People v. Miranda

COURT OF APPEAL, FOURTH APPELLATE DISTRICT DIVISION ONE STATE OF CALIFORNIA Jul 26, 2018

D073873 (Cal. Ct. App. Jul. 26, 2018)

HALLER, J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115. (Super. Ct. No. FSB1502215) APPEAL from a judgment of the Superior Court of San Bernardino County, William Jefferson Powell, IV, Judge. Affirmed with directions. Benjamin Kington, under appointment by the Court of Appeal, for Defendant and Appellant. Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

2 *2 A jury found Cosme Miranda guilty of possession of a firearm by a felon (Pen. Code,[1] § 29800, subd. (a)(1); count 1) and possession of methamphetamine for sale (Health & Saf. Code, § 11378; count 2), and found true the gang-enhancement allegation attached to each count (§ 186.22, subd. (b)(1)(A)). Miranda contends the trial court erred by admitting evidence of his prior conviction for possession of methamphetamine for sale, which the court admitted under Evidence Code section 1101, subdivision (b) for the limited purpose of establishing Miranda's intent in this case. Miranda also contends the court erred in many respects with its admission of evidence to support the gang enhancements, which he further contends are not supported by substantial evidence. For reasons we will explain, these contentions lack merit.

[1] Statutory references are to the Penal Code unless otherwise noted.

Miranda also seeks correction of an error in the abstract of judgment, which incorrectly reflects the sentence the trial court orally pronounced. The Attorney General agrees correction is appropriate. We also agree, and direct the trial court to correct the error as specified in the disposition below.

In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2015, Miranda and Rusty Kelly were jointly charged with (among other things) possession of a firearm by a felon and possession of methamphetamine for sale. Each count had a gang-enhancement allegation attached. Kelly entered into a plea bargain, under which

Kelly is not a party to this appeal.

The Prosecution Case

About 11:00 p.m. on June 25, 2015, San Bernardino Police Officers Darren Sims and Michael Paluzzi initiated a traffic stop on a green Honda Civic for three observed Vehicle Code violations. The Honda driver continued driving for over a block, then pulled into the parking lot of a liquor store. Before stopping, the Honda slowed down and the passenger (later identified as Miranda) opened his door, a tell-tale sign to Officer Paluzzi that the passenger intended to flee. The opening of the Honda's door also illuminated the interior of the vehicle, allowing the officers to see the occupants moving erratically inside.

The Honda eventually stopped when it hit a pole on the corner of the liquor store building. Officer Paluzzi had already exited the slowly moving patrol vehicle to flank Miranda before he could flee. Miranda exited the Honda holding a handgun, prompting Officer Paluzzi to yell, "gun!" Seeing that Officer Paluzzi had his service weapon trained on him, Miranda dropped his handgun and ran for about 30 yards before collapsing to the ground with his hands up. Officer Paluzzi arrested Miranda and placed him in the back of a patrol vehicle.

Meanwhile, Officer Sims approached the Honda's driver, Kelly. As he approached, Kelly made "a patting motion" toward the passenger seat, where Officer Sims spotted a handgun. Officer Sims commanded Kelly to exit the vehicle, and Kelly complied. Kelly initially
4 denied seeing the gun on the passenger seat, then admitted *4 seeing it but denied it was his. Officer Sims handcuffed Kelly, patted him down for weapons, then placed him in the rear of his patrol vehicle (not the one Miranda was in).

Officer Paluzzi recovered a black handgun about five feet from the Honda. The gun was loaded, and its serial number was "obliterated." Miranda has a prior conviction for possession of a firearm by a felon.

On the front passenger seat of the Honda, the officers observed a loaded handgun and a duffel bag. Inside the duffel bag, the officers found men's clothing, personal hygiene items, a notebook, a digital scale, and more than 21 grams of unpackaged methamphetamine. At trial, Officer Sims opined that based on the large quantity (about 21 grams, as compared to a single dose of about 0.3 grams), the lack of an ingestion device, and the presence of a scale and firearms, this methamphetamine was possessed for sale.

About 10 minutes after Kelly had been placed in the patrol vehicle, Officer Sims returned to the vehicle and observed about 19 grams of powdered methamphetamine strewn about the seat, floorboard, and cargo area. Kelly eventually admitted this methamphetamine was his, and apologized for the mess.

Although Kelly admitted the methamphetamine in the patrol vehicle was his, he initially gave the officers conflicting statements about ownership of the duffel bag and its contents. For example, Kelly denied owning the duffel bag, but claimed that drawings in the notebook inside it were done by his children. Kelly eventually admitted all the drugs were his, but claimed none of the guns were.

