S242153

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re B.M., a Person Coming Under the Juvenile Court Law	Supreme Court No. _____
THE PEOPLE Plaintiff and Respondent, vs. B.M., Defendant and Appellant.	COA No. **B277076** Ventura Superior Court No. **2016025026**

Appeal from The Superior Court of Ventura County
The Honorable Brian J. Back, Judge Presiding

PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION SIX

By Appointment of the
Second District Court of Appeal

Donna Ford
Attorney at Law
(CA State Bar No. 131924)
3435 E. Thousand Oaks Blvd., No. 3152
Thousand Oaks, CA 91362
Phone: (818) 427-3090
Email: DonnaFordLaw@gmail.com

Attorney for Appellant/Petitioner

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re B.M., a Person Coming Under the Juvenile Court Law	) Supreme Court) No. _____
THE PEOPLE	) COA No. **B277076**
Plaintiff and Respondent,	) Ventura Superior) Court No. **2016025026**
vs.	)
B.M.,	)
Defendant and Appellant.	)

Appeal from The Superior Court of Ventura County
The Honorable Brian J. Back, Judge Presiding

PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION SIX

By Appointment of the
Second District Court of Appeal

Donna Ford
Attorney at Law
(CA State Bar No. 131924)
3435 E. Thousand Oaks Blvd., No. 3152
Thousand Oaks, CA 91362
Phone: (818) 427-3090
Email: DonnaFordLaw@gmail.com

Attorney for Appellant/Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

Other:

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT NUMBER _____

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Crim. **B277076**
Plaintiff and Respondent,	) Ventura Superior Court No. **2016025026**
vs.	)
B.D.M., A minor,	)
Defendant and Appellant.	)

Appeal from The Superior Court of Ventura County
The Honorable Brian J. Back, Judge Presiding

PETITION FOR REVIEW

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant and appellant, B.D.M., a minor (hereafter "petitioner"), respectfully requests that this Court review the published decision of the Court of Appeal, Second Appellate District, Division Six, which affirmed his convictions. A copy of the Court of Appeal's opinion, filed April 20, 2017, which affirmed the judgment is attached as Exhibit A. Petitioner did not file a petition for rehearing.

ISSUES PRESENTED FOR REVIEW

1. Review is required because the published decision in this case is in direct conflict with the published decision in the case of *In re Brandon T.* (2011) 191 Cal. App. 4th 1491, which holds that a butter knife is not a deadly weapon, and disagreement as to how the issue should be resolved will result in inconsistent decisions of the trial courts.

2. Review is required because the constitutional rights of petitioner, a minor, were violated when the officer failed to read her *Miranda* rights before questioning her.

NECESSITY FOR REVIEW

Review is sought pursuant to California Rules of Court 8.500 (b)(1) because it is necessary to secure uniformity of decision or to settle an important question of law.

PROCEDURAL HISTORY OF THE CASE AND FACTS

At the time of this incident, petitioner, a minor recently had completed 11th grade with passing grades, and has expressed a desire to graduate high school and become a nurse. (CT 49.) She also volunteered at a local convalescent home. (CT 49.) Petitioner's mother was "camping out of town for the weekend," and petitioner and her two sisters, all minors, remained home with no adult supervision. (CT 42.) While the mother was gone, one of petitioner's sisters changed the locks to prevent petitioner from entering the premises with her boyfriend. (CT 42.) When petitioner returned home and discovered that her sister had changed the locks, she entered through a window, and the girls argued, which led to petitioner picking up a butter knife during the argument. (RT 14-15, 31.)

On August 12, 2016, after a contested hearing, the trial court sustained the juvenile wardship petition, Cal. Welfare & Inst. Code § 602, finding true the allegation that petitioner committed felony assault with a deadly weapon (a butter knife) in violation of Cal. Penal Code § 245, subd. (a)(1). (CT 33; RT 89.)

Additional facts will be incorporated into the argument as needed.

