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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re S.A., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

S.A.,

Defendant and Appellant.

E056534

(Super.Ct.No. RIJ119385)

OPINION

APPEAL from the Superior Court of Riverside County. Roger A. Luebs, Judge.

Affirmed with directions.

Joseph T. Tavano, 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, Melissa Mandel, Charles C. Ragland, and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

S.A., the minor, an admitted gang member, aided and abetted a gang recruit in robbing a high school boy of his iPod and earphones, as the boy and his friend walked home from school. Acting as a backup for the minor was the minor's brother, a member of another gang. Following a court trial, the juvenile court made true findings on a delinquency petition (Welf. & Inst. Code, § 602) alleging one count of robbery (Pen. Code, § 211) with an enhancement alleging the crime was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(A)), and a second count alleging active participation in a criminal street gang. (Pen. Code, § 186.22, subd. (a).) The minor appealed.

On appeal, the minor contends: (1) there is insufficient evidence to support the true finding that the minor actively participated in a criminal street gang; (2) there is insufficient evidence to support the gang enhancement; and (3) remand is needed to correct the court's determination of the minor's maximum commitment time. The People agree that the court's determination of the minor's maximum commitment time was in error. We remand for a new disposition hearing with regard to the determination of the maximum term of commitment, but otherwise affirm.

## **BACKGROUND**

### *a. The Robbery*

On May 14, 2012, A.H. and J.M. left Norte Vista High School at 2:35 p.m., and began walking home together. As they walked, a car passed them and stopped at the corner. Four people exited that vehicle and approached A.H. and J.M. The minor, S.A., and D.C., who was tried along with the minor, were identified as two of the four

individuals who approached A.H. and J.M. D.C. had his hand around his waistband, simulating a gun.

One of the four individuals, identified as D.C., asked A.H. and J.M. if they “banged,” and instructed the two boys to empty their pockets. A.H. showed D.C. that he had nothing in his pockets, so D.C. told him to keep walking. Then D.C. told J.M. to empty his pockets, and said that if J.M. did not comply, he would “[have] to use it.” J.M. complied, believing that D.C. had a weapon he planned to use. J.M. took his iPod and earphones from his pocket and D.C. took them. After taking the iPod and earphones, D.C. searched J.M.’s backpack; then the robbers left. During this time, the minor stood a few feet behind D.C., while the other two individuals held back a few feet further.

After the minor and D.C. took off, some friends of A.H. and J.M., who had been walking home on the other side of the street, joined A.H. and J.M., who described what had happened. The group yelled at the minor and D.C., who began to run. A.H. and J.M., along with their friends, decided to chase after the minor and his companions. They photographed the license plate of the car in which the robbers had arrived and reported that information to the police.

A short time later, Officer Castro, the school resource officer for Norte Vista High School, received a dispatch with a description of some Hispanic males involved in a robbery near the school. He observed a person matching the description of one of the individuals and detained that person, A.L. The officer patted Legarreta down, finding drug paraphernalia and methamphetamine, so he placed Legarreta under arrest. During

the patdown, the officer put Legarreta's cell phone on the trunk of his patrol car, and he noticed that the phone kept ringing.

Other officers arrived at the scene and also noticed the phone ringing. When one of the officers looked at the phone, he advised Officer Castro that someone had sent a text message to Legarreta which said that if the latter was okay, he was to meet them at another location. Two of the newly arrived officers responded to that location, where they found two other suspects, the minor and D.C. A.H. and J.M. were transported to the location and identified the suspects. When D.C. was patted down, an iPod and earphones were recovered. J.M. recognized the property as his, based on the songs and photographs that were saved on the iPod.

Both the minor and D.C. were interviewed at the police station after being admonished of their rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]. Both minors confessed to the robbery with each other, A.L., and a fourth person named F.A.,<sup>1</sup> who had driven the car.

*b. Gang Evidence*

The minor admitted he was a member of a gang called MD 13, also known as Mad Down 13. The minor had been jumped in on two separate occasions, and his moniker is "Demon." The minor's older brother, A.L., is a member of a different gang, Dark Side.

Mad Down 13 is a criminal street gang, having at least 16 members, whose turf covers the area of Norte Vista High School. Its identifying hand sign is the formation of

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<sup>1</sup> A.L. was an adult.

an “m” and a “d” with the hands. Certain clothing is identified with membership in Mad Down 13, specifically the wearing of a Milwaukee Brewers cap, which has a letter “M” on it.