5 *5 Kelly's live-in girlfriend, who owned the Honda, testified she had never seen Kelly with the duffel bag or its contents before. About 20 minutes before Kelly's and Miranda's arrests, the girlfriend had given Kelly permission to drive the Honda to the store to buy toilet paper.

The liquor store had several exterior security cameras, but the video system was unable to export recorded footage onto an external storage device. Therefore, a police forensic technician used a video camera to record the system's monitor while relevant footage was played back. By the time of trial, police had misplaced the "video of the video," so the forensic technician testified about her observations of it.[2] She said it showed the Honda hitting the building, but she did not remember seeing anyone exit the car. She said the quality of the video was poor and very grainy because it was dark outside and the overhead lights on the patrol vehicles made things difficult to see. Officer Sims also watched the security footage on the system's monitor, and described it similarly at trial.

[2] The trial court denied Miranda's motion to dismiss his charges on the basis the police destroyed the video evidence. He does not appeal this ruling.

The prosecution introduced evidence to support gang-enhancement allegations attached to Miranda's charges. We discuss the gang evidence in greater detail in part II.A. below, and therefore only briefly summarize it here. West Side Verdugo (or WSV) is a predominantly
6 Hispanic criminal street gang that operates in San Bernardino. Its *6 primary activities include possession of firearms by felons, and possession of methamphetamine for sale. San Bernardino Police Detective Dominic Vaca testified he arrested Miranda in 2012 for possession of a firearm by a felon, at which time Miranda had a prominent WSV tattoo on his head, and "self-admitted" to being a WSV member. Another police officer testified he arrested Miranda in 2004 for possession of methamphetamine for sale, which we discuss in greater detail in part I.A. below.

Defense Case

The sole defense witness was a liquor store employee who authenticated a video prepared by a defense investigator to support the defense theory that the quality of the store's security footage was not as bad as the prosecution witnesses claimed it was. Defense counsel insinuated the police had intentionally or negligently lost the video, and planted a "burner" gun near the Honda.

Additionally, although Miranda's primary defense was that he did not *possess* the duffel bag with the methamphetamine, his trial counsel also cross-examined prosecution witnesses to undermine Officer Sims's opinion that the methamphetamine in the Honda was possessed *for sale*. For example, counsel questioned Officer Sims about the fact the methamphetamine was not packaged in coin-sized baggies that are often used in drug sales; that Miranda and Kelly "could be going to the liquor store to buy a device to smoke the methamphetamine[]"; that Miranda and Kelly "could likewise be driving back to the house where they have ingestion devices"; that it is "safer" for a user to buy in large quantities to minimize the
7 potential opportunities to "be buying from an undercover cop"; *7 and that a drug purchaser might also "have their own scale so they are not left to trust whoever the dealer is."

Also under cross-examination by defense counsel, Detective Vaca (who arrested Miranda in 2012) testified he observed Miranda "had missing teeth," which is "one of the side effects" of methamphetamine use.

Jury Trial, Verdicts, Bench Trial on Priors, and Sentencing

the gang-enhancement allegation attached to each count.

In a bifurcated proceeding on five prison-prior allegations, the trial court made true findings as to four prison priors, and a not-true finding as to one.

At the sentencing hearing, the trial court denied probation and sentenced Miranda to an aggregate term of 11 years 8 months in state prison. We discuss the sentence in greater detail in part III below.

DISCUSSION

I. *Admission of Miranda's Prior Drug-sales Conviction*

Miranda contends the trial court erred by admitting evidence of his prior conviction for possession of methamphetamine for sale. He reasons that because his primary defense was that he did not possess the methamphetamine in the duffel bag, evidence of his prior conviction was inadmissible under Evidence Code section 1101, subdivision (b) to prove his intent in this case "because intent was not at issue—whoever possessed the drugs
8 possessed them for sale." (Bolding omitted.) Alternatively, he *8 argues the evidence was inadmissible under Evidence Code section 352 because the evidence had only "minimal probative value," yet "was extremely prejudicial." We disagree in both respects.

A. *Background*

To prove the pending charge that Miranda possessed methamphetamine with the intent to sell, the prosecution sought to introduce evidence regarding Miranda's 2004 conviction for the same offense. In the earlier case, Miranda was driving a vehicle when police attempted to stop him. He continued driving and dropped baggies containing methamphetamine out his car window. When police apprehended Miranda, he had no ingestion device, but did have $210 in cash. Police located three baggies that contained 1.6, 0.4, and .08 grams of methamphetamine.

