Filed 12/21/12 In re Adam S. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ADAM S., a Person Coming Under the Juvenile Court Law.	B239079 (Los Angeles County Super. Ct. No. TJ19455)
THE PEOPLE, Plaintiff and Respondent, v. ADAM S., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Catherine J. Pratt, Judge. Reversed.

Jolene Larimore, 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, Assistant Attorney General, Victoria B. Wilson and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Adam S., a minor, appeals from the order of the juvenile court finding that he made criminal threats against a school security officer in violation of Penal Code section 71.[1] Appellant asserts that respondent failed to present substantial evidence supporting necessary findings that he threatened the officer with the intent to interfere with the officer's performance of his duties, and that the officer reasonably believed that the threat could be carried out. We agree that there was not sufficient evidence to support the latter finding, and thus we reverse the order of the juvenile court sustaining the petition under Welfare and Institutions Code section 602 (section 602).

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was a 14-year old freshman at Compton High School at the time of the incident that gave rise to the section 602 petition. At the adjudication hearing, Compton High School security officer Larry Ventress testified that on the morning of April 20, 2011, after first period had already begun, he saw a group of five or six young men, including appellant, standing out on the school track. He approached the group and asked, "What are you doing out here? Why are you not in class?" He smelled marijuana smoke as he got closer.

Per campus policy, Officer Ventress searched each of the young men, letting most of them return to class. However, when he searched appellant, he found a small Altoids box containing two cigarette lighters and what appeared to be marijuana residue. Possession of a cigarette lighter on school grounds is a

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[1] All subsequent undesignated references are to the Penal Code, unless otherwise specified.

violation of school rules. Accordingly, Officer Ventress detained appellant and took him to the school "process center" to begin the suspension process.

In the process center, appellant got very upset when Officer Ventress said that he was being suspended. As Officer Ventress was trying to complete the paperwork, appellant told him that he would have "somebody to come up there and fuck [him] up" and "kick [his] ass." Appellant used a regular speaking voice, but his tone was angry. He was seated on a bench while he made the threats, and Officer Ventress testified that he believed appellant was handcuffed to the bench, but he could not remember if he handcuffed him before or after appellant made the threatening statements.

Officer Ventress testified that he did not feel afraid when appellant threatened him. When asked why he had reported the incident to his supervisor, he responded as follows: "Well, it's better for us to do that. Actually, that's what we are supposed to do and have him cited, for one thing. Because you're not supposed to have violators on campus. That's a rule, anyway. And then, when you call yourself – as far as I was concerned, it was a threat. So we have to report it to the officers." No other evidence was presented at trial regarding the incident.

Appellant's counsel unsuccessfully moved to dismiss the petition under Welfare and Institutions Code section 701.1, arguing that the elements of section 71 were not satisfied. He again argued during closing arguments that respondent failed to satisfy the elements of section 71 requiring that the person making the threat intend to interfere with the officer's duties and requiring that it reasonably appear to the officer that the threat could be carried out. The court disagreed, finding there was sufficient evidence that appellant intended to influence Officer Ventress while he was being disciplined, and finding that appellant's apparent ability to carry out his threat to have someone come and "fuck [him] up" Officer

Ventress was credible "in the context of a community where there is a lot of gang-related violence." Appellant's counsel asked the court to reconsider its ruling, in light of the dearth of evidence that appellant was in a gang or that Officer Ventress believed that he was in a gang. However, the court did not change its ruling, sustained the charge under section 71 as a felony and declared appellant a ward of the court under section 602.

Appellant appeals from the juvenile court's order sustaining the petition.

DISCUSSION

Appellant contends there was insufficient evidence to sustain the charge of threatening a school officer under section 71 and to declare him a ward of the court under section 602. "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "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; see *People v. Bolin* (1998) 18 Cal.4th 297, 331.) These principles are equally applicable to a review on appeal of the sufficiency of the evidence in a juvenile proceeding in which the minor is alleged to have violated a criminal statute. (*In re Roderick P.* (1972) 7 Cal.3d 801, 809.)

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." Thus, the elements of a section 71 violation 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.*).)

"[S]ection 71 is designed to prohibit plausible or serious threats and 'to ignore pranks, misunderstandings, and impossibilities.' [Citation.] . . . [T]he threatened injury [must] be of a nature that would be taken seriously and could cause the recipient to act or refrain from acting to avoid the threatened harm." (*Ernesto H., supra,* 125 Cal.App.4th at pp. 310-311.) Unlike section 422, another criminal threat provision, section 71 "contains no requirement of immediacy" to the threat. (*People v. Dunkle* (2005) 36 Cal.4th 861, 920 (*Dunkle*), disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

In particular, appellant contends that respondent failed to present sufficient evidence to satisfy the fourth element of section 71, requiring that Officer Ventress have reasonably believed that appellant could act on the threat. We agree with appellant.[2]

In *People v. Tuilaepa* (1992) 4 Cal.4th 569 (*Tuilaepa*), the Supreme Court considered the showing required to satisfy this element. There, the trial court

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[2] Because we find that insufficient evidence was presented with respect to this element of the offense, we need not consider appellant's contention that the People also failed to satisfy another element of the statute requiring that he intended to interfere with Officer Ventress' performance of his duties.

admitted evidence during the penalty phase of a capital case that the defendant, while in custody at a maximum security California Youth Authority (CYA) facility, threatened several employees. The defendant threatened to rape and kill two female employees when he was locked inside his cell; he also threatened to burn the face of another employee who reprimanded him. The evidence showed that none of the recipients of the threats believed they were in danger, but they all reported the defendant's remarks because they violated institutional rules. (*Id.* at pp. 579-580.)

