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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD ALLEN GATES,

Defendant and Appellant.

D060819

(Super. Ct. No. SCS242212)

APPEAL from a judgment of the Superior Court of San Diego County, Francis M. Devaney, Judge. Affirmed.

A jury convicted defendant Edward Gates of assault by means of force likely to produce great bodily injury (former Pen. Code, § 245, subd. (a)(1), now § 245, subd. (a)(4),<sup>1</sup> count 1), battery with great bodily injury (§ 243, subd. (d), count 2) and domestic violence (§ 273.5, subd. (a), count 3), and found true the allegation appended to each count that Gates inflicted great bodily injury on the victim in connection with the

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

offenses. In a bifurcated proceeding, Gates admitted various prior conviction allegations. The court sentenced him to a total determinate term of 16 years. On appeal, Gates asserts the court improperly limited his cross-examination of the victim, and asserts there was sentencing error.

## I

### FACTS

Susan Alfaro, the victim, dated Gates from June 2009 through the September 20, 2010, attack. She suffers from epilepsy and takes medications to control her seizures, which occur a couple of times a month. She eventually began living with Gates in his recreational vehicle (RV). Gates is a heavy drinker and has blackouts.

#### A. The Instant Offense

On September 20, 2010, Gates and Alfaro were staying at a campground in Bonita, California, and began drinking beer early that day. In the afternoon, Alfaro was in the RV getting ready to meet their friends at a campsite to prepare dinner. Gates accused her of liking some men in a nearby campsite, and told Alfaro she was not going anywhere. He ripped her shirt and bra from her body, pushed her to the floor, and kicked her while she was on the ground. He then picked her up, grabbed and squeezed her throat, and punched her in the eye, causing her to bleed.

Gates then stopped the assault and started to clean Alfaro. She put on a shirt and, when Gates was momentarily distracted, ran out of the RV. She went to a nearby campsite, occupied by the Smiths, knocked on their door and asked them to call 911. Shortly thereafter, she collapsed. She eventually became aware of being placed on a

stretcher, and heard Gates say she had experienced a seizure. Alfaro told paramedics Gates had hit her. The next thing she recalled was waking up the next day in a trauma center.

The Smiths testified Alfaro came to their motor home that evening and knocked on the door, and Mrs. Smith answered the door. It appeared to the Smiths that Alfaro had been drinking because her eyes were puffy and her hair was messed up. They did not see any blood on her. Alfaro said something to Mrs. Smith, who could not understand her and suggested she return to her campsite. Alfaro then left the Smiths' campsite.

Another camper, Mr. Uribe, saw Alfaro attempting to sit on a rock. A few minutes later, he saw her lying on her back on the ground. It appeared to Uribe that she was supine to relax rather than had fallen. Uribe did not see her on her side or her face and did not see her strike her face; she appeared calm. At about the same time, Mr. Smith went outside to see if Alfaro was okay. He saw Alfaro on the ground, "thrashing around totally incoherent." Mrs. Smith called 911. Paramedics arrived about 10 minutes later, but Alfaro forcefully resisted their effort to put her onto the stretcher, and the paramedics struggled to tie her arms down.

A deputy sheriff also responded to the scene. Gates was standing nearby. The deputy noticed Alfaro had a swollen eye and blood around her nose, and it appeared to the deputy to be more than just a woman having a seizure. The deputy detained Gates because he was drunk and uncooperative. After Alfaro was placed in the ambulance, the deputy asked her what happened, and she told him that Gates had punched her three times. The deputy arrested Gates for domestic violence. Gates denied striking her and

repeatedly referred to his arrest as "bullshit." The deputy asked Gates about a scratch above his eye, and Gates said he scratched himself with his tools all the time. When the deputy asked about the blood on the floor of his RV, Gates said it was his blood from the scratches on his body. However, the blood samples from the RV, found by deputies when they looked through the RV the following day, matched Alfaro's blood. Police also found a ripped bra inside the RV.

