IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

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

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

APPELLANT'S SUPPLEMENTAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATE STATUTES

Penal Code Sections:

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

INTRODUCTION

On July 17, 2018, the Court of Appeal, Fourth District, Division Two, decided *People v. Koback* (2018) 25 Cal.App.5th 323 ("*Koback*"). In *Koback*, the court considered an issue very similar to the issue presented in the current case, centered around whether substantial evidence supported an assault with a deadly weapon conviction based on the defendant's use of a non-inherently dangerous weapon. There, the object was a car key. The majority held that the evidence was sufficient to support the conviction because the defendant used the key in such a way that it was capable of producing great bodily harm. Justice Slough dissented.

As discussed below, the dissenting opinion correctly interpreted the law on this issue. The analysis employed therein should be adopted by this Court, and it demonstrates clearly why the conviction in the current case cannot stand.

ARGUMENT

I. THE COURT SHOULD ADOPT THE REASONING SET FORTH IN JUSTICE SLOUGH'S DISSENT IN *PEOPLE V. KOBACK* (2018) 25 CAL.APP.5TH 323, AND THE REASONING THEREIN DICTATES REVERSAL IN THIS CASE

A. The Facts of *Koback*

In *Koback*, the defendant stole a set of car keys from a rental company. When confronted by three employees, defendant told them to back off or he would "fuck" them up. He then walked across the street and the employees followed him, again demanding the keys. Defendant made a fist around one of the key fobs, so that the ignition portion was sticking out, and lunged at one of the employees (Agustin) while swiping at his torso. The key did not make contact. Agustin testified that he was within arm's reach of the defendant but did not get hit because another employee (Arthur) pulled him back. (*Id.* at p. 325-26, 327-28.) He stated that the defendant swung the key "with force." (*Id.* at p. 328.)

Defendant jumped a fence and fled. Police officers arrived and pursued him, subduing him after a struggle. (*Id.* at p. 328.)

B. The Majority Opinion

The majority found that the key was not an inherently deadly weapon, and then discussed Penal Code section 245, subdivision (a)(1)

("section 245(a)(1)") and the case law applying thereto.[1] (*Id.* at pp. 329-30.) The court ultimately found sufficient evidence to support an assault with a deadly weapon conviction because the defendant swung the car key at the employee's torso "with force," the employee was standing within arm's reach of the defendant, and Agustin likely would have been struck if Arthur had not pulled him back. (*Id.* at p. 330-31.) The court also found nothing in the record "to suggest that the defendant would not have continued to swing the car key at Agustin if he and the other men had not backed off, or that defendant would only have swung at Agustin's torso and would not have swung for his face or neck." (*Id.* at p. 331.)

The court went on to find that the case was similar to *People v. Simons* (1996) 42 Cal.App.4th 1100 ("*Simons*"). (*Id.* at p. 331.) In *Simons*, the defendant held several police officers at bay with a screwdriver. (*Id.* at p. 1107.) After the officers instructed him to drop the tool, the defendant flailed it about while urging the officers to shoot him. The court there found sufficient evidence to sustain a conviction of exhibiting a deadly weapon to prevent arrest pursuant to Penal Code section 417.8, finding that "[t]he evidence clearly demonstrated that the screwdriver was capable of being used as a deadly weapon and that defendant intended to use it as such if the circumstances required." (*Simons*, *supra*, 42 Cal.App.4th at p. 1107.) The *Koback* majority also noted that *Simons* has been cited in other assault with a deadly weapons cases, including *People v. Page* (2004) 123 Cal.App.4th 1466 and *In re D.T.* (2015) 237 Cal.App.4th 693.

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[1] Because the law applicable to this issue is set forth in detail in the opening and reply briefs on the merits, appellant does not recite it again herein, apart from referencing specifically pertinent cases where necessary.

C. The Dissent's Analysis Is Correct, And Reversal Is Required Pursuant Thereto

In her dissenting opinion, Justice Slough disagreed with the majority, finding that it reached its "holding only by leaving the record and engaging in gross speculation," and that it improperly affirmed "the conviction based on what *could have happened* had the defendant . . . not fled but instead continued swiping the key at the victim and perhaps, possibly, aimed for his face or neck." (*Koback*, *supra*, 25 Cal.App.5th at p. 333-34 (dis. opn. of Slough, J.), emphasis in original.) The dissent found the majority's conclusion to be at odds with this Court's established precedent as set forth in *People v. Aguilar* (1997) 16 Cal.4th 1023, 1029 ("*Aguilar*"), which holds that "where the charged offense is assault with a typically innocuous object alleged to be deadly as used (an as-used aggravated assault)," the prosecution must "prove the defendant used the object with force '*likely to produce* death or great bodily injury' (the force-used test)." (*Id.* at p. 334, quoting *Aguilar*, *supra*, at p. 1029.) The dissent also explained why the majority's reliance on *Simons* was misplaced. As discussed herein, the *Koback* dissent set forth the correct legal analysis, and it directs reversal in the current case.

