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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL CONTRERAS GONZALES, Defendant and Appellant.	G043384 (Super. Ct. No. 09WF0504) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobek and Meredith A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

A jury convicted Michael Contreras Gonzales of possession of methamphetamine for use and several other offenses, including active participation in a criminal street gang under Penal Code section 186.22, subdivision (a) (section 186.22(a))[1] and carrying a loaded firearm in a vehicle while an active participant in a criminal street gang under section 12031, subdivision (a)(1) and (2)(C). The jury found true the gang enhancement allegation under section 186.22, subdivision (b)(1) (section 186.22(b)(1)). The trial court sentenced Gonzales to an eight-year prison term.

In response to Gonzales's contentions, we conclude (1) the evidence was sufficient to support a finding Gonzales was an active gang participant when he was arrested; (2) felonious criminal conduct under section 186.22(a) need not be gang related; (3) an active gang participant may be liable under section 186.22(a) for acting alone; (4) substantial evidence supported findings for purposes of section 186.22(b)(1) that Gonzales's unlawful possession of a gun was gang related and that he possessed the gun with the specific intent to promote, further, or assist in criminal conduct by gang members; and (5) the trial court did not err by denying Gonzales's motion for a new trial. We therefore affirm.

FACTS

I.

Gonzales's Arrest and Interview by the Police

In March 2009, Orange County Sheriff's deputies, working undercover, approached Gonzales as he sat in his parked car in an alley in the City of Stanton. The alley was in an area claimed by two rival gangs—Big Stanton and 18th Street. When the deputies asked Gonzales if he had anything on him, he replied he had a gun and some methamphetamine.

[1] Further code references are to the Penal Code unless otherwise indicated.

The deputies opened the car door, handcuffed Gonzales, and removed him from the car. The deputies searched Gonzales and found in a front trouser pocket a plastic bottle holding six plastic baggies containing a total of one gram of methamphetamine, and $140 in his wallet. The deputies searched Gonzales's car and found a loaded handgun under the driver's seat and a hypodermic syringe. The gun was not registered in Gonzales's name. He claimed to have bought it from someone for $400 and suspected it might have been stolen.

Gonzales told the deputies he used methamphetamine and heroin, had injected drugs that day, using the syringe found in his car, and was in the alley to drop off a friend who sold drugs. Gonzales also sold drugs and used the money to pay for diapers and baby food and to support his drug habit.

The deputies noticed Gonzales had several tattoos, one of which said "Stanton," another which said "Raiders," and another which said "OC." When a deputy asked Gonzales about gang membership, he replied, "Big Stanton." For his residence, Gonzales gave the deputies a Garden Grove address.

Gonzales was interrogated by Orange County Sheriff's Deputy Kevin Navarro, who was part of the gang enforcement team and had been assigned to monitor the Big Stanton gang. Gonzales said he grew up among Big Stanton gang members, had been "jumped into" (i.e., beaten up by) the gang when he was 11 years old, was in good standing with the gang, and had recently spoken by cell phone with Big Stanton gang members. When Navarro asked Gonzales why he had the gun, he replied, "because 18 is out to get us." Navarro asked, "is us Stanton?" Gonzales answered, "yes."

II.

Navarro's Expert Testimony

Navarro also testified as an expert on criminal street gangs. As such, he explained Hispanic gang culture, including the importance of territory and the use of fear and threats of violence to maintain claimed territories and establish areas for business,

usually drug sales. Navarro testified gangs use violence to secure control over a claimed territory and weapons are important in gang culture as protection from rivals and as a display of power. Gang members use tattoos to show gang allegiance, "[i]t's kind of like graffiti, but it's on your body."

Navarro testified Big Stanton is a Hispanic criminal street gang and claimed territory which included the alley in which Gonzales was arrested. Big Stanton and 18th Street are rival gangs. Big Stanton tattoos include "STN," "BSTN," "Big STN," or "Big Stanton."

Big Stanton's primary activities include drug sales and weapons offenses. According to Navarro, three members of Big Stanton had been arrested for selling drugs and admitted they had done so for the gang's benefit. Anyone selling drugs in Big Stanton's claimed territory would have been expected to pay "taxes" to Big Stanton.

Navarro testified the term "good standing" means a participating gang member who is not in trouble with the gang.

Navarro opined Gonzales was an active member of Big Stanton at the time of his arrest in March 2009 based on the following facts:

1. When Navarro interrogated Gonzales after his arrest, Gonzales said he had been jumped into Big Stanton at age 11, knew several Big Stanton gang members, and recently had spoken with a known Big Stanton gang member.

