Supreme Court No. S163905

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

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APPELLANT ALEX ADRIAN ALBILLAR'S PETITION FOR REVIEW

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Petitioner, ALEX ADRIAN ALBILLAR, respectfully petitions this Court for review following the published decision of the Court of Appeal, Second Appellate District, Division Six, filed on May 5, 2008, affirming the judgment of the Superior Court of Ventura County. A copy of the opinion of the Court of Appeal ("Opin.") is attached hereto as an Appendix.

NECESSITY FOR REVIEW

Review is also necessary in this case to address important issues of law which are likely to recur in other cases, and to preserve for further review issues of federal constitutional dimension.

ISSUES PRESENTED FOR REVIEW

1. WAS THE TRIAL COURT REQUIRED TO DISMISS THE ENTIRE JURY VENIRE AS A REMEDY FOR THE "BATSON/WHEELER" VIOLATION WHEN THE COMPLAINING PARTY DID NOT CONSENT TO AN ALTERNATIVE REMEDY?

2. DID THE TRIAL COURT ERR AND THUS DEPRIVED APPELLANT OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND FAIR TRIAL BY FAILING TO GRANT APPELLANT'S REQUEST TO BIFURCATE/SEVER THE TRIAL OF THE GANG ALLEGATION AND THE "STREET TERRORISM" CHARGE FROM THE TRIAL ON THE UNDERLYING CHARGES?

3. DID THE PREJUDICIAL ADMISSION OF GANG EVIDENCE VIOLATE APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL?

4. WAS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S FINDING THAT APPELLANT COMMITTED THE OFFENSE FOR THE BENEFIT OF A CRIMINAL STREET GANG THUS REQUIRING REVERSAL OF THE GANG ENHANCEMENT?

5. DO THE GANG ENHANCEMENTS AND ALLEGATIONS CONSTITUTE A VIOLATION OF APPELLANT'S FIRST AND FOURTEENTH AMENDMENT RIGHTS TO FREEDOM OF ASSOCIATION?

STATEMENT OF THE CASE AND FACTS

Appellant adopts the procedural and factual summary contained on pages 1 through 4 of the Opinion of the Court of Appeal. The Court of Appeal affirmed the judgment. (Opin. 1, 14.)

ARGUMENT

I

THE TRIAL COURT WAS REQUIRED TO DISMISS THE ENTIRE JURY VENIRE AS A REMEDY FOR THE "BATSON/WHEELER" VIOLATION BECAUSE THE COMPLAINING PARTY DID NOT CONSENT TO AN ALTERNATIVE REMEDY.

After one of the defense attorneys brought a "Wheeler" motion during a break in jury voir dire, the trial court listened to the prosecutor's reasons for excusing the juror then stated that the court was "dismayed that the People so cavalierly would attempt to dismiss an Hispanic from this jury without good cause to do so," that, "...there's absolutely nothing in what he [Juror No. 2] said that would cause me to believe that if I were sitting in your chair he couldn't be a fair and impartial juror, and I am just amazed that after a week's worth of what we have been through that you don't even sit there and think, 'What's going to happen when I do this? What kind of motion is coming up next?'...." (SRT 497-498.)

After noting that there were no other Hispanic jurors in the audience, and only two left on the jury, the judge ordered that the dismissed juror remain on the jury. (SRT 498.) The trial court did not, as set forth in People v. Wheeler (1978) 22 Cal.3d 258, dismiss the entire jury venire and begin again with a new group of jurors, although it was clear that the prosecutor had successfully eliminated all but two Hispanic jurors from the entire jury venire and that the were no Hispanic jurors remaining in the audience. Because the trial

court never obtained consent to reseat the dismissed juror, nor even afforded an opportunity for counsel to object to the remedy, appellant's state and federal constitutional right to an unbiased jury was irremediably impaired.

The Court of Appeal, however, found no error in the trial court's failure to dismiss the entire jury venire after finding that the prosecutor failed to establish a race-neutral reason for dismissal of at least one Hispanic juror. (Opin. 6.) Although the Court of Appeal recognized that "trial courts lack discretion to impose alternative procedures in the absence of consent or waiver by the complaining party," the Court of Appeal nevertheless found that because "[a]ppellants never requested the dismissal of the jury venire, and they did not object to the reseating of the improperly challenged juror..." appellants had, "[b]y their silence ... impliedly consented to the reseating of the juror as an alternative remedy for the Wheeler-Batson violation." (Opin. 6.)

By so holding, the Court of Appeal has eviscerated this Court's requirement, as set forth in its decision in People v. Willis (2002) 27 Cal.4th 811, that a trial court may fashion an alternative remedy for Batson-Wheeler violation, ***"provided that the alternate relief is acceptable to the complaining party***." (Id., at p. 821; emphasis added.) Here, there was no consent to the alternative remedy nor did the defendants waive dismissal of the entire venire.

Not only did the defendants here neither waive the ordinary remedy nor consent to the alternative, the rationale set forth in Willis for the alternative remedy did not apply in appellant's case. In Willis, unlike appellants' case, the alternate remedy of reseating the improperly dismissed juror was devised by the trial court and approved by this Court as a "ready means of curing a perceived imbalance in the initial jury venire," where dismissal of the entire venire was the result desired by the party (the defendant in Willis) who improperly exercised numerous peremptory challenges in the hope of ultimately achieving dismissal of the entire venire. (People v. Willis, supra, 27 Cal.4th, at p. 818.) The Willis court concluded that dismissal of the jury venire, the remedy established by the court in

Wheeler, would only have rewarded the offending party for "engag[ing] in a series of concededly improper and biased peremptory exclusions, aimed at indirectly accomplishing what it could not directly achieve, thereby violating the People's right to a representative and impartial jury." (Ibid.)

Here, appellants were the aggrieved party and the prosecutor was the offending party, having dismissed nearly every Hispanic juror from the venire. Without input from defense counsel, the trial court fashioned a remedy which preserved, intact, the jury members already selected by the parties as well as the remaining venire comprised entirely of non-Hispanic individuals. While the judge in appellant's case was understandably concerned over the potential for wasting several judicial days, the record reflects that the remedy selected by the judge was not one which afforded appellant and his co-defendants their federal constitutional right to an unbiased jury. The remedy did not take into account the fact that the prosecutor had already exercised 2 or possibly 3 peremptory challenges against Hispanic jurors, jurors who were not restored to the jury panel. Additionally, because the remaining venire did not include any Hispanic individuals, the trial court's remedy rendered it impossible for the defendants to obtain any semblance of racial balance on the jury.

