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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARIANA R.,

Plaintiff and Respondent,

v.

SANDY A.,

Defendant and Appellant.

D062071

(Super. Ct. No. DVN18908)

APPEAL from an order of the Superior Court of San Diego County, Martin W. Staven, Judge. (Retired Judge of the Tulare Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Law Office of Brian R. Mason and Brian R. Mason for Defendant and Appellant.

HainesLaw and Laurence F. Haines for Plaintiff and Respondent.

INTRODUCTION

Mariana R. obtained a restraining order under the Domestic Violence Prevention Act (DVPA) (Fam. Code, § 6200 et seq.) against her stepsister, Sandy A., after Sandy and one of Sandy's friends confronted Mariana at Mariana's school and threatened

Mariana with bodily harm. Sandy appeals, contending we must reverse the order because the court erroneously excluded recorded remarks of a percipient witness stating she and Mariana lied about the incident. More particularly, Sandy contends the remarks were admissible as statements against interest under Evidence Code section 1230 and were not more prejudicial than probative under Evidence Code section 352. We conclude the court did not err in excluding the recorded remarks and affirm the order.

## BACKGROUND

### *Request for Retraining Order*

Mariana, a middle school student, filed a request for a restraining order against her stepsister, Sandy, a high school student. According to two declarations Mariana submitted with her request, Sandy and Sandy's friend, Carina C., who is also a high school student, approached Mariana at Mariana's school and accused Mariana of "talking crap" about Sandy. Carina then threatened to "kick [Mariana's] ass."<sup>1</sup> Carina said she was going to return to Mariana's school the following Monday to "kick [Mariana's] ass" and she did not care who Mariana told. Mariana walked away and, as she did, Sandy yelled, "I am coming to get you and you better watch your back." A declaration from Mariana's friend, Karen M., who attended the same school as Mariana and witnessed the incident, corroborated Mariana's account.

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<sup>1</sup> Mariana also requested and obtained a restraining order against Carina. The propriety of that order is not at issue in this appeal.

### *Opposition to Request for Restraining Order*

In opposition to Mariana's request, Sandy submitted a declaration from her brother, who attended the same school as Mariana and Karen. According to the declaration, the day after the incident, Karen told him she and Mariana lied about the incident and Mariana's mother coached them on what to say. A declaration from a friend of Sandy's brother corroborated Sandy's brother's account.

### *Hearing on Request*

#### *Mariana's Evidence*

At the hearing on Mariana's request, Mariana testified Sandy and Carina confronted her as she was leaving school for the day. Karen was with Mariana. Carina came up to within a foot of Mariana and asked Mariana in a raised voice why Mariana was "talking crap" about Sandy. Carina told Mariana that if Mariana did not stop "talking crap" about Sandy, Carina would "kick [Mariana's] ass." During the encounter, Sandy stood near Carina in a fighting stance with her fists clenched "like she wanted to hit [Mariana]." Carina then told Mariana she would return to Mariana's school the following week and "get" Mariana. Sandy told Mariana she was going to return with Carina and "get" Mariana and warned Mariana to watch her back.

Karen was not at the hearing and did not testify. When asked by Sandy's counsel why Karen did not come to the hearing to testify, Mariana responded, "Because she was scared because she got threatened too."

### *Sandy's Evidence*

Sandy testified that on the day of the incident her mother picked her and Carina up from their high school and they went to Mariana's school because her mom had a meeting with the school principal. Sandy claimed she stayed in her mother's car for one to two hours and helped her aunt babysit her younger siblings while her mother attended the meeting. Initially, Sandy testified Carina remained in the car with her the entire time. She later testified Carina left the car with Sandy's mother to go to the bathroom and attended Sandy's mother's meeting with the principal.

Carina similarly testified she left the car with Sandy's mother to go to the restroom and accompanied Sandy's mother to the meeting with the principal. However, she testified they were only at the school for a short time, less than a half hour. On cross-examination, she acknowledged her school investigated the incident and suspended her because of it.

Sandy's mother and Sandy's aunt both provided testimony corroborating Sandy and Carina's testimony. In addition, Sandy submitted a letter from the middle school stating Sandy's mother met with the school principal for one hour on the afternoon of the incident.

