POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of Criminal Law Approved for Credit Toward California Criminal Law Specialization #172-- The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider.

Week Of	Topic	Guest	
Jan. 7, 2019	**A Butter Knife as Assault with Deadly Weapon (*In re B.*M.); Some 2019 New Laws re Juveniles**	**Eileen McAndrew**	30 min General

In re B.M. (2018) 6 Cal.5th 528

The Supreme Court, in examining whether use of butter knife violated Penal Code section 245(a)(1), states that for an object to qualify as a deadly weapon based on how it was used, the defendant must have used the object in a manner not only capable of producing but also *likely to produce* death or great bodily injury. This is necessarily a fact-intensive inquiry and the Supreme Court stated (in a rebuke to the Court of Appeal) that speculation without record support as to how the object *could* have been used or what injury *might* have been inflicted had the object been used differently is not appropriate. The evidence presented in this case was insufficient to find the knife was used as a deadly weapon. The judgment of the Court of Appeal to the contrary was reversed.

I. Background

A. Factual

1. Seventeen-year-old B.M. returned to her family's home after spending the night away. She was unable to unlock the front door, and when her efforts at knocking on the door were unsuccessful, she entered the house through a window. She went to the bedroom of her sister Sophia and asked why the locks had been changed. B.M. was angry and upset and threw a phone at Sophia. She then went downstairs to the kitchen where she grabbed a metal knife from the counter. B.M. testified she grabbed the knife because "it was just the heat of the moment, and [the knife was] just the first thing that caught [her] eye." According to the opinion, the knife was about six inches long, with a three-inch blade that was not "sharp" and had "small ridges" on one side. Both B.M. and Sophia described the knife as a "butter knife." (p.*1.)

2. B.M. returned to Sophia's bedroom with the knife. Sophia was clothed only in a towel because she had just gotten out of the shower when B.M. arrived home. Sophia testified that when she saw B.M. with the knife, she covered herself with the blanket that was on the bed because she "didn't know what [B.M.] was going to do." (p.*1.)

3. B.M. approached Sophia, who was lying on top of the bed with her knees bent. Sophia testified

that B.M. "came . . . at [her] trying to stab [her]" and that from a distance of about three feet, B.M. made several "downward" "slicing" motions with the knife in the area around Sophia's legs. Sophia further testified that the knife hit her blanketed legs "a few" times and that the amount of pressure B.M. used was "maybe like a five or a six" on a scale from one to ten. Sophia initially said B.M. poked her with the knife, but she later clarified that B.M. did not poke or stab her and that B.M. did not "hurt" her. B.M. testified she only "wanted to scare [Sophia]" and "had no intentions in actually stabbing [Sophia] with [the knife]." (p.*2.)

4. B.M. then began arguing with another sister, and the fight turned physical. Sophia called the police who responded and arrested B.M. An officer later testified that B.M. told him she had wanted to scare Sophia and admitted to making several downward stabling motions at the bedding which Sophia had pulled up over her. (p.*2).)

B. Procedural Background

1. The juvenile court sustained a wardship petition alleging that B.M.'s use of the butter knife against Sophia was an assault with a deadly weapon under Penal Code section 245(a)(1).

2. B.M. appealed the juvenile court's order. The Court of Appeal rejected B.M.'s challenge to the sufficiency of the evidence under section 245(a)(1). The court reasoned that "[i]t matters not that [Sophia] was able to fend off great bodily injury with her blanket" or "that [B.M.] was not adept at using a knife" because B.M. "could have easily inflicted great bodily injury with this metal butter knife and just as easily [could] have committed mayhem upon the victim's face." The court concluded that the juvenile court's findings—that the six-inch metal butter knife could be used to slice or stab, even though it was not designed for such," and that the knife was in fact "used in a manner capable of producing great bodily injury"—were "not 'wholly irreconcilable' with the evidence." (p. *2.)

II. <u>California Supreme Court's Analysis</u>

A. Statute

1. As used in Penal Code section 245, subdivision (a)(1), a "'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' " (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) Although "[s]ome few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law," (*id.* at 1029), the Supreme Court has said that a knife is not such an object. (*People v. McCoy* (1944) 25 Cal.2d 177, 188.)" (p.*3.)

2. "In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue." (*Aguilar*, at p. 1029.) p.*3.)

