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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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

THE PEOPLE,

Plaintiff and Respondent,

v.

M.S.,

Defendant and Appellant.

E055067

(Super.Ct.No. J238506)

OPINION

APPEAL from the Superior Court of San Bernardino County. Thomas S. Garza,  
Judge. Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Gary Brozio, William M. Wood,  
and Stephanie Chow, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jurisdictional hearing, the juvenile court found true that defendant and appellant M.S. (Minor) had committed one count of felony making criminal threats (Pen. Code, § 422)<sup>1</sup> and one count of misdemeanor battery (§ 242) as alleged in a subsequent petition. Minor was thereafter continued as a ward of the juvenile court and placed in the custody of her father on various terms and conditions of probation. Minor’s sole contention on appeal is that there was insufficient evidence to support the true finding on the criminal threats charge. We reject this contention and affirm the judgment.

## I

### FACTUAL BACKGROUND

#### A. *The People’s Case*

On October 1, 2011, then 14-year-old Minor was in custody at juvenile hall. At approximately 3:00 p.m., San Bernardino County Probation Correction Officer (PCO) Yvette George brought Minor out of her room for an interview and to allow her to make a five-minute telephone call to her father. PCO Jose Fregoso was on duty at the time and sitting next to Minor. Minor was telling her father that “she was arrested because she was coming down hard on meth[amphetamine].”

When PCO George told Minor her five minutes were up, she refused to hang up the telephone, became angry, and began yelling. PCO Shannon Edwards heard Minor and came over to assist. Minor eventually hung up the telephone and began walking to the hallway leading to her room. As she was walking, she was yelling at staff and being

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<sup>1</sup> All future statutory references are to the Penal Code unless otherwise stated.

disrespectful. PCOs Fregoso, Edwards, and George walked with Minor to her room, however she refused to enter the room. Instead, Minor continued to yell in an angry, hysterical, and disrespectful manner. She was also very upset and crying. When the PCOs tried to counsel Minor, she became hostile and proceeded to the corner of the hallway. She refused commands to get on the floor, stood in a “hostile stance” with her “fists balled,” and began yelling, ““If anybody touches me, I’m going to fuck them up.”” PCO Fregoso testified that he took Minor’s statement as a threat and that he was concerned for his safety and “getting struck.”

The PCOs triangulated around Minor and continued to command her to get on the floor. Minor refused to follow the officers’ directives and, while continuing to make threats, Minor grabbed a chair and either threw or pushed it at PCO Fregoso, striking him in the leg. PCO Fregoso grabbed the chair and threw it out of the way. She also spat on PCO Fregoso and kicked him. PCO Fregoso backed away from Minor.

Probation Correction Supervisor Daniel Reyes came over and took over the incident. He began giving Minor commands to get down on the ground; however, Minor refused and continued to make “threats” and show an aggressive stance.<sup>2</sup> Probation Correction Supervisor Jaime Alarcon also came over and heard Minor threaten to bite anyone who got near her, and described Minor as being upset about the telephone call. He also saw Minor flailing her arms at the surrounding PCOs. Minor was warned that

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<sup>2</sup> It is unknown what “threats” Minor was making at that time. PCO Fregoso testified that after Supervisor Reyes came and began giving Minor commands to get down on the floor, “[t]he minor continued to show an aggressive stance, making threats and she was then pepper sprayed by PCO Edwards.”

she would be pepper sprayed if she did not comply with the officers' directives, and when she failed to comply, PCO Edwards pepper sprayed Minor. PCO Fregoso and several other staff members thereafter commanded Minor to get on the ground, but Minor refused. The PCOs then tried to put a "restraint hold" on Minor. However, Minor began to struggle and throw punches, and the assisting PCOs and Minor fell to the ground. After Minor was pepper sprayed again, PCO Fregoso gave Minor "several commands to get on the ground and roll on her stomach." Minor eventually complied and handcuffs were placed on her.