Currently, its members are Hispanic, and it is allied with the Mexican Mafia, as well as with the South Riverside Locotes and another Hispanic gang known as Tiny Winos. However, historically, the gang was bi-racial, comprising both White and Hispanic members. In the early 2000’s, the group split, with the White members forming the Riverside Skin Heads, while the Hispanic members became first a tagging crew called Mass Destruction Kings, then Mob Dat Kills, and finally Mad Down 13. The number “13” signifies the influence of the Mexican Mafia.

Mad Down 13 is predominantly involved in vandalisms, robberies, vehicle thefts, and vehicle burglaries. Two documented members of Mad Down 13, D.C. Penunuri, and Angelo Ortiz, have been convicted of gang-related crimes.

The minor admitted he was a member of Mad Down 13 in prior contacts. The minor’s Facebook page showed pictures of him throwing up Mad Down gang signs and included his comments about how proud he was to be from Mad Down. The minor’s moniker, “Demon,” appeared on his Facebook page also, in fancy lettering.

Neither D.C., nor F.A., is a documented gang member. In the gang expert’s opinion, on the date of the robbery, the minor was acting as D.C.’s “training officer.” In the expert’s opinion, the crime was committed in the presence of the minor’s brother, an admitted member of South Side, to bolster respect for Mad Down 13 from the other gang. In the opinion of the gang expert, the minor was a member of MD 13, actively

participated in that gang, and aided and abetted the robbery with the intention of promoting, furthering, or assisting criminal conduct by MD 13.

An amended wardship petition (Welf. & Inst. Code, § 602) was filed on June 5, 2012, alleging that the minor had committed certain acts which, if committed by an adult, would constitute crimes.<sup>2</sup> In paragraph 1 of the petition, the minor was alleged to have committed robbery (Pen. Code, § 211), with a special allegation that the crime was committed for the benefit of a criminal street gang. (Pen. Code, § 186.22, subd. (b)(1)(A). Paragraph 2 alleged that the minor actively participated in a criminal street gang, within the meaning of Penal Code section 186.22, subd. (a).

Following a bench trial, the court found the allegations of the petition true beyond a reasonable doubt and found that the minor comes within Welfare and Institutions Code section 602. The court set the minor's maximum confinement time at 12 years, removed custody of the minor from his legal guardians, and placed the minor in a suitable foster home, relative home, group home, or other facility on certain terms and conditions. The minor timely appealed.

## **DISCUSSION**

1. *Sufficiency of the Evidence to Support the Finding that the Minor Was an Active Participant of a Criminal Street Gang.*

The minor contends there is insufficient evidence to support the true finding that

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<sup>2</sup> Subsequent petitions pursuant to Welfare and Institutions Code section 777, were also filed, alleging the ineffectiveness of prior dispositions. They are not pertinent to the issue presented on appeal so we do not address them.

he actively participated in a criminal street gang, the substantive offense described in Penal Code section 186.22, subdivision (a). The thrust of his argument is that (a) he did not aid or abet criminal conduct by a member of the gang because he became a member of the gang after the date of the offenses; (b) there is no evidence he committed any other crime for the benefit of the gang; and (c) there was insufficient evidence the current offense was gang-related. We disagree.

a. ***Standard of Review***

Where there is a claim of insufficient evidence, we must examine the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

(*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1325; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319-320 [61 L.Ed.2d 560, 99 S.Ct. 2781]; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

b. ***Sufficiency of Proof of the Minor's Active Participation***

Penal Code section 186.22, subdivision (a), provides that 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 statute creates a substantive crime. (*In re Jose P.* (2003) 106 Cal.App.4th 458, 466.)

The elements of the offense described in Penal Code section 186.22, subdivision (a), are: (1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of the gang. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130.) Mere active and knowing participation in a criminal street gang is not a crime. (*Ibid.*) To satisfy the third element, a defendant must also do an act that promotes, furthers, or assists in any felonious conduct by members of that gang. (Pen. Code, § 186.22, subd. (a).) “[P]romote’ means to contribute to the progress or growth of.” (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436.) The underlying felony need not be gang related. (*Rodriguez*, at p. 1135, citing *People v. Albillar* (2010) 51 Cal.4th 47, 55.)

A person need not be a gang member to be guilty of violating Penal Code section 186.22, subdivision (a). (*In re Jose P.*, *supra*, 106 Cal.App.4th at p. 466, citing *People v. Valdez* (1997) 58 Cal.App.4th 494, 505.) Nor must the person charged devote all or a substantial part of his or her time and efforts to the gang. (*People v. Martinez*, *supra*, 158 Cal.App.4th at p. 1331.) But he or she must have had more than a nominal or passive involvement with the gang, knowing of the gang's pattern of criminal activity, and must have aided and abetted a separate felony committed by gang members. (*People v.*

*Castenada* (2000) 23 Cal.4th 743, 749-750; *People v. Martinez, supra*, 158 Cal.App.4th at p. 1329.)

