Filed 3/27/07 P. v. Johnson CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DANIEL GERARD JOHNSON, Defendant and Appellant.	H029905 (Santa Clara County Super. Ct. No. SS041952A)

While on probation for a 2004 conviction of indecent exposure with a prior conviction and failure to update the required sex offender annual birthday re-registration (former Pen. Code, § 314.1, now § 314, § 290, subd. (a)(1)(D)),[1] defendant Daniel Gerard Johnson was found in violation of probation for consumption of alcohol and new offenses including threatening a peace officer, loitering in or about a public toilet with lewd or unlawful intent, and resisting arrest. (§§ 69, 647, subd. (d) (647(d)), 148, subd. (a).) Defendant received concurrent three-year aggravated terms in state prison on the original charges. On appeal, he challenges the sufficiency of the evidence of loitering with unlawful intent, the constitutionality of the aggravated terms, and the competency of counsel in failing to object to the sentence.

[1] Further statutory references are to the Penal Code unless otherwise stated.

FACTS

Around 8:30 p.m. on June 13, 2005, Helga Ferguson, an off-duty bartender at the Shadow Box bar in Seaside, saw defendant, a familiar figure around the bar, in the bar's rear parking lot as she went into the women's restroom. They did not make eye contact or speak to each other. The outside door to the women's restroom did not have a functioning lock, but the toilet stall doors could be locked and Ferguson did so. As she was sitting on the toilet, she heard the outer door squeak, and thinking it was on-duty bartender Brenda Harris, she called out, "Brenda, is that you?" A deep voice said "um" or "uh-huh" and mumbled or talked. She knew it was not Brenda, and after she called out once again, "Brenda, is that you?" she pulled up her pants, wedged her foot against the door to hold it partially closed, opened it and looked out into the restroom.

Defendant was standing inside the restroom. Ferguson immediately slammed the stall door closed and locked it; she started kicking and pounding to draw the attention of others outside. She could not hear if defendant said anything because she was making so much noise herself. She became hysterical and started crying and screaming. She was "very much" frightened. Eventually, she looked out the stall door again and saw that the restroom entrance door was wide open and defendant was gone. Ferguson did not hear the door squeak or anyone leave because of her screaming. She ran out of the restroom, went behind the bar, and asked the bartender to call the police. Police responded and took a report.

Ferguson stated she thought she was in the stall about a minute before she heard the outer door open. She was unable to estimate how long she was in the stall after seeing defendant in the restroom. She stated she did not have "a clue" as to how much time went by, and she did not know how long she had been kicking and screaming.

Ferguson had seen defendant an hour earlier when he came into the bar and talked to Harris, and she had been in the bar on a prior occasion when defendant periodically went to the restroom and returned, having removed an item of clothing on each trip.

When "it came down to a tank top and three-quarter-long shorts," the bartender (not Ferguson) told defendant to leave. The police were called and a report was made on that occasion. At the contested violation of probation (VOP) hearing, defendant admitted to removing his jacket and sweat pants, but denied removing the tank top.

A week and a half before June 13th, a Seaside police officer had come into the Shadow Box looking for defendant, and the officer asked the employees to call the police if defendant returned to the bar.

A couple of hours after the incident with Ferguson, early on June 14, Seaside Police Officer Nicolas Borges encountered defendant on the corner of Fremont Boulevard and Birch Avenue. Defendant appeared intoxicated, had an odor of alcohol on his breath, and watery and bloodshot eyes. He was uncooperative. Defendant, a "large" and "heavy" person, refused to separate his legs when Borges told him he was to be searched before being put in the patrol car. Borges kicked defendant's legs apart to perform the pat search.

Defendant demanded to be taken directly to the county jail and refused to allow a booking photograph or to enter the booking cell when asked. While police officers forced defendant into the booking cell, he stated, "I'm going to make you all taze me and shoot me and kill me."