On cross-examination, PCO Fregoso admitted that there were eight back-up probation officers; that he went and retrieved some rubber gloves and put them on for protection; that he had pepper spray in his hand; and that he weighed over 100 pounds more than Minor. He also acknowledged that he did not know Minor's background, and that he had worked at the juvenile hall for 15 years. In those 15 years, about half of the juveniles he encountered were uncooperative, and he had participated in incidents where pepper spray had to be used on a minor "ranging from three to four times a month to six times in one day."

The videotapes of the incident, which were filmed at different angles, were admitted into evidence and played for the court.<sup>3</sup> The first videotape, Exhibit 3, depicts Minor walking from the telephone area with several PCOs, including PCO Fregoso, and disappearing from view and around a corner. The video also shows PCO Edwards

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<sup>3</sup> The videotapes contain no audio.

walking in a relaxed manner with either pepper spray or a radio in her hands. Exhibit 3 also shows Minor flailing her hands; a chair being pushed or thrown toward PCO Fregoso; and PCO Fregoso picking up the chair and tossing it to the side. Exhibit 3 further demonstrates PCO Fregoso backing away; an influx of PCOs coming to assist; and Minor being pepper sprayed. Exhibit 4 depicts the telephone area, and numerous PCOs standing around waiting and then going to assist the PCOs who were triangulated around Minor. Exhibit 4 further shows the PCOs apparently catching aromas from the pepper spray and Minor being led out of the other hallway with handcuffs behind her back followed by numerous PCOs, including PCO Fregoso.

B. *Minor's Case*

PCO George testified that Minor became upset and agitated after she was asked to get off the telephone because Minor believed the staff had allowed other juveniles to talk on the telephone longer. She stated that she heard Minor “kick something” either a trash can or a chair, but did not recall Minor making any threats to harm anyone. PCO George, who was the intake officer when Minor was brought into juvenile hall in April, recalled that Minor suffered from bipolar disorder and depression.

Supervisor Reyes believed that Minor appeared to be under the influence of drugs, and recalled from a nurse’s report that Minor had last ingested methamphetamine that morning. The nurse’s report also stated that Minor had been using methamphetamine for the last 12 days, drinking alcohol, and not eating; and that she suffered from bipolar disorder and major depression. However, Supervisor Reyes acknowledged that Minor was admitted into juvenile hall after a hospital clearance.

PCO Supervisor Soir Rabadi testified that he was informed that Minor was coming down off of “a cocktail of drugs,” including methamphetamine and cocaine. PCO Rabadi also stated that after the incident, he filed a report to forward to the probation department because pepper spray was used mandating a report and not because a threat had been made by Minor.

Minor’s father testified that when Minor ran away from home on September 15, 2011, she left without her mental health medication. He described Minor as being hysterical, paranoid, and difficult when not taking her medication. After Minor was subdued following the incident and placed in her room, Minor requested that staff kill her as she was being hounded by demons and devils.

Minor testified that she was a better, calmer, and happier person when she is taking her medication, and claimed that prior to entering into juvenile hall she had used methamphetamine, alcohol, marijuana, angel dust, and possibly crack cocaine. Minor denied threatening anyone or intentionally spitting on anyone.

## II

### DISCUSSION

Minor contends that there is insufficient evidence to support her conviction for making criminal threats against PCO Fregoso.

In considering a sufficiency of the evidence claim in juvenile delinquency proceedings, this court applies the same standard of review that is applicable in criminal cases. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) Thus, this 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 [minor] guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1136 (*Ricky T.*)) “We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence.” (*In re Jose R.* (1982) 137 Cal.App.3d 269, 275.) In addition, “we must make all reasonable inferences that support the finding of the juvenile court.” (*Ibid.*) The testimony of one witness is sufficient to sustain a conviction, so long as that testimony is not inherently incredible or improbable. (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 830.)

