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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.

DAVID ANTHONY HUSTED,

Defendant and Appellant.

E052831

(Super.Ct.No. RIF153156)

OPINION

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge.

Affirmed in part as modified and reversed in part.

Rex Williams, 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, Emily R. Hanks and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

A jury found defendant and appellant David Anthony Husted guilty of petty theft (Pen. Code, § 484, subd. (a)),<sup>1</sup> a necessarily included offense of robbery (§ 211) as alleged in count 1; petty theft with a prior (§§ 664, 484, subd. (a)) as alleged in count 2; and burglary (§ 459) as alleged in count 5.<sup>2</sup> In a bifurcated proceeding, defendant admitted that he had sustained three prior prison terms (§ 667.5, subd. (b)), two prior serious felony convictions (§ 667, subd. (a)), and two prior serious and violent felony convictions (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)(A)). Defendant was sentenced to a total indeterminate term of 25 years to life with credit for time served.<sup>3</sup>

On appeal, defendant contends: (1) his conviction on count 2 must be reversed because it is necessarily included in and is the same offense as count 1; (2) his sentence on count 2 must be stayed pursuant to section 654; (3) his sentence on count 2 was unauthorized under amended section 666 because there is no evidence to show three or more prior theft-related convictions; and (4) the true findings on his prior conviction allegations must be reversed because he was not adequately advised of his constitutional

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

<sup>2</sup> After the jury was unable to reach a verdict on count 3 (petty theft with a prior of Sears) and count 4 (burglary of Sears), a mistrial was declared as to those counts. Counts 3 and 4 were subsequently dismissed.

<sup>3</sup> The trial court struck the three prior prison term enhancements; however, the minute order for that hearing erroneously states that the court struck priors 1 through 5. The minute order should therefore be corrected accordingly.

rights and did not validly waive them. We conclude that count 1 must be reversed and that count 2 must be stayed. We, however, reject defendant's remaining contentions.

## II

### FACTUAL BACKGROUND

On October 15, 2009, around 3:30 p.m., surveillance video showed defendant hide a pair of shoes from the shoe department of a Sears store in the Moreno Valley Mall. After concealing the pair of shoes in his waistband, defendant exited the Sears store without paying for the shoes, leaving the empty shoebox in its original place.

Later in the day, around 3:45 p.m., a loss prevention manager at the same Sears store in the Moreno Valley Mall noticed defendant via a store surveillance camera in the Levis department hastily selecting a pair of jeans.<sup>4</sup> Defendant then rolled up the jeans and went near an exit of the store, where he acted suspiciously. Defendant also selected a pair of glasses, but the loss prevention manager was unable to see what he did with those glasses.

Due to defendant's suspicious activity, the loss prevention manager notified a loss prevention officer, who "staged himself nearby." Defendant eventually exited the store, leaving the rolled-up jeans on a table. Mall security was notified via a two-way radio of defendant's suspicious activity; they were provided with a description of defendant and were informed of his current whereabouts.

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<sup>4</sup> The surveillance videos were played for the jury at the time of trial.

Riverside County Sheriff Deputy Michael Berry, who was stationed at the Moreno Valley Mall, also received a call from Sears about defendant being a possible theft suspect and watched defendant via a surveillance camera leaving the Sears store. Deputy Berry observed defendant get into a red sedan, drive through the parking lot, pick up a woman, and then drive to a parking lot near the JC Penney store. After defendant parked the vehicle, he and the woman entered the JC Penney.

Mall security notified the loss prevention supervisor at the JC Penney that defendant was headed his way. Via video surveillance, two loss prevention officers observed defendant and the woman enter the JC Penney store. Defendant went to the lingerie department, selected some slippers, placed them in the front part of his pants, and discarded the slippers' plastic wrapping. He also removed a black "nightie" from its hanger and placed it in his front pocket. After proceeding to the men's department, defendant selected a jacket, removed it from its hanger, and put it on. Defendant thereafter went to the store's second level and exited the store without paying for any of the items.

After defendant exited the store, JC Penney's loss prevention supervisor contacted him and identified himself. Defendant attempted to flee; however, the supervisor grabbed defendant and told him to stop. When Defendant continued to resist, the supervisor forced him to the ground and held him down until sheriff's deputies arrived.

