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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAIME V. CORONA, Defendant and Appellant.	E039509 (Super.Ct.No. RIF121811) **OPINION**

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Scott C. Taylor, Supervising Deputy Attorney General, and Kelley Johnson, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant of residential burglary (count 1), criminal threats (count 2), and two counts of witness intimidation by force or threat (counts 3 and 4). The jury also found true allegations that in the commission of all four counts, defendant personally used a handgun and a knife. The court sentenced defendant to 22 years. We affirm the judgment.

I

FACTS

About 8:00 p.m. on January 31, 2005, Lucia Bran and her 10-year-old son Daniel were in the bedroom of her apartment watching television. Ms. Bran's boyfriend, Ignacio Alvarez, also lived at the apartment but was not present at the time. Alvarez was known as "Nacho."

Someone began banging on the door of the apartment and said, "Open the fuckin' door." Ms. Bran and Daniel went to the door. Ms. Bran tried to open the door, but it was stuck. A man, whom Ms. Bran and Daniel later identified as defendant, knocked the door down and entered the apartment with a gun in his right hand and a knife in his left.

Defendant looked mad and pointed the gun at Ms. Bran and Daniel. Defendant said, "Where the fuck is Nacho?" and, "If you don't tell me where Nacho is, I'm gonna kill you and your mom." Ms. Bran, who understood only a little English, could not understand what defendant was saying. Daniel, however, understood English, and believed defendant was going to kill them because of the look of anger on his face and the fact he was pointing the gun at them.

Defendant was in the apartment for five to 20 minutes. Before he left, defendant said to Ms. Bran and Daniel, "Shhh, don't say anything." After defendant left, Ms. Bran and Daniel talked about the incident, either that night or after that. Ms. Bran did not call the police, because she was afraid defendant "would do something to us if we were to call the police." She thought that if she called the police, defendant might return to the apartment and do something bad, or even kill her.

On February 3, 2005, Ms. Bran was in her apartment when she heard someone speaking or arguing. She went to the kitchen door and saw defendant and Alvarez outside. Defendant looked mad, and it looked like they were arguing. Defendant was eating a piece of bread and threw the bread at Alvarez. He also picked up things from the floor and threw those at Alvarez.

Alvarez then decided they should call the police. Ms. Bran did not want to go to the police, because she was still afraid that if they did, defendant would do something bad. However, that same day, Ms. Bran went to the police station and reported the January 31, 2005, incident to Deputy Telles. She was "hysterical, crying, upset, [and] very distraught."

Shortly after Ms. Bran and Telles spoke, they went to her home, and Telles spoke to Alvarez and Daniel. Telles then found defendant behind a store with "some other transients." Defendant was wearing boots with soles that matched footprints on Ms. Bran's door.

Defendant waived his *Miranda*[1] rights, and Telles interviewed him at the police station. Defendant first denied he went to Ms. Bran's apartment. About 15 minutes later, however, defendant said he did go to the apartment on January 31, 2005, to collect money. He said he knocked "real hard" with his hand on the door, but denied kicking it.

Defendant also said he owned a nine-millimeter Smith & Wesson gun. Telles searched defendant's trailer but did not find the gun, though he did find a BB gun. Defendant told Telles that when he went to Ms. Bran's apartment, he had the BB gun, not the nine-millimeter. However, when shown the BB gun and a nine-millimeter Smith & Wesson, both Ms. Bran and Daniel testified the BB gun was not the gun defendant had used and that the gun defendant had used looked more like the nine-millimeter than the BB gun.

Defendant also admitted he went to the apartment again on February 3, 2005, to collect money. Defendant said he spoke to Alvarez and threw a piece of sweet bread at him.

Sometime after the January 31, 2005, incident, someone came to Ms. Bran's place of work and spoke to her. He said he was there on behalf of defendant, so that Ms. Bran would withdraw the charges.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

II

DISCUSSION

A. *Sufficiency of the Evidence*

Defendant contends the evidence fails to sustain the judgment on any count. We find the evidence sufficient to support all counts.

1. *Burglary (count 1)*

"Every person who enters any house, room, [or] apartment . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." (Pen. Code, § 459.)[2] In this case, the People alleged in count 1 that defendant unlawfully entered the apartment with the intent to commit "theft and a felony." The court instructed that to convict defendant of the burglary charge, the jury had to find he entered the apartment with the intent to commit any of three possible intended felonies: (1) theft; (2) making criminal threats; or (3) assault with a firearm or a deadly weapon.