To prove the offense of making a criminal threat, the prosecution must establish all of the following: (1) Minor willfully threatened to commit a crime that will result in death or great bodily injury to another person; (2) she made the threat with the specific intent that it be taken as a threat; (3) the threat, on its face and under the circumstances in which it was made, was 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) the threat caused the victim to be in sustained fear for his or her own safety or for his or her immediate family’s safety; and (5) the victim’s fear was reasonable under the circumstances. (§ 422; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

We look to “all the surrounding circumstances and not just on the words alone” to determine if there is substantial evidence to support a violation of section 422. (*People v.*

*Mendoza* (1997) 59 Cal.App.4th 1333, 1340; see also *People v. Brooks* (1994) 26 Cal.App.4th 142, 148-149 [Fourth Dist., Div. Two.] “This includes the defendant’s mannerisms, affect, and actions involved in making the threat as well as subsequent actions taken by the defendant.” (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013.) Threats are judged in their context and not solely on the specific words that were spoken. (*Id.* at p. 1014.) The fact finder “can properly consider a later action taken by a defendant in evaluating whether the crime of making a [criminal] threat has been committed.” (*Ibid.*)

Section 422 may not be violated by nonverbal conduct alone, but a combination of words and gestures may constitute a criminal threat under section 422. (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1442, 1446.) “A communication that is ambiguous on its face may nonetheless be found to be a criminal threat if the surrounding circumstances clarify the communication’s meaning. [Citation.]” (*In re George T.* (2004) 33 Cal.4th 620, 635 (*George T.*)) “When the words are vague, context takes on added significance, but care must be taken not to diminish the requirements that the communicator have the specific intent to convey a threat and that the threat be of such a nature as to convey a gravity of purpose and immediate prospect of the threat’s execution.” (*Id.* at p. 637.)

The entirety of the circumstances in this case demonstrates that Minor made a criminal threat to PCO Fregoso. There is no question that Minor willfully threatened to “fuck them up” if anyone touched her. There is also no question that Minor specifically intended her statement to be taken as a threat, even if she had no intent on carrying it out. (See, e.g., *People v. Brooks, supra*, 26 Cal.App.4th at p. 149 [“[c]onditional threats are

true threats if their context reasonably conveys to the victim that they are intended”].)

The evidence shows that Minor made her threat while refusing to comply with the directives of the PCOs, and that she then positioned herself in a combative stance, with her hands balled into fists, thereby showing a specific intent that her statement should be taken as a threat. She grabbed a chair and either threw or pushed it at PCO Fregoso, striking PCO Fregoso in the leg. She also spat on PCO Fregoso and kicked him. In fact, PCO Fregoso took Minor’s threat seriously and began backing away. Although the evidence shows Minor was angry and upset after being told her time for the telephone call with her father was up, in light of the surrounding circumstances, it was reasonable for the juvenile court to find that Minor had made a threat with the specific intent that the statement be taken as a threat. (See *In re Ernesto H.* (2004) 125 Cal.App.4th 298, 310 [to determine whether words spoken may be construed as a serious expression of intent to commit a violent act, must look at circumstances in which they are spoken].)

Additionally, although we agree with Minor that the statute was not enacted to punish emotional outbursts, the juvenile court could reasonably conclude that Minor’s threat “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.” (§ 422.) The “so” in section 422 means that the ““unequivocality, unconditionality, immediacy,”” and specificity of the threat must be present in the threat itself and in the surrounding circumstances.

(*George T., supra*, 33 Cal.4th at p. 635.) Minor made her threat while refusing to comply with the directives of the PCOs and positioning herself combatively. She cornered herself

in a position that required PCO Fregoso to come closer to Minor in order to do his job. She took an aggressive stance with her hands, balled into fists, and either threw or pushed a chair at PCO Fregoso. She then kicked PCO Fregoso and spat at him. Minor continued to be hostile, out-of-control, and unpredictable, compelling staff to pepper spray her several times in order to subdue her. Even after she was initially pepper sprayed, Minor refused to comply with the PCOs directives and fought with the PCOs who tried to restrain her. At one point, she freed one arm and swung at the PCOs. Under the circumstances, the juvenile court could reasonably conclude that Minor's threat was made with a gravity of purpose and with an immediate prospect of execution. (§ 422.)