The prosecutor argued the prior offense and the charged offense were similar in that on both occasions Miranda (1) "[tried] to distance himself from the narcotics"; (2) "trie[d] to flee"; and (3) did not possess an ingestion device. The prosecutor reasoned that because Miranda had the intent to sell the methamphetamine on the prior occasion, he harbored the same intent with respect to the current one.

Defense counsel argued the incidents were not sufficiently similar because the quantities of drugs involved were "very different," efforts to avoid detection are common in almost any crime, and the crimes were committed 11 years apart.

The trial court found the circumstances of each offense were sufficiently similar to support the inference under Evidence Code section 1101, subdivision (b) that Miranda harbored the same intent during both:

9 *9 "It does appear to me that there are similar facts in both the 2004 case and the current case, specifically we are dealing with a similar drug, methamphetamine, a similar location within the same city not too far from—not too much of a distance between the two locations. There is an attempt to distance himself from the drugs in both instances. The fact that this defendant utilizes a vehicle, this is not a bicycle seller or a pedestrian street corner sales case. I think all of those may give the jury the ability to infer what the defendant's intent was on this occasion because we know what his intent was on the prior."

Code section 352 because the court "would give a limiting instruction with regard to the [Evidence Code section] 1101[, subdivision] (b), specifically for intent and order them not to use it for any other purpose."

At trial, one of the San Bernardino police officers involved in Miranda's 2004 arrest testified about the circumstances of the offense, as described above. After the close of evidence, the trial court instructed the jury it could (but was not required to) consider this evidence "for the limited purpose of deciding whether or not the defendant acted with the intent to sell methamphetamine in this case," and not to "consider this evidence for any other purpose." Similarly, the prosecutor argued during her closing argument that the jury could consider the 2004 offense to determine Miranda's intent with respect to the pending charge, but not to conclude "did that then, he must have [done] that now." Defense counsel likewise argued in closing that the jury could not use evidence of the prior offense to conclude "drug dealer, bad guy, drug dealer, bad guy."

10 *10 B. *Relevant Legal Principles*

"Character evidence, sometimes described as evidence of propensity or disposition to engage in a specific conduct, is generally inadmissible to prove a person's conduct on a specified occasion." (*People v. Harris* (2013) 57 Cal.4th 804, 841 (*Harris*); see Evid. Code, § 1101, subd. (a); [3]*People v. Jones* (2011) 51 Cal.4th 346, 371 (*Jones*).) But such evidence "may be admitted if relevant to show a material fact such as intent." (*Jones*, at p. 371; see Evid. Code, § 1101, subd. (b).)

3 [4] Evidence Code section 1101, subdivision (a) states: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

4 Evidence Code section 1101, subdivision (b) states: "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, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

"To be admissible, there must be some degree of similarity between the charged crime and the other crime, but the degree of similarity depends on the purpose for which the evidence was presented. The least degree of similarity is needed when, as here, the evidence is offered to prove intent." (*Jones*, *supra*, 51 Cal.4th at p. 371.) "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' "
11 (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) "In prosecutions *11 for drug offenses, evidence of prior drug use and prior drug convictions is generally admissible under Evidence Code section 1101, subdivision (b), to establish that the drugs were possessed for sale rather than for personal use and to prove knowledge of the narcotic nature of the drugs." (*People v. Williams* (2009) 170 Cal.App.4th 587, 607 (*Williams*).)

" ' "There is an additional requirement for the admissibility of evidence of uncharged crimes: The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious

discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352." [Citation.]' " (*People v. Fuiava* (2012) 53 Cal.4th 622, 667-668, fn. omitted.)

C. *Analysis*

We find no abuse of discretion in the trial court's decision to admit evidence regarding Miranda's 2004 drug-sales conviction for the limited purpose of establishing he possessed the methamphetamine with the intent that it be sold. A prior conviction for this offense is generally admissible to prove this intent in a pending case, provided the circumstances of the prior and current offenses are sufficiently similar. (See *Williams*, *supra*, 170 Cal.App.4th at p. 607.) Miranda does not contend the circumstances surrounding his prior offense and the charged offense are too dissimilar to support an inference of intent. Such a contention
12 would likely fail, in any event, because intent *12 requires the least degree of similarity under Evidence Code section 1101, subdivision (b). (*Jones*, *supra*, 51 Cal.4th at p. 371.)

Miranda contends that although intent was technically an element of the charged offense, evidence of his prior conviction was nonetheless "irrelevant because intent was not *at issue* —whoever possessed the drugs possessed them for sale." (Italics added, bolding omitted.) We disagree. First, a prosecutor's " 'burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.' " (*Jones*, *supra*, 51 Cal.4th at p. 372.) Thus, a defendant's " 'assertion that his defense . . . was bound to focus upon identity, and not intent, would not eliminate the prosecution's burden to establish both intent and identity beyond a reasonable doubt.' " (*Ibid*.)