Deputy Berry responded to the scene and searched defendant. Deputy Berry found a knife, wire cutters, the black negligee, and slippers on defendant's person. Defendant was still wearing the jacket he put on while inside the JC Penney with the tags

still attached to it. Deputy Berry and JC Penney's loss prevention supervisor testified that wire cutters are commonly used to remove store sensor security tags. Deputy Berry found no money or wallet on defendant's person.

### III

#### DISCUSSION

##### A. *Necessarily Included Offenses*

Defendant contends that either count 2 (petty theft of slippers from JC Penney) or count 1 (petty theft from JC Penney) must be reversed, because count 2 is necessarily included in and is the same offense as count 1. The People agree and assert that count 1 must be reversed. We agree with the People that count 1 must be reversed.

A defendant may not be convicted of both an offense and a lesser included offense. (*People v. Lewis* (2008) 43 Cal.4th 415, 518.) A lesser offense is necessarily included in a greater offense if the statutory elements of the greater offense include all the elements of the lesser offense, so that the greater cannot be committed without also committing the lesser. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034; *People v. Busch* (2010) 187 Cal.App.4th 150, 160.)

In *People v. Villa* (2007) 157 Cal.App.4th 1429, 1432, 1433-1435, the Court of Appeal held that the defendant could not be convicted of both robbery of a store employee and petty theft of the store's property based on the same course of conduct (the taking of a car navigation system) because petty theft is a lesser included offense of robbery. The court rejected the People's argument that the defendant could be convicted of both robbery and petty theft because the crimes involved different victims. The court

concluded that the crimes “legally” had the same victim because the store employee was the agent of the store employer. (*Id.* at p. 1435.) The court also explained that the fact the defendant was charged with and convicted of petty theft with a prior—as defendant was in this case—did not mean that the crime was not a lesser included offense of robbery because the prior conviction requirement of section 666 is a sentencing factor and not an element of the offense. (*Villa*, at pp. 1434-1435.)

Here, defendant was charged in count 1 with robbery of JC Penney. (§ 211.) In count 2, he was charged with petty theft of slippers from JC Penney having previously been convicted of a robbery. (§§ 666, 484, subd. (a).) Following a jury trial, the jury found defendant guilty of misdemeanor petty theft, a lesser necessarily included offense of count 1; guilty of count 2 as charged; and guilty of burglary of JC Penney as charged in count 5.

Hence, defendant was convicted of petty theft of the JC Penney property and petty theft (with a prior) of the JC Penney property based on the same course of conduct (his taking of certain store merchandise). The parties correctly conclude that the petty theft with a prior (count 2) is the same substantive offense as the petty theft (count 1). (*People v. Ortega* (1998) 19 Cal.4th 686, 699.) Defendant’s conviction for petty theft (the lesser offense) in count 1 must therefore be reversed. (*People v. Miranda* (1994) 21 Cal.App.4th 1464, 1468 [a conviction of the lesser offense cannot stand].)

B. *Section 654*

Defendant was sentenced to a total indeterminate term of 25 years to life as follows: an indeterminate term of 25 years to life on count 5 (burglary of JC Penney); a

concurrent indeterminate term of 25 years to life on count 2 (petty theft with a prior); and a concurrent term of six months on count 1 (petty theft).

Defendant contends, and the People agree, that the trial court improperly imposed concurrent sentences for his conviction on count 2 when it should have been stayed pursuant to section 654.<sup>5</sup> In particular, defendant argues that he had one intent and objective in committing the commercial burglary and petty theft. We agree that defendant's sentence on count 2 should have been stayed.

“Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct.’ [Citation.] It is the defendant’s intent and objective that determines whether the course of conduct is indivisible. [Citation.] Thus, “[i]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.” [Citation.]” (*People v. Le* (2006) 136 Cal.App.4th 925, 931.) “Section 654 does not allow any multiple punishment, including either concurrent or consecutive sentences. [Citation.]” (*People v. Deloza* (1998) 18 Cal.4th 585, 592.) “The determination of a defendant’s intent and objective is a factual matter for the trial court to determine. [Citation.] We must affirm if substantial evidence supports a trial court’s express or implied determination that punishment for crimes occurring during a course of conduct does not involve dual use of facts prohibited by section 654. [Citation.]” (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297.)

