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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CLEVELAND RENE BLACK,

Defendant and Appellant.

B295256

(Los Angeles County  
Super. Ct. No. MA074334)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed as modified.

Sarah M. Javaheri, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Jaime L. Fuster and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Cleveland Rene Black was convicted of one count of being a felon in possession of a firearm, in violation of Penal Code<sup>1</sup> section 29800, subdivision (a)(1) (firearm offense); and one count of possession of cocaine base for sale, in violation of Health and Safety Code section 11351.5 (drug offense). The trial court imposed an aggregate sentence of 21 years 4 months in state prison. Among other things, the aggregate prison sentence includes a four-year enhancement for the drug offense, imposed pursuant to section 186.22, subdivision (b)(1) (gang-enhancement provision); a one-year enhancement on the firearm offense, also imposed pursuant to the gang-enhancement provision; and a two-year enhancement imposed pursuant to section 667.5, subdivision (b) (prior prison sentence enhancement provision).

On appeal, Black challenges the trial court's imposition of the two gang enhancements. In particular, Black argues that the People failed to introduce sufficient evidence showing that he committed these offenses: (1) for the benefit of, at the direction of, or in association with any criminal street gang (the gang-related prong of the gang-enhancement provision); and (2) with the specific intent to promote, further, or assist in any criminal conduct by gang members (the specific-intent prong).

We find that the People offered sufficient evidence to support the gang enhancements on both offenses. First, the People introduced evidence that Black armed himself to be ready to kill rival gang members and thereby enhance his gang's reputation for violence. Second, the People offered evidence that Black acquired the cocaine base in association with other gang members, and that he intended to pay taxes to the gang on sales

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<sup>1</sup> Undesignated statutory citations are to the Penal Code.

of the drug, thereby benefitting the gang and furthering, promoting, and assisting its members' criminal activities.

Additionally, the parties agree that: (1) a statutory amendment to the prior prison sentence enhancement provision requires us to strike the two one-year sentencing enhancements imposed thereunder; and (2) we should not remand this matter to allow the trial court to modify Black's sentence to compensate for the loss of that enhancement. Thus, we strike that two-year sentencing enhancement, and affirm the judgment as modified.

### **PROCEDURAL BACKGROUND**

On August 22, 2018, the People filed an information charging Black with one count of possession of a firearm by a felon, in violation of section 29800, subdivision (a)(1) (count 1); and one count of possession for sale of cocaine base, in violation of Health and Safety Code section 11351.5 (count 2). Count 1 arose out of an incident that allegedly occurred on or about July 28, 2017, and count 2 purportedly arose out of an incident occurring on or about November 16, 2017. The information sought sentencing enhancements pursuant to the gang-enhancement and the prior prison sentence enhancement provisions, respectively. Although Black initially pleaded not guilty to both counts and denied any and all special allegations, Black later admitted he had suffered prior convictions for violations of section 422, subdivision (a), section 496, subdivision (a), and section 459.

At the conclusion of Black's trial, the jury found him guilty of both offenses and, with respect to each offense, the jury found true both prongs of the gang-enhancement provision. On January 16, 2019, the trial court sentenced Black to an aggregate term of 21 years 4 months in state prison. The trial court

selected count 2 as the base count and sentenced Black to the upper term of four years, which was doubled to eight years pursuant to section 667, subdivisions (b) through (j); and section 1170.12, subdivisions (a) through (e). The court also imposed the following prison terms, each of which were to run consecutive to Black's eight-year sentence on count 2: the high term of four years pursuant to the gang-enhancement provision; five years pursuant to section 667, subdivision (a)(1); and two years pursuant to the prior prison sentence enhancement provision.<sup>2</sup> Additionally, the trial court imposed a 28-month consecutive prison sentence for count 1, which was comprised of: an eight-month sentence (i.e., one-third of the midterm of 24 months), which was doubled to 16 months pursuant to section 667, subdivisions (b) through (j), and section 1170.12, subdivisions (a) through (e); and a one-year sentence under the gang-enhancement provision (i.e., one third of the midterm of three years).

On January 17, 2019, Black appealed the judgment of conviction.

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<sup>2</sup> Although Black admitted that he served three prior prison sentences within the meaning of the prior prison sentence enhancement provision, the trial court exercised its authority under section 1385 to strike the prior prison sentence that Black served for violating section 422, subdivision (a).

