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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND HIGGINS, Defendant and Appellant.	D055649 (Super. Ct. No. SCD212359)

APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Reversed.

Charles M. Sevilla for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Heather F. Crawford, Deputy Attorney General, for Plaintiff and Respondent.

I.

INTRODUCTION

A jury convicted defendant Raymond Higgins of burglary of an inhabited dwelling, assault with a deadly weapon or by means likely to cause great bodily injury, and assault with a firearm. Higgins's convictions stem from an incident in which Higgins broke into a neighbor's home with two guns in his possession.

On appeal, Higgins challenges his convictions on a number of grounds, including: (1) that he was not provided with sufficient notice that the prosecutor was going to rely on false imprisonment as a predicate crime for the burglary charge; (2) that the trial court committed reversible error in failing to instruct the jury, sua sponte, on the defense of mistake of fact; (3) that the trial court committed reversible error in failing to instruct the jury, sua sponte, on a number of offenses that Higgins maintains are lesser included offenses to the charged crimes, including simple assault, misdemeanor false imprisonment, and brandishing a weapon; (4) that the prosecutor engaged in a number of instances of improper conduct, any one of which, he contends, requires reversal; and (5) that the prosecutor's pattern of improper conduct resulted in cumulative prejudice that requires reversal.

We conclude that Higgins's convictions must be reversed on the ground that the prosecutor, Deputy District Attorney Christopher M. Lawson, engaged in a pervasive pattern of misconduct that rendered the trial fundamentally unfair.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The prosecution case*

Laurie Arnold and Higgins had been neighbors for approximately 15 years. Higgins lived with his wife and daughter a few houses down from Arnold. Arnold lived with her daughter Alana, who was 19 years old, and her son Jamie, who was 15 years old. Alana and Higgins's daughter had been "very good friends" when they were younger. The relationship between Arnold and the Higgins family had been sufficiently close that Arnold had memorized the Higgins family's home telephone number.

Arnold divorced her husband approximately four years prior to the incident at issue in this case. After Arnold and her husband separated, her son Jamie went through "tough times" and started getting into trouble. Arnold had asked Higgins to keep Jamie "on course." Arnold did not know whether Jamie had been spending time with Higgins recently, but over the prior year, the only contact she had had with Higgins was exchanging casual greetings.

On May 30, 2008, at approximately 9:00 p.m., Arnold and her boyfriend, Eric Wuerfel, were upstairs in Arnold's home when the doorbell rang. Arnold and Wuerfel decided to ignore the doorbell. A short time later, the front door began "rattling" and/or "violently shak[ing]." Wuerfel went downstairs to see who was at the door. When he got to the door, no one was there.

While Wuerfel was downstairs, he heard Arnold's dog barking in the garage. Wuerfel eventually came into contact with Higgins, who was in Arnold's garage. When Wuerfel encountered Higgins, he asked Higgins who he was. Higgins replied, "I'm a neighbor. I'm a friend of Laurie's." Wuerfel introduced himself to Higgins and continued to ask Higgins to identify himself, which Higgins eventually did. Higgins said that he wanted to talk to Arnold. Wuerfel told Higgins to stay where he was while Wuerfel went to see whether Arnold wanted to talk to Higgins.

Wuerfel went to the master bedroom, which was on the second floor, and closed the door behind him. Once he was in the bedroom, Wuerfel told Arnold that "Ray" was downstairs and that he wanted to talk to her. While Wuerfel and Arnold were discussing Higgins's behavior, they heard Higgins outside the bedroom door saying, "Laurie, Eric. . . . I just want to talk to you." Arnold opened the bedroom door and saw Higgins on the stairs, talking to Arnold's dog. Higgins repeatedly said that he "just want[ed] to talk to Laurie," and mentioned something about Jamie and his friends. Higgins gave no other reason for being present in Arnold's home.

Arnold told Higgins that he was "freaking [them] out," and demanded that he leave. Arnold escorted Higgins downstairs and out of the house. Once Higgins was outside, Arnold closed the front door and locked it.

After Arnold locked the front door, she and Wuerfel locked all of the doors to the house and set the alarm. Wuerfel and Arnold then returned to the bedroom. Shortly after they returned to the bedroom, the doorbell rang. Arnold and Wuerfel believed that it was Higgins ringing the doorbell. Arnold looked out the peephole and saw Higgins standing

outside the front door. Although Arnold did not see a gun, she knew that Higgins owned guns. Arnold said to Wuerfel, "I think he's got a gun." Higgins said, "Laurie, Eric, open the door. I just want to talk to you." Wuerfel told Higgins to leave, and warned him that if he did not leave, they would call the police or Higgins's wife. At this point, Higgins began to shake the door violently.

Arnold and Wuerfel ran upstairs to the master bedroom. When they reached the bedroom, Arnold called 911. While Arnold was talking to the 911 operator, the house alarm went off, and a verbal warning indicated that a door in the dining room had been opened. Arnold and Wuerfel could hear Higgins walking around the house, repeatedly saying, "Laurie, Eric, I just want to talk to you." Wuerfel pushed a couch up against the master bedroom doors, to keep Higgins out. Higgins hit the doors "really hard," pushing both Wuerfel and the couch back about a foot. Wuerfel pushed the couch back to the doors and tried to brace himself against the doors again.

Higgins continued to try to force open the doors to the master bedroom. At one point, Wuerfel saw what appeared to be the barrel of a gun poking through an opening between the two doors. Wuerfel shouted, "He's got a gun," but then said, "Maybe it's a crowbar." After getting a closer look at the object, Wuerfel could see that it was, in fact, a gun barrel. Wuerfel again shouted, "He's got a gun." In response, Higgins asked, "You're not afraid of this little thing, are you?"[1]

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1 Wuerfel testified that Higgins repeated this question two more times.

At one point, Arnold handed the telephone to Wuerfel while she used her cell phone to call Higgins's wife. When Higgins's wife answered the call, Arnold said something like, "Ray's here. I think he has a gun. I think he's going to kill me. Why would he kill me?"

