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**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>HENRY O. REYES,<br><br>Defendant and Appellant. | B185929<br><br>(Los Angeles County<br>Super. Ct. No. BA265139) |

APPEAL from a judgment of the Superior Court of Los Angeles County. William R. Pounders, Judge. Affirmed.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Lawrence M. Daniels and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, only the Summary, part V of the Discussion, the Disposition, and the Concurring and Dissenting opinion are certified for publication.

## *SUMMARY*

Henry Reyes was convicted of two counts of first degree burglary with a person present, one count of forcible oral copulation and two counts of forcible rape, with special allegations that he had committed the sexual assaults during the commission of a burglary with the intent to commit one of these sex crimes found true. The trial court sentenced Reyes to a term of 47 years to life in state prison. He appeals, claiming error in the trial court's denial of his motion to sever and admission of photographs of his tattoos, prosecutorial misconduct, insufficiency of the evidence and sentencing error. We affirm and publish the portion of this opinion (see section V., *post*) addressing Reyes's claim of error under *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856].

## *FACTUAL AND PROCEDURAL SYNOPSIS*

On April 24, 2004, Reyes knocked on the door of Irina Pryakhina's second-floor apartment and said something in Spanish.[1] She said she did not understand Spanish, closed the door and went to sleep. Later that afternoon, she was startled by a "terrible loud racket" and immediately knew it was Reyes breaking into her apartment through the window. He had removed the screen and got tangled in the drapes before landing on the floor. Reyes came after her, "touching himself in [his groin area]."
She was able to run out of her apartment, yelling, "Call for the police, call for the police." She was afraid no one could understand her because of "the lack of the language."[2]

Reyes tried to follow her, saying, "No, no, wait, wait," as she ran into her neighbor's apartment. He acted like he was trying to give her the phone from her own

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[1] Pryakhina identified Reyes in a photographic lineup on May 20, 2004—less than a month after he broke into her apartment.

[2] Pryakhina testified through a Russian interpreter.

apartment. She yelled for him to give it back. Reyes tried to get back inside Pryakhina's apartment but the door had shut; he tried to climb back in through the window. "An American man" told Reyes not to go back in. Reyes came back toward Irina and tried to get in the neighbor's apartment. The neighbor got the phone back and got the door shut despite Reyes's efforts. The American man called the police. There was a wallet on the table, but Reyes did not take it so she concluded he had not broken in to commit theft.[3]

That same night, about two-and-a-half blocks away, Margaret M. and her roommate Autumn hosted a party in their new apartment to celebrate Margaret's 24th birthday with friends and meet their new neighbors. Margaret, a producer for a show on the National Geographic channel, noticed a few people who had not been invited, including Reyes. He told her he lived in another apartment. Autumn thought he was under the influence of a stimulant because he had a lot of energy, was pushing people and staring them down.

Later, Margaret heard a scuffle outside. When she went out to investigate, she found Reyes laughing and yelling at her friend Peter. Peter said he had had a fight with his girlfriend, she left and he was going to go get her. Reyes jumped up and said, "If you're going to act like a little bitch, I'm going to treat you like one." He then slapped Peter with the back of his hand. Reyes took off his shirt, revealing tattoos all over his upper body, and taunted Peter: "Do you want to fight?" Autumn told Reyes he was not welcome and had to get out. Reyes laughed and did not leave.

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[3] She recalled that about two months before this incident, she had been smoking outside her apartment when Reyes appeared and asked for a cigarette. She said she did not have one and left. Ten minutes later, he knocked at her door and she asked him to leave. After that, she saw him through her window, sitting down and gesturing; then she heard the sound of shattering glass. A short time later, neighbors were standing outside and it turned out someone had called the police; she saw officers speaking with Reyes.

Trying to diffuse the situation, a guest at the party (Christopher Nahas) started talking with Reyes and walked with him to the corner outside.[4] Reyes said he was from Los Angeles, had been in jail for the last five or ten years and was in a gang. Nahas believed he'd said it was 18th Street. He asked Nahas if he wanted to smoke crack and said he wanted to "get laid." He also asked Nahas if he thought any of the girls at the party wanted to smoke crack; Nahas said, "No." Reyes said he had been staying with someone on the third floor of the complex. He also said he had been seeing someone but found out the woman was in the porn industry and dumped her, calling her a "whore." Reyes had tattoos all over his body including horns on his head. Nahas received a call on his cell phone and left.

Later, Peter told Autumn he was upset with her for letting Reyes back into the apartment. Autumn found Reyes on the couch and told him to leave. He wanted to know why he had to go; she told him people did not feel comfortable with him there and to "get the fuck out of here." Reyes left.

Between 1:30 and 2:00 a.m., Scott Foster left the party with two friends. As they entered the elevator, Reyes exited. His speech slurred, Reyes said something complimentary about Margaret and how she was "great" as he walked toward her apartment. Foster was uncomfortable and concerned about Margaret so he called to ask her if everything was ok. Satisfied when she said she was, he did not tell her about Reyes.

Margaret walked the last guests out at about 2:00 a.m. When she got back to the apartment, she realized Autumn and her friend Brandon were gone so she went back out to walk to Brandon's to get Autumn but Autumn had decided to stay at Brandon's. Margaret walked back to the apartment and started cleaning up. She heard a male voice calling her name from the family room in the dark. She saw Reyes laying on her futon, smoking a crack pipe. Reyes said he had been waiting for her all night. Margaret told

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[4] Nahas did not know Margaret; he attended the party with a friend and the friend's girlfriend. The girlfriend (Yvonna) was Margaret's friend.

him the party was over and he had to leave. Reyes told her, "[Y]ou need to relax, you need to . . . party some more with me." Margaret said, "No. The party is over. It's time for you to go." Reyes jumped up, grabbed her by the shoulders and pushed her down on the futon. He jumped on her and tried to kiss her on her mouth and neck. She tried to push him away and again said, "No," but he ignored her. Again, Reyes said he was "just trying to hang out, just trying to make the party last a little bit longer." She told him she didn't know what he was thinking—he needed to get out. He told her: "You need to relax. You're . . . strung too tight."

