Filed 12/13/04 Opinion on rehearing (Original 6/21/04 opinion was momentarily reposted as B166718a.doc on 12/13/04; discard that erroneous file and use this correct version)

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER OVERBY, Defendant and Appellant.	B166718 (Los Angeles County Super. Ct. No. KA058029-01)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, Herbert S. Tetef, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II through VIII in the majority opinion and the entire concurring and dissenting opinion.

The petition for rehearing was granted in this case to consider the impact, if any, of the recent United States Supreme Court decision in *Blakely v. Washington* (2004) 524 U.S. ____ [124 S.Ct. 2531] (*Blakely*) on this court's opinion. After considering the petition on rehearing, we find no reason to alter the opinion in any respect other than to add a final section to address the *Blakely* arguments raised by appellant's petition. We therefore reissue the opinion with the addition of section VIII.

Defendant and appellant Christopher Overby was convicted of attempted murder (Pen. Code,[1] §§ 664, 187, subd. (a)), two counts of first degree burglary (§ 459), first degree robbery (§ 211), forcible sodomy with special circumstances (§§ 286, subd. (c)(2), 667.61, subds. (a), (b), & (e)), and arson of an inhabited structure (§ 451, subd. (b)). Overby seeks reversal of his conviction because the trial court reseated a juror as a remedy for a *Batson-Wheeler*[2] violation without Overby's consent, failed to conduct a hearing to determine whether the jury was tainted by one juror's misconduct, erroneously admitted a bloodstained shirt into evidence, and improperly permitted a sexual assault nurse to testify about statements made by the victim. He also argues that the prosecutor committed misconduct, that his sentence for robbery must be stayed pursuant to section 654, and that the cumulative effect of the errors mandates reversal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of July 19, 2002, Overby entered Michael Conkey's house in Claremont through a kitchen window. He ransacked the house and stole two watches, a cell phone, and some cuff links. Overby's palm print was found on a window at the point of entry to the house, and his fingerprints were recovered from the car from which Conkey's cell phone was stolen.

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1 Unless otherwise indicated, all further statutory references are to the Penal Code.

2 *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

Nancy P. lived down the street from Conkey and was home alone on the night of July 19, 2002. Overby entered her home while she slept and awakened her by throwing himself on her and pressing a knife into her side. Nancy P. wrested the knife from Overby by its blade and attempted to escape.

During an extended struggle, Overby tackled Nancy P., choked her, and attempted to tie her wrists together. After she tried to hit him with a clock radio, Overby punched her repeatedly in the face and head, pinned her down on her bed, and penetrated her anus with his penis. When Overby withdrew, he threw a blanket over Nancy P.'s head, turned on the bedroom light, and said, "Look at what you made me do. What am I going to do?"

Overby dragged Nancy P. to the shower to "wash off all the evidence," washing her genital area himself. After the shower, he tied her hands and feet, gagged her with strips of sheets from the bed, and replaced the blanket over her head. He said he would set fire to the bed to destroy the evidence and asked for lighter fluid; when she denied having any, he left the room and returned with an aerosol product that he used as an accelerant. Overby set fire to the bed, then ran from the house with Nancy P.'s money, jewelry, and postage stamps. Nancy P. freed herself, reported the fire and assault to 911, and escaped her burning house.

On July 20, 2002, at approximately 11:45 a.m., Pattie Reed[3] pawned several pieces of Nancy P.'s jewelry, including her engagement ring. That afternoon, she pawned Nancy P.'s wedding ring and another piece of her jewelry. Five days later, Reed, accompanied by Overby, pawned additional items.

Overby and Reed were arrested together in Reed's car 10 days after the crimes. When arrested, Overby had a healing laceration across his right hand. Blood matching Overby's was found on the driveway of Nancy P.'s house, and sperm recovered from Nancy P.'s body during her sexual assault examination matched his sperm. Police

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[3] Reed and Overby were tried together; she was convicted of three counts of receiving stolen property (§ 496, subd. (a)). Reed's appeal was dismissed at her request.

recovered Nancy P.'s watch from Reed's apartment and a new roll of stamps from Reed's car, along with Overby's wallet and a bloodstained shirt.

Overby was charged with the first degree burglary (§ 459) of Conkey's home. In connection with the crimes against Nancy P., Overby was charged with attempted premeditated murder (§§ 664, 187, subd. (a)), first degree burglary (§ 459), first degree robbery (§ 211), forcible sodomy (§ 286, subd. (c)(2)), and arson of an inhabited structure (§ 451, subd. (b)). Overby was alleged to have served a prior prison term within the meaning of section 667.5, subdivision (b), and to have committed the sodomy during a burglary, with the use of a knife, and causing great bodily injury (§ 667.61, subds. (a), (b), & (e)).

The jury found that the attempted murder was not premeditated but otherwise convicted Overby as charged. After a bench trial in which the court found the prior prison term allegation true, the court sentenced Overby to 25 years to life in state prison, plus an additional term of 12 years. Overby appeals.