Minor relies on *Ricky T.*, *supra*, 87 Cal.App.4th 1132 and *In re Ryan D.* (2002) 100 Cal.App.4th 854 (*Ryan D.*) to support her position that the surrounding circumstances do not show a threat but demonstrate that she had an emotional outburst. In *Ricky T.*, a 16-year-old student left a classroom to use the restroom. When the student returned, he pounded on the locked door. The teacher opened the door outward and hit the student's head. Angry, the student cursed and told the teacher, "I'm going to get you" or "I'm going to kick your ass." The teacher felt physically threatened but conceded the student did not make a specific threat or engage in any other aggressive act. (*Id.* at pp. 1135-1136, 1138.)

The *Ricky T.* court held, in context, the student's outbursts were not serious, deliberate statements of purpose. The supposed threats were ambiguous, and there was no evidence a physical confrontation was imminent. (*Ricky T.*, *supra*, 87 Cal.App.4th at pp. 1137-1138.) Further, there was no evidence suggesting the student and the teacher

had a history of disagreements nor was there evidence a physical confrontation was actually imminent. (*Ibid.*) Additionally, the court found there was insufficient evidence the teacher was in sustained fear beyond the time of the student’s statements that was reasonable under the circumstances. (*Id.* at p. 1140.) The court concluded the student’s “intemperate, rude, and insolent remarks” constituted an emotional reaction to an accident rather than a criminal threat. (*Id.* at pp. 1138, 1141.)<sup>4</sup>

In *Ryan D.*, *supra*, 100 Cal.App.4th 854, a minor turned in a painting he had done for his high school art class. The painting depicted him shooting the police officer who had cited him for marijuana possession a month earlier. (*Id.* at pp. 858-859.) When the painting was shown to the officer, she became concerned for her safety. (*Id.* at p. 859.) Rejecting the minor’s claim that he was merely “‘letting [his] anger out’ for having gotten into trouble,” the juvenile court sustained a charge of making a criminal threat. (*Ibid.*)

The Court of Appeal reversed, finding the painting itself ambiguous, since it was not accompanied by any words, “on the painting or otherwise, such as ‘this will be you.’” (*Ryan D.*, *supra*, 100 Cal.App.4th at p. 864.) The surrounding circumstances did not support a finding that the painting constituted a criminal threat either. (*Id.* at p. 863.)

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<sup>4</sup> In concluding the minor did not violate section 422, the court in *Ricky T.* applied the “stringent” substantial evidence standard of review. (*Ricky T.*, *supra*, 87 Cal.App.4th at p. 1136.) The decision in *Ricky T.* was decided before the Supreme Court decided *George T.*, holding “a reviewing court should make an independent examination of the record in a section 422 case when a defendant raises a plausible First Amendment defense.” (*George T.*, *supra*, 33 Cal.4th at p. 632.) Here, Minor has not raised a First Amendment argument.

The minor had not shown it to the officer, put it where he knew she would see it, or communicated with her in any way that suggested she should see it. (*Ibid.*) He simply turned the painting in for credit—“a rather unconventional and odd means of communicating a threat.” (*Ibid.*) The incident that sparked the minor’s anger had occurred over a month before, and there was “nothing” to suggest he had remained in a rage for the entire month. (*Ibid.*) This evidence was insufficient to establish that the minor harbored the specific intent to threaten the officer. (*Id.* at p. 864.) Moreover, neither the school authorities nor the police had treated the painting as an immediate threat. (*Id.* at pp. 864-865.) It thus did “not appear to be anything other than pictorial ranting.” (*Id.* at p. 864.)

