Filed 5/9/07 P. v. McNatt CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP WAYNE MCNATT,

Defendant and Appellant.

F050056

(Super. Ct. No. BF110424A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush and Louis P. Etcheverry, Judges.*

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Leslie W. Westmoreland, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Phillip Wayne McNatt of oral copulation with a child under 18 years of age (Pen. Code, § 288a, subd. (b)(1))[1] and annoying a child under the age of 18

* Judge Etcheverry presided over the competency phase of the trial; Judge Bush presided over the criminal trial.

(§ 647.6, subd. (c)(2)). He argues his conviction must be reversed because (1) there was not substantial evidence to support the jury's finding that he was competent to stand trial (§ 1367 et seq.); (2) the prosecutor committed misconduct during closing arguments during the competency phase of the trial; (3) the trial court erred in admitting propensity evidence pursuant to Evidence Code section 1108 during the guilt phase of the trial; (4) the jury instructions for the use of propensity evidence violated his constitutional right to due process; and (5) his aggravated sentence violated his Sixth Amendment right to a jury trial. We reject each of these arguments and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Sixteen-year-old Mark P. considered 52-year-old McNatt a friend. The two often spent time together. On the day in question Mark called and asked if McNatt wanted to "hang out." McNatt agreed and picked up Mark in his (McNatt's) vehicle. The two ended up at the Kern River after drinking some beer. While at the river, McNatt began discussing pornography with Mark. McNatt proceeded to orally copulate Mark while he (McNatt) masturbated.

The jury found McNatt guilty of the crimes identified above, the only charges in the information. The trial court imposed an aggravated sentence of six years for the oral copulation count, plus two years for two prior prison term enhancements admitted by McNatt. (§ 667.5, subd. (b).) An aggravated sentence on the annoying the child count (three years) was stayed pursuant to section 654.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

DISCUSSION

I. The Competency Proceedings

McNatt's attorney filed a motion pursuant to section 1367 et seq. to suspend criminal proceedings because McNatt could not understand the nature of the proceedings against him and assist in his defense. The trial court appointed an expert to examine McNatt. A trial was then held and a jury found McNatt competent. McNatt claims there was insufficient evidence to support the verdict, and that the prosecutor committed misconduct during closing argument.

A. Substantial evidence

The only witness to testify at the hearing was Ross Kremsdolf, the psychologist appointed by the trial court to examine McNatt. Kremsdolf opined that McNatt was incompetent. The jury necessarily rejected Kremsdolf's opinion in finding McNatt competent. McNatt argues that since the only evidence presented at the competency hearing indicated that he was incompetent, the jury's verdict was not supported by substantial evidence. This argument reflects a misunderstanding of the proceedings in the trial court.

A defendant is presumed competent unless the contrary is proved by a preponderance of the evidence. (§ 1369, subd. (f).) It is defendant's burden to establish he is incompetent within the meaning of the statute. (*People v. Marks* (2003) 31 Cal.4th 197, 215.) In other words, the jury was required to presume McNatt was competent to stand trial unless he proved by a preponderance of the evidence that he was incompetent.

Kremsdolf, the only witness, evaluated McNatt through a review of the records he received and a two-hour interview, during which he completed an evaluation instrument entitled "Evaluation Competency to Stand Trial Revised." Kremsdolf found McNatt was depressed and, as a result, did not feel participation in the process was important. McNatt also demonstrated symptoms of paranoia when he stated he did not think his attorney would properly represent him because his attorney was working with the prosecutor to

convict him. Kremsdolf considered the possibility McNatt was so depressed that his thinking became unclear, but he did not reach that conclusion.

Kremsdolf opined that McNatt was not impaired in his understanding of the court proceedings, but thought he would have difficulty assisting counsel. McNatt understood the judge's responsibility during a trial and the roles of the different people in the courtroom.

The tools used by Kremsdolf also suggested that McNatt may have been malingering, although Kremsdolf did not reach that conclusion. Kremsdolf concluded that on the day he interviewed McNatt, which was two and one-half months before the hearing, McNatt was not able or willing to assist defense counsel sufficiently to receive a fair trial. Kremsdolf specifically stated he could not say the same was true as of the day of the trial, although he did not have any information that would change his opinion.

On cross-examination Kremsdolf stated, "When I put everything together, I came to the feeling at that time that [McNatt] was not [competent to stand trial], but … there was a question in my mind. I wasn't 100 percent certain in any way." Kremsdolf could not determine if McNatt had any history of mental illness because McNatt "wasn't very open about such things."