DISCUSSION

I. Reseating of Challenged Juror

In *Wheeler*, *supra*, 22 Cal.3d at p. 282, the California Supreme Court established dismissal of the jury venire as the remedy for the improper use of peremptory challenges to remove prospective jurors on the basis of group bias. The Supreme Court revisited *Wheeler* in *People v. Willis* (2002) 27 Cal.4th 811 (*Willis*), and approved remedies short of dismissing the entire venire, provided that the alternate relief is acceptable to the complaining party. The court explained that in "situations . . . in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial . . . . with the assent of the complaining party, the trial court should have the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose

challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve." (*Id*. at p. 821.)

The *Willis* court emphasized that the prevailing party's "waiver or consent is a prerequisite to the use of such alternative remedies or sanctions, for *Wheeler* made clear that 'the complaining party is entitled to a random draw from an entire venire' and that dismissal of the remaining venire is the appropriate remedy for a violation of that right. [Citation.] Thus, trial courts lack discretion to impose alternative procedures in the absence of consent or waiver by the complaining party. On the other hand, if the complaining party does effectively waive its right to mistrial, preferring to take its chances with the remaining venire, ordinarily the court should honor that waiver rather than dismiss the venire and subject the parties to additional delay." (*Willis*, *supra*, 27 Cal.4th at pp. 823-824.) The Supreme Court did not specify in *Willis* what constitutes consent to an alternate remedy or an effective waiver of the right to a mistrial.

In the proceedings in this case, when the prosecutor exercised a peremptory challenge to excuse a Black juror, Overby's counsel immediately asked the court to order the juror to remain in the courtroom. Having ensured that the juror remained available to be reseated, she then made a *Batson-Wheeler* motion, alleging that the prosecutor improperly used her peremptory challenge to exclude the Black juror—the first Black juror to be peremptorily challenged—because of a presumed group bias based on her race. In her argument, Overby's counsel did not request any specific remedy for the alleged *Batson-Wheeler* violation.

The trial court held a sidebar hearing and concluded, "So at this point I'm going to grant the motion as to Number 9 formally. And I'm going to elect the remedy to reseat Number 9 rather than the remedy to kick the entire panel." The court then asked counsel if they wished to be heard "as to the court's decision." Both defense counsel said, "Submit," and the prosecutor objected. The challenged juror was reseated and voir dire resumed.

The prosecutor immediately thereafter made a *Batson-Wheeler* motion that was denied. Later that day she requested reconsideration of both *Batson-Wheeler* rulings and argued that the jury venire should be dismissed. At no time during the reconsideration arguments did Overby's counsel state that she agreed that the venire should be dismissed, nor did she indicate any dissatisfaction with the remedy chosen by the court. The motion for reconsideration was denied.

Overby contends that he did not consent to the court's proposed remedy or waive his right to the dismissal of the panel and requests a new trial on the grounds that the trial court should have dismissed the entire venire in the absence of his consent. The Attorney General argues that Overby's conduct here amounted to implied consent to the reseating of the challenged juror as a remedy for the *Batson-Wheeler* violation.

The consent required by *Willis*, *supra*, 27 Cal.4th 811, need not be personally given by the defendant and may be granted by counsel. As a general rule, counsel "has general authority to control the procedural aspects of the litigation and, indeed, to bind the client in these matters." (*In re Horton* (1991) 54 Cal.3d 82, 94.) "By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to *counsel's* complete control of defense strategies and tactics." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1163.) The right to request a mistrial or to elect to continue with a particular jury is not one of the constitutional rights deemed to be so personal and fundamental that it may only be personally waived by the defendant. (*People v. Brandon* (1995) 40 Cal.App.4th 1172, 1175 ["Although the right to request a mistrial or proceed to a conclusion with the same jury is a fundamental right, the law does not require that it be personally waived by an accused, nor does the law require that an accused be admonished concerning the nature of the right," holding that counsel's consent to a mistrial is deemed the defendant's consent]; *People v. Moore* (1983) 140 Cal.App.3d 508, 513-514 ["We hold the right of the defendant to request a mistrial or proceed to a conclusion with the same jury, though a fundamental one, is one that should and can properly be exercised by experienced legal minds and is not beyond the control

of counsel"]; *People v. Allen* (1980) 110 Cal.App.3d 698, 704 & fn. 6.) Accordingly, counsel here was authorized to consent to the court's proposed remedy and to waive Overby's right to a mistrial and new jury venire. (*Horton*, at p. 95 ["as to other fundamental rights of a less personal nature, courts may assume that counsel's waiver reflects the defendant's consent in the absence of an express conflict"].)

Overby claims that his counsel did not consent, expressly or impliedly, to the reseating of Juror No. 9. He characterizes his counsel's conduct as "mere silence," and argues that consent or waiver may not be implied from silence. He bases his argument on *Curry v. Superior Court* (1970) 2 Cal.3d 707, 713, a double jeopardy case in which the Supreme Court held that a defendant's consent to a legally unnecessary mistrial could be inferred only from affirmative conduct and not from silence. Overby urges us to apply the *Curry* rule here, reasoning that if "mere silence in the face of an ensuing discharge [of a jury] cannot be deemed a waiver" (*ibid*.), then silence in the face of a court's stated intent to remedy a *Batson-Wheeler* violation by *not* discharging a jury should not constitute a waiver. *Curry*, however, concerned double jeopardy, an area of law in which the courts have deliberately declined to impose a duty upon the defendant to forewarn the trial court of legal error that will permit the defendant to assert the defense of double jeopardy in subsequent proceedings. It is because the defendant has no obligation to alert the trial court that it is about to err in a manner that sets up a double jeopardy defense that the defendant's silence does not constitute waiver or consent when the court declares a mistrial without legal necessity. (*Ibid*. ["When a trial court proposes to discharge a jury without legal necessity therefor, the defendant is under no duty to object in order to claim the protection of the constitutional guarantee, and his mere silence in the face of an ensuing discharge cannot be deemed a waiver"].) *Curry*'s duty-based rationale for declining to imply consent or waiver from silence is not applicable in the *Batson-Wheeler* context, where litigants waive their objections to the improper use of peremptory challenges if they do not assert them in a timely manner. (*People v. Anderson* (2001) 25 Cal.4th 543, 568.)

Overby's counsel's conduct, moreover, was not "mere silence," and it persuades us that she implicitly consented to the alternate remedy proposed by the court. When the first Black juror was excused by the prosecutor, Overby's counsel immediately asked the court to prevent her departure from the courtroom. As the only reason to ask that the juror remain was so that she could be reseated if the *Batson-Wheeler* motion were successful, it is clear that Overby's attorney intended at least to preserve the possibility of reseating the challenged juror. Counsel acted to ensure that the remedy ultimately selected was available to the court, prevailed on her motion, and then declined the opportunity to object to the appropriateness of the reseating remedy proposed by the court. When the court asked counsel by name if she wanted to present any argument on the court's tentative decision, she responded, "Submit." The primary definition of "submit," as was noted in *In re Richard K.* (1994) 25 Cal.App.4th 580, 588, is "to yield to, to surrender or to acquiesce," and counsel's choice to decline the opportunity to advocate any particular remedy—after having just argued at length the merits of her successful motion—suggests her acquiescence in the remedy the court proposed.

Overby argues that for an attorney to say "submit" is "merely [to] put the ball in the trial court's court for decision." The word is often used to advise a court that a party has presented all his or her arguments and evidence and does not object to the court ruling without further debate. (*In re Richard K.*, *supra*, 25 Cal.App.4th at p. 588 ["after the parties present evidence and argue their respective positions, they will 'submit' the matter, asking the court to rule without further argument"].) Here, however, counsel's use of the term "submit" cannot be interpreted as intended to communicate to the court that she had completed her argument on the appropriate remedy *because she had not made any argument or stated any position concerning remedies*. Overby's counsel won her *Batson-Wheeler* motion challenging the dismissal of a single juror and was offered a remedy that effectively undid the peremptory challenge of which she had complained. In light of this remedy, which "'vindicate[d] all the rights supported by the principles'" (*Willis*, *supra*, 27 Cal.4th at p. 820), counsel's express repudiation of the court's offer to

comment or argue about the appropriate remedy can only be understood as an indication of consent to the remedy the court suggested.

Our conclusion that Overby's counsel implicitly approved the reseating of the challenged juror is reinforced by the fact that she did not alter her position or indicate dissatisfaction with the reseating remedy even after having time and opportunity to consider it further. Later that day, well after the court had reseated the challenged juror and denied the prosecutor's *Batson-Wheeler* motion, the prosecutor asked the court to reconsider its rulings. The prosecutor requested the dismissal of the venire even if, upon reconsideration, the court would not grant her *Batson-Wheeler* motion: she asked that "[E]ven if [the court is] not granting the prosecution's [motion], regardless, to quash this venire. We have to start over." Overby's attorney did not express displeasure with the court's remedy or state a preference for a new panel.

Although counsel's implied consent to the alternate remedy may be discerned from the record in the present case, we emphasize that it would be preferable and advisable for the trial court to ensure that the record reflects the express consent of the prevailing party whenever an alternate remedy authorized by *Willis*, *supra*, 27 Cal.4th 811, is employed. An express consent ensures both that the aggrieved party has received a remedy the party deems appropriate to redress the constitutional violation found by the court and that the record will reflect the party's assent should the question arise on appeal. The time required to obtain from the prevailing party's counsel a brief but explicit waiver of the dismissal of the entire venire and consent to the remedy selected is minimal, particularly in light of the requirement of a retrial if consent or waiver is not expressly secured and cannot be inferred from the record.

II. Failure to Question Jury Regarding Excused Juror

Juror No. 3 was dismissed for misconduct on the first day of trial after she handed a pamphlet to the victim support representative with instructions to give it to Nancy P. Overby contends the court's failure to conduct an evidentiary hearing on whether the

remaining members of the venire had been influenced by the juror's misconduct constituted prejudicial error.

