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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND CAMPOS et al.,

Defendants and Appellants.

H0035756

(Monterey County

Super. Ct. No. SS091166)

1. INTRODUCTION

On April 10, 2009, two members of the Monterey County Joint Gang Task Force, Monterey County Sheriff's Deputy Jesse Pinon and Salinas Police Officer Jeffrey Alford, watched as defendant Raymond Campos, a long-time Norteño, emerged from a Salinas apartment and engaged in two consecutive hand-to-hand transactions with the drivers of two vehicles who had just pulled into the parking lot of the apartment complex. Before the second driver left the lot, the officers got out of their parked, unmarked car to question Campos about this conduct. Before they reached him, Campos got into his own car and began to back out of the lot. Officer Alford got Campos to stop momentarily by hitting the driver's side of the car with his hand and opening the driver's door. In disregard of Alford's instructions to stop, Campos resumed backing up. Deputy Pinon was knocked to the ground by the open driver's door and dragged underneath the car for a short distance. Campos fled in his car as Alford fired several shots.

Investigation by other officers revealed two envelopes containing almost three ounces of very pure methamphetamine on the ground near the site of the transactions and a safe in the yard of a church next door to the apartment containing about two and one-half ounces of equally pure methamphetamine along with packaging materials, digital scales, a cutting agent, and a mixing bowl. The safe was on the ground on the other side of a fence, but almost directly in line with the window of the apartment from which Campos had emerged. The apartment was rented by a long-time female friend of Campos, who was inside the apartment at the time with her husband defendant Miguel (“Michael”) Diaz, a long-time Norteño. A key to the safe was located inside the car Campos had abandoned on the side of the freeway less than two miles from the apartment.

Campos was charged with personally inflicting great bodily injury (Pen. Code, § 12022.7, subd. (a))¹ during the premeditated and deliberate attempted murder of Deputy Pinon (count 1; §§ 187, subd. (a), 664, subd. (a)) and an assault on Pinon with a deadly weapon (count 2; § 245, subd. (c)). He was also charged with assaulting Officer Alford with a deadly weapon (count 3; § 245, subd. (c)), possessing methamphetamine for sale (count 4; Health & Saf. Code, § 11378), and selling or furnishing methamphetamine (count 5; Health & Saf. Code, § 11379, subd. (a)). All these crimes were alleged to have been committed for the benefit of or in association with the Norteño criminal street gang (§ 186.22, subd. (b)(1)) and he was also charged with active participation in a criminal street gang (count 6; § 186.22, subd. (a)). It was further alleged that Campos had a prior conviction of the serious felony of possessing a controlled substance for sale (§§ 667, subd. (a)(1), 1170.12, subd. (c)(1); Health & Saf. Code, § 11370.2, subd. (c)) for which he had served a prior prison term (§ 667.5, subd. (b)).

¹ Unspecified section references are to the Penal Code.

Diaz was jointly charged in count 4 with possessing methamphetamine for sale, also for the benefit of or in association with the Norteño criminal street gang and in count 6 with active participation in a criminal street gang. It was further alleged that Diaz had two prison priors.

Campos testified at trial. Diaz did not. After eleven days of testimony and three days of deliberations, a jury convicted each defendant of all charges, except that Campos was acquitted of attempting to murder Deputy Pinon (count 1) and assaulting Officer Alford (count 3). In separate proceedings, the court found true Campos's prior serious felony conviction and prison term and Diaz's two prison priors.

The trial court sentenced defendant Campos to a total of 34 years in prison, including 23 years for the assault on an officer (count 2; § 245, subd. (c)), composed of a five-year upper term doubled due to the prior strike (§ 1170.12, subd. (c)(1)), a three-year enhancement for inflicting great bodily injury (§ 12022.7, subd. (a)), and a ten-year gang enhancement (§ 186.22, subd. (b)), and also six consecutive years for selling or furnishing methamphetamine (count 5; Health & Saf. Code, § 11379, subd. (a)), one-third the midterm doubled to two, with a one-year midterm for the gang enhancement and three years for the prior drug conviction (Health & Saf. Code, § 11370.2, subd. (c)), and a five-year consecutive sentence for a prior serious felony conviction (§ 667.5, subd. (a)). The court imposed and stayed pursuant to section 654 a three-year doubled term for possessing methamphetamine (count 4), a three-year gang enhancement, a three-year prior drug conviction enhancement, and a doubled four years for active participation in a criminal street gang (count 6), and a one-year prison prior enhancement. The court also ordered Campos to pay a restitution fine of \$10,000, a criminal conviction assessment of \$120 (Gov. Code, § 70373), a court security fee of \$120 (§ 1465.8), a \$400 lab fee (Health & Saf. Code, § 11372.5, subd. (a)), and a \$400 drug program fee (Health & Saf. Code, § 11372.7, subd. (a)), the latter two each including \$200 fees on counts 4 and 5.

The trial court sentenced defendant Diaz to eight years in prison, including the upper term of three years for possessing methamphetamine for sale (count 4; Health & Saf. Code, § 11378) and the middle term of three years for the gang enhancement (§ 186.22, subd. (b)(1)), with two one-year prison prior enhancements (§ 667.5, subd. (b)). The court stayed a three-year term for active participation in a criminal street gang (count 6; § 186.22, subd. (a)).

On appeal, the defendants individually contend that there was insufficient evidence to support each of their convictions, except for Campos's conviction of possessing methamphetamine for sale. They also question the sufficiency of the evidence to support the gang enhancements. They each individually challenge a supplemental instruction given in response to a jury question regarding whether it is enough to justify a gang enhancement that a defendant intended to assist, further or promote his own criminal conduct as a gang member. Diaz asserts error in the trial court's failing to sever his trial from that of Campos.

Campos also claims that too much gang evidence was admitted, including his own prior conviction of possessing methamphetamine for sale with a gang enhancement, and that the limiting instructions were inadequate to confine the gang evidence. He also challenges the admission of expert opinions about his hand-to-hand transactions and the court's refusal to instruct on the lesser included offense of simple assault. Finally, he questions the imposition of two nongang enhancements and the crime lab and drug program fees on stayed count 4. Diaz joins in all arguments by Campos that apply to him. The Attorney General disputes all of the arguments by defendants except for Campos's nongang enhancements. For the reasons stated below, we will affirm the judgment as to defendant Diaz and modify the judgment as to defendant Campos by striking the nongang enhancements and the crime lab and drug program fees on count 4, and then affirm that judgment as so modified.

2. TRIAL EVIDENCE

A. SELLING, FURNISHING, OR GIVING AWAY METHAMPHETAMINE (COUNT 5; CAMPOS)

In the evening of Friday, April 10, 2009, as Monterey County Joint Gang Task Force (“Gang Task Force”) members Sheriff’s Deputy Jesse Pinon and Salinas Police Officer Jeffrey Alford were patrolling Salinas in an unmarked car, Pinon recognized Campos and his Thunderbird from prior encounters and decided to follow him. They were both wearing civilian clothes with tactical raid vests. Pinon’s vest displayed a star and “Sheriff” on the front and “Sheriff” on the back. Alford’s vest displayed a badge and “Police” on the front and “Police” on the back.

Campos pulled into an apartment complex. Deputy Pinon was aware that Diaz may be living in the complex. Pinon initially parked across the street, but after five to ten minutes Pinon pulled into the parking lot of the apartment complex to get a better vantage point and parked next to Campos’s Thunderbird. According to Officer Alford, though the sun was setting when they pulled into the parking lot, they did not need artificial lighting to see. It was stipulated that the sun set that night at 7:37 p.m.

Within a couple of minutes, Deputy Pinon saw Campos emerge from a gate and walk into apartment seven (hereafter “the apartment”). A couple of minutes later, a white male in a white Bronco pulled up next to the Thunderbird. Campos left the apartment and walked up to the driver of the Bronco.

Deputy Pinon and Officer Alford were both trained in recognizing narcotics transactions. According to Pinon, Campos reached with his right hand into the Bronco and engaged in a hand-to-hand transaction with the driver. It was not a handshake. According to Alford, Campos reached into the Bronco with both hands. Both of them shared the opinion that money had been exchanged for controlled substances, though neither one saw either money or a drug or Campos put anything in his clothing.

According to Pinon, the location was a good one for drug transactions as it was shielded from the street. The Bronco drove off and Campos went back inside the apartment.

Within a couple of minutes, a man later identified as Valente Flores pulled into the parking lot without a passenger and parked his pickup truck. Again Campos came out of the apartment, spoke with the truck driver, and engaged in a hand-to-hand transaction. Again Officer Alford saw nothing in Campos's hands.

Campos accounted for this behavior that night as follows. He went to the apartment of Adriana Lerma Diaz² in order to retrieve clothes for her children, who were going to stay at his house that night with his children. The children were with his wife. When he first arrived, Adriana and her husband, defendant Diaz, were arguing in the kitchen and they ignored him. He talked to the Bronco driver to advise him not to park where he was parked, as the neighbors in the complex had been complaining about people parking in their spots. The man said he understood. They shook hands, and he left.

According to Campos, Adriana and Diaz were still arguing when he returned to their apartment. He interrupted them to tell them to have some clothes ready for their children when he returned from getting soda at the store.

The testimony of Adriana, who was called by the prosecution, essentially corroborated Campos. She had known Campos for 15 years by the nickname of "Shackles." He is the godfather of her daughter. She had been married to Diaz for ten years. His nickname is "Chaco." The studio apartment was hers. Diaz did not live there, but he often came over to watch their two children when she went to work two or three days a week at a food store. Otherwise they were not a couple.

² To avoid confusion over common surnames, we will refer to Adriana by her first name, not by Diaz or her maiden name of Lerma.

When Adriana got home on April 10, 2009 at around 7:30 p.m. after work and grocery shopping, Diaz was already there. No one else was in the apartment. It was okay for him to be there in case their children came home. That night they got into an argument. As they were arguing, Campos came inside and asked for her daughter's clothes, saying he would be right back.

According to Campos, he was expecting Flores to arrive based on telephone conversations earlier that day. Another man was also in the truck. Campos made money working on vehicles and Flores had been a good customer.

Flores had called him to fix a car in October 2008. On his way to that job, the police stopped Campos and searched his vehicle and his house, eventually releasing him.³ A few days later, when Campos had visited Flores, Flores asked him to hold a key for him. Campos knew that Flores had a drug charge in 2008.

In their telephone conversation on April 10, 2009, Flores asked Campos to return the key. Campos told Flores where to meet him. When Flores drove up, Campos told him to wait and he would give him the key when he returned from the store.

B. ASSAULTING A PEACE OFFICER WITH A DEADLY WEAPON (COUNT 2; CAMPOS)

After seeing the second hand-to-hand transaction, Deputy Pinon told Officer Alford that they should contact Campos, so they got out of their undercover car. Pinon assumed the role of cover officer, while Alford assumed the role of the contact person.

Campos walked to some grass in front of the vehicles as though heading either to the apartment or his vehicle. Neither Deputy Pinon nor Officer Alford saw Campos drop anything. Campos walked alongside the apartment and moved briskly to his car.

According to Deputy Pinon, as Campos started walking toward his car and the officers, he "looks up at us, and just stops his movements." Then he picked up his pace

³ Further details of this encounter and the arrest of Flores appear below (*infra* in part 2D(2)(C)).

and got into his car. According to Officer Alford, if he made eye contact with Campos, it was “for a brief second.” Campos was looking down as though to avoid eye contact.⁴ Alford was also scanning the area for other possible threats.

Campos got into the Thunderbird and the lights came on as he started it. Deputy Pinon was five to ten feet behind the Thunderbird. Pinon had his gun out. It had a flashlight on it. He held it aimed at the ground with both hands. Pinon testified on direct examination that, as the Thunderbird began to back up, he saw Campos’s eyes looking at him in the rearview mirror, so Pinon flashed his light at Campos. On cross-examination, Pinon acknowledged that the back window of the Thunderbird was tinted dark, and he could not have made out Campos’s eyes. He saw Campos’s head turn toward the rear view mirror and appear to look in his direction.

Officer Alford quickened his pace and approached the driver’s side. He was not holding his gun at the time. As the Thunderbird began to back up, Alford slapped the rear quarter panel or the driver’s door and the car stopped. Because the window was closed, Alford opened the driver’s door and told Campos to stop the car or turn it off. He did not recall his exact words. Campos looked up at Alford and then rapidly accelerated the vehicle in reverse.⁵

Officer Alford yelled at Campos and held onto the Thunderbird’s driver’s door as long as he could to give Deputy Pinon time to get out of its path, but he lost his grip on the four-foot wide door. The car swung in an arc to back into the street from the parking lot.

Deputy Pinon was in the path of the car door. When the interior center of the door hit him, he tried to grab the car to stay upright, and yelled repeatedly, “stop, Raymond,

⁴ During an interview the night of April 10, 2009, Officer Alford said that he did not believe that Campos had seen them as he got in his car.

⁵ As will appear below (*infra* in part 2D(1)), this was not their first encounter.

stop.’” He lost his grip and was knocked onto his back. Because of his gear he could not fit under the door. Before Pinon was able to shoot Campos, Campos hit the accelerator and Pinon’s head hit the concrete repeatedly. Pinon yelled at Officer Alford for help and at Campos to stop. Pinon struggled to stay out from underneath the car and eventually rolled free onto his face. Alford acknowledged at trial that the door would not have hit Pinon had it been closed.

Officer Alford observed the left side of the vehicle go up and over Deputy Pinon’s chest before backing into the street from the driveway. Alford thought he heard Pinon’s last gasp.

Deputy Pinon’s injuries included lacerations from over his right eye to the back of his head, a hematoma on the back of his head, scrapes on his elbows and knees, and a fractured clavicle that had not healed by the time of trial in March 2010. Photographs of his injuries were in evidence. At the time of trial he was still getting headaches.

After reaching the street, Campos’s car stopped backing up. Officer Alford positioned himself between Deputy Pinon and the Thunderbird, drew his gun, and fired two shots at Campos. He estimated that it was ten to fifteen seconds between his opening of the car door and firing shots. The car headed forward in his direction, straightened out, and went past him as he fired three more shots.

At 7:55 p.m., Officer Alford called in to report what had happened. He also asked a resident of the apartment complex to call 911.

Regarding his leaving the parking lot, Campos testified that he was aware someone was after him, but not that they were law enforcement officers. He did not see an undercover patrol car. As he was backing up, he saw a figure to his left moving fast and another figure directly behind him. It seemed that the individual behind him was

holding a gun.⁶ He did not see who opened the driver's door of his car as he was backing up. He just gunned the car. He heard someone yell "[s]top," but he did not hear the car door hit anyone. It was an "accident." He kept on going because he thought someone was trying to kill him based on his past. He heard a gunshot as he reached the street. He did not aim his car at the shooter. He just wanted to leave the area. He lost control of his car on the freeway later that night. After unsuccessfully trying to see his mother, he visited a neighbor who had a police scanner and learned that the police were looking for him. He went to his father's house in Fremont. He was taken into custody the following Thursday.

Some residents of the apartment complex (Maria Saucedo, Leticia Meza, Tony Sousa) testified that the setting sun gave them no difficulty in recognizing two law enforcement officers in their parking lot after their attention was drawn either by shouts of "stop," squealing tires, or gunshots.

Adriana testified that as Campos was leaving her apartment, she saw two men walking towards her apartment wearing T-shirts and black vests. After she closed the front door, she heard gunshots within a minute and sirens soon after. She was too scared to look outside. She and Diaz sat in the dark and drank. It was two hours before a police officer came to her apartment door.

C. POSSESSING METHAMPHETAMINE FOR SALE (COUNT 4; BOTH DEFENDANTS)

After the shooting and before other officers responded to Officer's Alford's call, Alford saw a Hispanic man run through the parking lot of the church next door to the apartment complex and down the sidewalk in front of the church. Rogelio Pedrano, who was inside the church at the time of the shooting, saw a man wearing a black and white sports jersey run across the church parking lot and hop a fence in the back. Across the

⁶ Campos tried to write down his recollections before he was apprehended. He wrote that he had a blurred vision of a bald-headed Mexican behind him with a gun gripped in both hands.

back fence of the church was a residence owned by the grandparents of Barrett Gonzales. Gonzales saw two men running through their yard. He later identified one of them wearing a black and white sports jersey as Flores. Gonzales's grandmother called 911. A recording of her call was played for the jury.

That night Salinas Police Officer Gerardo Magana responded to a radio report of a man jumping fences and arrested Flores in the neighborhood, as he matched the radio description. Flores (the driver of the truck involved in the second transaction) was on felony probation. A search revealed in his right rear shorts pocket close to \$600 in currency, in twenties, tens, fives, and ones, amounts that are typical of drug dealers. In Flores's left front shorts pocket was a bindle containing four rocks of cocaine base. Flores claimed that someone had taken his cell phone and put drugs in his pocket.

A number of police officers responded to the apartment complex the night of April 10, 2009. They located two white letter-sized envelopes containing methamphetamine on a grassy area next to the parking lot and in front of the apartment. In one envelope was a plastic baggie containing 54.9 grams of 98.8 percent methamphetamine. In the other envelope was a plastic baggie containing 27.9 grams of 98.4 percent methamphetamine, just under one ounce.

According to Salinas Police Detective Josh Lynd, based on his expertise in methamphetamine sales, the purity of the methamphetamine was very high compared to the 50 to 60 percent adulterated products typically sold to users on the streets. Common street level purchases are a "20," "40," or "60." A "20" would be half a gram of methamphetamine. A gram would go for \$60 to \$120.

Salinas Police Officer Michael Batchelor responded to the apartment complex while Deputy Pinon was still on the ground. In the course of establishing a police perimeter around the apartment, Batchelor noticed a safe on the ground of the church yard just across from the apartment. He lifted it and replaced it when he realized what it was. It was face down on its lock. A six-foot fence separated the church property from

the apartment complex outside the window of the apartment. The safe was on the church side of the fence. The apartment was the only apartment without a window screen. The safe looked to Batchelor to be clean and dry and not weathered, as though it had not been there long. He reported finding the safe at 8:42 p.m.

The safe was about three feet from the fence. The fence was about four feet from the apartment's window. The bottom of the window was three feet two inches from the ground. Dust on the window sill had been disturbed, according to two photographs taken on the night of April 10, 2009.

