Filed 7/14/11

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JORGE P., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. JORGE P., Defendant and Appellant.	F060915 (Super. Ct. No. JJD062781) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Juliet L. Boccone, Judge.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Tia M. Coronado, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I, II, IV, and V of the Discussion.

Appellant Jorge P., an admitted gang member, was riding in the front passenger seat of a car with two other known gang members when they were pulled over by police. A police officer discovered a gun in plain sight on the rear left passenger floorboard. Appellant appeals from the juvenile court's true findings that he: 1) carried a loaded firearm in a vehicle (Pen. Code, § 12031, subd. (a)(1), hereafter § 12031(a)(1))[1] as an active participant in a criminal street gang (§ 12031, subd. (a)(2)(C), hereafter § 12301(a)(2)(C)), and 2) was a minor in possession of a firearm (§ 12101, subd. (a)(1), hereafter § 12101(a)(1)). For the reasons that follow, we remand the matter to the juvenile court. In the published portion of this opinion, we conclude section 12031(a)(2)(C) requires proof of felonious conduct separate and distinct from the conduct supporting a section 12031(a)(1) allegation, notwithstanding the possibility the section 12031(a)(1) conduct can support multiple offense allegations. In the unpublished portion, we address appellant's claims of insufficient evidence, clerical error, and sentencing error.

FACTUAL AND PROCEDURAL HISTORY

Appellant was a known active member of the Loco Park clique of the Sureno criminal street gang. Officer Dwight Brumley, a member of the Gang Suppression Unit of the Visalia Police Department, had prior contacts with appellant and knew appellant was on probation with gang conditions. While on routine patrol on May 8, 2010, Officer Brumley noticed appellant sitting in the front passenger seat of a Mustang. Two other known gang members from the Loco Park clique were also in the car, one in the driver's seat, one in the right rear passenger seat. Officer Brumley initiated a traffic stop and the Mustang pulled over to the side of the road.

As Officer Brumley approached the driver's side of the car, he heard a thud that sounded like something metal or heavy hitting the floor. He had the occupants step out

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

of the car. When the driver got out of the car, Officer Brumley saw a chrome handgun with an ivory handle in plain view on the floorboard of the unoccupied left rear passenger seat. The handgun was accessible to appellant from where he was seated in the car. Officer Brumley later determined it was a .25-caliber Sundance Boe semi-automatic handgun in apparent working condition, with two live rounds in the magazine, but none in the chamber. Appellant and his associates were transported to the police station.

Officer Daniel Ford questioned appellant at the police station, asking him if he knew the gun was in the car. Appellant initially denied knowing the gun was in the car. The officer believed he was lying based on his experience in the gang suppression unit and knowledge that as a matter of course gang members inform everyone in a car if a gun is present so those on probation or parole can make informed decisions about violating their conditions of release. Appellant confirmed this practice was true and admitted knowing the gun was in the car.

The petition charged appellant with three counts: 1) carrying a loaded firearm in a vehicle (§ 12031(a)(1)) with a further allegation of being an active participant in a criminal street gang (§ 12031(a)(2)(C)); 2) being a minor in possession of a concealable weapon (§ 12101(a)(1)); and 3) active participation in a criminal street gang (§ 186.22 subd. (a), hereafter § 186.22(a)). The petition also charged for each of counts 1 and 2 a special gang allegation under section 186.22, subdivision (b)(1)(A) (hereafter § 186.22(b)(1)(A)), which is a sentencing enhancement. The parties raise no issues as to these special enhancement allegations.

After a contested jurisdictional hearing, the juvenile court found true the allegations of counts 1 and 2, and the associated special gang enhancement allegations under section 186.22(b)(1)(A). The juvenile court adopted the recommendations of the probation department and sentenced appellant to 365 days in the Youth Facility boot camp program, and set the maximum time of confinement for the current offenses at seven years, constituting a three-year upper term for count 2 (minor in possession) with a

four-year upper term sentence enhancement for the special gang allegation under section 186.22(b)(1)(A). The court stayed the sentence on count 1 (carrying a loaded weapon) pursuant to section 654. The court set the aggregate maximum time of confinement for all prior and current sustained petitions at 11 years, and 10 months, less time served.

On appeal, appellant raises several disparate issues.

