IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

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

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATE STATUTES

OTHER

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

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INTRODUCTION

For a dull butter knife to be a deadly weapon, it must be used in a particularly forceful and dangerous manner. In other words, it must be used in a way that is both capable and likely to cause great bodily injury. Not only does the law direct this, but common sense does as well. It is also not a coincidence that in cases where everyday instruments are found to be deadly, the objects are often sharp and/or pointed, and being directed at someone's throat, head, or face. Yet this case presents no such circumstances. Indeed, the ultimate question presented here is: Did a 17-year-old girl use a deadly weapon to assault her sister when she swiped a standard, rounded butter knife toward her legs that were under a blanket, resulting in no injury? The only reasonable answer to this question, given the facts presented and the law that applies, is no.

Respondent spends much time in the answer brief asserting that a butter knife *can qualify* as a deadly weapon, without any reference to the underlying facts of this case. (AB 15-17.)[1] To address the issue presented in such a limited manner, however, is not very helpful. For virtually *any* object *can* be a deadly weapon in California because the very definition of the term turns on considerations apart from the object itself, including the manner in which it was used. As defined, even objects as benign as a toothpick or spoon *can* be deadly weapons if they were to be used in a very violent way (for example, if either was inserted with significant force into someone's eye socket). Indeed, because the *circumstances* of the assault are inextricably woven into the definition of a deadly weapon, it is difficult to imagine any object that would be considered a *non-deadly* instrument as a matter of law, and such consideration is not the crux of the question presented here.

Rather, what is important here, and in all cases involving non-deadly instruments alleged to be used as deadly weapons, are the facts surrounding the assault at issue, which are considered in conjunction with the nature of the object used. As will be addressed in detail herein, respondent has exaggerated the facts of this case to overstate the nature of the altercation that occurred. Respondent has also improperly discounted the likelihood requirement under California's deadly weapon definition by incorrectly asserting that a "likelihood" is no different than a "possibility," while also failing to demonstrate that a likeliness of injury was supported in this case. In addition, by focusing solely on certain distinguishing facts found in

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[1] "AB" refers to the respondent's Answer Brief on the Merits. "OBM" refers to Appellant's Opening Brief on the Merits. "CT" and "RT" refer respectively to the Clerk's and Reporter's Transcripts of proceedings conducted in this case. All statutory references are to the Penal Code.

People v. Beasley (2003) 105 Cal.App.4th 1078 ("*Beasley*") and *In re Brandon T.* (2011) 191 Cal.App.4th 1491 ("*Brandon T.*"), respondent has largely overlooked the significance of those decisions. Both cases support reversal here based on the facts of the assault that transpired, and they both reject the drawing of speculative inferences like those on which respondent and the Court of Appeal have relied.

Lastly, when asserting that a butter knife *can* be a deadly weapon, respondent relies on a number of highly distinguishable examples of assault set forth in several brief news articles and cases from jurisdictions outside California. Not only do these examples hold no authoritative value, but many contain inadequate facts and little to no legal analysis of the issue presented. Moreover, those cases that do contain legal analysis are based on very different legal standards and definitions. Because the above-mentioned articles and cases hold no authoritative value and very little, if any, persuasive sway, they are addressed at the end of the brief.

ARGUMENT

I. RESPONDENT EMBELLISHES THE FACTS OF THE ALTERCATION INVOLVING THE BUTTER KNIFE, THEREBY PORTRAYING DETAILS OF AN ASSAULT THAT ARE NOT SUPPORTED BY THE RECORD

By embellishing the facts of this case, respondent attempts to paint a picture of an exceedingly violent assault with a dangerous instrument that is simply not supported by the evidence. Importantly, the altercation between appellant and Sophia led to no injury at all, and the lack of injury was not because Sophia narrowly escaped harm, but because harm was never likely in light of the little force employed and the dull instrument appellant used. To misconstrue the facts as respondent does is especially problematic in a case such as this, which concerns a mixed question of law and fact, and where an accurate assessment of the facts is critical to determining the ultimate issue presented. As set forth below, the true facts of this record

demonstrate a complete lack of evidence supporting a felony assault with a deadly weapon adjudication, and at best set forth a simple assault.

