IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

In re B.M., a Person Coming Under the Juvenile Court Law.	Supreme Court No. S242153
THE PEOPLE OF THE STATE OF CALIFORNIA,	2d. Crim. B277076
Plaintiff and Respondent,	Sup. Ct. No. 2016025026
vs.	
B.M., a minor,	
Defendant and Appellant.	

Second Appellate District, Division Six, Case No. B277076
Ventura County Superior Court, Case No. 2016025026
Honorable Brian Back, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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Under the California Appellate Project
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TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

ISSUE ON REVIEW

By order of this Court, filed July 26, 2017, the issue presented in this case is: "Can a butter knife with a rounded end and a serrated edge qualify as a deadly or dangerous weapon under Penal Code section 245, subdivision (a)(1)?"

INTRODUCTION

Appellant suffered an adjudication for assault with a deadly weapon for slicing a dull, rounded butter knife toward her sister's legs that were covered in a blanket, resulting in no injury. This was error.

A butter knife with a rounded end and a serrated edge is not an inherently deadly weapon. Therefore, it cannot qualify as a deadly weapon

under Penal Code section 245, subdivision (a)(1) ("section 245(a)(1)") unless there is sufficient evidence demonstrating that the butter knife was *actually used* "in such a way that it [was] *capable of causing and likely to cause death or great bodily injury.*' " (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-29, emphasis added ("*Aguilar*").) Common sense dictates that a dull butter knife would have to be used in a particularly violent manner for it to be considered "deadly" under this definition, and the facts of this case present no such scenario. Indeed, there is no evidence in the record that appellant's actions – which involved merely swiping a dull butter knife at her sister's blanket-covered legs a few times while applying just a little pressure – were either capable of causing or likely to cause any injury, much less serious injury or death. (See *In re Brandon T.* (2011) 191 Cal.App.4th 1491, 1496-98 ("*Brandon T.*"); *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1087 ("*Beasley*").)

The Court of Appeal, in concluding to the contrary, failed to evaluate the likelihood of injury, based its decision on hypothetical uses of the knife that were without support in the record, and expressly parted ways with sound, applicable case law. When analyzing the evidence under the proper legal standard, with a focus on the assault itself and the manner in which appellant in fact used the dull and rounded instrument, it is quite clear that it cannot support an adjudication under section 245(a)(1). Because the Court of Appeal failed to properly analyze the evidence under applicable law, and because the evidence does not support appellant's adjudication, reversal is required.

STATEMENT OF THE CASE

A petition was filed on July 6, 2016, under Welfare and Institutions Code section 602 alleging that appellant, B.M., a minor ("appellant"), committed felony assault with a deadly weapon in violation of section 245(a)(1) upon her sister with a butter knife. The petition requested that

appellant be adjudged and declared a ward of the Juvenile Court. (CT 1-2.)[1]

On August 12, 2016, after a contested hearing, the court sustained the juvenile wardship petition, finding true the allegation that appellant committed felony assault with a deadly weapon. (CT 33; RT 89.) On August 24, 2016, the court declared appellant a ward of the court and committed appellant to a Juvenile Justice Facility for 90 days. Upon completion of the commitment, the court ordered appellant detained pending suitable placement. (*Id.*)

Appellant filed a timely notice of appeal. (CT 98.) Following briefing by the parties, on April 20, 2017, the Court of Appeal, Second Appellate District, Division Six, issued a published opinion affirming the adjudication. (See *In re B.M.* (2017) 10 Cal.App.5th 1292.) On July 26, 2017, this Court granted review.

STATEMENT OF FACTS

Prosecution Case

On July 2, 2016, appellant returned to her family home after staying out for the night and discovered that the locks had been changed and her key did not work. (RT 12, 31.) Appellant, who was 16 years old at the time, became upset and entered the house through an unlocked window. (RT 13.) Sophia M., appellant's 17-year-old sister, had just gotten out of the shower when appellant entered her room and started yelling at her. Appellant shouted at Sophia, threw a phone at her, and left. (RT 14-15.) Appellant then returned to the room with a small butter knife in her hand.

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[1] "CT" and "RT" refer respectively to the Clerk's and Reporter's Transcripts of proceedings conducted in this case. All further statutory references are to the Penal Code.

(RT 14-16.) The knife was not sharp. It was about six inches long and metal. It had about three inches of ridges along one side. (RT 28-29.)

Once Sophia saw appellant enter her room for the second time, she grabbed a blanket and covered herself with it. She did this because she was still in her towel, and she did not know what appellant was going to do. (RT 16.) Sophia was laying down, fully on the bed with her knees bent. (RT 24.) Appellant "just had [the butter knife] in her hand." (RT 20.)