McNatt understood the purpose of the evaluation and was able to respond to the questions posed. He was very defensive or guarded in his responses, and it appeared he did not want to discuss the charged crimes, although he seemed to know them. McNatt also lied about some things until confronted with documents that proved he was lying. McNatt graduated from high school and has held gainful employment in the past. He did not have any dependency problems that would impair his ability to assist with his defense. It appeared at times that McNatt chose to answer some questions and not others.

Kremsdolf summarized his findings as follows: "[McNatt] presented himself as so hopeless and defensive or paranoid about the motives of his attorney that he basically saw no point in discussing anything with his attorney, saw no point in discussing with

him any possibility of issues that might come up. I don't know if they would come up, but judgments about what to plead or those kinds of issues. So he just presented himself as not doing that at all, those important things to be able to make choices, weigh issues, decide what are positive and negative factors."

This conclusion was impeached when it was pointed out that McNatt had urged his attorney to seek a reduction of bail at the preliminary hearing, thus indicating McNatt could assist his attorney if he chose to do so. At another point in the interview McNatt stated he was willing to cooperate with his attorney. He also stated he wanted his attorney to see him more often, that he wanted to speak with an investigator, and that his attorney was supposed to help prove he was innocent.

Kremsdolf recommended that McNatt be evaluated by a psychiatrist for possible depression, possible psychotic symptoms, possible medication, and evaluation of possible malingering. Kremsdolf acknowledged there was a possibility that McNatt was faking his symptoms, but he failed to do further tests on the issue. Various reports established McNatt used manipulation to commit the various crimes of which he had been convicted and accused.

Kremsdolf took into consideration McNatt's history of deceit, manipulation, criminal experience, lack of prior mental illness, and the possibility of malingering when rendering his diagnosis.

This thorough review of Kremsdolf's testimony convinces us that substantial evidence supported the jury's conclusion that McNatt was competent. (*People v. Marks, supra,* 31 Cal.4th at p. 214.) While Kremsdolf was the only expert witness to testify at the trial, his testimony was less than overwhelming.

First, an expert's testimony is only as reliable as the facts on which it is based. (*People v. Marks, supra,* 31 Cal.4th at p. 219.) The testimony established that Kremsdolf had a limited basis for forming an opinion. First, he received limited background to assist in his evaluation. Second, most of his opinion was based on his interview with

McNatt, an interview where Kremsdolf described McNatt as lying, withholding information, and guarded in his responses. The lack of a solid basis for forming an opinion significantly weakened Kremsdolf's opinion.

Moreover, Kremsdolf displayed a lack of conviction about the opinion himself. At times he described his opinion as a "feeling … that [McNatt] was not" competent to stand trial and went on to state, "there was a question in my mind. I wasn't 100 percent certain in any way." This lack of certainty also manifested itself when Kremsdolf admitted that McNatt might be trying to manipulate the system by faking his symptoms.

When these admissions are combined with the opinion that McNatt was not competent because he was so depressed "or paranoid about the motives of his attorney that he basically saw no point in discussing anything with his attorney," it is easy to understand why the jury rejected Kremsdolf's testimony. This is especially so when McNatt demonstrated his ability and willingness to participate in his defense when he urged his attorney to seek a bail reduction. Obviously, McNatt was capable of participating when he chose to do so.

The jury was not obligated to accept Kremsdolf's opinion. There is ample justification in the record to support the decision to reject it. These justifications provide ample evidentiary support for the finding that McNatt was competent.

B. Prosecutorial misconduct

McNatt's second argument related to the competency hearing is that the prosecutor committed misconduct during closing argument.

> "'"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.]' [Citation.]
>
> "Regarding the scope of permissible prosecutorial argument, '"'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness'" [citation], and he may "use appropriate epithets.…"'" [Citation.]' [Citation.]
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> "Finally, 'a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 951-952.)

The prosecutor's theme during closing argument was that McNatt was malingering to delay the trial. At one point he argued, "So you have somebody who commits crimes against children, who, if there is delay in going to court on the case, you have the possibility of them not remembering some things or getting some things wrong. The minutia, the devil is in the details. So you have that advantage. You have the advantage of maybe they're going to leave and disappear, not want to be contacted, not want to testify after a long time. They want to put it behind them."