As defendant was being transported to the Monterey County jail, he pointed his finger at Borges and said he was "going to kick [Borges's] fucking ass." He made similar threats to assisting officer Charlton. He also told Charlton, "When I see you on the streets, I'm going to beat your fucking ass." While defendant was seated in the patrol car, he spat on the window. Defendant never complained of having injuries and Borges saw none.

At the VOP hearing, defendant admitted going into the Shadow Box bar, but stated he left after a short conversation with the bartender. He went to the parking lot in

the alley behind the bar and spoke to one Henry Burner. Burner said "something about they don't like niggers drinking up in here."

Defendant saw Ferguson walking toward the restroom and recognized her as someone he had seen playing video games at the bar. He called to her, " 'Do you know who the person was that was sitting' . . . And when she seen me, she just went into the bathroom. So I walked down there, and I went to the door and I said, 'Hey, hey, hey.' " Ferguson said something and he thought she was calling his name. He answered, "No, this is Daniel Johnson. . . . Who's the person that said they don't like niggers drinking in here?" Ferguson opened the door and "got all hysterical." He realized she said "Brenda" only after she got hysterical. At that point, he said, "It's just best for me to leave" and "I'm gone."

Defendant said he did not go into the stall and did not try to open that door. "I didn't try to bust the door down or anything. If I did, I could."

Later that night, defendant encountered Borges, whom he described as "hysterical." Borges asked defendant what he was doing there and said that defendant had violated his probation. He told defendant to wait while backup was called, and defendant did. Defendant stated that Borges was afraid of him and "[w]hen he's alone, he keeps his distance," which defendant estimated at about 14 feet.

When other officers arrived, they handcuffed defendant and then kicked his feet "real hard," causing him pain. He told officers that he had bunions and a broken foot. The officers also pulled defendant's hair, scratched him, punched him in the ribs, and slammed his head on the trunk of the patrol car. He asked to be taken to the county jail so his ribs could be x-rayed. He stated he was unable to lie on them for 36 days afterward. Later he showed his injuries from the police encounter to a public defender investigator and photographs were taken. In rebuttal, Borges testified that he did not see any officer kicking defendant other than to separate defendant's legs to conduct a pat

search, scratching or otherwise inflicting any injury on defendant. The struggle to get defendant into the booking cell lasted less than three seconds.

Defendant acknowledged that he was asked to leave the Shadow Box bar on the occasion when he removed some clothing. He explained, "I intimidate people because of my size. And I'm scaring people or whatever. That's what they said." He recognized Ferguson from the previous incident but he never had any "bad contacts" with her. When asked whether she made any derogatory comments about him, he said, "I don't know what people--you know people--I'm in a country bar. I know people talk and they drink and stuff. So I know comments and stuff. Just like people say, you know, you're scaring people or whatever. They come [to] talk to me to see where my mind frame is at, whether I'm going to cause any trouble or whatever, just by the way I look or my appearance." Defendant thought he had a tendency to frighten people although he did not try to do so.

The trial court found defendant in violation of probation for consumption of alcohol, resisting arrest, and loitering about a public toilet with an unlawful purpose and sentenced him to concurrent three-year upper terms in state prison on the 2004 charges. This appeal ensued.

ISSUES ON APPEAL

Defendant contends: (1) the court abused its discretion in finding a violation of section 647(d), because the evidence of "loitering" is insufficient and the prosecution failed to present evidence that he had the requisite purpose in entering the bathroom. (2) The imposition of the upper term sentences violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and defendant's rights to a jury trial and due process under the Sixth and Fourteenth Amendments. (3) Trial counsel was ineffective in failing to object to the court's imposition of upper term sentences without a statement of reasons and without objecting that the court violated defendant's jury trial right articulated by *Blakely*.

SUFFICIENCY OF THE EVIDENCE

"[A] court is authorized to revoke probation 'if the interests of justice so require and the court, in its judgment, has reason to believe . . . that the person has violated any of the conditions of his or her probation.' " (*People v. Rodriguez* (1990) 51 Cal.3d 437, 440, (*Rodriguez*), quoting § 1203.2, subd. (a).) "[F]acts in a probation revocation hearing [are] provable by a preponderance of the evidence." (*Rodriguez*, *supra*, 51 Cal.3d at p. 441.) " '[P]robation may be revoked despite the fact that the evidence of the probationer's guilt may be insufficient to convict him of the new offense.' " (*Id*. at p. 442.)