Another officer called into the apartment and arranged for Diaz and his wife to leave. Officer Batchelor was part of the entry team after they left. He noticed an attic crawl space in the ceiling with a missing chip of paint in one corner and a paint chip on the ground below it. He did not collect the flake. There was a chair and a couch in the apartment. Other officers looked into the crawl space.⁷

The night of April 10, 2009, Campos's car was seen fishtailing at high speed on Highway 101 in Salinas in the direction of the Market Street exit and it was located later that night 1.8 miles from the apartment stuck on top of some iceplant near the Market Street off-ramp with its engine on and keys in the ignition. One Salinas police officer turned off the car. Another officer removed the keys and a cell phone from the car.

Police officers examined the safe located by Officer Batchelor inside the neighboring church. The safe weighed 31.5 pounds and was slightly over 13 inches tall, 15 inches wide, and 12 inches deep. The apartment window opening was over 15 inches wide and four feet tall.

One of the keys from Campos's car opened the lock on the safe. Inside the safe, crime scene investigator Salinas Police Officer Brian Canaday found two digital scales inside cardboard boxes, a box of sandwich bags, a bottle of Super MSM, which is used as

⁷ There was no testimony about what was found in the crawl space.

a cutting agent for drugs, a bowl with a white crystalline coating, a tied off baggie containing 12.3 grams of 98.6 percent methamphetamine, and another baggie containing two more baggies, one containing 25.8 grams of 98.4 percent methamphetamine and the other containing 27.8 grams of 99.2 percent methamphetamine. Photographs of the baggies of methamphetamine were in evidence. According to Canaday, the baggies containing all the methamphetamine were consistent with each other, though he could not say they came from the same box.

In the opinion of drug expert Detective Lynd, based on the contents of the safe and the methamphetamine in envelopes found on the grass, the methamphetamine was possessed for sale. It was packaged in almost half-ounce and ounce amounts. According to Lynd, people dealing in larger quantities of drugs, ounces or even half ounces, will often not keep the drugs in their residence or car, particularly if they are subject to a search condition. They keep them in a “cold location” that law enforcement will not have access to.

The cell phone removed from Campos’s car was registered to “John Smith.” It was activated on April 7, 2009. On April 10, 2009 there were six phone calls between the cell phones of Campos and Flores and three calls between the cell phones of Campos and Adriana.

Campos’s wife Viriviana testified that she obtained the cell phone found in his car. The carrier did not require any personal information.

According to Detective Lynd, drug dealers commonly use “dump phones,” not registering them in their names. They may have more than one phone.

Adriana testified that she had a cell phone, not a land line. Diaz did not have a cell phone and sometimes used hers. She had her phone all day on April 10, 2009. She did not talk to Campos on the phone that day and did not recall dialing his number twice.

Campos testified that he was unaware of a safe in the apartment and did not keep one there.

Adriana testified that she was unaware there was a crawl space in her apartment until the police pointed it out. Neither she or Diaz went into the crawl space or threw anything out the apartment window that night. There was no safe in her house. There was no chair in her apartment. Diaz was not selling drugs from her house and was not contributing to her financially.⁸

That night the police let Adriana and Diaz leave the apartment, but then arrested them at a nearby donut shop.

D. ACTIVE PARTICIPATION IN A CRIMINAL STREET GANG (COUNT 6; BOTH DEFENDANTS) AND GANG ENHANCEMENTS OF COUNTS 1 THROUGH 5

To prove the substantive offense of active participation by both defendants in a criminal street gang on April 10, 2009, and the gang enhancements of all other charges the prosecution presented evidence of Diaz's behavior from the date of trial in March 2010 back through January 5, 1993, and of Campos's behavior from the date of trial back through May 27, 1998.

The jury heard testimony by three officers with prior and current assignments to the Salinas Police Department's Gang Unit, Detectives Lynd and James Knowlton, and Salinas Police Officer Robert Zuniga, and four members of the Monterey County Joint Gang Task Force. In addition to Sheriff's Deputies Pinon and Michael Davis and Police Officer Alford mentioned above, Monterey County Deputy Probation Officer Chris Plummer testified. The prosecutor characterized Plummer to the jury as "the People's

⁸ Adriana denied telling a police officer that she did not need Diaz's drug money. Monterey County Sheriff's Deputy Michael Davis of the Gang Task Force interviewed Adriana at the Salinas Police Department the morning of April 11, 2009. She told Davis that she had not seen Campos the prior day. She said she went inside her residence when she saw two people she believed to be Salinas police officers approaching her residence. Davis questioned her about a safe that had been located and about drugs. She was upset. She said, "I don't need his dope money. I know where it gets people."

gang expert.” He was the last witness called by the People in their case-in-chief and testified for more than a day.

Officer Plummer explained that he has learned about gangs from other officers through classroom training, informal conversations, and their reports of gang crimes, as well as from gang members. He has supervised over 100 gang members on probation. They have various motivations for talking to him about the gang lifestyle. Gang experts also learn about gangs from messages called “kites” written in compact handwriting that have been confiscated from jail inmates.⁹ Plummer testified that much of what he knows is based on hearsay and that he had qualified as a gang expert in only one prior case.

(1). The existence of a criminal street gang

According to Plummer, the Norteño criminal street gang is a kind of subsidiary of the Nuestra Familia (“NF”) gang formed in California prisons by Hispanics from northern California who were disdained by the Mexican Mafia prison gang formed mainly by Hispanics from southern California. “Nuestra Familia is kind of the umbrella organization of the Nortenos on the street. Everything on the street is run by what’s in the prisons,” so the NF prison gang is “kind of the governing body of the Norteno street level guys that are out today.” “[T]he gangs control the prisons.” “[T]he prisons run the streets.” Criminals cycle through jail and prison, so a gang can control members through fear of what will happen to them or their family members once they go to prison.

Many of the original NF members came from Monterey County and specifically Salinas. When released from prison, they brought their gang mentality to the streets. They realized the gang could profit by recruiting younger people and setting up “rules to whereas any crimes that are committed on the streets they have to send money up to the leaders up in prison.”

⁹ Detective Lynd testified that “kites” are also called “wheels.” They are not just between inmates, but can be smuggled into jail when wrapped in plastic and concealed in a visitor’s bodily orifices.

“You have these individual, you know, neighborhood gangs but they all function under the same guidelines and they all answer ultimately to the leaders of the NF who are in prison.” Salinas East Market (“SEM”) and East Las Casitas (“ELC”) are different subsets of the Norteño gang in Salinas.

Plummer acknowledged on cross-examination that he had seen no manual or other documentary evidence that the Salinas street gangs are under the umbrella of the larger group. People have said so in debriefing by the Department of Corrections, but Plummer does not have access to those files.

According to Plummer, there are an estimated 5,000 Norteños in the City of Salinas and maybe 3,000 to 4,000 more in Monterey County. They have adopted a number of symbols and signs such as the color red. A star represents the North Star. The number “14” and variations on it are common because “N” for Norteño is the fourteenth letter of the alphabet.

According to Plummer, among the primary activities of Norteños are “possession of drugs for sale, murders, attempted murders, robberies, carjackings, identity theft, vehicle theft, crimes of that nature.”¹⁰ Plummer provided the details of five predicate

¹⁰ Plummer did not say that assault with a deadly weapon was a primary Norteño activity, though the jury was later instructed that it had to find that one or more of the primary activities of a criminal street gang “is the commission of violation of Health and Safety Code Section 11378, possession for sale of controlled substances, or violation of Penal Code Section 245, assault with a deadly weapon.”

The jury was further instructed: one aspect of a criminal street gang is a pattern of criminal gang activity by its members “whether acting alone or together”; a pattern is a conviction of two or more of the crimes of possession of drugs for sale and assault with a deadly weapon that were committed either on separate occasions or by two or more persons; and the charged crimes in the current case can qualify as a primary gang activity and as part of a pattern.

offenses committed by Norteños in Monterey County between September 19, 2004 and December 20, 2008.¹¹

The earliest crime was on September 19, 2004, after Campos was arrested for violating parole by associating with a Norteño parolee. He attempted to flush six bindles of methamphetamine down the toilet of a holding cell in the police station. When officers tried to stop him, he assaulted one of the officers and had to be tased several times. The methamphetamine was packaged for sale. The bindles were worth around \$300. He was convicted by plea of possessing methamphetamine for sale (Health & Saf. Code, § 11378) with a gang enhancement (§ 186.22, subd. (b)(1)). Campos was originally granted probation on November 16, 2004, but he was subsequently sent to prison on May 18, 2006 for violating probation.

Officer Alford also testified about this incident, as he was one of the officers who struggled with and subdued Campos in the Salinas Police Department holding cell. They were face-to-face during the struggle when Alford clenched Campos's jaw to prevent him from swallowing.

Campos testified that he did not recall the altercation with Officer Alford because he was high on drugs, but he admitted this conviction. He explained the underlying circumstances as follows. At the age of 19 when he got out of jail, he took care of his daughter. At the age of 20, he moved to Nebraska "to get away from all this stuff." In Nebraska he met Viriviana, married her, and had two children.

Campos returned to Salinas at the age of 23 so his children would know his grandfather. He took a job at a fencing company. Everyone there worked long hours and used methamphetamine, so he started using it and became addicted. He sold methamphetamine to support his habit, not to finance the gang. When he turned 24, he

¹¹ We will not summarize all of his testimony regarding the predicate offenses, only that most relevant to issues on appeal.

was apprehended with methamphetamine and was convicted of possession with a gang enhancement.¹²

Another of the predicate offenses described by Plummer was when Shantel Olivia Lerma was charged with possessing cocaine for sale on October 24, 2007 in order to benefit the Norteño criminal street gang.¹³

Detective Lynd provided more information about Lerma, whose is the sister of Adriana, defendant Diaz's wife. On April 27, 2006, a search of Lerma's home pursuant to a warrant revealed over three ounces of methamphetamine, \$4,000 in cash, numerous firearms, pay/owe sheets, and kites wrapped in plastic wrap around tobacco and marijuana. One of the kites was addressed to "Shackles," which Lynd found out was a nickname for Campos.

When Detective Lynd looked into the connection between Lerma and Campos, he learned from records of the Monterey County Jail ("Jail") that, on April 17, 2006, Lerma had deposited \$1,000 onto Campos's "books," which is money he could use in the Jail commissary. On April 30, 2006, the money was signed out to Campos's wife, Viriviana.

Subsequent to the search on April 27, 2006, according to Detective Lynd, Lerma was arrested for possession of controlled substances and gang activity and later for possession of methamphetamine and gang activity.

¹² On direct examination, Campos said that his latest gang-related activity was "[w]hen I caught my drug conviction." On cross-examination, however, Campos testified that he was not in a gang in 2004. On redirect examination, he explained that he admitted possessing the methamphetamine for gang purposes as part of a deal so he could spend one year in county jail and get back home with his family.

¹³ The exhibit on appeal includes only the complaint against Lerma, although Plummer apparently also had in front of him a plea form, a minute order of the plea hearing, and an abstract of judgment. Plummer was not asked to describe Lerma's convictions for the record. He did say the abstract reflected three different case numbers.

Campos testified that people have called him “Shackles” since he was a child. Campos grew up with Lerma and she is the godmother of his boys. Shantel’s sister is Adriana, who became the wife of defendant Diaz. Campos had known Diaz for about seven years.

(2). Defendant Raymond Campos

The factual issue at trial was not whether Campos was ever a member of the SEM gang, but whether his claims to have disengaged from the gang prior to April 10, 2009 were credible. As evidence of Campos’s continuing gang membership, Plummer relied partly on his tattoos, his admissions, and the prior conduct of Campos and others, including Campos being housed with Norteños in the Jail.

(A). His tattoos

In testimony, Campos admitted that gang expert Plummer had accurately identified some of his tattoos as gang tattoos, including “SEM” on his neck, “Salas” on his left shoulder, the Huelga bird on his back, and four dots and a fifth dot on his fingers, which symbolize 14 for N and Norteño. He got them before he turned 18. Campos disputed Plummer’s characterization of other tattoos as gang tattoos. “Always and Forever” right above SEM related to the tattooed names of his daughter and his daughter’s mother. “Smile Now, Cry Later” on his upper left shoulder is an attitude, but not a gang tattoo. That was one of his first tattoos. Some of his tattoos are from prison. On his wrists are not camouflaged Huelga birds, but Aztec designs.

(B). His admissions and testimony

Prior to trial, Campos had admitted gang membership several times over the years. According to Plummer, Campos admitted to an officer on September 18, 2005, during a field interview that he was a Salinas East Market gang member.

Some of Campos’s admissions were recorded on Jail intake questionnaires prepared by classification officers to facilitate the segregation of rival gangs in Jail pods. According to a classification officer, Monterey County Sheriff’s Deputy Michael

Hampson, the major gangs in the Jail are Norteños and Sureños. Those who have dropped out of a gang have to be housed separately. There are about ten pods in the Jail.

A new intake form is completed every time a person comes to the jail, not just when a person is charged with a new crime. Inmates are asked to complete an intake screening questionnaire asking if they or family members have been associated with a gang, if they have enemies, and where they would like to be housed. An inmate's tattoos are also documented on the intake forms with whatever thoroughness the intake officer employs.

On a questionnaire dated April 13, 2004, Campos indicated that he was a member of the "Northerners" gang. He asked to be put in the general population. On a questionnaire dated July 1, 2004, Campos identified Sureños as being his enemies because they were a rival gang. He asked to be put in the general population.

Other admissions by Campos occurred when he registered as a gang member. Because his prior conviction of possessing methamphetamine involved a gang enhancement, he was required to register with the law enforcement agency where he lived and participate in a short interview. He could have been incarcerated for failing to answer questions.

On August 29, 2005, when Detective Knowlton registered Campos, Campos told him that he had been associating with the SEM gang since the age of 18. He estimated there were about 200 SEM members and too many Norteños to count. He initialed a statement on a form acknowledging that the SEM gang, to which he belonged, is a criminal street gang within the meaning of the Penal Code. Campos said that he was no longer an active gang member, as he had gotten married and had two children.

On April 9, 2008, Officer Zuniga registered Campos as a gang member. Campos told Zuniga the following. He first became involved in gangs at age 15 both because SEM members hung out at a recreation center where he hung out and because he had been victimized by Southerners because family members were Northerners. He had been

housed with Northerners every time he was incarcerated. He said he was not an active gang member.¹⁴ He knew the difference between Norteños, who associate with red and 14, and Sureños, who associate with blue and 13. He knew that Norteño gang members committed crimes. He did not answer how he was allowed into the gang. Zuniga acknowledged that for a gang member to go through a formal debriefing could make him a marked man.

At trial Campos admitted that he was in a gang when he was a teenager, but he said he had disengaged from gang activities as he matured, married, and had children. He was 30 years old at the time of trial in March 2010.

(C). Prior conduct by Campos and others

A kite found in 1998 contained a programming schedule and mentioned Campos by his name and his moniker of Shackles and his “hood” of SEM. According to Plummer, “programming” is a way that Norteño Jail inmates prepare for prison. Norteños are very regimented with lots of bylaws they call house rules. Those who fail to abide by the rules are subject to discipline, from paying money to being beaten or slashed. According to Detective Knowlton, the gang requires the inmates in a Norteño pod to wake up, put on their shoes, work out, and go to bed at certain times.¹⁵

On May 27, 1998, Campos was contacted while wearing red shoes and a red belt with “N” on his belt buckle. A probation search revealed he had two sawed-off shotguns in his house.

¹⁴ Zuniga also testified that Campos was evasive when asked whether he was still active in the gang. According to Plummer, during his registration with Zuniga, Campos “refused to say that he dropped out of the gang, which only leaves him to be an active member.”

¹⁵ The prosecutor argued to the jury without objection that Campos’s good physical condition at trial resulted from “Norteno discipline in custody.”

On November 3, 1999, Campos was found to be harboring a wanted SEM member in violation of Campos's probation. Campos moved to Nebraska for a period of time and received letters from gang members in prison.

As previously stated, Campos was convicted in 2004 of possessing methamphetamine for purposes of sale with a gang enhancement and granted probation. On May 18, 2006, he was sent to prison for violating probation.

One kite listed a departure date of June 19, 2006 for Raymond Campos. According to Deputy Hampson, this was corroborated by Jail records.

Plummer acknowledged that while Campos was on parole from March 25, 2008, through April 9, 2009 he was not charged with a violation of parole, though he was subjected to random drug tests and searches and was under police surveillance.

Deputy Pinon had several contacts with Campos. As a member of the Gang Task Force, he met with Campos and other parolees at a meeting in 2008 that did not include their parole officers. The purpose of the meeting was to review parole conditions. Pinon called Campos "Shackles," introduced himself, and told him that his modified Mongolian haircut appeared to be gang related.

Their next encounter was a traffic stop, during which Campos called Pinon by name. Pinon participated in two parole searches of Campos's residence. No contraband was found. Campos was not present during one of them.

One search of Campos occurred on October 23, 2008. On that date, Salinas Police Officer Todd Kessler was conducting surveillance of Campos's residence in Salinas. He saw Campos come out of his house and talk on the street to the driver of a blue truck who had parked near his house. After they talked, they drove off in separate vehicles. Kessler saw no hand-to-hand exchange. Campos was stopped and searched, but not arrested.

The driver of the truck, Flores, was stopped and arrested by Salinas Police Officer Jason Gates on October 23, 2008 after Gates found 0.1 gram of methamphetamine and a firearm behind the truck's bench seat. Flores was later convicted of having a concealed

firearm in his vehicle and transporting a controlled substance, methamphetamine. There was no gang enhancement charged against Flores, even though Gates found a red bandana in the truck.

(D). His Jail housing

According to Jail classification officer Hampson, Campos has a long history of housing within Norteño housing units.

According to Plummer and Hampson, one of the dangers of a faulty official classification of a Jail inmate is that the gang members in the pod may reject the new inmate after conducting their own version of a classification study. The gang may tell a person to “roll up” and leave the housing area if he does not belong or the person may be assaulted and then removed by sheriff’s personnel.

According to Hampson, once an inmate has been classified and housed as a Norteño gang member, he will remain in Norteño housing until he stops associating with the gang and is housed with the gang dropouts. According to Detective Knowlton, it is unlikely that the Sheriff’s Department would put in the general Jail population a person who had been repeatedly housed with Norteños. The housing options for a gang member are either being in an active pod or a dropout pod. A dropout in an active pod would be in danger.

