Filed 1/7/05 P. v. Shaw CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JAMES ALLEN SHAW, Defendant and Appellant.	D042877 (Super. Ct. No. SCE224064)

APPEAL from a judgment of the Superior Court of San Diego County, Larrie R. Brainard, Judge. Affirmed in part, reversed in part and remanded.

James Allen Shaw appeals a judgment entered after a jury convicted him of one count of making a criminal threat. He contends (1) insufficient evidence supported his conviction; (2) the trial court erred in admitting evidence of prior bad acts and irrelevant evidence; (3) prosecutorial misconduct requires reversal of his conviction; (4) the court erred by failing to give a unanimity instruction; and (5) the cumulative effect of these errors warrants reversal. We reject these assertions and affirm the judgment of conviction.

Shaw also contends that the imposition of the upper term violated his right to a jury trial as described in *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*). We agree and remand the matter for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Shaw married Ana Maria Vitale in 1979, and the couple had three daughters (Melissa, Jennifer and Amy). They separated in April 1999 and after an incident that resulted in Shaw's arrest and subsequent conviction, Vitale obtained a permanent restraining order against him. During the subsequent divorce proceedings, the couple signed a marital settlement agreement designating Vitale the sole owner of the Little Village Academy (the Academy), a day-care center that Vitale opened in January 1999. The agreement specified that Shaw was to have no involvement in the Academy and that Vitale would repay him $78,000 that he loaned her during the marriage, but that Shaw would forfeit the loan repayment if he interfered in the Academy's business.

The family court later ordered Shaw's right to have Vitale pay the loan forfeited after he tried to regain control of the business by removing Vitale's name from the Academy's bank account and attempting to have her name removed as the Academy's corporate officer. About four weeks after the court's order, Vitale received an envelope in the mail containing a Los Angeles Times newspaper article about suicide bombings at small businesses. She reported the incident to police. Although Vitale did not recognize the handwriting on the mailing envelope, it had no return address and misspelled her name, she believed that Shaw had sent the article because he read this newspaper and knew she owned a small business. Melissa received two telephone calls from Shaw, one

before and one after September 11, 2001. Shaw first told Melissa that "the shit's going to hit the fan as far as the business goes" and then called to inform her that his plan needed to be postponed "because of September 11th happening." Vitale learned of these calls as they occurred.

On July 5, 2002, Shaw telephoned Amy, who worked at the Academy, and the two discussed the business, including the number of children and teachers. Shaw told Amy that she should change jobs because "something[] [was] going to happen." Amy asked whether he intended to burn down the business or do something else to it, with Shaw responding "[w]ell, we'll just have to see now, won't we." After Amy told him not to talk like that because it would only get him in more trouble, Shaw responded that "it won't matter if I'm dead, now, will it?'" Shaw also told Amy he would destroy the business if he could not run it and used a serious and firm voice throughout the conversation.

Amy became worried that Shaw would hurt the kids and the school and told Vitale about the conversation the following morning. Although Vitale admitted that Shaw's focus had always been on taking control of the business, when she learned of this conversation she believed Shaw might physically destroy the business through a suicide bombing during business hours. Vitale reported the telephone call to the police on July 9, and she passed the information on to Melissa, who then removed her son from the Academy. Vitale stated that she experienced fear after hearing about Shaw's first telephone call to Melissa and that she was "still very much afraid."

La Mesa Police Sergeant Terence Marks knew Shaw may have been living at Saint Vincent De Paul's, a homeless shelter, but Marks did not try to arrest him, fearing Shaw

might not be present and would flee when he learned about the visit. Thus, Marks waited until after an August 29 court hearing to arrest Shaw. A post-arrest search revealed an envelope addressed to one of Shaw's daughters containing a photocopy of a Los Angeles Times newspaper article entitled "Method Without Madness." The article addressed suicide bombings and a portion of the article referring to suicide had been highlighted.

An information charged Shaw with two counts of making a criminal threat in violation of Penal Code section 422. (All undesignated statutory references are to this code.) Prior to trial, the court granted Shaw's motion to dismiss one of the counts under section 995, with the remaining count indicating that the offense occurred between July 5 and July 9, 2002. A jury found Shaw guilty on the remaining count relating to Shaw's statements to Amy and the trial court sentenced him to the upper term of three years in prison.

