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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE MADRIGAL TRUJILLO,

Defendant and Appellant.

E052099

(Super.Ct.No. FVA1000371)

**OPINION**

APPEAL from the Superior Court of San Bernardino County. Ingrid Adamson Uhler, Judge. Affirmed.

Susan L. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Garrett Beaumont and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jorge Madrigal Trujillo was driving away from a bar in Fontana around midnight when a police officer initiated a traffic stop after observing a nonoperational taillight on his truck. Defendant smelled like alcohol and performed poorly on field

sobriety tests; he was arrested and his blood was drawn. Laboratory tests on his blood resulted in a blood-alcohol content of over .20 percent.

Defendant now claims on appeal as follows:

1. The trial court's own motion to introduce evidence of his prior convictions showed the trial court was biased against him in violation of his federal constitutional rights to due process and a fair trial.

2. The trial court erred by advising him to waive jury trial and admit the truth of the prior convictions.<sup>1</sup>

We affirm the judgment in its entirety.

## I

### PROCEDURAL BACKGROUND

Defendant was convicted by a jury of driving under the influence of alcohol (DUI) with prior DUI convictions within the meaning of Vehicle Code section 23152, subdivision (a), and driving while having a blood-alcohol content over .08 percent with prior convictions in violation of Vehicle Code section 23152, subdivision (b). It was further found true by the jury as to both counts that he had a blood-alcohol level of greater than .15 percent within the meaning of Vehicle Code section 23578. After waiving his right to a jury trial, defendant admitted he had suffered three prior DUI

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<sup>1</sup> Defendant filed a petition for writ of habeas corpus in case No. E054363 (petition). On October 26, 2011, we ordered that the petition be considered with the instant appeal. We will decide the petition by separate order.

convictions within the meaning of Vehicle Code sections 23550 and 23550.5. Defendant was sentenced to the upper term of three years.

## II

### FACTUAL BACKGROUND

#### A. *The People's Case-in-chief*

On January 9, 2010, Fontana Police Officer Christopher Romo was patrolling an area in Fontana looking for persons driving under the influence and also doing traffic enforcement.<sup>2</sup> At 12:09 a.m., he was in the area of Foothill and Locust Streets in Fontana. Officer Romo observed a truck driving toward him; he made a U-turn and followed the truck. The truck was not weaving or speeding. When Officer Romo got directly behind the truck, he noticed that the tow hitch was blocking a number on the license plate, and the right taillight was not working. These were both Vehicle Code violations, so he initiated a traffic stop.

Defendant, who was driving the truck, immediately pulled over. Officer Romo approached defendant and spoke with him through the driver's side window. Officer Romo smelled alcohol. Defendant's face was sweaty, his eyes were bloodshot and watery, and his speech was slurred. Defendant told Officer Romo that he had drunk three 12-ounce beers at a nearby nightclub between the hours of 6:00 p.m. and 11:00 p.m. Officer Romo instructed defendant to exit the truck to perform field sobriety tests. Defendant had a difficult time keeping his balance and had to hold onto the truck.

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<sup>2</sup> Officer Romo had attended DUI training classes and had been involved in at least 150 alcohol-related arrests.

Officer Romo instructed defendant to stand on one leg and count to the number 30.

Defendant was only able to count to the number two before he had to put his foot down.

He tried to perform this task three separate times and could not get past the number two.

Officer Romo attempted to get defendant to perform an additional test of walking in a straight line. Defendant told Officer Romo he could not perform the test because he had poor balance. Officer Romo also performed a horizontal gaze nystagmus test that gauged his ability to follow a pen with just his eyes. Based on the test, it appeared defendant had alcohol in his system. Defendant denied taking any drugs or medication.

Officer Romo arrested defendant for DUI. Officer Romo took defendant to the Fontana police station. Once there, defendant's blood was drawn by a nurse employed by Law Enforcement Medical Services. The blood sample was taken at 12:51 a.m. Officer Romo placed the vial of blood into an evidence envelope.

Officer Romo put the evidence envelope containing the blood vial in the evidence locker, which was not refrigerated. Officer Romo believed that after the blood vial was booked into evidence, the property clerk was responsible for taking it to the San Bernardino County Sheriff's Crime Lab. Officer Romo did not see the envelope again until trial and did not know when it was delivered from the evidence locker to the laboratory for testing.