Trial courts have "very broad discretion in determining whether a probationer has violated probation." (*Rodriguez*, *supra*, 51 Cal.3d at p. 443.) "Such discretion 'implies that in the absence of positive law or fixed rule the judge is to decide a question by his view of expediency or of the demand of equity and justice.' " (*Id*. at p. 445.) " '[O]nly in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation.' " (*Id*. at p. 443.) " 'To reverse a [probation] revocation order, the probationer must establish that the [trial] court abused its discretion.' " (*Id*. at p. 442.)

This case is not extreme and we decline to interfere with the discretion of the trial court in revoking probation. Section 647(d) declares, "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: [¶] . . . [¶] (d) Who loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act."

Defendant declares that there is no evidence he "loiter[ed]," that is, that he "linger[ed] in the designated place[] for the purpose of committing a crime as opportunity may be discovered. [Loitering] excludes the notion of waiting for a lawful purpose." (*People v. Caylor* (1970) 6 Cal.App.3d 51, 56.)

"Linger" has long meant remaining long or being slow in parting while "loiter" is to linger idly or aimlessly. (Webster's New Intern. Dict. (1954) 2d ed. Unabridged, "loiter" p. 1437.) In the criminal context, "idle or aimless" lingering is transmuted to lingering with a "sinister or wrongful" purpose (*In re Cregler* (1961) 56 Cal.2d 308, 311-312)--defined by section 647(d) as "the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act."

The trial court found defendant in violation of probation for consuming alcohol based on the officer's testimony that he had the odor of alcohol on his breath, resisting arrest by refusing to spread his feet apart and threatening Officer Charlton, and "as to the [section] 647(d)," the court stated, "I can't imagine, based on even your own testimony, that you went into the bathroom to confront Ms. Ferguson for any purposes other than an unlawful[2] purpose. So I am finding you violated [section 647(d)] for that reason. But not for the lewd or lascivious purpose."

The trial court did not abuse its discretion in revoking probation as stated above. Defendant went where he did not belong--a public women's restroom for (he said) the purpose of confronting Ferguson inside. He called to her outside and she did not answer him so he followed her inside and stayed there even after she called out the name of her coworker and became frightened.

We found no case and defendant cites us to none that defines "loitering" in terms of a specific length of time or number of minutes which must elapse. Here, defendant remained in the toilet designated for female members of the public (although accessible by anybody) long enough to cause Ferguson fright. When she started making a racket, defendant could reasonably expect that whatever opportunity that had existed for

[2] By order of this court on July 27, 2006, the word "unusual" on page 1345 of the reporter's transcript is corrected to conform with the trial court's pronouncement as reflected in the reporter's notes to read "unlawful."

commission of a crime was at an end since it would be reasonable for someone to investigate the noises, and he left. These circumstances established by a preponderance of the evidence that defendant "loitered."

As to defendant's intent, the trier of fact could consider evidence of defendant's past conduct as well as the circumstances of the offense. "[W]hile evidence of past acts is not admissible to prove 'conduct on a specified occasion' (Evid. Code, § 1101, subd. (a)), it is admissible to prove a disputed fact other than one's propensity to commit a crime, such as intent. (Evid. Code, § 1101, subd. (b).)" (*People v. Superior Court* (*Caswell*) (1988) 46 Cal.3d 381, 396, fn. 5 (*Caswell*).)

The circumstances of the offense supply evidence of defendant's intent. Ferguson testified regarding defendant's unusual conduct in the bar on prior occasions. Defendant was in court on charges of violating probation by indecent exposure with an indecent exposure prior (§ 314) and of failing to update his registration as a sexual offender as required by section 290, subdivision (a)(1)(D). The trial court did not use this information to find that defendant had a lewd or lascivious intent. Indeed, the court expressly rejected drawing that inference. This information was relevant on defendant's willingness to commit acts which he knew to be unlawful and the likelihood in light of the surrounding circumstances that he was in the women's restroom for an unlawful purpose.