Reyes put the crack pipe in Margaret's mouth and plugged her nose trying to force her to inhale as he laughed at her. She was not a smoker and swallowed the smoke instead of inhaling. She "felt terrible," "like she was choking." She lost her bearings in the room. Her eyes were watering so she couldn't see clearly. She tried to stay calm, hoping to find a moment to run for the door, but he kept himself between her and the doorway. Thinking she could move away from him, she tried to get up and said, "I just need to get a glass of water." He stood with her, saying he would get it, but pushed her down and kissed up her legs, pulling her underwear off from beneath her skirt. He put his mouth on her vagina. Again, she pushed him and said, "No." Reyes had taken all his clothes off; Margaret was still fully clothed except for her underwear. Reyes had devil horns tattooed on his forehead. He had "Latin Pride" tattooed across his chest and "South Central" on his stomach. His arms were also covered with blue and green tattoos.

Reyes was on top of Margaret and pinning her shoulders and upper arms. His penis penetrated her vagina but Margaret was wearing a tampon. She said, "Well, you found out for yourself. This isn't going to happen, is it?" He said, "That's no problem." Then he pushed her onto the floor, with his knees on Margaret's shoulders and arms and tried to put his penis in her mouth. She kept her mouth closed and kept trying to move her head away from his penis, but it kept hitting her lips. He laughed, saying, "Yeah, I know you like that, don't you, you little bitch. Yeah[,] you're a whore. You're a f'ing whore. I know you like it." He slapped her with his forehand and backhand.

Then Reyes pulled out Margaret's tampon and repeatedly inserted his penis eight times, hurting her. He hit her anus once. He ejaculated, groaned and fell off of her. She sprinted up the steps to the bathroom and locked the door. He was knocking on the door and "back to the other personality of, 'What are your doing? You're crazy. Where did you go? Why are you acting like this?'" She did not respond, instead jumping in the shower where she "just kept washing everything." She heard the front door slam. She ran to her bedroom, locked the door and fell asleep.

After she woke up, she watched movies on her computer, something she did when bad things happened to her. When Autumn came home, Margaret "wasn't herself." Autumn found her "in her room in the dark. She was "abnormally quiet." Although Margaret straightened her hair "absolutely every day," it was very curly and slightly damp. She had "dark[,] dark purple bruises all the way around her neck."

There was a knock at the door. When Autumn answered it, Reyes asked her for a glass of water and then asked if Margaret was home. She said if she ever saw him again, she was going to kill him and shut the door. Later, when Autumn told Margaret about Reyes asking for water and Margaret at the door, Autumn could see Margaret's body shaking. She got really quiet and stayed in bed the whole day watching movies.

At 7:00 the next morning, Margaret picked up her boss at the airport. Although it was supposed to be 80 degrees that day, she wore a black turtleneck. She drove herself and her boss into work. When she signed onto her instant messager, one of her friend's who had been at the party wrote about how Reyes had been bragging about being in jail for six years, being in a really notorious gang, being from South Central, having lots of drugs he could get if anyone wanted and "lots of other terrible things." He also bragged that he was going to "hookup with one of the girls" at the party that night.

It was the "push over the edge" that made Margaret realize it didn't matter about her job, and it didn't matter what people would think. What mattered was that Reyes had done this to her, he knew where she lived and he would do it again to her or someone else and she needed to do something about it because she didn't want to be a statistic, hiding and regretting it for the rest of her life. She knew she had been raped but she hadn't

been able to admit it to herself before that because she felt she had been weak, that she let it happen, that she hadn't done what the books tell you to do "which was not to take a shower afterwards" and then hadn't been able to stand up for herself.

She asked a friend from work to drive her to the police station where she filed a police report. Detectives then took her to the Valley Trauma Center at Northridge Hospital where Nurse Practitioner Marilyn Stotts interviewed and examined Margaret on April 26, 2004. She described the events of the night of the party. She had one shot of tequila and three margaritas within the seven hours before the assault. She had vaginal and rectal discomfort as well as discomfort in her upper back and the sides of her neck. The amount of force she described was corroborated by her injuries which were photographed. She had a laceration on her finger, an abrasion on her left arm, very large injuries on her neck, an abrasion on her vagina and two anal lacerations.

Margaret was "just different" after that; she never felt comfortable again. She had been very active, running or hiking every morning, but she stopped doing that. She would call for Autumn to meet her if she had to go in the elevator or to bring her up from the parking garage. As a result of what Reyes did to her, she moved out of her apartment, gave up her entertainment career and moved out of state.

Reyes was charged with two counts of burglary (counts 1 and 5), one count of forcible oral copulation (count 2) and two counts of forcible rape (counts 3 and 4). As to counts 2 through 4, it was alleged that Reyes committed these offenses during the commission of a burglary with the intent to commit rape and by the use of force, violence, duress, menace and fear of immediate and unlawful bodily injury. As to counts 1 through 4, it was further alleged that Reyes had served three prior prison terms.

