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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JERMAINE RAY BEARD, Defendant and Appellant.	B263550 (Los Angeles County Super. Ct. No. TA132732)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed in part; Reversed and Remanded in part.

Law Offices of Christopher Darden and Christopher A. Darden for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Jermaine Ray Beard of one count each of possession of cocaine for sale (Health & Saf. Code, § 11351) and possession of cocaine base for sale (Health & Saf. Code, § 11351.5), and found true as to each count that the crimes were committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(A)).[1] Defendant admitted having suffered a prior conviction that qualified as a strike under the Three Strikes law. (§§ 667, subds. (b) – (j), 1170.12, subd. (b)). The same prior conviction was also alleged as a prior serious felony conviction under section 667, subd. (a)(1)). However, as we explain later in our opinion, through the apparent inadvertence of the court and counsel, he did not admit that allegation. At the sentencing hearing, the court granted defendant's motion to strike his prior strike conviction. Assuming (incorrectly) that defendant had admitted the section 667, subdivision (a)(1) allegation, the trial court sentenced defendant to a total term of 14 years in prison, which included a five-year enhancement under section 667, subdivision (a)(1).

On appeal from the judgment of conviction, defendant raises numerous contentions. Only one has merit – that the five-year enhancement under section 667, subdivision (a)(1) was improperly imposed. We agree, and remand for further proceedings on that allegation. We otherwise affirm the judgment.

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[1] All unspecified section codes are to the Penal Code.

BACKGROUND[2]

I. *Prosecution Evidence*

A. *Drug Offenses*

On the evening of June 29, 2013, Los Angeles County Sheriffs' Department (LASD) Detective Steven Keen accompanied by Sergeant Brandon Dean, both members of the LASD's "Compton Operation Safe Streets" (OSS), and other officers, approached a residence at 1356 East Schinner Street in Compton to serve a search warrant. The house, commonly known as "the Studio," was within the territory of the South Side Compton Crips (SSCC). The location was used as an SSCC hangout, and a portion of the house had been converted into a music studio.

The front door of the house was open, but a mesh security door was closed. As they looked inside the house through the security screen, Keen and Dean each saw a man later identified as Walter Strider (with whom defendant was jointly tried) walking through the living room.[3] He wore a white tank top and carried a purple towel. Seeing the officers, Strider dropped the towel, which landed with a loud thud (Dean later discovered it concealed a loaded .45-caliber Colt semiautomatic with a round in the chamber), and ran toward the back door.

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[2] We limit our summary of the evidence to that relevant to the charges against defendant and his contentions on appeal.

[3] Strider, who is not a party to this appeal, was convicted of possession of a firearm by a felon (§ 29800, subd. (a)(1), and a gang allegation (§ 186.22, subd. (b)(1)(A)) was found true. He appealed separately. In our nonpublished opinion in that appeal (B258711), we concluded that introduction of a nonverbal statement by Strider admitting gang membership violated *Miranda v. Arizona* (1966) 384 U.S. 436. We found the error prejudicial as to the gang enhancement, and reversed that finding. We found the error not prejudicial as to the conviction of possession of a firearm by a felon. We remanded for a decision whether to retry the gang allegation and resentencing, and otherwise affirmed the judgment.

Another man in the room, who wore a black tank top, also ran toward the back of the house. The officers forced open the door and cleared the house. Dean and two other officers went out the rear door, where both Strider and the man wearing the black shirt had been detained.

Meanwhile, Keen and another detective heard someone in the bathroom, and ordered that person to open the door. At that point, Keen heard what sounded like a toilet being flushed. Defendant emerged from the bathroom, water dripping down his forearms, and was taken into custody. Keen's search of the bathroom revealed a hidden compartment behind a mirror. Inside the compartment, he found 10 baggies, all of which were wet, containing substances later identified as more than 37 grams of cocaine powder and 41 grams of cocaine base. Also seized from the house were two digital scales, and 80-count box of sandwich baggies, a Seattle Mariners baseball cap (an item commonly worn by SSCC members), mail in defendant's name, and $1,020 in cash. There was no drug paraphernalia for use.

Based in part on the quantity of cocaine (enough for 370 doses) and cocaine base (enough for 410 doses), the presence of .45 caliber revolver, and his past experience with incidents involving the house on Schinner Street, Keen opined that the drugs found in the house were possessed for the purpose of sale. He also testified that, in his experience, drug dealers commonly keep firearms in their residences or on their person to protect their narcotics.