Relying upon the decision in People v. Overby (2004) 124 Cal.App.4th 1237, the Court of Appeal here decided that even when defense counsel is given no opportunity to either consent or object to the alternative remedy, the appellate court can find implied consent from silence. In Overby, however, unlike in appellant's case, it was defense counsel who asked that the improperly excused juror remain in the courtroom, thus demonstrating that Overby's defense counsel anticipated the possibility of the dismissed juror remaining on the panel. (Id., at p. 1244.) Here, it was the judge who asked the dismissed juror to remain in the courtroom while the prosecutor was asked, at sidebar, to explain his reasons for exercising a peremptory challenge. (SRT 475.) Furthermore, the record in Overby demonstrated that the judge asked defense counsel "if she wanted to

present any argument on the court's tentative decision, [to which] she responded, 'Submit.'" (Ibid.) The appellate court in Overby found that by submitting to the trial court's choice of remedies, defense counsel had "decline[d] the opportunity to advocate any particular remedy..." (Id., at p. 1245.) No such submission occurred in appellant's case and the appellate court's finding that the injured parties "impliedly consented" to the alternate remedy of reseating the dismissed juror was entirely wrong and must be reversed if this Court's holding in Willis, conditioning an alternative remedy for Batson-Wheeler violation upon consent by the injured party, is to have any meaning, whatsoever. This Court must grant review to resolve this issue of constitutional proportions.

II

THE TRIAL COURT ERRED AND THUS DEPRIVED APPELLANT OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND FAIR TRIAL BY FAILING TO GRANT APPELLANT'S REQUEST TO BIFURCATE/SEVER THE TRIAL OF THE GANG ALLEGATION AND THE "STREET TERRORISM" CHARGE FROM THE TRIAL ON THE UNDERLYING CHARGES.

Prior to trial, the defense sought to have the trial of the gang allegations and gang offenses severed and/or bifurcated from trial on the underlying offenses. The trial court acknowledged that a gang allegation attached to a sexual offense was highly unusual and that the judge had, himself, never before seen a gang allegation attached to a sexual offense charge. (1RT 13.) Finding that gang enhancement allegations are "always prejudicial," the trial court, nevertheless, denied the defense motion to bifurcate/sever the gang charges. (2RT 26.)

At no time during trial did the victim, Amanda, testify that she was afraid to report the offense because the defendants were gang members, that any of the defendants threatened to do her any harm if she reported the incident, nor that she

was afraid of testifying because the defendants were in a gang. On the contrary, in response to defense questioning, Amanda stated that at no time on the night of the incident did the defendants say anything to her about their gang, nor did any of the defendants threaten her. (2RT 270-271; 279; 285; 302-303.)

The trial court should have bifurcated trial of the gang enhancement allegation and severed trial of the substantive gang charge from the trial of the underlying charges. In People v. Calderon (1994) 9 Cal.4th 69, the California Supreme Court held "that a trial court has the discretion, in a jury trial, to bifurcate the determination of the truth of an alleged prior conviction from the determination of the defendant's guilt of the charged offense...." (Id., at p.72.) The court in Calderon found the authority to bifurcate the trial of a prior conviction in Penal Code section 1044[1] which vests the trial court with broad discretion to control the conduct of a criminal trial. In People v. Hernandez (2004) 33 Cal.4th 1040, this Court recognized that a trial court may likewise exercise its discretion to bifurcate gang enhancement allegations from trial of an underlying offense. (Id., at p. 1049.)

Here, the gang evidence was extremely prejudicial but had very little relevance to the underlying offense. Unlike the defendants in Hernandez who used their gang status as a threat in demanding money from their victim, there was no evidence in appellant's case that he or his co-defendants ever used their gang status to further their criminal goal. (Id., at p. 1050.) Nor was the evidence relevant to motive or intent, contrary to the prosecutor's pre-trial assertions. On the contrary, the gang expert testified that Hispanic street gangs frown upon the commission of sexual offenses. (4RT 677; 696-697.) If anything, the fact that all three defendants were members of a Hispanic street gang disproves their motive and intent to commit a sexual offense. On the contrary, the prosecutor desired to

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[1]Penal Code section 1044 provides, in pertinent part, "It shall be the duty of the judge to control all proceedings during the trial... with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

present evidence and argue that appellant and his co-defendants are members of a gang whose primary activities are criminal acts including kidnapping, extortion, assault with a deadly weapon, vehicle theft, felony vandalism, drug sales, money laundering, robbery, mayhem, and rape. (3RT 632-633.) The prosecutor wanted to impress upon the jury the "inhumanity" of gang members who use violence to intimidate innocent members of their communities. (3RT 649.)

It is clear that the evidence of the gang enhancement and the gang offense could have easily been presented in a separate proceeding. Holland was the only witness who was necessary to the prosecution's presentation of the gang evidence. Apart from the hypothetical question, Holland did not testify, at all, regarding the facts of the underlying offense. Although Holland's testimony was lengthy and detailed, it would not have been any more so if he had testified at a bifurcated proceeding. Because the same jury would have already heard Amanda's testimony concerning the underlying charges, she would only have been required to testify concerning her knowledge of the defendants' gang membership at a separate proceeding. Even this additional bit of evidence could have been presented by stipulation in order to streamline any additional proceedings. By bifurcating the proceedings and presenting this evidence to the same jury, separate from the trial on guilt, the evidence would have been presented in its proper context rather than as highly inflammatory propensity evidence.

Allowing the jury to hear this evidence in the context of the trial on guilt of the underlying charges constituted an abuse of discretion which violated appellant's federal due process right to a fair trial, to a trial free from improper lessening of the prosecution's burden of proof, and to a reliable and non-arbitrary determination of guilt under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and reversal is required unless it can be shown that the error was harmless beyond a reasonable doubt. In this case, the guilty verdict was not "surely unattributable" to the errors. (Chapman v. California (1967) 386 U.S. 18; Sullivan v. Louisiana, supra, 508 U.S. at pp. 277-279.)

III

THE PREJUDICIAL ADMISSION OF GANG EVIDENCE VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL.

In its published opinion, the Court of Appeal adamantly rejected any inference that this gang rape – perpetrated by petitioner, his twin brother, and their cousin against an acquaintance – was not a "gang" rape. (Opin., at p. 1.) As proof, the lower court cited the defendants' gang membership, the victim's awareness of this gang membership, and the victim's week-long delay in reporting. Specifically, the victim reported the offense after a mutual friend of hers and the defendants said that the victim's family would be hurt if she reported. A police sergeant testified the victim told him that she was afraid that because the defendants were gang members, they would come after her family. The prosecution's gang expert testified that as a general matter, gang members lose status by not supporting one another during a crime. Contrarily, the prosecution's gang expert testified sex offenses were frowned upon in Hispanic gang culture, and a rape conviction would cause the defendants to lose status within the gang. (Opn., at pp. 1-4.)

However, the victim herself testified that while she was aware of the defendants' gang membership, it was irrelevant: it had nothing to do with the offense, or her delay in reporting, and that she was not particularly intimidated or frightened of the defendants because of their gang membership. Too, the mutual friend said nothing about any *gang* retribution in her call. In sum, in 264 pages of transcribed testimony, the victim's only mention of the defendants' gang membership were eleven unqualified *disavowals* of its relevance to her rape.

