Filed 3/15/12 P. v. Higgins CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SHERMAN HIGGINS,<br><br>Defendant and Appellant. | B230156<br><br>(Los Angeles County<br>Super. Ct. No. KA090166) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert M. Martinez, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

---

A jury convicted appellant Sherman Higgins of conspiracy to commit first degree burglary[1] in violation of Penal Code section 182, subdivision (a)(1).[2] The jury found that appellant had two prior convictions for robbery and one prior conviction for first degree burglary, which were serious felony convictions within the meaning of section 667, subdivision (a)(1) and "strike" convictions within the meaning of section 667, subdivisions (b) through (i) and section 1170.12, subdivisions (a) through (d). The trial court sentenced appellant to prison for a term of 35 years to life.

Appellant appeals on the grounds that: (1) the trial court abused its discretion in admitting evidence of a more serious prior conviction; (2) the trial court erred in denying suppression of appellant's confession; (3) the trial court committed several instructional errors; (4) the trial court abused its discretion in denying appellant's *Romero* motion;[3] and (5) a pattern of prosecutorial misconduct requires reversal.

## FACTS

### Prosecution Evidence

On the morning of April 1, 2010, Brian Kusserow was working at his home on Leyland Drive in Diamond Bar. He heard the doorbell ring and a knock at the door. Kusserow was alone because his wife had driven away in the family car with their two daughters approximately 10 minutes earlier. Kusserow ignored the knocking at first because he did not see any cars outside, and he presumed it was a salesman at the door. When the knocking persisted, he opened the door and found appellant standing outside. Appellant asked if "this was the Vu residence." Kusserow replied that it was not and shut the door. When Kusserow later left his home, he saw police cars in the neighborhood.

---

1 The jury deadlocked on two counts of attempted burglary, and the trial court declared a mistrial on those counts.

2 All further statutory references are to the Penal Code, unless otherwise indicated.

3 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

He approached the police, and an officer explained that they were detaining a man who had been knocking on doors. Kusserow told the officer that someone had knocked on his door, and he identified that person as appellant in a field showup. He also identified appellant at trial.

On the same morning, Angela Holloway, an FBI agent, was at her home located two houses away from Kusserow's. She responded to the doorbell and saw appellant standing outside. Appellant looked startled and said, "You're not Asia[n]." Holloway replied, "No, I'm not. May I help you?" Appellant said he was looking for the Vu family. Holloway asked appellant who "[he was] with," and appellant replied that he worked for Terminex. Appellant wore no clothing or hat with the Terminex name. When Holloway asked appellant for the address he was seeking, appellant said it was number 550. Holloway told appellant that this address was not on her block and was located to the west. Holloway's house was in "the 700 series," and she knew there was no 500 block on her street, but she wanted to get appellant away from her house. She closed the door and appellant left.

Holloway looked out the window and saw a dark SUV parked in front of her house. It bore no Terminex logo. She saw appellant walk down the street, but not in the direction she had indicated to him. She wrote down the license plate number of the SUV and reported it to the Los Angeles County Sheriff's Department. Holloway later saw appellant enter the passenger side of the SUV, and she watched the vehicle as it drove up and down her street. Shortly thereafter, Holloway saw the Sheriff's deputies detain appellant, and she identified appellant in a field showup. She also identified appellant in court.

Los Angeles County Sheriff's Deputy Paul Alaniz testified that he stopped a Black SUV with the reported license number. Appellant was in the passenger seat, and a female identified as Elvie White was in the driver's seat. Deputy Alaniz searched the vehicle with appellant's consent. He found four walkie-talkies—two of which were turned on. He also found a pair of gloves, a pair of socks that appeared new, and a

backpack. The backpack contained a 14-inch crowbar, a cutting grinder, and a hammer. Deputy Alaniz explained, based on his training and experience investigating burglaries, that these items were burglary tools. Appellant told Deputy Alaniz that he had rented the vehicle. Appellant had $752 in cash when he was booked at the jail.

Detective Mark Gittens interviewed appellant on the same day appellant was arrested. Appellant told Detective Gittens that he had not tried to break into homes, and the detective would not find any sign of a burglary. The detective explained to appellant that he did not need that type of evidence. He told appellant that, once appellant knocked on the doors, an attempted burglary had occurred because of all that appellant had done before that moment. The detective also explained "the conspiracy part of it." Detective Gittens told appellant that there had been an epidemic of burglaries in which the perpetrators had come from South Central Los Angeles, and sometimes Riverside or the High Desert area, to break into homes in the San Gabriel Valley—mostly homes inhabited by Asians. Law enforcement knew the pattern and what to look for. Detective Gittens told appellant that everything appellant had done in this case "pretty much matched the pattern."