At trial, the People presented evidence of the facts summarized above. Both sides entered into a stipulation that a comparison of a swab of cells taken from inside Reyes's mouth confirmed that it was Reyes's sperm found in Margaret's sexual assault kit. Nurse Practitioner Stott testified that most people do not receive injuries during consensual sex, and said Margaret's vaginal abrasion was a typical injury from a sexual assault.

Gail Abarbanel, director of the Rape Treatment Center at Santa Monica UCLA Medical Center and trained as a social worker, testified about rape victims' reactions, including defenses and delays or failures to report their attack. "[I]n the immediate aftermath a lot of victims are . . . just really in shock, they're kind of numb." She explained that it is "very common" for many victims to "dissociate during the attack" as a way to escape psychologically after they are physically unable to do so. The most common presentation of victims in the first hours or days after their assault is "exactly the opposite of what most people expect." Rather than crying or showing anger, they usually present with "very flat affect"—dazed, numb, in shock.

Reyes testified in his own defense. On the night of the party, he said, he was going to see his friend John "Juice" Born. When he got there, he saw Peter and his girlfriend (Ashley) arguing outside. Peter pushed Ashley into a wall. Reyes stepped between them and said everything was alright. Ashley told him she was going to a party and invited Reyes to go with her.[5] He went inside with Peter and Ashley. Everyone there was drunk, including Margaret. Later, Peter raised his voice to Ashley again and Reyes suggested he speak to her differently. Peter came toward Reyes, and Reyes hit him. Peter challenged him to go outside, but Reyes then apologized to Peter. He left to visit his friend Juice, but he was not home. He was going to leave, but a Cuban man said, "You know, man, you got to stay, man, kick it;" "you all right." Autumn saw him and said he could stay.

After that, Margaret and Autumn approached him, discussing between themselves which one would get to talk to him. Margaret asked him to come inside. She was drunk and very friendly. Only Autumn and Margaret were inside the apartment by that time, and Margaret asked Autumn to leave. Margaret approached him, they looked at each other and hugged and kissed. Autumn and Margaret went upstairs giggling, then Autumn

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[5] In rebuttal, the People presented testimony that Ashley had not invited Reyes to the party and further disputing his account.

left again. At the same time, Margaret and Reyes hugged and kissed again and Margaret moaned. Reyes was "going down on her" when Margaret said she had her period. She grabbed him by the neck, lay down on the carpet and told Reyes to come to her. He kissed her neck and she said she liked that. Margaret pulled down her underwear, removed her tampon and had sex with Reyes.

Margaret was "messy" so she went up to take a shower but told Reyes to wait for her. When he went to look for her, she called him into her room and he lay down on her bed. Later, Margaret said she was tired and was going to bed; she told Reyes to come back the next day.

Reyes admitted he had prior convictions for sales of a controlled substance and taking a vehicle without the owner's permission. He also admitted lying about his name and his birthdate on multiple occasions.

Born was called as a defense witness but denied he was Reyes's friend. He said his name was not John; it was Justin. Around Halloween of 2003, he met Reyes and they went back to Born's apartment for about two hours and smoked crack that night. The next day, Reyes unexpectedly just walked in the open door of Born's apartment which Born found strange because it was a secure building. Reyes displayed a lot of "jailhouse tattoos" and was "threatening and menacing" to Born's friends. He talked like he wanted to start a fight. Born said, "They're my friends. What are you doing? We're just hanging out." He grabbed Born's phone and said he was calling his wife in Mexico. He kept saying, "I'm Killer," and "They call me Killer," like "Don't mess with me."

Although Born didn't tell people he had one, Reyes asked to borrow Born's gun, but Born did not give it to him. Reyes left with a girl who had been at Born's apartment. Reyes returned unannounced to Born's apartment two more times when Born was out but his roommates were home. Finding Reyes to be "a little bit more than he could handle as a friend," Born had a phone conversation with Reyes. He said it was "nothing personal," but he didn't "want to hangout." He tried to be diplomatic because Reyes was "dangerous." Reyes's reaction was one of "denial," like "There is no way, you know, that you are saying this to me . . . ." This conversation took place about five months prior

to April 24, 2004 (the night of Margaret's party). It was the last time Born spoke with him; he never invited him back, but Reyes returned the night of the party.

The jury found Reyes guilty on all counts and found true the special allegations relating to counts 2 through 4 that Reyes had committed these offenses during the commission of a burglary with the intent to commit rape. On the People's motion, the prior conviction allegations were dismissed.

The trial court sentenced Reyes to a state prison term of 47 year to life as follows: on the principal term (count 4), 25 years to life; the upper term of 8 years on count 2; the upper term of 8 years on count 3; and the upper term of 6 years on count 5. (The sentence on count 1 was ordered stayed pursuant to Penal Code section 654.)

Reyes appeals.

## *DISCUSSION*

### I. Reyes Has Failed to Demonstrate Prejudicial Error in the Trial Court's Denial of His Motion to Sever the Burglary Count Involving Irina Pryakhina.

As relevant, Penal Code section 954 provides: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. . . ." (All undesignated statutory references are to the Penal Code.) "The law prefers consolidation of charges. [Citation.] Where, as here, the offenses charged are of the same class, joinder is proper under section 954. . . ." (*People v. Ochoa* (2001) 26 Cal.4th 398, 423, citations omitted.)

"The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. [Citation.] [¶] The determination of prejudice is necessarily dependent on the particular

circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial. [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a weak case has been joined with a strong case, or with another weak case, so that the spillover effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1030, internal quotations omitted.)

The "defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying [his] severance motion." (*People v. Mendoza* (2000) 24 Cal.4th 130, 160.) "In determining whether there was an abuse of discretion, we examine the record before the trial court at the time of its ruling." (*Id.* at p. 161.) "[A] party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial." (*People v. Arias* (1996) 13 Cal.4th 92, 127.)

