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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

FLOYD EUGENE BENDER,

Defendant and Appellant.

C081130

(Super. Ct. No. 15F05570)

Defendant Floyd Eugene Bender was found guilty by jury of two felony counts of indecent exposure. (Pen. Code, § 314, subd. (1).)¹ Through counsel, he stipulated to sustaining two prior convictions, one of which was an element of the felony indecent exposure charges against him. The trial court did not advise defendant of his constitutional rights in conjunction with this stipulated admission of his prior convictions.

¹ Further undesignated statutory references are to the Penal Code.

The People concede prejudicial error and join in defendant's request that we reverse the judgment.

We agree with the parties that the trial court's error resulted in a deficient showing that defendant's (stipulated) admission of his prior convictions--a true finding on which was necessary to prove defendant's felony conviction as charged--was knowing and voluntary. Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On July 11, 2015, the incarcerated defendant masturbated in front of a psychiatric technician at California State Prison, Sacramento. Eight days later, defendant masturbated a second time in front of a different psychiatric technician. Defendant was charged with two counts of felony indecent exposure. His 2010 prior conviction was cited in the complaint as the basis for the felony charges (which without a prior conviction under sections 314 or 288 were misdemeanors). (§ 314, subd. (1); counts one and two.)

Before trial, the prosecution sought to introduce the 2010 prior conviction as well as an uncharged 2012 prior conviction pursuant to Evidence Code section 1108. Defendant objected, arguing admission of the convictions was unduly prejudicial. (CT 85) The trial court held a hearing and found the prior convictions admissible and also agreed with defense counsel that the certified copies contained irrelevant details that "could be prejudicial" The trial court suggested the parties "come up with a way to sanitize some of this or remove some of the items," such as a stipulation. Both the prosecution and the trial court observed the prosecution had the obligation of proving defendant had previously been convicted of the 2010 offense because it was an element of both counts of felony indecent exposure as charged in the complaint.

Although defense counsel maintained her objection to the admission of the prior convictions, the parties agreed to the following stipulation, which was read to the jury: "On November 28, 2012, in the Kings County case 10CM7128, defendant [] was

convicted of a misdemeanor violation of [] section 314(a), indecent exposure. [¶] On February 5, 2010, in the Kings County case 09CM755, defendant [] was convicted of misdemeanor violation of [] section 314, indecent exposure.” The court and parties also agreed to modify the relevant jury instruction to reflect the conclusions that defendant had previously been “convicted of the crime of indecent exposure on February 5, 2010” and that the “defendant and the People have stipulated that the defendant was previously convicted of indecent exposure on February 5, 2010.” Defendant’s stipulation was also reflected in the verdict forms, which included the phrase, “defendant having previously been convicted of indecent exposure [in 2010], as charged in . . . the Information.”

The record before us does not reflect that the trial court *ever* directly addressed defendant regarding admitting his 2010 prior conviction, or the stipulation; nor did the trial court advise defendant of his constitutional right to a jury determination of the adequacy of proof of his prior convictions submitted by the People, or give him any advisement whatsoever. The parties do not argue otherwise.

On November 19, 2015, the jury found defendant guilty as charged, and in January 2016 the trial court sentenced him to two years eight months in prison. Defendant timely appealed.

DISCUSSION

Indecent exposure is punishable as a felony when the defendant has a prior conviction for indecent exposure. (§ 314; *People v. Adair* (2014) 228 Cal.App.4th 1469, 1477.) Here, defendant was charged with two counts of felony indecent exposure and admitted by stipulation a vital element of both charges--that he had prior convictions for the same conduct--without any advisement of his constitutional rights. Defendant contends the trial court erred by failing to advise him and thus ensure that his stipulation was knowing and voluntary. The People agree and so do we.

Just as when a defendant enters a guilty plea, when a defendant admits the truth of a prior conviction allegation which subjects him to increased punishment, the trial court

must ensure defendant is advised of and waives his constitutional rights, including the right to a jury trial, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. (*In re Yurko* (1974) 10 Cal.3d 857, 862-863.) The trial court must also insure a defendant understands the penal consequences of his admission. (*Id.* at p. 864.) A failure to give admonishments or obtain waivers is harmless if the record affirmatively shows the admission was voluntary and intelligent under the totality of the circumstances. (*People v. Howard* (1992) 1 Cal.4th 1132, 1175; *People v. Mosby* (2004) 33 Cal.4th 353, 360-361.) Here, the People properly concede the evidence does not show defendant was informed of or aware of his critical rights to the extent that we may conclude from the totality of the circumstances that defendant knowingly and intentionally waived his constitutional rights in admitting his prior convictions.

In *People v. Cross* (2015) 61 Cal.4th 164, the defendant stipulated to a prior conviction which subjected him to a higher potential prison term. The trial court accepted the defendant's stipulation without advising him of (a) his right to trial on the prior conviction allegation or (b) the penal consequences of his admission. In addition, the trial court accepted the stipulation during the prosecution's questioning of its first witness, so the defendant had not been exposed by the trial itself to the rights he was waiving. Our Supreme Court concluded defendant's waiver of his constitutional rights was not knowing and voluntary under the totality of the circumstances. (*Id.* at p. 180.)

Here, as in *Cross*, the record contains no indication that defendant's stipulation was knowing and voluntary. The trial court accepted the stipulation without advising defendant of either his rights or the fact that his conviction for a felony *depended* on the jury's finding, after trial, that his conviction allegation was true. (See *People v. Cross, supra*, 61 Cal.4th at p. 180.) In addition, the trial court failed to ask defendant or his counsel if they had discussed the stipulation with each other, and defense counsel never assured the court they did so. (*Ibid.*) The stipulation was discussed and decided at a pretrial hearing, when defendant had not yet been exposed by the trial itself to the rights

he was waiving. (*Ibid.*) Although defendant's prior convictions arguably signaled he had some experience with criminal procedure, the record does not disclose how the prior convictions were obtained. (*Ibid.* [existence of prior conviction did not support inference the defendant understood rights he was giving up where record does not disclose manner in which prior conviction was obtained].) Nothing in the record affirmatively shows defendant was aware of his right to *determination by jury of the truth* of the prior conviction allegation and all that accompanies that right.

Accordingly, the stipulation and the resulting verdicts of guilt rendered by the jury after being advised of the stipulation must be set aside.

DISPOSITION

The judgment is reversed.

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Nicholson, J.