Filed 11/20/12 In re U.P. CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| In re U.P., a Person Coming Under the Juvenile Court Law. | B235732<br>(Los Angeles County<br>Super. Ct. No. JJ18707) |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>U.P.,<br><br>Defendant and Appellant. | |

APPEAL from an order of the Superior Court of Los Angeles County, Donna Groman, Judge. Affirmed.

Bruce G. Finebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Lawrence M. Daniels, Supervising Deputy Attorney General, Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.

## INTRODUCTION

The District Attorney of Los Angeles County filed a petition alleging that defendant and appellant U.P. came within the provisions of Welfare and Institutions Code section 602 because he committed the offenses of threatening a public officer (Pen. Code, § 71[1]), making a criminal threat (§ 422), and battering a school employee (§ 243.6). The juvenile court found the allegations true, declared U.P. to be a ward of the court, and ordered U.P. placed at home on probation. On appeal, U.P. contends that insufficient evidence supports the juvenile court's true findings as to each offense. U.P. also contends, alternatively, that the juvenile court error in sustaining the threatening a public officer offense because that offense is a lesser included offense of making a criminal threat. We affirm.

## BACKGROUND

On February 3, 2011, Huntington Park High School teacher David Esparza was assigned to cover another teacher's class. Esparza was given notice of the assignment late, and he was about five minutes late to the classroom. Esparza's students were waiting outside the classroom and were displeased that he was late. Esparza had the students enter the classroom and sit down. After about a minute, the students calmed down except for U.P. who "kept talking out of turn" and did not want to "settle down."

Esparza told U.P. to settle down a few times and then said that he was going to send U.P. to "the deans" or call campus security. U.P. said that he did not care, got up from his seat, and said that it was not his class and that he did not belong there. U.P. began to leave the classroom. As he passed Esparza, U.P. held his backpack in his right hand and "had it on one strap." Esparza grabbed the other strap and told U.P. that he did not want U.P. to leave until campus security arrived. Esparza tried to call campus security.

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1 All statutory citations are to the Penal Code unless otherwise noted.

U.P. pulled on the backpack and told Esparza to let go. Esparza did not pull back on the backpack, but also did not release his hold. Esparza understood that while school policy did not allow him to touch a student, it did allow him to hold onto U.P.'s backpack to stop him from leaving. As Esparza tried to dial his telephone, he allowed U.P. to pull him into the hallway. Once in the hallway, U.P. slammed Esparza against the lockers about three times. U.P. repeated his demand that Esparza release his hold on U.P.'s backpack.

When campus security arrived, U.P. let go of the backpack. U.P. then said that he was going to go home, get his gun, and kill Esparza. U.P.'s threat caused Esparza to be scared.[2] By the time of the adjudication hearing, some six months later, Esparza was no longer "shaken up from the incident." The entire incident lasted about five minutes.

## DISCUSSION

### I. Sufficiency Of The Evidence

U.P. contends that insufficient evidence supports the juvenile court's findings that he committed the offenses of battering a school employee, making a criminal threat, and threatening a public officer. Sufficient evidence supports the findings.

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.) "We must presume in support of the judgment the existence of every

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[2] The prosecutor asked Esparza how defendant's statement made him feel. Esparza responded, "I was scared. I was shaken up by the whole thing." Defense counsel objected on the grounds that Esparza's answer was nonresponsive. The juvenile court sustained the objection and struck the answer. Esparza answer was in two parts. The first part, "I was scared" was responsive to the prosecutor's question. The second part, "I was shaken up by the whole thing" was not responsive. Thus, the juvenile court's finding that Esparza's answer was nonresponsive and its order striking the answer concerned the second part of Esparza's answer and not the first part.

fact that the trier of fact could reasonably deduce from the evidence. [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919.) "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. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.) "We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]' [Citation.]" (*People v. Zamudio, supra,* 43 Cal.4th at p. 357.) This standard governs review of the sufficiency of evidence in juvenile and adult cases. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.)

*A. Battery on a School Employee*

U.P. contends that there is insufficient evidence to support the finding that he committed battery on a school employee because "(1) Esparza used unreasonable force when he grabbed and held onto [U.P.] by his backpack, and was therefore not legally engaged in the performance of his duties as a school official; (2) [U.P.] was privileged to use self-defense because Esparza used unreasonable force in seeking to detain him; and (3) [U.P.] did not intend to batter Esparza but was merely criminally negligent in doing so." Sufficient evidence supports the finding.

"A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.) Section 243.6 defines a battery on a school employee as "a battery . . . committed against a school employee engaged in the performance of his or her duties, or in retaliation for an act performed in the course of his or her duties, whether on or off campus, during the schoolday or at any other time, and the person committing the offense knows or reasonably should know that the victim is a school employee . . . ."

