in their homes or on the land surrounding their homes. *Id*. at 563-64.

¶ 26 Decades later, the Court expanded the no duty to retreat rule in *Brown v. United States*. 256 U.S. 335 (1921). The case involved a long-standing dispute between Brown and his co-worker. *Id*. at 342. Due to their troubled history, Brown brought a gun to work for protection.

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[13] S. Aggergaard, *Criminal Law – Retreat from Reason: How Minnesota's New No-Retreat Rule Confuses the Law and Cries for Alteration – State v. Glowacki*, 29 Wm. Mitchell L. Rev. 657, 662 (2002) (quoting Joshua Dressler, *Understanding Criminal Law* 227 (3d ed. 2001)).

Id. Shortly thereafter, Brown and his co-worker got into an altercation. *Id.* The co-worker attacked Brown and began punching him. *Id*. In response, Brown ran to his gun, which was in his coat pocket approximately twenty feet away, and fired four shots at his co-worker, killing him. *Id*. At trial, Brown was convicted of second-degree murder after the trial court instructed the jury that "in considering the question of self defense . . . the party assaulted is always under the obligation to retreat so long as retreat is open to him, provided that he can do so without subjecting himself to the danger of death or great bodily harm." *Id*. On appeal, the United States Supreme Court reversed Brown's conviction, holding that defendants have no duty to retreat when they face a reasonable fear of imminent death or severe bodily harm. *Id*. at 343-44.

¶ 27 Today, a majority of jurisdictions embrace the Supreme Court's holding in *Brown*, which serves as the basis of the modern-day "no duty to retreat" or "stand your ground" doctrine. Twenty-nine states employ versions of the stand your ground doctrine and do not require defendants to retreat before exercising deadly force, so long as they reasonably believe their use of force is necessary to prevent death or serious bodily harm.[14] These jurisdictions espouse the idea that "victims need not yield their rights, surrender their dignity, or reveal their weak side to aggressive wrongdoers."[15]

¶ 28 Two jurisdictions attempt to appease both theories of retreat and adopt a middle ground theory. Wisconsin, *see, e.g.*, *State v. Wenger*, 593 N.W.2d 467, 471 (Wis. Ct. App. 1999), and the District of Columbia, *see, e.g.*, *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979), analyze the "possibility of escape" and "opportunity to retreat" to determine whether deadly force was necessary and reasonable. *Wenger*, 593 N.W.2d at 471. In essence, the middle ground

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[14] These twenty-nine states are: Alabama, Ala Code § 13A-3-23 (1975); Arizona, Ariz. Rev. Stat. § 13-411 (2008); California, Cal. Penal Code § 197 (2008); Colorado, *Cassels v. People*, 92 P.3d 951, 958 (Colo. 2004); Florida, Fla. Stat. § 776.013 (2005); Georgia, *McClendon v. State*, 651 S.E.2d 165, 170 (Ga. Ct. App. 2007); Hawaii, Haw. Rev. Stat. § 703-304 (2008); Illinois, *People v. McGraw*, 149 N.E.2d 100, 103 (Ill. 1958); Indiana, Ind. Code § 35-41-3-2(a) (2006); Kansas, Kan. Stat. § 21-3211 (2006); Kentucky, Ky. Rev. Stat. § 503.050 (2008); Louisiana, La. Rev. Stat. § 14:20 (2008); Michigan, Mich. Comp. Laws § 780.972 (2008); Mississippi, Miss. Code § 97-3-15 (2008); Missouri, Mo. Rev. Stat. § 563.031 (2008); Montana, *State v. Merk*, 164 P. 655, 657-58 (Mont. 1917); Nevada, *Culverson v. State*, 797 P.2d 238, 240 (Nev. 1990); New Mexico, *State v. Horton*, 258 P.2d 371, 372-74 (N.M. 1953); North Carolina, *State v. Davis*, 627 S.E.2d 474, 477-78 (N.C. Ct. App. 2006); Oklahoma, *Bechtel v. State*, 840 P.2d 1, 13 (Okla. Crim. App. 1992); Oregon, *State v. Sandoval*, 156 P.3d 60, 64 (Or. 2007); South Carolina, S.C. Code § 16-11-440(c) (2007); South Dakota, S.D. Codified Laws §§ 22-16-34, 22-16-35 (2008); Tennessee, Tenn. Code § 39-11-611 (2008); Texas, Tex. Penal Code § 9.31 (2008); Utah, Utah Code § 76-2-402 (2008); Virginia, *Foote v. Commonwealth*, 396 S.E.2d 851, 855-56 (Va. Ct. App. 1990); Washington, *State v. Redmond*, 78 P.3d 1001, 1004 (Wash. 2003); and West Virginia, *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 722 (W. Va. 2001).

