

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT SENGPINITH,

Defendant and Appellant.

C068504

(Super. Ct. No. 10F05523)

A jury found defendant Robert Sengphinith guilty of assaulting his mother with a deadly weapon -- a meat cleaver (count 2; Pen. Code,<sup>1</sup> § 245, subd. (a)(1)). The jury found defendant not guilty of first degree robbery (count 1; § 211) and making criminal threats (count 3; § 422). In a bifurcated proceeding, the trial court found true an allegation defendant had a prior serious felony conviction within the meaning of section 667, subdivision (a), that also qualified as strike under section 667, subdivisions (b)-(i), and section 1170.12. Defendant was sentenced to an aggregate term of 11 years in state prison, consisting of the middle term of 3 years, doubled for the prior strike, plus 5 years pursuant to section 667, subdivision (a).

---

<sup>1</sup> Further undesignated statutory references are to the Penal Code.

Defendant appeals, contending there is insufficient evidence to support his assault conviction, and the trial court prejudicially erred in failing to instruct the jury on brandishing a deadly weapon as a lesser included offense of “robbery and [making] criminal threats with the use of a deadly weapon.” Finding no error, we shall affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

Defendant often slept in his car outside his parents’ apartment. On the morning in question, he entered the apartment to get something to eat. His mother did not want him in the apartment; she was afraid of him. When she asked him to leave, he told her he would do so if she returned the \$140 he previously had given her to help with rent and other expenses. When he first requested the money, he did not have anything in his hands. Later, however, he emerged from the kitchen with a meat cleaver, grabbed his mother, forced her down on the couch, and threatened to kill her. He swung the cleaver at her about three times “just to scare” her.<sup>3</sup> She gave him all the money she had -- \$100 -- because she was afraid that he was going to strike her with the cleaver. Once she gave him the money, he left, and she called the police.

---

<sup>2</sup> Since the issue before us, at least in part, is whether there is sufficient evidence to support the jury’s finding that defendant was guilty of assault with a deadly weapon, the facts are set forth in the light most favorable to the judgment. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11)

<sup>3</sup> In his reply brief, defendant argues that the evidence showed that he merely “shook,” as opposed to “swung,” the cleaver at his mother. The evidence speaks for itself. When asked did the defendant “ever swing the knife at you,” his mother responded, “Yes. He swung it like this (indicating), just to scare me.” Thereafter, the prosecutor stated, “Okay. If the record would reflect the witness held up the right fist and shook it about three times.” Later, defendant’s mother testified that defendant “was standing up, waving [the cleaver] like this over me (indicating). He just tried to scare me, I guess.”

Sacramento police received a call from defendant's mother "indicat[ing] that her son was threatening to kill her." Defendant's mother told police that defendant had repeatedly threatened to kill her that day.

Police were unable to locate defendant until the following day. They found him asleep in his car, which was parked outside his parents' apartment. Defendant is bigger and appeared stronger than his mother.

## DISCUSSION

### I

#### Sufficient Evidence Supports Defendant's Conviction for Assault with a Deadly Weapon

Defendant claims there is no substantial evidence to support his assault with a deadly weapon conviction because "no reasonable juror could conclude that [he] did an act that would directly and probably result in the application of force to the victim . . . ." He is wrong.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez, supra*, 20 Cal.4th at p. 11.)

To find defendant guilty of assault with a deadly weapon, the People were required to prove that (1) defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person; (2) defendant did the act willfully; (3) when defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; and (4) when defendant acted, he had the present ability to apply force likely to produce great bodily injury or with a deadly weapon. (See *People v. Golde* (2008) 163 Cal.App.4th 101, 121.)

Assault is a general intent crime. (*People v. Chance* (2008) 44 Cal.4th 1164, 1169.) It “does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.” (*People v. Williams* (2001) 26 Cal.4th 779, 790.)