At this point McNatt's attorney objected because there was no testimony to support the argument and moved that the argument be struck. The objection was sustained, but the trial court denied the motion to strike. McNatt contends the failure to strike the argument was error, requiring reversal of the judgment. To prevail, McNatt must establish both that misconduct occurred and that the refusal to strike the argument caused him prejudice requiring a reversal of the verdict. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215, 1218-1219.) McNatt cannot meet either requirement.

While there was no evidence that witnesses might disappear or forget details of the events involved, the issue of malingering clearly was brought up during Kremsdolf's testimony. Kremsdolf admitted that a possible motivation for malingering was to put off the prospect of a jury trial on the charges. It is not beyond common experience to conclude that a delay in the trial court may cause problems in either locating witnesses or in their ability to remember the incident. The argument could be considered a fair comment on the evidence.

Moreover, the portion of the argument to which McNatt objected is not an example of using deceptive or reprehensible methods of persuasion. (*People v. Gionis, supra,* 9 Cal.4th at pp. 1218-1219.) The issue of malingering, and McNatt's motivation to malinger, clearly was an issue for the jury because of Kremsdolf's testimony.

Finally, even if we assume the prosecutor committed misconduct, this comment by the prosecutor on a valid basis for attacking McNatt's evidence did not cause McNatt any prejudice. (*People v. Gionis, supra,* 9 Cal.4th at p. 1215.) As stated above, the prosecutor was justified in arguing the jury should reject Kremsdolf's opinion because McNatt was malingering. The reference to possible consequences of a delay could not have caused sufficient prejudice to influence the verdict.

II. The Trial

McNatt argues the trial court made two errors requiring reversal of the judgment, both related to the use of propensity evidence. First, he asserts the propensity evidence should not have been admitted. Second, he contends the use of CALJIC No. 2.50.01 et seq. violated his right to due process. He claims his argument is different from that considered by the Supreme Court in *People v. Reliford* (2003) 29 Cal.4th 1007.

A. Introduction of propensity evidence

In addition to the testimony of the substantive offense, the People also received permission from the trial court to introduce testimony about two prior acts committed by McNatt pursuant to Evidence Code section 1108.

Joseph M. spent the summer with his cousin when he was 16 years old, approximately 14 years before the trial. Joseph obtained a summer job working for McNatt in his lawn care business. After his first day of work, McNatt bought some beer and drove to a secluded area. The two smoked marijuana and drank the beer. McNatt produced a pornographic magazine and began massaging his groin area while leaving his hand outside of his clothes. After a few minutes of this, Joseph became uncomfortable and exited the vehicle to urinate. When Joseph returned, he asked McNatt to drive him home, which McNatt did without protest.

F.A. met McNatt through his friend, Allen, when he was 13 years old. When F.A. was 14, McNatt took F.A. and Allen to a movie. Allen was 16 at the time. McNatt then took the boys out to dinner and then to a motel. McNatt provided the alcohol the three drank that night. F.A. eventually got sick from the alcohol and lost consciousness. When he woke up his pants were around his ankles and McNatt was sodomizing him. F.A. again lost consciousness. When he next awoke he saw McNatt sodomizing Allen. After falling asleep again, F.A. woke up to find McNatt orally copulating him while Allen orally copulated McNatt. The events eventually were reported to the police.

McNatt argues the trial court should have excluded the testimony of both Joseph and F.A. because admission of the propensity evidence violated his constitutional right to due process and equal protection of the law, and because the probative value of the evidence was substantially outweighed by its prejudicial effect. (Evid. Code, § 352.)

As McNatt recognizes, Evidence Code section 1108 has been found to comply with a defendant's constitutional right to due process and equal protection. (*People v. Falsetta* (1999) 21 Cal.4th 903, 907; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184-185.) The issue is well settled, and McNatt does not present any compelling or different argument that would justify departure from precedent. Therefore, we reject his constitutional challenges to Evidence Code section 1108.

McNatt focuses his argument on application of Evidence Code section 1108 to the facts of his case. Evidence Code section 1108, subdivision (a) permits the prosecution to introduce evidence that a defendant committed sexual offenses in the past if he is charged with a sexual offense in the instant matter (propensity evidence). This case is a perfect example of the reason the Legislature determined such evidence should be admitted. Since Mark and McNatt were the only witnesses to the charged crimes, without propensity evidence the jury must decide the matter based on its impression of Mark's credibility. The introduction of propensity evidence permits the jury to infer that because McNatt committed such crimes in the past, he may have committed this crime. In essence, the propensity evidence enhanced Mark's credibility.