[15] Aggergaard, 29 Wm. Mitchell L. Rev. at 661 (2002).

theory assesses the opportunity to retreat as a factor in determining whether a defendant's use of deadly force was both necessary and reasonable. *Id*.

¶ 29 In light of our review of the law of self-defense within other United States jurisdictions, we adopt the majority view that defendants are not required to retreat before using reasonable deadly or non-deadly force to defend against unlawful aggressors. However, in order to justifiably claim self-defense in exercising physical force, the following factors must be satisfied: (1) the defendant must have a reasonable fear of imminent danger; (2) the defendant may only use force against an unlawful aggressor; (3) the defendant's use of force must be necessary; and (4) the defendant's use of force must be proportional to the aggressor's use of force. In so holding, we bring Commonwealth law into conformity with the United States Supreme Court's decision in *Brown v. United States*, which reasoned that "[d]etached reflection cannot be demanded in the presence of an uplifted knife." 256 U.S. at 343. Victims need not yield their rights to unlawful aggressors, for "[i]f a defender is obligated to retreat, he is obligated to give way to the forces of . . . the Wrong."[16]

¶ 30 Having reviewed the applicable law of self-defense, we now address Demapan's specific claims. During closing statements, the prosecutor told the jury that "[y]ou're going to hear an instruction from the judge that if you're threatened with deadly force, you may not retreat first. But that also means that you're threatened with *non deadly* force, you *must retreat*." ER at 320 (emphasis added). The trial court then provided the jury with the following instruction: "A person threatened with an attack of deadly force that justifies the right of self-defense need not retreat." ER at 295. Demapan argues that the jury instruction, combined with the prosecutor's statement during closing arguments, erroneously implied that a person attacked with non-deadly force has a duty to retreat before acting in self-defense. He claims that the trial court erred in refusing to instruct the jury in accordance with his proposed instruction, which stated that "[a] person threatened with an attack that justifies the right of self-defense need not retreat." ER at 298 (citing 1 Cal. Jury Instr., Crim. 5.50 (7th ed. 2003)). As noted above, Commonwealth residents have no duty to retreat before using reasonable force in defending against unlawful aggressors. We therefore must determine whether the jury instructions were "misleading or inadequate to guide the jury's determination" when they failed to state that Demapan had no duty to retreat before using non-deadly force in self-defense. *Esteves*, 3 NMI at 454.

¶ 31 In *State v. Redmond*, the Washington Supreme Court held that a defendant is entitled to a no duty to retreat instruction when the jury might objectively conclude that retreat is a reasonable alternative to the use of force in self-defense. 78 P.3d 1001, 1003-04 (Wash. 2003). *Redmond*

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[16] George P. Fletcher, *Rethinking Criminal Law* 865 (1978).

involved a fight in a high school parking lot between the defendant, a former student, and a current student. *Id*. at 1002. During the fight, the defendant punched the other student and fractured his jaw. *Id*. As a result, the defendant was charged with second-degree assault. *Id*. At trial, each party alleged that the other was the initial aggressor and provided witnesses to support their allegations. *Id*. There was also evidence that the defendant could have easily retreated, but did not attempt to do so. *Id*. The defendant requested a no duty to retreat instruction as part of his theory of self-defense. *Id*. The trial court, however, refused to give the instruction, stating the case did not legitimately raise the issue of retreat. *Id*.

