UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1462

September Term, 2015

IN RE: DAVID P.

Eyler, Deborah S.,
Wright,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: May 18, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

The Circuit Court for Wicomico County, sitting as a juvenile court, found David P., appellant, involved of second-degree assault and related offenses and, thus, a delinquent child, based on an incident at his home in Salisbury on the morning of April 24, 2015**.** Appellant noted this timely appeal and raises three questions for our review:

> 1. Does the record fail to establish that the juvenile court had jurisdiction to conduct the adjudicatory hearing?
>
> 2. Was the evidence legally insufficient to sustain the adjudication for threat of arson?
>
> 3. Was the evidence legally insufficient to sustain the adjudication for disorderly conduct?

For the reasons stated below, we answer appellant's first two questions in the negative and the third question in the affirmative. Accordingly, we affirm in part and reverse in part the juvenile court's judgment.

BACKGROUND

When Kristine Vickers, appellant's mother, woke appellant up for school at approximately 7:00 a.m. on the morning of April 24, 2015, she could tell he was in a bad mood. Appellant told his mother that he had been kicked off the bus, and he was not going to school. Vickers asked appellant to take his morning medication, and appellant refused. Appellant also demanded a new bookbag because his had a hole in it. Vickers indicated that she would get him a new bag the next day. After that, "things just escalated from there," according to Vickers.

Appellant went outside and started throwing rocks at the house while "yelling and screaming and cussing." Vickers initially watched from inside the house, but she went

outside when appellant started throwing rocks at her car causing "dents in my hood, [and] a crack in my windshield." Appellant also threw rocks at Vickers. She estimated that appellant threw "30 [or] 40" rocks, some of which landed "within a couple feet of" her. At one point, appellant ran down the street, and Vickers pursued him while trying to calm him down. As appellant was throwing rocks, he continued to yell and scream. He also threatened Vickers and said he would burn the house down. A neighbor called the police.

When Officer Weiss of the Salisbury Police Department arrived at around 7:45 a.m., he observed appellant across the street from Vickers's house, leaning against a fence, and crying. Officer Weiss testified that appellant was upset and uncooperative and tried to walk away from him. Officer Weiss also spoke with Vickers, who informed him that appellant indicated he would burn the house if she did not replace his bookbag. In response to questioning, appellant said he was having a bad day. After appellant calmed down, Officer Weiss took him to the police station.

The State filed a juvenile petition charging appellant with second-degree assault, two counts of malicious destruction of property, threatening arson, and disorderly conduct. At an adjudicatory hearing, the circuit court granted appellant's motion for a judgment of acquittal as to one count of malicious destruction of property, but found appellant involved of the remaining charges. At a subsequent disposition hearing, the court placed appellant in a community-based placement with his uncle and his uncle's fiancée.

DISCUSSION

I. Jurisdiction of the Juvenile Court

Appellant contends that there was no evidence of his age adduced at the adjudicatory hearing. As such, he argues that the juvenile court lacked jurisdiction, and the court's judgments are a nullity. In response, the State contends that the juvenile court properly exercised jurisdiction, and there was no need to introduce evidence of appellant's age at the adjudicatory hearing.

The only evidence of appellant's age that was produced at the adjudicatory hearing was Officer Weiss's testimony that he believed appellant was a juvenile. This, however, is not fatal to the juvenile court's exercise of jurisdiction.

Maryland Code (1974, 2013 Repl. Vol., 2014 Suppl.), Courts & Judicial Proceedings Article ("CJP") § 3-8A-03(a)(1) provides that a circuit court, sitting as a juvenile court, "has exclusive original jurisdiction over [a] child who is alleged to be delinquent[.]" A child is defined as "an individual under the age of 18 years." CJP § 3-8A-01(d). The age of the person at the time the alleged delinquent act was committed controls the determination of jurisdiction of the juvenile court. CJP § 3-8A-05(a). Juvenile proceedings are initiated by the filing of a juvenile petition, which, *inter alia*, "shall state [t]he respondent's name, address and date of birth." Md. Rule 11-103(a)(2)(a). It is the filing of this petition by which the juvenile court gains jurisdiction over the matter. *See Hart v. Bull*, 69 Md. App. 229, 233-34 (1986) ("No jurisdiction exists in a juvenile delinquency case until a petition is filed by the State.") (Emphasis

omitted). *See also* CJP § 3-8A-10(c) (requiring intake officer to make inquiry into juvenile petition to determine if juvenile court has jurisdiction).