The trauma surgeon who treated Alfaro initially at the hospital noticed facial bruising.<sup>2</sup> A more thorough examination revealed a fracture to the bone above her right eye and blood on the brain, which usually indicates a life-threatening brain injury. A CAT scan also showed two fractured ribs in the process of healing but not sustained on the night of the assault. Alfaro also had abrasions on the fronts of both thighs and along the right side of her back. Alfaro's blood alcohol content was .20.<sup>3</sup> The doctor testified it would not be unusual for a person with epilepsy to have a seizure after being hit in the face. The injuries were consistent with either being struck in the eye or with having a seizure and falling and striking her face.

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<sup>2</sup> The day after the alleged assault, a deputy showed the Smiths a photograph of Alfaro (apparently taken after she arrived at the hospital) depicting Alfaro's facial injuries. The Smiths testified they did not see the injuries shown in the photograph when Alfaro came to their door.

<sup>3</sup> Alfaro testified she had been told that drinking too much can make her unsteady and could impact whether she has a seizure, and combining her medications with alcohol can intensify the effects of her medications. She stated she had not taken her anti-seizure medication that afternoon.

### B. Prior Acts of Domestic Abuse

On two prior occasions during the summer of 2010, Gates struck Alfaro and bystanders called police. After one of the assaults, Gates gave Alfaro a card asking her to "forgive me as much as you can for me hurting you so much, Baby. I feel really, really hurt and bad for my drinking so much and hurting you so."

Gloria Morales dated Gates "off and on" for a period of nine years starting in 1998. Morales told an investigator that, while they dated, Gates abused her "a lot" of times, including striking her face and breaking her nose in 2003, striking her face in 2004, and grabbing her by the throat and pushing her into a refrigerator in 2006 or 2007.

### C. The Defense

A camper who spent time with Gates and Alfaro testified Alfaro was a drinker, and had been intoxicated on the day of the alleged assault. Another camper testified Alfaro was having a seizure when paramedics were called, and was flopping around and hitting her head. A woman who dated Gates off and on between 2008 and 2010 testified that he was never physically violent toward her.

## II

### THE EVIDENTIARY CLAIM

Gates argues the court erred in restricting his cross-examination of Alfaro, the prosecution's principal witness against him.

#### A. Background

Toward the end of a lengthy cross-examination of Alfaro, defense counsel asked her whether she had ever accused Gates of stealing some of her property. The court

sustained a relevance objection over defense counsel's claim that it was germane to Alfaro's "bias." Defense counsel then asked her whether in late April 2010 she had accused Gates of stealing a medicine box belonging to her, and the court again sustained a relevance objection. Defense counsel again asked if she was ever upset at Gates for allegedly taking something from her, and the court again sustained a relevance objection.

### B. Legal Principles

The trial court has broad discretion to exclude impeachment evidence (*People v. Wheeler* (1992) 4 Cal.4th 284, 296), and to determine the relevance of proffered evidence. (*People v. Hamilton* (2009) 45 Cal.4th 863, 940.) Although wide latitude should be given to cross-examination designed to test the credibility of a prosecution witness, trial judges are empowered "to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*Wheeler*, at p. 296.) We review the court's evidentiary rulings for abuse of discretion. (*People v. Riggs* (2008) 44 Cal.4th 248, 290.)

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to confront the prosecution's witnesses. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678.) " '[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' " [Citations.] However, not every restriction on a defendant's desired method of cross-examination is a

constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citation.] California law is in accord. [Citation.] Thus, unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' " (*People v. Chatman* (2006) 38 Cal.4th 344, 372.)

### C. Analysis

Although cross-examination to test the credibility of a prosecuting witness in a criminal case should be given wide latitude (*People v. Brown* (2003) 31 Cal.4th 518, 545), that latitude does not prevent the trial court from imposing reasonable limits on defense counsel's inquiry based on concerns about harassment, confusion of the issues, or relevance. (*Ibid.*) Here, Gates was only prevented from inquiring into a collateral dispute between Alfaro and Gates that occurred five months earlier and was apparently so insignificant that Alfaro, despite enduring two subsequent physical attacks on her during the summer of 2010, continued to live with Gates for another five months after the suspected theft. A court could reasonably conclude Alfaro's beliefs about Gates's conduct in April 2010 were irrelevant to her allegations five months later.

