In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOSHUA CROSS,

Defendant and Appellant.

Case No. S212157

Third Appellate District, Case No. 11F03888
Sacramento County Superior Court, Case No. C070271
The Honorable Greta Curtis Fall, Judge

RESPONDENT'S ANSWERING BRIEF ON THE MERITS

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ISSUE PRESENTED

Was the trial court required to advise defendant of his fundamental trial rights before accepting his factual stipulation that he had been previously convicted of a felony violation of Penal Code section 273.5?

INTRODUCTION

At trial, the parties stipulated defendant previously was convicted of a felony violation of section 273.5 ("§ 273.5").[1] The jury was instructed to accept as true the content of the stipulation. The jury convicted defendant on a current charge of violating section 273.5, subdivision (a) ("§ 273.5(a)") and found true, pursuant to section 273.5, subdivision (e)(1) ("§ 273.5(e)(1)") that he had a prior conviction under § 273.5. The prior conviction caused defendant's sentencing triad to be two, four, or five years in prison, instead of the otherwise applicable triad of two, three, or four years.

In a partially published decision, the Court of Appeal rejected defendant's claim of error under *In re Yurko* (1974) 10 Cal.3d 857 ("*Yurko*"), premised on the fact defendant did not personally receive pre-stipulation *Boykin-Tahl*[2] advisements. That court found it dispositive that § 273.5(e)(1) triggers an alternate sentencing scheme on the charged offense, rather than imposing an enhancement in addition to the punishment for the charged offense. This Court granted defendant's petition for review.

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[1] Undesignated statutory references are to the Penal Code, as it existed when defendant committed his offense.

[2] *Boykin v. Alabama* (1969) 395 U.S. 238, 242 (*Boykin*) and *In re Tahl* (1969) 1 Cal.3d 122, 132 (*Tahl*).

STATEMENT OF THE CASE

At trial, victim MW described multiple instances in which defendant, the father of her two children, beat her. (1 RT 32.) At about 5:30 a.m. on May 20, 2011, MW was asleep in her apartment when she awoke to see defendant in her bedroom. (1 RT 38, 42.) Defendant asked for MW's telephone, which was under her pillow, but MW declined. MW did not want defendant, who was jealous, to see her phone record of calls and text messages to her boyfriend. (1 RT 40-41.)

Defendant wrestled with MW to take the telephone, slapping and punching her face, choking her, and throwing her to the floor. (1 RT 41-43.) When the phone flew from MW's hands, defendant seized it and reviewed its call and message history. He then yelled at MW and demanded she explain contacting another man. (1 RT 43.) Thereafter, defendant hit and choked MW, stopping only when their two-year-old son began crying. Their four-month-old daughter also awoke. (1 RT 42, 45.) Defendant announced his intent to fight MW's boyfriend. (1 RT 45.) He left the room, but returned and rifled through MW's purse. He took her telephone and $170 from her wallet. (1 RT 46.) MW begged for return of the money and telephone, but defendant refused and left the apartment. MW followed defendant to the parking lot where defendant was driven away in the rear passenger seat of a gold car. (1 RT 47.) MW dialed 911 and reported the incident to authorities. (1 RT 35.)

Two months earlier, on their son's birthday, defendant insulted MW, threw a glass of water at her, and dumped all her clothing from her dresser onto the floor. (1 RT 55, 58.) He emptied her purse and the childrens' diaper bag, and he took her telephone and keys to her car and house. (1 RT 58-59.) Defendant also shoved MW against the living room wall, hit her face, and choked her, before leaving in her car. (1 RT 61, 64.) MW phoned 911 and reported the incident. (1RT 55.) It was stipulated that

defendant on March 22, 2011, admitted these events were in violation of his probation. (1 RT 67.)