Beverly Taylor-White was employed by the San Bernardino County Sheriff's Department's Scientific Investigations Division. She was employed as a criminalist whose primary responsibility was testing blood for alcohol levels. She had completed several thousand blood analyses and had testified as an expert in court at least 300 times.

Taylor-White, based on her training and experience, was of the opinion that all persons with a blood-alcohol level of a .10 percent or higher would be impaired for the purposes of operating a motor vehicle. Taylor-White tested the blood taken from defendant. The results showed that defendant had a .20 percent blood-alcohol content. Based on her training and experience, defendant would have been impaired for purposes of driving.

Taylor-White explained that when a blood vial comes into the laboratory, it is taken out of the evidence envelope and put in the refrigerator. She reported no tampering with the envelope or blood vial. There was nothing unusual about the test results in the instant case.

Defendant's blood sample would have been treated with a preservative and an anticoagulant. The addition of these additives had no impact on the determination of the alcohol content in the blood. She could not testify as to how the blood vial got from the evidence locker to the laboratory. However, she noted that there was no evidence that the blood sample had spoiled.

#### B. *Defense*

Defendant testified on his own behalf. He admitted he had been at a bar prior to being pulled over by Officer Romo. He left the bar around midnight. He was not stumbling to the car. He immediately was stopped by Officer Romo.

Defendant admitted he told Officer Romo that he had consumed three beers. He did not recall putting his hand on the truck to steady himself. Defendant claimed he could not stand on one foot and balance, especially with his eyes closed. He offered to

show in court that he could not perform the task. He had trouble with his eyesight and wore prescription glasses but did not recall telling Officer Romo about his eyesight problems.

On cross-examination, he claimed he drank the three beers over a three-hour period. He drank the last beer 20 minutes prior to leaving the bar. Defendant felt “a little bit” of an effect from the beers, but he felt fine to drive. Defendant admitted he had three prior DUI convictions in 2001 and 2002, and that he performed field sobriety tests during the investigations. Defendant felt that even though he had three prior convictions for DUI, he was aware when he was too drunk to drive.

### III

#### JUDICIAL BIAS

Defendant contends the record supports that the trial court on its own motion introduced evidence that defendant had suffered three prior DUI convictions in violation of his federal constitutional rights to due process and a fair trial.

##### A. *Additional Factual Background*

Prior to trial, the trial court granted defendant’s request to bifurcate his three prior DUI convictions alleged pursuant to Vehicle Code sections 23550 and 23550.5. The trial court stated on the record that it would bifurcate the prior convictions “unless made relevant during the course of the trial . . . .”

During direct examination of defendant, the following interchange occurred:

“Q . . . [¶] Do you remember Officer Romo giving you some series of tests?”

“A Correct, yes.

“Q Do you normally do those series of tests in your normal life?

“A Playing around with friends, I’ve—you know, just talking about situations like this, yes.

“Q But you’ve played around in situations doing—

“A Just—

“Q —field sobriety tests like this?

“A Not something like that; just trying to stand on one leg, you know, trying to—you know.”

On cross-examination, the prosecutor asked defendant: “And I believe on direct examination you talked about the fact you’ve played around as far as . . . field sobriety tests?” Defendant responded: “There’s, you know, at work a lot—you know, we have a lot of conversations. We talk about many different things. You know, things happen. And that’s been maybe once or twice where that comes out and, you know, which is, I mean, ‘Can you do that?’ I can’t do it whether I’m drinking or not. I mean, that’s sort of the things that—you know, we’re not playing around, but just, you know, conversations.” The prosecutor followed up by asking him: “So is it your testimony that you have no experience with field sobriety tests other than the playing around with your friends?” Defendant responded: “Right.”

The prosecutor asked questions of defendant whether he was told by Officer Romo that he suspected he was driving under the influence. The prosecutor then asked for a sidebar conference, which was granted by the trial court.

Prior to the prosecutor making any statement on the record, the trial court stated: “We’re currently outside the presence of the jurors. [¶] I know where [the prosecutor] is going. He testified on cross-examination that the only experience that he had of doing field sobriety tests is when he’s been playing around with his friends and no other experiences, and obviously that opens up the door. It becomes relevant, the fact that he has prior convictions, because—obviously, because of those prior convictions, I would expect and suspect that he had to perform field sobriety tests, so it goes directly to his credibility as a witness. [¶] [Defense counsel]?” There was a pause, and then the trial court stated: “That’s the risk, obviously, he chose when he took the witness stand.”