2. When Navarro asked about the gun, Gonzales replied he bought the gun three months earlier because "18 is out to get us." Gonzales confirmed that "us" was Big Stanton. The use of the word "us" was significant to Navarro because it showed Gonzales was "speaking for the gang."

3. Gonzales was arrested with a gun in an alley claimed both by Big Stanton and its foe, 18th Street. Navarro testified Gonzales would not have needed the gun for protection if he were not an active participant of Big Stanton.

4. Gonzales knew 18th Street and Big Stanton were rival gangs. This demonstrated Gonzales knew "the current politics."

5. Gonzales said he was in "good standing" with Big Stanton.

6. Gonzales had several Big Stanton tattoos on his body.

7. Field identification cards from 1997, 1998, 2003, and 2005 indicated Gonzales had informed law enforcement officers he was a member of Big Stanton.

Based on a hypothetical mirroring the facts of this case, Navarro testified the offenses of possession of methamphetamine for sale, possession of a firearm by a felon, and possession of a loaded firearm in public by an active gang member were committed to promote and benefit the gang.

III.

Gonzales's Testimony

Gonzales testified that in August 2005 he pleaded guilty to resisting arrest and, in the plea form, admitted he was an active participant in a criminal street gang. Also in August 2005, Gonzales signed a California Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.) (STEP) form acknowledging he had been advised that Big Stanton was a criminal street gang. In September 2005 and February 2006, Gonzales signed field identification cards stating he was a member of Big Stanton.

Gonzales testified he grew up in an area claimed by Big Stanton and was jumped into the gang when he was 11 years old. The gang members fed him, clothed him, and treated him like family. When he was 13, he got a Big Stanton tattoo across his chest. He stopped associating with Big Stanton gang members when he became a father several years before he was arrested, and had an "STN" tattoo removed from his hand so he could get a job without drawing attention to himself.

Gonzales testified he started using drugs about two years before his arrest in March 2009. He described his drug use as "bad" and explained the quantity of drugs he had been using at the time of his arrest. The methamphetamine in his possession when

he was arrested was for his own use, not for sale. He lives in Tustin, and had driven to the alley in Stanton to find his heroin dealer to buy heroin.

Gonzales testified he bought the gun about three months before his arrest in order to commit suicide. He denied telling the arresting officers he was an active gang member, and denied telling Navarro he bought the gun for protection or that 18th Street was out to "get us." Gonzales testified he would not buy drugs from Big Stanton gang members because he wanted no more contact with the gang.

PROCEDURAL HISTORY

An amended information charged Gonzales with six counts. At the close of evidence, count 6 (carrying a loaded firearm in public while not a registered owner) was dismissed on the prosecution's motion. The jury found Gonzales not guilty of the offense charged under count 1 of the amended information of possession of a controlled substance for sale (Health & Saf. Code, § 11378), but convicted him of the lesser included offense of simple possession of a controlled substance (*id.*, § 11377). The jury convicted Gonzales of the crimes charged in counts 2 through 5 as follows:

Count 2: Possession of a controlled substance while in possession of a firearm. (Health & Saf. Code, § 11370.1, subd. (a).)

Count 3: Active participation in a criminal street gang. (§ 186.22(a).)

Count 4: Possession of a firearm by a felon. (§ 12021, subd. (a)(1).)

Count 5: Carrying a loaded firearm in public or a vehicle while an active participant in a criminal street gang. (§ 12031, subd. (a)(1) & (2)(C).)

On counts 2, 4, and 5, the jury found true allegations Gonzales committed those felonies for the benefit of, at the direction of, or in association with a criminal street gang and, on count 5, made a specific finding Gonzales was an active participant in a criminal street gang. The trial court found true an allegation Gonzales had a prior conviction for robbery qualifying as a strike prior, but at sentencing struck the prior in the interests of justice. The trial court denied Gonzales's motion for a new trial. For

purposes of sentencing, the court vacated the guilty verdict on count 3 because it is a lesser included offense of count 5, and struck the gang enhancements on counts 2 and 5. The court sentenced Gonzales under counts 2 and 5, and stayed execution of sentence under counts 1 and 4.

Gonzales does not challenge his convictions for the substantive offenses charged under counts 1, 2, and 4. He contends the evidence was insufficient to support his convictions under counts 3 and 5, the substantive gang counts, and was insufficient to support the true findings on the gang enhancements imposed on counts 2, 4, and 5.

DISCUSSION

I.

