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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re SERENA L., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. SERENA L., Defendant and Appellant.	F063857 (Super. Ct. No. 11CEJ600222-2) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Alvin M. Harrell, III, Judge.

Lauren E. Dodge, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Leanne LeMon, Deputy Attorneys General, for Plaintiff and Respondent.

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On June 10, 2011, a petition was filed under Welfare and Institutions Code section 602, subdivision (a)[1] charging 14-year-old Serena L. with three felony counts: Count 1, attempted murder (Pen. Code, §§ 664/187, subd. (a)); Count 2, carrying a dirk or dagger (Pen. Code, § 12020, subd. (a)); and Count 3, threatening a public officer or employee (Pen. Code, § 71). After a contested jurisdiction hearing, the court sustained the petition on all counts and committed Serena to the Department of Juvenile Facilities (DJF) with a maximum confinement time of 11 years.

On appeal, we disagree with Serena's contention that there is insufficient evidence to sustain the juvenile court's findings of attempted murder and threatening a public officer. We agree that the juvenile court failed to specify the statutory authority for imposition of a restitution fine. In all other respects, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Serena was a student at Kermit Koontz Educational Center in Fresno. The Koontz Center is a "lock down" campus; there is only one entrance for students and they must pass through security with a metal detector wand to get in. Students are screened by security officers to ensure that there are no weapons brought on campus.

On the morning of June 6, 2011, Serena was standing with several other students in a hallway that is off-limits to students between classes. Teacher's aide Lashonda Lynn Mack asked the students to move out of the hallway. All of the students complied except Serena. Mack, who was carrying an umbrella, asked Serena a second time to move out of the hallway. Serena stared at Mack and told her to "get the F out of her face before she takes the umbrella and hits [Mack] upside the f'ing head with it." Mack described Serena as "upset and angry." At the time, Serena was standing about six feet from Mack.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

Mack was familiar with Serena because she dealt with her for "different behavior issues" in the past, but she had no previous personal problems with her. Mack did not think much of Serena's comment at the time because "[I]t's our jobs. The kids kind of, you know, talk like that sometimes. I didn't really think of it, honestly at that time."

Mack did not make a formal complaint, but reported the incident to a classroom aid, Johnnie Huffman, when Huffman came outside about five minutes later. Mack told Huffman that Serena was "not in a good mood" and explained what had happened. Huffman told Mack she was "not going to let [Serena] get away with that," and called Serena over and asked her what she had said to Mack. Serena replied, "'Who, this "B" right here?' … [¶] … 'I didn't say shit to this bitch.'" Huffman sent Serena to the security office. At this point, Mack felt "disrespected" but was not afraid for her safety.

In the security office, school security officer Joshua David Hemsath noticed Serena pacing and not listening to direct orders. Serena, who was now handcuffed and shackled, repeatedly asked "who was the black bitch," and said she was going to "get her." Hemsath told Officer Steve Myers[2] that Serena had said, "'I'm going to beat the shit out of that bitch," and "'I will see you later bitch.'"

Ten minutes after Mack first encountered Serena, Mack took another student to the security office and again came into contact with Serena. Serena looked directly at Mack and said "'[T]here's that B, Ms. Mack. I'm going to F her up, F her car up.'" Serena was "very angry" and stood about 50 feet from Mack. This time Mack was "scared" that Serena "was going to do something to me." She reported the incident to Officer Myers.

Hemsath heard Serena ask Mack what type of car she drove so she could slash or flatten her tires and that she was going to "come back and get her." According to

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[2] Myers appears to be a police officer assigned to the campus.

Hemsath, Serena was "thinking about coming back – I don't know what she was doing, but coming back to beat her up or get her."

Vice Principal Tracy Klee was in the security office for a short time and heard Serena repeatedly say, "I'm going to get that bitch," which Klee interpreted as Serena saying she was going to kill Mack. Klee suspended Serena for three days and reported the incident to the police. Serena was escorted off campus and taken to juvenile hall.