Before addressing the elements of the offense, we must first determine whether Mad Down 13 (MD13) qualifies as a criminal street gang. A criminal street gang is “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” by Penal Code section 186.22, subdivision (e). (Pen. Code, § 186.22, subd. (f).) On this point, the gang expert’s testimony adequately established that MD13 is a criminal street gang, having at least 16 members, and having as its primary activities the commission of vandalisms, vehicle thefts, vehicle burglaries, and robberies, which are enumerated in Penal Code section 186.22, subdivision (e).

Going to the elements of Penal Code section 186.22, subdivision (a), the first element requires a showing that the accused person’s involvement was active, not passive. The minor admitted he was a member of MD13 in March 2012, two months before the instant crime. At the time of the offense, the minor had been a member of MD13 for approximately one year, having been “jumped in” twice, by his admission. Being jumped in makes one a full-fledged member.

Other evidence supports the finding that the minor’s participation was active: the minor admitted to the resource officer that he “hits people up all the time,” and he was involved in a beer run (theft) at a convenience market with other gang members in March 2012. His Facebook page showed pictures of the minor throwing up gang signs and

posting comments about how proud he was to say he was from Mad Down. There is sufficient evidence that the minor's participation was active, rather than passive.

Second, the evidence supports the finding as to the element that the accused person have knowledge of the gang's criminal activities: the gang expert testified that when he talked to gang members, he talked about crimes committed by their gangs even if the person being interviewed was not involved in that criminal activity, to show knowledge of the gang's criminal activity.

Here, the minor was interviewed by the gang expert after being detained on the beer run matter and provided the gang detective with information about the other gang members involved in that incident. The gang expert provided his opinion, based on the interviews he has had with the minor and the information the minor posted on his Facebook page, that he had knowledge of MD13's criminal street gang activity. This showed the minor had knowledge of the gang's criminal activity.

Third, there is sufficient evidence that the minor's participation in the crime promoted, furthered and assisted felonious criminal conduct by members of MD13. In this respect, we note the unique circumstance of this case in which the minor was the only full-fledged member of MD13, while the only other full-fledged gang member participating in the crime, his older brother, was a member of another gang. F.A., the driver of the car, was not a gang member and D.C. was in the recruitment process. The phrase "that gang" as used in the statute refers back to the gang in which the defendant is an active participant. (*People v. Rodriguez, supra*, 55 Cal.4th at p. 1131.)

The People argue that even though the minor's brother was not a member of MD13, he acted in concert with the minor during the robbery. Because the language of the statute refers to promoting, furthering and assisting members of "that" gang, we cannot agree with an interpretation that participation by a member of a different gang satisfies the element.

Nevertheless, the gang expert testified that D.C. was a recruit of MD13, and the minor acted as his "training officer." The minor's Facebook page praised the new recruits of MD13, showing the minor was actively promoting gang membership in MD13. By aiding and abetting D.C.'s robbery of J.M., the minor was mentoring and training a gang associate, a future member of MD13, who would then carry out the criminal activities of the gang. Defendant promoted, aided and abetted the robbery by D.C., who committed the crime as an MD13 recruit. Because the gang's reputation was enhanced by the commission of this crime, and because the minor was engaged in the recruitment and training of a future gang member, the minor's conduct directly promoted, furthered and assisted felonious conduct by other members of the gang, within the meaning of Penal Code section 186.22, subdivision (a).

At oral argument, defendant argued that because S.A. was the only member of MD13 present in the group, he could not be guilty of being an active participant under the holding of *Rodriguez*. In *People v. Rodriguez, supra*, the Supreme Court held that felonious conduct must be committed by at least two gang members, one of whom can include the defendant if he is a gang member. (*People v. Rodriguez, supra*, 55 Cal.4th at p. 1132.) In that case, the defendant was the lone participant in the robbery. Here,

defendant did not commit the crime alone. He was in the company of three other individuals: his gang recruit, his brother (a member of another gang), and a fourth individual.

