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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re FRANCISCO T., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO T., Defendant and Appellant.	A134489 (Solano County Super. Ct. No. J41032)

The juvenile court found that Francisco T. made criminal threats against his teacher and principal in violation of Penal Code section 71.[1] The minor challenges the sufficiency of the evidence. We affirm.

I. BACKGROUND

On August 30, 2011, the district attorney filed a juvenile wardship petition pursuant to Welfare and Institutions Code section 602 alleging that Francisco threatened three public officers (Roxanne R., Terri A., and Michael D.) at his school on May 17, 2011 (§ 71; counts 2–4).[2] A contested hearing was held on November 14, 2011.

[1] All statutory references are to the Penal Code unless otherwise noted.

[2] The original petition also alleged that Francisco was publicly intoxicated on March 31, 2011 (§ 647, subd. (f); count 1). The district attorney later amended the petition to allege another count of public intoxication that occurred on October 11 (count 5). On November 14, counts 1 and 5 were dismissed.

Francisco's teacher, Terri A., testified that during class on May 16, 2011, Francisco had asked to speak to her privately and she later discovered that a cord to the classroom surveillance camera was cut while they were talking. She suspected that Francisco had deliberately diverted her attention so the cord could be cut. Terry A. reported the incident to the principal. The next day, on May 17, another teacher at the school, Michael D., heard Francisco tell a female student, "Fuck you, bitch. You are a fucking hoe." Michael D. told Francisco to stop but Francisco ignored him. He then twice told Francisco to come with him to the office but Francisco did not respond. Michael D. gave the principal, Roxanne R., a referral about the incident and returned to his classroom.

Shortly thereafter on May 17, 2011, Roxanne R. called Francisco to her office. She mentioned Michael D.'s referral and Francisco "became very enraged; [he] eventually stood up, pushed the chair back, and started making very threatening comments" like " 'I'm going to fuck them up.' " He exited the office and headed toward the hallway where the teachers were located, saying he needed to see the teacher and that he was going to bring his boys. Roxanne R. tried to block Francisco's pathway, but he was so agitated—yelling within a couple of inches of her—that she feared physical injury if she stood in his way and she let him pass. She radioed the campus monitor to lock the classroom doors.

Michael D. heard a bang on his classroom door, opened the door, and saw Francisco outside the door with Roxanne R. blocking him from entering the room. Roxanne R. told Michael D. to get back in his room and said she was going to call the police. When Michael D. later moved to a different room to teach his next class, a campus monitor came up to him and said, " 'You need to get in your classroom. I'm locking you in. Francisco is coming this way.' " Terri A. also heard a knock on her door at some point during the day and when she tried to open the door Roxanne R. told her, " 'No,' " and pulled the door closed.

Roxanne R. watched Francisco go back and forth between the classrooms of Michael D. and Terri A., which were across the hall from each other, rattling the

doorknobs and pounding and kicking on the doors. He was very agitated and he yelled very loudly, " 'I'll bring my boys. I need to see the teachers and take care of this.' " Michael D. saw Francisco come up to his classroom door and repeatedly kick and punch it for about five minutes, but he could not hear what Francisco was saying. Terri A. heard yelling as well as pounding and kicking on her door. When she looked out the door window, she saw Francisco pounding on the door and heard him say, " 'Let me in you mother fucking bitch. How could you do this to me[?]' " He told her he was angry that she had reported him. His fists were balled up, he looked very angry, and his body language was intimidating and scary. She felt he might physically harm her if she opened the door and she was emotionally distraught following the incident.

After Francisco's door-banging and yelling went on for two or three minutes, a campus monitor and some peer professionals arrived. It took four staff members to "very gingerly" guide Francisco back to Roxanne R.'s office area. Francisco's father arrived and Roxanne R. attempted to discuss the situation with Francisco and his father. Francisco again became extremely agitated, repeated his comments about bringing his boys, needing to see the teachers and taking care of business, and tried to go back down the hallway. Roxanne R., the campus monitor, and Francisco's father followed Francisco down the hallway and were able to guide him out of the school and off campus.

