S163905

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

JOHN MADRIGAL, et al

Defendants and Appellants.

No. S163905

(Related Cases: Second Appellate District, Division Six, B194358; Ventura County Superior Court No. 2005044985)

APPELLANT'S PETITION FOR REVIEW

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APPELLANT'S PETITION FOR REVIEW

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant John Madrigal petitions this court for review following the decision of the Court of Appeal, Second Appellate District, Division Six filed in that court on May 5, 2008. A copy of the published decision of the Court of Appeal is attached as an Exhibit.

CERTIFICATE OF COMPLIANCE

The brief is proportionately spaced with Times Roman typeface, point size of 13, and the total word count is 2,746, not including tables, and thus is within the limits (8,400 words) of California Rules of Court, rule 8.504.

QUESTIONS PRESENTED

1. Whether the prosecution's use of its peremptory challenges to remove Hispanic prospective jurors violated appellant's rights under the sixth and fourteenth amendments?

2. Whether appellant was denied federal due process of law and a fair trial by the trial court's refusal to sever the street terrorism count and bifurcate the gang allegations from the two charged sex offenses?

3. Whether appellant was denied federal due process of law by his conviction premised upon insufficient evidence that the two charged sex offenses were committed within the meaning of either Penal Code[1] section 186.22, subdivision (a) or subdivision (b)?

4. Appellant Madrigal joins the questions of his co-appellants that may benefit him.

NECESSITY FOR REVIEW

A grant of review and resolution of these questions by this Court is necessary to secure a uniformity of decision and settle important questions of law, of constitutional dimension, pursuant to rule 8.500, subdivision (b)(1), California Rules of Court.

Errors, as here, of constitutional dimension warrant this Court's review and intervention, particularly as an exercise of this Court's inherent supervisory power to do equity and administer justice. (*Bauguess v. Paine* (1978) 22 Cal.3d 626, 635 [150 Cal.Rptr. 461]; *Bloniarz v. Roloson* (1969) 70 Cal.2d 143, 147-148 [74 Cal.Rptr. 285]; *Asbestos Claims Facility et al. v. Berry & Berry* (1990) 219 Cal.App.3d 9, 19 [267 Cal.Rptr. 896]; *Western Steel & Ship Repair, Inc. v. RMI, Inc.* (1986) 176 Cal.App.3d 1108, 1116-1117 [222 Cal.Rptr. 556].)

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[1] All references are to this Code unless otherwise noted.

Question 1

There is no dispute here with the factual basis for this question. The prosecutor sought to improperly remove Hispanic jurors from the panel of prospective jurors who were to hear the criminal charges against these Hispanic defendants. The blatancy of the prosecutor's attempt is manifest in the outrage one can sense from the tone and content of the trial judge's comments.[2]

People v. Overby (2004) 124 Cal.App.4th 1237 [22 Cal.Rptr.3d 233] was decided nearly a year and one-half before appellants' trial commenced. There Division Seven of the Court that decided appellants' appeal counseled trial courts on the importance of obtaining an express consent from the aggrieved party if it intended to adopt an alternative remedy to the norm for a *People v. Wheeler* (1978)

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2 The trial court's rage is palpable:

> I am frankly dismayed that the People so cavalierly would attempt to dismiss an Hispanic from this jury without good cause to do so. I listened to [Juror Number 2], and there's absolutely nothing in what he 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?" Because it had to be obvious. It was obvious to me what was coming next, but clearly wasn't to you?
>
> I'm just astounded. And so if he leaves and I grant the Wheeler motion, we start all over again. Are you kidding me? Your motion was denied. It was denied for good reason. It remains denied, and if for some reason [Juror Number 2] holds it against you, that's your problem because there's absolutely no reason to remove him from this jury, and if you had attempted to remove [Juror Number 1], the ruling would be the same.
>
> I look out into the audience, there's not another Hispanic out there. There are two sitting on this jury, and they're going to remain on this jury. And that's the Court's ruling. And I'll bet you any appellate court in the world would support my finding. (2Aug. RT 5/5/2007 494-498.)