Defendant argues the evidence suggests he went to the apartment to collect money from Alvarez, and no more; there was no evidence the money was not owed or defendant intended to take anything from Alvarez other than what he may have been owed; defendant's actions inside the apartment had no other purpose than to locate Alvarez; and when defendant learned Alvarez was not there, he left, taking nothing and harming no

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[2] All further statutory references are to the Penal Code unless otherwise specified.

one. Therefore, defendant concludes, there was no evidence he intended to commit theft or any felony when he broke into the apartment.

"'Although the People must show that a defendant charged with burglary entered the premises with felonious intent, such intent must usually be inferred from all of the facts and circumstances disclosed by the evidence, rarely being directly provable. [Citations.] When the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal. [Citations.]' [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 462, quoting *People v. Matson* (1974) 13 Cal.3d 35, 41.)

At least three circumstances in this case supported an inference that when defendant entered the apartment, he intended to commit a felony. First, defendant kicked the door down. " . . . 'Burglarious intent can reasonably be inferred from an unlawful entry alone. [Citations.]'" (*People v. Martin* (1969) 275 Cal.App.2d 334, 339; accord, *People v. Wolfe* (1967) 257 Cal.App.2d 420, 425; *Reed v. Superior Court of Los Angeles County* (1965) 238 Cal.App.2d 321, 323.) Most commonly, an unlawful entry supports an inference of intent to commit theft: "[T]he fact that the building was entered through a window [citation] or through a doorway which previously had been locked [citations] without reasonable explanation of the entry, will warrant the conclusion by a jury that the entry was made with the intention to commit theft." (*People v. Jordan* (1962) 204 Cal.App.2d 782, 786-787.)

Here, defendant obviously had no reasonable explanation for breaking down the door, such as, for example, a need to rescue someone inside the apartment. Instead, he claimed he went to the apartment to collect money. The jury could infer from

defendant's forcible entry that he intended to get the money from Alvarez by threat of violence if Alvarez was home (theft)[3] or, if Alvarez was not home, to force the other residents to reveal where he was (criminal threat). That was, in fact, exactly what defendant tried to do when he threatened Daniel Bran.

Second, defendant entered at a time when residents of the apartment were likely to be home. Entry in such circumstances reflects an intent to do harm to the residents. In *People v. Nelson* (1989) 211 Cal.App.3d 634, the court held the fact the burglars entered the victims' home when they were present supported an inference that "separate and apart from thievery they intended to inflict physical harm upon the victims." (*Id*. at p. 639, fn. omitted.) The court reasoned that "[i]f defendant's only object was to steal the victims' gold and money, he could have accomplished that simply by waiting until they were away to enter their home." (*Id*. at p. 638.) Here, similarly, the jury reasonably could infer defendant entered the apartment when residents were home because he wanted to threaten them into either giving him the money he claimed or revealing Alvarez's whereabouts.

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[3] It is not relevant that the prosecutor conceded in his argument that there was no evidence defendant went to the apartment to steal. The court explicitly stated just before the prosecutor made that concession, "They can consider theft, also." A finder of fact is not precluded from relying on evidence merely because the prosecutor did not argue it. (See *People v. Dunkle* (2005) 36 Cal.4th 861, 936 [in ruling on defendant's automatic application to modify death verdict, court was not precluded from relying on aggravating circumstance "merely because the prosecution did not explicitly argue it in aggravation"].)

Finally, when defendant entered the apartment he was armed with a gun and a knife. In *People v. Sears* (1965) 62 Cal.2d 737, overruled on another point in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, footnote 17, the Supreme Court said: "Although the jury could not properly infer that defendant intended to commit a felonious assault merely because such an attack took place, the fact that he had placed a piece of reinforced steel pipe under his shirt substantiates a finding that he entered the house with the requisite intent. [Citation.]" (*Id*. at pp. 745-746; accord, *People v. Smith* (1978) 78 Cal.App.3d 698, 704 [fact that "defendant was armed with a knife or other object of substance" supported inference of entry with felonious intent].) Here, defendant's armed entry into the apartment supported an inference he intended to assault whomever was inside.

