

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

In re P.S., a Person Coming Under the Juvenile Court
Law.

C073106

THE PEOPLE,

(Super. Ct. No. 68437)

Plaintiff and Respondent,

v.

P.S.,

Defendant and Appellant.

Following a contested jurisdiction hearing, the San Joaquin County Juvenile Court found that minor P.S., age 17, was described by Welfare and Institutions Code section 602 in that he drew or exhibited an imitation firearm in a threatening manner against Stockton police officers. (Pen. Code, § 417.4.)¹ The minor was continued as a

¹ Undesignated statutory references are to the Penal Code.

ward of the court under the usual rules of probation. He was ordered to, among other things, perform 80 hours of community service and pay various fines and fees.

On appeal, the minor contends the evidence was insufficient to prove that he drew or exhibited the imitation firearm in a threatening manner against police officers. We affirm.

FACTS

Prosecution Case-in-Chief

On April 19, 2012, around 6:30 p.m., Stockton Police Officers Paul Dona and Erika Gonzalez were on duty on Amherst Drive. As Officer Gonzalez conversed with some citizens, Officer Dona looked down the street toward a group of 10 to 12 people in the driveway of a residence. The minor was sitting in a chair in the driveway near the open garage door. Officer Dona estimated that he was 150 feet away from the people in the driveway.

As Officer Dona watched, the minor held up “what appeared to be a . . . camouflage rifle.” The rifle was dark green. Officer Dona could not tell whether the rifle was a real firearm. The minor “was pointing it up in the air.” A moment later, “[i]t looked like he fired it into the air. When he fired it, it sounded like to be some type of air rifle.”

After discharging the air rifle, the minor set it down on the ground beside or in back of him and picked up another dark object. Officer Dona thought the minor was holding a gun. As the minor was “looking towards” the officers’ direction, he “made a movement as if racking a gun, racking a firearm.” Officer Dona “heard a click, but wasn’t sure if it was a real firearm or not.” He said the pistol “was pointed in [his] direction” and appeared to be “pointed at [him] personally during the process of [the minor] racking the slide” of the pistol. Officer Dona said he had “worked that area for the past six years and . . . it is a very dangerous area there. Lots of firearms floating around there, lots of shots being fired.”

Officer Dona, who had been watching from behind a tree, “drew [his] firearm and held it down to [his] side as [he and Officer Gonzalez] approached the house.” As Officer Dona approached the people in the driveway, he “started shouting for everyone to let [him] see [their] hands.” Everyone, including the minor, complied with this command. Officer Dona saw the rifle and a “toy spring loaded bb gun” on the ground near the chair in which the minor was sitting. The toy bb gun was not a real firearm. But Officer Dona did not know he was dealing with a replica weapon until he “was close enough to see it.”

Officer Dona took the minor into custody and advised him of his constitutional rights. The minor said he understood his rights and, after first denying that he had pointed the gun in the officers’ direction, he admitted that he had “pointed it in our direction as he racked it.” The minor admitted that his friends were “telling him to stop, not to point it towards [the officers],” and that he did not follow the friends’ advice because “he’s hard-headed.” When Officer Dona asked the minor “what he thought would happen pointing a fake gun at a police officer,” the minor answered, “ [t]hat he has a fucked up life, that he is on probation, he has a child, ’ ” and “he’d rather get shot by the police than another gangster.” When Officer Dona explained that the officers might have shot him, “it just seemed like he really did not care.”

Defense

Kendra Castillo testified that she resided in one half of a duplex on Amherst Drive; the minor and his family lived in the other half. On the afternoon of April 19, 2012, Castillo was outside in front of the duplex with several other people. Castillo said the children were playing tag. Then her roommate’s son, D.J., “brought out his bb gun and we all started playing bb gun wars.” Castillo said four bb guns were present.

At some point that afternoon, Castillo saw two police officers go to another duplex down the street “to whatever complaint or whatever reason there was.” While the officers were occupied at the other duplex, Castillo and the others continued to play with

the bb guns. At one point, the minor discharged the bb pistol at a soda can. Castillo suggested he put away the bb gun. He set it down on the ground beside him.

As Castillo was talking to the minor, the male police officer suddenly walked up to them. The officer had his gun in his right hand and was pointing the gun “somewhat towards the ground.” Castillo heard the officer asking, “ ‘You think this is funny, you think this is funny?’ ” The officer holstered his weapon and then “grabbed [the minor] and immediately put him in handcuffs and walked him off.”

Castillo said she did not see the minor point the bb gun “across the street” toward the officers.

D.J. testified that on the day the minor was arrested the 10 to 12 people in the driveway of the duplex were “barbecuing and having a bb gun war.” D.J. said the pellet pistol belonged to him; he had bought it at a discount store. D.J. said the minor was using the pellet pistol to shoot at the license plate of one of the cars in the driveway. According to D.J., the minor was “pointing it at the license plate of the red car and shooting it.” He fired “[a]t least five or six” shots.

