

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND ANGUIANO, SR.,

Defendant and Appellant.

D058578

(Super. Ct. No. FWV033802)

APPEAL from a judgment of the Superior Court of San Bernardino County, Gerard S. Brown, Judge. Reversed in part, affirmed in part, and remanded for resentencing.

I.

INTRODUCTION

Defendant Raymond Anguiano, Sr., appeals from a judgment of conviction and sentence entered after a jury trial. The jury found Anguiano guilty of possession of a firearm by a felon; possession of methamphetamine; possession of heroin; resisting, obstructing, or delaying an officer; and street terrorism.

Anguiano's street terrorism conviction is based on his possession of personal use amounts of methamphetamine and/or heroin, and his resisting an officer. The evidence that the prosecution presented to prove the street terrorism charge is that Anguiano was sitting alone, on a porch, when he noticed police officers approaching him. Anguiano attempted to flee from the officers and threw the drugs over a fence. It is undisputed that Anguiano, a documented gang member, was alone at the time, and that his possession of personal use quantities of drugs or resisting the officers was not related to his gang.

On appeal, Anguiano argues that (1) there is insufficient evidence to support his conviction for street terrorism; (2) the trial court erred in failing to grant a new trial with respect to the count charging him with street terrorism; (3) the trial court erred in failing to instruct the jury that it must unanimously agree on which act formed the basis of the street terrorism offense; (4) the trial court erroneously instructed the jury that it could rely on misdemeanor conduct as the "felonious" conduct necessary to support a conviction for street terrorism; (5) the trial court erred in not granting a new trial on the ground that trial counsel was ineffective in failing to bring a motion to suppress the gunshot residue found on Anguiano, relating to the firearm he was found guilty of possessing; (6) the trial court did not understand that it possessed the discretion to strike only some, and not all, of Anguiano's prior strike convictions; and (7) he was not validly convicted of a serious or violent felony in the present case because only the street terrorism offense constitutes a serious or violent felony and, he maintains, there was insufficient evidence to support that conviction, such that the court erred in imposing the three five-year terms pursuant to

Penal Code¹ section 667, subdivision (a); in the alternative, Anguiano argues that if the street terrorism conviction is not reversed, the court should have imposed only two of the additional five-year enhancement terms because the court found true that he had suffered only two prior serious felonies.

We conclude that there is insufficient evidence to support Anguiano's conviction for street terrorism, and we reverse his conviction for that offense. Anguiano's possession of personal use quantities of drugs while alone on the porch is not the type of felonious conduct that the Legislature intended to include within the meaning of subdivision (a) of section 186.22.² (See *People v. Albillar* (2010) 51 Cal.4th 47, 55 (*Albillar*) (Italics added.) [Legislature was "targeting the scourge of *gang members committing any crimes together*" in enacting § 186.22, subd. (a)].) We therefore need not consider Anguiano's other claims with respect to that offense, nor his claims regarding his sentence, since the trial court will have to resentence him on remand. We reject Anguiano's contention that his trial counsel was ineffective for failing to bring a motion to suppress the gunshot residue found on him, and we therefore affirm the judgment of conviction, with the exception of the street terrorism conviction.

¹ Further statutory references are to the Penal Code unless otherwise indicated.

² The jury did not convict Anguiano of the charged felony offense of resisting an executive officer, but rather, of a lesser included misdemeanor offense. Therefore, his conduct in resisting an officer cannot be the "felonious criminal conduct" supporting a conviction for street terrorism under subdivision (a) of section 186.22. The only other felonious conduct that could support his conviction under subdivision (a) of section 186.22 is his possession of personal use quantities of methamphetamine and heroin.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The January 12, 2005 incident*

In the late afternoon of January 12, 2005, law enforcement officers were driving to a home in Rancho Cucamonga to perform a parole check on Anguiano's nephew. The officers were wearing plain clothes and were driving an unmarked vehicle. As the officers neared the nephew's residence, they saw Anguiano and another man walking toward the residence. Deputy Joe Braattan and Parole Agent Ardrick Elmore recognized Anguiano from previous contacts with him. Anguiano made eye contact with the officers, dropped a bowl of soup that he had been eating, and started running away. Braattan and Elmore jumped out of the vehicle and began to chase Anguiano.