First, respondent states several times that appellant was trying but failed to hurt Sophia when she initially threw, or "hurled," a phone at her, even referring to the incident as a "preceding uncharged assault," and asserting that it was only when appellant's "efforts to harm Sophia with the telephone failed did she leave the room briefly to find a more effective weapon." (AB 8, 19-20.) These assertions are based on one sentence in the record, where Sophia stated that appellant "[t]hrew my little sister's phone at me and then she took off . . . ." (RT 15.) There are no other facts about this occurrence. The record does not indicate where specifically the phone was thrown, nor how hard it was tossed. Indeed, for all the record shows, the phone was tossed downward at the space before Sophia's feet. Yet respondent claims the phone was "hurled" and from that "hurling" infers an intent to injure. This is a clear exaggeration that is not supported by the record.[2]

In addition, respondent's assertion that appellant "tried but failed to hurt Sophia by pulling her hair . . . before leaving briefly to retrieve a weapon" is also not supported. (AB 19; see also AB 8.) The reference to appellant pulling Sophia's hair is from the 911 call. During the call, Sophia stated that at that moment appellant was "trying to pull my hair out."

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[2] For the same reasons, the Court of Appeal's footnote that appellant's throwing of a phone "shows that [B.M.] intended to use any object available to harm her sister" is not supported either. (*In re B.M.*, *supra*, 10 Cal.App.5th at p. 1299, fn. 1.) The single sentence in the record regarding the phone does not show any intent to injure, and the Court of Appeal's note that "[*i*]*n theory*, throwing a telephone at another person with the requisite intent can be an assault with a deadly weapon" is irrelevant given the limited facts in the record here. (*Ibid.*, emphasis added.)

(Exhibit 1-B, at p. 2, line 21.) However, the record is clear that the 911 call occurred *after* the altercation with the butter knife, and the alleged hair pulling was happening in real time during the call. (RT 27; see also Exhibit 1-B.) The evidence therefore directly contradicts respondent's assertions that appellant resorted to a butter knife because her alleged prior attempts to hurt Sophia had failed. Moreover, the fact that appellant discarded the butter knife prior to allegedly trying to pull Sophia's hair demonstrates that appellant made a conscious choice to cease using the instrument in the middle of the altercation, which contradicts respondent's narrative that appellant was continuously escalating the encounter.[3]

Respondent also includes the following description of events regarding the use of the butter knife:

> When [appellant] reentered the bedroom, she had armed herself with the six-inch serrated knife, which she promptly used to stab and cut at her near-naked sister. Sophia was undressed, wrapped in a towel, and lying on her back on the bed when B.M. attacked her with the knife, and Sophia covered herself with a blanket to protect herself. (RT 14-17.) That the assault did not actually produce great bodily injury was not for lack of force or effort.

(AB 19.) This excerpt is exaggerated in a number of ways.

First, respondent's assertion that appellant immediately came at Sophia with the butter knife leading Sophia to cover herself with the blanket is not supported by the record. (AB 8, 19.) As noted in the opening brief, pursuant to Sophia's own testimony, appellant was just holding the knife in her hand when she first entered the room and did not

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[3] Respondent also alleges that appellant punched her other sister, Natalie, in the nose, which is not only irrelevant to the question presented, but also not supported by the record, since Sophia did not see this occur and no evidence discloses exactly how Natalie was injured. (AB 9, 20; RT 26-27.)

make any motion toward Sophia with it until after Sophia was already covered with the bedding. (RT 16-17, 20.) This distinction is important because it shows appellant did not aim the knife at Sophia's skin, and only ever directed it toward Sophia's legs when they were under a comforter, which greatly diminished any chance of injury given the dullness of the instrument, and the little force that was used.[4] (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-29.)