Gang evidence is only admissible if "relevant to establish the defendant's motive, intent, or some fact concerning the charged offense other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Other than as proof of the substantive gang charge, none of these goals were served by admission of gang evidence in this case (102 pages of trial testimony), evidence which included the gang's involvement in homicides and drug trafficking, as well as its ties to the nefarious Mexican Mafia. In short, this case squarely poses the question: is gang evidence automatically relevant simply because the prosecutor has elected to charge a substantive gang offense?

For even if relevant, gang evidence must be carefully scrutinized given its propensity to be used as improper disposition evidence. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194, cert. den. 540 U.S. 1124.) "Given its highly inflammatory impact, the California Supreme Court has condemned the introduction of such evidence if it is only *tangentially* relevant to the charged offenses." (*People v. Albarran, supra*, 149 Cal.App.4th at p. 223, citing *People v. Cox* (1991) 53 Cal.3d 618, 660, cert. den. 502 U.S. 1062.) In its published opinion, the Court of Appeal adamantly rejected any inference that this was not a "gang" rape. (Opn., at pp. 1.) However, except by virtue of the prosecutor's decision to charge the case as a gang case based on the defendants' gang membership, there's nothing that indicates this was a "gang" rape, and everything that indicates it wasn't, including the prosecutor's witnesses. (*People v. Partida* (2005) 37 Cal.4th 428, 432; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.)

The admission of evidence may violate due process if there are no

permissible inferences to be drawn from that evidence, and the evidence itself must necessarily preclude a fair trial. (*Jammal v. Van de Kamp* (1991) 926 F.2d 918, 920; *Reiger v. Christensen* (9th Cir. 1986) 789 F.2d 1425, 1430.) When a defendant's crime would prove detrimental to his gang status, and there's no evidence that indicates he used this status for any purpose related to the crime, the State should not be permitted to avoid the guarantees of due process by alleging violations of the anti-gang statute based on gang membership alone. Petitioner's case directly affects how courts and prosecutors will perceive gang statutes as portals for admission of gang evidence, regardless of its relevance to the underlying offense. Review should be granted. (Cal. Rules of Court, rule 8.500.)

IV

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S FINDING THAT APPELLANT COMMITTED THE OFFENSE FOR THE BENEFIT OF A CRIMINAL STREET GANG AND THIS REQUIRES REVERSAL OF THE GANG ENHANCEMENT.

In assessing a claim of the sufficiency or insufficiency of the evidence to support a verdict, the role of the reviewing court is to review the record in the light most favorable to the judgment, drawing all inferences from the evidence which support the jury's verdict. (People v. Johnson (1980) 26 Cal.3d 557, 576; People v. Barnes (1986) 42 Cal.3d 284, 303-304; People v. Alcala (1984) 36 Cal.3d 604, 623.) An enhancement finding or a conviction which is not supported by substantial evidence violates the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution. (In re Winship (1970) 397 U.S. 358, 364;

Jackson v. Virginia (1979) 443 U.S. 307, 319.)

The only evidence presented by the prosecutor to prove that the offenses were committed for the benefit of a criminal street gang consisted of the testimony of a so-called "gang expert," Officer Holland. The prosecutor also introduced photos of the defendants' gang tattoos, pieces of paper seized from appellant's home bearing purported gang graffiti, and a letter from one of Albert's friends making purported references to gang membership. While these items of material evidence may have had some bearing upon appellant's and his co-defendants' gang membership, it cannot be said that anything presented by the prosecution, apart from Holland's testimony, had any bearing on the defendants' intent to promote gang activities during the commission of the offense or the actual benefit that accrued to the gang as a result of the commission of the offense.

The sum total of the evidence of "gang benefit" was offered by way of Holland's response to a hypothetical question which contained facts mirroring the testimony of the complaining witness. In Holland's opinion the crime was gang related because "Southside Chiques gang members who come together for the purpose of committing a violent act in victimizing, they can do it knowing the benefits of acting in that way, outnumbering the victim, counting on each other's trust and loyalty. They can do it in handling the division of labor in restraining the victim, in standing by the door, possibly preventing escape, in mentally containing the victim, three against one perhaps." (3RT 646-647.) When Holland was asked how each defendant individually benefitted from participating together in the crime, he responded that each individual received a benefit by elevating their status in the gang. (3RT 647-648.)

During cross examination, Holland admitted that the crime of rape is generally frowned upon by Hispanic street gangs and that if a gang member were convicted of committing the crime of rape, that gang member would lose status within the gang. (4RT 677; 696-697.) Holland also admitted that he had no evidence that appellant's status in Southside Chiques increased as a result of

anything that happened on December 29, 2004, nor did he have any evidence that anyone in Southside Chiques was ever made aware of this offense. (4RT 698.) Holland also conceded that he had no particular evidence to prove that the offense was gang related other than his opinion that "based on my reviewing and knowledge of the three individuals' participation in [sic] crime and reading the activity of those individuals during the commission of the crime, and it is through those collectively that I form [sic] the opinion that they are doing it to receive benefit amongst themselves and do it in association with fellow activitists[sic]/participants in Southside Chiques." (4RT 698-699.) Asked by defense counsel whether he could point to any specific piece of evidence, other than generalities about how gangs work, to show that this was a gang related crime, Holland answered that his opinion was based on "a collective totality on everything that has occurred in their prior history." (4RT 699.)

Appellant submits that this evidence does not support the gang allegations. In order to find true the enhancement charged under Penal Code section 186.22, subdivision (b), the jury must find that the particular crime was committed for the benefit of a gang and that the defendant committed the crime with the specific intent to promote, further, or assist in any criminal conduct by members of the gang. The gang enhancement requires proof of specific intent to benefit the gang, not merely proof of a general intent to participate in criminal conduct which incidently or even directly benefits a gang. When a gang expert testifies, as did Holland in appellant's trial, that the defendant's offense was committed for the benefit of a gang, there must be some nexus between the opinion and the actual facts in the record. In this regard, the court in People v. Killebrew (2002) 103 Cal.App.4th 644, quoting Summers v. A.L. Gilbert Co. (1999) 69 Cal.App.4th 1155, 1182-1183, observed,

> "'Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided.... There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge

> and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision.'" (People v. Killebrew, supra, 103 Cal.App.4th at p. 651.)

Such is the case here. The opinion expressed by Holland that the offense was committed for the benefit of, in association with, or at the direction of a criminal street gang was nothing more than general speculation based on Holland's personal beliefs about what gangs and gang members do. Holland expressed this opinion while also admitting that Hispanic street gangs generally frown on the commission of rape and that a gang member would lose status in the gang should he be convicted of rape. Thus, even Holland's generalizations about gang culture conflicted with the specific crimes and the specific facts of appellant's case. There was nothing in the particular facts of this case to support a finding that the offense was committed by appellant with the intent to benefit a criminal street gang, nor that the offense was committed for the benefit of, in association with, or at the direction of a criminal street gang. "[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang." (People v. Martinez (2004) 116 Cal.App.4th 753, 762.) Such evidence is entirely missing from this record.