Appellant then became distraught and began to cry. Appellant said he wanted to tell the detective what happened. He said he had met Elvie White in the parking lot of a Target store in Rancho Cucamonga. He told her that he needed to make some money, and that "[h]e wanted to go down to the Diamond Bar area, get into a house, and get some stuff to make some money." She agreed to go with him. Appellant told Detective Gittens that he had rented a car because his girlfriend's car was broken. He then thought that it was a good time to do a burglary, since he had a rental car. Appellant told White to stop at a particular house because it looked "quiet," meaning that nobody was home. There was an African-American woman there, however. Appellant went to another house, and a White man was home. Appellant told Detective Gittens that if no one had answered the door, "he was going to go inside and get some stuff." Appellant admitted that the burglary tools were his and that he planned to use them "[t]o get into a house."

Under Evidence Code section 1101, subdivision (b), testimony regarding one of appellant's prior convictions was admitted. At approximately noon on March 29, 2004, Julie Christensen was in her home at 12 Photinia in Irvine. Someone knocked on her door a number of times. When she peered through the peep hole, she saw appellant "[d]ressed in large clothing that was hanging low . . . ." He appeared to be wearing jewelry around his neck. Christensen waited to see if he would leave. When he did not, she asked, "Can I help you?" through the closed door. Appellant walked away without responding. Christensen called the police. She also telephoned her neighbor two houses away, at 8 Photinia, to see if the man had knocked on the neighbor's door. As she spoke with her neighbor, someone knocked on the neighbor's door. Later that day, she identified appellant in a field showup. She also identified appellant in court.

Ilya Tsiperfal lived at 10 Photinia on March 29, 2004, and he went home at approximately noon that day. He found a lot of police cars at his home and discovered that someone had taken property from his home. There was a safe box missing from his closet. The police returned the property to him the same day.

Irvine Police Officer Lisa Peasley had responded to Christensen's home at 12 Photinia. She went upstairs and looked out the window. She saw two men jumping the fence in the backyard of 10 Photinia. She radioed fellow officers, who arrested the men as they climbed the wall. Detective Mike Li testified that he arrested two men, one of whom had a backpack containing a safe. Detective Li identified a photograph of appellant from his booking on March 29, 2004.

**Defense Evidence**

Appellant presented no evidence in his defense.

## DISCUSSION

### I. Admission of Evidence of Prior Burglary

#### *A. Appellant's Argument*

Appellant claims that the court erred in allowing the prosecution to present the evidence of the 2004 residential burglary under Evidence Code section 1101, subdivision

(b) to prove appellant's intent to commit the attempted burglaries in counts 1 and 2. Appellant also argues that the evidence was prejudicial and should have been excluded under Evidence Code section 352.

***B. Proceedings Below***

At the hearing on the prosecutor's motion to introduce the evidence of appellant's prior crime, defense counsel argued that the evidence was overwhelmingly prejudicial and superfluous to the prosecution's case. Proving appellant's intent was unnecessary, since the issue in the current case was one of actus reus rather than appellant's mens rea.[4] Counsel argued that the proffered evidence amounted to propensity evidence.

The trial court heard the prosecutor's offer of proof and reviewed the police reports. The court discussed the state of the evidence and noted that the defense had called into question Officer Gittens's veracity regarding appellant's confession of his intent. The trial court found extremely relevant the proffered evidence of appellant and a co-perpetrator knocking on two doors prior to their committing an actual burglary in a third house. The probative value with respect to appellant's intent was substantial, and it outweighed any prejudicial effect. The trial court intended to give a jury instruction dealing with Evidence Code section 1101, subdivision (b) evidence in order to limit any such prejudicial effect.

***C. Relevant Authority***

"When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant." (*People v. Daniels* (1991) 52 Cal.3d 815, 856.) "To be material, the evidence need only tend to prove or disprove some fact in issue." (*People v. Carter* (1993) 19 Cal.App.4th 1236, 1246.)

---

[4] Defense counsel later argued to the jury that appellant's act of knocking on two doors was mere preparation rather than an attempt.

Evidence Code section 1101, subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence Code section 1101, subdivision (b) provides an exception to this rule by providing that, "[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act."

In *People v. Ewoldt* (1994) 7 Cal.4th 380, 393-407 (*Ewoldt*), the California Supreme Court interpreted Evidence Code section 1101, subdivision (b) at length. *Ewoldt* reasoned that the least degree of similarity between the uncharged and charged offenses is required to prove intent. (*Ewoldt*, at p. 402.) The uncharged misconduct need only be sufficiently similar to support an inference that the defendant probably had the same intent on each occasion. (*Ibid*.) "'"[I]f a person acts similarly in similar situations, he probably harbors the same intent in each instance" . . . , and . . . such prior conduct may be relevant circumstantial evidence of the actor's most recent intent.'" (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1448.) According to *Ewoldt*, to prove the existence of a common design or plan, a high degree of similarity between the uncharged and charged offenses is required. (*Ewoldt*, at p. 402.)