We do not conclude that, even had Gates preserved his federal constitutional claim,<sup>4</sup> the court's ruling violated any federal constitutional protection because we are unconvinced a reasonable jury would have received a significantly different impression of Alfaro's credibility had the excluded cross-examination been permitted. Gates vigorously attacked Alfaro's credibility by extensive cross-examination about her assertedly inconsistent statements, her alcohol consumption, as well as discrepancies between her statements at trial and her statements at the preliminary hearing. Although Gates asserts the "theft" line of cross-examination questions was designed to show Alfaro bore animus toward Gates, there was ample evidence Alfaro had independent reasons to dislike Gates: Alfaro testified Gates left her for another woman for several months in late 2009, and also testified that he beat her often, including two recent attacks on her. On this record, there was no confrontation clause violation. (See *People Quartermain* (1997) 16 Cal.4th 600, 624.)

### III

#### THE SENTENCING CLAIM

The court sentenced Gates to a determinate term of 16 years. The term included two components: a five-year upper term authorized by section 273.5, subdivision (e)(1), and a consecutive one-year term provided by section 667.5, subdivision (b). Gates, relying on *People v. McFearson* (2008) 168 Cal.App.4th 388 (*McFearson*), contends that

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<sup>4</sup> The general rule is that a defendant forfeits a confrontation clause claim absent a specific and timely assertion of that claim below. (See, e.g., *People v. Waidla* (2000) 22 Cal.4th 690, 726, fn. 8.) Gates's counsel did not make that assertion below.

imposing sentences for both of these components violated section 1170, subdivision (b), which bars a court from imposing an upper term "by using the fact of any enhancement upon which a sentence is imposed under any provision of law."

#### A. Legal Framework

The first relevant provision is section 273.5, which provides:

"(a) Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years . . . . [¶] . . . [¶]

"(e)(1) Any person convicted of violating this section for acts occurring within seven years of a previous conviction under subdivision (a) . . . , shall be punished . . . by imprisonment in the state prison for two, four, or five years . . . ."

The second relevant provision, the so-called "prior prison term" enhancement (see, e.g., *People v. Perez* (2011) 195 Cal.App.4th 801, 805) provides that the court "shall impose a one-year term for each prior separate prison term" previously served "where the new offense is any felony for which a prison sentence . . . is imposed . . . ." (§ 667.5, subd. (b).)

The final relevant provision, commonly referred to as the "dual use of facts" proscription (see, e.g., *People v. Jones* (1993) 5 Cal.4th 1142, 1166), specifies that "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court . . . [but] the court may not impose an upper term by using the fact of any

enhancement upon which sentence is imposed . . . ." (§ 1170, subd. (b); see Cal. Rules of Court, rule 4.420(c).)

### B. Analysis

Gates admitted below that he suffered a domestic violence conviction in 2007, within the meaning of section 273.5, subdivision (e)(1), which triggered the elevated sentencing scheme under that section. He also admitted below that he was imprisoned for the 2007 conviction, which triggered the mandatory consecutive one-year term under section 667.5, subdivision (b).

Gates asserts that because the elevated sentencing scheme under section 273.5, subdivision (e)(1), was available only because of his 2007 domestic violence conviction, the dual use of facts proscription precluded the court from employing the elevated sentencing scheme under section 273.5, subdivision (e)(1), and *also* imposing a prior prison term enhancement under section 667.5, subdivision (b), served for that same conviction.

When the trial judge at sentencing is required to select among the three terms statutorily authorized for the current conviction, a single factor in aggravation is an adequate basis for deciding to impose the upper term. (*People v. Black* (2007) 41 Cal.4th 799, 815.) However, the dual use of facts proscription bars the court from using the *same* fact as the sole factor in aggravation on which the upper term is based when that fact is the basis for any enhancement on which sentence is *also* imposed. (*McFearson, supra*, 168 Cal.App.4th at pp. 392-395.)