Two days later, on June 8, 2011, Mack was out sick. Andre Grigsby, a para educator at the Koontz Center, was leaving the campus for lunch when he saw Serena in an alley across the street from the school. The area was directly across the street from the campus parking lot where staff, including Mack, park their cars. Serena was standing next to a rose bush. When Grigsby turned into the alley, Serena edged behind the rose bush, "[n]ot making herself visible but not necessarily trying to hide." Serena was heavily clothed, which Grigsby thought was strange because it was summer. Grigsby thought Serena was smoking a cigarette. Grigsby used his radio to call Klee and report Serena's presence.

After receiving the call, Klee and Officer Myers walked across the street to talk to Serena. Klee thought that Serena appeared to be hiding behind the rose bushes. As Klee and Officer Myers approached, Serena began walking in the other direction away from the school entrance. Klee and Officer Myers checked the area where Serena had been standing to see if she left anything, but found nothing. The alley was approximately 191 feet from the south driveway of the employee parking lot and 99 feet from the north driveway.

Five or ten minutes later, Serena returned and was on the sidewalk outside the school parking lot. Klee described Serena as calm and her demeanor normal. When Officer Myers asked Serena what she was doing, Serena pulled a kitchen steak knife from her pocket and asked, "Are you looking for this?" According to Klee, Serena then said, "'I told you I'm going to come back and get that bitch. Where is that bitch? I'm going to

fuck her up. Where's her car?'" Later in her testimony, Klee recalled Serena's statement slightly differently as "'I told you I'm going to fuck that bitch up. Which one is her car? I'm going to kill her. I'm going to fuck that bitch up.'" Officer Myers asked Serena to drop the knife. Serena asked, "'Why? I haven't done anything yet. I told you I was going to get that bitch.'" When Serena did not drop the knife after two or three requests, Officer Myers drew his service weapon. Serena then dropped the knife and was taken into custody without resisting or further incident.

In closing argument, the prosecutor argued that Serena had said to Mack "'I'm going to get that black bitch,'" and "I'm going to f'ing kill her and F up her car." She also argued that, when Serena took the knife out of her pocket, she said, "I'm going to kill her. I'm going to fuck that bitch up." As summarized by the prosecutor:

> "A lot of times in attempt cases, we don't always know what the person is intending to do. They don't straight out come out and tell us what they intend to do. Instead we have to look at the acts leading up to the point in time where they're caught or they are unable to complete the crime. [¶] But, in this case, Serena tells us exactly what she wanted to do on June 6th. She wanted to kill Ms. Mack. She wanted to fuck her up and fuck up her car, and she wanted to kill her. [¶] She tells us two days before she was caught hiding in the rose bush with an actual weapon with an actual ability to seriously injure or kill someone. [¶] At the point in time on June 8th, which is the date in which we have the attempted murder charged, she tells Officer Myers, and she tells Ms. Klee, again why she's there, what her intent is. 'I'm here to kill that bitch.' And basically what – 'I haven't done anything yet.' [¶] She's saying those things while she has the knife in her hand. Her intent is absolutely clear."

Defense counsel argued that there was "nothing definite or unambiguous" about the intent to kill in this case.

In rebuttal, the prosecutor stated, "I'm not sure how much more definite and unambiguous a statement can be than, 'I'm going to kill that bitch.' I mean, that is an absolute definite statement about her intent to kill."

The juvenile court summarized the evidence as showing that Serena, when she produced the steak knife to Klee and Officer Myers, "made statements of something to the effect, 'I told you I'm going to get that bitch. I'm going to kill that bitch. I'm going to F up her car. I told you that.'" In finding facts sufficient to make a true finding on the attempted murder allegation, the juvenile court stated:

> "We have the minor's own statement which in this case is very telling, specifically communicating to the officer and Ms. Klee that, '"I'm going to kill the bitch. I told you I'm going to kill the bitch."' Right there. I think that puts to rest any question as to what her intent was. [¶] It is clear to this court that she did take a direct step for her to number one, place herself in close proximity to the school. Number two, arm herself. Number three, put herself in a position of laying in wait to be able to observe, if and when Ms. Mack would leave the school and go into her car area to where she could be ambushed. [¶] As far as the court is concerned, her actions and her statements together with the close proximity in time where she made the initial threats, the People have, in fact, proved both elements of Count One."

The juvenile court also found true the allegations in Counts 2 and 3.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE OF ATTEMPTED MURDER

Serena first contends there is insufficient evidence to support the juvenile court's finding on attempted murder. We disagree.

