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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ELVIS AARON ROBLES, Defendant and Appellant.	B265889 (Los Angeles County Super. Ct. No. TA136854)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Lonergan, Judge. Affirmed.

David L. Annicchiarico, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Elvis Aaron Robles was convicted of assault with a deadly weapon and making criminal threats against his brother. He contends that there was insufficient evidence to support the assault conviction, that the prosecutor misstated the law of assault during closing argument, and that the felony assault conviction should be modified to misdemeanor brandishing of a deadly weapon. For the reasons stated below, we reject appellant's contentions and affirm.

STATEMENT OF THE CASE

Appellant was charged with one count of assault with a deadly weapon on Jesus Robles (Pen. Code, § 245, subd. (a)(1); count 1),[1] one count of making criminal threats against Jesus (§ 422, subd (a); count 2), and one count of possessing a controlled substance (Health and Saf. Code, § 11377; count 3). Appellant pled no contest to count 3, but pled not guilty to the other charges.

After a jury convicted appellant of counts 1 and 2, the trial court sentenced him to the low term of two years in state prison on count 1. It imposed an eight-month sentence on count 2 and a 365-day county jail sentence on count 3, but stayed the execution of those sentences.

Appellant timely appealed.

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

STATEMENT OF THE FACTS

A. *Prosecution Case*

On April 1, 2015, appellant had a physical altercation with his brother, Jesus Robles, following an argument with Jesus's wife, Elizabet Sanchez. After the two men were separated by their mother, appellant continued yelling at his brother, who walked away.

Appellant repeatedly told Jesus he was going to kill him. Appellant ran into the kitchen and grabbed a knife. He jumped on and ran over a kitchen table and some chairs to get around other family members in order to reach Jesus. When Sanchez saw appellant running with a knife toward Jesus, she took out her cell phone and started calling the police. Seeing Sanchez, appellant told her to stop, then ran back to the kitchen and threw the knife away. Meanwhile, the men's sister, Abigail, pulled Jesus into her bedroom and locked him inside. Jesus called 911, and remained in the locked bedroom until police officers arrived.

Krystal Nichols, appellant's girlfriend, was present during the entire incident. She testified that after appellant's mother broke up the fight, appellant went into the kitchen and grabbed a knife. However, "he never got close. He stayed at least seven feet" away from Jesus. Nichols further testified that appellant had not left the kitchen area with the knife before Jesus had been pushed into the bedroom.

Los Angeles County Sheriff Deputy Wilfredo Sibrian testified he interviewed Nichols that night. Nichols told him

that after the brothers were separated, "she saw her boyfriend . . . run to the kitchen, grab a knife and run around the table, jump over a couple chairs towards the victim and just charge him and stated he was going to kill him."

B. *Defense Case*

Appellant did not testify or call any witnesses in his defense.

DISCUSSION

A. *Substantial Evidence Supported Appellant's Conviction for Assault with a Deadly Weapon*

Assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) To commit an assault, the defendant must attempt an act that, if successful, "will probably and directly result in injury to another." (*People v. Wyatt* (2010) 48 Cal.4th 776, 780.) The attempted act must be coupled with a present ability to commit a violent injury, that is, the defendant must have "'attained the means and location to strike immediately.'" (*People v. Chance* (2008) 44 Cal.4th 1164, 1168 (*Chance*), quoting *People v. Valdez* (1985) 175 Cal.App.3d 103, 113.) "In this context, however, 'immediately' does not mean 'instantaneously.' It simply means that the defendant must have the ability to inflict injury on the present occasion. Numerous California cases establish that 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." (*Chance*, *supra*, at p. 1168, fn. omitted.)

Appellant contends there was insufficient evidence to support his conviction for assault with a deadly weapon. He argues the evidence showed he stopped several feet away from Jesus and did not commit any act likely to inflict injury on Jesus. Additionally, appellant contends, he lacked the present ability to commit a violent injury, as he was several feet away from Jesus when he stopped. "In determining whether the evidence is sufficient to support a conviction . . . , 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] Under this standard, 'an appellate court in a criminal case . . . does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Rather, the reviewing court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224, italics omitted.)

The factual circumstances of this case are similar to those in *People v. Yslas* (1865) 27 Cal. 630 (*Yslas*). There, the defendant approached within seven or eight feet of the

victim with a raised hatchet, but the victim escaped injury by running to the next room and locking the door. (*Id.* at p. 631.) As our Supreme Court noted, the defendant "committed assault, even though he never closed the distance between himself and the victim, or swung the hatchet." (*Chance*, *supra*, 44 Cal.4th at p. 1174, citing *Yslas*, *supra*, 27 Cal. at pp. 631, 633-634.) Here, the evidence showed that after threatening to kill Jesus, appellant grabbed a knife from the kitchen and charged at Jesus. Although appellant did not reach Jesus, it is likely that had appellant's sister not pulled Jesus into the bedroom, appellant would have reached Jesus and stabbed him. (See *Chance*, *supra*, at p. 1168 ["an assault may be committed even if the defendant is several steps away from actually inflicting injury"]; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028 ["One may commit an assault without making actual physical contact with the person of the victim"].) In short, on this record, there was substantial evidence to support the conviction for assault with a deadly weapon.