## FACTUAL BACKGROUND

### 1. *The July 28, 2017 altercation at a liquor store*

About 8:45 p.m. on July 28, 2017, K.A. drove A.B. (K.A.'s friend) and Ernest Wilkerson (A.B.'s friend, who was also known as "Duce Boy") to a liquor store located in Lancaster.<sup>3</sup> After K.A. parked her vehicle at the liquor store, she and A.B. remained in the vehicle, and Wilkerson left the vehicle and entered the store. Shortly thereafter, Wilkerson exited the store and asked "random people" outside the establishment to buy him cigarettes.

Black parked a PT cruiser next to K.A.'s vehicle. Black exited the PT cruiser and tried to "hit on" A.B. Shortly thereafter, Black walked toward the store, and Black and Wilkerson began "yelling at each other"; K.A. was unable to hear what the two men were saying.<sup>4</sup> Black then punched Wilkerson's face, and Wilkerson responded by drawing a firearm from his belt.

At that point, K.A. "immediately" ducked and heard "a lot of gunshots." Black ran past the driver's side of K.A.'s vehicle

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<sup>3</sup> It is undisputed that at all relevant times, Wilkerson had the moniker "Duce Boy," Wilkerson was a member of a Blood gang called the 6 Duce Brims, and Black was a member of the Crafty Crips/Crafty Crew clique of a Crips gang called the "Rolling 30s."

<sup>4</sup> On direct examination, the following colloquy occurred:  
"[Q] Did you see the male from the PT cruiser make any type of gestures at that point? [¶] [K.A.:] They were talking to each other. [¶] Q Did you see any, like, hand gestures, though? [¶] [K.A.:] Yeah. But I don't recall exactly where they were." Thus, K.A.'s testimony indicates that she saw Black and/or Wilkerson make some sort of hand gesture(s) to each other.

and then over to the back of it; when Black was behind K.A.'s vehicle, she heard a gunshot come from that direction. At that time, K.A. also heard gunshots that were coming from Wilkerson's position at the front of her car. The gunfire eventually ceased, and K.A. looked up and did not see Wilkerson or Black at the scene.<sup>5</sup> K.A. realized she had been shot in her hand and that A.B. sustained a gunshot to her shoulder.

After the incident, the police arrived at the scene and observed that the PT cruiser was parked in front of the liquor store with its engine still running. The police also recovered shell casings and bullet fragments from the liquor store's parking lot and an apartment complex directly to the east of the store. Forensic analysis later indicated that several of the bullets and shell casings were fired from a .40 S&W that was manufactured by Glock, and that others were fired from a 9-millimeter Luger. The parties do not dispute that the police later recovered from Wilkerson's home the 9-millimeter semiautomatic handgun that was used in the shooting and that the police have not recovered the .40 S&W handgun.

**2. *Black's check-in at the parole office on November 16, 2017***

In 2017, Marcel Clemmons was Black's parole agent. About 3:45 p.m. on November 16, 2017, Clemmons summoned Black to a parole office in Lancaster for a check-in. After Black reported to the parole office, Clemmons detained and searched him. Clemmons found the following items on Black: \$519.48 in

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<sup>5</sup> For the purposes of this appeal, Black does not dispute that he drove the PT cruiser and that he had this verbal and physical altercation with Wilkerson.

currency and a plastic baggie of bindles containing “what appeared to be cocaine.”

The crime lab later tested five of the bindles and found that each of those bindles contained cocaine base. Detective Giovanni Lampignano testified that the packaging for the cocaine base was “consistent with narcotic sales,” as was the amount of money that was found on Black.

### **3. *Expert testimony regarding gangs***

The People offered the testimony of three gang experts: Detective Giovanni Lampignano, Officer Dexter Navarro, and Officer Eduardo Gonzales. This section summarizes certain relevant aspects of their testimony.

#### **A. The 6 Duce Brims, the Rolling 30s, and the Antelope Valley**

The 6 Duce Brims gang operates in certain parts of Los Angeles County, including the Antelope Valley. One of its primary rivals is the Rolling 30s gang. The Rolling 30s gang has operated in various locations in San Bernardino County, Orange County, and Los Angeles County, including the Antelope Valley. The Antelope Valley is an “untraditional gang setting” in the sense that members of different gangs can be friends with one another and/or have been known to conduct business together. Further, gang territorial borders in the Antelope Valley are “more fluid[ ]” than they are in the City of Los Angeles; thus, members of different gangs “bump into each other a little bit more often” in the Antelope Valley than they do in the City of Los Angeles.

