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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK EDWARD RIVERA,

Defendant and Appellant.

H038702

(Monterey County

Super. Ct. No. SS092818A)

Following trial, a jury found defendant Mark Edward Rivera guilty of the felony violation of Vehicle Code section 2800.2, subdivision (a), (driving with disregard for safety while evading a pursuing officer) (count one) and three misdemeanor Vehicle Code violations. In a bifurcated court trial, the court found true two strike allegations based upon prior convictions, a 1994 conviction of gross vehicular manslaughter while intoxicated (former Pen. Code, § 191.5, subd. (a))¹ and a 2003 conviction of aggravated assault (former § 245, subd. (a)(1)). Under the Three Strikes law (§ 1170.12, subd. (c)), the court subsequently sentenced defendant to an indeterminate term of 25 years to life on count one.

On appeal from the judgment, defendant raises no issues concerning the current convictions. Rather, he challenges the sufficiency of the evidence to support the court's true findings as to the strike allegations. He also raises an *Apprendi* challenge (*Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*)) to the strike predicated upon his 1994

¹ All further statutory references are to the Penal Code unless otherwise specified.

conviction of gross vehicular manslaughter while intoxicated. He claims that a jury should have decided the factual question whether the victim of that crime was a “person, other than an accomplice.” (§ 1192.7, subd. (c)(8).)

We find the evidence insufficient to support the trial court’s true findings on the two strike allegations and reverse.

I

Procedural History

By amended information, defendant was charged with committing multiple offenses on or about December 26, 2009. That information also alleged a prior serious felony conviction (§ 667, subd. (a)(1)), three prior prison terms (§ 667.5, subd. (b)), and two strikes (§ 1170.12, subd. (c)). As indicated, the two alleged strikes were (1) a 1994 conviction of the crime of gross vehicular manslaughter while intoxicated (former § 191.5, subd. (a)), and (2) a 2003 conviction of the crime of assault with a deadly weapon, to wit, a vehicle (former § 245, subd. (a)(1)).

In his written in limine motions, defendant requested a bifurcated court trial on the prior prison term allegations and the strike allegations. At the January 30, 2012 hearing on the motions, defendant personally waived his right to a jury trial on the enhancement and strike allegations (§§ 667, subd. (a)(1), 667.5, subd. (b), 1170.12, subd. (c)) and defense counsel joined in the waiver.

Following a jury trial, defendant was found guilty of violating Vehicle Code sections 2800.2, subdivision (a) (driving with disregard for safety while evading a pursuing officer) (count one), 23152, subdivision (a) (driving under the influence (DUI)) (count three), 23152, subdivision (b), (driving while having a .08 percent or higher blood alcohol) (count four), and 20002, subdivision (a), (hit and run) (count five).

A court trial was held on the strike allegations and the court found them both true. It also found the prior prison term allegations true. The enhancement allegation pursuant to section 667, subdivision (a), was dismissed.

The trial court subsequently struck the prior prison term allegations (§ 667.5, subd. (b)). It sentenced defendant to 25 years to life on count one (§ 1170.12, subd. (c)). The court also imposed concurrent 365-day terms on the three other counts but it stayed execution of the sentence on count four.

II

Discussion

A. Sufficiency of Evidence to Prove the Three Strikes Allegations

1. Governing Law

The Three Strikes law mandates a harsher sentence if a defendant has one or more prior felony convictions for a “serious felony” as defined in section 1192.7, subdivision (c), or “violent felony” as defined in section 667.5, subdivision (c). (§ 1170.12, subs. (b) & (c); see § 667, subs. (d) & (e).) “Section 1192.7, subdivision (c), lists some felonies that are per se serious felonies, such as murder, mayhem, rape, arson, robbery, kidnapping, and carjacking. If a defendant’s prior conviction falls into this group, and the elements of the offense have not changed since the time of that conviction, then the question whether that conviction qualifies as a serious felony is entirely legal.” (*People v. Kelii* (1999) 21 Cal.4th 452, 456.)

“The list of serious felonies in section 1192.7, however, is not limited ‘to specific, discrete offenses.’ (*People v. Jackson* (1985) 37 Cal.3d 826, 831.) . . . [The California Supreme Court has] construed such provisions ‘as referring not to specific criminal offenses, but to the criminal conduct described therein, and applicable whenever the prosecution pleads and proves that conduct.’ (*People v. Jackson, supra*, 37 Cal.3d 826, 832.)” (*People v. Trujillo* (2006) 40 Cal.4th 165, 175.)

In *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*), the California Supreme Court considered whether, in determining the truth of an enhancement allegation that a prior conviction was a “serious felony,” the trier of fact was “limited to matters necessarily established by the prior judgment of conviction” or could “look to the entire

record of the conviction.” (*Id.* at p. 345.) The specific question in *Guerrero* was whether each of the defendant’s prior burglary convictions constituted a conviction of a serious felony of “burglary of a residence” (former § 1192.7, subd. (c)(18), added by Prop. 8, Primary Elec., June 8, 1982; see former § 667). (See *Guerrero, supra*, at pp. 347-348.) The court determined that the substance of a prior conviction is not limited to those matters necessarily established by the prior judgment of conviction. (*Id.* at p. 355.) It held that “in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction” (*ibid.*) “but no further” (*ibid.*). The court recognized that the holding “effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial.” (*Ibid.*) *Guerrero* did not address, however, “what items in the record of conviction are admissible and for what purpose or whether on the peculiar facts of an individual case the application of the rule set forth herein might violate the constitutional rights of a criminal defendant.” (*Id.* at p. 356, fn. 1.)

In *People v. Rodriguez* (1998) 17 Cal.4th 253, the abstract of judgment reflected the crime of conviction “with the abbreviation ‘ASLT GBI/DLY WPN,’ which accurately reflected the statutory language.” (*Id.* at p. 261.) The California Supreme Court confirmed that, for purposes of determining whether a prior conviction was for a “serious felony,” the prosecution was “entitled to go beyond the least adjudicated elements” of the prior aggravated assault conviction and “use the entire record to prove that [a] defendant had in fact personally inflicted great bodily injury (§ 1192.7, subd. (c)(8)) or personally used a dangerous or deadly weapon (§ 1192.7, subd. (c)(23)).” (*Id.* at pp. 261-262.) In that case, however, the prosecution had “offered only the abstract of judgment, which proved nothing more than the least adjudicated elements of the charged offense.” (*Id.* at p. 262.) The court found that the evidence was insufficient to support the strike allegation. (*Ibid.*)

“If the enumeration of the elements of the offense does not resolve the issue [whether a prior conviction is for a serious felony], an examination of the record of the earlier criminal proceeding is required in order to ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law. (See, e.g., *People v. Woodell* [(1998)] 17 Cal.4th 448, 452-461.)” (*People v. McGee* (2006) 38 Cal.4th 682, 706 (*McGee*.)

“The need for such an inquiry does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant’s prior conduct (see [*People v. Woodell, supra,*] at p. 460), but instead that the court simply will examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that *the conviction* is of the type that subjects the defendant to increased punishment under California law.” (*Ibid.*)

In *People v. Miles* (2008) 43 Cal.4th 1074 (*Miles*), it was alleged that the defendant’s prior federal conviction constituted the serious felony of bank robbery within the meaning of section 1192.7, subdivision (c). (*Miles, supra,* at p. 1077; see § 1192.7, subds. (c)(19) & (d).) Based upon reasonable inferences from the documentary evidence, the California Supreme Court rejected the defendant’s contention that “the ‘bank robbery’ notation on the federal judgment form, even as augmented by the references to ‘arm[ing]’ and ‘kidnapping,’ was insufficient evidence his 1976 conviction occurred under the prong of [the federal statute] that qualified as a California serious felony.” (*Id.* at p. 1078, see *id.* at pp. 1084-1094.)