A trial court's admission of evidence under Evidence Code sections 1101 as well as under section 352 is reviewed for an abuse of discretion. (*People v. Davis* (2009) 46 Cal.4th 539, 602.)

***D. Evidence Properly Admitted***

The trial court instructed the jury that the evidence of appellant's prior burglary could be considered for the limited purpose of deciding whether or not he acted with the intent to commit the crime of burglary in the instant case or that he had a plan or scheme

to commit the offenses alleged in this case. (CALCRIM NO. 375.) We conclude that the evidence of the 2004 burglary in Irvine was sufficiently similar to be used for these limited purposes.

There is no question that intent was a material issue, since it was required by the offenses with which appellant was charged. As stated previously, the least degree of similarity between prior and current offenses is required to show intent. Here, there was sufficient similarity for the evidence to be probative with respect to appellant's intent in the current crimes. In both the prior crime and the instant offenses, appellant knocked on doors in a residential neighborhood where he himself did not reside and gave a false reason for his presence at the door or did not respond when someone answered. He then left and tried another door. In the prior crime, appellant knocked at the doors of two homes where the occupants were home. We know that at the first home, he walked away without responding when the homeowner spoke with him through the door. Appellant was next seen jumping the fence with a companion at the house next door, whose owner was absent. Appellant's co-perpetrator had stolen property from the house in a backpack. Both crimes occurred at midday when most people are at work. There was sufficient similarity between the two crimes to warrant their admission on the issue of intent and even on common plan or scheme, and no abuse of discretion occurred.

Moreover, Evidence Code section 352 did not preclude admission of the evidence. As the trial court found, the relevance and materiality of the evidence far outweighed any prejudice. The degree of similarity was high, and the prior incident was not remote. The probative value was strong, considering defense counsel's relentless impeachment of Detective Gittens's testimony regarding appellant's confession and the detective's failure to record the confession. The evidence was not unduly prejudicial, since it was not more inflammatory than the current crimes, despite the fact that appellant was more successful in the 2004 Irvine crime.

Finally, there was substantial evidence of appellant's intent from his confession, his falsehoods to Holloway and Kusserow when they answered their respective doors, his

walking in the opposite direction from the one Holloway had directed him to take, his driving back and forth on the street with another person and walkie-talkies at the ready, and his possession of burglary tools. These circumstances constituted overwhelming evidence of his intent to commit burglary. We reject appellant's claim of prejudicial error.

## II. Admission of Appellant's Confession

### *A. Appellant's Argument*

Appellant contends his confession was induced by the officer's promise of a one-year sentence and was erroneously and prejudicially admitted into evidence in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

### *B. Proceedings Below*

Defense counsel filed a motion to exclude appellant's statements on the ground that there was insufficient evidence they were voluntary, and the statements lacked foundation. Counsel cited the fact that the statements were not recorded by law enforcement, and law enforcement took none of the usual steps to document appellant's waiver of his *Miranda* rights.

At the hearing on the motion, counsel criticized the fact that law enforcement had not used even the customary single-page document to record that appellant had been given his *Miranda* advisements. When Detective Gittens interviewed appellant, he did not re-admonish appellant. At no time was appellant's waiver of rights recorded on an audio or video device. Upon questioning by the court, defense counsel conceded that there was no authority for suppression of statements because of a failure to memorialize the statements in any way. In making its ruling, the trial court stated, "There's been proposed legislation that has not gotten to that point, but I don't know if it is a basis for me to suppress it on the basis that it was not video or audio recorded or the statement was not signed. The motion to preclude the People from presenting that evidence on the basis that you have argued is denied."

***C. Relevant Authority***

A confession is involuntary if it was motivated by an express or implied promise of leniency or benefit to the accused. "However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary." (*People v. Jimenez* (1978) 21 Cal.3d 595, 611, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17.)

***D. Confession Properly Admitted***

At the outset, we agree with respondent that appellant has forfeited the issue of the voluntariness of his confession based on a purported promise of leniency. As our summary shows, this basis for suppression of the confession was not even hinted at below prior to Detective Gittens's testimony. As occurred in *People v. Ray* (1996) 13 Cal.4th 313, "the parties had no incentive to fully litigate this theory below, and the trial court had no opportunity to resolve material factual disputes and make necessary factual findings." (*Id*. at p. 339.) It was not until sentencing that counsel quoted from the probation report that Detective Gittens said, "I would speak with the district attorney on his behalf to see if there was anything that could be done considering his cooperation. I explained to him that he would have to do some jail time but, hopefully, not as much." On appellant's notice of appeal, he claimed for the first time that his statements "were procured by a promise of a sentence of one year," made by Detective Gittens.