ARGUMENT

I

REVIEW IS REQUIRED BECAUSE THE PUBLISHED DECISION IN THIS CASE IS IN DIRECT CONFLICT WITH THE PUBLISHED DECISION IN THE CASE OF IN RE BRANDON T. (2011) 191 CAL. APP. 4TH 1491, WHICH HOLDS THAT A BUTTER KNIFE IS NOT A DEADLY WEAPON, AND DISAGREEMENT AS TO HOW THE ISSUE SHOULD BE RESOLVED WILL RESULT IN INCONSISTENT DECISIONS OF THE TRIAL COURTS.

Review is required in this case because the Court of Appeal expressly decided not to follow the published opinion in *In Re Brandon T.* (2011) 191 Cal.App.4th 1491, which held that a butter knife was not a deadly weapon for purposes of Cal. Penal Code, 245, subd. (a)(1). (Opinion at 9.)

Another published opinion cites *In re Brandon T*, but differed factually from *In re Brandon T.*, in that the knife in that case "had a sharp blade," and "had someone bumped into or startled the minor, or had he simply lost his balance, the sharp, 'pointy' knife could have caused serious injury." (*In re D.T.* (2015) 188 Cal.Rptr.3d 273.) Again, the butter knife in the present case was not sharp or pointy. Many unreported cases have also cited *In re Brandon T.* Thus, there is now a conflict in the law, and the opinion in this case causes disagreement as to how the issue should be resolved, and will result in inconsistent decisions of the trial courts.

The case of *In re Brandon T.* applies directly to this case, and was the law at the time of the incident and the trial in this matter. The minor petitioner in the present case did not use the butter knife in a manner capable of producing, and likely to produce, death or great bodily injury. The failure to follow the *In re Brandon T.* decision is a violation of the minor petitioner's constitutional rights.

The California Supreme Court pointed out "the distinction between instrumentalities which are "weapons" in the strict sense of the word, such as guns, dirks, etc., and those instrumentalities which are not weapons in that sense, such as ordinary razors, pocket-knives or other sharp objects." *People v. McCoy* (1944) 25 Cal.2d 177, 188.) For the category of instruments which are not weapons per se, the "character as a 'dangerous or deadly weapon'" may be established for purposes of that occasion. *(People v. McCoy, supra*, 25 Cal.2d at 188.)

The inquiry in determining if the butter knife constitutes a deadly weapon is whether the minor petitioner used it "in a manner as to be capable of producing and likely to produce, death or great bodily injury." (*In re Brandon T., supra*, 191 Cal. App. 4th 1496.) In cases where the victim felt a "pointy object touch" the neck, there was sufficient evidence that the object was a deadly weapon because "a pointed object," "at the victim's neck," is capable of producing death or great bodily injury. (*In re*

Brandon T, supra, 191 Cal.App.4th at 1497, *citing People v. Smith* (1963) 223 Cal.App.2d 431, 432 [a knife]; *People v. Page* (2004) 123 Cal.App.4th 1466, 1469 ["a sharp, pointy" pencil].)

The Court of Appeal cites *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-29, a California Supreme Court case which sets forth two requirements for an object to be considered a deadly weapon: (1) that it be used in a manner "capable of producing" death or great bodily injury and (2) that it be used in a manner "likely to produce" death or great bodily injury. (Opinion at 7.) The court of appeal rejected the law of *In Re Brandon T.* that the butter knife is not inherently deadly, and stated that the minor petitioner "could have" "committed mayhem upon the victim's face." However, in the present case the minor petitioner did not commit mayhem on the victim's face, and in fact was not likely to because she was at the victim's feet.

Applying the standard in the present case, "the butter knife did not produce great bodily injury, which is a 'significant or substantial injury.'" In fact, the butter knife could not have caused death or great bodily injury. The butter knife was not "capable of" great bodily injury because it was rounded, not pointy, and was not designed to cut or pierce objects. (RT 29.) The butter knife in the present case was the same type of knife as that of *In re Brandon T*, ". . . about three and a quarter inches long, with a

rounded end and slight serrations on one side." (*See In re Brandon T.*, *supra*, 191 Cal. App. 4th 1496.) Petitioner's sister testified that that the butter knife was not "sharp," with "small ridges" along one side (RT 29), and described the butter knife as "small," "the type of knife that you would use to butter a piece of toast."