B. Principles Guiding the Supreme Court's Analysis Here

1. First, the object alleged to be a deadly weapon must be used in a manner that is not only "capable of producing" but also "likely to produce great bodily injury. (p.*3.)

a. The Supreme Court said the Court of Appeal's analysis addressed only whether B.M.'s manner of using the butter knife was capable of causing great bodily injury, not whether it was likely to do so, thereby misstating the standard. Nevertheless, the Attorney General argued that "capable of producing" and "likely to produce" are essentially the same. The Supreme Court rejected this arguments as inconsistent with the ordinary meaning of the words and the treatment of "likely to produce" in other provisions of the Penal Code.

b. The Supreme Court also rejected the Attorney General's argument that the Court of Appeal sufficiently addressed the "likely" standard by noting that "the use of an object in an assault increases the likelihood of great bodily injury." The Supreme Court said the fact the B.M.'s use of the object may have *increased the likelihood* of serious bodily injury did not establish that her use of the object was *likely* to cause serious injury. (p.*4.)

2. Second, the standard for assault with a deadly weapon does not permit conjecture as to how the object could have been used. Instead, the determination of whether the object is a deadly weapon under section 245(a)(1) rests on how the defendant actually *used* the object. (p.*4.)

a. The Court of Appeal said B.M. could "easily have committed mayhem upon the victim's face." But the evidence showed that B.M. used the butter knife only in the area of Sophia's legs, which were covered with a blanket. There was no evidence that B.M. stabbed, sliced, or pointed the butter knife toward or near Sophia's face, or that B.M. attempted or threatened to do so. Nor was there evidence that B.M. was flailing her hand with the butter knife or otherwise wielding it wildly or uncontrollably.

b. The Supreme Court did note, however: "Although it is inappropriate to consider how the object could have been used as opposed to how it was actually used, it is appropriate in the deadly weapon inquiry to consider what harm could have resulted from the way the object was *actually used*. Analysis of whether the defendant's manner of using the object was likely to produce death or great bodily injury necessarily calls for an assessment of potential harm *in light of the evidence*. As noted, a mere possibility of serious injury is not enough. But the evidence may show that serious injury was likely, even if it did not come to pass. (p.*4, emphasis added.) The Supreme Court said that "the Court of Appeal's remark about injury to the victim's face is an impermissible conjecture as to how B.M. could have used the butter knife. It is not a reasonable inference of potential injury based on evidence of how B.M. actually *used* the butter knife." (p.*5.)

3. Third, "although it is appropriate to consider the injury that could have resulted from the way the object was used, the extent of actual injury or lack of injury is also relevant." A conviction for assault with a deadly weapon does not require proof of an injury or even physical contact, but limited injury or

lack of injury may suggest that the nature of the object or the way it was used was not capable of producing or likely to produce death or serious harm. (p.*5.)

C. Application of These Principles to this Case

1. The Supreme Court, "with these principles in mind," turned to this case and concluded that "the juvenile court's finding that B.M. used the butter knife as a deadly weapon is not supported by substantial evidence." It said: "Under any plausible interpretation of the term 'likely,' " the evidence was insufficient to establish that B.M.'s use of a butter knife against her sister's blanketed legs was likely to produce death or great bodily injury. The Court explained the circumstances supporting its conclusion.

2. "First, the record indicates that the six-inch metal knife B.M. used was '[t]he type of knife that you would use to butter a piece of toast'; it was not sharp and had slight ridges on one edge of the blade." (p.*5.)

3. "Second, B.M. used the knife only on Sophia's legs, which were covered with a blanket. There is no evidence that B.M. used or attempted to use the knife in the area of Sophia's head, face, or neck, or on any exposed part of her body." (p.*5.)

4. "Third, the moderate pressure that B.M. applied with the knife was insufficient to pierce the blanket, much less cause serious bodily injury to Sophia." (p.*6.)

5. The Supreme Court noted a remark by the juvenile court that it was "lucky" there were no injuries. The Supreme Court responded: "[T]here is no evidence that B.M. attacked any other part of Sophia's body despite the opportunity to do so. Nor is there any evidence that B.M. initially tried to stab some other part of Sophia's body but missed and instead hit Sophia's blanket-covered legs. It may be that B.M. could have caused serious injury if she had applied greater force, if she had applied the same force to Sophia's exposed legs, if she had used the knife on Sophia's head, face, or neck, or if she had wielded the knife in an uncontrolled or unpredictable manner. But the inquiry must focus on the evidence of how B.M. *actually used* the knife, not on various conjectures as to how she could have used it." (*Id*. at p.*6, emphasis added.)

6. Additionally the Supreme Court addressed the Attorney General's argument that an object can be a deadly weapon even if there is no contact or injury, and even if it's not actually used with deadly force. The Supreme Court stated that the cases relied on by the Attorney General [cited in the opinion] involved a sharp object applied to a vulnerable part of the body. "Here, the knife was not sharp or pointy; it was not applied to any vulnerable part of Sophia's body; and there is no evidence that B.M. wielded the knife wildly or uncontrollably." (p.*7.)