The foregoing were not the only incidents in which defendant abused MW. In August 2009, defendant punched MW's face at a Shell gas station. (1 RT 67.) MW's friend Marshawna Jackson saw the attack and reported it to 911. (1 RT 140-143.) Jackson saw defendant punch MW's face repeatedly and pull MW by her hair from a car. (1 RT 145.) Defendant threatened to kill Jackson, and he resumed punching MW's face outside the car. (1 RT 145-147.) Jackson had also seen defendant kick MW's stomach on a prior occasion. She had previously seen defendant chase MW. (1 RT 153-154.) Jackson knew defendant carried a firearm. She once saw him with a gun, while he threatened MW. (1 RT 155.) The jury viewed a video of part of these events. (1 RT 80-85.) It was stipulated that defendant was convicted of a felony violation of § 273.5 in connection to these events. (1 RT 85-86.)

A jury found defendant guilty of felony infliction of corporal injury to the mother of his child (§ 273.5(a)), and misdemeanor infliction of abuse on a child (§ 273a(b)). (1 CT 120-121.) After the jury could not reach a verdict on a charge of robbery (§ 211), the trial court dismissed that charge on the prosecutor's motion. (1 CT 10, 122; 1 RT 292.) The jury found true, pursuant to § 273.5(e)(1), that defendant previously was convicted of violating § 273.5. (1 CT 120.)

In cases 09F06395 and 09F05116, the court found defendant in violation of probation and imposed a prison term of six years, consecutive to a county jail term of six months. The prison term included an upper term

of five years due to the prior § 273.5 conviction. (1 RT 295, 299-300; 1 CT 11, 167.)[3]

The Court of Appeal affirmed, rejecting defendant's claim of error under *Yurko*, finding *Yurko* concerns only stipulations to the truth of (or all facts necessarily establishing the truth of) an enhancement authorizing punishment in addition to the punishment on the charged offense. (Opn. at pp. 3-9.)

SUMMARY OF ARGUMENT

Defendant's failure to object to a proceeding inconsistent with a jury trial on a prior conviction forfeited any such right because the right was statutory. Further, defendant's stipulation that he had suffered a § 273.5 conviction, once adopted by the jury, did not result in punishment in addition to that imposed for the charged offense, but it exposed him to an alternate sentencing scheme—a key distinction under *Yurko*. For both reasons, lack of advisements prior to his stipulation to the truth of the prior conviction is no cause for reversal.

ARGUMENT

DEFENDANT FORFEITED HIS OBJECTION TO LACK OF ADVISEMENTS, WHICH WERE NOT REQUIRED IN ANY EVENT UNDER *YURKO*

Defendant claims that the trial court committed reversible constitutional error in failing to advise him in accordance with *Yurko* before accepting a defense stipulation that defendant had a prior § 273.5 conviction. (Open. Brief on the Merits at 1, 8.) But defendant's failure to object to a proceeding inconsistent with a jury trial on a prior conviction forfeited any such right because the right was statutory. Moreover,

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[3] Probation was terminated in case number 09F05116. (1 RT 300.)

defendant's stipulation to some fact necessary to authorize a particular punishment on a charged offense does not come within *Yurko*.

A. Background

Prior to trial, the court granted the prosecutor's motion, pursuant to Evidence Code section 1109, to admit evidence of four prior domestic violence incidents.[4] (1 CT 45-51; 1 RT 10-12.)

During MW's testimony, the prosecutor introduced a stipulation that in January 2010 defendant was convicted of a felony violation of § 273.5 in connection with the August 2009 assault. (1 RT 85-86.)

At the close of evidence, the trial court instructed the jury:

> During the trial you were told that the People and the defense agreed or stipulated to certain facts. This means that they both accept those facts as true. Because there is no dispute about those facts, you must accept them as true.

(1 RT 256); and

> The People allege that the defendant has been convicted of a violation of Penal Code Section 273.5 on January 15, 2010, at and within the County of Sacramento. The People have the burden of proving the alleged conviction beyond a reasonable doubt. If the People have not met this burden, you must find that the alleged conviction has not been proved. In this case, counsel has stipulated that the defendant suffered the alleged prior conviction.

(1 RT 268.)

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[4] Evidence Code section 1109, subdivision (a)(1), provides in pertinent part: "Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

The jury convicted defendant of violating § 273.5(a) and found true, under § 273.5(e)(1), that he had a prior conviction for the offense. (1 CT 120.)