During his registration interview in August 2005, Campos told Detective Knowlton that he had been housed in a pod in the Monterey County Jail that Knowlton recognized to be an administrative segregation housing unit for active Norteño members. Campos indicated that he went there rather than to general population or a dropout pod to avoid retribution from the gang. In Knowlton’s experience, a person who stays in an active gang pod is an active participant in that gang.

According to Plummer, while Campos was in prison, he “was housed on a fully-functioning active Norteno yard, and as such would be expected to participate in all gang activity on that yard.”

Campos admitted in testimony that he mingled with the Northerners in prison, because “you can’t make it in prison by yourself.” People tend to mingle with their own groups. They accepted him in prison because of where he was from and his tattoos. He did not engage in gang activities in prison. Campos was a prison trustee for a year.

After being arrested in this case, Campos was housed in a Norteño Jail pod, though he asked to be placed in general population and asked for a classification hearing. It was the opinion of Jail Classification Officer Hampson based on Campos’s history of being housed in Norteño pods that Campos was an active participant of the Norteño gang.

In evidence over objection was a recording of a Jail telephone call that Campos made on an unknown date after he was arrested. Campos said he was calling on behalf of another Norteño gang member in his same Jail housing. He asked an unknown female to call a number she had called earlier. When she asked who was calling, Campos said, “This is . . . the famous guy.” Campos asked an unknown man to open a line for him and give the number to his wife. He also asked to have money placed on his books in Jail. The man asked if he wanted the “meat lovers package” instead. Campos said he did.

According to expert Plummer, three-way calls are a common tactic by gang members in jail “to kind of camouflage their activities.” The only three-way calls from jail that Plummer had heard were by gang members. Opening a line meant purchasing a prepaid cellular phone. It is common for gang members to use such disposable phones and to smash them to prevent law enforcement from accessing their contacts. Plummer did not research whether Campos received money or a food package after the call.

(E). Campos’s testimony

In addition to the above testimony by Campos, he did not agree that his gang was a criminal street gang as defined by expert Plummer. He said it was other kids from a certain neighborhood hanging out at a recreation center. He used to live on East Market Street in Salinas. He joined by associating with them, not being jumped in. He fought

with Sureños. The only crimes he committed as a gang member were the ones he was charged with.

Campos admitted not only the conviction of possessing methamphetamine for sale in 2004, but a conviction the same year of domestic violence. He was given probation in those matters, but he was later sent to prison after violating probation.

Campos was subject to parole conditions prohibiting his association with gang members. He did not consider codefendant Diaz to be a gang member, as Diaz was not a registered gang member or on probation or parole. Campos asked people about their status before associating with them. He did know of Diaz's past, but "had not seen him mess around for a long time."

Campos said, "I don't want nothing to do with that lifestyle anymore." He did not officially drop out of the gang because he did not want to become a target.

After being paroled, Campos devoted his life to his family and employment. He attended an automotive trade school in the mornings, driving to and from Fremont five days a week. He returned to Salinas in the afternoon and picked up his kids from school, made sure they did their chores, and helped them with their homework.

The owner of a martial arts studio in Salinas testified that Campos and his entire family attended classes five evenings a week starting in October 2008.

(3). Defendant Miguel "Michael" Diaz

Diaz did not testify at trial. His wife, Adriana, testified that he used to be in a gang when he was younger, but he was no longer in a gang.

A search of the apartment on April 10, 2009 did not yield methamphetamine, but the police found what expert Plummer considered to be gang-related items. Written on a CD holder was "S. E. M. street" and "500 Block," which according to expert Plummer was a reference to the 500 block of Market Street. One CD had four dots adjacent to "Ray." Another CD had stars in each of its four corners. Another CD had "XIV" on its cover. A fourth CD included songs by Norteño rap artists.

On a memory card were photographs dating from New Year's Eve 2006. One depicted a male giving hand signs of "M" and "4." Another showed two women wearing red shirts. A third showed several people wearing red shirts.

Diaz's wife Adriana testified that the memory disk was hers and the photos were of her family. It was her brother "throwing up a four." The group photograph showed her, a friend of hers, her brother, his girlfriend, and two cousins. The red clothing was not consistent with northern gang affiliation. The CDs had long been hers. She could not recall who wrote on them. She acknowledged that "14," "XIV," and "SEM" are associated with Norteños. She associates with northerners and southerners. She did not know what "500 block" meant.

Plummer's opinion of Diaz's active gang participation was based partly on his tattoos. "Norteno" is tattooed across his back. On his chest and his right shoulder is "ELC" He has "X4" on his right hand, standing for the number 14.

Plummer's opinion was also based partly on Diaz's prior police contacts. Plummer recited 15 instances of prior gang-related behavior by Diaz between January 5, 1993, and April 27, 2008.¹⁶ On April 21, 1994, Diaz was wearing a red shirt while associating with individuals with Norteño gang tattoos. He was arrested for possession of a pistol that he tried to dispose of.

On January 2, 1998, an ELC member was with Diaz at his residence. A search revealed an assault rifle, a handgun, and gang graffiti.

¹⁶ Diaz's opening brief does not review the details of his 15 prior contacts with law enforcement. He instead states that Plummer's opinion about his active Norteño membership was based partly on his "gang related tattoos, his association with other gang members, and gang related clothing that he wore in the past." As Diaz appears to concede that he regularly wore red clothing and associated with ELC members and other Norteños, we will set out only a few key contacts.

On a Jail intake form dated January 1, 1998, Diaz stated that he or a family member was a Norteño.¹⁷ A Jail intake form dated July 24, 1999, documented that Diaz had “ELC” and “XIV Salas” tattoos.

On January 14, 2001, Diaz was in the company of a Norteño gang member who was dressed in red. He was arrested for violating his probation. After that Diaz was in custody for about one and one-half years.

On September 29, 2007, Officer Mike Ravera and Deputy Pinon stopped a vehicle containing Diaz and a Norteño gang member. Diaz admitted that he was a “northerner.” This meant to Plummer that “he’s not a member of the [N]orthern [S]tructure, but he is a street level active Norteno gang member.” The Northern Structure is a lower level NF prison gang.

Early in 2008, Deputy Pinon contacted Diaz in the company of a parolee-at-large who had methamphetamine in his pocket. When Pinon asked Diaz for his name, Diaz said, “I’m Chaco Mike from ELC.’” Pinon remembered because it is pretty uncommon to “identify yourself as by your moniker and your subset.” He was not sure at trial if he had filled out a field interview card. According to Plummer, the report filed by Pinon recorded that Diaz said he was not a gang member.

Diaz was last seen wearing red clothing on April 3 and 27, 2008. He was not on probation or parole at the time.

Plummer acknowledged that Diaz is not a registered gang member.

After being arrested in this case, Diaz was housed in a Norteño pod in the Monterey Jail. Based on evidence of Diaz’s long history of such housing, in Hampson’s opinion, Diaz was an active participant in the Norteños.

¹⁷ There was no attempt to reconcile Deputy Hampson’s description of a Jail intake form dated January 1, 1998 with Plummer’s description of Diaz being contacted at home the following day. We assume that the contact preceded completion of the intake form.

(4). Plummer's opinions about the charged offenses

Plummer offered an opinion on how each of the charged offenses was committed for the benefit of or in association with a criminal street gang. As to the attempted murder and assaults on peace officers, a violent assault on an officer would benefit a gang by sending “the message to the public that, you know, gangs are willing to assault not only, you know, people on the street, but law enforcement officers as well. So, you know, how would just someone on the street feel about, you know, reporting a gang member for committing a crime when gang members are out there, you know, running over police officers or doing assaults on law enforcement officers? So it bolsters your reputation of the gang; it increases their fear, and it allows them to continue to commit crimes without fear of [reprisal].” A gang member, especially a Norteño, “can rise to the top by being extremely violent.”

Plummer also testified that for a gang member to escape apprehension also benefits the gang because the member can continue to promote the gang and commit crimes. Plummer acknowledged that there was no evidence Campos committed more crimes prior to his apprehension.

As to the possession and sale of methamphetamine, Plummer identified possessing drugs for sale as among the primary activities of Norteños. “Drugs sales are the No. 1 money maker for gangs in Monterey County.”¹⁸ “The drugs are distributed by the gang members to the lower level, people who will sell them. Those proceeds are in turned funneled back into the gang” and “used to buy more drugs, the vehicles, weapons, ammunition” to be used for future crimes. Also the appearance of wealth makes it easier to recruit impoverished kids.

¹⁸ When the prosecutor sought to question gang expert Plummer about how drug sales benefit criminal street gangs, Campos and Diaz objected to a lack of foundation and under Evidence Code section 352.

Plummer admitted that he had no documentation of a case in which a younger gang member was recruited based on the appearance of wealth resulting from drug sales. He had no documentation of any gang account containing the proceeds of drug sales. He has seen kites describing the requirement of paying into the organization.

According to Deputy Pinon, Nuestra Familia and the Norteño criminal street gang control drug dealing in the City of Salinas.¹⁹ A good portion of the drug sales in Salinas are by gang members. According to his training and contacts with drug dealers, a good portion of the proceeds of drug sales goes back to the gang. He has not seen a spreadsheet or pay/owe sheet identifying an amount going to a particular gang.

According to Detective Lynd, an expert in both drug sales and gangs, criminal street gangs, particularly in Salinas, use the sale of narcotics to fund their other criminal activities.²⁰ The higher an individual's gang status, the closer he will be to the main drug source and larger quantities of narcotics, which are distributed out to lower ranking gang members to distribute them for profit.

According to Plummer, "if you're selling drugs for the Nortenos, you don't get to keep all the money you make by selling those drugs. You have to pay what's called a tax back into the gang." The amount varies depending on the individual and the drug. "If you try to sell drugs on your own without kicking back to the gang, you're subject to discipline, which could include being targeted for murder." On the other hand, people who make money for the gang are given positions of power.

According to Plummer, in a hypothetical situation incorporating many of the facts set out above involving a 30-year-old man on parole for drug sales with a gang

¹⁹ This topic was first introduced on redirect examination of Deputy Pinon without objection to his qualifications. Defense counsel just sought clarification of his statement.

²⁰ When the prosecutor sought to question Detective Lynd about the connection between narcotics and criminal street gangs, Campos and Diaz objected to foundation, under Evidence Code section 352, and on constitutional grounds.

enhancement and gang tattoos who engages in two hand-to-hand transactions outside a Salinas apartment where another man with Norteño tattoos stayed, the hand-to-hand sales were done to benefit the gang, as the gang would receive the proceeds of the sale and spend them on resources for future crimes. The appearance of wealth makes it easier for the gang to recruit new members. For a person with gang tattoos to be the seller also bolsters the reputation of the Norteño gang as someone who can provide drugs to users. The sales were also done in association with the Norteño gang member in the apartment and therefore in association with the gang.

It was Plummer's opinion based on a hypothetical drawn from the facts of this case that each defendant possessed the drugs in association with the other one. "It's a common tactic gang members use, to take somebody who is not on any kind of searchable probation or parole, and use them and their residence as kind of a safe house or stash house and keep drugs, weapons, any other kind of contraband with that person because they know it keeps it away from the eyes of law enforcement." Possession of drugs furthers criminal conduct by gang members by allowing them to take only what they need from the "stash and sell to individual people without having to keep the entire amount of drugs on them at one time."

It was also Plummer's opinion: "It's very difficult for somebody who's really entrenched in the gang lifestyle, especially somebody with a lot of tattoos, with a lot of gang contacts, to just decide all of a sudden that they're not going to be a gang member anymore." For someone who's been "an active participant in this kind of stuff on the street to just walk away from it is – I haven't seen it in my ten years doing this job." He has heard of hundreds of people who have dropped out of gangs, but he has never encountered anyone on the streets who either dropped out or wanted to. He had not heard of a former gang member rehabilitating without dropping out. Members cannot leave the gang on their own. The gang is going to expect loyalty and involvement. A person who was too busy for gang work would be in trouble with the gang.

3. THE SUFFICIENCY OF THE EVIDENCE

On appeal, both defendants contend that the evidence was insufficient to support their convictions on all counts except for Campos possessing methamphetamine for sale (count 4). Both defendants also challenge the sufficiency of the evidence supporting their gang enhancements.

“In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, 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. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317–320.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant’s guilt beyond a reasonable doubt. “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” [Citations.]” (*Id.* at pp. 792–793.)” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

The same standard applies to the sufficiency of the evidence of a gang enhancement. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).)

A. POSSESSION OF METHAMPHETAMINE FOR SALE (CAMPOS AND DIAZ)

The jurors were instructed that both defendants were charged in count 4 with possessing methamphetamine for sale, including the following instructions. “Two or more people may possess something at the same time. [¶] A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person.” (CALCRIM No. 2302.)

They were also instructed that an aider and abettor of a crime is as guilty as its perpetrator and that aiding and abetting involves the defendant’s knowledge that the perpetrator intended to commit a crime, the specific intent to aid and abet the crime, and the fulfillment of that intent. The specific intent is to “aid, facilitate, promote, encourage, or instigate the perpetrator’s commission of that crime.” Presence at the scene of the crime is not required and does not by itself make a person an aider and abettor. (See CALCRIM Nos. 400, 401.)

On appeal, Campos does not challenge the sufficiency of the evidence of this conviction, but Diaz contends that “the record lacks sufficient evidence that [Diaz] knew of the existence of the safe or its contents, and no evidence links the safe found in the rear of the complex with the apartment that [Diaz] was visiting.” Diaz’s “mere presence . . . in the vicinity where drugs are found does not establish joint dominion and control.”

People v. Ingram (1978) 87 Cal.App.3d 832, 844, explained: “‘Unlawful possession of narcotics is established by proof (1) that the accused exercised dominion or control over the contraband, (2) that he had knowledge of its presence, and (3) that the accused had knowledge that the material was a narcotic.’ [Citation.]” [Citations.] “These elements may be established by circumstantial evidence and any reasonable inferences to be drawn therefrom. [Citations.] . . . Constructive possession is sufficient and possession by any person when the defendant has an immediate right to exercise

dominion and control over the narcotic will support a conviction. [Citation.]”
[Citation.]’ [Citation.]

“‘Exclusive possession of the premises is not required, nor is physical possession of the narcotic. [Citations.] Although proof of opportunity of access to a place where narcotics are found, without more, will not support a finding of unlawful possession [citation], possession may be imputed where the contraband is found in a location which is subject to joint dominion and control of the accused and another. [Citations.]’ [Citation.]”

In the evening of April 10, 2009, two police officers observed Campos engage in two hand-to-hand transactions within a short time. As the officers did not see either money or a suspicious package being exchanged, that alone may not have justified his arrest, let alone his conviction. (*Cunha v. Superior Court* (1970) 2 Cal.3d 352, 357; *Remers v. Superior Court* (1970) 2 Cal.3d 659, 665–666; see *People v. Limon* (1993) 17 Cal.App.4th 524, 532.) But there was much more. Campos fled as the officers approached him. The police did not find him that night, but they found his car, in which was a key to a safe that contained tools of the trade of a methamphetamine dealer, namely a mixing bowl, a cutting agent, two digital scales, a box of plastic baggies, and three packages of over 98 percent methamphetamine, weighing 27.8 grams, 25.8 grams, and 12.3 grams. Campos having a key to the safe was substantial evidence that, if he did not own the safe, he at least had dominion and control over it and its contents. (*People v. Ng King* (1943) 60 Cal.App.2d 239, 240 [the defendant had a key to a tin containing two bindles of opium and an opium bowl]; *People v. Montes* (1956) 146 Cal.App.2d 530, 533 [the defendant had the key to a kitchen cabinet drawer that contained a druggist’s scale and marijuana fragments]; *People v. Woods* (1951) 108 Cal.App.2d 50, 51-52 [the defendant had keys to the house and the room in which heroin was found].) This conclusion negates Diaz’s contention that “no evidence supports an inference that, as a

mere guest, [Campos] had any dominion or control over the drugs or even knew of their presence.”²¹ There was no evidence that Diaz had a key to the safe.

The police also found in a grassy area over which Campos had walked two envelopes each containing a bundle of over 98 percent methamphetamine, weighing 27.9 grams and 54.9 grams. The consistent purity of the methamphetamine, as well as its packaging and proximity, strongly indicated that the methamphetamine on the grass was from the same batch that was found in the safe.

In the opinion of drug expert Detective Lynd, the quantity of the drugs found, the packaging of the five bundles of methamphetamine, and the packaging accessories indicated that whoever possessed those drugs possessed them for sale.

Detective Lynd further testified that drug dealers, particularly those with probation and parole search conditions, tend to keep their drugs in safe locations and not in their own residences or vehicles. It is unlikely that Campos was keeping the safe on the church grounds, especially when his long-time friend, Adriana, lived nearby, and in fact in the very apartment from which he had twice emerged to engage in hand-to-hand transactions. Moreover, the condition of the safe when found was such that it appeared not to have been outdoors very long. (Cf. *In re Richard D.* (1972) 23 Cal.App.3d 592, 595-596 [sack on ground containing marijuana was dry although it was raining and the area around the sack was wet].)

As the prosecutor argued to the jury, a number of factors indicated that the safe had come from the apartment. The safe was on the ground in line with the apartment’s window and not far from it, about seven feet away, on the other side of a six-foot fence. That apartment window was the only one missing a screen. In photographs, the “windowsill, in front of the opening window . . . is clearly clean, reflective, compared to

²¹ Diaz appears to withdraw this opening brief claim in his reply brief, stating that he “agrees with respondent that the record contains plenty of evidence linking Campos to the safe.”

the area to the side of it, as if somebody has just walked on it, stepped on it, crawled on it, disturbed it in some fashion.”²² The safe was clean and dry. “[I]t had to come from somewhere and Apartment 7 is the only reasonable conclusion there.” These facts together are substantial evidence that Campos was keeping in the apartment a safe containing methamphetamine packaged for sale and packaging and cutting materials and that one or more persons had moved the safe from inside the apartment to where it was found.

As to who moved the safe from inside the apartment to the church grounds, at the time the safe was found, Diaz and his wife, Adriana, were the only occupants of the apartment at the time the police established a perimeter and Campos had fled the scene 50 minutes earlier. Diaz, if not a resident, was a frequent visitor.