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 and there existed an immediate prospect of execution.

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 though 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.

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*

A. Specific Intent

Because we conclude that the statements constituted a criminal threat, we must evaluate the remaining elements of section 422 under the substantial evidence standard and 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.) With these principles in mind, we turn to Shaw's remaining attack on the sufficiency of the evidence.

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 the jury could reasonably conclude that Shaw specifically intended to convey the threat to Vitale.

B. Sustained and Reasonable Fear

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*.)

II. *Alleged Evidentiary Error*

1. *General Legal Principles*

Relevant evidence is identified as "evidence relevant to the credibility of a witness . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) However, the trial court has discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, confuse the issues, or mislead the jury. (Evid. Code, § 352, subd. (b); *People v. Callahan* (1999) 74 Cal.App.4th 356, 366-367.)

Although evidence of other crimes or misconduct is inadmissible when it is offered to show that a defendant had the criminal propensity to commit the charged crime (Evid. Code, § 1101, subd. (a)), such evidence is admissible when offered to prove some fact (such as motive, opportunity, intent) "other than [the defendant's] disposition to commit such [crime or bad act]. (Evid. Code, § 1101, subd. (b).) However, even if the other crimes' evidence is relevant to prove one of the facts specified in Evidence Code section 1101, subdivision (b), it must also satisfy the admissibility requirements of Evidence Code section 352. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.)

Where a defendant challenges the relevance and admission of evidence under Evidence Code sections 352 and 1101, we review the trial court's rulings under the abuse

of discretion standard (*People v. Cole* (2004) 33 Cal.4th 1158, 1195) and its decision will not be disturbed on appeal absent a showing that it exercised its discretion in an arbitrary manner resulting in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

2. *Evidence of Prior Bad Acts*

During trial Vitale described an incident that occurred in April 1999, where she was home speaking on the telephone to Melissa when Shaw picked up the extension in another room, accused Melissa of stealing the family car and threatened to call the police. As Vitale questioned Melissa about what was happening, Shaw entered the room where Vitale was on the telephone, tried to pull the telephone away from her and ultimately yanked the cord out of the wall. As that happened, the police arrived because Vitale had previously called them. The incident resulted in Shaw's arrest and conviction on an unspecified charge. Vitale obtained a permanent restraining order against Shaw soon after the incident.

The trial court admitted this testimony as an act of domestic violence under Evidence Code section 1109. Shaw contends this testimony related to an unspecified arrest for property damage, not an act of domestic violence, and the incident was inadmissible under this statute. He also contends the incident was inadmissible evidence of a prior bad act and that the trial court failed to consider the prejudicial nature of the testimony.

Domestic violence includes abuse committed against a spouse and abuse is defined as the intentional or reckless "causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury . . . ." (§ 13700, subds. (a) & (b).) Here, police arrested Shaw for an unspecified

offense related to an argument with Vitale when he pulled a telephone cord out of the wall. Vitale admitted under cross-examination that Shaw did not physically touch her; thus, Shaw did not cause or attempt to cause any bodily injury, nor did Vitale ever indicate that Shaw put her in reasonable apprehension of imminent serious bodily injury when he pulled the telephone cord from the wall. This incident did not constitute an act of domestic violence as defined by section 13700 and was therefore inadmissible under Evidence Code section 1109.

The incident, however, was admissible under Evidence Code section 1101, not as evidence of character, but as evidence of Shaw's intent to intimidate and frighten Vitale. To be admissible to show intent, "the [prior] misconduct and the charged offense [need only be] sufficiently similar to support the inference" that Shaw "'probably harbor[ed] the same intent in each instance . . . .'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402, quoting *People v. Robbins* (1988) 45 Cal.3d 867, 879) namely to intimidate Vitale. In the current matter, Shaw was charged with making a criminal threat in violation of section 422, which required proof of his intent to place Vitale in fear for her safety or that of her family. The trial court found that testimony of the telephone cord pulling incident showed the "obsessive nature" of Shaw's conduct, that it created the impression of a threat and was therefore, sufficiently similar to the charged offense to warrant its admissibility.