Any of these circumstances alone would have been sufficient to support an inference that when defendant entered the apartment he intended to commit theft or assault with a deadly weapon and/or to make a criminal threat. Together, they were compelling. The evidence on count 1 was sufficient.

2. *Criminal threat (count 2)*

The prosecution charged in count 2 that defendant threatened Daniel Bran in violation of section 422. That section is violated where a person "willfully threatens to commit a crime which will result in death or great bodily injury to another person," with the specific intent that the statement is to be taken as a threat, and the circumstances of the threat cause the person threatened "reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety . . . ."

Daniel Bran testified that while defendant was in the apartment he pointed the gun at Daniel and his mother and said, "If you don't tell me where Nacho is, I'm gonna kill you and your mom." Daniel believed defendant was going to kill him. Defendant, however, argues his statement was nothing more than an outburst of anger, not intended to be taken as true, particularly since defendant left the apartment shortly after he made the statement without harming Daniel.

It is not reasonable to think that a 10-year-old boy, confronted with a gun pointed at him by an adult who has just kicked down the door to his home, would take a threat to kill him as a mere angry outburst and not a genuine threat. The jury's conclusion to the contrary was virtually compelled by the circumstances of the threat.

Defendant cites *People v. Felix* (2001) 92 Cal.App.4th 905, 913 for the proposition that mere anger, utterances, or ranting soliloquies, however violent, do not violate section 422. In *Felix*, the defendant told his jail psychologist, Dr. Levinger, that he was thinking about how he was going to kill his former girlfriend once he was released and that if he saw her with somebody else he would shoot her. (*Id*. at p. 909.) The court held the statements did not violate section 422, because the prosecution "produced no evidence about what preceded them, why he made them, whether they were in response to therapy, or what Felix wanted Levinger to do about them." (*Felix*, at p. 914.) In addition, to hold a defendant criminally liable under such circumstances "would mean that those who need therapy for their homicidal thoughts would not seek it. [Citation.]" (*Id*. at p. 915.)

The facts in this case were not remotely comparable. The prosecution produced ample evidence of the circumstances of defendant's statement, and there was no policy weighing against basing criminal liability on the statement. The jury was justified in concluding defendant's threat was genuine, not mere angry talk. The evidence on count 2 supported the conviction.

3. *Witness intimidation (counts 3 and 4)*

Defendant was prosecuted on counts 3 and 4 under section 136.1, subdivision (c)(1). That subdivision makes it a felony to violate either subdivision (a) or subdivision (b) of section 136.1 "[w]here the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person." (§ 136.1, subd. (c)(1).) Section 136.1, subdivision (a)(1) provides that a person is guilty of a public offense if he or she "[k]nowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law." Section 136.1, subdivision (b)(1) makes it a crime to dissuade a witness or victim from "[m]aking any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge."

Counts 3 and 4 charged that defendant, by means of force and threats, dissuaded and attempted to dissuade Ms. Bran (count 3) and Daniel Bran (count 4) from reporting a suspected crime and from testifying, in violation of section 136.1, subdivision (c)(1).

The prosecution further alleged that in committing both counts, defendant used a firearm and a knife.

Daniel Bran testified that before defendant left the apartment, he said to Ms. Bran and Daniel, "Shhh, don't say anything." That evidence sufficiently supported counts 3 and 4.

a. *Ms. Bran (count 3)*

Defendant asserts that because Ms. Bran did not understand English, she could not have been intimidated by anything defendant said, and he could not be guilty of violating section 136.1, subdivision (c)(1) as against her. The People argue the jury reasonably could infer that (1) Daniel Bran told his mother what defendant had said, and (2) Ms. Bran could understand, even without knowing English, that "shhh" meant not to tell anyone about the incident. Defendant argues those inferences were too speculative. The People have the better argument.

As noted, *ante*, a person can be held criminally liable for making a threat not only when the threat is made directly to the victim, but also "'when such a threat is communicated by the threatener to a third party and by him conveyed to the victim . . . .' [Citation.]" (*People v. Felix*, *supra*, 92 Cal.App.4th at p. 911.) In *In re David L.* (1991) 234 Cal.App.3d 1655, the minor called a friend of the victim's and told her he was going to shoot the victim. The friend told the victim about the threat. (*Id*. at p.1658.) The court held the evidence supported a violation of section 422: "The kind of threat contemplated by section 422 may as readily be conveyed by the threatener through a third party as personally to the intended victim. . . . Here, the climate of hostility between the

minor and the victim in which the threat was made and the manner in which it was made readily support the inference the minor intended the victim to feel threatened. The communication of the threat to a friend of the victim who was also witness to certain of the antecedent hostilities supports the inference the minor intended the friend act as intermediary to convey the threat to the victim." (*David L.*, at p. 1659.)