DISCUSSION

I. SUBSTANTIAL EVIDENCE SHOWS APPELLANT POSSESSED OR CARRIED THE WEAPON*

Appellant asserts insufficient evidence supports the juvenile court's finding that appellant possessed or carried the firearm in violation of sections 12031(a)(1) and 12101(a)(1). We disagree.

A. Standard of Review

"In considering a challenge to the sufficiency of the evidence …, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence--that is, evidence that is reasonable, credible, and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonable deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).)

---

* See footnote, *ante*, page 1.

B. Joint and Constructive Possession

Possession may be physical or constructive, and more than one person may possess the same contraband. (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 831; see *In re Jorge M.* (2000) 23 Cal.4th 866, 888.) "Constructive possession means the object is not in the defendant's physical possession, but the defendant knowingly exercises control or the right to control the object. [Citation.] Possession of a weapon may be proven circumstantially, and possession for even a limited time and purpose may be sufficient. [Citation.]" (*Daniel G.*, *supra*, 120 Cal.App.4th at p. 831.) A defendant "has constructive possession when the weapon, while not in his actual possession, is nonetheless under his dominion and control, either directly or through others. [Citations.]" (*People v. Pena* (1999) 74 Cal.App.4th 1078, 1083-1084 (*Pena*).) "Dominion and control are essentials of possession, and they cannot be inferred from mere presence or access. Something more must be shown to support inferring of these elements. Of course, the necessary additional circumstances may, in some fact contexts, be rather slight. [Citations.] It is clear, however, that some additional fact is essential." (*People v. Zyduck* (1969) 270 Cal.App.2d 334, 336.)

The circumstantial evidence establishes appellant had knowledge of and constructive possession of the handgun. The gun was not concealed in the vehicle, but rather found in plain view on the rear floorboard, easily accessible to appellant. Appellant admitted to Officer Ford he knew the gun was in the car, as did the other passengers. Officer Brumley testified he heard something heavy or metal drop to the floor immediately prior to his discovery of the gun on the rear floorboard. The juvenile court reasonably concluded that appellant knew of the gun's location in his vicinity in the car and had the right to control it, both by its nearby location on the floorboard and under common gang practices. Substantial evidence supports the juvenile court's finding as to the section 12101(a)(1) possession charge.

C. Carrying a Loaded Firearm

In contrast to section 12101(a)(1), which prohibits a minor's "possession" of a concealable firearm, section 12031(a)(1) prohibits a person from "carrying" a loaded firearm either on his or her person or in a vehicle. Although the terms are not synonymous, we note the offense of carrying a concealed firearm in a vehicle[2] requires no action on a defendant's part "beyond merely having the gun *available* for use" and such offense "is committed with the single passive act of carrying the firearm in a concealed fashion in a vehicle." (*People v. Arzate* (2003) 114 Cal.App.4th 390, 400.) Thus, likewise, the offense of carrying a loaded weapon in a vehicle requires no action beyond the single passive act of carrying the weapon in a vehicle. (See *Pena, supra*, 74 Cal.App.4th at p. 1085 ["a defendant is 'armed' when he has the weapon available for use, either offensively or defensively. [Citation.] A weapon that is available for use creates the danger it will be used. Thus, it is the availability--the ready access--of the weapon that constitutes arming. [Citation.]"].) Evidence of constructive possession of a loaded weapon in a vehicle, such as that described, *ante*, may therefore also support a finding of carrying a loaded firearm in a vehicle. Substantial evidence therefore supports the juvenile court's finding as to the section 12031(a)(1) carrying charge.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE JUVENILE COURT'S IMPLICIT FINDING APPELLANT WAS A MINOR[*]

Appellant asserts the prosecution failed to provide evidence appellant was a minor at the contested jurisdictional hearing, thus failing to prove an element of the section

---

[2] Section 12025, subdivision (a) states in part: "A person is guilty of carrying a concealed firearm when he or she does any of the following: [¶] (1) Carries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person. [¶]…[¶] (3) Causes to be carried concealed within any vehicle in which he or she is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person."

[*] See footnote, *ante*, page 1.

12101(a)(1) offense (minor in possession of a concealable weapon).[3] We construe this to be a sufficiency of the evidence argument as to the existence of the element of appellant's status as a minor and conclude substantial evidence supports the juvenile court's implied finding of each element of count 2. (See *People v. Lynch* (2010) 50 Cal.4th 693, 759.)