Second, the record undermines Miranda's suggestion that he did, in fact, decide not to contest the element of intent. To the contrary, his trial counsel effectively cross-examined Officer Sims regarding the manner in which the drugs were packaged, the possibility that Miranda and Kelly were en route to an ingestion device (either at the liquor store or at home), and the benefits to a user of buying in bulk and having his own scale. Similarly, defense counsel established through cross-examination of Detective Vaca that Miranda "had
13 missing teeth" and that "loss of teeth is one of the side effects" of *13 methamphetamine use. This undermines Miranda's assertion that his intent was "beyond legitimate dispute" at trial.

5 [5] It also undermines *Miranda*'s reliance on *People v. Balcom* (1994) 7 Cal.4th 414, in which the California Supreme Court concluded the defendant's intent was an all-or-nothing proposition—he either intended to rape the victim when he had sex with her at gunpoint (as she claimed), or the sex was consensual (as the defendant claimed). (*Id*. at p. 422.) "These wholly divergent accounts create no middle ground from which the jury could conclude that [the] defendant committed the proscribed act . . . but lacked criminal intent . . . ." (*Ibid*.) Here, the jury could have rationalized a middle ground in which Miranda possessed the methamphetamine, but did so for personal use and not for sale.

Alternatively, Miranda contends that even if evidence of his prior conviction was relevant on the issue of intent, the trial court abused its discretion under Evidence Code section 352 because the evidence's probative value was substantially outweighed by its unduly prejudicial effect. We disagree.

As noted, *Miranda*'s trial counsel effectively cross-examined the prosecution witnesses regarding intent. Thus, evidence of Miranda's prior conviction for the same offense had substantial probative value of his intent in this instance. (*Williams*, *supra*, 170 Cal.App.4th

was *convicted* in connection with the 2004 offense "reduced any prejudicial effect, as the jury would not be tempted to convict [him] of the charged offenses in order to punish him for the previous crime . . . ." (*Jones*, *supra*, 51 Cal.4th at pp. 371-372.) Second, the circumstances of Miranda's prior offense (when he possessed a smaller quantity of drugs
14 and was unarmed) "were not particularly inflammatory when compared *14 to" the charged offense (when he possessed a substantial quantity of drugs and was armed). (*Harris*, *supra*, 57 Cal.4th at p. 842.) Third, "the trial court instructed the jury on the limited purpose of this evidence, and we presume [the jury] followed the instruction." (*Ibid.*) Finally, during closing arguments, both the prosecutor and defense counsel reiterated the limited purpose for which the prior conviction was admitted.

Accordingly, the trial court did not abuse its discretion in admitting evidence of Miranda's prior conviction for the limited purpose of establishing his intent on the charged offense.

II. *Gang Evidence*

Miranda asserts several challenges to the gang evidence introduced at trial and the true finding on the gang-enhancement allegations. He contends (1) the expert who testified about the predicate offenses underlying the gang-enhancement allegations impermissibly relayed case-specific hearsay to the jury, in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*); (2) the admission of Kelly's guilty plea, including his admission of the gang-enhancement allegation, violated Evidence Code section 352 and constituted testimonial hearsay, thus violating the confrontation clause (U.S. Const., 6th Amend.); and (3) the true findings on the gang-enhancement allegations are not supported by substantial evidence because they rest largely on the finding that Kelly was a fellow WSV member, a finding Miranda also contends is not supported by substantial evidence. We find these contentions unpersuasive.

15 *15 A. *Background*

The prosecution presented a gang expert to establish that WSV met the statutory requirements of a criminal street gang, that its members committed the requisite predicate offenses, and that Miranda and Kelly were WSV members. San Bernardino Police Officer Lanier Rogers described his extensive training and experience regarding criminal street gangs, generally, as well as his specific experience with WSV and its members. He explained that a criminal street gang is statutorily defined as any "ongoing" or "continuous" "organization with three or more members" whose "primary operations are to commit criminal activity or any pattern of criminal activity and they share a common sign or symbol." He opined WSV met this standard.

WSV is a predominantly Hispanic gang that operates in San Bernardino and is affiliated with the Mexican Mafia. It was founded in the 1970's and has over 1,000 members. The gang has a somewhat formal structure, and uses many common signs, symbols, and colors. WSV's primary activities include car theft, robbery, assault with a deadly weapon, assault with a firearm, possession of firearms by felons, and methamphetamine sales.

