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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NICOLAS PAUL BALBAS,

Defendant and Appellant.

G045803

(Super. Ct. No. 10WF1170)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
W. Michael Hayes, Judge. Affirmed.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Garrett Beaumont and
Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Nicolas Paul Balbas appeals from the judgment entered after a jury found him guilty of two counts of attempted first degree robbery, one count of residential burglary, and two counts of assault with a semiautomatic weapon, with related enhancements. The trial court accepted defendant's admission of prior conviction allegations, and sentenced defendant to a total prison term of 17 years.

Defendant contends that although the trial court advised him of his right to a jury trial on the prior conviction allegations before accepting defendant's admission of them, the trial court failed to also advise him of his constitutional rights to remain silent and confront witnesses. Defendant further contends the trial court also erred by failing to completely advise him of the consequences of admitting the prior conviction allegations.

We affirm. After reviewing "the totality of the circumstances" surrounding defendant's admission of the prior conviction allegations, we conclude his admission was voluntary and intelligent. (*People v. Mosby* (2004) 33 Cal.4th 353, 360 (*Mosby*)). The trial court's failure to advise defendant of the consequences of admitting the prior conviction allegations did not constitute prejudicial error because defendant failed to show it is reasonably probable he would not have admitted them had he been so advised. (*People v. McClellan* (1993) 6 Cal.4th 367, 378.)

FACTS

Around 3:00 a.m. on May 18, 2010, defendant's friend, Kyle Valencia, called defendant and invited him to come to a motel room to drink beers and "to party." Valencia, Jared Gaeta, and Kimberly Norton were in the motel room when defendant and "this guy named Sean" arrived. Sean pulled out a firearm, pointed it at Gaeta, and yelled to everyone to be quiet and told Valencia to get on the ground. Valencia complied and got on the ground. Defendant and Sean told Norton to get on the floor; she also did as she was told.

Norton heard Sean say something like “get on the floor. Where is the money? If you don’t want a cap in him, you’ll tell me.” Norton also heard defendant say that she “better listen” to him and Sean. Valencia told Norton to give them the money; Norton told everyone that she did not have any money.

Defendant straddled Valencia (who was on the ground), and seemed to either try to get money or “just check [Valencia’s] person.” Defendant punched Valencia in the head. Gaeta grabbed the gun Sean was holding and struggled to get it out of Sean’s hand. The gun discharged and a bullet struck the door jamb. Defendant and Sean ran off together.

PROCEDURAL BACKGROUND

Defendant was charged in an information with two counts of attempted first degree robbery in violation of Penal Code sections 211, 212.5, subdivision (a), and 664, subdivision (a) (counts 1 and 2); one count of first degree residential burglary in violation of Penal Code sections 459 and 460, subdivision (a) (count 3); and two counts of assault with a semiautomatic firearm in violation of Penal Code section 245, subdivision (b) (counts 4 and 5). (All further statutory references are to the Penal Code unless otherwise specified.) As to count 3, the information alleged that offense came within the meaning of section 462, subdivision (a) and also alleged that a person who was not defendant’s accomplice was present in the residence during the commission of the residential burglary, within the meaning of section 667.5, subdivision (c)(21). The information further alleged that pursuant to section 12022, subdivision (a)(1), defendant was armed with a firearm in the commission of counts 1, 2, and 3.

The information contained prior conviction allegations. It alleged that pursuant to sections 667, subdivisions (d) and (e)(1) and 1170.12, subdivisions (b) and (c)(1), defendant was previously convicted of assault with a deadly weapon in violation of section 245, subdivision (a)(1) (a serious felony) in December 2004. The information

further alleged that in August 2005, defendant was convicted of possession for sale of a controlled substance in violation of Health and Safety Code section 11378, and, in January 2008, was convicted of second degree burglary in violation of sections 459 and 460, subdivision (b); for each of those two convictions, defendant served a separate prison term within the meaning of section 667.5, subdivision (b).

The jury found defendant guilty on all counts and also found true the enhancement allegations as to those counts. The trial court addressed resolution of the prior conviction allegations as follows:

“The Court: Counsel, I’m sorry to have to address this, but in the computer system, when they data input, they never input your priors. So we’ve never reached a decision. The jury is exactly where they would be now that there’s been a conviction. [¶] Counsel, your client has a right to have the jury determine whether or not the priors are true or your client can waive that right and ask the court that I hear that evidence. [¶] What would your client like to do?