Nor was the butter knife "likely to" produce great bodily injury as it was not used near the neck or face. Petitioner held the butter knife, "just had it in her hand," but she never touched her sister's skin with the butter knife. (RT 16, 20, 24.) The sister testified that the butter knife did not touch any part of her body. (RT 15-16; 24.) (*In re Brandon T.*, *supra*, 191 Cal. App. 4th at 1497; *see also People v. Beasley* (2003) 105 Cal.App.4th 1078, 1087 [broomstick and plastic vacuum attachment used to strike victim, causing bruising to arms, shoulders and back, not used in manner capable of producing, and likely to produce, death or great bodily injury, even though victim had bruising, because "Beasley did not strike her head or face with the stick, but instead used it only on her arms and shoulders."].)

In the present case, the butter knife (1) was not pointy, (2) did not touch the victim's neck, and (3) did not pierce, scratch, or penetrate the skin. Thus, the butter knife was not a deadly weapon. Thus, even under the definition set forth in *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-

29, the butter knife in this case was not a "deadly weapon," and the minor could not constitutional be convicted of violating Penal Code § 245, subd. (a)(1).

In the present case, the butter knife is not inherently a deadly or dangerous weapon. The minor petitioner did not use the butter knife in a manner capable of, and likely to, produce death or great bodily injury. Thus, the minor petitioner could not constitutionally be convicted of violating Penal Code § 245, subd. (a)(1).

In the present case, the failure to follow *In Re Brandon T.* violated petitioner's constitutional rights, the due process clause of the Fifth, Sixth and Fourteenth amendments, which denies the state the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. (U.S. Const, 5th, 6th and 14th Amend.; *Neder v. United States* (1999) 527 U.S. 1 [Errors and omissions in elements of the offense or theories of liability]; *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234 [6th Amen. & due process rights to notice of charges]; *United States v. Gaudin* (1995) 515 U.S. 506.) "The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. Jury instructions relieving States of this burden violate a defendant's due process rights. Such directions subvert the

presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." (*Carella v. California,* (1989) 491 U.S. 263, 265.) The error violated the minor petitioner's constitutional rights, and the error was not harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Therefore, petitioner seeks review by this court.

II.

REVIEW IS REQUIRED BECAUSE THE CONSTITUTIONAL RIGHTS OF PETITIONER, A MINOR, WERE VIOLATED WHEN THE OFFICER FAILED TO READ HER MIRANDA RIGHTS BEFORE QUESTIONING HER

The constitutional rights of petitioner, a minor, were violated because the officer failed to read the minor her *Miranda* rights before detaining and questioning her, in violation of due process and her 4th, 5th and 6th Amendment rights. ((U.S. Const., 5th Amend.; see also Cal. Const., art. I, § 15; *Miranda v. Arizona* (1966) 384 U.S. 436; *Dickerson v. United States* (2000) 530 U.S. 428 [5th Amen. self-incrimination privilege]; *Massiah v. United States* (1964) 377 U.S. 201 [6th Amen. right to counsel, and interrogation after right to counsel has attached, voluntariness, promises of leniency, threats, etc.]; *Arizona v. Fulminante* (1991) 499 U.S. 279 [Due process].) A detention followed by questioning like in the present case triggers *Miranda*, at least with minors.

The Court of Appeal cited and discussed the totality of the circumstances standard "in determining whether a person was subjected to custodial interrogation." (Opinion at 5-6.) However, the court did not discuss that petitioner was a minor, and did not consider that the reasonable person test must consider the perspective of a minor, not an adult.

The United States Supreme Court has affirmed the "commonsense" conclusion that "children 'generally are less mature and responsible than adults' [citation]; that they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them' [citation]; that they 'are more vulnerable or susceptible to ... outside pressures' than adults. [Citation.] Addressing the specific context of police interrogation, we have observed that events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.'" (*J.D.B. v. North Carolina* (2011) 564 U.S. 261, 270.) Thus, the "very real differences between children and adults" must be factored into any assessment of whether a minor was subject to a custodial interrogation.