The Supreme Court held that the threats did not violate section 71, in part because there was no evidence that the defendant's statements created "a reasonable belief the threat would be carried out." (*Tuilaepa*, *supra*, 4 Cal.4th at p. 590.) The court reasoned that "[d]efendant had no apparent history of attacking or injuring CYA officials, and the recipients of these threats indicated they did not actually fear for their safety. Defendant was locked in his cell for the night when he harassed the two women, and his response to [the third employee's] criticism was obviously intended as an angry retort." (*Ibid.*) Because the threats did not constitute a crime, the court held they should not have been admitted as aggravating circumstances supporting the imposition of the death penalty.

In *People v. Harris* (2008) 43 Cal.4th 1269 (*Harris*), the Supreme Court again considered whether an uncharged threat by a defendant was properly admitted as an aggravating circumstance during the penalty phase of a capital trial. (*Id.* at pp. 1310-1311.) When the defendant was a high school student, he had threatened two police officers stationed at the school when they detained him and brought him in handcuffs to the school security office. He told the officers that he knew or could find out where they lived, and that he would kill them. He also threatened to kill the wife of one of the officers and to burn down his house. While

handcuffed, the defendant approached one of the officers, and two other officers were needed to subdue him. He was screaming and had spit, foam, and mucous coming out of his mouth and nose. (*Id.* at p. 1278.) "Both officers took defendant's threats seriously," with one arranging for 24–hour police protection at his house, and the other staying away from his home for the rest of the week. (*Id.* at p. 1279.)

The defendant argued that the threats did not violate section 71 in part because he was in custody and handcuffed when he made the threats, and thus was in no position to carry them out. (*Harris, supra*, 43 Cal.4th at p. 1311.) The Supreme Court, however, noted that "section 71 does not require a present ability to carry out the threat" (*id.* at p. 1311) and held that "[i]t is sufficient if the defendant made a threat with the requisite intent and it reasonably appears to the recipient that the threat could be carried out." (*Id.* at p. 1311.) The court found that the testimony by the officers that they took the defendants' threats seriously, and took precautions against them, was "sufficient to establish a reasonable appearance that the threats could be carried out." (*Ibid.*)

Unlike in *Harris*, and as in *Tuilaepa*, no evidence was presented that Officer Ventress believed the 14-year old appellant could or would carry through on the threat to have someone come to "fuck [him] up" and "kick [his] ass." Like the CYA employees in *Tuilaepa*, who reported the sexual and death threats made by the defendant because they constituted violations of CYA rules, Officer Ventress explained that he reported the threats to his supervisor because campus rules required him to do so. No evidence was presented that Officer Ventress felt it necessary to take precautions following the threat. To the contrary, Officer Ventress testified that he was not afraid.

Respondent points out that fear on the part of the threat recipient is not an element of section 71. In a previous decision comparing the elements of section 71 with section 422, this court held that "the threat criminalized by section 71 need not generate fear, sustained or otherwise. All that is required is that the victim perceive it reasonably possible that the threat will be carried out." (*In re Marcus T.* (2001) 89 Cal.App.4th 468, 472.) As appellant correctly notes, however, the threat recipient's fear or lack thereof may still be a material factor in determining whether he or she believed it was reasonably possible for the defendant to act on the threat. (See *Tuilaepa, supra,* 4 Cal.4th at p. 590 [finding threat did not violate section 71 in part because CYA employees were not afraid]; *Ernesto H., supra,* 125 Cal.App.4th at p. 313 [minor's statement to teacher, "Yell at me again and see what happens," accompanied by threatening stance, violated section 71, where teacher testified that he felt afraid and feared the minor might retaliate in the future].) Here, Officer Ventress' testimony that appellant's threatening statements did not make him feel afraid suggests that he did not believe appellant would follow through on the threat.

As discussed above, section 71 applies only where "it reasonably appears *to the recipient of the threat* that such threat could be carried out." (§ 71, subd. (a), italic added.) Thus, it must *actually* appear to the *recipient* that the threat is capable of being carried out. (*Dunkle, supra,* 36 Cal.4th at p. 919 [holding that record contained sufficient evidence that a nurse, the recipient of death threat, actually believed inmate would try to kill her, where she testified she took the threat seriously and reported it to her supervisor and in the jail log]; *Ernesto H., supra,* 125 Cal.App.4th at p. 311 [section 71 applied where recipient of threat told police that "he actually feared for his safety and believed that the minor might retaliate against him in the future"].) In this case, the juvenile court found true the

allegation under section 71 based on its conclusion that the high level of gang-related violence in the community reasonably could have led Officer Ventress to believe that appellant could carry out the threat to summon someone to do him harm. No evidence was introduced that Officer Ventress considered the possibility that appellant might have ties to criminal street gangs or that he viewed the threat as credible because of the level of gang activity in the area. In the absence of evidence that Officer Ventress actually had gang-related concerns or otherwise believed appellant could carry through on his threats, it was error to sustain the charge under section 71.

In sum, respondent failed to satisfy its burden to proffer substantial evidence that Officer Ventress had a reasonable belief that appellant's threat would be carried out. We thus reverse the order sustaining the petition under section 602.

DISPOSITION

The order of the juvenile court is reversed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J. SUZUKAWA, J.