It is true that no witness saw or heard Diaz or Adriana hand the safe out the window or throw or drop it on the other side of the fence. (Compare *People v. Garcia* (1970) 4 Cal.App.3d 904, 908 [officers did not see the defendant or his companion throw anything as they fled up a stairwell, but officer heard something hit a door and saw a cellophane packet containing heroin on the landing in front of the door]; *People v. Perez* (1963) 213 Cal.App.2d 436, 439-440 [as officers entered a bus they had stopped, the defendant made a throwing motion in the direction where a packet of marijuana cigarettes was found].) No witness saw anyone leave that apartment until Diaz and Adriana emerged. The safe was moved before the police had an opportunity to establish a complete perimeter around the apartment, but it was found in the course of establishing that perimeter on the church grounds.²³

²² The prosecutor did not mention in argument that there was a paint chip on the apartment floor that had apparently come from the crawl space in the ceiling of the apartment, perhaps because it was not documented in a photograph.

²³ The prosecutor admitted in opening argument to the jury that he could not prove whether someone had leaned out of the window and thrown the safe over the fence, had

The most logical explanation is that either Diaz, Adriana, or both of them were involved in relocating the safe from inside the apartment to outside on the church grounds. It was a small studio apartment, and it is unlikely that either one of them could have carried concealed from the other a safe measuring one cubic foot and weighing 31.5 pounds. As the prosecutor argued to the jury, “if you didn’t know what was in there you wouldn’t throw the safe out of the window or climb out the window and dump it.” (Cf. *People v. Huerta* (1965) 238 Cal.App.2d 162, 163-164 [attempt by defendants’ companion to dispose of marijuana as police approached and subsequent flight by all justified an inference that the defendants were joint possessors and aware of drug’s character].) We conclude there was substantial evidence that in, at least, assisting an attempt to dispose of and conceal the safe as police officers approached, Diaz aided and abetted Campos’s possession of methamphetamine for sale. (*People v. Magee* (1963) 217 Cal.App.2d 443, 479; *People v. Garcia* (2008) 168 Cal.App.4th 261, 274.)

B. SELLING, FURNISHING, OR GIVING AWAY METHAMPHETAMINE (CAMPOS)

There are a number of ways to violate Health and Safety Code section 11379. In this case the jury was instructed that Campos was charged on count 5 with “selling, furnishing, or giving away methamphetamine” and that “[s]elling for the purpose of this

climbed out of the window and lifted it over the fence, or had shot-putted the safe over the fence from inside the apartment. He further asserted that he did not have to prove how the safe got over the fence, just that it came from the apartment.

Campos argued to the jury that Flores and another unidentified person were both seen running from the area and that the safe was found in Flores’s flight path. Diaz argued that there were other suspects in the area and that it was not physically possible to throw the safe out the window and have it clear a fence and land where it did without damage to the safe.

In response, the prosecutor argued that maybe the third person had come out of the apartment with the safe.

instruction means exchanging a controlled substance for money, services, or anything of value.” (CALCRIM No. 2300.)

We have already concluded above (*ante* in part 3A) that Campos possessed the methamphetamine for sale. On appeal, Campos challenges the sufficiency of the evidence that he actually sold, furnished, or gave it away. He emphasizes that the police detained only one of his two supposed customers on April 10, 2009, and when detained, Flores was not in possession of methamphetamine, just cocaine.²⁴ Thus, no evidence confirmed “a completed sale or furnishing of methamphetamine.”

We realize that many convictions of selling or furnishing a controlled substance are based on either a purchase of the substance by an undercover officer or a controlled buy, with law enforcement furnishing money (sometimes marked) to a buyer, who gives the defendant the money in exchange for a controlled substance that the buyer subsequently gives over to law enforcement. (E.g., *People v. Taylor* (1959) 52 Cal.2d 91, 94; *People v. Ingle* (1960) 53 Cal.2d 407, 414.)

However, other evidence of furnishing has also been found sufficient. In *People v. Hines* (1968) 260 Cal.App.2d 13 (*Hines*), two undercover officers in a vacant lot of an area known for drug dealing observed the defendant remove his cupped hand from a brown bag and appear to count out pill-shaped white and foil-wrapped objects into a metal container held by another man. The man asked the defendant for more and offered to bring money the next day. Immediately after this transaction, the defendant looked in the direction of the officers, dropped the bag, and said, “Cops.” The other man tossed the metal container to the ground and both men walked away. On the ground, the officers

²⁴ The prosecutor argued to the jury in opening argument without objection that “you could reasonably determine that Mr. Campos was giving him the methamphetamine or the cocaine, which Mr. Flores ended up with.” There was no evidence that Campos was in possession of cocaine that night. Campos does not assign this as misconduct on appeal, but he does argue that it reveals the weakness of the prosecution’s case.

found a paper bag, a metal can, and over fifty capsules and tablets containing four different kinds of dangerous drugs. The appellate court found substantial evidence of the defendant furnishing dangerous drugs. (*Id.* at pp. 14-15.)

Our case is similar to *Hines*, although the officers in our case did not observe what was exchanged between Campos and Flores or the driver of the Bronco. However, a ready inference can be drawn that, because of the approach of the officers, either Campos or Flores deposited the envelopes with methamphetamine on the ground. As the officers both testified that they did not see Campos drop anything on the ground before he got into his vehicle, it is possible that Campos had completed his exchange with Flores and that Flores subsequently dropped the envelopes in his flight, not bothering to secure them adequately while the officers were engaged, perhaps temporarily, with Campos.

Experienced officers saw a kind of transaction that was typical of an exchange of drugs for money. Their factual observations provided substantial evidence that Campos was handing something to the vehicle drivers, in the case of Flores most likely what was left behind on the grass near their encounter. We conclude that these observations, coupled with the evidence of Campos's possession of similarly packaged and pure methamphetamine in the safe, provide substantial evidence supporting Campos's conviction of furnishing or giving away methamphetamine.

C. ASSAULT WITH A DEADLY WEAPON ON PEACE OFFICERS (CAMPOS)

The jury was instructed that Campos was charged in counts 2 and 3 with assaulting peace officers with a deadly weapon. (CALCRIM No. 860.) In describing the requisite mental state, the court instructed the jury that counts 2 and 3 did not require a specific intent, though the attached gang enhancements did. Assault involves a general criminal intent. (CALCRIM No. 252.) That intent is the "wrongful intent" of intentionally doing a prohibited act on purpose, but it does not require an intent to break the law. (CALCRIM No. 860.) "[W]hen the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and

probably result in the application of force to someone.” “The People are not required to prove that the defendant actually intended to use force against someone when he acted.” The act was done “willingly or on purpose.”

The jury was also instructed that the defendant was not guilty of assault “if he acted without the required intent . . . , but acted instead accidentally.” (CALCRIM No. 3404.)

On appeal Campos asserts that “to be guilty of assault the defendant must still have *actual* knowledge of facts that would make a reasonable person aware a battery would *naturally* result.” “The particular split-second reverse driving conduct and other circumstances here do not fairly reflect a criminal assault on officer Pinon as distinct from reckless or negligent driving conduct.”

People v. Williams (2001) 26 Cal.4th 779, on which Campos relies, is the California Supreme Court’s most recent discussion of the mental state involved in assault. (*Id.* at pp. 784-785.) The court stated: “[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur.” (*Id.* at p. 788, fn. omitted.) “[M]ere recklessness or criminal negligence is still not enough.” (*Ibid.*)

Campos does not dispute the general proposition that “[a] car can be operated in such a manner as to constitute a deadly weapon.” (See *People v. Jones* (1981) 123 Cal.App.3d 83, 97.) He does not dispute that driving a car at a pedestrian can constitute an assault. (*People v. Golde* (2008) 163 Cal.App.4th 101, 109 (*Golde*)). Instead, he asserts that Deputy Pinon in fact “was hit because the door opened further – not because he was in the car’s path.” Campos did not and could not have known that Pinon was in the path of his open car door.

This was the same argument made to the jury, when Campos asserted, “Deputy Pinon was hit accidentally. Mr. Campos did not aim the car at him[. H]e was not driving in a reckless fashion to try to hit somebody or in such a fashion that he knew somebody would get hit.”

Campos focuses on the actual mechanics of the resulting injury. However, a battery will directly, naturally, and probably result somehow when a car is driven at a pedestrian who is nearby. Deputy Pinon’s unsuccessful attempt to avoid injury by dodging the rear of the vehicle was a natural reaction to be expected by a driver aware of a pedestrian in the path of his vehicle. Intentionally driving at a pedestrian amounts to an assault with a deadly weapon even if the pedestrian is able to jump clear. In any event, as the Attorney General points out, Pinon was eventually trapped under the car’s open driver’s door and yelling at Campos to stop, but Campos instead repeatedly punched the accelerator. Under these circumstances, a battery was not only likely to occur, it was occurring.

People v. Mortensen (1962) 210 Cal.App.2d 575 involved similar circumstances. A vehicle driver reacted to a motorcycle officer’s announced intent to arrest him for failing field sobriety tests by running to his car, getting in the driver’s seat, and attempting to start it. The officer followed and reached through the window in an attempt to get the ignition key. The car started while the officer’s arm was trapped in the steering wheel. This knocked the officer backward, but not down. The driver’s door flew open and the officer tried to grab the driver’s arms and told him to stop. “At that time, while the officer was between the open door and the side of the automobile, the automobile suddenly went backward and knocked the officer down.” (*Id.* at p. 578.) After backing over the motorcycle, the automobile went forward rapidly toward the officer, who was able to avoid it this time. (*Id.* at pp. 578-579.) The appellate court found that there was substantial evidence to support the verdict of assault with a deadly weapon. (*Id.* at p. 584.)

We conclude that substantial evidence supports the conviction of Campos for assaulting Deputy Pinon with a deadly weapon.

D. ACTIVE PARTICIPATION IN A GANG AND GANG ENHANCEMENTS (CAMPOS AND DIAZ)

The court instructed the jury both as to the separate crime of active participation in a criminal street gang (CALCRIM No. 1400) and as to the gang enhancements of the other crimes (CALCRIM No. 1401).²⁵ The elements of the existence of a criminal street gang were stated in CALRIM No. 1400.

As to the crime of active participation (§ 186.22, subd. (a)), the jury was instructed that the prosecution was not required to prove that the defendant was an actual member of the gang or devoted all or a substantial part of his time or efforts to the gang. The defendant had to be aware, however, “that members of the gang engage in or have engaged in a pattern of criminal gang activity.” (See CALCRIM No. 1400.) Other elements are that the defendant actively participated in the gang and that he “willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by: A, directly and actively committing a felony offense; or B, aiding and abetting a felony offense.” (*Ibid.*)

²⁵ Section 186.22 provides in pertinent part: “(a) 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 by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

“(b)(1) . . . [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 as” described in the following subsections.

Felonious criminal conduct was defined as committing or attempt to commit attempted murder, attempted voluntary manslaughter, assault with a deadly weapon, sale of a controlled substance, possession of a controlled substance for sale, or simple possession of a controlled substance.

“To prove that the defendant aided and abetted felonious criminal conduct by a member of the gang, the People must prove that: 1, a member of the gang committed the crime; 2, the defendant knew that the gang member intended to commit the crime; 3, before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime; and 4, the defendant’s words or conduct did, in fact, aid and abet the commission of the crime.” (See CALCRIM No. 1400.) Aiding and abetting involves the specific intent to aid, facilitate, promote, encourage, or instigate the commission of an intended crime. Being present at the scene of the crime does not by itself make him an aider and abettor. (*Ibid.*)

As to the gang enhancements of counts 1 through 5 and the lesser included offenses (§ 186.22, subd. (b)), the jury was instructed to find that “1, the defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang; and 2, the defendant intended to assist, further, or promote criminal conduct by gang members.” (See CALCRIM No. 1401.)

The prosecutor argued to the jury that both defendants are current gang members. “[S]o here we have Mr. Diaz and Mr. Campos, both Norteno gang members, committing this crime in association with each other.” “By possessing [the methamphetamine] Mr. Diaz is facilitating and aiding and abetting Mr. Campos being able to deal out of a location where he’s otherwise not going to be caught. So all of that contributes to money making, which contributes to the gang continuing in further criminal activity.” As to promoting, assisting, or further criminal conduct, it does not necessarily mean other conduct. “So the conduct in this case is sufficient if you believe that they intended to promote, further, or assist criminal conduct by gang members.”

(1). Defendant Miguel Diaz

As to his active gang participation conviction, on appeal Diaz contends that there was no evidence that he procured the drugs Campos was selling, provided them to him, or gave him advice or encouragement. “Similarly, no evidence suggests that [Diaz] attempted to further or assist felonious conduct through an attempted disposal of the safe.”

Diaz is essentially repeating his claim that there was insufficient evidence to connect him to the safe and its contents that were found outside the apartment he was in. We have already concluded above (*ante*, in part 3A) that there was substantial evidence that Diaz aided and abetting Campos in possessing methamphetamine for sale by attempting to dispose of the safe as police officers approached the apartment.

As to the gang enhancement of possessing methamphetamine for sale, Diaz contends that there is no evidence that Campos was in constructive possession of the drugs, so that they did not possess them in association with each other. We have already concluded above that Campos’s dominion and control over the drugs in the safe was establishing by his having the key to the safe filled with methamphetamine and his engaging in hand-to-hand transactions near where methamphetamine of the same purity was found.

Diaz also contends that there was no evidence he had the specific intent to promote, further, or assist any criminal conduct by another gang member. We already concluded above that Diaz aided and abetting Campos’s possession of the methamphetamine for sale. The specific intent required for liability as an aider and abettor is “the intent to aid, encourage, facilitate or promote a criminal act.” (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1380.) The specific intent required by the gang enhancement need not be more than the intent to promote, further, or assist another gang member in the charged crime. (*Albillar, supra*, 51 Cal.4th at pp. 66-67.) It follows from our conclusion that Diaz aided and abetted Campos’s crime that there was substantial

evidence that he had the specific intent required by section 186.22, subdivision (b)(1). (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*); *People v. Leon* (2008) 161 Cal.App.4th 149, 162 (*Leon*) [from aiding and abetting robberies by fellow gang members “ ‘[i]t was fairly inferable that he intended to assist criminal conduct by his fellow gang members.’ ”].)

(2). Defendant Raymond Campos

On appeal Campos primarily challenges the sufficiency of the evidence to support the gang enhancements and not the substantive offense. He does not dispute that there was substantial evidence that he remained a Norteño on April 10, 2009, and that he possessed methamphetamine for sale. He contends there was no serious claim that he was acting at a gang’s direction and “the record does not disclose substantial evidence these offenses were committed [in] association with or for the benefit of a cognizable Norteno *street* gang (versus a prison gang or a general regional affiliation) either.”

Campos cites this court’s opinion in *People v. Valdez* (1997) 58 Cal.App.4th 494 (*Valdez*) for the proposition that “Norteno” is not a discrete street gang. In that case the members of seven different Norteño gangs had united for a day to attack Sureños. In the context of concluding that there was no abuse of discretion in admitting expert testimony to describe this situation, this court stated: “At the time it assembled, the caravan was not a ‘criminal street gang’ within the meaning of the enhancement allegation. Moreover, their common identification as Norteños did not establish them as a street gang, for, as Officer Piscitello testified, Norteño and Sureño are not the names of gangs.” (*Id.* at p. 508.) It is clear from the context that these statements were merely reflective of the expert testimony in that case.

This court has subsequently stated, “*Valdez* does not hold that there is no criminal street gang called Norteño.” (*In re Jose P.* (2003) 106 Cal.App.4th 458, 467 [officer testified the Norteño street gang in Salinas had around 600 members or associates].) In *People v. Ortega* (2006) 145 Cal.App.4th 1344, the Third District Court of Appeal also

distinguished *Valdez* in rejecting “defendant’s assertion that the prosecution had to prove precisely which subset was involved in the present case. No evidence indicated the goals and activities of a particular subset were not shared by the others. There was sufficient evidence that Norteño was a criminal street gang” (*Id.* at p. 1357.)

Though it does not appear that expert Plummer was expressly asked whether Norteño was a discrete criminal street gang, he provided evidence that Norteño met the statutory definition, including common signs, the numbers of members, and primary and predicate criminal activities. In this case there was substantial evidence that Norteño did not simply reflect “a shared ideology or philosophy” (*People v. Williams* (2008) 167 Cal.App.4th 983, 988 [no evidence that Small Town Peckerwoods shared organizational structure with other Peckerwoods]), but that it was sufficiently monolithic to qualify as a criminal street gang. This negates Campos’s contention that he and Diaz “were not in the same street gang/set.” Plummer testified that SEM (Campos) and ELC (Diaz) are different subsets of the Norteño gang.

(A). Possessing methamphetamine for sale and selling or furnishing it

Campos contends that “more evidence of concerted joint dealing (versus a shared stash house and purely personal and separate dealings), or a sharing of drug proceeds” with others is required to “prove *gang* association, benefit, or direction.”

It is a mistake to suggest that the enhancement does not apply to a crime committed in association with a gang member unless there is also a demonstrable benefit to absent gang members. (*Morales, supra*, 112 Cal.App.4th at p. 1198; *Leon, supra*, 161 Cal.App.4th at p. 162.) The elements of association and benefit are in the disjunctive in section 186.22, subdivision (b)(1), applying 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.” (Our emphasis.)

Our above conclusion that Diaz aided and abetted Campos in possessing methamphetamine for sale provides substantial evidence that Campos committed this

crime (count 4) in association with another Norteño. Whether or not Campos also sold or furnished methamphetamine (count 5) in association with Diaz, there was evidence that he sold it for the benefit of Norteños.

The prosecutor's theory in this case was that at least part of the proceeds of methamphetamine sales were directed back to the Norteño gang in order to finance its criminal activities.

In *People v. Ferraez* (2003) 112 Cal.App.4th 925, a gang expert testified that the proceeds of drug sales "would be used to benefit the gang through the purchase of weapons or narcotics, or as bail for a fellow gang member" and "that the sale of drugs promotes, furthers, and assists criminal conduct by the gang." (*Id.* at p. 928.) The Fourth District (Div. Three) concluded that "the expert's testimony was circumstantial evidence, but it was still evidence supporting defendant's conviction." (*Id.* at p. 930.) The appellate court found that the expert's testimony, coupled with the defendant's prior admissions to membership in the Walnut Street gang and his obtaining permission from the Las Compadres gang to sell cocaine, amounted to substantial evidence in support of the gang enhancement. (*Id.* at p. 931.)

