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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JORRELL LENO JENNINGS,

Defendant and Appellant.

D061688

(Super. Ct. No. SCD235338)

APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

Law Offices of Steven S. Lubliner and Steven S. Lubliner for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr. and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jorrell Leno Jennings of assault by means likely to produce great bodily injury (Pen. Code,¹ § 245, subd. (a)(1); count 1) and battery with serious bodily injury (§ 243, subd. (d); count 2). It found true allegations that as to count 1, Jennings personally inflicted great bodily injury on the victim within the meaning of section 12022.7, subdivision (a) and for purposes of a section 1192.7, subdivision (c)(8) enhancement as to both counts. Jennings admitted he suffered a prior strike conviction (§§ 667, subds. (b)-(i) and 1170.12), which also constituted a serious felony (§ 667, subd. (a)). The court sentenced him to 16 years in prison.

Jennings contends the trial court (1) abused its discretion by prohibiting impeachment of a prosecution witness with his prior convictions, and (2) violated his due process rights by failing to give proper advisements before accepting his admission of his prior conviction. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

During the early morning of July 10, 2011, Jennings, his girlfriend Nicole Robles, Robles's cousin, Kaela Erbe, and two of Erbe's friends, Angelina Martinez and Erika Castro, were passengers in a limousine when, according to Erbe, Jennings and Robles began to argue. The girls decided they wanted the limousine driver to take them home rather than stay in downtown San Diego. When Jennings tried to approach Robles, Erbe intervened and told him to leave Robles alone. Jennings then grabbed Erbe by the hair and started punching her in the face with a closed fist. Erbe heard glass breaking but

¹ Statutory references are to the Penal Code unless otherwise indicated.

never saw anyone throw a glass or bottle. She testified that the girls had brought one bottle each of tequila and vodka with them, and Robles had champagne. The limousine was stocked with champagne glasses and shot glasses and its interior lighting was dim. Erbe drank two shots of vodka before leaving her house and had about one glass of champagne in the limousine. She admitted she had trouble remembering everything that happened that morning not because she had been drinking, but because it was just "a blur."

Martinez had had two and a half drinks in less than two hours that night. She observed inside the limousine that Robles was intoxicated; stumbling and slurring her speech. According to Martinez, after Robles got angry with Jennings and Jennings tried to speak with her, Erbe put her hand out to keep him back, told him to leave Robles alone, and that they were going home. Jennings got upset, tried to push Erbe's hand away, and then grabbed Erbe's hair and punched her with a full swing in the face. Martinez and Castro tried to get between them but Jennings kept punching Erbe in the face, approximately three and five more times. Martinez heard glass shattering and saw champagne glasses broken on the floor, but did not see anyone swing or throw glasses or bottles. She ran out of the vehicle and flagged down police, who eventually removed Jennings from the vehicle and called paramedics. While Jennings was sitting by the sidewalk handcuffed, he had an exchange with Martinez's brother-in-law, who had come to get Martinez, in which Jennings remarked, "You don't know me. I'm a pimp" and, "I hit my hoes."

Castro heard Jennings tell David Boren, the limousine driver, not to take the girls home; that Boren should stop the car, pull over or he would not get paid. According to Castro, Jennings told Robles not to listen to Erbe, and Erbe put her hand up and "flick[ed]" it at him. Jennings grabbed Erbe's arm, Erbe pushed him back, Jennings then grabbed Erbe's hair, and Castro hit Jennings in the face. She did not pay attention to Jennings's hands, but pulled Martinez to her chest because she thought he was going to go after her. Jennings began to hit Castro and Martinez on the arms and head, and Castro tried to keep her face covered while she kicked him. When Castro uncovered her face, she saw blood and glass everywhere. She grabbed Erbe, who was disoriented and bloody. Castro did not see anyone throw or swing a glass or bottle, and she had no idea how the glass got broken. After police showed up, Castro overheard Jennings say, "I pimp that hoe," and she believed he was referring to Robles.