"'[A]n order is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown.' [Citation.] We must 'view the record in the light most favorable to the trial court's ruling and defer to its findings of historical fact, whether express or implied, if they are supported by substantial evidence.' [Citation.]" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1046.) "If the circumstances reasonably justify the juvenile court's finding, we cannot reverse merely because the circumstances also might support a contrary finding. [Citation.] This rule applies equally to express and implied findings. [Citation.]" (*In re Manuel G.* (1997) 16 Cal.4th 805, 823.)

Although appellant concedes the juvenile court had before it in the record documentation of appellant's date of birth, appellant asserts such documentation fails to constitute evidence, comparable to that which would be provided to a jury in an adult criminal case. Respondent asserts the juvenile court established appellant's age at the beginning of the jurisdictional hearing when the court asked appellant his date of birth and he responded "8-28-93," which equated to 16 years of age. Appellant argues this is "unsworn testimony" that also fails to qualify as evidence.

Welfare and Institutions Code section 701 states, "At the hearing … [t]he admission and exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code and by judicial decision. Proof beyond a reasonable doubt supported by evidence, legally admissible in the trial of criminal cases, must be

---

3 Section 12101(a)(1) states: "A minor shall not possess a pistol, revolver, or other firearm capable of being concealed upon the person."

adduced to support a finding that the minor is a person described by [Welfare and Institutions Code] section 602." Evidence Code section 140 defines "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

Juvenile proceedings are not identical to adult criminal proceedings. Although juvenile offenders enjoy many of the rights enjoyed by adult defendants in criminal trials, a right to a jury trial is not one of them. (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1022-1023.) The United States Supreme Court's decision not to find a constitutional jury trial right in juvenile proceedings "reflected its concern that the introduction of juries in that context would interfere too greatly with the effort to deal with youthful offenders by procedures less formal and adversarial, and more protective and rehabilitative--at least to a degree--than those applicable to adult defendants. [Citations.]" (*Id.* at p. 1023, explaining *McKeiver v. Pennsylvania* (1971) 403 U.S. 528.) Welfare and Institutions Code section 680 specifically embodies this treatment of juveniles:

> "The judge of the juvenile court shall control all proceedings during the hearings with a view to the expeditious and effective ascertainment of the jurisdictional facts and the ascertainment of all information relative to the present condition and future welfare of the person upon whose behalf the petition is brought. Except where there is a contested issue of fact or law, the proceedings shall be conducted in an informal nonadversary atmosphere with a view to obtaining the maximum cooperation of the minor upon whose behalf the petition is brought and all persons interested in his welfare with such provisions as the court may make for the disposition and care of such minor."

Although appellant asserts the prosecution presented no evidence as to appellant's age, we note the parties referred to appellant as "the minor" on multiple occasions during the jurisdictional hearing, with no objection from appellant's counsel. Based on the record before us, appellant's status as a minor was not a contested fact.

Furthermore, evidence in the record through testimony of police officers provide confirmation of appellant's status as a minor. While questioning Officer Brumley, who

was familiar with appellant and his record, the prosecution asked, "Did you notice anything about this minor, Jorge [P.]'s, demeanor as you contacted him in the car on that day?" Officer Brumley responded, "Yeah. Usually when I speak with him, he's quite jovial …." The witnesses implicitly acknowledged the appropriateness of the use of "minor" to refer to appellant by responding affirmatively to the prosecution's label of appellant as a minor. Moreover, the prosecution differentiated the other occupants of the car, referring to them not as minors, but as "individuals" and as "adults."

Section 12101(a)(1) requires no specific showing of a juvenile's age, only that he or she is a "minor." Substantial evidence supports the juvenile court's implied factual finding that appellant was a minor at the time of the offense.

III. FELONIOUS CONDUCT SUPPORTING SECTION 12031(a)(2)(C) MUST BE DISTINCT FROM THE MISDEMEANOR CONDUCT UNDERLYING A SECTION 12031(a)(1) OFFENSE

The third issue appellant raises involves a complicated interplay between several statutes. Appellant asserts the juvenile court's felony finding of his 12031(a)(1) offense in count 1 must be reduced to a misdemeanor because the prosecution failed to prove appellant engaged in "felonious criminal conduct" for purposes of the 12031(a)(2)(C) gang allegation. The gang allegation elevates the otherwise misdemeanor 12031(a)(1) offense to a felony. (§ 12031(a)(2)(C).)