Much of Arnold and Wuerfel's encounter with Higgins was audible on the recording of Arnold's 911 call. Arnold told the 911 operator that she thought Higgins must be drunk, and that there was no history of violence between them. Arnold punched out a screen from her bathroom window, thinking that she might have to jump. At this point, the police arrived.

When San Diego Police Officer Thomas Kowalczyk arrived at Arnold's residence, he saw Higgins running away from Arnold's house, through an adjacent yard. Higgins appeared to be running in a straight line with no difficulty. Kowalczyk drew his firearm and ordered Higgins to get down on the ground. Higgins initially continued running, but then put up his hands and turned around. Kowalczyk again ordered Higgins to get on the ground, and told Higgins that he knew Higgins was armed. Higgins responded, "Yeah, whatever," and turned away from Kowalczyk. Because Higgins had not complied with Kowalczyk's order to get on the ground, Kowalczyk struck Higgins with the butt of his shotgun, causing Higgins to fall to the ground, on his back. Kowalczyk held Higgins at gunpoint until other police officers arrived.

After Higgins was placed under arrest, police officers found a loaded .45-caliber semiautomatic pistol and a loaded .38-caliber revolver in his right front pants pocket. In

Higgins's left front pants pocket, officers found two speed loaders and five loose rounds of .38-caliber ammunition.

2. *The defense*

a. *Higgins's Testimony*

Higgins testified that he graduated from the Naval Academy in Annapolis, Maryland in 1977 and had twice been awarded the Navy's humanitarian medal for his conduct during the Vietnam War. In 1979, while Higgins was deployed, his younger sister committed suicide. He was not permitted to return home for her funeral.

According to Higgins, after Arnold and her husband divorced, her son Jamie became "unglued." He started using drugs and was getting into trouble for fighting. Higgins had talked with Arnold about Jamie's issues, and had tried to take Jamie "under [his] wing."

Two months before the incident at issue, Sean Canepa, the 19-year-old best friend of Higgins's daughter, died from a drug overdose. The young man had spent a great deal of time with Higgins's family, and had his own room in the Higgins home. Higgins "broke down sobbing" when he learned of Canepa's death. Higgins testified that after Canepa's death, he started drinking heavily.

On May 30, 2008, Higgins, who owned a money management business, worked in his home office until after the stock market closed. At approximately 2:00 p.m., Higgins began drinking vodka to celebrate having had a good business day, and also to celebrate his mother's birthday. As Higgins drank, he prepared his guns and range bag for a trip to the firing range that he was planning to take that weekend. Higgins said that he put the

two handguns in his pocket because he intended to work on them later. According to Higgins, the two guns "were in and out of [his] pockets a couple of times in the course of the day."

Higgins drank a significant amount of alcohol over the rest of that day, including approximately half a bottle of vodka, a bottle of red wine, and part of a bottle of white wine. He later went to a nearby sushi restaurant, where he drank three or four bottles of sake.

Upon returning home, Higgins saw some of Jamie's friends standing in the street, and stopped briefly to talk with them. Higgins believed that these teenagers were "bad kids." Higgins "started thinking about Jamie [¶] . . . [and became] obsessed with going down to [Arnold's] house and talking to [Arnold] about Jamie."

The next thing that Higgins remembered was standing in a garage talking to Wuerfel. He also remembered lying on the stairs in Arnold's house, talking to Arnold's dog.

Higgins recalled that he had gone home sometime after these events. Higgins's wife was at home when he returned, but at some point, she left to go to McDonald's. After his wife left, Higgins went back to the Arnold house. He remembered going through a side gate and opening a sliding glass door which, according to Higgins, was unlocked. Higgins recalled walking through Arnold's home, calling for Arnold and Wuerfel. He did not recall hearing the house alarm go off.

The next thing that Higgins remembered was being at the top of the stairs in Arnold's home, and pushing on the bedroom doors to try to get them to open. He leaned

against the doors and could hear Arnold inside the bedroom. Higgins realized that there was something in his pocket. When he removed the item, he saw that it was his .38-caliber revolver. Higgins stuck the barrel of the gun between the two bedroom doors in an effort to pry them open. When Higgins heard someone yell, "He's got a gun," he had a "moment of clarity" and thought to himself, "What am I doing here?" He immediately left Arnold's house. Higgins next remembered seeing flashing lights, and his wife handing him some shoes.

b. *Dr. Kalish's Testimony*

Mark Kalish, M.D., a psychiatrist, testified as an expert for the defense. Dr. Kalish testified that people who are depressed may self-medicate with alcohol. In order to evaluate Higgins's mental state, Dr. Kalish had interviewed Higgins, reviewed the police reports concerning the incident, read transcripts of prior hearings in the case, listened to the 911 audiotape, and reviewed the audiotape and videotapes of Higgins's interviews with police. Dr. Kalish diagnosed Higgins as suffering from alcoholism and a recurring depressive disorder.

Dr. Kalish discussed a number of tragic events that he believed had exacerbated Higgins's disorder, including an incident during the Vietnam War, and Higgins's sister's suicide. According to Dr. Kalish, Sean Canepa's recent death also contributed to Higgins's condition. Dr. Kalish stated that in his opinion, Higgins's conduct at the Arnold house on the night of May 30, 2008, was consistent with that of a person who was depressed and who had self-medicated with alcohol.

B. *Procedural background*

On November 13, 2008, the San Diego County District Attorney filed an amended information charging Higgins with burglary of an inhabited dwelling (§§ 459, 460; count 1); assault with a deadly weapon or by means likely to cause great bodily injury (§ 245, subd. (a)(1); count 2); and assault with a firearm (§ 245, subd. (a)(2); count 3). As to counts 1 and 2, the information also alleged that Higgins personally used a firearm in the commission of the charged offenses (§ 12022.5, subd. (a)).

A jury trial began on November 10, 2008. The jury began deliberating on November 18. The jury deliberated on November 19 and for most of the day on November 20, before reporting to the trial court that it was hopelessly deadlocked. The trial court declared a mistrial.