B. Discussion

1. Precedent of This Court and the United States Supreme Court

In *Boykin*, the United States Supreme Court emphasized that a guilty plea is a waiver of important constitutional rights designed to protect the fairness of a trial. (395 U.S. at p. 243.) The Court noted that a plea of guilty "is itself a conviction; nothing remains but to give judgment and determine punishment." (*Id.* at p. 242.) In *Brady v. United States* (1970) 397 U.S. 742, the Court reaffirmed that a guilty plea is not simply "an admission of past conduct," but a waiver of constitutional trial rights such as the right to call witnesses, to confront and cross-examine one's accusers, and to trial by jury. (*Id.* at pp. 747-748, citing *Boykin*, 395 U.S. at p. 242.) In order for a criminal defendant to knowingly and voluntarily waive his constitutional rights when pleading guilty, the high court in *Boykin*, and subsequently this Court in *Tahl*, required proof on the record that the defendant was advised of his right to a jury trial, to remain silent and to confront witnesses before a trial court accepted the plea. (*Boykin*, *supra*, at p. 243.; *Tahl*, *supra*, 1 Cal.3d at p. 132.)

As a supervisory matter, this Court has held that such advisements must also be given when a defendant stipulates to the truth of a prior conviction (or all facts necessary thereto) that itself amounts to an enhancement. (See *In re Reno* (2012) 55 Cal.4th 428, 515, fn. 39 ["Concerns about judicial efficiency and the effective administration of criminal justice have sometimes moved this court to create rules of criminal procedure. In ...*Yurko*..., for example, we adopted a judicial rule of

criminal procedure requiring *Boykin- Tahl* [citations omitted] admonitions to be given not just before a person confesses to a crime but also "'before a court accepts an accused's admission that he has suffered prior felony convictions.'" (Citing *People v. Mosby* (2004) 33 Cal.4th 353, 360 (*Mosby*).)]; *People v. Adams* (1993) 6 Cal.4th 570, 577.) Two points bear immediate note.

First, the rule that advisements must be given in such circumstances stems from no constitutional right to trial on the truth of a prior conviction allegation, but only a right to trial as provided by statute. (See *People v. Epps* (2001) 25 Cal.4th 19, 23 (*Epps*) ["The right, if any, to a jury trial of prior conviction allegations derives from sections 1025 and 1158, not from the state or federal Constitution (citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v. Wiley* (1995) 9 Cal.4th 580, 585)."].)[5]

In *Mosby, supra,* 33 Cal.4th at page 360, this Court assumed *arguendo* that there was a state constitutional prophylaxis requiring advisements before waiver of a statutory right to trial on sentencing allegations.

> When trial is required by statute, we shall assume for the purpose of this discussion that a defendant's due process trial rights, at least under our state Constitution, encompass the rights to remain silent and to confront witnesses. (Cal. Const., art. I, § 15.)

(*Ibid.*) The defendant in *Mosby* was advised only of his right to trial, which he waived before admitting a prior conviction. He was not advised of his rights to remain silent and to confront witnesses. (*Id.* at p. 358.) This

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[5] Indeed, the United States Supreme Court has yet to find the Constitution requires proof of a prior conviction beyond a reasonable doubt. (*Dretke v. Haley* (2004) 541 U.S. 386, 395 ["We have not extended [*In re Winship* (1970) 397 U.S. 358]'s protections to proof of prior convictions used to support recidivist enhancements."].)

Court held that under the totality of circumstances, defendant's admission to his prior conviction was voluntarily and intelligently made, even though he was not advised of his rights to remain silent and to confront witnesses. (*Id.* at p. 365; see *Epps*, *supra*, 25 Cal.4th at p. 29 ["When a state need not provide a jury trial at all, it follows that the erroneous denial of that right does not implicate the federal Constitution. [Citations.] Moreover, because the error is purely one of state law, the [*People v. Watson* (1956) 46 Cal.2d 818, 836] harmless error test applies." [Citation.]"].)

In *People v. Vera* (1997) 15 Cal.4th 269, 277 (*Vera*), this Court resolved the issue whether a defendant's statutory right to trial on a prior conviction persists in the absence of a personal waiver that is voluntary and intelligent.