In *Miles*, the Supreme Court restated the applicable rules: “The People must prove all elements of an alleged sentence enhancement beyond a reasonable doubt. (*People v. Tenner* (1993) 6 Cal.4th 559, 566.) Where . . . the mere fact of conviction under a particular statute does not prove the offense was a serious felony, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue. (E.g., *People v. Reed* (1996) 13 Cal.4th 217, 222-223; *People v. Guerrero* (1988) 44

Cal.3d 343, 351.) This rule applies equally to California convictions and to those from foreign jurisdictions. (*People v. Woodell* (1998) 17 Cal.4th 448, 453; *People v. Myers* (1993) 5 Cal.4th 1193, 1198-1201.)” (*Miles, supra*, 43 Cal.4th at p. 1082.)

The court further explained that in California, “[s]uch evidence may, and often does, include certified documents from the record of the prior proceeding and commitment to prison. (Pen. Code, § 969b; Evid. Code, [§] 1280 [hearsay exception for contemporaneous official records]; *People v. Prieto* (2003) 30 Cal.4th 226, 258-259; *People v. Henley* (1999) 72 Cal.App.4th 555, 559-560; *People v. Haney* (1994) 26 Cal.App.4th 472, 475.) A court document, prepared contemporaneously with the conviction, as part of the record thereof, by a public officer charged with that duty, and describing the nature of the prior conviction for official purposes, is relevant and admissible on this issue. (*Delgado* [(2008)] 43 Cal.4th at pp. 1065, 1070.)” (*Miles, supra*, 43 Cal.4th at p. 1082.)

“[T]he trier of fact may draw *reasonable inferences* from the record presented. Absent rebuttal evidence, the trier of fact may presume that an official government document, prepared contemporaneously as part of the judgment record and describing the prior conviction, is truthful and accurate. Unless rebutted, such a document, standing alone, is sufficient evidence of the facts it recites about the nature and circumstances of the prior conviction. (E.g., *People v. Epps* (2001) 25 Cal.4th 19, 27; *Henley, supra*, 72 Cal.App.4th 555, 561.)” (*Miles, supra*, 43 Cal.4th at p. 1083.)

“On review, [courts] examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, [courts] determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. (E.g., *Tenner, supra*, 6 Cal.4th 559, 567; *Jones* [(1999)] 75 Cal.App.4th 616, 631.)” (*Miles, supra*, 43 Cal.4th at p. 1083.)

2. 1994 Conviction of Violating Former Section 191.5, Subdivision (a)

Procedural History and Background

In support of the allegation that, on April 5, 1994, defendant suffered a prior conviction of gross vehicular manslaughter while intoxicated (former § 191.5, subd. (a)) within the meaning of the Three Strikes law (see § 1170.12, subds. (b) & (c)), the prosecution introduced among other evidence: (1) an information filed on October 12, 1993, (2) court minutes, (3) a reporter's transcript of the trial, (4) jury verdicts, and (5) an abstract of judgment.

Any felony conviction, including gross vehicular manslaughter while intoxicated, qualifies as a "serious felony," and thus a strike, if in committing the crime, "the defendant personally inflicts great bodily injury on any person, other than an accomplice." (§§ 1170.12, subds. (b) & (c), 1192.7, subd. (c)(8); see § 1192.8.)² The trial court found true the strike allegation predicated on defendant's 1994 conviction of gross vehicular manslaughter while intoxicated. The court expressly found that defendant was *not an accomplice*.

Defendant's Contentions

Defendant asserts that the court's finding that the deceased victim was not an accomplice to the crimes underlying his 1994 conviction was not supported by sufficient evidence. He points out that the prior "charging information contains no allegation to the effect that the named victim was not an accomplice as to the unlawful acts giving rise to

² Section 1192.8 subdivision (a), provides in part that "serious felony" "also means any violation of Section 191.5" when the offense involves "the personal infliction of great bodily injury on any person other than an accomplice . . . within the meaning of paragraph (8) . . . subdivision (c) of Section 1192.7." The intent of the Legislature, in enacting subdivision (a) of section 1192.8, was "to codify the court decisions of *People v. Gonzales*, 29 Cal.App.4th 1684, and *People v. Bow*, 13 Cal.App.4th 1551, and to clarify that the crimes specified in subdivision (a) have always been, and continue to be, serious felonies within the meaning of subdivision (c) of Section 1192.7." (§ 1192.8, subd. (b).)

the killing with gross negligence.” Defendant argues that “the record of conviction gives rise to a strong possibility that” the deceased victim, Monte Greene, who had been a passenger in defendant’s car, may have contributed to the crime “by (a) encouraging [defendant] to driv[e] him home while intoxicated, (b) supplying [defendant] with the alcohol he consumed and/or encouraging [defendant] to drink while driving by drinking with him and/or (c) encouraging [defendant’s] recklessness in racing to ‘beat’ the train past the crossing.” Defendant also urges this court to reject any argument that “it is legally impossible for a decedent in a vehicular manslaughter case to be an accomplice in his own death.”

Record of Prior Conviction

Following a trial in 1994, a jury found defendant guilty of the felony of gross vehicular manslaughter while intoxicated (former § 191.5, subd. (a)). The jury also found him guilty of driving under the influence and causing bodily injury (former Veh. Code, § 23153, subd. (a)), driving with a blood alcohol level of .08 percent or more and causing bodily injury (former Veh. Code, § 23153, subd. (b)), and driving with a license suspended or revoked for driving under the influence (former Veh. Code, § 14601.2, subd. (a).) The reporter’s transcript of the testimony adduced at the 1994 trial was admitted into evidence in the current case to prove the alleged strike allegation. (Cf. *People v. Reed* (1996) 13 Cal.4th 217, 223 [preliminary hearing transcript was part of the record “reliably reflecting the facts of the [assault] offense for which the defendant was convicted” by plea].)

The reporter’s transcript contained evidence of the following. The night before he died, Monte Greene hung out with friends, drank beer, and talked in the garage of someone’s house. There was marijuana. Defendant was there that night as well. Defendant was waxing a white Volkswagen in the front yard. Defendant left at some point in the early hours of September 4, 1993. He picked up his girlfriend at about 5:15 a.m. and drove her to work in Carmel Valley, which was about a 40 minute drive.

Greene stayed the night at the house; defendant returned there in the Volkswagen in the morning. Defendant offered Greene a ride home.

Defendant was traveling south on Highway 183. Shortly before 11:20 a.m. on September 4, 1993, a train was traveling south at about 53 miles per hour, slowly overtaking vehicles traveling south on Highway 183, which ran parallel to the tracks. Highway 183 had one lane of traffic in each direction in that area. Defendant's car was traveling substantially faster than the general flow of traffic, which was about 50 miles per hour, and passing other vehicles. At one point, defendant passed a vehicle on the shoulder.

About a quarter mile before the train crossing at Espinosa Road, the train engineer began blowing the train's whistle. Defendant's car moved ahead of the train. The crossing gates came down and the crossing lights were flashing and bells were ringing. Traffic was stopped facing westbound and eastbound on Espinosa Road at the train crossing. Defendant drove around the cars waiting in the left-hand turn lane on Highway 183 and turned left onto Espinosa Road; he drove eastbound, in the westbound lane, on Espinosa Road and drove around the lowered crossing gate arms.

The train engineer saw defendant, who was driving, turn onto Espinosa Road and continue eastbound. He saw a passenger's legs. The train struck the defendant's car in the crossing. The passenger, Monte Greene, was ejected.

