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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. BENJAMIN DURHAM, Defendant and Appellant.	B272091 (Los Angeles County Super. Ct. No. 5PH09747)

APPEAL from an order of the Superior Court of Los Angeles County, Tammy Chung Ryu, Judge. Reversed.

Dave Linn, 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, Michael R. Johnsen and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Benjamin Durham's parole was revoked after a hearing in which the court found that Durham made criminal threats. We hold that the court's findings were not supported by substantial evidence because there was no evidence that Durham intended his statements to be conveyed to the alleged victims, nor was there evidence that the alleged victims experienced fear as a result of Durham's statements. We therefore reverse.

FACTUAL AND PROCEDURAL BACKGROUND

The California Department of Corrections and Rehabilitation (CDCR) filed a petition for revocation of Durham's parole, alleging that Durham had contact with a prohibited person, made criminal threats, and engaged in vandalism. CDCR ultimately dropped the vandalism charge, and a hearing was held with respect to the first two charges.

At the hearing, parole agent Stacey Martin testified that she was the agent of record for Durham. When Martin first reviewed Durham's case file on December 1, 2015, she learned Durham's listed address was the same as his mother's address. A condition of Durham's release on parole, however, was that he "shall not have any contact in person or third party [*sic*] with . . . Callie Whitmore [his mother] by any means." Martin testified that this condition of Durham's parole was imposed because Whitmore "is his victim in his controlling case."[1] Martin asked Durham's previous parole agent about it, and the previous agent told Martin that she was not aware that Durham had a no-contact order with respect to his mother.

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[1] Information about the underlying case is not in the record on appeal.

Martin testified that on December 2, 2015, Durham's brother, Grover Durham (Grover),[2] called Martin and said "he had filed paperwork to get a restraining order on" Durham. Grover gave a copy of the restraining order to Martin. Martin met Durham for the first time the same day, when Durham came to the parole office. Durham "told me that he had just – he was just released from county jail, then the hospital." Durham told Martin he had been attacked and hit with a shovel by two people acting upon orders of Grover.

Martin told Durham about Grover's restraining order, and attempted to serve Durham with the relevant papers. Martin testified that Durham "became upset and started yelling and made threats to hurt everybody in his family." Specifically, Durham said, "If they end up shot up, don't look for me. I'm just saying. If they die in a drive-by shooting, it wasn't me. I'm going to kill all these mother fuckers."

Durham's statements were not made in the presence of Grover; Durham and Grover were never in the same room together at the parole office on December 2. Martin testified as follows:

"Q. Were these threatening things ever conveyed to Mr. Grover Durham?

A. Yes.

Q. When was that?

A. Same day.

Q. Was that after Mr. Benjamin Durham had already been taken into custody?

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[2] Because the Durham brothers share a surname, we will refer to Grover Durham by his first name to avoid confusion. We intend no disrespect.

A. Yes, I believe so."

Grover did not testify, and there is no further information in the record about who conveyed Durham's statements to Grover or Grover's reaction to the comments.

Durham testified in his own defense. He said he was released from prison in June 2014 and then went to live in the Amity Home. He was aware that there had been a restraining order with respect to his mother in the past, but he was under the impression that the order expired in May 2013. Durham later reported to his parole agent that his mother's address was his home address. The agent went to the home for several compliance checks; at times, Whitmore was there and met the parole agent. The agent told Durham to take good care of his ailing mother. Durham testified that Grover informed the parole office that Durham was not supposed to be in Whitmore's household. Durham said his previous parole agent acknowledged this and told him that she and her supervisor intended to speak with him about it, but they never did.

Durham testified that on December 1, 2015, as he was walking toward his mother's house, "somebody slammed me in the back of my head with a shovel." He turned and saw two men he knew, and they were each holding shovels. When asked if he went to the hospital following the attack, Durham responded, "Yes. After the police arrested me." The record does not provide information about what led to Durham's arrest. While he was at the police station, Durham testified, "I passed out. I lost consciousness." He was transported to the hospital by ambulance. Medical personnel gave Durham medication and released him in the early morning hours of December 2.

Durham testified that when he met with Martin at the parole office on December 2, she never attempted to serve him with restraining order papers. Instead, a second parole officer presented Durham with a new condition of parole preventing Durham from seeing his mother. Durham testified that he got upset and threatened to refuse to sign the paperwork, but eventually signed it after the parole officer told Durham that refusing to sign would be a parole violation. Durham agreed that he said the words Martin testified to, "but I wasn't saying it towards my family or towards Ms. Martin or towards any other parole officer that was there." Instead, "I was clearing my mind because I had been medicated up." Durham never saw Grover or any other family members at the parole office.

