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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TIFFANY DIONNE MCMULLEN,

Defendant and Appellant.

B269552

(Los Angeles County
Super. Ct. No. MA065277)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles A. Chung, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Tiffany Dionne McMullen (defendant) appeals from the judgment which included 15 counts of information theft with a prior conviction of identity theft. Defendant contends that substantial evidence did not support the prior conviction element of information theft, because her stipulation to the prior conviction was not made to the jury. As defendant requested, acquiesced in, and benefitted by the procedure used, her contention is without merit, and we affirm the judgment.

BACKGROUND

Defendant was charged with 19 felonies and two misdemeanors, as follows: count 1, possession of methamphetamine for sale, in violation of Health and Safety Code section 11378; count 2, multiple thefts of identifying information, in violation of Penal Code section 530.5, subdivision (c)(3);¹ count 3, second degree burglary, in violation of section 459; counts 4 through 18, and 21, identifying information theft with a prior conviction, in violation of section 530.5, subdivision (c)(2); and counts 19 and 20, misdemeanor receiving stolen property of a value less than \$950, in violation of section 496, subdivision (a). The information further alleged as to counts 1 through 18 and 21, that defendant had suffered a prior serious or violent felony conviction within the meaning of the “Three Strikes” law (§§ 667, subd. (b)-(i) & 1170.12, subd. (a)-(d)), and that defendant suffered three prior convictions for which she served prison terms within the meaning of section 667.5, subdivision (b).

A jury found appellant not guilty as to count 17, and was unable to reach a verdict as to count 3, but convicted defendant of

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

the remaining counts as charged. Defendant waived her right to a trial on the prior convictions and admitted them. The trial court dismissed count 3 on motion of the prosecutor, and sentenced defendant to a total second strike prison term of 15 years 8 months, with 741 days of presentence custody credit.

Defendant filed a timely notice of appeal from the judgment.

DISCUSSION²

Defendant challenges the sufficiency of the evidence to sustain her conviction of counts 4 through 18, and 21, all alleging a violation of section 530.5, subdivision (c)(2), which provides: “Every person who, with the intent to defraud, acquires or retains possession of the personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and who has previously been convicted of a violation of this section, upon conviction therefor shall be punished by a fine, . . . a fine and imprisonment, or by imprisonment”

Defendant does not challenge that sufficiency of the evidence to support a finding that she acquired or retained possession of the personal identifying information of another, or that she did so with the intent to defraud. She concedes that she stipulated to having been previously convicted of the same crime. She contends that her stipulation was ineffective because it was not communicated to the jury.

² The only issue presented is one of law relating to the effect of defendant’s stipulation to a prior conviction alleged as an element of section 530.5, subdivision (c)(2). As the resolution of the issue does not require a summary of the evidence presented at trial, we summarize only the proceedings relating to the stipulation.

Defendant relies on article I, section 28, subdivision (f)(4) of the California Constitution (article I, § 28(f)),³ which states in relevant part: “When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.” The purpose of article I, section 28(f) was to eliminate “the rigid, black letter rules of exclusion which [the California Supreme Court] had grafted onto the [Evidence] code.” (*People v. Castro, supra*, 38 Cal.3d at p. 312.) As relevant here, article I, section 28(f), eliminated the “per se” rule of *People v. Hall* (1980) 28 Cal.3d 143, which “held that when a prior conviction is pertinent only to ex-felon status as an element of a currently charged offense, the jury may not learn either the fact or the nature of the prior conviction if defendant offers to stipulate he is an ex-felon.” (*People v. Valentine* (1986) 42 Cal.3d 170, 173.) Since the enactment of article I, section 28(f), the jury must be advised of the *fact* of a prior conviction which is an element of a current charge, but if defendant stipulates to it, “evidence of the *nature* of [the] prior convictions still may and should be withheld from the jury.” (*Valentine*, at p. 173; see also *People v. Sapp* (2003) 31 Cal.4th 240, 261.)

Here, prior to trial and off the record, the defense offered to stipulate that defendant had suffered the prior conviction for purposes of section 530.5, subdivision (c)(2). Then, during opening statement, the prosecutor said, “Counts 4 through 18 and 21 is possession of personal identifying information with a prior conviction of I.D. theft.” Defense counsel objected and then moved for a mistrial, explaining to the court that his understanding of the agreement was that as a result of the

³ Article I, section 28(f) was enacted by Proposition 8 in 1982 as part of the so-called Victims’ Bill of Rights. (*People v. Castro* (1985) 38 Cal.3d 301, 305.)

stipulation, the determination of that element would be bifurcated, and the jury would not be informed of the prior conviction. The prosecutor, on the other hand, thought that defendant intended to stipulate to the prior conviction so that the underlying facts of the conviction would not come out; and she argued that as an element of the crime, the fact of the conviction must be presented to the jury.

The trial court also thought that the purpose of the stipulation was to avoid presenting the facts underlying the prior conviction to the jury, which could be harmful to defendant. The court indicated that it could not bifurcate the issue altogether, and asked defense counsel: “At this point is it your desire then just to have a stipulation in front of the jury that your client was convicted of the [section] 530.5?” Defense counsel replied, “Yes.”