B. *Gang Evidence*

The jury was shown two YouTube videos in which defendant appeared. In one, he brags about his affiliation with the SSCC, throws the gang's "S" symbol, and identifies himself as "Maniac." In the other, he welcomes people "to the Maniac Music City of Compton South Side official, baby." Evidence at trial

showed that on his right forearm, defendant has tattoos displaying the moniker "Maniac," and the letters "SS."

Testifying as the prosecution gang expert, Detective Raul Ibarra stated that that SSCC has about 250 active members. They commonly wear Seattle Mariners' hats with the logo "S". The SSCC's primary activities are: vandalism, graffiti, robbery, carjacking, burglary, vehicle theft, possession and sale of narcotics, possession of illegal weapons, assault, murder and attempted murder. Ibarra had made drug arrests at the house on Schinner Street and had responded to shootings at that location. According to Ibarra, SSCC gang members Trent Hawthorne and Jeremy Williams previously have been convicted of felonies (carjacking and possession of a handgun, respectively).

Based on his contacts with defendant, information from informants as recently as 2013, field identification cards from 2000, 2005, and 2007, and the YouTube videos, Ibarra believed defendant was a current member of SSCC with the moniker Maniac.

Ibarra was asked to consider the following hypothetical: several members of the SSCC gang are inside a house located in SSCC territory when a search warrant is executed at the house. Cocaine and cocaine base are found behind a bathroom mirror, and digital scales and baggies are recovered. One gang member has a firearm. Based on these facts, Ibarra opined that possession of the narcotics was for the benefit of and in furtherance of the SSCC gang, which sells drugs to sustain its lifestyle. The gang member's possession of the handgun demonstrates that gang members need to protect themselves, the location at which they sell drugs, the drugs themselves and money made from drug sales.

II. *Defense Evidence*

Defendant called several witnesses in his defense. As here pertinent, Dominique Mitchell, the mother of defendant's three children, testified that she was showering in the bathroom when Detective Keen knocked on the bathroom door.[4] Covered in a towel, she opened the door. The Detective ordered her to leave without allowing her to get dressed. Defendant was not present in the bathroom.

Dominic Watkins testified that he was selling narcotics out of the house, and that the cocaine found in the bathroom belonged to him. He was present when the police entered, and heard Dominique Mitchell's voice coming from the bathroom.

Kimi Lent, a gang intervention specialist, testified that a gang member can leave the gang if he ceases gang activity and does something different.

Carlos Jenkins, a self-taught music producer, and Christine Carter, a rap singer, were in the music studio when the police executed the search warrant. Defendant had been in the studio about 10 minutes before the police arrived.

DISCUSSION

I. *Bifurcation of Gang Allegation*

The trial court denied Strider and defendant's oral, pretrial motion to bifurcate the gang allegation. On appeal, defendant contends that the court erred, because the gang evidence had little probative value concerning the narcotics offenses with which he was charged and was unduly prejudicial. We disagree.

"[I]n order to prevail on a motion to bifurcate a gang enhancement, a defendant must '"clearly establish that there is a substantial danger of prejudice

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[4] Mitchell previously had been convicted of forgery, burglary, narcotics sales, and narcotics possession.

requiring that the charges be separately tried."' [Citation.] 'In cases not involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]' [Citation.] [¶] 'Even if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself . . . a court may still deny bifurcation.' [Citation.] The court in *Hernandez* [*People v. Hernandez* (2004) 33 Cal.4th 1040, 1050] noted that a 'trial court's discretion to deny bifurcation of a charged gang enhancement is . . . broader than its discretion to admit gang evidence when the gang enhancement is not charged.' [Citation.]" (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1357-1358.)

Here, the evidence that defendant was a member of SSCC was independently relevant to prove defendant's motive for possessing the cocaine and cocaine base found in the house: he did so for the purpose of sale, to raise money for his gang, SSCC. The house was located in SSCC territory and was a hangout for the gang. Narcotics sales are one of the primary activities of SSCC. Defendant's defense was that Dominique Mitchell, not defendant, was in the bathroom before the drugs were found, and that defendant did not try to dispose of

the drugs in the toilet. Rather, Dominic Watkins, who denied that the house was an SSCC hangout, claimed that the drugs found in the bathroom were his.

