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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re DANNY S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. DANNY S., Defendant and Appellant.	F037969 (Super. Ct. No. 13575C) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. John W. DeGroot, Judge.

Mary Lynn Belsher, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Lloyd G. Carter and Kathleen A. McGurty, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On February 28, 2001, the Madera County District Attorney filed a wardship petition (Welf. & Inst. Code, §§ 602, 777, subd. (a)) in juvenile court alleging appellant minor committed the following offenses: count I--misdemeanor obstruction of a peace officer (Pen. Code, § 148, subd. (a)(1)); count II--vandalism an offense punishable as a misdemeanor (Pen. Code, § 594) for the benefit and at the direction of and in association with any street gang with the specific intent to promote, further, or assist in any current conduct of gang members (Pen. Code, § 186.22, subd. (d); and count III--violation of the terms of probation ordered in a prior juvenile disposition. The petition noticed intent to seek maximum aggregate term of confinement by aggregating the terms of all new charges which are found true on the Welfare and Institutions Code section 602 portion of the petition along with all previously sustained petitions. The total aggregate time was stated to be four years two months.

On March 1, 2001, the juvenile court conducted a detention hearing, appellant denied the material allegations of the petition, and the court placed minor in the care and responsibility of the probation officer.

On March 22, 2001, the court conducted a contested jurisdictional hearing, found the allegations of the petition true beyond a reasonable doubt, and set a disposition hearing for April 5, 2001.

On April 3, 2001, the probation officer filed a supplemental report and recommendation with the court.

On April 5, 2001, appellant filed a letter setting forth mitigating circumstances and requesting placement in a boot camp.

On the same date, the court conducted a contested dispositional hearing, removed minor from the physical custody of his parents, and continued him as a ward of the juvenile court. The court found minor's offense "deemed" to be "Misdemeanor & Felony" and reaffirmed its prior misdemeanor jurisdiction. The court ordered minor to

enroll in boot camp for two years and directed him to serve 38 days in juvenile hall with credit for 38 days served. The court also ordered minor to submit to drug and alcohol testing, to not associate with one Beto Daza (also known as Garfield), and to not contact or harass one Pete Tapia. The court ordered minor to pay a $100 restitution fine, to pay a $270 court fine, and to make restitution in an amount to be determined by the probation officer. The court lastly ordered minor to abide by a series of "gang conditions."

On April 13, 2001, minor filed a timely notice of appeal.

STATEMENT OF FACTS

At 7:30 p.m. on February 27, 2001, Pete Tapia opened the front door of his Madera apartment and observed four or five people outside "tagging" his neighbor's apartment. The individuals were using black spray paint to put a name on the wall and the sidewalk. Tapia recognized appellant and another individual, named Garfield, among the taggers. Appellant and Garfield were kneeling on the ground and spraying the acronym "BCG" on the sidewalk. Tapia did not see any spray paint in appellant's hand but did see Garfield painting the sidewalk with a spray can.

About 30 minutes later, appellant and some of his friends returned to Tapia's apartment carrying knives and "calling [Tapia] out." Tapia's mother told him to stay inside. Appellant, Garfield, and the others said, "[C]ome out here because we want to fight you" and "This is BCG 13." Tapia's mother called the Madera Police Department and Officer Dale Badorine responded to the scene. Tapia told Badorine what he had observed earlier in the evening. At trial, Tapia identified photographic exhibits that showed the spray painting completed on the evening of February 27, 2001. At the apartment complex, Tapia described two of the individuals and told Officer Badorine he could identify them.

Officer Badorine checked the area and observed two individuals matching Tapia's description. The officer approached the individuals and asked them to stop because he needed to speak to them. The shorter individual stopped but appellant, the taller of the

two, ran away. Officer Badorine ordered appellant to stop a few more times. Appellant finally stopped and put his hands in the air. Appellant's breath smelled of alcohol and he had black spray paint around his mouth and on his fingers.

Officer Badorine took appellant to juvenile hall, advised appellant of his *Miranda*[1] rights, and appellant agreed to speak with him. When Officer Badorine told appellant a witness saw him "tagging," appellant said "it was Pete. I know, I was going to . . . fight him tonight." At trial, Officer Badroine identified photographs he took of the graffiti after responding to the Tapias' call on February 27, 2001. No evidence was presented as to the dollar amount of defacement, damage or destruction caused by the vandalism.

Appellant did not have spray paint or knives on his person when Officer Badorine arrested him. The paint on the apartment complex sidewalk was not completely dry when Badorine arrived at Tapia's apartment.

Officer Damon Wasson testified as a gang liaison officer with the Madera Police Department. His duties include investigations of gang members and gang crimes and validation and documentation of gang members. Officer Wasson said he had taken special gang investigator training and was current on local gang culture and activity. He had previously testified as a gang expert more that 25 times. Wasson defined a gang as a group with three or more members who share a name, sign, or symbol. The members are organized and their primary goal is to commit such street crimes as vandalism, assault, vehicle theft, and robbery. According to Wasson, common characteristics of gang membership are a gang name, a gang-related tattoo, appearance on graffiti lists or in gang photographs, association with gang members, or identification by rival gang members. Wasson said gangs claim a territory and mark it with graffiti to let others know it is their turf. In addition, they identify one another through clothing or tattoos. Officer Wasson

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1 *Miranda v. Arizona* (1966) 384 U.S. 436.

was familiar with Barrio Central Gangsters, or "BCG," and said the BCG is a Surreno affiliated gang.

Officer Wasson concluded that appellant was associated with the Surreno street gang. He based his opinion on information he collected and documents regarding appellant's involvement with other Surreno members. According to Wasson, appellant engaged in spray painting and witness intimidation and admitted his association with Surreno street gang members. The officer explained that graffiti shown in photographic exhibits represented the southside BCG and was a way the gang marked its territory. In Officer Wasson's view, the graffiti was sprayed on the sidewalk and building with the intent to benefit the gang. He said graffiti helps the gang control its territory by intimidating both those living in the area and rival gangs, thus allowing the gang to continue criminal activity in the area. Officer Wasson further explained that acts constituting a pattern of criminal activity require a pattern by the gang as a whole and not by an individual defendant accused of violating Penal Code section 186.22, subdivision (d).

During the People's case-in-chief, the prosecution asked Officer Wasson if he was familiar with one Martin Avila. The officer said he had known Avila for eight years and described him as a Surreno street gang member who had committed numerous crimes, vehicle thefts, drug violations, attempted murders, drive-by shootings, and weapons violations. Wasson also testified he knew one Augustin Guy Delacerda, a Surreno gang member from Los Angeles. Wasson said Delacerda moved to Madera from Southern California and tried to take control of some of the Surreno street gang members. According to Wasson, Delacerda attempted to "teach them how to do it, how to be a Surreno street gang member here like they do in Los Angeles." He said Delacerda committed a "walk up shooting on four of my Norteno street gang members."

After Wasson testified on direct examination, the court admitted certified copies of superior court documents reflecting Martin Avila's conviction of felony assault with a

firearm and Augustin Delacerda's convictions of voluntary manslaughter, assaults with firearms, and numerous weapons enhancements.