There was similar expert testimony in our case from three gang experts, Deputy Probation Officer Plummer, Deputy Pinon, and Detective Lynd, who testified that Norteños control drug dealing in Salinas and collect a form of taxes from the sellers. Campos disparages "the weakness of these disturbingly sparse expert assurances all such dealing was controlled and/or taxed by a gang." It is true that the prosecution produced no evidence of any payment by Campos to a Norteño and no evidence of his receipt of methamphetamine from a Norteño. Nonetheless, if the jury believed these testimonial assertions of sociological fact, it amounted to substantial evidence that a portion of the

proceeds of Campos's drug sales went to finance Norteño crimes.²⁶ That Campos was selling methamphetamine in part to finance future Norteño crimes establishes the benefit element of the gang enhancements of counts 4 and 5.

Campos goes on to question the sufficiency of the evidence that he had the requisite specific intent to “promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).)

We note that the specific intent to benefit a gang is not an element of the enhancement (*Morales, supra*, 112 Cal.App.4th at p. 1198; *Leon, supra*, 161 Cal.App.4th at p. 163) and that a similar specific intent is not an element of the substantive offense of active participation in a gang, having been removed from the bill before it was enacted. (*Albillar, supra*, 51 Cal.4th at p. 57.) The intent involved in active participation is simply the intent to actively participate in a criminal street gang. (*In re Jose P., supra*, 106 Cal.App.4th at pp. 470-471.)

People v. Ramon (2009) 175 Cal.App.4th 843 held that the possession of illegal or stolen property by gang members without more, even in gang territory, is not enough to establish their specific intent to promote the gang. “Such a holding would convert section 186.22(b)(1) into a general intent crime. The statute does not allow that.” (*Id.* at p. 853.)

Some evidence of Campos's intent was that in 2004 he was convicted of possessing methamphetamine for sale for the benefit of, at the direction of, or in association with a criminal street gang. To the extent that there was substantial evidence that Campos was currently selling methamphetamine in part to finance future Norteño crimes, we conclude that there was also substantial evidence of the requisite specific intent.

²⁶ Whether these opinions were properly admitted is a separate issue that we discuss below in part 5A(2).

(B). Assaulting a peace officer with a deadly weapon

As to gang enhancement of count 2, assaulting Deputy Pinon in order to benefit Norteños and with the specific intent to promote, further, or assist in any criminal conduct by Norteños, the question is closer. This was not an action undertaken in association with Diaz, but rather, at least in part, was Campos's effort to avoid apprehension.

“[T]he typical close case is one in which one gang member, acting alone, commits a crime.” (*Morales, supra*, 112 Cal.App.4th at p. 1198.) Evidence that a gang member committed a solo crime for his personal benefit, without more, does not necessarily establish a benefit to the gang. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 665 [weapon possession, carjacking].)

Other decisions involving different facts have upheld gang enhancements for attempts to evade or escape apprehension. In *In re Ramon T.* (1997) 57 Cal.App.4th 201 (*Ramon T.*), two boys on bicycles attacked an off-duty peace officer who had physically detained a third boy for throwing a bottle at a car. When freed, the third boy also struck and kicked the officer and briefly pointed the officer's own gun at him before the boys fled. According to a gang expert, all three boys were active members of the Fairfield Norteños. (*Id.* at p. 204.) A juvenile court sustained charges including resisting arrest and assault with a firearm on a peace officer with gang enhancements.

On appeal the minor disputed the sufficiency of the evidence supporting the specific intent to promote, further, or assist in any criminal conduct by gang members. The appellate court found substantial evidence, reasoning: “We first note that Officer Bockrath opined that the crimes in question were, indeed, committed with such intent. In addition, in our view, a series of assaults and batteries committed to free a gang member (appellant) from the grasp of an officer effecting a lawful arrest strikes us as having unequivocally been committed with the intent of promoting, furthering *and* assisting in the criminal conduct of all three juveniles.” (*Ramon T., supra*, 57 Cal.App.4th at p. 208.)

In *People v. Margarejo* (2008) 162 Cal.App.4th 102 (*Margarejo*), the defendant disputed the sufficiency of the evidence that his evading police officers was done with the specific intent required by the gang enhancement. In that unusual case, during a 17- or 18-minute car chase, the defendant continued making hand signs of his gang while he was driving. (*Id.* at pp. 105-106.) An officer testified that defendant's purpose was to intimidate the community. The appellate court commented: "The message he broadcast—the *only* message he broadcast—was the gang message. The logical purpose was to accomplish the foreseeable effect: to proclaim the gang's dominance in the teeth of a determined police effort to enforce the law. The jury had an ample basis for concluding Margarejo was telling everyone he could that his gang was still in charge, despite the police pursuit. The jury could reasonably conclude Margarejo had 'the specific intent to . . . assist [other] criminal conduct by gang members' (§ 186.22, subd. (b)(1).)" (*Id.* at p. 110.)

People v. Miranda (2011) 192 Cal.App.4th 398, 411-412, stated: "There is rarely direct evidence that a crime was committed for the benefit of a gang. For this reason, 'we routinely draw inferences about intent from the predictable results of action. We cannot look into people's minds directly to see their purposes. We can discover mental state only from how people act and what they say.' (*Margarejo* [, *supra*,] at p. 110.)"

Campos urges that his case is more like *In re Daniel C.* (2011) 195 Cal.App.4th 1350 (*Daniel C.*) than other cases such as *Ramon T.* or *Margarejo*. In that case, a store employee saw three young men walking around a supermarket at midnight. Two wore red baseball caps. One of them wore a red shirt as well. The third had red stitching on his jersey. Two left, and the third headed toward the liquor aisle. The employee confronted him when he attempted to leave the store with a bottle of liquor without paying for it. The bottle broke as the man swung it at the employee. He hit him on the ear, ran out of the store, and drove off in a truck with his companions. (*Daniel C.*, *supra*, at pp. 1353-1354.) A gang expert testified that the minor and one of his companions

were active Norteños, while the third was a Norteño affiliate. (*Id.* at p. 1355.) The expert testified further that the robbery was committed to further the interests of the Norteño gang in that gang commit violent crimes to gain respect and to intimidate others in the community. (*Id.* at p. 1363.) The juvenile court sustained a robbery charge with a gang enhancement.

The appellate court essentially found no factual support for the expert’s opinion. As the minor’s companions had already left the store, the assault was not committed in association with them. (*Daniel C., supra*, 195 Cal.App.4th at p. 1361.) The purported objective of gang intimidation was also unfulfilled, as no gang words or signs were employed during the crime and the witnesses were unaware of the gang associations of the three men. (*Id.* at p. 1363.) The appellate court noted that the juvenile court had found “that appellant’s assault on [the employee] was simply a spur-of-the-moment reaction to [the employee’s] attempt to grab the bottle from him.” (*Ibid.*) “Thus, the underlying premise of [the expert’s] opinion, that the participants planned or executed a violent crime in concert in order to enhance their respect in the community, or to instill fear, was factually incorrect. An “expert’s opinion is no better than the facts on which it is based.” [Citation.]’ [Citation.]” (*Id.* at pp. 1363-1364.)

Unlike *Ramon T.*, Campos did not instigate or participate in a group assault on Deputy Pinon. As in *People v. Ochoa, supra*, 179 Cal.App.4th 650, Campos “did not call out a gang name, display gang signs, wear gang clothing, or engage in gang graffiti while committing the instant offenses.” (*Id.* at p. 662.) Campos “was not accompanied by a fellow gang member” (*ibid.*) in fleeing the scene.

On the other hand, given Campos’s tattoos and his prior encounters with Deputy Pinon and Officer Alford, there may have been no need for him to announce his gang allegiance to them. (*People v. Galvez* (2011) 195 Cal.App.4th 1253, 1261 [“Although no one called out the gang’s name, the assailants’ identity as Carpas gang members was obvious. Appellant had the word ‘Carpas’ tattooed across his upper lip.”].)

In *Albillar, supra*, 51 Cal.4th at page 63, the California Supreme Court noted: “Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a[] criminal street gang’ within the meaning of section 186.22(b)(1). (See, e.g., *People v. Vazquez* (2009) 178 Cal.App.4th 347, 354, [(*Vazquez*)] [relying on expert opinion that the murder of a nongang member benefited the gang because ‘violent crimes like murder elevate the status of the gang within gang culture and intimidate neighborhood residents who are, as a result, “fearful to come forward, assist law enforcement, testify in court, or even report crimes that they’re victims of for fear that they may be the gang’s next victim or at least retaliated on by that gang . . .”]; *People v. Romero* (2006) 140 Cal.App.4th 15, 19 [relying on expert opinion that ‘a shooting of any African-American men would elevate the status of the shooters and their entire [Latino] gang’].)”

In this case there was such testimony. Gang expert Plummer testified that violent assaults on law enforcement officers, such as “running over police officers,” will enhance a gang’s reputation for violence, as it will intimidate civilian witnesses from reporting the gang’s crimes. (Cf. *People v. Hill* (2011) 191 Cal.App.4th 1104, 1120 [expert testified that murdering a police officer sent the ultimate message that “ ‘ “even your protectors can be touched” ’ ”].) He also testified that Norteños value violent individuals and give them positions of power. Plummer was not asked and did not say specifically that it is a Norteño tenet either to confront police officers with force or to avoid apprehension at all costs, but he did give reasons why a Norteño drug dealer might try harder to escape apprehension than an unaffiliated drug dealer.

Campos asserts that “[a]ny claims of specific concurrent intent to further criminal conduct by other gang members in a split-second attempt to save one’s own skin are extravagant and unfounded.” He asks, “After assertedly dumping drugs, was [Campos]

really thinking about aiding present or future criminal conduct of gang members (plural), even through his own escape or reputation . . . ?”

We note that the enhancement applies equally to the specific intent to promote criminal conduct by other gang members as to further or assist it. *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 (*Ngoun*), explained: “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.’ (§ 186.22, subd. (a).) 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. (Webster’s New College Dict. (1995) pp. 885, 454, 68.)” The same words in section 186.22, subdivision (b)(1) should be given the same meaning.

As a parolee, Campos must have learned to expect the heightened scrutiny law enforcement had been giving him. Doubtless, there was an element of surprise in the emergence from an unmarked car of Deputy Pinon and Officer Alford on the evening of April 10, 2009. However, imposition of the enhancement does not, as Campos asserts, require the jury to have found that Campos expressly thought of his fellow gang members in the seconds between his recognition of the officers and his backing out of the parking lot. His conscious focus might well have been a primal flight response. If, however, Campos’s aggressive reaction to the officers’ appearance was primed by a Norteño mentality that exalts and rewards violent criminal behavior in order to intimidate the community, then the jury was justified in finding that he had the simultaneous, though subconscious, specific intent to promote that mentality. We conclude that the expert’s testimony provided substantial evidence in support of the conclusion that the assault on Pinon was done not only for the benefit of Norteños but “with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).)

4. SEVERANCE OR BIFURCATION OF THE TRIAL

On appeal each defendant argues that the trial should have been separated into different pieces, either by bifurcation of the gang evidence or severance of the trial of Diaz and Campos.

A. SEVERANCE OF TRIALS

Diaz asserts that “the trial court abused its discretion when it denied [his] numerous motions and requests to sever his trial.” (Emphasis omitted.)

Diaz made three unsuccessful pretrial requests to sever his trial (on September 9, 2009, October 14, 2009, and February 25, 2010) and three more unsuccessful requests to sever during trial (on March 16, 18, and 22, 2010). His unsuccessful motion for a new trial filed on June 11, 2010, also asserted an error in denying his prior requests to sever.

After the close of evidence, the trial court instructed the jury about which defendant was charged with which crime. Campos and Diaz were jointly charged with possessing the same methamphetamine for sale (count 4) and street terrorism (count 6). Campos was separately charged with sale of methamphetamine (count 5), attempted murder (count 1) and assault with a deadly weapon on Deputy Pinon (count 2), and assault with a deadly weapon on Officer Alford (count 3). “You must separately consider the evidence as it applies to each defendant. You must decide each charge for each defendant separately.” (CALCRIM No. 203.) The court further instructed the jury to decide what happened based on the evidence and not be influenced by “bias, sympathy, prejudice, or public opinion.” (CALCRIM No. 200.)

People v. Tafuya (2007) 42 Cal.4th 147, 162, explained: “Section 1098 provides in pertinent part: ‘When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials.’ [Citation.] Defendants ‘charged with common crimes involving common events and victims’ present a “‘classic case’” for a joint trial. [Citation.] Nonetheless, a trial court, in its discretion, may order separate trials “‘in the face of an

incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, *conflicting defenses*, or the possibility that at a separate trial a codefendant would give exonerating testimony.” [Citations.]’ [Citation.]

“A trial court’s denial of a severance motion is reviewed ‘for abuse of discretion based on the facts as they appeared at the time the court ruled on the motion.’ [Citations.] A trial court’s erroneous refusal to sever a defendant’s trial from a codefendant’s requires reversal if the defendant shows, to a reasonable probability, that separate trials would have produced a more favorable result [citations], or if joinder was so grossly unfair that it deprived the defendant of a fair trial [citations].”

On appeal Diaz argues that the trial court abused its discretion in denying his severance motions “because a high likelihood existed that the jury found [Diaz] guilty of counts four and six based on his association with Campos and the strength of the evidence against him. Indeed, [Diaz] was only charged with two of the six counts, and most of the conduct and status enhancements applied only to Campos.” The evidence establishing Campos’s guilt “instilled the notion in the jurors that [Diaz] must have been guilty because he was at the scene when violence and terror erupted outside of the apartment.”

Diaz invokes *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 152 (*Letner*), which stated: “A prejudicial association justifying severance will involve circumstances in which the evidence regarding one defendant might make it likely the jury would convict that defendant of the charges and, further, more likely find a codefendant guilty based upon the relationship between the two rather than upon the evidence separately implicating the codefendant. (See *People v. Chambers* (1964) 231 Cal.App.2d 23, 29 [concluding that the defendant ‘was probably fastened with vicarious responsibility for the long-continued brutality of [the codefendant],’ and that the jury likely convicted the defendant based upon a ‘notion of joint moral responsibility’ rather than personal guilt];

People v. Massie (1967) 66 Cal.2d 899, 917 & fn. 19 [citing *Chambers* concerning ‘prejudicial association with codefendants’ warranting severance]; *People v. Biehler* (1961) 198 Cal.App.2d 290, 298 [‘the vices inherent in a mass trial such as was had in the instant case are the danger that the jury will find one or more defendants guilty as charged because of his association with evil men . . .’]; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1286 [‘Since defendants were crime partners in several of the robberies and in the murder, prejudicial association with a codefendant is not a factor.’.]”

We conclude that the codefendants’ commission of a common crime made this a classic case for a joint trial, in view of the overlapping evidence required to prove the charges. Had Campos been tried separately on all charges, it would have been harder to explain his connection to a safe outside the apartment without evidence of Diaz and his wife being inside the apartment. Evidence of Diaz’s presence and his attempt to dispose of the safe would have been probative of the gang enhancements of Campos possessing methamphetamine for sale and selling or furnishing it, as well as his active gang participation. Diaz cannot complain of being jointly prosecuted with his partner in crime when judicial economy favored a joint trial. We conclude that the trial court did not abuse its discretion in denying Diaz’s requests to sever the trial.

We see no prejudice or gross unfairness to Diaz resulting from the denial of severance. Ours is not a case like *Letner* where the prosecutor argued that the codefendants’ “history of close friendship[] demonstrated [that] they were equally culpable.” (*Letner, supra*, 50 Cal.4th at p. 152.) While there was evidence that Diaz was married to a long-time friend of Campos, the prosecutor did not emphasize their social connection as evidence of guilt. The prosecutor did not urge Diaz’s guilt by association nor based on his mere presence on the scene. Instead, the prosecutor urged that Diaz at least aided and abetted Campos in possessing methamphetamine for sale by removing the safe from the apartment as the police approached, thus establishing both Diaz’s

possession of the contents of the safe to which Campos had the key and the active participation in Norteños by both of them. The prosecutor held Diaz's inferable conduct against him, not his association with Campos. He did not charge or argue that Diaz was involved in Campos's assaultive conduct while fleeing the scene. We must presume that the jury followed the instructions to consider the evidence against each defendant on each charge separately. (*Letner, supra*, at p. 152.) If the evidence against Campos was as inflammatory as Diaz suggests, the jury would not have acquitted Campos of attempting to murder Deputy Pinon and assaulting Officer Alford.

B. BIFURCATION OF GANG EVIDENCE

Campos argues on appeal, "even if some evidence of shared gang membership were admissible, this case was a good candidate for gang bifurcation and sanitization of impeachment priors."

Campos acknowledges that he did not actually make a motion to bifurcate, but suggests that trial courts have broad authority to bifurcate issues and he did repeatedly object to the introduction of any gang evidence. In a motion in limine heard on March 1, 2010, Campos asked for not only restrictions on gang testimony, but the complete exclusion of gang testimony as extremely prejudicial. Campos argued, "[U]nless you can show that this case was done for the purposes of gangs, if there's some substantial evidence, you know, you shouldn't be bringing in all of this really prejudicial stuff just to bootstrap the case into a gang case." The court denied this request, stating that gang evidence was generally admissible, though it would critically evaluate items of evidence as they were offered. "[W]e have to go item by item to determine whether or not [Evidence Code section] 352 would apply as to particulars." Campos continued making objections to any gang evidence during trial, as well as objecting to particular items of evidence that we will discuss separately below.

The Attorney General asserts that this bifurcation claim has been forfeited, but goes on to argue that it lacks merit anyway.

We will not reach the merits. The trial court had no sua sponte obligation to make and grant a motion to bifurcate the gang evidence. (Cf. *People v. Trujillo* (1984) 154 Cal.App.3d 1077, 1091 [no sua sponte duty to bifurcate trial on prior convictions]; *People v. Hawkins* (1995) 10 Cal.4th 920, 940 [no sua sponte duty to sever counts under section 954], disapproved on another ground by *People v. Lasko* (2000) 23 Cal.4th 101, 110.) We conclude that Campos forfeited this claim on appeal by failing to expressly request bifurcation below. (Cf. *People v. Hawkins, supra*, 10 Cal.4th at p. 940 [failure to request severance waives matter on appeal]; *People v. Burns* (1969) 270 Cal.App.2d 238, 251-252 [objection to consolidated trial forfeited].)