D.J. did not see the minor point the pellet pistol across the street or at Officer Dona.

Officer Gonzalez testified that on April 19, 2012, she and Officer Dona had been dispatched to “a family disturbance” on Amherst Drive. She had no recollection of any other events that day on Amherst Drive.

The minor did not testify.

DISCUSSION

The minor contends the evidence was insufficient to prove that the minor drew or exhibited an imitation firearm in a threatening manner against Stockton police officers. He argues “it was unreasonable for Officer Dona to experience apprehension or fear of bodily safety.” The minor further argues he “did not draw the toy gun against the officer, or against anyone else. Instead, he was shooting at inanimate objects in his driveway, a

soda can and a car license plate.” The minor also argues that Officer Dona’s testimony was inherently improbable. None of these claims has merit.

A. Standard of Review

In an “appeal challenging the sufficiency of the evidence to support a juvenile court judgment sustaining the criminal allegations of a petition made under the provisions of section 602 of the Welfare and Institutions Code, we must apply the same standard of review applicable to any claim by a criminal defendant challenging the sufficiency of the evidence to support a judgment of conviction on appeal. Under this standard, the critical inquiry is ‘whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] An appellate court ‘must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.]” (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1371.)

B. Elements of the Offense

Section 417.4 provides in relevant part: “Every person who, except in self-defense, draws or exhibits an imitation firearm, as defined in subdivision (a) of Section 16700, in a threatening manner against another in such a way as to cause a reasonable person apprehension or fear of bodily harm is guilty of a misdemeanor” Because the minor did not claim he fired the bb gun in self-defense, the prosecution was obligated to prove three elements: (1) the minor drew or exhibited an imitation firearm in a threatening manner against another person; (2) the minor’s act caused someone to fear bodily harm to himself or herself or someone else; and (3) that fear of harm was reasonable. (CALCRIM No. 985 (Feb. 2012 rev.))

C. Sufficiency of Evidence under In re Michael D.

Citing our opinion in *In re Michael D.* (2002) 100 Cal.App.4th 115 (*Michael D.*), the minor contends “it was unreasonable for Officer Dona to experience apprehension or fear of bodily safety.” The minor claims this is so for several reasons: (1) Officer Dona was much farther away from the scene, 10 times the distance; (2) the minor and other members of the group were playing on private property in a residential driveway; (3) children in the group were under adult supervision; and (4) the minor did not draw the toy gun against the officer or anyone else; rather, he was shooting at a soda can and a license plate in the driveway. None of these points has merit.

In *Michael D.*, the office manager of an elementary school heard voices of persons older than elementary school children. (*Michael D.*, *supra*, 100 Cal.App.4th at p. 119.) From a window, she saw three teenage boys on the playground. The boys were “apparently acting silly and laughing.” (*Ibid.*) One of the boys, Michael D., was holding what appeared to be a handgun. He was pointing it straight out at a smaller boy, Andre A., from a distance of about 15 feet. Andre was ducking and “had an odd expression on his face, as if he was pleading not to be shot.” (*Ibid.*) As soon as the office manager saw the gun, she dropped to the ground and took steps to “ ‘lock[] down the school.’ ” (*Ibid.*) The police located the three boys at a convenience store. (*Ibid.*) They eventually “found an inoperable replica of a handgun in Andre’s clothing.” (*Id.* at p. 120.)

Michael D. held that “the term ‘reasonable person’ in the phrase ‘draws or exhibits an imitation firearm in a threatening manner against another in such a way as to cause a reasonable person apprehension or fear of bodily harm’ refers to anyone who witnesses the actions of the perpetrator, not just to the person against whom the device is drawn or exhibited.” (*Michael D.*, *supra*, 100 Cal.App.4th at p. 123.) Thus, the office manager was the victim of the minor’s offense even though the minor pointed the gun at another boy, not the manager.

The minor's attempts to distinguish *Michael D.* are not persuasive. His claim that "Officer Dona was much further away from the scene, ten times the distance," fails because it is based on the 15 feet that separated the two boys. (*Michael D., supra*, 100 Cal.App.4th at p. 119.) The relevant distance, separating the victim office manager from the gun, was not stated in the opinion. Nothing in *Michael D.* suggests that Officer Dona was impermissibly far away.

The minor attempts to distinguish *Michael D.* on the ground "[he] and other members of the group were playing on private property in a residential driveway," rather than on school property. This distinction does not assist the minor. Real firearms are far more prevalent at home than at school. There is no reason why the residential setting would have decreased a reasonable officer's apprehension or fear of bodily safety.

The minor's claim that "[c]hildren in the group were not unsupervised, as adults were present," fails because it is not supported by evidence that Officer Dona discerned, or reasonably should have discerned, that adults were present in the driveway *and* that they were providing the expected supervision. Absent sufficient evidence that Officer Dona knew or should have known both of those facts, his apprehension or fear of bodily safety cannot be dismissed as unreasonable.