Given this defense, it was important to show that defendant, as a member of SSCC, had a motive not shared by Watkins to possess the drugs for sale (to raise money for the SSCC by selling drugs from an SSCC hangout in SSCC territory), thus supporting the conclusion that defendant (not Mitchell) was in the bathroom when the officers arrived, and placed the drugs in the hidden compartment after trying to flush them down the toilet.

Further, given its probative value, the gang evidence was not unduly prejudicial. Rather, it was tailored to the relevant issues – defendant's motive and intent in possessing the drugs, and proof of the elements of the gang enhancement. In short, the trial court did not abuse its discretion in denying bifurcation of the gang enhancement.

II. *Insufficiency of the Evidence*

A. *Gang Enhancement*

Defendant contends that the evidence was insufficient to support the gang enhancement under section 186.22, subdivision (b)(1), because it failed to prove that he was an active member of SSCC and that in possessing the drugs, he had the specific intent to promote criminal conduct by the gang. We disagree. Of course, we view the entire record in the light most favorable to the judgment, and presume in support all inferences that can reasonable be drawn from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1204-1205.)

"There are two 'prongs' to the gang enhancement under section 186.22, subdivision (b)(1). [Citation.] The first prong requires that the prosecution prove the underlying felony was 'gang related.' [Citations.] The second prong 'requires

that a defendant commit the gang-related felony "with the specific intent to promote, further, or assist in any criminal conduct by gang members."' [Citations.] [¶] Section 186.22, subdivision (b)(1) provides three alternatives for establishing the first prong—that the underlying offense was 'gang related.' The offense may be committed (1) for the benefit of a gang; (2) at the direction of a gang; *or* (3) in association with a gang. [Citation.]" (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484.)

To the extent defendant argues that the prosecution was required to prove he was an active member of SSCC and had not left the gang, he is mistaken. The enhancement under section 186.22, subdivision (b)(1), does not have such a requirement. "Indeed, it does not depend on membership in a gang at all. Rather, it applies when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 67-68.)

Nonetheless, though not required for the enhancement, the jury could easily infer that defendant was an active member of SSCC. As we have stated, the house was located in SSCC territory and was a hangout for the gang. Narcotics sales are one of the primary activities of SSCC. The quantity of cocaine (enough for 370 doses) and cocaine base (enough for 410 doses) seized from the house was clearly for sale. Defendant attempted to conceal the drugs from the police. Given the YouTube videos and defendant's gang tattoos, defendant's association with SSCC was undeniable. Based on this evidence, and on Detective Ibarra's expert testimony, the jury could easily infer that defendant was a current gang member. The jury could also easily infer that, as a current gang member, his possession of the cocaine and cocaine base for sale was gang related (for the benefit of the gang), and that he had the specific intent to promote, further, or assist in criminal conduct

by SSCC (possession and sale of narcotics, and the creation of revenue through which the gang could finance other criminal activities). Thus, the evidence was sufficient to support the gang allegation.[5]

B. *Possession for Sale*

Defendant contends that the evidence was insufficient to prove that he possessed cocaine and cocaine base for the purpose of sale. The basis of the contention is that the evidence that defendant possessed the drugs is "entirely circumstantial."

However, in violation of the standard of review on appeal, the entire argument is constructed by disputing reasonable inferences pointing to guilt, questioning the credibility of Deputy Keen's testimony, and relying on the testimony of defense witnesses. It is thus insufficient to demonstrate that the evidence failed to show defendant possessed the drugs. The jury was entitled to credit the prosecution's version of events. Deputy Keen testified that he heard someone in the bathroom. After ordering that the door be opened, he heard what sounded like a toilet flushing. Defendant emerged from the bathroom, water dripping down his forearms. Keen's search of the bathroom revealed a hidden compartment behind a mirror. Inside the compartment, he found 10 baggies, all of which were wet, containing substances later identified as more than 37 grams of

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[5] We note that even if defendant were not an active gang member, the evidence would still have been sufficient to support the gang allegation. From the evidence, the jury could reasonably infer that, regardless of whether he was currently active in other gang activity, defendant attempted to conceal drugs that were intended to be sold for the benefit of SSCC, and that in doing so, he specifically intended, at least in part, to promote, further, or assist SSCC's criminal activities by preserving their drugs for SSCC's later sale.

cocaine powder and 41 grams of cocaine base. From this evidence, the jury could reasonably infer that defendant possessed the cocaine and cocaine base, in that he unsuccessfully tried to flush the drugs down the toilet, and then concealed them in the hidden compartment behind the mirror.