The trial court has considerable discretion in determining how to investigate juror misconduct; that discretion extends to "what specific procedures to employ including whether to conduct a hearing or detailed inquiry." (*People v. Beeler* (1995) 9 Cal.4th 953, 989.) A trial court is obligated to determine whether misconduct has affected the impartiality of the other jurors only when there is evidence to that effect; there is no obligation to ascertain whether members of the jury were affected by misconduct in the absence of evidence that they knew of it. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1175; cf. *People v. Medina* (1990) 51 Cal.3d 870, 888-889 ["further investigation and more probing voir dire examination may be called for" when prospective jurors were exposed to other prospective jurors' misconduct].)

The trial court did not abuse its discretion by refusing to question members of the panel because there was no evidence that other jurors knew of, let alone were affected by, Juror No. 3's conduct. There was no evidence that any other member of the jury had seen the pamphlet or its conveyance to the victim support representative. There was also no indication that Juror No. 3 had discussed the victim or the case with any other member of the jury in the few hours since the presentation of evidence began that morning. It appeared likely that Juror No. 3 was attempting to engineer her dismissal from the jury by this act—the subject of the brochure, Alcoholics Anonymous doctrine, was completely unrelated to the facts of the case and the juror had predicted to courtroom staff that she would not return the following court day.

The court's inquiry was sufficient to satisfy itself that the juror's conduct demonstrated "simple garden variety stupidity" rather than a desire to influence others in the case, a conclusion supported by the record. Under the circumstances, we conclude that there was not a sufficient possibility of an improper effect on other jurors to trigger a duty on the part of the court to inquire further into the conduct. (*See People v. Ramirez*, *supra*, 50 Cal.3d at p. 1175 [trial court not obligated to investigate whether juror's

misconduct affected the remaining members of the panel when there was no evidence that any other juror knew of or heard the improper remark]; *People v. Prieto* (2003) 30 Cal.4th 226, 272-273 [no error in refusing to question jurors when there was no evidence beyond counsel's speculation that jurors had read newspaper article].)

III. Admission of Sexual Assault Nurse's Testimony

Janeece Berry, a forensic sexual assault nurse who examined Nancy P. after she was assaulted, testified to the injuries she had observed on Nancy P.'s body during her examination. Over Overby's hearsay objection, Berry testified that these injuries were consistent with Nancy P.'s account of the attack. Berry testified that the laceration on Nancy P.'s hand was consistent with her statement that she struggled to remove a knife from her attacker's hand; that her facial injuries were consistent with her account that the assailant punched her in the face; that bruises on her wrists were consistent with being tied with strips of bed sheets, as she reported; and that her rectal injuries were consistent with brief anal penetration by a small penis, as Nancy P. had described. Citing *People v. Brown* (1994) 8 Cal.4th 746, Overby contends that the testimony was improperly admitted hearsay because testimony concerning an extrajudicial complaint of sexual assault must be limited to establishing only the fact of and circumstances surrounding the disclosure of the assault.

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) Here, Nancy P.'s account of the incident was not hearsay because it was not offered to prove the truth of the matter asserted. The victim's description of the attack and sexual assault was presented in the course of eliciting Berry's opinion that each of Nancy P.'s many injuries was consistent with being caused by the physical and sexual attack she described—an appropriate subject of examination of this experienced sexual assault nurse. (*People v. Cegers* (1992) 7 Cal.App.4th 988, 998 ["An expert may always give his opinion as to the cause of a particular injury or condition"]; *People v. Rance* (1980) 106 Cal.App.3d 245, 254-255.) This testimony necessitated some

discussion of Nancy P.'s description of the incident, for Berry could not have testified to how Nancy P.'s injuries were consistent with Nancy P.'s account without reference to that account.

Because Berry alluded to Nancy P.'s statements to specify how the many injuries she observed were consistent with the physical and sexual assault that Nancy P. described, rather than as substantive proof that the attack took place, Overby's hearsay objection was properly denied. Because of the possibility that the jury could improperly consider Berry's recitation of Nancy P.'s statements for the truth of the matters asserted in those statements, a limiting instruction would have been appropriate if it had been requested; but, as Overby acknowledges, the trial court had no sua sponte duty to give a limiting instruction. (See *People v. Montiel* (1993) 5 Cal.4th 877, 918-919.)

IV. Admission of Bloody Shirt Recovered from Reed's Car

A bloodstained blue plaid shirt was recovered from Reed's car after she and Overby were arrested. Overby objected to the shirt's admission at trial as irrelevant and more prejudicial than probative (Evid. Code, §§ 350, 352) because Nancy P. had described her attacker as wearing a white shirt; there was no evidence that a shirt was taken from the victim's house; and there was no evidence of whose blood or shirt it was. The court concluded that the shirt was relevant and that its probative value outweighed its prejudicial aspects: "I'm going to jump to a wild legal conclusion that the shirt fairy did not put it in the trunk. Joint dominion and control over the car over a period of time, it's not 352. The issues raised by you folks as to whether it's male or female clothing, the type of clothing, the size and location of the spot, can all be covered by cross-examination. [¶] . . . You've got blood at the scene, by admitted evidence relating to the stamps because there was some evidence that stamps were taken, even though the stamps are relatively fungible. [¶] This is a circumstance that the jury can take into consideration and they can decide whatever they think it's worth, if anything." We review the rulings for an abuse of discretion. (*People v. Cash* (2002) 28 Cal.4th 703, 727; *People v. Valdez* (2004) 32 Cal.4th 73, 108.)