“[Defendant’s counsel]: Can I see the packet?

“[The prosecutor]: Yes.

“[Defendant’s counsel]: I need a minute to—

“The Court: Sure. [¶] Let’s hold off with the jury a minute. [¶] Sir, what the jury would decide is whether or not you’re the person who suffered these convictions only, not what they mean, just so you know. That is, whether or not they’re strikes. But you have a right to have the jury determine whether or not you suffered these convictions. [¶] Counsel, is it one—it’s two convictions? A 245 and a 459?

“[The prosecutor]: I believe there’s a one-year prior[] as well, Your Honor. There’s a—the 245 is the strike but then he—

“The Court: But I’m just doing convictions. That’s all the jury is going to do. What they are, I take care of. So what’s—how many cases is the jury going to hear? What do you have in the way of evidence?

“[The prosecutor]: I have the 245 prior and then I have the 969(b) packet for the 11377(a) and the 459-460(b).

“The Court: . . . I don’t see a[] 11377(a) charged.

“[The prosecutor]: It is, Your Honor. It’s immediately after the 667(a)(1), the first 667.5(b).

“The Court: Please give me page and line.

“[The prosecutor]: Page 3 starting at line 11.

“The Court: Mine says ‘11378.’

“[The prosecutor]: Yes.

“The Court: You said ‘11377.’

“[The prosecutor]: I misspoke, Your Honor.

“The Court: Okay. Would your client—

“[Defendant’s counsel]: My client would be fine if the court was the fact finder with regard to the priors.

“The Court: Whether or not he suffered the conviction.

“[Defendant’s counsel]: Correct.

“The Court: In other words, we—is that okay with you, sir?

“The defendant: Yes, sir.

“The Court: All right. Then what we’ll do at this point is excuse the jury, get them on their way.”

After the jury was dismissed and defendant’s counsel stated she had a “brief chance” to look at the prior conviction documentation, the trial court offered the following options on the bench trial of the prior conviction allegations. The court stated, “[w]e can do it now—sometimes your client says, ‘no, I’m just going to admit the priors anyway’—or we can do it on the date of sentencing. Whatever you’d like to do.”

Defendant’s counsel asked for a moment and the court said, “[s]ure.” The reporter’s transcript notes a “[d]iscussion [was] held off the record.” Defendant’s

counsel then stated, “at this time my client is inclined to admit the priors.” Defendant admitted each prior conviction allegation. The trial court pointed out that one of the prior conviction allegations pertaining to serving a prior prison term “[e]ssentially” was a “one-year enhancement,” to which defendant responded, “[o]kay.” The court asked him if he “underst[oo]d that” and defendant responded, “[y]es, sir.” The court also pointed out that the section 245 prior conviction was a “strike prior,” and asked whether “either side wish[ed] to be heard further on that.” The prosecutor and defendant’s counsel both replied, “[n]o.”

The trial court sentenced defendant to a total prison term of 17 years by imposing (1) a 12-year term on count 4 (double the middle term because of the strike prior conviction); (2) a 12-year term on count 5 (double the middle term for the strike prior conviction) to run concurrently with the term imposed on count 4; (3) a four-year term on count 1 (double the middle term because of the strike prior conviction), plus a one-year consecutive term for the section 12022, subdivision (a)(1) enhancement on count 1 (the court stayed execution of this sentence pursuant to section 654); (4) a four-year term on count 2 (double the middle term because of the strike prior conviction), plus a one-year consecutive term for the section 12022, subdivision (a)(1) enhancement on count 2 (the court stayed execution of this sentence pursuant to section 654); (5) an eight-year term on count 3 (double the middle term because of the strike prior conviction), plus a one-year consecutive term for the section 12022, subdivision (a)(1) enhancement, and a three-year consecutive term for the section 667.5, subdivision (c)(21) enhancement (the court stayed execution of this sentence as well, pursuant to section 654); and (6) a five-year term for the December 2004 prior conviction to run consecutively to the term imposed on count 4. The trial court struck the two prior conviction allegations under section 667.5, subdivision (b) for purposes of sentencing only.

Defendant appealed.

DISCUSSION

The trial court advised defendant of his right to a jury trial on the prior conviction allegations. Initially, defendant waived that right in favor of a bench trial. Shortly thereafter, defendant's counsel informed the trial court that defendant decided to admit the prior conviction allegations. The court accepted defendant's admission.

