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Original

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) No. S163905
	) Court of Appeal
Plaintiff and Respondent,	) No. B194358
	) Superior Court
	) No. 2005044895
v.	)
	)
ALEX ADRIAN ALBILLAR, et al.,	)
	)
Defendants and Appellants.	)
	)

Appeal from the Superior Court of Ventura County
The Honorable Edward F.Brodie, Judge

APPELLANT ALEX ADRIAN ALBILLAR'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Respondent's argument that there is sufficient evidence to support the substantive gang conviction and the gang enhancement in appellants' case is prefaced by a lengthy discussion and appeal to reject holdings in two Ninth Circuit cases, Garcia v. Carey (9th Cir. 2005) 395 F.3d 1099 and Briceno v. Scribner (9th Cir. 2009) 555 F.3d 1069, that the specific intent necessary to support either the gang crime or the gang enhancement must relate to "... '*other* criminal activity of the gang'..." (Respondent's Brief on the Merits, "RBM" p. 12, citing Garcia v. Carey, supra, 395 F.3d, at p. 1102, 1104, italics added in RBM.) Notwithstanding any statements in either of these federal cases relating to the intent element of the gang crime

or gang enhancement statutes, appellant has neither relied upon either of these federal cases in arguing the insufficiency of the evidence, nor do is it necessary to do so. Rather, appellant submits that, in accord with the statutory language of the STEP Act and basic concepts of due process, the evidence in this record is insufficient to support either the substantive gang offense or the gang enhancement.

REPLY TO RESPONDENT'S ARGUMENT

I

THE EVIDENCE IN THE RECORD DOES NOT SUPPORT EITHER THE GANG ENHANCEMENT OR THE GANG CRIME.

Respondent asserts the sufficiency of Detective Holland's opinion to support the gang crime conviction in that the expert testified that "the crimes served multiple gang-related purposes," which included "increasing the likelihood of completing the crime, bolstering each other's confidence in the commission of the crime, and helping train them to work together as a cohesive criminal unit." Respondent also notes Holland's opinion that the commission of crimes in concert "works to increase trust and loyalty among the participating gang members." (RBM p. 20.) Respondent's arguments are unavailing for a number of reasons.

First, Holland's opinion that the likelihood of completing the crime was enhanced by the defendants acting together as a "cohesive criminal unit" may have some merit when the crime being committed is robbery or assault or even murder by two or more gang members acting together. Here, however, ***by definition*** the charged offenses require that the defendants act ***in concert***. Thus, acting as a "cohesive criminal unit" in

order to enhance the likelihood of completing the offense is subsumed in the definition of a crime which is more severely punished because the likelihood of its commission is enhanced by the concerted acts of two or more individuals. Being members of a gang does nothing more to enhance the likelihood of completing the crime over and above the requirement of acting in concert to commit the crime.

Under the particular circumstances of this case, the fact that there was "trust and loyalty" between the co-participants in the offenses was far more a consequence of their relationship to one another ***entirely apart from*** their gang status. Appellant and his co-defendant Albert Albillar are twin brothers. One could not imagine a closer familial relationship that this. John Madrigal is Alex and Albert's cousin, who lived with and grew up with his co-defendants in the same household. All three defendants have known one another all their lives and not only have a close familial relationship, but apparently spend much of their time together as friends. The mutual trust and loyalty which exists between the three defendants is a result of a relationship which existed long before any of them became gang members and one which transcends their superficial membership in a gang.

Respondent argues that this Court should ignore the appellants' familial relationship because the jury did so and to do otherwise would be "nothing more than an impermissible reweighing of the evidence." (RBM p. 24.) Appellants are not asking this Court to "reweigh" the evidence, but rather to determine whether the record supports a finding that the offense was committed in furtherance of criminal conduct ***by the gang***. Respondent fails, as did Holland, to explain how this rape-in-concert had any nexus to criminal conduct by members of SouthSide Chiques. Instead, respondent argues that the record supports the gang findings and verdicts "because

appellants were all members of the same gang and helped each other commit the rapes." (RBM p. 24.) This argument, if adopted in a case such as this, would eviscerate the crucial requirement of a nexus between the crime and gang-related activities. In the words of this Court:

> "...the STEP Act does not punish a defendant for the actions of associates; rather the act increases the punishment for a defendant who committed a felony to aid or abet criminal conduct of a group that has as a primary function the commission of specified criminal acts and whose members have actually committed specified crimes, and who acted with the specific intent to do so." (People v. Gardeley (1996) 14 Cal. 4th 605, 624, fn. 10.)

