Filed 12/6/16 In re K.R. CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re K.R., a Person Coming Under the Juvenile Court Law.	C079034
THE PEOPLE, Plaintiff and Respondent, v. K.R., Defendant and Appellant.	(Super. Ct. No. 70830) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on November 16, 2016, be modified as follows:

1. On page six, delete the first sentence of the first paragraph under the heading "DISCUSSION." Insert the following sentence in its place: The current circumstances began on March 3, 2015, when the minor told her adult friend, Ashley Robinson, S. called the minor a "hoe."

This modification does not change the judgment

The petition for rehearing is denied.

THE COURT:

NICHOLSON, Acting P. J.

DUARTE, J.

RENNER, J.

Filed 11/16/16 In re K.R. CA3

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In re K.R., a Person Coming Under the Juvenile Court Law.	C079034
THE PEOPLE, Plaintiff and Respondent, v. K.R., Defendant and Appellant.	(Super. Ct. No. 70830)

K.R. (the minor) appeals from the juvenile court's order sustaining a petition under Welfare and Institutions Code section 602, adjudging her a ward of the court, and placing her on probation. The minor contends the court erred by finding she made misdemeanor criminal threats against her sister. (Pen. Code, § 422.)[1] We affirm.

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[1] Undesignated section references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

On March 5, 2015, the San Joaquin County District Attorney filed a petition alleging the minor committed a felony violation of section 422. The evidence at the contested jurisdictional hearing 27) was as follows:

Two sisters, the 14-year-old minor, and her 16-year-old sister, S. had a tense relationship. On March 3, 2015, the minor told her adult friend, Ashley Robinson, that S. had called the minor a "hoe." Robinson entered the minor's and S.'s home, yelled at S., spit in her face, and punched her. The minor and Robinson then left together.

The minor's and S.'s mother, L.R. (mother), came home 10 minutes later. After S. told mother what had happened, mother called their neighbor, then the police. Eventually, mother and S. drove to Robinson's house to pick up the minor.[2]

According to S.'s testimony, as they rode home, the minor threatened to stab S. with scissors when they got home. After they arrived, the minor threatened to kill S. in

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[2] S. initially testified that mother called 911 after hearing of Robinson's assault on S., then left alone to pick up the minor. Later, however, S. testified she went along in the car and mother called 911 either on the way home or after they returned home with the minor. In fact, mother called 911 once before picking up the minor, twice in the car after picking up the minor while on the way home, and twice after returning home.

Recordings of mothers 911 calls were played in court. The transcripts show that on March 3, 2015, mother called 911 at 5:21 p.m., 8:03 p.m., 8:05 p.m., 8:26 p.m., and 8:41 p.m. In the first call, made from her home, mother reported Robinson's attack on S. In the second and third calls, made from mother's car, she reported that after she drove to Robinson's house to pick up the minor, Robinson and Robinson's mother threw rocks at mother's car, then followed her as she drove away. In the fourth call, made from mother's home, she reported that the minor was threatening to stab S. with scissors; mother said, "I'm afraid to go to sleep, 'cause [the minor's] had scissors before." In the last call, also made from home, mother said the minor was threatening to kill S. by poisoning her or stabbing her in her sleep, saying S. would not see daylight tomorrow and would not make it to her next birthday.

Mother testified that S.'s next birthday was nearly six weeks later.

her sleep, poison her, hit her with a bat, and stab her with a knife. The minor said she was going to see S. in her grave and hoped to see her in the mortuary.

S.'s testimony on direct examination continued:

"Q. Were you afraid of your sister?

"A. No.

"Q. Did you believe she was going to harm you?

"A. No—yeah.

"Q. Were you taking her threats—I'm not asking if you were shaking in your boots afraid, I'm just asking did you believe she was going to carry out her threats?

"A. Yes.

"Q. And are you saying anything back to your sister as she's saying this stuff to you?

"A. Nope.

"Q. How long does this go on for?

"A. Like 40 minutes.

"Q. Are you guys standing stationary? Is she following you around?

"A. No. She was like sitting on the couch. I was like by the hallway kind of.

"Q. And did you call the police, or did somebody call the police?

"A. My mom did.

"Q. Did you want the police called?

"A. Yeah.

"Q. Okay. And as you sit here today, do you think that your sister intends to carry out these threats against you?

"A. No.

"Q. How long before you came to the conclusion that she wasn't going to carry out the threats against you?

"A. Maybe like seven days.

"Q. For a week or so?

"A. Yeah.

"Q. Okay. And you live up in Shasta County?

"A. Yes.

"Q. Is that because of this whole incident?

"A. Yes.

"Q. And did you go up to Shasta immediately after this incident?