Substantive Gang-related Offenses (Counts 3 and 5)

The jury convicted Gonzales of two substantive gang-related offenses: active participation in a criminal street gang under section 186.22(a) (count 3) and carrying a loaded firearm in public or a vehicle while an active participant in a criminal street gang under section 12031, subdivision (a)(1) and (2)(C) (count 5).
Section 186.22(a) imposes punishment on "[a]ny 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."

Section 12031, subdivision (a)(1) and (2)(C) elevates from a misdemeanor to a felony the offense of carrying a loaded firearm on one's person, in a vehicle, or in a public place when committed by an active participant in a criminal street gang as defined in section 186.22(a). "Thus, 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)." (*People v. Robles* (2000) 23 Cal.4th 1106, 1115.)

Gonzales argues the evidence did not satisfy all the elements of section 186.22(a) because (1) the evidence was not sufficient to support a finding he was

an active participant in a criminal street gang, (2) neither his possession of methamphetamine nor possession of the gun was gang related, and (3) he did not promote, further, or assist in felonious criminal conduct by gang members because he acted alone.

A. *The Evidence Supported a Finding Gonzales Was an Active Participant of Big Stanton.*

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

"Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive, is the first element of the substantive offense defined in section 186.22(a)." (*People v. Lamas* (2007) 42 Cal.4th 516, 523.) Thus, "membership alone in a gang is not sufficient to satisfy the requirement of active participation." (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509.)

There was no question Gonzales had been at one time an active member of Big Stanton. He testified he was jumped into the gang at age 11. At age 13, he got a Big Stanton tattoo across his chest, and had other Big Stanton tattoos on his body. In 1997, 1998, 2003, and 2005, Gonzales told law enforcement officers he was a member of Big Stanton. In August 2005, Gonzales signed a STEP notice, and, in September 2005 and February 2006, signed field identification cards stating he was a Big Stanton member. In

August 2005, he pleaded guilty to resisting arrest, admitted he was an active participant in a street gang, and admitted he had committed the crime to promote the gang.

Gonzales argues substantial evidence did not support a finding he was an active participant of Big Stanton at the time of his arrest in March 2009. According to Gonzales, Navarro's opinion that Gonzales was an gang participant was based only on evidence Gonzales "had once been a member of Big Stanton, had grown up in Stanton, and still knew some of the people he grew up with"—all facts Gonzales freely admitted. Gonzales points out that Navarro, who had spent 70 to 80 percent of his time over the prior three years investigating Big Stanton, had never seen or heard of him, even though Big Stanton has only 15 to 20 members. Navarro's opinion was based in large part on the assumption Gonzales was in the territory claimed by Big Stanton to sell drugs, a portion of the proceeds from which would be paid as a "tax" to Big Stanton and the Mexican Mafia. Gonzales argues that by acquitting him of possession of methamphetamine for sale, the jury "fatally undermined" Navarro's opinion.

But from the evidence, a rational jury could draw the inference Gonzales was an active participant of Big Stanton as of March 2009. In addition to the evidence Gonzales had been an active gang participant, there was the following evidence of his active gang participation at the time of his arrest. In March 2009, Gonzales said he was in "good standing" with Big Stanton, meaning he could "come and go as he pleases" in Big Stanton's claimed territory, and maintained gang contacts. Gonzales knew 18th Street and Big Stanton were rival gangs. When one of the arresting officers asked Gonzales about gang membership, he replied, "Big Stanton." When Navarro later asked about the gun, Gonzales replied he bought the gun three months earlier because "18 is out to get us" and "protection for us." Gonzales confirmed that "us" was Big Stanton. The use of the word "us" was significant to Navarro because it showed Gonzales was "speaking for the gang." Five days before his arrest in March 2009, Gonzales had spoken with a Big Stanton gang member, and recently had spoken with another Big Stanton gang

member about an assault on that gang member. Although Gonzales said he had moved to Tustin, he was arrested in an area claimed as territory by Big Stanton.

Although Gonzales did have a Big Stanton tattoo on his hand removed, he did so to get a job, not to indicate he had left the gang. Gonzales testified he ceased participating in Big Stanton, but the jury could, and apparently did, disbelieve him.