Defense

Tasha Tovar testified she lived across the street from Pete Tapia on the evening of February 27, 2001. Tovar said her boyfriend Beto, is nicknamed "Garfield." Tovar said appellant walked her home from Beto's home between 8:00 p.m. and 8:30 p.m. that day. Appellant then stayed at her apartment for about 40 minutes. Tovar testified appellant was not among the group of gang members who tagged outside her apartment that evening. Tovar said she had previously complained to police about Pete Tapia because he harassed her and engaged in tagging. At the time of trial, Tovar said she was in the process of trying to secure a restraining order against Tapia.

DISCUSSION

I.
PROPOSITION 21 (THE GANG VIOLENCE AND JUVENILE CRIME PREVENTION ACT OF 1998) DOES NOT VIOLATE THE SINGLE SUBJECT RULE

In his opening brief filed August 31, 2001, appellant contended "Proposition 21, 'The Gang Violence and Juvenile Crime Prevention Act of 1998,' under which [appellant] was prosecuted should be invalidated as violative of section 8, subdivision (d), of the California Constitution, the 'single subject' rule."

On February 28, 2002, the California Supreme Court ruled in relevant part:

> "Proposition 21, titled the Gang Violence and Juvenile Crime Prevention Act of 1998 and approved by the voters at the March 7, 2000, Primary Election (Proposition 21), made a number of changes to laws applicable to minors accused of committing criminal offenses.… [T]he initiative measure broadened the circumstances in which prosecutors are authorized to file charges against minors 14 years of age and older in the criminal division of the superior court, rather than in the juvenile division of that court. Welfare and Institutions Code section 707, subdivision (d) (section 707(d)) confers upon prosecutors the discretion to bring specified charges against certain minors directly in criminal court, without a prior

adjudication by the juvenile court that the minor is unfit for a disposition under the juvenile court law.

"Petitioners are eight minors accused of committing various felony offenses. . . . The Court of Appeal (by a two-to-one vote) held that section 707(d) violates the separation of powers doctrine (Cal. Const., art. III, § 3) by allowing the prosecutor to interfere with the court's authority to choose a juvenile court disposition for minors found to have committed criminal offenses.

". . . [W]e disagree with the Court of Appeal's conclusion that section 707(d) is unconstitutional under the separation of powers doctrine.

"Because the Court of Appeal held that the statute violates the separation of powers doctrine, the appellate court did not resolve the other constitutional challenges in section 707(d) raised by petitioners in that court. In order to prevent continued uncertainty regarding the status of numerous proceedings involving accusations of criminal conduct committed by minors, we shall resolve those remaining issues in the present case. As discussed below, we have reached the following conclusions with regard to these questions: . . . *(3) Proposition 21 does not violate the single-subject rule, set forth in article II, section 8, subdivision (d), of the California Constitution, applicable to initiative measures.*" (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 544-546, fns. omitted, italics added.)

In view of the Supreme Court's holding in *Manduley*, appellant's contention is rejected.

II.

APPLICATION OF PENAL CODE SECTION 186.22, SUBDIVISION (d) TO THE OFFENSE OF MISDEMEANOR GRAFFITI VANDALISM

Appellant contends the juvenile court erred in applying the Penal Code[2] section 186.22, subdivision (d) (hereafter subdivision (d)) gang penalty provisions to the offense

[2] All further statutory references are to the Penal Code unless otherwise indicated.

of misdemeanor graffiti vandalism which was adjudicated true in count II of the petition.[3] Respondent disagrees.

The disagreement arises over whether subdivision (d) applies to "straight" misdemeanors. Appellant asserts that the sentencing provisions of subdivision (d) only apply to those crimes described in section 17, subdivision (b) and commonly referred to as "wobblers." Respondent claims that subdivision (d) is not so limited and also applies to straight misdemeanors such as appellant's vandalism offense.

Section 186.22 is part of the California Street Terrorism Enforcement and Prevention Act (California STEP Act). (Pen. Code, § 186.20 et seq.) Section 186.22 of the act sets forth both base terms and enhancements for participation in a criminal street gang. (See Pen. Code, §§ 12022.53, subd. (e)(2), 186.22, subd. (b); *Salazar v. Superior Court* (2000) 83 Cal.App.4th 840, 846.) A base term is the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed. (Cal. Rules of Court, rule 4.405(b).) An enhancement is an additional term of imprisonment added to the base term. (Cal. Rules of Court, rule 4.405(c).) Enhancements focus on an element of the commission of the crime or the criminal history of the defendant which is

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[3] The district attorney alleged in count II of the juvenile wardship petition:

"That said minor, Danny [S.], on or about the 27th day of February, 2001, in the County of Madera, State of California with the specific intent to promote, further, and assist in criminal conduct by members of Sureno, a criminal street gang, did unlawfully commit the public offense of vandalism, in violation of Penal Code section 594, an offense punishable as a misdemeanor, for the benefit and at the direction of, and in association with Sureno, thereby violating section 186.22(d) of the Penal Code, a felony."

not present for all such crimes and perpetrators and which justifies a higher penalty than that prescribed for the offenses themselves. (*People v. Rayford* (1994) 9 Cal.4th 1, 9.) Section 186.22, subdivision (a) defines a particular offense to which only gang members are subject. Section 186.22, subdivision (b)(1) increases the punishment for gang-related felonies. (*People v. Robles* (2000) 23 Cal.4th 1106, 1109.)

Section 186.22, subdivision (d) states:

> "Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is 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 imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for one, two, or three years, provided that any person sentenced to imprisonment in the county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until he or she has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in a county jail."

The instant dispute centers on the meaning to be attributed to the words "public offense punishable as a felony or a misdemeanor," as used in subdivision (d) and to which it declares itself to be applicable. A wobbler is a special class of crime which could be classified and punished as a felony or misdemeanor depending upon the severity of the facts surrounding its commission. (*People v. Williams* (1996) 49 Cal.App.4th 1632, 1639.) Wobbler offenses are punishable by imprisonment either in the county jail or in the state prison. The characterization of the crime is dependent upon the actual punishment that is imposed. When a defendant is sentenced to state prison, the offense is a felony; when the defendant is sentenced to county jail, the offense is a misdemeanor. (*People v. Terry* (1996) 47 Cal.App.4th 329, 331-332.)

Penal Code section 17 vests in the trial court the discretion to sentence defendants convicted of wobblers to state prison or jail.[4] Generally speaking, the choice between felony and misdemeanor under section 17, subdivision (b)(1) is dependent upon a determination by the official who, at the particular time, possesses knowledge of the special facts of the individual case and may, therefore, intelligently exercise the legislatively granted discretion. (*People v. Dent* (1995) 38 Cal.App.4th 1726, 1730.)

Appellant contends:

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[4] Section 17, subdivision (b) states:

> "When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:
>
> "(1) After a judgment imposing a punishment other than imprisonment in the state prison.
>
> "(2) When the court, upon committing the defendant to the Youth Authority, designates the offense to be a misdemeanor.
>
> "(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.
>
> "(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.
>
> "(5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint."

"… [T]he clause [in subdivision (d)] is not ambiguous. The term, 'public offense punishable as a felony or a misdemeanor,' in California law is universally understood to mean a 'wobbler.' . . . Surely if the drafters intended to apply subdivision (d) to any felony or any misdemeanor they could have simply used the term 'any felony or misdemeanor.' Instead they used a peculiar term, well known to mean 'wobbler.' [Citation.]

