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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. STEVEN LEE MYRICK, Defendant and Appellant.	B204137 (Los Angeles County Super. Ct. No. YA064357)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie C. Brenan and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, Steven Lee Myrick was convicted of burglary and two counts of forcible rape with several enhancements. Because of Myrick's prior serious felonies, he was sentenced to two 45-year-to-life indeterminate terms, plus a 19-year determinate term. He argues that the prosecutor improperly dismissed a potential juror who was Black and committed prosecutorial misconduct during her closing argument. He also argues that his sentence constitutes cruel and unusual punishment. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On June 18, 2000, Stephanie and her boyfriend, Matthews, were living together.[1] That night, Matthews's friend, Jerome Blackburn, asked if he could use Matthews's phone, and Matthews let Blackburn into the apartment. About a minute after Blackburn entered the apartment, appellant Myrick and Kenneth Dobson entered the apartment without Matthews's permission. Blackburn, Dobson, and Myrick were all members of the PJ Watts Crips gang.

Myrick put a gun to Matthews's head, and the three men asked Matthews "[w]here is the money?" Matthews understood this question to refer to money a friend of his and of Blackburn's had entrusted briefly to Matthews's care. Myrick held a gun to Matthews's head and led Matthews into the bedroom where the men tied Matthews with a phone cord, placed speakers on his legs, hit him in the head and face with the gun, and kicked him several times.

Stephanie had been sleeping in the bedroom when the three men entered the apartment. She awoke when Myrick entered the bedroom and pointed his gun at her head. Blackburn and Dobson ordered Stephanie onto the floor and blindfolded her with a T-shirt. Stephanie recognized Blackburn's voice but did not know the

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[1] We do not use the victims' full names in order to protect their identity.

other men. Blackburn said "where is the baby?" "kill the baby" and Stephanie understood him to be referring to her niece, who had been at the apartment when Blackburn visited a few days earlier.

Still blindfolded, Stephanie was dragged into the bathroom by her hair. In the bathroom, one of the men put his penis inside her vagina against her consent; ordered her to sit down on him; and penetrated her vagina a second time without her consent. Later, when she was still blindfolded, Stephanie was ordered to sit on the dining room table and one of the men put his penis in her vagina against her consent. Blackburn, Dobson, and Myrick ransacked the apartment and took several items including Stephanie's jewelry.

Matthews identified Myrick as one of the men who entered the apartment without his permission. An expert forensic serologist testified that DNA taken from Stephanie's vagina and genitalia indicated that there was a 1 in 102 quadrillion chance that the semen belonged to someone other than Myrick. There was a 1 in 40 quadrillion chance that the semen belonged to another African American.

Myrick was charged with first degree residential burglary (Pen. Code, § 459) and two counts of forcible rape (Pen. Code, § 261, subd. (a)(2)).[2] It was alleged that each offense constituted a serious offense within the meaning of section 1192.7, subdivision (c) and that the two rape counts also constituted violent felonies within the meaning of section 667.5, subdivision (c). Gang enhancements pursuant to section 186.22, subdivisions (b)(1) and (b)(4) were alleged. It was alleged that, in the commission of each offense, a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1). With respect to the rape counts, it was alleged that Myrick engaged in the tying and binding of the

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[2] Undesignated statutory citations are to the Penal Code.

victim within the meaning of section 667.61, subdivisions (a) and (d), and that he committed the offense while committing a burglary within the meaning of section 667.61, subdivision (b). Four prior strike convictions were alleged, and it was alleged that each prior strike was a serious felony conviction. Four prior prison terms were alleged within the meaning of section 667.5, subdivision (b).

A gang expert opined that the crimes were committed for the benefit of a street gang, but acknowledged on cross-examination that the primary objective was robbery. No witness testified for the defense.

A jury found Myrick guilty of first degree burglary and found a principal was armed in that offense and that the offense was committed for the benefit of a gang within the meaning of section 186.22, subdivision (b)(1). The jury found Myrick guilty of two counts of forcible rape, and that a principal was armed in that offense and Myrick engaged in the tying or binding of the victim and committed the offense during the commission of a burglary. The jury rejected the gang allegations with respect to both counts of rape.

