B

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent. vs. ALBERT ANDREW ALBILLAR ET AL., Defendants and Appellants.	No. S163905 (Related Cases: Second Appellate District, Division Six, No. B194358; Ventura County Superior Court No. 2005044985)

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

Honorable Edward F. Brodie, Judge

APPELLANT'S OPENING BRIEF

CONRAD PETERMANN
State Bar Number 51907
Suite 110, PMB 142
323 East Matilija Street
Ojai, CA 93023
Firm@Cpetermann.com

Attorney for Appellant
John Madrigal

TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Constitution

Federal

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ALBERT ANDREW ALBILLAR ET AL., Defendants and Appellants.	No. S163905 (Related Cases: Second Appellate District, Division Six, No. B194358; Ventura County Superior Court No. 2005044985)

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

Honorable Edward F. Brodie, Judge

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment following a trial and is authorized by Penal Code section 1237.

CERTIFICATE OF WORD COUNT

The brief is proportionately spaced with Times Roman typeface, point size of 13, and the total word Count is 7,877, not including tables, and thus is not within the limits (25,500 words) of California Rules of Court, rule 8.360, subdivision (b).

INTRODUCTION

The State's case for rape had several vulnerabilities—the victim's friends said she had a reputation for being untruthful, she was promiscuous, she gave varying accounts of the incident, and was late in reporting the charges. The

prosecutor apparently attempted to overcome these problems by purging the venire of Hispanics and dominating its case with evidence that appellants were gang members in a gang, a gang with affiliations with the Mexican Mafia, despite the fact that either association had no relevancy to the charges.

ISSUE ON REVIEW

Does substantial evidence support defendants' convictions under Penal Code, section 186.22, subdivision (a) and the true findings with respect to the enhancement under Penal Code, section 196.22, subdivision (b)?

STATEMENT OF THE CASE

On October 7, 2005, Appellant John A. Madrigal and Co-appellants Albert and Alex Albillar were charged by information with the following criminal violations:

> Count One: Rape while acting in concert (Pen. Code,[1] § 264.1);
>
> Count Two: Rape by foreign object while acting in concert (§ 264.1); and
>
> Count Three: Street terrorism (§ 186.22, subd. (a)).[2]

It was alleged that counts one and two were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b). (CTA[3] 25-29.)

---

1 All further statutory references are to this code unless otherwise indicated.

2 A fourth count charged Co-appellant Alex Albillar with unlawful sexual intercourse with a minor (§ 261.5, subd. (c).)

3 The record on appeal consists of two sets of Clerk's Transcripts, each containing two volumes. The set containing 351 pages and beginning with the complaint filed December 19, 2005 will be cited as CTA. The set containing 449 pages and beginning with a motion for new trial filed September 7, 2006 will be cited as CTB.

Appellant pled not guilty and denied the allegations. (CTA 30-32.)

Appellants' trial commenced on May 1, 2006, and after jury selection, was heard over the course of seven days. (CTA 90-135, 2CTA 179-181.) The jury deliberated over a portion of two days and found appellants guilty as charged and the gang allegations true. (2CTA 179-193.)

On September 29, 2006, Appellant Madrigal's motion for new trial was denied and he was sentenced to state prison for 19 years and 4 months calculated as follows:

> Count One: 7 years, the middle term for rape while acting in concert (§ 264.1);
>
> Count Two: 2 years and 4 months, one-third the middle term for rape by foreign object while acting in concert (§ 264.1); and
>
> 10 years for the street terrorism allegation of section 186.22, subdivision (b).[4]

Appellant was ordered to pay a restitution fine of $5,000 pursuant to section 1202.4, and an additional $5,000 that was suspended pursuant to section 1202.45. He was ordered to pay restitution to the parents of the victims in an amount further to be determined by the court and a fine of $200 pursuant to section 290.3. Appellant was granted total custody credits of 721 days. (2CTA 224-230, 4RT 1072-1074.)

Appellant timely filed his notice of appeal, and on May 5, 2008, his convictions were affirmed by the Second Appellate District, Division Six, in *People v. Madrigal, et al,* B194358. (2CTA 231-232.)

The record also includes Augmented Clerk's Transcript and Second Augmented Clerk's Transcript. These will be cited as Aug. CT and 2dAug. CT, respectively.

[4] The court struck the gang enhancement allegation accompanying Count Two and imposed a concurrent term of two years for Count Three. (2CTA 224-230, 4RT 1072-1074)

STATEMENT OF THE FACTS

PROSECUTION'S CASE

Amanda M. was 15 years old on December 29, 2004. (RT 121, 392.) Coappellants Albert and Alex Albillar are twins; she met the former in September 2004 and the latter and Appellant Madrigal in November 2004.[5] (RT 122-124, 139-140, 185-186, 205-206.) The twins were 20 years old at the time of the incident and Appellant Madrigal was 24. (2RT 392-393.) Amanda testified that appellants knew she was only 15 years old (RT 125-127), and she knew they were members of a gang (RT 127-129, 131-132.)

She and one of her best friends, Carol M., who was 14 years old at the time, were frequent guests at the small one-bedroom apartment that appellants shared with Albert and Alex's mother on Warwick Street in Thousand Oaks. (RT 123, 137, 140, 186, 188, 194-195, 199-200, 204-205, 298, 2RT 503, 506-507, 517, 544) Amanda was romantically attracted to both Albert and Appellant Madrigal (2RT 366, 3RT 521, 535-536), even though she knew that Carol and Albert were romantically attracted to each other (RT 191, 197, 201, 204, 3RT 518, 520.) Amanda and Albert had each other's telephone number and spoke together by phone. (RT 202.)