"[T]he crucial test is whether ... the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" (*Florida v. Bostick* (1991) 501 U.S. 429, 437; *California v. Hodari D.* (1991) 499 U.S. 621, 628.) "The due process [voluntariness] test takes into consideration 'the totality

of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.'" (*Dickerson v. United States*, 530 U.S. at 434.) An interrogation is custodial when "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*People v. Kopatz* (2015) 61 Cal. 4th 62, 80, *citing Miranda v. Arizona, supra*, 384 U.S. at p. 444.) The test for *Miranda* custody is, "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." (*Yarborough v. Alvarado* (2004) 541 U.S. 652.)

"The age of a child subjected to police questioning is relevant" to determining whether a defendant has been taken into custody for purposes of *Miranda v. Arizona* (1966) 384 U.S. 436, and that "a child's age '[could] affect [] how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave'" and that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." (*J.D.B. v. North Carolina (2011) 564 U.S. 261.*) A juvenile's age is a factor in the reasonable-person analysis of Fifth Amendment custody, and may implicate "other areas of criminal procedure, including voluntariness of waivers of rights and seizure inquiries" as well as areas of substantive criminal law, such as "blameworthiness of [the subject's] conduct and/or state of mind." (Levick

& Tierney, The United States Supreme Court Adopts a Reasonable Juvenile Standard in *J.D.B. v. North Carolina* for Purposes of the *Miranda* Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind? (2012) 47 Harv.C.R.-C.L. L.Rev. 501, 517, fn. 121.)

"Our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults." (*J.D.B. v. North Carolina, supra*, 564 U.S. 261.) ". . . The tests for custody under the Fifth Amendment and detentions under the Fourth Amendment both focus on how reasonable persons would perceive their interaction with the police." (*see Kaupp v. Texas* (2003) 538 U.S. 626, 630–631 ["[A] group of police officers rousing an adolescent out of bed in the middle of the night with the words 'we need to go and talk' presents no option but 'to go'"]; In Re J.G., supra, 228 Cal. App.4th at 412 [court concluded that officer's request that juvenile sit on the curb resulted in a detention].)

In the present case, the officer had arrived at the scene looking for the minor petitioner because of the 911 call from her sister. Officer Reynosa saw the minor petitioner, a female "matching the description [he was] given prior to" his arrival. (RT 51.) Officer Reynosa asked the minor petitioner to identify herself. After identifying the minor, the officer then detained her by ordering her to sit on the bumper of the police car so that he could question her, without a parent or guardian present, about the incident.

(RT 51.) Petitioner obeyed the order, and then began to cry as she sat on the bumper. (RT 51-63.) The officer ran a records check to confirm the minor petitioner's identity. He conveyed to the minor that she was suspected of unlawful activity, and told her that he received a call of an assault with a deadly weapon inside of the residence, based on a report of her sister stating that the minor petitioner tried to stab her in the residence. (RT 54, 57.) Officer Reynosa asked the minor to tell him what happened inside the house, specifically asking her questions pointed questions related to the butter knife. (RT 57, 63.) The officer specifically questioned the minor petitioner about whether or not she committed assault with a deadly weapon. (RT 54, 57.) The officer did not give the minor petitioner her *Miranda* warnings. Essentially, the officer asked the minor to "confess," without giving her any *Miranda* advisements.

In the present case, even if the officer's initial encounter (asking her name) with the minor petitioner began as consensual, it "turned into a detention," "as the minutes passed," and "as the police presence and show of force grew," such that at the time the officer asked the minor petitioner to sit on the police car bumper, and as the officer persisted with "pointed" and "increasingly intrusive" questions about the butter knife and an alleged assault with a deadly weapon, "a reasonable minor" in petitioner's circumstances would not have felt free to end the encounter. (See *In Re*

J.G. (2014) 228 Cal.App.4th 402, 411.) The totality of the circumstances would have conveyed to a reasonable person – a juvenile - that he or she was not free to refuse the request.