Unlike the situation in *Ricky T.* and *Ryan D.*, Minor’s threat was a specific and unequivocal threat of harm, and was not triggered by an accidental blow or other sudden stimulus or spontaneously or weeks after being told to get off the telephone. Minor’s threat was made after she had time to think about her actions. She chose a course of action requiring a response from staff by failing to enter her room and instead running into a hall, being disrespectful, and yelling angrily. She cornered herself into the hall, making a threat when the PCOs responded to Minor’s actions. She also took an aggressive stance, balled her hands into fists, threw or pushed a chair at PCO Fregoso, kicked him, and spat on him. In contrast to *Ricky T.*, where there was no evidence a physical confrontation was imminent, here Minor’s actions required staff to physically confront Minor in order to control her. Additionally, unlike in *Ryan D.*, Minor’s threat was loudly broadcast when she had reason to believe PCO Fregoso would hear it. And,

by all accounts, Minor was very angry and upset when the threat was made. Further, in *Ricky T.*, the evidence revealed the teacher felt nothing more than fleeting or transitory fear during the verbal encounter with the student. Whereas here, the fear Minor instilled in PCO Fregoso was apparent from the video surveillance of the incident and PCO Fregoso's testimony.

“Sustained fear” means fear that continues for “a period of time that extends beyond what is momentary, fleeting, or transitory.” (*People v. Solis, supra*, 90 Cal.App.4th at p. 1024.) “Sustained fear” refers to the victim's state of mind (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156), and fear “describes the emotion the victim experiences” (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349). The sustained fear element “has [both] a subjective and an objective component. [The] victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances.” (*Ricky T., supra*, 87 Cal.App.4th at p. 1140.) “The victim's knowledge of [the] defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear.” (*Allen*, at p. 1156.)

Here, PCO Fregoso's testimony that he took Minor's statement as a threat and that he was concerned about his safety and “getting struck” were sufficient to establish that PCO Fregoso was actually in fear. Further, based on the surrounding circumstances, the evidence was sufficient to establish that his fear was “sustained” within the meaning of section 422. Although there were no direct questions to PCO Fregoso whether Minor's threat made him experience sustained fear, the videotapes of the incident show PCO Fregoso experiencing sustained fear that was more than “momentary, fleeting, or

transitory.” (*People v. Solis, supra*, 90 Cal.App.4th at p. 1024.) The videotapes show PCO Fregoso backing away presumably after Minor made her threat to harm anyone who touched her, and backing away even further after Minor either threw or pushed a chair at PCO Fregoso. In fact, the videotapes show all of the PCOs backing away and acting out of fear to avoid making contact with Minor.

It would also objectively be reasonable for a person in PCO Fregoso’s situation to be in fear for his own personal safety both during and after Minor made her threat under the circumstances. Following her threat, Minor continued to be hostile and take a combative position. She threw or pushed a chair at PCO Fregoso and spat on him. Minor’s actions were aggressive and unpredictable, which would cause a reasonable person in PCO Fregoso’s circumstances to be in fear for his own personal safety.

In sum, there was ample evidence PCO Fregoso feared for his safety and believed Minor posed an actual threat to him. The testimony concerning PCO Fregoso’s size advantage and Minor’s lack of a weapon neither negated the sustained fear element or its existence nor defeated the juvenile court’s finding, but merely served to create a conflict in the evidence to be resolved by the trier of fact. We may not invade the province of the fact finder by reweighing the evidence, reevaluating the credibility of witnesses, or substituting our own conclusions for the trier of fact’s findings. (*People v. Diaz* (1992) 3 Cal.4th 495, 541.)

Based on the foregoing, the evidence is sufficient to support the juvenile court’s finding that Minor committed the offense of making a criminal threat.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

HOLLENHORST  
J.

MILLER  
J.