B. *The Felonious Criminal Conduct Was Gang Related.*

In his opening brief, Gonzales argues the "'felonious criminal conduct' punished by § 186.22(a) must be gang-related." After Gonzales filed his opening brief, the California Supreme Court issued its decision in *People v. Albillar* (2010) 51 Cal.4th 47 (*Albillar*), in which the court rejected that argument. The Supreme Court concluded, "violation of section 186.22(a) is established when a defendant actively participates in a criminal street gang with knowledge that the gang's members engage or have engaged in a pattern of criminal activity, and willfully promotes, furthers, or assists in *any* felonious criminal conduct by gang members." (*Id.* at p. 54.) Thus, the "felonious criminal conduct" need not be gang related. In his reply brief, Gonzales concedes the argument.

C. *Gonzales Could Commit the Gang Offenses Acting Alone.*

Section 186.22(a) imposes punishment when an active gang participant "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang." In committing the substantive offenses of possession of methamphetamine and possession of a gun by a felon, Gonzales acted alone. He did not aid and abet a perpetrator nor did anyone aid and abet him in committing the offenses. Does the substantive criminal street gang offense under section 186.22(a) apply to possession of methamphetamine and possession of a gun by a felon when committed by an active gang participant acting alone?

People v. Castenada (2000) 23 Cal.4th 743 is usually cited for the proposition section 186.22(a) applies only to aiders and abettors. That is because the

Supreme Court stated: "[S]ection 186.22(a) limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang's pattern of criminal gang activity. Thus, a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members . . . ." (*Castaneda*, *supra*, at p. 749.) That statement is dictum because *Castenada* only held section 186.22(a) satisfies due process because it did not make a crime out of mere membership in a gang. (*Castaneda*, *supra*, at p. 749.) The defendant did not contest he promoted, furthered, or assisted felonious criminal conduct of gang members (*id.* at p. 753), and whether section 186.22(a) was satisfied when the defendant himself perpetrated a felony was not at issue.

In *People v. Ngoun* (2001) 88 Cal.App.4th 432 (*Ngoun*) and *People v. Salcido* (2007) 149 Cal.App.4th 356 (*Salcido*), panels of the Fifth District Court of Appeal concluded section 186.22(a) extended to a defendant acting solely as the perpetrator of the crime. The reasoning for this conclusion was expressed in *Ngoun*, *supra*, 88 Cal.App.4th at page 436, as follows: "Given the objective and intent of subdivision (a), we find good reasons not to construe section 186.22, subdivision (a), in the restricted manner advocated by appellant and instead to conclude that this subdivision applies to the perpetrator of felonious gang-related criminal conduct as well as to the aider and abettor. Courts should give statutory words their plain or literal meaning unless that meaning is inconsistent with the legislative intent apparent in the statute. [Citations.] Under the language of subdivision (a), liability attaches to a gang member who 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.' [Citation.] In common usage, 'promote' means to contribute to the progress or growth of; 'further' means to help the progress of; and 'assist' means to give aid or support. [Citation.] The literal meanings of these critical words squares with the expressed purposes of the lawmakers. An active gang member who directly perpetrates a gang-related offense 'contributes' to the accomplishment of the offense no less than does

an active gang member who aids and abets or who is otherwise connected to such conduct. Faced with the words the legislators chose, we cannot rationally ascribe to them the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity."

The *Salcido* court, following *Ngoun*, also concluded section 186.22(a) "includes perpetrators of felonious gang-related criminal conduct." (*Salcido*, *supra*, 149 Cal.App.4th at p. 370.) In *Salcido*, the felonious conduct forming the basis for the section 186.22(a) conviction included unlawful possession of a loaded firearm and other weapons. (*Id.* at p. 359.) The defendant contended the trial court erred by modifying CALCRIM No. 1400 (the standard jury instruction for the crime of active participation in a criminal street gang) to state a defendant willfully promotes, furthers, or assists felonious criminal conduct under section 186.22(a) "'*by either directly and actively committing a felony offense or aiding and abetting* felonious criminal conduct by members of that gang.'" (*Salcido*, *supra*, at pp. 365-366.)

The Court of Appeal, affirming, held the trial court correctly modified the instruction: "Here, if the evidence proved any criminal conduct by Salcido, it was only as the perpetrator of the crimes establishing the felonious criminal conduct with which he was charged. This conduct included illegal possession of a weapon, receiving stolen property, carrying a loaded firearm in a vehicle, or carrying a concealed firearm in a vehicle. Faced with CALCRIM No. 1400 which defines when a defendant willfully assists, furthers, or promotes a crime only in terms of whether the defendant aided and abetted another gang member in the commission of a crime, the trial court appropriately omitted that portion of the instruction. Instead, it told the jury it must find that Salcido 'willfully promoted, furthered or assisted *by either directly and actively committing a felony offense or aiding and abetting* felonious criminal conduct by members of that gang.' (Italics added.) As a result, the court correctly instructed the jury that Salcido could be convicted of the crime if he was a direct perpetrator of the felonious criminal

conduct. Although the court never defined the terms 'aiding and abetting,' this did not impact Salcido since the jury could not have found Salcido guilty based on aider-and-abettor status." (*Salcido*, *supra*, 149 Cal.App.4th at p. 369.)