Anguiano first ran north, then turned a corner and ran through an open gate. Deputy Braattan caught up with Anguiano and ordered him to stop, but Anguiano continued running. The officers watched Anguiano jump over fences as he tried to escape.

Agent Elmore caught up with Anguiano, drew his gun, and ordered Anguiano to drop to the ground. Anguiano stopped running, but did not comply with the order to get on the ground. Deputy Braattan then used a taser to stun Anguiano and ultimately apprehended him.

After officers detained Anguiano, Deputy Braattan retraced the path that Anguiano had taken during the chase. Along the route, Braattan found a semiautomatic handgun, a

loaded ammunition clip with one expended round, and a cigarette lighter. Braattan did not see any dirt, moisture or other debris on any of these items.

Officers transported Anguiano to the police station where his blood was drawn and he was tested for gunshot residue. Anguiano's blood tested positive for methamphetamine, cocaine, and opiates consistent with heroin. In addition, "one unique" particle of gunshot residue was found on Anguiano's left hand.

2. *The February 1, 2005 incident*

On the morning of February 1, 2005, several law enforcement officers drove to the same residence in Rancho Cucamonga in order to perform a parole check on another of Anguiano's nephews. After parking their vehicle nearby, the officers started to walk toward the house and saw Anguiano sitting on the front porch, looking down at something in his hands.³ When Anguiano looked up and saw the approaching officers, he jumped up and ran into the residence.

Several officers chased Anguiano through the house and out the back door, into the backyard. Anguiano threw a cell phone and some plastic bags over a fence. Deputies apprehended Anguiano near a garage in back of the house.

³ It is not clear from the record why Anguiano, who had been arrested a few weeks prior to this incident, was not in custody at this point in time.

In his pockets, Anguiano had a syringe, a spoon with a cotton ball stuck to it, and a bag of marijuana. Anguiano also had two marks on his forearm that appeared to be fresh needle injection sites that were bleeding. Deputy Paul Gallant recovered the cell phone and bags that Anguiano had tossed over the fence. The bags contained usable amounts of methamphetamine, heroin, and marijuana.

B. *Procedural background*

Anguiano was charged with possession of a firearm by a felon (§ 12021, subd. (a)(1); count 1); possession of a firearm while under the influence (Health & Saf. Code, § 11550, subd. (e); count 2); possession of a controlled substance, i.e., methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 3); possession of a controlled substance, i.e., heroin (Health & Saf. Code, § 11350, subd. (a); count 4); resisting an executive officer (§ 69; count 5); and street terrorism (§ 186.22, subd. (a); count 6). Counts 1 and 2 related to the events of January 12, 2005, while counts 3 through 6 related to the February 1, 2005 incident.

The information alleged that Anguiano committed count 1, possession of a firearm by a felon, for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). In addition, the information alleged that Anguiano had served four prior prison terms (§ 667.5, subd. (b)), that he had eight prior strike convictions (§§ 1170.12, subs. (a) – (d), 667, subs. (b)–(i)), and that he had been convicted of three prior serious felony convictions (§ 667, subd. (a)(1)).

Jury trial commenced on September 24, 2007. The jury found Anguiano guilty on counts 1, 3, 4 and 6, as charged. With respect to count 5, the jury found Anguiano guilty of the lesser included offense of resisting, obstructing or delaying an officer in violation of section 248, subdivision (a)(1).⁴ The jury acquitted Anguiano on count 2, and the court declared a mistrial with respect to the gang enhancement allegation connected to count 1 after the jury was unable to reach a verdict as to that enhancement.

The trial court found all of the alleged prior conviction allegations to be true. Anguiano filed a motion for a new trial, which the court denied.

The trial court sentenced Anguiano to 25 years to life on count 6, and added three consecutive five-year enhancements for three prior serious felony convictions. The court imposed an additional consecutive term of 25 years to life with respect to count 3, plus four years for the four prison priors, as well as a concurrent term of 25 years to life plus four years with respect to count 4. With respect to count 1, the trial court imposed and stayed (pursuant to § 654) a term of 25 years to life plus four years.⁵ The total prison term amounted to 69 years to life.

Anguiano filed a timely notice of appeal.

⁴ The trial court later dismissed count 5 pursuant to section 1118.1.