The use of propensity evidence is limited, however. Evidence Code section 1108, subdivision (a) specifically prohibits introduction of propensity evidence if Evidence Code section 352 requires exclusion. Evidence Code section 352 provides a trial court with discretion to exclude evidence if it determines the probative value of the proffered evidence is substantially outweighed by the probability that admission of the evidence will (1) necessitate undue consumption of time, or (2) create substantial danger of causing the defendant undue prejudice, or (3) create substantial danger of confusing the issues, or (4) create substantial danger of misleading the jury.

McNatt argues the propensity evidence should have been excluded pursuant to Evidence Code section 352 because the probative value of the evidence was substantially outweighed by its prejudicial effect. We review the trial court's ruling for an abuse of discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 578.)

McNatt relies primarily on two cases to support his argument. *People v. Smallwood* (1986) 42 Cal.3d 415, overruled on other grounds in *People v. Bean* (1988) 46 Cal.3d 919, 939, footnote 8, set forth the controlling law for admission of other crimes evidence pursuant to *Evidence Code section 1101, subdivision (b).* The Supreme Court stated, in essence, that admission of such evidence was disfavored because of the

potential that a defendant would be convicted because he was a bad person and not based on evidence that he committed the crime for which he was on trial. (*Smallwood*, at pp. 428-429.)

Smallwood does not assist McNatt because the Legislature has determined that propensity evidence should be admitted when a defendant is accused of a sex offense. As explained above, the courts have concluded that this determination does not violate a defendant's constitutional rights. In reaching this conclusion, the courts considered the potential for prejudice that concerned the *Smallwood* court. While the concerns in *Smallwood* remain valid, they are but one factor that the trial court must consider when conducting its analysis pursuant to Evidence Code section 352.

The second case on which McNatt relies is *People v. Harris* (1998) 60 Cal.App.4th 727. Harris, a mental health nurse, was convicted of several sex offenses as a result of allegations that he took advantage of two women who were patients at the institution where he worked. One victim had a long history of mental health problems, including hallucinations. She testified that while she was in the hospital, Harris lifted her gown, kissed her breasts, rubbed her vagina, and put her hand on his penis, which was not exposed. The second victim admitted she engaged in consensual sex with Harris, but alleged that on another occasion Harris forcibly took off her clothes and kissed her breasts and vagina. Harris stopped when she became hysterical. After she calmed down, she allowed Harris to rub lotion on her body while she was covered with only a towel. A few days later she had lunch with Harris. (*Harris*, at pp. 731-733.)

The prosecution introduced evidence of another attack committed by Harris 22 years earlier. The investigating officers discovered the victim in her apartment beaten unconscious. She was bleeding from her mouth and vaginal area. Harris had stabbed her with an ice pick several times. He was discovered a short distance away covered with blood, including his underwear and penis. (*People v. Harris*, *supra*, 60 Cal.App.4th at pp. 733-734.)

The appellate court began its analysis by recognizing the trial court's discretion to exclude evidence pursuant to Evidence Code section 352. (*People v. Harris, supra,* 60 Cal.App.4th at p. 736.) When exercising its discretion, however, the trial court is required to act consistently with the spirit of the law and "'in a manner to subserve and not to impede or defeat the ends of substantial justice.' [Citation.]" (*Id*. at p. 737.)

The appellate court then identified five factors it would consider when evaluating the admission of the prior crimes evidence: (1) the inflammatory nature of the evidence; (2) the probability of confusing the jury; (3) the remoteness of the prior crime; (4) the amount of time that would be consumed in presenting the prior crimes evidence; and (5) the probative value of the prior crimes evidence. (*People v. Harris, supra,* 60 Cal.App.4th at pp. 737-741.)

The appellate court found the prior crimes evidence was extremely inflammatory because of the brutality of the prior crime. The court also thought the jury was likely to be confused because it was informed Harris had been convicted of burglary with great bodily injury, creating the possibility the jury would believe Harris had escaped punishment for rape. The remoteness of the prior crime also weighed heavily in favor of exclusion because Harris had led a crime-free life in the 22 years since the prior crime. Although the amount of time consumed in presenting the evidence was not significant, the appellate court found the evidence lacked probative value because it was so dissimilar to the current charges.

