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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re GUSTAVO R., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

GUSTAVO R.,

Defendant and Appellant.

F065387

(Super. Ct. Nos. 11JQ0039,  
11JQ0039A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kings County. George  
L.Orndoff, Judge.

Linda K. Harvie, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jamie A.  
Scheidegger, Deputy Attorneys General, for Plaintiff and Respondent.

Following a contested jurisdictional hearing, the juvenile court found Gustavo R., a minor and ward of the court, violated Penal Code section 136.1, subdivision (a)(1),<sup>1</sup> by dissuading a witness, Kyler G., from testifying at a future trial.

On appeal, Gustavo contends that the evidence is insufficient to support the juvenile court's finding that he violated subdivision (a)(1) of section 136.1. He also contends that the juvenile court was required to state its reasons for designating the crime a felony rather than a misdemeanor, and that the trial court abused its discretion in not reducing the crime to a misdemeanor. Finally, Gustavo contends that the juvenile court incorrectly set his maximum custody time. Because we agree with Gustavo's first contention and reverse, we do not address his remaining arguments.

### **PROCEDURAL HISTORY**

On March 21, 2011, Gustavo admitted allegations that he committed an attempted lynching (§§ 664/405a) and an assault on a peace officer (§ 241, subd. (c)) and the juvenile court found the allegations true. The court found Gustavo eligible and suitable for the deferred entry of judgment program (DEJ). A week later, on March 28, 2011, the juvenile court found the attempted lynching to be a felony and the assault on a peace officer a misdemeanor, and it placed Gustavo in the DEJ program.

A year later, on April 2, 2012, the juvenile court rescinded Gustavo's grant of DEJ based on new allegations. A second amended juvenile wardship petition, filed April 30, 2012, alleged that Gustavo intimidated a witness or victim from giving testimony at a trial, proceeding or inquiry (§ 136.1, subd. (a)(1)).

Following a contested jurisdictional hearing, Gustavo filed a motion arguing that the prosecutor had not met his burden of proof on the allegation. The juvenile court subsequently found the allegation true beyond a reasonable doubt. The juvenile court denied Gustavo's request that the allegation be reduced to a misdemeanor and determined

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

it to be a felony. The juvenile court then declared Gustavo a ward, placed him on probation with various terms, committed him to boot camp for not less than 90 days up to one year, and calculated his maximum term of confinement to be four years.

### **STATEMENT OF THE FACTS**

In March of 2012, Kyler, a high school student, observed Gustavo and a group of other students putting cough syrup with codeine into a bottle with Kool-Aid and drinking it. Kyler told Officer Martha Forlines what he had seen. Kyler informed school staff that he did not want retaliation, so Officer Forlines waited a few hours before contacting Gustavo and the other students. Officer Forlines testified that Gustavo did not get into any trouble for the incident.

One or two days later, other students, including Gustavo and a student named Jonathan began harassing Kyler, calling him a “snitch.” Kyler heard students say “The shit could get beaten out of [him],” although Kyler testified that the statements were “indirect. Everything was indirect. There were no direct threats at that point.” When asked what were the exact words said, Kyler testified, “Just generalization, I could get the shit beat out of me” “for being a snitch.” Kyler testified that multiple people said it to him multiple times, and he was only aware of Gustavo indirectly saying it one time. Kyler admitted that he never told any school officers at the time that he was directly or indirectly told by Gustavo that “the shit could get beaten out of [him].” Gustavo and other students were giving Kyler “mad dog” looks.

A day or two later, Kyler noticed a backpack on the tennis court. The tennis coach instructed Kyler to look inside the backpack to determine the owner. Inside, Kyler found marijuana and a knife. Kyler told the coach, “this is out of my hands. I can’t deal with this.” Kyler explained what was in the backpack and the coach took the backpack and alerted the vice principal. While Kyler was holding the backpack, Joseph V. came up and said that the backpack was his. Joseph V. was subsequently suspended for this incident.

