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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JAMES COREY MCGEE, Defendant and Appellant.	A097749 (San Mateo County Super. Ct. No. 49252A)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the United States Supreme Court announced that the federal due process clause entitles criminal defendants to a jury trial on all factual issues, other than the fact of a prior conviction, that increase the penalty for a crime beyond the statutory maximum. The next year, in *People v. Epps* (2001) 25 Cal.4th 19 (*Epps*), the California Supreme Court raised but declined to resolve whether *Apprendi* henceforth required a jury trial of factual issues relating to the circumstances of a prior conviction used to enhance punishment. This case requires us to answer the question left open by *Epps*. In the published part of this decision, we hold that under *Apprendi*, a criminal defendant has a federal constitutional right to a jury trial on factual issues relating to the circumstances and conduct underlying a prior conviction used to enhance punishment.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part III.

Defendant James McGee (McGee) was charged with two "strikes" arising from prior Nevada robbery convictions. Because Nevada's robbery statute omits certain elements required under California law, the trial court decided whether McGee had acted with the intent required by California law, and thus whether the Nevada convictions counted as strikes. This deprived McGee of his due process right to have the issue of his intent decided by a jury.

Nevertheless, in this instance the error was harmless. Because any reasonable jury would have concluded, as the trial court did, that McGee's conduct satisfied the elements of robbery under California law, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 11, 2001, Aaron Kelly, Leonardo Lopez, and Matty Ibarra were sitting in a parked car in East Palo Alto. There was a knock on the window, and Lopez opened his door. A man wielding a shotgun demanded money. Lopez gave him $200. The robber instructed Lopez to shut the door. Kelly and Lopez heard a shot either a few moments or a minute later. Lopez saw the robber drive off in a red car.

On January 22, 2001, Lopez and Serafin Andrade were in Lopez's front yard when they heard a gunshot. Lopez recognized the robber's red car as it drove by. Minutes later, the car stopped close by, and the driver fired on Lopez and Andrade. Lopez was hit by a shotgun pellet and suffered a minor cut. Lopez and Andrade fled.

McGee was arrested and charged with two counts of attempted murder with firearm discharge enhancements (Pen. Code, §§ 187, 664, 12022.5, subd. (a)(1)—counts 1 and 10),[1] two counts of assault with a firearm with a firearm use enhancement (§§ 245, subd. (a)(2), 12022.5, subd. (a)(1)—counts 2 and 11), two counts of unlawful possession of a firearm (§ 12021, subd. (a)(1)—counts 3 and 6), unlawful possession of ammunition (§ 12316, subd. (b)(1)—count 4), one count of robbery and two counts of attempted robbery with use and discharge of a firearm enhancements (§§ 212.5, 664,

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

12022.5, subd. (a)(1)—counts 5, 7, and 8), two counts of dissuading a witness with firearm use enhancements (§§ 136.1, subd. (c)(1), 12022.5—counts 9 and 14), and two counts of discharging a firearm from a vehicle (§ 12034, subd. (c)—counts 12 and 13). A jury acquitted McGee of attempted murder but convicted him on all other counts.

The information listed two Nevada robbery convictions and alleged them as strikes under section 1170.12, subdivision (c)(2) and serious felonies under section 667, subdivision (a). The information alleged that because Nevada's robbery statute included all the elements of robbery under California law, the Nevada convictions should count as strikes and serious felonies under California law. The information also alleged a prior prison term under section 667.5, subdivision (b) for the second Nevada robbery conviction.

McGee argued that Nevada's robbery statute differed from California's robbery statute, and the People agreed. Thus, a determination had to be made whether defendant's conduct that led to the Nevada convictions would have violated California law. McGee argued that due process entitled him to have a jury make this decision. The People argued that McGee had no constitutional right to have a jury decide prior conviction issues, and that the Penal Code authorized the judge to determine whether McGee's actual conduct fit California's robbery statute.

The trial court agreed with the People. It examined the records of McGee's prior convictions as submitted by the People. The trial court found the elements of California's robbery statute were met, then instructed the jury to determine only whether McGee had suffered the two prior robbery convictions—in essence, whether the Nevada records were authentic. The jury found the prior strike allegations true. The trial court sentenced McGee to 90 years to life.

On appeal, McGee challenges the trial court's denial of his request for a jury as a violation of due process. He also challenges a single evidentiary ruling in the conduct of the underlying trial, which we dispose of in the unpublished portion of this opinion.