People commonly join the gang by being "familied in" (i.e., having a "family history of members that are within the gang"), "jumped in" (i.e., beaten up), or "crimed in" (i.e., successfully completing a crime). Gang members must "put in work" to gain and maintain status within the gang. This often consists of committing crimes for the financial benefit of the gang. A gang member can benefit from committing crimes in another member's

notoriety." Similarly, a junior member can benefit from associating with a more senior member because the senior member can vouch for the junior member. A junior member can also gain status by taking the blame for a crime committed by a more senior member. Kelly was 26 and Miranda was 43.

To establish WSV had the requisite "pattern of criminal activity" to qualify as a criminal street gang, Officer Rogers testified about several predicate offenses committed by WSV members. His opinions that the perpetrators of those offenses were, in fact, WSV members largely forms the basis of Miranda's *Sanchez* challenge.

The first predicate was Robert Vega's conviction in 2012 for robbery. Court records admitted in evidence showed that Vega pleaded guilty to the predicate offense and admitted a gang-enhancement allegation. Officer Rogers testified he concluded Vega was a WSV member based on the following considerations: "After pulling up his background, investigating that case, investigating prior instances where he has been arrested or contacted by police, speaking with the investigator on that case in particular, that combined with my background, training, and experience, I was able to form that determination."

The second predicate was Joseph Mendivil's conviction in 2012 for possession of a controlled substance for sale. Court records admitted in evidence showed that Mendivil pleaded guilty to the predicate offense and active participation in a criminal street gang. Officer Rogers testified similarly about how he concluded Mendivil was a WSV member: "Well, again, looking at his prior contacts, knowing him personally, and reviewing that case, all of those in addition to my background, training, and experience, those are all considerations that I took into consideration."

17 *17

The third predicate was David Corder's conviction in 2004 for possession of a firearm by a felon. Court records admitted in evidence showed that Corder pleaded guilty to the predicate offense and admitted a gang-enhancement allegation. Officer Rogers explained he concluded Corder was a WSV member by "reviewing that case, speaking with the officer who made that arrest, looking at his prior convictions, prior contacts, and, again, that mixed with my background, training, and experience."

Officer Rogers also testified about Kelly's involvement in the present offenses, and an earlier theft offense Kelly committed with Miranda. Concerning the current offenses, Officer Rogers was aware Kelly had pleaded guilty to possession of a firearm by a felon, and admitted a gang-enhancement allegation. The minute orders documenting Kelly's change-of-plea hearing and sentencing were admitted as trial exhibits. In the prior offense, Miranda and Kelly were convicted of grand theft for stealing goods together from a department store in Redlands.

Officer Rogers opined Kelly was a WSV member who went by the moniker "Kid Mode." Although WSV "is predominantly a Hispanic gang" and Kelly is White, Officer Rogers said it is "not necessarily unusual" to find White or African-American members of WSV. The officer further opined it would benefit Kelly (26) to associate with Miranda (43) because the latter could "vouch" for him as "a legitimate gang member." Officer Rogers testified he considered Kelly's admission of the gang-enhancement allegation in this case to be an admission of WSV membership.

gang activity, my knowledge of gang membership, and his prior contacts, prior arrests, and my background and training." Officer Rogers also based his determination on Detective Vaca's testimony in this trial regarding Miranda's 2012 arrest, self-admission, and prominent WSV tattoo.

As to the charged offenses, Officer Rogers concluded they were gang-related because they were "committed . . . in association with [West Side Verdugo]." He based this conclusion on his "knowledge of gang politics, knowledge of their primary activities, knowledge of the defendant's past, and my background, training, and experience."

Officer Rogers also concluded Miranda committed the present offenses "with the specific intent to promote, further, or assist in . . . criminal conduct by gang members." He explained he reached this conclusion based on "[s]everal things. Again, this is the modus operandi of gang activity, the way that they carried it out, . . . the types of drugs that they had, the amount, the way they tried to escape detection from it. Everything that I reviewed in this case is a hallmark for just—like a normal day, I guess, carrying out the activities of a gang." Officer Rogers also took into consideration the presence of two guns, a digital scale, and his opinion that Kelly is a WSV member or associate. When asked a hypothetical question that mirrored the facts of this case, Officer Rogers opined that the charged offenses "would be committed with the specific intent to promote, further, or assist in . . . criminal conduct by gang members."