Defense counsel responded: “I understand. Could I have a moment with my client?” He then stated: “He was asked a question and he was compelled to answer, and, yes, because of his answer, his past is going to come up. . . . I’ll submit to the Court’s ruling of whether or not it’s going to come in.” The trial court noted that defense counsel had asked about the field sobriety tests during direct examination, and it therefore made it relevant in terms of cross-examination. It stated: “And, again, we are dealing with credibility of witnesses, and I can’t go ahead and give him some sanctity in terms of his response merely because he didn’t know which way to answer. The bottom line is the credibility of witnesses is extremely important in front of the jurors, and he basically emphatically testified that he has no experiences of performing field sobriety tests, other than fooling around with his friends, which is in complete contradiction to his prior convictions.” The trial court also stated that the request to bifurcate no longer applied.

The trial court stated that it was also evaluating the evidence under Evidence Code section 352. It commented: “[O]bviously he’s attacking Officer Romo’s credibility in terms of the reasons for the stop and the lack of communication and the fact that there was nothing wrong with his hitch nor was there anything wrong with his taillight, these are issues of credibility. The jurors are required to make assessments of credibility. They’re entitled to know whether or not a witness is being truthful, and I think, again, based on [defendant]’s response and it’s a direct attack on his credibility in terms of that response, the jurors are entitled to understand that that is an incorrect response and that it’s not true. And it would be the same way if you had any information to impeach Officer Romo.” The trial court restricted the priors to those alleged in the information.

Trial resumed, and defendant was asked on cross-examination if he had been convicted of a DUI on May 23, 2001, and whether he was subjected to field sobriety tests during that investigation, to which he responded: “Correct.” Defendant initially denied being convicted of a second DUI in 2001. However, when the prosecutor showed him the plea agreement he entered into, he admitted he was convicted of a second DUI on March 19, 2001, and that during the investigation, he performed field sobriety tests.<sup>3</sup> Defendant also admitted he had been convicted of a third DUI on March 19, 2002, and that he had performed field sobriety tests during the investigation.<sup>4</sup>

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<sup>3</sup> According to the probation report, defendant was convicted of two misdemeanor counts of violating Vehicle Code section 23152, subdivisions (a) and (b) in 2001.

<sup>4</sup> According to the probation report, defendant was convicted of a felony violation of Vehicle Code section 23153, subdivision (b) in 2002. It was later reduced to a misdemeanor.

B. *Analysis*

“A fair trial in a fair tribunal is a basic requirement of due process,” and “the Due Process Clause guarantees a criminal defendant the right to a fair and impartial judge.” (*People v. Freeman* (2010) 47 Cal.4th 993, 1000.) Judicial bias must be raised at the ““earliest practicable opportunity”” and cannot be raised for the first time on appeal. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111.) The failure to object or raise the issue of judicial bias also forfeits claims that the trial court’s alleged bias affected subsequent rulings. (*Ibid.*) “[D]efendant’s willingness to let the entire trial pass without [a] charge of bias against the judge not only forfeits his claims on appeal but also strongly suggests they are without merit. [Citation.]” (*Id.* at p. 1112.)

Here, the People called for a sidebar conference. Prior to the People making any statement, the trial court stated it suspected the sidebar conference was requested to address defendant opening the door to the admission of his prior convictions. Defense counsel agreed that defendant had opened the door to the admission of the prior convictions, and that it would submit on the trial court’s determination of the admission of the prior convictions. At no time did counsel raise an issue that the trial court was biased or committed misconduct. By failing to raise the issue in the lower court, we find that defendant has waived his judicial bias claim on appeal. (*People v. Guerra, supra*, 37 Cal.4th at p. 1112.)

