

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of V.V., a person
Within the Jurisdiction of the Juvenile Court

OCT - 5 2010

THE PEOPLE OF THE STATE OF CALIFORNIA)	
)	Case No. S177654
Respondent)	
)	2 CRIM. B212416
vs.)	Sup. Ct.No.GJ25585
)	
V.V.)	
)	
Appellant)	

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE ROBERT LEVENTER, REFEREE PRESIDING

APPELLANT'S REPLY BRIEF ON THE MERITS

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STATEMENT OF ISSUES

Pursuant to California Rules of Court, Rule 8.520 subdivision (b)(2)(B), the question presented here is: When the juvenile court found that the minor was a "good kid" who had no intention of causing a fire, was the intentional lighting of a firecracker that resulted in a fire on a hillside sufficient to constitute malice under Penal Code section 451 or was it the reckless causing of a fire under Penal Code section 452 ?

Does the "malice" element of arson require the intent to do harm?

SUMMARY

Stripped to its essence, this case begins and ends with the legal boundary between conduct that is wilful and malicious and conduct that is reckless. In *People v. Atkins*, this court held that arson is a general intent crime, but that there must also be proof that a defendant acted maliciously as well as wilfully. (*People v. Atkins* (2001) 25 Cal.4th 76, 79.) While "wilfully" does not require any intent to violate law or injure another, "maliciously" requires exactly that - - a desire to injure another or do a wrongful act. Malice is in essence, therefore, wrongful intention.

The Attorney General contends that in the context of arson throwing a lit firecracker in proximity to combustible chaparral was "inherently wrongful", and that appellants therefore acted with the requisite malice. (Respondents' Brief, "RB"p. 6.) The Attorney General is mistaken. There was no evidence that the minors' act of lighting the firecracker was legally wrongful. There was no

evidence that the fireworks were illegal or that the minors were below the age to possess legal fireworks; there was no evidence that there was any prohibition against lighting a firecracker on the hill; there was no evidence that the minors were trespassing on the hill; there was no evidence of any personal animus to the inhabitants of the nearby houses; and there was no evidence that the minors wanted or expected the hill to catch fire. The juvenile court found that the minors had no intention of setting the hill on fire and were "kids" playing with fireworks." (Reporter's Transcript, "RT," pp 69, 73.)¹ Although the action of lighting and throwing the firecracker was intentional, there is nothing in the record to show that the minors acted with the requisite "design to do an intentional wrongful act.' " (See *People v. Atkins*, supra, 25 Cal.4th at 88.)

This case underlines the wisdom of the legislature in adding to the statutory scheme the new crime of unlawful burning when it recodified the arson statutes in 1979. Section 452 prohibits and penalizes just the kind of reckless conduct at issue in this case, when a person is aware of, and consciously disregards, a substantial and unjustifiable risk that his act will cause a fire to burn a structure, forest land or property. (See Pen. Code §§ 452, 450 subd. (f.) The enactment of Penal Code section 452, with a lesser standard of legal culpability than malice, helps to define the outer parameters of the reach of section 451.

When a person wilfully and recklessly does an act that causes property to

¹ The Reporter's Transcript and the Clerk's Transcript are each contained in a single volume.

burn, he violates section 452. It is only when the wilful act is done out of a design to vex, annoy, injure or defraud or to do an unlawful act that section 451 is violated. In appellants' case, their reckless conduct in lighting and throwing a firecracker caused the hill to burn, but the lighting was not unlawful nor, as the juvenile court recognized was it done from a design to vex, annoy, injure or defraud. Accordingly, the evidence is insufficient to support the finding that the minors committed arson in violation of Penal Code section 451, subdivision (c).

ARGUMENT

I

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE FINDING THAT THE MINORS COMMITTED ARSON IN VIOLATION OF PENAL CODE SECTION 451 BECAUSE THERE IS NO PROOF THAT THEY LIT THE FIRECRACKER TO VEX, DEFRAUD, ANNOY, OR INJURE ANOTHER PERSON OR TO DO AN UNLAWFUL ACT.