7. The Supreme Court concluded: "Viewing the totality of the evidence in the light most favorable to the judgment, we find it questionable whether a trier of fact could reasonably conclude that the manner in which B.M. used the knife was capable of causing great bodily injury. But even if B.M.'s use

of the knife were capable of causing great bodily injury, there is no substantial evidence that it was likely to do so." (p.*7.)

III. Some Observations and Takeaways

A. The Supreme Court's arguments are available for viewing on the Supreme Court's website. A takeaway from the arguments in this case is the importance for the prosecution of making a record that supports the appeal. During the course of the argument, several different justices asked both attorneys for a more detailed description of the butter knife used in this case. Although there was a description in the record that the knife "was about six inches long, with a three-inch blade that was not "sharp" and had "small ridges" on one side," that description was apparently still too vague for some of the justices. After all, the object/weapon is the crux of a section 245(a)(1) case. One of the justices had specific questions about the "serration" of the knife, which the appellate attorney was not able to answer. It appears the neither the knife nor any photos of the knife were introduced in evidence at the juvenile hearing. (The Supreme Court can view the exhibits that were admitted at trial.) Additionally, there were questions from several of the justices about the blanket that covered Sophia's legs. Justice Kruger asked B.M.'s attorney to describe the weight of the blanket, and whether it was a blanket or a comforter. But B.M.'s attorney answered that no testimony on this point had been elicited at the juvenile hearing. The thickness of the blanket was at issue here because B.M. admitted making slicing/stabbing motions on Sophia's blanketed legs, but B.M.'s efforts did not pierce or cut the blanket. As asked by Justice Kruger, did this reflect the thickness of the blanket or the kind of slicing motions made by B.M.? As the justices stated during oral argument, a violation of section 245(a)(1) is a "fact intensive inquiry." It is the responsibility of the prosecutor to elicit the testimony and other evidence that establish those facts.

B. Based on the opinion, a separate concurrence written by Justice Chin, and the justices remarks at oral argument, it appears there may have been disagreement among the justice on the definition of "likely" in the *Aguilar* requirement that the object be used in such a manner as to be "likely to produce death or great bodily injury." The opinion eventually concludes that "[u]nder *any* plausible interpretation of the term 'likely,'" the evidence was insufficient in this case. Justice Liu authored the majority opinion. Justice Chin authored a concurrence joined by Justice Corrigan. Justice Chin notes that Justice Liu's majority opinion cites several definitions of the word "likely" as meaning "having a high probability," "very probable," or "probability that is great." Justice Chin writes: "The majority opinion should not be read as holding . . . that for purposes of *Aguilar*'s definition of what constitutes a deadly weapon, 'likely' means 'probable.'" Additionally, there were questions asked of the attorneys at oral argument about the meaning of "likely," but ultimately the definition was not resolved in this case. Justice Chin's concurrence and the manner in which the "likely" issue was resolved in this opinion suggest that the question may be visited again in a future case.

2019 New Laws Affecting Juveniles

Santa Clara County Deputy District Attorney Kathy Storton, the author of the CDAA Digest, will be our P&A guest in a few weeks to talk about new laws that impact us as prosecutors. This P&A is going to address a few of the new laws that apply to juveniles. The description of juvenile laws in Kathy Storton's Legislative Digest it is a much more extensive review.

Welfare and Institutions Code Section 602

This amendment to section 602 establishes 12 years of age as the minimum age for which the juvenile court has jurisdiction and may adjudge a person a ward of the court. However, a minor under the age of 12 will be within the jurisdiction of the juvenile court if he or she commits one of the following specified offenses:

a) Murder;
b) Rape by force, violence, menace, duress, or fear of immediate bodily injury;
c) Sodomy by force, violence, menace, duress, or fear of immediate bodily injury;
d) Oral copulation by force, violence, menace, duress, or fear of immediate bodily injury; or,
e) Sexual penetration by force, violence, menace, duress, or fear of immediate bodily injury.

Therefore, a minor who is under the age of 12 at the time he or she commits any other crime, including serious or violent felonies, cannot be prosecuted in juvenile court.

Welfare and Institutions Code Section 602.1

This new provision sets forth how minors under age 12 are to be handled. ''This bill would protect young children from the negative impacts of formal justice system involvement, promote their rights, health, and well-being through alternative child-serving systems, and decrease the amount of resources wasted in the juvenile justice system.''

This new provision states that the Legislature intends counties to "pursue appropriate measures to serve and protect a child only as needed, avoiding any intervention whenever possible, and using the least restrictive alternatives through available school-, health-, and community-based services." The Legislature intends that counties use existing funding to provide alternative services.