The Supreme Court did not discuss how gang “membership” should be ascertained for purposes of determining whether a person is guilty of active participation. Gangs rarely give membership cards or maintain a membership roster. Since a person need not be a gang member to be guilty of active participation (*In re Jose P.*, *supra*, 106 Cal.App.4th at p. 466, citing *People v. Valdez*, *supra*, 58 Cal.App.4th at p. 505), requiring proof that D.C. had been formally “jumped in,” in the absence of a legislative requirement, would constitute a judicial revision of the statute, something we are not empowered to do. (*People v. Mendoza* (2000) 23 Cal.4th 896, 940.)

A person can become a gang member by various means, including being “jumped in,” “crimed in” (putting in work for the gang) and “walking on” (reserved for members with older siblings in the gang). (Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California’s Anti-Gang STEP Act*, 11 Berkeley J. Crim. L. 101, 108, fn. 59 (Fall, 2006).) In our view, a new gang recruit or a gang associate committing a crime with a gang member satisfies the requirement that the crime be committed with more than one member of “that gang.” Because defendant committed the crime along with D.C., his gang recruit and associate, the felonious conduct was committed by at least two gang members.

Defendant’s argument that the current offense was not gang related is in error. When D.C. approached A.H. and J.M., he immediately asked if they “banged.” D.C. was

backed up by two different gang members, the minor and his brother. Additionally, while the minor's brother was from a different gang than the minor and his recruit, the gang expert testified, without objection, that doing so would bolster the reputation of MD13, by spreading the word to other gangs of their violent exploits.

In short, there is substantial evidence to support the true finding that the minor committed the substantive crime of active participation in a criminal street gang.

*2. Sufficiency of the Evidence to Support the Finding that the Minor Committed the Robbery for the Benefit of a Criminal Street Gang.*

The minor argues there is insufficient evidence to support the true finding as to the enhancement allegation that the robbery was committed for the benefit of a criminal street gang, within the meaning of Penal Code section 186.22, subdivision (b)(1). He further argues that the only direct evidence linking the robbery to MD13 was the fact that the minor was a member of the gang and the robbery was committed in gang territory. We are guided by the substantial evidence standard of review which we have explained in the previous section, and, applying this standard, we disagree.

To establish that a crime was committed with the intent to benefit, further, or promote the gang, the prosecution must prove two elements: (1) that the crime was committed for the benefit of, at the direction of, or in association with any criminal street gang, and (2) that the defendant had the specific intent to promote, further, or assist in any criminal conduct by gang members. (Pen. Code, § 186.22, subd. (b)(1).) The crime must be gang related (*People v. Mendez* (2010) 188 Cal.App.4th 47, 56), and a person's

mere membership in the gang does not suffice to establish the gang enhancement.

(*People v. Gardeley* (1996) 14 Cal.4th 605, 623-624.)

The elements of the gang enhancement may be proven by expert testimony.

(*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048; *People v. Hunt* (2011) 196

Cal.App.4th 811, 820.) Expert opinion that particular criminal conduct benefited a gang

by enhancing its reputation for viciousness can be sufficient to raise an inference that the

conduct was committed for the benefit of a criminal street gang, within the meaning of

Penal Code section 186.22, subdivision (b). (*People v. Albillar, supra*, 51 Cal.4th at p.

63.)

It was undisputed that MD13 is a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)(1), and that the minor is a member of that gang.

The evidence showed the crime was committed by D.C. in association with the minor, a member of MD13, and the minor's brother, a member of another gang.<sup>3</sup> The minor

admitted that the group intended to steal from someone when they met up, prior to

confronting A.H. and J.M. D.C. asked the victims if they "banged," that is, if they

belonged to a gang, prior to directing them to empty their pockets. This evidence

established that the crime was committed for the benefit of, at the direction of, or in

association with a criminal street gang, the first element of Penal Code section 186.22,

subdivision (b).

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<sup>3</sup> The gang expert testified that having a member of another gang present during the crime would bolster respect for MD13 because A.L. would spread the word of the robbery to his own gang.

As to the second element, there was evidence that the defendant had the specific intent to promote, further, or assist in any criminal conduct by gang members. The gang expert explained, without objection, how MD13's reputation was bolstered by the robbery committed under the supervision of the minor, and in the presence of the minor's brother. Gang intent was also shown by D.C.'s inquiry into whether the two victims "banged." Although D.C. was not a documented gang member, the reputation of MD13 was promoted and furthered by the minor's participation in the robbery by D.C.

The minor argues that the gang expert's opinion was insufficient basis for the court's true finding that the robbery was committed for the benefit of MD13 with the specific intent to promote, further, or assist in any criminal conduct by MD13. He contends that the expert testimony offered nothing specific to support his expert opinion and points to the lack of any direct evidence connecting the crime to MD13, particularly where two of the participants were not gang members and the minor's brother was a member of a different gang.

