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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JENNIE MARIE CAMPANELLA,<br><br>Defendant and Appellant. | B238565<br><br>(Los Angeles County<br>Super. Ct. No. PA070305) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Dalila C. Lyons, Judge. Affirmed with modifications.

Law Offices of Pamela J. Voich and Pamela J. Voich for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Eric E. Reynolds and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

A jury convicted appellant Jennie Marie Campanella of attempted second-degree robbery (Pen. Code, §§ 211, 664, count 1).[1] Appellant admitted that she suffered a prior robbery conviction within the meaning of the "Three Strikes" law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and section 667, subdivision (a)(1). The trial court sentenced appellant to seven years and eight months in state prison, consisting of the low term of 16 months doubled pursuant to the Three Strikes law, plus a five-year serious felony enhancement (§ 667, subd. (a)(1)). Appellant was awarded 263 days of presentence credit consisting of 229 days of actual custody credit and 34 days of conduct credit.

Appellant contends the trial court had a sua sponte duty to instruct the jury on a claim-of-right defense; the trial court failed to advised her properly of her constitutional rights before accepting her admission on the prior conviction allegation that served as the basis for the section 667, subdivision (a)(1) sentence enhancement; and the judgment must be modified to reflect 343 days of presentence custody credit.

We order the abstract of judgment modified to reflect 343 days of presentence custody credit. In all other respects, the judgment is affirmed.

## FACTS

### *Prosecution Evidence*

Shortly before 2:00 p.m. on April 3, 2011, Sharon Meyer was shopping at a 99 Cent Store on Sepulveda Boulevard in Los Angeles. Meyer used a shopping cart and placed her purse containing her wallet and cell phone in the child seat portion of the cart. Appellant who was carrying a shopping basket walked back and forth three or four times before knocking over a box of items in the same aisle where Meyer was shopping. Appellant then reached into Meyer's cart, grabbed her purse and attempted to run away. Meyer immediately grabbed the purse and struggled with appellant. Appellant hit Meyer with the shopping basket and yelled at her to let the purse go. As Meyer and appellant

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[1] All further statutory references are to the Penal Code unless otherwise stated.

struggled over the purse, Maria Delrosario Molina Delgadillo who was shopping nearby was struck and knocked to the floor. Meyer screamed and a security guard tackled appellant. Appellant lost hold of Meyer's purse and fought with the security guard attempting to escape. Appellant was subdued and restrained by the security guard until the police arrived.

***Defense Evidence***

No evidence was presented on behalf of the defense.

## DISCUSSSION

### I. The Trial Court Properly Instructed the Jury on the Applicable Law

Appellant contends that the trial court committed reversible error by failing to instruct the jury on the claim-of-right defense. Appellant did not request the instruction (CALCRIM No. 1863)[2] but argues that claim-of-right was "the main theory of the defense" and the trial court had a sua sponte duty to give it.

Errors in jury instructions are questions of law which we review de novo. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424.)

In criminal cases, """"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.]

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[2] CALCRIM No. 1863 provides in relevant part: "If the defendant obtained property under a claim of right, (he/she) did not have the intent required for the crime of (theft/ [or] robbery). [¶] The defendant obtained property under a claim of right if (he/she) believed in good faith that (he/she) had a right to the specific property or a specific amount of money, and (he/she) openly took it. [¶] In deciding whether the defendant believed that (he/she) had a right to the property and whether (he/she) held that belief in good faith, consider all the facts known to (him/her) at the time (he/she) obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith. [¶] [The claim-of-right defense does not apply if the defendant attempted to conceal the taking at the time it occurred or after the taking was discovered.] [¶] . . . [¶] If you have a reasonable doubt about whether the defendant had the intent required for (theft/ [or] robbery), you must find (him/her) not guilty of _____ <*insert specific theft crime*>."

The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.]'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This duty to instruct, sua sponte, on general principles closely and openly connected with the facts encompasses an obligation to instruct on defenses that are supported by the evidence. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047; see also *People v. Breverman, supra,* at p. 157.)

"The claim-of-right defense provides that a defendant's good faith belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery. At common law, a claim of right was recognized as a defense to larceny because it was deemed to negate the *animus furandi,* or intent to steal, of that offense. (See 4 Blackstone, Commentaries 230 (Blackstone).)" (*People v. Tufunga* (1999) 21 Cal.4th 935, 938.) "'"It has long been the rule in this state and generally throughout the country that a bona fide belief, even though mistakenly held, that one has a right or claim to the property negates felonious intent. [Citations.] A belief that the property taken belongs to the taker . . . is sufficient to preclude felonious intent. Felonious intent exists only if the actor intends to take the property of another without believing in good faith that he has a right or claim to it."'" (*Id.* at p. 943.)

'"[A] trial court is not required to instruct on a claim-of-right defense unless there is evidence to support an inference that appellant *acted* with a subjective belief he or she had a lawful claim on the property.' [Citation.] Whether or not the evidence provides the necessary support for drawing that particular inference is a question of law. [Citation.] Although a trial court should not measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, the court need not give the requested instruction where the supporting evidence is minimal and insubstantial. . . . [Citations.]" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145, fn. omitted.)