"[B]attery is a general intent crime. [Citations.] This necessarily excludes criminal liability when the force or violence is accomplished with a 'lesser' state of mind, i.e., 'criminal negligence.' As with all general intent crimes, 'the required mental state entails only an intent to do the act that causes the harm . . . .' [Citation.] Thus, the crime

of battery requires that the defendant actually intend to commit a 'willful and unlawful use of force or violence upon the person of another.' [Citations.] In this context, the term 'willful' means 'simply a purpose or willingness to commit the act . . . .' [Citation.] [¶] 'Reckless conduct alone does not constitute a sufficient basis for . . . battery . . . .' [Citation.]" (*People v. Lara* (1996) 44 Cal.App.4th 102, 107-108.)

"[N]o provocative act which does not amount to a threat or attempt to inflict injury, and no conduct or words, no matter how offensive or exasperating, are sufficient to justify a battery [citations]." (*People v. Mayes* (1968) 262 Cal.App.2d 195, 197.) "[T]he only legal justification of battery is self-defense." (*Id. at* p. 198.) For self-defense to apply, "the defendant must actually and reasonably believe in the need to defend." (*People v. Jefferson* (2004) 119 Cal.App.4th 508, 518.)

"At school, events calling for discipline are frequent occurrences and sometimes require 'immediate, effective action.' (*Goss v. Lopez* (1975) 419 U.S. 565, 580 [95 S.Ct. 729, 739, 42 L.Ed.2d 725].) To respond in an appropriate manner, '"teachers and school administrators must have broad supervisory and disciplinary powers."' ([*In re*] *William G.* [(1985)] 40 Cal.3d [550,] 563, quoting *Horton v. Goose Creek Ind. Sch. Dist.* (5th Cir. 1982) 690 F.2d 470, 480.) California law, for example, permits principals, teachers, and any other certificated employees to exercise 'the same degree of physical control over a pupil that a parent would be legally privileged to exercise . . . which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning.' (Ed. Code, § 44807.)" (*In re Randy G.* (2001) 26 Cal.4th 556, 563.)

U.P. engaged in disruptive behavior in the classroom and did not discontinue that behavior despite Esparza's repeated directions. Esparza told U.P. that he was going to send U.P. to "the deans" or call campus security. U.P. attempted to circumvent such corrective action by leaving the classroom. Esparza took hold of a strap on U.P.'s backpack in an effort to prevent U.P. from leaving while he summoned campus security. Esparza testified that his actions were consistent with school policy. Esparza's response

to U.P.'s disruptive behavior was reasonable. (*In re Randy G., supra,* 26 Cal.4th at pp. 562-563; Ed. Code, § 44807.) Esparza was engaged in the performance of his duties as a teacher when U.P. pulled him into the hallway and slammed him against the lockers. (§ 243.6.) Accordingly, U.P. battered Esparza, a school employee, and was not privileged to use self-defense in doing so.

U.P.'s contention that he either did not have the intent necessary to commit a battery or was "merely reckless" in his conduct toward Esparza is unavailing. U.P. repeatedly slammed Esparza against the lockers and demanded that Esparza release his hold on U.P.'s backpack. Plainly, U.P. intended to slam Esparza against the lockers to cause him to release his hold on U.P.'s backpack. Accordingly, there is sufficient evidence that U.P. had the intent to batter Esparza and that U.P.'s conduct was not merely reckless. (*People v. Lara, supra,* 44 Cal.App.4th at pp. 107-108.)

*B. Criminal Threat*

U.P. contends that there is insufficient evidence to support the finding that he committed a criminal threat because the prosecution failed to establish any of the elements of that offense. Sufficient evidence supports the finding.

"In order to prove a violation of section 422, the prosecution must establish 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. [Citation.]" (*People v. Toledo* (2001) 26 Cal.4th 221, 227–228.)

"[S]ection 422 does not punish such things as 'mere angry utterances or ranting soliloquies, however violent.' (*People v. Teal* (1998) 61 Cal.App.4th 277, 281 [71 Cal.Rptr.2d 644].)" (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861.) For purposes of section 422, "sustained fear" is fear that "extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139–1140.)

U.P. contends that his statement in front of campus security that he was going to go home, get his gun, and kill Esparza was not a criminal threat, but a "mere angry utterance." According to U.P., even if he made a threatening statement with the specific intent that the statement be taken as a threat, the threat lacked credibility under the circumstances—i.e., that "the threat was not 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." U.P. states that there was no evidence of a history of hostility or violence between U.P. and Esparza and the probation officer's report indicated that U.P. had a history of behavior and anger management issues and was in a special education program. Thus, U.P. concludes, "it would appear [U.P.], as a special needs student, has a proclivity for irrational, angry outbursts, mitigating a finding of the claimant making the statement with the actual specific intent that his statement be taken as a threat." Finally, U.P. contends that there was no evidence that his threat caused Esparza to be in sustained fear for his safety.

