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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE DE JESUS CARDENAS,

Defendant and Appellant.

2d Crim. No. B284400
(Super. Ct. No. 2016043853)
(Ventura County)

Jose De Jesus Cardenas appeals his conviction by jury for criminal threats (count 2; Pen. Code, § 422)[1], possession of a firearm by a felon (count 3; § 29800, subd. (a)(1)), and assault with a deadly weapon (count 4; ADW, § 245, subd. (a)(1)) with a firearm use enhancement (§ 12022.5, subd. (a)(1)). The trial court sentenced appellant to 14 years 8 months state prison. We affirm.

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

Facts

During the early morning hours on December 13, 2016, Arturo Gama parked his 18-wheel semitruck at a parking lot on Arcturus Street in Oxnard. Gama left the truck motor running, put his personal belongings in a backpack, and walked over to his Chevrolet Suburban. Gama hauled bananas from Port Hueneme to Vancouver once a week and customarily parked the semi truck at the parking lot between jobs.

As Gama loaded up the Suburban to go home, he saw what appeared to be a black PT Cruiser in front of a storage facility. The area was usually vacant at that time of night. The PT Cruiser drove past Gama, stopped, and slowly backed up. Gama parked his Suburban next to the semitruck.

Appellant and a second man (Michael R.) got out of the PT Cruiser, walked towards Gama, and said "'get the fuck out of here.'" Gama responded, "Excuse me?" Appellant said, "'get the fuck out of here. I'm taking your shit.'" Gama was not looking for trouble and asked, "'[w]hat is it that you want?'"

Appellant responded, "'oh, so you want to get blasted?'" and said to Michael R. "'oh somebody's really getting blasted tonight, . . . show him what we got.'" Gama understood the term "get blasted" to mean getting shot. Michael R. pulled up his sweater and displayed a large metallic object. Appellant pointed a revolver at Gama and ran towards him.

Fearing for his life, Gama sped off in the Suburban, stopped, and looked back. Appellant had the semitruck door open and released the truck air breaks. When appellant saw Gama, he screamed at him, and ran back to the black PT Cruiser and gave chase. During the car chase, Gama called 911 and said the assailants were heavily armed.

Oxnard Police Officer Paul Knapp responded to the 911 call and found the semitruck running. Gama's backpack was inside the truck cab and appeared to have been moved.

Officer Angelica Duran stopped appellant's vehicle, a black 2010 Chevrolet HHR which resembled a PT Cruiser, and detained appellant. A woman was in the front passenger seat and Michael R. was in the rear passenger seat. A second officer found a loaded .357 Magnum revolver and a box of ammunition under the front passenger seat, and a gun holster and a round of ammo in the hatchback area. Gama identified appellant and Michael R. in a field show up and identified the Chevrolet HHR.

Stipulation That Appellant Was a Convicted Felon

On count 3 for felon in possession of a firearm, appellant conceded that he suffered a felony conviction in 2016 for felon in possession of ammunition. Because appellant's ex-felon status was an element of count 3, appellant faced the dilemma of being impeached on the prior conviction if he testified. The trial court told defense counsel "you may wish to make a tactical decision there in terms of sanitizing it . . . if you wish to stipulate that [appellant] suffered a felony conviction on that date, then there's no need for the jury to hear it having to do with a charge of being a felon in possession of ammunition." Defense counsel responded, "Yes. That would be fine."

The trial court directed the prosecution to prepare a written stipulation, which was signed by appellant and his trial attorney. The signed stipulation was marked as Court's Exhibit 1, received into evidence, and incorporated into a CALCRIM No. 2511 instruction. This permitted appellant to testify without being cross-examined about the details of the prior felony conviction. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 178

[trial court may sanitize a witness's prior conviction by allowing the prosecution to refer to it only in a general manner].) When a defendant stipulates to his ex-felon status, "evidence of the *nature* of his prior conviction[] . . . may and should be withheld from the jury, since such evidence is irrelevant to the ex-felon issue." (*People v. Valentine* (1986) 42 Cal.3d 170, 173.) Appellant told the jury that he did not threaten Gama, point a firearm at him, or know that a firearm was in appellant's car.

Appellant claims that the stipulation has zero evidentiary value because it was not published in open court (Cal. Const. art. I, § 28, subd. (f)(4)) or disclosed to the jury before the prosecution rested its case. Article I, section 28, subdivision (f)(4) of the California Constitution (commonly known as Proposition 8) provides that "[w]hen a prior felony conviction is an element of [a] felony offense, it [must] be proven to the trier of fact in open court." Appellant contends that the conviction on count 3 must be reversed based on insufficiency of the evidence, which results in an acquittal on double jeopardy grounds. (See *People v. Rodriguez* (2018) 4 Cal.5th 1123, 1129)

Article I, section 28, subdivision (f) was enacted in response to *People v. Hall* (1980) 28 Cal.3d 143, which held that if a prior conviction is an element of the charged offense and the defendant stipulates to the conviction, it is error to inform the jury that the defendant has a prior felony conviction. (*Id.* at pp. 153-154.) In *People v. Valentine*, *supra*, 42 Cal.3d 170, our Supreme Court held that article I, section 28, subdivision (f) "eliminates the per se rule of *Hall*" and requires that the jury be "advised that defendant is an ex-felon where that is an element of a current charge." (*Id.* at p. 173.) "*Valentine* allows one of two alternatives when a defendant's prior felony conviction is an

element of a charged crime: (1) The prosecution can prove the conviction in open court, and that proof can include both the fact that the defendant has previously been convicted of a felony offense as well as the nature of the felony involved; or (2) the defendant can stipulate to having a felony conviction and thereby keep from the jury the nature of the particular felony." (*People v. Sapp* (2003) 31 Cal.4th 240, 261.)

Appellant took option 2. The stipulation was signed by counsel and appellant, and entered into evidence as a court exhibit but not shown or read to the jury.[2] The stipulation was incorporated into and made a part of the CALCRIM No. 2511 instruction[3] so the jury would not learn the substance or nature of the prior conviction. We hold that the stipulation was

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[2] The stipulation stated: "The parties and the defendant in the above case hereby stipulate as follows: [¶] 1. On February 5, 2016, the defendant, Jose De Jesus Cardenas (DOB: 10/28/1983), was convicted of a felony violation of Penal Code section 30305, subdivision (a)(1), in Ventura County Superior Court case number 2015024155."

[3] The CALCRIM No. 2511 instruction stated in pertinent part: "The defendant is charged in Count 3 with unlawfully possessing a firearm. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant possessed a firearm; [¶] 2. The defendant knew that he possessed the firearm; [¶] AND [¶] 3. The defendant had previously been convicted of a felony. [¶] . . . [¶] The defendant and the People have stipulated, or agreed, that the defendant was previously convicted on a felony. *This stipulation means that you must accept this fact as proved.* [¶] Do not consider this fact for any other purpose. Do not speculate about or discuss the nature of the conviction." (Italics added.)

tantamount to a plea on the count 3 element of appellant's ex-felon status. (See, e.g., *People v. Nitschmann* (2010) 182 Cal.App.4th 705, 709; *People v. Borland* (1996) 50 Cal.App.4th 124, 128.)

Appellant is estopped from arguing that the procedure violated Article I, section 28, subdivision (f)(4) of the California Constitution or that the prior felony conviction was not proven to the trier of fact. In *People v. Voit* (2011) 200 Cal.App.4th 1353, the defendant pled no contest to various offenses and, on appeal, claimed there was no factual basis for the plea even though it was stipulated that the preliminary hearing transcript contained a factual basis for the plea. The court in *Voit* held that defendant was estopped from "creat[ing] an appellate issue by disputing what he previously conceded." (*Id.* at p. 1359.)

The same principle applies here. "[A]n appellate court should not engage in a substantive review of whether there is an evidentiary or factual basis for a defendant's no contest plea simply because the defendant contradicts on appeal what he admitted in the trial court." (*People v. Voit*, *supra*, 200 Cal.App.4th at p. 1370.) Article I, section 28, subdivision (f) of the California Constitution "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.) It does not require that the prior conviction be proven before the prosecution rests its case or preclude a defendant from entering into a stipulation to "keep

from the jury the nature of the particular felony." (*People v. Sapp*, *supra*, 31 Cal.4th at p. 261.)[4]

Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position on appeal. (*People v. Castillo* (2010) 49 Cal.4th 145, 155.) A defendant is bound by his "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.) Here the stipulation was evidence because it was the agreed upon means to prove appellant's ex-felon status. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1140.) This is consistent with the principle that a defendant may waive fundamental protections afforded by

