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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

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THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP ANGUS WRIGHT,

Defendant and Appellant.

C067661

(Super. Ct. Nos.  
CR027494, CR027105)

Following a jury trial, defendant Phillip Angus Wright was found guilty of battery with serious bodily injury, obstructing a peace officer and admitted a prior prison term enhancement. The trial court sentenced defendant to a prison term of five years and eight months, plus a consecutive eight months for a probation violation in an unrelated case.

On appeal, defendant contends his admission of the prior prison term enhancement was invalid, and instructing the jury that a broken nose constituted serious bodily injury violated his rights to due process and a jury trial. We reverse the enhancement, remand for further proceedings on that issue, and otherwise affirm the judgment.

## FACTS

On March 13, 2010, defendant was living in Lassen County with his mother Victoria Ridgebear (Victoria) and stepfather Elvis Ridgebear (Elvis). Defendant got into a discussion with his mother and stepfather over a summons for jury duty. The discussion escalated into a heated argument that lasted for 15 to 20 minutes.

The three eventually went into the bedroom, where defendant and Victoria continued the argument. When Elvis asked defendant why he did this when they kept caring for him, defendant "rubbed a fork" and said, "I ought to stick you."

Defendant and Victoria then resumed their argument. As the subject of the argument moved to Elvis, defendant was "jumping around . . . like he wanted to hit somebody." Victoria told Elvis to say something to defendant; when Elvis removed his glasses and began to stand up, defendant hit Elvis with a closed fist, breaking his nose.

Defendant ran into his room and barricaded himself. After police entered the residence, defendant told an officer that he wanted \$300 his mother owed him. Officers decided to forcibly enter the room when defendant said he had taken a bottle of pills.

When officers broke into defendant's room, he started throwing objects at them, including a table and a chair. Defendant had to be Tasered two times before officers could subdue him.

Testifying on his own behalf, defendant claimed his mother ordered him to move out even though he recently paid rent. During the ensuing confrontation, Elvis took off his glasses and moved toward defendant after Victoria told Elvis to "do something." Thinking Elvis was going to do something to him, defendant swung and warned Elvis to back up.

#### DISCUSSION

##### I

##### *Boykin-Tahl Error*

Defendant contends that in accepting his admission of a prior conviction, the trial court erred in failing to elicit waivers of his right against compulsory self-incrimination and his rights to jury trial and confrontation. We agree.

Counsel informed the trial court at the in limine hearing that defendant was willing to admit the prior prison term enhancement. After defendant was brought before the court, counsel asked whether he was willing to "admit that prior conviction." Defendant told the court that he was, and counsel asked whether the court wanted to voir dire defendant. The court told counsel: "We also need to cover the fact that [a] term was served as prescribed in Penal Code section 6667.5 [*sic*] for said offense and defendant did not remain free from prison custody for that offense and that did result in a felony conviction within a period of five years subsequent to the conclusion of said term." Defense counsel agreed, and asked defendant if the trial court's statement was correct. Defendant said, "Yes," and the hearing concluded. There is no record of

the trial court ever informing defendant of his rights to jury trial, confrontation, and to be free from compulsory self-incrimination, or of defendant waiving those rights.

Before a trial court can accept an accused's admission of a prior prison term, the accused must be advised of: (1) the right against compulsory self-incrimination; (2) the right to confrontation; and (3) the right to a jury trial. (*People v. Mosby* (2004) 33 Cal.4th 353, 359-360, citing *Boykin v. Alabama* (1969) 395 U.S. 238, 243 [23 L.Ed.2d 274, 279]; *In re Tahl* (1969) 1 Cal.3d 122, 132; *In re Yurko* (1974) 10 Cal.3d 857, 863; see also *People v. Little* (2004) 115 Cal.App.4th 766, 779-780.) A defendant need not be advised of all these rights if "the record affirmatively shows that [the admission] is voluntary and intelligent under the totality of the circumstances." [Citation.]" (*Mosby*, at p. 360, italics omitted.) The pertinent inquiry is "whether the defendant's admission was intelligent and voluntary because it was given with an understanding of the rights waived." (*Id.* at p. 361.) "[I]f the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances. [Citation.]" (*Ibid.*)

*Mosby* separated the cases involving flawed *Boykin-Tahl* procedures into two categories: "(1) truly silent record cases, those in which the record showed 'no express advisement and waiver of the *Boykin-Tahl* rights before a defendant's admission

of a prior conviction' [citation]; and (2) incomplete *Boykin-Tahl* advisement cases, those in which the defendants had been advised of their right to a jury trial, but not of the other two constitutional rights. [Citation.]" (*People v. Christian* (2005) 125 Cal.App.4th 688, 695.)