A responding firefighter, the captain of North County Fire engine company, saw open alcohol containers and noticed an intense odor of alcohol in the car. The fire captain observed that defendant's speech was slow and defendant was combative; the fire captain concluded defendant had been drinking. Thomas Yost, an officer with the California Highway Patrol (CHP) who responded to the scene, smelled alcohol coming from defendant's car. Another CHP officer later inventoried the contents of defendant's car. Two 40 ounce malt liquor bottles were found in the left front area. The interior of the vehicle smelled of alcohol.

At trial, CHP Officer Yost confirmed that certain conduct violated the law, including driving on the right shoulder to pass traffic, exceeding the speed limit, turning left from the right shoulder, turning left in front of approaching traffic when unsafe to do so, driving eastbound in the westbound lane on Espinosa, failing to stop at a railroad crossing intersection, and driving around a railroad crossing barrier when it is down.

While in the ambulance en route to the hospital, defendant's speech was slow and he was physically combative with and verbally abusive to the attending paramedic. The emergency room doctor ordered tests for alcohol and drugs. Defendant's blood alcohol level was 111 milligrams per deciliter, which was the equivalent of .11 percent, above the legal limit of .08 percent. The drug screen was positive for amphetamines and cannabinoid, indicating that defendant had used marijuana.

CHP Officer Yost went to the hospital where defendant was being treated. He observed defendant behaving extremely combatively and abusively toward the nurses. The officer concluded defendant was under the influence, placed defendant under arrest, and requested a blood sample be taken from defendant.

A sample of defendant's blood was drawn shortly after 2:00 p.m. on September 4, 1993. A criminologist employed by the Department of Justice determined that defendant's blood alcohol level was .07 percent, which meant it had been approximately .13 percent at 11:20 a.m. on September 4, 1993, about the time of the collision. Persons are generally considered under the influence for driving purposes if they have a blood alcohol level of .08 percent. A forensic toxicologist employed by the Department of Justice confirmed methamphetamine and marijuana (THC) were also present in defendant's blood. Based on defendant's behavior and concentrations of substances in his blood, a toxicologist opined that defendant was under the influence of alcohol and methamphetamine.

A probation officer, who had interviewed defendant in February 1992 in connection with a prior conviction of driving under the influence, testified. At that time,

the officer had discussed with defendant, who had a blood alcohol level of .10 percent in that case, the dangers of the being that intoxicated and driving. Defendant indicated that he had a drinking problem.

At the hearing on the strike allegation in the current case, the defense introduced evidence, not admitted at the 1994 trial, consisting of the Monterey County Sherriff Coroner's postmortem report regarding the deceased victim Monte Greene. It apparently included a toxicology report showing that Greene's blood alcohol level had been .03 percent.³

Governing Law

At the time of the 1993 offenses, former section 191.5, subdivision (a), provided: "Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23152 or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence." (Stats. 1990, ch. 1698, § 4, p. 8122; see Cal. Const., art. IV, § 8, subd. (c); Gov. Code, § 9600.) The elements of gross vehicular manslaughter while intoxicated were: "(1) driving a vehicle while intoxicated [in violation of Veh. Code, § 23152 or 23153]; (2) when so driving, committing some unlawful act, such as a Vehicle Code offense with gross negligence, or committing with gross negligence an ordinarily lawful act which might produce death; and (3) as a proximate result of the unlawful act or the negligent act, *another person was*

³ Although the prosecution may not go beyond the record of the prior conviction to prove that the conviction was for a "serious felony" (§ 1192.7, subd. (c)), the California Supreme Court has declined to decide "whether the defendant might have greater latitude in rebutting the prosecution's evidence. [Citation.]" (*People v. Delgado, supra*, 43 Cal.4th at p. 1071.)

killed. (See CALJIC No. 8.93.)” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1159, italics added (*Verlinde*)).) Violations of the Vehicle Code required by the first element of gross vehicular manslaughter while intoxicated cannot additionally serve as the “unlawful act” in the second element of the offense. (See *People v. Soledad* (1987) 190 Cal.App.3d 74, 82-83 [former § 192, subd. (c)(3)].)

“Gross negligence is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. (*People v. Watson* (1981) 30 Cal.3d 290, 296.) ‘The state of mind of a person who acts with conscious indifferences to the consequences is simply, “I don’t care what happens.”’ (*People v. Olivas* (1985) 172 Cal.App.3d 984, 988.) The test is objective: whether a reasonable person in the defendant’s position would have been aware of the risk involved. (*People v. Watson, supra*, 30 Cal.3d at p. 296.)” (*People v. Bennett* (1991) 54 Cal.3d 1032, 1036.)

An accomplice is “one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.” (§ 1111; see § 31 [defining “principals”]). “Both aiders and abettors and direct perpetrators are principals in the commission of a crime.” (*People v. Calhoun* (2007) 40 Cal.4th 398, 402 (*Calhoun*)). An aider and abettor must “act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citations.] [¶] When the definition of the offense includes the intent to do some act or achieve some consequence beyond the *actus reus* of the crime . . . , the aider and abettor must share the specific intent of the perpetrator.” (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

“[A] defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the ‘natural and probable consequence’ of the target crime.” (*People v. Prettyman* (1996) 14 Cal.4th 248, 261-262.) “Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that

murder, even if unintended, if it is a natural and probable consequence of the intended assault. ([*People v. Prettyman*, *supra*, 14 Cal.4th] at p. 267.)” (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 (*McCoy*)). “Aider and abettor culpability under the natural and probable consequences doctrine is vicarious in nature. [Citations.]” (*People v. Chiu* (2014) 59 Cal.4th 155, 164 (*Chiu*)).

“A nontarget offense is a ‘natural and probable consequence’ of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [Citation.] The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. [Citation.] Rather, liability ‘is measured by whether a reasonable person in the defendant’s position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.’” [Citation.]” (*Chiu, supra*, 59 Cal.4th at pp. 161-162.) Ordinarily, “[r]easonable foreseeability ‘is a factual issue to be resolved by the jury.’ [Citation.]” (*Id.* at p. 162.)

“Aider and abettor liability under the natural and probable consequences doctrine does not require assistance with or actual knowledge and intent relating to the nontarget offense, nor subjective foreseeability of either that offense or the perpetrator’s state of mind in committing it. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [inquiry is strictly objective and does not depend on defendant’s subjective state of mind].) It only requires that under all of the circumstances presented, a reasonable person in the . . . position [of the aider and abettor] would have or should have known that the nontarget offense was a reasonably foreseeable consequence of the act aided and abetted (*Ibid.*)” (*Chiu, supra*, 59 Cal.4th at pp. 165-166.)

Analysis

Under ordinary aiding and abetting principles, disregarding for the moment the natural and probable consequences doctrine, it does not appear that victim Greene could have been held criminally liable for his own death as an aider and abettor of gross vehicular manslaughter while intoxicated. It is highly doubtful that Greene, who it may

be inferred accepted a ride home from defendant, intended to encourage or facilitate his own death. Moreover, “[t]he actus reus of vehicular manslaughter is homicide—the unlawful killing of [another] human being. (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 349.)” (*People v. Soledad, supra*, 190 Cal.App.3d at p. 80 [former § 192, subd. (c)(3)].) Suicide is not a crime in California. (See *In re Joseph G.* (1983) 34 Cal.3d 429, 433; cf. § 401.) Further, as observed in *Verlinde, supra*, 100 Cal.App.4th 1146: “Ordinarily, accomplice liability under a coperpetrator theory or an aider and abettor theory is not associated with the crimes of gross vehicular manslaughter and felony drunk driving because of the individual nature of the act and mental state involved.” (*Id.* at p. 1060.) Nevertheless, as *Verlinde* recognized, circumstances may exist where a victim is also an accomplice.⁴

Defendant suggests that Greene might have aided and abetted defendant’s commission of a target crime of reckless driving (Veh. Code, § 23103) or driving under the influence (*id.*, § 23152) and, impliedly, his crime of gross vehicular manslaughter while intoxicated was a natural and probable consequence thereof. We agree that, under the natural and probable consequences doctrine, a person may be held criminally responsible for the crime of vehicular manslaughter as an aider and abettor of other crimes.