On December 29, 2004, Albert called Amanda and asked her to hang out with him, Carol, and Appellant Madrigal. (RT 133, 135-136, 203.) Amanda lived with her mother, two sisters, and brother. (RT 173.) Amanda agreed and lied to her mother that she was going to spend the night at Carol's, which would enable her to stay out later than the 10:00 p.m. curfew that her mother imposed. (RT 210, 2RT 297-298, 309-310, 384-385.)

Albert and Appellant Madrigal picked her up at around 6:00 p.m. (RT 136, 207, 209-211.) Amanda and her family also lived in Thousand Oaks. (RT 145.) They rendezvoused with Carol at a liquor store so that Carol's mother would not

---

[5] Appellant Madrigal is a cousin of the twins. (Appellant Madrigal's Probation Report, p. 6.)

see Amanda, because she did not want Carol hanging out with her. (RT 136, 208, 3RT 517.) Then they picked up Alex and drove to the home of 16 year old Adriana in Newbury Park. (RT 137, 204-205, 208.) They stayed there less than an hour. (RT 137-138, 209.)

At some point, when Amanda was alone with appellants, Albert said, "Let's have a foursome." (RT 138, 222-223.) Amanda said no, and laughed it off, taking it as a joke. (RT 138, 223.) The six youths then went to a liquor store and appellants bought beer. (RT 139.) Thereafter they drove to appellants' apartment. (RT 139, 3RT 506.) While in the car, Amanda and Appellant Madrigal kissed. (RT 142.)

When they arrived, Albert and Alex's mother was there, but she left in a few minutes. (RT 139-140, 216.) They watched television in the living room. (RT 142, 231-232.) Alex took a shower. (RT 142-143.) In 15 or 20 minutes, Albert and Carol went in the bedroom where they stayed for about 15 minutes.[6] (RT 142-144, 213-214, 217, 3RT 508, 534-538.) Amanda sat on Appellant Madrigal's lap and they kissed; she was okay with that. (RT 142-143, 216.) As Carol described it, Amanda was "all over" Appellant Madrigal. (3RT 520-521, 534.)

Amanda testified that when Carol finally came out of the bedroom, Carol was upset and crying. (RT 143-144, 217.) The three girls went into the hallway to the apartment and talked for a couple of minutes. (2RT 303.) Carol said she wanted to go home. (RT 143.) Amanda asked her what happened, and Carol told her nothing happened. (RT 218.) Carol denied this account. (3RT 525, 541-543.) It was decided that they all were going to go home. (RT 144.) All six got in the car and they took Carol home. (RT 144.) The girls sat in the back with Appellant Madrigal (RT 224-225) and Alex drove (RT 228.)

---

6 Albert and Carol engaged in intimate sexual activity in the bedroom that is the subject of Count Four. It is not relevant to Appellant Madrigal's appeal, and thus is not detailed here.

Carol lived closest to the boys. Amanda lived the next to the closest and 10 minutes from Carol. (RT 145, 226.) Then they took Adriana home in Newbury Park. (RT 145, 226.) Thereafter they drove in the direction of Amanda's home. (RT 145.) She asked Albert what had upset Carol. (RT 227.) He said he did not know. (RT 227-228.) Amanda and Appellant Madrigal kissed in the back seat. (RT 148, 229.) There next stop was Albert and Alex's apartment so that one of the boys could use the bathroom. (RT 146.)

Amanda testified that at Albert's request, she called Carol and learned from her that Albert had raped her in the bedroom. (RT 146-147, 233-237 2RT 343, 375, 3RT 527.) Amanda told Albert what Carol had said. (RT 238.) Albert said that was a lie and told her his side of the story. (RT 238-239.)

Once they all were in appellants' apartment, Amanda went out onto the patio. (RT 146, 148, 232.) Albert came out and suggested that they go into the bedroom to talk about what had happened with Carol earlier. She agreed. (RT 148-149.)

Albert closed the door behind them. (RT 149.) They sat together on the foot of the bed. (RT 149-150, 239.) They talked for five or ten minutes about the intimate acts Albert and Carol had participated in earlier in the bedroom. (RT 150-151, 240.) Amanda was wearing a hair tie that she took off as they were talking and loosened her hair. (RT 152, 242-243.) Albert touched her hair, pulled it back, and she lay on her back. (RT 152-153.) He was on the side and kind of on top of her. (RT 153, 258.) He kissed her and she was okay with that. (RT 153, 245-246.) He removed her jeans with her help. (RT 152-153, 246-247, 2RT 253.) She was wearing underwear, but he never removed them. (RT 153.)

At this point, Alex and Appellant Madrigal opened the door and asked if they could get in. (RT 154, 259.) She testified that Appellant Madrigal was wearing his boxers. (2RT 263-264.) She yelled a couple of time, "No" and "Get out." (RT 155, 2RT 259-260, 263-264.) They came in. (RT 155. Albert got off her. (RT 155, 2RT 260-261.) Appellant Madrigal grabbed one of her legs and

Albert the other. (RT 155, 157, 2RT 261-262.) Alex got on top of her, pulled her underwear aside and put his finger insider her vagina. (RT 155, 2RT 262, 265, 268.) She screamed more than once, "No." "Get off me." (2RT 268-269.) At that point, she did not want anything to happen with any of them. (RT 155-156.)