In any event, based upon the totality of the circumstances, we are satisfied that this is not that rare case where, despite valid *Miranda* waivers, the defendant's will was overborne. (See *Dickerson v. United States* (2000) 530 U.S. 428, 444.) Detective Gittens testified that he asked appellant if he had been read his rights when arrested, and appellant confirmed that he had and that he understood his rights. Detective Gittens spoke with appellant on the same day as appellant's arrest. Detective Gittens stated that appellant insisted at the beginning of the interview that the detective would not find any signs of a burglary having occurred. After the detective explained the concept of

conspiracy to appellant, appellant began to cry and said that he wanted to tell the detective what happened. When asked if he had made any promises to appellant, Detective Gittens replied, "No." The detective "explained to [appellant] I could not make him any promises. I told him I would do what I could, but I could not make any promises as to what the outcome would be." Appellant then recounted the events beginning with his meeting Ms. White.

Thus, there is no evidence in the record to support appellant's allegation of a promise of leniency. Indeed, the probation report appears to confirm Detective Gittens's testimony that he merely said he would do what he could for appellant, but he could make no promises. Moreover, our independent review of the circumstances of the confession, such as they are known, leads to the conclusion that appellant did not choose to confess because his will was overborne. (See *People v. Carrington* (2009) 47 Cal.4th 145, 169; *People v. Massie* (1998) 19 Cal.4th 550, 576.) There was no evidence that the confession was prompted by intimidation, coercion or deception. According to the detective's testimony, appellant became emotional only when he learned that he could be charged with conspiracy, which appears to have destroyed his confidence that nothing could be proved against him because he had not left traces of having tried to break into a house. Moreover, appellant acknowledged that he had been read his *Miranda* rights, and "'cases in which a defendant can make a colorable argument that a self-incriminating statement was "compelled" despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.'" (*Dickerson v. United States*, *supra*, 530 U.S. at p. 444.)

The circumstances here show no coercion, no prolonged interview, and no physical intimidation of any kind. Appellant was 28 years old at the time of the crimes and the interview, and although his level of education is unknown, he is an English speaker and was familiar with the criminal justice system. He had no reported mental or physical health issues. (See *People v. Massie*, *supra*, 19 Cal.4th at p. 576; *People v.*

*Williams* (1997) 16 Cal.4th 635, 660 [reciting factors to be considered in determining the voluntariness of a confession].) Appellant's argument is without merit.

## III. Jury Instructions

### *A. Flight Instruction*

Appellant contends the trial court prejudicially erred by instructing the jury that it could consider evidence of flight in the present case when it determined that flight was only present in the 2004 uncharged crime.

Defense counsel objected to the reading of CALCRIM NO. 372, the flight instruction, because it could confuse the jury that an attempt to flee took place in the instant offenses as opposed to the prior case. The trial court agreed that the only evidence of flight related to the 2004 matter.

The trial court instructed the jury with a modified version of CALCRIM No. 372, as follows: "If the defendant fled or tried to flee immediately after the uncharged crime in 2004 was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence the defendant fled or tried to flee cannot prove guilt by itself."

The trial court also instructed the jury that it could consider evidence of the prior crime only if the People had proved by a preponderance of the evidence that appellant had in fact committed the uncharged offense. (CALCRIM No. 375.) If the jury found that the People had not met this burden, it was to disregard entirely the evidence of the prior offense. Therefore, the flight instruction, as modified, was properly read, since it was relevant to the evidence of the prior crime, which was in turn relevant to the current offense. Given the modification, a reasonable jury would *not* have believed the instruction applied to the instant case. We perceive no prejudice and no error.

### *B. Failure to Instruct on Possession of Burglary Tools*

Appellant contends the jury should have been given the option of convicting him of the lesser offense of possession of burglary tools. In general, a lesser offense is

necessarily included in a greater offense when the greater offense cannot be committed without committing the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117-118.) The offenses are compared using the language of the statutes or the accusatory pleading. (*Ibid.*) Under the statutory elements test, the possession of burglary tools, a violation of section 466, is not a necessary included offense of burglary in violation of section 459. As the trial court pointed out, the elements of burglary consist only of entering a building or room with the intent to commit theft or any felony. (*People v. Foster* (2010) 50 Cal.4th 1301, 1348.) Burglary thus can be committed without possessing burglary tools. The accusatory pleading does not contain language that would render the possession of burglary tools a necessarily included offense of attempted burglary or conspiracy to commit burglary. A criminal defendant does not have a "unilateral entitlement" to instructions on offenses that are not necessarily included in the charged offense. (*People v. Birks*, at p. 136.)