A second jury was impaneled on June 25, 2009. The second jury began deliberating on the afternoon of July 7, 2009. After deliberating all day on July 8, the second jury returned guilty verdicts on all three counts, and found true the allegations of personal use of a firearm.

The trial court sentenced Higgins to five years in state prison.

Higgins filed a timely notice of appeal.

III.

DISCUSSION

Higgins argues that the prosecutor engaged in a pervasive pattern of misconduct throughout the trial, and that this conduct deprived him of his constitutional right to a fair

trial, under both the state and federal Constitutions. Higgins asserts that these instances of misconduct, either alone or in combination, require reversal of the guilty verdicts. We agree.

In considering the effect of the prosecutor's conduct, we are mindful that "[p]rosecutors . . . are held to an elevated standard of conduct. 'It is the duty of every member of the bar to "maintain the respect due to the courts" and to "abstain from all offensive personality." (Bus. & Prof. Code, § 6068, subds. (b) and (f).) A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.] As the United States Supreme Court has explained, the prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." [Citation.]' " (*People v. Hill* (1998) 17 Cal.4th 800, 819-820 (*Hill*).)

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted.[2] [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the

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2 A "reasonable probability" means " 'merely a *reasonable chance*, more than an *abstract possibility*,' of an effect of this kind." (*People v. Blakeley* (2000) 23 Cal.4th 82, 99.)

defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action ' "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' [Citation.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 298.)

"When a claim of misconduct is based on the prosecutor's comments 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. Friend* (2009) 47 Cal.4th 1, 29.)

A. *The challenged conduct*

Higgins maintains that the prosecutor posed improper questions throughout the trial, often repeatedly and despite objection, and made improper and inflammatory remarks during closing argument, all of which were intended to undermine Higgins's credibility, as well as the integrity of defense counsel and the defense expert.

1. *Impugning defense counsel and the defense expert*

Higgins contends that the prosecutor posed a number of improper questions and made a series of improper statements attacking the integrity of Higgins's defense attorney and his defense expert, Dr. Kalish, and that this conduct caused unfair prejudice to Higgins.

a. *Mentioning that defense counsel and Dr. Kalish had worked together on a prior "rape trial" and asserting that they had "attacked" the rape victim in that case*

On cross-examination of Dr. Kalish, the prosecutor questioned Dr. Kalish about the concept of "back filling," which Dr. Kalish agreed was a process that individuals who have gotten so drunk that they blacked out use to attempt to reconstruct past events. According to Dr. Kalish, these individuals "go to other sources and try to piece together the memory which [they themselves] do not have." During this line of questioning, the following colloquy occurred:

> "Q. Well, you've testified for Mr. Warwick[3] before in a rape trial where you talked about the victim —
>
> "Mr. Warwick: Objection. May we approach the bench, Your Honor?
>
> "The Court: Overruled.
>
> "By Mr. Lawson: [¶] . . . You've testified for Mr. Warwick several times, before, haven't you?
>
> "A. Yes.
>
> "Q. And in this particular case, your testimony is you don't remember how many billable hours you acquired up to this point?
>
> "A. Correct.
>
> "Q. You don't keep a log of that?
>
> "A. Sure. At the office.
>
> "Q. Have you ever been cross-examined about how much you've been paid for your testimony before?

3 Thomas J. Warwick was Higgins's defense attorney at trial.

"A. I'm sure.

"Q. Don't you think that that might be an important thing to come armed to court with?

"A. Not particularly.

"Q. When you testified in this previous trial, Mr. Warwick asked you, 'When someone has a failure to lay down memory tapes'—that would be the amnesia, right?

"A. Right.

"Q. -- 'It's predictable that all people will back fill that lack of memory.' [¶] Your answer, 'Pretty much.' [¶] Does that sound[] like something you would say?

"A. It's what I said here.

"Q. 'And is it predictable that all people will back fill that memory in a fashion that's favorable to them?' [¶] 'Answer: More often than not.'

"A. Which is exactly what I said here.

"Q. Almost.

"A. I said, 'Pretty much.'

"Q. Okay. Well, back filling is not a malicious thing, right?

"A. No.

"Q. It's just something that is natural to do. When you get that drunk and you want to know basically what happened, you're going to back fill those memories.

"A. Hold on a second. The back filling is a consequence of having the amnesia. When people don't remember things, it's uncomfortable. We want to know what happened. And the natural thing that people do is they ask around, they look at things and they

> try to piece together, you know, what happened. And that process is called back filling.
>
> "Q. I think your terminology was they want to make themselves feel right about what happened.
>
> "A. Okay. Isn't that what I just said? It's uncomfortable. They want to figure out what happened.
>
> "Q. And they want to make themselves feel right about what happened. Not just figure out what happened, but make themselves feel better about the actions they did.
>
> "A. They want to understand it."

The prosecutor asked Dr. Kalish how long his interview with Higgins had lasted, and then moved on to question Dr. Kalish about other topics.

The prosecutor's reference to Dr. Kalish having testified for Higgins's defense counsel in a "rape trial" was clearly improper. The question served only to provide the jury with the irrelevant and potentially inflammatory information that Dr. Kalish and Higgins's attorney had worked together in the past to defend someone accused of rape—a fact that could have caused the jurors to regard both Higgins's counsel and Dr. Kalish in an unfavorable light. The potential prejudice from the prosecutor's mentioning the rape trial was exacerbated by the fact that the trial court overruled defense counsel's objection to the remark.

The prejudice from the prosecutor's initial reference to the prior rape trial was amplified by an extremely prejudicial remark that the prosecutor made later in the case. During closing argument, in describing Dr. Kalish and defense counsel's conduct with respect to the victim in the prior case, the prosecutor asserted that Attorney Warwick and

Dr. Kalish had "*attack[ed] a victim in a rape trial*" regarding back filling. (Italics added.) The prosecutor made this allegation and then proceeded to argue, "And [Dr. Kalish's] words were, 'More often than not, people do it in a favorable way, though.' " The prosecutor continued, "And I asked him a question, and, no, he did not say it in the same fashion, because it's being spun a different way now. But when I confronted him on it, 'Yeah, that's exactly what I said.' You're the trier of the fact. You heard what he said the first time, and then when I asked him about what he said before when he was talking about that rape by intoxication victim, the one who, according to his opinion, could completely give consent, she was just back filling."