Alex held her hands above her head with his forearm. (RT 156.) Alex put his penis in her vagina. (RT 158.) At some point he removed his penis and got off of her. (RT 158-159.) There was no indication that he had ejaculated. (RT 159, 2RT 269-270.) Appellant Madrigal then got on her. (RT 159.) She slapped him on his upper body. (RT 161, 2RT 271-272.) She testified that he said, "You don't even know what you just did." (RT 162-163.) He bit her on her thighs and shoulder, but did not break the skin. (RT 162-165, 2RT 272-274, People's exh. 1.) He stuck his fingers in her vagina and tried to kiss her on the mouth, but she moved her head from side to side. (RT 165.) He stuck his penis in her vagina. (RT 166.) Alex and Albert were standing in the doorway watching and giggling. (RT 166, 2RT 272, 274.) At some point, he got off of her. She did not believe he ejaculated. (RT 166, 2RT 274.)

She tried to get up, but Albert pushed her back down roughly and got on top of her. (RT 167-168, 2RT 276-277.) He stuck his fingers in her vagina. (RT 168.) When he removed his fingers, he put his penis insider of her. (RT 168.) She just gave up. (RT 168.) When he removed his penis, he ejaculated on her stomach. (RT 169.) Some of it got on her panties. (2RT 301-302.) Then he left the room. (RT 169.)

She dressed and walked out onto the patio. (RT 170, 283.) She smoked a cigarette. (RT 170, 283.) She did not scream or holler that she had been raped. (RT 284.) At some point, Alex came out. (RT 170.) He tried to grab her breasts. (RT 170-171, 284.) Albert came out and said, "let's take her home." (RT 170.) They left right away. (RT 171.) None of them threatened her. (2RT 284-285.) None of the boys said anything or made any action that she took as a reference to a gang. (2RT 270-271, 279, 302-303, 357.)

They dropped her off in the parking lot in front of her apartment complex. (RT 171-172, 2RT 286.) She walked to the park up the street where she stayed for a couple of hours, cried, and thought about what had happened. (RT 172-173, 2RT 286-287, 356-357.)

Then she went home. (RT 173.) It was about 3:30 a.m. (2RT 287.) The first person she saw was her brother. (RT 173, 2RT 304-305.) She went into her mother's room to tell her that she was home. (RT 173.) She did not tell either of them what happened. (RT 173-174, 2RT 289, 355.) She called Carol that night, but did not tell her what happened (RT 174, 2RT 282, 288, 307-308, 3RT 528), nor her other girl friends (RT 123, 2RT 292, 308.)

The next day, the first person she told was her younger sister, Alexandria. (RT 174, 2RT 291-292, 2RT 443-445, 447, 449, 459-461.) Amanda testified that her vagina was sore, her leg muscles ached, and there was bruising. (RT 174 2RT 349-350.) She showed her mother the bruises and told her mother that she bumped into something. (RT 174-175.) She did not tell her mom what happened or call the police. (RT 175.)

That same day, Amanda spoke with Carol and began the conversation with, "What would you do if I told you I got gang raped?" (3RT 528, 545-546, 548-549, 564.) Carol testified that Amanda confided in her that she had sex with Alex and Appellant Madrigal the night before. (3RT 529, 546.) It was consensual sex. (3RT 565-566.) Carol characterized this as bragging, a characteristic she attributed to Amanda. (3RT 544.) Amanda did not tell her that she had sex with Albert. (3RT 529.) Amanda did not mention rape or the use of force. (3RT 529.) Amanda told her that Albert wanted to kiss her (Amanda.) (3RT 529.) She told Carol that she would not kiss him because she knew that Carol liked him. (3RT 529-530.)

On New Years Eve, Amanda had plans to go to a party with Carol in Oxnard. (RT 175.) She went to Carol's house and Carol's friend Susie was there. (RT 176.) Amanda testified that she told Carol and Susie what had happened.

(RT 176.) She still had not told her mother. (2RT 291.) At the party in Oxnard, Amanda testified that she saw Appellant Madrigal who said hi and gave her a hug. (RT 177, 2RT 292.) She denied that she sat on his lap and kissed him. (2RT 292-293.) Carol's account differed. Carol testified that Amanda greeted him, gave him a hug, and told him to sit next to her, which he did. (3RT 538-540.) Carol testified that she saw them hugging and kissing. (3RT 531, 540.) Amanda sat next to him and was kind of sleeping on his shoulder. (3RT 530, 552-554.) Amanda stayed with him until four or five in the morning. (3RT 530-531.)

At some point, Amanda learned that appellants were aware of her allegations. (RT 178.) On January 4, 2005, she received a telephone call from Jazmin Sarabia, whose boyfriend was Mario Lerma, a member of the SouthSide Chiques gang and a friend of appellants. Jazmin threatened her that if she was going to report this crime, she and her family could be hurt. (RT 178-179, 181.)

So Amanda told her brother, and then when her mother came home, she told her. (RT 180-181, 2RT 293.) Her mother called Amanda's father. (RT 181.) Amanda's parents were divorced and her father was not living with them. (RT 203, 2RT 306.) He intervened and she was ultimately interviewed by officers in a bedroom in her father's home. (RT 181-182, 2RT 294, 311.)

During the interview, she falsely told her interviewers that she was not okay with Albert's sexual advances. (RT 182-183.) She falsely said that when Albert began pulling her hair and kissing her she thought it was disgusting and was resisting. (2RT 255-256, 294, 434-435.) She gave the panties she had been wearing to the officers; they had not been washed. (2RT 280.) The officer that received them did not recall seeing any fluids on them. (2RT 418.)

A nurse and expert on sexual assault testified that only 25 percent of sexual assault victims have any injuries at all and most of them are superficial. (3RT 477.) When a woman's legs are held apart for any length of time it will cause soreness of the muscles in the groin area. (3RT 479.)