The Rolling 30s gang is known for being “very violent”; its primary activities include burglaries, robberies, narcotics sales,

murders, and shootings, and its members are known to carry firearms. Around June and July of 2017, the 6 Duce Brims and the Rolling 30s gangs were embroiled in a violent “ongoing dispute” in which rival gang members had shot and killed one another on multiple occasions.

Black has several tattoos showing he is affiliated with the Rolling 30s, including a tattoo on one of his arms that has the letters “D-N-A,” and a “Dice 5-6” tattoo on his other arm. Wilkerson has a set of tattoos around his neck and jaw line, including a “B,” “HP,” “fruit,” “Harvard,” and “Ness,” all of which are well-known symbols of the Brims gangs. Officer Navarro opined that a rival gang member would see Wilkerson’s tattoos and recognize them as gang signs. Officer Navarro further testified that upon seeing these tattoos, the rival gang member would have a “verbal confrontation” with Wilkerson that could escalate to a violent altercation.

#### **B. The Rolling 30s gang’s narcotics sales**

The Rolling 30s is “a really, really structured gang” whose members “abide by a lot of rules” and are “held to a really high standard.” The gang’s narcotics sales are likewise “really structured.” “[A] typical narcotics dealer in the gang will buy [narcotics] from a shot caller within the [Rolling] 30s who has permission to supply the gang with narcotics.” The gang has “very few . . . gang members[ ] that are allowed to buy drugs from the outside[ a]nd . . . supply [them] to the gang.” Put differently, “the [Rolling] 30s [members] don’t believe in just one individual going and finding their own narcotics and selling it on their own. They believe in the whole gang function. They’re very structured.”



The gang employs this approach because it allows the gang to “track how much narcotics . . . [the gang is] putting out there,” ensures that the gang will “get a cut back for the narcotic sales,” and protects the gang’s “reputation for selling good products.” The parties do not dispute that the Rolling 30s “taxes” its members’ narcotics sales. A tax is money or some other thing of value that a member provides to the gang.

The People asked Gonzales several questions regarding the consequences that a Rolling 30s gang member could face if that person did not abide by its rules governing narcotics sales. The prosecutor asked, “[W]hat permission would [a Rolling 30s gang member] have to have” in order to “buy from an outside supplier?” Gonzales responded, “Typically, they don’t sort of need permission to buy from an outside supplier. It doesn’t happen. There are just certain people who . . . the gang aligns with, that they’re allowed to buy narcotics from. And so they won’t have permission to, let’s say, go on their own and buy from a rival Blood gang. [¶] . . . You don’t really ask permission to work with someone else. Those individuals are already selected and they’re already put in that position to be able to supply the gang.”

The prosecutor also asked Gonzales, “[W]hat would happen if a [Rolling] 30s gang member bought from somebody that wasn’t approved for them to buy something?” Gonzales responded that such a person would be “disciplined.” He elaborated that “discipline can happen in many different ways,” including being subjected to a verbal warning, beaten, killed, or thrown out of the gang.

### **C. The People’s hypothetical questions**

The People asked Officer Gonzales questions regarding two hypothetical scenarios. The first hypothetical scenario concerned

the gang enhancement for the firearm offense: “Cliff is a Gang C gang member and a convicted felon. Bob is a Gang B member. Gang C and Gang B are rival gangs. Cliff sees Bob in a store. Cliff walks up to Bob. Bob has a big tattoo on his neck which is a clear symbol of Gang B. Cliff exchanges words with Bob. Cliff then punches Bob in the face which starts a fight. Both Cliff and Bob are carrying guns. [¶] Cliff and Bob pulls [*sic*] out their guns and start shooting each other.” After describing this hypothetical scenario, the prosecutor asked, “In your opinion, how would that conduct benefit the gang [*sic*] for Cliff and Bob to take these actions?”

Gonzales indicated that Cliff’s gang would benefit from this conduct. Gonzales stated, “Typically, . . . before [a gang member] even gets in a fight or sees a rival gang member[,] . . . he goes out into the community waiting for the opportunity to be able to use [a] gun [he put in his waistband].” Gonzales further testified that if a gang member sees that another person has tattoos associated with a rival gang, then he or she will recognize an “opportunity to take out a rival gang member.” According to Gonzales, the gang member’s decision to seize that opportunity “enhances [that member’s] overall reputation within the gang” and “enhance[s] the gang’s reputation,” given that the member is “sort of a soldier of the gang.” He opined that this conduct would promote, further, or assist in criminal conduct by gang members by causing residents of the community to “be more afraid to report crimes” and “rival gang members . . . to be more afraid to confront members of the gang.” Gonzales testified that if the gang member instead “backed down from having an opportunity to take out a rival gang member,” then that person “will be looked down upon in a gang.”