Boren was able to see what was going on in the back of the limousine and could hear conversation while he drove downtown. He could hear Robles was more intoxicated than the other individuals; slurring her words and stumbling in the back of the vehicle. After Robles became sick, the girls asked him to take them home, but when he turned the limousine around, Jennings became agitated and, using expletives, told Boren to turn the car around or he would not get paid. Boren told Jennings to "chill out" and that he was taking the girls home because Robles was sick. Boren heard the girls agree and ask Jennings why he was behaving in that way, then saw Jennings proceed to "rush" them. When Boren looked in his rear view mirror he observed the girls putting their hands up with Jennings swinging at them. According to Boren, Jennings swung both fists at least a

dozen times while the girls screamed and told him to stop. Boren pulled his vehicle over, called 911 and told them a guy was attacking the girls in his limousine. While on the phone, Boren saw Jennings punch one of the girls in the face with a full force swing. He then spotted a police car and flagged the officers down. While Boren spoke with police, Jennings shouted that Boren was a drug addict and a liar.

San Diego Police Officer Eric Valdez stopped at the scene that morning when Boren flagged him down. Valdez observed Jennings outside the vehicle yelling at the occupants through a window. Officer Valdez opened the limousine door and observed broken glass, blood and clothing strewn about, and the female occupants yelling and crying. He saw Erbe, who had her hands up to her face, bleeding profusely and with substantial facial injuries, including teeth that were chipped off. Valdez attempted to speak with Robles, who was highly intoxicated, slurring her speech, and yelling profanities at him. He put Robles in the back of his patrol car and spoke about the incident with Castro, who was not stumbling or swaying and was able to speak clearly. He also spoke to Martinez, who was not showing obvious symptoms of intoxication; she was not stumbling, she did not have to sit down, and he was able to speak with her while she was standing. According to Officer Valdez, Erbe, despite her injuries and distress, was oriented and talking about her face hurting. He testified that Robles was the only person that showed very obvious signs of alcohol intoxication.

Another responding police officer who photographed Erbe's injuries observed lacerations to her nose and upper lip requiring stitches, a scratch on her face, a large area of swelling on top of her head, and bruising around her left eye. Pictures taken of

Jennings that morning showed he had faint scratches on the right and left sides of his face.

Defense Evidence

Robles testified in Jennings's defense. According to her, Boren could not see through the closed window to the back of the limousine. Robles claimed the other girls were drinking both champagne and shots "nonstop" that night and were drunk, that she only had four glasses of champagne and was aware of what was going on, and that Jennings was not intoxicated. She initially testified that Jennings did not punch Erbe in the face at all; that it was Erbe who had pushed Jennings in the face and grabbed his shirt, and in the melee the other girls threw glasses that hit Erbe in the nose and mouth. Robles did not know how Erbe got a blackened and swollen left eye, or the scratch on the side of her face. Robles claimed events were "crystal clear" in her memory, even though the outburst of physical violence happened quickly and she did not expect it. Robles stated she did not feel the effects of alcohol at all during the fighting. On redirect examination, Robles admitted that Jennings could have hit Erbe with a punch, but claimed the major damage to Erbe was done by the glass.

Bryson Timothy, who had dated Robles, testified that he was at Robles's house after the incident when Boren showed up to return Robles's belongings. According to Timothy, Boren told him he heard arguing and a fight, with glasses breaking, in the back of the limousine, and pulled over to see what was going on. Timothy stated that Boren was upset about the limousine being "trashed."

Jennings testified that all of the girls were drunk that night, and the incident started when Erbe told him to get away from Robles while he was trying to comfort her. When he put his hand out, Erbe pushed it away and then pushed or slapped him in the face. He grabbed her arm and told her not to touch him, and she struck him with her other hand, and grabbed his shirt when he fell back. According to Jennings, Erbe was yelling and punching, and the other girls, Castro and Martinez, started to attack him. He tried to push Erbe's face off with both of his hands, and then hit her once in her left eye. Jennings denied he used a full swing, but he hit her just hard enough to get her off him. Erbe kept punching him, and then he saw a glass "explode" in her face.

On cross-examination, Jennings admitted he told a different story to police that morning; telling them he yelled at Erbe after she put her hands in his face, and after he fell back, kicked at Erbe, Castro and Martinez, and also threw glass back at them. Jennings admitted that when he was questioned at the police station, he never told police that he had punched Erbe. He claimed police did not give him an opportunity to explain, and his statements were the best of his knowledge in the chaos.