In a court trial on Myrick's priors, evidence showed that in 1988, Myrick was convicted of attempted robbery and robbery. The same year, he was convicted of possession of cocaine. In 1992, Myrick was convicted of attempted robbery. Also in 1992, he was convicted of possessing an illegal substance while in jail and of attempted robbery. The court found the alleged priors to be true.[3] The court

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[3] The probation report indicates that Myrick had a juvenile history dating back to 1984. In addition to his priors proven before the court, the probation report also lists the following convictions: unlawfully fighting or making disturbing noises (January 2004); resisting or obstructing a police officer (June 2004); resisting or obstructing a police officer and indecent exposure (December 2004); contempt of court (July 2005); and bringing a controlled substance into prison (July 2005).

denied Myrick's *Romero* motion. (*People v. Superior Court (Romero*) (1996) 13 Cal.4th 497.)

For the first degree burglary, Myrick was sentenced to prison for 25 years to life. That sentence was stayed pursuant to section 654. With respect to count two (rape), the court ordered a 45-year-to-life indeterminate sentence, plus a 13-year determinate term. With respect to count three (rape), the court ordered a consecutive 45-year-to-life indeterminate sentence, plus a six-year determinate term. The total sentence was 90 years to life plus 19 years. Myrick timely appealed.

DISCUSSION

Myrick argues (1) the prosecutor improperly used a peremptory challenge to eliminate a Black woman from the jury panel; (2) the prosecutor committed misconduct; and (3) his sentence constitutes cruel and unusual punishment under both the federal and state Constitutions. The Attorney General disputes each contention.

1. *Jury Selection*

A prosecutor's use of a peremptory challenge to strike a prospective juror because of the juror's race violates a defendant's right to have a jury from a representative cross-section of the community under the California Constitution and violates a defendant's right to equal protection under the federal Constitution. (*People v. Avila* (2006) 38 Cal.4th 491, 541, citing *People v. Wheeler* (1978) 22 Cal.3d 258, 276 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79, 85 (*Batson*).) A three-step process is employed for determining whether a peremptory challenge is based on an unconstitutional ground. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise

to an inference of discriminatory purpose.' [Citation.]" (*Johnson v. California* (2005) 545 U.S. 162, 169.) In the first step, the defendant must show that he or she is a member of a cognizable racial group and that the prosecutor has removed members from the jury venire of that group. "Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations]. Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.'" (*Id*. at p. 168.) In the third step, the court evaluates the persuasiveness of the constitutional claim and the burden of persuasion rests with the defendant. (*Id*. at p. 171; *People v. Stevens* (2007) 41 Cal.4th 182, 192.)

a. *Background Facts*

Two separate jury panels were called. The first panel included two or three potential Black jurors. The prosecutor used a peremptory challenge to strike one of the potential Black jurors, and defense counsel agreed that the prosecutor had a nondiscriminatory reason for the use of that peremptory. Defense counsel challenged the prosecutor's dismissal of Juror No. 1, another Black female.

Juror No. 1 was single, had one child, and worked as an administrative assistant. She had no prior jury service. The prosecutor accepted the panel with Juror No. 1 several times before eventually exercising a peremptory challenge to excuse her.

The court found a prima facie showing of discrimination, and in response the prosecutor explained her reasons for excusing Juror No. 1 as follows: "I have been watching that particular juror even as I accepted and watching her body language. I watched her. She was extremely receptive to the defense when he made the

joke . . . about the Klansman. . . . And a number of times, she has made eye contact with me since I accepted and has not only not smiled but has sort of given me what I call a dirty look or not a very inviting look."[4] The prosecutor also noted that Juror No. 1 was single, had never served on a jury, and appeared to have limited life experience. Finally, the prosecutor noted that she had, on at least three prior occasions, accepted the jury as then constituted, including Juror No. 1; only after another young juror had been excused, leaving Juror No. 1 "by far, by many, many years" the youngest, did the prosecutor elect to exercise her peremptory challenge. After hearing from both counsel, the court deferred ruling on the motion until the following day, when additional potential jurors would be present to supplement the venire.

The next day, the prosecutor further clarified her race-neutral reasons for exercising a peremptory challenge to excuse Juror No. 1. She reminded the court that she initially accepted the panel with Juror No. 1 and had done so repeatedly. Only after observing that Juror No. 1 continued to be "very responsive to the defense and . . . very nonresponsive towards me" and after seeing that defense counsel's challenge to another juror had left Juror No. 1 "probably . . . 15 years younger than the rest," did the prosecutor determine to exercise her challenge.