In *Calhoun, supra*, 40 Cal.4th 398, defendant Calhoun and a codefendant were drag racing. (*Id.* at p. 400.) The codefendant passed Calhoun and struck a third car resulting in the deaths of the third car’s driver and one of its passengers and severely injuring another of its passengers. (*Id.* at pp. 400-401.) A passenger in the codefendant’s

⁴ The appellate court in *Verlinde* determined that the unusual fact pattern in that case, involving driving shared by two intoxicated individuals, presented the possibility of accomplice liability. (*Verlinde, supra*, 100 Cal.App.4th at p. 1160.) The appellate court found that the court erred by failing to instruct that an accomplice is not subject to enhanced punishment under former section 12022.7, subdivision (a). (*Verlinde, supra*, at pp. 1166-1167.)

vehicle suffered great bodily injury. (*Id.* at p. 401.) Both defendants were convicted of two counts of vehicular manslaughter with gross negligence (§ 192, subd. (c)(1)) and two counts of reckless driving causing bodily injury (Veh. Code, § 23104, subd. (a)). (*Calhoun, supra*, at p. 401.)

On appeal, Calhoun conceded he was guilty of gross vehicular manslaughter as an aider and abettor. (*Calhoun, supra*, 40 Cal.4th at p. 401.) The Supreme Court considered whether a person convicted of gross vehicular manslaughter as an aider and abettor may be subject to an enhancement for fleeing the scene (*id.* at p. 400) under Vehicle Code section 20001, subdivision (c), which provides for imposition of a five-year enhancement term where a person who flees the scene of the crime after committing such a violation. In determining that an aider and abettor was subject to this enhancement, the court stated that “[g]eneral principles of criminal liability, including Penal Code section 31, indicate that both aiders and abettors and direct perpetrators can ‘commit[]’ the substantive crime of gross vehicular manslaughter.” (*Calhoun, supra*, at p. 403.) Since Vehicle Code section 23109 makes it a crime to engage in a motor vehicle speed contest, a jury could find, based upon the natural and probable consequences doctrine, that one driver engaging in such a contest against a second driver aided and abetted the second driver’s commission of an unlawful vehicular speed contest, the natural and probable consequence of which was gross vehicular manslaughter.

To refute any argument that, as a matter of law, a deceased victim can never be an accomplice to vehicular manslaughter, defendant directs us to *People v. Flores* (2005) 129 Cal.App.4th 174 (*Flores*). In *Flores*, the court looked to the natural and probable consequence doctrine to conclude that the deceased was an accomplice within the meaning of former section 12022.53, subdivision (d), a sentencing enhancement that did

not apply to an accomplice.⁵ In that case, during a gang fight, the defendant fatally shot Valdivia, a fellow gang member “who, until that very moment, had conspired with and had aided and abetted all of defendant’s conduct.” (*Flores, supra*, at p. 181.) A jury found the defendant guilty of first degree murder and found the enhancement allegation to be true. (*Id.* at pp. 177-178.) The jury also found defendant guilty of conspiracy to commit a battery of Morales, someone from a different gang. (*Id.* at pp. 177-180.)

The trial court in *Flores* had omitted the accomplice limitation from the standard instruction regarding the sentence enhancement. (*Flores, supra*, 129 Cal.App.4th at p. 178.) On appeal, defendant Flores argued that “[s]ince Valdivia was an accomplice to the target crime,” defendant was “entitled to the benefit of the accomplice exception where the murder is the natural and probable consequence of the crime to which [Valdivia] was an accomplice.” (*Id.* at pp. 180-181.) The appellate court observed that “[t]he Legislature apparently decided that killing one’s accomplice is less blameworthy (or at least less deserving of punishment) than killing a nonaccomplice.” (*Id.* at p. 181.)

In *Flores*, the appellate court “avoid[ed] writing the [accomplice exception] out of the statute by recognizing that the exception in the enhancement must be attached to the intended, not the charged crime” in the case of a killing. (*Flores, supra*, 129 Cal.App.4th at p. 182.) The court concluded that “[i]f the victim is an accomplice to the crime he or she and defendant intended but ends up the victim of one of the enumerated offenses, the exception in section 12022.53, subdivision (d) applies.” (*Ibid.*) Thus, “the relevant

⁵ At the time of the offense in *Flores*, section 12022.53, subdivision (d), provided: “Notwithstanding any other provision of law, any person who is convicted of a [specified] felony . . . and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury . . . or death . . . to any person other *than an accomplice*, shall be punished by a term of imprisonment of 25 years to life in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony.” (Stats. 2000, ch. 287, § 23, p. 2543, italics added.)

question” was “whether Valdivia was an accomplice to the intended crime, the natural and probable consequence of which was the intentional discharge of a firearm resulting in his own death.” (*Ibid.*) It determined: “There was sufficient evidence from which the jury could have found Valdivia was defendant’s coconspirator, and that a natural and probable consequence of the conspiracy to commit a battery on Morales was the firing of the gun which killed Valdivia. Valdivia’s status as a coconspirator to commit a battery on Morales would make him defendant’s accomplice to *that* crime, which resulted in his own murder.” (*Id.* at pp. 182-183.) The court concluded that concluded that the instructional error was not harmless and the enhancement term had to be stricken. (*Id.* at p. 183.)

We are persuaded by the reasoning of *Flores* and believe it is apt in this case. “The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]” (*People v. Pieters* (1991) 52 Cal.3d 894, 898.) In defining a serious felony, both the electorate and the Legislature impliedly concluded that personally inflicting great bodily injury upon an accomplice is less culpable than so injuring a person not an accomplice. In *People v. Gonzales* (1994) 29 Cal.App.4th 1684 (*Gonzales*), this court observed: “In Proposition 8 the electorate saw fit unambiguously to classify as a serious felony *any* felony in the commission of which the defendant inflicts great bodily injury on anyone other than an accomplice.” (*Id.* at p. 1694; see Prop. 8, as approved by voters, Primary Elec. (June 8, 1982) § 7, adding § 1192.7, subd. (c)(8).) *Gonzales* held that “by virtue of subdivision (c)(8) of Penal Code section 1192.7, either gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5) or gross vehicular manslaughter other than while intoxicated (Pen. Code, § 192, subd. (c)(1)) will be a serious felony if in the commission of the crime the defendant personally inflicts great bodily injury on any person other than an accomplice.” (*Gonzales, supra*, at p. 1688.) In 1996, the Legislature amended section 1192.8 clarifying that gross vehicular manslaughter, with or without intoxication,

may constitute a serious felony within the meaning of section 1192.7, subdivision (c), and codifying *Gonzales*. (Stats. 1996, ch. 645, § 3, p. 3630.)

We have no reason to believe that the electorate or the Legislature intended different results to obtain when subdivision (c)(8) of section 1192.7 is applied to accomplices who suffered great bodily injury short of death and when it is applied to those who were fatally injured. We conclude that a deceased victim may be deemed an “accomplice” to the felony of gross vehicular manslaughter while intoxicated within the meaning of section 1192.7, subdivision (c)(8), and section 1192.8, subdivision (a), if the victim aided and abetted a target crime, the natural and probable consequence of which is that felony.