¶ 32 On appeal, the Washington Supreme Court reversed, holding that the defendant was entitled to a no duty to retreat instruction because without it, the jury may speculate whether or not the defendant should have retreated. *Id*. at 1004. The court noted that "[t]he law is well-settled that there is no duty to retreat when a person is assaulted in a place where he or she has a right to be. An instruction should be given to this effect when sufficient evidence is presented to support it." *Id*. at 1003. The court further noted that where there is a possibility that the jury may speculate regarding a defendant's opportunity to retreat, the jury should be instructed that "the law does not require a person to retreat." *Id*. at 1004.

¶ 33 In the instant case, we find that the trial court should have instructed the jury that Demapan had no duty to retreat before using either deadly or non-deadly force. Although the trial court instructed the jury that there is no duty to retreat when threatened with a deadly attack, the instructions were silent as to the duty to retreat when threatened with a non-deadly attack. Like *Redmond*, this silence created a possibility that the jury may have speculated as to whether Demapan should have retreated before fighting Anthony Benavente. This possibility was enhanced exponentially when the prosecutor told the jury that if "you're threatened with non deadly force, you must retreat." ER at 320. The trial court's incomplete jury instructions, combined with the prosecutor's erroneous statement, not only invited jury speculation – if not seriously misled the jury – but it also denied Demapan the right to have the jury instructed on his theory of the case. *See, e.g.*, *United States v. Sanchez-Lima*, 161 F.3d 545, 549 (9th Cir. 1998) (stating a defendant is entitled to a jury instruction on the defense theory if "there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility").

B

Sufficiency of the Evidence to Support the Deadly Force Jury Instruction

¶ 34 After instructing the jury on the elements of assault with a dangerous weapon, the trial court provided a separate instruction on self-defense. The self-defense instruction included the

following language on the use of deadly force: "Force likely to cause death or great bodily harm is justified in self-defense only if a person reasonably believes that such force is necessary to prevent death or great bodily harm. It is never reasonable to use deadly force against a non-deadly attack." ER at 361. Demapan argues that there was insufficient evidence to support the trial court's instruction on the use of deadly force.

¶ 35 A criminal defendant claiming insufficiency of the evidence "faces a nearly insurmountable hurdle." *Commonwealth v. Yi Xiou Zhen*, 2002 MP 4 ¶ 33. In reviewing a challenge to the sufficiency of the evidence, we examine the record in the light most favorable to the prosecution to establish whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Commonwealth v. Camacho*, 2002 MP 6 ¶ 108 (citing *Commonwealth v. Oden*, 3 NMI 186, 191 (1992)); *see also In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). We may not weigh conflicting evidence or consider the credibility of witnesses. *Camacho*, 2002 MP 6 ¶ 108; *see also United States v. Croft*, 124 F.3d 1109, 1125 (9th Cir. 1997) (appellate courts may not question a trier of fact's assessment of witness credibility). All reasonable inferences are drawn in favor of the government, and any conflicts in the evidence are resolved in favor of the verdict. *Camacho*, 2002 MP 6 ¶ 108; *see also United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1201-02 (9th Cir. 2000). We "will not reverse the finding unless, after reviewing all the evidence, we are left with a firm and definite conviction that a mistake has been made." *Tropic Isles Cable TV Corp. v. Mafnas*, 1998 MP 11 ¶ 3.

¶ 36 In the Commonwealth, "[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." 6 CMC § 1204(a). A dangerous weapon is defined as "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). At trial, the Commonwealth presented evidence that Demapan both threatened to cause and attempted to cause bodily injury to another with a dangerous weapon. On cross-examination, Anthony Benavente admitted that he struck Demapan with his belt buckle three times, twice in the face and once on the back of the head. Thereafter, Anthony Benavente testified that Demapan, wielding a knife, threatened him when he stated "I am going to kill you." Demapan then swung his knife at Anthony Benavente, cutting his lower abdomen.