22 Cal.3d 258, 276-277 [148 Cal.Rptr. 890]-*Batson v. Kentucky* (1986) 476 U.S. 79, 80, 100 [90 L.Ed.2d 69, 111 S.Ct. 1364] violation.[3]

The norm, of course, required discharge of the jurors already selected and quash the remaining venire. (*People v. Fuentes* (1991) 54 Cal.3d 707, 715 [286 Cal.Rptr. 792]; *People v. Smith* (1993) 21 Cal.App.4th 342, 345 [25 Cal.Rptr.2d 850]; *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1193 [259 Cal.Rptr. 870]; *United States v. Battle* (8th Cir. 1987) 836 F.2d 1084, 1086; *see also United States v. Gordon* (11th Cir. 1987) 817 F.2d 1538, 1541.) The peremptory challenge of even a single juror on basis of race or ethnicity is error of constitutional magnitude requiring reversal. (See *People v. Silva* (2001) 25 Cal.4th 345, 386 [106 Cal.Rptr.2d 93].) *Wheeler/Batson* error is reversible per se and no inquiry as to the sufficiency of the evidence of guilt is made. (*People v. Snow* (1987) 44 Cal.3d 216, 226 [172 Cal.Rptr. 445]; *Turner v. Marshal* (9th Cir. 1997), 121 F.3d 1248, 1254, fn. 3.)

The Court in *Overby* found two indicia of waiver and acquiescence present there to avoid the otherwise prescribed solution. First, the defendant's counsel "immediately asked the court to order the juror to remain in the courtroom" in response to the prosecutor's peremptory challenge of a Black juror. (*People v.*

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[3] The Court in *Overby* provided future trial courts with the following instructions:

> [W]e 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 authorized by *Willis, supra,* ... 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,* at pp. 1245-1246.)

Overby, at p. 1242.) This factor the Court found strongly suggested defense counsel's support of the court's ultimate remedy. (*Id.* at p. 1244.) There is no similar indicia in appellants' case, yet the Appellate Court nevertheless found a waiver.

Second, the trial court in *Overby* expressly provided counsel the opportunity to respond to the court's proposed remedy and counsel responded, "Submit." (*Ibid.*) Later in the proceedings when the prosecutor asked the court to reconsider its ruling, defense counsel expressed no displeasure with the court's remedy. (*Id.* at p. 1245.) The instant case differs substantially for there is no manifest, let alone expressed demonstration of the prevailing party's support of maintaining the existing venire. In the instant case, the court's opening comments to memorialize the issue raised at the bench conference indicate that defense counsel had not been given the opportunity to speak. [4] (2Aug. RT 5/5/2007 494-495.) This readily suggests that defense counsel had likely not even been consulted about the court's elected disposition to avoid the waste of five days of jury selection with the dismissal of the entire venire. It is apparent that it was the court's outrage, set forth in footnote 2, above, that was driving the court's resolution of the issue without the advice and consent of the defense.

In the instant case, the Appellate Court below has pushed the envelop to even find a waiver where none of the indicia found in *Overby* is present. It is respectfully submitted that such an outcome eviscerates *Wheeler-Batson* violations

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[4] As the italicized text below of the court's comments demonstrates, all counsel had not been given the opportunity to address the issue, let alone the solution.

> All right. We're outside the presence of the jury. Mr. Minoui [the prosecutor] wants to make a record regarding his peremptory challenge of [Juror Number 21 which was challenged by a Wheeler motion by probably all three of the defense attorneys *if they had all had an opportunity to speak*, but I expect that that would have happened. (2Aug. RT 5/5/2007 494-495.)

in the most unwarranted situations where the trial court's rage at the flagrancy of the violation removes the very remedy designed to protect the aggrieved party.

Thus, despite the instructions in *Overby,* published 16 and one-half months before appellants' trial, there is no record that counsel was consulted or in any manner expressed support for the court's alternative remedy, or had the opportunity to discuss the issue with their clients, let alone seek their clients' input. On this record, absent the consent of the complaining party, the only remedy was dismissal of the venire. (*People v. Overby, supra,* 124 Cal.App.4th 1237, 1242.) The trial court's failure to follow this mandate denied appellant his constitutional right to an unbiased jury and the error is reversal per se. (*People v. Snow, supra,* 44 Cal.3d 216, 226; *Turner v. Marshall, supra,* 121 F.3d at p. 1254, fn. 3.)