Defendant contends his admission of the prior conviction allegations was not voluntary and intelligent because the trial court failed to advise him of his privilege against self-incrimination and his right to confront witnesses at a trial on the prior conviction allegations. Defendant further contends the trial court failed to completely advise him of the potential consequences of admitting the prior conviction allegations. We reject each of defendant's arguments for the reasons explained *post*.

I.

THE TOTALITY OF THE CIRCUMSTANCES SHOW DEFENDANT VOLUNTARILY AND INTELLIGENTLY ADMITTED THE PRIOR CONVICTION ALLEGATIONS.

In *Mosby, supra*, 33 Cal.4th at page 356, the California Supreme Court explained: "Thirty years ago this court held that before accepting a criminal defendant's admission of a prior conviction, the trial court must advise the defendant and obtain waivers of (1) the right to a trial to determine the fact of the prior conviction, (2) the right to remain silent, and (3) the right to confront adverse witnesses. [Citation.] Proper advisement and waivers of these rights in the record establish a defendant's voluntary and intelligent admission of the prior conviction. [Citations.] [¶] When, immediately after a jury verdict of guilty, a defendant admits a prior conviction after being advised of and waiving only the right to trial, can that admission be voluntary and intelligent even though the defendant was not told of, and thus did not expressly waive, the concomitant rights to remain silent and to confront adverse witnesses? The answer is 'yes,' if the totality of the circumstances surrounding the admission supports such a conclusion."

In *Mosby, supra*, 33 Cal.4th at page 364, a jury found the defendant guilty of selling cocaine, and the trial court told the defendant he had a right to a jury trial on a prior conviction allegation. The defendant waived a jury trial and then admitted the truth of the prior conviction allegation. (*Ibid.*) On appeal, the defendant contended the court committed reversible error by not telling him of his rights to remain silent and to confront witnesses. (*Ibid.*) The Court of Appeal rejected the defendant's argument on the ground it would exalt a formula "over the very standard that the formula is supposed to serve (that the plea is intelligent and voluntary) to suggest that a defendant, who has just finished a contested jury trial, is nonetheless unaware that he is surrendering the protections of such a trial' when after being advised of the right to a trial on an alleged prior conviction the defendant waives trial and admits the prior." (*Ibid.*) The Supreme Court agreed with the Court of Appeal and affirmed the judgment of conviction. (*Id.* at pp. 364, 366.)

The Supreme Court further stated that "[a] review of the entire record also sheds light on defendant's understanding. For instance, 'a defendant's prior experience with the criminal justice system' is, as the United States Supreme Court has concluded, 'relevant to the question [of] whether he knowingly waived constitutional rights.' [Citation.] This is so because previous experience in the criminal justice system is relevant to a recidivist's "knowledge and sophistication regarding his [legal] rights.'" [Citations.] Here defendant's prior conviction was based on a plea of guilty, at which he would have received *Boykin* [v. *Alabama* (1969) 395 U.S. 238]-[*In re*]*Tahl* [(1969) 1 Cal.3d 122] advisements. As the Court of Appeal here concluded: '[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 remained silent, and had experience in pleading guilty in the past, namely, the very conviction that he was now admitting.' [¶] Under the totality of the circumstances, the Court of Appeal did not err in concluding that defendant voluntarily and intelligently admitted his prior

conviction despite being advised of and having waived only his right to jury trial.”
(*Mosby, supra*, 33 Cal.4th at p. 365, fns. omitted.)

In the instant case, as in *Mosby*, at the time defendant admitted the prior conviction allegations, he had just undergone a jury trial at which he invoked his privilege against self-incrimination by not testifying. Through his trial counsel, defendant also cross-examined the prosecution’s witnesses. Defendant’s participation in that trial, therefore, demonstrated his understanding of his constitutional privilege against self-incrimination and right to confront witnesses during a trial.

Defendant and the Attorney General disagree as to whether we must also analyze defendant’s experience with the criminal justice system prior to the instant case, before concluding defendant’s admission of the prior conviction allegations was voluntary and intelligent. The parties do not dispute that defendant has previously pleaded guilty to several offenses before the instant case, as the probation report shows defendant pleaded guilty to (1) one count of felony assault with a deadly weapon or deadly force in 2004, (2) two felony drug offenses in 2005, and (3) two felony burglaries and one attempted theft offense in 2008. We may presume defendant received complete advisements before entering each guilty plea. (*Mosby, supra*, 33 Cal.4th at p. 365 [“Here defendant’s prior conviction was based on a plea of guilty, at which he would have received *Boykin-Tahl* advisements”]; *People v. Allen* (1999) 21 Cal.4th 424, 426-427 [a defendant may move to strike an alleged prior conviction on the ground the trial court in the prior proceeding failed to observe the defendant’s *Boykin-Tahl* rights].) Here, the consideration of defendant’s prior experience in the criminal justice system further supports the conclusion he voluntarily and intelligently admitted the prior conviction allegations in this case.