Defendant testified that he frightened people. The place he entered was a toilet designated for females where the occupants can be in a physically if not psychologically vulnerable state given the function of the room. Sex segregation in public restroom facilities is by long social usage the norm in this country and is expected by the occupants. It was around 8:30 on a June night; the restroom was inaccessible to the bar from inside the building; and Ferguson was alone. Defendant entered the toilet with an aggressive purpose--he stated he wanted to ask Ferguson about a racial slur which he said

she did not make, that she may or may not have heard, by a person he never described, and with no reason given for the urgency of the confrontation.

The People suggest the court could reasonably infer from defendant's conduct that he intended to harass Ferguson. "Harassment" is " 'a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose. This course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person.' " (*People v. McCray* (1997) 58 Cal.App.4th 159, 169 [discussing an element of the crime of "stalking"]; § 646.9.)[3] While defendant's conduct did not have all the elements of the crime of stalking (for one thing, such conduct happened on only one occasion), the fact the conduct would not support a conviction of section 646.9, subdivision (a), does not alter the fact that defendant exhibited a course of conduct that frightened Ferguson and had no legitimate purpose. That conduct supports the court's finding that defendant had the unlawful purpose required for section 647(d).

Section 647(d) does not require proof that defendant actually committed an independent criminal act. (*Caswell*, *supra*, 46 Cal.3d at pp. 395-396.) "[E]vidence that a probationer has committed another criminal offense during the period of his probation is admissible at a revocation hearing despite the probationer's having been acquitted of the criminal charge at trial." (*Rodriguez*, *supra*, 51 Cal.3d at p. 443.)

The evidence adduced at the VOP hearing clearly establishes by a preponderance of the evidence both that defendant "loitered" and that he had the requisite unlawful

[3] "Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking." (§ 646.9, subd. (a).)

intent. Since the trial court did not err in revoking probation, remand for resentencing is unnecessary on that basis.

SENTENCING

Next, defendant claims that the trial court's selection of upper term sentences violated his Sixth Amendment and due process rights. He cites *Blakely* for the proposition that a factfinding on aggravating circumstances to justify an upper term under California's Determinate Sentencing Law must be submitted to a jury and proven beyond a reasonable doubt. (*Blakely*,[4] *supra*, 542 U.S. 296.)[5]

Defendant also challenges the imposition of upper terms on his 2004 charges. He states that "[b]ecause the middle term is the presumptive sentence under California[] . . . [l]aw and a defendant may only receive an upper term if 'aggravating circumstances' are found (§ 1170[, subd.] (b)), the California sentencing scheme for judicial determination of those facts under a preponderance [of evidence] standard suffers from the same constitutional defects as the Washington regime reviewed in *Blakely*." He correctly complains that he had the right to have the facts that increased his sentence beyond a midterm sentence found by the jury beyond a reasonable doubt.

In imposing concurrent upper terms, the trial court stated, "I'm going to find that at the time that the initial probation report was prepared [after defendant pled guilty on

---

[4] Defendant also acknowledged the holding of the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), which stated that *Blakely* does not invalidate California's upper-term sentencing procedure. *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*), decided while this appeal was pending, has held that California's Determinate Sentencing Law is unconstitutional.

[5] The People claim that defendant's *Blakely* claim is barred by his failure to object on that ground at sentencing. Defendant counters that no objection at trial was necessary to preserve this issue because sentencing errors violated his fundamental constitutional right to a jury trial. (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6.) Defendant declares objection would have been futile because the California Supreme Court's decision in *Black*, *supra*, 35 Cal.4th 1238, was binding on the lower court. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6.)

September 15, 2004 (Cal. Rules of Court, rule 4.435(b), hereafter 'rule'], that the factors in aggravation, each one of those, outweigh the factors in mitigation that existed at the time."

The probation report listed aggravating factors relating to the crime including vulnerability of the victim (rule 4.421(a)(3)), and defendant has engaged in conduct that indicates a serious danger to society (former rule 4.421(a)(8), now 4.421(b)(1)). Aggravating factors relating to the defendant were that defendant's prior adult convictions are numerous or of increasing seriousness (rule 4.421(b)(2)), defendant served prior prison terms (rule 4.421(b)(3)), defendant was on two grants of probation when the crime was committed (rule 4.421(b)(4)), and defendant's prior performance on probation or parole was unsatisfactory (rule 4.421(b)(5)). The probation report listed one factor in mitigation, that defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process by virtue of his plea. (Rule 4.423(b)(3).)

Following *Almendarez-Torres v. United States* (1998) 523 U.S. 224, the court in *Cunningham* as well as both *Blakely* and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) recognized an exception to the jury trial requirement for "the fact of a prior conviction." (*Cunningham*, *supra*, 549 U.S. at p. __ [127 S.Ct. at p. 856]; *Blakely*, *supra*, 542 U.S. at p. 301; *Apprendi*, *supra*, 530 U.S. at pp. 488, 490.) However, "[c]ourts have not described *Apprendi* as requiring jury trials on matters other than the precise 'fact' of a prior conviction. Rather, courts have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism.' " (*People v. Thomas* (2001) 91 Cal.App.4th 212, 221 (*Thomas*).) "In terms of recidivism findings that enhance a sentence and are unrelated to the elements of a crime, *Almendarez-Torres* is the controlling due process authority. . . . Notably, the recidivism enhancement in *Almendarez-Torres* had elements apart from the mere fact of a prior conviction. . . . [Almendarez-Torres was alleged to be an alien who had illegally returned to the United States after having previously been deported following conviction of an 'aggravated

felony' which made him subject to an enhanced sentence of 20 years in federal prison. (*Thomas, supra,* 91 Cal.App.4th at pp. 216-217.)] As has been noted, the term 'aggravated felony' in *Almendarez-Torres* involved the commission of specific enumerated felonies, not merely the 'fact of a prior conviction' as that term was utilized in *Apprendi.*" (*Id*. at pp. 222-223.)

Our Supreme Court has noted that *Apprendi* did not involve a prior offense enhancement. "In *Apprendi,* the high court was confronted with a state statute that classified the possession of a firearm for an unlawful purpose as a ' "second-degree' " offense, punishable by imprisonment for ' "between five years and 10 years." ' [Citation.] A separate statute, described by the New Jersey Supreme Court as a ' "hate crime" law' provided for an ' "extended term" of imprisonment' of ' "between 10 and 20 years" ' if the trial court, based upon a preponderance of the evidence, determined that ' "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." ' " (*People v. McGee* (2006) 38 Cal.4th 682, 696 (*McGee*).) The issue of Apprendi's "purpose" in firing several bullets into the home of an African-American family that had moved into a previously all-white neighborhood (*ibid*.) required an evidentiary hearing in which the parties presented conflicting evidence and the court found, by a preponderance of the evidence, that the hate-crime enhancement applied.

In reversing the judgment of the New Jersey Supreme Court upholding the enhanced sentence, the high court held that " 'constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," . . . and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" . . . indisputably entitle a criminal defendant to a "jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." ' [Citation.] Notably, the high court's

framing of the issue in *Apprendi* was confined to the elements of the *charged offense*--not, as here, to the adjudication of aspects of the defendant's criminal *past*." (*McGee*, *supra*, 38 Cal.4th at pp. 696-697.)

After a review of California and other state cases, *McGee* concluded that there was a significant distinction between "sentence enhancements that require factfinding related to the circumstance of the current offense, such as whether a defendant acted with the intent necessary to establish a 'hate crime'--a task identified by *Apprendi* as one for the *jury*--and the examination of *court records* pertaining to a defendant's *prior conviction* to determine the nature or basis of the conviction--a task to which *Apprendi* did not speak and 'the type of inquiry that judges traditionally perform as part of the sentencing function.' " (*McGee*, *supra*, 38 Cal.4th at p. 709.)