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<sup>5</sup> Because we must reverse defendant’s conviction for count 1, we are concerned only with the concurrent sentence on count 2.

We find no evidence here that would support the trial court's implied determination that defendant's intent and objective were different for the commercial burglary conviction and the petty theft with a prior conviction. The record shows that defendant possessed a single objective and engaged in a single, continuous course of conduct when he committed these crimes, i.e., entering JC Penney with the intent to steal merchandise from the store. There is ample case authority holding a defendant must be punished only once if he is convicted of both burglary and theft arising from the same criminal event. (See *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457-1458.)

We conclude the concurrent sentence for the petty theft with a prior (count 2) violates section 654 and must be stayed. (See *People v. Le, supra*, 136 Cal.App.4th at p. 931 [finding "appropriate" the People's concession consecutive sentences imposed for robbery and burglary of drugstore items violated § 654].)

C. *Sentence on Count 2*

In his supplemental brief, defendant argues that the sentence imposed on count 2 pursuant to amended section 666, subdivision (a),<sup>6</sup> as effective on September 9, 2010, and applied retroactively, was unauthorized, because there was no evidence to show he had been convicted of *three or more* qualifying prior theft-related convictions.<sup>7</sup> He

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<sup>6</sup> Section 666, subdivision (a) will hereinafter be referred to as "section 666(a)."

<sup>7</sup> Defendant had admitted to suffering two prior robbery convictions, to wit, a June 16, 1998, robbery and an October 21, 2003, robbery.

further argues that section 666, subdivision (b),<sup>8</sup> also effective on September 9, 2010, does not apply because under the rules of statutory construction the phrase “a prior violent or serious felony” in section 666(b)(1) “must mean a prior violent or serious felony *other than* robbery.”

The People agree that amended section 666(a) should be applied retroactively to defendant’s case. They disagree, however, with defendant’s statutory interpretation of amended section 666(b)(1). Specifically, the People argue that only one prior theft-related conviction is required where the prior is a violent or serious felony conviction such as robbery.

We apply the de novo standard of review to defendant’s claim, since it raises an issue of statutory interpretation. (*People v. Superior Court (Ferguson)* (2005) 132 Cal.App.4th 1525, 1529.) ““When construing a statute, we must “ascertain the intent of the Legislature so as to effectuate the purpose of the law.”” [Citation.] “[W]e begin with the words of a statute and give these words their ordinary meaning.’ [Citation.] ‘If the statutory language is clear and unambiguous, then we need go no further.’ [Citation.]” (*People v. Sinohui* (2002) 28 Cal.4th 205, 211.) “If the statutory language is unambiguous, ‘we presume the Legislature meant what it said, and the plain meaning of the statute governs.’ [Citation.]” (*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 485.) “In other words, the courts ‘may not, under the guise of construction, rewrite the law or give the words an effect different from the plain

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<sup>8</sup> Section 666, subdivision (b) will hereinafter be referred to as “section 666(b).”

and direct import of the terms used.’ [Citation.]” (*People v. Massicot* (2002) 97 Cal.App.4th 920, 925.)

At the time defendant committed the present offenses, section 666 provided: “Every person who, having been convicted of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.” (Former § 666.)

“Effective September 9, 2010, Assembly Bill No. 1844 (2009-2010 Reg. Sess.), the Chelsea King Child Predator Prevention Act of 2010 (hereafter Assembly Bill 1844 or the act), amended section 666 to provide, in pertinent part: ‘(a) Notwithstanding Section 490 [(specifying the punishment for petty theft)], every person who, having been convicted *three or more times* of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, *robbery*, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.’” (*People v. Vinson* (2011) 193 Cal.App.4th 1190, 1194 (*Vinson*), second italics added.)

“Clearly, new subdivision (a) of section 666 requires proof of at least three prior convictions, not just one, for individuals who . . . have not suffered prior serious or violent felony convictions and who are not required to register as sex offenders.” (*Vinson, supra*, 193 Cal.App.4th at p. 1194, fn. omitted.) “Assembly Bill 1844’s amendment of section 666 had the effect of mitigating punishment by raising the level of recidivism required before a defendant can be sentenced to state prison.” (*Id.* at p. 1199.)