The appellate court observed, "'The court should not permit the admission of other crimes until it has ascertained that the evidence tends logically and by reasonable inference to prove the issue upon which it is offered, that it is offered on an issue material to the prosecution's case, and is not merely cumulative.' [Citation.]" (*People v. Harris, supra,* 60 Cal.App.4th at pp. 739-740.) The appellate court concluded, "The evidence did little more than show defendant was a violent sex offender. The evidence that defendant committed a violent rape of a stranger, as the jury was led to believe, did not

bolster [the victims'] credibility nor detract from the evidence impeaching their stories." (*Id*. at p. 740.) Based on its analysis of the above factors, the appellate court reversed the judgment and held the trial court abused its discretion in admitting the evidence. "The only factor favoring admitting this evidence is that it did not consume much time. Everything else militates against admission: The evidence was remote, inflammatory and nearly irrelevant and likely to confuse the jury and distract it from the consideration of the charged offenses." (*Id*. at p. 741.)

McNatt does not analyze the five factors identified in *Harris*, probably because each factor favors admission of the propensity evidence. Here, the propensity evidence was strikingly similar to the current offense. Each involved teenage boys who were befriended by McNatt. He plied each with drugs and/or alcohol and, when their resistance was compromised by intoxication, initiated some type of sexual activity. Pornography was often a theme used by McNatt to initiate the sexual activity. While there are some dissimilarities between the offenses (groping himself on one occasion, engaging in sodomy and mutual oral copulation on another, and orally copulating the victim while he masturbated in the current offense), the similarities are so striking as to render the differences insignificant. The similarities between the incidents in this case, however, establish the evidence was highly probative.

The remaining *Harris* factors also favored admission. The time consumed in presenting the evidence was minimal. The crimes were not particularly remote, especially when the trial court took into consideration the time McNatt spent in prison in the intervening years. Nor did McNatt live a crime-free life in the years between the prior acts and the current offense. The propensity evidence was not particularly inflammatory since it was very similar to the charged crimes. It would be irresponsible to suggest this factor resembled the inflammatory conduct in *Harris* in any way. Finally, we see little likelihood the jury would have been confused by the proffered evidence.

The trial court considered the arguments presented by McNatt and the applicable factors. We conclude there was no abuse of discretion.

B. The jury instructions

McNatt next argues that his right to due process was violated because CALJIC Nos. 2.50.01, 2.50.1, and 2.50.2 permitted the jury to convict defendant using a lower standard than beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) McNatt recognizes that *People v. Reliford, supra,* 29 Cal.4th 1007 "may be considered binding on this court." This is a misstatement because, if the issue is the same, *Reliford is* binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Reliford rejected two challenges to the 1999 revision to CALJIC No. 2.50.01.[2] First, the defendant contended the instruction did not clearly inform the jury of the

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[2] The 1999 revision to CALJIC No. 2.50.01 read: "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense [on one or more occasions] other than that charged in the case. [¶] ['Sexual offense' means a crime under the laws of a state or of the United States that involves any of the following: [¶] [A.] [Any conduct made criminal by Penal Code section ____. The elements of [this crime is] [these crimes are] set forth elsewhere in these instructions.] [¶] [B.] [Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person.] [C.] [Contact, without consent, between the genitals or anus of the defendant and any part of another's person's body.] [D.] [Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.] [E.] [An attempt or conspiracy to engage in specific sexual conduct identified [in subparagraph ___] [herein].]] [If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit [the same or similar type] sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that [he] [she] was likely to commit and did commit the crime [or crimes] of which [he] [she] is accused. [¶] However, if you find [by a preponderance of the evidence] that the defendant committed [a] prior sexual offense[s], that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] [she] committed the charged crime[s]. The weight and significance of the evidence, if any, are for you to decide. [¶] [[Unless you are otherwise instructed, y][Y]ou must not

limited purpose for which propensity evidence could be used. Second, the defendant argued the instruction would mislead the jury on the prosecution's burden of proof. (*People v. Reliford, supra,* 29 Cal.4th at pp. 1012-1014.)

The jury was instructed in this case as follows:

> "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in this case.
>
> "'Sexual offense' means a crime under the laws of a state or of the United States that involves any of the following:
>
> "A. Any conduct made criminal by Penal Code § 647.6(c)(2) and/or 288a(b)(1). The elements of these crimes are set forth elsewhere in these instructions.
>
> "If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused.
>
> "However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offenses [*sic*] or offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime."