U.P. stated that he was going to go home, get his gun, and kill Esparza. Esparza testified that U.P.'s threat caused him to be scared. U.P. made his threat after he struggled to free his backpack from Esparza's hold, after he slammed Esparza against the lockers, and after campus security arrived. A reasonable trier of fact could find that U.P. threatened to kill Esparza, that U.P. intended his statement to be taken as a threat, that the threat was on its face and under the circumstances such that it conveyed to Esparza a gravity of purpose and an immediate prospect of execution of the threat, and that Esparza

was actually and reasonably afraid for his safety. (*People v. Toledo, supra*, 26 Cal.4th at pp. 227–228.) Moreover, although Esparza did not specify the length of time that U.P.'s threat caused him to be afraid, a reasonable trier of fact could infer that a person receiving a death threat under the circumstances here was in fear for a period of time that was not "momentary, fleeting, or transitory." Accordingly, there is sufficient evidence to support the juvenile court's finding that U.P. made a criminal threat.

*C. Threatening a Public Officer*

Under section 71, subdivision (a), it is a crime for a "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 . . . ." The elements of the offense of threatening a public officer 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.' [Citation.]" (*People v. Hopkins* (1983) 149 Cal.App.3d 36, 40-41.)

U.P. contends that there is insufficient evidence to support the finding that he threatened a public officer. In support of this contention, U.P. relies on the "same reasons" he advanced in arguing that there was insufficient evidence that he made a criminal threat. Because U.P. relies on the "same reasons" in support of this contention that we rejected above in finding that sufficient evidence supports his criminal threats finding, sufficient evidence also supports the finding that he threatened a public officer.

## II. Threatening A Public Officer As A Necessarily Included Lesser Offense Of Making A Criminal Threat

U.P. contends that, as pleaded, the offense of threatening a public officer (section 71) is a lesser included offense of making a criminal threat (section 422). As pleaded, the threatening a public officer offense was not a necessarily included lesser offense of the making a criminal threat offense.

California courts "employ two alternative tests to determine whether a lesser offense is necessarily included in a greater offense. Under the elements test, we look to see if all the legal elements of the lesser crime are included in the definition of the greater crime, such that the greater cannot be committed without committing the lesser. Under the accusatory pleading test, by contrast, we look not to official definitions, but to whether the accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime. [Citation.]" (*People v. Moon* (2005) 37 Cal.4th 1, 25-26.)

Although U.P. relies solely on the accusatory pleading test, we note that threatening a public officer is not a necessarily lesser included offense of making a criminal threat under the elements test. "Under the statutory elements test, section 71 is not a lesser included offense of section 422, because a section 422 violation may be committed against *any person*, and does not require the specific intent to influence the performance of the public officer's duty, but rather only the intent that the statement be 'taken as a threat, even if there is no intent of actually carrying it out.' [Citation.] Therefore, a violation of section 422 can be committed without violating section 71, and section 71 is not a necessarily included lesser offense." (*People v. Chaney* (2005) 131 Cal.App.4th 253, 257.)

Under the accusatory pleading test, we look to the allegations in the Welfare and Institutions Code section 609 petition. Count one of the petition alleged, "On or about 02/03/2011 within the County of Los Angeles, the crime of THREATENING A PUBLIC OFFICER, in violation of PENAL CODE 71, a Felony, was committed by said minor, who did unlawfully and intentionally cause and attempt to cause an officer and employee

of a public and private educational institution and any public officer and employee to do, and refrain from doing, an act in the performance of duty, by means of threat directly communicated to DAVID ESPARZA, TEACHER, to inflict an unlawful injury upon the person and property and it reasonably appeared to the recipient of the threat that such threat could be carried out." Count two of the petition alleged, "On or about 02/03/2011 within the County of Los Angeles, the crime of CRIMINAL THREATS, in violation of PENAL CODE 422, a Felony, was committed by said minor, who did willfully and unlawfully threaten to commit a crime which would result in death and great bodily injury to DAVID ESPARZA, with the specific intent that the statement be taken as a threat. It is further alleged that the threatened crime, on its face and under the circumstances in which it was made, was so unequivocal, unconditional, immediate and specific as to convey to DAVID ESPARZA a gravity of purpose and an immediate prospect of execution. It is further alleged that the said DAVID ESPARZA was reasonably in sustained fear of his/her safety and the safety of his/her immediate family."

In support of his argument that the threatening a public officer offense was a lesser included offense of making a criminal threat, U.P. relies on *In re Marcus T.* (2001) 89 Cal.App.4th 468. In that case, a school district police officer caught a minor smoking on campus. (*Id.* at pp. 470-471.) When the officer patted down the minor, placed him in a wrist lock, and walked him towards the dean's office, the minor objected and stated, "I will fuck you up . . . . I will take you out." (*Id.* at p. 471.)