Defense counsel argued there was insufficient evidence to establish any of the three charged threats. She argued that Francisco never made a direct threat against Roxanne R. or her property and that neither Michael D. nor Terri A. heard Francisco threaten them. The court sustained the charges regarding Roxanne R. and Terri A., but not the charge regarding Michael D. "[I]t is clear in the Court's mind that as to [Michael D.], the minor's conduct was wrongful, inappropriate, and disruptive to his teaching but does not rise . . . to the level of a violation of Section 71. . . . [¶] . . . [¶] In the case of [Roxanne R.], the minor was directly communicating to her his intention to fuck up the teachers and get his boys and disrupt the whole process. That, in the Court's mind, is a direct threat to her in the performance of her duties in imposing discipline at the school, and he certainly had the ability to carry it out in his conduct and the manner in which he

attempted to enter into the two classrooms. [¶] With respect to the count involving [Terri A.], the minor's statements, again, were more direct and more focused, not just . . . in banging on the door and being disruptive but in communicating to her both by his statement and his showing his balled up fists to her, again, the type of conduct in the Court's mind that is prohibited by . . . Section 71." The court sustained the offenses against Roxanne R. and Terri A. as felonies. The court adjudged Francisco a ward of the court and placed him on probation in his parents' home.

II. DISCUSSION

Francisco argues there was insufficient evidence to support the findings that he violated section 71 as to Terri A. or Roxanne R. We affirm the judgment.

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 elements of the crime 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 (*Hopkins*), fn. omitted.)

Because a threat is a form of speech, the statute "must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." (*Watts v. United States* (1969) 394 U.S. 705, 707.) " 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. [Citations.] The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear

engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.' [Citation.]" (*Virginia v. Black* (2003) 538 U.S. 343, 359–360.) Such threats may be criminally punished consistent with the First Amendment. (*Id.* at p. 359.)

When a defendant raises a plausible First Amendment defense to prosecution for making a criminal threat, "a reviewing court should make an independent examination of the record . . . to ensure that a speaker's free speech rights have not been infringed by a trier of fact's determination that the communication at issue constitutes a criminal threat. [Citation.]" (*In re George T.* (2004) 33 Cal.4th 620, 632.) "Independent review is not the equivalent of de novo review 'in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes' the outcome should have been different. [Citation.] Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are findings of fact that are not relevant to the First Amendment issue. [Citations.] . . . [A reviewing court should] defer to the [lower] court's credibility determinations, but . . . ' " 'make an independent examination of the whole record' " ' [citation], including a review of the constitutionally relevant facts ' "de novo, independently of any previous determinations by the [lower court]" ' [citations] to determine whether [the charged conduct] was a criminal threat entitled to no First Amendment protection." (*Id.* at p. 634; see also *In re Ernesto H.* (2004) 125 Cal.App.4th 298, 310 (*Ernesto H.*).)

On other sufficiency of the evidence issues, we "review the whole record in the light most favorable to the judgment in order to determine whether it discloses substantial evidence that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. [Citations.]" (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1136 (*Ricky T.*).)

A. *Threat Against Terri A.*

Francisco argues his alleged threat against Terri A. was nothing more than an angry outburst in response to disciplinary action and there was no evidence he intended to influence Terri A.'s official conduct. He insists that his communications to Terri A. (and

to Roxanne R.) were "protected speech under the First Amendment and not a 'true threat.' " We disagree.

1. *True Threat*

"To determine whether the minor's statement to [the teacher] may be construed as a threat to inflict an unlawful injury upon person or property, we must examine not only the words spoken but also the circumstances surrounding the communication. [Citations.] In doing so, we will keep in mind that . . . section 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.)

Francisco correctly notes that his threats to "fuck them up," to "bring his boys," and to "take care of this" were not directly communicated to Terri A. His directly-communicated comments included, "Let me in you mother fucking bitch. How could you do this to me[?]" and a statement that he was angry she had reported him for misconduct. The literal meaning of these statements did not unambiguously threaten Terri A. with injury. Similarly, in *Ricky T.*, a student's statement to a teacher—"I'm going to get you" or "I'm going to kick your ass"—was deemed "ambiguous on its face and no more than a vague threat of retaliation without prospect of execution." (*Ricky T., supra,* at pp. 1135–1136, 1138 [juvenile delinquency petition for making criminal threat under § 422].) And in *People v. Tuilaepa*, a statement by a California Youth Authority (CYA) resident that he was going to burn an employee's face was deemed to be an angry retort. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 580, 590 (*Tuilaepa*).)[3]

[3] This issue arose in *Tuilaepa*, a death penalty case, because the Supreme Court held the trial court had erred in the penalty phase trial when it admitted evidence of threats made by the defendant while he was committed to the CYA, even though the evidence showed that they did not constitute criminal threats under section 71. (See *Tuilaepa, supra,* 4 Cal.4th at pp. 579–580, 590.)