In *Hopkins v. Reeves* (1998) 524 U.S. 88, the United States Supreme Court held that the Constitution did not require states to provide jury instructions on offenses that are not deemed to constitute lesser included offenses of the charged crime. (*Hopkins v. Reeves*, at pp. 96-98.) The Supreme Court stated that "'[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process.'" (*Id*. at p. 99, quoting *Spaziano v. Florida* (1984) 468 U.S. 447, 455.) Appellant was not entitled to the requested jury instruction, and the trial court did not err. (*People v. Birks*, *supra*, 19 Cal.4th at p. 136.)

## IV. Denial of Appellant's *Romero* Motion

### *A. Appellant's Argument*

Appellant contends that his conduct, i.e., contacting two homeowners with no attempt to force his way inside, was so minor that the 35 years to life sentence is outside the scope of the Three Strikes law.

***B. Relevant Authority***

In *Romero*, the California Supreme Court held that a trial court may strike an allegation under the Three Strikes law that a defendant has previously been convicted of a serious or violent felony "'in the furtherance of justice'" under section 1385(a). (*Romero*, *supra*, 13 Cal.4th at pp. 529-530; *People v. Williams* (1998) 17 Cal.4th 148, 158 (*Williams*).) "[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).)

"[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]. Moreover, 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce[] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case. [Citation.]" (*Carmony*, *supra*, 33 Cal.4th at p. 378.)

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citation.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, *supra*, 33 Cal.4th at pp. 376–377.)

According to *Williams*, in order to "render Penal Code section 1385(a)'s concept of 'furtherance of justice' somewhat more determinate," justice should be sought within

the "interstices" of the particular sentencing scheme, because the scheme itself suggests its spirit. (*Williams*, *supra*, 17 Cal.4th at p. 160.) This search must be "informed by generally applicable sentencing principles" relating to matters such as the nature of the current felonies, the defendant's prior convictions, and his "background, character, and prospects," which are intrinsic to the scheme. (*Id*. at pp. 160, 161.) The court cautioned that the standard for review of an exercise of discretion is "deferential," although not "empty," requiring the reviewing court to determine whether a ruling exceeds the bounds of reason under the law and relevant facts. (*Id*. at p. 162.)

***C. Motion Properly Denied***

The trial court considered the probation report, appellant's written motion to strike his prior "strike" convictions along with its supporting documents, and appellant's sentencing memorandum. The court also heard extensive argument from defense counsel.

In making its ruling, the trial court stated, "This court has discretion to strike priors. That isn't unlimited discretion. I can't do what I want just because I want. I have to find that the interest of justice will be promoted by striking a prior." The trial court observed that appellant claimed his offense was motivated by the need to have money to help himself live or help others live. Appellant also represented, however, that before his arrest, he was working. He had just obtained $900 for cutting trees and was a skilled person.[5] The trial court noted that appellant had $700 in his pocket when arrested, yet he had gone to a community where he had no business being, since he lived miles away, in order to steal. He took an innocent woman with him to rent a car so that she could be his co-conspirator. Appellant claimed that he knocked on doors to see if anyone was home to avoid violence. The trial court believed, however, that appellant knocked on doors to

---

**5** Appellant filed a motion for return of the cash on his person and said that he had earned the money trimming trees. The motion contained an affidavit from his father stating that appellant was a skilled tree trimmer and had earned $900 in March 2010 for this work.

avoid detection and gain easy access to someone's house so that he could steal the property that those persons had earned. He had done the same thing in 2004 and had gone to prison. When he got out, he joined a group of people that broke into a house that they knew was occupied. One of the perpetrators was armed, and they all had their faces concealed. They tied up their victims and stole their property. Appellant went to prison for that crime also. The trial court stated, "[t]hose factors are aggravating factors. Those factors indicate a continuous course of criminal behavior that's been undeterred over the years," even though appellant had gone to state prison. The trial court stated that it knew what had to be done to prevent appellant from breaking into people's houses. The trial court believed that, if nothing were done, appellant would eventually hurt someone, and the trial court did not wish to share in the responsibility for that. The trial court denied the motion to strike priors.

The record thus clearly shows that the trial court properly considered traditional sentencing criteria such as the "particulars of [defendant's] background, character, and prospects" as well as the circumstances of the current and prior offenses in denying defendant's motion. (*Williams, supra,* 17 Cal.4th at pp. 160-161) The trial court's comments certainly reveal no evidence of "'arbitrary determination, capricious disposition or whimsical thinking.'" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) The court clearly believed appellant was a danger to society, and as emphasized in *People v. Garcia* (1999) 20 Cal.4th 490, when deciding whether to strike prior convictions under section 1385, the trial court must consider not only the constitutional rights of the defendant, but also the "'"'*interests of society represented by the People. . . .*'"'" (*People v. Garcia,* at pp. 497-498.) The court acted as a "'"'reasonable judge'"'" in denying defendant's motion under section 1385, subdivision (a). (*Williams, supra*, 17 Cal.4th at p. 159.)