A search warrant executed on appellants' apartment produced indicia that one or more of the occupants had been interested in or associated with a gang. (3RT 566-584.) An expert on Hispanic criminal street gangs testified that one of the fifteen gangs in Oxnard was the SouthSide Chiques and in his opinion appellants were members and that the offenses were committed to promote or were in association with that gang. (3RT 600-699.)

DEFENSE'S CASE

Susy Cortez, a friend of Carol, testified that Amanda told her before leaving from Carol's for the New Year's Eve party, that she had consensual sex with Albert and Alex, and felt bad about the act with Albert because she knew that Carol liked Albert. (4RT 739-740, 750-751.)

Amanda's sister's friend, Camerina Lopez, testified that Amanda said all three guys dragged her in a room and raped her. (4RT 753-754.)

Amanda's former friend, Jazmin Sarabia, testified that Amanda telephoned her on December 30, 2004 and bragged to her that she engaged in sexual intercourse with Alex and Appellant Madrigal and wanted to do it again. (4RT 763-764, 778-781.) Amanda told her that after the sexual act with Appellant Madrigal, Albert came in the room, so she walked out and into the living room. (4RT 763.) Alex was there and they were watching a movie. (4RT 763.) Then they engaged in sexual intercourse. (4RT 763.) She did not do anything with Albert. (4RT 763.) Jazmin denied that she had threatened Amanda. (4RT 775-777, 780, 787.)

In the opinions of Carol and Camerina Lopez and Jazmin Sarabia, Amanda is really dishonest and lies about the littlest things. (3RT 557-558, 4RT 754, 765-766.) Jazmin testified that Amanda had admitted to her that she had falsely accused Jazmin's mother's ex-boyfriend of sexual assault. (4RT 764-765, 783-784.)

Sergeant Fleming interviewed Amanda at her father's apartment on January 5, 2005.[7] (4RT 827.) Amanda told him that when Albert began kissing her she thought it was disgusting because he had told her that he had earlier orally copulated Carol. (4RT 830.) As Albert removed her pants, she told Sergeant Fleming that she was resisting and hit Albert in the head with her fist. (4RT 830.) Later in the interview, she told him that she was kind of okay with Albert removing her pants. (4RT 833-834.)

PROSECUTION'S REBUTTAL

Amanda's mother, Karen Morales, testified that the day after the charged offenses, she noticed that Amanda was having trouble walking. (4RT 793.) Amanda told her that she was sore because she and Carol had been punching each other and biting each other. (4RT 793.) A week passed before Amanda told her what happened. (4RT 793-794.) Amanda told her that she had received threats from Jazmin and Carol. (4RT 795.) Amanda went to live with her father for the safety of the family. (4RT 795.)

Ms. Morales testified that Jazmin and Carol had left threatening messages on her voice mail. (4RT 795-799.)

ARGUMENT

THERE WAS NO EVIDENCE THAT THE TWO CHARGED SEX OFFENSES WERE COMMITTED WITHIN THE MEANING OF EITHER SECTION 186.22, SUBDIVISION (A) OR SUBDIVISION (B)

Two appellants are twins and all three appellants are cousins and roommates. They were charged and convicted of two counts of rape while acting in concert (§ 264.1) for acts committed in the single bedroom of their apartment with a female friend who was a frequent visitor of all three and a girlfriend of two.

---

[7] Sergeant Fleming was unavailable to testify and it was stipulated that his six-page report regarding his January 5, 2005 interview of Amanda could be read to the jury. (4RT 822.)

These acts provide insufficient evidence of either the substantive offense of participating in a criminal street gang (§ 186.22, subd. (a)[8]) or the criminal street gang sentencing enhancement of section 186.22, subdivision (b).[9]

A. STANDARD OF REVIEW

The constitutionally mandated test to determine a claim of insufficiency of the evidence in a criminal case is whether, on the entire record, a rational trier of fact could find a defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578 [162 Cal.Rptr. 431]; *Jackson v. Virginia* (1979) 433 U.S. 307, 318-319 [61 L.Ed.2d 560, 99 S.Ct. 2781].) In making this determination the reviewing court must view the evidence in the light most favorable to the prosecution and presume in support of the judgment of conviction the existence of every fact the trier of fact could reasonably deduce from the evidence. However, the court must resolve the issue of sufficiency of the evidence in light of the *whole* record. Furthermore, the reviewing court must judge whether

---

8 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, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years. (§ 186.22, subd. (a).)

9 Section 186.22, subdivision (b) provides in pertinent part:

> (1) Except as provided in paragraphs (4) and (5) [not applicable to this discussion], 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, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follow: ¶¶
>
> (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years. ¶¶ (§ 186.22, subd. (b).)

the evidence of each of the essential elements of the offense of which the defendant stands convicted is *substantial* and of *solid value*. (*People v. Johnson, supra; People v. Barnes* (1986) 42 Cal.3d 284, 303 [228 Cal.Rptr. 228]; *People v. Hernandez* (1988) 47 Cal.3d 315, 345-346 [253 Cal.Rptr. 199]; *People v. Ochoa* (1994) 6 Cal.4th 1199, 1206 [26 Cal.Rptr.2d 23].) That is, the evidence must reasonably inspire confidence and be of solid value. (*People v. Bassett* (1968) 69 Cal.2d 122, 139 [70 Cal.Rptr. 193].)

A finding based on conjecture or surmise cannot be affirmed. (*People v. Memro* (1985) 38 Cal.3d 658, 695 [214 Cal.Rptr. 832].) This is because suspicion is not evidence; it only raises a possibility, which will not support an inference of fact. Even a strong suspicion is insufficient to support a conviction. (*People v. Thompson* (1980) 27 Cal.3d 303, 324 [165 Cal.Rptr. 289].)