In *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1301 (*Sanchez*), the defendant and an accomplice robbed a pizza parlor. The defendant was a gang member; the accomplice was not. (*Ibid.*) The defendant was convicted of second degree robbery and violation of section 186.22(a). (*Sanchez*, *supra*, at p. 1301.) The defendant argued on appeal he could not be guilty under section 186.22(a) because he was a direct perpetrator, not an aider and abettor, of the charged robbery. (*Sanchez*, *supra*, at pp. 1305, 1306.) A panel of the Court of Appeal, Fourth Appellate District, Division Two, following *Ngoun*, rejected that argument by concluding "a gang member who perpetrates a felony by definition also promotes and furthers that same felony." (*Sanchez*, *supra*, at p. 1307.)

The *Sanchez* court then addressed a related argument, unbriefed and "lurking" in the case, that the defendant could not have promoted, furthered, or assisted felonious criminal conduct by gang members because the accomplice was not a member of a gang. (*Sanchez*, *supra*, 179 Cal.App.4th at p. 1307.) The *Sanchez* court deemed the argument forfeited, but stated, "[e]ven if it had been raised, however, we would reject it on the authority of *Salcido*." (*Id.* at p. 1308.)

We are persuaded by the reasoning of *Salcido*, *Ngoun*, and *Sanchez*, and conclude someone can "promote" or "further" felonious criminal conduct by acting alone, without assistance or participation by others. The Legislature surely did not intend for an active gang participant committing a felony alone to be punished less harshly than an active gang participant assisting such felonious conduct.

Gonzales argues the California Supreme Court's recent decision in *Albillar*, *supra*, 51 Cal.4th 47, though not addressing the issue, supports the conclusion a sole perpetrator cannot violate section 186.22(a). In *Albillar*, the court concluded "felonious

criminal conduct" under section 186.22(a) need not be gang related. Gonzales argues that because *Albillar* established "felonious criminal conduct" need not be gang related, if section 186.22(a) extended to a defendant acting alone, then it would impose punishment on any gang member who commits any felony. In that situation, Gonzales asserts, "the phrase 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang' is utterly superfluous[,] . . . is mere surplusage and means nothing more than 'commits a felony.'"

When a gang member acts either alone or as the perpetrator, the gang member is engaging in the kind of conduct the Legislature intended to punish. The court in *Albillar* reasoned: "[T]here is nothing absurd in targeting the scourge of gang members committing *any* crimes together and not merely those that are gang related. Gang members tend to protect and avenge their associates. Crimes committed by gang members, whether or not they are gang related or committed for the benefit of the gang, thus pose dangers to the public and difficulties for law enforcement not generally present when a crime is committed by someone with no gang affiliation. 'These activities, both individually and collectively, present a clear and present danger to public order and safety . . . .' [Citation.]" (*Albillar*, *supra*, 51 Cal.4th at p. 55.) Is the danger to the public any less because the gang participant commits a felony alone?

The Legislature apparently intended to punish any felonious criminal conduct by an active gang participant who knows the gang's members engage in or have engaged in a pattern of criminal gang activity. It has been said "[t]he gravamen of the substantive offense set forth in section 186.22(a) is active participation in a criminal street gang," and by enacting section 186.22(a), the Legislature targeted felonious criminal conduct by such active gang members. (*Albillar*, *supra*, 51 Cal.4th at p. 55.) Limiting the scope of section 186.22(a) to an active gang participant who promotes, furthers, or assists felonious criminal conduct by *another* gang member seems inconsistent with the Legislature's purpose. We recognize a reasonable argument can be

made that interpreting section 186.22(a) to effectuate that intent may run counter to the rules of statutory construction of giving significance to every word and phrase (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063) and of avoiding surplusage (*People v. Gilbert* (1969) 1 Cal.3d 475, 480). The rule against interpretations making parts of a statute surplusage will not be applied, however, if doing so would defeat legislative intent. (*In re J. W.* (2002) 29 Cal.4th 200, 209.)

For the reasons stated, we agree with *Ngoun*, *Salcido*, and *Sanchez*, and do not believe *Albillar* compels a different conclusion.