Question 2

Simply put, the gang charge of section 186.22, subdivision (a) and the sentence enhancement allegations of section 186.22, subdivision (b) had no relevance to the two counts of rape while acting in concert of section 264.1. Alternatively, even if there were some miniscule link between the 264.1 charges and either subdivision of 186.22, the prejudice that flowed from their joint resolution was vastly too great to try them together. There is no dispute that the trial court had this discretion to bifurcate the trial and that remedy is warranted where, as here, the gang evidence has so little relevance to guilt of the substantive offenses and was so extraordinarily prejudicial. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [16 Cal.Rptr.3d 880].)

Furthermore, under the approach proffered by the defense prior to the trial, the same jury could have heard the entire matter thus obviating the need for any additional court time or significant imposition upon the witnesses. Moreover, any other approach deprived appellants of a fair trial on the 264.1 charges, effectively reduced the prosecution's burden of proof by so stigmatizing appellants, and denied them of their federal constitutional rights to due process of the law.

At no point in this or *Question III*, does or can the Appellate Court below explain how gang membership enhanced the fealty of 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 264.1 charges. 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 denial of the defense motion to sever or bifurcate the gang charge and allegations from the counts of rape in concert rendered the trial so arbitrary and fundamentally unfair that it violated federal due process. (See *Reiger v. Christensen* (9th Cir. 1986) 789 F.2d 1425, 1430; *People v. Albarran* (2007) 149 Cal.App.4th 214, 229 [57 Cal.Rptr.3d 92].) It deprived appellant of his state and federal constitutional rights, including his rights to a fair trial, due process, present a defense, not to lighten the prosecutor's burden of proof, and reliable determination of guilt (Fifth, Sixth, Fourteenth Amendments; Cal. Const. Art. I, §§ 1, 7, 15, 16, 17.) In addition, the deprivation of a State created right (§ 954) amounts to an additional due process violation. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175, 100 S.Ct. 2227].) The State cannot establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 686 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824].) Even if a lesser standard were applied, the facts here overwhelmingly establish that there was a substantial danger of prejudice by the failure to sever and bifurcate the gang charge and allegation from the trial on Counts One and Two.

The Appellate Court's published decision here provides a conflict with *People v. Albarran, supra,* 149 Cal.App.4th 214.) There Division Seven of the Second Appellate District recently addressed the propriety of introducing evidence to prove a gang enhancement with charges for attempted murder, shooting at an inhabited dwelling, and attempted kidnapping and carjacking. (*Id.* at pp. 219, 222-223.) There the defendant, a gang member, fired shots into an occupied residence and then attempted to flee by carjacking a passing vehicle. (*Id.* at pp. 217-218.) Prior to trial, the defense sought to exclude the gang evidence as irrelevant and inadmissible under Evidence Code section 352. "The prosecutor argued the case presented a 'classic' gang shooting and that the entire purpose of the shooting was to gain respect and enhance the shooters' reputations within the gang community, and to intimidate the neighborhood-essentially to 'earn one's bones' within the gang." The prosecution proffered no percipient witness or evidence to prove the crime was gang related or motivated, but instead relied on the testimony of a gang expert who was familiar with the defendant and his gang. (*Id.* at pp. 219.) The expert conceded that he did not know the exact reason for the shooting and no gang signs had been shown. (*Id.* at p. 220.) Nevertheless, he testified that as a gang member the defendant would gain respect by committing crimes and intimidating people. (*Id.* at p. 221.)