Because there are no advisements and no waivers on the record here, we have a "truly silent record" case. "With regard to the 'truly silent record cases' [citations], *Mosby* concluded the appellate courts were correct in holding that the defendant's admissions were not voluntary and knowing: 'In all of [the silent record cases,] a jury trial on a substantive offense preceded the defendants' admissions of prior convictions. These defendants were not told on the record of their right to trial to determine the truth of a prior conviction allegation. Nor did they expressly waive their right to trial. In such cases, in which the defendant was not advised of the right to have a trial on an alleged prior conviction, [it] cannot [be inferred] that in admitting the prior the defendant has knowingly and intelligently waived that right as well as the associated rights to silence and confrontation of witnesses.' [Citation.]" (*People v. Christian, supra*, 125 Cal.App.4th at p. 695.)

"Under *Mosby*, we may not infer the admissions were voluntary and intelligent under the totality of the circumstances." (*People v. Sifuentes, supra*, 195 Cal.App.4th at p. 1421.) Accordingly, we reverse the prior prison term

enhancement and remand for further proceedings on the allegation.

## II

### *Instructional Error*

Defendant contends the trial court violated his due process and jury trial rights by instructing the jury that a broken nose satisfied the serious bodily injury element of battery with serious bodily injury (Pen. Code, § 243, subd. (d)). Although the trial court erred, we find the error harmless.

Regarding the crime of battery with serious bodily injury, the trial court instructed the jury with CALCRIM No. 925 as follows:

"The defendant is charged in Count I with battery, causing serious bodily injury in violation of Penal Code section 243(d). To prove the defendant is guilty of this crime, the People must prove that: [¶] One, the defendant willfully touched Elvis Ridgebear in a harmful or offensive manner. [¶] And two, Elvis Ridgebear suffered serious bodily injury as a result of the force used. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else or gain any advantage. Making contact with another person, including through his or her clothing is enough to commit a battery. [¶] *A broken nose is serious bodily injury.*" (Italics added.)

The parties did not stipulate that a broken nose was a serious bodily injury under Penal Code section 243. Defendant did not object to the instruction.

Although a broken bone can be a serious bodily injury, it is not a serious bodily injury as a matter of law. (*People v. Nava* (1989) 207 Cal.App.3d 1490, 1497; *People v. Beltran* (1989) 210 Cal.App.3d 1295, 1305-1306.) As such, whether the defendant inflicted a great bodily injury is a question for the jury absent a stipulation by the parties. (*Nava*, at p. 1498; CALCRIM No. 925 (2011) Bench Notes on Instructional Duty.)

The People argue that the record supports an inference of either an agreement or absence of disagreement between the parties over whether the broken nose constituted serious bodily injury. We are unwilling to infer a stipulation from a silent record, especially where, as here, the failure to object does not forfeit defendant's claim that the instructional error deprived him of his substantial rights. (Pen. Code, § 1259; *People v. Cabral* (2004) 121 Cal.App.4th 748, 750.)

"Misdescription of an element of a charged offense is subject to harmless error analysis and does not require reversal if the misdescription was harmless beyond a reasonable doubt. [Citations.]" (*People v. Hagen* (1998) 19 Cal.4th 652, 670.) Under this standard, we ask: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Neder v. United States* (1999) 527 U.S. 1, 18 [144 L.Ed.2d 35, 53].)

Although the parties did not stipulate that defendant inflicted serious bodily injury on his victim, the issue was uncontested. The prosecution presented testimony from Elvis Ridgebear that defendant struck him in the face and broke his

nose. Medical records documenting the nasal fracture were admitted at trial. An officer who responded to the 911 call testified that Elvis Ridgebear was bleeding profusely from his nose. Ridgebear was diagnosed with a "subtle fracture of the nasal bone without significant displacement." The defense was based on self-defense; defendant did not present contrary evidence on the extent of the injury and did not argue that the broken nose was not a serious bodily injury.

Where an omitted element is "uncontested and supported by overwhelming evidence," there is no basis for reversal. (*Neder v. United States, supra*, (1999) 527 U.S. at p. 17 [144 L.Ed.2d at p. 52].) Here, there is compelling, uncontradicted evidence that defendant inflicted serious bodily injury on his victim. Since the issue was not contested by the parties, the erroneous instruction on serious bodily injury was harmless beyond a reasonable doubt.

#### DISPOSITION

The true finding on the allegation that defendant served a prior prison term is reversed and the sentence imposed is vacated. The matter is remanded for further proceedings on that allegation. In all other respects, the judgment is affirmed.

We concur: ROBIE, J.

HULL, Acting P. J.

HOCH, J.