Here, the trial transcript discloses nothing about interactions between defendant and Greene aside from the fact that defendant offered Greene a ride home. Defendant had no legal reason to present evidence concerning their interactions. The information could have, but did not, allege facts making the charged crime of gross vehicular manslaughter while intoxicated qualify as a serious felony. (§ 969f [added by Stats. 1991, ch. 249, § 1, pp. 1630-1631].) Negligence on the part of the deceased victim was not an affirmative defense to the crime of gross vehicular manslaughter while intoxicated. (See *People v. Pike* (1988) 197 Cal.App.3d 732, 747-748 [vehicular manslaughter]; *People v. Harris* (1975) 52 Cal.App.3d 419, 426-427 [same].) In the absence of any evidence in the record of conviction with regard to the victim Greene’s conduct, it was not reasonable to infer that Greene was *not an accomplice* to driving under the influence and reckless driving, the natural and probable consequences of which was gross vehicular manslaughter while intoxicated. Substantial evidence that a prior conviction was a serious felony within meaning of the Three Strikes law is evidence which is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Henley, supra*, 72 Cal.App.4th at p. 561;

see *People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307, 318-320.)

People v. Henley, *supra*, 72 Cal.App.4th 555, which defendant cites, supports our conclusion. Defendant Henley had previously pleaded no contest to violating Vehicle Code section 2800.3 (causing serious injury while fleeing pursuing peace officer). (*Henley*, *supra*, at p. 560.) The on-the-record recitation of the factual basis of the plea indicated that the passenger on defendant's motorcycle was seriously injured when defendant crashed the motorcycle into another vehicle while attempting to elude a pursuing officer. (*Id.* at pp. 560-561.) The prior conviction was alleged to be a "serious felony" within the meaning of the Three Strikes law. (*Id.* at p. 558; see § § 667, subds. (b)-(i), 1170.12, 1192.7, subd. (c)(8), 1192.8, subd. (a).)

The appellate court in *Henley* concluded that the trial court erroneously placed the burden of proof on defendant. (*Henley*, *supra*, 72 Cal.App.4th at pp. 562-566.) The court also grappled with the question "whether the transcript of appellant's plea in the previous conviction or the criminal complaint filed in the case, as interpreted by the trial court, [was] substantial evidence that the injured individual was not an accomplice." (*Id.* at p. 561.) The appellate court stated that nothing in the record of conviction by plea "foreclose[d] the possibility [the passenger] was an accomplice." (*Id.* at p. 562.) It determined that the trial court could not reasonably infer that "the injured party was not an accomplice because she was not charged jointly with appellant" (*Ibid.*) The court also observed that "the status of the injured party [as an accomplice or "nonaccomplice"] was of no moment in the earlier proceeding, either as an element of or a defense to the crime defined in Vehicle Code section 2800.3." (*Id.* at p. 564.) Defendant Henley "had no right or opportunity to litigate the question [whether the injured passenger was an accomplice] at that time." (*Id.* at p. 565.)

In this case, the record does not reflect that the trial court improperly put the burden of proof on defendant as in *Henley*. Like *Henley*, however, it appears that

whether or not the victim was an accomplice was not a relevant issue in the earlier prosecution. We conclude that the record of the 1994 conviction adduced by the prosecution did not contain substantial evidence supporting the determination that victim Greene was a person “other than an accomplice.” (§ 1192.7, subd. (c)(8).)

3. *Prior Conviction of Violating Former Section 245, Subdivision (a)(1)*

In the present case, the amended information alleges that, on March 5, 2003, defendant suffered a prior conviction of assault with a deadly weapon, namely a vehicle, (former § 245, subd. (a)(1)) within the meaning of the Three Strikes law (§ 1170.12, subd. (c)). In support of this allegation, the prosecution introduced among other evidence: (1) an amended complaint filed on December 13, 2002, (2) a March 5, 2003 “minute order” regarding defendant’s guilty pleas and his admission of a strike, (3) preliminary hearing minutes, and (4) a 2003 abstract of judgment.

The amended complaint alleged six offenses that occurred on or about November 29, 2002: four felony violations of former section 245, subdivision (a)(1), involving four different victims (counts one, two, three, and six); misdemeanor reckless driving (Veh. Code, § 23103) (count four), and misdemeanor driving with a license suspended or revoked for driving under the influence (former Veh. Code, § 14601.2, subd. (a)) (count five). Count six specifically alleged that, on or about November 29, 2002, defendant committed a felony assault (former § 245, subd. (a)(1)) upon John Jessup “with a deadly weapon, to wit, VEHICLE, *or* by means of force likely to produce great bodily injury.” (Italics added.) At the time of these alleged offenses, section 245, subdivision (a)(1), stated: “Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished” (Stats. 1999, ch. 129, § 1, p. 1781.)

The March 5, 2003 preliminary hearing minutes, a standard form document, reflect that the complaint was amended to add to count seven (a misdemeanor violation of

Veh. Code, § 20002, subd. (a))⁶ and to add a strike allegation to count six. Those preliminary hearing minutes further reflect, by the check of boxes, the following waivers and advisements. “Defendant advised of, understood and knowingly and voluntarily waived” certain rights. “After questioning the Defendant the Court determined that Defendant understood the nature of the charges, the elements of the offense, the pleas available thereto, the possible defenses thereto, the possible range of penalties and other consequences of plea, included the effect of the admission of any prior conviction.” It may be inferred from the form that defendant was advised of, and waived, his right “[t]o a speedy preliminary hearing, within 10 days,” and he was advised of, and understood, the “consequences of conviction per PC 1016.5 (Alien),” “drivers license revocation,” and “[p]arole consequences.” The box for one strike was checked in the following preprinted language: “Defendant advised this is 1. 2. Strike(s).” Defendant pleaded guilty to counts five, six, and seven and admitted the Three Strikes allegation. The enhancements to count five were stricken. In addition, counts one through four were dismissed pursuant to a *Harvey* waiver.⁷ Defendant was sentenced.

The clerk’s separate minute order reflects essentially the same information. It likewise states: “Defendant advised this is 1 strike.” Defendant asserts this advisement likely referred to the newly-added strike allegation.

The 2003 abstract of judgment described the assault conviction under former section 245, subdivision (a)(1), as “ASSLT W/GBI W/WEAPON.” This description was

⁶ Vehicle Code section 20002, subdivision (a), requires the “driver of any vehicle involved in an accident resulting only in damage to any property, including vehicles,” to “immediately stop the vehicle at the nearest location that will not impede traffic or otherwise jeopardize the safety of other motorists.”

⁷ In *People v. Harvey* (1979) 25 Cal.3d 754, the Supreme Court found that implicit in a plea bargain providing for dismissal of a count is “the understanding (in the absence of any contrary agreement) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count.” (*Id.* at p. 758.)

consistent with the statutory definition of the crime. By his guilty plea to count six, defendant admitted only those matters essential to conviction. (See *People v. Devaughn* (1977) 18 Cal.3d 889, 895; see also *United States v. Broce* (1977) 488 U.S. 563, 570.)

Citing *People v. Banuelos* (2005) 130 Cal.App.4th 601 (*Banuelos*), defendant maintains that the prosecution failed to prove that the prior aggravated assault conviction was a “serious felony,” and therefore a strike. In *Banuelos*, the defendant had suffered a prior conviction of violating former section 245, subdivision (a)(1). (*Banuelos, supra*, at p. 604.) The appellate court recognized that “[t]he prior conviction may be treated as a serious felony only if we can say from the evidence presented that appellant was convicted of assault with a deadly weapon under section 1192.7, subdivision (c)(31), rather than an assault by some other means of force likely to produce great bodily injury.” (*Id.* at p. 606.) The abstract of judgment described the crime as an “ ‘ASSAULT GBI W/DEADLY WEAPON,’ ” (*id.* at p. 605), which the appellate court found to be ambiguous. (*Id.* at p. 606.) It stated: “Although the notation could be read to mean that the assault was committed both by means of force likely to produce great bodily injury *and* with a deadly weapon, it could also be construed as a shorthand description of the criminal conduct covered by section 245, subdivision (a)(1)—assault by means of force likely to produce great bodily injury *or* with a deadly weapon.” (*Ibid.*) The court concluded that the abstract’s description of the offense was “not substantial evidence—evidence that is ‘reasonable, credible, and of solid value’—that a deadly weapon was in fact used during the commission of that offense. [Citation.]” (*Ibid.*)

In *People v. Delgado, supra*, 43 Cal.4th 1059, the prosecution introduced into evidence an abstract of judgment to prove a prior serious felony. The abstract described a conviction of violating section 245, subdivision (a)(1), as an “ ‘Asslt w DWpn.’ ” (*Delgado, supra*, at p. 1064.) The California Supreme Court distinguished *Banuelos* on the ground that “the instant abstract does not mention the other specific, discrete, and disjunctive form of section 245(a)(1) violation, involving force likely to produce GBI.”