> When the defendant seeks to bifurcate the determination of the truth of the prior conviction allegation from determination of the defendant's guilt of the charged crimes, however, only the statutory right to jury trial is implicated in the trial of the sentencing allegations. Since there is no constitutional right to have the jury determine the truth of a prior conviction allegation [citation], it follows that the failure to obtain an express, personal waiver of the right to jury trial of prior conviction allegations does not constitute a violation of the state constitutional mandate.

(*Ibid.*) Rather than there being a need for affirmative waiver, this Court held squarely that the statutory right to a jury trial on a prior conviction may be simply forfeited by a defendant when his counsel does not object, and the defendant remains silent on the issue. (*Id.* at pp. 277-278.)[6] In light of *Epps*'s unequivocal holding that the right to jury trial on a prior conviction is not of state or federal constitutional dimension (25 Cal. 4th at

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[6] This Court has since noted that *Vera*'s forfeiture rule does not apply to an underlying trial right guaranteed by the federal Constitution. (*People v. French* (2008) 43 Cal.4th 36, 46-47.)

p. 23), it is still a clear point under *Vera* that any jury trial right on a prior conviction may simply be forfeited by counsel's lack of objection and a defendant's silence. (Cf. *People v. Saunders* (1993) 5 Cal.4th 580, 589-592 [Defendant could not properly claim on appeal that he was denied his statutory right to a determination of the alleged prior convictions by the same jury that determined his guilt; he forfeited that right by failing to object in a timely fashion when the jury was discharged.].)

Second, when the advisement rule applies at all, its scope is limited to stipulations that either admit an enhancement is true, or admit all facts necessary for its truth:

> In no case, however, did we hold, or even intimate, that a defendant's admission of evidentiary facts which did not admit every element necessary to conviction of an offense or to imposition of punishment on a charged enhancement, as opposed to an admission of guilt of a criminal charge or the truth of an enhancing allegation where nothing more was prerequisite to imposition of punishment except conviction of the underlying offense, was subject to the *Boykin-Tahl* or *Yurko* requirements. That question was not presented. When the question of evidentiary stipulation has been presented in other contexts, however, we have held that such admissions or stipulations need not be preceded by such advice and waiver of rights, and advice regarding the penalty consequences of the admission.

(*People v. Adams*, *supra*, 6 Cal.4th at p. 577; *id.* at pp. 578 [citing prior cases for holdings that stipulations to ordinary facts or prior convictions used as capital aggravating evidence require no advisement], 580-583 [holding that same rule applies to stipulation to prior conviction that does not itself constitute all elements of an enhancement]; *People v. Newman* (1999) 21 Cal.4th 413, 422 (*Newman*) [same, stipulation to prior conviction that is element of charged offense].)

Of particular note is that *Newman* approvingly cited *People v. Witcher* (1995) 41 Cal.App.4th 223, 234 (*Witcher*), insofar as that Court of Appeal decision held a "defendant charged with petty theft with a prior (§ 666)

need not be 'admonished about his constitutional rights' prior to stipulating to the existence of the prior conviction." (*Newman*, *supra*, 21 Cal.4th at pp. 422-423.) *Witcher* concluded that the recidivist factor in section 666 was neither an enhancement nor an element of the section 666 offense which the jury was required to determine and was thus properly subject to a stipulation to keep the fact out of evidence. (*Witcher*, *supra*, at pp. 233-234.) Thus, the requirement of advisements and waivers did not apply to such a stipulation, particularly where the stipulation had resulted in a benefit to the defendant of excluding otherwise admissible evidence about his prior offenses and an offsetting detriment to the prosecution of denying it the opportunity of proving the prior offenses to the jury. (*Ibid.*; cf. *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899 [Section 186.22, subdivision (d) is not an enhancement "because it does not add an additional term of imprisonment to the base term" and is instead an alternate sentence]; *People v. Murphy* (2001) 25 Cal.4th 136, 155 [In drawing an analogy to section 666 in the context of section 654, this Court held that section 666 "does not establish an enhancement, but establishes an alternate and elevated penalty."]; *People v. Robinson* (2004) 122 Cal.App.4th 275, 281 [Section 666 did not establish a substantive offense or an enhancement, but an alternate sentencing scheme with an elevated punishment for recidivist thieves.].)