A. Penal Code Section 451 Requires Proof of Both Intent and Malice

The arson statute provides that "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property." (Pen. Code § 451.) In *People v. Atkins*, this court held that arson is a general intent crime and that "[T]he specific intent to set fire to or burn or cause to be burned the relevant structure or forest land is not an element of arson." (*People v. Atkins*, supra, 25 Cal. 4th at 84.) However, the court's analysis of the statutes makes clear that even though no specific intent is required, the distinct element of malice must still be proved. (Id at 88.) "Maliciously" imports a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act, established

either by proof or presumption of law." (Pen Code § 450, subd (e).)

Applying *Atkins* to this case, the district attorney was not required to prove that the minors specifically intended to set fire to the hillside. However, the district attorney was required to prove that the acts that caused the hillside to burn were done "willfully and maliciously." (Pen. Code § 451.) Conceding the "seeming absence of any wish on [appellants'] part to vex, defraud, annoy or injure," (RB, p. 10), respondent turns to the language in the statutory definition of malice that requires proof of an intent to do a wrongful act, established either by proof or presumption of law. Although there is no evidence in the record of any unlawful acts by the minors that support the proposition that they acted with design to do an intentional wrongful act, respondent avers that malice may be inferred because lighting and throwing a firecracker was "inherently wrongful." (RB., pp 6, 11.) Respondent cites no authority in support of his proposition that the malice element of the arson statute may be satisfied by an act that is neither unlawful nor done with the design to vex, annoy, defraud or injure another person.

B. Malice Requires Proof of an Intent to Do Harm by Vexing, Annoying, Injuring or Defrauding Another Person or by Intending to Do an Unlawful Act.

For the purpose of the arson statute, malice is defined in Penal Code section 450 subdivision (e). The statute provides that malice be may shown either by proof of a wish to vex, defraud, annoy, or injure another person, or by proof of an intent to do a "wrongful act." (Pen Code § 450, subd (e). The statute does not itself define "wrongful," but because " malice implies the intent to do a

wrongful act, it follows that the act must be unlawful, and therefore not justifiable." (See *People v. Ah Toon* (1886) 68 Cal. 362, 363.) Thus, malicious intent is presumed from the deliberate commission of an unlawful act for the purpose of injuring another. (*People v. Kreiling* (1968) 259 Cal. App. 2d 699, 705.) "Wrongful" means "contrary to law; unlawful. " (Black's Law Dictionary (9th Edn.. 2009) p.1751.) Accordingly, the design to do an "intentional wrongful act" (*People v. Atkins*, supra, 25 Cal.4th at 88),s requires an intent to do an intentional act that is also unlawful.

Respondent, however, construes malice to encompass acts that are "inherently wrongful" even if they are not designed to vex, annoy, injure or defraud, and are not unlawful. To construe the term "wrongful" in this way opens the arson statute to constitutional challenge on grounds of vagueness. To satisfy the constitutional mandate, a statute must be sufficiently definite to provide adequate notice of the conduct proscribed, and must also provide sufficiently definite guidelines for the police, to prevent arbitrary or discriminatory enforcement. (*Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1106-1107; *People v. Laster* (1997) 52 Cal. App. 4th 1450, 1466.) If the statutory definition of malice were extended to encompass the intent to do any wrongful but not unlawful act, there could be no reliable yardstick to give notice or to guide enforcement. This problem does not arise, however, when, in the context of penal jurisprudence, the statutory definition of "wrongful" is properly construed to mean conduct that is unlawful. (See *People v. Ah Toon*, supra, 68 Cal. at 363; *People v. Kreiling*, supra, 259 Cal. App. 2d at 705.)

As to what otherwise constitutes malice, respondent asserts at some length

that nothing more than the statutory definition is required, citing cases that have so held in the context of offenses other than arson. (RB, pp 8-10.) Appellant has not advanced any argument to the contrary so respondent attacks the proverbial “straw man.” The issue here is not whether something more than the statutory definition is required to show malice, but whether appellants’ act of lighting and throwing the firecracker meets the statutory standard. It does not.

C. The Legislative History of Section 452 Supports the Conclusion That the Element of Malice Must Distinguish Arson from Reckless Burning.