In defendant’s supplemental brief, he argues: “As far as can be determined from the probation report, none of these prior felonies had related enhancing allegations attached. Thus, while the probation report indicates [defendant] had a significant amount

of prior experience pleading guilty to *substantive offenses*, it lacks any indication he had any experience admitting *prior conviction* sentencing allegations following a jury trial on the substantive offenses. As far as can be determined from the probation report, this was the first time [defendant] was involved in a jury trial followed by a determination of a prior conviction allegation.” In *Mosby, supra*, 33 Cal.4th at page 364, the Supreme Court rejected this argument, stating: “Defendant argues that when he admitted the prior conviction—immediately after a jury found him guilty of selling cocaine—he would not necessarily have understood that trial of the alleged prior would afford him the same rights that he had at the trial of the drug charge. We note that unlike a trial on a criminal charge, trial on a prior conviction is ‘simple and straightforward,’ often involving only a presentation by the prosecution ‘of a certified copy of the prior conviction along with the defendant’s photograph [or] fingerprints’ and no defense evidence at all. [Citation.] Here, defendant, who was represented by counsel, had *just* undergone a jury trial at which he did not testify, although his codefendant did. Thus, he not only would have known of, but had just exercised, his right to remain silent at trial, forcing the prosecution to prove he had sold cocaine. And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation.”

In sum, after reviewing the totality of the circumstances, we conclude defendant voluntarily and intelligently admitted the prior conviction allegations.

II.

THE TRIAL COURT’S FAILURE TO COMPLETELY ADVISE DEFENDANT AS TO THE CONSEQUENCES OF ADMITTING THE PRIOR CONVICTION ALLEGATIONS DID NOT CONSTITUTE PREJUDICIAL ERROR.

In his opening brief, without accompanying analysis or citation to legal authority, defendant argues the trial court erred by failing to completely advise him of the consequences that would follow his admission of the prior conviction allegations.

In *People v. Villalobos* (2012) 54 Cal.4th 177, 181-182, the California Supreme Court stated: “[B]efore taking a guilty plea the trial court must admonish the defendant of both the constitutional rights that are being waived and the direct consequences of the plea.” [Citation.] . . . However, we have held that because ‘advisement as to the consequences of a plea is not constitutionally mandated,’ ‘the error is waived absent a timely objection.’ [Citation.]” In *People v. Villalobos*, the Supreme Court held, “defendant failed to object to the restitution fine at or before sentencing; thus, the advisement error does not entitle defendant to a remedy.” (*Id.* at p. 182.)

Here, defendant did not object to the trial court’s failure to advise him as to the consequences of his admission to the prior conviction allegations. He first raised this issue on appeal. Hence, defendant’s argument is waived. (*People v. Jones* (2009) 178 Cal.App.4th 853, 859.)

Even if defendant’s argument was not waived, it is without merit because he has failed to show prejudicial error. In *People v. McClellan, supra*, 6 Cal.4th at page 378, the California Supreme Court stated: “[A] defendant (even on direct appeal) is entitled to relief based upon a trial court’s misadvisement only if the defendant establishes that he or she was prejudiced by the misadvisement, i.e., that the defendant would not have entered the plea of guilty had the trial court given a proper advisement.” [Citations.] Although defendant alleges that had he properly been advised, he would not have entered his plea of guilty, there is nothing in the record on appeal to support this contention. Thus, we conclude defendant has failed to meet his burden of establishing prejudice.” (See *People v. Walker* (1991) 54 Cal.3d 1013, 1023 [“Upon a timely objection, the sentencing court must determine whether the error prejudiced the defendant, i.e., whether it is ‘reasonably probable’ the defendant would not have pleaded guilty if properly advised”].)

In the instant case, nothing in the record shows that defendant would not have admitted the prior conviction allegations had he been completely advised as to the

consequences of such an admission. Defendant's opening brief does not make such an assertion. (Defendant did not file a reply brief in this appeal.) We therefore conclude defendant has failed to meet his burden of establishing prejudicial error.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.