The parties rested. Defense counsel told the court that she had medical records from Durham's December 1 hospital visit. "He was there for heart palpitations although no chest pains and was eventually given some medications to address that issue." There was no indication that Durham had a head injury. The court accepted the medical records as a defense exhibit.

In closing, defense counsel argued that Durham's previous parole agent knew Durham was living with his mother and visited him there, and Durham did not know there was a current stay-away order. As for the threats, although it could be inferred that Durham was referring to family members, "none of them were there to hear the threats." Instead, Durham's comments "were a result of his having an outburst to himself with regard to this situation."

The court held, "Based on the evidence, the court finds by a preponderance of the evidence that Mr. Durham has violated the terms and conditions of supervision in regards to the criminal

threats. The court cannot make that finding as to the non-contact with Callie Whitmore." The court said Durham could have been confused about the order relating to his mother based on his previous parole agent's actions and visits. The court also noted that Durham's medical records stated that Durham did not have head trauma when he visited the hospital. With respect to Durham's outburst, "[I]t's pretty clear to me the reasons that he said them, including he was threatening, especially given the number of statements he made throughout these proceedings as well [as] prior to today. And his statements that he was clearing his head doesn't really ring true for me." The court revoked Durham's parole and sentenced Durham to 150 days in jail.

Durham timely appealed.

DISCUSSION

"[T]he court may revoke and terminate the supervision of the person [on parole] if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless of whether he or she has been prosecuted for those offenses." (Pen. Code, § 1203.2, subd. (a).)[3] "[P]roof of facts supporting the revocation of [parole] pursuant to section 1203.2(a) may be made by a preponderance of the evidence." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447.) We review the trial court's factual findings under the substantial evidence standard of review. (*People v.*

[3] All further statutory references are to the Penal Code unless otherwise indicated.

Butcher (2016) 247 Cal.App.4th 310, 318; *People v. Urke* (2011) 197 Cal.App.4th 766, 773.)

A violation of section 422 requires all of the following: "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) In determining whether these elements have been met, "the communication and the surrounding circumstances are to be considered together." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 860 (*Ryan D.*).)

Durham argues there was insufficient evidence of a criminal threat because there was no evidence showing that Durham intended the threat to be conveyed to his family members, nor was there evidence that anyone was in fear as a result of Durham's words. We agree.

Section 422 "requires that the threatening statement be made with the specific intent to be taken as a threat." (*People v. Felix* (2001) 92 Cal.App.4th 905, 911 (*Felix*).) It is undisputed

that Durham was not with any family members when he suggested that he would "kill all these mother fuckers." However, "[s]ection 422 does not in terms apply only to threats made by the threatener personally to the victim." (*In re David L.* (1991) 234 Cal.App.3d 1655, 1659.) Instead, the threat may "be conveyed by the threatener through a third party," but under such circumstances, "the specific intent element of the statute is implicated. Thus, if the threatener intended the threat to be taken seriously by the victim, he must necessarily have intended it to be conveyed." (*Ibid.*) This is required because "[s]ection 422 was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others." (*Felix*, *supra*, 92 Cal.App.4th at p. 913.)

Here, there was no evidence that Durham intended his statements to be conveyed to Grover or anyone else. "[I]n evaluating intent, the setting in which the defendant makes the remarks must be considered." (*Felix*, *supra*, 92 Cal.App.4th at p. 913.) In *Felix*, for example, the defendant told his therapist he was thinking about killing his ex-girlfriend once he was released from jail. (*Id.* at p. 909.) The therapist testified that he called the ex-girlfriend, and the ex-girlfriend testified that after the call she cried and said, "'Oh my God, he's going to try to kill me.'" (*Ibid.*) The Court of Appeal held that there was insufficient evidence that the defendant intended his statements to his therapist to be relayed to his ex-girlfriend. (*Id.* at p. 913.) The defendant made the comments in a therapy session he thought was confidential, and there was no evidence he knew the therapist had a duty to warn the ex-girlfriend under *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425. (*Ibid.*) In addition, nothing in the record showed that the defendant

knew the therapist would convey his threats to the ex-girlfriend, nor did he tell the therapist the ex-girlfriend's last name. (*Ibid.*) In short, there was no evidence that the defendant intended his threats to be conveyed to his ex-girlfriend. (*Ibid.*)

The Attorney General contrasts the facts in this case with those in *Felix*, arguing that here there was no indication Durham thought his communication with Martin would be confidential. Instead, "the circumstances of the exchange indicate [Durham] knew the parole officer was in communication with Grover." However, Durham testified that he never saw Grover or any other family members at the parole office. The evidence does not suggest that Durham intended Martin to share his communications with family members, nor did Durham's words express an intent that Martin convey information to Grover.