In unpacking the elements of wilfulness and malice in the California statutes, the legislative history of the 1979 recodification of the arson statutes is instructive. That year, the legislature repealed the arson statutes as codified in 1929, and added section 451 to the Penal Code. (Stats. 1979, ch. 145, §§ 1-3, 7, p. 338.) For the offense of arson, section 451 retained the basic language of the former provisions requiring wilful and malicious conduct : “[a]ny person who wilfully and maliciously sets fire to or burns or causes to be burned . . .” (See Stats. 1979, ch. 145, § 8, p. 338.) Importantly, however, the legislature added to the statutory scheme the new crime of unlawful burning as defined in the new section 452.²

The new offense of unlawful or reckless burning was added in response to complaints from members of the law enforcement and firefighting communities that the most difficult task for investigators under the then-existing law was

² The legislature also added a new section defining various terms in the new arson statutes, including "recklessly" (§ 450, subd. (f)) and "maliciously" (§ 450, subd. (e)). (See Stats. 1979, ch. 145, §§ 6, 11, pp. 338-339.)

proving conduct that was “wilful and malicious” (Wilkinson, *California’s New Arson Law: a Weapon for the War on Arson* (1980-1981) 4 Crim. Just. J. 115, 130, quoting testimony of Chief Jim Shearn, International Association of Fire Chiefs.) The language of the new provision was modeled on a New York statute that prohibited and penalized unlawful burning as arson in the fourth degree. (Wilkinson, *supra* at 131.)

The New York statute provided that: “A person is guilty of arson in the fourth degree when he recklessly damages a building or motor vehicle by intentionally starting a fire or causing an explosion. ” (N.Y. Penal Law §150.05 (1).) The term “reckless” was defined as follows :

" A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto

(N.Y. Penal Law § 15.05.)

This definition of “reckless” was repeated verbatim in California’s new arson statute. (Wilkinson, *supra*, p 131; Penal Code section 450 subd (f).)

In essence, the New York statute on unlawful burning requires a finding of intent to start a fire or cause an explosion, recklessly, resulting in damage to a building. (See *Doolen v. Darrigrand* (1977) 397 N.Y.S. 2d 283.) Because the definitions of recklessness are the same, cases interpreting the New York statute may shed light on the California statute, in clarifying the relationship of a

volitional act to the statutory requirement of malice. In *People v. Goins*, for example, the defendants were in a vacant building some hours before it was destroyed by fire. They rolled up newspapers and set them on fire to use as torches so they could see inside the building, and they also set on fire some cardboard boxes to help illuminate a room. One of the torches was discarded in an area where the most significant charring was detected, and investigation by fire officials ruled out other causes of the fire. The court held that the evidence would be legally sufficient to establish that defendants committed arson in the fourth degree, in violation of Penal Law § 150.05 (1). (*People v. Goins* (1996) 653 N.Y.S. 51, 52.) Similarly, a New York court found the evidence sufficient to support the crime of arson in the fourth degree when a defendant threw a lit cigarette into an upstairs hayloft, knowing it was lit, and without caring whether it would start a fire. (*People v. Keith U.*, (1975) 365 N.Y.S. 2d 570, 571.) As noted above, the offense of arson in the fourth degree incorporates exactly the same definition of reckless culpability set forth in the California statute at Penal Code section 450 subdivision (f).

By adding section 451 to the arson statutes in 1979, the California legislature intended therefore to criminalize the kind of careless and reckless conduct epitomized by these New York cases. The common thread in these cases is that there is evidence of the defendants' intentional lighting of something combustible in circumstances that showed a complete disregard for the substantial concomitant risk of fire, a risk of which the defendants should reasonably have been aware. There is no evidence in these cases that the defendants acted out of any design to vex, injure or annoy, and no evidence that

their intentional acts were unlawful. Accordingly, the cases present precisely the factors that in California distinguish Penal Code section 451 from section 452.

In appellants' case, respondent argues that their conduct was not merely reckless, because the minors not only lit a firecracker, but they also threw it into a brush-covered hillside (RB, p. 12.) Respondent opines that appellants would have been merely reckless if they had carelessly dropped the firecracker in dry grass, or had knowingly left it in a place where it would ignite from intense heat, and also "if they had carved open the firecracker to check it for gunpowder next to a lit cigarette and it exploded." (RB, p.12.) Those scenarios are not before this court for decision, but the act of throwing the firecracker is. The New York cases, however, illustrate how the minors' conduct in this case fits within the analysis of reckless and unlawful burning, not arson. (See e.g. *People v. Keith U.*, supra, 365 N.Y.S. 2d at 571.)