"The most cursory perusal of the section shows a clear pattern. Subdivision (b) provides an escalating series of sentence enhancements for felonies (two, three, four years), for serious felonies (five years), and for violent felonies (ten years), then subdivision (d) provides a punishment scheme for wobblers (one, two, three years, or one year in county jail with a 180 day minimum). [¶] . . . [¶]

"Application of the sentencing scheme in subdivision (d) of section 186.22 to 'any felony' would have the really absurd result of making every felony crime in California punishable under a 'wobbler' sentencing scheme, so long as the crime is done for the benefit of a criminal street gang. Thus, even felonies for which the county jail is not an authorized sentence could be sentenced to one year in county jail, or 180 days. . . .

"The only sensible interpretation of the subdivision is that it simply applies a wobbler sentencing scheme to any wobbler public offense which is committed for the benefit of, at the direction of, or in association with a criminal street gang with the required specific intent. It does not turn minor, non-violent misdemeanors, like graffiti, into state prison crimes." (Original underscoring, fn. omitted.)

Respondent counters:

"Appellant contends the trial court erroneously imposed a 'wobbler' enhancement on a misdemeanor offense. However, the district attorney was required to elect whether the offenses listed in appellant's juvenile petition filed pursuant to Welfare and Institutions Code section 602 were misdemeanors or felonies. (Welf. & Inst. Code, § 656.1.) Thus, the fact the offense was alleged as a misdemeanor does not mean the offense was not also a 'wobbler.'"

At the time the petition was filed, Penal Code section 594 stated in relevant part:

"(a) Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism:

"(1) Defaces with graffiti or other inscribed material. [¶] . . . [¶]

"(b)(1) If the amount of defacement, damage, or destruction is four hundred dollars ($400) or more, vandalism is punishable by imprisonment in the state prison or in a county jail not exceeding one year, or by a fine of not more than ten thousand dollars ($10,000), or if the amount of defacement, damage, or destruction is ten thousand dollars ($10,000) or more, by a fine of not more than fifty thousand dollars ($50,000), or by both that fine and imprisonment.

"(2)(A) If the amount of defacement, damage, or destruction is less than four hundred dollars ($400), vandalism is punishable by imprisonment in a county jail not exceeding one year, or by a fine of not more than one thousand dollars ($1,000) . . .."

In their supplemental letter briefs and at oral argument on appeal, the parties agreed neither the wardship petition nor the evidence presented at the jurisdictional hearing established a dollar amount of damage or destruction caused by the graffiti vandalism. Therefore, the offense must be deemed a misdemeanor. (See Pen. Code, § 1192.) Faced with a straight misdemeanor, this court must determine whether the juvenile court properly found applicable and imposed the penalty under subdivision (d). In the case of statutory interpretation, our task is to determine afresh the intent of the Legislature by construing in context the language of the statute. In determining such intent, we begin with the language of the statute itself. In other words, we look first to the words the Legislature used, giving them their usual and ordinary meaning. If there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said and the plain meaning of the statute governs. When the statutory language is ambiguous, the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. In construing a statute, we must also consider the object to be achieved and the evil to be prevented by the legislation. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192-193.) When the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible

objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. (*People v. Jefferson* (1999) 21 Cal.4th 86, 94.)

In 1988, the Legislature enacted section 186.22 as part of the Street Terrorism Enforcement and Prevention Act. The act originated as Senate Bill No. 1555. (Sen. Bill No. 1555 (1989-1990 Reg. Sess.) In the original version, subdivision (b) stated:

> "Any person who is convicted of a felony or a misdemeanor which is 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 in the following manner . . .." (Stats. 1988, ch. 1242, § 1, p. 4128.)

Subdivision (b)(1) set forth the enhanced punishment for a misdemeanor while subdivision (b)(2) set forth the enhanced punishment for a felony conviction. (Stats. 1998, ch. 1242, § 1, p. 4128.) The Report of the Assembly Committee on Public Safety stated that Senate Bill No. 1555 provided sentencing "enhancements" for gang-related crimes. As enacted, section 186.22 provided in subdivisions (b)(1) and (b)(2), for an increased punishment for a misdemeanor of up to one year in jail or one, two, or three years in prison. Section 186.22 also provided an enhancement of a felony sentence with additional and consecutive punishment of one, two, or three years, at the court's discretion. (Assem. Com. on Public Safety, New Statutes Affecting the Criminal Law, Sen. Bill No. 1555 (1989-1990 Reg. Sess.) p. 17.)

In 1989, one year after section 186.22 was enacted, the Legislature amended subdivision (b) by eliminating all references to misdemeanors. (Stats. 1989, ch. 144, § 1, p. 1096.) While the Legislature eliminated all references to misdemeanors in subdivision (b)(1), it added subdivision (c). The latter subdivision provided penalty enhancements for "[a]ny person who is convicted of a public offense punishable as a felony or a misdemeanor." (Stats. 1989, ch. 144, § 1, p. 1096.) Although the Legislature appeared to change the scope of the statute, the amendment was intended to "recast, without

substantial change," those provisions relating to the punishment for felony and misdemeanor conduct done with the intent to promote, further, or assist criminal gang activity. (Sen. Rules Com., Office of Sen. Floor Analyses (Sen. Bill No. 1555) May 18, 1989, p. 2.) In 1994, the Legislature deleted subdivision (c) from section 186.22 but left subdivision (b)(1) substantially unchanged. (Stats. 1994, ch. 47, § 1, p. 389.)

In 1997, California Governor Pete Wilson supported a crime bill to amend section 186.22 as part of an effort to combat gang-related crimes. The amendments included the addition of subdivision (d) of section 186.22. Subdivision (d) provided sentencing enhancements for public offenses charged as felonies and misdemeanors. (Sen. Bill No. 1455 (1997-1998 Reg. Sess.) § 4; Assem. Bill No. 1735 (1997-1998 Reg. Sess.) § 4.) The proposed subdivision was identical to the repealed subdivision (c). The Senate's bill analysis found that subdivision (d) would apply to "gang members who commit misdemeanors as well as felonies." (Sen. Subcom. on Juvenile Justice, Rep. On Sen. Bill No. 1455 (1997-1998 Reg. Sess.) Apr. 20, p. 19.) The Assembly record reflected a similar intent. According to an analysis conducted by the Assembly Committee on Public Safety, the amendment was intended to make any gang-related misdemeanor or felony punishable by up to three years in state prison. (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1735 (1997-1998 Reg. Sess.) p. 2.)

The Legislature ultimately rejected the bill, stating that the legislative focus should be on "prevent[ing] juveniles from committing crimes rather than just locking them up." (*Propositions* (Feb. 2000) Cal. J. 59, 63.) Because the Legislature failed to enact the crime bill, Governor Wilson took the proposed legislation to the people of California and placed it on the ballot as Proposition 21, The Gang Violence and Juvenile Crime Prevention Act. (*Propositions, supra,* Cal. J. p. 63.) Proposition 21 passed on March 7, 2000 and became effective on March 8, 2000. (Deering's Ann. Pen. Code, § 186.22 (2002 supp.) pp. 134-135, 139.) Proposition 21 made numerous changes to the Penal and Welfare and Institutions Codes relating to adult and juvenile justice systems, including

the treatment of juvenile offenders, the confidentiality protections afforded to juvenile proceedings, the type of juvenile offenders that can be tried in adult court, and the punishment for gang-related offenses and offenders. (*In re Melvin J.* (2000) 81 Cal.App.4th 742, 744.) The backers of the initiative promised that Proposition 21 would end "the 'slap on the wrist' of current law by imposing real consequences for GANG MEMBERS, RAPISTS AND MURDERS who cannot be reached through prevention or education." (Ballot Pamp., Primary Elec. (Mar. 7, 2000) argument in favor of Prop. 21, p. 48.)