DISCUSSION

I. Exclusion of Boren's Prior Convictions

Jennings contends the trial court abused its discretion when it denied his in limine request to impeach Boren with his six prior convictions dating between 1981 and 1990. In denying Jennings's motion, the trial court reasoned Boren's 1981 and 1983 felony drug possession convictions did not involve moral turpitude, and his remaining convictions—a 1982 misdemeanor petty theft conviction, a 1984 federal conviction for alien smuggling,

a 1988 conviction for petty theft with a prior, and a 1990 conviction for vehicle theft—even assuming they had some probative value on truthfulness, were too remote under Evidence Code section 352 because they had occurred 20 to 30 years ago.²

We need not reach the question of error, because even assuming for the sake of argument the trial court abused its broad discretion in excluding the evidence (see *People v. Clair* (1992) 2 Cal.4th 629, 655 [applying abuse of discretion standard to such a claim]), the error would be harmless under the relevant standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. McNeal* (2009) 46 Cal.4th 1183, 1202-1203 [applying *Watson* standard to the claim of erroneous exclusion of evidence].) That is, it is not reasonably probable the verdict would have been more favorable to Jennings absent the evidentiary error. (*People v. Watson* (2008) 43 Cal.4th 652, 686.) Boren's testimony was not critical to the case against Jennings. The case was a credibility contest between

² The court stated in part: "I think that the case law is clear that for non-defendant witnesses, the two most crucial issues are how probative are these convictions on the issue of truthfulness and how remote are they? [¶] I am mindful that the appellate courts have found that all of these remaining convictions are crimes of moral turpitude. That does not necessarily mean they have equal probative value on the issue of truthfulness. [¶] When I look at this litany, it seems to me that the two with the most probative value are the alien smuggling from '84 and perhaps the Vehicle Code [section] 10851 from 1990. One involves theft and one involves intent to circumvent federal laws. [¶] So let's assume that they all have some probative value on truthfulness and those two perhaps have more than the others. When I do that, however, and look at all the other circumstances, I don't think any of them come in. They are just too remote. They happened 20 years ago. The most recent one happened 20 years ago and the oldest one happened 30 years ago. [¶] I'm impressed by this man's lack of felony record since that time. We all like to, I think, see that somebody's do [*sic*] so means more than their say so. A lot of people promise they're not going to get in trouble again, and not too many of them do it; that is, follow through with that promise. And this man apparently has. [¶] . . . I think the law commends the question about whether these should be put before the jury, in the first instance, to the court. And I think when you have 20 years of no intervening moral turpitude record, felony or misdemeanor, that decides the issue."

the girls, Erbe, Castro and Martinez, as well as the police officers who were flagged down on the morning in question, on the one hand, and Jennings and Robles on the other, but it was not a close contest. Jennings agrees the case comes down to credibility, but he gives too much import to Boren's testimony. Jennings also makes several arguments as to why Erbe, Castro and Martinez should not have been believed, either due to their intoxication or the fact Erbe's injuries could have been caused by a heavy glass that was thrown hard at her face. He maintains Erbe must have lied about her level of intoxication, and the other girls "almost certainly" lied about claiming to have no idea about how glass got broken. According to Jennings, because he had argued with Boren that night, Boren was biased in that he wanted to see Jennings get in trouble, and he asserts Boren's testimony "would have broken the tie" because he would have been the "neutral, sober, omniscient third party" and the only witness worthy of belief, and the jury would have been inclined to dismiss the testimony of Erbe, Castro and Martinez, who were drinking that evening.

We are not persuaded. It is not for us to reassess the jury's credibility calls and the jury alone resolves conflicts in the evidence. (*People v. Friend* (2009) 47 Cal.4th 1, 41.) The jury plainly believed Martinez and Erbe, who testified consistently about Jennings's actions in repeatedly punching Erbe with full swings and a closed fist. Jennings's claims as to the girls' intoxication ignores the testimony of Officer Valdez, who spoke with both Martinez and Castro and found them to be coherent and able to speak clearly, and found Erbe to be oriented despite her injuries, but who determined Robles was highly intoxicated, rebutting her testimony that she was not seriously impaired by alcohol. The

jury had ample reason to reject Robles's and Jennings's version of events, which was also undermined by bias, and believe the other girls, whose testimony was consistent about Jennings being the aggressor and causing Erbe's significant facial injuries. In the sudden melee and dim lighting, it would not be uncommon that some of the girls' stories would differ in some respects or have gaps as to who was throwing glass. Under the circumstances, we cannot say Erbe's, Castro's and Martinez's testimony is so contradictory that the jury would find it incredible or not worthy of belief so as to render Boren's testimony critical. In short, we reject Jennings's contention that any error was prejudicial.