Sandy's brother testified he questioned Karen about the incident and her declaration. With her knowledge, he recorded their conversation. When it appeared Sandy's counsel intended to offer the recording into evidence, Mariana's counsel objected to its admission on, among other grounds, there was no reason to believe Karen was unavailable as a witness and he would have no opportunity to cross-examine her. The

court sustained the objection stating, "I think a couple of things are important. First of all, [Mariana's counsel] doesn't get to cross-examine [Karen]. [Karen was] not under oath when [she made] these statements, so it's not trustworthy. At the very least, under [Evidence Code section 352], it's not admissible as far as I'm concerned."

Sandy's counsel countered that the recorded statements were admissions against interest. Mariana's counsel interjected, "Only for a party." The court responded, "No, . . . I just don't think it's admissible."

At the conclusion of the hearing, the court granted Mariana's request for a restraining order, finding: "Well, it's an issue of credibility. . . . [¶] In listening to the testimony of [Sandy], it is clear to me that she wasn't telling the truth. In fact, it was . . . pretty obvious that she wasn't . . . . Sometimes the [c]ourt has difficulties sorting out who is telling the truth and who isn't. In this case, it wasn't that hard. [¶] I listened to the testimony, I observed the witness, I heard the inconsistencies and, to me, clearly Sandy didn't tell the truth."

## DISCUSSION

Sandy contends the court should not have excluded Karen's recorded remarks because they were admissible as statements against her social interest under Evidence Code section 1230. We disagree.

Karen's recorded remarks were hearsay because they were made out of court and were offered for their truth. (Evid. Code, § 1200, subd. (a).) "Unless it falls within an exception to the general rule, hearsay is not admissible. [Citation.] "The chief reasons for this general rule of inadmissibility are that the statements are not made under oath, the

adverse party has no opportunity to cross-examine the declarant, and the [trier of fact] cannot observe the declarant's demeanor while making the statements.' " (*People v. Duarte* (2000) 24 Cal.4th 603, 610.)

Nonetheless, "[e]vidence of a statement by a declarant . . . is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . created such a risk of making [the declarant] an object of hatred, ridicule, or social disgrace in the community, that a reasonable [person] in [the declarant's] position would not have made the statement unless [the person] believed it to be true." (Evid. Code, § 1230.) For this exception to apply, the proponent of the evidence must show: (1) the declarant was unavailable, (2) the declarant's statement was against the declarant's social interest, and (3) the statement was sufficiently reliable to warrant admission despite its hearsay character. (*People v. Duarte, supra*, 24 Cal.4th at pp. 610-611.)

Assuming, without deciding, Sandy showed Karen's recorded remarks were both against Karen's social interest and reliable, Sandy did not show or even attempt to show Karen was unavailable. A declarant is unavailable if the declarant is (1) exempted from testifying because of a privilege; (2) disqualified from testifying; (3) dead or too ill to testify; (4) unable to be compelled by the court's process to appear and testify; or (5) persistently refusing to testify despite having been found in contempt. (Evid. Code, § 240 (a).) Sandy did not present any evidence Karen was exempt from testifying, disqualified from testifying, or too ill to testify, or that she was not amenable to service of

process. Sandy also did not present any evidence Karen refused to testify under threat of contempt.

Although there was evidence Karen did not attend the hearing because she was afraid to testify, this evidence was not sufficient to establish her unavailability. For a declarant's fear to support an unavailability finding, either the declarant must expressly refuse to testify on this basis or there must be expert evidence establishing the declarant's fear rises to the level of a mental illness or infirmity rendering the declarant unable to testify. (*People v. Stritzinger* (1983) 34 Cal.3d 505, 516-519.) Moreover, no matter how disabling, Karen's fear would not render her unavailable to the extent it was based on a specific threat made or procured by Sandy. (Evid. Code, § 240, subd. (b) [A declarant is not unavailable if the declarant's "exemption, preclusion, disqualification, death, inability, or absence . . . was brought about by the procurement or wrongdoing of the proponent of [the declarant's] statement for the purpose of preventing the declarant from attending or testifying."].) Accordingly, Sandy has not established Karen's recorded remarks were admissible under Evidence Code section 1230. Given this conclusion, we need not decide whether the court properly excluded the remarks as more prejudicial than probative under Evidence Code section 352.

DISPOSITION

The order is affirmed. Mariana R. is awarded her costs on appeal.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

AARON, J.