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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ERNESTINE CHANEY, Defendant and Appellant.	B277238 (Los Angeles County Super. Ct. No. MA068728)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joel L. Lofton, Judge. Affirmed.

Robert N. Treiman, 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, Stephanie C. Brenan and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Ernestine Chaney (Chaney) of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] after she attacked but did not injure her mother with a knife. She argues that the court erred by denying her motion for judgment of acquittal at the close of the People's case and that substantial evidence does not support the verdict. She also argues the court erred by instructing the jury with a pattern jury instruction on assault with a deadly weapon without modification and by failing to instruct the jury sua sponte on the misdemeanor crime of drawing or exhibiting a deadly weapon, other than a firearm, in a rude, angry, or threatening manner, commonly referred to as misdemeanor brandishing. She also contends her trial counsel provided ineffective assistance by failing to introduce portions of the transcript of the preliminary hearing that she now characterizes as "favorable" but were contrary to her defense at trial. Finally, regarding her sentence, Chaney argues the trial court abused its discretion by denying her probation.

We conclude that the trial court properly denied Chaney's motion for judgment of acquittal and that substantial evidence supports the verdict. We also find no error in the court's instructions to the jury, no ineffective assistance of counsel, and no abuse of discretion in denying Chaney probation. Therefore, we affirm.

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1 Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Chaney Attacks Her Mother*

Chaney moved from Oklahoma to California in February 2016 to live with and help care for her mother, Era Chaney (Era), who uses a wheelchair and receives dialysis treatment. In May 2016 Chaney's father died in Oklahoma, and Chaney could not afford to attend his funeral. Several days after her father's death, Chaney started drinking vodka and tequila at 10:00 a.m. She fought with her mother most of the day about Chaney's father and about whether Chaney and Era were good mothers in light of their alcohol use.

The argument between Chaney and her mother escalated in the afternoon. The two women got "closer and closer" as they criticized each other, until Era's boyfriend, Darryl Conway, intervened and tried to separate them. Conway said Chaney was pushing him, kicking him, and flailing her arms. He said he tried unsuccessfully for 30 minutes to "walk and talk" with Chaney to get her to "sit down and chill." By 4:00 p.m. the situation was "out of control," Chaney "socked" Conway, and Conway called 911. He told the 911 operator that Chaney was "jumping on" Era and that, without the police, "[s]omebody is gonna get killed." The 911 operator asked Conway if Chaney had a weapon, but

Conway did not directly respond to the operator's question.[2]

While Conway was calling 911, Chaney's 19-year-old daughter was spraying mace or pepper spray in the house to try to stop the argument. Chaney ran outside, where Conway and Chaney's son "pinned" her down until law enforcement arrived.

B. *Deputy Tanner Interviews the Witnesses*

Chaney was outside her mother's house when the Sheriff's deputies arrived. Deputy Benjamin Tanner placed Chaney in handcuffs and put her in the back of a patrol car. Deputy Tanner interviewed Era, whom he described as flustered and distracted. Era told Deputy Tanner that 10 to 20 minutes before he arrived, Chaney had grabbed a kitchen knife and "swung it at her . . . trying to stab her." Era said that she had to move out of the way to avoid being stabbed and that the knife came within a

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[2] The transcript of Conway's 911 call read:

"[Dispatcher]: Are there any weapons?

"[Conway]: Look man. Are you going to send the police or are you going to ask me all these goddamn questions?

"[Dispatcher]: As soon as I get the answers to the questions that I'm asking.

"[Conway]: [Others speaking in the background] Yes. Yes. Yes. Yes.

"[Dispatcher]: What weapons are there?

"[Conway]: Yea [speaking to someone in the house]. They coming . . . . Yea they coming . . . . Yea they coming.

"[Unintelligible chatter from several voices]

"[Unidentified]: Come on open this fuckin' door.

"[Conway]: Hello.

"[Dispatcher]: Yes."

foot of her.[3] Era told Deputy Tanner that Chaney grabbed the knife, raised it over her head, and swung it at her "kind of like a downward motion." Era said that, "when the knife came out," Conway intervened to try to calm Chaney, and Chaney eventually put the knife down. Deputy Tanner asked Era where the knife was, and she pointed to a knife sitting beside a kitchen cabinet. Era also told Deputy Tanner that Chaney threatened to rip out a dialysis tube from her chest.

Conway told Deputy Tanner a similar story. Conway said Chaney had been drinking and became upset, and he had been "trying to calm her down all day." He told Deputy Tanner he saw Chaney swing a knife at her mother, and he stepped in to separate them. Conway said he could not recall whether he or someone else pulled the knife away from Chaney. Conway also heard Chaney threaten to rip the dialysis tube out of her mother's chest.

Both Era and Conway also told Deputy Tanner they wanted Chaney to get help for her drinking problem. Era said she did not want to press charges against Chaney, but Deputy Tanner told Era he was going to arrest Chaney "because of the crime she committed."

Deputy Tanner took Chaney to the station for booking without retrieving any knife from Era's home. An hour later he returned and took the knife from the kitchen that Era had pointed out to him earlier. Deputy Tanner did not recall who gave him the knife.

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[3] At trial, the prosecutor asked Deputy Tanner whether Era told him how close the knife got to her. Deputy Tanner testified "it was within a foot and the neck up too."