Applying the foregoing rules, we conclude there was no substantial evidence supporting the inference that appellant acted with the requisite bona fide belief.

Appellant reached into the victim's shopping cart, grabbed the purse and tried to run away. She struggled with the victim for control of the purse. When forced to release her hold on the purse by the security guard she struggled with the security guard to flee from the store.

In claim-of-right cases there is usually some facially legitimate reason for asserting a good faith belief in the right to another's property. (See *People v. Marsh* (1962) 58 Cal.2d 732, 737 [defendants' belief in the curative power of their electrical apparatus was based on information from doctors and scientists]; *People v. Russell, supra,* 144 Cal.App.4th at pp. 1429–1431 [defendant testified he believed motorcycle had been abandoned, testimony supported by cycle's condition and location, and by defendant's non-furtive conduct].) Defense counsel argued to the jury that appellant acted in an irrational manner but there was no evidence that appellant had taken the purse in the belief that it was her own and her actions in doing so were inconsistent with a claim-of-right defense.

The trial court had no sua sponte duty to give such an instruction because there was no substantial evidence to show that appellant reasonably believed that she had a right to the property. (*People v. Felix* (2001) 92 Cal.App.4th 905, 911.) Hence, the trial court did not err in failing to instruct on claim-of-right.

Having examined the record, we are persuaded that even if the trial court erred in failing to give a claim-of-right instruction, that error was harmless under any standard of review. (Cf. *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The victim's testimony was uncontroverted. Given the state of the trial evidence and the fact that the jury returned its verdict after 37 minutes of deliberation, we are convinced that had a claim-of-right instruction been given the result of appellant's trial would have been the same.

## II. Appellant's Prior Conviction Admission

Pursuant to the Three Strikes law (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)) and section 667, subdivision (a)(1), the prosecution alleged that appellant suffered a prior

conviction for robbery in Superior Court case No. LA052781. Following a jury trial on the substantive offense, appellant admitted that she suffered the robbery conviction in case No. LA052781. On appeal, appellant contends that this admission was not voluntary and intelligent because, although the trial court advised her of and obtained her waiver of her constitutional right to a jury trial, the trial court failed to advise her of and obtain her waiver of her constitutional rights to remain silent and to confront her accusers as required by *In re Yurko* (1974) 10 Cal.3d 857. We disagree.

***A. Background***

On August 25, 2011, after the close of the evidence, but before the case was given to the jury, the trial court inquired of defense counsel what appellant wanted to do with regard to the prior conviction. The following exchange took place:

"MR. RICO [DEFENSE COUNSEL]: If there is a guilty verdict, [appellant] will waive jury for the issue—for the trial on her priors.

"THE COURT: Okay. Very well. Miss Campanella [appellant], do you understand that if the jury—and do you agree that if the jury comes back with a guilty verdict, do you agree to waive the jury for purposes of prior convictions?

"[APPELLANT]: Yes, I waive that."

Following the jury's verdict, the jury was excused and appellant admitted her prior robbery conviction in case No. LA052781 as follows:

"MR. RICO: All right. Your honor, there is going to be a stipulation.

"THE COURT: To the prior.

"MR. RICO: To the prior.

"THE COURT: All right. Mr. Bartos [prosecutor], can you please take the stipulation.

"MR. BARTOS: Certainly. [Appellant], in case [No.] PA070305, it is alleged pursuant to Penal Code 1170.12 (a) through (d) and Penal Code section two—I'm sorry, 667(b) through (i), as to count 1, that you suffered the prior conviction in case PA—I'm sorry, [case No.] LA052781 for violation of Penal Code section 211, robbery with a

conviction date of August 21, 2006, in the County of Los Angeles. Do you admit that prior conviction?

"[APPELLANT]: Yes.

"MR. BARTOS: Does the court wish to inquire further?

"THE COURT: No. Do you have any questions, Ma'am, regarding the prior convictions stipulation?

"[APPELLANT]: No.

"THE COURT: Okay. Thank you. Nothing else. Okay. Very well. Counsel join in the stipulation?

"MR. RICO: Yes.

"THE COURT: Okay. The court accepts the stipulation as to the prior conviction of the 211 on [case No.] LA052781."

***B. Analysis***

"[B]efore 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. (*In re Yurko* (1974) 10 Cal.3d 857, 863.) Proper advisement and waivers of these rights in the record establish a defendant's voluntary and intelligent admission of the prior conviction. [Citations.]" (*People v. Mosby* (2004) 33 Cal.4th 353, 356.)

Not all defective advisements require reversal. In *People v. Mosby*, *supra*, 33 Cal.4th 353, the California Supreme Court drew a distinction between silent record cases—those cases that show no express advisement and waiver of constitutional rights, and incomplete advisement cases—those cases in which a defendant waives his constitutional rights after being advised of his right to trial on the prior conviction allegation, but not of the associated rights to remain silent and to confront witnesses. (*Id.* at pp. 361–364.) In silent record cases, a reviewing court cannot infer that the defendant knowingly and intelligently waived his rights to trial, to remain silent, and to confront witnesses. (*Id.* at p. 362.) In incomplete advisement cases reversal is not required

"[w]hen, immediately after a jury verdict of guilty, a defendant admits a prior conviction after being advised of and waiving only the right to trial" but "the totality of circumstances surrounding the admission" supports the conclusion that the admission was voluntary and intelligent. (*Id.* at p. 356.)