⁵ The trial court incorrectly stayed Anguiano's sentence on count 1 pursuant to section 654, apparently based on the erroneous presumption that the street terrorism charge in count 6 was predicated on the same conduct as the felon in possession of a firearm charge in count 1. However, as the charging document makes clear, the street terrorism charge in count 6 is based on his criminal conduct on February 1, 2005, while the felon in possession of a firearm charge in count 1 is based on Anguiano's conduct on January 12, 2005, nearly three weeks earlier.

III.

DISCUSSION

Anguiano raises several grounds for reversing his convictions on counts 1 and 6, and also raises claims of error related to his sentence.

We conclude that there is insufficient evidence to support Anguiano's conviction for street terrorism as alleged in count 6. We therefore reverse his conviction on that count.⁶ The enhancements associated with count 6 are necessarily reversed as well.⁷ However, we conclude that Anguiano's trial counsel did not provide ineffective assistance in failing to move to suppress the gunshot residue, and therefore affirm Anguiano's conviction on count 1.

A. *Anguiano's conviction for street terrorism in count 6 must be reversed*

Section 186.22 is part of the California Street Terrorism Enforcement and Prevention Act, also known as the "STEP Act." (§ 186.20.) Section 186.22 contains two relevant provisions, a *substantive offense* in subdivision (a), and a *sentence enhancement* in subdivision (b)(1). The two subdivisions serve different purposes, and not all conduct committed by gang members is covered by subdivision (a), although some of what is not covered by subdivision (a) may be covered by subdivision (b)(1).

⁶ As a result, we need not consider Anguiano's alternative claims as to why his conviction on count 6 should be reversed.

⁷ In addition, we need not address Anguiano's contention that the trial court failed to understand its discretion with respect to striking Anguiano's prior strikes, although we note that the record does not appear to support Anguiano's claim. We presume that on remand for resentencing, the court will properly exercise its discretion with respect to whether to strike any, some, or none of Anguiano's prior strikes.

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

Subdivision (b)(1) of section 186.22 provides, with certain exceptions not relevant here, that "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall" be punished by an enhanced penalty consecutive to the punishment for the felony.

The two subdivisions thus identify and penalize different aspects of criminal gang involvement. The substantive offense of street terrorism defined in section 186.22, subdivision (a) has three elements: "[(1)] Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive [(2)] '[K]nowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,' and [(3)] . . . 'willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang.' (§ 186.22(a).)" (*People v. Lamas* (2007) 42 Cal.4th 516, 523.) The enhancement provision in subdivision (b)(1) also has three elements (with exceptions not relevant for our purposes here): (1) conviction of a predicate felony, (2) committed for the benefit of, at the direction of, or in association with a criminal street gang, and (3) with the specific intent to promote, further

or assist in any criminal conduct by criminal street gang members. (§ 186.22, subd. (b)(1).)

Anguiano was convicted of the substantive offense of street terrorism, under subdivision (a) of section 186.22. Anguiano does not dispute that there was sufficient evidence presented at trial to support the first two elements of that offense—i.e., that he was an active participant in a criminal street gang, and that he had knowledge that his gang's members engaged in or have engaged in a pattern of criminal gang activity. However, Anguiano contends that there was not sufficient evidence that in committing the offenses charged in this case, he "willfully promote[d], further[ed], or assist[ed] in . . . felonious criminal conduct by members of [his] gang" (§ 186.22, subd. (a)).

The question that this case presents is whether a defendant can be convicted of street terrorism under section 186.22, subdivision (a) where the evidence shows only that the defendant, a gang member, was the sole perpetrator of a felony (i.e., possession of personal use quantities of methamphetamine and heroin),⁸ that is concededly not gang related. We conclude that the reach of the statute is not so broad as to criminalize such conduct.

In construing any statute, our goal is " 'to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.' " (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 919.) "We first examine the words of the statute, 'giving them their ordinary and usual meaning and

⁸ We note that this issue is currently pending before the Supreme Court in *People v. Rodriguez* (case No. S187680).

viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent.' " (*Ibid.*) " 'If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary.' " (*People v. Traylor* (2009) 46 Cal.4th 1205, 1212.)

