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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID AGUIRRE, Defendant and Appellant.	E077679 (Super. Ct. No. FSB21000510) OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part, reversed in part with directions.

Michael C. Sampson, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland , Assistant Attorney General, Steve Oetting and Michael Dolida, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant and appellant David Aguirre broke into a private residence through a bedroom window while brandishing a knife, ingested one of the occupant's prescription medication, then broke furniture and punched holes in the wall. He was charged and convicted of one count of felony first degree burglary (Pen. Code, § 459)[1] and one count of felony vandalism (§ 594, subd. (b)(1)). The jury found true that defendant used a deadly and dangerous weapon (a knife) during the commission of the burglary and that another person, other than an accomplice, was present in the home at the time (§ 12022, subd. (b)(1)). The trial court sentenced him to seven years.

Defendant contends (1) insufficient evidence supports the jury's finding that he used a deadly weapon, (2) the trial court erroneously instructed the jury on use of a deadly or dangerous weapon, (3) his trial counsel was ineffective for failing to object to the prosecutor's misstatement of the law, and (4) the case must be remanded for resentencing under recently enacted legislation. We affirm in part, reverse in part, and remand.

[1] All further statutory references are to the Penal Code.

II.

FACTUAL AND PROCEDURAL BACKGROUND

McKenna S. and her fiancé, Jordan D., lived together in a duplex. Around 7:00 p.m., they were sitting on the couch and heard tires screeching outside, so Jordan went into the bedroom nearest to the street. Before he entered the room, he heard glass shattering. As he entered the bedroom, he saw the curtains, the dresser in front of the window, and all of the items on the dress come "flying" at him. He saw movement behind the curtains and realized defendant was breaking in through the bedroom window.

Jordan then saw defendant's hand holding something through the curtains and "fighting" to get in to the apartment. Jordan did not know what the object was, but thought it was a knife or a gun because part of it was black and another part was shiny, metal, and pointed. Jordan pushed the dresser and pinned defendant against it and the wall. While doing so, he saw the curtain "come at" him. Jordan decided to get McKenna and leave the house.

When they got outside, they called 911. A neighbor and Jordan tried to get defendant out of the house. Before the police arrived, defendant ingested McKenna's prescription migraine medication, broke furniture, put holes in the drywall, and got blood all over. Defendant eventually tried to run away and threw a knife on the ground as he ran, but Jordan and the neighbor tackled him to the ground. Law enforcement arrived and arrested defendant.

III.

DISCUSSION

A. *Jury's Finding that Defendant Used a Deadly or Dangerous Weapon*

Defendant does not challenge the jury's finding that the knife was a deadly or dangerous weapon. He argues, however, that there was insufficient evidence for the jury to find that he used it in a manner likely to cause death or great bodily injury. We disagree.

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Substantial evidence supports the jury's finding that defendant used the knife in a manner capable and likely to cause death or great bodily injury. When defendant broke the window to gain entrance into the victims' residence, he was holding a knife. He

brandished the knife while thrashing at the curtains to gain entrance, and the knife came "fighting its way in" through the split in the curtains. The curtains "c[a]me at" Jordan more than once. After realizing defendant was forcibly entering the house with a knife, Jordan decided to get McKenna and flee. From this evidence, the jury reasonably found that defendant used the knife while committing the burglary. (See *People v. Beck and Cruz* (2019) 8 Cal.5th 548, 630 [person "uses" a deadly or dangerous weapon to commit a felony by """intentionally displaying""" it """in a menacing manner"""]; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1198, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216 [jury may find defendant used weapon to facilitate felony if defendant deliberately brandishes weapon in apparent attempt to intimidate victim]; *In re Raymundo M.* (2020) 52 Cal.App.5th 78, 88 [minor used knife as deadly weapon by brandishing it from 10-12 feet away then lunging at victim, who immediately ran away].)