After Sophia covered herself with the blanket, appellant came toward her and made a downward "slicing" motion with the butter knife a few times. (RT 34.) She did not poke the knife. (*Ibid.*) Appellant remained three feet away from Sophia when she did this, positioned near Sophia's feet and legs. (RT 23-24, 32-33.) Appellant never made contact with Sophia and never stabbed her. (RT 17, 24.) The butter knife hit the blanket a few times, and Sophia could feel "a little" pressure through the blanket from the knife. (RT 24-25, 34.) On a scale of one to ten, Sophia estimated the pressure from the knife to be around five or six. (RT 34.) Sophia was not injured. (RT 27.)

Natalie, another sister, was also lying on the bed when this occurred. When appellant stopped slicing the butter knife, she started arguing with Natalie. Appellant and Natalie left the room and got into a fist fight. Sophia called the police.[2] (RT 26-27.)

Officer Ryan Reynosa responded to the 911 call and asked appellant to tell him what happened. (RT 49-54, 57.) Appellant told Reynosa that when she came home the locks were changed and she went into the house through an unlocked window. (RT 59.) Then she grabbed a butter knife and went into Sophia's room. She saw Sophia in a towel and yelled at her

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[2] The 911 call was played for the jury. (RT 44.)

because she was very upset about being locked out. (RT 59-60.) Sophia said to get out and that she was calling police. (RT 60.) Appellant told Reynosa that she wanted to scare Sophia and so she made stabbing motions toward the bedding that Sophia had pulled over her on the bed. Then she ran downstairs and put the butter knife in the kitchen sink before getting in a fight with Natalie. (*Ibid.*)

Another officer spoke with Sophia. (RT 61.) Reynosa saw that officer leaving the house holding a standard kitchen butter knife. (RT 61-62.)

Defense Case

Appellant testified that when she came home she was surprised to find the locks had been changed. She knocked but no one answered so she entered the house through an open window. (RT 74.) After she entered, she confronted Sophia, asking why the locks had been changed. (RT 75.) She was mad and in the heat of the moment she went downstairs and grabbed the butter knife. (RT 76.) She just wanted to scare Sophia. (RT 75.) She went back up to Sophia's room with the butter knife in her hand and yelled at Sophia again, asking why she changed the locks. She was just holding the butter knife, pointing it downwards, not at Sophia. (RT 76, 78.) When appellant got closer, Sophia covered herself with a blanket and started kicking. (RT 76.) Appellant didn't remember making contact, but thought the butter knife probably touched the bed more than once. (RT 76, 79.) She had no intention of stabbing Sophia and the butter knife never actually touched her. (RT 76.)

ARGUMENT

I. THE BUTTER KNIFE APPELLANT USED WAS NOT A DEADLY WEAPON UNDER PENAL CODE SECTION 245(A)(1)

A. Standard Of Review

The question of whether an instrument that is not inherently dangerous constitutes a deadly weapon pursuant to section 245(a)(1) is a mixed question of law and fact. (See *People v. McCoy* (1944) 25 Cal.2d 177, 188 ("*McCoy*").)

When addressing questions of fact, the substantial evidence standard applies. (*In re Roderick P.* (1972) 7 Cal.3d 801, 808-809.) Under this standard, the "court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [The Court] must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence [citation] and [it] must make all reasonable inferences that support the finding of the juvenile court. [Citation.]" (*In re Jose R.* (1982) 137 Cal.App.3d 269, 275.)

The term "substantial" in this context " 'clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence.' " (*People v. Basset* (1968) 69 Cal.2d 122, 138-39, quoting *Estate of Teed* (1952) 112 Cal.App.2d 638, 644.) In this regard, the Court "must judge whether the evidence of each of the essential elements constituting the higher degree of the crime is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding.' " (*Id.* at p. 138; *People v. Boyer* (2006) 38 Cal.4th 412, 479; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [setting forth the federal due process standard for sufficiency of the evidence]; *People v. Johnson* (1980) 26 Cal.3d 557, 576-78 [holding

that the federal and California standards are the same]; U.S. Const., 5th & 14th Amends.)

In addition, "mere speculation" can never constitute substantial evidence, and therefore "cannot support [an adjudication]." (*People v. Marshall* (1997) 15 Cal.4th 1, 34-35, citing *People v. Reyes* (1974) 12 Cal.3d 486, 500.)

Determinations of law are independently reviewed, such as the interpretation and construction of statutory language. (*People v. Love* (2005) 132 Cal.App.4th 276, 284.)