Without reaching the merits, we note that the California Supreme Court in *People v. Hernandez* (2004) 33 Cal.4th 1040 (*Hernandez*) found no abuse of discretion in denying a motion to bifurcate a gang enhancement when some of the evidence was relevant to proving the underlying offense. (*Id.* at pp. 1048-1051.) In our case, the prosecution alleged not only gang enhancements as to each underlying crime, but also the substantive offense of active participation in a gang on April 10, 2009. As the active participation involved committing the underlying crimes on that date, bifurcation would have required the prosecution to prove the underlying crimes twice.

5. GANG INSTRUCTIONS AND EVIDENCE

On appeal Campos complains that the trial court admitted too much gang evidence without sufficiently limiting it. Some of his arguments are directed at particular instructions and items of evidence.

A. THE CHALLENGED GANG EVIDENCE

(1). Campos's prior conviction

On appeal Campos asserts that he was prejudiced by the trial court's admission of his own 2004 conviction of possessing methamphetamine with a gang enhancement.

Campos unsuccessfully objected to Officer Alford describing his first violent encounter with Campos in 2004. Campos unsuccessfully objected to Detective Lynd

testifying that Campos had been convicted in 2004 of possessing methamphetamine for sale for the benefit of a criminal street gang. He argued that he was not going to dispute that the methamphetamine was possessed for sale on April 10, 2009. The prosecutor argued that it was relevant for impeachment. Campos responded that the court still had to decide whether to sanitize the conviction for impeachment purposes. The court reasoned that: “It’s relevant to the issues of possession, the purpose of possession. It’s relevant to any gang enhancement, the intentions of the individual. It is so probative of – of the pertinent issues in this case.”

Campos asserts on appeal that “[t]here was simply no need to admit it to show gang-pattern prior enhancement elements where so many other third party priors were available.[Fn. omitted]” Further, if Campos “possessed the envelopes with drugs, intent to sell nearly *two ounces* of methamphetamine was just not reasonably subject to dispute.”²⁷

Ten days before his opening brief was filed, the California Supreme Court decided in *People v. Tran* (2011) 51 Cal.4th 1040 (*Tran*) “that a predicate offense may be established by evidence of an offense the defendant committed on a separate occasion. Further, that the prosecution may have the ability to develop evidence of predicate offenses committed by other gang members does not require exclusion of evidence of a defendant’s own separate offense to show a pattern of criminal gang activity.” (*Id.* at p. 1044.)

The court reasoned as follows. “In cases such as [*People v. Ewoldt* [(1994) 7 Cal.4th 380], where evidence is admitted under Evidence Code section 1101, subdivision (b), the evidence is probative because of its tendency to establish an *intermediary fact* from which the ultimate fact of guilt of a charged crime may be

²⁷ Actually, the envelopes contained almost three ounces and the safe contained over two more.

inferred. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 393; [citation].) In prosecutions for active participation in a criminal street gang, the probative value of evidence of a defendant's gang-related separate offense generally is greater because it provides direct proof of several *ultimate facts* necessary to a conviction. Thus, that the defendant committed a gang-related offense on a separate occasion provides direct evidence of a predicate offense, that the defendant actively participated in the criminal street gang, and that the defendant knew the gang engaged in a pattern of criminal gang activity. [¶] At the same time, the inherent prejudice from a defendant's separate gang-related offense typically will be less when the evidence is admitted to establish a predicate offense in a prosecution for active participation in a criminal street gang, than when it is admitted to establish an intermediary fact from which guilt may be inferred." (*Tran, supra*, 51 Cal.4th at p. 1048.)

In his reply brief, Camps cites *Tran* for the proposition that "[t]he risk of prejudice is greater where the evidence is admitted on guilt issues, not just gang pattern elements." We believe the point of *Tran* is that a defendant's own prior gang conviction is more probative, not more prejudicial, when it is relevant to guilt issues and is not merely one of many possible predicate gang offenses.

Evidence Code section 1101, subdivision (b) states in pertinent part: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, . . . , intent, . . . , plan, knowledge, . . . , [or] absence of mistake or accident . . .) other than his or her disposition to commit such an act."

In this case, Campos's prior conviction was relevant to the existence of a Norteño criminal street gang (*Tran*), his active participation in that gang (*Tran*), his knowledge of the nature of the drug (*People v. Pijal* (1973) 33 Cal.App.3d 682, 691; *People v. Williams* (2009) 170 Cal.App.4th 587, 607), and his intent to possess it for sale (*ibid.*). His plea of not guilty required the prosecutor to prove all these facts, regardless of how indisputable

they might appear. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 204.) His prior felony conviction was also relevant to his credibility. (Evid. Code, § 788.)

In reply, Campos asserts that “[a]dmission of details regarding the supposed jailhouse assault on officer Alford . . . was particularly prejudicial regarding the equivocal assaultive counts involving officers Alford and Pinon in this case.”

People v. Whisenhunt, supra, 44 Cal.4th at page 204, explained: “Certainly, when a defendant admits committing an act but denies the necessary intent for the charged crime because of mistake or accident, other-crimes evidence is admissible to show absence of accident.”

In this case, Campos’s prior physical confrontation with Officer Alford was relevant to at least two issues. Campos’s claim at trial was that he did not recognize the individuals approaching his car as law enforcement officers. A previous close-up encounter with one of them tended to undermine that claim of lack of knowledge. His claim was also that his car’s collision with Deputy Pinon was simply an accident. Prior violent resistance to apprehension by Campos tended to undermine his claim of accident.²⁸

If this prior conviction was as misleading and inflammatory as Campos claims, then the jury would have wanted to punish him for his prior assault on Officer Alford. Instead, he was acquitted of the current charged assault on Alford.

We conclude that in view of the highly probative nature of this prior incident, the trial court did not abuse its discretion under Evidence Code section 352²⁹ in admitting

²⁸ As we will explain below (*infra* in part 5B(2)), the limiting instructions ultimately given did not invite the jury’s attention to this possible Evidence Code section 1101, subdivision (b) relevance, but that does not reflect an error in admitting the evidence.

²⁹ Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its

either the fact or the details of Campos's prior conviction. Because the evidence was properly admitted there was no denial of due process.

(2). Expert characterizations of Campos

On appeal Campos argues that he was afforded inadequate relief for violations of an in limine ruling by prosecution witnesses.

Before trial, Campos asked in writing that the government's witnesses be instructed "not to refer to Mr. Campos as a shot-caller, leader, commander or any other title with respect to the Norteno criminal street gang." At a hearing on March 1, 2010, the prosecutor responded that the People had told the witnesses "not to say this information," but did not want a witness put in a position of having to lie. The court commented that testimony could go in different directions, so both sides would have to be sensitive to this issue.

(A). Detective Knowlton's testimony

On March 16, 2010, Salinas Police Detective Knowlton testified about his registration of defendant Campos as a gang member on August 29, 2005. On direct examination, Detective Knowlton testified that Campos said he had been housed in the Monterey Jail just before their visit. Knowlton questioned him about being housed with active Norteño gang members. Campos said he was housed there because he did not want to be "no good" with the gang. On cross-examination, Campos's counsel elicited that this statement meant that he was in that pod at least partially as "an act of self-preservation." On redirect examination, the prosecutor asked what other reasons might exist for being in gang housing. Knowlton answered, "Well, there's other benefits to the gang member, especially someone who's been around as long as Mr. Campos has, when he goes to the Monterey County Jail, based on how long he's been involved in the gang

admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

and his status within the gang --” Campos objected and moved to strike the testimony. The court limited the testimony as to what the other benefits might be. Knowlton began to answer, “Due to Mr. Campos’s status within the Monterey County Jail he would have decision – or could have decision-making powers within –.” Campos objected again and moved for a mistrial. The court asked the prosecutor to move on.

In the jury’s absence, both defense counsel moved for a mistrial. The court pointed out that Detective Knowlton was interrupted before giving his whole answer. The prosecutor had asked what the benefits are. “Clearly, it wasn’t [the prosecutor’s] intending to elicit status information, it just happened to fit, so there wasn’t — there’s no inappropriate conduct here clearly. . . . [¶] . . . I think in the big picture that this is not something that justifies a new trial or granting of a mistrial.”

Campos asked the court to instruct the jury to disregard the answer and to tell the jury that there was no evidence that Campos had any decision-making power in those pods. The prosecutor said that the latter statement would be venturing onto dangerous ground. When the jury returned, the court had an off-the-record discussion with Campos’s counsel and told the jury that there was some unfinished business at the end of Detective Knowlton’s testimony. “The answer, the partial answer that was given in response to that last question that he testified to, is stricken and to be disregarded and not considered by you for any purpose.”

After the close of evidence on March 26, 2010, the court instructed the jury in part: “During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. If I ordered testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose.” (See CALCRIM No. 222.)

Campos renewed his objections to Detective Knowlton's remarks in an unsuccessful motion for a new trial.

People v. Wharton (1991) 53 Cal.3d 522 explained: “‘A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.’ [Citation.] Although most cases involve prosecutorial or juror misconduct as the basis for the motion, a witness's volunteered statement can also provide the basis for a finding of incurable prejudice.” (*Id.* at p. 565.)

On appeal Campos argues that this testimony was “incurably prejudicial,” as “[a]uthoritative assertions of [Campos's] supposed decision-making status later in jail unfairly dovetailed with claims this level of dealing had to be gang-related and had to involve higher-level members.”

Campos's trial counsel alertly interrupted the witness when he tried to rely on Campos's gang status and decision-making authority to answer questions. The first mention was a vague reference that included how long he had belonged to the gang. The second mention was also vague, that he would or could have decision-making authority. The “volunteered remarks . . . were brief and ambiguous.” (*People v. Collins* (2010) 49 Cal.4th 175, 199.) The court promptly instructed the jury to disregard the second mention. The prosecutor made no argument to the jury about Campos's status among Norteños. The prosecutor at trial did not attach the significance to this statement that Campos does now on appeal. We conclude that there was neither an abuse of discretion nor a denial of due process in denying the motion for a mistrial on this basis.

(B). Officer Plummer's testimony

Probation Officer Plummer was asked in the morning on March 22, 2010 during direct examination, “Based on all of the contacts, the tattoos, the jail information, are you able to form an opinion as to whether Mr. Campos was an active participant in the

Norteno criminal street gang at the time of this incident, April 10th of 2009?” He was able to form an opinion and his opinion was that Campos was an active participant. The prosecutor asked why.

Plummer gave the following answer. “He was associating with Mr. Diaz, who also, I believe, is a gang member. He was in possession of an extremely large quantity of methamphetamine. That quantity of drugs is usually reserved for – in Salinas, that quantity of drugs is sold by gang members. The Norteno gang controls the methamphetamine trade in Salinas. Those types of quantities you’re not going to see on just a street-level dealer. That’s going to be connected to the gang when you’re dealing with, I believe it was, 7 – 6 ounces that were found. That’s an extremely large quantity of drugs to have.

“Given his gang tattoos that he has; Mr. Diaz’s tattoos; the fact that Valente Flores was there, who has prior contacts with Mr. Campos, contact that ended with Mr. Flores being in possession of a gun and drugs; the fact that Mr. Campos continually refuses to say that he’s left the gang when asked, when he doesn’t have any pending cases, but now that he’s tried to kill two police officers he wants to say that he’s not a gang member.”

Defense counsel both objected. The trial court sustained the objections and granted Campos’s request to strike “the conclusion about what he was trying to do.” Plummer continued that Campos had past opportunities to deny his gang affiliation and “only now has he chosen to take that opportunity.” The trial broke for lunch.

In the jury’s absence, Campos moved for mistrial and was joined by Diaz. The court characterized the witness’s statement as the kind of argument that “could be made by the prosecution.” “In the scheme of this three week plus trial, the Court does not see that as a basis for declaring a mistrial.” The jury would be instructed that they are the fact-finders. Defense counsel did not want to highlight the statement with a further admonition. The trial court stated, “it was acted on promptly and addressed promptly.”

Direct examination of Plummer continued on the afternoon of March 22, 2010. He was asked how committing a violent assault on an officer would benefit a gang. As partly quoted above, he answered: “It benefits the gang in the long run because again it sends the message to the public that, you know, gangs are willing to assault not only, you know, people on the street, but law enforcement officers as well. So, you know, how would just someone on the street feel about, you know, reporting a gang member for committing a crime when gang members are out there, you know, running over police officers or doing assaults on law enforcement officers? So it bolsters your reputation of the gang; it increases their fear, and it allows them to continue to commit crimes without fear of [reprisal].”

At a sidebar conference Campos requested, he moved for mistrial based on the “sneaky” reference to gang members running over police officers. The court stated, “I did not take the witness’s testimony to be a statement of what happened in this case. I take it as a statement of an example on how an assault on a peace officer can occur generally, and not specifically to this case.” The court wished that Plummer would have used a different example, but “I don’t think that that choice infects this case in any way.” After further conferring with defense counsel, the trial court admonished the jury as follows. Their job as jurors is to be the judges of the facts from all the evidence they hear. “Now, in the context of this particular testimony, the expert made a reference to a police officer got run over; and it’s not a reference to this case. It’s going to be up to you to decide whether or not that occurred.”

During cross-examination later that day, Plummer admitted that he had “strong opinions” about this case “based on [his] research.” He acknowledged that Deputy Pinon and Officer Alford were on the Gang Task Force with him and were his friends.

Campos renewed his objections to Plummer’s remarks in his unsuccessful motion for a new trial.

On appeal Campos contends that “the assertions of his supposed attempts to run over police went directly to claims [Campos] intentionally assaulted anyone. These needless references on key points were incurably prejudicial and, in any event, were not effectively cured by any limiting instructions.”

Without in any way endorsing Plummer’s attempts as an expert witness to convince the jury of his views about what happened, we conclude that the trial court promptly and effectively ameliorated the potential prejudice in the questioned remarks. The court struck the first remark as soon as it was made. The court informed the jury that the second remark did not refer to this case. If Plummer’s remarks were as prejudicial as Campos claims, the jury would not have acquitted him of the attempted murder of Deputy Pinon and assaulting Officer Alford with a deadly weapon. The jury must have recognized Plummer’s law enforcement orientation. We conclude that there was neither error nor prejudice in the court’s rulings on Plummer’s spontaneous statements.

(3). The gang expert testimony

Before trial and at trial Campos repeatedly objected to gang expert opinions as lacking foundation and more prejudicial than probative. In his opening brief he complains that the gang expert’s opinions were both too specific and too general. They were too specific because the hypothetical questions were “overly detailed mirroring hypothetical questions.”

After Campos’s opening brief was filed, the California Supreme Court determined that “[i]t is required, not prohibited, that hypothetical questions be based on the evidence. The questioner is not required to disguise the fact the questions are based on that evidence.” (*People v. Vang* (2011) 52 Cal.4th 1038, 1041 (*Vang*)). *Vang* arose in the context of hypothetical questions posed to a gang expert. The court explained that to the extent a hypothetical question is “not based on the evidence is irrelevant and of no help to the jury.” (*Id.* at p. 1046.) On the other hand, “ ‘[e]xpert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the

Penal Code section 186.22, subdivision (b)(1), gang enhancement. (*People v. Albillar, supra*, 51 Cal.4th at p. 63.)” (*Vang, supra*, 52 Cal.4th at p. 1048.)

In his reply brief, Campos recognizes that *Vang* has upheld the practice of detailed hypothetical questions of gang experts. He reiterates his argument for purposes of exhaustion of state remedies, recognizing that we are bound by *Vang*.

Campos also assails in his opening brief “the repeated sweeping statements from several witnesses asserting vague and unattributed reports of broad gang control and taxation of *all* such drug activity, especially by Nortenos, in Salinas.” “[E]xperts may not merely transmit key hearsay or other information tailored to a case without any analysis or supporting details to enable jurors to evaluate the basis of opinion.” Without analysis or details, “a witness offering such facts is not acting as an expert but merely a case agent transmitting hearsay.” His reply asserts that “this is not a challenge to the expert’s qualifications or even specific factual foundation. It is a challenge to expert reports of case-specific (or here, at least *categorical and dispositive*) hearsay as *fact* – with no supporting facts or expert analysis as might even allow jury to assess this as nontruth basis of opinion.”

Campos relies in part on the statement in *People v. Richardson* (2008) 43 Cal.4th 959 that “the expert’s opinion may not be based ‘on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors. . . . [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?’” (*Id.* at p. 1008).

People v. McWhorter (2009) 47 Cal.4th 318 elaborated: “ ‘[T]he value of an expert’s opinion depends on the truth of the facts assumed.’ [Citation.] ‘Where the basis of the opinion is unreliable hearsay, the courts will reject it.’ [Citations.] It is settled that a trial court has wide discretion to exclude expert testimony, including hearsay testimony, that is unreliable.” (*Id.* at p. 362.)

People v. Ochoa, supra, 179 Cal.App.4th 650 concluded that a gang expert’s “testimony, as to how defendant’s crimes would benefit Moreno Valley 13, was based solely on speculation, not evidence. An appellate court cannot affirm a conviction based on speculation, conjecture, guesswork, or supposition.” (*Id.* at p. 663.)

We have already discussed above the sufficiency of the evidence to support Campos’s convictions, which included expert testimony. In this context, we understand Campos to be objecting to the testimony of several witnesses that drug dealing in Salinas was controlled by Norteños. If he is not objecting to the qualifications of the witnesses to make this statement, then he must be objecting to the lack of an evidentiary basis for this factual conclusion, but he claims not to question its factual foundation either.

As stated in *People v. Eubanks* (2011) 53 Cal.4th 110, Campos “was entitled to attack [the gang experts’] credibility regarding the claimed basis of [their] opinion, but questions regarding the validity or the credibility of an expert’s knowledge go to the weight of such testimony, not its admissibility.” (*Id.* at p. 143.) Campos had the opportunity at trial to elicit the factual underpinnings of these factual conclusions. To the extent that he complains that the basis was pure hearsay, as we will explain in the next section below, the jury was properly instructed on how to evaluate the basis of an expert opinion. We conclude there was no abuse of discretion in allowing the experts to assert general sociological facts within their expertise and leave it to cross-examination to explore whether their generalizations had adequate factual support.