1) Assaults With Inherently Deadly Weapons Versus Weapons That Are Made Deadly Only By How They Were Actually Used

In her dissent, Justice Slough explained that an assault is an attempted battery, and the more serious crime of aggravated assault can be committed in various ways, including: "(1) by means of force likely to produce great bodily injury, (2) by means of an *inherently* deadly weapon, and (3) by means of an object not designed to be a weapon but alleged to be a deadly weapon *as used*." (*Koback*, *supra*, 25 Cal.App.5th at p. 335 (dis. opn. of Slough, J.), emphasis in original.) With respect to options one and

three, there must be a showing of the force the defendant employed. (*Ibid.*, citing *Aguilar, supra*, 16 Cal.4th at p. 1035.) When using an inherently deadly weapon, however, no force is required, and simply threatening injury on another is sufficient to sustain a conviction. (*Id.* at pp. 335-36 (dis. opn. of Slough, J.).)

The issue of how to evaluate an assault with a non-inherently deadly object (option three) was addressed by this Court in *Aguilar*, which held that the test "is whether it was 'used in such a manner as to be capable of producing *and likely to produce*, death or great bodily injury." (*Id.* at p. 336 (dis. opn. of Slough, J.), emphasis in original, quoting *Aguilar, supra*, 16 Cal.4th at pp. 1028-1029.) The first part of this test, addressing capability, "focuses on the nature of the object (is it sharp, heavy, blunt?) and whether it is possible to cause serious injury with it." (*Id.* at p. 336 (dis. opn. of Slough, J.).) "The second part of the test, likelihood, focuses on how the defendant *actually* used the object." (*Ibid.*, citing *Aguilar, supra*, 16 Cal.4th at p. 1035, emphasis in original.) "In other words," Justice Slough explained, "the capability prong turns on how someone could use the object to injure and can therefore be based on speculation. By contrast, the likelihood prong depends on how *the defendant did* use the object and therefore must be based on evidence in the record. It is the difference, for example, of swinging a nine iron at someone's head, or shoving someone in the shoulder with it. The club is certainly capable of causing severe injury, but only in the former example is it also likely to cause severe injury as used." (*Id.* at p. 336 (dis. opn. of Slough, J.), emphasis in original.)

In other words, for normally non-deadly objects, the court "must look to the specifics to determine whether the defendant's actions were culpable enough to warrant the harsher punishment aggravated assault carries," and that "additional, factual analysis is clear cut: Was the force

with which the defendant used the object likely to produce death or great bodily injury?" (*Id.* at p. 337 (dis. opn. of Slough, J.).)

2) The Record Here Contains No Evidence Of Force Likely To Cause Great Bodily Injury

Just as was the case in *Koback*, the question of whether a butter knife is merely *capable* of causing great injury is not in dispute here. The pertinent question is whether the butter knife, *as actually used by appellant*, was *likely* to do so. As set forth in detail in the opening and reply briefs on the merits, the record here is devoid of evidence demonstrating such likelihood. As the dissenting opinion in *Koback* points out "*some* force is not the same as force *likely to produce* death or great bodily injury," and neither was the *little* force described by the victim in this case. (*Koback*, *supra*, 25 Cal.App.5th at p. 334 (dis. opn. of Slough, J.), emphasis in original, citing *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1087 ("*Beasley*"); RT 25, 34.)

Justice Slough also noted that the majority in *Koback* improperly relied on hypothetical facts to find support for the conviction that the record lacked; for example, when it stated that there was nothing "to suggest defendant would not have continued to swing the car key at [the victim] if he and the other men had not backed off, or that defendant would only have swung at [the victim's] torso and would not have swung for his face or neck." (*Id.* at p. 338.) This is very similar to the improper speculation engaged in by the Court of Appeal in this case, when it concluded that appellant "*could have* inflicted great bodily injury . . . and *just as easily have* committed mayhem upon the victim's face." (*In re B.M.* (2017) 10 Cal.App.5th 1292, 1299, emphasis added.) As Justice Slough pointed out, such "speculation is completely irrelevant to the likelihood, or force-used, analysis. It demonstrates only that a key[, or a butter knife,] *can* be used to

injure." (*Koback*, *supra*, 25 Cal.App.5th at p. 338 (dis. opn. of Slough, J.), emphasis in original.)

In her dissent, Justice Slough also found that *Beasley*, *supra,* 105 Cal.App.4th 1078 directed reversal in that case, just as it does here, because *Beasley* demonstrates that the type of speculation in which the courts have engaged is improper. (*Koback*, *supra*, 25 Cal.App.5th at p. 335 (dis. opn. of Slough, J.).) For "[i]f it were permissible to make up stories about how the object was used, the court would have done so in *Beasley*, upholding the conviction by reasoning there was 'nothing in the record to suggest defendant would not have' continued to beat the victim with the broomstick and, say, poked her in the eye with it." (*Id.* at p. 338.) That is not what the court in *Beasley* did, however, because such speculative analysis is improper.