Defendant argues otherwise, relying on *In re B.M.* (2018) 6 Cal.5th 528 and *In re Brandon T.* (2011) 191 Cal.App.4th 1491, but both cases are distinguishable. In *In re B.M.*, the minor stabbed at her sister's blanket-covered legs with a butter knife with "moderate pressure." (*In re B.M.*, *supra*, at p. 536.) The butter knife did not pierce the blanket or cause her sister any serious injury. (*Ibid.*) Our Supreme Court therefore concluded it was "questionable" that the butter knife was even "capable of causing great bodily injury" and that there was no evidence that it was "likely to do so" given the

dullness of the blade, the limited pressure the minor applied, the victim's legs were covered by a blanket, and the victim suffered no injuries. (*Id.* at pp. 539.)

The minor in *In re Brandon T.*, *supra*, 191 Cal.App.4th 1491, also used a butter knife incapable of causing serious injury. The minor struck the victim with the knife with enough pressure to break the handle off the knife, but left only a "'small scratch'" and "'welts'" on the victim because the knife "wouldn't cut." (*Id.* at p. 1497.) Because the butter knife could not have produced a stabbing injury, the *Brandon T.* court held that it could not have been used as a deadly or dangerous weapon. (*Ibid.*)

Defendant did not use a butter knife like the minors in *In re B.M.* and *In re Brandon T.* He used a four-inch-long metal knife. Nothing in the record suggests that the knife would have broken or caused Jordan only negligible injuries had defendant made contact. And the fact that defendant did not successfully stab Jordan does not mean he did not use the knife in a manner capable and likely to produce great bodily injury or death. (See *In re Raymundo M.*, *supra*, 52 Cal.App.5th at p. 88; see also *In re B.M.*, *supra*, 6 Cal.5th at p. 537 ["an aggressor should not receive the benefit of a potential victim fortuitously taking a defensive measure or being removed from harm's way once an assault is already underway"].)

B. *Instructional Error*

As part of its instructions on the deadly or dangerous weapon enhancement allegation, the trial court instructed the jury with CALCRIM No. 3145, which provided in part, "[a] deadly or dangerous weapon is any object, instrument, or weapon that is

inherently deadly or dangerous, or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." The instruction told the jury that "[i]n deciding whether an object is a deadly or dangerous weapon, consider all the surrounding circumstances, including when and where the object was possessed."

Defendant contends, the People concede, and we agree that the instruction's language about inherently dangerous weapons was erroneous under *People v. Aledamat* (2019) 8 Cal.5th 1 (*Aledamat*), which held that a knife is not an inherently deadly weapon and it is instructional error to instruct the jury on inherently deadly weapons if the defendant did not use an inherently deadly weapon. The People argue, however, that defendant forfeited any argument that CALCRIM No. 3145 was erroneous by failing to object and, in any event, the error was harmless beyond a reasonable doubt. We disagree on both points.

A defendant generally forfeits any challenge to a jury instruction by failing to object so long as the instruction is legally correct and applicable under the facts of the case. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) But, as the People acknowledge, the trial court erroneously used CALCRIM No. 3145's language about inherently dangerous weapons because it was inapplicable given that a knife is not an inherently dangerous weapon. (*Aledamat*, *supra*, 8 Cal.5th at p. 6.) Defendant may therefore advance his challenge to the instruction on appeal despite not objecting in the trial court. (See *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7 [defendant did not forfeit argument that instruction was legally incorrect].) In any event, "[i]nstructions regarding

the elements of the crime affect the substantial rights of the defendant, thus requiring no objection for appellate review." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

In *Aledamat*, *supra*, 8 Cal.5th 1, the defendant assaulted the victim with a deadly weapon by thrusting a box cutter at the victim from a few feet away while saying, "'I'll kill you.'" (*Id.* at p. 4.) The box cutter was not an inherently deadly weapon, yet the trial court instructed the jury with CALCRIM No. 875, which defined "'a deadly weapon' as 'any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or . . . great bodily injury.'" (*Ibid.*)

Our Supreme Court held the trial court erred in doing so, but held that the error was harmless beyond a reasonable doubt for several reasons. (*Aledamat*, *supra*, 8 Cal.5th at p. 6.) First, the *Aledamat* court noted that CALCRIM No. 875 juxtaposed "'inherently deadly'" with "'used in such a way that it is capable of causing [injury] and likely to cause death or . . . great bodily injury,'" and therefore "'at least indicate[d] what the "inherently deadly" language was driving at.'" (*Id.* at pp. 13-14, 20.)