Anticipating that we would find he has waived his claim, defendant contends that (1) counsel would not want to object for fear of alienating the trial court or that it would have been futile; and (2) he received ineffective assistance of counsel due to his trial

counsel's failure to raise the issue in the lower court. In order to show ineffective assistance of counsel, defendant has the burden of establishing that: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674, 104 S.Ct. 2052].) Determination of ineffective assistance of counsel can be decided on prejudice. (*Id.* at pp. 697-699.) Here, as will be discussed, *post*, defendant cannot show judicial bias that violated his rights to due process, the admission of defendant's prior convictions (even if erroneously admitted) was not prejudicial, and his trial was not rendered fundamentally unfair by the admission of his prior convictions. Hence, even if we addressed the merits of his claims, he would not be entitled to relief.

Here, “[o]ur role . . . is not to determine whether the trial judge’s conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge’s behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.’ [Citation.]” (*People v. Snow* (2003) 30 Cal.4th 43, 78.) As such, “[o]n appeal, we assess whether any judicial misconduct or bias was so prejudicial that it deprived defendant of “a fair, as opposed to a perfect, trial.”” (*People v. Guerra, supra*, 37 Cal.4th at p. 1112.)

The bias that defendant alleges against the trial court is simply not supported by the record. Certainly, the trial court can anticipate what argument a prosecutor will raise at a sidebar conference. If it was wrong, the prosecutor would have stated as much on the record. Further, the trial court gave defense counsel a chance to respond and evaluated

the admission of the evidence assessing Evidence Code section 352. Moreover, even if the ruling may have been erroneous, it did not show bias or misconduct. (*People v. Guerra, supra*, 37 Cal.4th. at p. 1112 [a trial court's rulings against a party, even if erroneous, does not establish a charge of judicial bias].) We have reviewed the entire record and find no instances of judicial bias or misconduct.

Moreover, defendant was not prejudiced by the trial court's ruling and the admission of the prior convictions did not render the trial fundamentally unfair.<sup>5</sup> Here, the mention of defendant's prior convictions was brief. The People argued briefly in closing argument that defendant was not credible because he had lied about having performed prior field sobriety tests. It was never suggested to the jury that they could find defendant guilty based on his prior convictions.

Finally, the evidence of defendant's guilt was overwhelming. Defendant drove out of a Fontana bar at midnight. He smelled of alcohol, his eyes were bloodshot and watery, and his speech was slurred. He admitted that he had had three beers. He performed poorly on his field sobriety tests, and his excuse that he had bad balance could easily be rejected by the jury. The horizontal gaze nystagmus test showed that defendant had alcohol in his system. Defendant's blood test showed that he had a .20 percent blood-alcohol content. There was no convincing evidence that the test was wrong.

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<sup>5</sup> We need not determine if the admission of the fact of defendant's prior convictions for a felony (later reduced to a misdemeanor) and two misdemeanors was erroneous, or whether the prosecutor improperly introduced the priors by questioning defendant rather than having an officer testify, because we find admission of the priors was not prejudicial and did not render the trial fundamentally unfair.

Based on the foregoing, defendant was not prejudiced by the admission of his prior convictions, and his trial was not rendered fundamentally unfair by the trial court's rulings.

#### IV

#### JUDICIAL INFLUENCE TO ADMIT PRIOR CONVICTIONS

Defendant contends the trial court compelled him to admit the truth of the prior convictions, and therefore, he was coerced into waiving his rights and admitting the truth of the prior convictions. He claims that he may have prevailed had he gone to trial on the priors and presumably seeks to withdraw his admission of the prior convictions.

Normally, a defendant may not appeal from a judgment of conviction upon a plea of guilty or no contest unless the trial court has executed and filed a certificate stating there is probable cause for the appeal. (*People v. Shelton* (2006) 37 Cal.4th 759, 769.) None was filed or granted in this case. However, the California Supreme Court has recently concluded that a certificate of probable cause is not required to attack the admission of a prior conviction where the defendant pleaded not guilty and was convicted after trial, regardless of whether the defendant's admission to the enhancement allegation resulted from a negotiated plea agreement. (*People v. Maultsby* (2012) 53 Cal.4th 296, 305-306.) Hence, we will review defendant's claim.