B. Definition Of A Deadly Weapon

Pursuant to section 245(a)(1), "[a]ny person who commits an assault upon the person of another with a deadly weapon . . ." is guilty of a felony. As used in this section, there are two types of objects that will qualify as a "deadly weapon." (*Ibid.*) The first is "any object, instrument, or weapon that is *inherently deadly*." (*Aguilar, supra,* 16 Cal.4th at pp. 1028-29, emphasis added; see also CALCRIM 875.) Inherently deadly weapons are those that exist for the very purpose of causing injury or death. "Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.]" (*Aguilar, supra,* 16 Cal.4th at p. 1029.)

It is indisputable that a butter knife is not an "inherently deadly" weapon under section 245(a)(1). The ordinary and intended use of a butter knife is spreading butter, not causing injury or death. Therefore, it is not inherently dangerous. (See *McCoy, supra,* 25 Cal.2d at p. 188 ["a knife is not an inherently dangerous or deadly instrument as a matter of law"].)

Alternatively, an instrument that is not inherently deadly can still be considered a "deadly weapon" for purposes of section 245(a)(1) if it is used "in such a way that it is capable of causing and likely to cause death or great bodily injury." (*Aguilar, supra,* 16 Cal.4th at pp. 1028-29; see also

CALCRIM 875.) In this context, "[g]reat bodily injury is significant or substantial injury." (*Beasley, supra,* 105 Cal.App.4th at p. 1087.)

When evaluating a non-inherently deadly instrument to determine if it will be treated as a deadly weapon under section 245(a)(1), the trier of fact "may look to the nature of the instrument, the manner of its use, and the injury inflicted." (*People v. White* (1963) 212 Cal.App.2d 464, 465.) Therefore, it is not merely the potential capability of the object that renders it a deadly weapon, but rather the facts and circumstances surrounding the alleged assault and how the item was *actually used* that will determine whether it was both capable of causing, and likely to cause, serious injury or death. (*Ibid.* ["The rule is that an instrument not inherently a deadly weapon may become so by reason of its use."]; *McCoy, supra,* 25 Cal.2d at p. 188 ["In assault with a deadly weapon, the character of the particular agency employed is the substance of the offense."]; *Aguilar, supra,* 16 Cal.4th at pp. 1028-29 ["Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury"]; see also *Beasley, supra,* 105 Cal.App.4th at p. 1087 [broomstick and plastic vacuum attachment used to strike victim, causing bruising to arms, shoulders and back, were not used in a manner capable of producing, and likely to produce, death or great bodily injury, and therefore were not deadly weapons under section 245(a)(1)].)

C. The Butter Knife In This Case Was Not A Deadly Weapon Because, As Used, It Was Not Capable Of Causing Or Likely To Cause Great Bodily Injury Or Death

As described above, because a butter knife is not inherently deadly, it will only be considered a deadly weapon under section 245(a)(1) if it is used in such a way that it is both capable of causing, and likely to cause, death or great bodily injury. (*Aguilar, supra,* 16 Cal.4th at pp. 1028-29.) Based on applicable law and the record of this case, there is insufficient

evidence that appellant used the knife in such a way, and therefore her adjudication for assault with a deadly weapon cannot stand.

The object appellant used was a small butter knife. (RT 15, 16 [according to the victim, it was a "small . . . knife, like a butter knife," the "[t]he type of knife that you would use to butter a piece of toast"].) The knife was approximately six inches long, with three inches of small ridges on one side. (RT 28-29.) "It wasn't . . . sharp." (RT 29.) In sum, it was a typical dull, rounded butter knife, designed for spreading soft substances, as opposed to cutting or stabbing. (RT 28-29, 61-62.)

The facts surrounding appellant's use of the knife are as follows: Appellant entered Sophia's room, holding the butter knife in her hand. Sophia was lying on her bed. When Sophia saw appellant enter, she pulled a blanket over herself because she didn't know what appellant was going to do. Appellant then sliced the butter knife toward the area of Sophia's covered legs "a few times" while standing about three feet away. (RT 16, 20, 23-24, 32-33.) Through the blanket, Sophia felt "a little" pressure from the butter knife. (RT 25.) Appellant did not poke or stab the knife. (*Ibid.*)

These facts and circumstances do not support a finding that appellant used the butter knife in such a way that it was "capable of causing and likely to cause death or great bodily injury." (*Aguilar, supra,* 16 Cal.4th at pp. 1028-29.) Notably, appellant did not point the butter knife toward her sister's head or neck, and did not attempt to make contact with her skin. (Cf. *People v. Page* (2004) 123 Cal.App.4th 1466, 1472 [finding a pencil was a "deadly weapon" only because the offender held it to the victim's neck.]) Indeed, it is difficult to even imagine what kind of *minor* injury would be likely to result from a dull butter knife used with just a little force against a person's blanket-covered legs, and it is only the particular use of the specific instrument that is relevant when determining whether it will be

considered "deadly" under section 245(a)(1). (*McCoy*, *supra*, 25 Cal.2d at p. 188.)