Furthermore, the evidence must be capable of supporting a finding as to every fact required for conviction *beyond a reasonable doubt*. "[T]he trier of fact must be reasonably persuaded to a near certainty" (*People v. Hall* (1964) 62 Cal.2d 104, 112 [41 Cal.Rptr. 284]) or "evidentiary certainty" (*Cage v. Louisiana* (1990) 498 U.S. 39, 41 [112 L.Ed. 2d 339, 111 S.C. 328].) It is therefore *not* enough that there is *some* evidence based upon which a trier of fact might *speculate* that the defendant is in fact guilty. (*People v. Thomas* (1992) 2 Cal.4th 489, 245 [7 Cal.Rptr.2d 199] Mosk, J. dissenting.)

B. ELEMENTS OF THE ENHANCEMENT

The jury found that Appellant Madrigal was guilty of the crime of Street Terrorism (Count Three, § 186.22, subd. (a)) and that Counts One and Two were committed for the benefit of, at the direction of, and in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1).[10] (CTA 182, 184, 186.)

---

[10] As a result, Appellant Madrigal is serving a sentence of 10 years for the section 186.22, subdivision (b) allegation and a concurrent sentence of 2 years for the substantive offense of Street Terrorism (§ 186.22, subd. (a). (2CTA 224-230.)

Section 186.22 became operative on September 26, 1988 (*In re Lincoln J.* (1990) 223 Cal.App.3d 322, 328 [272 Cal.Rptr. 852]) as part of emergency legislation (*In re Alberto R.* (1991) 235 Cal.App.3d 1309, 1318 [1 Cal.Rptr.2d 348]) the product of the California Street Terrorism Enforcement and Prevention Act (*In re Leland D.* (1990) 223 Cal.App.3d 251, 256 [272 Cal.Rptr. 709]), known as the STEP Act (*People v. Gardeley* (1997) 14 Cal.4th 605, 609 [59 Cal.Rptr.2d 356].) This Court in *People v. Gardeley* (1996) 14 Cal.4th 605 [59 Cal.Rptr.2d 356] explained that the STEP Act did not criminalize mere gang membership. (*Id.* at p. 623.)

> [T]he STEP Act does not punish a defendant for the actions of associates; rather the act increases the punishment for a defendant who committed a felony to aid or abet *criminal conduct of a group* that has as a primary function the commission of specified criminal acts and whose members have actually committed specified crimes, and who acted with the specific intent to do so. [Emphasis added.] (*Id.* at p. 624, fn. 10.)

In *People v. Morales* (2003) 112 Cal.App.4th 1176 [5 Cal.Rptr.3d 615] the court acknowledged that a gang member committing a crime in association with other gang members is not in itself enough to satisfy the STEP Act, because "it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang." (*Id.* at p. 1197.) Or, as acknowledged in *People v. Olquin* (1994) 31 Cal.App.4th 1355 [37 Cal.Rptr.2d 596], the defendants' may have been pursuing a personal agenda, rather than a gang agenda. (*Id.* at p. 1382.)

In *In re Frank S.* (2006) 141 Cal.App.4th 1192 [46 Cal.Rptr.3d 839] the court found that crimes may not be found to be gang-related based solely upon a perpetrator's criminal history and gang affiliations. (*Id.* at pp. 1199; accord *People v. Martinez* (2004) 116 Cal.App.4th 753, 756, 762 [10 Cal.Rptr.3d 751], in the context of section 186.30[11]) The *Frank S.* Court explained, "To allow the expert to

---

11 Section 186.30 provides:

(a) Any person described in subdivision (b) shall register with the chief of police of the city in which he or she resides, or the

state the minor's specific intent for the knife [to benefit the Nortenos since it helps provide them protection against rival gang members] without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended."] (*In re Frank S.*, *supra,* at p. 1199.) The crime itself must have some connection with the activities of a criminal street gang. (*Ibid.* accord *People v. Martinez, supra,* 116 Cal.App.4th 753, 756, 762 in the context of section 186.30.) Membership alone does not prove a specific intent to commit the offense to promote, further, or assist in criminal conduct by gang members. (*In re Frank S.*, *supra,* at p. 1199, citing *People v. Gardeley, supra,* at p. 623.)

C. FACTS AS THEY WERE DEVELOPED AT THE TRIAL[12]

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

---

sheriff of the county if he or she resides in an unincorporated area, within 10 days of release from custody or within 10 days of his or her arrival in any city, county, or city and county to reside there, whichever occurs first.

(b) Subdivision (a) shall apply to any person convicted in a criminal court or who has had a petition sustained in a juvenile court in this state for any of the following offenses:

(1) Subdivision (a) of Section 186.22.

(2) Any crime where the enhancement specified in subdivision (b) of 186.22 is found to be true.

(3) Any crime that the court finds is gang related at the time of sentencing or disposition.

12 This Part C is quoted from the factual recitation provided by co-appellant, Alex Adrian Abillar, in his opening brief below in the Second Appellate District, Division Six, in Argument III, Part 1, *Background*, at pages 39 through 43 and is herein joined by Appellant Madrigal. (Cal. Rules of Court, rule 8.200, subd. (a)(5).)