This instruction was immediately followed by CALJIC No. 2.50.1, which read:

> "Within the meaning of the preceding instruction, the prosecution has the burden of proving by a preponderance of the evidence that the defendant committed a sexual offense or offenses other than those for which he is on trial.

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consider this evidence for any other purpose.]" (CALJIC No. 2.50.01 (1999 rev.) (6th ed. 1996).)

> "You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that the defendant committed the other sexual offense or sexual offenses."

McNatt's argument is difficult to follow. It appears to us that McNatt is arguing that propensity evidence is a form of circumstantial evidence. CALJIC No. 2.01, with which the jury also was instructed, informs the jury that "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." CALJIC Nos. 2.50.01 and 2.50.1, on the other hand, permit the facts underlying propensity evidence to be proven using the preponderance of the evidence standard, thus creating a special class of circumstantial evidence.

As we read McNatt's argument, the tension created by using the beyond a reasonable doubt standard for most circumstantial evidence, and the preponderance of the evidence standard for propensity evidence, results in various problems. The solution, according to McNatt, is to require propensity evidence be proven using the beyond a reasonable doubt standard.

Part of the difficulty in understanding McNatt's argument is that he uses interchangeably the terms "facts" and "evidence." *Winship* requires that each element of a crime be proven beyond a reasonable doubt before a conviction may result. Some cases refer to the elements of the crime as the ultimate facts in the case. (See, e.g., *People v. Medina* (1995) 11 Cal.4th 694, 763.) In the context of circumstantial evidence, CALJIC No. 2.01 is analogous in that it requires the ultimate facts supporting the inference that the defendant is guilty be proven beyond a reasonable doubt. We note that one case has described the origins of this requirement as "murky" (*People v. James* (2000) 81 Cal.App.4th 1343, 1358-1359, fn. 9).

On the other hand, direct evidence of defendant's guilt, such as eyewitness testimony, need not be proven true beyond a reasonable doubt. CALJIC No. 2.00, which defines direct evidence, does not place any restriction on the use of direct evidence. It is left to the jury to determine the value to be placed on direct evidence in determining the

defendant's guilt, e.g., the believability of the witness and the quality of his or her observations.

The Supreme Court, however, has resolved these distinctions for the ultimate facts used to establish propensity evidence, and other classes of prior acts evidence, by holding that they need to be proved by a preponderance of the evidence. (*People v. Carpenter* (1997) 15 Cal.4th 312, 380-383; *People v. Medina*, *supra*, 11 Cal.4th at pp. 763, 764.) The Supreme Court also has held that CALJIC Nos. 2.50.01 and 2.50.1 are appropriate instructions to guide the jury in the use of propensity evidence pursuant to Evidence Code section 1108. (*People v. Reliford*, *supra*, 29 Cal.4th at p. 1016; *People v. Falsetta*, *supra*, 21 Cal.4th at pp. 923-924.)

While McNatt spends considerable effort contending his argument is different from those made in the preceding cases, we disagree. The essence of his argument is that by allowing a jury to use propensity evidence that has been proven using the preponderance of the evidence standard, his right to due process is violated. The above cases have held that it does not, and we are bound by these holdings. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.)

III. The Sentence

McNatt argues that the imposition of an aggravated sentence violates his Sixth Amendment right to a jury trial as established in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), *United States v. Booker* (2005) 543 U.S. 220 (*Booker*) and, most recently, *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*).[3]

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[3] McNatt asked to submit additional briefing because *Cunningham* was decided after his briefs were filed. We denied the request. McNatt asked again to file a supplemental brief on this issue. We have reviewed his brief and again deny his request pursuant to this court's standing order dated February 16, 2007.

Apprendi held that a defendant's Sixth Amendment right to a jury trial required any fact that increases the prescribed statutory maximum penalty for a crime be charged in the indictment and submitted to a jury utilizing the beyond a reasonable doubt standard. (*Apprendi, supra*, 530 U.S. at p. 490.) The only fact not subject to these requirements is a prior conviction. (*Ibid*.)

In *Blakely* the Supreme Court, citing *Apprendi*, invalidated Washington's sentencing law finding that it violated the Sixth Amendment. "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring* [*v. Arizona* (2002) 536 U.S. 584], or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." (*Blakely, supra*, 542 U.S. at p. 305.) The Supreme Court again recognized, however, that a prior conviction is not subject to this requirement. (*Id*. at p. 301.)