In context, however, such statements can amount to criminal threats under section 71. In *Ernesto H.*, for example, the minor told a teacher, " ' "Yell at me again and see what happens." ' " (*Ernesto H., supra*, 125 Cal.App.4th at p. 303, fn. omitted.) The court held that the statement was ambiguous standing alone. (*Id.* at p. 311.) However, its context established it as a violation of section 71: "The minor was angry and very upset at the time the words were spoken. Simultaneously with his statement, he took a step toward [the teacher], tilted back his head, and, there was a slight recollection that he clenched his fists. When [the teacher] asked if the minor was threatening him, the minor did not deny it. [The teacher] felt the minor was very upset and was serious about what he was saying." (*Ibid.*, fn. omitted.) In contrast, the context in *Ricky T.* and *Tuilaepa* established that the statements made by the defendants were not threats within the meaning of section 71. In *Ricky T.*, the minor's statement was made in response to the teacher's having accidentally hit him with the classroom door, there was no display of physical aggression, and there was no evidence of prior animosity between the student and teacher or an imminent physical confrontation. (*Ricky T., supra*, 87 Cal.App.4th at pp. 1135, 1138.) Similarly, in *Tuilaepa*, there was "no substantial showing . . . that his statements had the requisite effect—creating a reasonable belief the threat would be carried out. [Citation.] Defendant 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's] response to [one employee's] criticism was obviously intended as an angry retort." (*Tuilaepa, supra*, 4 Cal.4th at p. 590.)

Here, the context amply supports a finding that Francisco's statements were true threats. Francisco pounded on and kicked Terri A.'s classroom door for two to five minutes. While doing so, he yelled at her, demanding a face-to-face confrontation, and displayed balled up fists, an angry facial expression, and intimidating body language. His demand to be let into the classroom even though he could communicate with Terri A. through the closed door dispelled any notion that he merely wanted to talk to her. Terri A. understandably perceived Francisco's words and actions as threatening. Francisco notes the prosecution did not produce any evidence of a history of violence.

Ricky T., however, does not hold that such evidence is essential to establishing a true threat, but only that it is one factor to be considered. (*Ricky T., supra,* 87 Cal.App.4th at p. 1138.) Francisco's physically aggressive behavior and belligerent statements in combination more than sufficiently established that he directly communicated to Terri A. a true threat, not protected under the First Amendment, and a threat of injury to her person or property within the meaning of section 71.

2. *Intent*

The evidence also supports a finding that Francisco threatened Terri A. in order to influence her performance of her official duties. " '[I]ntent is rarely susceptible of direct proof and may be inferred from the circumstances disclosed by the evidence.' [Citation.]" (*Hopkins, supra,* 149 Cal.App.3d at p. 44.) Thus, the specific intent element of section 71 may be inferred from the circumstances in which a threat is made. In *Hopkins*, the appellant (an adult defendant) threatened physical harm to the principal and to a teacher after he was repeatedly told to leave an elementary school campus. (*Id.* at p. 39.) Although the appellant did not expressly condition this threat on the victims' performance of their duties as school officials, the court ruled that, in context, it was reasonable to infer "that appellant threatened the school officials in order to cause them to cease their efforts to eject him from the school grounds. Such reasonable inference would support a finding that appellant acted with specific intent to prevent school officials from carrying out their duties," as required by section 71. (*Id.* at p. 44.)

Here, Terri A. had referred Francisco for misconduct the day before Francisco made his threat, and Francisco specifically referenced the referral in his threatening statements to her. He expressed his displeasure with Terri A.'s action by pounding on her classroom door, addressing her profanely, making physically aggressive gestures, and saying, "How could you do this to me?" The evidence readily supports an inference that his threats were intended to dissuade Terri A. from pursuing the misconduct referral or from referring Francisco for any future misconduct.