Standard of Review

The standard of review in a claim regarding the sufficiency of the evidence is familiar: "'"When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence – i.e., evidence that is credible and of solid value – from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt."'" (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) This same standard applies in juvenile cases. (*In re Macidon* (1966) 240 Cal.App.2d 600, 607.)

We must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]'" (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) Reversal is warranted only where it clearly appears that "upon no hypothesis whatever is there sufficient substantial evidence" to support the conviction. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact. (*People v. Briggs* (1967) 255 Cal.App.2d 497, 500-501; *People v. Tatge* (1963) 219 Cal.App.2d 430, 435-436; *People v. Rascon* (1954) 128 Cal.App.2d 118, 122.)

Applicable Law and Analysis

In order to prove an attempted murder charge, there must be sufficient evidence of "the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) "The mental state required for attempted murder has long differed from that required for murder itself." (*People v. Bland* (2002) 28 Cal.4th 313, 327.) For murder, malice may be express or implied. "Malice is *express* when the killer harbors a deliberate intent to unlawfully take away a human life. Malice is *implied* when the killer lacks an intent to kill but acts with conscious disregard for life, knowing such conduct endangers the life of another." (*People v. Lasko* (2000) 23 Cal.4th 101, 104.) To be guilty of attempted murder, the defendant must harbor express malice: implied malice will not suffice. (*People v. Swain* (1996) 12 Cal.4th 593, 604-605.) Express malice, or intent to kill, requires more than knowingly placing the victim's life in danger, it requires at least that the assailant either """desire the result,""" i.e., death, or """know, to a substantial

certainty, that the result will occur." [Citation.]' [Citation.]" (*People v. Davenport* (1985) 41 Cal.3d 247, 262.)

Here there is uncontradicted evidence that Serena harbored the specific intent to kill Mack. Serena made it abundantly and unequivocally clear that she intended to harm Mack. While her first statements heard by Mack, Hemsath and Klee were vague, threatening to "get" Mack and "F her up," her statements to Klee and Officer Myers two days later clearly showed that her intent had been and was to kill Mack.

The controversy in this case is whether there was also a direct but ineffectual act toward accomplishing the intended killings. For an attempt, the overt act must go beyond mere preparation and show that the killer is putting his or her plan into action; it need not be the last proximate or ultimate step toward commission of the crime or crimes (*People v. Kipp* (1998) 18 Cal.4th 349, 376), nor need it satisfy any elements of the crime. (*People v. Dillon* (1983) 34 Cal.3d 441, 453.) But, as our Supreme Court has explained, "[b]etween preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made." (*People v. Murray* (1859) 14 Cal.159; see also *People v. Anderson* (1934) 1 Cal.2d 687, 689-690.) "'[I]t is sufficient if it is the first or some subsequent act directed towards that end after the preparations are made.'" (*People v. Memro* (1985) 38 Cal.3d 658, 698, overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181.)

> "As simple as it is to state the terminology for the law of attempt, it is not always clear in practice how to apply it. As other courts have observed, '"[m]uch ink has been spilt in an attempt to arrive at a satisfactory standard for telling where preparation ends and attempt begins." [Citation.] "Both as fascinating and as fruitless as the alchemists' quest for the philosopher's stone has been the search, by judges and writers, for a valid, single statement of doctrine to express when, under the law of guilt, preparation to commit a crime becomes a criminal attempt."' [Citations.] Indeed, we

> have ourselves observed that 'none of the various "tests" used by the courts can possibly distinguish all preparations from all attempts.' [Citation.]" (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 8.)

Although a definitive test has proved elusive, courts have long recognized that "[w]henever the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt." (*People v. Anderson, supra,* 1 Cal.2d at p. 690 [attempted robbery]; see also *People v. Memro, supra,* 38 Cal.3d at p. 699 [attempted lewd conduct]; *People v. Dillon, supra,* 34 Cal.3d at p. 455 [attempted robbery]; *People v. Morales* (1992) 5 Cal.App.4th 917, 926 [attempted murder].)