Respondent's statement in the excerpt that appellant used the butter knife to "stab and cut at" her sister is similarly embellished. Not once did Sophia assert that appellant was trying to "cut" her, and Sophia stated that appellant did *not* come right at her lunging with the knife. (RT 20-21.) Sophia did state that appellant "tried to stab" her (RT 33), but when asked to explain this statement, she clarified that appellant remained three feet away from her, that she never climbed over her, and she "didn't poke" her, but instead made a "slicing" motion with the butter knife only while Sophia's legs were covered with the comforter. (RT 34; see also RT 24, 33.)

In addition, respondent's assertion that the lack of injury "was not for lack of force or effort" is entirely unsupported – a lack of force and effort is precisely why no injury resulted. In Sophia's own words, she felt

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[4] Respondent cites to other alleged facts in an attempt to support an inference that appellant intended to hit Sophia's skin with the butter knife, but none of the cited facts offer such support. For example, respondent cites to appellant's "'downward stabbing motions' *at the blanket*" as well as "Sophia's testimony that she could feel the knife pressing against her *through the blanket*" – but all these facts demonstrate is that the knife was not directed toward Sophia's bare skin. (AB 22, emphasis added.) Moreover, these statements are consistent with appellant's assertions that she only intended to scare Sophia by making motions with the butter knife toward the bedding. (RT 60.)

only "a little" pressure from the butter knife, and after appellant swiped it a few times, she stopped. This demonstrates both a lack of force and a lack of effort.

Respondent asserts further that appellant is minimizing the force used by stating that it caused only "a little" pressure. (AB 23.) But here appellant is directly quoting the victim's testimony. (RT 25.) On redirect, after stating that she could feel only "a little" pressure through the blanket, Sophia also measured the force to be "maybe a five or six" out of ten, but that does not change her characterization of it as "a little." In addition, when stating that it was a little, Sophia was describing what she actually felt, as opposed to giving some estimation of how much appellant was exerting herself. Moreover, the indisputable fact that Sophia suffered no injury from the altercation corroborates the only reasonable conclusion that the force exerted was minimal. (See *People v. McDaniel* (2008) 159 Cal.App.4th 736, 748 [lack of injury is probative of force used].) While respondent repeatedly refers to the force used as "substantial" and describes "significant pressure of the knife blows through the blanket," Sophia never used any of those words.[5] (AB 19, 23.)

Respondent likewise cites and relies on the Court of Appeal's conclusion that it was Sophia's ability to "fend off great bodily injury with her blanket" that kept her safe. (AB 22; *In re B.M.* (2017) 10 Cal.App.5th

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[5] Respondent also asserts that the level of pressure must be considered along with Sophia's testimony that she was fearful that appellant was trying to hurt her and that Sophia was screaming. But Sophia's fear does not establish the force exerted, especially here, where Sophia only testified generally to her fear of what appellant might do. (RT 28.) The evidence of the force that was applied in this case is the total lack of injury, and Sophia's description of the force itself, which respondent cannot dispute entailed the words "a little." (AB 23; RT 25.)

1292, 1299; see also AB 26.) This statement is also unsupported by the record. It ignores reason to infer that Sophia's use of the blanket "fended off" appellant's actions. (AB 22.) For if it was appellant's true intention to continue her attack and to seriously hurt Sophia with a butter knife, why would a blanket stop her? Rather, what the record reflects is that appellant *chose to stop* using the butter knife on her own accord. According to Sophia, after appellant sliced the knife a few times, she began arguing with Natalie and then left the room, and she discarded the knife on her own. (See RT 25, 26, 60.) Moreover, if covering oneself with a blanket is enough to "fend off" an assault with a butter knife, then it can show only that such assault was done with very little force in the first place, and there was no likelihood of causing any real injury at all.[6]

Respondent also takes some liberties in describing the altercation generally, stating more than once that Sophia was "terrified" that appellant could hurt her. (AB 9, 19.) The record paints a less dramatic and more equivocal response, when Sophia was specifically asked to describe the extent of her fear, and she replied, "I don't know. I was pretty scared."