(*Id.* at p. 1069.) The court found the evidence sufficient to support a finding that the conviction was for the serious felony of assault with a deadly weapon. (*Id.* at pp. 1069-1070.)

In *Delgado*, the California Supreme Court stated: “ ‘[The] trier of fact is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction. . . .’ [Citations.] ‘[O]fficial government records clearly describing a prior conviction presumptively establish that the conviction in fact occurred, assuming those records meet the threshold requirements of admissibility. (See Evid. Code, § 664 [“It is presumed that official duty has been regularly performed”].) Some evidence must rebut this presumption before the authenticity, accuracy, or sufficiency of the prior conviction records can be called into question.’ (*People v. Epps* (2001) 25 Cal.4th 19, 27.)” (*Delgado, supra*, 43 Cal.4th at p. 1066.) “When prepared by the court clerk, at or near the time of judgment, as part of his or her official duty, [an abstract of judgment] is cloaked with a presumption of regularity and reliability. (Evid. Code, §§ 660, 664; see *id.*, § 1280.)” (*Id.* at p. 1070.) The court concluded that “[u]tilizing the presumption of official duty, and drawing reasonable inferences from the official record, the trial court, as a rational trier of fact, could thus properly find beyond reasonable doubt that a prior serious felony conviction had occurred.” (*Ibid.*, fn. omitted.)

The Supreme Court further explained in *Delgado*: “[I]f the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the statute under which the prior conviction occurred could be violated in a way that does not qualify for the alleged enhancement, the evidence is thus insufficient, and the People have failed in their burden. [Citations.]” (*Delgado, supra*, 43 Cal.4th at p. 1066.) *Delgado* disapproved of *People v. Luna* (2003) 113 Cal.App.4th 395, which had reached a result contrary to *Banuelos* on similar facts (*id.* at pp. 398-399 [offense described in

abstract as “ ‘ASSLT GBI W/DL WPN’ ”]). (*Delgado, supra*, at p. 1070, fn. 4; *id.* at p. 1073.) The Supreme Court stated that “[a]ny implication in *Luna* that section 245[, subdivision] (a)(1) now states serious felonies in both its prongs, or that an abstract of judgment that contains ambiguous references to both prongs of the statute can nonetheless be sufficient evidence of a serious felony, is . . . incorrect” (*Id.* at p. 1070, fn. 4.)

Unlike the abstract of judgment in *Delgado*, the 2003 abstract of judgment in this case does not by abbreviated description indicate that defendant pleaded to an assault with a deadly weapon.⁸ (See *Delgado, supra*, 43 Cal.4th at p. 1064.) The complaint was not amended to add an allegation of facts making the crime alleged in count six a serious felony within the meaning of section 1192.7, subdivision (c) (see § 969f). Defendant did not admit that the crime charged in count six qualified as a “serious felony” or “assault with a deadly weapon” (§ 1192.7, subd. (c)(31)). Neither did he admit that, in committing that crime, he “personally inflict[ed] great bodily injury on any person, other

⁸ “As used in [former] section 245, subdivision (a)(1), a ‘deadly weapon’ is ‘any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.’ [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) Thus, “deadly weapons or instruments not inherently deadly are defined by their use in a manner capable of producing great bodily injury. [Citation.]” (*Id.* at p. 1030.) A vehicle falls into this latter category but may constitute a deadly weapon based on the manner of its use. (See *People v. Golde* (2008) 163 Cal.App.4th 101, 116-117 [defendant drove motor vehicle toward the victim and repositioned the vehicle in her direction when she tried to move out of its way].)

than an accomplice” (*id.*, subd. (c)(8)) or he “personally us[ed] a dangerous or deadly weapon” (*id.*, subd. (c)(23)).

Since the focus of former section 245, subdivision (a)(1), was “on *use* of a deadly weapon or instrument or, alternatively, on force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial. (See *People v. Wingo* (1975) 14 Cal.3d 169, 176.)” (*People v. Aguilar, supra*, 16 Cal.4th at p. 1028.) Defendant’s conviction of count seven, which was added at the plea hearing and to which defendant pleaded guilty, suggests that defendant may not have actually personally inflicted great bodily harm on another person. Count seven alleged a misdemeanor offense in violation of Vehicle Code section 20002, which imposes certain duties upon “[t]he driver of any vehicle involved in an accident resulting *only in damage to any property*, including vehicles” (Italics added.)

Although both the preliminary hearing minutes and the clerk’s minutes indicate “this is” one strike, they do not clearly show that the word “this” referred to the aggravated assault alleged in count six rather than to the mandated punishment (as a one strike, as opposed to a two strike, case). Given the record of conviction presented to the trial court, including the circumstance that defendant admitted a strike allegation and subjected himself to Three Strikes punishment based on one strike, we find the advisement that “this is 1 strike” highly ambiguous. It is not reasonable to infer from this advisement that defendant necessarily pleaded to an assault with a deadly weapon.

Since “one may commit the assault with force ‘likely’ to cause great bodily injury without . . . *actually* causing great bodily injury or using a deadly weapon,” “the least adjudicated elements of the crime defined in [former] section 245[, subdivision] (a)(1) are insufficient to establish a ‘serious’ felony. [Citations.]” (*People v. Rodriguez* (1998) 17 Cal.4th 253, 261.) As explained, where “the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least

serious form of the offense. [Citations.]” (*Miles, supra*, 43 Cal.4th at p. 1083; see *Guerrero, supra*, 44 Cal.3d at p. 355.) When “the serious felony nature of the prior conviction depends upon the particular conduct that gave rise to the conviction, the record is insufficient to establish that a serious felony conviction occurred.” (*Miles, supra*, at p. 1083.)

We hold that the evidence of the record of conviction presented was *not* sufficient to support the trial court’s finding that defendant’s 2003 aggravated assault conviction was for a serious felony and, consequently, it cannot be regarded as a strike.

4. *Double Jeopardy*

Defendant maintains that, if this court finds insufficient evidence to support the strike allegations, retrial is barred by the constitutional prohibition against double jeopardy. He contends that *Apprendi, supra*, 530 U.S. 466 effectively abrogated *Monge v. California* (1998) 524 U.S. 721 (*Monge*).

“The Double Jeopardy Clause of the Fifth Amendment commands that ‘[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.’ Under this Clause, once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense. [Citation.]” (*Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 106 (*Sattazahn*).

In *Monge, supra*, 524 U.S. 721, a pre-*Apprendi* California case, the information alleged “two sentence enhancement allegations: that petitioner had previously been convicted of assault and that he had served a prison term for that offense, see Cal. Penal Code Ann. §§ 245(a)(1), 667(e)(1), and 667.5” (*Id.* at p. 724.) The Supreme Court held that “the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context.” (*Id.* at p. 734.) It reasoned that “the determinations at issue [in noncapital sentencing proceedings] do not place a defendant in jeopardy for an ‘offense,’ [citation].” (*Id.* at p. 728.) The court stated: “Sentencing

decisions favorable to the defendant, moreover, cannot generally be analogized to an acquittal. We have held that where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial. See *Burks v. United States*, 437 U.S. 1, 16, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978). Where a similar failure of proof occurs in a sentencing proceeding, however, the analogy is inapt.” (*Id.* at p. 729.)