Federal precedent agrees with the California cases which have held that evidence that one or more participants in the commission of a crime or crimes may be gang members, standing alone, is insufficient to prove that the offenses were gang-related. (See, e.g., United States v. Garcia (9th Cir. 1998) 151 F.3d 1243, 1245-1247; Mitchell v. Prunty (9th Cir. 1997) 107 F.3d 1337, 1342, overruled on other grounds, Santamaria v. Horsley (9th Cir. 1998) 133 F.3d 1242.) In Garcia v. Carey (9th Cir. 2005) 395 F.3d 1099, the court overturned a California appellate court decision finding sufficient evidence of a gang enhancement in a robbery committed by admitted gang members in gang territory, in which one of

the robbers said to the victim, "I'm Little Risky from EMF." (Id., at p. 1101.) The court in Garcia v. Carey, supra, found that there was no testimony which established that "protection of turf enables any other kind of criminal activity of the gang. The [gang] expert's testimony is singularly silent on what criminal activity of the gang was furthered or intended to be furthered by the robbery..." (Id., at p. 1103.) The same is true here.

V

THE GANG ENHANCEMENTS AND ALLEGATIONS CONSTITUTE A VIOLATION OF APPELLANT'S FIRST AND FOURTEENTH AMENDMENT RIGHTS TO FREEDOM OF ASSOCIATION.

The Court of Appeal rejected petitioner's argument that the gang charge and enhancements violated his First and Fourteenth Amendment rights of association, finding proof of "gang teamwork" not "familial teamwork" in the commission of the offense. (Opn., at p. 13.) To the extent it may be possible to distinguish members of a family working in cahoots to commit a crime and members of a family who are also members of the same gang working in cahoots to commit a crime, review should be granted to determine if punishment based on application of anti-gang statutes predicated on gang membership violates the constitutional rights of association when the gang members are close family members. (Cal. Rules of Court, rule 8.500.)

There are two First Amendment rights of association: intimate and expressive. (*Roberts v. United States Jaycees* (1984) 468 U.S. 609, 619.) Intimate associations are those exemplified by family affiliations; intimate associations are "central to any concept of liberty," and are characterized as involving "deep attachments and commitments to the necessarily few other

individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." (*Ibid.*) Intimate associations have inherent or "intrinsic" value; expressive associations are considered in more utilitarian terms, as "instrumental" to religious and political activity/expression. (*Ibid.*)

Petitioner has a First Amendment right to membership in SouthSide Chiques. (*New York State Club Assn. v. New York* (1988) 487 U.S. 1; *Board of Directors for Rotary Int. v. Rotary Club of Duarte* (1987) 481 U.S. 537.) "It is settled law that the government may not convict an individual merely for belonging to an organization that advocates illegal activity." (*United States v. Abel* (1984) 469 U.S. 45, 48; *N.A.A.C.P. v. Claiborne Hardware* (1982) 458 U.S. 886, 908.) Petitioner, his twin brother, and their cousin have a First Amendment right to associate with one another as family members. (*Roberts v. United States Jaycees*, *supra*, 468 U.S. at p. 619)

"Freedom of association, in the sense protected by the First Amendment, 'does not extend to joining with others for the purpose of depriving third parties of their lawful rights.'" (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1112, cert. den., 521 U.S. 1121, quoting *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 776.) Expressive associations may be regulated insofar as they engage in criminal activity, so long as the focus of the regulation is not the content of the expression as such; what is constitutionally noxious is targeting conduct "'even arguably 'conditioned upon the sovereign's agreement with what a speaker may intend to say.'" (*See also, R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 390, quoting *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490, 555 (Stevens, J., diss.).) California's anti-gang statutes do "not criminalize

group membership." (*People ex rel. Gallo v. Acuna*, *supra*, 14 Cal.4th at p. 11.) As this Court has written:

> At bottom, protected rights of association in the intimate sense are those existing along a narrow band of affiliations that permit deep and enduring personal bonds to flourish, inculcating and nourishing civilization's fundamental values, against which even the state is powerless to intrude.

(*Id.*, at pp. 11-12.) However, in petitioner's case, there is *no distinction* between the gang association and the familial one. These defendants were linked by the same narrow band of "deep and enduring bonds" that inculcate and nourish civilization's fundamental values to at least the same extent as they were conjoined by their gang membership. The Government's gang case against the defendants was predicated on a theory of association, not instrumentality: it was a gang crime because the relatives were gang members.

In *Acuna*, this Court found the use of the disjunctive "or" relative to the predicate crimes provision of the applicable version of Penal Code section 186.22 signaled a legislative intent to permit alternative modes of meeting the statutory requirement. (*Id.*, at p. 9.) This appears to be the same logic employed by the prosecution in application of the anti-gang provisions, and the theory used by the trial court in permitting those allegations to go forward. However, this interpretation of the statute ignores a fundamental constitutional distinction between commission of an offense at the direction of, or for the benefit of, a gang, and one done simply in association with gang members. Absent any evidence that an offense is gang-related beyond the mere fact that it is committed by gang members, the statute then punishes or aggravates punishment in this case based on the

fact of the blood-related association itself – which runs afoul of the defendant's associational rights.

In *Scales v. United States* (1961) 367 U.S. 203, 228-230, the United States Supreme Court held criminalization of group membership violates First Amendment and due process rights unless there is a statutory requirement the defendant knew of the group's illegal goals and specifically intended to *advance those goals*. In so holding, the Court encapsulated both problem and solution:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

(*Id.*, at p. 224-225.) Likewise, the thing that keeps section 186.22 from constitutional condemnation is that there is a gang-based relationship contemplated between act and actor, that the crime bears some sort of gang signature such that it warrants special punishment as a gang crime. (*People v. Castenada* (2000) 23 Cal.4th 743, 752; *People v. Gardeley* (1996) 14 Cal.4th 605, 623-624, cert. den. 522 U.S. 854.) Similarly, the statute's knowledge plus scienter requirement explains why prior offenses need not be gang-related, while the present offense must be: it is the increased culpability of consciously and actively contributing to the *gang's* criminality that is punishable, not contributing to one's personal or private stock of individual immorality, separate from and, as here, in opposition to, the criminality of the gang. (*Scales v. United States*, *supra*, 367 U.S. at pp. 224-225 ["significantly substantial relationship" required between group

status and "other concededly criminal activity"]; *accord, People v. Zermeno* (1999) 21 Cal.4th 927, 929.)