DISCUSSION

I. *McGee Has a Federal Constitutional Right to Have the Issue of His Intent in Committing the Nevada Robberies Resolved by a Jury*

A. *The Three Strikes Law*

" 'Various sentencing statutes in California provide for longer prison sentences if the defendant has suffered one or more prior convictions of specified types.' (*People v. Woodell* (1998) 17 Cal.4th 448, 452 [71 Cal.Rptr.2d 241, 950 P.2d 85].) A prominent example is a conviction of a 'serious felony' as defined in Penal Code section 1192.7, subdivision (c). Conviction of a serious felony has substantial sentencing implications under the 'Three Strikes' law (*People v. Woodell, supra,* 17 Cal.4th at p. 452) and also under section 667, subdivision (a)(1), which mandates a five-year sentence enhancement for each such conviction." (*People v. Avery* (2002) 27 Cal.4th 49, 53, fn. omitted.)

"To qualify as a serious felony, a conviction from another jurisdiction must involve conduct that would qualify as a serious felony in California." (*People v. Avery, supra,* 27 Cal.4th at p. 53; see §§ 667, subd. (d)(2),[2] 1170.12, subd. (b)(2).[3]) In determining whether an out-of-state conviction is a serious felony, "the trier of fact may consider the entire record of the proceedings leading to imposition of judgment on the prior conviction to determine whether the offense of which the defendant was previously

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[2] Section 667, subdivision (d) provides: "(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as: [¶] . . .[¶] (2) A conviction in another jurisdiction for an offensethat, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7."

[3] Section 1170.12, subdivision (b) provides: "(b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as: [¶] . . .[¶] (2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7."

convicted involved conduct which satisfies all the elements of the comparable California serious felony offense." (*People v. Myers* (1993) 5 Cal.4th 1193, 1195.) Thus, the trier of fact may consider both the legal elements of the crime and the actual conduct, as revealed by the record of conviction. (*People v. Woodell, supra,* 17 Cal.4th at p. 453; *People v. Avery, supra,* 27 Cal.4th at p. 53.)

Conviction of a "violent felony" as defined in section 667.5, subdivision (c) also triggers application of the Three Strikes law. (§§ 667, subds. (d)(1) & (2), 1170.12, subds. (b)(1) & (2); *People v. Nava* (1996) 47 Cal.App.4th 1732, 1735.) The same principles apply to violent felonies as to serious felonies. A conviction for an offense in another jurisdiction will qualify so long as it includes all the elements of the same felony under California law. (§ 1170.12, subd. (b)(2).) In determining whether the defendant has been convicted of a violent felony, the trier of fact may consider the entire record of proceedings. (*People v. Riel* (2000) 22 Cal.4th 1153, 1204-1205.)

Consequently, determining whether a conviction from another jurisdiction is a strike involves distinct legal and factual questions. Legally, does the crime for which a defendant was convicted include all elements of one of the crimes listed as a violent felony in section 667.5, subdivision (c) or a serious felony in section 1192.7, subdivision (c)? If not, then factually, does the record of conviction demonstrate that the defendant's conduct satisfied any missing elements? And—the question posed in this case—who decides these first two questions, a judge or a jury?

B. *Legal Inquiry into the Elements of a Crime Under California and Nevada Law: A Question for the Judge*

McGee does not dispute that the threshold comparison of the foreign jurisdiction's law with California law is a question for the judge. Here, the People conceded at trial that the elements of robbery under Nevada law and California law differed, and consequently that the fact of McGee's Nevada robbery convictions alone did not establish that he had been convicted of serious felonies under section 1192.7, subdivision (c)(19) or violent felonies under section 667.5, subdivision (c)(9).

McGee contends that the Nevada robbery statute differs from the California robbery statute in two respects. First, "[u]nder California law, theft requires an intent to *permanently* deprive another of property." (*People v. Avery, supra,* 27 Cal.4th at p. 52; see *People v. Ortega* (1998) 19 Cal.4th 686, 693 ["[t]heft requires an element—the specific intent to *permanently* deprive a person of property"].) In contrast, robbery under Nevada law is a general intent crime; Nevada law does not require the specific intent to permanently deprive the victim of property. (E.g., *Litteral v. State* (Nev. 1981) 97 Nev. 503, 505-508, overruled on other grounds in *Talancon v. State* (1986) 102 Nev. 294, 301.)[4]

Second, under Nevada law, a taking may be accomplished by fear of future harm. (Nev. Rev. Stat. § 200.380 ["Robbery is the unlawful taking of personal property . . . by means of force or violence or fear of injury, *immediate or future* . . .," emphasis supplied].) According to McGee, California law requires a fear of present harm. Without deciding whether California law always requires a fear of present harm, we agree that the fear element under California law applies to a narrower range of conduct than the fear element under Nevada law.