Facts which are suitable for court determination, such as whether prior serious felony convictions are based on charges brought and tried separately (§ 667, subd. (a)(1)), "[are] largely legal in nature, . . . generally are readily ascertainable upon an examination of court documents." This is the type of inquiry traditionally performed by judges. (*People v. Wiley* (1995) 9 Cal.4th 580, 590.) Other facts suitable for court determination are whether a prior felony conviction qualified as a "serious felony" for purposes of the Three Strikes law (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1); *People v. Kelii* (1999) 21 Cal.4th 452, 454); whether defendant served prior prison terms under section 667.5 (*Thomas*, *supra*, 91 Cal.App.4th at p. 221); and whether the defendant was the person identified in the section 969b (prison) packet offered to show service of prior prison terms. (*People v. Belmares* (2003) 106 Cal.App.4th 19, 28.)

Defendant cites *Shepard v. United States* (2005) 544 U.S. 13, 24 (plur. opn.) (*Shepard*), for the proposition that the "exception [to the right of a jury trial] is read very narrowly and applies only to the mere fact of a prior conviction." According to defendant, "[t]he so-called 'recidivist' factors present in this case fall outside of the

Almendarez-Torres exception because they go beyond the mere fact of a prior conviction."

In *Shepard*, the court, in considering what documents a trial court may use in determining whether a prior conviction falls within the provisions of the Armed Career Criminal Act (18 U.S.C. § 924(e) (ACCA)) so as to increase the penalty for the current crime, stated the trial court is limited to the terms of the charging document, to the terms of a plea agreement or transcript of colloquy between judge and defendant in which the defendant confirmed the factual basis for the plea, or to some comparable judicial record of the information. (*Shepard*, *supra*, 544 U.S. at p. 26.) The court rejected the use of police reports or complaint applications to prove whether a state burglary conviction falls within the "generic burglary" definition of the ACCA. (*Id.* at p. 19.) Whether a state burglary conviction has the elements of the crime of the federal "generic burglary" of ACCA purposes is a disputed fact which, while it "can be described as a fact about a prior conviction, . . . is too far removed from the conclusive significance of a prior judicial record, . . . to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." (*Id*. at p. 25.)

The facts used to aggravate the sentence in this case are divided into two categories--facts pertaining to the crime (rule 4.421(a)(3)) and facts pertaining to the defendant. (Rule 4.421(b).) The facts pertaining to the crime are clearly the probation officer's value judgments about defendant's conduct in carrying out the offense (such as, "[t]he victim was particularly vulnerable in that the victim lives in the same neighborhood as the defendant and she indicates that the defendant can not [*sic*] be avoided when he commits these types of offenses," and "[i]t appears this offense was premeditated. The defendant's different versions of his conduct in this offense indicate criminal sophistication in an attempt to minimize his behavior"). Certain of the "facts relating to the defendant" also are based on the current crime, such as "[t]he defendant has engaged in conduct which indicates a serious danger to society." These "facts" are

"too far removed from the conclusive significance of a prior judicial record" to be tried to a court and not a jury. (*Shepard*, *supra*, 544 U.S. at p. 25.)

Other of the factors in aggravation, however, were proved by judicial records. The court may use an uncertified CLETS printout (*People v. Martinez* (2000) 22 Cal.4th 106) to ascertain whether and how many prior felony convictions the defendant suffered and the nature of the offenses.

Defendant's prior adult criminal record from "CLETS, CTS, CJIS, CII, and FBI" records was set out in the probation report. Defendant did not object to the accuracy or the use of that information. The probation report lists six felony convictions: defendant was convicted twice of theft with a prior theft conviction (§§ 484, 666) on May 15, 1986, and on November 7, 1991; burglary with service of a prior prison term (§§ 459, 667.5) on October 20, 1993; indecent exposure (former § 314.1 now § 314) occurring on June 16, 1995, and false imprisonment and burglary (§§ 236, 459) occurring on June 28, 1995, conviction on both on March 11, 1996; and possession of a controlled substance (Health & Saf. Code, § 11350) on November 8, 2000.