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[6] Regarding the nature of the instrument at issue, respondent asserts that it was not a "true" butter knife, while also noting that not all butter knives are equal. (AB 8, n. 2; 11.) Respondent also asserts that the record does not expressly state the knife was rounded. (AB 11, n. 4.) Regardless of what a "true" butter knife is, this Court is bound by the witnesses' depictions in the record. The rounded nature of the knife is evident from those descriptions, which noted that the knife was not sharp, and none of which referred to a pointed end. In addition, a rounded end is consistent with respondent's assertion that the proper label of the instrument at issue is a "table knife," since "[t]he distinguishing feature of a table knife is a blunt or rounded end." (See AB 8, n. 2, citing https://en.wikipedia.org/wiki/Table_knife.) Lastly, it was the prosecution's burden to prove the nature of the instrument in connection with its burden of proving that the instrument used was a deadly one, and it was certainly never proven that the butter knife used in this case had a pointed tip.

(RT 28.) Fear alone, however, does not transform an object into a deadly weapon if the manner of its use does not align with that fear, and where the definition requires not just the *capability* of *any* injury, but rather a *likelihood* of *serious injury or death.* Lastly, respondent states that appellant's arm movements were "forceful and violent" (AB 19), yet the record shows that Sophia could not recall the arm movements appellant made. (RT 20-21.)

In sum, the discussion above explains the true details of the butter knife altercation, and to paint it, as respondent does, as an extremely violent and calculated attack intended to cause great pain and injury is simply not supported by the record. Appellant does not dispute that she assaulted her sister, but the question this case poses is whether she did so *with a deadly weapon.* In this respect, it is of utmost importance to consider the facts of the assault in the context of the applicable standard. The question is not: *Could* the butter knife have been used in a way that would render it *capable* of causing *any injury.* Rather, the question is: Was the butter knife *actually used* in such a way that it was *both capable* of causing *and likely* to cause *death or great bodily injury.* (*People v. Aguilar, supra,* 16 Cal.4th at pp. 1028-29.) When analyzing the *supported* facts under the proper standard, the only reasonable answer to the inquiry is no.

II. THE LIKELIHOOD REQUIREMENT FOUND IN THE CALIFORNIA DEFINITION OF A DEADLY WEAPON REQUIRES THAT THE PROBABILITY OF HARM BE HIGH, HAS BEEN IMPROPERLY OVERLOOKED BY BOTH RESPONDENT AND THE COURT OF APPEAL, AND IS NOT SUPPORTED BY SUFFICIENT EVIDENCE IN THIS CASE

Respondent does not dispute that California's deadly weapon definition requires that the instrument be used in a manner "likely" to produce death or great bodily injury. However, respondent appears to contend that the term "likely" adds nothing to the definition because there

is no discernible difference between a likelihood and a possibility (or, a capability). (AB 21.) This, however, is not so.

CALCRIM 821 provides that "[t]he phrase likely to produce great bodily harm or death means the probability of great bodily harm or death is high." This definition appears in the context of the felony child abuse statute set forth in Penal Code section 273a. To be convicted under that code section, the jury must find that the defendant inflicted pain or suffering on a child under circumstances or conditions "likely to produce great bodily harm or death." The "likely to produce" language contained therein is therefore identical to that found in the definition of a deadly weapon for the purposes of section 245, subdivision (a)(1).

Several cases have similarly held that the phrase "likely to produce great bodily harm or death" means " 'the probability of serious injury is great.' " (See *People v. Sargent* (1999) 19 Cal.4th 1206, 1223, quoting *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835; *People v. Cockburn* (2003) 109 Cal.App.4th 1151, 1160; *People v. Cline* (1982) 135 Cal.App.3d 943, 948; *People v. Northrop* (1982) 132 Cal.App.3d 1027, 1036; *People v. Hernandez* (1980) 111 Cal.App.3d 888, 895.) In *People v. Valdez* (2002) 27 Cal.4th 778, this Court reiterated that definition. (*Id.* at p. 784.) In addition, non-legal dictionaries contain very similar language, defining "likely" as "having a high probability of occurring or being true; very probable" (see Miriam-Webster Online Edition, available at https://www.merriam-webster.com/dictionary/likely>), and "expected to happen; probable." (See also Cambridge English Dictionary Online Edition, available at <https://dictionary.cambridge.org/us/dictionary/english/likely>.)