The United States Supreme Court has not addressed whether *Monge* has been undermined in any respect by *Apprendi* or its progeny. Meanwhile, the California Supreme Court and California appellate courts have adhered to the position that if the finding on a strike allegation is reversed on appeal for insufficient evidence, the allegation may be retried. (See *People v. Barragan* (2004) 32 Cal.4th 236, 240 (*Barragan*); *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1133; see also *People v. Anderson* (2009) 47 Cal.4th 92, 102.) As an intermediate court, we are bound by the decisions of the California Supreme Court and the United States Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity*)). Accordingly, if the prosecution seeks retrial upon remand, the prosecution may present additional evidence within the record of conviction to prove that defendant’s 1994 and 2003 convictions constituted serious felonies and, therefore, strikes. (See *People v. Roberts, supra*, at p. 1133.)

5. *Res Judicata*

Defendant argues that, even if double jeopardy protections do not apply, principles of res judicata and collateral estoppel preclude retrial of the strike allegation based on the 1994 conviction of gross vehicular manslaughter while intoxicated. He maintains the prosecution already presented “as full and complete of a record” as is possible and, therefore, we should not permit a retrial of this strike allegation. He points to language in *Barragan, supra*, 32 Cal.4th 236 intimating that a reviewing court could preclude retrial

of a strike allegation where “the record shows ‘that on no theory grounded in reason and justice could the party defeated on appeal make a further substantial showing in the trial court in support of his cause.’ [Citations.]’ [Citation.]” (*Id.* at p. 254.)

In *Barragan*, the California Supreme Court held that retrial of a strike allegation not supported by sufficient evidence does not violate principles of res judicata. (*Barragan, supra*, 32 Cal.4th at pp. 252-258.) This is because a true finding reversed for insufficient evidence “lacks the requisite finality for purposes of applying res judicata or collateral estoppel. [Citations.]” (*Id.* at p. 254.) Further, the court determined that “the balance of policy interests justifies” *not* applying res judicata or collateral estoppel principles to strike allegations. (*Id.* at p. 258.) It recognized the public’s “substantial interest in the implementation of statutes imposing more severe punishment on ‘persisten[t]’ offenders who ‘have proved immune to lesser punishment,’ ” and in ‘prevent[ing]’ such offenders ‘from escaping the penalties imposed by those statutes through technical defects in . . . proof.’ [Citation.]” (*Id.* at p. 256.)

While it appears unlikely that the prosecution will be able to adduce additional evidence within the record of conviction to support the strike allegation based upon the 1994 conviction, the prosecution will be allowed the opportunity. Principles of res judicata doctrine do not bar retrial.

B. Apprendi

Defendant further argues, with respect to the strike based on his 1994 conviction of gross vehicular manslaughter while intoxicated, that the trial court committed reversible error by making a factual finding that the victim was not an accomplice in violation of defendant’s right to a jury trial under the Sixth Amendment to the United States Constitution as construed in *Apprendi, supra*, 530 U.S. 466.

1. Apprendi and Progeny

Apprendi held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be

submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, 530 U.S. at p. 490; see *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243 [“[R]ecidivism . . . is a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sentence”].) “[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” (*Blakely v. Washington* (2004) 542 U.S. 296, 303-304.)

“The high court has given several reasons for treating ‘the fact of a prior conviction’ differently from other sentencing facts that may increase the maximum punishment for an offense. The court has noted that ‘recidivism’ is a highly traditional basis for a court to increase a current offender’s sentence, and that, unlike a typical ‘element,’ this factor relates not to the circumstances of the current offense, but only to punishment. Finally, . . . the court has stressed that prior convictions have been obtained in proceedings which themselves included substantial procedural protections, including proof beyond reasonable doubt *and the right to a jury trial*. (*Apprendi, supra*, 530 U.S. 466, 488, 496; *Jones, supra*, 526 U.S. 227, 249; see *Almendarez-Torres, supra*, 523 U.S. 224, 243-244.)” (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1011.)

The California Supreme Court has “rejected a narrow or literal application of the high court’s reference to ‘the fact of a prior conviction.’ ” (*People v. Towne* (2008) 44 Cal.4th 63, 79; see *id.* at pp. 70-71 [judge may determine whether “a defendant served a prior prison term or was on probation or parole at the time the crime was committed” or “a defendant’s prior performance on probation or parole was unsatisfactory . . . so long as that determination is based upon the defendant’s record of one or more prior convictions”].) In *McGee, supra*, 38 Cal.4th 682, the court concluded that *Apprendi* was not offended by a judicial “determination regarding the nature or basis of the defendant’s *prior conviction*—specifically, whether *that conviction* qualified as a conviction of a serious felony.” (*Id.* at p. 706.) “California law specifies that in making this

determination, the inquiry is a limited one and must be based upon the record of the prior criminal proceeding, with a focus on the elements of the offense of which the defendant was convicted.” (*Ibid.*)

In *McGee*, the California Supreme Court expressed its reluctance “in the absence of a more definitive ruling on this point by the United States Supreme Court, to overturn the current California statutory provisions and judicial precedent that assign to the trial court the role of examining the record of a prior criminal proceeding to determine whether the ensuing conviction constitutes a qualifying prior conviction under the applicable California sentencing statute.” (*McGee, supra*, 38 Cal.4th at p. 686.) The California Supreme Court recognized “the *Shepard* decision [*Shepard v. U.S.* (2005) 544 U.S. 13] may suggest that a majority of the high court would view the legal issue presented in the case before us as presenting a serious constitutional issue” but the court found it did not control since the high court’s opinion was predicated upon statutory interpretation of the federal law at issue and did not resolve the constitutional issue. (*Id.* at p. 708.) The California Supreme Court refused “to assume, in advance of such a decision by the high court, that the federal constitutional right to a jury trial will be interpreted to apply” to the determination, based upon an examination of the record of a prior conviction, whether the “conviction constitutes a qualifying prior conviction for purposes of a recidivist sentencing statute” (*Id.* at p. 709.)

In *Descamps v. United States* (2013) 570 U.S. __ [133 S.Ct. 2276] (*Descamps*), the United States Supreme Court determined that defendant’s prior burglary conviction under California law (§ 459) could not serve as the predicate for sentencing under the Armed Career Criminal Act (ACCA) because the act required a *conviction* of “generic burglary” involving breaking and entering, proof of which is not required by California law. (*Id.* at pp. __ [133 S.Ct. at pp. 2285-2286].) The Supreme Court stated: “Whether *Descamps* *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant.” (*Id.* at p. __ [133 S.Ct. at p. 2286.]

“[The Supreme Court’s] decisions [concerning the ACCA] authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines burglary not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not.” (*Ibid.*)

It is important to keep in mind that before *Descamps*, the United States Supreme Court had decided that, as a matter of statutory construction, the predicate for application of ACCA was a *conviction* of a “generic offense,” not the conduct underlying the conviction. (*Taylor v. United States* (1990) 495 U.S. 575, 598-599 (*Taylor*)). In contrast, section 1192.7, subdivision (c), has been construed by the California Supreme Court as referring to criminal conduct where a listed “serious felony” does not correspond to a specific criminal offense. (See *People v. Trujillo*, *supra*, 40 Cal.4th at p. 175.) Even so, the United States Supreme Court had held in *Taylor*, *supra*, 495 U.S. 575 that “an offense constitutes ‘burglary’ for purposes of a [United States Code] § 924(e) sentence enhancement if either its statutory definition substantially corresponds to ‘generic’ burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant.” (*Id.* at p. 602.)