D. There Is No Evidence in the Record That Appellants Acted Unlawfully Rather Than Recklessly in Lighting a Firecracker

Respondent apparently concedes that there is no evidence in the record that appellants acted with any design to vex, injure, annoy or defraud any person. (RB, p.100.) This concession is appropriate because the juvenile court found that appellants were "good kids" who had no intention to set the hill on fire. (RT, 64, 65, 69,71.) The trial court's factual findings, express or implied, must be upheld when, as here, they are supported by substantial evidence. (*People v. Leyba* (1981) 29 Cal. 3d 591.)

Despite his apparent concession, respondent nevertheless attempts to

show that appellants acted with malice because they should have known, and did know, that throwing a firecracker near combustible material was an “inherently wrongful act.” (RB, p 13.) As discussed above, the legal standard for malice is not whether the act was subjectively “inherently wrongful “ but whether it was legally wrongful, i.e unlawful. (See *People v. Kreiling*, supra, 259 Cal. App. 2d at 705.) There is no evidence in the record that appellants’ acts were unlawful.

To support his argument that appellants acted with malice, respondent states that fireworks are a controlled product in California, and that “throwing a lit firecracker is a qualitatively different act than throwing, for example, a rock or a beer bottle.” (RB, p. 14.) Respondent concedes, however, that there is no evidence in the record to show that appellants’ fireworks were illegal. (RB p. 14, n. 6.) There is also no evidence to show that appellants’ action were unlawful in any way at all. There was no evidence of any prohibition against lighting a firecracker on the hill; there was no evidence that the minors were trespassing on the hill; there was no evidence that they had personal animus to the inhabitants of the nearby houses; and there was no evidence that the minors wanted or expected the hill to catch fire. The juvenile court found that the minors had no intention of setting the hill on fire and were “kids,” “playing with fireworks.” (RT,, 69, 73.)

Notwithstanding the lack of evidence of any unlawful activity, respondent also points to certain aspects of appellants’ behavior that he asserts are evidence that they knew that what they were doing was wrong; that they acted “furtively”

in going to Pasadena from their homes in Compton and Downey³, that a third companion did not want to participate, “unmistakably putting appellants on notice that they were committing not just a reckless but a wrongful act”⁴; that appellants “plainly enjoyed the thrill of the dangerous act;”⁵ that they later acknowledged that what they did was wrong, and that after the fire started, they abandoned the fireworks they did not use, and they fled. (RB, pp 14-16.)

First, as noted above, whether appellants’ conduct was malicious depends upon whether it was unlawful not “inherently wrongful.” Second, in finding that they were “good kids” who had no intention of setting a hill on fire, the juvenile court impliedly rejected this kind of negative characterization of the minors. The court’s implied findings are entitled to deference because they are supported by substantial evidence. (See, *People v. Leyba*, supra, 29 Cal. 3d at 597.) Third, appellants’ subsequent remorse for the fire they had inadvertently started

³ Officer Carillo testified that the minors told him they went to the mountain to climb, and that they were planning to go to Chinatown afterwards to get something to eat. (RT 47.)

⁴ Respondent’s interpretation of what the adolescent third minor’s statement meant to the adolescent appellants is no more than speculation. However, the probation officer opined that the offense was “born out of the failure to consider consequences and poor judgement skills’ with “no malicious intent.” (Clerk’s Transcript, “CT,” 32.)

⁵ This assertion is based upon the testimony of one witness who in court embellished the statement he gave to police immediately after the fire started. In court the witness stated that he heard what sounded like some kids having a good time, yelling and screaming. (RT 17.) As the parties stipulated, he told the police only that he saw three Hispanic males talking loudly and walking at a fast pace away from the mountain. (RT, 58-59.) (See AOB, p.3, and n.4.)s

cannot reasonably provide an inference of prior malicious design. Respondent quotes the third minor (who is not a party to this appeal) as saying “[O]h my god, dude, what if somebody get’s hurt, and J.H replying “[D]ude, I know.” (RB, p. 15, quoting Exh. 15 at 8.) The transcript shows that these comments were made after the fire started, not before the firecracker was lit or thrown , a circumstance that puts a very different gloss on the inference to be drawn from the comment. Indeed, this comment and others like it serve to demonstrate the complete lack of animus the minors had towards anyone, including the residents of the nearby houses. This factor distinguishes appellants’ case from the common fact pattern found in cases where the defendant set fire to a different or additional structure to the one that burned and then challenged his conviction for arson on that ground..

