

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Shasta)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
DWAYNE BRIAN BURNS,  
  
Defendant and Appellant.

C063603

(Super. Ct. No.  
07F3931)

ORDER MODIFYING  
OPINION AND DENYING  
REHEARING  
[NO CHANGE IN  
JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on August 22, 2011, be modified as follows:

Insert the following as a footnote at the end of the first and only full paragraph on page 19:

In a petition for rehearing, the Attorney General scolds this court for questioning the continued vitality of *Ford* and lectures us that we are bound by *Ford* because it has not been, in the Attorney General's words, "clearly superseded." (See

*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) This diatribe fails to recognize that we distinguish *Ford*; we do not refuse to follow it. Furthermore, we may be bound, but we are not gagged. (*People v. Hart* (1999) 74 Cal.App.4th 479, 487.)

Insert the following as a footnote at the end of the sixth line on page 20:

The Attorney General worries in the petition for rehearing that our conclusion concerning collateral estoppel will interfere in other situations when a defendant has been convicted but must be retried on associated enhancement allegations -- for example, when the jury convicted on the substantive offense but deadlocked on an enhancement allegation.

The Attorney General "imagine[s] the situation where a defendant is charged with robbery and personal use of a firearm. He defends himself at trial by presenting an alibi defense and arguing that the gun used in the robbery was a toy. The jury convicts him of robbery and deadlocks on the gun use enhancement. Under the Court's reasoning, not only would the prosecution have to reprove the robbery on the retrial of the enhancement, but the defendant would be able to defend himself on the enhancement by again arguing that he was not the robber."

To the contrary, the California Supreme Court, in the indistinguishable analog of death penalty prosecutions, has held that "'a trial court may receive a guilty verdict from a jury

that is unable to agree on a penalty provision, declare a mistrial on the penalty provision alone, and empanel another jury to consider the issue of penalty. [Citations.]' [Citation.]" (*People v. Anderson* (2009) 47 Cal.4th 92, 119-120.) Nothing in our decision prevents the trial court from retrying an enhancement provision and instructing the jury that the defendant has already been convicted of the substantive offense.

The Attorney General misconstrues our decision. We do not hold that a jury can never be apprised of an earlier conviction that has not become final. That question is well beyond the scope of the issues raised and argued by the parties in their briefing. We hold only that, under the circumstances of this case, collateral estoppel did not justify instructing the jury that defendant, at some point, was a trespasser.

This modification does not change the judgment.

The Attorney General's petition for rehearing is denied.

THE COURT:

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RAYE, P. J.

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NICHOLSON, J.

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HULL, J.