[4] Appellant, in his reply brief, argues that he is not estopped from arguing that the stipulation has no evidentiary effect. It was agreed the stipulation would say that appellant had been convicted of a felony in 2016 without specifying the basis for the felony. The prosecution, however, drafted a "non-sanitized" stipulation that the prior conviction was for violation of section 30305 and then tried to "save" the stipulation by asking the trial court not to provide the jury a copy of the stipulation. That may be true, but appellant, for tactical reasons, signed the stipulation as written. "He who takes the benefit must bear the burden." (Civ. Code, § 3521.) Appellant is barred from arguing, for the first time on appeal, that the stipulation lacks evidentiary value or violates *People v. Valentine*, *supra*, 42 Cal.3d 170. Appellant cannot "sit back and acquiesce in the procedure used, await a jury verdict, and then assert error." (*People v. Rhoades* (2001) 93 Cal.App.4th 1122, 1126.) There is no merit to the argument that the doctrines of judicial estoppel and invited error violates the presumption of innocence or lessens the prosecution's burden of proof.

the Constitution, including the right to jury trial on an element of a charged offense. (*United States v. Mezzanatto* (1995) 513 U.S. 196, 201.) To hold otherwise would be to declare "'open season'" on jury verdicts not to a defendant's liking. (See *People v. Andrade* (2000) 79 Cal.App.4th 651, 661.)

Amended Information to Add ADW Count

During the defense case-in-chief, the prosecution asked for leave to amend the information to add the ADW count and firearm enhancement. (§ 12022.5, subd. (a)(1).) Appellant objected and moved for mistrial to investigate further and develop "a different approach to the case." The trial court deferred ruling and granted leave to amend after appellant testified. It did not err. It is settled that an information may be amended at any stage of the proceedings provided the amendment is supported by evidence at the preliminary hearing and does not prejudice the defendant. (§ 1009; *People v. Birks* (1998) 19 Cal.4th 108, 129.) The defendant's due process rights are not prejudiced by amendment of the information, so long as defendant's substantial rights are not prejudiced. (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 554.)

Appellant argues that he was prejudiced because, had he known of the ADW charge before trial, he would have investigated Gama's background for violence and presented evidence that Gama started the altercation. Appellant, however, testified that Gama made no threatening comments, statements, or gestures. Testimony about Gama's reputation or character for violence would have been irrelevant. The preliminary hearing evidence showed that appellant assaulted Gama with a revolver and said "'We're gonna blast you and we're gonna take your shit.'"

Under section 1009, the prosecution can move to amend the information after a preliminary hearing to allege any charge or enhancement shown by evidence provided at the preliminary hearing, providing the new crime is transactionally related to the crimes that defendant was held to answer. (*People v. Superior Court* (*Mendella*) (1983) 33 Cal.3d 754, 764 [amendment to information to add another offense shown by evidence at the preliminary hearing did not violate a defendant's constitutional rights]. "If there is no prejudice, an amendment may be granted 'up to and including the close of trial.' [Citations.]" (*People v. Goolsby* (2015) 62 Cal.4th 360, 368.)

The prosecution presented strong evidence at the preliminary hearing and at trial that appellant threatened and assaulted Gama with a handgun. It was transactionally related to an attempted robbery count (count 1, on which appellant was acquitted) and the criminal threats count (count 2, on which appellant was convicted). We reject the argument that amendment of the information to add an ADW count and firearm enhancement violated appellant's due process rights. "'[A] preliminary hearing transcript affording notice of the time, place and circumstances of charged offenses "'is the touchstone of due process notice to a defendant.'" [Citation.]" (*People v. Graff* (2009) 170 Cal.App.4th 345, 367.)

911 Call Referring to Gang Members

Appellant contends that the trial court abused its discretion in not redacting a brief portion of the 911 call in which Gama said he was being chased by a car with four gang members in it. The trial court ruled that the statement was relevant to show the victim's state of mind and that it would give a limiting instruction. Over appellant's objection, the prosecution played

the entire 911 recording in which Gama told the operator "they're driving in back of me and they're just heavily dressed. It, it's, uh, it's like four, four gang members."

After the 911 recording was played to the jury, the trial court instructed: "There is a reference in here by the witness on this telephone conversation identifying the occupants of the vehicle following him as gang members. That's admitted as evidence of the speaker's state of mind but is not admitted as to the truth of that statement as to whether those occupants were or were not affiliated with any gang . . . . I'll give you further instructions about it at the end of the case . . . . Its only pertinence to this action is [that] it discloses the victim's state of mind and what he believed at the time." The jury was later instructed that "certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." (CALCRIM No. 303.)

The trial court reasonably concluded that the 911 statement was relevant to establish Gama's state of mind (Evid. Code, § 1250) and that its probative value substantially outweighed the potential for prejudice (Evid. Code § 352). The 911 statement was admissible to show that appellant feared for his safety, an element of the criminal threats charge, and the fear was "more than momentary, fleeting, or transitory." (CALCRIM No. 1300.) Appellant pointed a revolver at Gama, threatened to "blast" Gama and "take his shit," and chased Gama through Oxnard. Appellant ran for his life and told the 911 operator that "I'm doing 80 miles an hour" and "they're behind me and they're, they're heavily armed."

