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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re D.W., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B293943 (Super. Ct. No. YJ39556) (Los Angeles County)
THE PEOPLE, Plaintiff and Respondent, v. D.W., Defendant and Appellant.	

Fourteen-year-old D.W. threw a knife at a relative. The juvenile court found that D.W. committed assault with a deadly weapon (ADW). (Pen. Code, § 245, subd. (a)(1).)[1] In addition, D.W. admitted to carjacking and assault by force likely to produce great bodily injury. (§§ 215, subd. (a), 245, subd. (a)(4).)

[1] Unlabeled statutory references are to the Penal Code.

She was declared a ward of the court and ordered into a residential program. (Welf. & Inst. Code, § 602, subd. (a).)

We conclude that substantial evidence supports the ADW finding. The trial court found that the crimes were felonies, not misdemeanors. Restitution is mandatory and D.W. did not object to it. We affirm.

PROCEDURAL HISTORY

D.W. was the subject of three delinquency petitions in 2018. The first petition alleged that she committed petty theft (§§ 484, subd. (a), 490.2). The second petition alleged that D.W. committed six felonies in one day: two carjackings and an attempted carjacking (§ 215, subd. (a)); two assaults using force likely to cause great bodily injury (§ 245, subd. (a)(4)); and second-degree robbery (§ 211). The third petition alleged that D.W. committed ADW (§ 245, subd. (a)(1)).

The court sustained the third petition. D.W. waived her right to have the adjudicating court render a disposition; she agreed to have the "home court" in Inglewood make a global disposition as to all three petitions.

In Inglewood, D.W. admitted three counts in the second petition—attempted carjacking, carjacking, and assault by force likely to produce great bodily injury. The court dismissed the first petition and the remaining counts in the second petition. D.W. was declared a ward of the court, placed in a residential therapeutic program and ordered to pay $100 to the victim restitution fund.

FACTS[2]

D.W. and her cousins live with their grandmother Lilly Thomas. D.W. has "temper tantrum[s]" in which she acts out,

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[2] The facts relate solely to the third petition for ADW.

yells profanity and throws objects. D.W.'s cousins Donnell and Christopher Drain have had to physically restrain her during tantrums, on the instructions of their grandmother or police officers.

In April 2018, Donnell was awakened at midnight by "[a] bunch of commotion. Screaming." He heard D.W. cursing at Thomas. He left his bedroom and encountered his mother and Christopher, who discouraged him from intervening in the altercation.

Donnell decided to leave the house. On the way out, he sat down in the living room to put on his shoes. D.W. and Thomas continued to argue. D.W. was 16 feet away, facing Donnell; his grandmother, mother and brother had their backs to him. Donnell told D.W. not to be rude to Thomas; he told Thomas that she should not allow D.W. to be disrespectful.

As Donnell bent to tie his shoe, an object flew past his head, 18 inches away. He heard it drop to the floor. It was a serrated knife with a six-inch blade.

Donnell did not see who threw the knife, but stated that his grandmother, mother and brother were not upset with him. D.W. was angry with him because he tried to protect Thomas. Donnell asked, "Did she just throw something at me?" No one answered because they were trying to calm D.W.

Christopher testified that D.W. threw "an object" at his brother. He denied knowing what it was or telling police that D.W. threw a knife at Donnell.

DISCUSSION

1. Sufficiency of the Evidence

We review the record in the light most favorable to the judgment and presume in support of the judgment the existence

of every fact the trier could reasonably deduce from the evidence. (*In re Oscar R.* (1984) 161 Cal.App.3d 770, 773; *In re Roderick P.* (1972) 7 Cal.3d 801, 808.) We cannot say, on this record, that under """"no hypothesis whatever""" could the court find that D.W. committed ADW. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87 [substantial evidence standard applies].)

D.W. contends that she did not use the knife in a manner likely to produce great bodily injury. The record disproves her claim. D.W. threw a long, serrated knife with enough force to travel 16 feet, missing the victim by little more than a foot. The knife was likely to produce great bodily injury had it struck Donnell's head, neck or chest. An ADW conviction "'does not require proof of an injury or even physical contact.' [Citation]." (*In re B.M.* (2018) 6 Cal.5th 528, 535.)