We agree with the parties that the amendment to section 666(a), effective on September 9, 2010, “applies retroactively” (*Vinson, supra*, 193 Cal.App.4th at p. 1193) to convictions that were not final as of that date (*id.* at p. 1194). Hence, defendant is entitled to the benefit of the amendment to section 666. One element of a violation of section 666, as amended, is that the defendant has previously suffered three or more theft-related convictions. (*Vinson*, at p. 1194.) At trial, the People pleaded and proved that defendant had suffered two prior theft-related convictions, to wit, two robberies. Proof of two prior theft-related convictions does not meet the amended statutory requirement. (*Ibid.*)

The People agree that defendant does not fall within amended section 666(a) but argue that defendant qualifies for the enhanced punishment based on his having suffered a “prior serious or violent felony conviction” under section 666(b)(1). Defendant, on the other hand, claims that the exception found in section 666(b)(1) cannot apply because “the term ‘robbery’ in section [666(a)] would be rendered meaningless, and in section [666(b)(1)] superfluous, unless the phrase ‘a prior violent or serious felony’ contained in section [666(b)(1)] means a prior violent or serious felony other than robbery.”

Accordingly, we determine whether the Legislature intended that robbery be excluded from amended section 666(b)(1)'s definition.

Amended section 666(b) provides: “Notwithstanding Section 490, any person described in paragraph (1) who, having been convicted of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496, and having served a term of imprisonment therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, who is subsequently convicted of petty theft, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.”

Paragraph (1) of amended section 666(b) states: “This subdivision shall apply to any person who is required to register pursuant to the Sex Offender Registration Act, *or who has a prior violent or serious felony conviction, as specified in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.*” (Italics added.)

In other words, amended section 666(b) provides an exception to amended section 666(a). If a person is required to register as a sex offender or has a prior serious or violent felony conviction, the People need prove only one prior theft-related conviction that resulted in imprisonment for a subsequent petty theft to be punished as a felony.

The plain and common sense meaning of section 666(b)(1) language “a prior violent or serious felony conviction, as specified in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7” unambiguously applies to robbery. As defendant acknowledges, robbery *is* a violent and serious felony “as specified in” section 667, subdivision (c)(9) and section 1192.7, subdivision (c)(19). Thus, the words of the statute

are controlling. (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818.) We conclude the phrase “a prior violent or serious felony” as used in section 666(b)(1) includes robbery.

We reject defendant’s claim that this interpretation renders other portions of the statute superfluous. In fact, both subdivisions (a) and (b) of section 666 require not only prior robbery conviction(s), but also that defendant served a term in a penal institution or received imprisonment as a term of probation for the robbery conviction. Section 666(b)(1) requires a prior robbery conviction and does not mention imprisonment. Thus, the robbery conviction requirement in section 666(b)(1) is not exactly the same as that required by sections 666(a) or 666(b), and it therefore does not render them meaningless or superfluous.

“[W]e are required to ascribe significance to every word of each statute we are called upon to apply.” (*People v. Jones* (1988) 46 Cal.3d 585, 596.) Each word of a statute is assumed to have been chosen carefully to impart its own meaning. (See *Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1056.) We therefore assume the drafters chose the language “a prior violent or serious felony conviction, as specified in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7” to include robbery.

Defendant’s interpretation of the statute, which partially ignores the literal language, adds to the words of the statute to accomplish a purpose that does not appear on the face of the statute. We do not “consider the statutory language in isolation, but rather examine the entire substance of the statute in order to determine the scope and

purpose of the provision, construing its words in context and harmonizing its various parts. [Citation.]” (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1040.) “Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.” (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.)

While we agree with defendant that the overall intent of Assembly Bill No. 1844 “was to significantly increase punishment for various sex offenses against minors [citation]” (*Vinson, supra*, 193 Cal.App.4th at p. 1196) and concurrently intended to reduce punishment for petty thieves, this does not mean that the Legislature intended to reduce punishment to the class of criminals who had *previously* been convicted of a serious or violent felony as specified in sections 667.5 and 1192.7. (*Vinson*, at p. 1196, citing *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 297, 300-301 [treating different provisions within single initiative measure differently for purpose of retroactive application].)