B. THE CHALLENGED GANG INSTRUCTIONS

(1). CALCRIM No. 332

Before gang expert Plummer began to testify on the ninth day of testimony, the court instructed the jury that “an expert in this area commonly relies on hearsay.” “And to the extent that the expert relies on hearsay, which is an out-of-court statement generally offered to prove the truth of the matter asserted, it – hearsay as related by this witness, relevant to his opinions, is not offered for the truth of the matter asserted at all, it

is offered only to help you understand the basis of his opinion. [¶] So you cannot consider the hearsay that is elicited during the course of the expert's testimony for the truth but only to show the basis for the expert's opinion." The court observed that the jurors nodded in response to this instruction. Several times during Plummer's testimony, the court reminded the jury that any hearsay stated by an expert could not be considered for the truth of the matter asserted, but only to show the basis of his opinion.

After the close of evidence, the jury was instructed in terms of CALCRIM No. 332 as to expert testimony that they were to decide "[t]he meaning and importance of any opinion." In evaluating an opinion, consider "the facts or information on which the expert relied in reaching that opinion. . . . You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence." If an expert considered a statement by another person in reaching an opinion, "[y]ou may consider those statements only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in the statements is true." If an expert's opinion is based on facts assumed in a hypothetical question, "[i]t is up to you to decide whether an assumed fact has been proved," and if it "is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion."

Campos asserts on appeal, "the form nontruth expert hearsay instructions used here were ineffective to blunt substantive use of key expert reports of broad gang control of drug-dealing." (Emphasis omitted.)

Campos recognizes that the opinion of a gang expert may be based on otherwise inadmissible hearsay, so long as it is reliable. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) It is up to the trial court to ensure that the inadmissible evidence is not considered by the jury as independent proof of the facts recited. (*Id.* at p. 619.) In *Valdez, supra*, 58 Cal.App.4th 494, this court observed "that most often hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth. [Citations.] . . . [¶] Since an admonition

may not always be sufficient, Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. [Citation.] The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court's decision exceeds the bounds of reason." (*Id.* at p. 511.)

In *People v. Hill, supra*, 191 Cal.App.4th 1104, the First District Court of Appeal (Div. Five) examined gang expert testimony closely and opined that, in many cases, the expert's opinion is meaningful only if the jury finds its basis true. (*Id.* at p. 1131.) However, the court concluded that "we must follow *Gardeley* and the other California Supreme Court cases in the same line of authority.[Fn. omitted]" (*Ibid.*) The "basis evidence" in that case violated neither the hearsay rule nor the confrontation clause as the out-of-court statements were not admitted for their truth. (*Ibid.*)

Campos complains about the state of California law on this issue for purposes of further state review and exhaustion of state remedies. He offers us no reason to part company with *People v. Hill, supra*, 191 Cal.App.4th 1104 and the authority on which it relied.

To the extent Campos complains that CALCRIM No. 332 was too weak to adequately instruct the jury about how to evaluate an expert's reliance on hearsay, we note that the trial court repeatedly gave stronger instructions during Plummer's testimony. We presume that the jury understood and followed these instructions. (*Valdez, supra*, 58 Cal.App.4th at p. 512.)

(2). CALCRIM No. 1403

The jury was instructed in terms of CALCRIM No. 1403 that it could consider the evidence of "gang activity only for the limited purpose of deciding whether: The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes and enhancements charged; or the defendant had a motive to commit the crimes charged; or whether the defendant actually believed in the need to defend

himself; or whether the defendant was acting in [association with] a criminal street gang; or whether the defendant committed the crime for the benefit of a criminal street gang.

“You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness is reaching his or her opinion.

“You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.”

The jury was not instructed in terms of CALCRIM No. 375 (or its precursor, CALJIC No. 2.50) that a defendant’s prior uncharged offense may be probative of a defendant’s motive, intent, plan, knowledge, or absence of accident nor that a prior uncharged offense may be considered only if the People have proved it by a preponderance of the evidence.

The jury was instructed that “Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.” (CALCRIM No. 220.) “Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.” (CALCRIM No. 224.) The jury was not informed that any part of the evidence could be established by a preponderance of the evidence.

On appeal Campos lodges what he lists as three objections to CALCRIM No. 1403. “First, the inaptly phrased limiting instruction grossly overstates the purposes for which other ‘gang activity’ (not just membership) could be considered on the substantive crimes versus technical elements of the gang allegations and gang count.” “Unlike lawyers, jurors would hardly understand the ‘gang-related crimes’ language to limit the evidence to gang enhancements or the active gang participation where every count was alleged to be gang-related.” “Second, . . . the limiting instruction, covering

any and all evidence of ‘gang activity,’ grossly fails to specify and segregate the various types of gang and other crimes evidence admitted for various purposes.”

“‘Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.’ [Citation.] But that rule does not apply when . . . the trial court gives an instruction that is an incorrect statement of the law.” (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.)

People v. Samaniego (2009) 172 Cal.App.4th 1148 stated: “CALCRIM No. 1403, as given here, is neither contrary to law nor misleading. It states in no uncertain terms that gang evidence is not admissible to show that the defendant is a bad person or has a criminal propensity. It allows such evidence to be considered only on the issues germane to the gang enhancement, the motive for the crime and the credibility of witnesses.” (*Id.* at p. 1168.) In that case, the appellant unsuccessfully challenged as unsupported by the evidence only optional parts of that instruction identifying relevance to motive and credibility. (*Ibid.*)

In this case, as we have noted above (*ante* in part 5A(1)), Campos’s prior conviction was relevant not only to his credibility, but to his guilt of all charges, not just the gang enhancements and participation. The jury would not have been misled by CALCRIM No. 1403 had it understood some of the gang activity as relevant to those issues. As the Attorney General asserts, “[t]he use of the evidence for such purposes is not limited by law to the gang related charges, and the instruction told the jury that no such limit was present.”

Campos seems to posit that the court, during trial, should have instructed the jury on the limited relevance of each item of evidence as it was admitted, and again, at the conclusion of the trial, reminded the jury for what purposes each item of limited evidence was admitted. However, trial courts ordinarily have no duty to provide limiting instructions *sua sponte*. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1094 [a defendant’s

prior crimes]; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1053-1054 [a defendant's past gang membership].) If Campos wanted limiting instructions during the trial or at its conclusion tailored to each item of gang activity, it was his obligation to request them. He has not established that CALCRIM No. 1403 as given was not a correct general statement of the law.

His third objection is that “the court failed to give any instruction . . . informing jurors they could not consider other crimes or gang activities that were not at least proven to a preponderance An instruction defining the minimum burden of proving other acts is required sua sponte.”

Evidence Code section 502 states: “The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.” In general, trial courts have a sua sponte obligation to “instruct the jury on the allocation and weight of the burden of proof.” (*People v. Mower* (2002) 28 Cal.4th 457, 483.)

Here the jury was instructed about the prosecutor's burden to prove guilt beyond a reasonable doubt. In the absence of any instruction lowering this burden, we presume that the prosecutor was held to the higher burden. This could not have prejudiced Campos.

Campos did not request CALCRIM No. 375 or a related limiting instruction defining the prosecutor's burden of establishing prior offenses. Just as trial courts ordinarily have no duty to provide limiting instructions sua sponte (*People v. Harris* (1977) 71 Cal.App.3d 959, 966 [relevance of prior crimes]), they have no duty to modify them sua sponte to include the standard of proof for prior offenses. (*People v. Goodall* (1982) 131 Cal.App.3d 129, 143.)

Campos goes on to argue that if his trial counsel has forfeited any objection to the limiting instructions, it was constitutionally ineffective. A similar claim was made and rejected in *Hernandez, supra*, 33 Cal.4th 1040, which stated: “‘To establish ineffective assistance, defendant bears the burden of showing, first, that counsel’s performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel’s error, it is reasonably probable that the verdict would have been more favorable to him.’ [Citation.] ‘If the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation.’ [Citation.]” (*Id.* at pp. 1052-1053.)

In *Hernandez*, no instruction limiting the gang evidence was requested or given. (*Hernandez, supra*, 33 Cal.4th at p. 1052.) The court explained that some of the gang evidence in that case was relevant to prove the charged offense, robbery, as well as the gang enhancement. (*Id.* at pp. 1050-1051, 1053.) The California Supreme Court concluded that “defense counsel might reasonably have concluded it best if the court did not explain how the evidence could be used” to prove the charged offense. (*Id.* at p. 1053.) As to the evidence relevant only to the gang enhancement, “counsel might reasonably not have wanted the court to emphasize this evidence either, ‘especially since it was obvious for what purpose it was being admitted.’” (*Ibid.*)

By not requesting a limiting instruction like CALCRIM No. 375, defense counsel required the prosecutor to establish all proof of guilt beyond a reasonable doubt as well as inhibiting the jury’s use of Campos’s prior crime to establish his guilt of assault and possessing and furnishing methamphetamine. This is no basis to criticize trial counsel. We cannot imagine how Campos might have benefitted had the trial court after the close of evidence explained to the jury how each piece of evidence of gang activity was relevant to each of the charges in this case. Instead, it was reasonable for Campos’s

counsel to request no more specific instruction about the relevance of the “gang activity” than allowed in the general provisions of CALCRIM No. 1403. “This record presents no basis for finding that counsel acted ineffectively.” (*Hernandez, supra*, 33 Cal.4th at p. 1053.)

(3). The court’s supplemental instruction

Campos and Diaz separately criticize a supplemental instruction given by the trial court in response to a jury question on its fourth day of deliberations.

The jurors were instructed and began their deliberations on Friday afternoon, March 26, 2010. As indicated above (*ante* in part 3D), as to the gang enhancements (§ 186.22, subd. (b)(1)) of counts 1 through 5 and the lesser included offenses, the jury was instructed to find that “1, the defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang; and 2, the defendant intended to assist, further, or promote criminal conduct by gang members.” (See CALCRIM No. 1401.)

The jurors continued deliberations on March 29 and 30, 2010, and after a break on March 31, on April 1, 2010, resumed deliberating and wrote the following question to the court. “Under CALCRIM 1401, Point 2, if the defendant intended to assist, further, or promote criminal conduct by himself as a gang member, does that qualify as ‘conduct by gang members’? Or does it apply only to other gang members, i.e., not the defendant himself?”

Outside the jury’s presence, the court explained that its proposed answer was based on the authority of *Morales, supra*, 112 Cal.App.4th 1176 and *People v. Romero* (2006) 140 Cal.App.4th 15 and particularly the language of *People v. Hill* (2006) 142 Cal.App.4th 770 and *Vazquez, supra*, 178 Cal.App.4th 347. Counsel for both defendants objected that the intent should be to further criminal conduct by gang members, not just the defendant himself. The original instruction proposed by the court was modified in several ways based on suggestions by all parties, with Diaz’s counsel proposing what

became the final sentence. The court identified the jury's question as partly based on the original instruction's reference to "gang members plural" and whether "it's permissible for them to consider the activities of a gang member in isolation."

After this conference with counsel, the court answered the jury on the afternoon of their fourth day of deliberations as follows. "For purposes of CALCRIM 1401, there is no requirement that a defendant's intent to assist, further, or promote criminal conduct by gang members relate to criminal activity apart from the offense a defendant is charged with. The specific intent required is to assist, further, or promote any criminal conduct by gang members. A defendant's own criminal conduct, if proven, may show the required specific intent. A defendant's gang membership alone is not enough."

The court noted that some jurors nodded in response to this instruction. Five minutes after this instruction was given, the jury returned with its verdicts.

Both defendants attack this instruction on appeal, but from different perspectives. Campos contends that the supplemental instruction omitted and misdescribed essential elements of the enhancement. "[T]he plain language of the statute requires intent to 'promote, further, or assist in any criminal conduct by gang members' . . . in the *plural*, not just the defendant's sole conduct." "Assuming the charged offenses may be considered on intent, if intent to aid one's *own* (singular) conduct is also enough, then any minimum 'gang' intent has been read out of the statute." The instruction is internally inconsistent by describing the intent to aid conduct by other gang members and then "specifically stating there is no requirement the defendant intend to assist criminal activity other than his own." The instruction went beyond the holdings of either *People v. Hill, supra*, 142 Cal.App.4th 770 or *Albillar, supra*, 51 Cal.4th 47.

Diaz, on the other hand, contends that the "trial court's answer was not responsive to the question, for it did not address the scenario about which the jury was asking." It was so broad and vague as to be misleading.

The Attorney General asserts that this issue has been directly resolved in *People v. Hill, supra*, 142 Cal.App.4th 770.

The issue in *People v. Hill* was not how a jury should be instructed, but whether there was substantial evidence to support a gang enhancement of a criminal threat. (*People v. Hill, supra*, 142 Cal.App.4th at p.773.) The Court of Appeal considered the specific intent element in the context of a crime where the defendant was the only gang member present. In that case, the defendant's car scraped against another car. In exchanging words with the driver of the other car, the defendant referred to his gang, told the other driver that "she had 'disrespected' him," and later threatened to shoot her. (*Id.* at p. 772.) A police detective testified that "taking action when one feels 'disrespected' is important to a gang member," and that the defendant's gang benefited from his threat "because it showed that the gang could not be 'disrespected' without consequences." (*Id.* at pp. 772-773.) The jury found the defendant guilty of making a criminal threat and found the gang allegation true. (*Id.* at p. 773.)

On appeal, the defendant contended that there was insufficient evidence to support the gang enhancement. The Court of Appeal disagreed. The court first determined that there is "no requirement in section 186.22, subdivision (b), that the defendant's intent to enable or promote criminal endeavors by gang members must relate to criminal activity apart from the offense the defendant commits. To the contrary, the specific intent required by the statute is 'to promote, further, or assist in *any* criminal conduct by gang members.' ([*Ibid.*], italics added.) Therefore, defendant's own criminal threat qualified as the gang-related criminal activity. No further evidence on this element was necessary." (*People v. Hill, supra*, 142 Cal.App.4th at p. 774.) The court next rejected the defendant's assertion that there was "insufficient evidence that he intended to enable or further any other gang crime." (*Ibid.*) The court explained that "[s]ince there is no requirement in section 186.22 that the crime be committed with the intent to enable or further any other crime, defendant's contention fails in its premise." (*Ibid.*)

Later, *Vazquez* followed *People v. Romero, supra*, 140 Cal.App.4th 15 and concluded that “[t]here is no statutory requirement that this ‘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.” (*Vazquez, supra*, 178 Cal.App.4th 347, 354.) They both disagreed with the Ninth Circuit interpretations of the enhancement. (*Id.* at pp. 353-354.) The issue in *Vazquez* was also the sufficiency of the evidence.

In *Albillar, supra*, 51 Cal.4th 47, decided after the trial in this case, the California Supreme Court definitively resolved the conflict between state appellate courts and the Ninth Circuit regarding the proper interpretation of the specific intent element for the gang enhancement. The court quoted *Vazquez* with approval and found “that the scienter requirement in section 186.22(b)(1)—i.e., ‘the specific intent to promote, further, or assist in any criminal conduct by gang members’—is unambiguous and applies to *any* criminal conduct, without a further requirement that the conduct be ‘apart from’ the criminal conduct underlying the offense of conviction sought to be enhanced.” (*Id.* at p. 66.) Answering a related argument, the court further held “[t]here is no further requirement that 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*. [Citations.]” (*Id.* at p. 67.) The gang enhancement in *Albillar* was applied to convictions of forcible rape and forcible penetration in concert by twin brothers and a cousin who were all members of the same Southside Chiques gang. That they were gang members who intended to attack the minor victim and “they assisted each other in raping her” was substantial evidence warranting application of the gang enhancement. (*Id.* at p. 68.)

Albillar did not involve a gang member acting alone as Campos arguably did in assaulting Deputy Pinon during his escape. In interpreting section 186.22 in *Albillar*, the Supreme Court does not seem to believe it resolved the question of whether an active

participant in a criminal street gang may be found guilty of violating section 186.22, subdivision (a), when the defendant acts entirely alone in committing a felony, and there is no other evidence indicating the crime had anything to do with the gang. Instead, this issue is currently pending in the high court. (*People v. Rodriguez* (2010) 188 Cal.App.4th 722, rev. granted Jan. 12, 2011 [S187680] and *People v. Gonzales* (2011) 199 Cal.App.4th 219, rev. granted Dec. 14, 2011 [S197036].)

We disagree with Campos that the supplemental instruction given informed the jury that a gang member's specific intent to assist, further, or promote his own criminal conduct is enough to find the enhancement true. We do not believe that the supplemental instruction in our case requires us to decide the issue now pending in the California Supreme Court.

We will number the instruction's sentences for ease of reference. "[1] For purposes of CALCRIM 1401, there is no requirement that a defendant's intent to assist, further, or promote criminal conduct by gang members relate to criminal activity apart from the offense a defendant is charged with. [2] The specific intent required is to assist, further, or promote any criminal conduct by gang members. [3] A defendant's own criminal conduct, if proven, may show the required specific intent. [4] A defendant's gang membership alone is not enough."

We perceive Campos to have no quarrel with two of these four sentences. The second sentence simply repeated the specific element in the language of section 186.22, subdivision (b)(1). The fourth sentence was requested by counsel for Diaz and favored the defendants.

The third sentence merely states a specific application of the truism that an actor's intent may be revealed by his conduct. The first sentence, based on *People v. Hill*, accurately anticipated the holding of *Albillar*. At least in a case of joint criminal action, a defendant's specific intent to promote or assist that action is enough.

Contrary to Campos's characterization, the jury was not instructed "that there is *no requirement* that the defendant *intend* to assist criminal conduct (activity) other than his own." As the Attorney General contends, Campos's argument itself "misstates the instruction." The jury was instructed in CALCRIM No. 1401 and again in the supplemental instruction that "[t]he specific intent required is to assist, further, or promote any criminal conduct *by gang members.*" (Italics added.)

While the jury in this case seems to have specifically asked if a defendant's intent to assist, further, or promote his own criminal conduct as a gang member was enough, we do not understand the supplemental instruction to have directly answered this question yes or no. The instruction was "responsive to the question," contrary to Diaz's characterization, but it did not provide a direct answer.

The Attorney General points out that *People v. Hill, supra*, 142 Cal.App.4th 770 apparently concluded that a defendant's intent to promote, further, or assist his own criminal conduct is enough to warrant the enhancement and that "several published cases interpreting the language of subdivision (a)" have found "that the act of a defendant acting alone qualifies under the statute." We recognize that subdivision (a) has been interpreted as applying to a defendant gang member who acts *solely* as the perpetrator of a felony, without any evidence that the defendant aided and abetted *another* gang member. (See, e.g., *Ngoun, supra*, 88 Cal.App.4th at pp. 433-436 ; *People v. Salcido* (2007) 149 Cal.App.4th 356, 366-369; see also *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1305-1308.) This is close, if not identical, to the question currently pending in the Supreme Court.