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) The "fear" element "may be either: [¶] 1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or, [¶] 2. The fear of an immediate and unlawful injury to the person or

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[4] The relevant question is the state of Nevada law as of 1988 and 1994. (See §§ 1170.12, subd. (b)(1) ["The determination of whether a prior conviction is a prior felony conviction for purposes of this section shall be made upon the date of that prior conviction"], 667, subd. (d)(1) [same].) However, there do not appear to have been any material changes between 1988 and the present. In 1988, as now, Nevada's robbery statute provided in part, "Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery." (Nev. Rev. Stat. § 200.380.)

property of anyone in the company of the person robbed at the time of the robbery." (§ 212.) The definition of fear includes only fear of immediate harm to someone in the victim's company, but omits the immediacy limitation with respect to fear of harm to the victim or the victim's family. The People argue that under section 212, threat of future harm to the victim may support a robbery conviction here, just as in Nevada.

This is certainly the most logical reading of section 212. The inclusion of the "immediate" limit in section 212, subdivision (2) and its corresponding omission from section 212, subdivision (1) strongly suggests that the feared harm need not be immediate. In addition, section 212, subdivision (1) extends to fear of harm to family members, who need not be present at the scene of the robbery. Any such feared harm would necessarily be future harm, not immediate harm.

However, it is not necessary to decide whether robbery can ever be based on a fear of future harm in California in order to say that the two statutes differ. In Nevada, unlike California, robbery can always be based on future harm, whether to the victim, a family member, or a companion. The Nevada robbery statute extends to a fear of "immediate or future [harm] to [the victim's] person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery." (Nev. Rev. Stat. § 200.380.) It is undisputed that in California, in contrast, Penal Code section 212 limits the fear of harm to one's companion to immediate harm. Thus, the fear element under Nevada law is broader than the same element under California law.

Because of these differences between California and Nevada law, McGee's Nevada convictions do not establish as a matter of law that his actions constituted robbery under California law. Instead, they leave factual questions as to whether McGee acted with the requisite specific intent and took property with the requisite fear or force. To answer these questions, a fact finder must look beyond the convictions to the record of each conviction to determine whether that record establishes the missing elements. Over McGee's objection, the trial court conducted that inquiry itself, rather than requiring the prosecution to prove the elements of intent and fear or force to the jury.

C. *Factual Inquiry into the Defendant's Conduct: A Question for the Jury*

1. *Jury Rights Before* Apprendi v. New Jersey

In 1995, the California Supreme Court, relying on United States Supreme Court precedent, concluded, "[T]he federal Constitution does not confer a right to have a jury determine [any] aspect of a sentence enhancement imposed upon a defendant for previously having been convicted of a serious felony . . . ." (*People v. Wiley* (1995) 9 Cal.4th 580, 585 (*Wiley*), citing *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 93 and *Walton v. Arizona* (1990) 497 U.S. 639, 648.) The California Supreme Court went on to conclude that as a statutory matter, California law provides that a judge, rather than a jury, should determine whether prior serious felony convictions had been brought and tried separately so as to qualify as separate bases for enhancement. (*Wiley,* at pp. 590-592; see § 1025.)

In 1999, the California Supreme Court revisited the question of the right to have a jury decide prior conviction issues. Relying on *Wiley*, it reaffirmed that "defendants have 'no constitutional right to have a jury determine factual issues relating to prior convictions alleged for purposes of sentencing enhancement.' " (*People v. Kelii* (1999) 21 Cal.4th 452, 455 (*Kelii*), quoting *Wiley, supra,* 9 Cal.4th at p. 589.) Treating the question as a statutory one hinging on the interpretation of sections 1025 and 1158, the Supreme Court held that a judge should determine whether a prior conviction qualified as a "serious felony" for purposes of sentence enhancement under the Three Strikes law. (*Kelii,* 21 Cal.4th at p. 454.) In *Kelii*, the defendant previously had been convicted of burglary. The burglary convictions counted as strikes if and only if they were residential, a factual issue not disposed of by the prior conviction itself. (§ 1192.7, former subd. (c)(18) [including "residential burglary" in list of serious felonies]; see §§ 667, subd. (d)(1), 1170.12, subd. (b)(1).) In order to determine whether the convictions counted as strikes, a fact finder would need to consider the record underlying the prior conviction to evaluate the nature of the defendant's conduct. (*Kelii*, at pp. 456-457.) Holding that such factual issues were limited in scope, the California Supreme Court

concluded that section 1025 reserved such questions for the court, not the jury. (*Id.* at pp. 457-458.)