However, this new provision is not operative until January 1, 2020. As Kathy Storton points out, this is an entire year after juvenile courts loses jurisdiction over those minors under age 12.

This provision states that when a minor under the age of 12 comes to the attention of law enforcement because of criminal activity (W&I 602) or truancy or being beyond control (W&I 601) "the response of the county shall be to release the minor to his or her parent, guardian or caregiver," It also requires

counties to develop a process for the least restrictive responses that may be used instead of, or in addition to, the release of the minor to his or her parent, guardian, or caregiver."

Welfare and Institutions Code Section 707 (SB 1391)

The legislative counsel's digest described the purpose of SB 1391, the legislation that gave rise to the enacted amendments to W&I 707 as follows: "Existing law, the Public Safety and Rehabilitation Act of 2016, as enacted by Proposition 57 at the November 8, 2016, statewide general election, allows the district attorney to make a motion to transfer a minor from juvenile court to a court of criminal jurisdiction in a case in which a minor is alleged to have committed a felony when he or she was 16 years of age or older or in a case in which a specified serious offense is alleged to have been committed by a minor when he or she was 14 or 15 years of age. The existing Public Safety and Rehabilitation Act of 2016 may be amended by a majority vote of the members of each house of the Legislature if the amendments are consistent with and further the intent of the act. [¶] This bill would repeal the authority of a district attorney to make a motion to transfer a minor from juvenile court to a court of criminal jurisdiction in a case in which a minor is alleged to have committed a specified serious offense when he or she was 14 or 15 years of age, unless the individual was not apprehended prior to the end of juvenile court jurisdiction, thereby amending Proposition 57."

In other words, before this amendment, a 16 or 17 year-old could be prosecuted in adult court for any felony crime, and a 14 or 15 year old could be prosecuted in adult court for a W&I 707(b) offense, which includes murder, attempted murder, voluntary manslaughter, forcible rape, forcible sodomy, forcible oral copulation, arson, kidnapping for ransom, kidnapping for purposes of robbery, kidnapping with bodily harm, kidnapping for purposes of sexual assault, assault with a firearm, torture, and carjacking. As a result of the passage of SB 1391, W&I 707 continues to permit 16 and 17 year olds to be prosecuted in adult court for any felony. But a 14 or 15-year-old may not be prosecuted in adult court for a W&I 707(b) offense, except where he or she is "not apprehended prior to the end of juvenile court jurisdiction." (W&I 707(a)(1). As Kathy Storton points out, the statute does not define "prior to the end of juvenile court jurisdiction," but may mean cases where the offender is arrested after reaching age 18.

This new provision is not without controversy. Uncodified section three of SB 1391 stated: "The Legislature finds and declares that this act is consistent with and further the intent of Proposition 57, as enacted at the November 8, 2016 statewide general election." However, it is anticipated that the issue of the constitutionality of this amendment may be challenged by some district attorney's offices. Proposition 57 eliminated the ability of prosecutors to file charges against minors directly in adult court (which had been provided by Proposition 21.) Proposition 57 instead authorized prosecutors to make a motion to transfer a minor from juvenile court to adult court when the minor was 16 years or older, or when a minor who was 14 or 15-years old who committed a specified offense. Under Proposition 57, a minor can be transferred to adult criminal court only after a fitness hearing, at which the court is required to consider specified criteria. The decision as to whether the minor will be prosecuted in adult criminal court is for the judge alone.

The amendments to section 707 eliminate the authority of the prosecutor to make a motion to

transfer, and the discretion of judges to transfer, any 14 or 15 year old to adult court. The potential argument is that the amendment regarding 14 and 15 year-old minors thwarts the voters' intent under Proposition 57, rather than being consistent with the voters' intent. Proposition 57 permits amendments of section 707 by a majority vote of the Legislature only if the amendment is consistent with and furthers the intent of the Proposition 57. The Attorney General has taken the position that the amendments to section 707 are constitutional. It is expected that these amendments will be applied retroactively. In other words, they are to be applied to all pending cases, no matter when the crime was committed, and to all case not yet final on appeal.

Welfare and Institutions Code section 709

The existing version of W&I 709 was repealed. This provision related to juvenile competency to stand trial. It has been replaced with a new version that results in the immediate dismissal of a petition containing only misdemeanor charges if a juvenile is found incompetent to stand trial, regardless of the seriousness of the crimes, and results in the dismissal of felony charges as early as six months after a finding of incompetence. This new version of W&I applies to juveniles who come within the jurisdiction of the court both under W&I 601 and 602.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

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