The Court found that this was insufficient evidence to support the contention that the shooting was done with the intent to gain respect; the motive for the underlying crimes was not apparent from their circumstances. There was no evidence that any gang members had bragged about their involvement. (*Id.* at p. 227, citing *People v. Martinez* (2004) 116 Cal.App.4th 753, 762 [10 Cal.Rptr.3d 751 [presence of an unidentified accomplice does not demonstrate a crime is gang related where there is no evidence the accomplice is a gang member].) The Court also found that even if they were to conclude that evidence of the defendant's gang membership and some evidence concerning gang behavior were relevant to the issue of motive and intent, other extremely inflammatory gang evidence was

admitted which had no connection to these crimes. (*Id.* at p. 227.) This included the identities of other gang members, the wide variety of the crimes they had committed, the numerous contacts between gang members and the police, and references to the Mexican Mafia. (*Id.* at pp. 227-228.) The Court found that this evidence "had little or no bearing on any other material issue relating to Albarran's guilt on the charged crimes and approached being classified as overkill." (*Id.* at p. 228.) The gang expert's testimony in *Albarran* consumed the better part of an entire trial day in a six day trial and spanned 70 pages of the reporters' transcript. (*Id.* at p. 228, fn. 10.) The Court found that the references to the Mexican Mafia had little, if any, bearing on the gang enhancements in the case. (*Id.* at p. 228, fn. 11.) The Court found no permissible inferences that could be drawn by the jury from this evidence. (*Id.* at p. 230.) "From this evidence there was a real danger that the jury would improperly infer that whether or not Albarran was involved in these shootings, he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished." (*Ibid.*)

Overall, the *Albarran* Court found that the erroneous introduction of the gang evidence rendered the trial so arbitrary and fundamentally unfair that it violated federal due process. (*Id.* at pp. 229-232.) Yet, in the instant case, the Appellate Court did not even acknowledge the existence of *Albarran*, let alone acknowledge the conflict it had created with that decision. This case provides the opportunity to resolve this split of authority.

Question 3

Appellant incorporates here the third paragraph in the preceding question.

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, because "it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang." (*People v. Morales* (2003) 112

Cal.App.4th 1176, 1197 [5 Cal.Rptr.3d 615].) 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* (1994) 31 Cal.App.4th 1355, 1382 [37 Cal.Rptr.2d 596]) 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.* (2006) 141 Cal.App.4th 1192, 1199 [46 Cal.Rptr.3d 839]; *People v. Martinez* (2004) 116 Cal.App.4th 753, 756, 762 [10 Cal.Rptr.3d 751] [in the context of section 186.30];[5] *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

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[5] 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 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.

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].) It merely shifted the responsibility for decision making from the jurors to the witness; and in any event was wholly without value to the trier of fact in reaching a decision. (*Ibid.*, accord *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.)

Other than the bare supposition of Officer Holland, no evidence was introduced that the acts committed by appellants' in their own bedroom 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.)

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), and, as a result, appellant's convictions on this count and these allegations must be reversed. (*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].) 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.

Question 4

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 co-appellants that may benefit him. (See *People v. Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5 [172 Cal.Rptr. 445].)

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,[6] § 264.1);
>
> Count Two: Rape by foreign object while acting in concert (§ 264.1); and
>
> Count Three: Street terrorism (§ 186.22, subd. (a)).[7]

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[6] All further statutory references are to this code unless otherwise indicated.

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

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[8] 25-29.)

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).[9]

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.

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[8] 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.

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.

[9] 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)

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, exh..)

CONCLUSION

For the foregoing reasons, review should be granted.

Dated: May 25, 2008

Respectfully submitted,
Conrad Petermann
Attorney at Law

EXHIBIT

Opinion of the Second Appellate District, Division Six, in *People v. Madrigal, et al.*, B194358

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, ALEX ADRIAN ALBILLAR AND JOHN ANTHONY MADRIGAL,

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.

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

(§ 186.22, subd. (a).) The jury found true enhancement allegations that the rape and 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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[2] *Wheeler* was disapproved on another ground in *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129].

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

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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,.

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CASE NUMBER: B194358

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 PETITION FOR REVIEW* 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:

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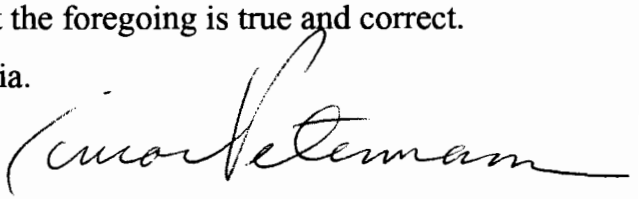
I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 25, 2007, at Ojai, California.



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