The scenario may have been different if the officer had informed the minor petitioner that she was free to decline to cooperate, and that she was free to leave. However, the officer did not do that in the present case. The officer failed to give the minor petitioner any advisements that she was free to leave, free to get an attorney, and free to refuse to speak to him. (*cf. People v. Profit* (1986) 183 Cal.App.3d 849, 879-800 [fact that federal agent "affirmatively advised the defendants on four occasions that they did not have to speak to him and were free to leave" supported conclusion that no detention occurred].) The very fact that the officer ordered the minor to "sit on the bumper" of the police car, in essence, was an order by a law enforcement official, to a minor, that she was not free to leave.

A detention followed by questioning like in the present case triggers *Miranda*, especially with minors. Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. (*People v. Kopatz, supra*, 61 Cal.4th at 80.) When reviewing a trial court's determination regarding a custodial interrogation, "an appellate court . . . . independently determines whether, given those circumstances," the interrogation was custodial. (*People v. Kopatz, supra*, 61 Cal.4th at 80.)

Facts that are material to determine that the interrogation was custodial in this case include that:

(1) petitioner was a minor;

(2) she was detained and questioned outside her home;

(3) she was confronted by police, armed and in uniform;

(4) she was ordered to sit on the police car bumper;

(5) she was asked accusatory and incriminatory questions;

(6) with no other persons, parent or legal guardian, present.

The court of appeal did not consider that petitioner was a minor, which must be a factor in the "totality of the circumstances." The reasonable person test is what a child would feel, not an adult. Under these circumstances, the officer's order that the minor petitioner sit on the bumper of the police car resulted in a custodial detention such that she did not feel free to leave, and the subsequent interrogation about the suspected illegal activity, and the butter knife, without *Miranda* advisements, violated her constitutional rights.

In the present case, the motion to suppress was improperly denied by the trial court, and the error was prejudicial under *Chapman v. California* (1967) 386 U.S. 18. The error was not harmless. The harmless error rule does apply to confessions obtained in violation of the Fifth Amendment. (*Arizona v. Fulminante* (1991) 499 U.S. 279; *Collazo v. Estelle* (9th Cir.

1991) 940 F.2d 411, 423-24 (*en banc*), *cert. denied*, 502 U.S. 1031 (1992) ["It is impossible to conclude from the foregoing as well as from the rest of the evidentiary record that Collazo's coerced statement did not contribute to his conviction."].)

Thus, petitioner, a minor, requests that this court review her case, as the statements should have been suppressed because they were obtained in violation of her constitutional rights, and that error was not harmless.

CONCLUSION

For the foregoing reasons, petitioner urges this Court to grant review of her case. Petitioner's federal Constitutional rights were violated and petitioner, a minor, urges reversal of the judgment.

Dated: May 22, 2017

Respectfully submitted,

/s/ Donna Ford

DONNA FORD
Attorney at Law
(CA State Bar No. 131924)
3435 E. Thousand Oaks Blvd., No. 3152
Thousand Oaks, CA 91362
Phone: (818) 427-3090
Email: DonnaFordLaw@gmail.com

Attorney for Appellant/Petitioner
B.M., A Minor

CERTIFICATE OF WORD COUNT

I hereby certify that pursuant to Rule 8.204 of the California Rules of Court, this brief is produced using 13-point Roman type and contains approximately 4369 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Date: May 22, 2017 *__/s/ Donna Ford__*
Donna Ford

PROOF OF SERVICE

Re: People v. B.M., A minor, COA Crim. B277076
(Ventura Superior Ct. No. 2016025026)

I, DONNA FORD, declare as follows:

I am a citizen of the United States, a resident of Los Angeles County, and am over 18 years of age. I am not a named party to the above-entitled action. My business address is 3435 E. Thousand Oaks Blvd., No. 3152, Thousand Oaks, CA 91362. On this day, I served a copy of the attached PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION SIX, as indicated either by electronic mail, or by placing a true and correct copy thereof in a sealed envelope, first-class postage prepaid, in the United States mail at Thousand Oaks, California, addressed as follows:

Kamala D. Harris, Attorney General
California Attorney General
docketingLAawt@doj.ca.gov

The Hon. Brian J. Back
c/o Clerk of Court – Criminal
Ventura Superior Court .
800 South Victoria Avenue
Ventura, CA 93009