In the count as to Pryakhina as well as the counts relating to Margaret, Reyes came after women after confirming they were alone in their apartments. The attacks took place on the same night and within three blocks of each other. When Reyes entered Pryakhina's apartment, he chased her and grabbed his groin area (but left behind a wallet on a table). He actually committed two forcible rapes and oral copulation against Margaret after announcing to others that he planned to "get laid." (See Evid. Code, § 1101, subd. (b) [nothing in this section prohibits admission of evidence 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 or absence of mistake or accident) other than his disposition to commit such acts].)

However, even the absence of cross-admissibility alone does not establish prejudice. (*People v. Mendoza, supra,* 24 Cal.4th at p. 161.) On this record, counts 1

through 4 were not unusually likely to inflame the jury against Reyes, and the jury was required to find that Reyes had the specific intent to commit the crime of forcible rape or oral copulation when he entered Pryakhina's apartment. Moreover, contrary to Reyes's argument, this was not a weak case joined with a strong case or another weak case. In light of Margaret's testimony as well as the corroborating evidence of her injuries and testimony of multiple other witnesses, the evidence of Reyes's guilt of the crimes against Margaret was overwhelming. The jury clearly rejected his incredible story that his conduct with Margaret was consensual.

Through Reyes's own testimony as well as that of his witness (Justin Born), Reyes established that he did what he wanted when he wanted. In spite of being asked and told to leave twice, he "came back [to Margaret's apartment] because [he] wanted to come back." In spite of the fact Born told him he did not want to see him again, he kept coming back to Born's apartment intimidating whoever was there. With respect to the count involving Pryakhina, she adamantly testified to her certainty about Reyes and his intent when he entered her apartment.[6] According to her testimony, he was told on two occasions to leave, yet kept coming back, forcing his way into her apartment and then

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[6] Outside the jury's presence, Pryakhina was questioned extensively—by the prosecutor, defense counsel and the court—regarding the issue of whether her *subsequent* in-court identification of Reyes was tainted by conversation with a police detective after some of her prior testimony seemed to suggest that it had. (In initially identifying Reyes in a photographic lineup within less than a month of the crime, she "went directly to [Reyes's] picture" and "didn't hesitate at all" in identifying him. Having reviewed the record, we are satisfied that the trial court's conclusion that the issue was one of miscommunication attributable to the language barrier and Pryakhina's characterization of conclusions she reached on her own and insistence on volunteering her "understanding" of matters she found obvious was the source of the apparent inconsistency. Further, at trial defense counsel fully developed the seeming contradictions in her testimony although, given the opportunity to explain herself, she clarified repeatedly that the inferences and conclusions she had drawn were her own, and not impermissible suggestions from anyone else. For example, when she said she did not recognize Reyes in court, she said, she meant that he had "changed tremendously;" he appeared as a "predator" both when she saw him at her apartment and in the photograph included in the six-pack but appeared as a "lamb" in the courtroom for trial.

attempting to force his way into her neighbor's apartment. Reyes has failed to demonstrate that the trial court abused its discretion in denying severance.

## II. Reyes Was Not Prejudiced by the Admission of the Tattoo Photographs.

Over defense counsel's objection that the tattoos were the sort someone got in prison or in a gang, the trial court admitted photographs of Reyes's tattoos as relevant on the issue of consent and not unduly prejudicial in that regard. The court commented that a woman would not consent to have sex with an unknown person covered with tattoos unless she was a "bar type" or "biker type[]." Even assuming arguendo an abuse of discretion, Reyes could not have been prejudiced by the admission of these photographs. Margaret described the devil horn and other tattoos in her testimony and there was also testimony that, on the night of the party, Reyes himself volunteered that he had been in prison as well as a gang. In light of Margaret's injuries, her testimony as well as that of multiple other corroborating witnesses, the evidence of Reyes's guilt was overwhelming. It is not reasonably probable that, absent the admission of these photographs, Reyes would have obtained a more favorable result. (*People v. Champion* (1995) 9 Cal.4th 879, 923.)

## III. Reyes Has Failed to Establish Prejudicial Error as a Result of Prosecutorial Misconduct.

Reyes complains of prosecutorial misconduct in the following portion of the prosecutor's closing argument: "So, if the law is not on your side and that's bad for you, if the testimony is bad for you, then you attack the victims and hope that the jury will be fooled into ignoring the mountain of evidence that's in front of them and the actual client who is seated next to you. [¶] And that's essentially what you have here today. You have someone who is . . . trying to make his trial about the victims, and he's trying to paint the victims as drunks, as liars, and he's trying to get you to hate them so that you

won't hate or see his client . . . . No matter how many times counsel yells at the victims, and he only yelled at two witnesses in this case, conveniently the two people that were victims . . . . No matter how many times he yells at them or he ridicules them or he tries to trip them up, they never once got tripped up . . . .

"Now he's doing that and attacking them and it makes for a dramatic afternoon or in some cases it makes for an interesting afternoon of listening to an attorney attack people that are coming to court and describing crimes that have happened to them, but you have to ask yourself why is he doing that? Well, the reason why counsel is doing that is because he's trying to get you to ignore the person who is seated at his left. He's trying to get you to ignore the person who basically . . . ." At this point, defense counsel objected that the argument was a personal attack, but the trial court overruled the objection.

