Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2008-402 & 2008-425

JULY TERM, 2009

In re K.S.	}	APPEALED FROM:
	}	
	}	Chittenden Family Court
	}	
	}	DOCKET NO. 135-3-07 CnJv
State of Vermont	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
v.	}	
	}	
K.S.	}	DOCKET NO. 5558-12-06 CnCr
		Trial Judge: James R. Crucitti

In the above-entitled causes, the Clerk will enter:

Defendant was charged with violating the terms of his adult and youthful offender probation by making threats to another participant in the residential treatment program where he was assigned. Defendant argues that there was insufficient evidence to conclude that he willfully engaged in threatening behavior. We affirm.

The record reveals the following facts. Defendant was charged with forgery, and assault and robbery. As part of a plea agreement, defendant received a deferred sentence on the forgery charge, and the assault and battery charge was transferred to juvenile court for disposition treating him as a youthful offender. His probation on his deferred sentence required, among other things, that he (1) abide by juvenile probation conditions, (2) participate fully in any program to which he was referred by the court or his probation officer, and (3) refrain from engaging in "threatening, violent, or assaultive behavior." In conjunction with the delinquency proceedings, defendant was also placed on juvenile probation with conditions, including that he "[f]ollow the rules of your home or living situation," and "[p]articipate fully in any program . . . to which your juvenile probation officer refers you."

In November 2007, defendant was enrolled in a residential program in Bennington, Vermont. Prior to entering this program, defendant's probation officer went over a contract with him that required defendant to follow all program rules and prohibited threatening or assaultive behavior. In March 2008, the facility removed defendant from its program because defendant violated the facility's rule against physical violence or threats of physical violence, by communicating threats to another resident. Based on the reported incidents, the State charged defendant with violating the terms of his district court and juvenile probation. In district court, the State charged defendant with violating three conditions: that he participate in referred

programming; that he not engage in threatening, violent or assaultive behavior; and that he abide by juvenile probation conditions. The juvenile complaint charged defendant with violating the condition that he follow the rules of his living situation. Both complaints were based on the same conduct wherein defendant allegedly made threatening statements to another resident. Defendant admitted making the statements, but contended that they were made in a joking manner and not intended to be threats.

Following a hearing, the district court issued an order on May 21, 2008. The court found that in two instances defendant had threatened another resident at the program. In the first instance, defendant and several other residents were shoveling snow as part of a work crew. During a snow fight, defendant commented to another resident that he was going to "pummel his asshole." The resident "fined" defendant for his behavior.[1] At a group meeting later, defendant did not challenge the fine, but laughed it off. The group leader kicked him out of the group. Defendant admitted that the comment was a violation of the house rules, but testified the comment was not meant as a rape threat. The court concluded that defendant did not make the comment in a joking manner, but "did convey a threat to the other resident."

The second incident occurred later and involved the same resident. Defendant entered the shower where the resident was already showering in one stall. Defendant turned off the light, began to undress and told the resident, "I don't really care, shit don't happen here during the daytime, shit happens at night." Defendant testified that his comment was not a threat and offered a long explanation for what he meant. The court did not find defendant's explanation for this statement credible. On the contrary, the court found "this comment made to the other resident was clearly a serious threat." The district court concluded that defendant had violated his conditions of probation by not fully participating in the program and by engaging in "threatening behavior." The family court incorporated the district court's findings and terminated defendant's youthful offender probation status because defendant failed to comply with the condition that he follow the rules of his living situation.

The court subsequently granted defendant's motion to reopen the evidence to hear testimony from the resident who was the putative victim of defendant's alleged threats; he had been subpoenaed by the State to testify at the original probation violation hearing, but was unavailable at that time. At the new hearing, the individual testified that he did not consider defendant's statements as threats. He conceded that he had fined defendant for the "pummel" comment, but claimed he did it just to get defendant in trouble. As to the incident in the shower, the resident admitted that after the incident he reported to a staff member what had happened and that he told the staff member he had felt threatened. The resident testified, however, that he had said that to get defendant in trouble and in fact did not feel threatened. The court concluded that the witness' testimony was not credible and found that the State had met is burden of proving that defendant had violated the conditions of his deferred sentence. The court revoked defendant's probation and youthful offender status, and ordered defendant to serve his underlying sentence.[2] Defendant now appeals.

---

[1] At the facility, residents can fine one another for inappropriate behavior. When a resident is fined, he can accept it or challenge it.

[2] The parties disagree as to the basis of the court's revocation order. Defendant views the court's decision as revoking his probation because he violated the standard probation condition prohibiting threatening behavior. The State contends that the issue is whether

"The State bears the burden of proving probation violations by a preponderance of the evidence." State v. Coyle, 2005 VT 58, ¶ 8 178 Vt. 580 (mem.). The court's determination of whether a violation occurred involves a mixed question of fact and law. "The trial court must first determine what actions the probationer took and then make a legal conclusion regarding whether those acts violate probation conditions." State v. Decoteau, 2007 VT 94, ¶ 8, 182 Vt. 433. Thus, on appeal, "[w]e will not disturb the court's findings if they are fairly and reasonably supported by credible evidence, and we will uphold the court's legal conclusions if reasonably supported by the findings." Id.