Here, obviously there was a "climate of hostility" between defendant and Ms. Bran -- he had just kicked down her door, cursed at her, and pointed a gun at her -- and there could be little doubt defendant "intended the victim to feel threatened." (*In re David L.*, *supra*, 234 Cal.App.3d at p. 1659.) There also could be little doubt defendant intended that Daniel tell his mother what defendant had said. Ms. Bran was much more likely to tell the authorities about the incident than Daniel was. Scaring only Daniel and not Ms. Bran into not reporting the incident would have done nothing to benefit defendant.

Moreover, the evidence reasonably supported an inference that Daniel did, in fact, convey to his mother the statement defendant had made. Ms. Bran and Daniel talked about the January 31, 2005, incident, either that night or after that. Ms. Bran testified she did not call the police because she was afraid defendant would "do something to us" if she did. Since Ms. Bran did not understand English, it was reasonable to infer Ms. Bran was afraid to call the police because Daniel translated the statement for her.

Further, even assuming for the sake of argument that Daniel did not convey defendant's statement to Ms. Bran, she would have known what "shhh" meant. In *People v. Franz* (2001) 88 Cal.App.4th 1426, the defendant assaulted three victims at a house.

When the police arrived, the defendant stood behind one of the officers and made a "'shushing' noise" (*id*. at p. 1446) with his finger to his mouth, and then ran his finger across his throat. (*Id*. at p. 1445.) The court held the evidence sufficiently supported the defendant's convictions for criminal threats and dissuading a witness (*id*. at p. 1449), stating in part that "'shush' means, 'to urge quiet upon (as by making the sound "sh" and holding an index finger before the lips) . . . .' Likewise, Webster's defines 'sh' as, 'often used in prolonged or reduplicated form to enjoin silence or urge moderation of sound.'" (*Id.* at p. 1446.)

Here, as in *Franz*, Ms. Bran would have understood defendant's statement, "Shhh, don't say anything," as a warning to her not to report the incident, whether or not she knew what the English words "don't say anything" meant. For this additional reason, the evidence sufficiently supported count 3.

b. *Daniel Bran (count 4)*

Daniel Bran testified he took defendant's statement "Shhh, don't say anything" to mean not to talk to the police or other authorities about what had happened. Notwithstanding this testimony, defendant contends it is more reasonable to infer the statement meant not to tell *Alvarez* that defendant had been to the apartment trying to find him. Defendant's argument is irrelevant to this court's standard of review, which requires us to "affirm the convictions as long as a rational trier of fact could have found guilt based on the evidence and inferences reasonably drawn therefrom. [Citation.]" (*People v. Millwee* (1998) 18 Cal.4th 96, 132.) "'[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the

circumstances might also reasonably be reconciled with a contrary finding.' [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.) For the reasons stated in our discussion of count 3, *ante*, Daniel Bran's testimony concerning defendant's statement to him and his mother adequately supported count 4.

B. *Instructions on Count 3*

The prosecutor argued to the jury that count 3, intimidating Ms. Bran, was supported both by defendant's conduct during the January 31, 2005, incident and by the later incident in which someone came to Ms. Bran's place of work. He stated that defendant's conduct on January 31, 2005, violated section 136.1, subdivision (b), dissuading a person from reporting a crime to the authorities. The later incident, the prosecutor argued, violated section 136.1, subdivision (a), dissuading a person from testifying: "[I]f the defendant has someone go to her job and say, We're here on behalf of Jaime Corona and we want to you [*sic*] drop charges on behalf of Jaime Corona, that is exactly what (A) [*sic*] is talking about, attending or giving testimony at any trial, proceeding or inquiry."

Based on the prosecutor's reliance on two separate incidents to prove count 3, defendant contends the court in instructing on that count erred in (1) failing to instruct in the language of section 136.1, subdivision (a)(1); (2) failing to give a unanimity instruction; and (3) failing to instruct that defendant had to have authorized the contact at Ms. Bran's place of work to be liable for that contact. In addition, defendant argues the court erred in failing to require the jury to find which underlying offense -- burglary or criminal threat -- was the subject of the intimidation.