In order for the gang statute to be applied constitutionally, there must be a substantial nexus between gang membership and the predicate offense. (*C.f., Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 499 ["... perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."].) Given the inherent value of intimate associations, the nexus between *this* family's criminal activity and their gang-status, *i.e.*, whether the crime was gang-related, as opposed to relative-related, must be moreover substantial and *specific*.[2]

In *Acuna*, this Court acknowledged this requirement of a demonstrable nexus by reiterating that the Court's approval of the Street Terrorism Enforcement and Prevention Act [STEP] was conditioned on the statute's requirement that the defendant not just act for the benefit of/direction of/in association with gang members, but also with the specific intent to promote/further/assist in criminal conduct *by gang members*. (*People ex rel. Gallo v. Acuna, supra*, 14 Cal.4th at p. 11.) This makes constitutional sense under *Scales* only if the gang membership is not incidental – *i.e.*, if the gang membership is irrelevant to the offense, then there is no specific intent to further the criminal enterprise *relative to the*

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[2] This argument is distinguished from the Ninth Circuit's analysis in *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103-1104, which held that there needed to be proof the current gang offense was intended to promote some additional gang criminal activity. (*But see, People v. Hill* (2006) 142 Cal.App.4th 770, 774; *People v. Romero* (2006) 140 Cal.App.4th 15, 19-20 [critiquing *Garcia* as a misinterpretation of section 186.22].)

gang. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 624.) As summarized by the Supreme Court in *Scales*, any problem in appending criminal liability to group membership is solved "by the requirement of proof that [the defendant] knew that the organization engages in criminal advocacy, and that *it was his purpose to further that criminal advocacy*." (*Scales v. United States*, *supra*, 367 U.S. at p. 226, fn. 18, emphasis added.)

When the crime is committed outside the context of the gang, it is not done with the intent to further the gang's purpose, and is therefore not a gang crime. When the crime is done inside the context of an intimate association, and is punished *because the fact of the intimate association* is used to transmutate the offense into a gang crime, such punishment violates the First Amendment. (*Healy v. James* (1972) 408 U.S. 169, 185-186 ["the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization."].) As trenchantly put by petitioner's trial court: "Well, if the two brothers happen to be a [sic] member of a gang, they're screwed essentially for life." (RT 3:575)

In *In re Englebrecht* (1998) 67 Cal.App.4th 486, 496, the appellate court upheld that portion of a preliminary injunction prohibiting gang associations within a target area; in so doing, the court dismissed the objection that some of the defendants' and their families also lived within that area. The court noted the defendant's contempt finding was not predicated on his association with relatives, but with gang members; in any event, the court reasoned, "gang activities remain nonintimate activities.... The familial nexus is not carte blanche for creating a public nuisance." (*Ibid.*) Embedded in this analysis is the understanding that gang activities are, as this Court has assumed they are, *gang* activities, not activities

committed by family members who happen to be gang members, activities eschewed by the gang and committed outside the public sphere. These defendants' actions were intimate in every sense of the word, and it appeared from all accounts that they wished to keep them that way. Petitioner was punished for his gang status, not for his gang crime. But status does not and cannot by itself confer criminal liability. (*In re Wing Y.* (1977) 67 Cal.App.3d 69, 79.)

In *Dawson v. Delaware* (1992) 503 U.S. 159, a white man escaped from prison. He killed a white woman and stole her car and some money. The white man was a member of the Aryan Brotherhood; the prosecution wanted to introduce evidence of the man's membership and the gang's purpose/reputation. The defense objected that the evidence was irrelevant and inflammatory, and would violate the defendant's First and Fourteenth Amendment rights. Before the penalty phase, the parties stipulated that the jury be told the Aryan Brotherhood was a racist white prison gang which began in the 1960s in California, and which had chapters in other states, including Delaware. (*Dawson v. Delaware*, *supra*, 503 U.S. at pp. 160-161.) The Supreme Court held this was constitutional error: not only was the stipulation inadequate in terms of connecting the racist beliefs of the California proto-gang to its Delaware branch, the State had not demonstrated the Aryan Brotherhood was relevant to any aggravating or mitigating factor at issue in the penalty phase, nor shown that the gang had committed any illicit or violent acts, or endorsed such conduct. (*Id.*, at p. 165-167.)

Criminal street gangs are bad organizations composed of bad people who do bad things. However, gangs are also composed of family members, who are still family members, who affiliate for mutual support for all sorts

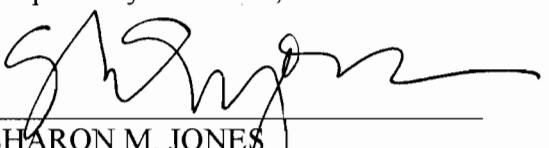
of reasons and in all sorts of events, some of which have absolutely nothing to do with the gang. If petitioner, his brother, and his cousin support each other by going together to visit their aging grandmother, would this then constitute a gang activity? According to the prosecution's expert, the answer would be no, as there is no elevation in gang status/stock by virtue of behaving virtuously. But if the same family members find mutual support in engaging in criminal behavior *that their gang condemns*, how does the fact of their intimate association turn this into a gang activity? This is not what the STEP Act was created to address. (*In re Alberto R.* (1991) 235 Cal.App.3d 1309, 1319.) Review should be granted. (Cal. Rules of Court, rule 8.500.)

CONCLUSION

For the reasons set forth herein, appellant respectfully urges this Court to grant review of the decision of the Court of Appeal.

Dated: June 9, 2008

Respectfully submitted,



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ALEX ADRIAN ALBILLAR

WORD COUNT CERTIFICATE

Counsel for petitioner hereby certifies that this brief contains 6,526 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 June 9, 2008, at Ventura, California.

SHARON M. JONES

Filed 5/5/08

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ALBERT ANDREW ALBILLAR et al., Defendants and Appellants.	2d Crim. No. B194358 (Super. Ct. No. 2005044985) (Santa Barbara County)

A person who joins a criminal street gang, boasts of his membership, and commits crimes with fellow gang members, is in a poor posture to complain about evidence of gang association. A trial is a search for the truth and no defendant has the right to an antiseptic trial where the jury is deprived of a full and relevant evidentiary presentation. (See e.g., *People v Zack* (1986) 184 Cal.App.3d 409, 415). Here the trial court, consistent with both the law and common sense, exercised its discretion and allowed this evidence in a unitary trial. As we shall explain, despite their best efforts to present this as something other than a "gang" rape, appellants have failed to do so.

Albert Andrew Albillar (Albert), Alex Adrian Albillar (Alex), and John Anthony Madrigal appeal from the judgment entered following their conviction by a jury of the forcible rape of Amanda M. while acting in concert (Pen. Code, §§ 261, subd. (a)(2), 264.1),[1] the forcible sexual penetration of Amanda M. while acting in concert (§§ 289, subd. (a)(1), 264.1), and active participation in a criminal street gang. (§ 186.22, subd. (a).) The jury found true enhancement allegations that the rape and

[1] Except as otherwise noted, all statutory references are to the Penal Code.