Francisco argues *Tuilaepa* and *Ernesto H.* support a contrary conclusion. *Tuilaepa* is distinguishable. Some of the defendant's threats were made to two patrolling

female employees while the defendant was locked in a maximum security cell at CYA, and neither of those threats mentioned any specific action that had been taken by the employees. (*Tuilaepa, supra,* 4 Cal.4th at pp. 579–580.) Thus, "[t]here was no substantial showing that defendant harbored the requisite intent—interfering with the performance of official duties . . . ." (*Id.* at p. 590.) Although the threat of burning a third CYA employee's face was made in response to a reprimand by that employee, the court had already concluded this was not a true threat and "was obviously intended as an angry retort" because the defendant was in maximum-security CYA custody, he had no history of actual violence toward CYA officials, and the recipients of the threats did not actually fear for their safety. (*Id.* at pp. 580, 590.) Against this background, the court held there was no evidence of the requisite intent. (*Ibid.*) Here, Francisco specifically stated that he was angry because Terri A. had referred him for misconduct, and we have already found that his statements were true threats. Francisco was not under restraint in a maximum-security facility. He was in an open school environment where he frequently had physical access to Terri A.'s person and property, and where school officials had great difficulty in restraining his movement. His actions were aggressive enough that school authorities were required to lockdown classrooms. There is no basis in this case to dismiss Francisco's statement as an incident of blowing off steam with no intent to follow up on the threat. The circumstances support a more than reasonable inference that he made the threat to dissuade Terri A. from reporting him for misconduct.

Francisco attempts to contrast the facts of his case with those of *Ernesto H.*, but again we are not persuaded. The incident in *Ernesto H.* began when the minor alerted students who were fighting at school that a teacher was approaching. (*Ernesto H., supra,* 125 Cal.App.4th at p. 303.) When the teacher reprimanded the minor for acting as a lookout, the minor told the teacher not to yell at him. After he was told to move away, the minor said, "Yell at me again and see what happens" while using aggressive body language, and he declined an opportunity to deny that he was threatening the teacher. (*Id.* at pp. 303–304.) In this context, the court held a jury could find the minor acted with the requisite intent: "When the minor told [the teacher] that something would happen to him

unless he stopped yelling, the minor was clearly interfering with [the teacher's] attempt to restore order to the physical education class." (*Id.* at p. 314.) The same logic applies here. The juvenile court's finding that Francisco acted with the requisite intent is supported by substantial evidence.

We affirm the finding that Francisco threatened Terri A. within the meaning of section 71.

B. *Threat Against Roxanne R.*

Francisco argues there was insufficient evidence that he made threats with a specific intent to influence Roxanne R. in the performance of her duties. We again disagree.

The circumstances of Francisco's threats to harm Michael D. and Terri A.[4] support an inference that Francisco made the threats in order to influence Roxanne R. in the performance of her official duties. Francisco's outburst began immediately after Roxanne R. confronted him with Michael D. and Terri A.'s complaints during a conference in the principal's office. That is, Francisco was directly reacting to Roxanne R.'s performance of her duty to enforce discipline in the school. Francisco's verbal and physical reaction to Roxanne R.'s disciplinary meeting with him—becoming enraged, making threats, leaving the office, ignoring her attempts to block his progress toward the classrooms, and his aggressive conduct at the classrooms themselves—directly interfered with Roxanne R.'s performance of her duties and implicitly threatened continued interference if she persisted in the performance of her disciplinary duties. As already discussed, *Hopkins, supra,* 149 Cal.App.3d 36; *Ricky T., supra,* 87 Cal.App.4th

[4] Section 71 prohibits an attempt to cause a public officer to do or refrain from doing any act in the performance of her public duties "by means of a threat, directly communicated to such person, to inflict an unlawful injury upon *any person* or property, ..." (Italics added.) Francisco does not dispute that he directly communicated to Roxanne R. a threat to harm Michael D. or Terri A. or both when he said, " 'I'm going to fuck them up,' " that he needed to see the teacher, and that he was going to bring his boys. He only disputes the sufficiency of the evidence that he did so with an intent to influence Roxanne R.'s performance of her official duties.

1132; *Tuilaepa, supra*, 4 Cal.4th 569; *Ernesto H., supra*, 125 Cal.App.4th 298 support our conclusion. The juvenile court's finding that Francisco acted with the requisite intent is supported by substantial evidence.

We affirm the finding that Francisco threatened Roxanne R. within the meaning of section 71.

III. DISPOSITION

The juvenile court's disposition order is affirmed.

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Bruiniers, J.

We concur:

_____
Simons, Acting P. J.

_____
Needham, J.