Respondent contends the true finding of the felony allegation of count 2 -- section 12101(a)(1) (minor in possession of a concealable weapon) -- constitutes the felonious conduct to support the 12031(a)(2)(C) gang allegation. Section 12101(a)(1), however, is a "wobbler" offense, punishable either as a misdemeanor or a felony, at the court's discretion. (§ 12101(c)(1)(C); see also *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 902 (*Robert L.*).) The trial court here failed to declare the section 12101(a)(1) offense a felony, in violation of California Rules of Court rule 5.780(e)(5). As outlined

below, this issue is remanded to the juvenile court for further determination as to whether the section 12101(a)(1) offense is a felony or misdemeanor.

Appellant, while conceding (perhaps prematurely) that the 12101(a)(1) offense is a felony, argues his *conduct* underlies two *offenses*, but there was no *distinct* felonious conduct as between the two offenses. In other words, he asserts we should differentiate felonious *conduct* from felonious *offenses*. For the sake of judicial economy, we address this contention, notwithstanding the possibility that upon remand, the juvenile court finds the 12101(a)(1) offense to be a misdemeanor. As outlined below, we agree with appellant the "felonious criminal conduct" requirement requires felonious conduct distinct from the misdemeanor gun possession conduct relied upon here, and thus reduce count 1 from a felony to a misdemeanor.

A. "Conduct" Is Not Synonymous With "Offense"

Section 12031(a)(1) states in pertinent part: "A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street …." As we discussed, *ante*, substantial evidence supports the finding appellant committed this offense.

Section 12031(a)(2) states in pertinent part: "Carrying a loaded firearm in violation of this section is punishable, as follows: [¶]…[¶] (C) Where the person is an active participant in a criminal street gang, as defined in [Section 186.22(a)] … as a felony."

Section 186.22(a) states in pertinent part: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished …."[4]

---

[4] Section 186.22(a) is a substantive offense, and is itself punishable as a wobbler. (*People v. Robles* (2000) 23 Cal.4th 1106, 1115 (*Robles*); § 186.22(a).)

Our Supreme Court has interpreted section 12031(a)(2)(C) to require proof of all the elements of section 186.22(a), holding that "carrying a loaded firearm in public becomes a felony under section 12031(a)(2)(C) when a defendant satisfies the elements of the offense described in section 186.22(a)" by "'actively participat[ing] in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity' and 'willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang.' (§ 186.22(a).)" (*Robles*, *supra*, 23 Cal.4th at p. 1115.)

More recently, our Supreme Court further clarified the process in performing a section 12031(a)(2)(C) analysis, concluding "*all* of section 186.22(a)'s elements must be satisfied, including that defendant willfully promoted, furthered, or assisted felonious conduct by his fellow gang members *before* section 12031(a)(2)(C) applies to elevate defendant's section 12031, subdivision (a)(1) misdemeanor offense to a felony. Stated conversely, section 12031(a)(2)(C) applies only *after* section 186.22(a) has been *completely* satisfied by conduct *distinct from* the otherwise misdemeanor conduct of carrying a loaded weapon in violation of section 12031, subdivision (a)(1)." (*People v. Lamas* (2007) 42 Cal.4th 516, 524, original italics (*Lamas*).) The court concluded, "defendant's misdemeanor conduct -- being a gang member who carries a loaded firearm in public -- cannot satisfy section 186.22(a)'s third element, felonious conduct, and then be used to elevate the otherwise misdemeanor offense to a felony." (*Ibid.*)

In *Lamas*, the defendant discarded a loaded handgun into a planter while attempting to flee from police by scaling a wall. A police gang enforcement team member testified he believed defendant was an active member in the Baker Street criminal street gang. The handgun was one of several guns that had been stolen earlier. Lamas was charged with four felonies: 1) active participation in a gang (§ 186.22(a)); 2) active gang member carrying a loaded firearm in public (§ 12031(a)(2)(C)); 3) active gang member carrying a concealed firearm on his person (§ 12025, subds. (a)(2) &

(b)(3)); and 4) receiving stolen property (§ 496, subd. (a)). The information also alleged a gang enhancement under section 186.22, subdivision (b)(1) as to the second charge. Finally, he was also charged with misdemeanor resisting and obstructing an officer. The jury found Lamas guilty of being an active participant in a criminal street gang, the gang-related elevated felony gun offenses, and misdemeanor resisting an officer. (*Lamas*, *supra*, 42 Cal.4th at pp. 520-521.)