At this point, Attorney Warwick objected. The following colloquy then occurred:

> "The Court: Sustained. Ladies and gentlemen, disregard the last comment, please.
>
> "Mr. Warwick: And the earlier comment. He's done it twice in a row now.
>
> "The Court: The earlier comment I think was supported by the evidence. The latter I'm going to strike."

Later that day, outside the presence of the jury, the trial court returned to the issue of the prosecutor's remark about Dr. Kalish and defense counsel "attacking a victim in a rape trial." Recognizing that the prosecutor's comment was irrelevant and that it might constitute prejudicial misconduct, the trial court stated:

> "I want to revisit an objection that Mr. Warwick made during Mr. Lawson's opening argument. Mr. Warwick lodged an objection to Mr. Lawson's reference in argument to a statement previously made by Dr. Kalish and admitted by Dr. Kalish to the effect that people tend to back fill their memories in a way that is most favorable to them or that puts themselves in a favorable light. [¶] Mr. Warwick's

> objection was to the reference made by the prosecutor that this statement was previously made by Dr. Kalish in connection with the defense of a rape case for Mr. Warwick and to attack a victim in a rape trial. I sustained Mr. Warwick's objection.
>
> "I'm mentioning the matter now because I'm going to invite Mr. Warwick to tell me if he wants a further limiting or curative instruction having to do with this issue.
>
> "[¶] . . . [¶]
>
> "It's not relevant, and, indeed, may border on prejudicial misconduct, in my view, however unintended that might have been, to suggest that this occurred in an effort to attack a rape victim. Where it occurred has zero proper relevance before this jury. [¶] It's certainly not proper for a prosecutor to impugn defense counsel where the effect of that impugning is to create some form of prejudice that the defense attorney is engaged in some form of improper conduct by vigorously defending his client. I'm also mindful that sometimes trying to unring the bell tends to ring it again and further emphasizes the point."

Defense counsel reiterated that he believed that the prosecutor's statement that Dr. Kalish and Attorney Warwick had "attack[ed]" a rape victim "was presented in a way that was, arguably, an attempt to inflame the jury against Dr. Kalish," and sought a cautionary instruction from the court telling the jury that it should not consider the prosecutor's remark. After hearing counsel's argument on the issue, the trial court decided to include in its concluding instructions to the jury an instruction directing the jury not to consider the prosecutor's improper comments about the prior rape trial.

The court ultimately provided the jury with the following instruction concerning the prosecutor's comments about Dr. Kalish's prior work with defense counsel in a rape trial:

"At this time I'm going to strike an item or two of evidence and also a statement that was made by Mr. Lawson during his argument. As we know, the arguments of counsel are not evidence; however, I'm going to direct that you not consider these matters in any way in your deliberations.

"There was some evidence that Dr. Kalish testified that in a previous case he had made the statement during testimony in that case that people tend to back fill their memories, and, when they do so, they tend to do it in a way that is favorable to themselves or make themselves look favorable. I'm sure you remember that testimony.

"There also may have been evidence given by Dr. Kalish back when that questioning was occurring to the effect that he made this statement while testifying in the defense of a rape case. Also, as you know, during argument Mr. Lawson referred to that statement. I believe he referred to it twice. I believe once he said it was in defense of a rape case and the other time he said words to the effect that Dr. Kalish had made that statement while they were attacking a rape victim.

"Ladies and gentlemen, any reference, either in Dr. Kalish's testimony or in Mr. Lawson's argument that it was a rape case or a sexual assault case or that it was attacking a rape victim, is stricken. You must treat those things as if they were never said. Please do not consider those references or allow them in any way to affect your deliberations.

"You may consider Dr. Kalish's testimony about the back filling and how it occurs. You may consider the fact that he told you he had been retained by defense counsel, including Mr. Warwick in the past, as he has been retained by prosecuting agencies in the past; however, you must not infer that there was anything improper about the defense of that other case and you must disregard any emotions that might be triggered by the notion of defending a person charged in a sexual assault case.

"The bottom line is, ladies and gentlemen, you need to assess the evidence in this case without any emotions being triggered by the term 'rape case' or 'rape victim.' Can everybody do that? Of course you can, and I see all affirmative responses."

" 'A prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury.' [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1195.) However, "[a] prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. [Citations.]" (*Hill, supra*, 17 Cal.4th at p. 832; see also *People v. Sandoval* (1992) 4 Cal.4th 155, 184 [it is misconduct when a prosecutor in closing argument "denigrat[es] counsel instead of the evidence" because "[p]ersonal attacks on opposing counsel are improper and irrelevant to the issues"].)

" 'An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable.' (5 Witkin & Epstein [Cal. Criminal Law (2d ed. (1988)], Trial, § 2914, p. 3570.)" (*Hill, supra,* at p. 832.)

While the fact that Dr. Kalish had previously worked with defense counsel may have been relevant, and the subject of Dr. Kalish's previous testimony regarding the process of back filling may have been a legitimate area of inquiry, the prosecutor's argument to the jury that Dr. Kalish and defense counsel had "attack[ed] a victim in a rape trial" was inexcusable. The remark was irrelevant and potentially inflammatory, served no legitimate purpose, and unfairly maligned defense counsel and Dr. Kalish. Based on the prosecutor's choice of language, one can only conclude that the prosecutor was attempting to prejudice the jury against defense counsel and the defense expert—and, by association, Higgins.

Beyond the prosecutor's highly improper accusation that Dr. Kalish and defense counsel had "attack[ed]" a rape victim, the prosecutor's argument in this regard suggested that Dr. Kalish had testified inconsistently in the two trials on the subject of back filling, and, by implication, that defense counsel and Dr. Kalish were willing to present whatever testimony might be necessary to help a client avoid conviction. This type of attack clearly constituted misconduct, and was highly prejudicial.