The court, while noting that the composition of the supplemental venire would not be pivotal in its decision, waited for the additional jurors to arrive. After observing that there appeared to be at least two Black males in the pool and

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[4] During voir dire, defense counsel asked the prospective jurors if they could give Adolph Hitler a fair trial. He continued: "I'm a defense attorney, and obviously I'm defending a person accused of a crime. And I've come across my share of people who have participated in what are called street gangs. . . . But do you punish people merely for association? For example, if you were a Klansman, would you want me to treat you unfairly under the law?" An objection was then sustained.

possibly more, the court ruled that "[b]ased upon [the prosecutor's] argument and explanation and [defense counsel's] argument, the [*Batson/Wheeler*] motion is denied."

b. Analysis

We review the trial court's ruling for substantial evidence. (*People v. Avila, supra*, 38 Cal.4th 491.) "It is presumed that the prosecutor uses peremptory challenges in a constitutional manner, and we give deference to the court's ability to distinguish 'bona fide reasons from sham excuses.'" (*Id*. at p. 541.) "As long as the court makes 'a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.'" (*Ibid*.) We defer to the trial court's credibility determinations. (*People v. Stevens, supra,* 41 Cal.4th at p. 198.) "The best evidence of whether a race-neutral reason should be believed is often 'the demeanor of the attorney who exercises the challenge,' and 'evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."'" (*Ibid.*)

We assume that the court correctly found a prima facie case of discrimination, an issue neither side challenges.[5] We focus only on whether Myrick demonstrated purposeful discrimination in the third step. The trial court credited the prosecutor's explanation, in which she relied primarily on the behavior of Juror No. 1, which appeared more favorable to defense counsel than to the prosecutor, as well as on the juror's youth and inexperience. That credibility determination was within the province of the trial court. (*People v. Stevens, supra*, 41 Cal.4th at p. 198.)

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[5] Myrick does not identify his race, but the record indicates that he is Black.

The trial court was also entitled to consider the record, specifically, the fact that the prosecutor had repeatedly elected to accept the panel "as presently constituted" when Juror No. 1 was still a member. (See *People v. Reynoso* (2003) 31 Cal.4th 903, 926 ["Although not a conclusive factor, 'the passing of certain jurors may be an indication of the prosecutor's good faith in exercising [his/her] peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection . . . .' [Citations.]"].) Similarly, the prosecutor was permitted to exercise a peremptory challenge on the basis of the potential juror's nonverbal behavior and rapport with defense counsel. (*People v. Stevens, supra,* 41 Cal.4th at p. 198; *People v. Johnson* (1989) 47 Cal.3d 1194, 1217-1219.) Contrary to Myrick's suggestion that the court was required to give credence to his counsel's claim that "all the other jurors on the panel laughed at his joke," we defer to the trial court to resolve conflicting characterizations of the events it observed. Finally, the prosecutor's reliance on the juror's youth was not improper, as young persons are not a cognizable group under *Batson/Wheeler*. (*People v. Lewis* (2008) 43 Cal.4th 415, 482.) Thus, Myrick has shown no error in the trial court's crediting the prosecutor's race-neutral reasons for exercising a peremptory challenge against Juror No. 1.

Cases relied upon by Myrick are inapposite. *People v. Silva* (2001) 25 Cal.4th 345, 385 instructs that a trial court "should be suspicious when presented with reasons that are unsupported or otherwise implausible" and *People v. Turner* (1986) 42 Cal.3d 711, 723-725 warns that a prosecutor's unsupported reasons undermine his or her explanation. Here, the prosecutor's reasons were neither unsupported nor implausible. Nor was this a case in which the court failed to determine to which juror the prosecutor's explanation for her challenge applied. (Cf. *People v. Fuentes* (1991) 54 Cal.3d 707, 721 [trial court failed to determine if

the prosecutor's reasons applied to each juror sought to be excused].) Here, the prosecutor's explanation obviously applied only to Juror No. 1.

Finally, we reject Myrick's argument that the court failed to evaluate the prosecutor's reasons for exercising the peremptory challenge. As appellant concedes, the court is not required "to make explicit and detailed findings for the record." (*People v. Reynoso, supra,* 31 Cal.4th at p. 929.) The trial court heard extensive argument from both counsel on two separate occasions and deferred its decision overnight before issuing its ruling, which evidently credited the prosecutor's explanation. No more was required, and nothing in the record below suggests the court did not make a "sincere and reasoned attempt" to evaluate the prosecutor's explanation.