The Supreme Court has determined that the "felonious criminal conduct by members of [the defendant's] gang" referenced in section 186.22, subd. (a) need not be "gang-related" felonious conduct. (See *Albillar, supra*, 51 Cal.4th at p. 55.) ["The plain language of the statute . . . targets felonious criminal conduct, not felonious gang-related conduct"].) However, the defendants in *Albillar* were all gang members who acted together to commit a rape. (See *id.* at p. 54). Indeed, the Supreme Court in *Albillar* discussed the fact that a literal reading of the statute to include nongang related felonious conduct does not yield absurd results because "there is nothing absurd in targeting the scourge of *gang members committing any crimes together* and not merely those that are gang related." (*Id.* at p. 55, italics added.) *Albillar* thus does not directly answer the question presented here—i.e., whether a gang member may be convicted of street terrorism for nongang related conduct in which he engaged *by himself*. However, *Albillar* suggests that a gang member who engages in nongang related conduct by himself is *not* the target of subdivision (a) of section 186.22, since the problem that the Legislature intended to address in enacting the statute is that of gang members committing crimes *in concert*.

Other published cases interpreting section 186.22, subdivision (a) further demonstrate that the felonious conduct at issue in this case is not the type of felonious conduct that can support a conviction for street terrorism. In *People v. Castenada* (2000) 23 Cal.4th 743 (*Castenada*), one of the leading cases construing section 186.22, subdivision (a), the court addressed the meaning of the phrase "actively participates." The *Castenada* court explained that in adopting this legislation, the Legislature was cognizant of the ruling in *Scales v. United States* (1961) 367 U.S. 203, "that 'mere association with a group cannot be punished unless there is proof that the defendant knows of and intends to further its illegal aims.' " (*Castenada, supra*, at p. 749.) The court continued,

"This explains why the Legislature expressly required in section 186.22[, subd.] (a) that a defendant not only 'actively participates' in a criminal street gang . . . , but also that the defendant does so with 'knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,' and that the defendant 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.' . . . These statutory elements necessary to prove a violation of section 186.22[, subd.] (a) exceed the due process requirement of personal guilt that the United States Supreme Court articulated in *Scales*[¶] . . . Here, section 186.22[, subd.] (a) limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang's pattern of criminal gang activity. Thus, a person who violates section 186.22[, subd.] (a) has also aided and abetted a separate felony offense *committed by gang members*, as the Court of Appeal in [*People v.*] *Green* [(1991)] 227 Cal.App.3d 692, 703–704, acknowledged." (*Castenada, supra*, at p. 749, italics added.)

Castenada therefore suggests that an active gang member who commits a nongang related felony by himself would not be guilty of street terrorism.

In *People v. Ngoun* (2001) 88 Cal.App.4th 432 (*Ngoun*), decided after *Castenada*, the court concluded that it would be inconsistent with the objective and the intent of section 186.22, subdivision (a) to restrict its language to apply only to aiders and abettors, and not read it to also include direct perpetrators of felonious conduct. The *Ngoun* court reasoned:

"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 literal meanings of these critical words squares with the expressed purposes of the lawmakers. An active gang member who directly perpetrates a gang-related offense 'contributes' to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct. Faced with the words the legislators chose, we cannot rationally ascribe to them the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity." (*Ngoun, supra*, at p. 436.)

We agree with the *Ngoun* court that there is no reasonable basis, textual or otherwise, to conclude that the Legislature intended to attach liability under section 186.22, subdivision (a) solely to aiders and abettors and not to direct perpetrators. However, *Ngoun*, like *Albillar*, does not answer the question that this case presents. In *Ngoun*, the defendant "went with other Modesto Hit Squad members to a party where he knew other rival gang members would be," and, while at the party, fired into a crowd of people that included members of a rival gang who had " 'disrespected' " him earlier in the evening. (*Ngoun, supra*, 88 Cal.App.4th at p. 437.) At the party, prior to shooting into

the crowd, the defendant had told a fellow gang member to " 'watch his back.' " (*Ibid.*) Thus, as the *Ngoun* court acknowledged, the evidence "support[ed] a reasonable inference that the murder of [the victim] and the assaults committed on the unidentified victims were intended by appellant to promote, further and assist the gang in its primary activities—the commission of criminal acts and the maintenance of gang respect." (*Ibid.*) The crime in *Ngoun* not only involved multiple gang members (although the defendant was the direct perpetrator and it is not clear whether any other gang members were charged as aiders and abettors), but also clearly involved *gang related* criminal conduct. Here, in contrast, it is undisputed that the felonious conduct underlying Anguiano's conviction on count 6 was *not* gang related and did not involve other gang members.