The deficient evidence presented here is similar to, and in fact even more lacking than, the evidence that was found insufficient in *Beasley*, *supra*, 105 Cal.App.4th 1078. In *Beasley*, the defendant challenged the sufficiency of the evidence supporting his conviction for assault with a deadly weapon that resulted from his hitting a cohabitant with a broomstick. The victim testified that Beasley beat her, and "[w]hen asked what he had beat her with, she replied, 'with a broomstick . . . .' She further described Beasley's actions as follows: 'I was on the ground, and he kicked me, and he was socking me in my head and my back.' She later testified that bruises on her arms and shoulders depicted in a photograph were caused by the broomstick." (*Id.* at p. 1087.)

Because hands and feet cannot constitute deadly weapons, Beasley's conviction under section 245(a)(1) had to rest solely upon his striking the victim's arms and shoulders with the broomstick. In concluding that the evidence presented was insufficient to support this conviction, the court of appeal explained:

> It is certainly conceivable that a sufficiently strong and/or heavy broomstick might be wielded in a manner capable of producing, and likely to produce, great bodily injury, e.g., forcefully striking a small child or a frail adult or any person's face or head. [Citation omitted.] [The victim's] testimony, however, was far too cursory to establish that the broomstick, *as used by Beasley*, was capable of causing, and likely to cause, great bodily injury or death. Beasley *did not strike her head or face with the stick, but instead used it only on her arms and shoulders*. She did not describe the degree of force Beasley used in hitting her with the stick . . . . The record does not indicate whether the broomstick was solid wood or a hollow tube made of metal, fiberglass, or plastic. . . . The jury therefore had before it no facts from which it could assess the severity of the impact between the stick and [the victim's] body. *The evidence showed only that Beasley*

> *hit her arms and shoulders, caused bruising in those areas.* Although extensive, severe bruising, in conjunction with other injuries has been held to constitute great bodily injury ([citations]), *bruises on [the victim's] shoulders and arms are insufficient to show that Beasley used the broomstick as a deadly weapon.*

(*Beasley, supra,* 105 Cal.App.4th at pp. 1087-1088, emphasis added.)

As was the case in *Beasley*, appellant "did not strike [Sophia's] head or face with the [butter knife], but instead" directed it only toward her legs, and only when they were covered with a blanket. (*Id.* at p. 1087.) Nor was the victim here a small child or a frail adult. (*Ibid.*) Moreover, in *Beasley*, the force used was enough to cause bruising, while here Sophia was left completely unscathed. Although this record does contain evidence of the type of instrument used and the force that was applied, it showed only that appellant exerted "a little" force with a dull, rounded butter knife, which was not enough to cause any injury at all. (RT 25, 27.) The evidence therefore is quite similar to, and in fact far less severe than, that presented in *Beasley*. If hitting someone's arms and shoulders with a broomstick resulting in actual bruising is not sufficient evidence to demonstrate that the instrument was used as a deadly weapon, then surely slicing a small, dull butter knife towards someone's blanket-covered legs leaving no injury at all is not sufficient either. (*Beasley, supra,* 105 Cal.App.4th at p. 1087.)

Brandon T. is another analogous case that supports reversal. There the court held that there was insufficient evidence that Brandon T.'s use of a butter knife in the commission of an assault constituted use of a deadly weapon. (*Brandon T., supra,* 191 Cal.App.4th at p. 1496.) The evidence showed that "Brandon took the knife and tried to cut [the victim's] cheek and throat. Brandon moved his arm up and down, applying a slashing motion on [the victim's] cheek." (*Id.* at p. 1497.) The victim testified that Brandon "was trying to cut, but it wouldn't cut. So it was just making, like,

welts." (*Ibid.*) Then the handle of the knife broke off. (*Id.* at p. 1494.) A small scratch was left on the victim's cheek, and there was no evidence that the knife drew blood. (*Id.* at p. 1497.)

The court noted that while a conviction for assault with a deadly weapon did not require proof of injury or even physical contact, if injuries do result, " 'the extent of such injuries and their location are relevant facts for consideration' in determining whether an object or instrument was used in a manner likely to produce death or great bodily injury." (*Ibid.*, quoting *Beasley, supra*, 105 Cal.App.4th at p. 1087.) The court then concluded that "the butter knife certainly did not produce great bodily injury." (*Brandon T., supra*, 191 Cal.App.4th at p. 1497.)