Kyler claimed that a couple of days after the backpack incident, he talked to Officer Forlines and told her he “feared for [his] safety because [he] was being threatened, being jumped.”

Less than a week after the backpack incident, Kyler’s ex-girlfriend called him to say that there was a picture of him posted on Facebook. Kyler testified that he “figured nothing of it, just more harassment,” and he was not afraid.

Officer Forlines obtained a copy of Gustavo’s Facebook page. On Facebook, along with a picture of Kyler, Gustavo wrote, “NARC! Everyone this guys a narc. Just Lookin out for everyone at west.”<sup>2</sup> In response to the posting, one of Gustavo’s friends asked Gustavo for a “price” and “he outta your life.” Gustavo responded, “2G’z. And a cop.” Another friend wrote that Kyler “got [his] homie joseph in trouble fuck him.” Gustavo responded, “He got my joseph expelled and snitched on me for supposedly [*sic*] drinking lean, and since my friend jd kept calling em a narc he got searched today cause that narc snitched.” Another friend posted, “fuck that fool ill sock him.” Gustavo responded, “My \*homie. An I would too but he’d snitch an get me locked up cause the cops are on his dick.” By the time Kyler checked Facebook, 25 minutes after talking with his ex-girlfriend, the comments and photo were gone. Kyler did not see the posting before it was deleted.

Officer Brenda Lemos also viewed Gustavo’s Facebook posting. When Officer Lemos spoke with Gustavo, he acknowledged that it was his posting. Although Officer Lemos believed that Gustavo’s response to the comment about a “price” or “2G’z” from Gustavo’s friend meant that he would pay \$2,000 to have Kyler out of his life, Gustavo claimed that it meant “two gays or like too gays [*sic*] like a joke in Spanish.” Gustavo also claimed that he labeled Kyler a snitch because Gustavo got into trouble for Kyler’s

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<sup>2</sup> Kyler and Gustavo were both students at Hanford West High School.

report of the Kool-Aid incident. Gustavo told Officer Lemos that he thought it was all a joke.

### Defense

Officer Forlines testified that Kyler did not tell her Gustavo had threatened him that he could get beat up for his actions. Angelic S., a friend of Gustavo's, testified that she recalled a date in March of 2012 when Kyler entered history class and "the entire classroom" called him a "narc" and a "snitch," but no one made any threats. According to Angelic, "everyone" commented on Gustavo's Facebook page in which he posted Kyler's photo and warned people to watch out for him.

Gustavo recalled Kyler, who testified that students called him names for more than a day between the Kool-Aid incident and the backpack incident and consistently after that. He testified to only one incident when Gustavo indirectly threatened to beat him up.

Mark Herron, the tennis coach, testified that, contrary to Kyler's testimony, he did not instruct him to open the backpack found on the tennis court. Instead, Herron testified that Kyler approached him and told him there was a knife inside the backpack. Herron then took the backpack to the school's administrator.

Gustavo testified on his own behalf that, on the date of the Kool-Aid incident, he was putting creatine in his drink. Based on Kyler's report, school authorities then contacted and searched him. Gustavo admitted that he was friends with Joseph V., who was suspended or expelled based on the tennis court incident. Gustavo admitted calling Kyler a narc after the tennis court incident, but denied doing the same after the Kool-Aid incident and denied threatening that he should get beat up for being a snitch. He admitted calling Kyler names because he was mad at him for getting his friend Joseph expelled from school.

Gustavo acknowledged that he used the Facebook posting to alert his friends that Kyler was a narc. He admitted posting a picture of Kyler on Facebook, but claimed he did not intend for Kyler to see the posting. Gustavo estimated that he had about 100

friends on Facebook that attended his and Kyler's high school. Gustavo admitted that his Facebook posting could cause Kyler trouble, and stated that the reason he made the posting was because he was mad at Kyler.