Gregory D. Totten
District Attorney
800 South Victoria Avenue
Ventura, CA 93009

California Appellate Project
520 S. Grand Avenue, 4th Floor
Los Angeles, CA 90071
capdocs@lacap.com

Clerk of Court, California Court of Appeal
Second District, Div. Six, Court Place
200 East Santa Clara Street
Ventura, CA 93001

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

Dated: May 22, 2017 */s/ Donna Ford*
DONNA FORD

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re B.M., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B277076 (Super. Ct. No. 2016025026) (Ventura County)
THE PEOPLE, Plaintiff and Respondent, v. B.M., Defendant and Appellant.	COURT OF APPEAL – SECOND DIST. FILED Apr 20, 2017 JOSEPH A. LANE, Clerk D. Kaster Deputy Clerk

A common butter knife is designed to cut and spread butter. In the hand of a person bent on assaulting another, it may be a useful tool to inflict great bodily injury. Consistent with an express direction from the California Supreme Court (*People v. McCoy* (1944) 25 Cal.2d 177, 188-189) and time-honored rules on appeal, we conclude that the trial court's factual finding that the instant butter knife was a deadly weapon must be affirmed on appeal. To the extent that *In re Brandon T.* (2011) 191 Cal.App.4th 1491 holds to the contrary, we respectfully disagree.

As we shall explain, an assault with a deadly weapon is complete when the defendant, with the requisite intent, uses an object in a manner which is capable of producing great bodily injury upon the victim. Such an assault is not negated by 1. the victim's use of a shield or body armor to prevent injury; or 2. ineptness or poor aim in the use of the object; or 3. lack of success in inflicting great bodily injury.

B.M. appeals from a juvenile court order declaring her a ward of the court and ordering her to serve 90 days in a juvenile justice facility. After a contested jurisdictional hearing, the court sustained a petition charging that appellant committed a felony assault with a deadly weapon (a knife) in violation of Penal Code section 245, subdivision (a)(1).

Relying on *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), appellant contends the juvenile court erroneously admitted statements she made to the police. She also contends that the evidence is insufficient to support the finding that the knife she used was a deadly weapon. These contentions are without merit and we affirm.

Facts

Appellant, seventeen years old, was angry because she could not get inside the family home. Her mother had changed the locks to the house. She entered the house through a window and went into her sister's (S.M.) bedroom. She tried to pull S.M.'s hair out, threw a telephone at her, and left the room.[1]

---

[1] This uncharged assault shows that appellant intended to use any object available to harm her sister. In theory, throwing a telephone at another person with the requisite intent can be an assault with a deadly weapon. (See *People v. Cordero* (1949) 92 Cal.App.2d 196, 199 [beer bottle as a club or a missile].)

She returned carrying "a small . . . knife, like a butter knife." It was "[t]he type of knife that you would use to butter a piece of toast." The knife was metal and about six inches long. The blade was about three inches long. "It wasn't . . . sharp" and had "small ridges" along one side.

S.M. was lying on her back on a bed when appellant attacked her with the knife. She covered herself with a blanket for protection. The knife struck the blanket near her legs a "few times." Through the blanket, S.M. felt pressure from the knife. On a scale of one to ten with one being the least amount of pressure, the pressure was "[m]aybe like a five or a six." Instead of "pok[ing]" S.M. with the knife, appellant made a "slicing kind of" motion.

Appellant was "yelling" at S.M. who was terrified by the attack. When appellant left the bedroom, S.M. telephoned the police. The recording of her frantic call for help to the 911 operator was received by the juvenile court.

In response to the telephone call, Officer Ryan Reynosa drove to S.M.'s residence. On the way there, he was given a description and the name of the suspect. He saw appellant outside the residence "and asked her if her name was [B.M.]." Appellant replied, "Yes." Officer Reynosa testified, "I then asked her to walk over towards me and sit against the bumper by my marked patrol vehicle so I could talk to her about what had happened." Appellant complied with his request.