19 *19 B. *Relevant Legal Principles*

"Section 186.22, subdivision (b)(1) imposes additional punishment when a defendant commits a felony for the benefit of, at the direction of, or in association with a criminal street gang." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) "There are two 'prongs' to [this] gang enhancement . . . ." (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484 (*Weddington*).) "The first prong requires that the prosecution prove the underlying felony was 'gang related.' " (*Ibid.*) This can be established in any of three ways: "The offense may be committed (1) for the benefit of a gang; (2) at the direction of a gang; *or* (3) in association with a gang." (*Ibid.*) "The second prong 'requires that a defendant commit the gang-related felony "with the specific intent to promote, further, or assist in any criminal conduct by gang members." ' " (*Ibid.*, fn. omitted.) Both prongs can be satisfied by proving the defendant committed the charged offense with a known gang member. (*Id.* at pp. 484-485; see *People v. Albillar* (2010) 51 Cal.4th 47, 61-62, 68.)

" 'In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period.' " (*Weddington*, *supra*, 246 Cal.App.4th at p. 484, fn. 10.)

20 *20 The prosecution may rely on expert testimony regarding criminal street gangs to establish a gang enhancement under section 186.22, subdivision (b)(1). (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

which the expert based his or her opinion, but of which the expert had no personal knowledge. The *Sanchez* court disapproved a long line of cases holding that an expert could relate the hearsay bases of his or her opinions because the hearsay was not being offered for its truth. (*Id*. at p. 686, fn. 13.) The *Sanchez* court found the reasoning underlying those cases untenable, and adopted the rule that "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Id*. at p. 686; see also *id*. at p. 683.) Under those circumstances, "it cannot logically be asserted that the hearsay content is not offered for its truth" (*id*. at p. 683), and the statements must be admitted through an applicable hearsay exception (*id*. at pp. 684, 686).

The *Sanchez* court further ruled that if the hearsay was "testimonial" within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), its admission would violate the confrontation clause unless there was a showing of unavailability and that the defendant had a prior opportunity for cross-examination (or had forfeited that right by wrongdoing). (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) The *Sanchez* court explained, "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity,
21 which could be used like trial testimony. Nontestimonial statements are *21 those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Id*. at p. 689.)

Thus, under *Sanchez* and *Crawford*, "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception?" (*Sanchez*, *supra*, 63 Cal.4th at p. 680.) If the statement is not hearsay, "our inquiry is at an end." (*Id*. at p. 674.) However, "If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." (*Id*. at p. 680.)

The *Sanchez* court clarified the import of its holding on the scope of expert testimony: "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. . . . [¶] What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686; see *People v. Perez* (2018) 4 Cal.5th 421, 456 ["an expert may nonetheless *'rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so' without violating hearsay rules or the confrontation clause"].)

Applying these principles, the *Sanchez* court concluded the trial court prejudicially erred by
22 admitting a gang expert's testimony that "recounted facts contained in . . . police *22 reports and [a] STEP notice," when the contents of those records were not personally known to the expert or otherwise admitted in evidence. (*Sanchez*, *supra*, 63 Cal.4th at p. 698.)

6 [6] As explained in *Sanchez*, police issue a "STEP notice" (an acronym derived from California's Street Terrorism Enforcement and Prevention Act) "to individuals associating with known gang members. The purpose of the notice is to both provide and gather information. The notice informs the recipient that he is associating with a known gang; that the gang engages in criminal activity; and that, if the recipient commits certain crimes with gang members, he may

identification of the recipient's associates." (*Sanchez*, *supra*, 63 Cal.4th at p. 672.)

C. *Miranda's* Sanchez *Challenge*

Miranda contends Officer Rogers's testimony that the perpetrators of the predicate gang offenses were WSV members violated *Sanchez* because the testimony "was based on hearsay, and was not supported by any independent evidence." We disagree.

Officer Rogers explained that in concluding certain individuals were WSV members he reviewed their case files regarding the predicate offenses,[7] criminal histories, and prior police contacts; spoke to other police officers; and used his background, training, and experience.[8] Notably, Officer Rogers testified only *generally* about the matters he consulted, and did not relate their contents to the jury. *Sanchez* allows this. (*Sanchez*, *supra*, 23 63 Cal.4th at pp. 685-686 ["Any expert may still *rely* on *23 hearsay in forming an opinion, and may tell the jury *in general terms* that he did so."]; see *Perez*, *supra*, 4 Cal.5th at p. 456.)

[7] The term "case files" is not defined in the record, but court records regarding the predicate offenses were admitted in evidence, and consisted primarily of charging documents, minute orders, and change-of-plea forms.

[8] As to Mendivil, Officer Rogers also relied on "knowing him personally."

Miranda's reliance on *People v. Ochoa* (2017) 7 Cal.App.5th 575 and *People v. Stamps* (2016) 3 Cal.App.5th 988 to support a contrary conclusion is misplaced. In both cases, an expert related to the jury the specific content of the hearsay on which the expert based his or her opinion. (*Ochoa*, at p. 583 [gang expert "*told the jury* that certain individuals had admitted they were . . . gang members," italics added]; *Stamps*, at p. 998 [appellate court rejected expert's "unfiltered and unvarnished recapitulation of what she saw" in an online drug database].)[9] By contrast, Miranda has not identified any specific out-of-court statements he contends Officer Rogers related to the jury.