## **DISCUSSION**

### *Sufficiency of the Evidence*

Gustavo argues that his conviction for violating section 136.1, subdivision (a)(1) is not supported by substantial evidence. He argues specifically (1) that there was insufficient evidence of the required specific intent to intimidate the witness; and (2) that there was insufficient evidence that he dissuaded the witness from testifying since there was no evidence of any pending criminal or civil investigation. We agree with Gustavo that there is insufficient evidence that he had a specific intent to dissuade Kyler from testifying at trial.

In addressing a challenge to the sufficiency of the evidence supporting a conviction, we examine the “whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – evidence that is reasonable, credible and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We presume in support of the judgment “the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]” (*Ibid.*)

In relevant part, section 136.1 provides: “(a) ...any person who does any of the following is guilty of a public offense .... [¶] (1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.” The CALCRIM instruction for section 136.1, subdivision (a)(1), provides that a defendant is guilty if “[t]he defendant maliciously (tried to (prevent/ [or] discourage)... [a named witness] from (attending/ [or] giving testimony at) [trial].” (CALCRIM No. 2622(1A).)

The crime of dissuading a witness, as proscribed by section 136.1, is a specific intent crime. (*People v. Brenner* (1992) 5 Cal.App.4th 335, 339.) “Unless the defendant’s acts or statements are intended to affect or influence a potential witness’s or victim’s testimony or acts, no crime has been committed under this section.” (*People v. McDaniel* (1994) 22 Cal.App.4th 278, 284.) As with criminal threats, we consider the circumstances in which a statement is made, not just the statement itself to determine whether a statement constitutes an attempt to dissuade a witness. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1343.) However, “[a] threat need not actually deter or reach the witness because the offense is committed when the defendant makes the attempt to dissuade the witness.” (*People v. Foster* (2007) 155 Cal.App.4th 331, 335.) Once the crime has been committed, it makes no difference whether the witness does or does not testify. (*People v. Ford* (1983) 145 Cal.App.3d 985, 990 [likening the crime to the crime of bribery, which is complete when the defendant makes the offer with a corrupt intent].)

In *People v. Lyons* (1991) 235 Cal.App.3d 1456 (*Lyons*), the court found sufficient evidence to establish victim intimidation pursuant to section 136.1, subdivisions (a), (b), and (c)(1). *Lyons* involved a robbery victim who saw the defendant after the robbery and identified him as the robber, leading to the defendant’s arrest. (*Lyons, supra*, at pp. 1458-1459.) The defendant then sent the victim a letter from custody, which stated in part:

“I’m in the county jail and you won’t believe what I am charged with. guess? ... “Robbery.” Some white guy with a black leather jacket pointed me out to the police the day before Thanksgiving, saying I robbed him for his watch and gold chain. Ain’t that a bitch? All this supposedly happened in front of the Greyhound station. [¶] I’ll be going to a “preliminary-hearing” on the 14th of next week. A “preliminary-hearing” is a court proceeding where the guy that said I robbed him has to come to court and testify and identify me as the person that robbed him. The guy has a right not to show up in court, and if he does not, I will be set free. And if he does show up in court and says I’m not the person that robbed him, or that he’s not sure if I’m the person that robbed him, I will be set free. But if he does come to court and says I’m the person that robbed him I will still be set free because I have three witnesses that will testify that I was no-where

near the Greyhound station during the time the robbery took place....” (*Id.* at p. 1459, fn. 3.)

The *Lyons* court found there was “no plausible explanation” for defendant’s act of sending the letter “without ascribing to him an intention to dissuade” the victim from testifying at the preliminary hearing. (*Lyons, supra*, 235 Cal.App.3d at p. 1461.)