The court also noted that while there can "be no doubt that a pointed object aimed at the victim's neck is capable of producing death or great bodily injury," the butter knife that the defendant used "had a rounded end, not a pointed one." (*Id.* at p. 1497-98.) In addition, while "Brandon applied force, . . . the knife did not penetrate through the layers of [the victim's] skin," and indeed the knife broke while defendant was using it. (*Id.* at p. 1498.) Based on these facts, the court concluded that the butter knife as used was not capable of causing great bodily injury, and therefore the adjudication for assault with a deadly weapon was not supported by sufficient evidence. (*Ibid.*)

Brandon T. clearly supports reversal of appellant's adjudication. It involved use of the same type of instrument, and the facts surrounding Brandon T.'s assault were far more serious than those present here, and yet still were not sufficient to sustain an adjudication for assault with a deadly weapon. While Brandon T. actively tried to cut the victim's neck (a highly vulnerable area), and made direct contact with the victim's skin leaving welts and a scratch on his cheek, appellant directed the butter knife only toward Sophia's covered legs, made no contact with skin, and used only a

small amount of force leaving no injury at all. (RT 16, 17, 20, 23-24, 27, 32-33, 34.) If the facts of *Brandon T.* do not support an adjudication for assault with a deadly weapon when a butter knife is employed, then the facts of this case do not either.

Brandon T. also demonstrates why the use of something like a dull, rounded knife must be very forceful if it is going to constitute a deadly weapon. As the court noted in *Brandon T.*, it might be a different story if appellant used a knife that was sharp and pointed. In such instance, the way in which appellant employed the object would have been far more likely to lead to significant injury. But appellant did not pick up a sharp, pointed knife, she picked up a butter knife. Both the nature of the object and the manner in which it is used must be considered when evaluating the evidence, and if scraping a butter knife directly against someone's neck is not capable of causing great injury, then there is no doubt that lightly swiping the same type of knife towards someone's legs (a far less vulnerable part of the body), while they are protected with a blanket, cannot cause great injury either. (*Brandon T.*, *supra*, 191 Cal.App.4th at pp. 1496-97.)

Based on the foregoing, the record of this case does not support a reasonable inference that the butter knife was used as a deadly weapon under section 245(a)(1). There is simply no evidence in the record that the manner in which appellant used the knife was capable of causing or likely to cause injury, and therefore appellant's adjudication must be reversed. (*Beasley*, *supra*, 105 Cal.App.4th at p. 1087; *Brandon T.*, *supra*, 191 Cal.App.4th at pp. 1496-97; see also *Aguilar*, *supra*, 16 Cal.4th at pp. 1028-29; *People v. Boyer*, *supra*, 38 Cal.4th at p. 479.)

D. The Court Of Appeal's Opinion

In coming to the opposite conclusion, the Court of Appeal stated that "the use of an object in an assault increases the likelihood of great bodily

injury. In this instance, the Legislature has provided for greater punishment for the would-be assailant who utilizes an object in such a manner as to be 'capable' of producing great bodily injury." (*In re B.M.*, *supra*, 10 Cal.App.5th at p. 1299.) There are several problems with this statement and the Court of Appeal's evaluation that followed.

First, the Court of Appeal's analysis ignores part of the definition of a "deadly weapon." To prove that a normally non-deadly object is being used as a deadly weapon, the prosecution must show not only that the object was used in such a way that it was "*capable*" of causing death or great bodily injury, but also that it was "*likely*" to do so. (*Aguilar*, *supra*, 16 Cal.4th at pp. 1028-29.) The definition is not disjunctive. Yet, the Court of Appeal failed to discuss this latter portion of the definition or to make any finding thereunder, instead concluding only that the butter knife was used in a manner "capable" of producing great injury. (*In re B.M.*, *supra*, 10 Cal.App.5th at p. 1299; see also *People v. Love*, *supra*, 132 Cal.App.4th at p. 284 [error applying incorrect legal standard reviewed independently].)

While the Court of Appeal might have ignored this requirement, it is apparent from the record that there is no evidence demonstrating that appellant's use of the butter knife was *likely* to cause her sister any injury, and certainly not a serious injury or death. As noted above, appellant was not using a steak knife, nor did she aim the knife at Sophia's neck or head. Again, it would take very unusual circumstances for substantial injury or death to be "likely" when one is using a rounded, dull object like a butter knife, and the record reflects no such circumstances here. (See *Brandon T.*, *supra*, 191 Cal.App.4th at pp. 1497-98; see also *People v. Page*, *supra*, 123 Cal.App.4th at p. 1472.)

