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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JERMOND C. DAVIS,

Defendant and Appellant.

B276666

(Los Angeles County  
Super. Ct. No. BA429334)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig J. Mitchell, Judge. Affirmed.

James M. Crawford, 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, Kim Aarons and Amanda V. Lopez Deputy Attorneys General, for Plaintiff and Respondent.

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The trial court imposed a five-year sentencing enhancement on Jermond C. Davis (defendant) because his prior robbery conviction constituted a “serious felony” conviction under Penal Code section 667, subdivision (a)(1).<sup>1</sup> Defendant argues that this was error because he only admitted that his robbery conviction was a “strike” within the meaning of our Three Strikes law (§§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d)), and because the trial court never told him that, in so admitting, he was also admitting that his prior robbery conviction was a prior “serious felony” that could subject him to the additional five-year term. We conclude that defendant forfeited this objection by not objecting when the trial court later imposed the five-year enhancement, that his admission was still “knowing and voluntary,” and that he was not in any event prejudiced by the trial court’s omission. Accordingly, we affirm.

## **FACTS AND PROCEDURAL BACKGROUND**

### **I. Facts**

In late August 2014, defendant fired at least two shots at Henry Dorsey (Dorsey) as Dorsey was driving, and the bullets struck Dorsey in the abdomen and the buttocks.

### **II. Procedural Background**

The People charged defendant with: (1) attempted willful, deliberate, and premeditated murder (§§ 187, subd. (a) & 664); (2) shooting at an occupied vehicle (§ 246); (3) discharging a firearm with gross negligence (§ 246.3, subd. (a)); (4) being a felon in possession of a firearm (§ 29800, subd. (a)(1)); (5) carrying a loaded, unregistered firearm (§ 25850, subd. (a)); and (6) assault

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

with a semiautomatic firearm (§ 245, subd. (b)). The People also alleged that defendant's 2006 conviction for robbery (§ 211) constituted a "strike" within the meaning of our Three Strikes law as well as a prior "serious felony" conviction under section 667, subdivision (a)(1) as to the attempted murder, shooting at an occupied vehicle, discharging a firearm, and assault counts.<sup>2</sup> The People further alleged that the strike allegation's "[e]ffect" would be "x 2" (that is, to double the base sentence) and that the "667(a)(1)" allegation would add "+5 yrs per prior State Prison."

Defendant waived his right to counsel and proceeded pro se.

At a pretrial conference weeks before trial, the prosecutor gave defendant a copy of the charging document and told the court that he had explained to defendant that the allegations in that document pertaining to the "prior criminal history" "may" "double[]" the sentence or "add[] consecutive time" to defendant's sentence. At a further pretrial conference days before trial, the court asked defendant whether he wanted to bifurcate the issue of his prior felony conviction (underlying the felon-in-possession count as well as the sentencing enhancements) or whether he wanted to admit that prior conviction. Defendant replied that he was "open for" "say[ing] it's a robbery" and that he "can stipulate to a strike or prior conviction." The court then accepted this

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<sup>2</sup> The People also alleged that all of the counts except the gun possession counts were done "for the benefit of, at the direction of, and in association with a criminal street gang" (§ 186.22, subd. (b)(1)); that defendant personally used a firearm (§ 12022.5) in committing the attempted murder, shooting at an occupied vehicle, and assault; and that defendant's 2006 robbery conviction constituted a prior prison term (§ 667.5, subd. (b)).

waiver of the right to have the jury determine the prior conviction.

The matter proceeded to trial. The jury found defendant guilty of discharging a firearm with gross negligence, being a felon in possession, and possessing a loaded, unregistered firearm; the jury acquitted him of the remaining counts. The jury found the gang allegation not true.

Immediately after the jury was discharged, the court asked defendant whether he wanted to “stipulate” that he “suffered a prior strike” or whether he wanted to proceed to a bench trial on the issue. Defendant said he wanted to “stipulate to my prior strike.” The court then informed defendant of the constitutional rights he would be giving up if he waived his right to a bench trial—specifically, the right to require proof beyond a reasonable doubt, the right to confront witnesses and evidence, the right to compulsory process, and the privilege against incrimination. Defendant then indicated that he understood those rights and “gives up and admit[s], pursuant to what is alleged in the [charging document], that [he] ha[s] suffered, within the meaning of Penal Code section 667(d) and 1170.12, . . . a prior strike conviction” for the 2006 robbery.