The People also asked, “How does that promote, further or assist in criminal conduct by the gang members?” Gonzales responded that the conduct described in the hypothetical “enhanc[es]” the gang’s reputation by ensuring that its members will be known to be ruthless and willing to kill rival gang members. Gonzales opined that this enhanced reputation will cause other gangs to desire to align with the gang, “not only when it’s time to go kill a rival gang member, but also when it’s time to possibly sell or buy guns or commit other crimes.” He also stated that the gang’s enhanced reputation can “create fear and intimidation within the community,” such that a community member may be less likely to “want to report crimes or . . . come forward to law enforcement or police with information regarding that gang, in fear of retaliation.”

The People’s second hypothetical scenario concerned the drug offense: “Assume Cliff is a Gang C gang member. Gang C . . . [has] selected individuals who are permitted or allowed to buy drugs from outside sources. [These sources are] after middle men and street level sellers within the gang. [¶] Cliff does not have a stable job. Cliff has \$500 with him. He also has six grams of cocaine base packaged into 20 baggies for sale. Gang C taxes narcotics sales.” The prosecutor first asked, “Do you have an opinion as to whether the crime, possession of sales, would benefit the gang?” Gonzales testified that this crime would benefit the gang because it would make money on the narcotics sales. He claimed that the money allows the gang to buy guns, cars, jewelry, and nice clothing, all of which support the gang’s recruitment efforts.

Gonzales further opined that the offense was committed “in association with the criminal street gang” because the gang

member in the hypothetical would “[t]ypically” need to work with other gang members “in order to be able to put these products [on] the street.” He also testified that the crime “promotes and assists conduct by . . . gang members” because if a member of Gang C sells a “good quality” product at a “good price,” Gang C will have a good reputation. Gonzales claimed that, by virtue of this good reputation, Gang C will “get more clientele, . . . expand [its] business, [and] produc[e] more money for the gang.”<sup>6</sup>

#### **4. *Black’s social media account***

Black’s Facebook username is “Crafty Minds,” which is a reference to the “Crafty Crips or Crafty Crew [clique] of the [Rolling] 30s.” The People introduced into evidence excerpts of messages and images from Black’s Facebook account. Several of those excerpts were screenshots police had taken of certain content on Black’s Facebook page, whereas other excerpts were taken from materials that Facebook provided in response to a search warrant served by Detective Lampignano.

Officer Gonzales testified that certain aspects of Black’s Facebook page reference his gang affiliation and particular drug sales. In one conversation, Black responded “DG” to another Facebook accountholder’s use of the hashtag “buybachthabloc,”

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<sup>6</sup> Black argues that Gonzales’s testimony regarding the second hypothetical scenario was “not grounded in fact, but based on mere speculation.” We note that Black did not raise this objection at trial. Nonetheless, his failure to do so is not dispositive of the instant appeal. Regardless of whether Black forfeited any objection to the admissibility of this testimony, we must still determine whether it, in combination with other proof introduced at trial, constitutes substantial evidence supporting the gang enhancement for the drug offense.

which Officer Gonzales interpreted to mean that Black agreed with a fellow gang member's statement that they should expand the Rolling 30s gang's territory. In another message, Black bragged about "[r]iding round" with a "burner," which Officer Gonzales interpreted to be a reference to a firearm.<sup>7</sup> Additionally, in September 2017, Black uploaded a picture depicting cash, and stated "break bread with yo people" and "when you eat they eat[,] when you shine[,] they shine." Gonzales also testified that Black had a conversation with a fellow Rolling 30s gang member concerning taxes paid to the gang for the sales of codeine and other drugs. On cross-examination, however, Gonzales admitted that Black and the other gang member did not discuss cocaine during that conversation.

Similarly, Detective Lampignano also opined that Black's Facebook page references his gang affiliation. For instance, Black posted the following message on his page: "'Niggas be fraternizing with the enemies . . . Palmcaster shit!! On Crip I don't trust you niggas.'" Lampignano opined that Black was stating that he does not trust gang members in the Antelope Valley who fraternize with rival gang members.