Appellant cites a case from the Court of Appeals of Texas, *Matter of A.S.*, 875 S.W.2d 402, 403 (Tex. App. 1994), for the proposition that failure to adduce evidence of the child's age at the adjudicatory hearing is fatal to the juvenile court's exercise of jurisdiction. Appellant fails to recognize, however, that the Texas appellate courts have since overruled the relevant portion of that case, *see In re E.D.C.*, 88 S.W.3d 789, 792 (Tex. App. 2002), and there are cases from Maryland that are contrary to appellant's position.

This Court has held that once the State files a delinquency petition – which includes the alleged delinquent's birthdate – there is "a presumption in favor of subject matter jurisdiction, and that the burden was on [the respondent] to introduce evidence sufficient to rebut that presumption." *In re John F.*, 169 Md. App. 171, 181 (2006) (disussing *In re Nahif A.*, 123 Md. App. 193, 211 (1998), *overruled on other grounds by In re Antoine M.*, 394 Md. 491 (2006) (finding "no such requirement" of proving the age of the child at an adjudicatory hearing)).

In accordance with Md. Rule 11-103, the delinquency petition filed in this case listed appellant's birthdate, indicating that appellant was 14 years old at the time of the incident. Accordingly, the juvenile court properly exercised jurisdiction, and the burden was on appellant to rebut the presumption of proper jurisdiction. He made no attempt to do so. We, therefore, find no error in the juvenile court's exercise of jurisdiction in this matter.

II. Sufficiency of the Evidence

The Court of Appeals has remarked: "In a juvenile delinquency matter, an appellate court will 'review the case on both the law and the evidence.' We review any conclusions of law *de novo*, but apply the clearly erroneous standard to findings of fact." *In re Elrich S.*, 416 Md. 15, 30 (2010) (internal citation omitted). This Court has noted that "[a] delinquent act is an act which would be a crime if committed by an adult." *In re Lavar D.*, 189 Md. App. 526, 585 (2009) (citing CJP § 3-8A-01(l)).

Accordingly, as to the sufficiency of the evidence, we apply to juvenile delinquency proceedings the same standard of review as in criminal trials:

> "Appellate review of the [trial] court's judgment on the evidence is limited to determining whether there is a sufficient evidentiary basis for the court's underlying factual findings. [T]he appropriate inquiry is not whether the reviewing court believes that the evidence establishes guilt beyond a reasonable doubt, but rather, whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Elrich S., 416 Md. at 30 (quoting *In re Anthony W.*, 388 Md. 251, 261 (2005)); *see also In re Kevin T.*, 222 Md. App. 671, 676-77 (2015).

A. Threat of Arson

Appellant contends that there was insufficient evidence of his involvement in threatening arson because he did not make a true threat to commit arson. Appellant does not dispute that he said he would burn the house down, but he argues that, in the context of the incident, this was not a "true threat." Appellant points out that Vickers, his own mother, who heard appellant's threats, did not call the police. Accordingly, he argues,

she did not take appellant's threat seriously and a rational trier of fact cannot find appellant's words to constitute a threat to commit arson.

The State contends that appellant's constitutional argument, as to whether the threat to burn the house down amounted to a threat or a true threat, is not at issue. Rather, the State argues that there was sufficient evidence to find that appellant was involved in threatening to commit arson because he did, in fact, threaten to burn the house down.

Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 6-107(a)(1) provides: "A person may not threaten verbally or in writing to set fire to or burn a structure." The Court of Appeals has defined "threat" as a "'communicated intent to inflict' harm." *Moosavi v. State*, 355 Md. 651, 664 (1999) (quoting BLACK'S LAW DICTIONARY 1480 (6th ed. 1990)). This Court has defined threat, alternatively, as "'an expression of a determination or intent to injure presently or in the future.'" *Hammonds v. State*, 436 Md. 22, 42 (2013) (quoting *Abbott v. State*, 190 Md. App. 595, 619 (2010)).

CL § 6-107 punishes speech. As such, the First Amendment of the United States Constitution's guarantee of the freedom of speech, as incorporated to the states through the Fourteenth Amendment, is implicated. We, therefore, reject the State's contention that appellant's constitutional claim is not at issue, and we also note that appellant raised this issue at the hearing.

