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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 in part, reversed in part, and remanded for resentencing.

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 and Julie L. Garland, Assistant Attorneys General, Pamela Ratner Sobek, Meredith S. White, Donald W. Ostertag, James D. Dutton and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

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] (count 3) and carrying a loaded firearm in a vehicle while an active participant in a criminal street gang under former section 12031, subdivision (a)(1) and (2)(C) (count 5).[2] The jury found true the gang enhancement allegation under section 186.22, subdivision (b)(1) (section 186.22(b)(1)). The trial court vacated the verdict on and dismissed count 3 because it was a lesser included offense of count 5. The court sentenced Gonzales to an eight-year prison term.

We affirmed the judgment. The Supreme Court granted review of our opinion and deferred further action pending consideration and disposition of a related issue or further order. After issuing its opinion in *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*), the Supreme Court transferred this case to us with directions to vacate our decision and reconsider the cause in light of *Rodriguez*. Following transfer, the parties submitted supplemental briefs pursuant to California Rules of Court, rule 8.200(b).

We have reconsidered the cause in light of *Rodriguez*, *supra*, 55 Cal.4th 1125, and have considered the parties' supplemental briefs. Based on *Rodriguez*, we now reverse the conviction on count 5 and remand for resentencing. In all other respects, we affirm the judgment.

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

[2] As explained by the Supreme Court in *People v. Elliott* (2012) 53 Cal.4th 535, 587, footnote 7: "Effective January 1, 2012, section 12031 was repealed and section 25850, which similarly prohibits carrying a loaded firearm in public, became operative. (Stats. 2010, ch. 711, §§ 4, 6.)"

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.

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," and "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.) 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 lived 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 for 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. The trial court vacated the verdict on and dismissed count 3 because it was a lesser included offense of count 5. For purposes of sentencing, the court 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). We address only count 5 because the trial court vacated the verdict on and dismissed count 3.

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." Former section 12031, subdivision (a)(1) and (2)(C) elevated 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.)

In *Rodriguez*, *supra*, 55 Cal.4th at page 1132, the California Supreme Court held a sole perpetrator cannot be convicted of violating section 186.22(a). The court concluded the plain meaning of section 186.22(a) "requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member." (*Rodriguez*, *supra*, at p. 1132.)

In this case, there is insufficient evidence that Gonzales acted with one or more gang members in committing felonious criminal conduct. The Attorney General concedes this point. As a consequence, the evidence was insufficient to support a conviction on count 3, the substantive gang offense under section 186.22(a). Because satisfaction of the elements of section 186.22(a) was necessary for a conviction under former section 12031, subdivision (a)(2)(C) (*People v. Robles*, *supra*, 23 Cal.4th at p. 1115), the conviction under count 5 must be reversed.

II.

Gang Enhancement Under Section 186.22(b)(1)

A. *Application of* Rodriguez *to the Enhancement*

Gonzales argues that the gang enhancement under section 186.22(b)(1), as section 186.22(a), cannot apply when a defendant acted alone. We disagree. In the majority opinion in *Rodriguez*, Justice Corrigan explained: "Contrary to the Attorney General's suggestion, our conclusion does not lead to absurd results. A lone gang

member who commits a felony will not go unpunished; he or she will be convicted of the underlying felony. Further, such a gang member would not be protected from having that felony enhanced by section 186.22(b)(1), which applies to 'any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . .' Because the gang enhancement under section 186.22(b)(1) requires both that the felony be gang related and that the defendant act with a specific intent to promote, further, or assist the gang, these requirements provide a nexus to gang activity sufficient to alleviate due process concerns. [Citation.]" (*Rodriguez, supra*, 55 Cal.4th at pp. 1138-1139.)