¶ 37 Demapan acknowledges that a knife is a dangerous weapon as defined under 6 CMC § 102(f), but argues that he did not use the knife in a dangerous or deadly manner. In support of his

claim, Demapan relies on a Florida appellate court opinion, which states that "[w]hile a knife is a weapon, it is not necessarily a deadly weapon. Further, even the display of a deadly weapon, without more, is not deadly force." *State v. Howard*, 698 So.2d 923, 925 (Fla. Dist. Ct. App. 1997) (citations and quotations omitted). The *Howard* court also notes that "only the discharge of a firearm," as opposed to merely pointing a firearm, "has been held to be deadly force as a matter of law." *Id*. (citation omitted).

¶ 38 In *Howard*, the defendant, a battered spouse, was attacked by her husband. *Id*. at 924. The defendant claimed that as her husband lurched at her, she held out a knife to shield herself from his punches. *Id*. In so doing, her husband inadvertently impaled himself on the knife, which killed him. *Id*. The defendant claimed that although she held the knife in her hand, she used no force and that her husband, in essence, stabbed himself when he lurched at her. *Id*. After the trial court refused to instruct the jury on the use of non-deadly force in self-defense, the appellate court reversed, stating that the trial court erred in its refusal to provide a non-deadly force instruction. *Id*. at 925.

¶ 39 However, *Howard* is distinguishable from the present case in several respects. Unlike *Howard*, where there was no evidence that the defendant threatened her husband, Demapan allegedly threatened Anthony Benavente's life while wielding a knife. Additionally, while the defendant in *Howard* claimed she inadvertently stabbed her husband, there is no evidence in the present case that Demapan inadvertently cut Anthony Benavente. Rather, Demapan swung the knife at Anthony Benavente in an apparent attempt to cut or stab him. Furthermore, the *Howard* court stated that "the display of a deadly weapon, without more, is not deadly force." *Id*. Demapan, however, did not simply display his knife. He swung it at Anthony Benavente, which resulted in a laceration. Although Demapan argues that Anthony Benavente's "superficial" injury supports his claim that he used only non-deadly force, *see* ER at 148-49, we note that "it is the nature of the force and not the end result that must be evaluated." *Garramone v. State*, 636 So.2d 869, 871 (Fla. Dist. Ct. App. 1994). In light of Demapan's threats and his use of the knife in injuring Anthony Benavente, we find that a reasonable trier of fact could have determined that Demapan used "[f]orce likely to cause death or great bodily harm." ER at 361. Thus, there is sufficient evidence to support the trial court's deadly force instruction.

C

Jury Determination Whether Demapan Used Deadly or Non-Deadly Force

¶ 40 In instructing the jury on self-defense, the trial court provided two instructions stating that "[*f*]*orce likely to cause death or great bodily harm* is justified in self-defense only if a person reasonably believes that such force is necessary to prevent death or great bodily harm. *It is never*

reasonable to use deadly force against a non-deadly attack." ER at 361, 363 (emphasis added). Demapan asserts even if there was sufficient evidence to warrant the deadly force instructions, the instructions should have stated that the jury must determine whether Demapan's use of the knife when fighting Anthony Benavente constituted deadly or non-deadly force.

¶ 41 The United States Supreme Court explicitly holds that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364; *see also Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (stating that the right to a jury trial "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty'"). The Court further holds that criminal defendants have a "constitutionally guaranteed right . . . to demand that the jury decide guilt or innocence on *every issue*, which includes application of law to the facts." *United States v. Gaudin*, 515 U.S. 506, 514 (1995) (emphasis added). Thus, a jury instruction is unconstitutional if it removes an issue or element of a crime from the jury's consideration. *See id*.

