

FILED WITH PERMISSION

No. S266854

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
CRISTIAN RENTERIA,
Defendant and Appellant.

Fifth Appellate District Court, Case No. F076973
Tulare County Superior Court, Case No. VCF304654
The Honorable Kathryn T. Montejano, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

As previously discussed in the People's answer to the amicus curiae brief from the State Public Defender (SPD), it would be appropriate for this Court to transfer the case back to the Court of Appeal for further consideration in light of Assembly Bill No. 333 (Reg. Sess. 2021-2022) (AB 333). In the amicus briefing, the People and SPD focused on how AB 333 amended the elements of Penal Code section 186.22, subdivision (b) that relate to the defendant's commission of the current offense. After the People answered the amicus brief, appellant Renteria filed a Second Supplemental Brief (ASSB) focusing on how AB 333 amended other elements of Penal Code¹ section 186.22, particularly those relating to the commission of prior offenses comprising a pattern of criminal gang activity by the defendant or other gang members. Renteria argues that this Court should (i) apply those amendments in the first instance, (ii) strike the jury's verdicts on the gang allegations, and (iii) bar the prosecution from retrying the allegations under current law.

The People respectfully maintain that the application of AB 333 to the particular facts of the present case should be addressed by the Court of Appeal in the first instance. The issue upon which this Court granted review does not include questions regarding the meaning of Penal Code section 186.22 as amended by AB 333, particularly questions regarding the commission of prior offenses comprising a pattern of criminal gang activity. Nor

¹ Future undesignated statutory references are to the Penal Code.

does it include questions regarding the appropriate standard of prejudice and the ability of the prosecution to retry a gang allegation in light of changes to the law. And, because these new questions predominate over the one upon which this Court granted review, it remains appropriate to transfer the case without decision.

BACKGROUND

This Court granted review limited to whether, when “a member of a criminal street gang acts alone in committing a felony, what evidence will suffice to establish the felony was ‘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?’” The order granting review quoted section 186.22, subdivision (b)(1), and cited *People v. Albillar* (2010) 51 Cal.4th 47, 59-60.

As previously discussed in the amicus briefing, AB 333 amended section 186.22 in several ways. As relevant here, it modified the definition of “criminal street gang” and “pattern of criminal gang activity,” and it changed what is required to show an offense “benefit[s], promote[s], further[s], or assist[s]” a criminal street gang. (§ 186.22, subds. (f)-(g).)

Under former section 186.22, subdivision (f), a “criminal street gang” was defined as

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, or (31) to (33), 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.

AB 333 narrowed the definition of a “criminal street gang”—which is integral to proving both a gang participation offense and gang enhancements—to “an ongoing, organized association or group of three or more persons,” and now requires prosecutors to show that members of the gang “collectively” engage in, or have engaged in, a pattern of criminal gang activity. (Stats. 2021, ch. 699, § 3.)

Additionally, AB 333 amended the definition of “pattern of criminal gang activity.” (Stats. 2021, ch. 699, § 3.) Under former section 186.22, subdivision (e), a “pattern of criminal gang activity” was defined as “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.” Further, under former law, a pattern of criminal gang activity could be established by the current offense(s). (*People v. Zermeno* (1999) 21 Cal.4th 927, 931-932; *People v. Louen* (1997) 17 Cal.4th 1, 10.)

AB 333 modified this definition by additionally requiring that: (1) the last offense used to show a pattern of criminal gang activity occurred within three years of the date that the currently charged offense is alleged to have been committed; (2) the

offenses are committed on separate occasions or by two or more gang members, as opposed to persons; (3) the offenses commonly benefited a criminal street gang, and the common benefit was more than reputational; and (4) the currently charged offense cannot be used to establish a pattern of criminal gang activity. (Stats. 2021, ch. 699, § 3.) AB 333 also reduced the list of qualifying offenses that can be used to establish a pattern of criminal gang activity from 33 to 26, removing certain offenses related to theft, fraud, and vandalism. (*Ibid.*)

AB 333 further clarified that to “benefit, promote, further, or assist” a criminal street gang for purposes of section 186.22, subdivisions (a), (b), and (d), “means to provide a common benefit to members of a gang where the common benefit is more than reputational.” (§ 186.22, subd. (g); Stats. 2021, ch. 699, § 3.)