The Court of Appeal also stated that "[i]t matters not that the victim was able to fend off great bodily injury with her blanket" because such

"self-defense does not negate appellant's assault." (*In re B.M., supra*, 10 Cal.App.5th at p. 1299.) This statement, however, mischaracterizes the facts. When Sophia testified, she was very clear that she covered herself with the blanket when appellant re-entered the room, at which point appellant was only holding the butter knife. (RT 16, 20.) It was not until after Sophia took cover that appellant swiped the butter knife toward the blanket. (RT 16.) Indeed, Sophia specifically stated that she covered herself when appellant entered the room because she was still in her towel, and she *did not know* what appellant was going to do – not because appellant was already slicing the knife. (*Ibid.*) The record is also clear that the butter knife only ever touched the blanket, and Sophia felt just "a little" force through the blanket "a few times." (RT 24-25, 34.) As such, there is no evidence that appellant was aiming the knife at Sophia's bare legs, or that Sophia was defending herself from appellant's actions. Rather, Sophia's legs were already covered when appellant decided to swipe the knife, making appellant's actions even less likely to lead to any injury. (*Brandon T., supra*, 191 Cal.App.4th at pp. 1497-98.)[3]

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[3] Moreover, even in the event Sophia did use the blanket to defend herself against an assault (despite her own factual account to the contrary), the evidence would still be insufficient to find that appellant's actions were likely to cause great bodily injury or death. For how dangerous could the assault have been if a mere blanket was enough to fend it off? In addition, even taking the blanket out of the equation entirely, slicing a butter knife a few times at someone's bare legs while applying only a little pressure is not at all likely to result in serious injury or death. (*Brandon T., supra*, 191 Cal.App.4th at pp. 1497-98.) Given these facts and circumstances, which are what must determine whether the instrument can qualify as a deadly weapon, there is simply no evidence demonstrating that great injury or death was likely to occur regardless of what role the blanket played. (See e.g. *Ibid.*; *Beasley, supra*, 105 Cal.App.4th at p. 1087-88.)

In addition, while the Court of Appeal stated that a greater punishment for assault with a deadly weapon only applies to the "would-be assailant *who utilizes an object in such a manner* as to be 'capable' of producing great bodily injury," this is not the standard the Court applied. (*In re B.M., supra,* 10 Cal.App.5th at p. 1299, emphasis added.) The court was correct that the fact-finder must evaluate the manner in which the defendant *actually used* the object when determining whether it should be considered a deadly weapon. Here, however, the Court of Appeal did not consider how appellant actually used the butter knife. Instead, the court stated only that the "butter knife *could be* used to slice or stab, even though it was not designed for such." (*Ibid.*, emphasis added.) To consider solely how the object *could be* used is not the proper assessment. Rather, the court must consider how the defendant *did use* the object in order to determine whether it was in fact "used in such a way that it [was] capable of causing . . . death or great bodily injury." (see *People v. Page, supra,* 123 Cal.App.4th at p. 1470.) In other words, it is the known circumstances of the assault that determine whether the weapon used was a deadly one – not just the potential ways one might use the instrument at issue.

The court's error is even more apparent in its statement that appellant could "just as easily have committed mayhem upon the victim's face." (*In re B.M., supra,* 10 Cal.App.5th at p. 1299.) There is absolutely nothing in the record indicating that appellant made any gesture toward Sophia's face, or took any action that could have caused an injury constituting mayhem. Pursuant to Penal Code section 203, mayhem is committed when someone "unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip." The manner in which appellant actually used the butter knife here was in no way likely to cause any such injury, and the court's inference that this

type of injury could "just as easily" have resulted amounts to nothing more than unreasonable and improper speculation that cannot support an adjudication. (*People v. Marshall*, *supra*, 15 Cal.4th at pp. 34-35.)

Moreover, this was the exact type of speculation that was rejected in *Beasley*, where the court distinguished between hitting someone in the shoulders versus aiming an object at someone's face or head. (*Beasley*, *supra*, 105 Cal.App.4th at p. 1087; see also *McCoy*, *supra*, 25 Cal.2d at p. 188 ["In assault with a deadly weapon, *the character of the particular agency employed* is the substance of the offense."], emphasis added.) The Court of Appeal therefore pointed only to potential, speculative uses of the butter knife to support the adjudication, as opposed to evidence in the record concerning appellant's actual use of the instrument. (*Ibid.*; *People v. Marshall*, *supra*, 15 Cal.4th at pp. 34-35.)