The initiative amended section 186.22, subdivision (b)(1) to punish gang-related felonies with two, three, or four years in prison, except if the felony was serious (as defined by Penal Code section 1192.7, subdivision (c)). The initiative also reinserted subdivision (d) (formerly subdivision (c)) to provide increased sentences for gang-related felonies and misdemeanors. (§ 186.22, subd. (d).) Generally speaking, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of existing law. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 283.)

The applicability of section 186.22, subdivision (d) to straight misdemeanors is further underscored by subdivision (g) of the same statute, which provides:

> "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or *refuse to impose the minimum jail sentence for misdemeanors* in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition." (§ 186.22, subd. (g), italics added.)

Upon review of the record, including the lengthy legislative history underlying subdivision (d), we conclude that respondent's more expansive definition of "a public offense punishable as a felony or a misdemeanor" should prevail and that the trial court

properly applied the subdivision to the straight misdemeanor offense of graffiti vandalism.[5]

III.

SUBSTANTIAL EVIDENCE SUPPORTS FINDING THE GRAFFITI VANDALISM WAS COMMITTED TO PROMOTE CRIMINAL CONDUCT BY GANG MEMBERS

Appellant contends there was insufficient evidence to show he committed graffiti vandalism to promote criminal conduct by gang members.

He specifically argues (a) Officer Wasson impermissibly expressed an opinion as to appellant's guilt or innocence, and (b) there was no evidence of any criminal activity by gang members.

When an appellate court reviews the sufficiency of the evidence supporting a criminal conviction, the critical inquiry is whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. This inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In making that determination, the appellate court must view the evidence in a light most favorable to the respondent and presume in support of the judgment the existence of every fact the

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[5] Appellant devotes a substantial portion of his discussion to the case of *Robert L. v. Superior Court* (2001) 90 Cal.App.4th 1414, review granted October 24, 2001, S100359. In *Robert L.*, the Fourth District Court of Appeal held (a) section 186.22, subdivision (d) is more aptly characterized as a penalty provision than a crime and (b) the scope of the provision includes all gang-related offenses, not just wobblers. (See also *People v. Arroyas* (2002) 96 Cal.App.4th 1439.)

trier could reasonably deduce from the evidence. (*People v. Staten* (2000) 24 Cal.4th 434, 460.)

The penalty set forth in section 186.22, subdivision (d) is applicable to (a) any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is (b) committed for the benefit of, at the direction of, or in association with any criminal street gang, and (c) with the specific intent to promote, further, or assist in any criminal conduct by gang members. Under California law, it is incumbent upon the prosecution, in seeking an enhanced sentence under section 186.22, to prove through competent evidence the elements of a "criminal street gang" as set out in the statute. (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1004 [construing section 186.22, subd. (b)].)

A. Testimony of Expert Witness

Appellant argues:

> "… [T]he government's expert [witness, Officer Wasson,] was impermissibly allowed to testify that 'Mr. [S.] is associated with the Surreno street gang' and had the 'specific intent to promote, further, or assist in criminal conduct by gang members pursuant to Penal Code Section 186.22, Sub (d), Sub (1)[.]' . . . This testimony was inadmiss[i]ble. The officer's opinion was tantamount to expressing an opinion that Danny was guilty of being a gang member and possessed the specific intent to assist gangs. Moreover during argument when defense counsel again pointed out to the court that the evidence was insufficient to prove her client was a gang member or had participated in gang related activity the court responded, 'Well you misread the law. And Officer Wasson testified as to the law, and he was absolutely right. There's no issue there.' [¶] 'A consistent line of authority in California as well as other jurisdictions holds a witness cannot express an opinion concerning the guilt or innocence of the defendant. [Citations.] *People v. Torres* (1995) 33 Cal.App.4th 37, 47.)' [¶] The true finding of violation of section 186.22 subdivision (d) must be set aside."

As the People properly point out, this claim is not really a challenge to the sufficiency of the evidence but, rather, a challenge to the admission of evidence in the form of expert opinion testimony. The requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and be

based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates. Such evidence is admissible even though it encompasses the ultimate issue in the case. On the other hand, expert opinion is not admissible if it consists of inferences and conclusions that can be drawn as easily and intelligently by the trier of fact as by the witness. As a general rule, a trial court has wide discretion to admit or exclude expert testimony. An appellate court may not interfere with the exercise of that discretion unless it is clearly abused. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.)

The following exchange occurred during the direct examination of Officer Wasson:

> "Q [by deputy district attorney Hill]: Are you familiar with an individual named Danny [S.]?
>
> "A [by witness Wasson]: Only through probation reports and through police department reports.
>
> "Q In your familiarity with him, is he affiliated with any criminal street gangs?
>
> "A Yes, ma'am.
>
> "MS. ROGERS [defense counsel]: Objection, Your Honor. This witness does not have any personal knowledge of this, just through probation reports and stuff. [H]e is not a percipient witness as to knowledge of this.
>
> "THE COURT: He is an expert witness. Overruled.
>
> "MS. ROGERS: Your Honor, she asked if he was familiar with my client. He has no association with him before this.
>
> "THE COURT: So? It's an expert witness. He's testifying as to his findings and his opinion. And so it's foundational. Whether he has had any personal experience with your client is irrelevant. [¶]…[¶]
>
> "Q [by deputy district attorney Hill] You could go ahead and answer.
>
> "A [by Wasson] Yes. With the information that I have collected and documented, Mr. [S.] is associated with a Surreno street gang.

"Q Which one?

"A BCG.

"Q What are you basing that opinion on?

"A . . . His associations with the other BCG that was down there that night, the criminal act, spray painting, the BCG, the witness intimidation, the threats in the area, the probation report where Mr. [S.] denies affiliation but admits that he associates with and hangs out with the Surreno street gang members. [¶] . . . [¶]

"Q [by deputy district attorney Hill]: Can you tell me what you see in the photograph [People's Exh. No. 1]?

"A [by witness Wasson]: Yes, ma'am. At the top is the BCG, Barrio Central Gang. Immediately off to the right of it would be the 3 dots for the number 3. The X 3 underneath it for 13. And then it says Sur and side -- next to it. So they're saying south side BCG, south side.

"Q What would be the significance of those signs and symbols to a criminal street gang member?

"A That is saying what gang it is and whether they're a north or south side gang. And it's spray painted on the sidewalk here so that they're marking their territory with that graffiti right there. (Indicating) [¶] . . . [¶]

"Q Based on the testimony that you have heard and the exhibits that you have observed, do you have an opinion as to whether or not this graffiti would have benefited or was at the direction of, or was in association with the Surreno gang BCG?

"A Yes.

"Q What is your opinion?