C. *The Jury Convicts Chaney*

The People charged Chaney with one count of assault with a deadly weapon. (§ 245, subd. (a)(1).) At trial, Conway and Era testified that Chaney never used a knife during the argument with Era and that they had lied to Deputy Tanner so he would take Chaney to jail and "let her sleep it off." Conway stated Deputy Tanner told him, "We can't take [Chaney] because she's at . . . home. She's not in the street. All we can do is give her a ticket. We can't take her unless she has a weapon." Conway testified at trial, "She didn't have no knife. I told the officer that she had a knife so that—so that they would take her and put her in the drunk tank for overnight and let her come home 'cuz I was tired. I wanted them to take her and let her sleep it off and let her go the next day. There wasn't no knife."

Era testified she had lied to Deputy Tanner because "the only way [she] could get [Chaney] arrested was to say she had a knife." She denied telling Deputy Tanner that Chaney raised the knife over her head and swung it at her. The prosecutor impeached Era with her testimony at the preliminary hearing that Chaney had a knife in her hand and raised it while Chaney was "[a]bout a[n] inch" away from her. The prosecutor also read Era's preliminary hearing testimony confirming that the knife Deputy Tanner retrieved from her house and photographed was "the knife [Chaney] was holding."

Chaney testified in her defense. She said she was upset on the day of the fight because of the responsibility weighing on her after her father's death. She admitted drinking a pint of alcohol earlier in the day, but said she had stopped drinking by 1:30 p.m. and was not drunk at 4:00 p.m. when the deputies arrived.

Chaney also admitted she had argued with her mother and had yelled and screamed for "some hours," but she denied having or swinging a knife during the argument. She also denied threatening to pull out her mother's dialysis tube, but she admitted she had threatened to do so on another occasion. She also admitted she had hit Conway in the face that day.

The jury convicted Chaney of assault with a deadly weapon. The trial court sentenced her to the lower term of two years in prison. Chaney timely appealed.

DISCUSSION

A. *Substantial Evidence Supports the Jury's Verdict*

Chaney contends substantial evidence does not support the verdict because the People did not prove she had the requisite intent for assault with a deadly weapon and because the People relied solely on Deputy Tanner's unreliable hearsay testimony to convict Chaney. The record, however, contains substantial evidence to support Chaney's conviction.

"When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] Our review must presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.) "'"Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury

to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict.'" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87; see *Zaragoza*, at p. 44 ["the relevant inquiry on appeal is whether, in light of all the evidence, '*any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt'"].)

1. *Assault is a General Intent Crime, Even If the Victim Is Not Harmed*

Chaney contends the People failed to prove she intended to assault her mother with a knife or had any intent beyond frightening her or acting recklessly. Chaney, however, misconstrues the intent required to prove assault.

Section 240 defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." "[S]ection 245, subdivision (a)(1) punishes 'an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury.'" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1026 (*Aguilar*), fn. and italics omitted.) "As used in 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.'" (*Aguilar*, at pp. 1028-1029; see *In re D.T.* (2015) 237

Cal.App.4th 693, 698; *People v. Brown* (2012) 210 Cal.App.4th 1, 7.)

In *People v. Williams* (2001) 26 Cal.4th 779 (*Williams*) the Supreme Court discussed the intent required to commit assault and assault with a deadly weapon. "In [*People v. Rocha* (1971) 3 Cal.3d 893, 899 (*Rocha*)], we held that assault does not require the specific 'intent to cause any particular injury [citation], to severely injure another, or to injure in the sense of inflicting bodily harm. . . . [Fns. omitted.]' Rather, assault required 'the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another.' (*Ibid.*) [¶] . . . In [*People v. Colantuono* (1994) 7 Cal.4th 206, 215], we noted that '*Rocha* accurately focused on the violent-injury-producing nature of the defendant's acts, rather than on a separate and independent intention to cause such injury' but may have left a 'measure of understandable analytical uncertainty.' [Citation.] Hoping to resolve this uncertainty, we reaffirmed that assault 'is a general intent crime'—and not a specific intent crime. [Citation.] 'The pivotal question is whether the defendant intended to commit an act likely to result in such physical force, not whether he or she intended a specific harm.' [Citation.] We also reiterated that "'[r]eckless conduct alone does not constitute a sufficient basis for assault or for battery even if the assault results in an injury to another.'"'"[4] (*Williams*, at pp. 784-785.)

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[4] The Supreme Court in *Williams* clarified that "recklessness" in this sense meant "a synonym for criminal negligence, rather than its more modern conception as a

The Supreme Court in *Williams* recognized that "the crime of assault has always focused on the nature of the act and not on the perpetrator's specific intent." (*Williams*, *supra*, 26 Cal.4th at p. 786.) The Supreme Court explained: "An assault occurs whenever "'[t]he next movement would, *at least to all appearance,* complete the battery.'" [Citation.] Thus, assault 'lies on a definitional . . . *continuum of conduct* that describes its essential relation to battery: An assault is an incipient or inchoate battery; a battery is a consummated assault.' [Citation.] As a result, a specific intent to injure is not an element of assault because the assaultive act, by its nature, subsumes such an intent." (*Ibid*.)

The Supreme Court further explained that "a defendant is only guilty of assault if he intends to commit an act 'which would be indictable [as a battery], if done, either from its own character or that of its natural and probable consequences.' [Citation.] Logically, a defendant cannot have such an intent unless he actually knows those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another, i.e., a battery. . . . In other words, a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." (*Williams*, *supra*, 26 Cal.4th at pp. 787-

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subjective appreciation of the risk of harm to another." (*Williams*, *supra*, 26 Cal.4th at p. 788, fn. 4.)

788.) "For example, a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*Id.* at p. 788, fn. 3.)