III. *Ineffective Assistance of Counsel*

Defendant contends that his trial counsel was ineffective. He lists 28 instances of supposed ineffectiveness in which his trial attorney purportedly acted as a second prosecutor. Fourteen of these instances are unsupported by any reference to the record. We deem these claims forfeited. (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 384 (*Lonely*) [claim of error forfeited by failure to provide appropriate citations to the record].)

As to the remaining 14 claims that contain a citation to the record, they are not supported by reasoned argument regarding the standard of ineffective assistance of counsel. When a defendant raises a claim of ineffectiveness of counsel, he must establish both that his "'counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome.'" (*In re Cudjo* (1999) 20 Cal.4th 673, 687; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-696.) Here, defendant's disjointed claims are particularly lacking in reasoned argument demonstrating the prejudice prong, and rely simply on conclusory assertions of prejudice. Therefore, we deem them forfeited. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*) [claim of error forfeited when not supported by argument and citation to authority].)

Even if they were not forfeited, we would reject defendant's claims of ineffective assistance on appeal. Boiling down defendant's contention to its essence, it is that defense counsel undermined his defense by eliciting or not objecting to evidence regarding drug sales at the house and witnesses' prior convictions, and his candor about possible credibility issues concerning certain witnesses in closing argument. However, it is apparent that defense counsel sought to bolster the credibility of the defense by candidly admitting that defendant had been a gang member in the past, that some of the people at the house (which defendant used as a studio) had unsavory backgrounds (including misdemeanor and felony convictions), and that drugs were being sold out of the house. But the thrust of the defense was that associating with unsavory characters and being present at the house did not mean that defendant was in possession of the drugs found in the bathroom. As defense counsel explained: "Detective Keen found the drugs – I have no doubt about that – in performing his search of the bathroom. But . . . there was no one he could pin them on at that time, because it was Ms. Mitchell who walked out of the bathroom. But he looks around, and he sees a really good target. He sees Maniac. 'Let's put it on him. . . . Let's get him out of our hair. We know he's a gangbanger. We've seen him on the videos. Let's pin it on him. He's a good source.'" In this context, defense counsel's approach to the case was supported by tactical reasons. (See *People v. Gurule* (2002) 28 Cal.4th 557, 612 [""'good trial tactics demanded complete candor" with the jury'"].)

Further, the California Supreme Court has "repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.'" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Here, to the extent the record suggests that defense counsel's acts or omissions did not flow from a tactic of candor, defendant has failed to demonstrate that there could be no other satisfactory explanation.

In short, even if defendant's claims of ineffective assistance were not forfeited, we would reject them on appeal.

IV. *Search Warrant*

The house on Schinner Street was searched pursuant to a warrant. A portion of the supporting affidavit was sealed. In the trial court, defendant moved to unseal the sealed portion, and to traverse the warrant. After conducting an in camera hearing, the trial court denied the motion. On appeal, defendant contends that the trial court erred, and asks this court to review the sealed transcript of the in camera hearing to determine whether an informant could provide evidence that someone else possessed the drugs found at the location or that defendant was not present or not involved in drug sales.

The so-called *Hobbs* procedure (*People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*)) for handling sealed search warrant affidavits was summarized in *People v. Galland* (2008) 45 Cal.4th 354, 363-364:

"Evidence Code section 1041 codifies the common law privilege against disclosure of the identity of a confidential informant. Evidence Code section 1042, subdivision (b) states, in particular, that disclosure of an informant's identity is not required to establish the legality of a search pursuant to a warrant. A corollary rule provides 'that "if disclosure of the contents of [the informant's] statement would tend to disclose the identity of the informer, the communication itself should come within the privilege."' [Citation.] 'These codified privileges and decisional rules together comprise an exception to the statutory requirement that the contents of a

search warrant, including any supporting affidavits setting forth the facts establishing probable cause for the search, become a public record once the warrant is executed.' [Citations.] Instead, a court may order any identifying details to be redacted or, as in this case, a court may adopt 'the procedure of *sealing* portions of a search warrant affidavit that relate facts or information which, if disclosed in the public portion of the affidavit, will reveal or tend to reveal a confidential informant's identity.' [Citation.]