These definitions are also consistent with the language set forth in cases addressing assaults committed with force "likely" to cause great bodily injury, in which courts consider the "natural and *probable*

consequences" of the assault at issue. (*People v. Williams* (2001) 26 Cal.4th 779, 787, emphasis added; Pen. Code, § 245, subd. (a)(4).) Moreover, case law has held that assault with force likely to cause great bodily injury is a necessarily included offense of assault with a deadly weapon. (See *In re Jonathan R.* (2016) 3 Cal.App.5th 963, 973-74.) In so holding, the *In re Jonathan R.* court discussed the interplay of these two offenses and stressed the likelihood aspect of each as they applied to the force that was used, stating that

> [w]hen a defendant commits an assault using an instrument other than a firearm, the instrument is considered to be a "deadly weapon," and therefore to qualify under section 245, subdivision (a)(1), only if the instrument is used in a manner *likely* to produce death or great bodily injury. For that reason, when assault with a deadly weapon other than a firearm is found to have occurred, the trier of fact necessarily must have concluded the defendant used or attempted to use force likely to produce great bodily injury, *since that likelihood is what makes a weapon or instrument "deadly."* If the use of the instrument was not likely to produce great bodily injury, the defendant's conduct could not satisfy subdivision (a)(1).

(*Id.* at p. 973, emphasis added.)

Accordingly, the term "likely" does have its own meaning and significance in this context, and it is quite different from that of "capable," which is defined as being merely "susceptible," or "having attributes . . . required for performance or accomplishment." (See Miriam-Webster Online Edition, available at < https://www.merriam-webster.com/dictionary/capable>; see also Cambridge English Dictionary Online Edition, available at

<https://dictionary.cambridge.org/us/dictionary/english/capable > [defining capable as "having the skill or ability or strength to do something"].)[7]

In addition, the term "great bodily injury" is defined as "significant or substantial physical injury," and "it does not refer to trivial or insignificant injury or moderate harm." (*People v. Clark* (1997) 55 Cal.App.4th 709, 714; see also Pen. Code, § 12022.7, subd. (f); CALCRIM 875.) Therefore, to be considered deadly, an instrument must be used in such a way and with such force that there is a *high or great* probability of causing an injury that is *more than minor or moderate*.

Evidence that there was a high or great probability of death or great bodily injury in this case is nonexistent. Indeed, all of the evidence in this record demonstrates that the risk of *any* injury was slight at best. The dull and rounded nature of the instrument, the fact that it was directed solely in the direction of Sophia's covered legs, and the small amount of force that was employed, all show that the probability of an injury amounting to more than moderate harm was extremely low, meaning no rational trier of fact could find such a likelihood.[8]

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[7] In one case, *People v. Wilson* (2006) 138 Cal.App.4th 1197, the Court of Appeal arrived at a different definition of "likely" for purposes of section 273a, relying on the definition supplied by this Court in *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888. In *Ghilotti*, the court addressed the term "likely" as it appears in the Sexually Violent Predators Act ("SVPA"), and held that it meant "a substantial danger – that is, a serious and well-founded risk." (*Ghilotti, supra*, 27 Cal.4th at p. 895, italics omitted.) *Wilson*'s reliance on *Ghilotti* and departure from the above-cited case law has been questioned, particularly because *Ghilotti* was decided in such a specific context under the SVPA. (See *People v. Chaffin* (2009) 173 Cal.App.4th 1348, 1351.) In any event, even under this alternative definition, "a substantial danger" or "well-founded risk" is also clearly more than a mere possibility.