## V. Cruel and Unusual Punishment

### *A. Appellant's Argument*

Appellant contends that his sentence of 35 years to life for knocking on two doors with burglar's tools still in the car and no attempt of forced entry constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and cruel or unusual punishment in violation of article I, section 17 of the California Constitution.

### *B. Relevant Authority*

In *Harmelin v. Michigan* (1991) 501 U.S. 957 (*Harmelin*), a majority of the Supreme Court determined that the Eighth Amendment does not guarantee proportionality of sentences. (*Harmelin*, at p. 965.) Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the Eighth Amendment prohibits only sentences that are "'grossly disproportionate'" to the crime. (*Harmelin*, at p. 1001.) Even those justices in the *Harmelin* plurality who recognized a guarantee of proportionality review stressed that, "'"[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [are] exceedingly rare"'" because of the "relative lack of objective standards concerning terms of imprisonment . . . ." (*Ibid*.; see also *Lockyer v. Andrade* (2003) 538 U.S. 63, 77 (*Andrade*) ["The gross disproportionality principle reserves a constitutional violation for only the extraordinary case"].)

In *Ewing v. California* (2003) 538 U.S. 11 (*Ewing*), the lead opinion by Justice O'Connor, in which two justices joined her and two others concurred, confirmed that the "proportionality principles . . . distilled in Justice Kennedy's concurrence" in *Harmelin* guide application of the Eighth Amendment to challenges to recidivist sentencing. (*Ewing*, at pp. 23-24.) In *Ewing*, the defendant was sentenced to a term of 25 years to life pursuant to the Three Strikes law for shoplifting golf clubs worth approximately $1,200. He had suffered several prior theft-related convictions, as well as convictions for robbery, battery, burglary, possession of drug paraphernalia, unlawful possession of a firearm, and trespassing. (*Id*. at pp. 17-19.) In rejecting Ewing's cruel and unusual punishment claim,

the Court explained that the Eighth Amendment contains a "'narrow proportionality principle'" applicable to noncapital sentences. (*Ewing*, at p. 20.) It does not require strict proportionality between crime and sentence, but only forbids extreme sentences that are grossly disproportionate to the crime. (*Id*. at pp. 23-24.) *Ewing* recognized that California's three strikes scheme represents the Legislature's judgment "that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice." (*Id*. at p. 25.)

In *Andrade*, the defendant's two consecutive 25-years-to-life sentences, imposed for shoplifting videotapes valued at approximately $150, were upheld against an Eighth Amendment challenge. (*Andrade*, *supra*, 538 U.S.at pp. 66, 77.) The high court stated that one governing legal principle emerges as "'clearly established'" federal law: "A gross disproportionality principle is applicable to sentences for terms of years." (*Id*. at p. 72.) The court held that it was not an unreasonable application of this principle for the California Court of Appeal to affirm Andrade's sentence. (*Id*. at p. 77.)

This gross proportionality principle corresponds to the test used in analyzing whether a sentence is cruel or unusual under the California Constitution, as stated in *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*) [holding punishment to be cruel or unusual if so disproportionate to the crime that it "shocks the conscience and offends fundamental notions of human dignity"].) In *Lynch*, the court set out three techniques for evaluating whether a sentence is cruel and unusual under California law. According to *Lynch*, it is useful to: (1) examine the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" (*id*. at p. 425); (2) compare the challenged punishment with punishments prescribed for more serious offenses in the same jurisdiction (*id*. at p. 426); and (3) compare the challenged punishment with punishments prescribed for the same offense in other jurisdictions (*id*. at p. 427).

The usefulness of *Lynch's* second and third techniques is questionable, however. The California Supreme Court has held in death penalty decisions subsequent to *Lynch*

that "intercase" proportionality review is not required by the federal Constitution and "is not mandated under our state Constitution in order to ensure due process and equal protection, nor is it required in order to avoid the infliction of cruel or unusual punishment." (*People v. Crittenden* (1994) 9 Cal.4th 83, 156; accord, *People v. Barnett* (1998) 17 Cal.4th 1044, 1182; *People v. Bradford* (1997) 15 Cal.4th 1229, 1384.) The court has indicated that all that is required is "intracase" review, i.e., an evaluation of whether the sentence is "grossly disproportionate" to the offense. (*People v. Bradford*, at p. 1384.) The California Supreme Court has emphasized that the defendant must overcome a considerable burden in challenging a penalty as cruel or unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.)