Officer Reynosa told appellant that he "had gotten a call of a fight inside the house and [he] asked her what . . . happened." Appellant explained as follows: she arrived at the

---

Appellant also assaulted another sister giving her a bloody nose.

residence and had been unable to open the front door with her key. She believed that S.M. had rekeyed the lock. Appellant entered the residence through an unlocked window. She was "very upset." Appellant "grabbed . . . what she described as a butter knife off of the kitchen counter and went upstairs to confront her sister [S.M.]." Upon entering her sister's bedroom, appellant "began yelling at [S.M.] . . . and . . . was holding the butter knife in her right hand and was pointing it at S.M." When S.M. told her to get out and threatened to call the police, appellant made "downward stabbing motion[s]" toward "the bedding . . . that S.M. had pulled up over her." Appellant's intent was "to scare S.M." Appellant "then ran back downstairs and put the knife in the kitchen sink."

Appellant testified as follows: She had been living at the residence for two weeks. After entering the residence through a window, she grabbed a butter knife in "the heat of the moment." She "wanted to scare [S.M.]." While holding the knife, she approached S.M., who was sitting on her bed. Appellant was "yelling at her and cussing at her and telling her, . . . 'why did you . . . change the locks?'" When appellant "got close . . . with the knife, [S.M.] covered herself with the blanket and started kicking her legs." Appellant was "pretty sure [the knife] probably did touch the blanket[] because [S.M.] was kicking it, and [appellant] was right there, like, touching the bed." The part of the knife that touched the blanket was the blade - "[t]he part where you would . . . cut . . . toast and stuff."

Alleged Miranda Violation

Appellant claims that her "constitutional rights were violated" because Officer Reynosa did not inform her of "her Miranda rights before detaining and questioning her." Based on

the alleged *Miranda* violation, appellant moved to exclude her statements to Officer Reynosa. The juvenile court denied the motion. It found that appellant was not subjected to custodial interrogation.

"We apply a de novo standard of review to a trial court's denial of a motion to suppress [*sic*, exclude] under *Miranda* insofar as the trial court's underlying decision entails a measurement of [as here] undisputed facts against the law." (*People v. Riva* (2003) 112 Cal.App.4th 981, 988.)

"It is settled that *Miranda* advisements are required only when a person is subjected to 'custodial interrogation.' [Citations.]" (*People v. Davidson* (2013) 221 Cal.App.4th 966, 970.) "An interrogation is custodial when 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citation.] The test for *Miranda* custody is, '"would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave."' [Citation.] The objective circumstances of the interrogation are examined, not the '"subjective views harbored by either the interrogating officers or the person being questioned."' [Citation.]" (*People v. Kopatz* (2015) 61 Cal.4th 62, 80.)

In determining whether a person was subjected to custodial interrogation, "[t]he totality of the circumstances is considered and includes '(1) whether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning.' [Citation.] Additional factors are whether the officer informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom

of movement, whether the police were aggressive, confrontational, and/or accusatory, and whether the police used interrogation techniques to pressure the suspect. [Citation.]" (*People v. Davidson, supra*, 221 Cal.App.4th at p. 972.)

Based on the "totality of the circumstances," we conclude that appellant was not subjected to custodial interrogation. Officer Reynosa did not place her under arrest or handcuff her. He was the only officer present. The detention was not prolonged and occurred in a noncoercive atmosphere outside appellant's residence. Officer Reynosa's questioning was not aggressive, confrontational, or accusatory. He simply told her that he "had gotten a call of a fight inside the house and [he] asked her what . . . happened." Reynosa did not use interrogation techniques to pressure appellant. He testified, "She was just telling me what happened." "[A] reasonable person in [appellant's] situation would have believed [s]he was free to leave at any time and to terminate the interview. . . . The [juvenile] court correctly denied [appellant's] motion to suppress [sic, exclude] the interview." (*People v. Kopatz, supra*, 61 Cal.4th at p. 82.)

Sufficiency of the Evidence

"The same standard governs review of the sufficiency of evidence in adult criminal cases and juvenile cases . . . ." (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) "In reviewing a criminal conviction challenged as lacking evidentiary support, '"the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."'

[Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 396.) "'A finding . . . based upon a reasonable inference . . . will not be set aside by an appellate court unless it appears that the inference was wholly irreconcilable with the evidence. [Citations.]' . . . '[W]hen the evidence gives rise to conflicting reasonable inferences, one of which supports the finding of the trial court, the trial court's finding is conclusive on appeal. [Citation.]' [Citations.]" (*Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 851; see also *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

"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.' [Citation.] 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.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. 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. [Citations.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.)

The issue is whether a reasonable trier of fact could find beyond a reasonable doubt that appellant used the butter knife "'in such a manner as to be capable of producing and likely to produce, death or great bodily injury.'" (*People v. Aguilar*, *supra*, 16 Cal.4th at pp. 1028-1029.) We conclude that a reasonable trier of fact could and did make the requisite finding.

Why does a person who assaults another person pick up an object to do so? The answer is apparent: to do greater harm than can be done with fists or feet. The victim of an assault with an object apprehends a greater degree of danger than a victim who is not assaulted with an object. 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.[2]

Here, sitting as trier of fact, and utilizing the power and ability to draw inferences from the evidence, the trial court concluded that the six-inch metal butter knife could be used to slice or stab, even though it was not designed for such. It was used in a manner "capable" of producing great bodily injury. This factual finding is not "wholly irreconcilable" with the evidence. (*Phillips v. Campbell, supra*, 2 Cal.App.5th at p. 851.) This appeal "turns" on this factual finding.

It matters not that the victim was able to fend off great bodily injury with her blanket. This self defense does not negate appellant's assault. Similarly, that appellant was not adept at using a knife does not inure to her benefit. She could have easily inflicted great bodily injury with this metal butter

---

[2] There is a historical exception to this observation. When Abraham Lincoln was accosted by a detractor, his bodyguard of tremendous physical strength, Ward Hill Lamon, knocked the assailant unconscious. He did this with a single blow to the head with his fist. Lincoln reportedly told Lamon that in the future, he should give the victim a chance: "Hereafter, when you have occasion to strike a man, don't hit him with your fist! Strike him with a club or crowbar or something that won't kill him."

knife and just as easily have committed mayhem upon the victim's face. The trial court expressly found that it was only "lucky" that there were no injuries.

In *People v. McCoy, supra*, 25 Cal.2d 177, our Supreme Court quoted with approval the Court of Appeal opinion in *People v. Raleigh* (1932) 128 Cal.App. 105, which said, "When it appears . . . that [such] an instrumentality . . . is capable of being used in a 'dangerous or deadly' manner, and it may be fairly inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon should the circumstances require, we believe that its character as a 'dangerous or deadly weapon' may be thus established, at least for the purposes of that occasion." (*Id.* at pp. 108-109; see also *People v. Graham* (1969) 71 Cal.2d 303, 328.)

As indicated, we part company with the opinion of *In re Brandon T., supra*, 191 Cal.App.4th 1491. The attorney general submits, and we agree, that this case was "wrongly decided." This opinion has the earmarks of impermissible reweighing of the evidence. There, the appellate court drew inferences away from the factual finding under review. The defendant slashed at the victim's face and neck with a butter knife and used sufficient force to break the knife. (*Id.* at p. 1497.) Even from the bare recital of facts, it is apparent that the butter knife was "used in a manner so as to be capable" of producing great bodily injury. That it broke during the assault preventing further stabbing should not inure to the defendant's benefit. The brutality of the attack in *In re Brandon T.* should not be minimized with hindsight.

The extent of the injuries, or lack of them, is relevant but not determinative. (*People v. Aguilar, supra*, 16 Cal.4th at p.

1028.) The *In re Brandon T.* opinion gives undue emphasis to the lack of injuries. The fallacy of this focus is easily shown by the typical assault with a deadly weapon with a firearm when the defendant has poor aim. (See, e.g., *People v. Bradford* (1976) 17 Cal.3d 8, 20.)

Disposition

The orders appealed from are affirmed.

CERTIFIED FOR PUBLICATION.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Brian J. Back, Judge

Superior Court County of Ventura

Donna Ford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Michael J. Wise, Deputy Attorney General, for Plaintiff and Respondent.