Lampignano further testified that Black's Facebook page contains messages that referenced Promethazine (i.e., a

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<sup>7</sup> Although People's exhibits 40-A and 40-B do not explicitly state that Black's account was used to post this message, certain data accompanying these documents indicate that Black did so. Specifically, the "Facebook Business Record" header on People's exhibits 40-A and 40-B and the "Mobile Uploads" notation for the "Album Name" accompanying these exhibits indicate that Black posted this message in connection with a photograph that he uploaded onto Facebook.

prescription cough syrup), Xanax, Hydrocodone, and marijuana. Yet, Lampignano testified that he did not see any “references to the sale of cocaine” in the Facebook materials he had reviewed.

Detective Lampignano also opined that Black’s Facebook page discusses the July 28 shooting. In a conversation that occurred late on July 28, 2017 “and/or early July 29th,” Black told another person that “‘somebody shot at [him].’” The other person then asked who shot at Black, and Black responded that the shooter was a “[g]ang banger.”

Lastly, Lampignano testified that Black had certain conversations that appear to show that he had “access to weapons.” Specifically, Lampignano testified that Black may have referred to a Glock handgun in the following June 29, 2017 message: “‘Gloc 9 4 a stacc brand new.’” Also on that date, a different Facebook user sent Black a message containing the words “Glock 750,” followed by “a money sign and a bunch of question marks.” Black then replied, “‘Let me see what I can do.’” Lampignano opined that these messages indicate that the other user was “offering 750 for [Black’s] Glock” or that Black was “trying to purchase the Glock for 750.”

## **STANDARD OF REVIEW**

“‘In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’” (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 656–657 (*Ochoa*)). “‘[The] appellate court must . . . presume in support of the judgment the existence

of every fact the trier could reasonably deduce from the evidence,’ ” and “draw[ ] all reasonable inferences in favor of the jury’s findings.” (See *People v. Rios* (2013) 222 Cal.App.4th 542, 564 (*Rios*), ellipsis added; *People v. Perez* (2017) 18 Cal.App.5th 598, 607 (*Perez*).) “ ‘ ‘ ‘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.’ ” ’ ” (*Ochoa*, at p. 657.) “ ‘A reasonable inference, however, “may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.” ’ [Citation.] A trier of fact may rely on inferences to support a conviction only if those inferences are ‘of such substantiality that a reasonable trier of fact could determine beyond a reasonable doubt’ that the inferred facts are true.” (*Rios*, at p. 564.)

The substantial evidence standard applies to sufficiency-of-the-evidence challenges to enhancements imposed pursuant to section 186.22, subdivision (b)(1). (See *Ochoa*, *supra*, 179 Cal.App.4th at pp. 656–657.) That provision authorizes the trial court to enhance a criminal defendant’s sentence only if the People establish that he or she committed a felony “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 . . . .” (See § 186.22, subd. (b)(1); see also *Perez*, *supra*, 18 Cal.App.5th at p. 606 [“The evidence must establish both of the two prongs to the gang enhancement under section 186.22, subdivision (b)(1)”].)

## DISCUSSION

### **I. The People Offered Sufficient Evidence to Support the Gang Enhancement for the Firearm Offense**

Black argues that, “[i]n relation to the gun charge, the People relied on three facts to support the [gang] enhancement: that [Black] was a gang member, that he was involved in an altercation with a rival gang member, and expert testimony regarding how gang members in general behave.” He further contends that “[t]he People presented no evidence as to why [Black] was armed when he went to [the liquor store],” and “even if the shooting could shed some light on why [he] possessed a gun, . . . the [p]rosecution presented no evidence regarding the reason a fight broke out between [Black] and Wilkerson.” Black’s arguments fail because he overlooks other evidence in the record that supports the gang enhancement, and he fails to construe all reasonable inferences in favor of the jury’s verdict.