Applying the accusatory pleading test, the Court of Appeal held that the offenses of threatening a public officer and making a criminal threat have "four primary ingredients: a criminal intent, a victim, a threat, and a reaction by the victim." (*In re Marcus T., supra*, 89 Cal.App.4th at p. 471.) The court held that three of the four elements of threatening a public officer—the victim, the criminal intent, and the victim's reaction—"are clearly encompassed within and exceeded by the corresponding elements" of making a criminal threat. (*Id.* at p. 472.)

The Court of Appeal held that the criminal threat charge alleged the same victim as the threatening a public officer charge, although the threatening a public officer charge

identified the victim as a school police officer. (*In re Marcus T., supra,* 89 Cal.App.4th at pp. 472-473.) The criminal intent alleged in support of the threatening a public officer charge was "the intent to 'cause and attempt to cause [the victim] to do, and refrain from doing, an act in the performance of duty." (*Id.* at p. 473.) The criminal intent alleged in support of the criminal threat charge was "'the specific intent that the statement be taken as a threat.'" (*Ibid.*) The court reasoned that "[t]he essence of a threat is a 'declaration of hostile determination or of loss, pain, punishment, or damage to be inflicted in retribution for or conditionally upon some course.' [Citation.] Thus, the intent alleged to violate section 422, directed as it was in this case toward a public officer, encompassed the intent alleged to violate section 71." (*Ibid.*)

The Court of Appeal further held that the severe reaction alleged in the criminal threat charge encompassed and exceeded the much lower level reaction alleged in the threatening a public officer charge. (*In re Marcus T., supra,* 89 Cal.App.4th at p. 473.) The only element of the threatening a public officer offense that the criminal threat charge did not encompass was the threat itself. (*Ibid.*) The threat alleged pursuant to section 71 was "'to inflict an unlawful injury upon the person and *property*.'" (*Ibid.*) The criminal threat charge did not include a threat to property. (*Ibid.*) Otherwise, "to the extent that the two crimes focused on personal injury, the section 422 threat encompassed and exceeded the section 71 threat." (*Ibid.*) Because the People made no attempt to prove that the minor threatened to harm the victim's property, the Court of Appeal remanded to the juvenile court to exercise its discretion to amend the complaint to conform to proof, and, thereafter, to strike the finding that the minor threatened a public officer. (*Id.* at pp. 474-475.)

Respondent argues that we should follow *People v. Chaney, supra,* 131 Cal.App.4th 253 which disagreed with the intent analysis in *In re Marcus T., supra,* 89 Cal.App.4th 468. The Court of Appeal in *People v. Chaney* held that "specific intent to influence the performance of [the public officer's] duties, by causing or attempting to cause him 'to do, or refrain from doing, any act in the performance of his duties,'" was not encompassed in the criminal threats charge. (*People v. Chaney, supra,* 131

Cal.App.4th at p. 257.) The court disagreed with the *In re Marcus T.* court's reasoning "that merely because the pleading describes the victim as a public officer, the language alleging the specific intent that 'the statement . . . be taken as a threat,' as required by section 422, necessarily encompasses the intent to 'cause and attempt to cause [the victim] to do, and refrain from doing, an act in the performance of duty.' (*Marcus T., supra,* at p. 473.)" (*Id.* at pp. 257-258.) The court in *People v. Chaney* stated that, "It does not . . . follow from the mere fact that the alleged threat is directed at a public officer . . . and was made 'with the specific intent that the statement be taken as a threat,' that defendant also had the specific intent required under section 71. A threat, even when directed to a person who is a public officer, may be made in 'retribution for,' or 'conditionally upon some act' committed in his or her personal life unrelated to the performance of any of his or her duties and without any intent to influence performance of those duties. . . . Nothing in the language of the accusatory pleading refers to the content of the threat, or the circumstances in which the threat was uttered, which would support the conclusion that as alleged in the accusatory pleading, defendant could not have committed the section 422 violation without also committing the section 71 violation." (*Id*. at p. 258.) We agree with the court's reasoning in *People v. Chaney*.

As stated, under the accusatory pleading test we look to "whether the accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime. [Citation.]" (*People v. Moon, supra*, 37 Cal.4th pp. 25-26.) As alleged in the petition, the charge of making a criminal threat in violation of section 422 did not state the content of the threat or the circumstances in which it was uttered such that one could conclude that U.P. could not have made a criminal threat without also having threatened a public officer in violation of section 71. (*People v. Chaney, supra*, 131 Cal.App.4th at p. 258.) That is, as pleaded, U.P. could have threatened Esparza for a reason unrelated to Esparza's status as a public official or to the performance of his official duties. (*Ibid.*) Accordingly, we hold that, as pleaded, the threatening a public officer charge was not a necessarily included lesser offense of the making a criminal threat charge.

## DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.