"A Benefits the gang by them marking their territory. It's an intimidation factor, helps them maintain control of that particular area, lets rival gangs know that is their area and if they come in there they can be expected to be assaulted. Basically it helps the gang members that are doing it and the gang itself. And according to the testimony, there was numerous subjects out there at the time that it was occurring. They were all associating with each other out there in that particular area. And they were there when it occurred."

The following exchange occurred during defense counsel's closing argument:

"MS. ROGERS: . . . As to the 186.22, (d), allegations, Your Honor, trying to establish gang activity and the pattern of criminal street conduct, Your Honor, it's our position that this has not been proved as to my client. The fact that the minor may associate with some gang members does not necessarily mean that he is a criminal street gang member and engaged in a pattern of criminal conduct. [¶] The statute clearly calls for certain elements, it has to be proven as to my client. There have not been any of the sustained petitions against my client alleging any criminal street gang activity. . . .

"THE COURT: Well, I think you misread the law.

"MS. ROGERS: I do believe that the law calls for some pattern of criminal street gang.

"THE COURT: It is. It's called Surreno.

"MS. ROGERS: He does not have any tattoos on him. The only other allegation is his questionable association with a member of that gang. As to whether there's graffiti, as to the actual tagging, does not necessarily mean that he is a member.

"THE COURT: Well, I believe the testimony of Officer Wasson and Officer Wasson's opinion is your client is a member of a street gang. [¶]…[¶] 186.22, Sub (d), does it say that the person who commits that offense has to be a criminal street gang member?

"MS. ROGERS: Yes, it does.

"THE COURT: It just says any person . . . who is convicted of a public offense punishable as a felony or a misdemeanor, which is 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.

"MS. ROGERS: Who also participate in the conduct of criminal activity, participate in conduct of criminal street gang. We do have a list.

"THE COURT: Well, you misread the law. And Officer Wasson testified as to the law, and he was absolutely right. There's no issue there."

The subject matter of the culture and habits of criminal street gangs is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. Expert testimony may be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in a particular field in forming their opinions. Of course, any material that forms the basis of an expert's opinion testimony must be reliable. So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony. An expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. A trial court has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay. A witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into "independent proof" of any fact. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-619.)

Evidence Code section 353 states:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> "(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
>
> "(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

In the instant case, appellant did not interpose a contemporaneous objection when Officer Wasson offered his opinion in response to the prosecutor's question "as to whether or not Mr. Danny [S.] had the specific intent to promote, further, or assist in criminal conduct by gang members pursuant to Penal Code Section 186.22, Sub (b), Sub

(1)." Even assuming arguendo a proper objection, we cannot say the admission of the testimony amounted to a miscarriage of justice. A "miscarriage of justice" should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached absent the error. (Cal. Const., art. VI, § 13; *People v. Steele* (2000) 83 Cal.App.4th 212, 224-225.)

In the instant case, the juvenile court judge could determine for himself whether or not appellant intended his activity to benefit a criminal street gang. Without even considering Officer Wasson's opinion testimony, the court could reasonably infer from the content and placement of the graffiti and the spray paint on appellant's person that appellant committed an act of vandalism. Moreover, relying upon Wasson's non-opinion testimony, the court could further infer the act of vandalism was committed for the benefit of, at the direction of, or in association with a criminal street gang. Absent a miscarriage of justice, reversal for alleged evidentiary error is not required.

B. <u>Evidence of Criminal Activity by Gang Members</u>

Appellant contends:

> "In this case there is no evidence of 'any criminal conduct by gang members' which the minor's graffiti offense promoted, furthered or assisted. There were no gang members committing any crimes for the minor to assist when he 'might have' sprayed some paint on a wall. It may be noted the evidence shows other persons were present ('four or five') and one other person was involved in criminal conduct (at least one of them was spray painting). However, there is no evidence proving beyond a reasonable doubt that any of those persons (including the minor himself) were or are 'gang members.'
>
> "If there are no gang members engaged in criminal conduct at the given place and time of the offense, commission of that offense cannot then and there promote, further, or assist 'criminal conduct **by gang members.**' Nor can it be automatically inferred that other persons said to be present were **gang members** merely because one of them was spraying gang graffiti.

> Remember, the witness testified that he never saw the minor spraying gang graffiti, and it is undisputed that he is not a gang member. [¶]…[¶]
>
> ". . . Danny S. could not have specific intent to assist 'criminal conduct by gang members' because there was no occurrence of criminal conduct by gang members for him to assist. There was no evidence that any of the four or five people that Pete saw at the scene were gang members." (Original bolding.)

The juvenile wardship petition filed on February 28, 2001, alleged in relevant part:

> "COUNT II:
>
> "That said minor, Danny [S.], on or about the 27th day of February, 2001, in the County of Madera, State of California with the specific intent to promote, further, and assist in criminal conduct by members of Sureno, a criminal street gang, did unlawfully commit the public offense of vandalism, in violation of Penal Code section 594, an offense punishable as a misdemeanor, for the benefit and at the direction of, and in association with Sureno, thereby violating section 186.22(d) of the Penal Code, a felony."

Officer Damon Wasson testified he officially became the Madera Police Department Gang Liaison Officer in 1993 and had more than 250 hours of formalized gang training. Wasson also said he kept current on gang culture by talking to gang members on the street, reviewing reports and field interview cards, and networking with staff members of the Sheriff's Department, county jail, and juvenile hall. Wasson said a gang is a formal or informal association of three or more members with a common name, sign, or symbol and a goal of committing street crimes. Wasson said a gang member gains authority or respect through the commission of criminal acts, particularly violent acts. Those who commit the more vicious, violent acts are "pretty much leading and showing the other people what to do." According to Wasson, the terms "turf" or "territory" have a special meaning in gang society. They refer to the area claimed by a gang. He explained:

> "Basically they own that area and they mark their area to let people know that that's their area, to keep rival gangs out. Rival gangs come in, you know, they will either assault them, chase them out, do whatever. They

> claim that area and intimidate the people living in that area so they can commit crimes and do their stuff in that area without fear of having the police called or not being able to do what they want."

Wasson further explained that gang members mark the borders of their turf with graffiti "so that if somebody comes into that area they will know that they're in that particular area." Wasson explained that gang members will spray paint buildings, streets, sidewalks, trees, and cars within the area to mark their turf. He also testified that BCG, Barrio Central Gangsters, is a "sub set" of the Surreno street gang faction. Wasson had investigated several crimes involving BCG members and had personally contacted more than 20 people claiming affiliation or association with BCG. Wasson said BCG is an active gang claiming turf approximately three blocks north of the Madera Police Department. He also said the symbol of the gang is "[t]he color blue, the 3 dots, the number 3, the number 13, BCG Surreno, the word Surreno or Sur." According to Wasson, BCG members were involved in drug and alcohol violations, assault with deadly weapons, vehicle thefts, and vandalism.

Wasson said the graffiti sprayed at Tapia's apartment complex was "typical street gang-style graffiti" and marked the territory of the BCG gang. In Wasson's opinion, the graffiti benefited the gang by marking their territory, helping them to intimidate others, and allowing them to maintain control over that particular area. He explained:

> "By spraying the graffiti up there they were promoting the Surreno street gang BCG, they were assisting them in marking their territory, controlling their territory, intimidating the people living in that particular area so they can maintain control, so they can continue with their criminal activities in that particular area."