APPENDIX

sexual penetration offenses had been committed for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b).) In addition, the jury convicted Albert of unlawful sexual intercourse with Carol M. (§ 261.5.) The trial court found true enhancement allegations that Alex had been convicted of a prior serious felony (§ 667, subd. (a)(1)) and had served a prior prison term. (§ 667.5, sub. (b).) As to all of the appellants, the court struck the gang enhancement on the sexual penetration offense. As to Alex, the court struck the prior prison term enhancement. It sentenced appellants to state prison as follows: Albert - 20 years; Alex - 24 years, 4 months; Madrigal - 19 years, 4 months.

Appellants contend that the trial court committed reversible error in failing to dismiss the entire jury venire after it had granted their *Wheeler-Batson* motion. (*People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79, [106 S. Ct. 1712, 90 L.Ed.2d 69] (*Batson*).) Appellants also contend that (1) the trial court erroneously denied their motion to sever the gang charge (§ 186.22, subd. (a)) and bifurcate the gang enhancements (§ 186.22, subd. (b)(1)(C)); (2) the admission of gang evidence violated their right to due process; (3) the evidence is insufficient to support the true findings on the gang enhancements and the convictions on the gang charge; (4) the true findings on the gang enhancements and the convictions on the gang charge violated appellants' First Amendment right of freedom of association; and (5) the trial court erroneously denied appellants' motion for a new trial. We affirm.

Facts

Southside Chiques is a criminal street gang based in the Oxnard area. It has more than 150 members. Appellants, who resided in Thousand Oaks, are active members of the gang. Albert and Alex are twin brothers. Madrigal is their cousin.

Amanda M. was 15 years old, and appellants were aware of her age. She knew that appellants were members of Southside Chiques. In her presence, Albert had flashed a gang sign and had said the name of his gang. He had shown her his gang

tattoos. She had also seen gang tattoos on Madrigal's body. Alex told her that he had been "jumped" into Southside Chiques.

Amanda M. knew appellants' gang monikers. Albert's moniker was "Sneaky," Madrigal's was "Spanky," and Alex's was "Monstro." In Spanish, "monstro" means monster.

On December 29, 2004, appellants, Amanda M., Carol M., and another girl, Adriana, went to appellants' apartment. Carol M. was 14 years old. Inside a bedroom, Albert and Carol M. engaged in an act of sexual intercourse. Thereafter, Carol M. became upset and asked to be driven home.

Appellants agreed to drive all of the girls home. After dropping off Carol M. and Adriana, appellants returned with Amanda M. to their apartment because one of the appellants said that he wanted to use the bathroom.

Amanda M. and Albert walked into a bedroom. After closing the bedroom door, Albert pulled Amanda M. down onto the bed and started kissing her. He removed her pants, but not her underwear. Amanda M. was "okay with that."

Alex and Madrigal opened the bedroom door. One of them said, "Can we get in?" Amanda M. "yelled 'No' and 'Get out.' " Alex and Madrigal entered the bedroom, where Amanda M. was lying on her back on the bed. Madrigal grabbed one of Amanda M.'s legs, and Albert grabbed the other leg. Alex got on top of her, held her hands above her head, "pulled [her] underwear aside and put his finger inside [her] vagina." Amanda told Alex to "get off of [her] and stop." She tried to close her legs, but was unable to do so because Madrigal and Albert were holding them open. Amanda was scared.

Alex put his penis inside Amanda M.'s vagina and had sexual intercourse with her. When he was through, he got off of Amanda M. and Madrigal got on top of her. Amanda M. slapped Madrigal. He said, "You don't even know what you just did." Madrigal then bit Amanda M. on her thigh and shoulder. He put his fingers inside her vagina and tried to kiss her on the mouth. Amanda M. moved her head from side to side to prevent him from kissing her. Madrigal put his penis inside Amanda M.'s

vagina. At this point, Alex and Albert were standing in the doorway of the room, "[w]atching and giggling." Amanda M. could hear them laughing.

Madrigal got off of Amanda M. and left the bedroom. Amanda M. tried to get up from the bed, but Albert pushed her back down. Albert got on top of Amanda M. He put his fingers and then his penis inside her vagina. Amanda M. "was tired of fighting it, so [she] just laid back, and [she] just went to another state of mind pretty much." Albert removed his penis from Amanda M.'s vagina and ejaculated on her stomach. He then left the room.

Amanda M. got up from the bed, cleaned herself, and put on her clothes. Appellants drove her home. She walked to a park and cried. She stayed there for several hours and then returned to her home. She did not tell anyone what had happened. However, the next day she told Carol M., and the day after that she told another friend, Susy C.

About a week later, Jazmin S. telephoned Amanda M. and told her that, if she reported the crimes to the police, she and her family could be hurt. Jazmin S.'s boyfriend was a member of Southside Chiques. Amanda M. got scared and told her parents what had happened. Her father reported the incident to the police.

The following day a police sergeant interviewed Amanda M. She told him that, after the incident, "she did not want to tell anyone because she feared that since [appellants] were gang members they will come after her family." She said that appellants "are aware that she told Carol [M.] and that they were going to have someone come over to her house and hurt her."

Detective Neail Holland, an expert on criminal street gangs in Oxnard, opined that appellants' rape of Amanda M. was committed for the benefit of and in association with Southside Chiques. A gang member would lose status by "not supporting other gang members when they're out committing crimes . . . ." But he also opined that rape is "frowned upon in Hispanic gang culture." If a gang member were convicted of rape, he would "lose status within the gang."

Wheeler-Batson Motion

" '[Under *Wheeler,*] [a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias - that is, bias against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds" - violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. [Citations.][2] [Under *Batson,*] [s]uch a practice also violates the defendant's right to equal protection under the Fourteenth Amendment. [Citations.]' " (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1104.)

Here the trial court granted appellants' *Wheeler-Batson* motion because of the prosecutor's allegedly race-based exercise of a peremptory challenge against a juror of Hispanic descent. As a remedy for the prosecutor's improper peremptory challenge, the trial court reseated the juror. Appellants contend that the trial court committed reversible error in failing to dismiss the entire jury venire.

In *Wheeler* our Supreme Court concluded "that dismissal of the remaining jury venire was the sole remedy for an exercise of peremptory challenges based on group bias." (*People v. Willis* (2002) 27 Cal.4th 811, 818.) But our Supreme Court now permits trial courts to invoke alternative remedies, such as reseating the improperly challenged juror, if the complaining party consents or waives the remedy of dismissal of the jury venire. (***Id.***, at p. 821.) "[T]rial courts lack discretion to impose alternative procedures in the absence of consent or waiver by the complaining party. On the other hand, if the complaining party does effectively waive its right to mistrial, preferring to take its chances with the remaining venire, ordinarily the court should honor that waiver rather than dismiss the venire and subject the parties to additional delay." (***Id.***, at pp. 823-824.)