Absent any change in the constitutional landscape, *Kelii* would require affirmance here. The factual inquiries required in this case—whether McGee had the intent to deprive his victims permanently of any property, and whether he committed each theft by means of the sort of fear addressed by section 212—hinge on an examination of the record of the prior convictions. These inquiries are precisely analogous to the *post hoc* record review *Kelii* determined was reserved for the court by section 1025. No intervening legislative amendments or California Supreme Court decisions have revised that statutory allocation. The only question is whether such an allocation is constitutional.

2. Apprendi v. New Jersey

In the landmark opinion *Apprendi, supra,* 530 U.S. 466, the United States Supreme Court invalidated a statutory scheme that allowed judges to increase criminal penalties beyond the maximum established for a given crime after making factual findings about the defendant's conduct. A New Jersey statute established penalties for possession of a firearm for an unlawful purpose, and a second hate crime statute imposed a sentencing enhancement if the court found by a preponderance of the evidence that the defendant " 'acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.' " (*Id.* at pp. 468-469, quoting N.J. Stat. Ann. § 2C:44-3, former subd. (c).) Apprendi had fired a rifle into the home of an African-American family; the trial court conducted an evidentiary hearing, concluded by a preponderance of the evidence that the crime was motivated by racial bias, and enhanced Apprendi's sentence. (*Id.* at pp. 469-473.)

The United States Supreme Court reversed, holding that this procedure violated the federal constitution. (*Apprendi, supra,* 530 U.S. at pp. 476, 477.) The Supreme Court framed the question as "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum

prison sentence for an offense . . . be made by a jury on the basis of proof beyond a reasonable doubt." (*Id.* at p. 469.) It reviewed the history of the rights to a jury and proof beyond a reasonable doubt and concluded, "The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." (*Id.* at pp. 482-483.) From these underpinnings, the Court recognized a constitutional right: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum [for the particular crime] must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) Consequently, " '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.' " (*Id.* at p. 490, quoting *Jones v. United States* (1999) 526 U.S. 227, 252-253 (conc. opn. of Stevens, J.).)

Apprendi left open a single narrow exception to its broad rule. Two years earlier, in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*), the Court had held in a 5-4 decision that a judge could sentence a defendant to a term higher than that attached to the offense charged in the indictment on the basis of a prior aggravated felony conviction. The *Apprendi* majority, consisting of the four *Almendarez-Torres* dissenters and Justice Thomas, acknowledged, "[I]t is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested"—in other words, that even the issue of whether the defendant had suffered a prior conviction should go to a jury in those cases where it was contested. (*Apprendi, supra,* 530 U.S. at pp. 489-490.) However, the *Apprendi* majority expressly stopped short of overruling *Almendarez-Torres*. Instead, it attempted to reconcile and limit *Almendarez-Torres* on two bases: (1) in *Almendarez-Torres*, the defendant admitted the prior convictions, and (2) the "fact" of a prior conviction carried with it procedural safeguards. (*Apprendi,* at p. 488.) These two

factors "mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." (*Ibid.*)

3. *Jury Rights After* Apprendi v. New Jersey

The California Supreme Court considered the implications of *Apprendi* in *Epps, supra,* 25 Cal.4th 19. Relying on *Wiley* and *Apprendi*, it reiterated, "The right, if any, to a jury trial of prior conviction allegations derives from sections 1025 and 1158, not from the state or federal Constitution." (*Epps,* at p. 23, citing *Apprendi*, *supra,* 530 U.S. at p. 490 and *Wiley*, *supra,* 9 Cal.4th at p. 585.) *Epps*'s citation to *Apprendi* relied on the portion of that decision exempting from the jury trial guarantee proof of "the fact of a prior conviction." To that extent, *Wiley*'s holding that there was no federal constitutional right to a jury trial on "factual issues relating to prior convictions alleged for purposes of sentencing enhancement" (*Wiley,* at p. 589) remained good law. *Epps* went on to confirm that statutory amendments to section 1025 did not alter the conclusions reached in *Wiley* and *Kelii* that, as a statutory matter, prior conviction allegations were to be decided by the judge, not the jury.