Pete Tapia testified he saw appellant and "Garfield" kneeling on the sidewalk outside his apartment on the evening of February 27, 2001. Although he did not see anything in appellant's hands, he testified they were "tagging their BCG on the ground." Later that evening, appellant, Garfield, and five or six of their friends returned, called Tapia out, and said "[t]his is BCG 13." He also said appellant was gesturing with a knife

in his mother's presence. According to Tapia, appellant's friends returned to the complex later that evening. Officer Dale Badorine testified he arrested appellant on the evening of February 27, 2001. Appellant had an odor of alcoholic beverage on his breath, black spray paint on the upper lip area of his mouth, and similar paint on the first three fingers of his right hand.

The foregoing direct and circumstantial evidence of the February 27, 2001, graffiti vandalism was sufficient to show appellant committed a public offense for the benefit of the BCG criminal street gang--a subset of the Surreno street gang--with the specific intent to promote, further, or assist in criminal conduct by gang members.

IV.

SUBSTANTIAL EVIDENCE SUPPORTS FINDING THAT BCG IS A CRIMINAL STREET GANG

Appellant contends:

> "To prove that the BCG is a criminal street gang[,] subdivision (e) required that the prosecution prove a 'pattern of criminal activity.' The expert testified BCG is a criminal street gang, but that is not enough. The court in *People v. Gardeley* (1996) 14 Cal.4th 605, discussed the additional requirement to prove two or more predicate offenses[.] [¶]…[¶] Here, the prosecution failed to prove the required two or more 'predicate' offenses by members of the BCG. The evidence the prosecution offered showed that numerous offenses by Martin Avila and Augustin De La Cerda.
>
> "Therefore, there is no evidence proving BCG is a criminal street gang as required by *People v. Gardeley* . . .. Thus, the criminal street gang element of 186.22 subdivision (d) was not proved. The evidence may support a finding that Danny S. tagged the sidewalk for the benefit of BCG, but there is insufficient evidence that BCG is a criminal street gang. Predicate offenses do not have to be gang-related but must be committed by gang members.. . ." (Fn. omitted.)

Penal Code section 186.22, subdivision (f) states:

> "As used in this chapter, 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission

of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."

Section 186.22, subdivision (e) states:

"As used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons:

"(1) Assault with a deadly weapon or by means of force likely to produce great bodily injury . . . .
"(2) Robbery . . . .
"(3) Unlawful homicide or manslaughter . . . .
"(4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances . . . .
"(5) Shooting at an inhabited dwelling or occupied motor vehicle . . . .
"(6) Discharging or permitting the discharge of a firearm from a motor vehicle . . . .
"(7) Arson ….
"(8) The intimidation of witnesses and victims . . . .
"(9) Grand theft . . . .
"(10) Grand theft of any firearm, vehicle, trailer, or vessel.
"(11) Burglary . . . .
"(12) Rape . . . .
"(13) Looting . . . .
"(14) Money laundering . . . .
"(15) Kidnapping . . . .
"(16) Mayhem . . . .
"(17) Aggravated mayhem . . . .
"(18) Torture . . . .
"(19) Felony extortion . . . .
"(20) Felony vandalism, as defined in paragraph (1) of subdivision (b) of Section 594.
"(21) Carjacking . . . .
"(22) The sale, delivery, or transfer of a firearm . . . .
"(23) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person . . . .

"(24) Threats to commit crimes resulting in death or great bodily injury ….
"(25) Theft and unlawful taking or driving of a vehicle . . .."

In *People v. Gardeley, supra,* 14 Cal.4th at p. 625, the Supreme Court held the prosecution can prove a pattern of criminal gang activity through evidence pertaining to the charged offense and one other offense committed on a prior occasion by the defendant's fellow gang member. In *People v. Loeun* (1997) 17 Cal.4th 1, 5-10, the Supreme Court held the requisite "pattern" can also be established by evidence of the offense with which the defendant is charged and proof of another offense committed on the same occasion by a fellow gang member. In other words, the prosecution can rely on evidence of the defendant's commission of the charged offense and the contemporaneous commission of a second predicate offense by a gang member.

As noted above, count II of the juvenile wardship petition alleged:

> "That said minor, Danny [S.], on or about the 27th day of February, 2001, in the County of Madera, State of California with the specific intent to promote, further, and assist in criminal conduct by members of Sureno, a criminal street gang, did unlawfully commit the public offense of vandalism, in violation of Penal Code section 594, an offense punishable as a misdemeanor, for the benefit and at the direction of, and in association with Sureno, thereby violating section 186.22(d) of the Penal Code, a felony."

Officer Wasson, gang liaison officer with the Madera Police Department, testified that gangs claim a territory and mark it with graffiti to let others know it is their turf. In addition, they identify one another through clothing or tattoos. Wasson testified he was familiar with the Barrio Central Gangsters, or "BCG," said the BCG is a Surreno-affiliated gang, and concluded that appellant was associated with a Surreno street gang, i.e., BCG. Wasson based his conclusion on information he collected and documents regarding appellant's involvement with BCG members. According to Wasson, appellant engaged in spray painting and witness intimidation and admitted his association with Surreno street gang members. As we noted above, the subject matter of the culture and habits of criminal street gangs is sufficiently beyond common experience that the opinion

of an expert would assist the trier of fact. (*People v. Gardeley, supra,* 14 Cal.4th at pp. 617-619.)

Appellant nevertheless contends the People failed to prove the required two or more predicate offenses by members of the BCG. Appellant's claim is based on a misreading of the juvenile wardship petition. The People specifically alleged appellant engaged in graffiti vandalism with the "specific intent to promote, further, and assist in criminal conduct by members of Sureno, a criminal street gang." Wasson specifically testified he knew of two Surreno street gang members who had engaged in extensive criminal activities. According to Wasson, one Martin Avila had committed numerous crimes, vehicle thefts, drug violations, attempted murders, drive-by shootings, and weapons violations. On August 21, 1998, Avila was convicted in Madera County of assault with a firearm (Pen. Code, § 245, subd. (a)(2)) upon a plea of guilty. Wasson further testified one Augustin Delacerda, a Surreno gang member from Los Angeles, had moved to Madera to take control of local Surreno street gang members and "how to be a Surreno street gang member here like they do in Los Angeles." On February 23, 2000, Delacerda was convicted in Madera County of two counts of voluntary manslaughter (Pen. Code, §§ 192, subd. (a), 664) and four counts of assault with a firearm (Pen. Code, § 245, subd. (a)) as well as multiple firearm enhancements (Pen. Code, §§ 12022.5, subd. (a)(1), 12022.7, subd. (a)).

To fall within the statutory definition of a "criminal street gang," there must be an ongoing association that (a) consists of at least three persons; (b) has as one of its primary activities the commission of specific types of criminal activity; (c) uses a common name or identifying sign or symbol; and (d) has members who individually or collectively have actually engaged in "two or more" acts of specified criminal conduct committed either (i) on separate occasions or (ii) by two or more persons. Our Supreme Court has held the "two or more" statutorily enumerated offenses that establish the "pattern of criminal gang activity" described section 186.22, subdivision (e) need *not* be gang related. (*People v.*

Gardeley, supra, 14 Cal.4th at pp. 623-625, fn. 12.) Nevertheless, the statute contains two timing requirements for the offenses used to establish a "pattern of gang activity." First, the last crime must have occurred within three years of a prior crime. Second, at least one of the offenses must have occurred after the effective date of "this chapter." (*People v. Godinez* (1993) 17 Cal.App.4th 1363, 1368.)