The 911 transcript was nine pages long. Gama's statement that he was being chased by four "heavily dressed . . .

like four, four gang members" was brief and inconsequential. Appellant argues that Gama had law enforcement training and the jury may have viewed the 911 statement "as one made by someone with some expertise that would permit him some insight into knowing whether a person is a gang member of not." Gama testified that he attended a basic six-month law enforcement course before becoming a commercial trucker, but there was no evidence that the course included specialized training in gangs.

The jurors received two limiting instructions that the 911 call was not admitted for the truth of the matter stated. On review, it is presumed that the jury understood and followed the instructions. (*People v. Williams* (1995) 40 Cal.App.4th 446, 456.) The alleged error, if any in admitting the 911 statement that the assailants in the car looked like gang members was harmless. (*People v. Price* (1991) 1 Cal.4th 324, 433 [erroneous admission of irrelevant gang evidence harmless under *People v. Watson* (1956) 46 Cal.2d 818 standard].) The evidence was compelling. Gama testified that appellant pointed a handgun at him and threatened to blast him and take his semitruck. Gama identified appellant as the gunman, identified appellant's car, and the loaded revolver was found in appellant's vehicle matched Gama's description of the handgun. There is no reasonable likelihood that appellant would have received a more favorable verdict had the 911 reference to "four gang members" been excluded.

Jury Question About Following the Law

Appellant next contends that the trial court erred in responding to a jury hypothetical about not following the law. During jury deliberations, the jury asked, "Can a juror vote not guilty if they [sic] don't agree with the law used or thinks the law is too harsh[?] For example, assault with a deadly weapon . . .

also states you don't actually have to prove intention[.]" The trial court directed the jury to CALCRIM No. 200 and instructed "'You must follow the law as I explain it to you even if you disagree with it.'" Appellant's trial attorney did not object. Having waived the alleged error, appellant is precluded from arguing, for the first time on appeal, that a different response was required. (*People v. Bohana* (2000) 84 Cal.App.4th 360, 373.)

On the merits, the trial court's response was proper and directed the jury to apply the jury instructions already given. CALCRIM No. 200, on which the jury was instructed, stated "[y]ou must follow the law as I explain it to you, even if you disagree with it." Appellant argues that his trial attorney rendered ineffective assistance of counsel by not objecting. The Sixth Amendment does not require trial counsel to make futile or frivolous objections. (*People v. Memro* (1995) 11 Cal.4th 786, 834.)

Appellant contends that the jury misunderstood the elements of ADW when it asked, "For example, assault with a deadly weapon . . . states you don't actually have to prove intention[.]" Appellant claims the jury believed ADW was a strict liability crime. The jury, however, was instructed that the prosecution had to prove that appellant acted willfully in order to convict for ADW. (CALCRIM No. 875.) The instruction stated: "Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage." The jury question about not having to prove "intention" was most likely in reference to CALCRIM No. 875 which is a correct statement of the law. (*People v. Flores* (2007) 157 Cal.App.4th 216, 220.) Assault requires only that the perpetrator act

"willfully," i.e., with "a purpose or willingness to commit the act" without "any intent to . . . injure another" or "intent to violate law." (§ 7, subd. (1).) A defendant need not intend to commit violence against a specific victim to be guilty of an assault. (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1736.)

The jury was also instructed that ADW is a general intent crime and there must be a union of act and intent: "For you to find a person guilty of this crime . . . , that person must not only commit the prohibited act, but must do so with wrongful intent." (CALCRIM No. 252.) The jury was provided a copy of the jury instructions which, read as a whole, stated that the prosecution had to prove that appellant acted willfully and with general intent. (*People v. Rocha* (1971) 3 Cal.3d 893, 898-899 [ADW is a general intent crime].) It is presumed that the jury followed the instructions given. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 83.) There is no merit to the argument that the trial court's response to the jury question violated appellant's right to jury trial or required a clarifying instruction. A criminal defendant has no due process right to a supplemental instruction that is cumulative, repetitious, or argumentative. (*People v. Noguera* (1992) 4 Cal.4th 599, 648.)

Appellant finally argues that the cumulative effect of the alleged errors denied him a fair trial. "We have identified no errors. In the absence of error, there is nothing to cumulate." (*People v. Duff* (2014) 58 Cal.4th 527, 562.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

David R. Worley, Judge

Superior Court County of Ventura

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