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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

EFRAIN SALINAS, JR.,

Defendant and Appellant.

B272298

(Los Angeles County
Super. Ct. No. KA109609)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed as modified.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

Efrain Salinas, Jr. appeals from a judgment of conviction entered after a jury trial. The jury convicted Salinas of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),¹ a car, and found true the allegations he suffered a prior serious felony conviction (§§ 667, subds. (a)(1), (b)-(i), 1170.12) and a prior conviction for which he served a prison term (§ 667.5, subd. (b)).

Salinas contends the trial court erred in denying his motion to bifurcate the trial on his prior convictions as untimely without evaluating the prejudice he would suffer from the jury hearing evidence of his prior felony convictions. We agree, but find the error was harmless.

Salinas also contends the trial court erred in applying the 15 percent limitation on accrual of his presentence conduct credits applicable to violent felonies, and requests correction of a clerical error in the abstract of judgment. We modify the judgment to award Salinas the full 384 days of presentence conduct credits and order that the abstract of judgment be corrected. We affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

Salinas was charged by information with assault with a deadly weapon, a car (§ 245, subd. (a)(1)). The information alleged he had a prior serious felony conviction for robbery (§ 211), which constituted a strike under the three strikes law (§§ 667, subds. (b)-(i), 1170.12), and supported a five-year

¹ All undesignated statutory references are to the Penal Code.

sentence enhancement under section 667, subdivision (a). The information further alleged that Salinas served prison terms for the robbery and a conviction for evading a police officer (Veh. Code, § 2800.2, subd. (a)). Finally, for purposes of eligibility for probation (§ 1203, subd. (e)(4)), the information alleged that Salinas had a conviction for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), in addition to the conviction for evading a police officer.

B. *Salinas's Request for Pro. Per. Status*

On March 28, 2016, prior to trial, Salinas requested to represent himself. He signed a *Faretta*² waiver, and was granted pro. per. status. Salinas represented himself at trial.³

C. *Jury Selection and Salinas's Motion To Bifurcate his Prior Convictions*

Jury selection commenced on May 4, 2016. In opening remarks to the prospective jurors, the trial court stated that Salinas was charged with assault with a deadly weapon, and that it was alleged that Salinas was previously convicted of a “serious felony” and had two additional “prior convictions.” Specifically, the trial court stated, “It’s further alleged that prior to the commission of that offense, the defendant had been convicted of the following serious felony as defined in Penal Code [s]ection

² *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].

³ Salinas previously represented himself, but relinquished his status when his pro. per. privileges were revoked based on his conduct while in custody.

667[, subdivision] (d) and Penal Code section 1170.12[, subdivision] (b), specifically case number BA170528, charged with Penal Code [s]ection 211, conviction date December 10th, 1998, in Los Angeles Superior Court.” The court also informed the jury that Salinas “suffered two prior convictions pursuant to Penal Code [s]ection 667.5[, subdivision] (b). That same case, BA170528, . . . and a violation in KA095782 of Vehicle Code [s]ection 2800.2[, subdivision] (a) . . . on December 1st, 2011, again in the Los Angeles Superior Court.” The trial court did not identify the nature of the prior convictions other than the code sections.

During voir dire, Salinas asked the prospective jurors if they could think of any reason why they could not be fair. He then stated: “Okay. I want to mention that—I want to express something to you as far as me being the defendant. I’m bald. I’m Mexican. I’m sure you’ve seen my tattoos. You’ve heard the convictions.” He then asked the jury, “But because this person has a criminal history, and this other one doesn’t, do you think it’s fair to believe the one that don’t have a criminal history because they don’t got no record? Would that be considered bias or prejudice?” At the close of the day, the jury was impaneled.

The following day, prior to opening statements, Salinas told the court that he wanted to “file a motion to bifurcate all priors.” The court responded, “It’s a little late now. You needed to file that motion ahead of time.” Salinas responded, “Yeah, I know.” There was no argument on the motion. The court ruled, “That motion will be denied. Untimely.” The case then proceeded to trial on both the underlying charge and the prior conviction allegations.