2. *Prosecutorial Misconduct*

Myrick contends that the prosecutor committed misconduct in her rebuttal argument when she allegedly (1) disparaged defense counsel and (2) shifted the burden of proof to defendant. Appellant timely objected in the trial court, but did not request any admonition to the jury.

"'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."'" [Citations.]'" (*People v. Hill* (1998) 17 Cal.4th 800, 819; see also *People v. Carter* (2005) 36 Cal.4th 1215, 1263.)

Where prosecutorial misconduct is shown, a judgment will be reversed only if there is a miscarriage of justice. (*Hill*, at p. 844.)

a. *Comments Allegedly Disparaging of Defense Counsel*

Myrick contends the following argument made by the prosecutor in her rebuttal argument constituted misconduct: "As I listened to that argument by the defendant's lawyer and I wondered as I wondered for the years that I've handled this particular case what in the world the defense would be because how do you truly defend the absolutely indefensible when the evidence is as overwhelming as it is in this case. So the defendant's lawyer did what they usually do in cases and they just throw up a whole bunch of crap and hope it sticks to one of you." When, following defense counsel's objection and a sidebar conference, the court instructed the prosecutor to "clean up" her argument, she stated, "[t]he defense threw up a whole bunch of different theories and hope that one of them sticks for one of you. From what I can understand, there are about six different reasons, according to defendant's lawyer, that you should find his client not guilty."

A prosecutor may not argue that defense counsel fabricated or manipulated evidence. (*People v. Bemore* (2000) 22 Cal.4th 809, 846) However, a prosecutor may focus on the deficiencies in the defense case, and may, for example, argue that defense counsel "'obscure[d] the truth'" to "'manufacture doubt'" where none existed. (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1781.) In a similar context, our Supreme Court has held that a prosecutor's argument that "'any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something . . . .'" did not constitute misconduct. (*People v. Medina* (1995) 11 Cal.4th 694, 759.) Here, the prosecutor focused on the deficiencies in the defense case; she did not argue that defense counsel fabricated or manipulated evidence.

Although the gist of the prosecutor's argument was appropriate, her language was not. As Myrick correctly observes, every member of the bar is required to maintain the respect due to the courts. (Bus. & Prof. Code, § 6068, subd. (b); *People v. Hill, supra*, 17 Cal.4th at p. 832.) "'Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve.'" (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1076.) The prosecutor's argument that "defendant's lawyer did what they usually do in cases and they just throw up a whole bunch of crap" was intemperate and undignified. Using the word "crap" is similar to using an epithet, which is disapproved in arguments to the jury. (*People v. Harrison* (2005) 35 Cal.4th 208, 258-259 [disapproving argument that defendant was a "'rotten, nasty, S.O.B. and M.F. . . .'"])

The brief reference in this case, although inappropriate, was not likely to impact the jury and was corrected by the prosecutor after defense counsel's objection and the court's directive. (See *People v. Harrison, supra*, 35 Cal.4th at p. 259.) Any residual impact on the jury not already mitigated could have been cured by an admonition, which was not requested, and was therefore forfeited. (See *People v Carter, supra,* 36 Cal.4th at p. 1263 [defendant may not complain on appeal of prosecutorial misconduct unless he objected in a timely fashion and requested the jury be admonished to disregard the impropriety].)

b. *Alleged Shifting of the Burden of Proof*

During her rebuttal argument, the prosecutor discussed the DNA evidence and argued that defense counsel had had time to cross-examine the prosecution's

expert, Gary Harmor, a forensic serologist.[6] "If he didn't believe that at nine markers and then a totally separate test done at all 15 markers was accurate and true, he knew that that rape kit was in evidence. There were a number of swabs there waiting and available as Flynn Lamas [a criminalist at the Los Angeles County Sheriff's Department's crime laboratory] told you and as Gary Harmor told you, for the defense to request, get their own lab and do their own testing." Myrick contends the foregoing argument constituted prosecutorial misconduct.