1. *Failure to instruct in language of section 136.1, subdivision (a)(1)*

The People argue defendant forfeited his contention that the court failed to instruct in the language of section 136.1, subdivision (a)(1) by failing to request such an instruction. A court must instruct sua sponte on those principles closely and openly connected with the facts before the court and which are necessary for the jury's understanding of the case. (*People v. Cavitt* (2004) 33 Cal.4th 187, 204.) As our discussion will show, the principle stated in section 136.1, subdivision (a)(1) was closely and openly connected with the facts of this case, so that no request for an instruction was necessary, but the court properly instructed on that principle.

As stated, *ante*, section 136.1, subdivision (c)(1) makes it a felony to violate either subdivision (a) or subdivision (b) of section 136.1, by dissuading a witness from testifying or from reporting a crime, by means of force or threats. Ordinarily, a violation of section 136.1, subdivision (a)(1) or subdivision (b)(1) can be either a misdemeanor or a felony. Subdivision (c)(1) elevates the crime to a felony if the defendant violates subdivision (a) or (b) under specified circumstances, including the use of force or a threat of force.

Count 3 of the information in this case charged that defendant violated section 136.1, subdivision (c)(1) by violating *both* subdivision (a)(1) and subdivision (b)(1). Count 3 alleged that "on or about January 31, 2005, [defendant] did willfully and unlawfully prevent and dissuade and attempt to prevent and dissuade LUCIA BRAN . . . from *reporting* a suspected crime to a law enforcement agency . . . and from *attending and giving testimony* at a trial, proceeding and inquiry authorized by law by means of

force and threats of unlawful injury to person and damage to property." (Italics added.) Thus, the charge encompassed dissuasion from *both* reporting and testifying, and the court had a duty to instruct on both varieties of dissuasion as possible bases for count 3.

However, the court did just that, stating: "Every person who knowingly and maliciously prevents or dissuades or attempt [*sic*] to prevent or dissuade any victim from:

"A. Attending or giving testimony at any trial, proceeding, or inquiry authorized by law; or

"B. Making any report of such victimization to a peace officer, state, or local law enforcement officer, or prosecution agency; . . . [¶] . . . [¶] . . . is guilty of a violation of 136.1 (c) (1) of the Penal Code."

Defendant's contention that the court failed to instruct in the language of section 136.1, subdivision (a)(1), therefore, is simply at odds with the record. The contention was not forfeited, but it fails on the merits.

2. *Failure to give unanimity instruction*

A unanimity instruction is required "if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 423.) Where a unanimity instruction is required, it must be given sua sponte. (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 59.) Here, based on the prosecutor's argument, the jury might have been led to convict defendant on count 3 based either on his statement on January 31, 2005, or on the incident at Ms. Bran's place of work. As there was no evidence when the incident at

work occurred, the incidents had to be considered discrete events, and a unanimity instruction was required.

However, failure to give a unanimity instruction when one is required is harmless if the reviewing court can find beyond a reasonable doubt that the jury "focused on the same specific act . . . when it reached its decision . . . ." (*People v. Smith* (2005) 132 Cal.App.4th 1537, 1546.) We can make that finding here. The record makes clear that the jury did not convict defendant on count 3 based on the incident at work, but based on the January 31, 2005, incident.

The jury unanimously found true the allegations that in committing count 3 defendant personally used a handgun and a knife. The court instructed the jurors that to find those allegations true, they had to find beyond a reasonable doubt that defendant used the weapons "in the commission of" the offense. The only evidence of any weapon use was in the commission of the January 31, 2005, incident. There was no evidence of any use of a gun or a knife in the incident at Ms. Bran's place of work.

Therefore, the jury could not have found the weapon allegations on count 3 to be true unless all 12 agreed, at least, beyond a reasonable doubt that defendant committed the charged offense on January 31, 2005. While some might *also* have believed he violated section 136.1, subdivision (c)(1) based on the later incident, they could not have based their verdict *solely* on that incident without violating the court's instructions. We must presume the jury followed the instructions. (*People v. Carter* (2005) 36 Cal.4th 1114, 1176.) Hence, the error in not giving a unanimity instruction was harmless beyond a reasonable doubt.