The minor's claim that he "did not draw the toy gun against the officer, or against anyone else" appears to be based upon Castillo's testimony that she never saw the minor point the gun across the street and D.J.'s testimony that he did not see the minor point the pellet pistol across the street or at Officer Dona. But neither witness claimed to have observed the minor the entire time he held the gun in his hand. Their failure to observe him pointing the gun at Officer Dona does not mean that the minor did not do so.

In *Michael D., supra*, 100 Cal.App.4th 115, this court recognized that violation of section 417.4 is a general intent crime. (*Id.* at p. 126.) The minor's trial counsel argued that the statute required evidence of intent to point the gun at Officer Dona, such that it did not occur accidentally or in the course of other conduct not designed to cause

reasonable fear. On appeal, the minor claims it was “never established that the minor ever noticed Officer Dona across the street, much less pointed a toy gun at him.”

But Officer Dona testified that the pistol “was pointed in [his] direction” and appeared to be “pointed at [him] personally during the process of [the minor] racking the slide” of the pistol. Moreover, when Officer Dona asked the minor “what he thought would happen pointing a fake gun at a police officer,” the minor answered, “ ‘[t]hat he has a fucked up life, that he is on probation, he has a child,’ ” and “he’d rather get shot by the police than another gangster.” The juvenile court could infer that the minor’s holding and pointing of the gun would not have spawned any of these thoughts if he had been unaware of the police downrange of the gun and if he had harbored no intent to threaten them.

“Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.” (Evid. Code, § 411; see *People v. Cuevas* (1995) 12 Cal.4th 252, 262; *People v. Scott* (2002) 100 Cal.App.4th 1060, 1064.) Officer Dona’s testimony is sufficient to establish that the gun was pointed at him and that the pointing was not an accident.

Echoing his trial counsel’s summation, the minor argues that “[d]ue to the dry click and the color of the gun, Officer Dona would not reasonably conclude that it would cause him any kind of bodily injury.” We disagree.

Officer Dona testified that after the minor discharged the air rifle, he set it down on the ground beside or in back of him and *picked up another dark object*. Officer Dona *thought the minor was holding a gun*. As the minor was “looking towards” the officers’ direction, he “made a movement as if racking a gun, racking a firearm.” Officer Dona “heard a click, but wasn’t sure if it was a real firearm or not.”

Thus, contrary to the minor’s argument, Officer Dona did not conclude that the gun *would* cause him injury. He concluded only that the gun was “dark,” a color

ubiquitous to real firearms, and its sound made him unsure whether the gun was real. The minor has not shown that the officer's lack of certainty was unreasonable.

D. Inherent Improbability

Last, the minor contends Officer Dona's testimony is not sufficient to support his conviction because it is inherently improbable. He claims "[t]he reluctance of other officers to corroborate any of Officer Dona's testimony raises a strong inference of inherent improbability." The claimed "reluctance" consists of Officer Gonzalez's failure to recollect details of the incident, as well as a lieutenant's evident unwillingness to comply with a subpoena to testify for the defense. We need not consider these points at length because they overlook the controlling principle of law.

“ “ “To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent *without resorting to inferences or deductions.*” ’ ’ ’ ” (*People v. Friend* (2009) 47 Cal.4th 1, 41 (*Friend*), quoting *People v. Barnes* (1986) 42 Cal.3d 284, 306, italics added; see *People v. Allen* (1985) 165 Cal.App.3d 616, 623 [effectively equating “inherent improbability” with “falsity . . . apparent without resorting to inferences or deductions”]; *People v. Young* (2005) 34 Cal.4th 1149, 1181 [citing *Allen*].) The minor's argument that the lack of corroboration from other officers “raises a strong inference of inherent improbability” is based on inference or deduction and overlooks the italicized limitation.

The minor may be understood to claim that Officer Dona's testimony was inherently improbable because he claimed to be “concealed behind the bushy portion of a tree” when the minor pointed the gun at him. Officer Dona testified that he was “kind of standing behind a tree” because he had “worked that area for the past six years” and “[was] familiar” with the locale, which he described as “a very dangerous area.” To the extent the minor infers or deduces that shooting at Officer Dona was impossible or inherently improbable because, by “kind of standing behind a tree,” the officer had

successfully “concealed” himself from the minor’s view, the inference or deduction fails for the reasons we have stated. (*Friend, supra*, 47 Cal.4th at p. 41.)

The minor may also be understood to contend that his admission that he had, in fact, pointed the pellet pistol at Officer Dona was suspect because the “conversation [with Officer Dona] was not recorded, as the patrol car was not equipped with a recording device.” This contention invites us to speculate that a recording would have undermined the officer’s testimony. The speculative inference does not require rejection of Officer Dona’s testimony. (*Friend, supra*, 47 Cal.4th at p. 41.)

In sum, the minor’s conviction is supported by sufficient evidence.

DISPOSITION

The judgment is affirmed.

_____ RAYE _____, P. J.

We concur:

_____ BLEASE _____, J.

_____ HOCH _____, J.