Although the trial court attempted to cure the prejudice caused by the prosecutor's improper remarks by admonishing the jury to disregard them, we are not convinced that the court's admonition was sufficient to cure the harm. The problem began five days earlier, when the prosecutor first mentioned that defense counsel had hired Dr. Kalish as a defense expert in a rape trial, and the trial court overruled defense counsel's objection to this comment. In closing argument, during the morning session that day, the prosecutor asserted that Dr. Kalish and defense counsel had "attack[ed] the victim" in that trial. The court did not admonish the jury concerning this issue until the afternoon session (after having originally overruled defense counsel's objection). By that time, the jury had been exposed to the prosecutor's problematic characterization for hours. Further, in light of the prosecutor's other comments attacking defense counsel's integrity, which we discuss in parts III.A.1.c. and III.A.1.d., *post*, this "curative" instruction may have had the opposite effect of what the court intended—i.e., rather than eliminating the harm from the improper comment, the instruction may have served simply to reinforce the fact that defense counsel had utilized Dr. Kalish in defending a person charged with rape, thereby potentially amplifying the damaging effect of the prosecutor's original misconduct.

To make matters worse, there was no evidentiary basis for the assertions that the prosecutor made in his closing argument on the subject of back filling, because the prosecutor neglected to elicit from Dr. Kalish any testimony that would have supported the point that the prosecutor was attempting to make in this portion of his argument. The prosecutor argued that Dr. Kalish had suggested that the victim in the rape case might have actually consented to sex, but that, as a result of back filling, she may have created a different story about what had occurred. However, the prosecutor never asked Dr. Kalish how the concept of back filling was relevant to his testimony in that case. Instead, the prosecutor asked Dr. Kalish only general questions about the process of back filling. As a consequence, the prosecutor's argument about the manner in which Dr. Kalish had used the concept of back filling in the rape trial—i.e., to challenge the victim's story—was not based on evidence elicited at trial. For this reason, alone, the prosecutor's remarks were highly improper. This improper argument, together with the prosecutor's highly prejudicial accusation that Dr. Kalish and defense counsel had "attack[ed]" a rape victim, created a situation that no instruction or admonition could fully cure.

b. *Disparaging the defense expert*

During closing argument, the prosecutor made a number of unfair disparaging comments about Dr. Kalish, in a further attempt to undermine Dr. Kalish's credibility. The prosecutor argued that Dr. Kalish was "being paid a lot of money to come in and give his opinion to spin. . . . His entire opinion is based on what the defendant told him." The prosecutor continued, "This isn't a man looking for the truth . . . . This was a man looking for an excuse, and he found one." The prosecutor also argued that the reason

Dr. Kalish did not write a report until just prior to trial was because "[h]e doesn't want his opinion being critiqued, having me go out and talk to someone who would counter what he's saying. That's why. It's part of the game." Later, the prosecutor repeated the allegation that Dr. Kalish had been paid to make up a defense: "He got paid seven grand to meet for two hours with the defendant and come up with an excuse. That's what he did."

Although it is fair to ask a witness about compensation that the witness received for his or her work and trial testimony to attempt to show bias (see *People v. Parson* (2008) 44 Cal.4th 332, 362-363), the prosecutor crossed the line when he argued that Dr. Kalish had failed to write a report as an entrée to accusing Dr. Kalish of being a "hired gun" who had been paid to create an "excuse" for Higgins.

The record demonstrates that, in fact, Dr. Kalish had called the district attorney's office on two occasions, prior to trial, to offer to make himself available for an interview. The prosecutor informed defense counsel that he did not want to interview Dr. Kalish, and that he wanted Dr. Kalish to prepare a written report instead. Defense counsel suggested, as an alternative, that there be a pretrial hearing at which Dr. Kalish could testify and answer the prosecutor's questions. In response to this offer, the prosecutor said that he would be fine with examining Dr. Kalish, but that he would prefer a written report. At a subsequent pretrial hearing at which the subject was raised, the trial court directed defense counsel to have Dr. Kalish prepare a written report within the following three days.

In light of this record, it was unfair for the prosecutor to argue to the jury that the reason Dr. Kalish did not prepare a report until just prior to trial was to avoid having his conclusions examined and critiqued by the prosecutor. The record establishes that, in fact, Dr. Kalish had been willing to make his opinions available to the prosecutor prior to the time he submitted a report; the prosecutor's suggestion to the contrary misstated the facts, and gave the jury the false impression that Dr. Kalish had attempted to avoid having the prosecutor gain access to his conclusions.

The prosecutor further disparaged Dr. Kalish by twice asserting that Dr. Kalish had been hired by defense counsel to make up a defense for Higgins. Although "harsh and colorful attacks on the credibility of opposing witnesses are permissible" (*People v. Arias* (1996) 13 Cal.4th 92, 162, italics omitted), a prosecutor is to "argue, *from the evidence*, that a witness's testimony is unbelievable, unsound, or even a patent 'lie.' " (*Ibid*., italics added.) Further, accusations that counsel fabricated a defense or misstated facts in order to deceive the jury are forbidden. (E.g., *People v. Friend, supra,* 47 Cal.4th at pp. 30-31.) The prosecutor's statement in closing argument that Dr. Kalish "got paid seven grand to meet for two hours with the defendant and come up with an excuse," was not an argument based on the evidence. Rather, it was an unfair suggestion to the jurors that they should disregard Dr. Kalish's testimony because his testimony had been bought and paid for by defense counsel.