Chaney acknowledges the Supreme Court's decision in *Williams* but suggests California courts have not yet concluded whether *Williams* applies in a case like this one involving a knife or sharp object where the victim was not touched. She cites two decisions that applied *Williams* or its definition of assault to cases involving sharp objects where the victims, though not injured, were "touched" by the weapon. (See *In re D.T.*, *supra*, 237 Cal.App.4th at pp. 701-702 [rejecting the defendant's argument that the People must prove he intended to use a knife as a deadly weapon where the defendant poked the victim in the back]; *People v. Page* (2004) 123 Cal.App.4th 1466, 1473 [applying *Williams* and concluding an assault occurred where the defendant held a pencil to the victim's neck, touching him].) Chaney also cites a number of pre-*Williams* cases for the proposition that "[i]ntent to strike with a knife should be required where the victim was not touched." Chaney, however, cites no post-*Williams* authority supporting her attempt to distinguish between cases involving knives where the victim is touched but unharmed and cases involving knives where the victim is not touched.

Moreover, the victim in *Williams* was neither touched nor injured, although the deadly weapon was a gun and not a knife. (See *Williams*, *supra*, 26 Cal.4th at p. 782.) Chaney does not explain or cite any authority to support creating a legal distinction between assaults with knives and assaults with guns.

Therefore, we follow *Williams* and apply the general intent requirement for assault to this case.

2. *Substantial Evidence Supports Chaney's Conviction for Assault With a Deadly Weapon*

Assault with a deadly weapon requires "an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Williams*, *supra*, 26 Cal.4th at p. 790.) Assault "does not require proof that a battery has resulted or will inevitably result." (*People v. Navarro* (2013) 212 Cal.App.4th 1336, 1346 (*Navarro*); see *Aguilar*, *supra*, 16 Cal.4th at p. 1028 ["[o]ne may commit an assault without making actual physical contact with the person of the victim"]; *People v. Chance* (2008) 44 Cal.4th 1164, 1167-1168 ["an assault may be committed even if the defendant is several steps away from actually inflicting injury, or if the victim is in a protected position so that injury would not be 'immediate,' in the strictest sense of that term"].) Assault may occur where the victim takes effective steps to avoid or prevent injury. (*Navarro*, at p. 1347.)

There was substantial evidence Chaney assaulted her mother with a knife. Conway testified he told Deputy Tanner that Chaney had a knife and was "swingin[g]" it. Deputy Tanner stated Conway told him that, when he intervened in the fight between Chaney and Era, he tried to prevent Chaney from stabbing anyone. Deputy Tanner's testimony that Era told him she had to move out of the way to avoid being stabbed corroborated Conway's statements. In addition, the jury heard Era's testimony from the preliminary hearing that Chaney used a

knife and that Era identified the knife Deputy Tanner retrieved from the house as the knife Chaney used in the assault. The jury also heard Era's testimony from the preliminary hearing that Chaney raised the knife above her head while positioned "really close," "about a[n] inch" away from her.

A reasonable juror could have concluded that, absent Conway's intervention and Era's efforts, Chaney would have stabbed her mother. (See *People v. Chance*, *supra*, 44 Cal.4th at pp. 1167-1168; *Navarro*, *supra*, 212 Cal.App.4th at p. 1346.) Although Chaney had consumed a lot of alcohol the morning of the assault, she testified she was no longer feeling its effects later in the afternoon when, according to Era's statements to Deputy Tanner, Chaney grabbed the knife. Chaney also testified she was able to control herself, make decisions, and take responsibility for her actions. Thus, the jurors reasonably could have found from the evidence that Chaney was aware of facts that would lead a reasonable person to believe a battery would naturally and probably result from her conduct. (See *Williams*, *supra*, 26 Cal.4th at pp. 787-788.) Substantial evidence supported the jury's verdict.[5]

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[5] Thus, the trial court did not err in denying Chaney's motion for a judgment of acquittal pursuant to section 1118.1. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213 ["[i]n ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, '"whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged"'"].)

Chaney argues Deputy Tanner's testimony was not substantial evidence because it was unreliable hearsay. Chaney, however, did not object to Deputy Tanner's testimony as inadmissible hearsay, and Chaney does not argue the trial court erred in admitting the deputy's testimony. Chaney nevertheless asserts, "The trial court appears to have admitted Deputy Tanner's testimony as to [Era's] and Conway's statements under Evidence Code [section] 1235." She argues that, although evidence admitted under section 1235 may be substantial evidence of identity if there are other indicia of reliability, such evidence "should be insufficient to show the offense occurred."

A prior inconsistent statement admitted pursuant to Evidence Code section 1235, however, is "admissible both as impeachment and for its truth." (*People v. Rices* (2017) 4 Cal.5th 49, 85; see, e.g., *People v. McKinnon* (2011) 52 Cal.4th 610, 672 [witness's "prior inconsistent statement to [an investigator] was admissible, under the hearsay exception for prior inconsistent statements, both to impeach the credibility of [the witness's] contrary trial testimony and for the truth of the" witness's statement]; *People v. Roa* (2009) 171 Cal.App.4th 1175, 1180 [witnesses' statements to law enforcement that the defendant "was the one who used the gun in the carjacking—admissible for their truth under Evidence Code section 1235—constituted substantial evidence of that use"]; *In re P.I.* (1989) 207 Cal.App.3d 316, 319 ["inconsistent statements [the victim] made prior to the hearing were admissible not only to impeach him, but also to prove the truth of the facts asserted in those statements"]; *People v. Brown* (1984) 150 Cal.App.3d 968, 972 [jury could rely on a witness's prior inconsistent statement that she saw the defendant bring stolen property to her house to convict the

defendant of theft].) Chaney does not cite any California authority supporting her contention that admissible hearsay testimony is insufficient to show an offense occurred.

