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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ALLEN SHAW,

Appellant and Defendant.

D042877

(Super. Ct. No. SCE224064)

ORDER DENYING PETITION FOR
REHEARING AND MODIFICATION
OF OPINION

[NO CHANGE IN JUDGMENT]

THE COURT:

The opinion filed in this case on January 7, 2005, is modified to delete the section entitled "Sufficiency of the Evidence" on pages 4 to 9. This section is replaced with the attached.

Except for the modification set forth above, the opinion previously filed remains unchanged. The request for rehearing is denied.

[NO CHANGE IN JUDGMENT]

BENKE, Acting P.J.

Copies to: All parties.

DISCUSSION

I. *Sufficiency of the Evidence*

1. *General Legal Principles*

To prove a violation of section 422, the prosecution had to show that Shaw (1) "willfully threaten[ed] to commit a crime which [would] result in death or great bodily injury to another person"; (2) made the threat "with the specific intent that the statement, . . . [was] to be taken as a threat, even if there [was] no intent of actually carrying it out"; (3) the threat ("made verbally, in writing, or by means of an electronic communication device") was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat"; (4) the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety"; and, (5) the threatened person's fear was "reasonabl[e]" under the circumstances. (§ 422.)

2. *Criminal Threat*

Because making a criminal threat implicates First Amendment interests, our high court recently concluded that reviewing courts must apply the independent review standard when examining a trier of fact's determination that the communication at issue constituted a criminal threat. (*In re George T.* (2004) 33 Cal.4th 620, 632.) Under this standard of review, we examine the statements at issue and the circumstances under which they were made to determine whether the statements constituted a criminal threat entitled to First Amendment protection. (*Id.* at p. 631.) In making this determination we

independently examine the entire record, but defer to the trier of fact's credibility determinations. (*Id.* at p. 634.)

A purported threat must be examined on its face, in context and in light of the surrounding circumstances to determine if it conveyed the required gravity of purpose and immediate prospect of execution. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137.) Relevant circumstances include the prior history of disagreements between the perpetrator of the threat and the victim (*id.* at p. 1138), with the inquiry focusing on the effect the words had on the victim, rather than the precise words uttered. (*People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1158.) Section 422 does not require an immediate ability to carry out a threat (*People v. Lopez* (1999) 74 Cal.App.4th 675, 679-680) and even an ambiguous statement that does not communicate a precise time or manner of execution may violate section 422 when it is viewed in light of the surrounding circumstances. (*People v. Butler* (2000) 85 Cal.App.4th 745, 752-753.)

After examining Shaw's statements and the surrounding circumstances under the independent review standard, we conclude that the statements at issue constituted a criminal threat and were not entitled to First Amendment protection because they threatened to commit a crime that would result in death or great bodily harm, there existed an immediate prospect of execution and Shaw harbored the specific intent that his statement be taken as a threat.

On July 5, Shaw telephoned Amy at home and in a firm and serious voice that was different from his normal tone, told her to stop working at the Academy within 60 days because something was going to happen. When Amy inquired whether he intended to do

something to the business, Shaw responded that "we'll just have to see now, won't we" and implied that he would not get in trouble because he would be dead. Although Amy admitted that Shaw threatened to destroy the business "pretty much every time" they discussed it, she had had no contact with Shaw for about a year prior to this conversation and believed Shaw intended to physically destroy the business. Based on Shaw's unequivocal comment to Amy that "something[] [was] going to happen," Vitale believed that Shaw would follow through with a suicide bombing during business hours.

Vitale's conclusion that Shaw threatened to physically destroy her and the business was not unreasonable based on her prior experiences with him. (*In re Ricky T.*, *supra*, 87 Cal.App.4th at p. 1138.) Vitale had a lengthy history of problems with Shaw relating to her business; among other things, he interfered with its bank accounts, repeatedly drove past the business and was detained one evening by police on the business premises after trying to enter the building without keys. Vitale had also previously received a Los Angeles Times newspaper article about suicide bombings at small businesses and believed Shaw had sent the article because he read this newspaper and because she had had no trouble with anyone, nor had anyone else ever threatened her business. That Shaw possessed an envelope addressed to his daughter containing a photocopy of a Los Angeles Times newspaper article about suicide and suicide bombings when police arrested him provides further support for the reasonableness of Vitale's beliefs.

Section 422 does not require that a threat be communicated directly to the victim and a defendant may be found liable even if the threat was made through an intermediary; however, it must be shown that the defendant specifically intended that the threat be

conveyed to the victim. (*In re David L.* (1991) 234 Cal.App.3d 1655, 1659.) Such specific intent can be inferred from the circumstances. (*Ibid.*) Here, Shaw had reason to believe that his daughter would tell her mother about the threat based on the fact Amy was 16-years old and lived with Vitale, who owned the business. Under these circumstances we conclude that Shaw specifically intended to convey the threat to Vitale.

Based on Shaw's language, the parties' background and the context of Shaw's statement, we conclude that Shaw's statement was a criminal threat that was not protected by the First Amendment.

3. *Remaining Elements*

Because we conclude that the statements constituted a criminal threat, we evaluate the remaining elements of section 422, which focus on the victim and not the defendant's speech, under the substantial evidence standard. We review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence (i.e., evidence that is credible and of solid value), from which a rational trier of fact could find beyond a reasonable doubt that the accused committed the offense. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) It is not our function to reweigh the evidence (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206) and reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

A necessary element of a criminal threat is sustained fear, meaning fear that is both reasonable and real. (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 417.) Fear is "sustained" if it continues for "a period of time that extends beyond what is momentary,

fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) Here, Vitale testified that she feared Shaw would commit a suicide bombing during business hours because he warned Amy to find another job within 60 days. Further, Vitale contacted the police a few days later. Her delay in contacting police was not unreasonable in light of the 60-day execution deadline and it did not vitiate the fear she immediately experienced and continued to experience as a result of Shaw's statements to Amy.

The Attorney General argues that Amy was also a victim and we should consider her fear in assessing the sufficiency of the evidence, but the record does not support this assertion. After the trial court dismissed one of the counts, the People specified that one count pertained to Amy and the other to Vitale. While it was initially unclear which count remained, at trial the prosecutor made clear that Vitale was the victim. (See section IV, *infra*.)

Finally, even if the independent standard of review applies to these remaining elements, we independently find the evidence is sufficient to support these elements. Vitale feared Shaw and believed that he intended to bomb her business. Her prior experiences with Shaw made her fear reasonable under the circumstances.