¶ 42 Moreover, "the [United States] Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations omitted). In accordance with that guarantee, a defendant is entitled to a jury instruction on the defense theory if "there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *Sanchez-Lima*, 161 F.3d at 549; *Runion v. State*, 13 P.3d 52, 58 (Nev. 2000) ("[T]he defense has the right to have the jury instructed on a theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be."). "Expressing the theory of the defense in an instruction that precisely defines that theory is far superior to reliance on the jury's ability to piece the theory together from various general instructions." *United States v. Mason*, 902 F.2d 1424, 1440 (9th Cir. 1990).

¶ 43 In the present case, there is some disagreement as to whether Demapan's use of the knife constituted deadly or non-deadly force. The ramifications of such a determination are significant. As already discussed, self-defense requires proportionality, in that the amount of force exerted in self-defense must be proportional to the force threatened. *See, e.g.*, *Robertson*, 34 Cal.4th at 167. Individuals may exercise non-deadly force to repel both non-deadly and deadly attacks, assuming the use of force satisfies our four-prong test of self-defense.[17] However, individuals may only

[17] (1) Defendant must have a reasonable fear of imminent danger; (2) defendant may only use force against an unlawful aggressor; (3) defendant's use of force must be necessary; and (4) defendant's use of force must be proportional to the aggressor's use of force.

exercise deadly force to repel deadly attacks, assuming again that the use of force satisfies the requirements of self-defense.

¶ 44 Whether Demapan used non-deadly or deadly force in his altercation with Anthony Benavente is both a factual issue and an essential element of Demapan's self-defense claim. The trial court, however, never explicitly instructed the jury that it must determine whether Demapan used non-deadly or deadly force. Rather, the instructions only mentioned deadly force. As a result, the jury instructions created an erroneous presumption that Demapan used deadly force. This presumption lessened the prosecution's burden of proof, as it made it easier for the prosecution to disprove Demapan's claim of self-defense. Additionally, Demapan's defense theory is that he used reasonable non-deadly force in self-defense. The trial court deprived him of his constitutional right "to demand that the jury decide [his] guilt or innocence on *every issue*, which includes application of law to the facts." *See Gaudin*, 515 U.S. at 514. Furthermore, in misinstructing the jury, the trial court deprived Demapan of the jury's fair consideration of his theory of defense. *See Sanchez-Lima*, 161 F.3d at 549 (finding that a defendant is entitled to an instruction on the theory of defense if "there is any foundation in the evidence"). The question of whether Demapan's use of the knife constituted deadly or non-deadly force is a question for the jury under a proper instruction from the trial court. We therefore hold that the trial court erred in failing to have the jury, as the fact-finder, determine whether Demapan's use of force constituted deadly or non-deadly force.

D

Harmless Error Analysis

¶ 45 The United States Supreme Court has held that erroneous jury instructions that omit an element of an offense are subject to a harmless error analysis. *Neder v. United States*, 527 U.S. 1, 10 (1999). The Commonwealth Rules of Criminal Procedure set forth the harmless error standard and provide that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Com. R. Crim. P. 52(a). The harmless error concept was developed by appellate courts "to embody and implement the truism that no litigant is assured a perfect trial, only a fair one." *Commonwealth v. Rabauliman*, 2004 MP 12 ¶ 41 (citing *Commonwealth v. Lucas*, 2003 MP 9 ¶ 13 n.10). The harmless error doctrine "serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman v. California*, 386 U.S. 18, 22 (1967); *see also Lucas*, 2003 MP 9 ¶ 13 n.10 (stating that the harmless error rule allows a reviewing court to omit objectionable evidence and then examine the remaining untainted evidence in order to see whether the same result would follow). The test for determining whether

a trial court error is harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id*. at 24; *see Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (finding that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt").