***C. No Cruel and/or Unusual Punishment***

Under this gross disproportionality principle that must guide our analysis of appellant's challenge, we conclude that appellant's individual circumstances do not demonstrate that his punishment is cruel and unusual under the *Lynch* test or the federal test. The particulars of appellant's criminal record show that his adult criminal history began in 2000, when appellant was 18. In January 2000, appellant was arrested and charged with several counts related to theft of vehicles. He was ultimately convicted of a misdemeanor and given two years of summary probation and 60 days in jail. In December 2000, he was convicted of a violation of Health and Safety Code section 11351.5 and given three years formal probation.

In March 2004, appellant was convicted of burglary and sentenced to two years state prison. In March 2005, appellant was charged with three counts of robbery, one count of false imprisonment with violence, and one count of assault with a deadly weapon likely to produce great bodily injury. He was sentenced to four years in prison on one count and a consecutive term of two years on another count. He was paroled in August 2009. The current offense was committed in April 2010, approximately eight months later. As indicated in the previous section, appellant received the three-strikes sentence not merely for the present offense of conspiracy to commit burglary, and

certainly not for knocking on two doors. His sentence was premised on his recidivist behavior, which justifies the punishment imposed.

Appellant relies on *People v. Carmony* (2005) 127 Cal.App.4th 1066 (*Carmony II*), in which a three strikes sentence for violating section 290, failure to register as a sex offender, was deemed cruel and/or unusual punishment. (*Carmony II*, at pp. 1073, 1084.) In that case, the defendant registered his correct address with the police a month before his birthday, but failed to update his registration with the same information when his birthday arrived. (*Id*. at p. 1073.) Because Carmony's address had not changed and his parole officer knew where he was residing, the Court of Appeal characterized his offense as a harmless technical violation of a regulatory law that did not warrant a three strikes sentence of 25 years to life. (*Id*. at pp. 1071–1072.) "[T]he requirement that defendant reregister within five days of his birthday served no stated or rational purpose of the registration law. . . ." (*Id*. at p. 1073.) The court found that the sentence was grossly disproportionate to the offense, that it shocked the conscience and offended notions of human dignity, and that it was therefore cruel and/or unusual punishment under the state and federal Constitutions. (*Ibid*.)

In comparing himself to Carmony, appellant ignores the seriousness of his recidivist behavior and the failure to rehabilitate upon which his sentence is based. (See *People v. Cooper* (1996) 43 Cal.App.4th 815, 825-826.) Appellant's current offense was far from a harmless technical violation and is therefore fundamentally different from Carmony's. That case is not persuasive authority for appellant's claim of cruel and unusual punishment. In the language of *Rummel v. Estelle* (1980) 445 U.S. 263, 276 (*Rummel*), a case whose viability was reaffirmed in *Andrade*, *supra*, 538 U.S. at pages 73-74, the state has an "interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." (*Rummel*, at pp. 265-266, 276 [mandatory life sentence for felony of obtaining $120.75 by false pretenses, with prior felonies of fraudulent use of a credit card to obtain $80 of

goods or services and passing a forged check for $28.36].) The "primary goals [of a recidivist statute] are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. . . . [T]he point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." (*Id*. at pp. 284-285.) Although California's recidivist statute may be harsher than those of some other jurisdictions, the proscription against cruel and/or unusual punishment does not require California "to march in lockstep with other states in fashioning a penal code" or to conform its penal code "'to the "majority rule" or the least common denominator of penalties nationwide.'" (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516.)

In sum, appellant's sentence is not an "extreme" sentence that is "'grossly disproportionate to the crime,'" nor does it "shock[] the conscience or offend[] fundamental notions of human dignity." (*Harmelin*, *supra*, 501 U.S. at p. 1001 (conc. opn. of Kennedy, J.); *Lynch, supra*, 8 Cal.3d at p. 424.) The sentence therefore does not run afoul of either the California Constitution or the Eighth Amendment strictures of the United States Constitution, and it does not constitute cruel and unusual punishment.

## VI. Alleged Prosecutorial Misconduct

### *A. Appellant's Argument*

Appellant contends the prosecutor engaged in a pattern of misconduct. He delayed turning over photographs relating to the 2004 Irvine robbery until the middle of trial. During closing argument, he implied Mrs. Kusserow had testified as a prosecution witness when she had not.

***B. Relevant Authority***

"The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Even assuming prosecutorial misconduct occurred, reversal is not required unless the defendant can show he suffered prejudice. (See *People v. Arias* (1996) 13 Cal.4th 92, 161.) Defendant must show it is reasonably probable he would have obtained a result more favorable in the absence of the misconduct. (*Ibid*.)

The general rule requiring assignment of misconduct and a request for jury admonishment does not apply if a defendant's objection or request for admonition would have been futile or would not have cured the harm. (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.) It also does not apply when the trial court promptly overrules an objection, resulting in the defendant having no opportunity to request an admonition. (*Ibid*.)