Moreover, Deputy Tanner's testimony was not the only evidence to support the jury's finding. As noted, Conway and Era testified they told Deputy Tanner that Chaney used a knife. While both witnesses provided reasonable explanations for why they claimed to have lied to Deputy Tanner, the jury did not have to believe them. (See *People v. Manibusan*, *supra*, 58 Cal.4th at p. 94 ["conflict between trial testimony and prior statement to police created question of fact for jury"]; *People v. Roa*, *supra*, 171 Cal.App.4th at p. 1181 ["[t]he credibility of [witnesses'] explanations for the alleged mistakes [in their testimony] was for the jury to weigh against the substantial evidence of witness intimidation by [the defendant's] family"].) The jury also heard Era's testimony from the preliminary hearing that Chaney had a knife in her hand, was "really close" when she raised the knife, and used the knife Deputy Tanner later retrieved from the house.

Chaney also argues that, at most, the evidence at trial showed Chaney intended to "threaten" her mother with the knife, but did not intend to injure her. Chaney cites Era's testimony at the preliminary hearing that Chaney merely "threatened" her and was not going to actually stab her. Although mere threats may not constitute assault (see, e.g., *People v. Page*, *supra*, 123 Cal.App.4th at p. 1473 [a conditional future threat is not assault]), the People proved Chaney did more than merely threaten Era.[6]

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[6] We agree with Chaney that some of Deputy Tanner's testimony was ambiguous and may have included his personal

B. *The Trial Court Did Not Err in Instructing the Jury on Assault with a Deadly Weapon*

Chaney makes three arguments concerning the trial court's jury instructions. She argues the trial court erred by (1) failing to instruct the jury that an intent to frighten or mere reckless conduct is insufficient to prove assault with a deadly weapon; (2) instructing the jury with CALCRIM No. 875 without modification; and (3) failing to instruct the jury on misdemeanor brandishing as a lesser included offense.

The People contend that Chaney forfeited these arguments because at trial she did not object to the challenged jury instructions or request the instructions or modifications she argues on appeal the trial court should have given or made. "Under section 1259, however, objection at trial is unnecessary if instructional error affected the defendant's substantial rights," and "a defendant's substantial rights are affected if the

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characterizations of what Era and Conway told him. Even on "'the cold transcript received by the appellate court'" (*People v. Avila* (2014) 59 Cal.4th 496, 513), some of the deputy's testimony rings hollow. Counsel for Chaney, however, had the opportunity to and did cross-examine Deputy Tanner, as well as Era and Conway. (See *People v. Cuevas* (1995) 12 Cal.4th 252, 274 [the availability of witnesses for cross-examination and the opportunity to present other evidence questioning the reliability of out-of-court statements are safeguards against unjust convictions based on those statements].) We cannot revisit the jury's credibility determinations. (See *People v. Brown* (2014) 59 Cal.4th 86, 106 ["'[w]e do not reweigh evidence or reevaluate a witness's credibility'"]; *People v. Weddington* (2016) 246 Cal.App.4th 468, 479 ["[i]t is not the role of the appellate court to reweigh the evidence or reevaluate witnesses' credibility"].)

instruction was reversibly erroneous." (*People v. Cruz* (2016) 2 Cal.App.5th 1178, 1183.) Thus, under section 1259 we review any claim of instructional error that affects a defendant's substantial rights whether or not there was an objection to the instruction at trial. (See *People v. Myles* (2012) 53 Cal.4th 1181, 1219, fn. 12 [forfeiture rule does not apply when "the court gives an instruction that incorrectly states the law"]; *People v. Denman* (2013) 218 Cal.App.4th 800, 812 ["[w]hen the trial court gives an incorrect or incomplete instruction that allegedly affects the substantial rights of a defendant, it is reviewable even if no objection was raised in the trial court"].) And we cannot determine whether the defendant's substantial rights were affected without deciding if the instruction given was erroneous and, if so, whether the error was prejudicial. Therefore, we must review, and Chaney has not forfeited, the merits of her arguments regarding the jury instructions. (See *People v. Cruz*, at p. 1183 [because "there is no other way of determining whether the instruction was reversibly erroneous, we will consider the merits of [the defendant's] contention despite the lack of objection"]; see also *People v. Brown*, *supra*, 210 Cal.App.4th 1, 9, fn. 5 [reviewing the merits of the appellant's instructional error argument based on CALCRIM No. 875 even in the absence of an objection].)

1. *The Trial Court Did Not Err by Failing To Instruct the Jury That Intent To Frighten or Mere Reckless Conduct Is Insufficient for Assault with a Deadly Weapon*

"'Even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely

and openly connected to the facts before the court and that are necessary for the jury's understanding of the case.'" (*People v. Jackson* (2014) 58 Cal.4th 724, 765; accord, *People v. Montoya* (1994) 7 Cal.4th 1027, 1047; see *People v. Cruz*, *supra*, 2 Cal.App.5th at p. 1183 ["[a] trial court in a criminal case is required to give correct jury instructions on the general principles of law relevant to issues raised by the evidence"].) "'[T]he court has a duty to see to it that the jury are "adequately informed on the law governing all elements of the case submitted to them to an extent necessary to enable them to perform their function in conformity with the applicable law."'" (*People v. Friend* (2009) 47 Cal.4th 1, 70.)