"[F]or an object to qualify as a deadly weapon based on how it was used, the defendant must have used the object in a manner not only capable of producing but also *likely to produce* death or great bodily injury. . . ." (*In re B.M.*, *supra*, 6 Cal.5th at p. 530; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029 [deadly weapon is any object, instrument or weapon used in a manner capable of producing, or likely to produce death or great bodily injury].) "'[L]ikely to produce'" means "'having a high probability of occurring or being true' and 'very probable.'" (*B.M.* at p. 533, citing dictionary definitions].)

"[I]t is appropriate in the deadly weapon inquiry to consider what harm could have resulted from the way the object was actually used. Analysis of whether the defendant's manner of using the object was likely to produce death or great bodily injury necessarily calls for an assessment of potential harm in light of the evidence. As noted, a mere possibility of serious injury is not

enough. But the evidence may show that serious injury was likely, even if it did not come to pass." (*In re B.M., supra*, 6 Cal.5th at p. 535.)

The minor in *In re B.M.* made slicing motions at her sister's blanket-covered legs using a rounded butter knife with a dull three-inch blade, without applying pressure sufficient to pierce the blanket or cause serious bodily injury; she did not poke or stab, or aim at the victim's head, face, neck or exposed skin. (*In re B.M.*, *supra*, 6 Cal.5th at pp. 531, 536.) Because she did not use the knife near her sister's face, the Supreme Court rejected this court's "impermissible conjecture" that B.M. could have committed mayhem. (*Id.* at p. 535.) It concluded that "the evidence was insufficient to establish that B.M.'s use of a butter knife against her sister's blanketed legs was '"likely to produce . . . death or great bodily injury."' [Citation]." (*Id.* at p. 536.)

D.W. did not draw a short dull knife against blanketed legs. Instead, she threw at the victim a sharp, serrated knife, with a six-inch blade and a six-inch handle. Donnell was fortuitously uninjured. But the potential for harm is great when "a sharp object [is] wielded in a wild or uncontrolled manner," even without injury or physical contact. (*In re B.M.*, *supra*, 6 Cal.5th at p. 538, citing *People v. Simons* (1996) 42 Cal.App.4th 1100, 1106 [defendant flailed a screwdriver at police].) D.W. aptly writes that "[a] thrown knife could cause injury if a person . . . is hit by the blade and slashed. Injury may also be possible if a person in the vicinity is hit with the point of the thrown knife."

This case is akin to those in which the aggressor uses a "sharp" or "pointy" knife or pencil. (*In re B.M.*, *supra*, 6 Cal.5th at p. 538.) "[T]he manner in which [D.W.] used the knife was capable of causing great bodily injury." (*Id.* at p. 539.) There was

a high probability the thrown knife would cause great bodily injury had it struck D.W.'s target.

Donnell was especially vulnerable. He was seated where there was "no real lighting" and looked down to tie his shoe. D.W. took advantage of Donnell's lapse of attention to throw the knife. Unlike the victim in *In re B.M.*, who defensively covered herself with a blanket before B.M. attacked, Donnell did not take defensive or evasive action because he was unaware D.W. had a knife or intended to throw it at him.

The evidence does not support D.W.'s claim that she "did not aim at Donnell." The knife did not land five feet short or ten feet wide; it was flung from a distance of 16 feet and passed within 18 inches of Donnell. The record supports the conclusion that D.W. had a tantrum, was angry at Donnell for defending his grandmother, and aimed the knife at him.

2. The Court Deemed the Assaults Felonies

Violations of section 245 are "wobblers." (*People v. Park* (2013) 56 Cal.4th 782, 790; *People v. Tran* (2015) 242 Cal.App.4th 877, 885.) They may be reduced to misdemeanors to extend lenient treatment to an offender, if the court feels that felony punishment is inappropriate. (*Park* at p. 801; *Tran* at p. 887 ["tailoring the punishment to fit the crime and the offender"].) In juvenile law, identifying an offense as a felony or misdemeanor "facilitate[s] the determination of the limits on any present or future commitment to physical confinement for a so-called 'wobbler' offense." (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1206 (*Manzy*).)