As Justice Slough explained, "[i]t should go without saying an appellate court may not fabricate the evidence to support a conviction when conducting a substantial evidence review," but that is precisely what the Court of Appeal has done here with its "conjecture about what might have happened had [appellant] continued swinging" or directed the butter knife directly at the victim's face. (*Koback*, *supra*, 25 Cal.App.5th at p. 340 (dis. opn. of Slough, J.).)

Justice Slough also acknowledged that in cases where the defendant does not make contact, "some form of speculation about what might have (but didn't) happen is required to determine whether the defendant used force "likely to produce" great bodily harm under *Aguilar*. (*Id.* at p. 340.) "However," she explained, "courts should limit their speculation to identifying the risk of injury posed by the defendant's actual conduct. They should not engage in speculation about what additional actions the defendant could have taken that would have increased the risk of injury." (*Ibid.*) "Simply put, it is appropriate to speculate about hypothetical

injuries from real actions . . ., but it is completely improper to speculate about hypothetical injuries from hypothetical actions," as the lower courts did here. (*Id.* at p. 341, citing *In re D.T.*, *supra*, 237 Cal.App.4th 693.)

In sum, the *Koback* dissent's analysis under section 245(a)(1), regarding the required showing of force and the impropriety of relying on hypothetical facts with no support in the record, is correct, and it demonstrates clearly why the lower courts' analyses in this case were improper, and why the evidence was insufficient to support an aggravated assault charge.

3) *People v. Simons* (1996) 42 Cal.App.4th 1100 is Inapplicable

Justice Slough also correctly sets forth why *Simons*, *supra*, 42 Cal.App.4th 1100, a case addressing the offense of exhibiting a deadly weapon to evade arrest, does not govern here. (*Koback*, *supra*, 25 Cal.App.5th at p. 341-43 (dis. opn. of Slough, J.).) As Justice Slough explains, "[w]hat matters in a Penal Code section 417.8 case is the defendant's intent – that is, whether he or she brandished a dangerous object at a police officer as a means of evading arrest." (*Id.* at p. 341.) It therefore "punishes those who would exhibit a dangerous object during an arrest with the intent to use it if need be. As-used aggravated assaults, by contrast, depend entirely on the type of force used. A person is guilty of as-used aggravated assault only if they wield the typically innocuous object 'in a manner likely to' cause serious harm." (*Ibid.*, quoting *Aguilar, supra*, 16 Cal.4th at p. 1029.) "*Simons* therefore has no bearing on an as-used assault case like this one. The test we must apply is the one in *Aguilar*." (*Id.* at p. 341.)[2]

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[2] The dissent also points out that *People v. Page*'s reliance on *Simons* was also misplaced, but in that case the court's analysis still led to a proper

D. Conclusion

In sum, here the lower courts "hypothesize[d] factual scenarios not supported by the record to reach [their] result[s]." (*Koback*, *supra*, 25 Cal.App.5th at p. 343 (dis. opn. of Slough, J.).) Appellant "did not continue swiping the [butter knife] at the victim and did not aim for [her] face or neck. [She] swung [a few times] at [her feet] from a few feet away. Because the record contains no evidence [she] did so with force "likely to produce" death or great bodily injury, [she] should not be guilty of assault with a deadly weapon." (*Ibid.*)

In addition, as Justice Slough explained, the erroneous conviction in this case is not harmless. "By upholding an as-used aggravated assault conviction based on a [butter knife's] capacity to inflict injury and [the court's] conjecture about what might have happened had things gone differently, [this case] blurs the important distinction between cases involving inherently deadly weapons and those involving objects alleged to be deadly as used." (*Koback*, *supra*, 25 Cal.App.5th at p. 334 (dis. opn. of Slough, J.).) "As precedent, [this] will lead to over-prosecution of simple assaults, treating people who use innocuous objects without injury as if they are just as culpable as people who wield weapons designed to inflict deadly injury. It is critical that we maintain the distinction, for a fool with a [butter knife] is much less dangerous than a fool with a dagger." (*Ibid.*)

CONCLUSION

For the foregoing reasons, and those set forth in the opening and reply briefs on the merits, this Court should hold that the butter knife as

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conclusion because the assault at issue would have fulfilled the *Aguilar* requirements. (See *Koback*, *supra*, 25 Cal.App.5th at p. 341-42 (dis. opn. of Slough, J.).)

used in this case was not a deadly weapon, and reverse appellant's adjudication.

CERTIFICATION OF WORD COUNT

I, Elizabeth K. Horowitz, hereby certify that, according to the computer program used to prepare this document, Appellant's Supplemental Brief on the Merits, contains 2,589 words.

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

Executed September 22, 2018, at Tulsa, Oklahoma.

_____

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Case Number: S242153

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

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Tulsa, Oklahoma, on September 22, 2018.

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

Executed on September 22, 2018, at Tulsa, Oklahoma.

Elizabeth K. Horowitz