The issue presented here is distinct from the question of what facts may support a choice to impose the upper of the three statutorily authorized terms. The issue here is: when a defendant has suffered a prior conviction that also resulted in a prison term, and the prior conviction triggers a different (and elevated) set of three statutorily authorized terms, does the dual use of facts proscription operate to bar the court from employing the elevated sentencing scheme based on the prior conviction and also imposing the prior prison term enhancement under section 667.5, subdivision (b), for that same prior conviction? Although this issue is one of first impression as to the elevated sentencing scheme provided under section 273.5, subdivision (e)(1), we are convinced by analogous case law that a court may sentence a defendant under the elevated scheme specified in section 273.5, subdivision (e)(1), and also impose the prior prison term enhancement without transgressing section 1170, subdivision (b).

In *People v. Coronado* (1995) 12 Cal.4th 145, the defendant was found guilty of driving a vehicle while under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a). He then admitted he had suffered three prior driving under the influence convictions within the meaning of Vehicle Code section 23175 and that he had served three prior prison terms within the meaning of section 667.5, subdivision (b). One of those prior prison terms, for felony drunk driving in violation of Vehicle Code section 23152, subdivision (a), resulted from the same third prior conviction used to elevate the current offense from a Vehicle Code section 23152, subdivision (a) offense to a felony under Vehicle Code section 23175. (*Coronado*, at p. 149.) The trial court sentenced the defendant to the upper term of three years for the

violation of Vehicle Code sections 23152, subdivision (a), and 23175, together with three 1-year prior prison term enhancements under section 667.5, subdivision (b). (*Coronado*, at p. 149.) The Supreme Court concluded the ability to use a prior conviction to trigger the elevated sentencing scheme (elevating the current offense from a misdemeanor under Veh. Code, § 23152, subd. (a), to a felony driving under the influence charge under Veh. Code, § 23175), and to also use the same prison term for enhancement purposes, was consistent with the legislative intent underlying the statutory scheme, and was not barred by section 654. (*Coronado*, at pp. 150-160.) Applying *Coronado* here, the use of Gates's prior conviction to trigger the elevated sentencing scheme under section 273.5, subdivision (e)(1), and to also use the resulting prison term from his prior conviction for enhancement purposes, is consistent with the apparent legislative intent of imposing increased punishment on recidivist spousal abusers, and is not barred by any relevant law.

Gates seeks to distinguish *Coronado* by asserting its analysis did not consider the dual use of facts proscription and instead was limited to matters of statutory interpretation and section 654. While Gates correctly notes *Coronado* principally examined issues of statutory construction and the impact of section 654, he overlooks that the *Coronado* court, advertent to the dual use of facts question, stated:

"Defendant seems to additionally argue that the 'dual use' of his prior conviction to elevate his current offense to a felony and to enhance his sentence is prohibited. As we have previously recognized, however, '[o]nly two express "dual use" prohibitions appear in the Determinate Sentencing Act. Section 1170, subdivision (b), prohibits imposition of an upper term based upon "the fact of any enhancement upon which sentence is imposed [under section 667.5] . . . ." California Rules of Court, Rule 425(b), states that a fact that is an element of the crime, or that is used to impose an upper

term or otherwise enhance a defendant's prison sentence, may not be used also to justify imposition of a consecutive rather than a concurrent sentence.' [Quoting *People v. Jenkins* (1995) 10 Cal.4th 234, 252, fn. 10.] *The facts of the present case do not fit within the parameters of those two dual-use prohibitions.*" (*People v. Coronado, supra*, 12 Cal.4th at pp. 159-160, fn. 10, italics added.)

Other courts have reached analogous conclusions involving statutes calling for elevated sentencing provisions for repeat offenders. For example, in *People v. Whitten* (1994) 22 Cal.App.4th 1761, a defendant pleaded guilty to annoying or molesting a child, in violation of section 647.6. Although the first violation of that statute was punishable by a fine and/or imprisonment in a county jail for a term not exceeding one year, the statute called for an elevated set of sentencing parameters (imprisonment in the state prison for two, four, or six years) for a violation of section 647.6 "after a previous felony conviction under this section, conviction under Section 288, or felony conviction under Section 311.4 involving a minor under the age of 14 . . . ." (*Whitten*, at p. 1764, fn. 4.) The court concluded the defendant's service of a prior prison term could both trigger an elevated sentencing scheme and again be relied on for other sentencing purposes (there, as a factor in aggravation to impose the upper term), without violating the proscription contained in section 1170, subdivision (b), against the dual use of facts. (*Whitten*, at pp. 1764-1768.)