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 the following hypothetical question which contained facts mirroring the testimony of the complaining witness:

> "Q [by the prosecutor]: A 15-year-old girl a 14-yearold girl and a 16-year-old girl, three adult men who are active members and participants of the Southside Chiques hang out during the course of an evening. At some point, the 14-yearold girl and the 16-year-old girl are dropped off, and on the way to drop the 15-year-old girl off, one of the men says he needs to use the bathroom, and they all go back to an apartment.
>
> "The apartment is the defendants' apartment. While at the apartment, one of the men tells the 15-year-old girl that he needs to talk to her in the back bedroom. They go into the back bedroom and shut the door. After talking, they engaged in consensual kissing, and he removes her pants with her consent.
>
> "After he removes her pants, the two other men open the door and one of them says, 'Can we get in?' To which the 15-year-old girls says no. The three men then grab her and manipulate her on the bed, one of the men grabbing her left leg, another man grabbing her right leg and the third man laying on top of her holding her arms above her head. This third man digitally penetrates her vagina and then has sexual intercourse with her while the other two hold her legs down.
>
> "At this time she's telling them no, stop, to get off of her. When the third man is finished, he gets off, and the second man gets on her. She hits the second man in the head. And he tells her something to the effect of, 'You don't even know what you just did.' He then bites her on her thigh and her shoulder hard enough to where it leave a mark. He then digitally penetrates her vagina and has sexual intercourse with her while she's telling him no and tries to push him off.

"The two other men stand in the doorway of the room, watched and laughed as this is going on. When the second man gets off, the 15-year-old girl tries to get up off of the bed, but the first man pushes her back down. He then digitally penetrates her and has sexual intercourse with her. This scenario, this hypothetical takes place at the Warwick address where this search warrant was completed.

"Do you have an opinion as to whether or not the crime against the 15-year-old girl was committed for the benefit of, at the direction or of [sic] or in association with a criminal street gang?" (3RT 645-646.)

After overruling a defense objection that this was an improper hypothetical, Holland answered, "Yes, sir." The prosecutor then asked Holland, "What is your opinion?" The defense again objected on the grounds that there was no foundation for the opinion, and the trial court overruled the objection. Holland then answered, "That it is." (3RT 646.) When asked what he based his opinion on, Holland responded:

"My opinion on this is based on my prior training and experience and my familiarity with gang conduct. It is based on the specifics that you relayed in the hypothetical in that three 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.

"It's based on my knowledge that when one gang member who is having, in your hypothetical, consensual sex with another, two others walk in and that gang member provides it to the other two is benefitting as a result of doing that. I believe that the crime benefits these individuals who are pm1icipating in the hypothetical favorably towards each other, towards a predatorial attack on the victim, and they're doing it in association with one another in that they're all active participants in Southside Chiques." (3 RT 646-647.)

Holland was then asked how each defendant individually benefitted from participating together in the crime, to which Holland responded that each

individual received a benefit by elevating their status in the gang. (3RT 647-648.) Holland was then asked how the gang benefits from such a crime, to which Holland responded:

> "The gang Southside Chiques is an entity that would not exist if it wasn't for the individual actions of the collective actions of all the members. And it has been this way over a period of time, has built up upon itself. When three gang members go out and commit a violent brutal attack on a victim, that's elevating their individual status, and they're receiving a benefit. They're putting notches in their reputation. When these members are doing that, the overall entity benefits and strengthens as a result of it....
>
> "More than likely this crime is reported as not three individual named defendants conducting a rape, but members of Southside Chiques conducting 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." (3RT 648-649.)

Holland was then asked by the prosecutor, "Do you have an opinion as to whether or not this crime was done with the intent to promote, further or assist in any criminal conduct by gang members?" The defense foundational objection was sustained. Holland was then asked, "Do you have an opinion as to whether or not the defendants willfully assisted or promoted felonious - felonious criminal conduct by members of the gang?" The defense foundational objection was overruled and Holland responded:

> "I believe it was used - done to further and assist members of the gang ....
>
> "By your hypothetical, each of them restrained the victim, each of them forced the victim into a position of submission. They had stood by while the crime had occurred near a door while each other gang member engaged in the act of sex." (3RT 650.)

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.)

The jury found true the allegation that appellant committed the charged offenses for the benefit of a criminal street gang. (2CT 215-219; 237.) It is respectfully submitted that the evidence, as summarized above, was not sufficient to support this finding.

D. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT DEFENDANTS' CONVICTIONS UNDER PENAL CODE, SECTION 186.22, SUBDIVISION (A) AND THE TRUE FINDINGS WITH RESPECT TO THE ENHANCEMENT UNDER PENAL CODE, SECTION 196.22, SUBDIVISION (B)

While the prosecution's gang expert was not short on opinions regarding appellants' purported association with a gang and whether Counts One and Two were committed within the meaning of Section 186.22, subdivision (a) and (b), his opinions were no stronger than the facts upon which they were predicated. (*Mark v. Industrial Accident Commission of California* (1939) 29 Cal.App.2d 495, 500 [84 P.2d 1071]; *Blankenfeld v. Industrial Accident Commission* (1940) 36 Cal.App.2d 690 [98 P.2d 584].) A witness' conclusional pronouncements are not

enough. (*In re Leland D., supra,* 223 Cal.App.3d 251, 259; *In re Jose T.* (1991) 230 Cal.App.3d 1455, 1462 [282 Cal.Rptr. 75].) The value of an opinion lies in the reasoning by which the witness progresses from his material to his conclusion and does not lie in his mere expression of his conclusion. (*People v. Bassett, supra,* 69 Cal.2d 122, 141.) Opinions based upon assumptions that are not supported by the record, or upon factors which are speculative, remote or conjectural, have no evidentiary value. (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135 [234 Cal.Rptr. 630].)