"When a defendant seeks to quash or traverse a warrant where a portion of the supporting affidavit has been sealed, the relevant materials are to be made available for in camera review by the trial court. [Citations.] The court should determine first whether there are sufficient grounds for maintaining the confidentiality of the informant's identity. If so, the court should then determine whether the sealing of the affidavit (or any portion thereof) 'is necessary to avoid revealing the informant's identity.' [Citation.] Once the affidavit is found to have been properly sealed, the court should proceed to determine 'whether, under the "totality of the circumstances" presented in the search warrant affidavit and the oral testimony, if any, presented to the magistrate, there was "a fair probability" that contraband or evidence of a crime would be found in the place searched pursuant to the warrant' (if the defendant has moved to quash the warrant) or 'whether the defendant's general allegations of material misrepresentations or omissions are supported by the public and sealed portions of the search warrant affidavit, including any testimony offered at the in camera hearing' (if the defendant has moved to traverse the warrant). [Citation.]"

In the instant case, we have reviewed the transcript of the in camera hearing and the sealed portion of the search warrant affidavit. Disclosure of a confidential informant's identity is required only if the informant was a potential material

witness on the issue of guilt in the defendant's case (*Hobbs, supra,* 7 Cal.4th at p. 959), meaning that the defendant has demonstrated "through 'some evidence' [citation] that there exists a '"reasonable possibility that the anonymous informant whose identity is sought could give evidence on the issue of guilt which might result in defendant's exoneration."'" (*People v. Hardeman* (1982) 137 Cal.App.3d 823, 828.) In contrast, "the identity of an informant who has supplied probable cause *for the issuance of a search warrant* need not be disclosed where such disclosure is sought merely to aid in attacking probable cause." (*Hobbs, supra*, 7 Cal.4th at p. 959.)

Our review of the sealed portion of the affidavit and the transcript of the in camera hearing confirms that the confidential informant was not a material witnesses to the charges against defendant. Therefore, the trial court properly refused to disclose the informant's identity. Further, because the trial court properly refused to disclose the identity of the confidential informant, the court was justified in not unsealing the sealed portion of the affidavit, as it would have revealed the informant's identity. (See *Hobbs, supra*, 7 Cal.4th at p. 972.) Because on appeal defendant does not challenge the determination of probable cause or assert there were material misrepresentations, we do not discuss those issues.

In a related contention, without citation to the record or any authority, defendant contends that the trial court "erred because it refused to unseal a search warrant that was never sealed." (Boldface and caps. omitted.) We deem the issue forfeited. (*Stanley, supra,* 10 Cal.4th at p. 793; *Lonely, supra,* 201 Cal.App.4th at p. 384.) In any event, our review of the in camera hearing shows that the search warrant under review, was signed by Judge Santana, and the confidential portion of the affidavit was properly sealed.

V. *Brady Discovery*

Defendant contends that in violation of *Brady v. Maryland* (1963) 373 U.S. 83, the prosecutor failed to disclose exculpatory "evidence or information indicating codefendant Strider and/or [a person identified as] 'Solo' were trafficking in drugs at the Schinner house as described in the search warrants signed by Judges Santana and apparently authorized by Judge Torribio. This evidence . . . could have supported defense claims that appellant did not possess the narcotics at issue, and that he did not possess any narcotics for purposes of sale."

Although defendant fails to provide any citation to the record, he is apparently referring, at least in part, to speculation contained in the motion to unseal the search warrant affidavit. In that motion, defense counsel argued that there was confusion as to which of two warrants authorized the June 29, 2013 search of the Schinner house. One warrant was purportedly signed by Judge Torribio on an unidentified date, and sought to search the Schinner house and a person identified as "Solo." The other was signed by Judge Santana and authorized the search of the Schinner house and the person of codefendant Strider. As was later clarified by the trial court, the warrant signed by Judge Santana was the warrant executed on June 29, 2013.

Defendant's cryptic assertion of a *Brady* violation on appeal does not come close to meeting the relevant legal standard. "'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.]" (*People v. Superior Court* (*Johnson*) (2015) 61

Cal.4th 696, 710.) "Prejudice, in this context, focuses on 'the materiality of the evidence to the issue of guilt or innocence.' [Citations.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]. A defendant instead 'must show a "reasonable probability of a different result."' [Citation.]" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043.)

Here, defendant has not shown that the purportedly exculpatory evidence exists, or that any such evidence was suppressed. Further, he makes only a passing attempt to show how such purported evidence would create a reasonable probability of a different result. Therefore, we reject his contention.