The circumstances of the shooting support the reasonable inference that Black confronted Wilkerson to benefit the Rolling 30s and to further criminal conduct by its members. The People offered evidence showing that Black or Wilkerson flashed some sort of gesture(s) to one another, Wilkerson had visible tattoos on his neck and jawline that are well-known by gang members to be associated with a rival of the Rolling 30s gang, Black was aware of Wilkerson’s gang affiliation because he stated shortly thereafter that some “[g]ang banger” shot at him, Black escalated the dispute from a verbal confrontation to a physical altercation by punching Wilkerson, and this fight occurred during a timeframe in which Black’s and Wilkerson’s respective gangs had a violent “ongoing dispute.” (See *ante*, fn. 4 [K.A.’s testimony regarding the gesture(s) that Black and/or Wilkerson flashed at



each other].) Additionally, approximately one month before the shooting, Black sent messages from his “gang-related” Facebook account<sup>8</sup> in which he sought to buy or sell a firearm produced by Glock, which was the company that manufactured one of the two guns used in the shooting. These messages suggest that Black used a Glock firearm at the liquor store for a gang-related purpose.

Officer Gonzales opined that in the circumstances described above, each gang member had an opportunity to enhance his gang’s reputation for violence, which in turn would further and promote its members’ criminal conduct by deterring (a) residents of the community from reporting the gang’s crimes and (b) rivals from confronting the gang’s members. The jury could reasonably rely upon Gonzales’s opinion to ascertain Black’s intent because the hypothetical facts upon which it was based “were properly rooted in the evidence presented at trial.” (See *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930 (*Ferraez*).)

Although Black correctly points out that the People did not offer direct evidence of the reason for the fight (e.g., K.A. could not hear what Black and Wilkerson had said to one another), the jury could reasonably infer Black’s intent from the circumstantial evidence discussed in this section. (See *Perez*, *supra*, 18 Cal.App.5th at p. 607 [“Rarely is the perpetrator’s intent proven by direct evidence; usually it must be inferred from the facts and circumstances surrounding the case”]; *Ferraez*, *supra*, 112 Cal.App.4th at p. 930 [“We agree the expert’s testimony [predicated on hypothetical facts] was circumstantial evidence, but it was still evidence supporting [the verdict]”].)

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<sup>8</sup> Black concedes that his Facebook account is “gang-related.”

Black also claims that Gonzales’s testimony was deficient because it rested on the premise that “any time a gang member is armed, the crime is gang related and committed with the specific intent to aid the gang.” (See also *Perez*, at p. 610 [“In this gang expert’s view, . . . essentially any shooting by a gang member is gang related because the use of violence enhances the gang member’s reputation, and thereby inures to the gang’s benefit by instilling fear in the community. Many courts have soundly rejected such a sweeping generalization untethered, as it is, to specific evidence of both prongs of the gang enhancement”].) We reject Black’s contention because the hypothetical questions posed by the People incorporated certain evidence showing that the shooting was gang-related—i.e., the shooters were members of rival gangs and one of them had “a big tattoo on his neck which is a clear symbol” of his gang. (See also *Rios*, *supra*, 222 Cal.App.4th at p. 574 [noting whether the perpetrator “displayed gang signs or otherwise stated his gang affiliation” and whether the victim of a crime is a rival gang member are relevant factors under the gang-enhancement provision].) The People presented other evidence on this point as well, including the fact that Black and/or Wilkerson flashed one or more hand gestures at each other, and Black’s Facebook messages concerning a Glock and a “[g]ang banger” who shot at him.

Moreover, Black’s Facebook account contains other messages supporting the inference that Black armed himself in anticipation for such a confrontation with a rival. In one conversation, Black expressed his desire to expand his gang’s territory (i.e., by buying back the block). Black also posted a message indicating that he considered members of rival gangs in the Antelope Valley to be his “enemies.” In another message on

his gang-related Facebook account, he bragged about “[r]iding round” with a firearm. One could rationally interpret these messages as circumstantial evidence that Black was the archetypal gang member described by Officer Gonzales—i.e., one who “goes out into the community waiting for the opportunity to be able to use [a] gun [he put in his waistband].” Thus, the jury could have reasonably inferred that, prior to the liquor store encounter, Black armed himself so that he would be ready to seize upon any such opportunity to enhance his gang’s reputation for violence.

Black’s remaining arguments are unpersuasive. He claims to have used the firearm in self-defense—and not for the purpose of enhancing his gang’s reputation for violence—because Wilkerson was the first to draw a weapon and Black “only brought out a gun while fleeing from Wilkerson’s gunshots.” Black also argues that he “never mentioned in his Facebook posts that he shot back at a rival gang member, something Detective Lampignano admitted would enhance [Black’s] status with the gang.” Furthermore, Black contends that the fight could not have been gang-related because “the People did not establish that [the liquor store] was in any gang’s territory, in disputed territory, or that the two gangs had a territorial dispute regarding the area.” He also argues that two of the People’s experts “admitted that not all gang members live up to the standards imposed by the gang, and [s]ome go against the gang’s rules.” These arguments all fail because Black does not construe the evidence in the light most favorable to the judgment. (See *Ochoa, supra*, 179 Cal.App.4th at p. 656.)