Examples of common benefits that are more than reputational

may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant. (*Ibid.*)

The effective date of non-urgency legislation such as AB 333, passed in 2021 during the regular legislative session, was January 1, 2022. (Cal. Const., art. IV, § 8, subd. (c); Gov. Code, § 9600, subd. (a); see *People v. Camba* (1996) 50 Cal.App.4th 857, 865.)

ARGUMENT

I. THE RECENT AMENDMENTS TO SECTION 186.22 APPLY RETROACTIVELY, BUT THE COURT OF APPEAL SHOULD HAVE THE FIRST OPPORTUNITY TO ADDRESS THEIR IMPACT

Since Renteria's trial, AB 333 has changed the way a gang enhancement can be proved. Renteria argues, in support of his sufficiency of the evidence claim, that the evidence at trial fails to satisfy the new requirements of AB 333 in that it fails to demonstrate: (1) the charged offense was committed to provide a common benefit to the gang that was more than reputational (ASB² 13-19); (2) the predicate offenses commonly benefited the gang (ASSB 7-9); and (3) that gang members "collectively" engage in, or have engaged in, a pattern of criminal gang activity (ASSB 7-9).³ The People agree that the amendments to section 186.22 apply retroactively because the judgment is not yet final. It is possible Renteria may benefit from the amendments, though his sufficiency of the evidence claim must be based on the law at the time of his offense. Therefore, the matter should be transferred back to the Court of Appeal so that court may determine AB 333's impact on this case in the first instance.

A. The amendments to section 186.22 apply retroactively to appellant's case

In *In re Estrada* (1965) 63 Cal.2d 740, the California Supreme Court held that, absent evidence to the contrary, the Legislature intended amendments to statutes that reduce the punishment for a particular crime to apply to all defendants

² "ASB" refers to Appellant's Supplemental Brief.

³ "ASB" refers to Appellant's Supplemental Brief, and "ASSB" refers to Appellant's Second Supplemental Brief.

whose judgments are not yet final on the amendment's operative date. (See *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 306-308 [discussing *Estrada*]; *People v. Brown* (2012) 54 Cal.4th 314, 323 [same].) Although AB 333 did not alter the punishment for the gang participation offense or the gang enhancement pursuant to section 186.22, it did increase the threshold for conviction of the offense and imposition of the enhancement by altering the required elements. In analogous situations, appellate courts have held that similarly operating statutory amendments were retroactive to non-final judgments. (See, e.g., *People v. Nasalga* (1996) 12 Cal.4th 784, 792 [applying *Estrada* to statutes regulating penalty enhancements and substantive offenses]; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 300-301 [applying *Estrada* to statutory amendments benefitting defendants that "redefine" criminal conduct]; *People v. Roberts* (1994) 24 Cal.App.4th 1462, 1466 [amendment to enhancement raising threshold amount for large takings applied retroactively]; *People v. Figueroa* (1993) 20 Cal.App.4th 65, 69-71 [amendment raising threshold for imposition of drug enhancement applied retroactively].) Therefore, AB 333's amendments to section 186.22 are retroactive to non-final judgments, such as this one. (*People v. E.H.* (2022) 75 Cal.App.5th 467, 478; *People v. Lopez* (2021) 73 Cal.App.5th 327, 343-344.)

- B. Transfer to the Court of Appeal is appropriate to determine, in the first instance, how AB 333 impacts appellant's case

Review in this case was granted to determine what evidence will suffice to prove a gang enhancement when a defendant acted

alone. Prior to the enactment of AB 333, the People took the position that expert testimony, combined with case specific facts, will suffice, but that sufficiency must be decided on a case-by-case basis. (ABM 23-32.) But section 186.22 now requires different showings of proof to establish the gang enhancement. Consequently, the question of whether sufficient evidence supports the gang enhancement as it existed prior to AB 333 may have become academic.

Although AB 333 added significant requirements to the gang enhancement, the evidence in this case may nevertheless satisfy those requirements. The evidence likely supports the inference that the charged crimes were intended as retaliation, a common benefit to the gang. (See § I-B-1, *ante*.) Likewise, the evidence may support the inference that the predicate offenses also provided a common benefit to the gang. (See § I-B-2, *ante*.) And it is unclear what evidence may satisfy the requirement that the gang's members have "collectively" engaged in a pattern of criminal gang activity. (See § I-B-3, *ante*.) Whether the facts here satisfy the new requirements and establish beyond a reasonable doubt that the jury would have imposed the gang enhancement if instructed on those requirements was not decided by the Court of Appeal. Thus, the Court of Appeal should be given the opportunity to determine these issues in the first instance.