¶ 46 We cannot conclude that the defective jury instructions were harmless beyond a reasonable doubt. In instructing the jury on assault with a dangerous weapon, the trial court made at least two significant errors. First, the trial court erred in refusing to instruct the jury that Demapan had no duty to retreat before using reasonable force in self-defense. The trial court instructed the jury that a person threatened with an attack of deadly force that justifies the right of self-defense need not retreat. However, it failed to state that a person threatened with an attack of non-deadly force that justifies the use of force in self-defense likewise has no duty to retreat. The trial court's incomplete instruction invited jury speculation regarding Demapan's duty to retreat and deprived him of an instruction on his defense theory. Second, the trial court did not instruct the jury that it must determine whether Demapan used non-deadly or deadly force in fighting Anthony Benavente. The trial court's instructions had the effect of foreclosing the jury's consideration of whether Demapan, in fact, used deadly force. However, Demapan was entitled to have the jury, rather than the trial court, make that factual determination. Thus, the trial court's incomplete instructions deprived him a jury determination on the issue, which, in turn, lessened the prosecution's burden of proof. We therefore conclude that there is a reasonable possibility that the incomplete jury instructions contributed to Demapan's conviction of assault with a dangerous weapon.

¶ 47 The incomplete jury instructions not only impact our review of Demapan's assault with a dangerous weapon conviction, but also his other convictions. Although the jury found Demapan guilty of assault with a dangerous weapon, the trial court, in a bench trial, convicted Demapan of assault and battery against Anthony Benavente and disturbing the peace of Juan Cabrera. A person commits "assault and battery if the person unlawfully strikes, beats, wounds, or otherwise does bodily harm to another." 6 CMC § 1202(a). A person disturbs the peace "if he or she unlawfully and willfully does any act which unreasonably annoys or disturbs another person so that the other person is deprived of his or her right to peace and quiet, or which provokes a breach of the peace." 6 CMC § 3101(a). In addition to these statutorily mandated requirements, when self-defense evidence is presented to the jury, the prosecution has the burden of proving, beyond a reasonable doubt, that the defendant did not act in self-defense. 6 CMC § 251(b).

¶ 48 In the present case, Demapan presented evidence of self-defense, which, in turn, required the prosecution to prove Demapan did not act in self-defense. 6 CMC § 251(b). However, prior to this case, this Court had never set forth the law of retreat in the context of self-defense. As a result, there was confusion at trial as to whether Demapan was justified in exercising physical force against Anthony Benavente without first attempting to retreat. Demapan argued he had no duty to retreat before exercising justifiable non-deadly or deadly force. The prosecution, however, argued that Demapan had a duty to retreat before exercising non-deadly force. The trial court apparently agreed with the prosecution, as it refused to instruct the jury that Demapan had no duty to retreat before using reasonable non-deadly force in self-defense.

¶ 49 In refusing to instruct the jury that a defendant need not retreat before exercising justifiable non-deadly force in self-defense, the trial court adopted the Model Penal Code's position with regard to the duty to retreat. ER at 294, 314. However, as discussed above, we embrace the stand your ground doctrine in accordance with the majority view, which is at odds with the Model Penal Code. *Compare Brown*, 256 U.S. at 343 (imposing no duty to retreat before using justifiable force in self-defense) *with* Model Penal Code § 3.04(b)(ii) (requiring defendants to prove that they could not have safely retreated before using deadly force against an aggressor). The trial court's apparent decision to adopt a retreat requirement not only adversely affected the jury instructions for the assault with a dangerous weapon charge, but also its ability to accurately rule on the assault and battery and disturbing the peace charges. Without an accurate understanding of the duty to retreat, the trial court was not in a position to correctly determine the legitimacy of Demapan's claim of self-defense. Therefore, we find that there is a reasonable possibility that the trial court's decision to adopt a retreat requirement contributed to Demapan's conviction for assault and battery and disturbing the peace. Accordingly, we vacate all of Demapan's convictions.[18]

III

Mandatory Minimum Sentence

¶ 50 In sentencing Demapan for his assault with a dangerous weapon conviction, the trial court applied the mandatory minimum sentencing provision set forth in 6 CMC § 4102(a). In so doing, the trial court sentenced Demapan to five years imprisonment with all but forty months suspended.[19] Demapan argues the trial court erred in applying the forty-month mandatory

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[18] In vacating all of Demapan's convictions, we find it unnecessary to discuss Demapan's sufficiency of the evidence claims with regard to his assault and battery and disturbing the peace convictions.