First, a defendant cannot complain of prosecutorial misconduct at trial unless he made a timely objection on the same ground in the trial court and requested an admonition; otherwise, any such claim of error is waived on appeal unless an admonition would not have cured the harm. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.) Further, the prosecutor has wide latitude to discuss and draw inferences from the evidence at trial, (*People v. Dennis* (1998) 17 Cal.4th 468, 522), and argument is proper as long as it amounts to fair comment on the evidence, including reasonable inferences and deductions to be drawn from that evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.)

"In addressing a claim of prosecutorial misconduct that is based on the denigration of opposing counsel, we view the prosecutor's comments in relation to the remarks of defense counsel, and inquire whether the former constitutes a fair response to the latter." (*People v. Frye* (1998) 18 Cal.4th 894, 978.) Where the focus of the prosecutor's comments is on the evidence at trial, rather than on the integrity of defense counsel, the argument is proper. (*Ibid.*) On this record, including the prosecutor's references to defense counsel as a "very[,] very capable, very respected defense attorney," we find no misconduct. (*People v. Breaux* (1991) 1 Cal.4th 281, 306 ["in context, the prosecutor

could only have been understood as cautioning the jury to rely on the evidence introduced at trial and not as impugning the integrity of defense counsel"].)

In any event, the jury was instructed with CALJIC No. 1.02, advising that the arguments of counsel are not evidence, and the jury is presumed to have understood and followed the court's instructions. (*People v. Morales* (2001) 25 Cal.4th 34, 47.) The evidence of Reyes's guilt was overwhelming. It is not reasonably probable he would have obtained a more favorable result absent the prosecutor's remarks. (See *People v. Haskett* (1982) 30 Cal.3d 841, 866.)

## IV. The Burglary Conviction Relating to Irina Pryakhina Is Supported by Substantial Evidence.

According to Reyes, the evidence was insufficient to support the jury's finding that he had the intent to commit rape or oral copulation when he entered Irina Pryakhina's apartment. "'The specific intent with which an act is done may be shown by a defendant's statement of his intent and by the circumstances surrounding the commission of the act.' [Citation.] 'In objectively assessing a defendant's state of mind during an encounter with a victim, the trier of fact may draw inferences from his conduct, including any words the defendant has spoken.'" (*People v. Craig* (1994) 25 Cal.App.4th 1593, 1597.) A defendant bears a "massive burden" in claiming insufficiency of the evidence underlying his conviction as the role of a reviewing court is limited. (*People v. Akins* (1997) 56 Cal.App.4th 331, 336.)

Pryakhina testified that Reyes came after her, making "threatening gestures." Asked to explain, she said he was "touching himself in [his groin area]"—"as if he was showing that . . . something was interfering or bothering him there." This alone was sufficient evidence from which the jury could infer Reyes's intent. Moreover, the evidence was that Reyes had first checked to see if Pryakhina was alone, chased her once inside, did not steal anything and later that same day committed another burglary where

he did in fact rape the woman who lived just a couple of blocks away. (See *People v. Nunley* (1985) 168 Cal.App.3d 225, 232.)

## V. Reyes Has Failed to Demonstrate Prejudicial Sentencing Error under *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856].

Finding that the victims were particularly vulnerable; the violence as to counts 2 through 4 was extreme; Reyes had two prior prison terms; he was on parole when he committed the crimes for which he was to be sentenced and his prior performance on parole and probation was unsatisfactory (Cal. Rules of Court, rule 4.421), the trial court imposed upper term sentences on counts 2 (forcible oral copulation), 3 (forcible rape) and 5 (first degree burglary).[7] According to Reyes, the trial court's imposition of these upper term sentences violated his constitutional rights to a jury trial and due process. We disagree.

In *People v. Black* (2005) 35 Cal.4th 1238, 1244, our Supreme Court determined that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." However, after briefing was completed in this case, the United States Supreme Court held in *California v. Cunningham* (2007) 549 U.S. __ [127 S.Ct. at p. 860] that, California's determinate sentencing law, "by placing sentence-elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments."

Nevertheless, the *Cunningham* court reaffirmed the rules that apply in this case. "*Other than a prior conviction*, see *Almendarez-Torres v. United States* [(1998) 523 U.S. 224, 239-247], we held in *Apprendi* [*v. United States* (2000) 530 U.S. 466, 490], "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Cunningham, supra,*

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[7] Here, there were no mitigating factors.

549 U.S. __ [127 S.Ct. at p. 864], italics added.) "'Our precedents make clear . . . that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* . . . . In other words, the relevant statutory "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.'" (*Cunningham, supra,* 549 U.S. __ [127 S.Ct. at p. 865], quoting *Blakely v. Washington* (2004) 542 U.S. 296, 303, original italics.)

Leaving to one side the People's waiver argument (Reyes's sentencing hearing took place two months after our Supreme Court's decision in *Black* so it was controlling authority at the time), Reyes had at least three prior convictions.[8] In fact, as the trial court noted, Reyes *admitted* multiple prior convictions on the stand. Moreover, Reyes *further admitted* at trial he had been in prison and had just been released at the time these crimes were committed.[9] The existence of a single aggravating circumstance is sufficient to support the imposition of an upper term. (Pen. Code, § 1170, subd. (b); and see *People v. Osband* (1996) 13 Cal.4th 622, 728.) Each of Reyes's prior convictions (as well as each of his admissions) was sufficient to satisfy the statutory requirement, making the upper term the statutory maximum for his offenses. (See *People v. Black, supra,* 35 Cal.4th at pp. 1269-1270 (conc. & dis. opn. of Kennard, J.).) It follows that no Sixth Amendment violation occurred in this case. On this record, "*without* any additional findings," (*Cunningham, supra,* 549 U.S. __ [127 S.Ct. at p. 865], original italics), the trial court was authorized to impose the upper term sentences. (*Blakely v. Washington, supra,* 542 U.S. at p. 303; and see *People v. Black, supra,* 35 Cal.4th at p. 1270 (conc. & dis. opn. of Kennard, J. ["Once the upper term became the statutory maximum in this

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[8] Reyes had two prior convictions for sales of a controlled substance in addition to a prior conviction for taking or driving a vehicle without the owner's consent. (He also admitted another conviction for stealing clothing.)