Further, evidence tending to establish prior quarrels between the defendant and his victim "and the making of threats by the former is properly admitted . . . to show the motive and state of mind of the defendant . . . ." (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1612, quoting *People v. Cartier* (1960) 54 Cal.2d 300, 311.) Thus,

this incident and Shaw's general pattern of intimidating behavior toward Vitale were relevant on the issue of his intent to threaten her in the present matter and were admissible under subdivision (b) of Evidence Code section 1101.

Additionally, admission of this testimony was not unduly prejudicial because it was highly probative of the nature of Shaw's and Vitale's relationship and provided the jury with necessary background information. Jurors could reasonably interpret Shaw's acts of trying to pull the telephone away from Vitale and then ripping the cord out of the wall as threatening behavior. The testimony did not consume an undue amount of time and was not inflammatory. In fact, when ruling on an in limine motion, the trial court recognized the possible prejudicial effect of the evidence by instructing the prosecutor that Vitale would not be allowed to present the details of the incident. We cannot conclude that the trial court prejudicially abused its discretion in admitting this testimony.

Even assuming the trial court erred in admitting this evidence, we find no prejudice because there was no reasonable probability that a result more favorable to Shaw would have been reached in the absence of the alleged error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The testimony was brief and did not counteract the evidence showing Shaw was set on intimidating Vitale and her continued operation of the business.

3. *Alleged Irrelevant Evidence*

Shaw argues the trial court erroneously admitted evidence of the Los Angeles Times suicide bombing article Vitale received in the mail because it was prejudicial and there was no proof he sent the article. We disagree because the trial court properly allowed the jury to decide whether Shaw had sent the article, and it was reasonable for

the jury to so conclude because when he was arrested, he possessed a second article from the same source and on the same subject in an envelope addressed to his daughter. Moreover, the letter was relevant to show Shaw's intent because it was one in a series of acts between 1999 and July 2002 designed to intimidate and frighten Vitale. The letter caused Vitale to fear that because Shaw had been unsuccessful in taking control of the business, he would carry through his verbal threat with a bombing. In fact, Shaw told Amy that if he could not have the business, then he would "destroy it." Therefore, contrary to Shaw's contention, the article was more probative than prejudicial as it revealed his continuing obsession with the business and led credence to his threat to destroy it. Consequently, the trial court did not abuse its discretion in admitting the article as evidence of Shaw's intent.

III. *Alleged Prosecutorial Misconduct*

Prosecutorial misconduct that "'so infect[s] the trial with unfairness'" may render the resulting conviction a denial of federal due process. (*People v. Valdez* (2004) 32 Cal.4th 73, 122, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) However, conduct that does not render a criminal trial fundamentally unfair violates a defendant's state law due process rights only if the prosecutor used deceptive or reprehensible methods to persuade the jury. (*People v. Earp* (1999) 20 Cal.4th 826, 858.) When, as here, the claim focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.)

Shaw contends the prosecutor committed misconduct by repeatedly mentioning the date September 11, 2001, when questioning Vitale and Melissa about his telephone calls to Melissa. He also contends the prosecutor misstated the law during opening argument and improperly questioned Amy. However, Shaw waived any objection to this alleged misconduct because he failed to object or ask for a curative instruction. Assuming the prosecutor's questions and statement were improper, a curative instruction could have mitigated any prejudice. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Shaw also argues that his counsel provided ineffective assistance based on this failure to object; as such, we address his misconduct claims on their merits and conclude they lack merit. Although Shaw contends that the repeated references to September 11 were inflammatory and irrelevant, Melissa used this date as a reference point to address the time period of the two telephone calls in her written statement to police. The prosecutor adopted this reference point during his questioning and never mentioned the tragic events of that date. Under these circumstances we will not assume that the jury interpreted the mention of that day to be anything more than a date reference.

Similarly, Shaw contends the prosecutor committed misconduct by eliciting Amy's testimony that she attended Santana High School and requests judicial notice of a newspaper article and one of our unpublished opinions addressing a well publicized shooting that occurred at this high school in March 2001. (Evid. Code, § 452, subds. (d)(1) & (g).) Amy stated that she attended Santana High School in response to the prosecutor's foundational question about where she went to school. There was nothing improper about eliciting this response. Later in her testimony Amy expressed concern

that Shaw intended to hurt the children at the Academy and the prosecutor again asked if she attended Santana High School and whether she was afraid Shaw would hurt people at the Academy. Although the prosecutor's second question appears to be a veiled reference to the shooting that occurred at Santana High School, she never mentioned the shooting and thus this question did not rise to the level of deceptive or reprehensible conduct. (*People v. Earp*, *supra*, 20 Cal.4th at p. 858.)