Defendant first argues that there was insufficient evidence to conclude that in either instance defendant willfully engaged in threatening behavior. According to defendant, since he testified that he did not intend his words to be threatening and the victim testified that he did not perceive the statements as threatening, there was no evidence to support the State's allegation that he engaged in threatening behavior. Defendant claims that all the evidence supports his contention that his statements were made in a joking manner and that he did not intend to threaten anyone.

Viewing the evidence in the light most favorable to the State, State v. Sanborn, 155 Vt. 430, 434 (1990), we conclude that there was sufficient evidence for the court to find that defendant's statements violated the rules of the program that prohibited threats of violence. While defendant testified that he did not intend to threaten, the court did not find him credible. There was other evidence, including defendant's conduct and the surrounding circumstances that could support the court's finding. "It is common . . . that the mental element of an offense must be inferred from the defendant's conduct." State v. Russo, 2004 VT 103, ¶ 8, 177 Vt. 394. The victim fined defendant for the pummel comment, and defendant did not contest the fine; indeed, at trial, defendant agreed that his pummel comment violated the program rule against making threats of physical violence. In addition, when the resident fined defendant, defendant laughed about the comment. As to the second comment, the other resident had initially reported the incident to staff members and explained that he felt threatened by the statement. Although he later testified that he did not feel threatened and defendant attempted to explain that the statement was innocent, the court found that defendant's explanation lacked any credibility. Furthermore, both comments were made against a resident whom the court found defendant did not get along with. Given these facts, the evidence supported the court's finding that defendant violated the program's rules by threatening another resident. This in turn supports the court's revocation of defendant's juvenile and district court probation.

---

defendant's statements violated the program's rule prohibiting "physical violence or threats of physical violence." As explained, at the time of the alleged conduct, defendant was subject to two sets of conditions. First, defendant was under conditions of probation in district court, including that he fully participate in any program to which he had been referred and prohibiting him from engaging in threatening behavior. Second, he was subject to juvenile probation conditions requiring him to abide by the rules of his living situation. The court found that defendant had violated the conditions of both. It was, however, the court's finding that defendant violated the juvenile probation requirements that resulted in revocation of defendant's youthful offender status and imposition of defendant's underlying suspended sentence. Thus, we agree with the State that the central issue is whether defendant violated the juvenile probation requirement that he follow the rules of his living situation, specifically the facility's prohibition of physical violence threats. In any event, we conclude that the evidence supports all of the violations the court found.

We are not persuaded by defendant's argument that regarding his statement "shit happens at night," his words are at the worst ambiguous, and ambiguous statements are not credible, intentional threats. In support of his argument, defendant cites In re Ricky T., 105 Cal. Rptr. 2d 165 (2001), wherein a juvenile was found guilty of terrorist threats for telling his teacher, "I'm going to get you." On appeal, the court found insufficient evidence to demonstrate that the statement was an unequivocal, immediate, specific threat, as required by statute. Id. at 168-70. The court explained that the juvenile's statement was ambiguous on its face and lacked any corresponding circumstances to corroborate that it was intended as a threat. Id. at 169. This situation differs from Ricky T. in several key ways. First, Ricky T. was a criminal prosecution and required the prosecution to prove there was a threat beyond a reasonable doubt, whereas here the State must demonstrate defendant's violation by a preponderance of the evidence. Second, the applicable statute in Ricky T. contains several elements for proving terrorist threats—such as an immediate and unequivocal statement—that are not attached to the probation conditions at issue in this case. See id. at 168 (listing elements of terrorist threats). Finally, in Ricky T. the court emphasized that the ambiguous statement lacked context because there was no history of disagreement between the juvenile and the teacher. Id. at 169. In contrast, here, the evidence demonstrates, and the court found, that defendant and the other resident had a history of not getting along.

Defendant finally contends that to violate a condition prohibiting threatening behavior our past cases have required the State to demonstrate significant conduct in addition to oral statements. Defendant argues that his verbal statements were insufficient to constitute threatening behavior. Because defendant failed to raise this argument in the trial court, we review it for plain error. See Decoteau, 2007 VT 94, ¶ 11 (holding plain error may apply to unpreserved claims in probation-violation proceedings if "important interests and basic constitutional rights" are implicated). Defendant's argument that the trial court erred in violating his probation for verbal threats without accompanying conduct it is not plain error since, as we recently held, this error—if any—is not obvious. State v. Gilbert, 2009 VT 7, ¶¶ 6-7 (mem.).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Brian L. Burgess, Associate Justice