[9] As the trial court observed, Reyes had been out of state prison for only 13 days and was on parole at the time of these crimes.

manner, defendant's right to jury trial under the federal Constitution's Sixth Amendment was satisfied, and the trial court on its own properly could—and did—make additional findings of . . . aggravating circumstances in support of its discretionary sentence choice to impose the upper term"].) Once the upper term became the statutory maximum in this case, the trial court properly made its own additional findings regarding aggravating circumstances not submitted to the jury in support of its discretionary sentencing decision. Standing alone, however, each of Reyes's multiple prior convictions as well as each of his admissions was sufficient to authorize the trial court to impose the upper term sentences as it did.

## *DISPOSITION*

The judgment is affirmed.

**CERTIFIED FOR PARTIAL PUBLICATION**

**WOODS, J.**

**I concur:**

**PERLUSS, P. J.**

**CERTIFIED FOR PUBLICATION**

JOHNSON, J., Concurring and Dissenting.

I concur in the judgment and rationale of my colleagues' opinion affirming appellant's convictions. I respectfully dissent, however, from that portion of the opinion affirming the sentence despite what I perceive to be *Apprendi-Blakely-Cunningham* error[1] which cannot be deemed harmless and requires remand to the trial court.

It is true appellant had two prior felony convictions for transporting, selling or giving away drugs (in violation of Health and Safety Code section 11352) and another conviction [evidently reduced to a misdemeanor] under the Vehicle Code for vehicle theft (in violation of section 10851). It also is true, as the majority opinion emphasizes, the trial court mentioned those prior non-violent, not very serious convictions in the course of discussing why it was imposing the high terms on counts 2, 4 and 5. In my view, however, the majority opinion allows those convictions to justify high term sentences on three of appellant's offenses despite the fact most of the court's explanation for imposing those sentences revolved around aggravating factors not found by the jury about the circumstances and nature of the offenses appellant committed.

The trial court found the count 1-4 offenses involved a "high degree of cruelty, viciousness and callousness." Second, both victims were "particularly vulnerable in view of the fact they were defenseless in their own homes and unaware of the attack until it occurred." Third, the "violence that was used in the rape and oral copulation (counts 2 and 4) was extreme to the extent that the bruising on the victim was visible thereafter."

Then after mentioning the two prior prison terms and poor performance on probation and parole, the trial judge explained why he was giving the high term on count 5 which he found did not involve the high degree of cruelty, etc., nor violence. "The high term is selected in part in addition to the reasons that I've indicated that it *wasn't simply a*

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[1] *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Blakely v. Washington* (2004) 542 U.S. 296; *California v. Cunningham* (2007) 549 U.S. ____ [127 S.Ct. 856].

*burglary but a terrorizing situation for the victim* who was known to be in the premises at the time the defendant came in through the window and chased her out the front door."

As to counts 2 and 3, the trial court found they "were separate and apart from each other . . . and for that reason I would select the high term of eight years *because of the extreme violence that was used in committing both of those offenses* and for the reasons that have been outlined earlier. The high term of eight years for each, and they're consecutive to each other and consecutive to count 5, which is the primary term."

The trial judge then summed up the total sentence and why he was imposing such a lengthy term, highlighting still more facts he rather than the jury found about the commission of the crimes. "The total term, effective term is 47 years to life. I've *seldom seen a case that involved so much violence*, and the concern that I had was the defendant was, as to counts 1 through 4, *rejected from the premises twice, came back a third time* and insisted on *satisfying himself at the expense of the victim*."

On this record, it seems unlikely this trial judge would have imposed the high terms or even the discretionary consecutive sentences on all three of these counts based solely on appellant's two prior prison terms for non-violent, not very serious felonies and poor performance on probation and parole. Rather, the transcript fairly oozes outrage about facts the judge rather than the jury found – appellant's "extreme violence," "terrorizing the victim," "cruelty, viciousness, and callousness" toward "particularly vulnerable victims" while "satisfying himself at the expense of the victim." All of this the judge summed up in his final justification for such a harsh sentence. "I've seldom seen a case that involved so much violence."

For purposes of this dissent, I accept the test the California Supreme Court announced in *People v. Avalos*.[2] That is, in reviewing a sentence based on both proper and improper aggravating factors we "must . . . reverse where [we] cannot determine whether the improper factor was *determinative for the sentencing court*."[3] It is not what

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[2] *People v. Avalos* (1984) 37 Cal.3d 216.

[3] *People v. Avalos, supra*, 37 Cal.3d at page 233, italics added.

*could* have been determinative if the trial court had known some of the factors it used would turn out to have been improper. Rather, it is what the sentencing court *did* use that "*was* determinative" in fixing the sentence the trial court actually meted out.