[9] At least one court has since disagreed with the underlying conclusion in *Stamps*, *supra*, 3 Cal.App.5th at pages 996 to 997 that an expert's relation of the contents of the Ident-a-drug online database is inadmissible case-specific hearsay. (See *People v. Veamatahau* (2018) 24 Cal.App.5th 68, 73.) Moreover, the Attorney General in *Stamps* did not contest the defendant's assertion that information from the online database was inadmissible hearsay. (*Stamps*, at p. 996.)

Because Miranda has not identified any hearsay statements he contends Officer Rogers related to the jury, "our inquiry is at an end." (*Sanchez*, *supra*, 63 Cal.4th at p. 674.)

D. *Admission of Kelly's Guilty Plea and Gang-enhancement Admission*

Miranda contends the court erred by admitting the court records from this case that showed Kelly pleaded guilty to possession of a firearm by a felon, and admitted the attached gang-enhancement allegation. Miranda maintains the evidence was unduly 24 *24 prejudicial under Evidence Code section 352, and inadmissible testimonial hearsay under *Crawford*. We disagree in both respects.

10 [10] It is unclear whether Miranda contends the court records regarding the predicate offenses (i.e., Vega's, Mendivil's, and Corder's convictions) are also inadmissible as testimonial hearsay. If he does, the contention fails for the same reasons it fails as to Kelly's conviction records.

Sanchez, supra, 63 Cal.4th at p. 698 ["gang membership is not an element of the gang enhancement"].) Although admitting to a gang enhancement may not, standing alone, necessarily establish that an individual is a gang member, Miranda does not persuade us that it is a legally impermissible factor for a gang expert to consider in determining whether an individual is a gang member.

As for which gang Kelly was a member of, Officer Rogers also testified he believed Kelly was a member of WSV, as evidenced by (among other things, as discussed below) Kelly's commission of multiple offenses with admitted WSV-member Miranda. Evidence of Kelly's gang admission thus had substantial probative value, and, in light of the fact it was essentially undisputed that Miranda was a WSV member, it was unlikely to cause undue prejudice.

Nor were court records of Kelly's gang-enhancement admission testimonial hearsay. "The certified records of the convictions of other gang members [are] not testimonial under *Crawford*." (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1176, fn. 10, review granted
25 March 2, 2017, S239442.) Although such records "may happen to be *25 offered as evidence (to prove such prior convictions) at a later trial, the records so proffered were not made primarily for that purpose. The records are made for other purposes in the ordinary course of other business of the courts and relevant departments. The records are needed and maintained for these other purposes; they are not offered as evidence in any later trial unless and until an accused commits a new, additional offense. Thus, the records are not made in contemplation of, or primarily for the purpose of, providing evidence in a future trial against the defendant. The records are not testimonial." (*People v. Larson* (2011) 194 Cal.App.4th 832, 837-838; see *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225.)

The cases Miranda cites to support a contrary conclusion are distinguishable because the court records in those cases included plea allocutions that contained substantive testimony. (See, e.g., *People v. Hill* (2011) 191 Cal.App.4th 1104, 1127, 1136 [a gang member's statement in a federal plea agreement that he had been a gang leader and was involved in a "war" would be testimonial]; *U.S. v. McClain* (2d Cir. 2004) 377 F.3d 219, 220-221 [coconspirators' plea allocutions, formally given in court, under oath, and in response to questions by the court or the prosecutor, were testimonial when introduced at trial as evidence of the existence of the conspiracy]; *U.S. v. Reifler* (2d Cir. 2006) 446 F.3d 65, 86 [coconspirators' detailed plea allocutions were testimonial when offered as substantive evidence].)

26 *26 By contrast, the court records here reflect only the fact of Kelly's conviction and admission of the gang enhancement.[11] The records contain no substantive testimony by Kelly.

[11] The trial court's minute order from Kelly's change-of-plea hearing states in pertinent part: "Defendant withdraws plea of NOT GUILTY and enters a plea of GUILTY as to Count(s) 2. [¶] Defendant admits allegation(s) SK-186.22(B)(1)(A) PC, as to Count 2." The court records regarding Vega's, Mendivil's, and Corder's predicate offenses are similarly devoid of any plea allocutions or other substantive testimony. --------

E. *Substantial Evidence Supports the Gang Enhancements*

together." (See *Weddington*, *supra*, 246 Cal.App.4th at pp. 484-485; *Albillar*, *supra*, 51 Cal.4th at pp. 61-62, 68.) However, he contends neither prong is satisfied here because insufficient evidence supports the finding Kelly was a WSV member. We disagree.