***C. Introduction of Photographs***

Prior to the testimony of Tsiperfal, defense counsel addressed the trial court regarding approximately 15 photographs that the prosecutor had just shown him. Counsel complained that he had submitted a discovery request and had never had a formal response. Because of the violation of the discovery statute, he argued, the photographs should be excluded. Counsel also argued that the photographs and the

officer's testimony were superfluous, since Christensen's testimony had already established a common plan or scheme.

When asked by the trial court when he had received the photographs, the prosecutor replied that the police officer who was going to testify had brought them in that morning. The photographs showed the background of the victim's house, the adjoining backyard, the backpack and the safe that were retrieved from appellant's co-perpetrator.

The trial court noted that the photographs merely illustrated and explained the testimony of the witnesses and made it more easily understood. The trial court did not find them prejudicial. Counsel argued that they were revisiting what was essentially propensity evidence. The trial court reminded counsel that it had already ruled on that issue, and that exclusion of evidence was the sanction of last resort under section 1054. The trial court overruled counsel's objection.

At the outset, defense counsel made no objection based on prosecutorial misconduct, nor did he request a curative admonition or request that the jury be instructed about late discovery. Therefore, appellant's claim is forfeited. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.)

Moreover, even if misconduct were found, appellant was not prejudiced by the introduction of the photographs. As the trial court explained, the photographs were merely illustrative of the witnesses' testimony, and therefore appellant cannot show that he would have achieved a more favorable result absent the alleged misconduct or with a curative admonition. (See *People v. Arias, supra,* 13 Cal.4th at p. 161.)

***D. Mention of Mrs. Kusserow During Argument***

During argument, the prosecutor stated that, "Circumstantially, what's interesting is this: When Mr. Brian Kusserow testified, okay, he testified . . . of the garage, roughly, he says, he's not great with time, ten minutes passed. There's a knock on the door. That's the defendant. I would submit that either the defendant or Ms. White saw . . ." At this point, defense counsel objected on the basis of "not in evidence." After a brief

pause, the trial court overruled the objection. The prosecutor continued, "There's something what's known as circumstantial evidence in this case. If you recall the jury instruction yesterday, direct evidence is if I was from outside I saw it raining. I come in. I testify. Circumstantial evidence or indirect evidence, I come in with a raincoat on. There's water droplets on. You can infer that it's raining outside. That's a logical induction that you can make, logically. That's what I'm doing in this instance in terms of Ms. Kusserow. When she left that house with her two daughters, one of the two . . ." Defense counsel objected, stating, "Ms. Kusserow did not testify, your honor. It is improper to argue facts which has not been admitted into evidence. They could have subpoenaed Ms. Kusserow. She was not brought in." The trial court stated, presumably to the prosecutor, "Excuse me. There is no evidence as to that witness." The prosecutor explained, "Yes. But I said Mr. Kusserow testified that his wife left and that was in evidence." The trial court replied, "Proceed."

The prosecutor continued, "Now, they saw a person just left. They assumed that that house was empty. Logical inference. That's why the defendant went directly to Brian Kusserow's house, knocked on the door, just to make sure that no one's home. Okay. He wasn't expecting anyone home."

We disagree with appellant's interpretation of this argument. "'[W]hen the [prosecutorial misconduct] claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 260.) Here, there was no such reasonable likelihood. The prosecutor did not imply that Mrs. Kusserow testified. To the contrary, it was abundantly clear that she had not. In a short trial such as this one, the jury clearly would remember that she had not. Defense counsel's objection and the trial court's remark to the prosecutor also made that clear. The prosecutor explained that it was Mr. Kusserow who had testified, and he correctly pointed out a portion of his testimony as the basis for what he believed was a reasonable inference from the evidence. A

prosecutor has "wide latitude to discuss and draw inferences from the evidence at trial," and it is for the jury to decide whether the inferences the prosecutor draws are reasonable. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) "When we review a claim of prosecutorial remarks constituting misconduct, we examine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief complained of. [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 689.) Applying this standard, we find no misconduct.

In addition, the jurors were told before trial and before argument that remarks made by the attorneys during argument were not evidence, and the jurors must rely solely on the evidence. (CALCRIM Nos. 104, 222.) We assume the jurors followed the court's instructions. (*People v. Osband*, *supra*, 13 Cal.4th at p. 714.) It is not reasonably probable that appellant would have received a more favorable outcome if the comment had not been made. (See *People v. Arias*, *supra*, 13 Cal.4th at p. 161; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057.)

In sum, we perceive no "'"pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process"'" nor "'"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.]" (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) Therefore, there was no prosecutorial misconduct.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
ASHMANN-GERST

_____, J.
CHAVEZ