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Appellants never requested the dismissal of the jury venire, and they did not object to the reseating of the improperly challenged juror. By their silence, appellants impliedly consented to the reseating of the juror as an alternative remedy for the *Wheeler-Batson* violation. (*People v. Overby* (2004) 124 Cal.App.4th 1237.)[3] A contrary rule permitting a defendant to complain for the first time on appeal, i.e., without having objected or moved to dismiss the jury venire, "would deprive the People [and the trial court] of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal.' [Citations.]" (*People v. Rogers* (1978) 21 Cal.3d 542, 548.)

Motion to Sever the Gang Charge and Bifurcate the Gang Enhancements

Appellants claim that the trial court erred in denying their motion to sever the gang charge (§ 186.22, subd. (a)) and bifurcate the gang enhancements (§ 186.22, subd. (b)(1)(C)). We review the denial of the motion for abuse of discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 [bifurcation of enhancement]; *People v. Marshall* (1997) 15 Cal.4th 1, 27 [severance of charges].) "An abuse of discretion may be found when the trial court's ruling ' "falls outside the bounds of reason." ' [Citation.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

"Severance of charged offenses is a more inefficient use of judicial resources than bifurcation because severance requires selection of separate juries, and the

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[3] "Although [appellants'] implied consent to the alternate remedy may be discerned from the record in the present case, we emphasize that it would be preferable and advisable for the trial court to ensure that the record reflects the express consent of the prevailing party whenever an alternate remedy . . . is employed. An express consent ensures both that the aggrieved party has received a remedy the party deems appropriate to redress the constitutional violation found by the court and that the record will reflect the party's assent should the question arise on appeal. The time required to obtain from the prevailing party's counsel a brief but explicit waiver of the dismissal of the entire venire and consent to the remedy selected is minimal, particularly in light of the requirement of a retrial if consent or waiver is not expressly secured and cannot be inferred from the record." (*People v. Overby, supra,* 124 Cal.App.4th at pp. 1245-1246.)

severed charges would always have to be tried separately; a bifurcated trial is held before the same jury, and the gang enhancement would have to be tried only if the jury found the defendant guilty." (*People v. Hernandez, supra,* 33 Cal.4th at p. 1050.)

" '[T]he propriety of a ruling on a motion to sever counts is judged by the information available to the court at the time the motion is heard.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) Therefore, "[w]e examine the record before the trial court at the time of its ruling to determine whether the court abused its discretion in denying the severance motion. [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 110-111, fn. omitted.)

Alex filed a written motion to sever the gang charge, arguing that gang evidence would be highly inflammatory and irrelevant to the other charges. Such evidence, he maintained, is "merely a red herring offered by the prosecution to cast the defendants in . . . as negative [a] light as possible." Its admission would "lead the jury to conclude that defendant is a dangerous person and more likely to commit a rape, especially a rape in concert." The other appellants joined in Alex's motion.

At the hearing on the motion to sever, the prosecutor argued that gang evidence would be admissible to show why Amanda M. had waited a week to report the crimes to the police and "why she [had reported the crimes] when she did." The prosecutor said that Amanda M. would testify that, prior to the incident, appellants had "admitted their gang membership to her" and that she had been "aware of their gang tattoos" and "their gang monikers." The prosecutor also pointed out that, if the motion were granted, "[w]e would essentially have two jury trials . . . ." "[Amanda M.] will essentially have to testify twice, and every witness involved in that will have to testify twice."

In denying the motion to sever, the trial court observed that the gang charge and enhancements would be no more prejudicial than the rape in concert charge. The court stated: "I don't see how it's going to benefit anyone by severing this except to try this case twice, and that means putting the witnesses and the victims . . . on the stand twice to talk about the same thing."

" ' "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." [Citation.]' " (*People v. Bradford, supra,* 15 Cal.4th at p. 1315.) "No abuse of discretion in denying severance will be found absent that showing in the trial court." (*People v. Bean* (1988) 46 Cal.3d 919, 939, fn. 8.) " ' "The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial." [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]' [Citations.] [¶] Furthermore, . . . the criteria . . . are not equally significant. '[T]he first step in assessing whether a combined trial [would have been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. If so, any inference of prejudice is dispelled.' [Citations.] Cross-admissibility suffices to negate prejudice, but it is not essential for that purpose." (*People v. Bradford, supra,* 15 Cal.4th at pp. 1315-1316.) "[C]omplete cross-admissibility is not necessary to justify joinder. [Citation.] The state's interest in joinder gives the court broader discretion in ruling on a motion for severance than it has in ruling on admissibility of evidence. [Citation.]" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1284.)

Based on the record before the trial court at the time of its ruling, it could have reasonably concluded that gang evidence would be admissible at a separate trial on the rape and sexual penetration charges to explain why Amanda M. had delayed reporting the crimes to the police. It was reasonable to infer that, because Amanda M. knew that appellants were gang members, she had feared retaliation. (See *People v. Martinez*

(2008) 158 Cal.App.4th 1324, 1333 [witnesses' failure to remember their previous identification of gang member as perpetrator of crime "raises a reasonable inference they were too afraid to do so at trial based on defendant's gang status . . . ."].) The reasonableness of this inference was confirmed by evidence presented at the trial. A police sergeant testified that Amanda M. had told him that, because she knew appellants were gang members, she feared that they would harm her or her famly if she reported the incident.

The court could also have reasonably concluded that gang evidence would be admissible at a separate trial on the rape and sexual penetration charges to prove the acting-in-concert allegations. Likewise, the court could have reasonably concluded that evidence of the rape and sexual penetration of Amanda M. by gang members would be admissible in a separate trial on the gang charge. One of the elements of the gang charge is that the defendant "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . ." (§ 186.22, subd. (a).) Because evidence of the crimes would be cross-admissible in separate trials, " 'any inference of prejudice is dispelled.' " (*People v. Bradford, supra,* 15 Cal.4th at p. 1316.)

Even if appellants had demonstrated in the trial court that evidence of the crimes would not be cross-admissible, they still failed to establish that one charge was significantly more likely to inflame the jury than the other charge. Nor did they show that evidence of guilt on one charge was significantly stronger than on the other charge, "creating the danger that [the stronger] case would be used to bolster the weaker case . . . ." (*People v. Bradford, supra,* 15 Cal.4th at p. 1318; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1155-1156; *People v. Mayfield* (1997) 14 Cal.4th 668, 721 [in addition to showing absence of cross-admissibility of evidence, to establish prejudice defendant "must show also, for example, that evidence of guilt was significantly weaker as to one group of offenses, or that one group of offenses was significantly more inflammatory than the other"].)