Accordingly, in order to find appellant involved of threatening arson, it is necessary to find that his threat was a "true threat." *See Abbott*, 190 Md. App. at 619 (noting that true threats are not constitutionally protected speech and are distinct from

"'words as mere political argument, talk or jest'" (quoting *United States v. Dysart*, 705 F.2d 1247, 1256 (10th Cir. 1983))). This Court has held that "[w]hether a particular communication constitutes a true threat depends on both its language and its context." *Id.* at 620 (citing *Pendergast v. State*, 99 Md. App. 141, 149 (1994)). The United States Court of Appeals for the Fourth Circuit explained that "'the context in which the words were written [or spoken], the specificity of the threat, and the reaction of a reasonable recipient familiar with the context in which the words were written are factors which must be considered' in determining whether a writing [or verbal remark] is a 'true threat.'" *Id*. (quoting *United States v. Roberts*, 915 F.2d 889, 890 (4th Cir. 1990)); s*ee also United States v. Syring*, 522 F.Supp.2d 125, 130 (D.D.C. 2007) (listing factors to consider whether a remark constitutes a true threat). Because consideration of these factors involves an analysis of facts, "it is for the trier of fact to determine whether a statement constitutes a true threat." *Abbott*, 190 Md. App. at 619 (citations omitted).

The juvenile court did not explicitly determine that appellant's remark was a true threat, but it implicitly did so because it found appellant involved of the offense:

> And as to the arson threat, count four, the Court finds again beyond a reasonable doubt that he's involved as to that offense. I think [appellant's counsel] makes a very good argument, but the law's not caught up as it relates to that to where an assault is. I think [State's attorney] has a valid argument that due to the nature of an arson that there's not the conditional issue as there is with an assault. And so therefore the Court finds that he's involved with that as well beyond a reasonable doubt until I guess someone in Annapolis clarifies that issue.[1]

[1] Here, the Court is referring to statements made during closing arguments. There was conflicting testimony as to whether appellant conditioned the threat to burn the house on obtaining a new bookbag. During closing arguments, appellant's (continued…)

Appellant emphasizes that he did not have matches or a lighter, indicating that he could not bring his threat to fruition. Whether or not appellant could carry out the threat at the time, however, is immaterial. *See Abbott*, 190 Md. App. at 621 ("Nor is the government required to prove the present ability or intent to carry out the threat.") (Citations omitted).

Focusing on the nature of the remark, appellant contends that the threat to burn the house down was not genuine. Rather, it emanated from an angry young man who was upset as a result of either Vickers's answer to his request for a new bookbag or fear of upsetting his mother over being kicked off the bus.

Taking the evidence in the light most favorable to the State, we conclude that a rational trier of fact could find that appellant's threat constituted a true threat to commit arson. Although Vickers apparently did not subjectively regard appellant's threat as genuine, he was in the midst of a tirade in which he threw rocks at the house, Vickers, and her vehicle, causing damage to the latter. A rational trier of fact could conclude, therefore, that at the time appellant made the threat to burn the house down, he had the

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counsel contended that a threat has to be actionable in order for it to be a true threat, similar to the law as it stands with the crime of assault. The State argued that arson was different because of the nature of the crime. Essentially, because arson involves the burning of a structure, which the State argued instilled more fear in a listener than a threat of assault, a conditional threat of arson is different than a conditional assault.

Whether appellant's threat to burn the house was conditioned on the replacement of the bookbag is of no moment to our consideration of whether appellant's remark amounted to a true threat. *See Abbott*, 190 Md. App. at 620 ("'[A] threat may be considered a true threat even if it is premised on a contingency.'" (Quoting *United States v. Bellrichard*, 994 F.2d 1318, 1322 (8th Cir. 1993))).

intent to carry it out. *See Hammonds*, 436 Md. at 43 (analyzing statute criminalizing making threats in retaliation for testifying in court and holding that "statute only requires proof of (1) an intentional threat of harm to another, and (2) that defendant made the threat with the intent to retaliate against a witness" (citing *Parker v. State*, 189 Md. App. 474, 486-87 (2009)); *Abbott*, 190 Md. App. at 629-30 (finding sufficient evidence that objective observer could conclude that Abbott threatened the Governor of Maryland via e-mail). Accordingly, there was sufficient evidence to support finding appellant involved in threatening arson.[2]

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[2] We are, in some ways, sympathetic to appellant's arguments. Much like this Court in *Moosavi v. State*, 118 Md. App. 683, 691 (1998), *rev'd* 355 Md. 651 (1999), "we would not have been persuaded that the appellant was guilty of threatening to" commit arson.