The prosecutor was free to question Dr. Kalish about the bases of his conclusions, as well as about the compensation he received for the work he performed on behalf of the defense. However, the prosecutor went too far when he argued to the jury that Dr. Kalish

had essentially made up his conclusions only to get paid and supported this assertion by misstating the record, telling the jury that Dr. Kalish had tried to avoid having his conclusions examined by the prosecutor before trial.

c. *Disparaging defense counsel's trial strategy*

Higgins contends that the prosecutor "unfairly chastised" defense counsel for exercising Higgins's constitutional right to cross-examine witnesses. During closing argument, the prosecutor argued: " . . . Ms. Arnold. She's a vulnerable victim. She tried to do her best to tell you the truth. I sincerely—well, I think her testimony sincerely showed that to you. [¶] And he had her on the stand for three or four hours asking about every single little detail about a door. Why do you do that? It's just distraction. It's distraction. It's his job. I get it. I understand it. But it's distraction. [¶] She didn't even lock that dining room door. Why is Mr. Warwick asking her 25 questions about it? She doesn't know. Well, he sees an opportunity and he's going to take advantage of it."

The implication that defense counsel's cross-examination of one of the two main prosecution witnesses amounted to "tak[ing] advantage" of "an opportunity" was an improper comment about defense counsel's integrity. Rather than arguing about the evidence or the inferences to be drawn from the evidence, the prosecutor instead attacked the manner in which defense counsel presented his case, and unfairly suggested that defense counsel was doing something improper in thoroughly cross-examining a prosecution witness.

d. *Suggesting improper strategies on the part of the defense*

Higgins complains that the prosecutor posed argumentative questions that unfairly suggested that his attorney had improperly "coached" him to do or say certain things while on the witness stand. For example, the prosecutor asked Higgins if he recalled running across Arnold's front lawn. When Higgins responded that he did not recall having done so, the prosecutor asked Higgins whether he needed a moment. Higgins answered, "No." At that point, Higgins apparently rubbed his head, because the prosecutor then asked, "Did your defense attorney tell you to rub your head in terms of preparing you for . . . ." Defense counsel immediately objected. The court overruled the objection. Higgins responded that the "only thing that Mr. Warwick has told me is to be honest with the jurors."

At another point during his cross-examination of Higgins, the prosecutor asked, "How much time have you spent working on your testimony with Mr. Warwick?" implying that Higgins's testimony was rehearsed. The prosecutor also asked Higgins whether defense counsel had suggested that Higgins look at the jury and maintain eye contact and "those type of things."[4]

During closing argument, the prosecutor insinuated that Higgins was attempting to fabricate a defense by testifying that he had used the .38-caliber firearm, and not the .45-caliber firearm, to pry open the bedroom door, because Higgins had been charged

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4 In asking Higgins questions concerning what his attorney had said to him, the prosecutor improperly encroached on Higgins's attorney-client privilege.

"with assault with a semiautomatic firearm."[5] The prosecutor argued, "I think that's indicative of how smart this man is. He is a very, very intelligent man, and he knows—I asked him questions." The prosecutor later argued that Higgins was "not a good actor[,] [a]nd make no mistake, that was an act, members of the jury. That was coached. That was trained. That was an act."

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (*Hill*, *supra*, 17 Cal.4th at p. 832.) "If there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302.) In addition, the Supreme Court has said that "such locutions as 'coached testimony' are to be avoided when there is no evidence of 'coaching' . . . ." (*People v. Thomas* (1992) 2 Cal.4th 489, 537.)

Despite the fact that there was no evidence of coaching by defense counsel, the prosecutor suggested several times during his cross-examination of Higgins that Higgins had been "coached" by his attorney. The suggestion that Higgins had been "coached" to do or say certain things—both by the prosecutor's asking argumentative questions that suggested coaching, and the prosecutor's asserting during closing argument that Higgins

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[5] The implication of the prosecutor's statement was that Higgins had said that he used the .38-caliber weapon to pry open the door, rather than the .45-caliber weapon, in order to escape a conviction on such a charge. However, Higgins had not, in fact, been charged with assault with a semiautomatic firearm.

had been coached by his counsel—constituted improper attacks on the integrity of defense counsel.

In addition to the prosecutor's attacking defense counsel's integrity by repeatedly suggesting that Higgins had been "coached," the prosecutor's comments with respect to Higgins's claim that he had used the .38-caliber weapon—and not the .45-caliber weapon—in order to avoid a conviction for a charge of assault with a semiautomatic firearm had the additional effect of unfairly undermining Higgins's own credibility. The prosecutor essentially improperly impeached Higgins by asserting, incorrectly, that Higgins had been charged with assault with a semiautomatic firearm, and arguing that Higgins had changed his story in order to avoid a conviction on that charge. In fact, Higgins had *not* been charged with assault with a semiautomatic firearm. The People essentially admit that the prosecutor erred in claiming that Higgins had been charged with assault with a semiautomatic firearm, but contend that the prosecutor's misstatement was harmless. Although this error, alone, might not support reversal of Higgins's conviction, as we explain below, this error was but one of a number of instances of prosecutorial conduct that undermined the fairness of the proceeding.

2. *Improper, argumentative questioning of Higgins*

Higgins challenges a number of questions that the prosecutor posed to him on cross-examination as argumentative, and as constituting an improper attack on Higgins's credibility. For example, Higgins testified on direct examination that he had been "obsessed with trying to save Jamie" on the night in question because Higgins "had already lost Sean [Canepa]." The prosecutor asked Higgins, "You'd agree with me that

it's pretty pathetic if you're using the memory of a dead 17-year-old kid as an excuse in this trial, wouldn't you? Would you agree with me? Is that the legacy that you want Sean Canepa to have— [?]" Defense counsel objected and moved to strike the question. The trial court sustained the objection and granted the motion to strike.

Higgins also testified on direct examination about his sister's suicide and the fact that he had felt guilty about having been unable to attend her funeral. During cross-examination, Higgins mentioned that on the day of the incident at Arnold's residence, he had looked at a photograph of his sister that was taken when she was 19 years old. Apparently undeterred by the fact that the trial court had sustained the objection to the prosecutor's improper "question" regarding Sean Canepa's death, the prosecutor asked, "You agree that's pretty despicable if you were using that as an excuse—[?]" Defense counsel objected on the ground that the question was argumentative. The trial court sustained the objection. Defense counsel then asked "for an admonishment" because "this has been a couple of times." In response, the trial court said to the prosecutor, "Let's ask questions, please, Mr. Lawson."