During opening comments the prosecutor told the jury to ignore the legal "gobbledygook" and decide whether Shaw threatened to commit a crime. The prosecutor then stated that although Shaw did not "strap a bomb to [his] stomach" and walk into the Academy, he made veiled threats to do something similar. Although defense counsel did not object to these statements, Shaw now argues that the evidence did not support the inflammatory image and the prosecutor misstated the law.

Even assuming the prosecutor misstated the law, the court had already instructed the jurors that they must follow its instructions concerning the law and not anything said by counsel. We presume the jury followed the court's instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.) Moreover, the evidence supported the bomb comment because Shaw possessed a newspaper article about suicide bombings when the police arrested him.

Finally, during rebuttal argument the prosecutor argued that past physical violence is not an element of the crime and he questioned defense counsel's suggestion that Shaw could not be convicted until "[Shaw] blows the place up" stating: "And then when we have little body parts flying all over the county and the City of La Mesa, then we say 'ah-hah, I bet he meant for her to take that as a threat. . . .' It's before the threat is carried out.

We cannot live in our nation and not realize what happens when people make threats and those threats are ignored. [¶] People make threats every day who've never harmed anyone before. . . . [A]nd you just never know whether they're going to carry it out, if they're going to bring that gun to school. You just never know, so you've got to look at the circumstances."

Defense counsel promptly objected to this argument as inflammatory and the trial court cut off the prosecutor, admonishing that "[w]e've all been through 9-11. We've all experienced the issues of the world as they are, but we need to concentrate on this case, what was done, what was intended." Thus, the trial court addressed the prosecutor's potentially misleading argument and we presume the jury followed the court's instruction to focus on the instant case, thus curing any prejudice from the claimed misconduct. (*People v. Ryan* (1981) 116 Cal.App.3d 168, 184.)

After hearing this admonishment, the prosecutor clarified that threats need to be taken seriously, but he was not suggesting that Shaw was "going to go into Santana High [School] or anything like that." While this continued allusion to the Santana High School shooting was arguably inappropriate, the prosecutor made it when the court's admonishment was fresh in the jurors' minds and in the context of explaining his prior argument. Under these circumstances we find no due process violation and also conclude it was not reasonably probable the jury construed the comment in an objectionable fashion. (*People v. Ayala*, *supra*, 23 Cal.4th at pp. 283-284.)

In summary, Shaw's allegations do not constitute a cognizable claim of prosecutorial misconduct. Because we find no prejudice on this record, Shaw's claim of ineffective assistance of counsel for failure to object to some of the asserted misconduct fails.

IV. *Failure to Give a Unanimity Instruction*

When the evidence shows more than one unlawful act that could support a single charged offense, a defendant's constitutional right to a unanimous jury verdict requires that either the prosecution elect which act to rely upon or the trial court sua sponte give a unanimity instruction telling the jurors they must unanimously agree which act constituted the crime. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) The unanimity instruction is designed to eliminate the danger that the defendant will be convicted even though there is no single offense that all jurors agree the defendant committed. (*Ibid*.) Where a unanimity instruction is required but not given in a particular case, we review such error under the harmless beyond a reasonable doubt standard. (*Id.* at p. 1536; but see *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448-1449 [split of authority in California as to proper standard for failure to give unanimity instruction].)

Shaw contends the trial court committed reversible error by failing to instruct sua sponte with CALJIC No. 17.01, which would have required the jury to unanimously agree on which act constituted the criminal threat. He asserts that the jury could have construed four acts as being a criminal threat, to wit, the newspaper article received by Vitale, his two telephone calls to Melissa and his telephone call to Amy about destroying the business. We reject this assertion.

Although the prosecutor did not use the words of CALJIC No. 4.72 in making his election as to which of the four acts constituted the criminal threat, he clearly identified the telephone call to Amy as the act for which the conviction was sought when he stated during closing argument that Shaw's comment "I'm going to destroy the business" constituted the criminal threat. (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1455 [prosecutor's jury summation elected conduct that constituted charged offense].) The prosecutor focused on this comment throughout his argument and only mentioned the newspaper article that Vitale received in the mail to stress the importance of looking at the "big picture" and to demonstrate that Shaw's statement about "destroying" the business related to a suicide bombing. Defense counsel reiterated this point during closing argument, saying "You're being asked to decide if, on July 5th, 2002, [Shaw] did, in fact, commit the crime." Under these circumstances, a unanimity instruction was not required.