[19] The trial court also sentenced Demapan to twelve months imprisonment for his assault and battery conviction and six months imprisonment for his disturbing the peace conviction.

minimum sentence. Questions of law are reviewed de novo. *Jasper v. Quitugua*, 1999 MP 4 ¶ 2 (citing *Rosario v. Quan*, 3 NMI 269, 276 (1992)).

¶ 51 The mandatory minimum sentencing provision provides in pertinent part that "[a]ny person who is armed with a dangerous weapon in the commission of an offense shall be sentenced to serve no less than one-third of the maximum term of imprisonment which may otherwise be imposed upon conviction of the offense . . . ." 6 CMC § 4102(a). The maximum prison term that may be imposed for assault with a dangerous weapon is ten years. 6 CMC § 1204(b). However, the mandatory minimum sentence only applies if "being armed with a dangerous weapon is *alleged and proven* as an element of the underlying offense." 6 CMC § 4102(a) (emphasis added).

¶ 52 In the present case, the prosecution acknowledges that, in charging Demapan with assault with a dangerous weapon, it did not allege that Demapan was armed with a dangerous weapon as required by Section 4102(a). Appellee's Response Br. at 21. The prosecution therefore admits that this case should be remanded for sentencing without application of the mandatory minimum sentencing provision. *Id*. Furthermore, the United States Supreme Court holds that a trial court may not enhance a criminal sentence based on facts that are not submitted to a jury and proved beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *see also Blakely v. Washington*, 542 U.S. 296, 305 (2004) (finding that because the facts supporting the defendant's enhanced sentence were neither admitted by the defendant nor found by a jury, the sentence violated his Sixth Amendment right to trial by jury); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (stating that when a particular fact – whether it is considered an "element" of a crime or a "sentencing factor" – exposes a defendant to a greater punishment, then the Sixth Amendment requires a jury to find it beyond a reasonable doubt). However, as noted above, the trial court implemented the mandatory minimum sentence even after it failed to have the jury determine whether Demapan's use of force constituted deadly or non-deadly force. In so doing, the trial court essentially enhanced Demapan's sentence without the benefit of an essential jury finding. Thus, we find that the trial court erred in sentencing Demapan in accordance with the mandatory minimum sentencing provision set forth in 6 CMC § 4102(a).

IV

¶ 53 For the foregoing reasons, we hold that the trial court erroneously instructed the jury on the law of self-defense when it: (1) refused to state that a person threatened with an attack of either non-deadly or deadly force that justifies the right of self-defense has no duty to retreat; and

(2) presumed that Demapan used deadly force in fighting Anthony Benavente rather than allowing the jury to determine whether Demapan used non-deadly or deadly force. In misinstructing the jury, the trial court implemented a retreat requirement that we decline to adopt, which, in turn, adversely affected the judge's ability to accurately rule on the assault and battery and disturbing the peace charges. Additionally, the trial court erred in applying the mandatory minimum sentence provision set forth in 6 CMC § 4102(a) to Demapan's assault with a dangerous weapon conviction. Accordingly, Demapan's convictions for assault with a dangerous weapon, assault and battery, and disturbing the peace are VACATED, and this case is REMANDED to the trial court for proceedings consistent with this opinion.[20]

Concurred:
Bellas, J.P.T., Soll, J.P.T.

[20] Demapan may not be retried for assault with a dangerous weapon against Jonathan Benavente and Johnny, assault and battery against Jonathan Benavente and Johnny, or disturbing the peace of Juan Cabrera. These charges are barred on double jeopardy grounds.