1. Renteria's retaliatory shooting was likely committed to provide a common benefit to gang members

Section 186.22, subdivision (g), now requires proof that the charged offense was committed to provide "a common benefit . . . [that] is more than reputational." While the evidence in this case likely supports the inference that the charged crimes were intended as retaliation—which the new section 186.22, subdivision (g), expressly contemplates as a common benefit—the new statute does not define "retaliation." Renteria admitted that he was "hit up" by individuals who he assumed were rival gang members and he was expected to respond. (Aug CT 46, 50; Exhibit 27 [20:48-21:18, 25:15-25:33].) Detective Adney's testimony linked retaliation and reputation, by observing that Sureño gang members highly value respect, which in gang culture is obtained through violence and intimidation. (4 RT 533, 539-540; 5 RT 606-607.) Detective Adney opined that Renteria retaliated to avoid looking "weak." (5 RT 610.)

Whether appellant's retaliatory behavior to avoid looking weak provided only reputational benefit—insufficient on its own—or whether his retaliation was sufficient to establish a common benefit was neither decided by the jury nor addressed by the Court of Appeal. Thus, the Court of Appeal should be given the opportunity to determine, in the first instance, the extent to which the jury relied on a reputational theory and, if so, whether it is clear beyond a reasonable doubt the jury would have found that the charged crimes were committed for a permissible common benefit.

2. The predicate offenses likely commonly benefitted the gang

Section 186.22, subdivision (e)(1), now requires that the predicate offenses used to establish a “pattern of criminal gang activity” must have “commonly benefited a criminal street gang” in a manner that is “more than reputational.” (§ 186.22, subd. (e)(1).) Renteria concludes that the predicate offenses here were inadequate because they did not provide a common benefit that is more than reputational. (ASSB 6-8.) But that conclusion is not necessarily correct, and the Court of Appeal has not had the opportunity to address the question.

The predicate offenses appear to have commonly benefited the gang in a way that was more than reputational. In the first predicate offense, law enforcement stopped a vehicle carrying Francisco Cortez and three other Sureño gang members, at which point Cortez fled with a firearm and another gang member fled with a loaded magazine. (4 RT 550; 1 CT 278-289.) In the second predicate offense, another Sureño gang member, Fabio Delreal, possessed a loaded, stolen firearm. (4RT 553; 1 CT 244-253.) And in the third, Sureño gang members Armando Flores and Daniel Villagomez were found together in a vehicle with two firearms a few days after committing a drive-by shooting together. (4RT 554-555; 1 CT 254-277.)

Detective Adney testified that subsets of the Sureño gang share weapons, presumably including firearms. (4 RT 559-560.) Detective Adney also explained that gang members benefit from having weapons such as firearms because it permits them to commit crimes of opportunity, such as retaliating against rivals.

(5 RT 583-584.) The ability to retaliate immediately upon being disrespected, or to immediately commit a crime when the opportunity arises—an ability that is enhanced by possession of a firearm—is a “more than reputational” benefit. The Court of Appeal should have an opportunity to determine whether this evidence satisfies the new AB 333 requirement as well.

3. The predicate offenses may establish that gang members collectively engaged in a pattern of criminal gang activity

Additionally, under AB 333, the prosecution must establish that members of the gang “collectively engage in, or have engaged in, a pattern of criminal gang activity.” (§ 186.22, subd. (f).) A “pattern of criminal gang activity,” in turn, requires the prosecution to establish at least two predicate offenses, where “the offenses were committed on separate occasions or by two or more members.” (§ 186.22, subd. (e)(1).) At the time of Renteria’s trial, however, establishing predicate offenses required only proof that the gang members “individually or collectively” engaged in the pattern of criminal gang activity. (Stats. 2021, ch. 699, § 3.)