CL § 6-107(a)(2) criminalizes threatening to "explode a destructive device," such as a bomb, "in, on, or under a structure." Moosavi sought to have an erroneous $30 charge credited to his bank account. *Moosavi*, 118 Md. App. at 689. He wrote two letters to the bank, which did not achieve the desired result, followed by a series of telephone calls, during one of which he threatened to bomb the bank. *Id.* at 689-90. He was charged with and convicted of making a false statement regarding a bomb threat. *Id.* at 685.

Judge Moylan, writing for this Court, remarked: "Our 'gut' reaction would probably have been that [Moosavi] was an unsophisticated layman who experienced the frustrated helplessness that one sometimes suffers in attempting to communicate with an impersonal institution or an impersonal bureaucracy." *Id.* at 691. Noting Moosavi's letters and phone calls, in addition to a language barrier, we noted that "he may, to be sure, have blurted out the word 'bomb' but it would seem to us not to have been a genuine threat." *Id.*

We affirmed his conviction, however, persuaded that he had not preserved the issue of sufficiency for review, and we also felt constrained by the verdict of the jury. *Id.* at 691-92, 695-96. The Court of Appeals reversed our decision, holding that Moosavi should have been charged with threatening to bomb a structure, not making a false report of a bomb threat. *Moosavi*, 355 Md. at 661-62. (continued…)

B. Disorderly Conduct

Finally, appellant contends that there is insufficient evidence to support his involvement in disorderly conduct because there was no crowd that was disturbed by his actions. As such, he avers that his actions cannot be found to constitute disorderly conduct. The State responds that at least one neighbor was sufficiently disturbed by appellant's conduct and called police. Moreover, the State points out, there was damage to Vickers's vehicle which demonstrates that there was a disturbance of the public peace.

CL § 10-201(c)(2) provides: "A person may not willfully act in a disorderly manner that disturbs the public peace." This Court has noted that "'[t]he gist of the crime of disorderly conduct . . . as it was in the cases of common law predecessor crimes, is the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite, **a number of people gathered in the same area**.'" *Livingston v. State*, 192 Md. App. 553, 570 (2010) (quoting *Drews v. State*, 224 Md. 186, 192 (1961), *vacated by* 378 U.S. 547 (1964)) (emphasis added). Importantly, then, "disorderly conduct within the statute's meaning 'requires the **actual presence of other persons** who may witness the conduct or hear the language and who may be disturbed or provoked to resentment thereby.'" *Briggs v. State*, 90 Md. App. 60, 68 (1992) (quoting *In re Nawrocki*, 15 Md. App. 252, 258 (1972)) (emphasis added).

Similarly, our "gut" reaction in this case is that appellant was, indeed, having a bad morning and said something in the heat of a tantrum.

In this case, taking the evidence in the light most favorable to the State, we are persuaded that there is insufficient evidence to support appellant's involvement in disorderly conduct. The evidence demonstrates that one neighbor called police in response to appellant's activities. Vickers stated that another neighbor was "back and forth between in the house and her vehicle" while appellant was yelling and screaming, but the neighbor paid no attention to appellant. Accordingly, there was not "a number of people gathered in the same area" nor "the actual presence of other persons" who witnessed appellant's conduct and where "disturbed as provoked to resentment thereby."

The State argues that the damage to Vickers's car supports appellant's involvement in disorderly conduct and cites *Lavar D.*, 189 Md. App. at 592. *Lavar D.* is distinguishable from this case, however, because in that case, a crowd of people witnessed a mob of juveniles riot and damage a bus while they attacked two individuals. *Id.* The damage to the vehicle, by itself, is not sufficient to sustain involvement in disorderly conduct. Whereas a crowd of individuals witnessed the conduct in *Lavar D.*, there was no crowd in this case. As such, we are persuaded that there was insufficient evidence of appellant's involvement in disorderly conduct.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY, SITTING AS A JUVENILE COURT, AFFIRMED AS TO JURISDICTION AND THREAT OF ARSON. JUDGMENT AS TO DISORDERLY CONDUCT REVERSED. COSTS TO BE PAID 2/3 BY APPELLANT AND 1/3 BY WICOMICO COUNTY.