Similarly, in *People v. White Eagle* (1996) 48 Cal.App.4th 1511, the defendant pleaded guilty to petty theft with a prior conviction for robbery (§ 666), and admitted he served a prison term for the prior robbery offense. The trial court sentenced the defendant under the elevated sentencing scheme applicable to repeat offenders, which it

also doubled under section 667, subdivision (e)(1), but stayed the one-year prior prison term enhancement. (*White Eagle*, at p. 1515.) The *White Eagle* court framed the question to be "whether the same [prior] robbery conviction [could] be used: (1) to convert the current offense to a felony under section 666; (2) to invoke the punishment provisions of section 667, subdivision (e)(1); and (3) to impose a prior prison term enhancement pursuant to section 667.5, subdivision (b)." (*Id.* at p. 1516.) The court first concluded the prior conviction could be used to elevate the current offense to a felony and to also double his term under section 667, subdivision (e)(1), reasoning that section 666 is "a statute which gives the court discretion to treat the offense as either a misdemeanor or a felony for the purpose of punishment" rather than an enhancement (*White Eagle*, at p. 1518), and therefore *People v. Jones*, *supra*, 5 Cal.4th 1142 did not apply to prohibit use of the 1981 robbery conviction to elevate the current offense to a felony under section 666 and to invoke double punishment under section 667, subdivision (e)(1). (*White Eagle*, at pp. 1517-1520.) The court, after first concluding multiple use of the prior conviction was not barred and the prior prison term enhancement was not subject to section 654, turned to whether the trial court's sentence, insofar as it stayed the prior prison term enhancement, was an unauthorized sentence subject to correction on appeal. (*White Eagle*, at p. 1520.) The court rejected the defendant's argument that the prior prison term enhancement was discretionary rather than mandatory, concluding there was "no question whether the enhancement *may* apply--it does apply. The question is whether, upon determining that imposition of the enhancement is not prohibited, there is any discretionary basis for not doing so." (*Id.* at p. 1521.) The court concluded that,

under section 1170.1, subdivision (d), after the court imposed a determinate sentence, the imposition of an additional term under section 667.5 was mandatory unless the additional term was stricken. The court therefore held the order "staying imposition of the prior prison term enhancement is an unauthorized sentence and is subject to correction on appeal" (*White Eagle*, at p. 1521) because of its mandatory character, and ordered the sentence corrected. (*Id.* at pp. 1521-1523.)

Gates's reliance on *McFearson*, *supra*, 168 Cal.App.4th 388 is inapposite. *McFearson* merely stated that, under the rationale of *People v. Jones*, *supra*, 5 Cal.4th 1142, a prior prison term enhancement is based on the *fact* of a prior conviction, *not* on the prior prison term, and therefore it was improper to cite the defendant's prior conviction as the basis to impose an upper term and thereafter use the prison term served as a result of that conviction to enhance his sentence by one year under section 667.5, subdivision (b). (*McFearson*, at p. 395.) *McFearson* has no application here because the trial court's decision to impose the five-year upper term in the present case, as authorized by section 273.5, subdivision (e)(1), was based on aggravating facts *apart* from Gates's 2007 conviction. Accordingly, even assuming *McFearson* was correctly decided, nothing in *McFearson* would bar the trial court from *also* imposing a prior prison term enhancement under section 667.5, subdivision (b), for the 2007 conviction.

We conclude, under *People v. Coronado*, *supra*, 12 Cal.4th 145, as well as *People v. Whitten*, *supra*, 22 Cal.App.4th 1761 and *People v. White Eagle*, *supra*, 48 Cal.App.4th 1511, use of his prior conviction to trigger--and apply to Gates--the elevated sentencing scheme under section 273.5, subdivision (e)(1), and to rely on the resulting prison term

from his prior conviction to impose a prior prison term enhancement, is consistent with the apparent legislative intent of imposing increased punishment on recidivist spousal abusers, and is not barred by any relevant law.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.