Chaney argues the trial court should have instructed the jury that an intent to frighten or mere reckless conduct is not sufficient to prove assault with a deadly weapon. Even if this is a correct statement of the law, however, it was not "'"closely and openly connected to the facts before the court"'" (*People v. Delgado* (2013) 56 Cal.4th 480, 488), and the court did not have a sua sponte duty to give such an instruction. At trial, Chaney insisted she never had or used a knife, recklessly or otherwise. Era and Conway testified they only told Deputy Tanner that Chaney had a knife so he would arrest her and take her someplace to "sober up." As counsel for Chaney stated in his closing argument, Chaney's theory and interpretation of the evidence at trial was that "there was no knife," not that Chaney used a knife only to threaten or in a reckless manner. And the only evidence Chaney cites to support her contention that she intended only to frighten her mother or was merely reckless with the knife is testimony from the preliminary hearing that was not admitted at trial. Nor does Chaney attempt to explain the

differences between the evidence at the preliminary hearing and her interpretation of the evidence at trial.

Under these circumstances, the trial court did not have a sua sponte obligation to instruct the jury that an intent to frighten or mere recklessness is not an assault with a deadly weapon. (See *People v. Montoya*, *supra*, 7 Cal.4th at pp. 1048-1050 [rejecting the defendant's argument that the trial court should have given a pinpoint instruction sua sponte where the arguments of defense counsel at trial did not emphasize any interpretation of the evidence suggested by the instruction suggested on appeal]; *People v. Flores* (2016) 2 Cal.App.5th 855, 879, fn. 12 ["'[t]he instructions given the jury were adequate in light of the evidence presented, and the trial court was under no obligation further to instruct the jury, sua sponte'"].)[7]

2. *CALCRIM No. 875 Was Not Misleading or Ambiguous*

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[7] We do not address Chaney's implicit argument that she received ineffective assistance of counsel because "there can be no satisfactory explanation for failing to request" an instruction that an intent to frighten or mere reckless conduct does not prove assault with a deadly weapon. Chaney buried this argument in a footnote in her opening brief and did not present argument on the elements of ineffective assistance of counsel. (See *People v. Johnson* (2016) 62 Cal.4th 600, 653 [defendant must show deficient representation and prejudice]; *People v. Crosswhite* (2002) 101 Cal.App.4th 494, 502, fn. 5 [argument is forfeited if raised "only in a footnote under an argument heading which gives no notice of the contention"].)

The trial court instructed the jury on assault with a deadly weapon under section 245, subdivision (a)(1), with CALCRIM No. 875, which provides in part: "The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted." Chaney argues the trial court should not have given CALCRIM No. 875, or should have modified it, because the instruction "was misleading or ambiguous in the circumstances here." In particular, Chaney argues the instruction "should be found incorrect in light of an assault with a knife charge where the alleged victim was not touched and no other legal theory was shown." In such circumstances, Chaney argues, "an intent to apply force with a knife should need to be proven." We review jury instructions de novo (*People v. Cruz*, *supra*, 2 Cal.App.5th at p. 1183) and consider whether there is a reasonable likelihood the challenged instruction caused the jury to misconstrue or misapply the law (*People v. Thornton* (2007) 41 Cal.4th 391, 436).

As explained, a specific intent to apply force is not an element of assault with a deadly weapon; the crime requires only the intent "to commit an act likely to result in physical force." (*Williams*, *supra*, 26 Cal.4th at pp. 784-785.) As noted, "[a]n assault occurs whenever "'[t]he next movement would, *at least to all appearance,* complete the battery.'"" (*Id*. at p. 786.) Chaney contends the test should be different where, as here, the defendant uses a knife rather than a gun because when the defendant uses a knife "an assessment needs to be made of the defendant's intent" before we can know what his or her "next movement" would have been. As noted, however, the assessment of the "next movement" is an objective one; it does not depend on the defendant's subjective intent. (See *Williams*, at p. 788, fn. 3.)

Chaney does not provide any reason why an assault with a knife requires a different jury instruction than an assault with a gun. Nor has she shown a reasonable likelihood the challenged instruction caused the jury to misconstrue or misapply the law. (See *People v. Thornton*, *supra*, 41 Cal.4th at p. 436.)[8]

3. *Misdemeanor Brandishing Is Not a Lesser Included Offense of Assault with a Deadly Weapon*

Chaney contends that, because misdemeanor brandishing was a lesser included offense in the circumstances of this case, the trial court had a sua sponte duty to instruct the jury on that crime. Because brandishing is not a lesser included offense, however, the trial court did not have a sua sponte obligation to give such an instruction.

"'A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, "'that is, evidence that a reasonable jury could find persuasive"' [citation], which, if accepted, "'would absolve [the] defendant from guilt of the greater offense' [citation] *but not the lesser*."'" (*People v. Licas* (2007) 41 Cal.4th 362, 366 (*Licas*); see *People v. Cole* (2004) 33 Cal.4th 1158, 1218.) "'[A] lesser offense is necessarily included

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[8] Chaney again argues in a footnote she received ineffective assistance of counsel because "there could be no satisfactory explanation to not require the jury to find an intent to apply force with a knife." As explained, Chaney's request misconstrues the law. Therefore, her trial counsel was not ineffective by failing to request such an instruction. (See *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836 ["[c]ounsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance"].)

in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.'" (*Licas*, at p. 366; accord, *People v. Hicks* (2017) 4 Cal.5th 203, 208-209.) "If a lesser offense shares some common elements with the greater offense, or if it arises out of the same criminal course of conduct as the greater offense, but it has one or more elements that are not elements of the greater offense as alleged, then it is a lesser related offense, not a necessarily included offense." (*People v. Hicks*, at p. 209; see *People v. Hall* (2011) 200 Cal.App.4th 778, 781 ["'[a] defendant has no right to instructions on lesser related offenses'"].) "'We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense.'" (*Licas*, at p. 366; see *People v. Souza* (2012) 54 Cal.4th 90, 113.)

a. *The Statutory Elements Test*

"'The elements test is satisfied if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, such that all legal elements of the lesser offense are also elements of the greater. [Citation.] In other words, "'[i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.'"'" (*People v. Robinson* (2016) 63 Cal.4th 200, 207, quoting *People v. Bailey* (2012) 54 Cal.4th 740, 748.)