The two gun offenses in *Lamas* required a finding the defendant was an active participant in a criminal street gang under section 186.22(a) to trigger the elevation from misdemeanor to felony. Our Supreme Court, however, concluded that a triggering section 186.22(a) violation required separate felonious conduct from the misdemeanor gun offense conduct. (*Lamas*, *supra*, 42 Cal.4th at p. 524.) The gang allegation was to be applied to elevate the offense to a felony only after the elements of section 186.22(a) were proved separately using conduct distinct from the conduct underlying the misdemeanor gun offenses. (*Lamas*, *supra*, at p. 524.) The court found prejudicial instructional error where the trial court informed the jury the underlying felonious conduct for section 186.22(a) could be possession of a loaded or concealed firearm, and reversed the gun convictions. (*Lamas*, *supra*, at pp. 526-527.)

The *Lamas* court declined to address the issue before us, noting in a footnote, "[w]e do not address the issue raised in briefing regarding whether the felonious conduct requirement in section 186.22(a) can be satisfied with conduct that occurs contemporaneously with otherwise misdemeanor gun offenses because the record does not contain evidence that defendant [Lamas] engaged in *any* felonious conduct, either concurrently with, or prior to, his misdemeanor gun offenses." (*Lamas*, *supra*, 42 Cal.4th at p. 526, fn. 9.)[5]

---

[5] The implication is that *prior* felonious conduct could satisfy the felonious conduct requirement. (See also *Robles*, *supra*, 23 Cal.4th at pp. 1109-1110.) We note the record indicates appellant has a prior petition sustained on charges of felony vandalism. The

Assuming the juvenile court declares the section 12101(a)(1) offense in count 2 to be a felony, the issue before us is a determination of whether or not the section 12101(a)(1) offense, which is based on appellant's same conduct as the section 12031(a)(1) offense, can support a section 186.22(a) violation and by extension, application of the section 12031(a)(2)(C) gang allegation.

B. Section 186.22(a)

The language of section 186.22(a) is facially unambiguous. (*Albillar*, *supra*, 51 Cal.4th at p. 55; *People v. Castenada* (2000) 23 Cal.4th 743, 752 (*Castaneda*) ["Through section 186.22(a)'s plainly worded requirements--criminal knowledge, willful promotion of a felony, and active participation in a criminal street gang--our Legislature has made it reasonably clear what conduct is prohibited …"].) In *Castenada*, the court, analyzing the requirement of section 186.22(a) for a defendant to "actively participate" in a criminal street gang, noted in dicta, "a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members …." (*Castenada*, *supra*, 23 Cal.4th at p. 749.)

The *Albillar* court analyzed the phrase "'*any* felonious criminal conduct'" (original italics) in section 186.22(a), but focused on the determination that the phrase targeted "felonious criminal conduct, not felonious gang-related conduct." (*Albillar*, *supra*, 51 Cal.4th at p. 55.) The court explained, "[t]he Legislature clearly knew how to draft language limiting the nature of the criminal conduct promoted, furthered, or assisted

---

prosecution failed to raise this at the hearing, instead noting three different theories of felonious conduct, all revolving around appellant's conduct underlying the current offenses: 1) the "possession of the weapon"; 2) "being in possession of a concealable firearm"; and 3) "aid[ing] and abet[ting] his companions in committing that offense [possession of a concealable firearm] because by [*sic*] his presence in the vehicle." (But see, *Albillar*, *supra*, 51 Cal.4th at p. 66 [no statutory requirement that section 186.22, subdivision (b)(1)'s reference to "'"criminal conduct by gang members" be distinct from the charged offense, or that the evidence establish specific crimes the defendant intended to assist his fellow gang members in committing'"].)