The trial court could ascertain from the same record that defendant served two prior prison terms and that he was on two grants of court probation when the crime was committed. The record shows that defendant's probation or parole was violated a number of times and that he was jailed or imprisoned on the violations.

Consequently three factors in aggravation listed in the probation report, that defendant had numerous adult prior convictions, served two prior prison terms, and was on two grants of probation when the crime was committed, were established without violating *Cunningham*, *Blakely* and *Apprendi*. "A single aggravating factor is sufficient to impose an aggravated sentence where the aggravating factor outweighs the cumulative effect of all mitigating factors, justifying the upper prison term when viewed in light of the general sentencing objectives stated in rule 410 [now, rule 4.410]." (*People v. Nevill* (1985) 167 Cal.App.3d 198, 202.) Thus, trial counsel's failure to object to the trial

court's use of the erroneously-found factors in sentencing did not prejudice defendant and did not constitute ineffective assistance of counsel. Given the gravity of the properly found factors in aggravation--defendant's numerous prior convictions, service of prior prison terms, and that he was on two grants of probation when he committed the instant offense--the one factor in mitigation--that he acknowledged wrongdoing at an early stage of the criminal process by virtue of his plea--does not outweigh the factors in aggravation. Any error as to an aggravating circumstance is harmless if the evidence at trial or at sentencing as to a particular circumstance is overwhelming or uncontradicted. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.)

Defendant claims that the court selected the upper term sentence "by incorporating the original probation report through reference without providing an explanation of the aggravated circumstances that served as a basis for the sentence." In the past, this court rejected as incorporation by reference a sentencing court's statement, " 'I base that aggravated term upon Rule 421 [now 4.421] and the circumstances in aggravation more specifically set forth in the probation officer's report.' " (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 677-678.) Other examples of incorporation by reference occurred in *People v. Turner* (1978) 87 Cal.App.3d 244, 245, where the "trial court stat[ed] that it has read the probation report and where the report recommend[ed] the upper term, based on specific articulated factors listed in rule 421, California Rules of Court"; and in *People v. Pierce* (1995) 40 Cal.App.4th 1317, 1319, where the sentencing judge stated, " 'The circumstances in aggravation and mitigation as set forth on page four of the presentence report are adopted as the circumstances in aggravation and mitigation. Court finds that circumstances in aggravation outweigh the circumstances in mitigation.' "

However, in the capital case of *People v. Farnam* (2002) 28 Cal.4th 107, 195 (*Farnam*), our Supreme Court rejected defendant's complaint "that the trial judge made no mention of any particular aggravating or mitigating circumstance at the hearing and

offered no explanation as to what weight he may have given to any of those circumstances . . . . [T]his ignores the context of the judge's remarks at the modification hearing. As noted, the judge expressly confirmed he had 'independently reviewed and evaluated each of the factors under [section] 190.3 [factors] (a) through (k).' He also stated that, after having 'considered the matter in careful detail,' he independently concluded that the factors in aggravation 'overwhelmingly' outweighed the factors in mitigation. Although the judge did not single out specific factors in aggravation or mitigation, his statements were sufficiently specific to demonstrate his performance of the statutory requirement to review all the evidence independently. (§ 190.4, subd. (e).)"

"Undoubtedly, a more detailed statement of reasons would have been helpful to understand more fully the trial court's independent determination that death was warranted. But the record here not only establishes that the court acted on a proper understanding of its statutory duties, it amply justifies the court's conclusion as well. Under these circumstances, we have no hesitation rejecting defendant's claims. (See *People v. Sully* (1991) 53 Cal.3d 1195, 1251; *People v. Hernandez* (1988) 47 Cal.3d 315, 371-373; *People v. Heishman* (1988) 45 Cal.3d 147, 199-202 [holding that defendant was not prejudiced by trial court's failure to state reasons for denial of modification]; cf. *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794 [remand for new hearing ordered where record reflected trial court's erroneously narrow view of the scope of its statutory powers]; *People v. Bonillas* (1989) 48 Cal.3d 757, 801 [same where the trial court's statement of reasons indicated it did not exercise independent judgment in reweighing the evidence].)" (*Farnam*, *supra*, 28 Cal.4th at p. 195.)