"A. No.

"Q. How soon after this incident were you up there?

"A. Um, I think like four days.

"Q. Okay. To get you away from [the minor]?

"A. Yeah. And Ashley.

"Q. Did you feel safer once you got up to Shasta?

"A. Yeah."

On cross-examination, S. testified that a couple of months before this incident the minor threatened to stab S. with scissors, but S. and mother "just blew it off, like no big deal." This time, however, S. testified she thought the minor "was really going to do it. Like she was really, like, angry and mad. And I guess in her state of mind, she wanted just to do it, just to get revenge or something."

Mother testified the minor threatened to stab S. only with scissors; mother mentioned knives when calling 911 because "I have a bunch of them in the house . . . [a]nd I know [the minor's] temper." Between mother's first and second 911 calls, S. was taken to the hospital by ambulance, but after waiting for approximately two hours, S. and mother were told to go home because the hospital was too busy and they could not do anything for S.; after that, they went to pick up the minor at Robinson's house. In the car, the minor, who was "livid" and "mad," wanted to jump out of the car, but mother told the minor she had to come home.

Mother said the minor had never physically attacked S.

Stockton Police Officer Justin Madsen came to mother's home at approximately 8:39 p.m. on March 3, 2015, in response to a dispatch. Before entering, he heard people yelling. After he entered and tried to talk to mother, he could not understand her because S. and the minor were still yelling. Eventually, he heard the minor saying to S., "I can kill you a million ways," and, "You better not go to sleep tonight, you won't wake up." He tried to get the minor to stop talking, but she refused to stop. The minor also said to S., "I hate you." S. did not say anything like that back to the minor. The minor's voice was "very angry and loud." It seemed to Officer Madsen that the minor meant what she was saying. After some time, the officer detained her. Mother requested that he take the minor to Safehouse, but the minor said: "I would run away from Safehouse and stab that bitch" (meaning S.). Therefore, he decided to arrest the minor.

After taking her to the police station, Officer Madsen read the minor her *Miranda*[3] rights; she said she understood them. She said she and S. (whom she called "the B word") had been arguing and she was tired of S.; she complained her mother and S. were against her. She said she could stab S. with a knife, and if she could not find a knife, she would use earrings; she also said she could pour chemicals into S.'s drink and make S.'s death look like an accident. She said S. had "better watch her back, I can make [her] life a living hell. And I have a million ways to make [her] life a living hell." Officer Madsen asked the minor if she intended to carry out her threats; she said she did.

The minor did not testify.

The minor's counsel argued the minor's offense, if any, was a misdemeanor. Primarily, however, he argued the People failed to prove S. was afraid when she heard the minor's threats, or the threat was immediate.

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3 *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

The prosecutor responded that the criminal threats statute does not require the victim to be "afraid," but only "in reasonable fear." This does not mean "shaking in your boots and crying with fear," but only the reasonable belief that the person making the threats intends to carry them out. It did not matter whether the minor intended to carry out the threats, but only whether she wanted S. to think she would do so; since S. thought that for at least a week, that was sufficient to prove sustained fear.

The juvenile court found beyond a reasonable doubt the minor committed the offense of making criminal threats, "in that [the minor] did willfully and unlawfully threaten to commit a crime which [would] result in death or great bodily injury to [S.], of [*sic*] her immediate family, and . . . said threat cause[d] [S.] reasonably to be in sustained fear for her safety or the safety of her immediate family." The court further found the offense was a misdemeanor because it would have been a misdemeanor if committed by an adult.

The juvenile court imposed probation under parental supervision, including 30 days on electronic monitoring and 80 hours of community service.

DISCUSSION

The current circumstances began on March 3, 2015, when the minor told her adult friend, Ashley Robinson, S. called Robinson a "hoe." Robinson entered the minor's and S.'s home, yelled at S., spit in her face, and punched her. The minor and Robinson then left together. This presents a sad beginning to a very troubled day for everyone involved.

Having already fostered an adult's attack on S. that day, while in the presence at different times of her mother, S., and a police officer, the minor, in loud, angry tones, repeatedly threatened to stab S. with scissors, to kill S. in "a million ways," to kill S. in her sleep, to poison S., to hit S. with a bat, and to stab S. with a knife. The minor said she intended to see S. in her grave and hoped to see her in the mortuary.

All the while, S. did not respond but was in fear for a week, during which time, while still in that fear, she moved a considerable distance away.

Nevertheless, the minor contends there is insufficient evidence to support the juvenile court's ruling because there was no substantial evidence (1) that the threat was unequivocal, unconditional, immediate, and specific; (2) that S. was placed in sustained fear for her safety; or (3) that S. reasonably feared the minor under the circumstances. We are not persuaded.