D. *The Evidence at Trial*

1. *Evidence of Assault with a Deadly Weapon*

On the night of February 18, 2015 Salinas and his wife, Maria Pizarro, were driving home in separate cars. Pizarro was about eight months pregnant at the time. Salinas and Pizarro had a telephone conversation from their cars, during which they got into an argument over Salinas's drug use and the fact he was high. Pizarro did not want to be home when Salinas arrived, so she drove around for about two hours. While Pizarro was heading south on Rockvale Avenue, she decided not to go home because she did not know if Salinas was there. She made a U-turn, then turned right onto Gladstone Street. She made another U-turn, then drove west on Gladstone Street. Salinas's car then hit her car. The air bags deployed, and Pizarro called 9-1-1.

While she was on the telephone with 9-1-1, Pizarro saw Salinas, and "was panicked" and "scared." She was concerned for herself and her unborn baby. Salinas approached Pizarro's car on the passenger side. He tried to open the passenger side door,⁴ but the door was stuck, and he was unable to open it. While Pizarro was still on the phone with 9-1-1, Salinas got in his white Honda, and left.

Although Pizarro admitted at trial that it was Salinas who hit her car, she denied that she saw his white Honda before she was hit. However, she acknowledged testifying at the preliminary hearing that she saw Salinas's car speeding toward her on her side of the road with the headlights off, and that she

⁴ After the incident Pizarro told the police officer who responded to the accident that Salinas attempted to open the driver side door, but at trial she testified he tried to open the passenger side door.

told this to the police. Pizarro's preliminary hearing testimony was read to the jury, in which she stated she was driving around in fear for her safety because about a month earlier she had reported a domestic violence incident with Salinas.⁵

The prosecutor played a recording of Pizarro's 9-1-1 call. Pizarro is heard on the call screaming. When asked if she started screaming when she saw Salinas, Pizarro responded, "I don't know. I just started screaming. The air bag went off." She could be heard on the call saying, "leave me alone." She could not remember if she said that to Salinas.

Los Angeles County Deputy Sheriff Jeff Demooy responded to the scene of the collision. He approached Pizarro, who was standing toward the front of her car. He recognized her as the same woman who made a domestic battery call a couple weeks earlier. She was crying and "physically shaken." Pizarro told him she was afraid of Salinas because he was still upset about going to jail for the prior domestic violence incident.

Pizarro described to Demooy the turns she made on Gladstone Street to evade Salinas, who was in his car with his lights off. After making a U-turn on Gladstone Street, she was heading westbound, and saw Salinas coming toward her in her lane with his lights off. He turned into her, and she attempted to

⁵ On January 26, 2015 Salinas pushed Pizarro while they were in the car, and then they started "pushing and shoving" each other. She reported the incident to the police, and obtained a restraining order. Photographs taken after the incident showed redness on her cheek and blood on her lip. On April 30, 2015 Pizarro reported a second domestic violence incident to the police, in which Salinas threw a hat at her face, hitting her cheek, and pushed her face back with his open palm.

swerve out of the way, but he collided head on with her. After the collision, Pizarro saw Salinas exit the driver's side of his car, and come to the driver's side of her car. He tried to open the door, but could not. Pizarro told Demooy she believed the collision was intentional, which led him to treat the incident as an assault.

Los Angeles County Sheriff's Department Detective Elizabeth Molina, who interviewed Pizarro in February 2015 after the incident, testified that Pizarro told her that "she felt it was deliberate and that he intentionally drove his car head on into hers because he was upset because . . . [she] had him arrested for the [prior] domestic violence."

At trial, Pizarro denied that she told any officers that on the night of the accident she was scared of Salinas or that she saw him speeding toward her on the wrong side of the road with his headlights off.

Pizarro suffered bruises, and was hospitalized for one night.

Salinas did not call any witnesses in his defense.

2. Evidence of Prior Convictions

A paralegal from the Los Angeles County District Attorney's office testified regarding a section 969b, "prison packet," which showed that in case number KA095782, Salinas was convicted on December 1, 2011 of evading arrest in violation of Vehicle Code section 2800.2, and that he was sentenced to two years eight months in prison.⁶ On September 30, 2012 Salinas

⁶ A fingerprint examiner testified that the fingerprints she rolled from Salinas during the trial matched the fingerprints on each prison packet.

was convicted in case number BA372693 of possession of a controlled substance, in violation of Health and Safety Code section 11377, and was sentenced to three years in prison. In case number BA170528, Salinas was convicted on October 22, 1998 of robbery in violation of section 211, and was sentenced to two years in prison plus an additional 10 years for the use of a firearm. The paralegal also testified that Salinas was charged with a new felony within five years of being released from custody, and that his most recent release date was March 1, 2014.

E. *Jury Instructions on Prior Convictions*

The trial court instructed the jury with CALJIC No. 17.18 with respect to the prior prison term allegation: “It is alleged that before the commission of the crimes charged, defendant[] was convicted of a felony, [section] 211[, Vehicle Code section] 2800.2[, subdivision (a)], and served . . . separate prison terms therefor and that a period of less than [five] years elapsed in which the defendant[] remained free of both prison custody and the commission of an offense which resulted in the conviction of a felony. [¶] If you find the defendant[] guilty of the crimes charged, you must determine whether the allegation is true or not true. [¶] Do not consider the allegation or evidence offered thereon in your determination of defendant’s guilt of the crimes for which he [or] she is now on trial. . . .”

As to the prior strike allegation under sections 667, subdivisions (b)-(i), and 1170.12, the trial court instructed the jury with CALJIC No. 17.25: “It is alleged that before the commission of the crimes charged in the information, the defendant was convicted of . . . a felony, namely a violation of

[section] 211 on 12-10-1998 [¶] The defendant has denied the truth of the allegation. [¶] In this case, you must first decide the question of whether defendant is guilty of the crimes charged. [¶] You shall not consider the allegation of the prior convictions or evidence thereof, if any, as proof that the defendant committed the crimes charged in the information. . . .”

F. *Jury Verdict and Sentencing*

The jury convicted Salinas of assault with a deadly weapon and found true the allegations that Salinas suffered all three alleged prior convictions.

Salinas moved to strike the prior robbery conviction based on its age (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504, 529-530), which motion the trial court denied. The trial court sentenced Salinas to the upper term of four years, doubled as a second strike to eight years (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)), plus five years for the prior serious felony (§ 667, subd. (a)(1)) and one year for a prior prison term (§ 667.5, subd. (b)), for a total term of 14 years.

The trial court awarded Salinas 442 days of presentence custody credit, including 384 days of actual custody credit and 58 days of conduct credit.

DISCUSSION

A. *The Trial Court Erred in Denying Salinas’s Motion To Bifurcate Trial of the Prior Convictions Without Evaluating Potential Prejudice to Salinas, But any Error Was Harmless*

1. *Governing Law and Standard of Review*

The trial court has the discretion in a jury trial to bifurcate the determination of a prior conviction from determination of the defendant’s guilt of the charged offense. (*People v. Calderon* (1994) 9 Cal.4th 69, 79 (*Calderon*); accord, *People v. Profitt* (2017) 8 Cal.App.5th 1255, 1266; *People v. Burch* (2007) 148 Cal.App.4th 862, 867 (*Burch*).) “In ruling upon a defendant’s timely request for bifurcation, the trial court first should consider the potential prejudicial effect of admission of evidence that the defendant has suffered the alleged prior conviction. [Our Supreme Court] long has ‘recognized the substantial prejudicial effect inherent in evidence of prior offenses [citation]’ [Citation.]” (*Calderon, supra*, at p. 79; accord, *Burch, supra*, at p. 866.)

Our Supreme Court in *Calderon* held further that “[t]he potential for prejudice will vary, . . . depending upon the circumstances of each case. Factors that affect the potential for prejudice include, but are not limited to, the degree to which the prior offense is similar to the charged offense [citation], how recently the prior conviction occurred, and the relative seriousness or inflammatory nature of the prior conviction as compared with the charged offense [citation].” (*Calderon, supra*, 9 Cal.4th at p. 79.)

However, “[t]he denial of bifurcation will not unduly prejudice the defendant when, ‘even if bifurcation were ordered, the jury still would learn of the existence of the prior conviction

before returning a verdict of guilty.” (*Burch, supra*, 148 Cal.App.4th at p. 867, quoting *Calderon, supra*, 9 Cal.4th at p. 78.) As the court in *Calderon* explained, “[f]or example, . . . when it is clear prior to trial that the defendant will testify and be impeached with evidence of the prior conviction [citation], denial of a request for a bifurcated trial generally would not expose the jury to any additional prejudicial evidence concerning the defendant.” (*Calderon, supra*, 9 Cal.4th at p. 78.)

In *Burch*, the court considered whether the trial court’s denial of a motion to bifurcate the trial on an alleged prison prior was an abuse of discretion where the defendant decided to testify, and he was going to be impeached with three prior felony convictions. The trial court denied the motion, reasoning that once the felony convictions would come out, allowing evidence of the sentence involved would not “expose the jury to any unduly prejudicial evidence.” (*Burch, supra*, 148 Cal.App.4th at p. 868.)

The Court of Appeal found that the denial of bifurcation did not result in “gross unfairness” to the defendant. (*Burch, supra*, 148 Cal.App.4th at p. 868.) Although the jury learned that the defendant was sentenced to prison and the details as to when he was discharged from prison and parole (to show he served a prison term and was in custody within the prior five years), “[a]ny potential unfairness from the admission of evidence necessary to prove the prior prison allegation is overshadowed by the impact to [the defendant’s] credibility associated with his criminal record that was properly used to impeach him. [The defendant] argue[d] his credibility was unfairly damaged because the evidence of the prior prison allegation portrayed him as being incapable of following the law. However, once [the defendant’s]

prior convictions were used for impeachment, the damage was already done.” (*Ibid.*)

We review the trial court’s denial of a request to bifurcate for an abuse of discretion. (*Calderon, supra*, 9 Cal.4th at pp. 77-78; *People v. Profitt, supra*, 8 Cal.App.5th at p. 1266; *Burch, supra*, 148 Cal.App.4th at p. 867.)

2. *The Trial Court Failed To Consider Potential Prejudice to Salinas*

Here, the trial court failed to consider the potential prejudice to Salinas from introduction of evidence of his prior convictions at a unitary trial, as required by *Calderon*, instead simply denying the motion as “untimely.” (See *Calderon, supra*, 9 Cal.4th at p. 80 [finding the trial court committed error because it denied the defendant’s motion to bifurcate the trial on the prior conviction “without considering the particular circumstances of the case before the court”].)⁷

It may well be, as argued by the People, that the trial court considered the motion untimely because the court had already advised the jury that Salinas was charged with a prior “serious felony” and other prior offenses, and Salinas had himself suggested he had convictions (“You’ve heard the convictions”). Even so, the trial court failed to evaluate the potential prejudice from allowing the jury to hear evidence of Salinas’s prior

⁷ However, the court in *Calderon* found that the trial court’s error did not affect the jury’s guilty verdict because after the court’s ruling on the motion to bifurcate, the defendant admitted the prior conviction outside the presence of the jury and the jury did not hear evidence of the defendant’s prior conviction. (*Calderon, supra*, 9 Cal.4th at p. 80.)

convictions (as compared to reading the charges), identification of the actual crimes (for robbery with use of a firearm, evading arrest, and possession of a controlled substance), and the prison sentences imposed (12 years, two years eight months, and three years, respectively).

In addition, the trial court failed to analyze the recency of the convictions and “the relative seriousness or inflammatory nature of the prior conviction[s] as compared with the charged offense.” (*Calderon, supra*, 9 Cal.4th at p. 79.) The trial court should have considered the seriousness of a charge for robbery with use of a firearm and that the crimes were relatively recent, ranging from the 1998 robbery conviction to the 2011 conviction for evading arrest. In addition, Salinas was not released from prison until March 1, 2014, less than a year before the date of the underlying offense.

The People contend that the trial court did not abuse its discretion because Salinas’s motion—made after the jury was impaneled and learned of the alleged prior convictions— was untimely. Indeed, the court in *Calderon* held, “We conclude, therefore, that the denial of a defendant’s *timely* request to bifurcate the determination of the truth of a prior conviction allegation from the determination of the defendant’s guilt is an abuse of discretion where admitting, for purposes of sentence enhancement, evidence of an alleged prior conviction during the trial of the currently charged offense would pose a substantial risk of undue prejudice to the defendant.” (*Calderon, supra*, 9 Cal.4th at pp. 77-78, italics added.)

However, we are not aware of any statute or case law that establishes a specific time frame for when a motion to bifurcate must be made. Although it would be better practice to make a

motion to bifurcate before jury selection begins, we cannot say that Salinas's motion was properly denied based solely on the fact that it was made after the trial court informed the jury of the charged prior convictions. Thus, the denial of the motion without any analysis of prejudice was error.

3. *Any Error in Denying the Motion To Bifurcate Was Harmless*

Even assuming the trial court's denial of the motion to bifurcate was error, any error was harmless because Salinas cannot show that he was prejudiced by the additional information presented to the jury. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837; *Burch, supra*, 148 Cal.App.4th at pp. 868-869 [finding any error in denying the motion to bifurcate was harmless given the lack of prejudice to the defendant and the CALJIC No. 17.18 limiting instruction].)

First, because Salinas delayed making his motion to bifurcate, as in *Burch*, to some degree "the damage was already done," in that the jury had already heard both that Salinas was charged with a prior serious felony and other crimes and, according to Salinas, "You've heard the convictions." (See *Burch, supra*, 148 Cal.App.4th at p. 868.) In addition, the trial court instructed the jury with CALJIC Nos. 17.18 and 17.25, which specifically instructed the jurors that they should not consider evidence of the prior convictions as proof that Salinas committed the charged crime. We presume the jury understood and followed these instructions. (*People v. Jackson* (2016) 1 Cal.5th 269, 352; accord, *Burch, supra*, 148 Cal.App.4th at p. 869.)

Moreover, the evidence was overwhelming that Salinas intentionally drove directly at Pizarro, going the wrong way in

her traffic lane, at a high rate of speed with his headlights off. After hitting her car, he tried to open her car door, but was unable to open it. Pizarro started screaming, and told Salinas to “leave me alone.” He then fled.

While Pizarro at trial denied that Salinas intentionally drove into her car on the wrong side of the road with his headlights off, the jury heard her preliminary hearing testimony that this is what happened and Demooy testified that Pizarro told him this account immediately after the accident. Similarly, Molina testified that Pizarro told her after the accident that she believed Salinas intentionally drove his car head on into hers because she got him arrested for the prior domestic violence incident. We conclude there is no reasonable probability that the evidence of Salinas’s prior convictions affected the jury’s determination as to his guilt of the charged offense. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

B. *Salinas Was Entitled to Full Presentence Conduct Credits*

Salinas contends, and the People agree, that he was entitled to 384 days of presentence conduct credit rather than the 58 days awarded by the trial court. Section 2933.1, subdivision (a), limits presentence conduct credit to 15 percent for persons convicted of violent felonies listed in section 667.5, subdivision (c). (*In re Reeves* (2005) 35 Cal.4th 765, 768; accord, *People v. Hernandez* (2017) 10 Cal.App.5th 192, 201.) The trial court reduced Salinas’s presentence conduct credits from 384 to 58 days, apparently based on the assumption that the 15 percent

limitation applied.⁸ However, assault with a deadly weapon in violation of section 245, subdivision (a)(1), is not one of the listed felonies under section 667.5, subdivision (c). Accordingly, Salinas was entitled to 768 days of presentence conduct credit, including 384 actual days and the full 384 days of conduct credits. (§ 4019, subd. (f).)

C. *The Trial Court Should Correct the Abstract of Judgment To Fix a Clerical Error*

The trial court imposed a one-year enhancement under section 667.5, subdivision (b), for a prior conviction. Due to a clerical error, the abstract of judgment indicates that the one-year enhancement was imposed pursuant to section 337.5, subdivision (b). We order the error corrected. (*People v. Jones* (2012) 54 Cal.4th 1, 89.)

⁸ The trial court did not state the reason for its reduction of the conduct credits from 384 days to 58 days, but we note this is a reduction to 15 percent of the actual days served, and is consistent with the trial court's comment, "Credit 384 at 85?"

DISPOSITION

The judgment of conviction is affirmed, as modified. The trial court is directed to correct the abstract of judgment to reflect a one-year enhancement imposed pursuant to section 667.5, subdivision (b), and to provide a total of 768 days of presentence credits (384 actual days and 384 days of conduct credits), and to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

FEUER, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.