Appellant contends that because no advisement was given when she made her admission this case should be treated as a classic "silent-record" case. But *Mosby* made it clear that "[t]ruly silent-record cases are those that show no express advisement or waiver of the *Boykin-Tahl* rights before a defendant's admission of a prior conviction." (*People v. Mosby, supra,* 33 Cal.4th at p. 361.)

The circumstances of the *Mosby* case are materially indistinguishable from those present here, and appellant's advisement cannot be meaningfully distinguished from the incomplete advisement found in *Mosby*. In *Mosby,* the defendant was advised of his right to a jury trial on the prior conviction allegation immediately after the jury found him guilty of his substantive offense of selling cocaine. (*People v. Mosby, supra,* 33 Cal.4th at p.364.) The defendant waived that right and then admitted the recidivist allegation. "On appeal, defendant contended that the trial court committed reversible error by not telling him of his rights to remain silent and confront witnesses." (*Ibid.*) But the *Mosby* court rejected that contention: "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." (*Ibid.*)

Appellant also expressly waived her right to a jury trial on the prior conviction allegations. As in *Mosby*, appellant was not expressly advised of her privilege against self-incrimination or her right to confront and cross-examine witnesses as to the allegations. However, appellant had just participated in a trial in which she exercised each of those rights. Appellant's defense counsel cross-examined Ms. Meyer, Ms. Delgadillo, and the two police officers who testified. Moreover, defense counsel

argued in closing, in appellant's presence, that "Miss Campanella exercised her constitutional right to not testify." (See *People v. Mosby, supra,* 33 Cal.4th at p. 361 ["the reviewing court must 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"].) The court provided the same admonition as part of the jury instructions before the jury went into deliberations on August 25, 2011, the day appellant admitted her prior conviction. Those statements, coupled with appellant's decision not to testify during the trial on the attempted robbery, amount to compelling evidence that she was aware of this right.

The cases upon which appellant relies are inapposite. In *People v. Campbell* (1999) 76 Cal.App.4th 305, there were *no* admonitions with respect to *any* of the applicable constitutional rights. The appellate court rejected the contention that it could infer from defendant's past experience and familiarity with the criminal justice system that he intelligently and voluntarily waived his rights. *(Id.* at p. 310.)

Similarly, in *People v. Johnson* (1993) 15 Cal.App.4th 169, the record was silent as to any waiver by defendant of any right. The trial court did not give the defendant an opportunity to answer the question whether he waived jury before it asked him another question, whether he was convicted. The court asked: '"All I want to know is whether you were convicted or whether or not you want a jury trial; were you convicted?'" (*Id.* at p. 177.) Accordingly, the court could not find that he voluntarily and intelligently waived his *Boykin-Tahl* rights with respect to the prior conviction. (*People v. Johnson, supra,* at p. 178.) Here, appellant unequivocally waived her right to jury trial on the record before admitting the prior conviction.

Furthermore, the period of time that elapsed between the advisement and admission was less than one hour while the jury deliberated. There is no basis from which to infer that appellant did not understand or was unaware of her right to remain silent, or to confront her accusers. Taking the totality of the circumstances into consideration, and noting the factual similarities to *Mosby*, we are satisfied that appellant's admissions were voluntarily and intelligently made.

## III. Award of Presentence Custody Credits

Appellant contends that the trial court erred in impliedly finding that she was convicted of a violent felony and limiting her presentence conduct credits to a maximum of 15 percent.

The People do not dispute the point but argue that the issue must be returned to the trial court for determination. (§ 1237.1.) Section 1237.1, however, "does not require a motion be filed in the trial court as a precondition to litigating the amount of presentence credits when there are other issues raised on direct appeal." (*People v. Acosta* (1996) 48 Cal.App.4th 411, 420; see *People v. Mendez* (1999) 19 Cal.4th 1084, 1101.)

Appellant has demonstrated that she was not convicted of a violent felony and is entitled to full conduct credits. While section 667.5, subdivision (c) lists robbery as a violent felony (see subd. (c)(9)), the subject crime of attempted robbery is excluded from the list. (*People v. Acosta, supra,* 48 Cal.App.4th at p. 420.) Justice and judicial economy require that we correct the sentencing error. (*Id.* at p. 427; *People v. Sylvester* (1997) 58 Cal.App.4th 1493, 1496, fn 3.)

Here, appellant served a total of 229 days in custody from the date of her arrest to the date of her sentencing. She thus earned 114 days of conduct credit under section 4019, rather than the 34 days awarded by the trial court pursuant to section 2933.1.

## DISPOSITION

The judgment is modified to reflect that appellant is awarded 343 days presentence credit consisting of 229 days actual custody credit and 114 days of conduct credit. The clerk of the superior court is ordered to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