Thus, this Court has held that it is not enough that a gang member commit a criminal offense in concert with other gang members. If this were so, then the prosecution would be required only to produce evidence of the commission of the underlying offense and the defendants' membership in a criminal street gang. This is precisely what respondent is arguing, based upon the asserted rationale of People v. Romero (2006) 140 CalApp.4th 15 and People v. Hill (2006) 142 CalApp.4th 770. (RBM p. 13.) This, however, is not how this Court interpreted the STEP Act in People v. Gardeley, supra. As stated in the above-quoted passage, the prosecution must also prove that gang members who have committed an offense together have done so with the intent or purpose to promote, assist, or further criminal conduct ***by the gang***.

This crucial element can only be proven by evidence that the commission of the underlying offense has somehow enhanced the ability of the gang to exist and/or to conduct its criminal activities. Ordinarily, this element is proven by expert testimony that the commission of the underlying offense enhances the gang member's or the gang's status in the

community by instilling fear and/or respect for the gang or gang member. Although there was an attempt to prove this element in appellants' case, that attempt fell apart for two reasons: (1) rape is an offense which is frowned upon by Hispanic street gangs, and (2) the offense was committed far from SouthSide Chiques' gang turf and outside the turf of any rival gang.

Respondent attempts to explain away the weakness in the evidence by asserting that Holland "indicated that rape, one of the various predicate offenses for section 186.22, had been committed by other SouthSide Chiques member," and that the community would hear of this crime and this would cause fear and intimidation of the gang and gain them respect in the community. (RBM 21, citing 4RT 609, 702.) Respondent's reliance upon the cited portions of the record belie that argument. Taken in context, this is what Holland actually had to say about the subject:

> "Q [by prosecutor]: Now, just the mere fact that a rape may be frowned upon, does that prevent a gang member from committing that crime?
>
> "A [by Holland]: No, sir.
>
> "Q: Why not?
>
> "A: Gang member commit all kinds of crimes to ***further themselves or their personal interests***, you know. Crimes that involve some type of sexual gratification occurs by other gang members, by other SouthSide Chiques gang members, they are not going to come back and announce that they have committed a rape or promote it that it's a rape at all, you know, and they're going to claim that law enforcement and the district attorney's office is making stuff up, you know, ***to protect their position***, but these crimes still occur." (4RT 702; emphasis added.)

As the above-emphasized statements indicate, the gang expert testified that not only is rape frowned upon, but that a SouthSide Chiques gang member charged with rape or other sexual offense would deny that he had committed such an offense. Moreover, the gang expert testified that sexual offenses, including rape, would be committed by SouthSide Chiques members not to promote or further their gang status or the status of their gang, but to ***further themselves or their personal interests***. In light of Holland's testimony that a SouthSide Chiques gang member would deny participating in rape or other sexual offenses, it can only be concluded that sexual offenses would be committed by SouthSide Chiques ***only*** for self-gratification or, in the words of one court, as a "frolic and detour unrelated to the gang." (People v. Morales (2003) 112 Cal.App.4th 1176, 1198.)

Indeed, one would be hard-pressed to find a more paradigmatic example of a frolic and detour from gang-related conduct. Intuitive logic leads to the inescapable conclusion that by committing a rape-in-concert, these three defendants committed the one offense which has the ***least likelihood*** of enhancing their individual status as gang members and the status of their gang among those whom they would most want to impress: eligible young females.