and could have included such language had it desired to so limit the reach of section 186.22(a)." (*Id.* at p. 56.) The court discussed the legislative history of the statute, noting it went through a handful of amendments, one of which added "felonious" to "criminal conduct." (*Id.* at pp. 56-57.) If the Legislature desired to specify felonious criminal *offenses*, or expand the scope of the conduct required, it had ample opportunity and ability to do so. (Compare § 186.22, subd. (b)(1) ["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 …" (italics added)] with § 1192.7, subd. (c)(28) [making "any felony *offense*, which would constitute a felony *violation* of Section 186.22" a serious felony (italics added)]; *People v. Briceno* (2004) 34 Cal.4th 451, 458-459 (*Briceno*).) Thus, "conduct" and "offense" are not synonymous for purposes of a section 186.22(a) analysis.

The *Lamas* court alluded to the distinction between conduct and offenses as well. It noted, "'misdemeanor convictions do not constitute "felonious criminal conduct[,]"'" and that "[i]t logically follows that *misdemeanor conduct* similarly cannot constitute 'felonious criminal conduct' within the meaning of section 186.22." (*Lamas*, *supra*, 42 Cal.4th at p. 524; see also *Briceno*, *supra*, 34 Cal.4th at pp. 458, 460 [concluding section 1192.7, subdivision (c)(28)'s reference to a felony "violation" of section 186.22 encompassed sentence enhancements under section 186.22, subdivision (b), and not just the felony "offense" of section 186.22(a)].) While different facts here had to be proved for the 12101(a)(1) offense, such as minor's status as a minor (discussed, *ante*), or the concealable nature of the weapon, appellant's *conduct* remained the same, and thus cannot be used to support the 12031(a)(2)(C) gang allegation in violation of *Lamas*.

The single act required of the section 12031(a)(1) and section 12101(a)(1) charges was possession or carrying of the handgun, as discussed, *ante*. Appellant was found guilty of both offenses by virtue of being a passenger in a car with access to a handgun.

His behavior, actions, and omissions constituted a single course of conduct from which those two charges arose. This was acknowledged by the juvenile court in its application of section 654 in appellant's disposition.

At the dispositional hearing, the juvenile court adopted the probation report's recommendations, which included staying the term for count 1 (§ 12031(a)(1)) under section 654. Section 654 prohibits multiple punishment for offenses arising out of the same conduct, stating in part, "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Thus, the probation department and the juvenile court recognized that a single act, omission, or course of conduct supported both counts 1 and 2.

We conclude the prosecution must prove felonious conduct distinct from the conduct that underlies the 12031(a)(1) offense, notwithstanding the possibility that a separate felony offense may be charged based on the same underlying conduct. Misdemeanor conduct that would be impermissibly used to support the gang allegation in count 1 under *Lamas* cannot be transformed into viable felonious conduct simply by charging a different offense.

We note that section 12101(a)(1) itself is not at issue. Appellant makes no argument it is not properly charged and we have determined, *ante*, substantial evidence supports it. The issue, rather, is its *use* as the means to turn an otherwise misdemeanor offense into a felony, based on the same conduct that cannot be used in the context of section 12031(a)(1) to find true a gang allegation. Rather than imposing additional sentencing enhancement terms, as in cases discussing the impermissibility of bootstrapping statutes to impose additional penalties, or otherwise addressing the interplay of gang statutes with other provisions (see *Briceno, supra,* 34 Cal.4th at p. 465; *People v. Arroyas* (2002) 96 Cal.App.4th 1439; *People v. Jones* (2009) 47 Cal.4th 566),

at issue here is the elevation of the offense from a misdemeanor to a felony. The underlying conduct used for the elevation here is the same, notwithstanding it being charged as both a misdemeanor and a felony offense.[6] This is an impermissible attempt to circumvent the Supreme Court's restriction on the ability to use the particular misdemeanor conduct of a gang member carrying a loaded firearm in public to elevate the otherwise misdemeanor gun offense to a felony. (*Lamas, supra*, 42 Cal.4th at p. 524.)