"The benefits to the state of joinder, on the other hand, were significant. Foremost among these benefits is the conservation of judicial resources and public funds. A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process. These considerations outweigh the minimal likelihood of prejudice through joinder of the charges in this case." (*People v. Bean, supra,* 46 Cal.3d at pp. 939-940.)[4]

The trial court, therefore, did not abuse its discretion in denying the motion to sever the gang charge. Since gang evidence would be admissible to prove that charge, it follows that the trial court also did not abuse its discretion in denying the motion to bifurcate the gang enhancements. "Virtually all of the gang evidence which would be admissible on the gang enhancements would also be admissible on the street terrorism [gang] charge. Thus the jury would hear the evidence during trial of the substantive gang offense." (*People v. Burnell* (2005) 132 Cal.App.4th 938, 948.)

But this does not end the matter. "Even if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process.' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.) Appellants have failed to carry this burden. The jury was instructed pursuant to CALCRIM No. 1403, which limited the purpose of the gang evidence. We presume that the jury followed this instruction. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

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[4] Appellants argue that, if the trial court had severed the gang charge, that charge could have been tried before the same jury after it had rendered a verdict on the other charges. This procedure allegedly would have conserved resources by avoiding the selection of a new jury. But appellants cite no authority allowing separate trials on severed counts before the same jury. In *People v. Hernandez, supra,* 33 Cal.4th at p. 1050, our Supreme Court stated that "severance requires selection of separate juries."

Receipt of Gang Evidence Did Not Violate Due Process

We reject Albert's contention that the admission of gang evidence violated his right to due process because "there was no point on which [his] gang status was relevant to his underlying offense." As discussed in the preceding section, gang evidence was relevant to explain why Amanda M. had delayed reporting the crimes to the police and to prove the acting-in-concert allegations. In any event, gang evidence was properly admissible to prove the gang charge and enhancements.

Substantial evidence also supports the jury's determination that the crimes were committed with the specific intent to promote, further, or assist in criminal conduct by gang members. "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. [Citation.]" (*People v. Villalabos, supra,* 145 Cal.App.4th at p. 322; see also *People v. Morales, supra,* 112 Cal.App.4th at p. 1198-1199 ["defendant's intentional acts, when combined with his knowledge that those acts would assist crimes by fellow gang members, afforded sufficient evidence of the requisite specific intent"].)

Sufficiency of the Evidence, Section 186.22 (b)(1)

Section 186.22, subdivision (b)(1), provides an enhanced sentence for "any person who is convicted of a felony 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 . . . ." Appellants contend that the evidence is insufficient to show (1) that they committed the rape and sexual penetration offenses for the benefit of or in association with Southside Chiques, and (2) that they had the requisite specific intent.

" ' " 'When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence-i.e., evidence that is credible and of solid value-from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." ' [Citations.]' [Citation.]. We resolve all conflicts in favor of the

judgment and indulge all reasonable inferences from the evidence in support of the judgment. [Citation.] This standard applies to . . . gang enhancement findings [citation]." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.) "In order to prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs. [Citation.]" (*People v. Hernandez, supra,* 33 Cal.4th at p. 1047.)

Substantial evidence supports the jury's determination that the crimes were committed for the benefit of or in association with Southside Chiques. This was a question of fact for the trier of fact. Detective Holland explained: "When three gang members go out and commit a violent brutal attack on a victim, that's elevating their individual status [within the gang], and they're receiving a benefit. They're putting notches in their reputation. When these members are doing that, the overall entity [the gang] benefits and strengthens as a result of it." "[O]ne of the most important [reasons] why gang members commit crimes together is the value of one gang member witnessing another gang member committing the crime because that gang member can share it with others or keep it within the group and bolster this person's status by their level of participation in the crime . . . ." "More than likely this crime is reported as not three individual named Defendants [committed] a rape, but members of SouthSide Chiques [committed] a rape, and that goes out in the community by way of mainstream media or by way of word of mouth. That is elevating SouthSide Chiques' reputation to be a violent, aggressive gang that stops at nothing and does not care for anyone's humanity." Simply put, the jury credited this testimony.

Sufficiency Of The Evidence, Section 186.22(a)

Section 186.22, subdivision (a), provides: "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," is guilty of an offense punishable as either a felony or a misdemeanor. "The provision 'punishes active gang participation where the defendant promotes or assists felonious

conduct by the gang. It is a substantive offense whose gravamen is the participation in the gang itself. [Citation.]' Thus, it 'applies to the perpetrator of felonious gang-related criminal conduct . . . .' [Citation.]" *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.)

Appellants contend that the evidence is insufficient to show that they engaged in gang-related criminal conduct. However, as discussed above, substantial evidence shows that their conduct was gang related.

No Violation of First Amendment Right of Freedom of Association

Albert contends that the true findings on the gang enhancements and his conviction on the gang charge violated his First Amendment right of freedom of association. Albert argues that he, "his brother [Alex], and his cousin [Madrigal] have a First Amendment right to associate with one another as family members." "In this case, gang membership is indivisible from family membership . . . ." "There was no gang crime here. There was a family crime. To further punish or exacerbate appellant's punishment because of his family ties violates his fundamental right of intimate association."

Albert concedes that he failed to raise the First Amendment issue in the trial court. His constitutional claim, therefore, is waived. (*People v. Waidla* (2000) 22 Cal.4th 690, 718, fn. 4; *People v. Carpenter* (1997) 15 Cal.4th 312, 362.) In any event, the claim lacks merit. Appellants were not prosecuted for associating with family members. Familial relationship is not a defense to a gang charge or gang enhancement. Engaging in criminal gang activities does not fall within the freedom of association protected by the First Amendment. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1110-1112.) In our view, the precision in which this forcible rape "in concert" was accomplished shows criminal street gang teamwork, not simple familial teamwork. The inference that it has something to do with a criminal street gang, as opposed to a simple family relationship, is strong, if not compelling.

The Trial Court Did Not Err In Denying Appellants' Motion for a New Trial

In their written motion for a new trial, appellants contended that the evidence was insufficient to support the gang enhancements and the gang convictions and that the gang evidence prejudiced the jury against them.

In denying the motion for a new trial, the court concluded that the probative value of the gang evidence outweighed its prejudicial impact. The court also considered that the jury had been instructed on the limited purpose of the gang evidence. It "presume[d] that they [had] followed the Court's instructions."

" ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1210.) The trial court did not abuse its discretion.

Disposition

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Edward F. Brodie, Judge

Superior Court County of Ventura

Vanessa Place, under appointment by the Court of Appeal, for Albert A. Albillar, Appellant.

Sharon Jones, under appointment by the Court of Appeal, for Alex Adrian Albillar, Appellant.

Conrad Peterman, under appointment by the Court of Appeal, for John Madrigal, Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael C. Keller, Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF VENTURA

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 PETITION FOR REVIEW on the following by placing the same in an envelope addressed as follows:

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The Honorable Edward F. Brodie, Judge
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Each said envelope was then, on June 9, 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 June 9, 2008, at Ventura, California.

SHARON M. JONES