II.

Gang Enhancement Under Section 186.22(b)(1)

Gonzales argues substantial evidence did not support the jury's true finding on the gang enhancement under section 186.22(b)(1) because there was no evidence he possessed the methamphetamine or the gun with the specific intent to promote, further, or assist in criminal conduct by gang members.

"In considering a challenge to the sufficiency of the evidence to support an enhancement, 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 reasonably 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.]" (*Albillar*, *supra*, 51 Cal.4th at pp. 59-60.)

The gang enhancement under section 186.22(b)(1), unlike the offense of active participation in a criminal street gang, punishes the commission of a crime with a

particular intent, purpose, or state of mind. Section 186.22(b)(1) states, in relevant part: "[A]ny 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, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished."

The enhancement under section 186.22(b)(1) has two prongs. The first prong is the defendant's conviction "of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang" (§ 186.22(b)(1)); that is, the crime was gang related. (*Albillar*, *supra*, 51 Cal.4th at pp. 59-60.) The second prong is the defendant committed the crime "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22(b)(1).) The enhancement does not require the defendant act with specific intent to promote, further, or assist a gang; "the statute requires only the specific intent to promote, further, or assist criminal conduct by *gang members*." (*Albillar*, *supra*, at p. 67.)

As to the first prong, we agree with Gonzales that possession of the methamphetamine was not gang related. "Not every crime committed by gang members is related to a gang." (*Albillar*, *supra*, 51 Cal.4th at p. 60.) Gonzales was convicted of possession for use and was acquitted of possession for sale. There was no evidence Gonzales purchased or possessed the methamphetamine "for the benefit of, at the direction of, or in association with" Big Stanton.

The evidence was sufficient, however, to establish Gonzales's possession of the gun was gang related. When Navarro asked about the gun, Gonzales replied he bought the gun three months earlier because "18 is out to get us" and "protection for us." Gonzales confirmed that "us" was Big Stanton. Big Stanton and 18th Street were in a turf war over the area in which Gonzales was arrested. Navarro testified Gonzales had the gun for protection and would not need it if he were not an active participant of Big

Stanton. From this evidence, the jury could draw the inference Gonzales possessed the gun in association with the Big Stanton gang as protection against rival gang members.

As to the second prong, the California Supreme Court concluded in *Albillar* that section 186.22(b)(1) requires the specific intent to promote, further, or assist in any criminal conduct by gang members, including the offense sought to be enhanced. (*Albillar*, *supra*, 51 Cal.4th at p. 66.) Gonzales argues the only evidence of his specific intent came from Navarro, who, in response to a hypothetical based on the facts of this case, testified the hypothetical defendant committed the crimes to promote and further the gang. The question and response elicited by the hypothetical addressed the wrong issue under the second prong of section 186.22(b)(1)—the relevant issue is specific intent to promote, further, or assist in criminal conduct by gang members, not to promote or further the gang. (*Albillar*, *supra*, at p. 67.)

Nonetheless, there was sufficient evidence aside from Navarro's testimony from which a rational jury could find that Gonzales possessed the gun with the specific intent to promote, further, or assist in criminal conduct by gang members. As we have explained, the evidence was sufficient to support a finding Gonzales was an active participant of Big Stanton at the time of his arrest and he possessed the gun in association with the Big Stanton gang as protection against rival gang members. Possession of the gun was unlawful because Gonzales also was in possession of methamphetamine, a felon, and an active participant of a criminal street gang.

Section 186.22(b)(1), as section 186.22(a), raises the issue whether the enhancement can apply when the defendant acts alone. Neither Gonzales nor the Attorney General addresses this issue and both focus instead on whether he acted with the intent to benefit *the gang* rather than with the intent to promote, further, or assist in criminal conduct by *gang members*.

We conclude the enhancement, as the substantive offense, can apply when the defendant acts alone. The second prong of the enhancement is worded in nearly

identical terms as the substantive offense. Section 186.22(b)(1) states, "with the specific intent to promote, further, or assist in any criminal conduct by gang members." Section 186.22(a) states, "who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang." The two statutes differ in that section 186.22(a) requires active gang participation and promotion, furtherance, or assistance in any felonious criminal conduct by members of the gang in which the defendant is an active participant. The enhancement does not require active gang participation and requires promotion, furtherance, or assistance in felonious criminal conduct by any gang members. When the defendant is an active gang participant, and acting alone commits a gang-related felony, the defendant has promoted, furthered, or assisted in felonious conduct by a gang member—himself. Our conclusion a defendant acting alone may be guilty of the substantive offense under section 186.22(a) leads, by parity of reasoning, to the conclusion the term "criminal conduct by gang members" in section 186.22(b)(1) can mean the defendant acting alone.[2]