Booker invalidated the federal sentencing scheme on Sixth Amendment grounds and, instead, implemented a system that gave trial judges vast discretion in sentencing. (*Booker, supra*, 543 U.S. at pp. 243-244 (opn. of Stevens, J.; *id.*, at pp. 244-246 (opn. of Breyer, J.).) *Booker* continued to recognize that the fact of a prior conviction need not be pled or proven to the jury. (*Id*. at p. 231 (opn. of Stevens, J.).)

Cunningham held that California's Determinate Sentencing Law (§ 1170 et seq.) violated a defendant's Sixth Amendment right to a jury trial when an aggravated sentence was imposed. (*Cunningham, supra*, 549 U.S. at p. ___ [127 S.Ct. at p. 868].) The Supreme Court, however, specifically recognized the validity of imposing aggravated terms based on prior convictions. "Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, [citation,] the [Determinate Sentencing Law] violates *Apprendi's* bright-line rule: *Except for 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.' [Citation.]" (*Ibid*., italics added.)

This precedent convinces us that in California, under prior law,[4] an aggravated sentence can be imposed if the facts on which the aggravated sentence are based (1) are pled in the information and found true beyond a reasonable doubt by the jury or (2) are limited to prior convictions.

The probation report indicates that between 1977 and 1989 McNatt suffered three convictions (§ 12020, subd. (a)(17) (possession of an illegal firearm); § 647, subd. (a) (disorderly conduct); and Health & Saf. Code, § 11357, subd. (c) (possession of marijuana)). McNatt received misdemeanor probation for each offense, and apparently performed satisfactorily. In 1993 McNatt was sentenced to eight years in the California Department of Corrections as a result of his conviction of eight counts of violating section 288a (oral copulation) and three counts of violating section 286 (sodomy), apparently as a result of the incident to which F.A. testified. He was paroled in 1998 and violated his parole in 2001. The parole violation apparently occurred when he was convicted in 2001 of violating section 288, subdivision (c)(1) (lewd and lascivious acts with a child), for which he received a one-year sentence in the California Department of Corrections. McNatt was discharged from parole one month before the present offense occurred.

In sentencing McNatt, the trial court found McNatt's satisfactory performance on misdemeanor probation and felony parole in the past as the only factor in mitigation. (Cal. Rules of Court, rule 4.423(b)(6).) As circumstances in aggravation, the trial court found (1) McNatt's prior convictions were numerous (*id.*, rule 4.421 (b)(2)); (2)

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4 Section 1170 was amended effective March 30, 2007, to address the issues raised by *Cunningham.* (Stats. 2007, ch. 3, § 2.) The trial court is now granted discretion to determine which term to impose without any presumption that the middle term is the appropriate term. (§ 1170, subd. (b).)

McNatt's prior convictions were significant because they involved charges similar to the instant offense (*id.*, rule 4.421(c)); and (3) McNatt's performance on felony parole was unsatisfactory after the 1993 conviction (*id.*, rule 4.421(b)(5)). Based on these facts, the trial court imposed the aggravated term of six years.

McNatt contends his sentence violates *Cunningham*. We disagree. The first two factors relate to his prior convictions, the one aggravating factor left to the discretion of the trial court by the Supreme Court in each of the above cited cases. The trial court was not, therefore, obligated to submit the issue to the jury for its determination.

We cannot agree with the proposition that, even if a defendant has prior convictions, a jury must determine whether they are numerous, similar to the present charges, or significant for some other reason. McNatt attempts to extend the above cases beyond any rational boundary. Trial courts retain discretion, as was established in *Booker*, where federal trial courts now have virtually unlimited discretion. Once a prior conviction is found true, how it is used or interpreted is left to the sound discretion of the trial court.

The only factor that arguably may be unrelated to a prior conviction is that McNatt performed poorly on parole in the past. McNatt suggests that performance on parole does not fall within the *Cunningham* exception because it merely reflects his status after a conviction. There is no need to resolve this dispute because the factors relating to McNatt's prior convictions support imposition of the aggravated term. Any error, therefore, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

McNatt has framed his argument as ineffective assistance of counsel because this issue was not raised in the trial court. He received ineffective assistance only if he can establish that had trial counsel objected, he would have received a more favorable result. (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.) Since we have concluded that any objection would have been futile, McNatt's counsel was not ineffective.

DISPOSITION

The judgment is affirmed.

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CORNELL, Acting P.J.

WE CONCUR:

_____
DAWSON, J.

_____
HILL, J.