To illustrate this point further, one might consider a different object – a pillow. A pillow is clearly not an inherently dangerous object. It can, however, be used in a manner that it would be capable of causing death or great bodily injury, for example, if it were used to suffocate someone. On the other hand, were one to simply swing a pillow at someone's shoulder, it would not be reasonable to conclude that the pillow, as used, was capable of causing major injury or death. Therefore, whether a pillow could ever constitute a deadly weapon would not turn on how the object *could* be used (for a defendant holding a pillow always *could* just as easily try to suffocate someone), but instead would turn on the circumstances of the assault and how the assailant *did use* it. (See *People v. White*, *supra*, 212 Cal.App.2d at p. 465 ["The rule is that an instrument not inherently a deadly weapon may become so *by reason of its use*."].) Did the defendant hold the pillow over someone's face for five minutes, or did he merely swing the pillow towards someone's shoulder? The former instance concerns a potentially

deadly weapon, the latter does not. (See e.g. *People v. Helms* (1966) 242 Cal.App.2d 476, 487.)

The same concept applies here. Appellant did not hold her sister down and try to stab her in the neck, and she did not aim the butter knife at Sophia's eye or face. While she perhaps *could* have done any of those things, she did not. As such, given the manner in which appellant *did use* the butter knife, it was not capable of causing or likely to cause Sophia serious injury or death, and the Court of Appeal's conclusion to the contrary was based on incomplete analysis and unreasonable, speculative inferences. Therefore, because the record lacks any actual evidence that appellant used the butter knife as a deadly weapon, reversal is required. (*Aguilar, supra,* 16 Cal.4th at pp. 1028-29; *Brandon T., supra,* 191 Cal.App.4th at pp. 1496-97; *Beasley, supra,* 105 Cal.App.4th at p. 1087.)

E. *In re Brandon T.* (2011) 191 Cal.App.4th 1491 Is Sound And Should Not Be Rejected

The Court of Appeal "part[ed] company" with *Brandon T.*, finding that the butter knife in that case "was 'used in a manner so as to be capable' of producing great bodily injury" on the grounds that the defendant "slashed at the victim's face and neck . . . and used sufficient force to break the knife." (*In re B.M., supra,* 10 Cal.App.5th at p. 1300.) The Court of Appeal felt that the knife breaking and thereby "preventing further stabbing should not inure to the defendant's benefit," and "[t]he brutality of the attack . . . should not be minimized with hindsight." (*Ibid.*)

This analysis is flawed for several reasons. First, the knife breaking goes directly to the issue at hand under section 245(a)(1) – i.e., the capability of the knife to cause great injury or death in the manner it was used. (*People v. White, supra,* 212 Cal.App.2d at p. 465 [when evaluating a non-inherently deadly instrument, the trier of fact "may look to *the nature of the instrument* [and] *the manner of its use.*"], emphasis added.) If a

butter knife will break when force is applied, then it is not capable of causing great injury. This is not minimizing anything with hindsight, these are just the facts. Nor is this a re-weighing of the evidence, but rather it is the only reasonable interpretation of the evidence available. For where was the evidence that the knife as used was capable of causing great bodily injury if it was so flimsy that it broke after causing a small scratch? Simply put, there was none, and therefore the evidence supporting an adjudication under section 245(a)(1) was lacking.

The Court of Appeal also held that "[t]he *In re Brandon T.* opinion gives undue emphasis to the lack of injuries," and the "[t]he fallacy of this focus is easily shown by the typical assault with a deadly weapon with a firearm when the defendant has poor aim. [Citation.]" (*In re B.M., supra,* 10 Cal.App.5th at p. 1300.) This parallel is faulty. If a defendant fires a gun at someone but misses, the elements of a deadly weapon are still met: the defendant used a firearm in such a way that it was both capable of causing and likely to cause great injury or death. It was solely the defendant's error that prevented any resultant harm, not his manner of use. This is starkly different from a scenario where a defendant is using an instrument that is simply not capable of causing significant injury because when force is employed it leaves only a small welt or scratch before it breaks. In the latter scenario, it is the instrument itself that is not capable of causing the injury in the way it was being used, and therefore it cannot be considered deadly.