"[A] requirement of articulated reasons to support a given decision serves a number of interests: it is frequently essential to meaningful review; it acts as an inherent guard against careless decisions, insuring that the judge himself analyzes the problem and recognizes the grounds for his decision; and it aids in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the

decision-making is careful, reasoned and equitable." (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.)

At sentencing in this case, the sentencing court stated that it had referred the case back to the probation department for a second addendum report because the finding that defendant's intent in loitering was for an "unlawful," not "lewd or lascivious," purpose. The court noted that "that has been addressed" in the ensuing report. Time credits were updated, and then the prosecutor reviewed the circumstances of the violation of probation, especially the loitering incident, and pointed out that defendant "has 20 misdemeanor convictions. This is his eighth felony conviction. . . . This is his third [section] 314 [violation]. He has three prior prison terms."

Defense counsel stated she believed defendant makes "a valid and true effort to comply with probation[,] [b]ut he does have mental health issues. And I think that those interface with his ability to comply. . . . [H]e's a good man that's having a difficult time with life." Asked if he had anything to say, defendant stated, "Put it in God [*sic*] hands."

As noted above, the sentencing court stated "that the factors in aggravation, each one of those, outweigh the factors in mitigation that existed at the time." However, the court added, "I don't think that continued probation is viable for you for a number of reasons. [¶] I may well be doing you a favor to let you start off with a clean slate when you finish this prison commitment. On [C]ount . . . 1, I'm going to impose the upper term of three years in State Prison. I'm going to impose the same term on Count 2, but I'm going to run the second count concurrent, or at the same time, as the commitment on Count 1."

The sentencing hearing shows that the court read the reports submitted by the probation officer, referred the matter back to the probation department for reconsideration after the finding of unlawful, not lewd and lascivious, intent, read the resubmitted report, and was familiar with the record. Rule 4.409 requires the relevant criteria enumerated in the sentencing rules of court to be considered by the sentencing judge, and states they

"will be deemed to have been considered unless the record affirmatively reflects otherwise." Our record reflects that they were considered.

The court's statement, although sketchy, showed that the court was aware of its discretion in selecting prison over probation and its duty to weigh the sentence carefully. The circumstances of sentencing show that the court considered each of the factors in aggravation and the factor in mitigation and found that the aggravating factors outweighed the mitigating factor, although the court did not list the factors on the record. The statement showed that the court considered the effect of the sentence on defendant's future and, finally, it made a sentencing choice of leniency in imposing concurrent, rather than the consecutive sentences that were recommended by the prosecutor.

Applying *Farnam* to this case, we agree that "[a]lthough the judge did not single out specific factors in aggravation or mitigation, his statements were sufficiently specific to demonstrate his performance of the statutory requirement to review all the evidence independently. [Citation.] [¶] Undoubtedly, a more detailed statement of reasons would have been helpful to understand more fully the trial court's independent determination that death [prison in our case] was warranted. But the record here not only establishes that the court acted on a proper understanding of its statutory duties, it amply justifies the court's conclusion as well. Under these circumstances, we have no hesitation rejecting defendant's claims." (*Farnam, supra*, 28 Cal.4th at p. 195.)

Although not all of the factors in aggravation survived our *Cunningham*/*Apprendi*/*Blakely* review *ante*, any inclusion of the erroneously-found factors in the court's sentencing calculus was harmless and the trial court's finding that the aggravating factors outweighed the mitigating factors was not erroneous. Since the sentencing court's statement of reasons for the sentence choice was adequate, counsel was not ineffective for failing to object that the court's statement was insufficient.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.