Relevant evidence is "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The trial court did not abuse its discretion in admitting the evidence because it tended to establish the disputed fact that Overby was the perpetrator of the crimes against Nancy P. Although no tests were performed on the blood on the shirt to determine whether it was Overby's, Overby was cut while struggling with Nancy P. over the knife, and he left a trail of blood drops leading away from the house and down the street. A cut remained visible on his hand when he was arrested 10 days after the attack on Nancy P. The shirt, moreover, was found in the car in which Overby was arrested, as were his wallet and a new roll of stamps of the same type as those taken from Nancy P.'s house.

The presence of the bloodstained shirt in the car supported the other evidence of identity and permitted the inference that Overby accidentally bled on the shirt or used it to stop the bleeding from his wound. As this inference does not depend on Overby having worn the shirt during the attack, the fact that the shirt does not match Nancy P.'s description of the shirt her assailant wore does not diminish its relevance. "Evidence that a defendant possessed clothing stained with human blood is relevant to prove the defendant's presence at the scene of a homicide involving substantial bloodshed" (*People v. Price* (1991) 1 Cal.4th 324, 435 [bloodstained gloves are weak evidence but admissible even though the blood type could not be determined and the gloves appeared to be women's gloves, while the defendant was male], superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165), and it is similarly relevant to establish the defendant's presence at the scene of an *attempted* homicide involving substantial bloodshed.

The trial court also did not abuse its discretion when it concluded that any prejudicial impact of the shirt did not substantially outweigh its probative value. Overby's arguments under Evidence Code section 352 rest on his view that the shirt had no probative value, in which event a showing that the prejudicial nature of the evidence

substantially outweighed its probative worth would not be difficult to make; but, as discussed above, the shirt was relevant, although not compelling, evidence on the element of identity. The shirt, with a single bloodstain, does not appear to have been especially prejudicial or inflammatory, particularly in comparison to the other evidence before the jury in this violent case of sexual assault, arson, and attempted murder. Overby has not established that the admission of the shirt into evidence was an arbitrary, capricious or patently absurd decision resulting in a miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

V. Alleged Prosecutorial Misconduct

Overby alleges that the prosecutor committed misconduct when she said in her closing argument, "There aren't many things we can count on in the world these days but we still do assume when we close our eyes at night that our purse will stay where we left it, that the knife we used for a last meal before we went to bed will stay on the counter, that our bed sheets, our covers, will stay over us unless a loved one is returning later than expected, that our medicine cabinets will stay firmly in the wall instead of melting out of it from the heat of flames coming out of our own bed after our bodily integrity has been violated." Although Overby waived this claim by failing to object and request a jury admonition (*People v. Hill* (1998) 17 Cal.4th 800, 820), we address his argument nonetheless because he argues that his attorney's failure to object constitutes ineffective assistance of counsel within the meaning of *Strickland v. Washington* (1984) 466 U.S. 668.

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or

reprehensible methods to attempt to persuade either the court or the jury.'"'" [Citation.]' [Citation.]" (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.)

Prosecutors have wide latitude to vigorously argue and fairly comment on the evidence—including reasonable inferences and deductions from that evidence—and may refer to matters of common experience. (*People v. Williams* (1997) 16 Cal.4th 153, 221; *People v. Cunningham* (2001) 25 Cal.4th 926, 1026.) Although prosecutors may neither appeal to jurors' sympathy, passion, and prejudice (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, revd. on other grounds *sub nom*. *Stansbury v. California* (1994) 511 U.S. 318) nor exhort them to place themselves in the victim's position (*People v. Arias* (1996) 13 Cal.4th 92, 160), they are "free to relate the People's theory of the case and to tie the law and evidence together for the jury in a comprehensible, story-like manner. A prosecutor may properly identify the traits that made the victim vulnerable to attack when such characteristics are relevant to the charged crimes, and has no obligation 'to . . . describe relevant events in artificially drab or clinical terms.' [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 975 [not misconduct to describe the victims of a residential robbery and murder as "kind and trusting people" when there was evidence that the defendant took advantage of the victims' trust to commit the crime]; see also *People v. Millwee* (1998) 18 Cal.4th 96, 138 [not misconduct to present a social history of a disabled victim when it had "some logical bearing on the prosecution's theory of murder during the course of robbery and burglary"].) When arguing sexual offenses involving the elements of force, fear, and lack of consent, a prosecutor may "argue the existence of those elements in vigorous terms." (*Arias*, at p. 160.)