The scenario presented in *Brandon T.* is much more akin to cases where a defendant points an unloaded firearm at someone. It has long been held that the offense of assault with a firearm cannot be committed by the mere act of pointing an unloaded gun at a person (so long as the gun is not used as a club or bludgeon). (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3; *People v. Mosqueda* (1970) 5 Cal.App.3d 540, 544.) This is so

because when one merely points an unloaded firearm at someone, "there is no present ability to commit a violent injury on the person." (*People v. Orr* (1974) 43 Cal.App.3d 666, citing *People v. Mosqueda*, *supra*, 5 Cal.App.3d at p. 544; *People v. Ranson* (1974) 40 Cal.App.3d 317, 321; see also *People v. Raner* (1948) 86 Cal.App.2d 107, 113.) Just as an unloaded gun pointed at someone has no ability to cause great injury, neither does a butter knife being scraped against someone's skin if it will leave only a small scratch before it breaks. (*Ibid.*)

Moreover, the *Brandon T.* opinion considered the injury suffered in combination with the other facts surrounding the assault, which was proper. (*People v. White*, *supra*, 212 Cal.App.2d at p. 465.) It did not give undue emphasis to the lack of great injury, but rather was required to consider it when evaluating what, if any, evidence supported an assault with a deadly weapon adjudication. (*Ibid.*) Because there was no evidence of great injury, and no evidence that the weapon as used was capable of producing the same, the court rightly decided that the adjudication was unsupported.

As noted above, *Brandon T.* is analogous to this case because it also involved a scenario in which a butter knife, as used, was simply not capable of causing or likely to cause great bodily injury. In addition, *Brandon T.* demonstrates why it would take very unusual circumstances for something like a dull, rounded knife to constitute a deadly weapon, and why those circumstances are not present here. (*Brandon T.*, *supra*, 191 Cal.App.4th at pp. 1496-97; see also *Beasley*, *supra*, 105 Cal.App.4th at p. 1087.)

F. Even If The Court Finds *In re Brandon T.* Was Wrongly Decided, The Present Case Is Distinguishable And Should Still Be Reversed

Even if the Court were to conclude that *Brandon T.* was incorrectly decided, this Court should still find the evidence in the present case lacking. The Court of Appeal found that evidence demonstrating that Brandon T.

"slashed at the victim's face and neck with a butter knife and used sufficient force to break the knife" was sufficient to find that the butter knife was used as a deadly weapon. (*In re B.M.*, *supra*, 10 Cal.App.5th at p. 1300.) Here, the facts of the assault and the way in which appellant used the butter knife were far more benign.

Again, appellant did not aim the knife near Sophia's face or neck, but only toward her legs, which were already covered with a blanket. (RT 16, 23-24, 32-33, 34.) Appellant never made contact with Sophia's skin, Sophia could feel only "a little" pressure through the blanket, and Sophia was not injured. (RT 17, 24-25, 27, 34.) The facts of this case thereby portray a far less dangerous scenario than those described in *Brandon T.*, and do not support an adjudication under section 245(a)(1) regardless of whether this Court also parts ways with that case.

In sum, when evaluating an instrument that is not inherently deadly, it is the nature of the object in conjunction with the manner in which it was used that will determine whether it will qualify as a deadly weapon under section 245(a)(1). What are not relevant to this inquiry are speculative inferences as to how the object could have been used, with no support in the record of the actual assault. As set forth above, the facts of this case do not support a finding that appellant's *actual use* of the dull, rounded knife was deadly in nature, and therefore appellant's adjudication for assault with a deadly weapon cannot stand.

CONCLUSION

For the foregoing reasons, this Court should hold that a dull, rounded butter knife cannot be considered a deadly weapon under section 245(a)(1) where the evidence shows only that it was sliced with little force toward the victim's legs that were already covered in a blanket, and where no injury resulted. As such, appellant's adjudication must be reversed. In addition,

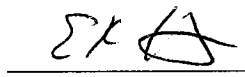
the Court should conclude that *In re Brandon T.* (2011) 191 Cal.App.4th 1491 was rightly decided and supports reversal in this case.

CERTIFICATION OF WORD COUNT

I, Elizabeth K. Horowitz, hereby certify that, according to the computer program used to prepare this document, Appellant's Opening Brief on the Merits, contains 6,814 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed November 18, 2017 at Tulsa, Oklahoma



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I, the undersigned, declare: I am over 18 years of age, employed in the County of Tulsa, Oklahoma, and not a party to the subject cause. My business address is 5272 S. Lewis Ave, Suite 256, Tulsa, OK 74105. I served the within Appellant's Opening Brief on the Merits by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Tulsa, Oklahoma on November 18, 2017.

I also served a copy of this brief electronically on the following parties:

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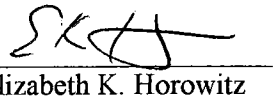
I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 18, 2017 at Tulsa, Oklahoma.



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