In contrast, in *People v. Hallock* (1989) 208 Cal.App.3d 595 (*Hallock*) this court found insufficient evidence of witness intimidation pursuant to section 136.1, subdivision (a). In *Hallock*, the defendant attempted to rape the 77-year-old victim in her home but was thwarted when she spit tobacco juice into his eyes, pushed him away, and fled to her neighbors. (*Hallock, supra*, at p. 598.) As she ran, the defendant threatened, “if you tell anybody anything that happened tonight here ... I’ll blow your house up.” (*Ibid.*)

Based on this threat, the defendant was convicted, among other things, of intimidating a witness under section 136.1, subdivision (c)(1), making it a felony to intimidate a witness under either subdivision (a) or (b) of that section.<sup>3</sup> (*Hallock, supra*, 208 Cal.App.3d at p. 597.) Although the language in the information forming the basis for the charge under subdivision (c)(1) was a violation of subdivision (b), relating to preventing the witness from reporting a crime to an authorized person, the court instructed the jury pursuant to subdivision (a), relating to the defendant preventing the witness from testifying at an authorized proceeding. (*Hallock, supra*, at pp. 605-607.)

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<sup>3</sup> At the time, section 136.1 “basically prohibits four forms of witness intimidation. In subdivision (a), it forbids knowingly and maliciously preventing or dissuading a witness or victim from attending or testifying at trial. Subdivision (b) prohibits preventing or dissuading a witness or victim from (1) reporting the victimization; (2) causing a complaint or similar charge to be sought; and (3) arresting or causing or seeking the arrest of any person in connection with such victimization. All of these crimes are made a felony where the act is accompanied by force or an express or implied threat of violence upon a witness, victim, or the property of any witness, victim, or third person. (§ 136.1, subd. (c)(1).)” (*Hallock, supra*, 208 Cal.App.3d at p. 606.)

On appeal, the defendant in *Hallock*, argued that the evidence was insufficient to support the conviction under subdivision (a) “because there was no evidence of attempt to dissuade a victim from attending or testifying at any trial . . . .” (*Hallock, supra*, 208 Cal.App.3d at p. 606.) This court agreed, concluding that the defendant’s threat, made at the time of commission of the original crime, “could only reasonably have been believed to have been directed at reporting the crime to the police, defendant’s mother or others in authority that might lead to defendant’s arrest.” (*Id.* at p. 607.) Moreover, the court observed, “[i]t is also unreasonable to conclude that defendant was concerned with testimony at a future trial for a crime for which he had not yet been arrested.” (*Ibid.*)

The above observations by this court in *Hallock* imply that had the evidence been sufficient to show that at the time the defendant made the threat he was concerned with the witness/victim giving testimony at a future trial, the evidence would have been sufficient to support the conviction under subdivision (a) of section 136.1. Here, while Gustavo’s remarks to and about Kyler were made after Kyler reported the two incidents to school authorities, as well as before he reported the second, the evidence is insufficient to support a finding that Gustavo had the specific intent to dissuade Kyler from testifying at any future trial. Gustavo’s references to Kyler as a “narc” or “snitch” and comment that he could get beaten up, appear to be angry rants for the trouble Kyler’s reporting had caused Gustavo and his friends. On Facebook, Gustavo specifically stated that he was upset with Kyler for getting his friend Joseph expelled from school and for “snitching” on Gustavo for drinking “lean.” His statement on Facebook, “Just Lookin out for everyone at west,” seems to warn others at his high school to be cautious around Kyler.

“A specific intent is an intent to accomplish some additional consequence by commission of the proscribed act.” (*People v. Lyons, supra*, 235 Cal.App.3d 1456, 1458.) Thus, as we explained in *People v. Ford, supra*, 145 Cal.App.3d at page 989, “Unless the actions or statements are meant to achieve the consequences of affecting a potential witness’ testimony, no crime has been committed.”

Gustavo's actions and comments, while evidence of harassment or bullying, do not show a specific intent to knowingly and maliciously prevent Kyler from attending or giving testimony at any trial, proceeding, or inquiry authorized by law, as required for a violation of section 136.1, subdivision (a)(1). Consequently, the true finding of the juvenile court and the dispositional findings and orders flowing from it, must be reversed.

**DISPOSITION**

The finding that Gustavo R. violated Penal Code section 136.1, subdivision (a)(1) and the dispositional orders flowing from that finding are reversed. The matter is remanded to the juvenile court for consideration of Gustavo R.'s DEJ status.

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Franson, J.

WE CONCUR:

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Kane, Acting P.J.

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Peña, J.