2. This Case

Given the foregoing, at least two bases appear to warrant rejection of defendant's complaint that the trial court failed to advise him in accordance with *Yurko* before accepting a defense stipulation that he had suffered a prior § 273.5(a) conviction.

a. Forfeiture of Statutory Right Under *Vera*

First, defendant's failure to object to a proceeding inconsistent with a jury trial on a prior conviction forfeited any such right because the right was statutory. Under *Vera*, that right was forfeited when neither he nor his counsel objected to conduct inconsistent with that right. Instead, the defense expressly desired the stipulation that is claimed to have resulted in an invalid deprivation of the jury trial right. In line with *Vera*, there can be no reversal based on a theory that defendant did not validly make a formally-advised waiver.

b. Scope of Advisement Requirement

Second, even were *Vera* not dispositive, defendant's case would be readily disposed of by the fact *Yurko* would not apply on its own terms as delimited by this Court, as his stipulation did not establish each element of an enhancement. Section 273.5(e)(1) does not set forth an enhancement, i.e., a term of punishment in addition to the punishment set forth for an underlying offense. (See, e.g., §§ 667, subd. (a) [term for prior conviction is imposed "in addition to the sentence ... for the present offense"], 667.5, subd. (b) [term of for prior conviction is imposed "in addition ... to any sentence []for [the new offense]"].) Instead, it sets forth a different triad as punishment for present conduct violating § 273.5(a), upon proof of other facts—a prior § 273.5(a) conviction within seven years of the current conduct—that aggravate such current conduct.

There is thus no "additional penalty" to speak of (see *People v. Adams*, *supra*, 6 Cal.4th at pp. 580, fn. 7 & 582), such that an advisement duty would be triggered under *Yurko*. There is only a single, aggravated penalty that applies if and only if there are jury findings as to other facts that make the current conduct into an aggravated offense. (See also *Monge v. California* (1998) 524 U.S. 721, 728 ["An enhanced sentence imposed on

a persistent offender thus 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes' but as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'"].) And defendant retained his right to jury trial on the present aggravated offense in the same way as if he had stipulated to any other element, such as whether the victim was his cohabitant, or whether he willfully inflicted corporal injury.

Accordingly, even were *Vera* not clear that the statutory right to a jury trial on a prior conviction may be simply forfeited by a defendant when his counsel does not object and the defendant remains silent on the issue, it would still be the case that no advisements would be required, per *Yurko*, for a stipulation that a defendant has a prior § 273.5(a) conviction within the meaning of § 273.5(e)(1).

c. Defendant's Counter

Defendant relies on *People v. Little* (2004) 115 Cal.App.4th 766 (*Little*), to claim a constitutional requirement of advisements. (Open. Brief at 15.) Defendant Little was charged with a violation of Health and Safety Code section 11550, subdivision (a); he flatly stipulated that at his arrest he was under the influence of methamphetamine "in violation of Health and Safety Code section 11550(A)"; and the jury convicted him of violating that statute. (*Little*, at pp. 769, 772.) In short, defendant Little more than stipulated to facts—he stipulated he committed the very statutory violation the prosecution charged he committed. (*Id.* at p. 775.) Unsurprisingly, *Little* was not a case implicating the scope of *Yurko*. Rather, it asked the straightforward question whether guilt of a current offense can be stipulated without the advisements needed for a complete waiver of the right to jury trial on that offense. *Little* simply has no bearing on this case, except perhaps as a showing in contrast to the rights defendant himself retained.

CONCLUSION

Based on the foregoing, the judgment of the Court of Appeal should be affirmed.

Dated: March 26, 2014

Respectfully submitted,

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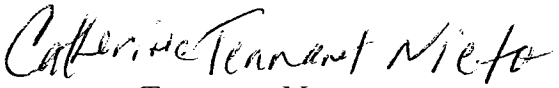

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWERING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 3,983 words.

Dated: March 26, 2014

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DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Cross** No.: S212157

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 26, 20114, I served the attached **RESPONDENT'S ANSWERING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 26, 2014, at Sacramento, California.

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