Respondent asserts as an alternative that appellant "was found in a car with two other gang members who were minors" and "[t]he court could reasonably find that appellant was an accomplice in one of the other minors' possession of the handgun, which is in itself a felony …." We note the record reference that respondent uses to assert the other two gang members in the car were minors makes no mention of them as minors, but does note that appellant was a minor. We further note the prosecution, referring to the circumstances of the offense, explained to the juvenile court that "[o]ne of the adults in the vehicle had been recently shot." The juvenile court also specifically asked whether one of the other individuals in the car was a minor, to which the prosecution replied, "no." The prosecution in its closing argument theorized "this minor did aid and abet his companions in committing that offense," but referred to the offense of count 1(carrying a loaded weapon), rather than count 2 (minor in possession). Our review of the record fails to indicate the age or minor status of the other occupants of the car. We conclude insufficient evidence supports the proposition that appellant's underlying felonious conduct was being an accomplice to the undocumented possible

---

6 Like the *Lamas* court, we decline to address the situation where other felonious conduct occurs simultaneous with the section 12031(a)(1) and section 12031(a)(2)(C) conduct. We note, however, the defendant in *Castenada* "[did] not contest here that through the robbery and attempted robbery in this case, he 'promote[d], further[ed], or assist[ed]' felonious criminal conduct of the Goldenwest gang in violation of section 186.22(a)." (*Castenada, supra,* 23 Cal.4th at p. 753.)

violations of section 12101(a)(1) by the other two occupants of the car whose ages are unknown and at least one of which falls outside the purview of section 12101(a)(1). Regardless, the underlying conduct of being a passenger in a car with other gang members and a loaded handgun remains the same and our prior analysis applies to prohibit circumventing of the *Lamas* holding in this manner as well.

Once again, to summarize, we conclude appellant's count 2 true finding on the 12101(a)(1) felony allegation, even assuming the juvenile court would have deemed it a felony in accordance with California Rules of Court rule 5.780(e)(5), cannot support the gang allegation under section 12031(a)(2)(C) because the underlying conduct is the same conduct underlying the section 12031(a)(1) offense, which cannot be used under section 12031(a)(2)(C) to elevate the 12031(a)(1) offense to a felony under *Lamas*. The prosecution must prove separate and distinct felonious conduct, that is, actions or omissions evidencing the offender's behavior, different from the misdemeanor conduct supporting a section 12031(a)(1) allegation, notwithstanding the possibility that the offender's same conduct can support separate and distinct misdemeanor and felony offenses.

IV. THE COUNT 3 TRUE FINDING STATED ON THE DISPOSITIONAL ORDER WAS A CLERICAL ERROR*

Appellant asserts the juvenile court either made a clerical error in noting on the dispositional order that all the allegations of the petition were found true, or that, if there was no error, the true finding on count 3 must be reversed for the same reason the section 12031(a)(2)(C) allegation failed. In the alternative, count 3 is a lesser included offense to count 1, since count 1 also incorporates a section 186.22(a) analysis. Respondent agrees only with appellant's contention count 3 is a lesser included offense to count 1.

---

* See footnote, *ante*, page 1.

The juvenile court in making its finding stated, "[c]ount three pretty much is a lesser included of those charges. It doesn't really stand on its own, or is not necessarily on its own by the finding of the -- true finding on counts one and two." The court later stated, "The special allegations are found true, as well." The prosecution requested further clarification, stating, "Your Honor is the allegation attached to count one, besides the 186.22(b)(1), I know it is not under a separate heading. [¶] The allegation -- well, 12021(a)(1)(C),[7] the Court is finding that true as the basis for its ruling as to count three?" The court responded, "Yes. That's part and parcel, and also part and parcel of the special allegation. Because I don't think if he was not an active member it would not have been -- I understand that's not required, but that's one of the reasons the Court took that into consideration. [¶] And, obviously, the evidence established that he is an active member."

While respondent points to the juvenile court's later generic statement about finding the "new petition … sustained," we read the record to support appellant's contention the juvenile court intended for count 3 to be dismissed or otherwise addressed as a lesser included to count 1. The court noted at the dispositional hearing that it adopted the probation report sentencing recommendation. That report noted count 3 was dismissed and imposed no punishment for the charge. Moreover, as discussed in section III, *ante*, we agree with appellant that a section 186.22(a) violation is unsupported here. On remand, the juvenile court is to modify the dispositional order to reflect its disposition that count 3 was a lesser included offense to count 1. (See § 1385; *People v. Flores* (2005) 129 Cal.App.4th 174, 184.)