VI. *Prior Serious Felony*

Defendant contends that the court improperly sentenced him to a five-year enhancement under section 667, subdivision (a)(1), because he was not properly advised of his constitutional rights as to that allegation, was not advised of the consequence of that enhancement, and did not specifically admit the allegation. We agree.[6]

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[6] Respondent contends that the issue is forfeited because in his opening brief defendant fails to cite any authority and provide reasoned argument. We agree that the opening brief is deficient, but given the obvious nature of the error and its consequence to defendant's sentence, we decline to find the issue forfeited. Respondent also contends that the error was forfeited by defendant's failure to object to the lack of advisements and waiver in the trial court. But the forfeiture rule does not apply to a "claim that the trial court should have ensured [the defendant's] stipulation [to a prior conviction] was voluntary and knowing by advising him of his right to 'a fair determination of the truth of the prior [conviction] allegation[].' [Citation.]" (*People v. Cross* (2015) 61 Cal.4th 164,

A. *Relevant Proceedings*

The initial information alleged that defendant "had been convicted of the following serious and/or violent felonies, as defined in Penal Code section 667(d) and Penal Code section 1170.12(b) [the Three Strikes law], and is thus subject to sentencing pursuant to the provisions of Penal Code sections 667(b)-(j) and Penal Code section 1170.12." The sole conviction alleged was a conviction of "PC 664/187A" (attempted murder) occurring on May 1, 1991 in Los Angeles Superior Court case No. TA009696.

On the first day of trial, before jury selection began, the prosecution filed an amended information which, on a separate page, added an allegation "pursuant to Penal Code section 667(a)(1) that the defendant[] . . . has suffered the following prior conviction[] of a serious felony." The listed offense was the same one alleged under the Three Strikes law, "PC 664/187A" occurring on May 1, 1991 in Los Angeles Superior Court case No. TA009696. Defendant was arraigned on the amended information and denied "all special allegations." Trial on the prior allegations was bifurcated.

After the jury returned its guilty verdicts, and outside its presence, the court asked the prosecutor whether he was "ready to prove up the priors" and whether he had "the priors packet." The prosecutor stated that he was ready, but moved to amend the information to allege the prior conviction as a violation of section 245, subdivision (d)(3) (assault on a peace officer with a machine gun or assault weapon). The court permitted the amendment.

173-174 (*Cross*).) In any event, as we explain below, there was no admission of the section 667, subdivision (a)(1) allegation whatsoever.

However, it appears that the court and the parties did not recall that defendant's prior conviction was alleged under both the Three Strikes law and as a serious felony under section 667, subdivision (a)(1). Thus, in the record on appeal, the amended information shows a handwritten, interlineated amendment of the prior conviction ("245D(3)") as it was alleged in the strike allegation. But it does not show such an amendment in the allegation of the prior conviction under section 667, subdivision (a)(1), which was on a separate page.

Further, in discussing how to proceed in the bifurcated proceeding, there was no discussion of the conviction being alleged in two allegations. Rather, the discussion referred to a single prior. Thus, after conferring with defendant, defense counsel stated that defendant would "admit the prior violation." The court stated that it was not asking whether defendant "want[ed] to admit it now," but rather whether he wanted a jury or court trial, though "ultimately, if you want to admit it, you can. But it's up to you." Defendant again conferred with his attorney. His attorney then stated that defendant "wish[ed] to save whatever time might be expended in this regard. He will waive a jury trial, waive a court trial, and admit the prior."

In the colloquy in which the court advised defendant of his rights and took his waivers and admission, the court referred to the prior in the singular and only as a "strike":

"THE COURT: Okay. Mr. Beard [defendant], before you can do that, you have to understand and give up certain constitutional rights.

"In this case, we bifurcated *your prior* that is alleged. The People have just amended it, and it's apparently not an attempted murder. It was a violation of Penal Code section 245(d)(3), *which is a strike*.

"Is that correct, People?

"MR. ZYGIELBAUM [the prosecutor]: Yes, it is, Your Honor.

"THE COURT: Okay. So you have a right to have a trial *on that*. It could be a court trial or a jury trial. At either one, you have a right to call your own witnesses; you have a right to confront witnesses; and you have a right against self-incrimination.

"Do you understand those rights, sir?

"DEFENDANT BEARD: Yes.

"THE COURT: And do you waive and give up those rights?

"DEFENDANT BEARD: Yes.

"THE COURT: In this case, you are going to be admitting to *a strike*, and, as such, *that strike* could be used against you to enhance your sentence in connection with the case -- the counts that you were convicted of.