As explained in *Vinson*, the legislators were concerned about the increased costs and prison overcrowding that would be caused by Assembly Bill No. 1844. (*Vinson, supra*, 193 Cal.App.4th at p. 1197.) Therefore, section 666 was amended to address these concerns. (*Vinson*, at p. 1197.) The amendment was intended to decrease the number of petty thefts punished as a felony; “[h]owever, individuals required to register as sex offenders, or with a prior serious or violent felony conviction or who have been previously sentenced under the Three Strikes law, would remain subject to imprisonment in the state prison with one prior qualifying offense (as in current law).” (Sen.

Appropriations Com. Fiscal Summary, analysis of Assem. Bill No. 1844 (2009-2010 Reg. Sess.) as amended Aug. 2, 2010, p. 6.) Clearly, the Legislature did not intend to omit robbery from section 666(b)(1).

D. *Admissions to Prior Conviction Allegations*

Defendant also contends that the true findings on his prior conviction enhancements must be reversed because the trial court did not adequately advise him of his *Boykin-Tahl*<sup>9</sup> rights prior to his admissions to the allegations, and he did not waive those rights. Specifically, he asserts the court failed to advise him of his rights to remain silent and confront witnesses. He further asserts that the trial court failed to advise him of the consequences of admitting the prior convictions. Defendant is correct that the trial court did not expressly advise him of his complete *Boykin-Tahl* rights prior to his admissions. However, we conclude the totality of the circumstances demonstrate the admissions were voluntary and intelligent, and any error in failing to advise defendant of the penal consequences of his admissions was waived and/or harmless.

Under both the federal and state Constitutions, before a court accepts a guilty plea, a defendant must be advised of three constitutional rights: (1) the privilege against self-incrimination, (2) the right to a jury trial, and (3) the right to confront one's accusers. (*Boykin, supra*, 395 U.S. at pp. 242-243; *Tahl, supra*, 1 Cal.3d at pp. 132-133.) For a waiver of these fundamental constitutional rights to be valid, it must be knowing, intelligent, and voluntary. (*Boykin*, at p. 243.) Such a waiver may not be presumed from

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<sup>9</sup> *Boykin v. Alabama* (1969) 395 U.S. 238 (*Boykin*); *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*).

a silent record; rather, the record must affirmatively disclose that a defendant who pleaded guilty did so knowingly and voluntarily. (*Ibid.*) In California, the same rule applies to the acceptance of an admission of the truth of an alleged prior conviction or prior prison term. (*In re Yurko* (1974) 10 Cal.3d 857, 863 (*Yurko*).

Our Supreme Court has since made it clear, however, that the requirement of such advisals is a matter of its own supervisory powers and not a matter of federal constitutional law. (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.) Accordingly, even when a trial court fails to give the required advisals, it is not reversible per se. (*Id.* at p. 1178.) “The pertinent inquiry . . . [is] whether ‘the record affirmatively shows that [the admission] is voluntary and intelligent under the *totality of the circumstances*’ [citation] . . . .” (*People v. Mosby* (2004) 33 Cal.4th 353, 360 (*Mosby*)). The focus of this examination is not “whether the defendant received express rights advisements, and expressly waived them, [but] whether the defendant’s admission was intelligent and voluntary because it was given with an understanding of the rights waived.” (*Id.* at p. 361.) In order to properly analyze the issue, “an appellate court must go beyond the courtroom colloquy” and “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.” (*Ibid.*)

In *Mosby*, the court advised the defendant that he was entitled to have a jury determine the truth of the allegation that he suffered a prior felony conviction. (*Mosby, supra*, 33 Cal.4th at p. 357.) The defendant waived that right and agreed to have the court determine the truth of a prior conviction allegation. (*Id.* at pp. 357-358.) After the

guilty verdict was delivered, the jury was discharged, and defendant admitted the truth of the prior conviction allegation. (*Id.* at p. 358.) The defendant appealed, contending that the trial court’s incomplete rights advisements rendered his admission invalid. (*Id.* at p. 359.) The Court of Appeal disagreed and found that the defendant had voluntarily and intelligently admitted his prior conviction. (*Ibid.*) The Supreme Court affirmed the Court of Appeal’s decision, noting that a trial on a prior conviction is ““simple and straightforward,”” and the defendant “had *just* undergone a jury trial,” where he had exercised his right to remain silent and had confronted witnesses. (*Id.* at p. 364.)