When Higgins denied that he had broken the sliding glass door in order to gain entry into the Arnold home, the prosecutor said, "This whole thing about, 'Oh, the door was unlocked,' that moment of clarity that you have in your mind, that's just another excuse that you're feeding the jury?" The trial court sustained defense counsel's objection to this question as argumentative.

At another point, Higgins testified that he had been drunk when he went to the Arnold home. He said that he did not remember much of what had taken place, but that

he did recall Wuerfel saying, "He's got a gun," which, Higgins said, caused him to realize what he was doing and to leave the Arnold home. The prosecutor interjected, "Isn't that convenient that all of a sudden, right after you've committed the crimes, that that's when you come to?" Defense counsel objected to the argumentative nature of the question, and the court sustained the objection.

"An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer. The question may, indeed, be unanswerable. . . . An argumentative question that essentially talks past the witness, and makes an argument to the jury, is improper because it does not seek to elicit relevant, competent testimony, or often any testimony at all." (*People v. Chatman* (2006) 38 Cal.4th 344, 384.)

"The rule is well established that the prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.' [Citations.]" (*People v. Wagner* (1975) 13 Cal.3d 612, 619.)

The prosecutor's "questions" as to whether Higgins agreed that it was "pathetic" and/or "despicable" for him to use the deaths of his daughter's best friend and his sister as "excuse[s]" for his behavior on the night of the incident were not proper questions designed to elicit actual evidence. Rather, they were "speech[es] to the jury masquerading as [ ] question[s]" (*People v. Chatman, supra,* 38 Cal.4th at p. 384), and

served only to suggest to the jury, in a highly improper manner, that Higgins was making up excuses for his conduct. In addition, these "questions" suggested to the jury that the defense that Higgins was presenting was "despicable." The prosecutor's tactic in posing these "questions" was clearly improper, and appears to have been intended only to make Higgins look bad in the eyes of the jury.

Similarly, the prosecutor's "questions" about Higgins's memories of the night in question constituted improper argument. Rather than seeking facts, in posing these "questions," the prosecutor was arguing to the jury that the memories that Higgins claimed to have about certain parts of the incident were in fact only a convenient defense story. The trial court correctly sustained defense counsel's objections to these argumentative questions.

A trial court's sustaining an objection to an improper argumentative question and giving an appropriate admonishment or striking the question will generally be sufficient to cure the harm caused by the impropriety of posing argumentative questions. However, in this case, the prosecutor's argumentative questions, which struck direct blows to Higgins's credibility, were part of a pervasive pattern of improper statements and repeated misconduct. The prosecutor was clearly undeterred by the trial court's repeated sustaining of defense counsel's objections, since he continued to pose similarly objectionable questions throughout his cross-examination of Higgins. One is forced to conclude that the prosecutor intentionally posed questions that he knew were improper, in an attempt to discredit Higgins and his defense, and that the prosecutor was unconcerned about whether his "questions" drew objections, or whether the court sustained any such

objections, because in merely posing these questions, the prosecutor accomplished his purpose. As we discuss further in part III.B., *post*, in this context, we are not convinced that the trial court's attempt to dispel the negative effects of these "questions" was sufficient to cure the prejudice that resulted from the combined effect of the prosecutor's improper questions and his other improper remarks.

3. *Commenting on seeing the bulge in Higgins's pants*

One day during trial, Higgins wore the work pants that he had been wearing on the night of the incident, in an attempt to demonstrate that it was possible that the two guns had been in Higgins's pockets without Arnold or Wuerfel noticing them during his first visit to the Arnold home.[6] In closing argument, the prosecutor addressed the defense argument that Higgins's pants could have easily accommodated the two handguns without the guns being noticeable, saying, "I don't know if those pockets are the same . . . . I would submit to you that when the defendant was walking by, I could see the bulges through the lining, regardless." Higgins argues that this statement constituted prosecutorial testimony, and offered a fact that was not in the record.

There was no testimony by any witness as to whether one could or could not see bulges in Higgins's pants caused by the guns in his pocket. The prosecutor therefore was essentially testifying when he told the jury that he could see bulges in Higgins's pants during the demonstration. Whether Higgins had been absentmindedly carrying around

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[6] Higgins testified on direct examination that the two guns were in his pocket during his first visit to Arnold's house that evening. The prosecutor argued that Higgins had gone home between his visits to the Arnold house to arm himself.

the guns in his pockets as he claimed, or rather, went home between visits to the Arnold house in order to arm himself, as the prosecutor claimed, was significant to Higgins's intent—which was the only disputed issue at trial. The jury may have given too much weight to the prosecutor's improper statement that he could see the bulges during Higgins's demonstration, since the jurors may have taken what the prosecutor said as an established fact, rather than making an independent determination of the meaning of the demonstrative evidence.

4. *Improperly referring to Higgins's potential sentence during closing argument*

Higgins complains that the prosecutor improperly raised the issue of sentencing when he suggested to the jury that the court would have discretion in sentencing Higgins. In an apparent attempt to counterbalance the defense evidence of Higgins's good character (i.e., Higgins's military record, his record as a successful businessman, his humanitarian efforts, and his general good character), during closing argument the prosecutor told the jurors, "Your job isn't to decide whether or not he's a good or bad guy. That's something for the judge to do at sentencing. [¶] Your job is to decide whether or not he broke the law. The judge is the ultimate person who gets to consider all that stuff. That's a sentencing issue." The prosecutor made the point again, stating, "That stuff is for the judge to consider at sentencing, not for you to consider when you're deciding whether or not he broke the law, whether or not he violated the Penal Code."

A defendant's potential punishment is not a proper matter for juror consideration. (See *People v. Holt* (1984) 37 Cal.3d 436, 458, superseded by statute on other grounds.)

As the United States Supreme Court has explained, "The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion. [Citations.]" (*Shannon v. United States* (1994) 512 U.S. 573, 579, fn. omitted.)