B. *The Prosecutor did not Commit Misconduct during Closing Argument*

Appellant contends the prosecutor engaged in misconduct by misstating the law of assault during closing argument. He further contends his trial counsel was ineffective for failing to object to the prosecutor's comments.

1. *Relevant Factual Background*

During closing argument the prosecutor told the jury that although appellant did not stab the victim and "no one

got hurt," the law does not require that "someone was actually injured. That's not what an assault is. I don't have to prove to you anyone actually made contact with each other." The prosecutor analogized the case to a situation where "someone [raises] their hand, you know, how like they are going to hit you or they raise their hand at another person like they are going to hit that person and that person reacts, they do that natural flinch or they duck because they feel like the impact is coming." He further stated: "[We] moved from assault right at the moment where a person realizes something is coming and it makes them apprehensive. It makes them fearful. That's what we are dealing with with assault."

Immediately after making these comments, the prosecutor explained the elements of assault with a deadly weapon: "The defendant had to do some act with this [knife] that would result reasonably, probably result in the application of force to someone. And we know what that act was in this case: grabbing that knife out of the drawer, charging past his mother, jumping over tables and chairs and trying to get to Jesus." He further stated: "So the defendant had to be aware of facts that would alert a reasonable person, just your average Joe, that, hey, if I don't react or move, that application of force is coming."

2. *Analysis*

"'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct . . . .'" (*People v. Friend* (2009) 47 Cal.4th 1, 29.) However, "'[i]n

order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' [Citation.]" (*Ibid.*) "When a claim of misconduct is based on the prosecutor's comments before the jury, "'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" [Citation.]" (*Ibid.*)

Here, appellant did not object to the prosecutor's statements regarding the law of assault. Thus, his misconduct claim is forfeited. Moreover, there was no misconduct. Appellant argues that the prosecutor's comments could be reasonably interpreted as stating that an assault occurs when a person raises his or her hand at another and the other person reacts by flinching or becoming apprehensive and fearful. When viewed in context, however, the prosecutor did not misstate the law of assault. First, the prosecutor informed the jury that appellant's assaultive conduct was not in raising his hand at Jesus, but in grabbing the knife and charging at Jesus. Second, "[i]t has long been established that the 'injury' element of the assault statute is satisfied by any attempt to apply physical force to the victim, and includes even injury to the victim's feelings." (*Chance*, *supra*, 44 Cal.4th at p. 1168, fn. 2.) Thus, there is no reasonable likelihood that the jury misconstrued the prosecutor's comments as stating that it could convict appellant of assault merely for raising a hand at Jesus. In

short, there was no misconduct, and trial counsel was not ineffective for failing to object to the prosecutor's comments.

C. *There is no Basis to Modify Appellant's Felony Conviction for Assault with a Deadly Weapon to Misdemeanor Brandishing a Deadly Weapon*

Finally, appellant contends that his felony conviction for assault with a deadly weapon (§ 245, subd. (a)) should be modified to a misdemeanor conviction for brandishing a weapon (§ 417, subd. (a)). Appellant's challenge is "premised on a doctrine often referred to as the *Williamson* rule, based on [the California Supreme Court's] decision in *In re Williamson* (1954) 43 Cal.2d 651, 654 (*Williamson*). Under the *Williamson* rule, if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute. In effect, the special statute is interpreted as creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute." (*People v. Murphy* (2011) 52 Cal.4th 81, 86.) "[T]he *Williamson* preemption rule is applicable (1) when each element of the general statute corresponds to an element on the face of the special statute, or (2) when it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute." (*People v. Watson* (1981) 30 Cal.3d 290, 295-296.)

Here, the general statute -- section 245, subdivision (a) -- prohibits an "assault upon the person of another with a

deadly weapon or instrument other than a firearm." As noted above, "assault" is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) The special statute -- section 417, subdivision (a) -- provides: "Every person who, except in self-defense, in the presence of any other person, draws or exhibits any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a deadly weapon other than a firearm in any fight or quarrel is guilty of a misdemeanor." The elements of section 245 do not correspond to the elements of section 417. "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." (*People v. Escarcega* (1974) 43 Cal.App.3d 391, 398; see also *People v. Torres* (1957) 151 Cal.App.2d 542, 544-545 ["An assault with a deadly weapon can be committed without violating any provision of Penal Code, section 417, as by firing a gun through a coat pocket without either drawing or exhibiting the weapon and without then being engaged in a fight or quarrel."].) Moreover, a violation of section 417 will not necessarily or commonly result in a violation of section 245. A person may brandish a deadly weapon in the presence of another without any intent to use the weapon *on* the other person. (See *In re Peter F.* (2005) 132 Cal.App.4th 877, 881 ["brandishing a deadly weapon in the presence of another person is not a crime of violence 'upon' that person, but is committed in someone's presence"];

cf. *People v. Hall* (2000) 83 Cal.App.4th 1084, 1094 ["crime of brandishing a firearm does not require an intent to harm or the commission of an act likely to harm others"].) In short, we conclude that the Legislature did not intend appellant's conduct here to be prosecuted exclusively under section 417.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.