Moreover, there is no indication that Durham would expect his parole agent to convey a threat to Grover's life. "Ordinarily, a person wishing to threaten another would not do so by communicating with someone in a position of authority over the person making the threat." (*Ryan D., supra,* 100 Cal.App.4th at p. 863.) In *Ryan D.*, a high school student, angry that an officer cited him for possession of marijuana, painted a picture of himself shooting the officer in the head. He turned in the picture as an art class assignment. (*Ryan D.*, *supra,* 100 Cal.App.4th at p. 858.) The Court of Appeal held that the painting did not constitute a criminal threat under section 422. The court noted that completing a painting and turning it in for credit in an art class "would be a rather unconventional and odd means of communicating a threat." (*Id.* at p. 863.) The student conceded that it was reasonable to expect that the officer, MacPhail, would learn about the painting, but that "concession is insufficient to

support the juvenile court's finding that the minor intended MacPhail to see the painting. After all, he did not display it to MacPhail or put it in a location where he knew she would see it. Nor did he communicate with MacPhail in any manner to advise her that she should see the painting. Even MacPhail acknowledged that the students would not expect her to come into the art classroom. In fact, MacPhail did not learn of the painting until an assistant principal called and then showed it to her." (*Id.* at p. 864.) Recognizing that the officer might learn about the painting was "not sufficient to establish that, at the time he acted, the minor harbored the specific intent that the painting would be displayed to MacPhail." (*Ibid.*)

The evidence here is similarly lacking. Nothing in Durham's or Martin's testimony suggests that Durham intended his statements to reach Grover or any other family member. The Attorney General argues that this case is not like *Ryan D.* because, unlike the student's painting in that case, Durham's threat was unequivocal. "I'm going to kill all these mother fuckers" could be construed as more of a direct statement than the painting in *Ryan D.*, because it indicates action on the part of the speaker. But it does not suggest that Durham intended his words to reach Grover or any other family members. Moreover, unlike the painting in *Ryan D.*, which showed the officer's badge number and therefore made it clear that MacPhail was the officer depicted in the painting, the object of Durham's statement about killing "all these mother fuckers" is less clear. No evidence demonstrated who "all these mother fuckers" were, even though Martin assumed that Durham meant his family members.

Durham also argues there was no evidence that anyone in his family experienced reasonable, sustained fear for his or her

own safety or the safety of his or her immediate family. "A violation of section 422 is not complete upon the issuance of a threat; it depends on the recipient of the threat suffering 'sustained fear' as a result of the communication." (*People v. Wilson* (2015) 234 Cal.App.4th 193, 201.) There is no information in the record about how Durham's words were communicated to Grover, what Grover's reaction was, or how Grover felt when he learned of Durham's words. The Attorney General argues that "Grover had already filed for a restraining order against [Durham], indicating that he was *already* afraid of him." However, this fails to address the causation element, and indeed, may undermine a finding of causation. Section 422 requires that the threat *causes* the threatened person to be in fear; it is insufficient to say that the threatened person was already in fear before the threat occurred.

The Attorney General argues that subjective fear can be inferred from a totality of the circumstances, citing *People v. Ortiz* (2002) 101 Cal.App.4th 410. In *Ortiz*, in the course of a carjacking and kidnapping, the defendant told the victim that if he spoke or tried to "do anything," defendant would kill him. (*Ortiz*, 101 Cal.App.4th at p. 413.) Although the victim did not testify, the court held that based on the evidence showing an "uninterrupted series of crimes" that included driving the victim along darkened streets, "the only reasonable inference from the evidence is [the victim] had [actual] fear." (*Id.* at p. 417.) Here, on the other hand, the evidence does not support such an inference. The alleged threat was vague, it did not occur in the commission of other crimes, and it was not conveyed directly to a victim in the context of otherwise terrifying circumstances. In a case such as this, an inference of fear cannot be assumed without

supporting evidence. "[T]here must be evidence to support an inference and the prosecution may not fill an evidentiary gap with speculation." (*Felix, supra*, 92 Cal.App.4th at p. 912.) That evidentiary gap was not filled here.

The court's finding that Durham violated section 422 is not supported by substantial evidence.

DISPOSITION

The order revoking parole is reversed.

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COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.