The trial court ultimately sentenced defendant to a prison term of 11 years. The court imposed an 11-year sentence on the discharging a firearm count, calculated as a base term of three years (doubled due to the prior strike), plus an additional five years for the prior serious felony. The court did not impose the one-year enhancement for a prior prison term. The court also imposed a concurrent six-year term on the felon-in-possession count, and imposed but stayed under section 654 a four-year term on the possession of an unregistered firearm count. Defendant’s

sole objection to his sentence was that the discharging a firearm count was not itself a “serious felony” (and thus could not support the five-year enhancement that required both the prior and current felonies to be serious felonies). Defendant did not object that the court was wrong to treat his prior admission that the robbery conviction was a strike as an admission that it was also a prior serious felony.

Defendant filed this timely appeal.

### **DISCUSSION**

A defendant’s admission to a prior conviction, like his entry of a guilty plea to a substantive offense, is valid under the federal Constitution only if it is “knowing and voluntary.” (*In re Yurko* (1974) 10 Cal.3d 857, 863 (*Yurko*); *People v. Mosby* (2004) 33 Cal.4th 353, 359 (*Mosby*), citing *Boykin v. Alabama* (1969) 395 U.S. 238 & *In re Tahl* (1969) 1 Cal.3d 122.) An admission or plea is “knowing and voluntary” if the defendant is specifically informed of, and specifically gives up (1) “the privilege against compulsory self-incrimination,” (2) “the right to trial by jury,” and (3) “the right to confront one’s accusers.” (*People v. Cross* (2015) 61 Cal.4th 164, 170 (*Cross*).) In California, an admission to a prior conviction is valid only if the defendant is “also advised of ‘the full penal effect of a finding of the truth of an allegation of prior convictions.’” (*Cross*, at p. 170; *Yurko*, at p. 865.)

In this case, defendant was not explicitly advised by the court that his stipulation to “[his] prior strike” would qualify him for an additional, consecutive five-year prison term if his current conviction was also a “serious felony” (which, in this case, it was). Consequently, the court did not advise defendant of the “full penal effect” of his admission.

However, the court's omission does not require reversal for three reasons.

First, defendant has forfeited this argument. Although the requirement that a court advise a defendant of the constitutional rights he is waiving is of constitutional dimension, the requirement that the court advise the defendant of the "full penal effect" of that admission is not; instead, it is a "judicially declared rule of criminal procedure." (*Cross, supra*, 61 Cal.4th at pp. 170-171; *Yurko, supra*, 10 Cal.3d at p. 865.) As such, it is subject to forfeiture "if not raised at or before sentencing." (*People v. Wrice* (1995) 38 Cal.App.4th 767, 770-771; *People v. Walker* (1991) 54 Cal.3d 1013, 1022-1023, overruled in part on other grounds by *People v. Villalobos* (2012) 54 Cal.4th 177, 183.) In this case, although defendant objected that his *current* offense was not a serious felony (thereby rendering section 667's five-year enhancement inapplicable), he never objected that the court was wrong to apply that enhancement in the first place because his admission did not encompass that enhancement. What is more, the absence of any objection cannot be blamed on ineffective assistance of counsel because defendant represented himself. (*People v. Espinoza* (2016) 1 Cal.5th 61, 75 ["a self-represented defendant 'cannot premise a claim of ineffective assistance of counsel on his own shortcomings'"].)

Second, the court's failure to tell defendant that his stipulation to the prior strike also exposed him to an additional five-year sentence did not render that stipulation invalid. In assessing whether a defendant's plea or admission is knowing and voluntary, courts look not only to the colloquy at which the plea or admission is taken, but to the record as a whole, and ask: Does that record "affirmatively show [the admission to be]

voluntary and intelligent under the *totality of the circumstances?*” (*Mosby, supra*, 33 Cal.4th at p. 360.) In this case, the prosecutor gave defendant a copy of the charging document, which on its face explained that defendant’s prior robbery conviction would not only double his sentence but would also add a consecutive five-year sentence. At that very same hearing, the prosecutor reiterated what the charging document said—namely, that defendant’s “prior criminal history” “may” “double[]” the sentence or “add[] consecutive time.”

Lastly, defendant cannot show that he was prejudiced by the lack of advisement. In this context, prejudice means that “the defendant would not have entered the plea [or made the admission] had the trial court given a proper advisement.’ [Citation.]” (*People v. McClellan* (1993) 6 Cal.4th 367, 378.) There is nothing in the record indicating that defendant would have opted *not* to admit that his robbery conviction was a prior strike if he knew that admission also rendered him eligible for a five-year enhancement under section 667, subdivision (a)(1). To the contrary, defendant told the court he was “open for” “say[ing] it’s a robbery” and that he “can stipulate to a strike *or prior conviction*”—without any reservations about doing so.

**DISPOSITION**

The judgment is affirmed.

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\_\_\_\_\_, J.  
HOFFSTADT

We concur:

\_\_\_\_\_, P. J.  
LUI

\_\_\_\_\_, J.  
CHAVEZ