Serena threatened Mack. Two days later Serena returned to the area right outside the school parking lot. She presumably did not enter the school premises because of metal detection equipment, but stood in a location where Mack would likely be. Although it was summer, she was heavily clothed and somewhat concealed by a rose bush. When Serena noticed Klee and Officer Myers coming toward her, she began walking away, but then returned to the sidewalk outside the school parking lot. Serena then displayed a knife to Klee and Officer Myers and told them of her intent to kill Mack. Serena did not drop the knife until Officer Myers repeatedly commanded her to do so and then drew his service weapon.

Viewing the entirety of Serena's conduct in light of her clearly expressed intent, we find sufficient evidence under the slight-acts rule to find her guilty of attempted murder. (See *People v. Memro, supra,* 38 Cal.3d at p. 699.)

II. SUFFICIENCY OF THE EVIDENCE OF INTENT TO INTERFERE WITH THE DUTIES OF A TEACHER

Serena also contends that there is insufficient evidence to support the true finding that she interfered with the duties of a teacher in violation of Penal Code section 71. We disagree.

Penal Code section 71, subdivision (a) provides:

> "Every person who, with intent to cause, attempts to cause, or causes, any officer or employee of any public or private educational institution or any public officer or employee to do, or refrain from doing, any act in the performance of his duties, by means of a threat, directly communicated to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out, is guilty of a public offense …."

The essential elements under Penal Code section 71 are: "'"(1) A threat to inflict an unlawful injury upon any person or property; (2) direct communication of the threat to a public officer or employee; (3) the intent to influence the performance of the officer or employee's official duties; and (4) the apparent ability to carry out the threat."' [Citations.]" (*In re Ernesto H.* (2004) 125 Cal.App.4th 298, 308 (*Ernesto H.*) In *Ernesto H.,* a teacher broke up a fight at school. Later, the students who had been fighting renewed their fight. The minor, who was acting as a lookout, became angry when the teacher yelled at the students to stop fighting and said, "'"Don't yell at me."'" (*Id*. at p. 303.) The minor, with his head tilted back and hands clinched, then took a step toward the teacher and said, "'"Yell at me again and see what happens."'" (*Id.* at pp. 303-304.) The teacher did not feel the minor was going to hurt him at that moment, but was concerned about future retaliation. (*Id.* at p. 304.)

The court found sufficient evidence of intent to influence the teacher's performance of duties noting that, while intent is rarely susceptible of direct proof, it could be inferred from "all the facts and circumstances disclosed by the evidence." (*Ernesto H., supra,* 125 Cal.App.4th at p. 313.) The court found that, when the minor made his statements, the teacher was engaged in duties that included maintaining order, preventing fighting and keeping students safe, and that the minor interfered with the teacher's attempt to restore order, to prevent fighting and to keep the students safe. (*Id.* at pp. 313-314.)

Serena contends that, in sustaining the Penal Code section 71 allegation, the juvenile court failed to specify which evidence satisfied the elements of the offense.

Serena acknowledges that there are two incidents "that could potentially form the basis for liability under section 71," but claims neither satisfies the necessary elements.

The first of these incidents occurred when Mack asked a group of students, including Serena, to move out of a hallway, and Serena did not comply. When Serena was again asked to move, she told Mack to "get the F out of her face before she takes the umbrella and hits [Mack] upside the f'ing head with it." Mack was not concerned about the outburst at the time, although she did mention it to another teacher's aide. Serena argues that her statements were nothing more than "an angry outburst" and did not interfere with Mack's official duties because she continued on with her work.

The second incident happened later that same morning when Serena was in the security office and Mack entered to drop off another student. Serena, who was at this point handcuffed and shackled, yelled at Mack "I'm going to fuck you up and I'm going to fuck your car up." Serena was angry and agitated and Mack felt "scared" and then made a formal report to the school security officer. Serena argues that "it is unclear how [her] angry outbursts intended to cause Ms. Mack to do, or refrain from doing, any act in performance of her duties."

We disagree with Serena's analysis of the incidents. In both incidents, Serena made a threat to inflict an unlawful injury upon Mack or her property, she communicated the threats directly to Mack, and she had the apparent ability to carry out the threats. It is also reasonable to infer that both incidents interfered with Mack's duties as a teacher's assistant to maintain order. In the first, to clear the hallway that was off limits to students; in the second, to return to her duties while she reported the incident to the security officer. And in both, it can be inferred that Serena threatened Mack in an attempt to intimidate her so that she would be reluctant to report Serena's future misconduct.