However, it is unclear what evidence AB 333 requires to establish that the pattern of criminal gang activity was committed “collectively.” *People v. Delgado* (2022) 74 Cal.App.5th 1067, cited by Renteria (ASSB 6), interpreted section 186.22, subdivision (e)(1), to require each predicate offense to have been committed by more than one person, but this interpretation would appear to render the term “on separate occasions or” in section 186.22, subdivision (e)(1), inoperative. The evidence here

showed that at least four different gang members committed enumerated offenses (§ 186.22, subd. (e)(1) (A)-(Z)) on three different occasions, which appears to satisfy the requirement that predicate offenses be “committed on separate occasions or by two or more members.” (§ 186.22, subd. (e)(1).) However, the Court of Appeal has not yet had an opportunity to address the issue and decide which interpretation is correct, and it should be given the opportunity in the first instance.⁴

4. Any error on these facts is not automatically prejudicial, and the Court of Appeal should be able to decide whether it was here

While the record in this case may satisfy AB 333’s new requirements, nevertheless, the jury was not instructed on the additional requirements. (2 CT 340-341.) When the jury is not instructed on an element of the offense, prejudice is not automatic, and error is harmless if the omitted element was proved by uncontested and overwhelming evidence. (*People v. Merritt* (2017) 2 Cal.5th 819, 827; see *Chapman v. California* (1967) 386 U.S. 18, 23; *E.H.*, *supra*, 75 Cal.App.5th at pp. 479-480 [applying *Chapman* standard for harmless error analysis in light of AB 333’s changes to section 186.22]; *People v. Sek* (2022) 74 Cal.App.5th 657, 668-669 [same].)

Detective Adney testified about how the possession of firearms, and their use, commonly benefits gang members (5 RT

⁴ Respondent disputes Renteria’s characterization of Cortez’s offense as “individual” (ASSB 7), given that when Cortez possessed the firearm, he was with several other gang members, one of whom possessed a loaded magazine and fled with him.

583-584, 606-607), and there was no evidence to the contrary. In a culture where respect is paramount, and respect flows from violence (4 RT 533-535), the common benefit provided by the possession and use of firearms is no less clear following AB 333. Based on the evidence in the record, the Court of Appeal could potentially find the error harmless beyond a reasonable doubt, and it should be given the opportunity to decide this factual issue in the first instance.

C. AB 333 does not inform whether the evidence was sufficient under prior law

AB 333 did not merely codify or clarify existing law. Rather, it changed the substance of what is required to prove a gang allegation and how it may be proved. Consequently, contrary to Renteria's position advanced in his supplemental brief (ASB 11-13), AB 333 is not relevant in determining the meaning of section 186.22, subdivision (b), as it existed at the time of Renteria's offense. The new statutory requirements should not be considered in reviewing whether sufficient evidence supported the gang enhancements in this case under the law as it existed when Renteria was convicted. Renteria was not entitled to a not true finding on the gang enhancement as it was codified prior to AB 333.

This conclusion becomes clear when this Court considers the appropriate remedy when an ameliorative statute that amends the elements of a charged offense applies retroactively. "Where... evidence is not introduced at trial because the law at that time would have rendered it irrelevant, the remand to prove that element is proper and the reviewing court does not treat the issue

as one of sufficiency of the evidence." (*People v. Figueroa* (1993) 20 Cal.App.4th 65, 72, citing *People v. Balderas* (1985) 41 Cal.3d 144, 197-199; see *E.H., supra*, 75 Cal.App.5th at p. 480.) That the quality or quantity of proof was subsequently altered or increased by the Legislature does not permit a defendant to assert insufficient evidence and thereby avoid any potential criminal liability that might arise under the amended statute. For this reason, too, this Court should not determine the sufficiency of the evidence in this case based on the new section 186.22 statutory requirements.

CONCLUSION

It is not clear that Renteria is entitled to reversal by virtue of AB 333. However, the Court of Appeal should be given the first opportunity to evaluate the evidence to decide whether he is, and respondent respectfully requests that this matter be transferred back to the Court of Appeal for that purpose.

Respectfully submitted,

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May 13, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13 point Century Schoolbook font and contains 3,159 words.

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on May 13, 2022, at Fresno, California.

Gabriel Vallejo

Declarant

/s/ Gabriel Vallejo

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

Case Name: **PEOPLE v.
RENTERIA**

Case Number: **S266854**

Lower Court Case Number: **F076973**

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