The majority cites a passage from the Supreme Court's opinion in *People v. Osband*[4] to the effect "[o]nly a single aggravating factor is required to impose the upper term."[5] But this pre-*Apprendi* case has little relevance to the case before this court. After upholding the death sentence Osband received for a rape-murder, the court turned to the determinate prison sentences the trial court imposed for other offenses occurring during the crime. Finding the trial court violated the "dual use" prohibition by using one of the aggravating factors to both make the sentences consecutive and to impose the high term on one of those offenses, the court had to decide whether the high term could be affirmed on the basis of other aggravating factors. "'Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if "[i]t is *not reasonably probable* that a more favorable sentence would have been imposed in the absence of the error." [Citation.] . . . . In this case, the court could have selected disparate facts from among those it recited to justify the imposition of both a consecutive sentence and the upper term, and on this record we discern *no reasonable probability* that it would not have done so.'"[6]

*Osband* and its statement saying a single aggravating factor will suffice is readily distinguishable. In that case, only *Watson* error was involved – dual use of an aggravating factor in violation of a statutory prohibition. Thus, the reviewing court only remands for resentencing if it finds a "reasonable probability" the trial court would *not* have imposed the high term had the improper factor been unavailable. Furthermore, in *Osband* only one of several strong aggravating factors had been found improper. It was as if in the case before this court somehow only the trial court's finding of victim

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[4] *People v. Osband* (1996) 13 Cal.4th 622, upholding the death penalty as well as upper term and consecutive sentences for related crimes in a rape-murder case.

[5] *People v. Osband, supra*, 13 Cal.4th at page 728.

[6] *People v. Osband, supra*, 13 Cal.4th at pages 728-729, italics added.

vulnerability had violated *Cunningham* and its predecessors, with any of the several other aggravating factors relating to violence, and cruelty, and viciousness the trial court stressed had remained available to upgrade the sentences on all three offenses. While it is true even a single legitimate aggravating factor *can* support an upper term, that is true only if the trial court indeed found that single legitimate factor sufficient by itself to impose the upper term sentence it did -- or definitely would have if it were the only aggravating factor in the case. The mere presence of a legitimate aggravating factor does not justify upholding an upper term sentence.

In the case before this court, in contrast to *Osband*, the factors the trial court rather than the jury found to be true were not just improper, but constitutionally improper. Consequently, the *Chapman* standard[7] applies and we must remand for resentencing unless we can determine *beyond a reasonable doubt* the improper factor or factors were *not* determinative in the sense of tipping the scale toward the upper term. For reasons explained above, not only do I entertain a reasonable doubt but believe it is almost certain this trial judge imposed the high term on these three counts and used his discretion to make the sentences consecutive to each other primarily because of the facts he, not the jury, found about the circumstances of these crimes. It appears unlikely the two non-violent, non-serious prior convictions alone *were determinative* in elevating the penalty to the high term on not just one or two, but all three of these counts,

The majority suggests the presence of *any* prior conviction in a defendant's past effectively negates *Apprendi-Blakely-Cunningham*. As long as the trial court mentioned the conviction in the process of sentencing the defendant to one or more upper terms, according to this view, the aggravation of the sentence is "authorized" within the meaning of *Cunningham* and its predecessors. Furthermore, because the high term was "authorized" by the presence of a prior (even though that prior may not have been *determinative* in the trial court's imposition of the high term) the trial court was free to itself find and use other aggravating factors the jury otherwise would be required to find

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[7] *Chapman v. California* (1967) 386 U.S. 18.

in making the court's decision whether or not in fact to elevate the sentence from the mid-term to the high term. (Maj. Opn. at pp. 17-18.)

According to this line of reasoning, a conviction the trial court did not consider serious enough by itself to warrant an upper term nonetheless trumps *Cunningham* and its predecessors. The mere presence of that prior conviction in a defendant's record permits a trial judge rather than the jury to find the factors the court deems the true reason for raising the sentence beyond that permitted by the findings the jury made. The result? *Apprendi-Blakely-Cunningham* would only apply when trial courts are sentencing defendants who have *no* prior convictions. Even a single prior conviction, or a single juvenile adjudication many years in the past would be enough to disable the requirement aggravating factors be decided by a jury not the sentencing judge.

The majority opinion finds support for this rationale in a concurring and dissenting opinion found in the California Supreme Court's decision, *People v. Black*,[8] an opinion the U.S. Supreme Court returned to our high court along with the entire decision in that case.[9] In my view, this position represents the sort of narrow reading of *Apprendi* which would force the U.S. Supreme Court to once again emphasize it meant what it said in that opinion, as it did in *Blakely* and now in *Cunningham*. I find nothing in *Apprendi*, *Blakely* or *Cunningham* to suggest the requirement of jury findings as to aggravating factors other than prior convictions is disabled in any and all cases where the defendant had a prior conviction. Yes, a prior conviction can be used to elevate a sentence without a jury finding. Yes, a trial judge can use a prior conviction alone as the sole grounds for elevating a sentence – at least when that is appropriate. But this does not mean the prior

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[8] *People v. Black* (2005) 35 Cal.4th 1238, 1264-1273 (conc. & dis. opn. of Kennard J.). This opinion in fact identifies two permissible aggravating factors: the defendant's "criminal history" which Justice Kennard argued required no jury finding; and another factor related to the crime which the jury had found true in determining the defendant was ineligible for parole. So this dissenting opinion does not present squarely the issue whether defendant's past criminal history by itself necessarily "authorizes" a high term sentence.

[9] Certiorari granted and judgment vacated by *Black v. California*, 127 S.Ct. 1210, 2007 WL 505809, 75 USLW 3429 (U.S.Cal. Feb. 20, 2007) (No. 05-6793).

conviction can serve as a smokescreen behind which the trial judge in fact employs other factors as the true reasons for determining the higher term is warranted.