It is improper for a prosecutor to suggest that he or she does not have the burden of proving every element and to suggest that there must be some affirmative evidence demonstrating a reasonable doubt. (*People v. Hill, supra,* 17 Cal.4th at p. 831.) In contrast, a prosecutor may comment on the failure of the defense to introduce material evidence, the failure to call a rebuttal witness, and the failure to call logical witnesses. (*People v. Carter, supra,* 36 Cal.4th at p. 1266; *People v. Medina, supra,* 11 Cal.4th at p. 758; *People v. Hughes* (2002) 27 Cal.4th 287, 372.)

Here, the prosecutor's suggestion that Myrick had failed to rebut the prosecution's DNA evidence was a proper comment on material evidence. There was testimony that the lab analyzing the DNA tried "to preserve the sample so both

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[6] "'DNA analysis . . . is a process by which characteristics of a suspect's genetic structure are identified, are compared with samples taken from a crime scene, and, if there is a match, are subjected to statistical analysis to determine the frequency with which they occur in the general population.' [Citation.] '[O]nce analysis and comparison result in the declaration of a "match," the DNA profile of the matched samples is compared to the DNA profiles of other available DNA samples in a relevant population database or databases in order to determine the statistical probability of finding the matched DNA profile in a person selected at random from the population or populations to which the perpetrator of the crime might have belonged.' [Citation.]" (*People v. Wilson* (2006) 38 Cal.4th 1237, 1242.)

prosecutors and defense can both attempt to analyze it themselves, or have a private lab to analyze it for them." There was also testimony from the sergeant who collected Myrick's DNA that it was his "practice to try to get as much as I can in the event that additional tests need to be done in the future or in the event an additional crime lab such as the public defender's office would wish to examine that as well." Additionally, the prosecutor's argument was an appropriate response to defense counsel's argument that the DNA evidence was not credible.[7] Her argument did not improperly shift the burden of proof to Myrick as she was simply urging the jury to consider the DNA evidence presented.

Even assuming the jury could have understood the prosecutor to be arguing that Myrick had a duty to present evidence, there was no prejudice. Myrick's premise that this was "a close case" is belied by the record. Putting aside the gang allegations rejected by the jury, the evidence of the burglary and the two counts of forcible rape was overwhelming. Matthews identified Myrick and Myrick's DNA was found in Stephanie's vagina. It is "'clear beyond a reasonable doubt that the jury would have returned a verdict of guilty' [citation] even if the prosecutor had not made the comment at issue." (*People v. Carter, supra,* 36 Cal.4th at p. 1267.)

3. *Cruel and Unusual Punishment*

Myrick argues that his sentence of two consecutive 45-year-to-life indeterminate terms, plus a 19-year determinate term constitutes cruel and unusual punishment. We disagree. Although Myrick did not raise this issue adequately in

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[7] Defense counsel argued the DNA evidence was like "monopoly money." "Right here in court I'm telling you do not accept this monopoly kind of money because he didn't explain to you what were the calculations he used to get to this number."

the trial court, we consider it to forestall a claim of ineffective assistance of counsel.[8] (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

The Eighth Amendment to the federal Constitution proscribes "cruel and unusual punishment [and] contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. 11, 20.) A proportionality analysis requires consideration of three objective criteria, which include "'(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.' [Citation.]" (*Id*. at p. 22, quoting *Solem v. Helm* (1983) 463 U.S. 277, 292.) "'[F]ederal courts should be reluctant to review legislatively mandated terms of imprisonment, and . . . successful challenges to the proportionality of particular sentences should be exceedingly rare.'" (*Ewing v. California, supra*, 538 U.S. at p. 22; see also *Lockyer v. Andrade* (2003) 538 U.S. 63, 77 ["The gross disproportionality principle reserves a constitutional violation for only the extraordinary case"].)

The purpose of recidivist statutes is "to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." (*Rummel v. Estelle* (1980) 445 U.S. 263, 284.)

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[8] Myrick mentioned the Constitution in a footnote in his *Romero* motion. The brief perfunctory citation contained no argument in support of it and was not sufficient to preserve the issue, which the trial court never discussed. (*People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.)

The standard under the state Constitution to determine whether a sentence is cruel or unusual is similar to the test under the Eighth Amendment of the federal Constitution: a punishment may be cruel or unusual if it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) To analyze this, we look at the nature of the offense and the offender as well as compare the punishments imposed within California for more serious offenses and in other jurisdictions for similar offenses. (*Id.* at pp. 425-428; see also *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.) With respect to the nature of the offense and nature of the offender, courts may consider the facts of the crime in question including the motive, the manner, the defendant's involvement and the consequences, as well as the facts of the offender, including his culpability, prior criminality and state of mind. (*People v . Dillon* (1983) 34 Cal.3d 441, 479.)