The prosecutor's comments concerning sentencing were clearly improper. The comments may have suggested to the jury that even if it were to convict Higgins of all of the charged offenses, the judge might be lenient towards Higgins based on the evidence of Higgins's good character. This, in turn, could have caused the jury to be less concerned about returning a guilty verdict than if the suggestion had never been made. In addition, the prosecutor's improper comments regarding Higgins's potential sentence may have misled the jury concerning the consequences of a conviction, since the enhancement allegations of personal use of a firearm carry a mandatory five-year prison sentence. The prosecutor should not have raised the issue of sentencing at all. Once he did, he clearly should not have provided misleading information on the subject.

5. *Telling jurors that they had the "right" to get justice for the community by holding Higgins accountable*

Higgins challenges the prosecutor's remark to the jury that it had "rights," including the right "to make sure the community gets justice." The prosecutor stated: "You equally have rights as a jury. Your right is to make sure that the community gets justice. Your right is to hold him accountable for his actions, to hold him responsible, to let him know that his vanity, his arrogance, his aggression, the fact that he was under the influence of alcohol, are not excuses and he will be held accountable. Those are your rights when you find him guilty of all three counts and the allegation."

There is no support for the prosecutor's assertion that a jury has the "right" to convict a defendant. This comment was clearly improper. By raising the notion of the jury's "rights," the prosecutor impliedly suggested to the jury that it should exercise its rights. Further, it is improper to appeal to the self-interest of jurors or to urge them to view the case from a personal point of view. (*People ex rel. Dept. of Public Works v. Graziadio* (1964) 231 Cal.App.2d 525, 533-534.) The prosecutor's suggestion to the jury that it had "rights" was not an argument about the evidence presented during trial. Rather, it was arguably an appeal to the jurors' self-interest, and suggested to the jurors that they had a personal stake in a certain outcome.[7]

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7 Higgins also complains that the prosecutor committed misconduct during closing argument by arguing multiple times that Higgins had lied on the witness stand. "The prosecution may properly refer to a defendant as a 'liar' if it is a 'reasonable inference based on the evidence. [Citation.]' [Citation.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 338.) Higgins's testimony was at odds with the victims' testimony, particularly with respect to how Higgins entered the victim's home, and as to whether he had the guns with

B. *The prosecutor's conduct requires reversal*

This is not a case in which the prosecutor engaged in a few minor incidents of improper conduct. Rather, the prosecutor engaged in a pervasive pattern of inappropriate questions, comments and argument, throughout the entire trial, each one building on the next, to such a degree as to undermine the fairness of the proceedings. Although we are not convinced that any individual instance of the prosecutorial misconduct of which Higgins complains would, by itself, require reversal, we conclude that the cumulative effect of all of the misconduct does require reversal.

The basic facts in this case were not in contention. The central issue was Higgins's intent, and the case turned on the jury's assessment of Higgins's credibility. A previous jury had deadlocked on these same charges, and there is no indication that the state of the evidence changed in any meaningful way between the two trials. Because Higgins's credibility was pivotal in this case, the prosecutor's repeated attempts to undermine Higgins's credibility—as well as the integrity of defense counsel and the defense expert witness—by posing grossly improper questions and presenting improper argument, was particularly prejudicial.

In reviewing the record and considering the extent of the prosecutor's improper questions and arguments, we conclude that the prosecutor's improper conduct " ' "so infected the trial with unfairness as to make the resulting conviction a denial of due

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him on his first trip to the home. Based on the conflicting testimony, one could reasonably infer that Higgins had lied. For this reason, we do not consider the prosecutor's assertion that Higgins lied on the stand to be part of the pattern of improper conduct that warrants reversal in this case.

process." ' " (*People v. Riggs, supra*, 44 Cal.4th at p. 298, citation omitted.) We further conclude that it is reasonably probable, i.e., that there is a reasonable chance, that Higgins would have obtained a more favorable result absent the repeated incidents of improper conduct. (See *People v. Welch* (1999) 20 Cal.4th 701, 753.) Again, in this context, "reasonable probability" means " 'merely a *reasonable chance*, more than an *abstract possibility*,' of an effect of this kind." (*People v. Blakeley* (2000) 23 Cal.4th 82, 99.) The aggregate prejudicial effect of the prosecutor's conduct therefore requires reversal.[8]

The People argue that Higgins forfeited a number of his claims of prosecutorial misconduct by failing to object and to request an admonition at the time of the asserted misconduct. " '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.]' [Citation.]" (*Hill, supra,* 17 Cal.4th at pp. 820-821.) However, the Supreme Court "has recognized exceptions to the forfeiture rule in cases of pervasive prejudicial prosecutorial misconduct . . . ." (*People v. Dykes* (2009) 46 Cal.4th 731, 775, fn. 8, citing *Hill, supra,* at p. 821; see also *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1100 ["When . . . the misconduct is part of a pattern, when the misconduct is subtle and when multiple objections and requests for mistrial are made, we

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8 Because we conclude that the prosecutor engaged in prosecutorial misconduct requiring reversal, it is unnecessary to address Higgins's other contentions on appeal, since they are either no longer an issue for purposes of retrial (i.e., notice of false imprisonment as a predicate offense for burglary) or are dependent on the evidence to be presented at trial (i.e., jury instructions).

conclude it proper for a reviewing court to consider the cited misconduct in evaluating the pattern of impropriety"].)

Further, courts have recognized that in some situations an objection and/or admonition will actually exacerbate the prejudice to the defendant. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 692, superseded by statute on other grounds.) For example, in a situation in which "improper comments and assertions are interspersed throughout trial and/or closing argument, repeated objections might well serve to impress upon the jury the damaging force of the misconduct." (*Ibid*.) "In such a situation, a series of admonitions will not generally cure the harmful effect of [the] misconduct." (*Ibid*.)

Due to the pervasive nature of the prosecutor's improper comments and questions in this case, and the fact that it is clear from the record that the prosecutor was undeterred by the trial court's repeated sustaining of objections to his improper questions and argument, we conclude that a series of admonitions would not have served to cure the unfairness caused by the prosecutor's conduct.

DISPOSITION

The judgment is reversed. The matter is remanded for a new trial.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

McINTYRE, J.