However, Penal Code section 186.22, subdivision (b), does not require the involvement of more than one member of a specific gang to give rise to a finding that the crime was committed for the benefit of, at the direction of, or in association with any criminal street gang. The enhancement applies only if the crime is "gang related." (*People v. Gardeley, supra*, 14 Cal.4th at p. 622.) It is possible to commit a crime for the benefit of, or at the direction of a criminal street gang without other gang members being involved in the active commission of the gang-related felony. If the Legislature had

intended the enhancement to apply only when multiple gang members commit crimes in concert, it could have so stated expressly.

The minor also argues that because D.C. planned to give the stolen iPod to his brother, there was no gang motivation for the robbery. We are aware that the California Supreme Court has recently held that when a gang member commits a felony while acting alone he may not be in violation of Penal Code section 186.22, subdivision (a). (*People v. Rodriguez, supra*, 55 Cal.4th at pp. 1128, 1139.) However, the fact that a gang member planned to use the proceeds from the crime for a personal reason does not negate the gang-relatedness of that crime. (See *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931.) Expert opinion that particular criminal conduct benefitted a gang is not only permissible, but can be sufficient to support a gang enhancement pursuant to Penal Code section 186.22, subdivision (b)(1). (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

The expert testified, without objection, that the gang benefitted by the minor's involvement in the robbery which enhanced the gang's reputation for violence, despite the fact the minor was the sole MD13 member in the group. Other evidence presented to the trier of fact included the facts that (a) the minor was a documented gang member; (b) D.C. asked the victims if they "banged," prior to demanding that they empty their pockets; (c) the minor's brother, who was also a gang member, was present; (d) the type of crime committed was one of the primary activities of MD13; and (e) the crime was committed in gang territory controlled by MD13.

The evidence is sufficient to support the finding on the gang enhancement.

*3. Remand is Necessary to Correct the Determination of the Minor's Maximum Confinement Time.*

The minor argues that the juvenile court incorrectly calculated the minor's maximum confinement time. The People agree, and both parties suggest that a consecutive term for the substantive crime of active participation in a street gang is possible, if calculated at one-third the middle term. We accept the People's concession but direct the juvenile court to reconsider the disposition in light of Penal Code section 654.

Welfare and Institutions Code section 726, governs juvenile court orders when limitations on parental control are to be imposed. Subdivision (d) of that section provides that if the minor is removed from the physical custody of his or her parent or guardian, the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court.

The section further provides that the "maximum term of imprisonment" means the longest of the three time periods set forth in paragraph (2) of subdivision (a) of section 1170 of the Penal Code, with some exceptions. Additionally, where the court elects to aggregate the period of physical confinement on multiple counts or multiple petitions, the "maximum term of imprisonment" shall be the aggregate term of imprisonment specified in subdivision (a) of section 1170.1 of the Penal Code. (Welf. & Inst. Code, § 726, subd. (d).) Penal Code section 654 does apply to juvenile court dispositions since Welfare and

Institutions Code section 726 requires aggregate confinement in accordance with Penal Code section 1170.1, which specifies that consecutive sentencing is subject to Penal Code section 654. (*In re David H.* (2003) 106 Cal.App.4th 1131, 1134.)

In setting the minor's maximum confinement time, the court calculated five years, the upper term, for the robbery, four years for the gang enhancement, and three years for the substantive crime of active participation in a street gang, in order to reach the term of 12 years.<sup>4</sup> Penal Code section 654 does not permit separate punishment for the substantive crime of active participation in a criminal street gang where the only evidence of such participation is the current charged offense. (*People v. Mesa* (2012) 54 Cal.4th 191, 197-198.)

We agree that a new disposition hearing is required and that the court should recalculate the minor's maximum term of confinement.

### **DISPOSITION**

We affirm the true findings on the allegations of the aggregated petitions but remand the matter for disposition in order to recalculate the minor's maximum term of

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<sup>4</sup> The 12-year maximum term is reflected in the clerk's minute order but is not found in the reporter's transcript of the oral proceedings relating to disposition. Instead, the court ordered that the minor was to be removed from the custody of his guardians, made "findings pursuant to 726(a) subdivision (2) and (3)."

confinement in accordance with the principles of Welfare and Institutions Code section 726, subdivision (d), and Penal Code section 654.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ  
P. J.

We concur:

HOLLENHORST  
J.

MILLER  
J.