However, *Epps* acknowledged that where more was at issue than just whether or not the defendant had previously been convicted, *Apprendi* might require a jury trial. Because no such issue was presented in *Epps*, the court declined to decide whether *Apprendi* might overrule the portion of *Kelii* finding no federal constitutional jury right on ancillary factual questions: "The Los Angeles County Public Defender as an amicus curiae argues we should reconsider our holding in *Kelii* in light of the high court's decision in *Apprendi, supra,* 530 U.S. 466 [120 S.Ct. 2348], and thereby confer a more significant role on the jury. Specifically, amicus curiae argues *Apprendi* gives defendants a right to have a jury decide whether a prior conviction is a serious felony for purposes of the three strikes law. *Apprendi*, however, reaffirms that defendants have no right to a jury trial of 'the fact of a prior conviction' (*id.* at p. 490 [120 S.Ct. at p. 2362]), and here, at least, only the bare fact of the prior conviction was at issue, because the prior

conviction (kidnapping) was a serious felony by definition under section 1192.7, subdivision (c)(20). We do not now decide how *Apprendi* would apply were we faced with a situation like that at issue in *Kelii*, where some fact needed to be proved regarding the circumstances of the prior conviction—such as whether a prior burglary was residential—in order to establish that the conviction is a serious felony." (*Epps, supra,* 25 Cal.4th at p. 28.) Thus, *Epps* called into doubt whether the "no federal constitutional right" holdings of *Wiley* and *Kelii* still applied to factual issues ancillary to the fact of a prior conviction.

4. *Application of* Apprendi *to Factual Questions Ancillary to a Prior Conviction*

This case presents just such ancillary factual issues relating to the circumstances and conduct giving rise to McGee's prior convictions. The issues are whether McGee acted with the specific intent to deprive his victims permanently of their property, and whether he did so by means of force or fear as defined in sections 211 and 212. We hold that under *Apprendi*, McGee has the right to have these issues tried to a jury.

Plainly, the issue of intent is a factual issue whose determination could be used to enhance McGee's sentence beyond the maximum to which he would otherwise be exposed. It is, indeed, very much akin to the issue of intent in *Apprendi*. This factual issue falls within the broad rule that "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." (*Apprendi, supra,* 530 U.S. at p. 490.) The real issue is whether it falls within the sole exception to that rule, for proof of "the fact of a prior conviction." (*Ibid.*)

We interpret the scope of that exception both by reference to the specific facts of *Almendarez-Torres*, the source of the exception, and by reference to the specific rationales for the exception offered in *Apprendi*. In *Almendarez-Torres*, the sentence enhancement arose from a statute that provided, " 'Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection— . . . [¶] (2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such

alien shall be fined under such title, imprisoned not more than 20 years, or both.' " (*Almendarez-Torres*, *supra,* 523 U.S. at p. 229, quoting 8 U.S.C. § 1326, subd. (b).) In *Almendarez-Torres*, the determination whether the defendant had been convicted of an aggravated felony involved no factual issues surrounding the defendant's conduct—what the defendant had done—but only issues concerning what legal consequences had been imposed. Indeed, *Almendarez-Torres* involved no contested factual issues at all, because, as *Apprendi* emphasized, the defendant admitted his prior convictions for aggravated felonies. (*Almendarez-Torres,* at p. 227; *Apprendi, supra,* 530 U.S. at p. 488.)

The other factor *Apprendi* emphasized was the fact that the prior convictions in *Almendarez-Torres* carried with them their own procedural protections; presumably, with respect to each prior conviction, Almendarez-Torres had had the opportunity to have any factual issues surrounding his conduct evaluated by a jury pursuant to the reasonable doubt standard. So long as such assurances were present, *Apprendi* found it permissible to have the determination of what legal consequences had been imposed, i.e., the fact of conviction, made by a judge. (*Apprendi, supra,* 530 U.S. at p. 488.) This suggests that the *Almendarez-Torres* exception applies, at most, to such legal consequences, but not to the evaluation of a defendant's conduct in the first instance—an evaluation that *Apprendi* placed in the hands of the jury. While *Apprendi* found it unnecessary to overrule *Almendarez-Torres*, it expressly characterized it as a "narrow exception" arising from "unique facts." (*Apprendi,* at p. 490.) Given this characterization, there is no reason to interpret *Almendarez-Torres* as creating an exception that is any broader. Consequently, we conclude that the *Almendarez-Torres* exception to *Apprendi* is confined to determinations about the past legal consequences of a defendant's conduct, such as whether his conduct has given rise to a conviction or prison term, and does not extend to determinations about the conduct itself, such as the intent with which a defendant acted.