II. *Request for Judicial Notice*

Concurrently with the filing of his reply brief on appeal, Jennings asked us to take judicial notice of certain documents assertedly pertaining to Boren: (1) a United States District Court, Southern District of California criminal docket; (2) the fact the docket shows that a person named David Scott Boren had pleaded guilty in January 1993 to transportation of illegal aliens and was sentenced to 30 months in federal prison; (3) the results of an online inmate locator search on the federal Bureau of Prisons Website; and (4) the fact the search results showed David Scott Boren was released from federal prison in January 1995. Jennings concedes these matters were not before the trial court. He argues the material is relevant to demonstrate why the trial court acted unreasonably in assuming Boren had led an unblemished life since 1990.

We decline to take judicial notice of these matters. We cannot say the matters are relevant to assess the trial court's exercise of its discretion in its evidentiary ruling when

the materials were not before it. And, " 'an appellate court generally is not the forum in which to develop an additional factual record.' [Citation.] 'Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally "when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered." ' " (*People v. Jacinto* (2010) 49 Cal.4th 263, 272, fn. 5.) It is true that we as a reviewing court may take judicial notice of matters not before the trial court, including court records. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1, citing Evid. Code, §§ 459, subd. (a), 452, subd. (d).) But we need not give effect to such evidence, and we will not here, where Jennings's counsel was well aware that Boren's criminal history was at issue and had every opportunity to locate and present evidence of additional prior convictions. (*Doers*, at p. 184, fn. 1.)³

³ The California Supreme Court in *Doers* explains: " 'Having taken judicial notice of such a matter, the reviewing court may or may not apply it in the particular case on appeal. The effect to be given to matters judicially noticed on appeal, where the question has not been raised below, depends on factors that are not evidentiary in character For example, the appellate court is required to notice [various decisional and statutory law], but it may hold that an error which the appellant has 'invited' is not reversible error or that points not urged in the trial court may not be advanced on appeal' (Cal. Law Revision Com. comment to Evid. Code, § 459; 29B West's Ann. Evid. Code (1966 ed.) p. 423.) [¶] 'An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver Often, however, the explanation is simply that it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.' " (*Doers v. Golden Gate Bridge etc. Dist.*, *supra*, 23 Cal.3d at p. 184, fn. 1, italics omitted.)

III. *Claim of Deficient Adviseements*

A. *Background*

After the jury's verdicts, Jennings's prior felony conviction for attempted kidnapping was addressed and his counsel indicated Jennings would be willing to admit his prior conviction and waive a bench or jury trial. The trial court explained the People's charges with regard to that prior conviction, the consequences of it being found true, and confirmed Jennings understood the allegation against him. The following exchange occurred:

"[The Court]: You do have a right to have a trial in front of me as to whether or not you suffered that conviction? [¶] Do you wish to have that trial or do you wish to admit that you have that conviction.

"[Jennings]: I have that conviction, your honor, so I don't really know what's going on.

"[The Court]: Do you need a moment to talk to your lawyer?

"[Jennings]: I mean—

"[The Court]: All right. You may.

"(Discussion held off the record.)

"[Defense counsel]: Please proceed, your honor, if you would. He understands.

"[The Court]: Thank you. The question, sir, is: Do you wish to have a trial on the question of whether you suffered that prior conviction or do you wish to give up that trial and admit that you suffered it?

"[Jennings]: Yes. Whatever you said. Yes.

"[The Court]: Sir, do you give up your right to a trial on that prior conviction?

"[Jennings]: Yes.

"[The Court]: Do you admit that on or about March 20, 2006, you were convicted in the San Diego Superior Court of the crime of attempted kidnapping, a felony? Do you admit that?

"[Jennings]: Yes."

The court then found Jennings had made a voluntary and intelligent waiver of his right to a trial, stating, "The jury was previously waived." The court accepted Jennings's admission and found the prior conviction to be true.

B. *Analysis*

Jennings contends we must reverse his sentence because the trial court did not fully advise him of his rights before he admitted suffering his 2006 conviction, by guilty plea, of attempted kidnapping. He concedes the court informed him before trial of his rights to a jury trial on his prior convictions, but he maintains it did not inform him after the trial he would have the same rights in a court trial.