Later, in *People v. Salcido* (2007) 149 Cal.App.4th 356 (*Salcido*), the court, relying on *Ngoun*, concluded that section 186.22, subdivision (a) "includes perpetrators of felonious gang-related criminal conduct." (*Salcido, supra*, at p. 370.) The felonious conduct that formed the basis for the section 186.22, subdivision (a) conviction in *Salcido* included unlawful possession of a loaded firearm and other weapons, offenses that the defendant committed by himself. (*Salcido, supra*, at p. 359.) On appeal, Salcido contended that the trial court had erred by modifying CALCRIM No. 1400 (the standard jury instruction for the crime of active participation in a criminal street gang) to state that a defendant willfully promotes, furthers, or assists felonious criminal conduct under section 186.22, subdivision (a) " 'by either directly and actively committing a felony offense or aiding and abetting felonious criminal conduct by members of that gang.' " (*Salcido, supra*, at pp. 365–366.)

The *Salcido* court affirmed the defendant's conviction, concluding that the trial court had properly modified the instruction. In reaching this conclusion, the *Salcido* court reasoned,

"Here, if the evidence proved any criminal conduct by Salcido, it was only as the perpetrator of the crimes establishing the felonious criminal conduct with which he was charged. This conduct included illegal possession of a weapon, receiving stolen property, carrying a loaded firearm in a vehicle, or carrying a concealed firearm in a vehicle. Faced with CALCRIM No. 1400 which defines when a defendant willfully assists, furthers, or promotes a crime only in terms of whether the defendant aided and abetted another gang member in the commission of a crime, the trial court appropriately omitted that portion of the instruction. Instead, it told the jury it must find that Salcido 'willfully promoted, furthered or assisted by either directly and actively committing a felony offense or aiding and abetting felonious criminal conduct by members of that gang.' (Italics added.) As a result, the court correctly instructed the jury that Salcido could be convicted of the crime if he was a direct perpetrator of the felonious criminal conduct. Although the court never defined the terms 'aiding and abetting,' this did not impact Salcido since the jury could not have found Salcido guilty based on aider-and-abettor status." (*Salcido, supra*, 149 Cal.App.4th at p. 369.)

The *Salcido* court appears to have assumed that the felonious conduct that formed the basis of the defendant's conviction for street terrorism was gang related conduct (as was the conduct engaged in by the defendant in *Ngoun*): "[A]s we concluded in *Ngoun*, section 186.22, subdivision (a), cannot be read so narrowly [as to only cover aiders and abettors] and includes *perpetrators of felonious gang-related criminal conduct*." (*Salcido, supra*, 149 Cal.App.4th at p. 370.) Although the *Salcido* court noted that "there was no evidence [that the known gang members who accompanied Salcido] participated in Salcido's crimes," the court continued, "however, '[t]he evidence supports a reasonable

inference that the [crimes] were intended by [the defendant] to promote, further and assist the gang in its primary activities—the commission of criminal acts and the maintenance of gang respect.' [Citation.]" (*Id.* at p. 368.)

More recently, the court in *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (*Sanchez*), followed *Ngoun* and *Salcido*, and rejected the defendant's contention that section 186.22, subdivision (a) " 'imposes liability on perpetrators only if they commit the crime in concert with other gang members.' " (*Sanchez, supra*, at p. 1308.) In *Sanchez*, the defendant, who was a gang member, and an accomplice, who was not a gang member, robbed a pizza parlor. (*Ibid.*) The defendant was convicted of second degree robbery and of violating section 186.22, subdivision (a). (*Sanchez, supra*, at p. 1301.) The defendant argued on appeal that he could not be guilty under section 186.22, subdivision (a) because he was a direct perpetrator, not an aider and abettor, of the charged robbery. (*Sanchez, supra*, at pp. 1305, 1306.) Citing *Nguoun*, the appellate court rejected that argument, concluding that "a gang member who perpetrates a felony by definition also promotes and furthers that same felony." (*Id.* at p. 1307.)

