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MAR 11 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

	)	2 CA-JV 2008-0125
	)	DEPARTMENT B
	)	
IN RE JACOB Z.	)	MEMORANDUM DECISION
	)	Not for Publication
	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. JV 2008-024

Honorable Peter J. Cahill, Judge

AFFIRMED

Daisy Flores, Gila County Attorney
By Ramai L. Alvarez
Globe
Attorneys for State

Gary V. Scales
and
Stephen M. Johnson
Tucson
Attorneys for Minor

B R A M M E R, Judge.

¶1 After a contested adjudication hearing, the juvenile court found thirteen-year-old Jacob Z. had committed the offense of threatening or intimidating, by word or conduct, to cause physical injury to another person, *see* A.R.S. § 13-1202(A)(1), and was a delinquent minor. The court further ordered that "no probation, consequences, penalties, or monetary assessments" would be imposed. On appeal, Jacob argues the evidence was insufficient to

find him delinquent because the state failed to establish that he made a "true threat." *See In re Kyle M.*, 200 Ariz. 447, ¶¶ 18-19, 27 P.3d 804, 807-08 (App. 2001). We affirm.

¶2 In *Kyle M.*, Division One of this court construed § 13-1202(A)(1) as proscribing only the issuance of a "true threat," mindful of the United States Supreme Court's caution that "'a statute . . . [that] makes criminal a form of pure speech [] must be interpreted with the commands of the First Amendment [of the United States Constitution] clearly in mind,'" with criminal threats distinguished from constitutionally protected speech. *Kyle M.*, 200 Ariz. 447, ¶ 20, 27 P.3d at 808, *quoting Watts v. United States*, 394 U.S. 705, 707 (1969). The state agrees with Jacob that a delinquency adjudication based on § 13-1202(A)(1) requires proof that a defendant made a "true threat" and that,

> "in order for the government to establish a 'true threat' it must demonstrate that the defendant made a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon . . . [a person]."

Kyle M., 200 Ariz. 447, ¶ 21, 27 P.3d at 808, *quoting United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990) (second alteration in *Kyle*). The parties disagree only about whether the state met that burden in this case.

¶3 When reviewing a delinquency adjudication, "we will not re-weigh the evidence, and we will only reverse on the grounds of insufficient evidence if there is a complete absence of probative facts to support the judgment or if the judgment is contrary to any substantial evidence." *In re John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d 772, 774 (App. 2001). We view the evidence in the light most favorable to sustaining the adjudication. *Id.*

¶4 At the adjudication hearing, eight-year-old J. testified that a year earlier he had been riding on the school bus with other students when Jacob said "he wanted to shoot [J.]" with "a .22." J. stated he had been scared, told his mother what Jacob had said when he arrived home that afternoon, and stayed out of school for the next two weeks. A Gila County sheriff's deputy who later interviewed Jacob testified Jacob had admitted saying he was going to shoot J. and his brother with a BB gun, but that Jacob had added, "I was only joking."

¶5 Jacob argues there was also testimony that he and another boy had been talking on the bus about having an "airsoft war" and shooting each other with guns that shoot plastic pellets and "are considered . . . toy[s]." He also notes that the school's principal, who interviewed J. after the bus incident had been reported, expressed his opinion that J. had been "coached" about what to say. Jacob asserts, "There was no threat beyond possibly jokingly telling J.M. that [Jacob] was going to shoot him." But, as in *Kyle M.*, "The [s]tate was not required to demonstrate [Jacob] had the ability to carry out his threat or that he actually intended to do so." *Kyle M.*, 200 Ariz. 447, ¶ 23, 27 P.3d at 809.

¶6 In light of *Kyle M.*, the juvenile court was required to determine whether a reasonable person would foresee that those who had heard Jacob's statement on the bus would have believed it was a serious expression of intent to inflict bodily harm. 200 Ariz. 447, ¶ 21, 27 P.3d at 808. Although this reasonable-person standard is an objective one, it is also context-specific and requires a court's consideration of the listener's circumstances. Chief among those circumstances here are J.'s young age and lack of familiarity with airsoft guns. And although Jacob argues that testimony of "feuding" between J.'s and Jacob's families suggests J.'s testimony may have been coached, the same evidence could be

considered a circumstance that Jacob knew would cause J., then a seven- or eight-year-old child, to take Jacob at his word. Based on the court's remarks at the close of the adjudication hearing, it had carefully considered the evidence, including J.'s perspective, before finding beyond a reasonable doubt that Jacob was responsible for threatening or intimidating.[1] The court's decision in this case depended on its assessment of each witness's credibility, and we will not reweigh that evidence on review. *John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d at 774.

¶7 Substantial evidence supported the juvenile court's judgment of delinquency, *see id.*, and we therefore affirm it.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

_____
JOSEPH W. HOWARD, Judge

[1]The court commented, for example, "[T]here is no reason to think that [J.] was fully informed that this was some sort of joke and that this [gun being discussed] was some sort of a toy."