Our Supreme Court also determined that "the jury necessarily found the following: (1) defendant did an act with a deadly weapon (either inherently or as used) that by its nature would directly and probably result in the application of force; (2) defendant was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; and (3) defendant had the present ability to apply force with a deadly weapon to a person."

(*Aledamat*, *supra*, 8 Cal.5th at p. 15.) The *Aledamat* court concluded that "'[n]o reasonable jury that made all of these findings could have failed to find' that defendant used the box cutter in a way that is capable of causing or likely to cause death or great bodily injury." (*Ibid.*, citing *People v. Merritt* (2017) 2 Cal.5th 819, 832.)

The *Aledemat* court also considered another jury instruction, a portion of which was given here, that directed the jury to "'consider all of the surrounding circumstances including when and where the object was possessed and any other evidence that indicates whether the object would be used for a dangerous rather than a harmless purpose.'" (*Aledamat*, *supra*, 8 Cal.5th at p. 14.)[2] Given this instruction, our Supreme Court found that it was unlikely the jury improperly relied on the "inherently deadly" language of CALCRIM No. 875. (*Ibid.*) The court reasoned that the jury would have understood the box cutter the *Aledemat* defendant used to be deadly "in the colloquial sense of the term—i.e., readily capable of inflicting deadly harm—and [found that] defendant used it as a weapon." (*Id.* at p. 15.)

Next, the *Aledamat* court observed that in closing argument "no one ever suggested to the jury that there were two separate ways it could decide whether the box cutter was a deadly weapon. Defense counsel argued that defendant did not use the box cutter in a way that would probably result in the application of force, that is, that defendant did not assault the victim at all—an argument the jury necessarily rejected

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[2] The version of CALCRIM No. 3145 given here did not include the language "and any other evidence that indicates whether the object would be used for a dangerous rather than a harmless purpose."

when it found defendant guilty of that crime. But counsel never argued that, if he did assault the victim with the box cutter, the box cutter was not a deadly weapon." (*Aledamat*, *supra*, 8 Cal.5th at p. 14.)

Similarly, the prosecutor here never *explicitly* argued the object defendant used was an inherently deadly weapon or that there were "two separate ways [the jury] could decide whether the [object] was a deadly weapon." (*Aledamat*, *supra*, 8 Cal.5th at p. 14.) But the prosecutor's limited argument on the issue suggested that the knife was an inherently deadly weapon. Shortly after beginning her closing argument, the prosecutor said that "The knife that was in [defendant's] hand out, displayed, and ready to use." The prosecutor then outlined her understanding of the ensuing burglary and the victims' response.

The next time the prosecutor mentions defendant's use of knife, she states, "the first thing [Jordan] sees is a weapon. It is not sheathed. It is not in a pocket. It is out. It is wielded. [¶] When Jordan pushes against the dresser, the defendant's arm comes out with a knife." Later, when discussing the "personal use" enhancement allegation, the prosecutor argued: "The defendant came in with a knife. The first thing he sees, when Jordan pushes that dresser against the defendant, the defendant's arm reached out and he has the knife." The prosecutor then stated, "What else are you doing when you break into somebody's house and climb through the window with a knife in your hand, and push that through the curtain first? What else are you doing?" The next and last time the prosecutor mentioned the knife, she argued to the jury that defendant acted intentionally

(a necessary element for count 1) by committing a wrongful act. The prosecutor asked the jury, "What else is a wrongful act if not forcing your way into somebody's house with a knife?"

Taking all of the prosecutor's arguments about the knife together, a rational jury could conclude that the prosecutor erroneously asserted that defendant's mere possession of a knife while committing the burglary meant that he committed the offense with deadly weapon irrespective of how he used the knife. The jury therefore may have relied on the prosecutor's erroneous argument to improperly find that the knife defendant held while breaking into the victims' house was inherently deadly, and incorrectly based its verdict on that finding. Put another way, it is plausible that the jury credited the prosecutor's suggestion that the presence of the knife during the burglary was sufficient, without more, to find it was committed with a deadly weapon.