In his concurring opinion, Justice Baxter agreed with the majority that the gang enhancement can apply to a lone perpetrator. He explained: "I recognize, of course, that a seemingly similar reference to gang 'members' appears in *both* section 186.22(a) *and* section 186.22(b)(1). However, small but significant differences in grammar and context make clear that the enhancement provision lacks the same multiple-actor condition as the gang offense. [¶] First, section 186.22(b)(1), unlike section 186.22(a), applies where the defendant, even if acting alone, 'specific[ally] inten[ds]' by his felonious action to promote, further, or assist in any criminal conduct by gang members. Section 186.22(b)(1)'s reference to promoting, furthering, or assisting gang members thus merely describes a culpable *mental state*. By contrast, the gravamen of section 186.22(a) is that the defendant's own criminal *conduct* must itself directly promote, further, or assist felonious criminal conduct by members of the gang. Thus, section 186.22(a) implies joint criminal *action* with other gang members—an implication that does not necessarily arise in section 186.22(b)(1). This difference suggests we need not construe gang 'members' in each provision the same way. [¶] The relevant two subdivisions also treat criminal conduct by gang 'members' differently. As noted, section 186.22(a) plainly requires felonious criminal conduct committed in tandem by at

least two gang members, one of whom may be the defendant. In contrast, nothing in section 186.22(b)(1) states or implies that the criminal conduct by gang members which the defendant intends to promote, further, or assist *is the same criminal conduct* underlying the felony conviction subject to enhancement. For this reason too, the direct and specific link between criminal conduct committed by the defendant and that committed by other gang members set forth in the gang offense (§ 186.22(a)) is not present in the gang enhancement (§ 186.22(b)(1))." (*Rodriguez*, *supra*, 55 Cal.4th at pp. 1140-1141 (conc. opn. of Baxter, J.).)

Gonzales points out that in our original opinion, we held the enhancement under section 186.22(b)(1) can apply when the defendant acted alone because, we concluded, a defendant acting alone may be convicted of the substantive offense under section 186.22(a). Since the latter conclusion was incorrect under *Rodriguez*, Gonzales argues the former conclusion must be incorrect too. But our original opinion in the matter was vacated by order of the California Supreme Court; the Supreme Court opinion in *Rodriguez* now directs our decision.

Thus, based on *Rodriguez*, we conclude the enhancement under section 186.22(b)(1), unlike the substantive offense under section 186.22(a), can apply when the defendant acts alone.

B. *Sufficiency of the Evidence*

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.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).)

The gang enhancement under 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 the 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. 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.[3] Possession of the gun was unlawful because Gonzales was a felon, in possession of methamphetamine, and an active participant of a criminal street gang.

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 participant, possessed the knife to protect himself, and possessed the knife to benefit

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[3] Gonzales testified he was jumped into Big Stanton at age 11; at age 13, he got a Big Stanton tattoo across his chest, and he had other Big Stanton tattoos on his body. According to police records, in 1997, 1998, 2003, and 2005, Gonzales told law enforcement officers he was a member of Big Stanton. In August 2005, Gonzales signed a California Street Terrorism Enforcement and Prevention Act notice, and, in August and 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 criminal street gang, and admitted he had committed the crime to promote the gang. 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.

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. Because we are reversing the conviction on count 5, and the trial court vacated the verdict on and

dismissed count 3, we review the order denying Gonzales's motion for a new trial only as to the gang enhancement under section 186.22(b)(1).

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 that 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 [disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151], citing *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 128; see *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 (*Ault*), Gonzales argues the standard of review for an order denying a motion for a new trial is de novo. In *Ault*, 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. (*Id.* at p. 1255.) 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. 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 as to the gang enhancement. The record reflects the trial court carefully, thoroughly, and independently reviewed the evidence and satisfied itself the evidence supported the true finding on the enhancement allegation. 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 enhancement under section 186.22(b)(1) notwithstanding the jury verdict acquitting Gonzales of possession of methamphetamine for sale. The true finding on the enhancement under section 186.22(b)(1) was supported by evidence of Gonzales's unlawful possession of a gun. Navarro's opinion that Gonzales was an active participant of Big Stanton 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 that 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 as to count 5 is reversed and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.