In addition, Black claims that because K.A. was not aware that Wilkerson was a gang member, Black could not have been

aware of that fact either. This aspect of K.A.'s testimony, however, is of little assistance to Black. K.A. testified that she had never met Wilkerson before the day of the shooting, and her testimony suggests that she did not carefully observe Wilkerson's appearance and "didn't think about" whether he was a gang member. Moreover, whereas there is no evidence that a layperson such as K.A. would recognize the import of Wilkerson's tattoos, the People introduced expert testimony that the meaning of his tattoos were "well known" to his rivals.

In sum, we find that the People introduced substantial evidence supporting both prongs of the gang-enhancement provision: Black possessed a firearm (1) for the benefit of the Rolling 30s gang (i.e., to enhance its reputation for violence), and (2) with the specific intent to promote criminal conduct by the gang's members (i.e., by instilling fear in the community, thereby allowing fellow members to commit crimes without interference from community residents and rival gang members). Accordingly, we shall affirm the trial court's imposition of the gang enhancement for the firearm offense.

## **II. The People Offered Sufficient Evidence to Support the Gang Enhancement for the Drug Offense**

Although Black does not dispute that he possessed the cocaine base for the purpose of selling it, Black argues that the People failed to offer sufficient evidence supporting each prong of the gang enhancement for this offense. For the reasons discussed in this section, we disagree.

Officer Gonzales testified that the Rolling 30s is "a really, really structured gang" that has "a lot of rules." Under those rules, Rolling 30s gang members may not sell drugs on their own, but instead have to obtain them through certain members who

are authorized suppliers. The rules also require members to pay taxes to the Rolling 30s on their drug sales. When taxes are paid to a gang, its members can purchase guns, cars, jewelry, and nice clothing, all of which support the gang's recruitment efforts. Further, the Rolling 30s gang's members are "definitely willing to kill" a member if that person does not "abide by the rules," including the rule requiring each member to purchase his or her drugs from an authorized supplier. A member may also be "disciplined" in other ways, including being subjected to a verbal warning, beaten, or thrown out of the gang.

Black's Facebook messages indicate that he was aware of, and adhered to, the Rolling 30s gang's rules regarding narcotics sales. Black utilized his gang-related Facebook account to attempt to purchase Promethazine and sell several other drugs, including Xanax bars and marijuana. Black also had a Facebook conversation with another Rolling 30s member where they discussed the gang's taxes on codeine sales. Furthermore, about two months before the police found cocaine base on Black, he posted a message on his gang-related Facebook page that Officer Gonzales interpreted as expressing Black's willingness to pay taxes to the gang (i.e., Black said, "[B]reak bread with yo people").

The jury could have reasonably relied upon this evidence to find both prongs of the gang-enhancement provision. Concerning the first prong, the jury could have rationally inferred from this evidence that Black committed the drug offense in association with the Rolling 30s because gang rules required him to obtain narcotics from particular gang members, and Black intended to sell the drugs to benefit the gang because he knew he would pay taxes on those transactions. Substantial evidence also shows

that Black possessed the cocaine base to further, promote, or assist criminal conduct by Rolling 30s gang members, as the taxes paid on narcotics sales supported the recruitment efforts of a “very violent gang” whose primary activities include burglaries, robberies, narcotics sales, murders, and shootings.

Black nonetheless insists there is no evidence that he “worked with anyone else to sell cocaine,” had the gang’s permission to sell the drug (e.g., evidence showing he tried to sell it in gang territory), or paid a tax to the gang from the sale of cocaine. Black apparently overlooks the aforementioned evidence that the Rolling 30s gang’s rules required him to pay the gang a tax on narcotics sales and obtain its permission and assistance to engage in those transactions, and that Black approved of these rules.