As a result, we cannot say that the instructional error was harmless beyond a reasonable doubt. (See *Aledamat*, *supra*, 8 Cal.5th at p. 14 [instructional error was harmless beyond a reasonable doubt because "no one ever suggested to the jury that there were two separate ways it could decide whether the box cutter was a deadly weapon"].) We therefore reverse the jury's true finding on the deadly weapon use enhancement.

C. *Prosecutorial Misconduct*

In his closing argument, defense counsel argued a jury instruction defining reasonable doubt as "an abiding conviction" was unhelpful. Defense counsel argued, "[t]he judge informed you that beyond a reasonable doubt is proof that leaves you with an

abiding conviction that the charges are true. [¶] Now for me, personally, that doesn't really provide a lot of useful information, that definition. Because what it does is it sort of punts the definition of beyond reasonable doubt off to the phrase, abiding conviction. [¶] So then we have to say, well, what is an abiding conviction? I like to think that an abiding conviction is something that you make sure of, not just today, not just tomorrow, not just next week or next month, or even next year; but something that you'll be sure of for very, very long time, that you can be absolutely positive of."

In her rebuttal, the prosecutor responded to defense counsel's argument as follows: "Ladies and gentlemen, defense talks about reasonable doubt. And what the law says, reasonable doubt is an abiding conviction. That's correct. And defense said what is it he wants you to think that it's something that you are sure of for a long time, something that you are positive of. Nobody is going to come back and poll you two weeks from now, six months from now, two years from now. It is an abiding conviction. And a conviction is a feeling. [¶] Here is what reasonable doubt is not: It is not beyond all possibilities. It is not beyond all what ifs. So that is great. And defense asks a lot of questions, a lot of which I just got up and answered for you. It is not beyond all of the ifs. It is not beyond all doubt. And it is not beyond a shadow of a doubt. It is not beyond a scientific certainty. It is just being reasonable, ladies and gentlemen."

In defendant's view, the prosecutor made three misstatements of law: (1) an "abiding conviction" is a "feeling" that the jurors need not be "sure of for a long time," (2) reasonable doubt "is just being reasonable," and (3) the jury could convict defendant

if the prosecution's evidence "reasonably leads" to guilt. Defendant thus contends his trial counsel was ineffective for failing to object to prosecutor's allegedly improper arguments.

Even if defendant is correct, he fails to show that the prosecutor's arguments prejudiced him. Defendant does not dispute that the trial court properly gave CALCRIM No. 220, which correctly instructed the jury on reasonable doubt and the prosecution's burden. The trial court also instructed the jury that an attorney's argument is not evidence and that they had to convict defendant based only on the evidence. We presume the jury followed these instructions, which cured any possible prejudice from the prosecutor's brief, allegedly improper rebuttal argument. (See *People v. Johnsen* (2021) 10 Cal.5th 1116, 1167.)

D. *Resentencing*

The trial court sentenced defendant to the upper term for the burglary conviction. Defendant contends that the matter must be remanded for resentencing under recently enacted Senate Bill No. 567, which makes the middle term the presumptive term, and the trial court erroneously imposed the upper term irrespective of Senate Bill No. 567.

Because we reverse the true finding on the deadly or dangerous weapon allegation due to instructional error, the People may retry the allegation on remand. (See *People v. Hallock* (1989) 208 Cal.App.3d 595, 607 [conviction reversed for instructional error may be retried if supported by sufficient evidence].) Even if the People do not elect to do so, however, remanding for a full resentencing is appropriate. (See *People v. Buycks* (2018)

5 Cal.5th 857, 893.) We therefore remand the matter to allow the prosecution to retry defendant for the deadly or dangerous weapon use allegation and resentencing, as appropriate.

IV.

DISPOSITION

The judgment of conviction on counts 1 and 2 is affirmed. The jury's true finding on the deadly or dangerous weapon use allegation is reversed. The matter is remanded for the People to retry defendant on that allegation, if the People elect to do so, and for resentencing after the retrial. If the People decline to do so, then the trial court is directed to resentence defendant accordingly. In all other respects, the judgment is affirmed.

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CODRINGTON
J.

We concur:

MILLER
Acting P. J.

RAPHAEL
J.