Perhaps it will be helpful to clarify the limited point of this dissent in the context of the case before this court. I am not saying remand would necessarily be required had the trial judge expressly said he would elevate the sentence on all three counts to the upper term based *solely* on the two prior convictions, even though they were non-violent, non-serious offenses. (Such a statement would compel a reviewing court to determine whether this represented an abuse of discretion, however, something I need not address here.) Had the judge made this clear during the sentencing hearing, reversal might not be required even though he had gone on to say he also found the other aggravating factors to be enough by themselves to impose the high term.

But the trial judge here did something entirely different. He mentioned the prior convictions and other behavior related to those convictions that arguably do not require jury findings,[10] but did so in the midst of a vigorous rendering of the several factors which *do* require the jury rather than the judge to decide whether they are true. From the trial judge's discussion of sentencing factors it is impossible to conclude beyond a reasonable doubt he *did* find the two prior drug convictions sufficient by themselves to elevate the sentence on any or all three counts to the upper term. It is not even possible to conclude beyond a reasonable doubt he *would* have done so had he known the other factors were not available for that purpose. It is conceivable a reviewing court could make such a finding had appellant had a lengthy history of past felony convictions involving assaultive behavior or sex offenses, for instance, another issue not before this panel. But by themselves, because of their nature it cannot be said beyond a reasonable doubt appellant's two drug priors alone would have led the trial judge to raise all three counts to the high term.

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[10] Once again, although entertaining some doubts, I find it unnecessary to discuss whether appellant's behavior on parole and probation, etc. are so closely related to the prior convictions as to evade the jury finding requirement of *Apprendi-Blakely-Cunningham.*

Nor is this a case where it is possible to conclude *beyond a reasonable doubt* a jury *necessarily* would have found defendant guilty beyond a reasonable doubt of the aggravating circumstances the trial court recited as reasons for upgrading the punishment. Was this rape truly far more violent, cruel, etc., than the average rape? Were the two victims unusually vulnerable compared to other rape victims? The trial judge said he found them so, but this particular judge had some basis of comparison after more than a quarter century of experience sitting primarily in criminal courts. Jurors lacking exposure to other rape convictions would have a difficult time making those same comparative assessments.

True, I would have little trouble finding substantial evidence sufficient to affirm a jury finding this rape was particularly violent, cruel, etc. and the victims especially vulnerable. Yet, despite the trial judge's characterization of this as the most violent rape he had seen, based on the scores of other rapes this court has reviewed during the past quarter century -- many of them involving far more violence and cruelty and more vulnerable victims than this case -- I cannot find beyond a reasonable doubt such a verdict would have been inevitable even had it been feasible to submit these factors to a jury.

I note a very recent decision from the Fourth District, *People v Banks*,[11] supports the view expressed in this dissent. Writing for a unanimous court, Acting Presiding Justice Rylaarsdam reversed an upper term sentence and remanded "with directions to conduct a new sentencing hearing consistent with the views expressed in this opinion."[12] In *Banks*, the defendant received a six year sentence after a jury convicted him of two counts of second degree robbery, one count of commercial burglary, and two counts of false imprisonment by violence. Five years of that sentence, however, consisted of an upper term imposed on one of the burglary counts. That upper term, in turn, was based on the several aggravating factors – "defendant's 'leadership role' in the undertaking,

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[11] *People v. Banks* (Apr. 13, 2007, G036873) ___ Cal.App.4th ___ (2007 WL 1111849).

[12] *Banks, supra*, ___ Cal.App.4th at ___ [p. 4].

which involved 'some planning and sophistication,' 'a high degree of cruelty,' . . . defendant's use of 'at least [the] replica' of a gun. . . . [and defendant's] 'well documented' 'priors and the fact' he 'ha[d] not been doing well on probation or parole.'"

After explaining jury findings were not required for the prior conviction factors (and taking the position the poor performance on parole and probation factor fell in that category, too) the *Banks* court nonetheless found it necessary to remand to the trial court for a new sentencing hearing. "A trial court may impose an upper term sentence based on a single aggravating factor [citing *People v. Osband, supra*]. But unlike *Perez,*[13] the trial court in this case cited several additional factors to support its choice of the upper term on count 1, and also did not declare defendant's prior criminal record alone would support its decision. "Since we are not convinced the trial court would have imposed the same sentence solely because of defendant's prior criminal history, we remand for resentencing."[14]

Accordingly, if in the majority, as the Fourth District did in *Banks,* I would remand for resentencing. At that hearing, without any further findings, the trial court could impose the mid-term on any or all of the three offenses on which it previously imposed the high term.[15] As to any of the three offenses on which it proposes to impose the high term once again, however, the trial court would be required to ignore the factors it improperly found true and determine whether it would still elevate the sentence to the high term as to that offense based solely on (1) the elements of the offense charged and found true beyond a reasonable doubt by the jury, and (2) appellant's prior felony drug convictions for which no jury finding is required. That is, the trial court would have to

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[13] *People v. Perez* (2007) 148 Cal.App.4th 353.

[14] *People v. Banks, supra,* ___ Cal.App.4th ___ [p. 4].

[15] I note the sentence would still be lengthy even if the trial court only assessed the mid-term for each of the three counts on which the judge raised the sentence to the high term. Instead of 47 years to life appellant would face a sentence of 41 years to life. Of course, the decision to impose consecutive sentences rather than concurrent sentences had a greater impact on the minimum period of imprisonment than the decision to impose the high terms on the three counts—adding as much as 11 years to the determinant element of appellant's life sentence.

find these particular prior convictions were such it would raise the period of imprisonment to the high term in the "average" case involving both rape and forced oral copulation without regard to the violence, cruelty, vulnerable victims, and other characteristics it and not the jury found to have been present in this particular crime.

JOHNSON, J.