Acts such as “[h]olding up a fist in a menacing manner, drawing a sword . . . or bayonet, [and] presenting a gun at a person who is within its range, have been held to constitute an assault. So, any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another, will be considered an assault. . . . [¶] . . . [¶] . . . [W]hen the party draws the weapon, although he does not directly point it at the other, but holds it in such a position as enables him to use it before the other party could defend himself, at the same time declaring his determination to use it against the other, the jury are fully warranted in finding that such was his intention.” (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263, quoting *People v. McMakin* (1857) 8 Cal. 547, 548-549.) Similarly, where the deadly weapon is a knife, “it [is] not necessary that the prosecution introduce evidence to show that the appellant *actually made an attempt to strike or use the knife upon the person of the prosecutrix . . .*” (*People v. McCoy* (1944) 25 Cal.2d 177, 189.)

Here, defendant argues that he did not attempt a battery, and merely “shaking” the cleaver was not an act that by its nature would probably and directly result in the application of physical force. The evidence shows otherwise. Defendant did not merely show his cleaver, he emerged from the kitchen with it, forced his mother down onto the couch, and swung it at her about three times. This act by its nature would directly and probably result in the application of force. Furthermore, defendant’s actions would lead a reasonable person to believe that the application of physical force was the direct, natural,

and probable result of his behavior. Indeed, his mother testified that she was afraid he was going to strike her with the cleaver. At that close distance, and wielding the cleaver in such a manner, defendant had the present ability to inflict violent injury on his mother. Based on this evidence, the jury had a sufficient basis to convict defendant of assault with a deadly weapon.

## II

### The Trial Court Did Not Err in Failing to Sua Sponte Instruct the Jury on Brandishing a Deadly Weapon as a Lesser Included Offense of Robbery and Making Criminal Threats with the Use of a Deadly Weapon

Defendant contends the trial court's failure to sua sponte instruct the jury on brandishing a weapon as a lesser included offense of "robbery and [making] criminal threats with the use of a deadly weapon" violated his Fifth, Sixth, and Fourteenth Amendment rights to a jury trial and to due process. He is mistaken.

"[I]t is the 'court's duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed.' [Citation.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826.) California courts have applied "two tests in determining whether an uncharged offense is necessarily included within a charged offense: the 'elements' test and the 'accusatory pleading' test. [Citation.] . . . Under the accusatory pleading test, a lesser offense is included within the greater charged offense if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense. [Citations.]" (*People v. Bailey* (2012) 54 Cal.4th 740, 748.)

Defendant was charged in an amended information with, among other things, first degree robbery (count 1; § 211) and making criminal threats (count 3; § 422). In addition, it was alleged that defendant "personally used a deadly and dangerous weapon(s), to wit, a meat cleaver" in the commission of those offenses. (§ 12022,

subd. (b)(1) .) Defendant argues that under “the accusatory pleadings test, if the court was allowed to consider the section 12022 subdivision (b)(1) enhancement, brandishing a weapon is a necessarily included offense to robbery and criminal threats with the use of a deadly weapon.” As defendant acknowledges, our Supreme Court has long held “that enhancements may not be considered as part of an accusatory pleading for purposes of identifying lesser included offenses.” (*People v. Sloan* (2007) 42 Cal.4th 110, 114, citing *People v. Wolcott* (1983) 34 Cal.3d 92.) Defendant also acknowledges that we are bound by that long standing rule (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), and explains that “[t]his argument is being presented for the California Supreme Court.”

Putting aside the fact that we are bound by the rule against considering enhancement allegations in determining lesser included offenses, we note that defendant has failed to explain, and we are unable to discern, how he was prejudiced by the court’s failure to instruct the jury on brandishing a weapon as a lesser included offense of “robbery and [making] criminal threats with the use of a deadly weapon” insofar as defendant was acquitted of those counts, and brandishing a weapon is not a lesser included offense of the count for which he was convicted -- assault with a deadly weapon. (See *People v. Steele* (2000) 83 Cal.App.4th 212, 217-221.)

#### DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

DUARTE, J.