The argument here was not, as Overby argues, an improper plea to the jurors to convict on the basis of fear or of viewing the crime through the eyes of the victim. Counsel's statement was not tantamount to urging the jurors to imagine themselves being assaulted with a knife (*People v. Simington* (1993) 19 Cal.App.4th 1374, 1378-1379); to consider the suffering and final conscious thoughts of a child sexual assault and murder victim (*People v. Stansbury*, *supra*, 4 Cal.4th at p. 1057); to imagine that the victim was

their child (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1250); to worry about what might happen to their children if the defendant were not convicted (*People v. Jones* (1970) 7 Cal.App.3d 358, 361-363); or to imagine themselves as a young woman being kidnapped, raped, robbed, shot, and slowly dying. (*People v. Fields* (1983) 35 Cal.3d 329, 361-362.)

Instead, the prosecutor emphasized the evidence about what happened in Nancy P.'s home in the course of her argument that no matter what doubt the defense attorney suggested in closing argument, there was no doubt about what happened to Nancy P. or who did it. This sentence was part of the prosecutor's theme that the defendants' guilt clearly emerged when the listener followed the trail of events, objects, and the defendants' conduct. In her next sentence, she encouraged the jury to remain focused on what the evidence revealed: "There's been a lot of questions proposed to a lot of different witnesses in this case and some of those questions went to hypothetical or theoretical or speculative matters, intending to suggest that it's hard to know what we know. And what I'm standing here proposing to you today, ladies and gentlemen, is, no, as a matter of fact, based on our common sense experience in the world, we do know what we know; and we know it through our reason, we know it through our experience, and we apply that when we listen to facts, read the law, and see how that leads us to our conclusions." The prosecutor urged the jury to "look at those items of evidence and that testimony and . . . find[] the order and find[] the logic and form[] your conclusions."

The prosecutor's use of the rhetorical device of what people should be able to assume or count on as a basis for exhorting the jury to fulfill its obligation to return a verdict based on a careful review of the evidence is similar to the prosecutor's argument in *People v. Jones* (1998) 17 Cal.4th 279, 308. In *Jones*, the prosecutor argued, "'[Y]ou know, a woman, going to a mall should be able to go to Penney's and shop, and buy . . . a baby shower gift without being kidnapped, raped, and murdered. I mean, this isn't any better than a terrorist attack. They have something in common. Terrorists don't pick their victims—they pick their victims at random, and so did these two men. . . . People

should be able to go shopping at a mall and not have to endure this. So we all say "They should do something." . . . Well, guess what? You're the "they."'" (*Ibid*.) The Supreme Court held that this argument was a proper part of a legitimate argument reminding the jurors of their obligation to render a verdict based on the evidence. (*Id*. at p. 309.) The reference to terrorists was a fair and forceful argument on the elements of force, fear, and lack of consent. (*Ibid*.) Both here and in *Jones*, counsel emphasized the reasonableness of the common assumption that we can proceed with our daily lives without becoming the victims of violent crime in the course of underscoring the jury's obligation to return "'a true verdict based on the evidence in the case,'" as the *Jones* prosecutor said (*ibid*.), or as counsel here argued, "to listen to facts, read the law, and see how that leads to our conclusions."

This reference to common experience, discussion of the vulnerability of the victim, and recitation of the evidence of Overby's conduct, made in the context of urging the jury to follow the evidence to construct a chronological account of the defendants' crimes and draw conclusions accordingly, was not an improper appeal to the sympathies, passions, or fears of the jury. The prosecutor did not commit misconduct and Overby's counsel did not provide ineffective assistance by failing to object.

VI. Section 654

Overby contends that section 654 requires his sentence for first degree robbery to be stayed because he was also sentenced for first degree burglary. Section 654 bars punishment under multiple statutory provisions when a defendant engages in an indivisible course of conduct involving a single criminal objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "The divisibility of a course of conduct depends upon the intent and objective of the defendant. If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each

objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

The trial court's factual determination that a defendant entertained multiple criminal objectives "must be sustained on appeal if supported by substantial evidence." (*People v. Osband* (1996) 13 Cal.4th 622, 730.) Although Overby argues that to punish him for robbery and for burglary when the felonious intent underlying the burglary was theft amounts to two punishments for one single intent, substantial evidence supports the trial court's ruling that the burglary and robbery were not part of an indivisible course of conduct motivated by a single goal but were separate events with different intents.

The record supports the conclusion that Overby's initial motivation of burglary changed into the intent to rob and sexually assault Nancy P. once he discovered that she was sleeping alone in her bedroom. There was no evidence that Overby knew anyone was present when he entered Nancy P.'s darkened house. If Overby had intended to assault or rob individuals in the home, presumably he would have brought a weapon and/or materials with which to bind those individuals, and he would have located, attacked, and restrained the residents of the home immediately so that he could steal at leisure without risk of being apprehended. Here, however, there was no evidence that Overby was armed or that his first action was to seek out and attack Nancy P.; to the contrary, he searched the house and took valuables before taking a knife from the kitchen and assaulting her. From this the trial court reasonably concluded that Overby's initial intent was to steal valuables from Nancy P.'s home, just as Overby had done earlier at the nearby Conkey residence. Overby accomplished that objective when he entered the house, searched for valuables, and removed stamps from the office and money from Nancy P.'s purse.