As for the expert, "the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based." (*People v. Gardeley, supra,* 14 Cal.4th at p. 618, quoting *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923 [184 Cal.Rptr. 393]; accord *People v. Valdez* (1997) 58 Cal.App.4th 494, 510 [68 Cal.Rptr.2d 135].) Where the expert's opinion is not adequately supported, the expert's opinion cannot rise to the dignity of substantial evidence. (*Pacific Gas & Electric Co. v. Zuckerman, supra,* 189 Cal.App.3d 1113, 1135.)

At no point does or can the Appellate Court below explain how gang membership enhanced the fealty that these three male/cousins/roommates/generational cohorts had for each other. They shared a one bedroom apartment with their mother/aunt and godmother. (RT 186-187.) You cannot get much closer together than that. They did not even live within the territory claimed by the gang. The offenses were committed in their apartment. They were the only members known by the prosecution's gang expert to live in Thousand Oaks. (4RT 681, 690-691.) The point here is not that they were not gang members. The point here is that because of the incredible confluence of commonality amongst these young males, their gang membership was an irrelevancy to the sexual offenses. Their gang membership was a mere incidental

to their lives; akin to school loyalty, or which football team they favored, or whether they drank their coffee with or without cream.

The Appellate Court below does not dispute that a gang member committing a crime in association with other gang members is not in itself enough to satisfy section either subdivision (a) or (b) of section 186.22. (*People v. Morales, supra,* 112 Cal.App.4th 1176, 1197 ["it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang."") Well, if this has any truth, it is true in spades here. These three males on their own "detour" did not stray into gang territory and did not stray outside their own company, with the exception of their female companions. They took no detour related to the gang.

There is here no dispute that a gang member pursuing a personal agenda, rather than a gang agenda does not satisfy the requisite elements of section 186.22. (*People v. Olquin, supra,* 31 Cal.App.4th 1355, 1382.) What could be a more personal agenda than sex with your girlfriend in the privacy of your own residence, as exemplified in the instant case?

There is here no dispute that gang affiliation by itself is not enough. (*In re Frank S., supra,* 141 Cal.App.4th 1192, 1199; *People v. Martinez* (2004) 116 Cal.App.4th 753, 756, 762 [10 Cal.Rptr.3d 751] [in the context of section 186.30]; *People v. Gardeley* (1997) 14 Cal.4th 605, 623 [59 Cal.Rptr.2d 356].)

Neither the Appellate Court nor Respondent provided a single authority where the only gang members participating in the charged offense were also intimates by consanguinity or household. The Appellate Court's reliance on *People v. Villalobos* (2006) 145 Cal.App.4th 310 [51 Cal.Rptr.3d 678] is illustrative of the weakness of their position. Notably the offense there was a home invasion robbery committed by three "cohorts," two unrelated male defendants, at least one a gang member, and his girlfriend. (*Id.* at pp. 314-315, 321-322.) Recitation of the facts there is ample to dispel its purported relevancy here.

The Appellate Court's recitation of Detective Holland's efforts on the prosecution's behalf does not support the conclusion reached. The generalities he expressed had no meaning to the facts in the instant case. Officer Holland's testimony amounted to no more than an expression of his general belief as to how the case should be decided. (See, *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651 [126 Cal.Rptr.2d 876].) "'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.'" (*Ibid.*, quoting *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1182-1183 [82 Cal.Rptr.2d 162].)

Even Officer Holland acknowledged that rape was frowned upon in Hispanic street gang culture. (4RT 677, 696-697, 702.)

The Ninth Circuit's decision in *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 is instructive. In that case, a California jury found the defendant guilty of robbery, a gun-use enhancement and a street gang enhancement. (*Id.* at p. 1100-1101.) The defendant was a member of the El Monte Flores gang. The gang's territory included much of the city of El Monte. The offense occurred after the victim entered a liquor store and nodded to the defendant, who was with two or three other people. The defendant asked the victim if he knew him, and when the victim said no the defendant told him not to speak to him. When the victim tried to leave the store, the defendant identified himself by name, said he was a member of the El Monte Flores gang, and asked the victim if he wanted to get jacked (robbed). The defendant then stole $14.95 from the victim. (*Id.* at p. 1101.) The liquor store was in the territory of the El Monte Flores gang. (*Id.* at p. 1102.)

In federal court, the defendant challenged the gang enhancement on the ground of lack of sufficient evidence to establish he committed the offense with the intent to promote, further or assist in any criminal conduct by gang members. (*Id.* at p. 1100.) The district court ruled that the prosecution failed to present any direct or circumstantial evidence that the defendant committed the robbery with the

specific intent to promote, further, or assist in other criminal conduct by the El Monte Flores street gang. (*Id.* at p. 1002.) The Ninth Circuit agreed, noting there was "nothing inherent in the robbery that would indicate it furthers some other crime." (*Id.* at p. 1103.) Although a gang expert testified the gang was "turf oriented," the court noted that nothing in the record connected the turf-oriented nature of the gang with the commission of robberies generally or, more importantly, with the commission of this robbery in particular. (*Ibid.*) Nor did the expert explain what criminal activity was furthered or intended to be furthered by the robbery in this case. (*Ibid.*)

The Ninth Circuit noted that the California Court of Appeal had held that the jury properly could conclude that the robbery was one of a series of robberies committed by the gang not only to obtain the property of the victims, but also as a means of instilling fear of the gang in residents of the neighborhood, thereby facilitating the gang's criminal operations in the area. (*Ibid.*) The Ninth Circuit found, however, that there was nothing in the record to support an inference that the defendant robbed the victim in order to facilitate other gang-related criminal operations in El Monte. Also, this theory of specific intent had never been argued to the jury by the prosecutor and the jury had not been asked to make such an inference. The court concluded that it would be pure speculation to assume the jury found that the gang was involved in criminal activity not mentioned in any of the testimony. Although there was testimony that the gang committed robberies, there was nothing to indicate why those other robberies were aided by this robbery. (*Id.* at pp. 1103-1104.)