Relying on *In re Frank S.* (2006) 141 Cal.App.4th 1192 (*Frank S.*), Gonzales argues the act of carrying a weapon for self-protection is insufficient to meet the requirement of section 186.22(b)(1) of intent to benefit the gang. In *Frank S.*, *supra*, 141 Cal.App.4th at page 1195, a police officer stopped the defendant, a minor, for failing to stop at a traffic light while riding a bicycle. The officer discovered the minor was in possession of some methamphetamine and a concealed knife. (*Ibid.*) The minor said he had been attacked two days earlier and carried the knife for protection against gang members who believed he supported rival gangs. (*Ibid.*) At the jurisdiction hearing, a prosecution expert on gangs testified she believed the minor was an active gang

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[2] Interpreting similarly worded portions of section 186.22(a) and section 186.22(b)(1) in the same way is a valid means of statutory construction. In *Albillar*, *supra*, 51 Cal.4th at page 66, the Supreme Court relied on similarity in statutory language between section 186.22(a) and the second prong of section 186.22(b)(1) to conclude both applied to any felonious criminal conduct, not just felonious gang-related conduct.

participant, possessed the knife to protect himself, and possessed the knife to benefit fellow gang members by providing them protection. (*Id.* at pp. 1195-1196.) The juvenile court found true against the minor, among other counts, one count of carrying a concealed dirk or dagger with an enhancement under section 186.22(b)(1). (*Frank S.*, *supra*, at p. 1194.)

The appellate court reversed the true finding on the enhancement for the reason no substantial evidence supported the element of specific intent to promote, further, or assist in any criminal conduct by gang members. (*Frank S.*, *supra*, 141 Cal.App.4th at pp. 1194-1195.) The court concluded the expert's opinion the minor carried the knife for the benefit of the gang was improper, and, aside from that opinion, the prosecution offered no evidence of the intent element of section 186.22(b)(1). (*Frank S.*, *supra*, at p. 1199.) The court noted the prosecution presented no evidence the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense. (*Ibid.*)

Here, by contrast, the prosecution presented evidence Gonzales was in an area that was the subject of a turf war between Big Stanton and 18th Street and had the gun with him because 18th Street was out to get "us." He had every reason to expect to use the gun in gang-related conduct.

III.

Motion for a New Trial

A. *Background*

After the jury rendered its verdict, Gonzales moved for a new trial on the gang-related counts and enhancement. He argued the jury verdict acquitting him of possession of methamphetamine for sale undermined Navarro's expert opinion because it was based on the assumption Gonzales was selling methamphetamine to benefit the Big Stanton gang. As a result, he argued, the verdict was contrary to the evidence.

The trial court reviewed the relevant portions of the trial transcript and denied the motion for a new trial. The court concluded the verdict acquitting Gonzales of possession of methamphetamine for sale was not "fatal to the expert's opinion given the totality of the circumstances and everything that the expert relied on." Although Navarro's expert opinion was "a big portion" of the prosecution's case, the court explained other facts supported the jury's verdict on the gang-related counts. The trial court found: "[T]he fact that defendant was arrested in Big Stanton territory, the fact that the expert testified that there had been a struggle in the area for control and that the rivals have been active in that area, the defendant's own admissions that he had a loaded firearm for protection against his rivals, specifically telling the detective that, quote, '18 is out to get us' and acknowledges that 'us' was Stanton. [¶] . . . [¶] The fact that it . . . appeared to the expert the defendant was actively participating in Big Stanton, still sporting the tattoos and the gang paraphernalia so to speak, still had contacts and was knowledgeable with the gang situation on the day that he was arrested. He admitted still [being] in good standing with the neighborhood . . . . [¶] The defendant also admitted that he had made contact with . . . active participants of Big Stanton. So it's not just solely speculation in the court's eyes." The court noted the jury's verdict acquitting Gonzales of possession of methamphetamine for sale showed "the jury looked at each crime individually and came to a conclusion with respect to each crime and then looked at the separate enhancements if there was a guilty verdict on the underlying crime."