The record evinces a change in Overby's intent once he noticed a sleeping, vulnerable, female victim. Rather than attempt to steal her jewelry without waking Nancy P., Overby armed himself with a knife from the kitchen and attacked her. He used items he found at the house to bind and gag her, and searched the house for an accelerant

to burn and destroy the evidence. The court reasonably inferred from this evidence that when Overby found Nancy P. sleeping alone in her bedroom he decided to attack, sexually assault, and rob her.

As the record supports the trial court's findings that the residential robbery and burglary were transactionally divisible, motivated by different criminal objectives, and not merely incidental to one another, Overby's sentence for first degree robbery does not violate section 654. (*People v. Green* (1985) 166 Cal.App.3d 514, 518 [no section 654 violation to punish for both burglary and robbery when entry was with intent to steal but intent to rape and rob developed when victim was found sleeping in her bedroom].)

VII. Cumulative Error

Overby's final argument is that the cumulative effect of the claimed errors created prejudice of federal constitutional magnitude. While the cumulative effect of multiple errors may constitute a miscarriage of justice (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1236), "[i]f none of the claimed errors were individual errors, they cannot constitute cumulative errors. . . ." (*People v. Beeler*, *supra*, 9 Cal.4th at p. 994.)

VIII. *Blakely v. Washington*

In his petition for rehearing, Overby requests that the case be remanded for resentencing because under *Blakely*, *supra*, 524 U.S. ____, 124 S.Ct. 2531, the trial court lacked the authority to impose consecutive sentences without a jury trial on the factors justifying their imposition. The Attorney General contends that the issue was waived by Overby's failure to object in the trial court. Overby, who was sentenced prior to the Supreme Court's *Blakely* decision, would have had little reason to object to his sentence on jury trial grounds, for prior to *Blakely* the California and federal courts consistently held that there was no constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. For Overby to have challenged the imposition of consecutive sentences would not have achieved the purpose of prompt detection and correction of error in the trial court. Moreover, because *Blakely* had not yet been decided, Overby cannot be said to have knowingly and intelligently waived the right to a

jury trial relating to the imposition of a consecutive sentence by failing to raise such an objection at the sentencing hearing. Overby has neither waived nor forfeited this issue. (*People v. Juarez* (2004) ___Cal.App.4th ___ [21 Cal.Rptr.3d 75, 86-90]; *People v. George* (2004) 122 Cal.App.4th 419, 424; *People v. Barnes* (2004) 122 Cal.App.4th 858, 876-879; *People v. Butler* (2004) 122 Cal.App.4th 910, 918-919; *People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1580-1583; *People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1369 (*Vaughn*); *People v. Picado* (2004) 123 Cal.App.4th 1216, ___ [20 Cal.Rptr.3d 647, 660] (*Picado*); see also *People v. Shaw* (2004) 122 Cal.App.4th 453, ___, fn. 9 [18 Cal.Rptr.3d 766, 768, fn. 9].)

Overby's consecutive sentencing objection is unavailing, however, for *Blakely* and *Apprendi*—both of which involved convictions on single counts—do not apply to California's consecutive sentencing scheme. This issue is presently pending before the California Supreme Court in *People v. Black* (review granted July 28, 2004, S126182). Several appellate courts have held that *Blakely* does not apply to the discretionary imposition of consecutive sentences. (*People v. Dalby* (2004) 123 Cal.App.4th 1083, 1102-1103 (*Dalby*); *Picado*, *supra*, 123 Cal.App.4th at p. ___ [20 Cal.Rptr.3d 647, 668-669]; *Vaughn*, *supra*, 122 Cal.App.4th at pp. 1370-1372.)

Pursuant to *Blakely*, "'[o]ther than the fact of a prior conviction, 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.'" (*Blakely, supra*, 124 S.Ct. at p. 2536, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) Consecutive sentencing falls outside *Blakely* because it does not increase the penalty for any crime beyond the prescribed statutory maximum; it merely establishes the manner in which each statutory sentence is served.

By its own terms, the *Blakely* decision does not impugn all judicial factfinding in the course of the court's discretionary selection of a sentence. *Blakely* is implicated when judicial factfinding as a basis for exercising sentencing discretion pertains to "whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar

as judicial impingement upon the traditional role of the jury is concerned." (*Blakely*, *supra*, 124 S.Ct. at p. 2540.) No legal right to a lesser sentence is involved here. Unless a specific statutory scheme applies, under California law, when a person is convicted of two or more crimes, the trial court has discretion to sentence the defendant concurrently or consecutively. (§ 669.) While multiple sentences are by default concurrent if they are not specified as consecutive (*id*.), and trial courts are required to state the reasons for their sentencing choices (§ 1170, subd. (c)), neither of these sentencing rules creates a presumption of or a legal entitlement to concurrent sentencing. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923; *Dalby*, *supra*, 123 Cal.App.4th at p. 1103; *Picado*, *supra*, 123 Cal.App.4th at p. ___ [20 Cal.Rptr.3d 667, 669].) As Overby had no legal right or entitlement to concurrent sentences, the trial court's exercise of its discretion to impose the sentences consecutively did not constitute a *Blakely* violation.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

ZELON, J.