As the supplemental instruction did not directly inform the jury that a defendant's intent to assist, further, or promote his own criminal conduct as a gang member was enough, we need not determine whether such an instruction would have been a valid interpretation or extension of section of 186.22, subdivision (b)(1).

While Diaz agrees that the instruction did not directly answer the question, he asserts nevertheless that “the jury was wrongly led to believe that if a defendant committed a criminal offense on his own and did so to promote or further his own well-being as a gang member, the enhancement would apply.” Again we disagree. The supplemental instruction reinforced the statement from CALCRIM No. 1401 that the specific intent involves criminal conduct by gang *members*. This is not reasonably subject to an interpretation that assisting, further, or promoting oneself is enough. We conclude that the jury could not have reasonably understood the supplemental instruction to conflict with or contradict CALCRIM No. 1401.

6. NONGANG ISSUES

A. OFFICERS’ OPINIONS ABOUT HAND-TO-HAND TRANSACTIONS

On appeal Campos asserts that “the court erred prejudicially in admitting the officers’ opinions these were actual drug sales.” (Emphasis omitted.)

Over repeated foundation objections, Deputy Pinion testified to his opinion that what he saw Campos engage in “was a narcotics hand-to-hand transaction.” Before giving this opinion, he testified that he had special training in narcotics transactions and had observed drug sales on the streets, including arranging a controlled buy. The apartment parking lot was a good area for drug transactions because it was shielded from the street. Over conclusion and foundation objections, Officer Alford likewise testified that he believed he saw the “exchange of controlled substances for money.” He also had formal and informal training in drug transactions and had observed real transactions between controlled substances dealers and buyers.

Campos argues that “authoritative assurances these were actual sales were not proper expert opinion, where jurors had ample basis, on equivocal observations, to determine this ultimate issue for themselves.”

People v. Prince (2007) 40 Cal.4th 1179, 1223-1224, explained: “[C]ourts have held an expert may testify concerning criminal modus operandi and may offer the opinion

that evidence seized by the authorities is of a sort typically used in committing the type of crime charged. An experienced police officer may testify as an expert, for example, that tools discovered in a defendant's automobile are of the type commonly used in burglaries. (*People v. Jenkins* (1975) 13 Cal.3d 749, 755.) A police inspector may explain that conduct such as that engaged in by the defendant constituted the ‘ “usual procedure” ’ followed in committing the crime of ‘till tapping.’ (*People v. Clay* (1964) 227 Cal.App.2d 87, 93; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 438 [a detective with relevant training may furnish expert opinion concerning the gang-related significance of the defendant's tattoo]; *People v. Gardeley* (1996) 14 Cal.4th 605, 617 [the expert properly testified concerning the culture and habits of criminal street gangs, opining on whether certain behavior constituted gang-related activity]; *People v. Martinez* (2003) 113 Cal.App.4th 400, 413–414 [an expert properly testified that a gang ordinarily will exact revenge upon a gang member who reveals gang confidences]; *People v. Gamez* (1991) 235 Cal.App.3d 957, 965 [based upon his expertise concerning the modus operandi of armed robbers, an officer properly testified concerning the probable intent to commit robbery exhibited by persons who acted as the defendants did].)”

Experts have also helped juries understand hand signs typical of gangs (*People v. Williams* (2009) 170 Cal.App.4th 587, 609; cf. *In re Cesar V.* (2011) 192 Cal.App.4th 989, 1000) and whether the jargon used by a defendant implicated a drug sale (*People v. Lewis* (1962) 206 Cal.App.2d 82, 85; *People v. Velasquez* (1976) 54 Cal.App.3d 695, 699).

It would seem to follow that an experienced officer should also be allowed to testify that a certain type of handshake or exchange is typical of drug sales. However, in *People v. Hernandez* (1977) 70 Cal.App.3d 271, on which Campos relies, the appellate court concluded that an officer should not have been allowed to testify that he had observed a narcotics transaction. (*Id.* at p. 280.) “The circumstances of this case furnish

no basis for admitting Officer Zeuner's opinion. The jury was fully aware that the contacts which the officer described took place outside of a methadone center 'where narcotic addicts, heroin addicts go.' They had been informed that two of the four people who approached defendant were narcotics users and could form their own conclusions about the other two. The officer was no more expert than the jurors concerning the significance of the fact that the four persons kept looking at the area where defendant had his hands. Nor did the officer's expertise add any probative value to defendant's shaking of his head from side to side when he was approached by two other persons." (*Id.* at pp. 280-281; cf. *People v. Soto* (1968) 262 Cal.App.2d 180, 187 [no expertise required to connect furtive, concealing behavior with drug sales].)

People v. Brown (1981) 116 Cal.App.3d 820, on which Campos also relies, closely parsed the expert testimony offered there. The appellate court upheld the testimony of the officers interpreting the jargon used by drugs buyers and sellers. (*Id.* at p. 828.) It was also permissible for them to testify as to the role of a "runner" in a narcotics transaction. (*Ibid.*) However, the court found impermissible the officer's opinion that the defendant was working as a runner for a drug dealer. "The latter answer given by the officer was tantamount to an opinion that Brown was guilty of the charged crime. The term 'runner' having been defined for them, the jury were as qualified as the witness to determine whether Brown was 'working as a runner . . .'" (*Id.* at p. 829.)

In this case, Detective Pinon and Officer Alford were, of course, entitled as eyewitnesses to describe what they saw Campos do in encountering the drivers of two vehicles. (*People v. Phillips* (1970) 10 Cal.App.3d 488, 489; *People v. Perez* (1955) 135 Cal.App.2d 205, 208.) To the extent their observations could best be summarized in a factual conclusion, it should be allowable.

Vang, supra, 52 Cal.4th 1038 recently explained one limit on expert testimony in the course of criticizing and limiting the opinion in *People v. Killebrew* (2002) 103 Cal.App.4th 644. "To the extent that *Killebrew, supra*, 103 Cal.App.4th 644, was correct

in prohibiting expert testimony regarding whether the *specific* defendants acted for a gang reason,[fn. omitted] the reason for this rule is *not* that such testimony might embrace the ultimate issue in the case. ‘Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.’ (Evid. Code, § 805; [citations].) Rather, the reason for the rule is similar to the reason expert testimony regarding the defendant’s guilt in general is improper. ‘A witness may not express an opinion on a defendant’s guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] “Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.”’ (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77; [citation].)” (*Vang, supra*, 52 Cal.4th at p. 1048; cf. *People v. Arguello* (1966) 244 Cal.App.2d 413, 421.)

To the extent that the opinions of Deputy Pinon and Officer Alford reflected a legal conclusion of guilt of sales rather than a factual conclusion about the nature of the encounter they had witnessed, the trial court arguably erred in admitting their opinions under the existing authority. However, we conclude that this error was not prejudicial. When an expert states a legal conclusion that the jury is fully equipped to draw, then the opinion is superfluous. (*People v. Arguello, supra*, 244 Cal.App.2d at pp. 422-423.) The jurors were instructed here on how to evaluate expert testimony and their role as the finders of fact. In convicting Campos of possessing and furnishing methamphetamine, the jurors had not only the opinions from Pinon and Alford as to what they saw, but their descriptions of what they saw, and the related evidence of packaged methamphetamine being found near the scene of the encounters and in a nearby safe to which Campos had a key. It is not probable that Campos would have obtained a more favorable verdict had these opinions been excluded.

B. REFUSAL TO INSTRUCT ON SIMPLE ASSAULT

Campos requested that the jury be instructed on simple assault as a lesser included offense of assault with a deadly weapon on a peace officer. The court refused this request, reasoning that if the assault occurred as charged, it was an assault with a deadly weapon, not a simple assault. “[I]t was either an assault with a deadly weapon or it wasn’t an assault at all.” The court did instruct the jury on the lesser included offense of assault with a deadly weapon. (CALCRIM No. 875.)

The same issue was presented in *Golde, supra*, 163 Cal.App.4th 101, and the court reasoned as follows. The appellate court accepted that simple assault is a lesser included offense of assault with a deadly weapon. “Nevertheless, a trial court errs in failing to instruct on a lesser included offense only if the lesser offense is supported by substantial evidence in the record. (*People v. Breverman* [1998] 19 Cal.4th 142, 162.) ‘[T]he court is not obliged to instruct on theories that have no such evidentiary support.’ (*Ibid.*)

“Defendant argues substantial evidence existed to support an instruction on simple assault, because a car is not inherently deadly, and a jury could find it was not used as such, based on defendant’s intent. Defendant cites *People v. Beasley* (2003) 105 Cal.App.4th 1078, where the defendant beat the victim with a broomstick, there was insufficient evidence that the broomstick, as used by the defendant, was capable of causing great bodily injury, and the appellate court reduced the conviction from assault with a deadly weapon or force likely to produce great bodily injury (§ 245) to simple assault.

“However, even assuming *Beasley* is correctly decided, a car is very different from a broomstick. Although a jury may consider the nature of an object and how it was used in determining whether an object not inherently dangerous is used as such (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029), it is ludicrous to suggest on this record that defendant committed only simple assault when he drove a motor vehicle toward the four-

foot, 11-inch, 83-pound victim, and repositioned the vehicle in her direction when she tried to move out of its way.” (*Golde, supra*, 163 Cal.App.4th at pp. 115-116.)

Campos seeks to distinguish *Golde* based on the “unusual facts” of this case. “[T]his was hardly a typical assault with a vehicle, but, if an assault at all, an assault with a door; the unfortunate fact officer Pinon was struck was not the result of driving at him, but of officer Alford holding on to the door and the door opening.”

The facts of *Golde* are somewhat different, but not in the essential details. Campos’s defense was that it was an unintended accident that any part of his car struck Deputy Pinon and that he did not recognize the individuals near his car as officers. The trial court appropriately instructed the jury on the defense of accident and the lesser included offense of assault with a deadly weapon. We agree with the trial court that there was no substantial evidence warranting an instruction on simple assault as a lesser included offense of assault with a deadly weapon. (*Golde, supra*, 163 Cal.App.4th at p. 117.)

C. CUMULATIVE PREJUDICE

Campo asserts that “the cumulative effect of the errors discussed above deprived [him] of a fair trial by an impartial jury.”

In some cases, “a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]” (*People v. Hill* (1998) 17 Cal.4th 800, 844-845, and cases there cited.) We see no accumulation as we have identified at most one error above.

D. SENTENCING

(1). The assault enhancements

Campos asserts that, as the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C) is based on his infliction of great bodily injury, the trial court erred in imposing a separate three-year enhancement for personal infliction of great bodily injury under section 12022.7.

Section 186.22, subdivision (b)(1)(C) states that when the underlying “felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.” Assault is not expressly listed as a violent felony in section 667.5, subdivision (c), but subsection (8) of that subdivision includes “[a]ny felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7.”

Section 1170.1, subdivision (g) provides, “When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense.”

It is established that the effect of section 1170.1, subdivision (g) is to preclude imposition of a three-year enhancement under section 12022.7 in addition to a 10-year enhancement under section 186.22, subdivision (b)(1)(C) for infliction of the same great bodily injury on the same victim. (*People v. Gonzalez* (2009) 178 Cal.App.4th 1325, 1331-1332.)

The Attorney General concedes that the trial court erred in imposing this three-year enhancement and suggests that we remand to have the trial court strike the lesser enhancement.

(2). The drug prior enhancements

Campos asserts that the trial court erred in imposing the three-year drug prior enhancement of Health and Safety Code section 11370.2, subdivision (c) twice, once on count 5 (sale or furnishing) and again on count 4 (possessing methamphetamine for sale).

Health and Safety Code section 11370.2, subdivision (c) provides in pertinent part: “Any person convicted of a violation of . . . Section 11378 or 11379 with respect to any substance containing a controlled substance specified in paragraph (1) or (2) of subdivision (d) of Section 11055 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and

consecutive three-year term for each prior felony conviction of . . . Section . . . 11378, . . . whether or not the prior conviction resulted in a term of imprisonment.”

Enhancements based on prior convictions are recognized to be status enhancements that attach to the offender, not offenses. (*People v. Edwards* (2011) 195 Cal.App.4th 1051, 1059; *People v. Tillotson* (2007) 157 Cal.App.4th 517, 542.)

The Attorney General concedes the error and proposes that we order the abstract of judgment modified to strike the stayed enhancement of count 4.

(3). Crime lab and drug program fees

As a final argument, Campos notes that the trial court imposed \$200 in crime lab fees³⁰ and \$200 in drug program fees³¹ on stayed count 4 (possessing methamphetamine for sale) as well as the same fees on count 5 (selling or furnishing methamphetamine).

³⁰ Health and Safety Code section 11372.5, subdivision (a) provides in pertinent part: “Every person who is convicted of a violation of Section . . . 11378, . . . [or] 11379 . . . shall pay a criminal laboratory analysis fee in the amount of fifty dollars (\$50) for each separate offense. The court shall increase the total fine necessary to include this increment.”

³¹ Health and Safety Code section 11372.7 provides in pertinent part: “(a) Except as otherwise provided in subdivision (b) or (e), each person who is convicted of a violation of this chapter shall pay a drug program fee in an amount not to exceed one hundred fifty dollars (\$150) for each separate offense. The court shall increase the total fine, if necessary, to include this increment, which shall be in addition to any other penalty prescribed by law.

“(b) The court shall determine whether or not the person who is convicted of a violation of this chapter has the ability to pay a drug program fee. If the court determines that the person has the ability to pay, the court may set the amount to be paid and order the person to pay that sum to the county in a manner that the court believes is reasonable and compatible with the person’s financial ability. In its determination of whether a person has the ability to pay, the court shall take into account the amount of any fine imposed upon that person and any amount that person has been ordered to pay in restitution. If the court determines that the person does not have the ability to pay a drug program fee, the person shall not be required to pay a drug program fee.”

He contends that these fees should have been stayed under section 654 along with the underlying terms on count 4 as they “constitute fines or punishment.”³²

Whether a fee or fine imposed after a criminal conviction is regarded as punishment determines its retroactivity (*People v. Alford* (2007) 42 Cal.4th 749, 753 [court security fee]) as well as whether it can be imposed on a stayed count (*People v. Le* (2006) 136 Cal.App.4th 925, 934 [restitution fine]).

We find a conflict in authority regarding the criminal laboratory analysis fee under Health and Safety Code section 11372.5. In *People v. Vega* (2005) 130 Cal.App.4th 183 (*Vega*), the Second District Court of Appeal (Div. Seven) concluded that the fee did not qualify as “punishment” within the meaning of section 182, subdivision (a). (*Id.* at p. 194.) In *People v. Sharret* (2011) 191 Cal.App.4th 859 (*Sharret*), the Second District Court of Appeal (Div. Five) overlooked *Vega* in reviewing precedent (*id.* at pp. 865-870) before concluding that “[t]he section 11372.5 criminal laboratory analysis fee constitutes punishment and must be stayed under section 654.” (*Id.* at p. 869.)

Vega and *Sharret* took different paths to their conclusions. *Sharret* attached significance to the Legislature characterizing the payment in the statute as a “fine” (*Sharret, supra*, 191 Cal.App.4th at p. 869), while *Vega* noted that it was also called a “fee,” thereby canceling the other characterization. (*Vega, supra*, 130 Cal.App.4th at p. 195.) Both courts noted that the payment must be deposited in a county criminalistics laboratories fund. This appeared to *Sharret* to be earmarking the funds for the law enforcement purposes of crime investigation without a civil purpose. (*Sharret, supra*, at p. 870.) To *Vega* it appeared “to offset the administrative cost of testing the purported

³² Section 654, subdivision (a) provides in pertinent part: “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.”

drugs the defendant transported or possessed for sale in order to secure his conviction.” (*Vega, supra*, at p.195.)

For *Vega*, the determinative consideration was “the purpose of the charge imposed. Fines are imposed for retribution and deterrence; fees are imposed to defray administrative costs.” (*Vega, supra*, 130 Cal.App.4th at p. 195.) *Vega* concluded that the main purpose was to defray the cost of lab testing and “not to exact retribution against drug dealers or to deter drug dealing (given the amount of money involved in drug trafficking a \$50 fine would hardly be noticed).” (*Ibid.*) *Vega* refused to “needlessly prolong this opinion to engage in a detailed analysis of every factor.” (*Ibid.*)

Sharret similarly considered the “dispositive inquiry” to be “whether the Legislature intended it to be punishment.” (*Sharret, supra*, 191 Cal.App.4th at p. 865.) As evidence of punishment, *Sharret* cited that the charge was imposed only on conviction of a criminal offense, it is assessed in proportion to culpability based on the number of offenses, and its imposition is mandatory and does not depend on a defendant’s ability to pay. (*Id.* at p. 870.)

The Attorney General asks us to “follow the reasoning of *Vega*, and reject that of *Sharret*.” Campos naturally favors *Sharret*.

We consider *Sharret* to be more persuasive as to whether the lab fee under Health and Safety Code section 11372.5 should be stayed pursuant to section 654.

This is not, however, dispositive of the drug program fee under Health and Safety Code section 11372.7. *Sharret* relied in part on the crime lab fee being mandatory and not depending on the defendant’s ability to pay. As the Attorney General points out, that is not true of the drug program fee, which is optional depending on the defendant’s ability to pay. Despite its dependence on the defendant’s ability to pay, however, the Legislature itself characterized the drug program fee as both an “increment” of “the total fine” and “in addition to any other penalty prescribed by law.” (Health & Saf. Code, § 11372.7, subd. (a).) In deference to the Legislature’s characterizations, we conclude

that the drug program fee amounts to punishment that should be stayed pursuant to section 654 on an otherwise stayed count.

7. DISPOSITION

As to Miguel Diaz, the judgment is affirmed. As to Raymond Campos, the trial court is directed to strike the three-year enhancement of count 2 and the stayed three-year enhancement of count 4 and to stay the \$200 lab fee and the \$200 drug program fee on count 4, and to send a corrected abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

I CONCUR:

DUFFY, J.*

I CONCUR IN THE JUDGMENT ONLY:

MIHARA, J.

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.