B. *Legal Standards*

Section 1181, subdivision 6 provides a trial court may grant a new trial when the verdict is contrary to the evidence. "In deciding such a motion, the trial court's function is to 'see that the jury intelligently and justly perform[ed] its duty and, in the exercise of a proper legal discretion, to determine whether there is sufficient credible evidence to sustain the verdict.' [Citation.] The trial court's duty is to review the

evidence independently and satisfy itself that the evidence as a whole is sufficient to sustain the verdict. [Citation.]" (*People v. Dickens* (2005) 130 Cal.App.4th 1245, 1251.)

"On appeal, a trial court's ruling on a motion for new trial is reviewed for abuse of discretion." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1159, citing *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 128; see also *People v. Lewis* (2001) 26 Cal.4th 334, 364.) "The trial court's factual findings, express or implied, will be upheld if supported by any substantial evidence. [Citation.]" (*People v. Dickens*, *supra*, 130 Cal.App.4th at p. 1252, citing *People v. Sheran* (1957) 49 Cal.2d 101, 109.)

Citing *People v. Ault* (2004) 33 Cal.4th 1250, Gonzales argues the standard of review for an order denying a motion for a new trial is de novo. In *Ault*, *supra*, at page 1255, the Supreme Court concluded an order granting a criminal defendant's motion for a new trial based on prejudicial juror misconduct is reviewed under an abuse of discretion standard. In contrast, an order denying such a motion is subject to independent review. (*Ibid.*, citing *People v. Nesler* (1997) 16 Cal.4th 561.) *Ault* expressly limited this standard of review to the trial court's finding of prejudice resulting from juror misconduct. (*Ault*, *supra*, at p. 1267, fn. 9; see *People v. Collins* (2010) 49 Cal.4th 175, 242, fn. 31.) Supreme Court cases since *Ault* have applied the abuse of discretion standard to the review of orders denying a criminal defendant's motion for a new trial. (E.g., *People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27; *People v. Guerra*, *supra*, 37 Cal.4th at pp. 1159-1160; *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 128.) We do too.

C. *Application*

The trial court did not abuse its discretion by denying Gonzales's motion for a new trial. The record reflects the trial court carefully, thoroughly, and independently reviewed the evidence and satisfied itself the evidence supported the jury verdict. The court considered the proper weight to be given the evidence, including Navarro's opinion testimony, and made findings on the record to support its decision.

Those findings were supported by substantial evidence. Earlier in this opinion, we concluded, as did the trial court, substantial evidence supported the gang-related counts and enhancement under section 186.22(b)(1) notwithstanding the jury verdict acquitting Gonzales of possession of methamphetamine for sale. The convictions under count 3 and count 5 and the true finding on the enhancement under section 186.22(b)(1) were supported by evidence of Gonzales's unlawful possession of a gun. Navarro's opinion that Gonzales was an active participant of Big Stanton (the necessary predicate for conviction under counts 3 and 5) was not premised on an assumption he possessed methamphetamine for sale.

As we have explained, the gang-related felony requirement for the enhancement under section 186.22(b)(1) was satisfied by the unlawful possession of the gun. The specific intent requirement of section 186.22(b)(1) requires only intent to promote, further, or assist in "any criminal conduct" by gang members; it does not require intent to promote, further, or assist the gang. Thus, Navarro's opinion the defendant in the hypothetical committed the crime of selling methamphetamine to promote and further the gang had no bearing on the issue whether Gonzales possessed the gun to promote, further, or assist in his own criminal conduct.

Gonzales argues he should have been given a new trial on due process grounds because he "deserves to have a jury consider gang evidence that is *not* based on testimony and opinions that were rejected." Navarro's opinion testimony the hypothetical defendant was selling methamphetamine to benefit the gang did not render the trial "fundamentally unfair." (*People v. Partida* (2005) 37 Cal.4th 428, 439, italics omitted; *Estelle v. McGuire* (1991) 502 U.S. 62, 70.) The prosecution merely presented testimony to support a theory the jury rejected. Navarro's opinion on possession for sale to benefit the gang did not improperly influence the jury; to the contrary, as the trial court pointed out, the jury's acquittal on the count for possession of methamphetamine for sale demonstrates the jury considered each crime individually.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL CONTRERAS GONZALES, Defendant and Appellant.	G043384 (Super. Ct. No. 09WF0504) ORDER GRANTING REQUEST FOR PUBLICATION

Appellant Michael Contreras Gonzales has requested that our opinion, filed August 26, 2011, be certified for partial publication. On the court's own motion, we GRANT full publication. It appears that our opinion meets the standards set forth in California Rules of Court, rule 8.1105(c).

The opinion is ordered published in the Official Reports.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.