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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND ANTHONY SOLAREZ,

Defendant and Appellant.

E053971

(Super.Ct.No. RIF152761)

OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey Prevost, Judge.

Reversed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Raymond Anthony Solarez appeals after he was convicted of active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)) and unlawful possession of a hypodermic needle (Bus. & Prof. Code, § 4140). Defendant was acquitted of charges of possession of methamphetamine for sale (Health & Saf. Code, § 11378) and transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)). In view of defendant's acquittal of the felony drug charges, he contends that the evidence was insufficient to support his conviction of the street terrorism gang offense. In conformance with the California Supreme Court's recent decision in *People v. Rodriguez* (2012) 55 Cal.4th 1125, we agree that the street terrorism conviction cannot stand; accordingly, we reverse as to that count.

#### FACTS AND PROCEDURAL HISTORY

On February 5, 2009, Riverside Police Officers Stephen Quinn and Richard Glover effected a stop on an automobile with an expired registration sticker. The driver of the car was Pamela Smith. Defendant was sitting in the front passenger seat. Gregory Henry was in the back seat behind the driver. Officer Glover approached the driver and explained why the car had been stopped. At the same time, Officer Quinn approached the passenger side of the vehicle and talked to defendant. Defendant did not have any identification with him. Officer Quinn asked defendant to step out of the car and performed a pat-down search. Officer Quinn asked defendant whether he had anything sharp in his pockets, and defendant admitted that he had a hypodermic needle. Officer

Quinn removed the hypodermic needle from defendant's pocket and placed defendant under arrest.

After defendant was arrested, the officers searched the stopped vehicle. They found a plastic baggie of methamphetamine on the floorboard of the front passenger seat where defendant had been sitting. Later testing confirmed that the substance in the baggie contained methamphetamine and weighed 15.37 grams. A narcotics expert gave the opinion that this quantity of methamphetamine would be possessed for sale. The amount of methamphetamine was approximately one-half ounce and had a wholesale value of \$500 to \$700. A typical useable dose of methamphetamine would be between 0.1 and 0.2 grams. A methamphetamine user would typically carry about two or three grams for personal use; one gram would provide about five "hits" or doses.

Defendant told police that he used heroin; the narcotics expert opined that defendant would use the hypodermic needle for heroin ingestion, not methamphetamine. It was common for heroin users to sell methamphetamine to support a heroin habit.

Defendant was a documented active member of the Eastside Riva gang. The gang had about 500 members. The primary activities of the Eastside Riva gang were violent assaults and sale of methamphetamine. At trial, the prosecution presented evidence of three predicate gang offenses: In 2007, a gang member was convicted of possession of methamphetamine for sale. Another gang member was convicted of possession of methamphetamine. Also in 2004, defendant was convicted of illegal possession of a gun.

Defendant was charged by information with: possession of methamphetamine for sale, a felony (count 1); transportation of methamphetamine, a felony (count 2); active membership in a criminal street gang, a felony (count 3); and misdemeanor possession of a hypodermic needle (count 4). The information also alleged a gang enhancement with respect to count 1 (Pen. Code, § 186.22, subd. (b)), and it alleged that defendant had suffered three prior prison terms (Pen. Code, § 667.5, subd. (b)).

At the defense request, the trial court bifurcated trial on the prior conviction allegations, and defendant waived his right to a jury trial on those allegations. Trial began on April 25, 2011.

The jury returned verdicts finding defendant not guilty on counts 1 and 2 (possession of methamphetamine for sale & transportation of methamphetamine). The jury did find defendant guilty on count 3 (active participation in a criminal street gang), and count 4 (misdemeanor possession of a hypodermic needle). In a separate proceeding, the trial court found the prior prison term allegations to be true. The court granted probation; among the terms of probation, defendant was required to serve one year in the county jail.

Defendant filed a notice of appeal on June 30, 2011.

## ANALYSIS

### I. Defendant's Conviction for Street Terrorism Must Be Reversed

Defendant contends that the evidence was insufficient to sustain his conviction on count 3, for active participation in a criminal street gang.

Penal Code section 186.22, subdivision (a), defines the crime:

“Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.”

“The substantive offense defined in section 186.22(a) has three elements. Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive, is the first element of the substantive offense defined in section 186.22(a). The second element is ‘knowledge that [the gang’s] members engage in or have engaged in a pattern of criminal gang activity,’ and the third element is that the person ‘willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.’ (§ 186.22(a).)” (*People v. Lamas* (2007) 42 Cal.4th 516, 523.)

Defendant focuses on the third element here, whether there was sufficient evidence that he “willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of th[e] gang.” Defendant contends that the evidence was insufficient to support the conviction because there was no showing that any other gang members were involved. He asserts, in essence, that an individual acting by himself cannot be acting for the benefit of a gang. In *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (Fourth Dist., Div. Two), this court rejected a similar contention. Citing *People v. Ngoun* (2001) 88 Cal.App.4th 432, we held that a street terrorism charge did not apply

solely to aiders and abettors of other gang members. Rather, “the promote/further/assist element can *also* be satisfied by evidence that the defendant was the *perpetrator* of a felony.” (*People v. Sanchez, supra*, 179 Cal.App.4th 1297, 1306, citing *People v. Ngoun, supra*, 88 Cal.App.4th 432, 435-437.)

Since our decision in *Sanchez*, however, the California Supreme Court has held that the third element of the offense is not satisfied when a gang member commits a felony while acting alone. (*People v. Rodriguez, supra*, 55 Cal.4th 1125.) The word “members,” as the Supreme Court explained, “is a plural noun.” (*Id.* at p. 1132.) “Therefore, to satisfy the third element, a defendant must willfully advance, encourage, contribute to, or help *members* of his gang commit felonious criminal conduct. The plain meaning of section 186.22[, subdivision] (a) requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member.” (*Ibid.*) The California Supreme Court expressly disapproved *People v. Sanchez, supra*, 179 Cal.App.4th 1297, and *People v. Salcido* (2007) 149 Cal.App.4th 356. (*People v. Rodriguez, supra*, at p. 1137, fn. 8.)

Here, although the evidence established that defendant was an active member of the Eastside Rivas gang, and that a primary activity of the gang was methamphetamine sales, there was no evidence that defendant acted together with any other gang member in pursuit of the possession, sale or transportation of methamphetamine. So far as the evidence showed with respect to the current offense, defendant was the only gang member who could have possessed the drugs, and he was acquitted of both drug-related

charges. In the absence of evidence that at least two gang members (including defendant) participated in felonious conduct, the street terrorism conviction cannot stand.

II. We Need Not Address Defendant's Contention that His Motion for Mistrial Was Improperly Denied

Defendant also contends that the trial court erred in denying his motion for a mistrial, based on an improper statement by one of the officers during trial testimony. However, in view of the reversal of defendant's felony street terrorism conviction, we need not address the point.

DISPOSITION

The conviction of street terrorism in count 3, in violation of Penal Code section 186.22, subdivision (a), must be reversed.

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MCKINSTER  
J.

We concur:

HOLLENHORST  
Acting P. J.

RICHLI  
J.