Here, as in *Mosby*, defendant, who was represented by counsel, had just undergone a jury trial. Thereafter, while the jury was deliberating on the substantive charges, defendant waived his right to have the jury determine his prior enhancement allegations. Specifically, the following colloquy occurred:

“THE COURT: Can we take that waiver, please, to be tried to the Court as opposed to the jury.

“[DEFENSE COUNSEL]: [Defendant], you have the right to have a jury determine the truth of the priors alleged under 667(a) and 1192.7. Do you agree that these priors can be tried to [the trial court]?”

“DEFENDANT: Yes.

“[DEFENSE COUNSEL]: Do you waive your right to have a jury trial?”

“DEFENDANT: Yes.

“THE COURT: Thank you . . . . I think that should conclude all matters. . . .”

After the jury returned its verdict, the parties agreed to try the priors before the court at the time of sentencing. At the sentencing hearing, defendant admitted his priors.

Because of the advisement given by defense counsel, defendant's reliance on the silent-record cases *People v. Moore* (1992) 8 Cal.App.4th 411 and *People v. Johnson* (1993) 15 Cal.App.4th 169 is misplaced.

Instead, we must analyze this case as an incomplete advisement case under *Mosby*, *supra*, 33 Cal.4th 353. Here, defendant admitted his priors after completion of the trial on his substantive charges. Therefore, as in *Mosby*, defendant had just completed a contested jury trial at which he exercised his right not to testify and observed the confrontation of witnesses against him. Moreover, at his arraignment, defendant was advised of his constitutional rights to (1) speedy trial; (2) trial by judge or jury; (3) confrontation and cross-examination of witnesses; (4) present evidence on own behalf; (5) privilege against self-incrimination; and (6) charges and consequences of his plea and statutory sentencing. Additionally, defendant had a lengthy criminal history dating back to 1985. Defendant had been convicted of several offenses and spent time in both jail and prison. Furthermore, the record clearly shows that defendant understood what was transpiring during the hearing.

In sum, under the totality of the circumstances, defendant voluntarily and intelligently admitted his prior enhancement allegations despite being advised of and having expressly waived only his right to a jury trial.

Defendant also cursorily argues that the court failed to advise him of the penal consequences of the true findings on the priors. However, the record indisputably

demonstrates defendant was aware of and understood how the priors would enhance his sentence. Defendant filed a motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), in which he pleaded with the court to dismiss his prior strike allegations. In addition, at the sentencing hearing, in arguing in support of his *Romero* motion, defense counsel asserted that defendant was not “deserving of a life sentence . . . .” Defense counsel also pointed out that defendant “desperately wanted to plead, and he was willing to plead to any determinate term that was offered to him. At one point, . . . at the preliminary, he was willing to plead to 20 years.” Defense counsel further informed the court that he had “discussed” the priors with defendant and that defendant was “prepared to admit the priors.” Under these circumstances, any failure to advise defendant of the consequences of his admissions did not render the admissions invalid. (*People v. Wrice* (1995) 38 Cal.App.4th 767, 770-771.)

Moreover, the failure to advise of the penal consequences of an admission is subject to the California standard of harmless error. There is nothing in the record to suggest defendant would not have made the admissions had he been explicitly advised of the penal consequences. Error, if any, was harmless. (Cal. Const., art. VI, § 13; *People v. Walker* (1991) 54 Cal.3d 1013, 1023.)

#### IV

#### DISPOSITION

The judgment of conviction on count 1 for petty theft is reversed. Additionally, the judgment is modified to stay the sentence on defendant’s conviction for petty theft with a prior (count 2) pursuant to section 654.

The superior court clerk is directed to prepare a corrected minute order for the December 10, 2010, hearing as stated in footnote 3, *ante*; to prepare a new sentencing minute order and an amended abstract of judgment; and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RICHLI  
J.

We concur:

RAMIREZ  
P. J.

MILLER  
J.