D.W. argues that the court did not satisfy Welfare and Institutions Code section 702, which required it to "declare the

offense to be a misdemeanor or felony." We disagree with D.W.'s reading of the transcript.

When the court resolved the second petition it said to D.W., "do you also admit that count 5 is true for a violation of section 245(a)(4) as a felon [*sic*], assault by means likely to produce great bodily injury?" She answered yes. By specifying that D.W. committed assault *as a felony*, the court exercised discretion not to reduce the crime to a misdemeanor. (*Manzy*, *supra*, 14 Cal.4th at pp. 1207, 1209 [court must exercise discretion].)

At disposition, the court began with, "We're on calendar for disposition, and it is with regard to the [second] petition, admission to . . . attempted carjacking as a felony . . . and [the third] petition, count 1 [section] 245(a)(1) as a felony." The court stated, "the behavior involved certainly merits . . . a camp commitment. The offenses happened less than 30 days apart" and "the conduct is very serious in nature." It identified the maximum confinement time of four years for ADW and nine years for carjacking.

Addressing D.W., the court said, "your record is not good at this point. It's pretty bad. So we won't be inclined to take a lot of chances on you not doing well in placement or not staying in placement. Understood?" The record makes clear that the court considered D.W.'s repeated violent conduct felonious and undeserving of leniency. (*Manzy*, *supra,* 14 Cal.4th at p. 1209 [even without a formal declaration, the record may show that the court knowingly exercised discretion to determine the felony or misdemeanor nature of a wobbler].) It would be pointless to remand the case, only to have the court reiterate the gravity of D.W.'s conduct and declare it felonious. (*Ibid*.)

3. Restitution Fine

D.W. was ordered to pay $100 to the victim restitution fund. She did not object, but now claims inability to pay. A minimum $100 restitution fine for committing one or more felonies is mandatory. (Welf. & Inst. Code, § 730.6, subd. (b)(1) [the court "shall impose" a restitution fine].) The fine deposited in the restitution fund "shall be imposed regardless of the minor's inability to pay." (*Id.,* subd. (c).)

D.W. forfeited the claim. (*People v. Torres* (2019) 39 Cal.App.5th 849, 860; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155 [forfeiture by failing to object]. Compare *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1162 [disabled homeless defendant raised her inability to pay fines at sentencing].)

DISPOSITION

The judgment is affirmed.

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PERREN, J.

I concur:

GILBERT, P. J.

TANGEMAN, J., Concurring and Dissenting:

I join with my colleagues as regards all but their conclusion that D.W. forfeited her claim that she is entitled to a hearing on her ability to pay the restitution fine imposed pursuant to Welfare and Institutions Code section 730.6, subdivision (b)(1), because she did not object to that fine in the trial court. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126.) In particular, I disagree with the conclusion in *Frandsen* that the result in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 was foreseeable.

As succinctly stated in *People v. Black* (2007) 41 Cal.4th 799, 812: "The circumstance that some attorneys may have had the foresight to raise this issue does not mean that competent and knowledgeable counsel reasonably could have been expected to have anticipated" the change in law. In *Black*, our Supreme Court held that there was no forfeiture where a defendant failed to object in the trial court that he was entitled to a jury trial on sentencing issues based on an argument later accepted by the United States Supreme Court in *Blakely v. Washington* (2004) 542 U.S. 296. This was so, held the court, even though the *Blakely* opinion relied on "longstanding precedent" (*id*. at p. 305).

Based on law in existence when D.W. was sentenced, *Dueñas* was surely as unforeseeable as was the holding in *Blakely*. Accordingly, I agree with and would follow *People v. Castellano* (2019) 33 Cal.App.5th 485, 489.

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TANGEMAN, J.

Irma J. Brown, Judge
John C. Lawson, II, Judge
Superior Court County of Los Angeles

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