Under the federal Constitution, sentencing a three-time offender to a life sentence was not cruel and unusual punishment where the crimes included fraudulent use of a credit card, passing a forged check, and felony theft, which together totaled less than $300. (*Rummel v. Estelle, supra,* 445 U.S. at pp. 284-285.) Under the California "Three Strikes" law (§ 667, subds. (b)-(i)), it was not cruel and unusual punishment to sentence a recidivist criminal to 25 years to life where the triggering offense was the theft of three golf clubs. (*Ewing v. California, supra,* 538 U.S. at pp. 30-31.) A term of 40 years for possession with intent to distribute and distribution of marijuana was not cruel and unusual punishment. (*Hutto v. Davis* (1982) 454 U.S. 370.) Under the state Constitution, the imposition of a 61-year-to-life term for an offender convicted of two counts of residential burglary with two prior convictions for the same offense was not cruel or unusual. (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1415-1416, disapproved on another ground in *People v. Dotson* (1997) 16 Cal.4th 547, 559,

560, fn. 8.) A sentence of 25 years to life for an ex-felon in possession of a handgun who had two prior robbery convictions was not cruel or unusual punishment. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 828.)

No factor suggests that Myrick's sentence was unconstitutional under either the federal or state Constitution. Myrick committed burglary and two counts of forcible rape after having been previously convicted of four serious felonies and after having amassed an extensive criminal history dating back to 1984 from which he failed to learn or reform his behavior. "In weighing the gravity of [Myrick's] offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions." (*Ewing v. California, supra*, 538 U.S at p. 29; see also *People v. Martinez, supra*, 71 Cal.App.4th at p. 1511.) The offenses were violent, causing trauma and injury to two victims. (*People v. Alvarado, supra*, 87 Cal.App.4th at p. 200 [substantial trauma is caused by having one's home invaded and being sexually assaulted].) The offenses were committed with the use of a gun, and the burglary was committed to benefit Myrick's gang.

Myrick's argument that his sentence is greater than someone in California who committed first degree murder is unpersuasive because it fails to account either for Myrick's recidivism or for his multiple convictions. It is appropriate to punish a repeat offender more severely than a first-time offender and Myrick fails to make any relevant comparison. (*People v. Martinez, supra*, 71 Cal.App.4th at pp. 1511-1512.) In any event, the potential penalty for first degree murder is the death penalty, a sentence greater than Myrick's. (*People v. Cooper, supra*, 43 Cal.App.4th at p. 826; § 190, subd. (a).) If Myrick had been a first-time offender and had committed only one crime, his sentence would have been less

than the minimum 25-year-to-life sentence for a first degree murder. (§ 190, subd. (a).)

Myrick makes no comparison of his sentence to the sentences in other jurisdictions for the same or similar crimes applied to a defendant with a lengthy criminal history. Although California's sentencing scheme represents an aggressive approach to punishing and deterring rape in the commission of a burglary, the resulting sentences are "not irrational or obviously excessive punishment for rape during a burglary." (*People v. Alvarado, supra,* 87 Cal.App.4th at p. 200.) Nor are the lengthy sentences under California's Three Strikes law unconstitutional. (*Ewing v. California, supra*, 538 U.S. at p. 25; *People v. Cooper, supra*, 43 Cal.App.4th at pp. 827-828.) Myrick fails to show that his lengthy sentence for two forcible rapes in the commission of a burglary, where the jury found multiple enhancements and Myrick has multiple prior felonies, was unconstitutional.[9]

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[9] Neither *People v. Dillon, supra,* 34 Cal.3d 441 nor *People v. Deloza* (1998) 18 Cal.4th 585, relied on by Myrick, compels a different result. Myrick's extensive criminal history distinguishes him from the immature, first-time offender in *Dillon*, for whom the high court found an indeterminate life sentence constituted cruel or unusual punishment. (*People v. Dillon, supra,* 34 Cal.3d at p. 478.) In *Deloza*, the majority did not discuss cruel or unusual punishment, and Justice Mosk's expressed belief that a sentence too lengthy to be served in a lifetime violates the state and federal constitutions did not command a majority. (*People v. Deloza, supra,* 18 Cal.4th. at pp. 600-601.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.