"Do you understand that, sir?

"DEFENDANT BEARD: Yes, ma'am.

"THE COURT: Do you still want to go ahead and admit *the strike*?

"DEFENDANT BEARD: Yes, ma'am.

"THE COURT: All right. So it alleges in the 'information' that on or about May 1st, 1991, in TA009696, you committed the crime -- or were convicted of the crime of Penal Code section 245(d)(3), *and the People are alleging this pursuant to 667, (b) through (j), and Penal Code section 1170.2 -- or 12* [*the Three Strikes law*].

"*Do you admit this prior conviction, sir?*

"DEFENDANT BEARD: Yes, ma'am.

"THE COURT: All right. The court's going to find the waivers to be knowingly, intelligently, and understandably made; also freely and voluntarily

made. And I'll go ahead and accept the defendant's admission *of the prior*." (Italics added.)

At sentencing, defendant was represented by new counsel. The trial court granted defendant's motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and stuck the strike allegation. The court then sentenced defendant to a total term of 14 years, calculated to include a five-year enhancement for a prior serious felony conviction under section 667, subdivision (a)(1) (the upper term of four years on count 2, plus one year for the gang enhancement, a consecutive term of one year on count 3, and an additional five years under § 667, subd. (a)(1)). However, as is apparent from the record, defendant had not admitted the section 667, subdivision (a)(1) allegation.

B. *Remand is Required*

"When a criminal defendant enters a guilty plea, the trial court is required to ensure that the plea is knowing and voluntary." (*Cross, supra*, 61 Cal.4th at p. 170.) As a part of this obligation, "the court must inform the defendant of three constitutional rights—the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers—and solicit a personal waiver of each," the so-called *Boykin-Tahl* rights. (*Ibid*.) In *In re Yurko* (1974) 10 Cal.3d 857, the California Supreme Court held that these *Boykin-Tahl* "requirements of advisement and waiver apply when a defendant admits the truth of a prior conviction allegation that subjects him to increased punishment." (*Cross, supra*, 61 Cal.4th at p. 170 [discussing *Yurko*].) Moreover, *Yurko* held "'as a judicially declared rule of criminal procedure' that an accused, before admitting a prior conviction allegation, must be advised of the precise increase in the prison term that might be imposed, the effect on parole eligibility, and the possibility of

being adjudged a habitual criminal." (*Cross, supra,* 61 Cal.4th at pp. 170-171, quoting *Yurko, supra,* 10 Cal.3d at p. 864.) However, a failure to obtain explicit admonitions and waivers under *Yurko* "is not reversible per se. Instead, the test for reversal is whether 'the record affirmatively shows that [the guilty plea] is voluntary and intelligent under the totality of the circumstances.'" (*Cross, supra,* 61 Cal.4th at p. 171, quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1175.)

In the instant case, defendant was advised of and waived his *Boykin-Tahl* rights insofar as his prior conviction was alleged as a strike,[7] and he admitted the strike allegation. However, he was not advised of those rights, and did not waive them, insofar as his prior conviction was alleged as a serious felony under section 667, subdivision (a)(1). Nor was he advised of the potential increase in his prison term (5 years). Further, he never admitted the prior conviction as a serious felony under section 667, subdivision (a)(1). From the record, it appears that in the heat of having just received guilty verdicts and deciding how the prior conviction would be handled, counsel and the court forgot that defendant's prior conviction was alleged as both a strike under the Three Strikes law and a serious felony under section 667, subdivision (a)(1).

Under these circumstances, the relevant proceedings do not demonstrate that defendant admitted the section 667, subdivision (a)(1) allegation. Moreover, even if there had been such an admission, the totality of the circumstances fails to show that it was knowing and voluntary. Indeed, not even the court or the attorneys understood that defendant was admitting the conviction as a serious felony under section 667, subdivision (a)(1).

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[7] We note that the court failed to inform defendant of the specific increase in his prison term that could result from his admission of a strike. But that error (not discussed by the parties) is moot, given that the court struck the strike allegation.

The remedy, however, is not, as defendant requests, simply to reduce his sentence by five years with no further proceedings. Rather, it is to reverse the five-year enhancement, and remand the case for further proceedings to determine the truth of the section 667, subdivision (a)(1) allegation, and for resentencing.

DISPOSITION

The imposition of a five-year enhancement under section 667, subdivision (a)(1), is reversed. The case is remanded for further proceedings on that allegation and for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.