In *Descamps*, the Supreme Court suggested that a court’s attempt to “discern what a trial showed, or a plea proceeding revealed, about the defendant’s underlying conduct” raises serious Sixth Amendment concerns. (*Descamps*, *supra*, 570 U.S. at p. ___ [133 S.Ct. at p. 2288].) It stated: “The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. See, e.g., *Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). Similarly, as *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense’s elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose

extra punishment. See 544 U.S., at 24-26, 125 S.Ct. 1254 (plurality opinion).”⁹ (*Id.* at p. __ [133 S.Ct. at p. 2288].) The court concluded that the Ninth Circuit impermissibly relied upon the prosecutor’s statement of the factual basis for the petitioner’s plea. (*Id.* at pp. __ [133 S.Ct. at pp. 2287-2289]; see *id.* at pp. __ [133 S.Ct. at pp. 2302-2303 (dis. opn. of Alito, J.).)

After *Descamps* was handed down, this court decided *People v. Wilson* (2013) 219 Cal.App.4th 500 (*Wilson*). In an earlier criminal case, defendant Wilson had pleaded no contest to gross vehicular manslaughter while intoxicated. (*Id.* at p. 506.) The record of conviction included the transcript of the preliminary hearing, which contained the defendant’s hearsay statements indicating that the front seat passenger grabbed the wheel before the accident. (*Id.* at p. 505.) The information in the current case alleged a strike predicated on the earlier conviction by plea. (*Id.* at p. 507.) On appeal, Wilson claimed the trial court violated his right to a jury trial by finding that he personally inflicted great bodily injury in committing that prior offense. (*Id.* at p. 504.) Relying in part on *Descamps*, *Wilson* concluded that “that the Sixth Amendment under *Apprendi* precluded the court from finding the facts—here in dispute [whether the defendant personally inflicted great bodily injury]—required to prove a strike prior based on the gross vehicular manslaughter offense.”¹⁰ (*Id.* at p. 515.) It held that “federal law prohibits what *McGee* already proscribed: A court may not impose a sentence above the statutory

⁹ In Justice Thomas’s view, a court is precluded by *Apprendi* from even attempting to discern what facts were necessary to a prior conviction. (*Descamps, supra*, 570 U.S. at p. __ [133 S.Ct. at p. 2294] (conc. opn. of Thomas, J.).)

¹⁰ In *Wilson*, this court declined to decide whether the trial court erred in making a finding that the victim was “a person other than an accomplice” (§ 1192.8, subd. (a); see § 1192.7, subd. (c)(8)) since the defendant had not raised that error and we had found that the court erred on other grounds. (*People v. Wilson, supra*, 219 Cal.App.4th at p. 513, fn. 4.) In the present case, defendant Rivera does not contend that the trial court erred in finding that he personally inflicted great bodily injury on another person. (§§ 1192.7, subd. (c)(8), 1192.8, subd. (a).)

maximum based on disputed facts about prior conduct not admitted by the defendant or implied by the elements of the offense.” (*Id.* at p. 516, fn. omitted.) *Wilson* found the *Apprendi* error was not harmless and reversed. (*Id.* at pp. 518-520.)

The United States Supreme Court recently reiterated that, under *Apprendi*, “[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.” (*Alleyne v. United States* (2013) ___ U.S. ___, ___ [133 S.Ct. 2151, 2162].) The court held that “[f]acts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.” (*Id.* at p. ___ [133 S.Ct. at p. 2158; see *id.* at p. ___ [133 S.Ct. at p. 2155].) It overruled *Harris v. United States* (2002) 536 U.S. 545, which had held to the contrary, as inconsistent with *Apprendi* and wrongly decided. (*Alleyne v. United States, supra*, ___ U.S. at p. ___ [133 S.Ct. at pp. 2155, 2158, 2163].)

2. Defendant did not Waive Constitutional Right to Jury Trial

The People now claim that “*Descamps* and *Wilson* are inapplicable here because the trial court did not utilize the prior conviction exception to enhance appellant’s sentence.” The People assert that defendant’s Sixth Amendment claim must be rejected because defendant waived a jury on the strike allegations and, therefore, “the judge was permissibly acting as factfinder under the Sixth Amendment and was authorized to make the necessary factual findings . . . to enhance [defendant’s] sentence, without any need to resort to the *Almendarez-Torres* exception.”

This contention has superficial appeal because “nothing prevents a defendant from waiving his *Apprendi* rights.” (*Blakely v. Washington, supra*, 542 U.S. at p. 310.) “When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. See *Apprendi*, 530 U.S., at 488, 120 S.Ct. 2348; *Duncan v. Louisiana*, 391 U.S. 145, 158, 20 L.Ed.2d 491, 88 S.Ct. 1444 (1968). If appropriate waivers are

procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.” (*Ibid.*)

The fatal flaw in this argument is that, under California Supreme Court’s view of *Apprendi* and applicable California law at the time of defendant’s waiver, defendant did not have any constitutional or statutory right to have a jury determine whether a prior conviction qualified as a conviction of a “serious felony.” (See *McGee, supra*, 38 Cal.4th at pp. 685-686, 695, 702, 706; *People v. Kelii, supra*, 21 Cal.4th 452, 457; § 1025, subds. (b) & (c).) Defendant’s waiver must be viewed as only a waiver of his limited statutory right to a jury trial under California law.

3. Analysis

Alleyne v. United States, supra, __ U.S. __ [133 S.Ct. 2151] indicates to us that the United States Supreme Court is strictly applying *Apprendi*. *Descamps* give us serious pause as to the scope of the exception for “the fact of a prior conviction” from the federal constitutional right to jury trial as to “any fact that increases the penalty for a crime beyond the prescribed statutory maximum” (*Apprendi, supra*, 530 U.S. at p. 490.) Nevertheless, the fact-of-conviction exception still stands as does the California Supreme Court’s decision in *McGee, supra*, 38 Cal.4th 682. Again, we are bound by these high courts’ decisions. (*Auto Equity, supra*, 57 Cal.2d at p. 455.)

Moreover, where a defendant is found guilty following a jury trial, the record of conviction may reflect that certain evidence was necessarily believed, certain inferences were necessarily made, and certain factual questions were necessarily resolved by the jury under the charging documents, the evidence presented, the instructions provided, and the verdicts reached. In addition, the record of conviction may disclose that the defendant stipulated to particular facts. The record of conviction produced by the prosecution in a particular case may reliably reflect all or some of the facts of the offense

of which a defendant was convicted. As *McGee* made clear, however, in determining whether a record of conviction establishes that the conviction was for a serious felony under California law, the court must not “make an independent determination regarding a disputed issue of fact relating to the defendant’s prior conduct [citation]” (*McGee, supra*, 38 Cal.4th at p. 706.)

In this appeal, we have already concluded that that trial court’s true findings with respect to the two strike allegations were not supported by sufficient evidence and, therefore, the judgment must be reversed. We find it unnecessary to additionally decide whether the trial court improperly resolved a disputed fact or violated defendant’s constitutional right to have a jury decide “any fact,” “[o]ther than the fact of a prior conviction,” “that increases the penalty for a crime beyond the prescribed statutory maximum” (*Apprendi, supra*, 530 U.S. at p. 490.) Upon remand, however, the trial court should remain cognizant of *Apprendi*’s general preclusion of judicial factfinding.

DISPOSITION

The judgment is reversed. Upon remand, the trial court shall vacate its true findings regarding the strike allegations. The prosecution may elect to retry the strike allegations by presenting additional evidence within the record of conviction. If the prosecution opts not to retry the strike allegations, the trial court shall enter “not true” findings. In any event, the trial court shall resentence defendant.

ELIA, J.

WE CONCUR:

PREMO, Acting P. J.

MIHARA, J.