In determining whether sufficient evidence supports the trial court's findings, we apply the substantial evidence standard. (*In re S.C.* (2006) 138 Cal.App.4th 396, 414.) We "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 allegations against the appellant true] beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We "must . . . presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.] . . . [¶] Before the judgment of the trial court can be set aside for insufficiency of the evidence . . . , it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. [Citation.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755; see also *People v. Johnson, supra*, 26 Cal.3d at pp. 576-577.)

Section 422, subdivision (a) provides as relevant: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, 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, which, on its face and under the circumstances in which it is made, is 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, and thereby causes that person reasonably to be in

sustained fear for his or her own safety . . . , shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

The elements of the offense are as follows: "The prosecution must prove '(1) that the [appellant] "willfully threaten[ed] to commit a crime which [would] result in death or great bodily injury to another person," (2) that the [appellant] made the threat "with the specific intent that the statement . . . [was] to be taken as a threat, even if there [was] no intent of actually carrying it out," (3) that the threat . . . 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 . . . ," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.' [Citations.]" (*In re George T.* (2004) 33 Cal.4th 620, 630.)

"To constitute a criminal threat, a communication need not be *absolutely* unequivocal, unconditional, immediate, and specific. The statute includes the qualifier 'so' unequivocal, etc., which establishes that the test is whether, in light of the surrounding circumstances, the communication was *sufficiently* unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution. [Citation.]" (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861 (*Ryan D.*), original italics.) "The circumstances surrounding a communication include such things as the prior relationship of the parties and the manner in which the communication was made. [Citation.]" (*Id.* at p. 860.)

"While the third element of section 422 . . . requires the threat to convey ' "a gravity of purpose and an immediate prospect of execution of the threat,' " it 'does not require an immediate ability to carry out the threat. [Citation.]' [Citations.]" (*People v. Wilson* (2010) 186 Cal.App.4th 789, 807 (*Wilson*).) "Immediate," as used in the statute, means " 'that degree of seriousness and imminence which is understood by the victim to

be attached to the *future prospect* of the threat being carried out . . . .' [Citation.]" (*Ibid.*, original italics.)

Substantial evidence supports this element of the offense. The minor, who had a longstanding hostile relationship with S., unequivocally threatened to kill her by any of several means readily accessible in the home, as early as that night when S. was asleep, and no later than her birthday nearly six weeks later, which sufficed to convey to S. the "immediate prospect of execution" required by the statute. (*Wilson, supra*, 186 Cal.App.4th at p. 807.) The minor's "communication" consisted of shouting these threats at S. for up to 40 minutes, and continuing to do so even after a police officer came to the house. Although the minor had made a similar threat once before, S. (like mother) perceived this incident as altogether different because the minor seemed so angry and determined to carry out her threats. S. did not personally call the police, but she wanted them called.

The minor asserts her threats were "simply an emotional outburst" and "random;" they were not "accompanied by a physical show of force," an attempt to "batter" S., or damage to property; she made these threats while sitting in the car or the living room; she got in the car willingly; "in going from the car to the couch," she did not try to get a weapon or harm S.; she was in the presence of her mother and/or a police officer when she made her threats; and her threats "did not convey an immediacy, but threatened harm at some future point, that night or sometime before [S.]'s birthday." None of these points establishes that there was no substantial evidence of "unequivocal, unconditional, immediate, and specific" threats in this case.

Section 422 does not require that a threat be accompanied by a "physical show of force," attempted battery, or damage to property. Nor does it state that threats made during an "emotional outburst," or in the presence of parents or police, cannot qualify as criminal threats within the meaning of the statute. Nor does the statute require the threat to be capable of being carried out immediately, or the time or precise manner of

executing the threat to be specified. (*Wilson, supra*, 186 Cal.App.4th at pp. 807, 816.) The authorities on which the minor relies are inapposite or distinguishable.

The minor cites *People v. Teal* (1998) 61 Cal.App.4th 277, 281 for the proposition the statute does not punish "mere angry utterances or ranting soliloquies, however violent." But this rule applies only if such "utterances" or "soliloquies" are not communicated to anyone. (*Ibid*.) Here, as in *Teal*, the threat was communicated to the victim and others, and therefore fell within the statute. Thus, *Teal* does not assist the minor.

