

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
---

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

SILVIO HERNANDEZ,

Defendant and Appellant.

B275530

(Los Angeles County  
Super. Ct. No. KA110871)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho Jr., Judge. Affirmed in part, reversed in part, and remanded.

Meredith J. Watts and William L. Heyman, 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, Senior Assistant Attorney General, Steven D. Matthews,

Supervising Deputy Attorney General, Robert C. Schneider,  
Deputy Attorney General, for Plaintiff and Respondent.

---

Defendant and appellant Silvio Hernandez was convicted of second degree burglary of an automobile (Pen. Code, § 459)<sup>1</sup> and possession of burglary tools (§ 466). Following a bench trial, the court found true allegations that defendant had suffered a prior conviction under the three strikes law (§§ 1170.12, subs. (a)–(d); 667, subds. (b)–(i)) and defendant had served four prior prison terms (§ 667.5, subd. (b)).<sup>2</sup> Defendant was sentenced to eight years in state prison, consisting of the upper term of three years on the burglary charge, doubled due to the strike prior conviction, enhanced by one year each for two prior prison terms, and a concurrent six month sentence on the section 466 conviction.

Defendant contends the trial court erred by refusing to strike the prior conviction alleged under the three strikes law “because it was constitutionally invalid.” In reality, defendant makes no appellate argument on the constitutional validity of the strike prior conviction, but instead he contends the evidence is insufficient to support

---

<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The trial court dismissed two of the prior prison term findings at sentencing.

the finding under binding California Supreme Court authority.

Based on binding California Supreme Court authority, we agree the record does not contain substantial evidence to support the finding that the strike prior conviction allegation was true. We therefore reverse the finding that the prior strike conviction was true and remand for further proceedings on the allegation.<sup>3</sup> We also direct the trial court to correct the abstract of judgment to reflect that defendant's trial was by jury rather than by plea, as reflected in the current abstract of judgment. In all other respects we affirm.

## DISCUSSION

We review the sufficiency of the evidence to support a prior conviction allegation under the substantial evidence rule. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067.) “On an appellate challenge to a finding that a prior conviction was a strike, where . . . it cannot be determined from the

---

<sup>3</sup> Defendant, who represented himself at the hearing on the recidivism allegations, also argues that the trial court misled him into believing the case was only calendared for submission of his motion for new trial, and he was not prepared to proceed on the court trial on the prior conviction allegations. We need not consider this contention, as we reverse the prior strike conviction, and defendant makes no argument regarding the validity of the prior prison term allegations.

record that the offense was committed in a way that would make it a strike, a reviewing court must presume the offense was not a strike.” (*People v. Watts* (2005) 131 Cal.App.4th 589, 596 (*Watts*), italics omitted.)

By pleading no contest to a charged offense, a defendant generally admits to every element of the offense and any sentence enhancements. (*Watts, supra*, 131 Cal.App.4th at pp. 594–595; *People v. Westbrook* (1996) 43 Cal.App.4th 220, 223–224.) A violation of former section 12031, subdivision (a)(1), carrying a loaded firearm in public, is a misdemeanor. The violation is elevated to a felony if a defendant qualifies as “an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22 . . . .” (Former § 12031, subd. (a)(2)(C).)

The issue in dispute on appeal involves defendant’s 2002 plea of no contest to carrying a loaded firearm, in violation of former section 12031, subdivision (a)(1),<sup>4</sup> a misdemeanor offense that was elevated to a felony in defendant’s prior case due to defendant’s admission to a gang allegation under section 186.22, *subdivision (b)(1)*. Our Supreme Court has interpreted former section 12031 to require that a defendant meet all of the elements of section 186.22, *subdivision (a)* before the offense may be elevated to a felony. (*People v. Robles* (2000) 23 Cal.4th 1106 (*Robles*).) Defendant contends that because the record does not

---

<sup>4</sup> Former section 12031, subdivision (a)(1) is now section 25850. (Added by Stats. 2010, ch. 711, § 6, eff. Jan. 1, 2011, operative Jan. 1, 2012.)

demonstrate that his admission to the allegation under section 186.22, subdivision (b), established all of the elements of section 186.22, subdivision (a), the proof of the strike allegation is not supported by substantial evidence.<sup>5</sup>

In *Robles*, the Supreme Court held that former section 12031, subdivision (a)(2)(C)'s condition that a defendant be an “active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22” requires proof of all three elements of the substantive offense of active participation in a criminal street gang under section 186.22, subdivision (a). (*Robles, supra*, 23 Cal.4th at pp. 1111, 1115.) These three elements include: (1) actively participating in any criminal street gang; (2) with knowledge that its members engage in or have engaged in a pattern of criminal gang activity; and (3) willfully promoting, furthering, or assisting in any felonious criminal conduct by members of that gang. (*Id.* at p. 1115.) Subsequent to

---

<sup>5</sup> While this appeal was pending, defendant filed a petition for writ of habeas corpus, which contended, inter alia, that defendant's prior conviction under former section 12031 did not qualify as a strike. We denied the petition on the ground that a defendant represented by counsel on appeal “may not file *pro se* petitions on matters that fall within counsel's scope of representation. (See *In re Barnett* (2003) 31 Cal.4th 466, 477.)