In considering a challenge to the sufficiency of the evidence to support a gang enhancement, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a
27 contrary finding." (*Albillar*, *supra*, 51 Cal.4th at pp. 59- *27 60.) We do not reweigh evidence or credibility determinations. (*Id.* at p. 60.) "Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction." (*People v. Elliott* (2012) 53 Cal.4th 535, 585 (*Elliott*).)

Substantial evidence supports the jury's finding that Kelly was a WSV member. Most notably, Officer Rogers opined this was so. The jury could have found his opinion adequately supported by the following considerations: (1) Kelly committed the charged offenses with Miranda, a self-admitted WSV member who bore a prominent WSV tattoo on his head; (2) the charged offenses were among WSV's primary activities; (3) Kelly and Miranda perpetrated the charged offenses in "hallmark" fashion for the gang, as evidenced by the type and quantity of drug, and the presence of a scale and multiple firearms; (4) the fact Kelly perpetrated the charged offenses with Miranda would benefit Kelly's standing in the gang; and (5) Kelly pleaded guilty to one of the charged offenses and admitted the attached gang enhancement. This was a sufficient basis upon which Officer Rogers and the jury could conclude Kelly was a WSV member.

Miranda cites evidence he contends shows Kelly was not a WSV member—Kelly had no gang tattoos, he had not previously been documented as a WSV member, and he is White (whereas WSV is predominantly Hispanic). However, none of this evidence demonstrates Officer Rogers's testimony (or any other prosecution evidence) was "physically impossible or inherently improbable" such that jurors were required to disregard it. (*Elliott*, 53 Cal.4th
28 at p. 585.) And as to the last example, Officer Rogers *28 specifically explained it is "not necessarily unusual" to find non-Hispanic members of the *predominantly* Hispanic WSV.

Miranda asserts that "[e]ven the prosecutor did not argue Kelly was conclusively shown to be a member." In support, he cites the following passage from the prosecutor's closing argument: "There is some dispute as to whether [Kelly] was a documented gang member or not or how involved he was in the gang. *I don't have to prove to you that [Kelly] was a gang member, although there is sufficient evidence that he was*—that he might have been, or at the very least, he was an associate. What I have to prove to you is that he was acting in association with a gang member, being Mr. Miranda, and that they committed the crime in association with each other and for the benefit of a criminal street gang." (Italics added.)

We do not construe the prosecutor's argument as conceding no substantial evidence supports the finding Kelly was a WSV member. If anything, on the cold, hard record, the italicized portion of the quote suggests the prosecutor believed there *was* "sufficient evidence that he was" a WSV member.

gang enhancement.

III. *Correction of the Abstract of Judgment*

Miranda contends the trial court's minute order and the abstract of judgment contain a clerical error regarding the gang enhancement attached to his methamphetamine-sales
29 conviction—that the court orally pronounced a one-year *29 enhancement, yet the cited records indicate a four-year enhancement. The Attorney General concedes this is an error that "should be corrected." We agree. (See *People v. Leonard* (2014) 228 Cal.App.4th 465, 504 ["The court's oral pronouncement of . . . sentence controls subsequent written judgments and orders."].)

At the sentencing hearing, the trial court orally pronounced Miranda's sentence as follows. On count 1 (possession of a firearm by a felon), the court imposed the upper term of three years, plus four years for the gang enhancement. On count 2 (possession of methamphetamine for sale), the court imposed a consecutive term of one-third of the two-year middle term, or eight months, plus a gang enhancement of one-third of the three-year middle term, or *one year*. The court also imposed consecutive one-year terms for three of Miranda's four prison priors (the court stayed the fourth because it was the basis for the conviction in count 1).

The court's June 23, 2016 minute order and the abstract of judgment incorrectly reflect the sentence on the gang enhancement attached to count 2 as the upper term of four years, instead of the one-year term the court orally imposed (based on one-third the middle term of three years). Accordingly, we direct the trial court to correct its minute order and amend the abstract of judgment to reflect Miranda's one-year sentence on the gang enhancement attached to count 2.

DISPOSITION

The trial court is directed to correct its minute order dated June 23, 2016 and to amend the abstract of judgment to reflect Miranda's one-year sentence on the gang enhancement
30 attached to count 2. The trial court is further directed to forward the *30 amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HALLER, J. WE CONCUR: HUFFMAN, Acting P. J. IRION, J.

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