Respondent also makes the false assertion that rape was one of the predicate offenses committed by SouthSide Chiques. (RBM p. 22, citing 4RT 702.) It was never proven that any member of SouthSide Chiques had ever committed the offense of rape as a predicate offense in this case or in any other gang prosecution in Ventura County, and respondent can cite no portion of the record which supports an assertion to the contrary. The entire text of Holland's comments are quoted above and certainly do not stand for the proposition that SouthSide Chiques have committed predicate gang

crimes involving sexual assault or rape. Certainly, if the prosecutor had proof that a SouthSide Chiques gang member had been convicted or even arrested for a sexual offense it would have been presented during the course of the trial. Holland's allusion to the commission of sexual offenses by SouthSide Chiques was made in a hypothetical context in response to the question whether a gang member would *ever* commit rape.

Indeed, respondent has failed to cite a single case in the history of the STEP Act to support the argument that rape is an offense commonly, or ever, perpetrated by criminal street gangs in furtherance of gang activity. Nor did the prosecution gang expert in appellants' case explain how the commission of rape would further, promote, or assist in the criminal conduct of the SouthSide Chiques. Respondent merely concludes, as did Holland, that the rape of a 15 year old girl would achieve the gang objective of causing fear in the community. (RBM 22.)

Obviously, the rape-in-concert of a 15 year old girl would cause fear in any community. This fact does not, however, bridge the nexus between the commission of the offense and furtherance of criminal activity by the gang, particularly when the prosecution expert testified that a SouthSide Chiques gang member accused of rape would categorically deny committing the offense. Even if it were argued that the community responded to the offense by fearing SouthSide Chiques, this does not satisfy the requirements of the STEP Act. The elements of the gang crime and gang enhancement are not proven by a community's real or hypothetical response to a crime. The prosecution must prove that the defendants intended to act in furtherance of gang activities when they committed the offense, not that the defendants acted in pursuit of their own base sexual motivations and the gang gained some degree of notoriety as a result of that

conduct. The prosecution utterly failed to carry out its burden of proof in this regard and there is no substantial evidence, "that is evidence which is reasonable, credible, and of solid value," to support the jury's verdict of guilt for the gang offense and true finding of the gang enhancement. (People v. Johnson (1980) 26 Cal.3d 557, 578.)

II

JOINDER IN CO-APPELLANTS' ARGUMENTS

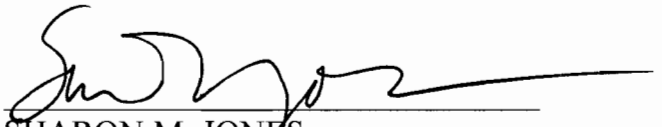
Appellant hereby joins in the arguments of co-appellants Albert Albillar and John Madrigal insofar as those arguments may benefit him. (See People v. Stone (1981) 117 Cal.App.3d 15, 19, fn. 5.)

CONCLUSION

For the reasons set forth herein and in Appellant's Opening Brief on the Merits, appellant's conviction in Count 3 must be reversed, the gang enhancements must be stricken, and the judgment must be reversed and the matter remanded for a new trial on the underlying charges in Counts 1 and 2.

Dated: May 5, 2008

Respectfully submitted,



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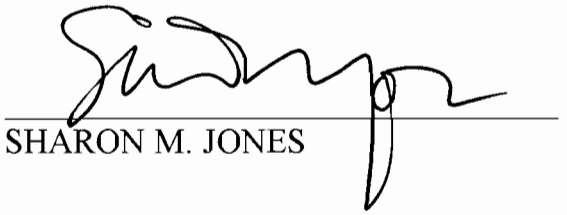
WORD COUNT CERTIFICATE

Counsel for petitioner hereby certifies that this brief contains 2,414 words, as counted by the word count function of counsel's word processing program.

I declare, under penalty of perjury that the foregoing Word Count Certificate is true and correct. Executed on May 4, 2009, at Ventura, California.



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DECLARATION OF SERVICE BY MAIL

I, SHARON M. JONES, declare that I am over 18 years of age, and not a party to the within cause; my business address is P. O. Box 1663, Ventura, California 93002. I served on copy of the attached APPELLANT'S REPLY BRIEF ON THE MERITS on the following by placing the same in an envelope addressed as follows:

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Each said envelope was then, on May 5, 2008, sealed and deposited in the United States mail at Ventura, California, with postage thereon fully prepaid. I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on May 5, 2008, at Ventura, California.

SHARON M. JONES