Section 417 defines misdemeanor brandishing as "draw[ing] or exhibit[ing] any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner, or . . . unlawfully us[ing] a deadly weapon other than a firearm in any

fight or quarrel." None of these elements is an element of assault with a deadly weapon under section 245, subdivision (a)(1).

"Obviously an assault with a deadly weapon may be perpetrated without drawing or exhibiting it in a rude, angry, or threatening manner, or using it in a fight or quarrel. It might be committed by a hidden sniper, or by a stealthy prison stabbing, or in other innumerable ways without at the same time being a violation of section 417." (*People v. Escarcega* (1974) 43 Cal.App.3d 391, 398 (*Escarcega*); see *People v. Steele* (2000) 83 Cal.App.4th 212, 218 (*Steele*) ["it is theoretically possible to assault someone with a firearm without exhibiting the firearm in a rude, angry or threatening manner, e.g., firing or pointing it from concealment, or behind the victim's back"].) "Following this rationale the Courts of Appeal of this state have expressly and consistently held that Penal Code section 417 does not cover or define an offense lesser than, and necessarily included within, the crime of assault with a deadly weapon as proscribed by Penal Code section 245." (*Escarcega*, at p. 398 [citing cases]; see *Steele*, at p. 218 ["it has long been held that brandishing is a lesser related offense, rather than lesser included" of assault with a deadly weapon].)

Chaney argues *Steele* and a case cited in *Escarcega*, *People v. Torres* (1957) 151 Cal.App.2d 542, are distinguishable because they involved guns instead of knives, and, "[w]hile a gun can be fired through a coat pocket, a knife cannot." Chaney's argument ignores a variety of circumstances in which someone can assault another person with a knife without the victim ever seeing the weapon. Indeed, the court in *Escarcega* described the example of a "stealthy prison stabbing." (*Escarcega*, *supra*, 43 Cal.App.3d at p. 398.) In *In re D.T.*, *supra*, 237 Cal.App.4th 693, the defendant

committed assault with a deadly weapon by holding a sharp knife to the victim's back (*id.* at p. 701), and in *People v. Page*, *supra*, 123 Cal.App.4th 1466, the defendant held a sharp pencil to the victim's neck (*id.* at p. 1473). In neither of these cases did the defendant brandish the weapon. (See also *People v. Santascoy* (1984) 153 Cal.App.3d 909, 912 [victim stabbed in the back without first seeing the weapon].)

b. *The Accusatory Pleading Test*

In the information, the People alleged: "On or about May 18, 2016, in the County of Los Angeles, the crime of ASSAULT WITH A DEADLY WEAPON, in violation of PENAL CODE SECTION 245(a)(1), a Felony, was committed by ERNESTINE INEZ CHANEY, who did willfully and unlawfully commit an assault upon ERA CHANEY with a deadly weapon, to wit, knife." Because the accusatory pleading did not precisely track the statutory language, we may consider whether it includes language describing the offense in such a way that, if committed as alleged, Chaney necessarily committed misdemeanor brandishing. (See *People v. Montoya* (2004) 33 Cal.4th 1031, 1035; cf. *People v. Robinson*, *supra*, 63 Cal.4th at p. 207 [when the accusatory pleading merely incorporates the statutory definition of the charged offense without referring to the particular facts of a case, a reviewing court must rely on the statutory elements test to determine if there is a lesser included offense].)

The accusatory pleading in this case did not include language describing misdemeanor brandishing. Chaney does not argue otherwise. Instead, Chaney argues we should expand the accusatory pleading test to include consideration of evidence at

the preliminary hearing demonstrating Chaney committed misdemeanor brandishing because the People relied on that evidence to hold Chaney to answer before filing the information. In support of her position Chaney cites *People v. Ortega* (2015) 240 Cal.App.4th 956 (*Ortega*), which applied an "expanded accusatory pleading test" and held "[t]he evidence adduced at the preliminary hearing must be considered in applying the accusatory pleading test when the specific conduct supporting a holding order establishes that the charged offense necessarily encompasses a lesser offense." (*Id.* at p. 967.)

The Court of Appeal's decision in *Ortega*, however, is inconsistent with the Supreme Court's decision in *Montoya*, which requires courts to "consider *only* the [accusatory] pleading" in determining whether a charged offense includes a lesser included offense. (*People v. Montoya*, *supra*, 33 Cal.4th at p. 1036.) Indeed, the Supreme Court in *Montoya* disapproved *People v. Rush* (1993) 16 Cal.App.4th 20, which considered evidence at the preliminary hearing in applying the accusatory pleading test. (See *People v. Montoya*, at p. 1036, fn. 4; *People v Rush*, at p. 27.) Significantly, the Court of Appeal in *Ortega* did not discuss or distinguish *Montoya*.