I concur:

WOODS, J.

JOHNSON, J., Concurring and Dissenting.

I concur in the judgment and the rationale of the majority decision in all respects except its treatment of the *Blakely* issue involving section 654 and the consecutive sentences imposed on the burglary and robbery counts. I write separately but briefly to explain why I am compelled to disagree on that issue. As the majority opinion itself explains "Section 654 bars punishment under multiple statutory provisions when a defendant engages in an indivisible course of conduct involving a single criminal objective.[4] . . . 'On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'[5]" (Maj. Opn. at p. 18.)

I agree with my colleagues – the factual issue is the defendant's mens rea, his mental state – during the course of criminal conduct. That is, did he entertain a "single criminal objective" or "multiple criminal objectives" while engaged in this crime? Where we part company is over who should make that factual finding about the defendant's mens rea? My colleagues say it is the judge's proper role and they certainly are correct under California statutory law. In my view, however, that statutory law is unconstitutional to the extent it assigns this vital factual finding about the current offense to a judge rather than a jury. It is unconstitutional because, inconsistent with the U.S.

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4 The majority cites the seminal case of *Neal v. State of California* (1960) 55 Cal.2d 11, 19, for this proposition.

5 *People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.

Supreme Court's opinion in *Blakely*,[6] it allows the trial court to itself make the findings required to impose a sentence higher than it could impose solely on the jury's findings.

Before *Blakely*, it was possible to conclude California's consecutive sentencing scheme did not violate *Apprendi v. New Jersey*.[7] After all, the jury would already have found the defendant guilty of both offenses, the sentences of which the trial court combined, if the judge decided the defendant entertained multiple rather than a single objective when committing those crimes. Thus, the consecutive sentence merely added together two sentences the jury's two convictions carried and thus, in a sense at least, did not exceed the maximum total sentence the jury verdict had authorized.

But this rationale collapses under *Blakely*. In that opinion, the Supreme Court makes it abundantly clear the "maximum sentence" a judge may impose is not the very highest sentence the Legislature has set for a given offense (or pair of offenses). Instead, as the *Blakely* court held, "[o]ur precedents make clear, . . . that *the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant.* . . . In other words, the relevant '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*. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,'. . . and the judge exceeds his proper authority."[8]

In the context of section 654, it appears difficult to deny a judge cannot impose a consecutive sentence without making "additional findings" of fact beyond those "reflected in the jury verdict." After all, the jury did not decide the defendant had multiple objectives. Nor can it be implied from the jury's verdict the defendant

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6 *Blakely v. Washington* (2004) 524 U.S. ___ [124 S.Ct. 2531].

7 *Apprendi v. New Jersey* (2000) 530 U.S. 466.

8 *Blakely, supra*, 124 S.Ct. at page 2537, italics added.

possessed more than one objective. All the jury verdict decided is that the defendant violated two criminal statutes in the course of committing the crime.

Indeed in this instance the finding the trial judge makes is at the heart of the jury's ordinary responsibility – determining the defendant's mens rea while committing the crime. Without peering into the defendant's mind and divining he pursued not one but two objectives while carrying out this course of criminal conduct, the trial court cannot add the two sentences together. Moreover, as a result of the trial court's unilateral factual finding about the defendant's mens rea, the latter may see his punishment doubled or nearly doubled beyond the "maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict."

The trial court's factual finding here closely resembles the sort of factual finding the Supreme Court decided belonged with the jury not the judge in *Apprendi* – the defendant's mens rea. In *Apprendi*[9] it was the defendant's motive – racial hatred – the judge found and used to increase the defendant's sentence. Here it is the judge's finding the defendant had dual motives not a single motive which the trial court used to justify an increased sentence. The fact the mechanism for increasing the sentence in one case is an "enhancement" and in the other a "consecutive sentence" does not seem constitutionally relevant. In both instances, a trial court is imposing a higher sentence that depends on the judge not the jury deciding facts about what the defendant was thinking when he committed the crime.

In the instant case, the trial court found the appellant entered the victim's home with one criminal objective – simply to surreptitiously steal some property. But then he developed a second objective, to sexually assault and rob her. I concede the evidence of dual (or triple) objectives was sufficient to support the trial court's finding and resulting imposition of a consecutive sentence on the robbery count. But I do not find that evidence so overwhelming a reasonable juror would be precluded from entertaining a

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9 *Apprendi v. New Jersey, supra,* 530 U.S. 466.

reasonable doubt about appellant's objectives. The fact he had only stolen property when he burglarized a male victim's house does not mean he initially entered this female victim's home for a similar limited purpose. Accordingly, although to my mind this harmless error issue is the closer question, I am unable to conclude the error was not prejudicial in the circumstances of this case.

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JOHNSON, Acting P. J.