---

7 This appears to be a typographical error or a misstatement by the prosecutor and should be "12031(a)(2)(C)."

V. THE MAXIMUM PERIOD OF CONFINEMENT MUST BE MODIFIED[*]

Appellant contends his maximum term for confinement (MTC) of four years, 10 months, for prior petitions improperly encompassed a full term imposition of three years for a section 186.22, subdivision (d) (hereafter § 186.22(d)) violation in 2009 when aggregated with the MTC for the current petition. He argues the probation report erroneously characterized the section 186.22(d) violation as a sentence enhancement, instead of as an alternative sentencing scheme to the section 594 (vandalism) violation, and thus improperly included terms for both the section 186.22(d) and section 594 violations. In other words, he argues the two sentences should be mutually exclusive and contends his term should be reduced overall by three years.[8]

Respondent asserts the juvenile court only erroneously failed to reduce the upper term sentence of three years on the 186.22(d) offense and makes no mention as to how this interacts with the section 594 sentence. Respondent thus only concedes that appellant's sentence should reflect a reduction to the one-third midterm sentence on the 186.22(d) charge, down to eight months, thus reducing appellant's aggregate MTC by two years, four months.

"Under [Welfare and Institutions Code] section 726, if the juvenile court chooses to 'sentence' consecutively on multiple counts or multiple petitions, the maximum term must be specified in accordance with the formula set forth in subdivision (a) of Penal Code section 1170.1, i.e., the sum of the 'principal term' (the longest term imposed for any of the offenses) and 'subordinate terms' (one-third of the middle term imposed for each other offense). [Fn. omitted.]" (*In re Eric J.* (1979) 25 Cal.3d 522, 536.)

---

[*] See footnote, *ante*, page 1.

[8] The reduction results from either removing the section 594 offense and related sentence and reducing the section 186.22(d) sentence to one-third the midterm sentence, or to strike the section 186.22(d) three-year upper term sentence and maintain the section 594 sentence as is.

The juvenile court in July 2009 appears to have erroneously imposed a sentence under section 186.22(d) in addition to a sentence for the related section 594 offense. Section 186.22(d) is an alternate penalty provision rather than an additional penalty. (*Robert L.*, *supra*, 30 Cal.4th at p. 900.) A sentence enhancement for a gang-related offense is imposed under section 186.22, subdivision (b). The record indicates this was not merely a clerical error on the part of the probation report or the juvenile court, but rather a misunderstanding that section 186.22(d) is an alternate penalty provision and not a sentence enhancement.[9]

The term imposed for the felony vandalism charge in 2009 is therefore stricken and the term for the section 186.22(d) charge is reduced to one-third of the midterm in accordance with Welfare and Institutions Code section 726 and Penal Code section 1170.1, subdivision (a). (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1205 ["an unauthorized sentence may be corrected at anytime"].) We remand the matter to the juvenile court for a recalculation of the MTC in accordance with this opinion and a corresponding correction to the dispositional order.

DISPOSITION

Count 1 is reduced to a misdemeanor and the related special gang allegation under section 186.22(b)(1)(A) is stricken. The matter is remanded to the juvenile court to permit it to exercise its discretion and make a declaration whether the section 12101(a)(1) offense alleged in count 2 and found true is a felony or misdemeanor. If the juvenile

---

9 The sentence enhancement under section 186.22, subdivision (b) imposes an additional two-, three-, or four-year sentence to a gang-related offense. The probation report indicated the term options for the section 186.22(d) charge were "16, 2, or 3" which is in accordance with section 18's designation of sentences for felonies with otherwise undeclared sentencing terms. As noted above, however, section 186.22(d) authorizes a one-, two-, or three-year sentence when designated a felony. The distinction here is moot since the juvenile court imposed the upper term of three years and designated punishment as a felony.

court deems count 2 to be a misdemeanor, the related special gang allegation under section 186.22(b)(1)(A) is stricken and the matter must be resentenced accordingly. The juvenile court is further directed to correct the jurisdictional and dispositional orders as necessary to reflect changes made in accordance with this opinion.

_____
Franson, J.

WE CONCUR:

_____
Wiseman, Acting P.J.

_____
Detjen, J.