In making these arguments, Jennings seeks to distinguish *People v. Mosby* (2004) 33 Cal.4th 353, in which the California Supreme Court found that a defendant's

admission of his prior convictions was intelligent and voluntary under the totality of the circumstances, notwithstanding the trial court's failure to advise the defendant and obtain a waiver from him on the rights to silence and confrontation of witnesses before he admitted them. (*Id.* at pp. 356, 360, 363-365.) The defendant in *Mosby* had been expressly advised about, and had expressly waived, his right to a jury or court trial on his priors. (*Id.* at pp. 362, 365, fn. 3.) *Mosby* reasoned that it was apparent the defendant there knew about and intended to waive the two rights attendant to a trial—the right to silence and witness confrontation—because he had just participated in a jury trial on the substantive offenses where he had exercised those same rights. (*Id.* at pp. 362, 364-365.) Further, the defendant's prior conviction was based on a plea of guilty, at which he would have received the necessary advisements. (*Id.* at p. 365.) Jennings disagrees with *Mosby*, maintaining the fact he testified during his jury trial, unlike the defendant in *Mosby*, does not permit a conclusion that he understood he had the same rights in a court trial on his prior convictions, and the record shows that when asked by the trial court before taking his waiver, he was confused about what would happen at a court trial.

We are of course not free to disregard the Supreme Court's conclusions in *Mosby*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see *People v. Johnson* (2012) 53 Cal.4th 519, 528.) And we perceive nothing that materially distinguishes *Mosby* from this case. Before trial, Jennings was advised in depth of his right to a jury trial on his prior conviction, and indicated he understood that right, and the effect of the strike if found true. During the colloquy, the court gave all of the

constitutionally required advisements⁴ of the right to jury trial, the right against self-incrimination, and the right to confront witnesses: "Now, you have the right to have the question of whether you were convicted of that crime decided by a jury as part of this trial. And we can do it as a separate part so they don't hear about it when they are trying to decide count 1 and count 2. [¶] That means you have the right to have a jury decide it. You have the right to confront the district attorney's witnesses. You have the right to have the D.A. prove it beyond a reasonable doubt. You have the right to testify or not as you wish. You have all the same rights that you have with respect to count 1 and count 2. Do you understand?" Jennings responded, "Yes, your honor." The court asked Jennings if it was acceptable to him to give up those rights, and Jennings again responded, "Yes, your honor." The court found Jennings's jury trial waiver on his prior conviction to be "voluntary, knowing and intelligent. . . ."

As in *Mosby*, we conclude based on this record that the totality of the circumstances shows Jennings voluntarily and intelligently waived his rights. This is not a case where there was absolutely no advisement and waiver as to the jury or court trial right (*Mosby, supra*, 33 Cal.4th at pp. 361-362; see also *People v. Campbell* (1999) 76 Cal.App.4th 305, 310), or where the trial court's reference to the trial right was fleeting and without response from the defendant so that the circumstances in effect equated with a complete lack of advisement and waiver. (e.g., *Mosby*, at p. 362, discussing *People v. Johnson* (1993) 15 Cal.App.4th 169 [superseded on another point as stated in *People v.*

⁴ See *Boykin v. Alabama* (1969) 395 U.S. 238, 243; *In re Tahl* (1969) 1 Cal.3d 122, 132; *In re Yurko* (1974) 10 Cal.3d 857, 863.

Howard (2005) 34 Cal.4th 1129, 1137].) Rather, like the defendant in *Mosby*, just before admitting his prior conviction, Jennings underwent his jury trial resulting in convictions for assault and battery, and he was represented by counsel who confronted the witnesses against him. In view of the court's pretrial admonishments, we cannot fairly infer Jennings was left unaware of his right to remain silent merely because he testified in his own defense at trial. Additionally, as in *Mosby*, Jennings had prior experience in the criminal justice system: he had pleaded guilty to his prior conviction for attempted kidnapping, and thus "[h]e knew he did not have to admit [the prior conviction] but could have had a jury or court trial, had just participated in a jury trial where he had confronted witnesses . . . and had experience in pleading guilty in the past, namely, the very conviction that he was now admitting.'" (*Id.* at p. 359.) Jennings's confusion during the court's posttrial exchange was eliminated after he conferred with his counsel, and counsel stated Jennings understood the court's comments. This is not a record that is silent about Jennings's knowledge of his waiver of rights.

Our application of *Mosby* should not be read to discount trial courts' obligations to give the required advisements of the three rights the defendant is waiving—to a jury trial, against self-incrimination, and to confront witnesses—before accepting a defendant's admission of a prior conviction allegation. To the contrary, we urge trial judges to take measures to ensure explicit advisements of these rights and waivers occur on the record before they accept such admissions.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.