In his AOB, appellant pointed to a number of these cases. (See AOB, pp 11-15.) In *People v. Green*, the defendant started a fire in an apartment in which his estranged wife had been living, and flames from the apartment fell onto the carport in which neighbors’ cars were parked (*People v. Green* (1983) 146 Cal.App.3d 369, 373.) In *People v. Fry* , the defendant intentionally set fire to four vehicles with a disposable lighter and the fire in one of the vehicles damaged the carport in which it was parked. (*People v. Fry* (1993) 19 Cal. App. 4th 1334, 1337.) The Court of Appeal upheld his conviction for four counts of arson of a vehicle and one count of arson of a structure. (*Ibid.*) (See also *People v. Glover* (1991) 233 Cal. App. 3d 1476, 1483 [defendant told others she would bun her apartment for insurance money, the fire was deliberately set and after the fire, defendant applied for fire insurance proceeds and received an insurance settlement as a

result of the fire]; *People v. Clagg* (1961) 197 Cal. App. 2d 209, 212 [evidence that two independent fires in the building were deliberately set, and the defendant had threatened to burn the house on numerous occasions to penalize his wife by destroying furniture]; *People v. Lee* (1994) 28 Cal. App. 4th 659, 664 [defendant admitted he set three or four fires in different places inside the house but contended it was in order to kill himself]; *People v. Lopez* (1993) 13 Cal. App. 4th 1840, 1845-1846 [defendant removed his mother and his personal property from the vicinity of a trailer which burned shortly thereafter].)

In these cases, the evidence of malice is a far cry indeed from the actions of the minors here, who lit and threw a firecracker to hear the noise it would make, with the unintended consequence that a hillside caught fire. In the Respondent's Brief, the Attorney General does not address any of these cases, to show how the facts of appellants' case might reasonably be reconciled under the same statutory umbrella of Penal Code section 451, rather than the unlawful burning provisions of section 452.

E. For Arson, Malice Requires Intent to Do "Harm" as Defined by Penal Code Section 450.

To recap the parameters of this appeal, the juvenile court and both divisions of the Court of Appeal all agreed that appellants lit and threw the firecracker but had no intention of setting the hill on fire. The only question, then, is whether those actions are sufficient to show malice. Although malice may be inferred from intent, it is inferred from the nature of the intentional act, not from the mere doing of the act.

With regard to intention, Justice Mosk explained in his concurring

and incorrectly broadened the definition of malice far beyond what was expressed or implied in this court's analysis in *Atkins*.

CONCLUSION

For the reasons discussed in this brief and in the Appellants Opening Brief on the Merits, as well as the arguments advanced in the co-appellant's briefing before this court, which appellant V.V incorporates herein, appellant asks this court to find that the intentional lighting and throwing of a firecracker with no intent to cause a brush fire does not constitute evidence of malice under Penal Code section 451. Accordingly, the Court of Appeal erred in affirming the juvenile court's adjudication sustaining the petition.

Without proof of malice, the evidence does not establish sufficient proof of all the elements of arson under Penal Code section 451 and appellant therefore asks this court to reverse the judgments sustaining the wardship petition on that ground.

Respectfully submitted



Laini Millar Melnick

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S177654

Certificate of Word Count

I hereby certify that the number of words in the Appellant's Reply Brief is 4,388.. This certification is made in reliance upon the word count of the computer program used to prepare the brief.

Signed:

A handwritten signature in black ink, appearing to read "Laini Millar Melnick", with a stylized flourish at the end.

Laini Millar Melnick

Dated: October 4, 2010

PROOF OF SERVICE BY MAIL

I am employed in the county of Santa Barbara, State of California. My business address is 610 Anacapa Street , Santa Barbara, California 93101. I am over the age of 18 and not a party to the action herein.

On the date written below, I served the attached APPELLANT'S REPLY BRIEF ON THE MERITS on all interested parties in this action by placing a copy in envelopes with postage fully prepaid, addressed as follows:

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I deposited the aforesaid envelopes in the mail at Santa Barbara, California. I declare on penalty of perjury under the laws of the State of California that the foregoing is true and correct. Dated October 5, 2010

Lenn Allen Co