The minor cites *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137-1138, in which the appellate court found no substantial evidence of a criminal threat in part because the accused minor did not accompany his angry words with a show of physical violence to persons or property. However, that was not all that the court found lacking in *Ricky T*. to comprise a threat within the meaning of section 422. The court also found that although the minor, after being accidentally hit with a door, cursed and ambiguously said he was " 'going to get' " the alleged victim, he gave no indication of any immediate intent to act on the threat; there was no history of any prior bad relationship between the minor and the alleged victim; and nothing happened after the " 'threat,' " which suggested any intent to follow up on it. (*Id.* at pp. 1138-1139.) The present case is distinguishable on the first two points, and perhaps only the immediate intervention of Officer Madsen, who took the minor's threats seriously enough to arrest her, prevented her from attempting to follow up on those threats. Thus, *Ricky T.* does not assist the minor.

The minor cites *Ryan D., supra*, 100 Cal.App.4th at page 863, for the proposition that threats made in the presence of an authority figure are "[u]sually" made "when the threatener is in a rage, is under the influence of alcohol or drugs, or is attempting to serve an immediate purpose, such as dissuading a witness." So far as the minor means to say that her threats did not fall within section 422 because they were made in her mother's and Officer Madsen's presence, *Ryan D.* does not stand for any such proposition. There,

the minor painted a picture which depicted a person (representing himself) shooting a peace officer (representing a particular officer who had cited him for possessing marijuana). (*Id.* at p. 858.) He took the painting to class and turned it in for credit. (*Id.* at p. 863.) He did not show it to the officer, did not expect her to see it, and did not intend for it to scare her; he was merely expressing his anger at her. (*Id.* at p. 859.) In finding that the painting did not constitute a criminal threat, this court observed that "[o]rdinarily, 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." (*Id.* at p. 863.) We then made the observation the minor quotes. (*Ibid.*) Given the peculiar facts of *Ryan D.*, it does not support a general rule that threats made in the presence of authority figures cannot fall within section 422.

"As used in the statute, 'sustained' has been defined to mean 'a period of time that extends beyond what is momentary, fleeting, or transitory. . . .' " (*Wilson, supra,* 186 Cal.App.4th at p. 808.) Although S. testified at first she was not afraid of the minor, she also testified she believed the minor was going to harm her because the minor seemed angry and bent on "revenge" while she made her homicidal threats. S. continued to hold this belief in the minor's purpose for a week. She took the minor's threats seriously enough to relocate to Shasta County four days after the threats were made. This evidence shows more than a "momentary, fleeting, or transitory" fear. (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349 [15 minutes of fear may suffice].)

Arguing to the contrary, the minor cites S.'s original negative response to the question whether she was afraid of the minor, which S. immediately clarified.[4] The

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[4] The minor asserts S. so testified twice, during direct examination and during cross-examination. However, on cross-examination, S. simply responded to counsel's restatement of the question asked on direct examination and agreed that she had given that answer then.

minor also asserts S. did not "[take] any steps to distance herself from [the minor] during the incident," notes it was mother, not S., who called the police, and says S.'s move to Shasta County was also prompted by her fear of Robinson. None of this rebuts the evidence S. felt sustained fear for a week on account of the minor's threats. Furthermore, although mother was the one who called the police, S. testified she wanted them to be called, and she might have chosen to stay in the house while awaiting the police on the assumption they would want to talk to her.

Although the statute requires on its face that the victim "reasonably . . . be in sustained fear" (§ 422, subd. (a)), recent case law breaks down this clause into two elements: "sustained fear" and fear that is " ' "reasonabl[e]" under the circumstances.' " (See, e.g., *In re George T.*, *supra*, 33 Cal.4th at p. 630; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228; CALCRIM No. 1300 (2016); cf. *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536, citing statutory language and CALJIC former No. 9.94.) However, the cases do not give any specific standard for determining whether fear is "reasonable under the circumstances." Thus, we decide the question by assessing the circumstances surrounding the minor's threat to determine whether the threat, made under the present circumstances, would cause a reasonable person in S.'s position to feel sustained fear. For reasons already indicated, we conclude S.'s fear was reasonable under the circumstances.

For up to 40 minutes, the minor threatened S. with death over and over by a variety of means easily accessible in mother's home. These threats included the threat of an imminent attack when S. was asleep and unable to defend herself. Both mother and S., having known the minor for a long time, perceived this situation as entirely different from the minor's earlier threat against S., which was transitory and not repeated. Therefore, we reject the minor's assertion her failure to carry out her earlier threats proved S.'s fear under the very different circumstances of March 3, 2015, was unreasonable. The minor was so enraged even a police officer's presence failed to shut

off her torrent of threats. Under all of the circumstances, a reasonable person in S.'s position could easily fear for her safety.

The minor's arguments to the contrary amount to a request that we reweigh the evidence more favorably to her position. Under substantial evidence review, we may not do so.

DISPOSITION

The order of the juvenile court is affirmed.

NICHOLSON, Acting P. J.

We concur:

DUARTE, J.

RENNER, J.