Black further complains Gonzales’s opinion that the sale of cocaine would enhance the gang’s reputation relied on the assumption that the product was of “good quality,” and the People failed to present any evidence showing that the cocaine base in question was a “good” product. We agree that the People’s case was deficient in this regard. Nonetheless, the jury was entitled to rely on other evidence (including other aspects of Gonzales’s testimony) tending to establish that Black committed this offense in association with the gang, to benefit the gang, and to further, promote, or assist its criminal conduct. (See *People v. Jasso* (2012) 211 Cal.App.4th 1354, 1376 [“ ‘ “A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility” ’ ”].)

Black argues that because the People did not introduce evidence showing he discussed the sale of cocaine on his Facebook page, he must have been “trying to hide the sale of crack cocaine

from the gang.” Black’s argument erroneously construes this omission in his favor, rather than in favor of the jury’s implicit finding that his Facebook account was not the only means by which Black would sell drugs. (See *Ochoa*, *supra*, 179 Cal.App.4th at p. 657 [“ ‘ ‘ ‘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’ ” ’ ”]; *Rios*, *supra*, 222 Cal.App.4th at p. 564 [“ ‘[The] appellate court must . . . presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence,’ ” ellipsis added].) Additionally, Black argues that “[a]ll the drugs mentioned [on] Facebook are ones that could be legal in California” under certain circumstances, whereas cocaine “is always illegal.” As there is no evidence that the Rolling 30s’ rules draw this distinction, it has no apparent relevance to the instant case.<sup>9</sup>

For these reasons, we conclude that substantial evidence supports the jury’s finding that Black possessed the cocaine base for sale “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.” (§ 186.22, subd. (b)(1).)

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<sup>9</sup> Black concedes that at least some of the drugs mentioned on his Facebook page are available only with a prescription (e.g., Promethazine). Yet, he offers no evidence showing he had a license to sell prescription drugs.

### **III. We Strike the Two-Year Prior Prison Sentence Enhancement**

On the date of Black’s sentencing hearing, section 667.5, subdivision (b) provided in pertinent part: “Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows: [¶] . . . [W]here the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under subdivision (h) of Section 1170 is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 . . . .” (Stats 2018, ch. 423, § 65.) About nine months after the trial court imposed Black’s prison sentence, the Governor signed into law an amendment to section 667.5, subdivision (b), which became effective on January 1, 2020. (Sen. Bill No. 136 (2019–2020 Reg. Sess.); see Cal. Const., art. IV, § 8, subd. (c)(2) [providing the effective date for this amendment].) As amended, section 667.5, subdivision (b) imposes a sentencing enhancement for only a “prior . . . prison term for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.” (See Sen. Bill No. 136 (2019–2020 Reg. Sess.).)

After briefing closed on the instant appeal, we asked the parties to provide supplemental briefing on what impact, if any, Senate Bill No. 136 would have on Black’s sentence. In response, the parties submitted supplemental letter briefs in which they agreed that: (1) Senate Bill No. 136 requires us to strike the aggregate two-year sentencing enhancement the trial court imposed under section 667.5, subdivision (b), largely because Black has not committed any of the offenses identified in



Welfare and Institutions Code section 6600, subdivision (b); and (2) we should not remand this matter to allow the trial court to modify Black’s sentence to compensate for the loss of that enhancement. We accept the parties’ concessions and strike the two one-year enhancements imposed under section 667.5, subdivision (b). (See *Artal v. Allen* (2003) 111 Cal.App.4th 273, 275, fn. 2 [“ ‘[B]riefs and argument . . . are reliable indications of a party’s position on the facts as well as the law, and a reviewing court may make use of statements therein as admissions against the party’ ”]; 9 Witkin, Cal. Procedure (5th ed. 2019) Appeal, § 704 [“An express concession in a brief is frequently treated as an admission of a legal or factual point, controlling in the disposition of the case”]; see also *People v. Lopez* (2019) 42 Cal.App.5th 337, 341–342 [applying Senate Bill No. 136 retroactively when appeal not final by January 1, 2020].)

## DISPOSITION

The judgment is modified as follows: The two one-year enhancements imposed pursuant to Penal Code section 667.5, subdivision (b) are stricken. As modified, the judgment is affirmed.

Upon the issuance of our remittitur, the trial court is directed to amend the abstract of judgment to reflect the aforementioned modification and Black's resulting aggregate prison sentence of 19 years 4 months. The trial court shall forward certified copies of the amended abstract of judgment to the Department of Corrections and Rehabilitation. (Cal. Rules of Court, rule 8.272(d)(2).)

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

JOHNSON, Acting P. J.

WEINGART, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.