We find sufficient evidence to support the true finding on Count 3 and disagree with Serena's claim to the contrary.

III. RESTITUTION FEE

At sentencing, the juvenile court ordered that Serena "make restitution to the victim of Counts 1, 2 and 3 in the amount of $300, pursuant to Welfare and Institutions Code [section] 730.7." The fine is listed in the minutes as direct restitution to the victim, with a handwritten notation listing the name of Serena's mother, "purs to WIC 730.7 (joint and several.[)]" The commitment order references a "restitution fine" of $300. Serena contends, and respondent agrees, that the case must be remanded because the juvenile court did not state the statutory basis for the $300 fine pursuant to *People v. High* (2004) 119 Cal.App.4th 1192, 1200.

Section 730.5 allows the court to levy a fine on the minor in the amount that could be imposed on an adult for the same offense, if the minor has the ability to pay.

When, as here, a minor is "found to be a person described in [s]ection 602," subdivision (a) of section 730.6 authorizes the juvenile court to order two types of restitution (§ 730.6, subds. (a)(2)(A), (a)(2)(B)). The court may order a restitution fine (§ 730.6, subds. (b)-(e)) or victim restitution (§ 730.6, subd. (h)).

Subdivision (b) of section 730.6 provides that when a minor is found to have committed one or more felony offenses, the restitution fine "shall" not be less than $100 and not more than $1,000. (§ 730.6, subd. (b)(1)). The amount of the fine is consigned to the discretion of the court, which is not required to conduct a hearing on the fine or to make express findings "as to the factors bearing on the amount of the fine …." (§ 730.6, subds. (b)(2), (e).) The fine is paid to the Restitution Fund, and must be imposed "regardless of the minor's inability to pay." (§ 730.6, subd. (c).) Nonetheless, subdivision (d) of section 730.6 provides that the court, in determining the amount of the fine, may consider the minor's ability to pay, as well as "the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the minor as a result of the offense, and the extent to which others suffered losses as a result

of the offense." (§ 730.6, subd. (d)(1).) The minor has the burden of showing his or her inability to pay. (§ 730.6, subd. (d)(2).)

Subdivision (h) of section 730.6 authorizes the court to order restitution to victims in an "amount sufficient to fully reimburse the … victims for all determined economic losses incurred as the result of the minor's conduct for which the minor was found to be a person described in [s]ection 602 …." Losses include the value of stolen or damaged property, medical expenses, and lost wages and profits. (§ 730.6, subd. (h)(1)-(4).) The minor's inability to pay is neither "a compelling or extraordinary reason" to deny victim restitution, nor a factor in determining the amount of restitution. (§ 730.6, subd. (h).) The minor has a right to a hearing on the amount of victim restitution. (*Ibid.*) Under subdivision (h), the court must "identify on the court order[ ] any cooffenders who are jointly and severally liable for victim restitution," whenever this is "feasible." (§ 730.6, subd. (h).)

Here, the order directing Serena to pay $300 in restitution does not identify the statutory basis for the payment. Instead, the section referenced by the juvenile court in ordering the fine, section 730.7, merely sets forth a parent's joint and several liability for fines the minor is ordered to pay, but does not set forth the basis for the fine. As a general rule, the abstract of judgment or order of probation filed by the trial court must "separately list, with the statutory basis, all fines, fees and penalties imposed …." (*People v. High, supra*, 119 Cal.App.4th at p. 1201.) Although *High* addressed the statutory bases of fines, fees, and assessments in the abstract of a criminal judgment, both parties contend, and we agree, that the principle applies equally to fines ordered in a delinquency action. "At a minimum, the inclusion of all fines and fees in the abstract may assist state and local agencies in their collection efforts." (*Id.* at p. 1200.)

Because all fines and fees must be set forth in the commitment order, we will remand and direct the juvenile court to include the statutory basis for the restitution fine. (*People v. High, supra*, 119 Cal.App.4th at pp. 1200-1201.)

DISPOSITION

We order the commitment order corrected to include the statutory basis for the restitution fine imposed. As corrected, the commitment order is affirmed. The clerk of the juvenile court is ordered to prepare an amended commitment order in accordance with this opinion and to transmit it to the appropriate authorities.

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Franson, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Poochigian, J.