3. *Failure to instruct defendant must have authorized contact*

Defendant's claim that the court prejudicially erred in not instructing that defendant could only be liable based on the incident at Ms. Bran's place of work if he authorized the conduct of the person who made the statement to Ms. Bran fails for the reason discussed in the preceding part of this opinion. Since it is clear the jury did not base its verdict on count 3 on the incident at work, the failure to instruct that defendant had to have authorized that contact was not prejudicial under any harmless error standard.

4. *Failure to require jury to find underlying offense*

Defendant's remaining claim of error concerning the count 3 instructions is that the court erred in failing to require the jury to find which offense -- burglary or making a criminal threat -- defendant dissuaded Ms. Bran from testifying about and/or from reporting to the authorities. According to defendant, one of the elements of section 136.1 is that the intimidation relate to a specific offense, and the jury must agree on which offense that is. The People argue defendant forfeited his claim of error by failing to request an instruction. We agree.

Neither the terms of section 136.1 nor any authority of which we are aware requires a jury to find the offense to which the intimidation relates. There is no basis for creating such a requirement in this case. As stated, *ante*, a court must instruct sua sponte on principles that are closely and openly connected with the facts before the court and which are necessary for the jury's understanding of the case. (*People v. Cavitt*, *supra*, 33 Cal.4th at p. 204.) Conversely, a court has "no obligation to sift through the evidence to identify an issue that conceivably could have been, but was not, raised by the parties, and

to instruct the jury, sua sponte, on that issue. [Citation.]" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1050.)

Which offense defendant dissuaded Ms. Bran from testifying about or reporting was not an issue that was so "closely and openly" connected to the facts before the court as to give rise to a sua sponte duty to instruct on that issue. As stated, *ante*, the jury's weapon use findings made clear that it relied on defendant's statement on January 31, 2005, as the basis for the conviction on count 3. There was no conceivable way a reasonable jury could have found that statement was an attempt to deter testimony about, or a report of, the crime of burglary but not the crime of making a criminal threat, or vice versa. The statement simply told the victims not to "say anything." It said nothing to suggest which crime the victims were not to "say anything" about in court or to the authorities.

Therefore, an instruction as advocated by defendant would have had no connection with the evidence in the case and would have been superfluous even if defendant had requested it. A fortiori, the court had no duty to give such an instruction.

C. *Full Consecutive Terms on Intimidation Counts*

Section 1170.15 provides that if a person is convicted of both a felony and an additional count of violating section 136.1 for dissuading the victim from giving information about the first felony, the subordinate term for each of those felonies that is punished consecutively shall be the full midterm instead of one-third the midterm. In addition, any consecutive term shall include the full term for any enhancement for use of

a dangerous or deadly weapon or a firearm. Pursuant to section 1170.15, the court imposed full consecutive terms for counts 3 and 4.

Defendant asserts that in so doing, the court relied upon factual findings that counts 3 and 4 were based on dissuading the victims from giving information about counts 1 and/or 2. As the jury made no findings to that effect, defendant asserts the imposition of the full consecutive terms for counts 3 and 4 violated *Blakely v. Washington* (2004) 542 U.S. 296.

The People argue defendant forfeited this contention by failing to object to the full consecutive terms in the trial court on that basis. The only California decision of which we are aware on the issue of whether a *Blakely* claim is forfeited by failing to raise it in the trial court is inconclusive on the issue, holding that such a claim raises "a question of constitutional law that we may resolve from the record before us," and therefore may be considered in the discretion of the court even though not asserted in the trial court. (*People v. Shaw* (2004) 122 Cal.App.4th 453, 456, fn. 9.)

In any event, defendant acknowledges his contention is foreclosed on the merits by *People v. Black* (2005) 35 Cal.4th 1238, at least until the United States Supreme Court decides *Cunningham v. California* (cert. granted Feb. 21, 2006) ___ U.S. ___ [126 S.Ct. 1329], which involves the same issue as *Black*. Pending a decision of the United States Supreme Court, we remain bound by *Black*. (See *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 242, fn. 3.) It is appropriate under these circumstances simply to reject defendant's claim of *Blakely* error, without deciding the forfeiture issue. (See *People v.*

Jordan (2006) 141 Cal.App.4th 309, 323 [declining to decide forfeiture issue because claim lacked substantive merit].)

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

MILLER
J.