Courts since *Montoya* have continued to apply the rule excluding evidence at the preliminary hearing in applying the accusatory pleading test. (See *People v. Smith* (2013) 57 Cal.4th 232, 244 ["[t]he trial court need only examine the accusatory pleading"]; *People v. Chaney* (2005) 131 Cal.App.4th 253, 257 ["'to determine whether a defendant is entitled to instruction on a lesser uncharged offense—we consider *only* the pleading for the greater offense'"]; see also *People v. Banks* (2014) 59 Cal.4th 1113, 1160 ["[w]hen applying the accusatory pleading test, '[t]he

trial court need only examine the accusatory pleading'"], disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

We follow the Supreme Court's decision in *Montoya* and its progeny and apply the "unexpanded" accusatory pleading test. Under this test, it is undisputed that misdemeanor brandishing is not a lesser included offense of assault with a deadly weapon. Therefore, the trial court did not have a sua sponte duty to instruct on misdemeanor brandishing.

C. *Chaney Has Not Demonstrated Ineffective Assistance of Counsel*

Chaney argues her trial counsel provided ineffective assistance by failing to introduce portions of Era's preliminary hearing testimony after the People introduced other portions at trial. The portions of Era's testimony Chaney now contends were favorable include statements that Chaney raised the knife "not quite above her head," never brought the knife down toward her, and was just trying to scare Era. Chaney contends the unintroduced testimony explained the portions of Era's preliminary hearing testimony the prosecutor introduced at trial and refuted Deputy Tanner's testimony that Era told him Chaney swung the knife at her.

"'"'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome.'"'" (*People v. Johnson* (2016) 62 Cal.4th 600, 653 (*Johnson*).) "[C]ounsel has wide

discretion in choosing the means by which to provide constitutionally adequate representation." (*Ibid.*) Chaney has the burden of demonstrating her trial counsel was ineffective. (*People v. Centeno* (2014) 60 Cal.4th 659, 674; *People v. Garlinger* (2016) 247 Cal.App.4th 1185, 1193.)

"An appellate court's ability to determine from the record whether an attorney has provided constitutionally deficient legal representation is in the usual case severely hampered by the absence of an explanation of an attorney's strategy." (*People v. Weaver* (2001) 26 Cal.4th 876, 955; accord, *Johnson*, *supra*, 62 Cal.4th at pp. 652-653.) "For this reason, we long ago adopted the rule that, "'[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.'"" (*Johnson*, at p. 653; see *People v. Centeno*, *supra*, 60 Cal.4th at pp. 674-675 [when the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, the defendant must show there was no conceivable tactical purpose for counsel's act or omission].) "The merits of such claims are more appropriately resolved, not on the basis of the appellate record, but rather by way of a petition for writ of habeas corpus." (*Johnson*, at p. 653; see *People v. Nguyen* (2015) 61 Cal.4th 1015, 1051.)

Here, Chaney's ineffective assistance of counsel argument fails because the record does not reveal the reason her trial counsel chose not to offer the portions of Era's preliminary hearing testimony that were not introduced at trial. (See *People v. Vines* (2011) 51 Cal.4th 830, 876 [rejecting an ineffective assistance of counsel argument because the record did not

establish why defense counsel failed to introduce impeachment evidence]; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 450 [rejecting an ineffective assistance of counsel argument because the record did not establish why defense counsel did not introduce evidence of the value of property taken].) Indeed, although the record does not conclusively show why counsel for Chaney did not introduce additional portions of Era's preliminary hearing testimony, the record suggests counsel for Chaney made a tactical decision to argue Chaney never had a knife. The portions of Era's testimony that Chaney argues her trial counsel was ineffective for not introducing directly contradicted that argument. (See *People v. Carrasco* (2014) 59 Cal.4th 924, 986 ["'normally the decision to what extent and how to cross-examine witnesses comes within the wide range of tactical decisions competent counsel must make'"]; *People v. Gurule* (2002) 28 Cal.4th 557, 652-653 [reasonable tactical decision not to call a witness was not ineffective assistance].)

D. *The Trial Court Did Not Abuse Its Discretion by Denying Chaney Probation*

Section 1203, subdivision (e)(2), provides: "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to . . . [a]ny person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted." Because of her conviction for assault with a deadly weapon, section 1203 made Chaney presumptively ineligible for probation. The probation department recommended the court place Chaney on probation and suspend imposition of a prison sentence. The

parties stipulated that the trial court could sentence Chaney based on that report, but the trial court nevertheless imposed the lower term of two years in state prison and denied probation. Chaney argues the court abused its discretion in denying her probation.

1. *Relevant Proceedings*

After agreeing the court could sentence Chaney pursuant to the recommendations of the probation officer, the prosecutor noted Chaney was presumptively ineligible for probation, used a knife while intoxicated, and threatened great bodily injury to a "particularly vulnerable" victim. The prosecutor conceded Chaney was provoked, but contended her argument with Era was "a typical family argument that may occur again."

Counsel for Chaney conceded Chaney was presumptively ineligible for probation. He noted, however, that Chaney had no criminal record and that the circumstances giving rise to the argument with Era (i.e., the recent death of Chaney's father) were unique. He argued that "[w]ith proper rehabilitation [Chaney] can continue to lead a crime-free life as she had been doing."

The court acknowledged that Chaney had no criminal record and that her arrest arose from a family dispute. The court also stated, however, "there was a knife that was involved. It's a little disconcerting that she took the stand and fabricated . . . and said, 'there wasn't a knife,' [when] obviously there was a knife." The court asked Chaney if she wanted to make a statement. Chaney stated, "I just want to do the . . . outpatient program [because] durin[g] all this time they took my kids, and I need to get out and fight for my kids." The court interrupted Chaney and

said, "It's not about you and your kids. . . . I'm asking you about you and your conduct because the question is, if you're still minimizing the conduct, not taking responsibility for the conduct, [the prosecutor] is right: prison. You can't be trusted."