The *Sanchez* court proceeded to identify a related argument that the court described as "lurking" in the case (but which the defendant had not raised and the parties had not briefed), i.e., that the defendant could not have promoted, furthered, or assisted felonious criminal conduct by gang members because the accomplice was not a member of a gang. (*Sanchez, supra*, 179 Cal.App.4th at p. 1307 ["One could argue that this element cannot be satisfied by evidence that the defendant perpetrated a felony alone or with nongang members (such as defendant's cousin)"].) The *Sanchez* court deemed the

argument forfeited, but stated, without further analysis or explanation, "[e]ven if it had been raised, however, we would reject it on the authority of *Salcido*." (*Id.* at p. 1308.)

In *Ngoun*, *Salcido*, and *Sanchez* it was clear from the circumstances that the felonious conduct underlying the street terrorism convictions was gang related. In fact, in both *Ngoun* and *Salcido*, the felonious conduct was undertaken in the presence of other gang members.⁹ In this case, in stark contrast, the People *concede* both that the felonious conduct underlying the street terrorism charge for which Anguiano was convicted was not gang related *and* that there were no other gang members involved.¹⁰ Because the facts in *Ngoun*, *Salcido*, and *Sanchez* differ from the present case in this significant respect, we cannot read those courts' interpretation of section 186.22 subdivision (a) as permitting a gang member to be convicted of street terrorism based on *nongang related* felonious conduct in which the defendant engaged *by himself* (or without the participation of at least one other gang member).

⁹ Although the appellate court in *Sanchez* did not discuss the fact that the defendant's felonious conduct was gang related when it considered whether he had promoted, furthered or assisted in felonious conduct by members of his gang, it is clear that the prosecution in that case had presented evidence in the trial court that the crime had been committed for the benefit of the defendant's gang. (*Sanchez, supra*, 179 Cal.App.4th at p. 1304.)

¹⁰ The People argue that there is sufficient evidence to support Anguiano's conviction for street terrorism "even though the evidence presented demonstrated that appellant was an active gang member committing a nongang related offense by himself."

We conclude that in enacting section 186.22, subdivision (a), the Legislature did not intend to make it an additional, separate crime for a defendant to engage in felonious conduct—conduct that is already criminalized and punishable—simply because the defendant is a gang member where the conduct at issue is *neither gang related nor committed in concert with other gang members*. To read the statute as permitting Anguiano to be convicted of street terrorism for sitting alone on a porch in possession of personal use quantities of drugs simply because he is a member of a gang is not, in our view, a reasonable interpretation, and finds no support in current case law. The statute was not intended to make it a crime for a defendant to associate with a gang, but rather, to criminalize active participation in a gang, with knowledge of the gang's criminal purpose, and promoting, furthering or assisting felonious conduct by members of that gang. (See *Castenada, supra*, 23 Cal.4th 750-751 ["As we have explained, section 186.22[, subd.] (a) imposes criminal liability not for lawful association, but only when a defendant 'actively participates' in a criminal street gang *while also aiding and abetting a felony offense committed by the gang's members*" (italics added)].) Although Anguiano may be a gang member and may have had knowledge of his gang's criminal purpose, his possession of personal use quantities of drugs while alone on his porch—which respondent concedes are not gang related offenses—simply cannot be deemed to constitute promoting, furthering, or assisting felonious conduct by members of Anguiano's gang within the meaning of section 186.22, subdivision (a).

We therefore reverse Anguiano's conviction for street terrorism in count 6. The enhancements associated with count 6 are necessarily reversed, as well.

B. *Trial counsel did not render ineffective assistance by not moving to suppress the gunshot residue*

Anguiano contends that his trial court rendered ineffective assistance by failing to bring a motion to suppress the gunshot residue found on him immediately after the January 12, 2005 incident. According to Anguiano, if his attorney had made such a motion, the court would likely have granted it because officers did not have reasonable suspicion to stop him on January 12, 2005. We conclude that Anguiano's trial counsel did not provide ineffective assistance in failing to bring this motion because doing so would have been futile.