The instant case is vastly more compelling than *Garcia v. Carey.* Here the offenses were committed not only outside the gang's territory, but were committed by family members in their own home. The prosecution's theory would turn a domestic violence case into one subject to the added sanctions of section 186.22.

The gang enhancements here are not even supported by competing viable inferences. Even there, "[w]hen the facts give equal support to two competing

inferences, neither is established." (*People v. Acevedo* (2003) 105 Cal.App.4th 195, 198 [129 Cal.Rptr.2d 270]; *People v. Brown* (1989) 216 Cal.App.3d 596, 600 [264 Cal.Rptr. 908].) In both of these cases, the Court of Appeal reversed based on lack of substantial evidence. Thus, in Mr. Madrigal and his codefendants' case there is even greater certitude of the absence of support for Section 186.22, subdivisions (a) and (b).

E. CONCLUSION

Other than the bare supposition of Officer Holland, no evidence was introduced that the acts committed by appellants' in their own bedroom of their own family's apartment aided or abetted the *criminal conduct of a group*, a requisite requirement of section 186.22, subdivision (b). (*People v. Gardeley, supra,* 14 Cal.4th 605, 624, fn. 10.) The fact that each of the three appellants was a gang member was not determinative. (*People v. Morales, supra,* 112 Cal.App.4th 1176, 1197; *In re Frank S., supra,* 141 Cal.App.4th 1192, 1999.) It is respectfully submitted that both subdivisions (a) and (b) of section 186.22 require that the acts of the defendant must have some connection with the activities of a criminal street gang. (Cf. *In re Frank S., supra,* 141 Cal.App.4th 1192, 1999; *People v. Martinez, supra,* 116 Cal.App.4th 753, 756, 762.) Otherwise, the result would be strict liability for section 186.22 subdivision (a) or (b) for merely aiding and abetting a gang member or members regardless of whether the gang or group was promoted, furthered, assisted, or benefited; or directed or associated in the endeavor.

From a review of the entire record, a rational trier of fact could not have found appellant guilty beyond a reasonable doubt of Counts Three or the sentencing enhancements of section 186.22, subdivision (b). The issues appellant raise are one of federal constitutional law. A conviction or other finding which is not supported by sufficient evidence constitutes not just an error of state law, but is also a denial of due process of law and a violation of the accused's rights under the United States Constitution. (*Jackson v. Virginia, supra,* 443 U.S. 307, 309.) The federal constitutional standard for determining the sufficiency of evidence is

identical to the standard under California law. (*People v. Staten* (2000) 24 Cal.4th 434, 460 [101 Cal.Rptr.2d 213].) Under both, reversal is required if one of the essential elements of the crime or enhancement is not supported by substantial evidence. (*People v. Hernandez, supra,* 47 Cal.3d 315, 345-346.) The substantial evidence standard applies to a claim of insufficiency of evidence to support a gang enhancement. (*People v. Vy* (2004) 124 Cal.App.4th 1209, 1224 [22 Cal.Rptr.3d 203].)

Furthermore, since double jeopardy considerations bar a retrial (*Burks v. United States* (1978) 437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141]), the trial court should be directed to dismiss these offenses from the accusatory pleading with prejudice and resentence appellant. To premise appellant's conviction and enhanced sentence on such insufficient evidence violates his rights to due process of the law under the Fifth and Fourteenth Amendments.

Appellant Madrigal was tried and convicted with Appellants Alex and Albert Albillar. Their appeals have been joined in this direct appeal. Appellant Madrigal hereby joins in those arguments of his coappellants that may benefit him. (See *People v. Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5 [172 Cal.Rptr. 445].)

CONCLUSION

For the foregoing reasons, appellant's conviction in Count Three must be reversed and the enhancement pursuant to section 186.22, subdivision (b) stricken.

Dated: September 26, 2008

Respectfully submitted,
Conrad Petermann
Attorney at Law

CONRAD PETERMANN
323 East Matilija Street
Suite 110, PMB 142
Ojai, CA 93023

CASE NUMBER: S163905

DECLARATION OF SERVICE

I, undersigned, say: I am a citizen of the United States, a resident of Ventura County, over 18 years of age, not a party to this action and with the above business address. On the date executed below, I served the APPELLANT'S OPENING BRIEF by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Ojai, California. Said copies were addressed as follows:

Edmund G. Brown, Jr.
Attorney General
300 South Spring St
Los Angeles, CA
90013

Clerk Superior Court
For Hon. Edward F.
Brodie, Judge
P.O. Box 6489
Ventura, CA 93006

Second Appellate
District, Div. Six
200 E. Santa Clara St.
Ventura, CA 93001

Mr. Rameen Minoui
Deputy District
Attorney
800 South Victoria
Ventura, CA 93009

Mr. John A. Madrigal
F-47052, B2-247-U
P.O. Box 3030
Susanville, CA 96130

Mr. Charles Cassy
Attorney at Law
800 South Victoria
Avenue
Ventura, CA 93009

California Appellate
Project
520 S. Grand Ave.
Fourth Floor
Los Angeles, CA
90071

Ms. Vanessa Place
Attorney at Law
P.O. Box 351951
Los Angeles, CA
90035

Ms. Sharon Jones
Attorney at Law
P.O. Box 1663
Ventura, CA 93002

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 27, 2008, at Ojai, California.

Conrad Petermann
Attorney for Appellant