After both parties rested, the trial court advised defense counsel that it had redacted certain portions of the certified prior convictions that were marked court exhibits 6, 7, and 8. The trial court then stated: "I indicated this morning to [defense counsel] that based on my review of the court exhibits, that it would probably be in the best

interest of the defendant to either waive jury on the prior convictions or just submit them because in review of some of the documentation—I think it was the Riverside prior conviction that showed that the original case arose from a felony Complaint charging [Vehicle Code section] 23153[, subdivisions] (a) and (b), which was a DUI with injuries that was later reduced to a misdemeanor. I note that in the Rancho Superior Court prior conviction that it did indicate it was a second conviction; that he had a prior conviction dating back to 1996, so that would inform the jurors that he was more than just that which he was impeached with during the course of his cross-examination. [¶] So I don't know what [defendant] would like to do. It's up to him. It's his option whether or not he wants to waive the jury on the prior convictions or whether or not he would like to admit to those prior convictions.”

Defense counsel indicated that defendant had been confused as to whether he had two or three prior DUI convictions. Counsel had reviewed the prior records with defendant. Defense counsel stated: “After discussing this with him, my understanding is [defendant] wants to admit the three prior DUI's.”

The trial court then admonished defendant that he had three options: he could have the jury make the decision on the prior convictions, he could have the trial court make the decision on the prior convictions, or he could just admit the prior convictions if he was found guilty. The trial court asked defendant what he wanted to do and defendant responded: “I will admit.”

The trial court then advised defendant: “You do have the right, again, for this jury to make that decision and be convinced beyond a reasonable doubt that these prior

convictions are, in fact, true. By making that admission, you are going to give up your right to a jury trial on that issue, to present a defense, to confront and cross-examine the witnesses, and you're going to give up your right to remain silent. [¶] Do you understand that?" Defendant responded: "Yes." Defendant then admitted the truth of the prior convictions.

"There is no rule in California forbidding judicial involvement in plea negotiations. Nonetheless courts have expressed strong reservation about the practice." (*People v. Weaver* (2004) 118 Cal.App.4th 131, 148.) Defendant relies almost exclusively on *Weaver* to support his claim that the trial court's involvement in the plea negotiations compelled him to enter into the plea and warrants withdrawal of his admission of his prior convictions.

In *People v. Weaver, supra*, 118 Cal.App.4th 131, the defendant pleaded guilty to four counts of lewd acts upon a child. On appeal, he argued that the trial court's undue pressure on him to plead guilty constituted good cause to withdraw the plea. When the case was assigned to the trial court, it expressed to the defendant that the case was "very severe," the acts were "predatory," and that he appeared to be a "pedophile." (*Id.* at pp. 135-136.) The trial court continually encouraged the defendant to take a plea since he was facing a long period of prison time; the victims should not be forced to testify; and that based on its experience, the defendant would be convicted. (*Id.* at pp. 135-138.) The trial court stated on the record that "[c]hild molests aren't pretty" and the People's case was strong. (*Id.* at pp. 138-139.) When the defendant finally entered a guilty plea, the

trial court noted that the evidence was overwhelming and it was glad the victims did not have to testify. (*Id.* at p. 140.)

On appeal, the defendant was allowed to withdraw his plea by the reviewing court based on the fact the trial court's conduct was "highly inappropriate." The appellate court concluded that even though judges can have a useful part in plea negotiations, "when the trial court abandons its judicial role and thrusts itself to the center of the negotiation process and makes repeated comments that suggest a less-than-neutral attitude about the case or the defendant, then great pressure exists for the defendant to accede to the court's wishes." (*People v. Weaver, supra*, 118 Cal.App.4th at pp. 149-150.)

Nothing in this case comes close to the statements made by the trial court in *Weaver*. Although the trial court briefly stated that it would be in defendant's best interest to admit the prior convictions because they showed that one of the violations involved an injury, it made no further comment on the record. Rather, it advised defendant that it was up to him how he wanted proceed and that he could waive a jury trial or admit the prior convictions. Defendant was told he had the option of going to trial, and no comment was made by the trial court at that point as to his chances of prevailing at trial.

Based on the record, the trial court did not so involve itself in defendant's admission of the prior convictions as to give good cause for withdrawing the plea. Defendant met with his counsel and decided to admit the prior convictions. Nothing in

the record supports that defendant was coerced. As such, there is no good cause for defendant to withdraw his admission of the prior convictions.

V

DISPOSITION

The judgment is affirmed.

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RICHLI  
J.

We concur:

McKINSTER  
Acting P.J.

MILLER  
J.