During closing argument, the prosecutor argued that the gunshot residue found on Anguiano constituted evidence that he had possessed a gun. The jury ultimately convicted Anguiano of count 1, possession of a firearm by a felon. Anguiano subsequently fired his trial counsel. His new trial attorney filed a motion for a new trial, arguing that Anguiano's former attorney had provided ineffective assistance by failing to move to suppress the results of the gunshot residue test that was performed after Anguiano's January 12, 2005 arrest. At a hearing, Anguiano's former attorney testified that Anguiano had asked him to move to suppress the gunshot residue test results. The attorney stated that he had not filed a motion to suppress the results of the gunshot residue test because he believed that a motion to suppress would not have been granted. Specifically, the attorney believed that since police had found the gun prior to arresting Anguiano, along Anguiano's flight path, the gun could not have been found as a result of

the arrest. The trial court determined that a motion to suppress would not have been meritorious, and denied Anguiano's new trial motion.

On appeal, Anguiano contends that the trial court erred in denying his motion for a new trial because his original trial counsel rendered ineffective assistance by failing to move to suppress the gunshot residue evidence.

"An appellant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. [Citations.]" (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1146 (*Montoya*)). "To establish prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.] In demonstrating prejudice, the appellant 'must carry his burden of proving prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel.' [Citation.]" (*Ibid.*)

"In determining whether counsel's performance was deficient, we exercise deferential scrutiny. [Citations.] The appellant must affirmatively show counsel's deficiency involved a crucial issue and cannot be explained on the basis of any knowledgeable choice of tactics. [Citation.] ¶ Our Supreme Court recently reiterated the obligations of appellate courts in reviewing claims of ineffective assistance of counsel: ' "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of professional assistance." ' [Citation.] '[W]e accord great deference to counsel's

tactical decisions' [citation], and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' [citation]. 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' [Citation.]" '[Citation.]

" 'Competent counsel is not required to make all conceivable motions or to leave an exhaustive paper trail for the sake of the record. Rather, competent counsel should realistically examine the case, the evidence, and the issues, and pursue those avenues of defense that, to their best and reasonable professional judgment, seem appropriate under the circumstances. [Citation.]' [Citation.]" (*Montoya, supra*, 149 Cal.App.4th at pp. 1147-1148.)

Anguiano cannot establish that his original trial counsel rendered ineffective assistance in failing to move to suppress the gunshot residue because, as the trial court determined, any such motion would have been futile.

Anguiano's argument is that officers did not have reasonable suspicion to seize him after they saw him and he ran. Therefore, he asserts, anything that officers found after this initial unlawful seizure of his person should have been excluded.¹¹ Anguiano's assertion that the officers did not have reasonable suspicion to seize him at the time they did is incorrect. When Anguiano saw the officers, he did not simply stand there and go about his business. Instead, he ran away from them. His unprovoked flight gave the officers reasonable suspicion to stop him. "[W]hen an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. [Citation.] And any 'refusal to cooperate, without

¹¹ Anguiano does not argue that there was no probable cause for his arrest. We therefore need not address that issue.

more, does not furnish the minimal level of objective justification needed for a detention or seizure.' [Citation.] [¶] But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not 'going about one's business'; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or stay put and remain silent in the face of police questioning." (*Illinois v. Wardlow* (2000) 528 U.S. 119, 125.)

There was thus no basis to suppress the gunshot residue evidence on the ground that officers did not have reasonable suspicion to stop Anguiano when they seized him on January 12, 2005. Consequently, any motion to suppress the evidence on this ground would have been denied, and Anguiano's counsel could not have been ineffective in not making a futile motion. We therefore reject Anguiano's contention that the trial court erred in not granting his motion for a new trial on the ground that his original trial attorney failed to move to suppress the gunshot residue evidence, and affirm Anguiano's conviction on count 1 for possession of a firearm by a felon.

IV.

DISPOSITION

We reverse Anguiano's conviction on count 6. The matter is remanded to the trial court for resentencing on the remaining counts.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.

Filed 10/22/12

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND ANGUIANO, SR.,

Defendant and Appellant.

D058578

(Super. Ct. No. FWV033802)

ORDER CERTIFYING OPINION
FOR PUBLICATION

THE COURT:

The opinion, filed on September 25, 2012, is ordered certified for publication.

The attorneys of record are:

Boyce & Schaefer and Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Theodore M. Cropley, Deputy Attorneys General, for Plaintiff and Respondent.

HALLER, Acting P. J.