A short time later, the court informed counsel that it had reviewed the CALJIC jury instruction, which caused it to believe that the prior ruling was erroneous, and that the stipulation did in fact give defendant the right to have the jury informed of the prior conviction.⁴ Defense counsel confirmed that “we did stipulate to it,” and renewed his motion for mistrial, based upon the prosecutor’s opening statement in which the prior conviction was mentioned. Defense counsel told the court that his reason for stipulating to the prior offense was to have that element -- the third element -- removed from the jury instruction. Still outside

⁴ CALJIC No. 15.62 sets forth the three elements of a violation of section 530.5, subdivision (c)(2), as follows: “1. A person acquired or retained possession of the personal identifying information of another person [ten or more other persons]; [and] [¶] 2. That person had the specific intent to defraud[.] [, and [¶] 3. That person had been previously convicted of a violation of this section.]” The use note for the instruction states: “If the defendant admits or stipulates to the prior, delete that portion of the instruction.”

the jury's presence, defendant then waived her right to a trial on all the prior convictions, and then personally stipulated and admitted that she had been convicted of a violation of section 530.5, subdivision (a), on January 21, 2010.

Later in the trial, defense counsel asked that mention of the prior conviction be deleted or excised from defendant's recorded interview, as it had been agreed that it would not be mentioned and it was irrelevant. The court found that its ruling had essentially been to exclude any mention of the prior conviction. Defense counsel requested that any reference to the prior conviction be struck from the record, that nothing be done to highlight the reference to the prior conviction, and that the prosecutor be prohibited from referring to it. After both sides rested in the presence of the jury, the bifurcated proceeding on the prior conviction allegations went forward outside the presence of the jury. Again defendant admitted the prior conviction element of section 530.5, subdivision (c)(2). Accordingly, the third element was eliminated from the jury instruction.

The trial court was mistaken that a stipulation barred presenting the prior conviction element of the offense to the jury, as article I, section 28(f) provides for just two options: "Either the defendant admits to having a prior conviction and the court 'sanitizes' the prior by keeping from the jury the nature of the offense, or the prosecution proves the prior conviction in open court"; there is no third option of "full bifurcation of trial on the . . . prior conviction by having the trial court decide the charge outside the jury's presence." (*People v. Sapp, supra*, 31 Cal.4th at p. 260.) "[T]he constitutional provision was intended to prevent defendants from using stipulations to foreclose the introduction of prior convictions in jury trials." (*People v. Hucks* (1990) 217 Cal.App.3d 260, 268.) Thus, any error committed by the trial

court was in relying on an obsolete CALJIC use note and failing to sustain the prosecutor's objection to the procedure.

Respondent contends that as defendant invited the error and benefited by it, she may not urge it as a ground for reversal. Defendant counters that she cannot be deemed to have waived her substantial evidence claim, relying on *People v. Butler* (2003) 31 Cal.4th 1119, 1126, which held that a claim that the judgment is unsupported by substantial evidence may be raised for the first time on appeal. However, defendant's attempt to couch the issue as a substantial evidence challenge fails. It is not a substantial evidence issue. A party may not stipulate or admit an essential fact or element in open court and then claim that the fact or element is unsupported by substantial evidence. (*In re Francis W.* (1974) 42 Cal.App.3d 892, 903.) "It is, of course, well established that the defendant is bound by [a] stipulation or open admission . . . and cannot mislead the court and jury by seeming to take a position on issues and then disputing or repudiating the same on appeal. [Citations.]" (*People v. Pijal* (1973) 33 Cal.App.3d 682, 697.) In addition, a defendant "may not assert on appeal procedural rights which he waived at the trial. [Citations.]" (*People v. Wilson* (1947) 78 Cal.App.2d 108, 120.)

Further, as respondent argues, defendant's stipulation and admission could not be presumed to be invalid, as even "[t]he most basic rights of criminal defendants are . . . subject to waiver." [Citation.]" (*People v. Johnson* (2002) 28 Cal.4th 1050, 1055.) Thus, if he does so knowingly and voluntarily, a criminal defendant may waive many of the most fundamental protections afforded by the Constitution, including the right to a jury trial or any trial, and may plead guilty or confess to a charge. (*United States v. Mezzanatto* (1995) 513 U.S. 196, 201.)

We agree with respondent that defendant's challenge to the procedure and the modification of the jury instruction is barred

by the doctrine of invited error, which “applies when a defendant, for tactical reasons, makes a request acceded to by the trial court and claims on appeal that the court erred in granting the request. [Citations.]” (*People v. Russell* (2010) 50 Cal.4th 1228, 1250.) In particular, when defense counsel makes an conscious and deliberate tactical choice to request or omit a particular instruction, defendant may not complain of error on appeal. (*People v. Wader* (1993) 5 Cal.4th 610, 657-658.) Here, defense counsel made clear the request was to eliminate all mention of the prior conviction in the presence of the jury, and told the court that the “specific reason for . . . stipulating” was to have paragraph 3 eliminated from the jury instruction.⁵

In sum, defendant’s substantial evidence challenge fails due to her admission, and because defendant received a benefit at her own request, a benefit to which she was not entitled. (See art. I, § 28(f); *People v. Sapp*, *supra*, 31 Cal.4th at pp. 260-261.)

⁵ Defense counsel referred to paragraph 3 of CALCRIM No. 2041, although the court used CALJIC No. 15.62. However, both instructions assign a number “3” to the prior conviction element of section 530.5, subdivision (c)(2). As respondent notes, only CALJIC No. 15.62 is followed by a use note stating that the prior conviction element may be deleted upon stipulation.

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT