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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. HOVIK MANKYAN, Defendant and Appellant.	B224757 (Los Angeles County Super. Ct. No. BA274167)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald H. Rose, Judge. Affirmed.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Daniel C. Chang and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Hovik Mankyan appeals from a judgment after a jury convicted him of murder and possession of a firearm by a felon. He argues the trial court abused its discretion in denying his request to substitute retained for appointed counsel and in denying defense counsel's request for a continuance. He asserts several instructional errors. We find no abuse of discretion and no instructional error. Defendant contends that the post-verdict amendment of the information to add a second prior strike conviction was unauthorized. We find this issue forfeited, and, in the alternative, find the error harmless.

We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On the evening of October 9, 2004, in a parking lot in North Hollywood, Lydvik Tadevosyan met with Alfred Gazaryan to settle a dispute about credit cards.[1] Each man was accompanied by his own group of friends, among whom were Arsen Aivazian and defendant. When Gazaryan started cursing Tadevosyan, the argument turned physical, and Aivazian, who was a boxer, punched Gazaryan, causing Gazaryan's face to bleed. Aivazian might have hit defendant as well. Eventually the men went their separate ways.

Later that evening Tadevosyan, Gazaryan and their respective friends met near Laurelgrove Park. Gazaryan's face was still bleeding. Tadevosyan and Gazaryan spoke and shook hands. As Tadevosyan and Aivazian started walking away, defendant asked Aivazian if he punched everyone who cursed his mother. Curse words were exchanged, and Aivazian punched defendant. Then, two shots were fired, killing Aivazian. Tadevosyan and his friend Arthur Baronyan saw a gun in defendant's hand. Most of the men, including defendant, left the scene. Tadevosyan called 911, then retrieved his gun from the car in which he had arrived, and hid it in the park.

Police found two guns in the park, but neither could have shot the bullet found at the scene. No useful fingerprints were taken from either gun. Gunshot residue taken

[1] In the record, Tadevosyan and Gazaryan are also referred to as Aper and Alfo. Defendant is referred to as John.

from Tadevosyan's hand was not submitted for testing. Initially, Tadevosyan lied to the detectives telling them that Aivazian had been the victim of a drive-by shooting. Eventually, Baronyan and then Tadevosyan identified defendant as the shooter.

In November 2004, the case against defendant was filed with the District Attorney's office. Defendant's house was placed under surveillance, and his wife was informed that a warrant had been issued for his arrest. Four years later, in March 2008, police surrounded a house where defendant had been seen and directed him to come out. After several hours, defendant exited the house, covered with blood and with razor blade cuts on his arms. He was treated at the scene and taken away by ambulance.

In April 2009, defendant was charged with murder (Pen. Code, § 187, subd. (a))[2] and possession of a firearm by a felon (§ 12021, subd. (a)(1)). Also alleged were firearm use enhancements (§ 12022.53, subds. (b)-(d)), a prior serious felony conviction (§ 667, subd. (a)(1)), and a prior strike felony conviction (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)). In July 2009, retained counsel's motion to be relieved was granted, and the Public Defender's office was appointed to represent defendant. On March 9, 2010, the trial court denied a second retained counsel's substitution motion, as well as appointed counsel's motion to continue. Defendant waived his right to a jury trial on the prior conviction. The jury trial began on March 11, 2010. On March 30, 2010, the jury convicted defendant as charged and found the special allegations regarding firearm use to be true.

A week later, an amended information was filed, alleging a second prior strike conviction. Defense counsel did not object. After a bench trial, the court found the prior conviction allegations to be true. In May 2010, defendant's new trial motion was denied, and he was sentenced to 100 years to life in prison, as follows: 15 years to life, tripled to 45 years to life, on count 1; 25 years to life for the firearm use enhancement under section 12022.53, subdivision (d); 5 years for the prior conviction under section 667, subdivision

[2] All statutory references are to the Penal Code unless otherwise indicated.

(a); and 25 years to life, consecutive, on count 2. Defendant was given credit for 771 days actually served and was assessed various fines and fees.

This timely appeal followed.

DISCUSSION

I

Defendant contends the trial court abused its discretion and violated his right to counsel of his choice when it denied his second retained counsel's substitution motion. We disagree.

A defendant's due process right to effective assistance of counsel includes '"the right to retain counsel of one's own choosing. [Citations.]'" (*People v. Courts* (1985) 37 Cal.3d 784, 789 (*Courts*).) Once retained, counsel must be given a reasonable time to prepare a defense. (*Id*. at p. 790.) But the trial court has discretion to deny a last-minute request for substitution of counsel and a continuance that will disrupt the orderly process of justice. (*Ibid*.) Whether the denial of a continuance is so arbitrary so as to violate due process depends on the circumstances of the case. (*Id*. at p. 791.)

The defendant in *Courts*, who was represented by appointed counsel, contacted an attorney two months before the scheduled trial date and sought a continuance eight days before trial to retain the attorney. He paid the attorney a retainer five days before trial and attempted to calendar a motion for substitution of counsel and a continuance. All his requests for a continuance, including the one made on the day of trial, were denied. (*Courts*, *supra*, 37 Cal.3d at p. 788.) The Supreme Court reversed the ensuing conviction, finding that the defendant had made a good-faith, diligent effort to obtain the substitution of counsel months before the scheduled trial date and had conscientiously informed the trial court of his progress. (*Id*. at p. 791.) Since the defendant in *Courts* had previously requested only one continuance and his request had been denied, his case did not present the problem of a sudden request to change counsel after numerous continuances. (*Id.* at p. 792.) His request for a continuance to retain counsel, made more than a week before the scheduled trial date, and the efforts to calendar a motion for a

continuance after counsel was retained were not untimely as they were made in advance of trial. (*Id*. at pp. 792-793.) The court concluded that the defendant's diligence made the state's interest in an expeditious resolution of the case less compelling, and the record did not indicate that a continuance would have created a significant disruption or inconvenience for the court and the parties. (*Id*. at p. 794.)

Like *Courts*, this case involves a request to substitute retained for appointed counsel in advance of trial.[3] In other respects, it is significantly different.

Defendant was represented by retained counsel Vicken P. Hagopian at the preliminary hearing and arraignment in April 2009. On June 19, 2009, Hagopian disclosed a distant relationship with defendant and informed the court that defendant's family had paid a partial retainer to attorney Mark Geragos, who had some undisclosed conflict. Hagopian agreed to represent defendant until Geragos resolved the conflict, but defendant's family was not able to pay Hagopian's fees and investigative costs. The court noted that if Hagopian had a conflict and no other counsel could be retained, it would appoint the Public Defender's office. The matter was continued to July 16, 2009.

On July 16, 2009, Hagopian declared a conflict of interest, stating he was related to defendant.[4] He was relieved at defendant's request, and the public defender was appointed to represent defendant. The case was then continued numerous times.

On March 9, 2010 (day 6 of 10 for trial), H. Russell Halpern, who had been retained by defendant's family the day before, appeared and moved to be substituted as defendant's counsel, asking for a continuance of one or two months to get ready. He advised the court that defendant's family had tried to retain him for several months but,

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[3] Defendant relies on *People v. Ortiz* (1990) 51 Cal.3d 975, 990 (*Ortiz*), where the court appointed previously discharged retained counsel to represent the defendant on retrial, a situation not present in this case. In relevant part, *Ortiz* cited the same limitations on defendant's right to counsel of choice as those discussed in *Courts*, *supra*, 37 Cal.3d at p. 790. (See *Ortiz*, at p. 983.)

[4] The court later recalled that Hagopian was related to the victim as well, but nothing in the record indicates that he was.

he guessed, had been unable to find the funds to do so. The prosecutor opposed the motion. The trial court ruled that the motion was untimely, noting that the case dated back to 2004, had remained in the preliminary hearing courts for a year after defendant was arrested in 2008,[5] and had been continued for another year after that. Altogether, it had been on the court's calendar 29 times. The court attributed the delays to the fact that defendant's original retained attorney had stayed on for months before declaring a conflict of interest. Appointed counsel was then given additional months to prepare the case for trial. The court noted that the substitution motion was made on day 6 of 10 for trial, when the case was ready to be tried. It found that defendant had sufficient opportunity to retain private counsel and considered the motion a delaying tactic.

Under these circumstances, the court's denial of the requested substitution and continuance was not an abuse of discretion. In *Courts*, the case had been pending for only three months and only one, unsuccessful, request for a continuance had been made when the defendant made his first and only attempt to retain the counsel of his choice. (*Courts*, *supra*, 37 Cal.3d at p. 787.) In contrast, this case had been pending for years, and defendant had already retained two private attorneys, each of whom had some conflict that could not be resolved. Hagopian advised the court that he had told defendant's family right away that he could not work on the case. Yet, he remained counsel of record for months despite the alleged conflict. When Hagopian finally was relieved as counsel, the court was not advised that defendant's family would try to retain another private attorney. Nor was the court informed of any such efforts in the eight intervening months, during which numerous continuances were granted. The substitution motion and request for a 30- to 60-day continuance were made after the case already had been called for trial once on February 24, 2010, when it was continued by stipulation, and several witnesses had been placed on call. The jury trial started promptly, two days after the court denied the substitution of counsel.

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[5] It was suggested that the preliminary hearing was delayed because defendant had been in and out of a coma.

Considering the numerous delays in the case, defendant's prior opportunity to retain private counsel, and his failure to keep the court apprised of the continuing efforts to retain such counsel until the eve of trial, we cannot say that the court unreasonably denied defendant's right to counsel of his choice.

Defendant argues alternatively that the court was required to hold a hearing under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). The weight of authority is that an inquiry into defense counsel's effectiveness under *Marsden* is implicated only when the defendant seeks to substitute one appointed counsel for another. (*Courts*, *supra*, 37 Cal.3d at p. 795, fn. 9 [*Marsden* involved the substitution of one appointed counsel for another]; see also *Ortiz*, *supra*, 51 Cal.3d at p. 986 ["[I]t is ordinarily appropriate to require the defendant who is seeking to substitute one appointed counsel for another to show cause, because he is requesting duplicative representation and repetitive investigation at taxpayer expense"].) Even where *Marsden* was applied to a substitution of retained for appointed counsel, the defendant's desire to substitute a private attorney did not by itself indicate "that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel." (*People v. Molina* (1977) 74 Cal.App.3d 544, 549.) Nothing in the record indicates that the substitution sought in this case was due to any problem with defendant's appointed counsel. *Marsden* does not apply.

II

Defendant argues that in denying appointed counsel's motion for a continuance, the trial court abused its discretion and violated his constitutional rights to confrontation and effective assistance of counsel. The record does not bear this out.

The trial court has discretion to determine whether good cause exists to grant a continuance when such a request is made. "The court must consider '"'not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.'"'

[Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 450.) We review the denial of a continuance for abuse of discretion and prejudice. (*Ibid*.)

On March 9, 2011 (day 6 of 10 for trial), after the court had denied the request to substitute retained counsel, appointed counsel moved for a two-week continuance under section 1050, on five separate grounds. On appeal, defendant limits his argument to the first ground—that counsel needed additional time to investigate two recently disclosed incident reports showing prosecution witness Tadevosyan's propensity for violence. Counsel advised that, on February 12, 2010, the prosecution had sent her documents alleging that Tadevosyan pointed a gun at security guards at a night club, but the officer who wrote the incident report was on medical leave, and her return to duty was unknown. Tadevosyan reportedly had told officers that he had pointed a cell phone in a threatening manner, but counsel did not have a separate report about this statement or the names of the officers who took it. The court denied a continuance because the return date of the officer who wrote the gun use incident report was unknown, and the reported incident with the cell phone was irrelevant as it did not involve a weapon. The court reiterated that the case was very old.

The court did not abuse its discretion in denying the two-week continuance. At the time, there was no assurance that the officer who reported Tadevosyan's threatening use of a gun at a night club would return to duty during that time, and holding up this long-pending case indefinitely would have been unreasonable. As to Tadevosyan's reportedly threatening use of a cell phone, the impeachment value of this evidence was marginal. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 296-297, superseded by statute on other grounds, as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460 ["impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present," and courts should "consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value"].)

Moreover, defendant does not show that he was prejudiced by the denial of the requested continuance. Before Tadevosyan took the stand at trial, his counsel indicated she had a witness ready to testify to an incident where security guards believed Tadevosyan pointed a gun at them through the window of his car, but he told police he had pointed a cell phone at them. The trial court refused to admit this evidence on the ground that it would unduly consume time and confuse the jury. (Evid. Code, § 352.) Defendant does not challenge this ruling even though it, rather than the denied continuance, was what precluded cross-examining Tadevosyan about the incident.

III

Defendant argues that the trial court erred in instructing the jury with a modified version of CALCRIM No. 372 (flight and suicide attempt) and when it refused to instruct the jury with CALCRIM No. 505 (justifiable homicide based on self-defense), CALCRIM No. 570 (voluntary manslaughter based on heat of passion) and CALCRIM No. 571 (voluntary manslaughter based on imperfect self-defense).

A. Modified CALCRIM No. 372

The court expanded CALCRIM No. 372 (flight instruction) to include a parallel attempted suicide instruction: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself. ¶ If the defendant attempted to commit suicide at the time of his arrest, that conduct may show that he was aware of his guilt. If you conclude that the defendant attempted to commit suicide, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant attempted suicide cannot prove guilt by itself." Counsel objected only to the attempted suicide portion of this instruction.

Appellant argues that there was insufficient evidence to justify the instruction.

A defendant's conduct after a crime, be it flight, evasion of arrest, attempted suicide, or escape from custody may be relevant circumstantial evidence showing consciousness of guilt and, by further inference, commission of the crime. (*People v.*

James (1976) 56 Cal.App.3d 876, 889.) "[T]here need only be some evidence in the record that, if believed by the jury, would sufficiently support the suggested inference." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102.)

The evidence here supported giving CALCRIM No. 372. Defendant not only left the scene of the crime, but was missing from "his usual environs" for about four years. (See *People v. Turner* (1990) 50 Cal.3d 668, 694, habeas corpus granted on other grounds in *Turner v. Wong* (E.D.Cal. 2009) 641 F.Supp.2d 1010.) He could not be located at his home or at his relatives' homes. At the time of his arrest in 2008, police found a Mexican voter card and an international driver's license, suggesting he may have lived abroad. A SWAT team surrounded his house for hours before defendant came out. When he did, he was covered with blood from cutting his arms with a razor blade. He had to be treated at the scene and transported by ambulance. The jury could infer from the evidence that defendant fled after Aivazian's murder and attempted to commit suicide to avoid arrest. And it could infer from these actions a consciousness of guilt that could have been related to the murder.

Defendant challenges the instruction as an impermissible "pinpoint" instruction that violated his right to due process by lessening the prosecution's burden of proof. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1137 [disapproving instructions that improperly imply certain conclusions from specified evidence].) In *People v. Jackson* (1996) 13 Cal.4th 1164, 1224, the court rejected such a challenge to several consciousness-of-guilt instructions, including a flight instruction similar to the one given in this case. These instructions made clear that "certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior." (*Ibid.*) Their cautionary nature benefited the defense, "admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*Ibid.*)

Defendant's companion argument that the instruction creates an unconstitutional permissive inference also has been rejected. (See *People v. Mendoza* (2000) 24 Cal.4th

130, 179-180 [approving CALJIC No. 2.52]; *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1158-1159 [approving CALCRIM No. 372].) '"A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. [Citation.]'" (*People v. Mendoza*, at p. 180.) It was not unreasonable to infer a consciousness of guilt from evidence that in the years after the murder defendant was missing and may have lived abroad, and that he cut himself in an attempt to commit suicide at the time of his arrest.

People v. Owens (1994) 27 Cal.App.4th 1155, 1158-1159, upon which defendant relies, is inapposite. The instruction in that case expressly stated the People had introduced evidence "tending to prove" appellant's guilt. The court disapproved of this language because the jury could infer from it that guilt had been established. (*Id*. at p. 1159.) The instruction in this case did not employ that phrase, and it specifically warned the jury that evidence of flight and attempted suicide could not prove guilt by itself.

B. CALCRIM Nos. 505, 570 and 571

Defendant requested that the trial court instruct the jury on justifiable homicide based on self-defense or defense of others and voluntary manslaughter based on imperfect self-defense, sudden quarrel or heat of passion (CALCRIM Nos. 505, 570, and 571). Counsel argued these instructions were justified because guns were brought to both meetings, and Aivazian, who was a boxer, threw the first punch both times. The court refused the instructions because there was no evidence that defendant saw anyone with a gun or reacted to that person, and he was not justified in shooting someone who punched him.

"The trial court must give instructions on every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case. [Citation.] Evidence is 'substantial' only if a reasonable jury could find it persuasive. [Citation.] . . . The trial court need not give instructions based solely on conjecture and speculation." (*People v. Young* (2005) 34 Cal.4th 1149, 1200.)

There was no substantial evidence supporting defendant's theory of self-defense or defense of others. "[B]oth self-defense and defense of others, whether perfect or imperfect, require an actual fear of *imminent* harm." (*People v. Butler* (2009) 46 Cal.4th 847, 868.) In other words, there must be evidence from which the jury could find the defendant actually believed there was imminent danger to life or great bodily injury. (*People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1262.) While there was some evidence that Tadevosyan and Gazaryan may have brought guns to the first or second meeting, it did not indicate that defendant was aware anyone but he was armed at the second meeting. There was no evidence of defendant's state of mind, and no evidence that defendant fired out of actual fear. (Cf. *People v. Oropeza* (2007) 151 Cal.App.4th 73, 82 [only evidence of defendant's state of mind was in testimony about his aggressive and provocative behavior].)

The only testimony regarding defendant's actions was that he sought to provoke Aivazian by asking whether he hit everyone who insulted his mother. Defendant may not "'"provoke a quarrel,"'" then take advantage of it to justify a homicide. (*People v. Holt* (1944) 25 Cal.2d 59, 66.) Nor may defendant seek to reduce the homicide to voluntary manslaughter based on a sudden quarrel for which he is responsible, regardless of whether the victim's response also is unjustified. (See *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1312-1313 [defendant created disturbance, cursed and provoked victim to fight].)

We find no instructional error.

IV

Defendant contends that the trial court was not authorized to allow an amendment of the information to add a second prior strike allegation after the jury was discharged.

The facts are these: In 1991, in case No. GA006402, defendant was convicted on two counts of assault with a firearm (§ 245, subd. (a)(2)). The information in this case originally alleged only one of these counts for purposes of the Three Strikes law. (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)). The court advised defendant that his sentence would be doubled if the prior strike allegation was found true, and defendant waived his

right to a jury trial on the prior. After the jury was discharged, the prosecution moved to file an amended information that alleged the other count in case No. GA006402 as a second prior strike. Defense counsel submitted on the issue without argument and waived reading of the amended information and statement of constitutional rights. The court conducted a bench trial on the two priors, receiving fingerprint testimony and documentary evidence of defendant's 1991 conviction, where both sides submitted without argument. The court found the allegations true and at sentencing tripled defendant's minimum term on count 1 based on the two prior strikes.

Section 969a allows adding prior conviction allegations to an information "[w]henever it shall be discovered that a pending indictment or information does not charge all prior felonies." Section 1025, subdivision (b) gives a defendant a waivable statutory right to be tried on prior conviction allegations by the same jury that decided the issue of guilt. In *People v. Tindall* (2000) 24 Cal.4th 767 (*Tindall*), the Supreme Court reasoned that "in the absence of a defendant's forfeiture or waiver, section 1025, subdivision (b) requires that the same jury that decided the issue of a defendant's guilt 'shall' also determine the truth of alleged prior convictions. Because a jury cannot determine the truth of the prior conviction allegations once it has been discharged [citation], it follows that the information may not be amended to add prior conviction allegations after the jury has been discharged." (*Id*. at p. 782.)

The defendant in *Tindall* who invoked his right to a jury trial on the late-added strike allegations, was allowed to withdraw his waiver as to the originally alleged priors, and all priors were then tried to a new jury. (*Tindall*, *supra*, 24 Cal.4th at pp. 770-771.) The Supreme Court held that the defendant had not waived or forfeited his right to have the same jury try the strike allegations, and permitting the amendment after the jury was discharged was an act in excess of the trial court's jurisdiction. (*Id*. at p. 776.) The court noted, however, that an act in excess of jurisdiction "is valid until set aside, and a party may be precluded from setting it aside, due to waiver, estoppel or the passage of time. [Citation.] Thus, . . . a violation based on section 1025 *will* accommodate the circumstance of a defendant's forfeiture or waiver . . . ." (*Id*. at p. 776, fn. 6.) It also

noted that the defendant had lodged a continuing objection to the amendment procedure. (*Id*. at p. 778; see also *People v. Gutierrez* (2001) 93 Cal.App.4th 15 (*Gutierrez*) [noting that although defendant did not object to discharging jury, defendant did object to prosecutor's post-discharge motion to amend information to add previously uncharged prior conviction].)

Defendant relies on *Tindall* in arguing that he never waived his right to a jury trial on the second strike prior conviction. *Tindall* is distinguishable because defendant did not object to the post-discharge amendment, did not invoke his right to a jury trial, and did not seek to withdraw his original waiver. In fact, his counsel submitted on the amendment and waived reading of his rights. The failure to raise the section 1025 violation below resulted in a forfeiture. Additionally, because counsel could waive defendant's statutory right to a jury trial on prior conviction allegations (*People v. Thomas* (2001) 91 Cal.App.4th 212, 215), her waiver may be imputed to defendant.[6]

Defendant contends that he can raise the violation of section 1025 for the first time on appeal because his sentence is unauthorized. It is true that "claims involving . . . sentences entered in 'excess of jurisdiction,' can be raised at any time." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) But the issue here is not whether the court committed a sentencing error, and *Tindall* makes clear that a violation of section 1025 may be forfeited. (*Tindall, supra*, 24 Cal.4th at pp. 776, fn. 6; 778.)

The People argue that any error was harmless under *People v. Epps* (2001) 25 Cal.4th 19 (*Epps*). In *Epps*, the trial court discharged the jury over defendant's objection, held a bench trial on the priors, and found the allegations true. (*Id*. at p. 22.) The Supreme Court held that the right to a jury trial on the prior conviction allegations "is purely a creature of state statutory law," and that denial of this right is subject to

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[6] Defendant does not argue that counsel rendered ineffective assistance, and on the record before us we cannot determine whether counsel's submission and waiver resulted from a prior discussion with defendant and thus expressed defendant's wishes, or whether counsel acted on her own. But counsel's reaction indicates that the proposed amendment did not come as a surprise.

harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*Id*. at p. 29.)

Defendant argues that *Epps* is not on point because the court in that case was not confronted with a late amendment of the charges against the defendant and did not consider whether the erroneous denial of a jury trial on the prior allegations was in excess of the court's jurisdiction. That is true, and there is indeed some tension between *Epps* and *Tindall*.[7] The *Tindall* court did not consider whether harmless error analysis applies to a violation of section 1025. Rather, the court deemed the violation of the "procedural requirement" in section 1025 to be an act in excess of jurisdiction and assumed that the prejudice to the defendant was manifest. (*Tindall*, *supra*, 24 Cal.4th at pp. 776, 783.) Yet, since both *Epps* and *Tindall* dealt with the trial court's violation of section 1025, the holding of *Epps* appears to apply with equal force in the context of a late amendment that deprives a defendant of a right codified in that section. In another context, the Supreme Court has held that an act in excess of the trial court's jurisdiction may be subject to harmless error analysis under *Watson*. (See *People v. Williams* (2006) 40 Cal.4th 287, 301 [court's revocation of appointment of cocounsel in capital murder case was harmless error].)

Under facts almost identical to the ones in this case, the court in *Epps* found that defendant would not have obtained a more favorable result had a jury, instead of the court, determined the truth of his alleged priors: "[T]he only factual question for the jury was whether the prior convictions occurred, and defendant did not question this fact at his prior convictions trial. The only witness at the trial was a fingerprint expert, and defense counsel's cross-examination and closing argument focused exclusively on the issue of identity, not questioning the fact that *someone* was convicted. Moreover, the prior conviction records were official government documents clearly describing the alleged convictions. As such, the fact of the convictions was presumptively established. (Evid.

[7] Both *Epps* and *Tindall* were split decisions, and the majority opinion in *Epps* was authored by Justice Brown, who had dissented in *Tindall*.

Code, § 664.) Under those circumstances, the trial court's error could not possibly have affected the result." (*Epps*, *supra*, 25 Cal.4th. at pp. 29-30.)

The same analysis applies here. During the short bench trial on the two counts of the prior conviction, the defense did not challenge the evidence in any way, and the court found the priors to be true. Nothing in the record leads us to believe that the jury which determined defendant's guilt would have reached a different result.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.