The People point us to three post-*Apprendi* Court of Appeal cases which they contend militate in favor of a different result: *People v. Thomas* (2001) 91 Cal.App.4th 212 (*Thomas*), *People v. Belmares* (2003) 106 Cal.App.4th 19 (*Belmares*), and *People v. Garcia* (2003) 107 Cal.App.4th 1159 (*Garcia*). However, none of these cases involved a

factual determination about the defendant's charged conduct; instead, all involved the legal consequences of that conduct and thus fit within the *Almendarez-Torres* exception to *Apprendi*.

Thomas dealt with an enhancement under section 667.5, subdivision (b), which depends on proof that the defendant previously has served a prison term as the consequence of a prior conviction. The issue in *Thomas* revolved around the past legal consequences of the defendant's conduct, and did not require resolution of factual issues surrounding what the defendant actually did. *Thomas* correctly recognized that the *Almendarez-Torres* exception was not limited to "the fact of a prior conviction," but extended to other legal consequences, such as whether the defendant had been required to serve time in prison. It held that "[i]n 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." (*Thomas, supra,* 91 Cal.App.4th at pp. 222-223.) In essence, *Thomas* drew the same distinction we draw today—between factual issues that relate to whether a defendant's conduct satisfies the elements of a crime, and factual issues that relate to the legal consequences a recidivist may have suffered because of that conduct, whether it be a prior conviction or a prior prison term. While we agree with *Thomas*, this case presents the flip side of the situation in *Thomas*—recidivist findings that *are* related to the elements of a crime, that is, whether the defendant's earlier conduct satisfies the elements of a specific crime. While *Almendarez-Torres* is the governing due process authority for the issue raised in *Thomas*, *Apprendi* is the governing due process authority for the issue raised here.

Belmares and *Garcia* each dealt with the issue of identity: was this defendant the same person that had previously been convicted? (*Belmares, supra,* 106 Cal.App.4th at pp. 27-28; *Garcia, supra,* 107 Cal.App.4th at p. 1165.) This is precisely what *Apprendi* said was not covered by its rule: the fact of prior conviction. As with *Thomas* and *Epps*, the factual issues in these cases related to the legal consequences defendant had suffered as a result of past criminal conduct, not whether that conduct was criminal in the first instance. These cases are governed by the *Almendarez-Torres* exception to *Apprendi*.

In contrast, the instant case falls under the general rule of *Apprendi*. We cannot reconcile with *Apprendi* the notion that a judge may, in the first instance, make a factual determination about a criminal defendant's intent, and then use that factual determination to increase substantially the maximum term to which the defendant will be subjected. *Apprendi* compels the conclusion that that issue must go to a jury.

However, even in cases such as this one, the trial court may still exercise a gatekeeper function. The question whether McGee is the person identified in court documents is a question for the judge under section 1025, and the federal constitution does not require otherwise. (*Apprendi, supra,* 530 U.S. at p. 490; *Epps, supra,* 25 Cal.4th at pp. 23, 26.) In addition, the further question whether the foreign jurisdiction's law contains the same elements as California law is a legal one, to be decided by the judge, not the jury. (See *Avery, supra,* 27 Cal.4th at pp. 54-57.) However, once a judge determines that there are differences between the two jurisdiction's laws—elements that are omitted by the foreign jurisdiction's definition, or defined so as to criminalize a broader range of conduct under foreign law—such that reference to the actual record is necessary, the judge is required by *Apprendi* to put those elements to the jury. The failure to do so here was federal constitutional error.

At oral argument, McGee contended that whenever there are differences between California's and another state's law, a jury must decide anew *all* elements of the California crime. We do not read *Apprendi* so broadly. *Apprendi* establishes a due process right to a jury on those factual issues that have not previously been resolved through a process that included jury and reasonable doubt protections. (See *Apprendi, supra,* 530 U.S. at p. 488 [excluding fact of prior conviction because fact had already been determined through process subject to "procedural safeguards"]; cf. *Jones v. United States, supra,* 526 U.S. at p. 249 [recognizing that no jury right attaches to fact of prior conviction because "unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees"].) For each element of robbery in California that is also an element of robbery in Nevada,

McGee has already received the due process to which he is entitled in the Nevada proceeding, either by having the element submitted to a jury or by waiving that right. Only those elements that are different, that present new California-specific factual issues not already decided, must be submitted to a jury. Similarly, in cases such as *Kelii* where a prior burglary conviction is at issue, only the new factual issue (was the burglary residential?) would need to be submitted to a jury under *Apprendi*, the other elements of burglary having already been found in a proceeding comporting with due process.

II. *The Denial of the Federal Constitutional Right to a Jury Trial Was Harmless*

McGee argues that the failure to submit factual issues to a jury is a structural error, and thus requires reversal per se. (See, e.g., *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281; *People v. Collins* (2001) 26 Cal.4th 297, 312-313; *People v. Ernst* (1994) 8 Cal.4th 441, 449.) "It has long been established that the denial of the right to a jury trial constitutes a ' "structural defect[]" in the judicial proceedings' that, by its nature, results in . . . a 'miscarriage of justice' " requiring reversal. (*People v. Ernst*, at p. 449, quoting *People v. Cahill* (1993) 5 Cal.4th 478, 493, 501.) However, McGee's argument is foreclosed by more recent decisions.

In 1999, the United States Supreme Court held that the failure to instruct a jury on an element of a crime, such that that element is never submitted to the jury, can be harmless. (*Neder v. United States* (1999) 527 U.S. 1, 8-15 (*Neder*).) While *Neder* did not clarify when such a partial denial of the right to a jury trial is simple trial error subject to harmless error review, as opposed to structural error requiring reversal per se (see *id.* at p. 33 (dis. opn. of Scalia, J.)), it did establish that the denial of a jury verdict on an issue is not always reversible per se.

Following *Neder*, the California Supreme Court addressed whether and to what extent *Apprendi* error should be subject to harmless error analysis. (*People v. Sengpadychith* (2001) 26 Cal.4th 316 (*Sengpadychith*).) In *Sengpadychith*, the trial court submitted a charged gang enhancement to the jury, but did not instruct the jury on one element of the enhancement. (*Sengpadychith*, at p. 322; see § 186.22, subd. (b).) The

Supreme Court concluded that this *Apprendi* error was subject to harmless error review under the federal *Chapman v. California* (1967) 386 U.S. 18 standard: the error was reversible "unless it can be shown 'beyond a reasonable doubt' that the error did not contribute to the jury's verdict." (*Sengpadychith*, at p. 326; see also *People v. Smith* (2003) 110 Cal.App.4th 1072, 1079, fn. 9 [following *Sengpadychith*]; *Summerlin v. Stewart* (9th Cir. 2003) 341 F.3d 1082, 1121 (en banc) ["*Apprendi* errors are not structural and therefore are subject to harmless-error analysis"]; *U.S. v. Nealy* (11th Cir. 2000) 232 F.3d 825, 829 ["*Apprendi* did not recognize or create a structural error that would require per se reversal"]; *U.S. v. Swatzie* (11th Cir. 2000) 228 F.3d 1278, 1283 ["The error in *Neder* is in material respects indistinguishable from error under *Apprendi*" and thus *Apprendi* error is subject to harmless error review].)

Hence, the *Chapman* harmless error standard applies. Under that standard, the *Apprendi* error was harmless as to both the 1988 and 1994 convictions.

In 1988, McGee pleaded guilty to robbery. The transcript of the plea hearing indicates that when McGee was 18 years old, he took $2 from another teenager he knew through a Job Corps program while at a bus stop. The victim testified at the 1988 preliminary hearing that McGee "threatened us . . . he said if anybody tells on him that he will beat them up, hunt them down and beat them up." According to the victim, he watched McGee "slapping another guy and saying that that's what will happen if anybody tells on him." According to the victim, McGee "demanded my money," and he complied. McGee argues that on the limited record, a juror might have doubt whether he intended to permanently deprive the victim of the $2, or whether the incident was any more than schoolyard bullying. There is nothing in the record to suggest McGee ever intended to return the money. On this record, McGee's suggested scenario amounts to speculation, not reasonable doubt.

In 1994, McGee again pleaded guilty to robbery. At the preliminary hearing, the victim testified that McGee, with another defendant, "asked me for money." When the victim refused, McGee struck him, at which point the victim handed over his wallet, which contained $120, and a Walkman. This record offers no room for doubt; any

reasonable jury would find the elements of California's robbery statute satisfied. Under *Chapman*, therefore, the denial of a jury trial on the facts surrounding this prior conviction was harmless.

III. *The Trial Court Did Not Abuse Its Discretion in Excluding Evidence of McGee's Demeanor in Response to False Evidence of Guilt*

In the course of their investigation of McGee's 2001 crimes, the police prepared fictitious lab reports purporting to show that McGee's fingerprints had been found on shotgun shells at the site of one shooting, and that powder residue had been found on McGee's skin. Detective Gary Brown questioned McGee about these reports; in response, McGee maintained his innocence.

At trial, McGee's attorney sought to question Detective Brown about the ploy. The prosecution requested a sidebar. The prosecution argued that the reports were hearsay and irrelevant, and that the detective's questioning of McGee was irrelevant. Defense counsel conceded that McGee's statements in response to the reports were inadmissible hearsay but argued that he should be permitted to introduce evidence of McGee's "demeanor" in response to efforts to elicit a confession—in essence, the fact that McGee did not confess. The trial court refused to admit the reports and allow the line of questioning, concluding that the evidence of demeanor was speculative and subject to too many conflicting interpretations.

On appeal, McGee argues that he was entitled to introduce evidence concerning his demeanor in response to the accusations as tending to prove his innocence. We review the trial court's exclusion of evidence for an abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.)

The evidence McGee sought to admit is analogous to evidence of absence of flight. In *People v. Green* (1980) 27 Cal.3d 1, 36-39, the court reviewed the historical rule against admission of such evidence: "A century ago this court held such evidence inadmissible in *People v. Montgomery* (1879) 53 Cal. 576. . . . The court held in effect that evidence that a suspect did *not* flee when he had the chance was of little value as tending to prove innocence because there are plausible reasons why a guilty person might

also refrain from flight: 'He may very naturally have been deterred from making an effort to escape from a fear that he would be recaptured, and that his fruitless attempt to escape would be evidence of guilt; or he may have felt so strong a confidence of his acquittal, for want of the requisite proof of his guilt, that he deemed it unnecessary to flee.' " (*People v. Green,* at p. 37.)

The *Green* court concluded that, even to the extent absence of flight had some probative value, it should always be excluded under Evidence Code section 352. "Evidence Code section 352 codifies the long-standing rule that relevant evidence may be excluded if its probative value is substantially outweighed by the risk of prejudice. The rule also applies if that value is outweighed by the probability that admission of the evidence will create a substantial danger 'of confusing the issues, or of misleading the jury.' (*Ibid.*) Each of the latter consequences would be threatened by the introduction of evidence of absence of flight. Against this manifest risk of confusion and delay is to be weighed the probative value of the evidence in question: for the reasons given above the absence of flight is so ambiguous, so laden with conflicting interpretations, that its probative value on the issue of innocence is slight. Although such a weighing process is ordinarily performed by the trial court as a question of fact, the *Montgomery* rule thus embodies the view of this court that in all cases the scales tip so heavily against admission of evidence of absence of flight that it must be excluded as a matter of law." (*People v. Green, supra,* 27 Cal.3d at pp. 38-39, fn. omitted.) Principal among the concerns in *Green* and *Montgomery* was the possibility that admission of such evidence would lead to a side trial of a collateral issue, with each side introducing a host of evidence to explain why the absence of flight was or was not consistent with guilt or innocence. (*People v. Green,* at pp. 38-39, fn. 24.)

The demeanor evidence McGee sought to introduce stands on similar footing. It gives rise to no substantial inference that McGee was innocent. Such "negative evidence lacking in probative value is properly excluded as too speculative in nature." (*People v. Mehaffey* (1948) 32 Cal.2d 535, 555.) " 'The inference which [appellant] sought to have drawn from the [proffered evidence] is clearly speculative, and evidence which produces

only *speculative* inferences is *irrelevant* evidence.' " (*People v. Babbitt* (1988) 45 Cal.3d 660, 682, quoting *People v. De La Plane* (1979) 88 Cal.App.3d 223, 242.) Against this speculation is the likelihood that each side would then seek to explain why McGee's demeanor was or was not indicative of innocence, for example, through extensive evidence of McGee's previous dealings with the criminal justice system, dealings that rendered him impervious to the tactic employed here. The trial court did not abuse its discretion in refusing to allow McGee's line of questioning.

DISPOSITION

The judgment is affirmed.

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GEMELLO, J.

We concur.

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JONES, P.J.

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SIMONS, J.

People v. McGee, A097749

Trial court:	San Mateo County Superior Court
Trial judge:	Hon. Carl Holm
Counsel for defendant and appellant:	John A.W. Halley, under appointment by the Court of Appeal
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