Section 186.20, enacted in 1988, states:

> "This chapter shall be known and may be cited as the 'California Street Terrorism Enforcement and Prevention Act.'" (Stats. 1988, ch. 1242, § 1, p. 4127; Stats. 1988, ch. 1256, § 1, pp. 4178-4179.)

Although Martin Avila and Augustin Delacerda sustained their Madera County criminal convictions prior to the adoption of Proposition 21 in March 2000, they committed their offenses well after the adoption of the "chapter" embodying the California STEP Act. According to People's exhibit 4, Avila committed his offense in 1998. According to People's exhibit 3, Delacerda committed his offenses in 1999. Therefore, the last crime occurred within three years of a prior crime and all of the offenses occurred after the 1988 effective date of the California STEP Act. At the March 22, 2001 jurisdictional hearing, the juvenile court sustained count II of the wardship petition beyond a reasonable doubt stating:

> "He [Danny S.] committed an act of vandalism, namely, graffiti and it was committed for the benefit of, at the direction of, or in association with the Surreno criminal street gang with the specific intent, in Danny's mind, to promote, further, assist in criminal conduct by these gang members."

Thus, the petition alleged criminal conduct for the benefit of the Surreno street gang, the predicate offenses were committed by individuals identified as members of the Surreno street gang, and the juvenile court found that minor committed the offense underlying count II to benefit the Surreno street gang.

The criminal acts of Surreno members Avila and Delacerda were sufficient to establish a pattern of criminal gang activity (i.e., predicate offenses) for purposes of section 186.22 in the instant case.

V.

SUBSTANTIAL EVIDENCE SUPPORTS THE FINDING THAT APPELLANT ENGAGED IN MISDEMEANOR RESISTING ARREST

Appellant contends there was insufficient evidence to prove he violated Penal Code section 148.

Section 148, subdivision (a)(1), as charged in the wardship petition, states in relevant part:

> "Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment."

Appellant specifically contends:

> "The question of interference with or delay of the officer in the performance of his duty could come into play only after the officer communicates to the citizen that he is ordering him to stop. Here the officer did issue such orders after the minor began to leave, and then the minor did stop, submitting to detention.… However, there is no evidence as to whether the minor heard the officer's order the first time, or the second time it was issued. After one of the series of orders, the minor did, in fact, stop. Thus, any delay and any necessity for the officer to run after the minor, may well have resulted not from wil[l]ful disobedience but from the fact that he did not, at first, hear the order. The prosecution was required to prove each element of the offense beyond a reasonable doubt. There is no substantial evidence that any delay was willful.
>
> "Even assuming the minor did hear one or more of the earlier orders to stop, his conduct in continuing to run away for a few more seconds, before stopping and submitting to the officer's request, amounted to no more than an inconsequential hesitation before lawfully complying with the officer's demand." (Original underscoring.)

The principles of appellate review in adult criminal trials are applicable to the appellate courts in considering sufficiency of the evidence admitted in a juvenile wardship proceeding. (*In re Roderick P.* (1972) 7 Cal.3d 801, 809.) Upon a claim of insufficient evidence to support a conviction, reviewing courts must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. The test on appeal becomes whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. (*In re Joseph F.* (2000) 85 Cal.App.4th 975, 981.)

A reviewing court starts with the presumption the record contains evidence to sustain every finding of fact. A defendant claiming insufficiency of evidence on appeal must demonstrate there is no substantial evidence to support challenged findings. A recitation of only the defendant's evidence is not the demonstration contemplated under this rule. If some particular issue of fact is not sustained, a defendant is required to set forth in brief all of the material evidence on the point and not merely his own evidence. Unless this is done, the error is deemed to be waived. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.) Moreover, an appellate court may not weigh the evidence or the inferences to be drawn. (*People v. Garcia* (1958) 166 Cal.App.2d 141, 143.) Determinations of the weight to be accorded the testimony of witnesses rest within the purview of the trier of fact and the appellate court must uphold such determinations if supported by substantial evidence. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1395.)

In the instant case, appellant engages in speculation and essentially invites the court to reweigh the evidence and draw inferences in his favor. This we may not do under the foregoing authorities. Even if we assume the issue is properly briefed for appeal, appellant's contention must still be rejected. In most cases, section 148 has been applied to physical acts, such as fleeing from a proper investigatory detention by a police officer, brandishing a gun at an officer, passively resisting an arrest or going limp, or

struggling physically with an officer making an arrest. Nevertheless, section 148 is not limited to nonverbal conduct involving flight or forcible interference with an officer's activities. However, Division One of the First District Court of Appeal has observed: "[I]t surely cannot be supposed that Penal Code section 148 criminalizes a person's failure to respond with alacrity to police orders." (*People v. Quiroga* (1993) 16 Cal.App.4th 961, 966-968.)

Madera Police Officer Dale Badorine testified he was on duty at 7:30 p.m. on February 27, 2001. Badorine received a dispatch about some subjects causing trouble at Pete Tapia's apartment complex. Badorine went to the scene, spoke with Tapia, saw the graffiti vandalism, and obtained detailed descriptions of the taggers. At some point in the evening, Badorine saw two individuals matching the descriptions. The subjects were walking by Badorine in front of the complex. Badorine was with Officer Christopher Jacob at the time. Badorine approached the two individuals and they looked over at him. He said, "[H]old on a second, I need to talk to you . . .." One subject stopped but the other started to run away. Badorine chased him and ordered him to stop three separate times. He pursued the subject into a complex south of Pete Tapia's apartment complex. Badorine ordered the subject to stop a few more times. He eventually stopped, turned around, put his hands up, and ultimately identified himself as appellant Danny S. During closing argument, defense counsel stated, "As to the 148 charge, we will admit . . . to that because the minor did run when he was first stopped, but that's only because he was afraid."

Evidence Code section 411 states: "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." Thus, Badorine's testimony was sufficient to establish a violation of Penal Code section 148. In view of appellant's flight from Officer Badorine, the juvenile court could reasonably conclude appellant delayed or obstructed a peace officer in the discharge or attempt to discharge a duty of his office and reversal is not required.

VI.

THE GANG MEMBER REGISTRATION REQUIREMENT OF PENAL CODE SECTION 186.30 DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

Appellant contends the registration requirement in section 186.30 constitutes cruel or unusual punishment contrary to the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution.

Section 186.30 states:

> "(a) Any person described in subdivision (b) shall register with the chief of police of the city in which he or she resides, or the sheriff of the county if he or she resides in an unincorporated area, within 10 days of release from custody or within 10 days of his or her arrival in any city, county, or city and county to reside there, whichever occurs first.
>
> "(b) Subdivision (a) shall apply to any person convicted in a criminal court or who has had a petition sustained in a juvenile court in this state for any of the following offenses:
>
> "(1) Subdivision (a) of Section 186.22.
>
> "(2) Any crime where the enhancement specified in subdivision (b) of Section 186.22 is found to be true.
>
> "(3) Any crime that the court finds is gang related at the time of sentencing or disposition."