[8] This is further demonstrated by the Court of Appeal's need to make the unsupported leap that appellant *could have* committed mayhem upon

Respondent also asserts that appellant's argument concerning the likelihood requirement was rejected by the court in *In re D.T.* (2015) Cal.App.4th 693, but this is not so. In *In re D.T.*, the subject minor poked the victim multiple times in the back with a "sharp" and "pointy" pocketknife that had a two-and-a-half-inch blade. (*Id.* at pp. 696-97.) The minor argued that the court improperly failed to consider the likelihood of injury. The court first stated that the minor proposed no articulable standard differentiating "likelihood" from "possibility." (*Id.* at p. 700.) Notably, appellant is articulating such a standard here, as set forth above.

In addition, the *In re D.T.* court went on to state that it would be "hard pressed to see why common sense could not properly lead a finder of fact to conclude that *pressing a sharp knife against a victim's back was likely* to cause a serious bodily injury." (*Id.* at p. 700, emphasis added.) The court also stated that "[b]ecause the knife was sharp, and because minor held it against the victim in such a way that a sudden distraction or misstep could have resulted in a serious puncture wound," the knife had met "the *Aguilar* standard for likelihood." (*Id.* at p. 701.) Indeed, the court in *In re D.T.* focused greatly on the facts surrounding the type of weapon used and its manner of use throughout the opinion, referring multiple times to the "sharp" and "pointy" nature of the knife, and to the fact that it was poked into the victim's back, i.e., a highly vulnerable "area of her body she could not even see, let alone control." (*Id.* at pp. 700, 701.) In addition,

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Sophia's face; the actual actions appellant took had no likelihood of significant injury, so the court needed to speculate regarding entirely different actions to create a risk that did not exist in the record, which is addressed in greater detail in Section III, herein. Moreover, given appellant's positioning only near Sophia's feet and the lack of any evidence demonstrating that she ever moved any closer, there was certainly not a *likelihood* that appellant would commit any injury upon Sophia's face.

when distinguishing both *In re Brandon T.* and *People v. Beasley*, the court again focused on the fact that the knife *D.T.* used was "sharp" and "pointy." (*Id.* at p. 701.)

Accordingly, *In re D.T.* did not reject appellant's argument, but rather expressly found, based on the facts of the assault and the nature of the weapon used, a likelihood of injury. Moreover, because *In re D.T.* involved an intrinsically dangerous instrument being placed in direct contact with a particularly vulnerable area of the body, the facts of that case supported the court's inference of likeliness. Here, on the other hand, no such facts exist, and no such inference is supported.[9]

In sum, respondent's assertion that the term "likely" has no meaning or application when it expressly appears in the definition of a deadly weapon and has been defined in the context of the Penal Code is without merit. In addition, respondent fails to rebut the fact that the record of this

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[9] Notably, respondent has not pointed to any part of the Court of Appeal's opinion in which it analyzed the likelihood of injury in this case, instead pointing only to general recitations of the standard. (See AB 20-21.) For example, respondent cites to the Court of Appeal's assertion that "[t]he use of an object in an assault increases the likelihood of great bodily injury." (See AB 20, quoting *In re B.M.*, *supra*, 10 Cal.App.5th at p. 1299.) When viewing this statement in context, however, one sees that the court was not addressing the likelihood of injury in this case, but instead was noting generally why the law provides for greater punishment when an object is used to commit an assault. Moreover, even this general statement is questionable, considering an aggravated assault that is committed without a weapon but with force likely to cause great bodily injury or death is addressed in the same fashion as when a deadly weapon is used. (See *People v. Aguilar*, *supra*, 16 Cal.4th at p. 1035 ("Ultimately . . ., the jury's decisionmaking process in an aggravated assault case under section 245, subdivision (a)(1), is functionally identical regardless of whether, in the particular case, the defendant employed a weapon alleged to be deadly as used or employed force likely to produce great bodily injury; in either instance, the decision turns on the nature of the force used.")