Defendant's habeas corpus petition was supported by a reporter's transcript of his January 9, 2002 plea to the violation of former section 12031. We take judicial notice of the transcript for purposes of this appeal. (Evid. Code, §§ 452, subd. (d)(1), 459.)

*Robles*, the Supreme Court has held that to elevate misdemeanor weapons offenses to felonies based on gang status, the prosecution must prove the defendant participated in felonious gang conduct that is distinct from weapons offenses (*People v. Lamas* (2007) 42 Cal.4th 516, 524 (*Lamas*)), and that conviction for active participation in a criminal street gang requires that a person commit an underlying felony with at least one other gang member (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1134 (*Rodriguez*)).

Here, defendant did not admit to an enhancement under section 186.22, subdivision (a). Defendant admitted to a different enhancement under section 186.22, subdivision (b)(1), which applies to “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” “Section 186.22(a) and section 186.22(b)(1) strike at different things. The enhancement under section 186.22(b)(1) punishes gang-related conduct, i.e., felonies committed with the specific intent to benefit, further, or promote the gang. [Citation.] However, ‘[n]ot every crime committed by gang members is related to a gang.’ [Citation.] As such, with section 186.22(a), the Legislature sought to punish gang members who acted *in concert* with other gang members in committing a felony regardless of whether such felony was gang related.” (*Rodriguez, supra*, 55 Cal.4th at p. 1138; see *Lamas, supra*,

42 Cal.4th at p. 524 [“to prove the elements of the substantive offense defined in section 186.22(a), the prosecution must prove that defendant . . . ‘willfully promot[ed], further[ed], or assist[ed] in . . . *felonious* criminal conduct by members of that gang’ [citation] that is *distinct from his otherwise misdemeanor conduct of carrying a loaded weapon in public*”].)

The evidence supporting the strike prior conviction consists of defendant’s section 969b prison packet establishing the crime charged (§ 12031, subd. (a)(1)) and enhancement admitted (§ 186.22, subd. (b)(1)), and the judicially noticed January 9, 2002 transcript of defendant’s plea and admission. The plea colloquy reveals that defendant pled guilty to the charge under former section 12031, subdivision (a)(1), which the prosecutor described as “being in possession of a loaded firearm and also being a member of a street gang.” Defendant admitted as true “the special allegation under 186.22 (b)(1), which is the gang allegation . . . .”

Without consideration of the judicially noticed reporter’s transcript of defendant’s 2002 plea and admission, there is insufficient information to determine whether defendant admitted all three elements of section 186.22, subdivision (a), at the time he entered the plea. We cannot “determine from the record before us whether the prior conviction in question qualifies as a strike. Under these circumstances, we must presume the least adjudicated elements, i.e., we must presume [defendant] was convicted of

an offense which did not include all the elements of section 186.22(a). Accordingly, we hold that the record [without the judicially noticed reporter's transcript] does not support the conclusion that" defendant's 2002 conviction was a strike. (*Watts, supra*, 131 Cal.App.4th at p. 597.)

With consideration of the judicially noticed reporter's transcript of defendant's 2002 plea and admission, it is readily apparent that there is insufficient evidence of the elements required by California Supreme Court authority to elevate a misdemeanor violation of former section 12031, subdivision (a)(1), to a felony based on participation in a criminal street gang as defined in section 186.22, subdivision (a). Defendant admitted being a member of a street gang, but did not admit actively participating in a criminal street gang, knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity, and willfully promoting, furthering, or assisting in any felonious criminal conduct by members of that gang, as required by *Robles, supra*, 23 Cal.4th at page 1115. Nor did defendant admit that he participated in felonious gang conduct that is distinct from weapons offenses, as required by *Lamas, supra*, 42 Cal.4th at page 524, or that he committed an underlying felony with at least one other gang member, as required by *Rodriguez, supra*, 55 Cal.4th at page 1134.

The Supreme Court has held that retrial of a prior conviction allegation, in a noncapital case, is not barred by the Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment.



(*Monge v. California* (1998) 524 U.S. 721, 731–732.) On this record, we are skeptical that the prosecution can present evidence to support the truth of the elements of a violation of former section 12031, and we do not decide here whether the law permits such proof in this context. Nevertheless, in light of *Monge*, we reverse and remand to afford the prosecution the opportunity to relitigate the nature of the prior conviction if additional admissible evidence is available.

## **DISPOSITION**

The finding that defendant suffered a prior conviction under the three strikes law is reversed, and the cause is remanded to the trial court. Within 30 calendar days after remittitur issuance, the prosecution may file a motion to set a retrial on the issue of whether defendant's 2002 section 12031, subdivision (a) conviction constitutes a strike. If the prosecution does not seek retrial on the allegation, the trial court shall proceed to resentence defendant without regard to the alleged strike conviction. The abstract of judgment shall reflect that defendant's convictions were by jury.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

RAPHAEL, J.\*

---

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