The court continued: "So the question for me is, what is the most appropriate sentence? It is presumptive prison unless I find unusual circumstances. There are some circumstances that are unusual. For example, you have no criminal record. There was provocation. Your father just passed away. You were in the middle of an argument. You were drunk, but still, if I'm not satisfied that there is some . . . that you are aware what you did is unacceptable, I believe [the prosecutor] is correct. . . . [S]o again, ma'am, is there anything you want to tell me about what you've just seen in this trial and your behavior and your conduct?" Chaney replied, "No," and, after a brief statement from her counsel, she said, "I would still say . . . I never had a knife. I never." The court then denied probation and sentenced Chaney to two years in state prison.

2. *Applicable Law*

California Rules of Court, rule 4.413(b)[9] directs courts to consider certain criteria in determining whether a case is sufficiently "unusual" and whether the interests of justice warrant an exception to the presumption of ineligibility for probation under section 1203, subdivision (e)(2). Those criteria include the seriousness of the crime, the defendant's record of committing similar crimes or crimes of violence, whether the

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[9] References to rules are to the California Rules of Court.

defendant committed the crime under circumstances of provocation or coercion, the defendant's culpability, and the defendant's age. (See generally rule 4.413(c).)[10]

"'[M]ere suitability for probation does not overcome the presumptive bar'" imposed by section 1203, subdivision (e)(2). (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178 (*Stuart*), quoting *People v. Superior Court* (*Dorsey*) (1996) 50 Cal.App.4th 1216, 1229 (*Dorsey*).) "'[I]f the statutory limitations on probation are to have any substantial scope and effect, "unusual cases" and "interests of justice" must be narrowly construed,' and rule 4.413 'limited to those matters in which the crime is either atypical or the offender's moral blameworthiness is reduced.'" (*Stuart*, at p. 178; see *Dorsey*, at p. 1229.)

"Under rule 4.413, the existence of any of the listed facts does not necessarily establish an unusual case; rather, those facts merely '*may* indicate the existence of an unusual case.'" (*Stuart*, *supra*, 156 Cal.App.4th at p. 178.) "This language indicates the provision 'is permissive, not mandatory.'" (*Ibid.*) "'[T]he trial court may but is not required to find the case unusual if the relevant criterion is met under each of the subdivisions.'" (*Ibid.*; see *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1587.) Only if a court finds that a case qualifies as an "unusual case[ ] where the interests of justice would best be served" by overcoming of the statutory limitation on probation, does a court then apply the criteria in rule 4.414 for deciding whether to grant probation. (*Dorsey*, *supra*, 50 Cal.App.4th at p. 1229.)

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[10] Rule 4.413, was amended effective January 1, 2018. We review the trial court's decision under the version in effect on August 25, 2016, when the court sentenced Chaney.

"'The standard for reviewing a trial court's finding that a case may or may not be unusual is abuse of discretion.'" (*Stuart*, *supra*, 156 Cal.App.4th at p. 178.) "The trial judge's discretion in determining whether to grant probation is broad. [Citation.] '[A] "'decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge."'"'" (*Id.* at pp. 178-179.) "'[T]hese precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.' [Citation.] Generally, ""[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citations.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."'" (*Id.* at p. 179.)

3. *The Denial of Probation Was Not an Abuse of Discretion*

The trial court appears to have concluded the facts of this case were insufficient to overcome the statutory presumption of ineligibility for probation under section 1203, subdivision (e)(2), and the court never considered the criteria under rule 4.414 for determining whether to grant probation. The trial court acknowledged there were some "unusual" circumstances, but pressed Chaney to take responsibility for her actions before agreeing to lift the statutory presumption against probation. When she did not do so to the court's satisfaction, the court

followed the presumption of ineligibility under section 1203 and denied probation.

We agree with Chaney that the trial court came perilously close to punishing her for failing to confess guilt. But the court's comments, read in context, did not quite require Chaney to admit she had a knife and assaulted her mother with it. Instead, the court asked Chaney whether she was aware that what she did was unacceptable. Indeed, Chaney testified about a lot of unacceptable behavior, including drinking excessively, screaming and "get[ting] in her [mother's] face," and punching Conway in the face.

In light of the trial court's broad discretion in sentencing matters and the permissive nature of rule 4.413, the trial court did not abuse its discretion by denying Chaney probation for failing to accept responsibility for her actions. (See *Stuart*, *supra*, 156 Cal.App.4th at p. 178 [a trial court is not obligated to find a defendant eligible for probation even if the relevant criteria are met under rule 4.413]; see also *People v. Ogg* (2013) 219 Cal.App.4th 173, 186 [trial court acted within its discretion in denying probation to a defendant who failed to accept responsibility for the harm her boyfriend caused her daughter]; *People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 43 [sentence appropriately reflected """the defendant's appreciation of and attitude toward the offense,""" including the fact that he never acknowledged that his conduct was wrong]; rule 4.408 [the enumeration of some criteria for making discretionary sentencing

decisions does not prohibit courts from applying additional criteria "reasonably related" to the decision].)[11]

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.*

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11 Chaney also argues the trial court abused its discretion by "failing to determine whether it would sentence [her] offense as a misdemeanor and impose probation without regard to the statutory presumption against probation." Chaney's sentencing recommendation, however, asked the court for three years of "formal felony probation," and Chaney cites no authority for the proposition that the trial court has a sua sponte duty to consider sentencing her offense as a misdemeanor.

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.