Shaw also contends a unanimity instruction was necessary because Amy and Vitale were both victims of the July 5 telephone call and the jury needed to agree which victim was placed in "sustained fear." We reject this contention because the prosecutor argued that Shaw intended for Vitale to believe that Shaw had threatened the Academy and was too much of a coward to threaten Vitale directly, so he made indirect threats. The prosecutor also reviewed the evidence showing that Vitale took the July 5 comment as a threat to physically destroy the Academy and she was still scared. Thus, the prosecutor made it clear that Vitale was the victim. Defense counsel recognized this by arguing that any fear Vitale experienced from the July 5 telephone call was unreasonable.

Under these circumstances, there is no possibility that the jury could have divided on which individual constituted the victim.

V. *There Was No Cumulative Error*

Shaw contends the cumulative effect of the court's alleged errors deprived him of a fair trial. We have identified only one matter that is even arguable error, namely, Vitale's testimony regarding the telephone-pulling incident, but concluded such claimed error was harmless. There was no cumulative error in this case.

VI. *Blakely Error*

Shaw contends that the trial court's imposition of the upper term based on its findings of aggravating factors violated his Sixth Amendment right to a jury trial. Under *Blakely*, a jury trial is required to determine beyond a reasonable doubt any fact that "the law makes essential to the punishment," other than the fact of a defendant's prior conviction. (*Blakely*, *supra*, 124 S.Ct. at p. 2537 & fn. 5.)

The application of *Blakely* to the imposition of the upper term is currently under review by the California Supreme Court in *People v. Towne* (review granted July 14, 2004, S125677) and *People v. Black* (review granted July 28, 2004, S126182). The appellate courts in our state are divided on this issue and a number of courts, starting with this court in *People v. George* (review granted December 15, 2004, S128931), have concluded that *Blakely* applies to the California determinate sentencing scheme because the maximum penalty the court can impose under California law without making additional factual findings is the middle term. (But see *People v. Wagener* (2004) 123 Cal.App.4th 424, 429-437, petition for review pending, petition filed November 29,

2004; *People v. Picado* (2004) 123 Cal.App.4th 1216, 1243, petition for review pending, petition filed December 9, 2004.)

As a threshold matter, we reject the attorney general's argument that Shaw forfeited the *Blakely* issue by failing to raise it below where, as here, *Blakely* was decided after the sentencing hearing. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [constitutional right to jury trial may be raised for the first time on appeal].)

On the merits, the trial court imposed the upper term based on five aggravating factors, to wit, that (1) he still posed a danger to the victim; (2) he took advantage of a position of trust; (3) he previously engaged in violent conduct; (4) his prior performance on probation was poor; and (5) his prior convictions were numerous and increasing in seriousness. We cannot conclude a jury would have made the requisite findings to support the first four factors had the matter been submitted to them, or that the error was harmless under either the traditional harmless error standard or the constitutional harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24. Although the latter factor relating to the increasing seriousness of Shaw's prior convictions arguably fails within the exception for prior convictions (*Almendarez-Torres v. United States* (1998) 523 U.S. 224, 246), we cannot conclude that the trial court would have imposed the upper term based on this factor standing alone because it also noted that Shaw had no prior felony convictions and considered this to be an important mitigating factor.

Because we cannot conclude the error in this case was harmless under either standard, the sentence must be vacated and the case remanded to the superior court to conduct a new sentencing hearing

DISPOSITION

The judgment is affirmed as to the conviction. The judgment is reversed as to the sentence and the case is remanded to the superior court to conduct a new sentencing hearing.

McINTYRE, J.

I CONCUR:

HUFFMAN, J.

BENKE, Acting P.J., concurring and dissenting.

For the reasons expressed in this court's opinion in *People v. Wagener* (2004) 123 Cal.App.4th 424, I would conclude the sentencing here was proper. If our Supreme Court concludes otherwise, appellant may obtain relief by way of writ of habeas corpus.

BENKE, Acting P.J.