In the instant case, the court stated at the April 5, 2001 dispositional hearing:

> "This Court deems the offense to be gang related. Minor is ordered to register as a criminal street gangster pursuant to 186.30 of the Penal Code. The minor is ordered not to be a member of any gang, act in furtherance of, in association with, or for the benefit of any gang. Shall not associate with any person known to him as a gang member. Shall not frequent any area where gang members are known by him to congregate or areas known to him for gang-related activity."

Appellant contends on appeal:

> "In this case, these dire consequences [from registration] are cruel and unusual punishment as applied because the appellant committed a minor,

> nonviolent six-month misdemeanor. He has no history of violent or serious crimes. This additional punishment for the minor offense involved here is disproportionate to the crime committed and the culpability of the offender. Moreover, . . . this punishment is added to the fact that appellant already received three [*sic*] years for a misdemeanor violation of section 594. [¶]…[¶]
>
> "What further shocks the conscious [*sic*] is that, in this case, all these dire consequences are imposed on a young man who is not a gang member. . . ."

In *People v. Dillon* (1983) 34 Cal.3d 441, 477-478, the Supreme Court held a criminal sentence can be unconstitutionally cruel and unusual if it is grossly disproportionate to the offender's culpability. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) *Dillon* makes clear its holding was premised on the unique facts of that case. Since the determination of the applicability of *Dillon* in a particular case is fact specific, the issue must be raised in the trial court. When the matter is not raised in the trial court, the issue is deemed waived on appeal. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) Appellant has not cited a different rule affecting juvenile wardship dispositional orders.

Even assuming the appellant can avoid the waiver doctrine, we note a punishment is cruel or unusual within the meaning of the California Constitution if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. (*People v. Estrada* (1997) 57 Cal.App.4th 1270, 1278.) Given the broad authority of the Legislature to prescribe to determine the types and limits of punishments for crimes (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1213-1214), we simply cannot say that a simple registration requirement is unconstitutionally excessive.

Appellant's contention must be rejected.

VII.

FAILURE TO CHARACTERIZE THE VANDALISM OFFENSE AT THE DISPOSITIONAL HEARING

Appellant contends the juvenile court committed prejudicial error by failing to make a specific declaration that count II was a misdemeanor.

He specifically argues:

> "Because of the tremendous potential for prejudice and lifetime impact of a court finding that a juvenile offense is a felony, it is mandatory that the court make a reasoned determination on the record of the status of the offense. (*In re Manzy W*. (1997) 14 Cal.4th 1199, 1209.) . . . Violation of section 594 carries varying terms of incarceration and fines dependent upon dollar value of damage. In this case, the court never stated what subdivision of section 594 it found true. The judge only said, 'Count Two is basically a charge of 594 and special allegation of 186.22, Sub (d), of the Penal Code.' The court then declared that the 'said offense be deemed a felony and misdemeanor.'
>
> "First, it is legally and logically impossible for a crime to be both a felony and a misdemeanor. Penal Code section 17 makes it clear that all crimes (other than infractions) are either one or the other.
>
> ". . . [A]s enhanced under 186.22, subdivision (d), the Section 594 offense is subject to a wobbler sentencing scheme. Consequently, the court should have, but did not, determine the status of the offense. Instead the court declared that the 'said offense' be deemed a '*felony and misdemeanor*[.']
>
> "The enhancement allegation under Section 186.22, subdivision (d) cannot and does not convert the charge into a felony because an allegation under that section does not state a substantive offense. [Citation.] As the Supreme Court held in *People v. Bright* (1996) 12 Cal.4th 652, '[A] penalty provision prescribes an added penalty to be imposed when the offense is committed under specified circumstances. A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged.' (*Id*. at p. 661.) Thus, the Section 594 offense, if enhanced under Section 186.22, subdivision (d), does not become a felony; rather it is simply a three-year-state-prison misdemeanor."

Welfare and Institutions Code section 702 states in relevant part:

> "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony."

The Legislature enacted Welfare and Institutions Code section 702 in 1976 as part of a substantial modification of the juvenile court law. The requirement of a declaration by the juvenile court was directed, in large part, at facilitating the determination of the limits on any present or future commitment to physical confinement for a so-called "wobbler" offense. If, for example, the juvenile court committed the minor to the Youth Authority for a present offense, the required declaration would constitute a record for the purposes of determining the maximum term of physical confinement. If, on the other hand, the juvenile court imposed probation, the required declaration would constitute a record for the purposes of determining the maximum term of physical confinement in a subsequent adjudication. Moreover, the requirement also ensures the juvenile court is aware of, and actually exercises, its discretion under section 702. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1205-1208)

In the instant case, the juvenile court stated at the jurisdictional hearing:

> "… [T]he Court does find beyond a reasonable doubt that Count One of the petition, resisting, delaying or obstructing a peace officer was committed by Danny.
>
> "Count Two is sustained beyond a reasonable doubt. He committed an act of vandalism, namely, graffiti and it was committed for the benefit of, at the direction of, or in association with the Surreno criminal street gang with the specific intent, in Danny's mind, to promote, further, assist in criminal conduct by these gang members.
>
> ". . . [T]he Court, as alleged in Count Two, finds that to be a crime or in the alternative … find that it alleges a 594 of the Penal Code, vandalism with a special allegation of 186.22, Sub (d), of the Penal Code. In the alternative, the Court finds both defenses [*sic*] and the special allegation true beyond a reasonable doubt. And also Court will find, naturally, that as to Count Three, the minor has violated probation, namely, the term and condition to obey all laws."

The court stated in relevant part at the dispositional hearing:

". . . Court hereby finds that the minor is a fit and proper subject for Juvenile Court proceedings. The Court takes judicial notice of its file and has read and considered previous probation reports contained therein. That continued custody by the parent or guardian would be detrimental to the minor, and that the welfare of the minor requires that custody be taken from the parent or guardian. That all reasonable efforts have been made to maintain the minor in his home and these efforts have failed. That the said offense be deemed a felony and misdemeanor. Court will reaffirm the prior misdemeanor jurisdiction of the Court."

The People concede on appeal:

"… [T]he trial court's findings are somewhat ambiguous. However, the court was aware the gang allegation applied to offenses that are punishable as a felony or misdemeanor. To resolve potential ambiguity and because both the graffiti vandalism offense (§ 594) and the gang allegation (§ 186.22, subd. (d)) are 'wobblers,' respondent submits this Court may wish to remand to the trial court so that it may more clearly articulate its findings as to the nature of the vandalism charge and the gang enhancement." (Fn. omitted.)

As we have noted above, the People failed to prove the monetary amount of defacement, damage, or destruction alleged under count II of the juvenile wardship petition. Absent proof of the precise amount of damage, the substantive offense must be deemed a misdemeanor. We will remand the matter to the juvenile court with instructions to make an appropriate finding pursuant to Welfare and Institutions Code section 702, to further define and identify the basis for its disposition as between the respective counts and to amend the dispositional order consistent therewith.

DISPOSITION

The matter is remanded to the juvenile court with direction to make a Welfare and Institutions Code section 702 finding as to count II and to further identify the basis for its disposition as between the respective counts found true. In all other respects the findings and orders appealed from are affirmed. The juvenile court shall prepare an amended dispositional order.

_____
Harris, J.

WE CONCUR:

_____
Ardaiz, P.J.

_____
Wiseman, J.