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S187680

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

JOE RODRIGUEZ, JR.,

Defendant and Appellant.

Case No.

Third Appellate District, Case No. C060227
Yuba County Superior Court, Case No. CRF07288
The Honorable James L. Curry, Judge

PETITION FOR REVIEW

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

Respondent respectfully petitions for review of the opinion by the California Court of Appeal, Third Appellate District. The decision, Exhibit A, was filed on September 20, 2010, and is reported at 188 Cal.App.4th 722. The petition for review is timely. (Cal. Rules of Court, rule 8.500(e)(1).)

ISSUE PRESENTED

Can a 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 be guilty of violating Penal Code¹ section 186.22, subdivision (a)—active participation in a criminal street gang—when he or she, acting alone, is the direct perpetrator of felonious criminal conduct?

STATEMENT OF THE CASE

Appellant, an active participant in a criminal street gang with knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity, attempted to rob the victim while visiting his sister in Marysville.² He was charged with attempted robbery (§§ 664/211), along with an enhancement that the crime was committed for the benefit of a gang (§ 186.22, subd. (b)(1)), and active participation in a criminal street gang (§ 186.22, subd. (a)) ("186.22(a)").³ (1 CT 40-43.) A jury found him

¹ All further undesignated statutory references are to the Penal Code.

² Appellant lived in Woodland.

³ Each count further alleged that appellant had suffered a prior "strike" conviction under California's Three Strikes Law (§ 667, subs. (b)-(i) & § 1170.12, subs. (a)-(d)), a 2000 robbery conviction (§§ 211/212.5), and had served a prior prison term (§ 667.5, subd. (b)). (1 CT 40-43.)

(continued...)

guilty on both counts and found the gang enhancement true.⁴ (1 CT 118, 127-129.) Prior to sentencing, appellant filed a motion for new trial on the enhancement pursuant to section 1181, subdivision (6).⁵ (1 CT 151-180.) The court granted the motion, finding that while it was beyond a reasonable doubt that appellant was an active member of a gang, “[t]here’s nothing about the crime that connects it to the activities of the gang other than the [gang] expert’s statement that robbery is one of the crimes Norte[ñ]os commit.”⁶ (1 CT 234; 2 RT 501.) The prosecutor elected not to retry the enhancement, and appellant was sentenced to eight years and four months in state prison. (1 CT 235-237; 2 RT 502.)

On September 20, 2010, in a partially published opinion, two justices of a three justice panel of the Third District Court of Appeal reversed appellant’s conviction for active participation in a criminal street gang (§ 186.22(a)), finding that the crime does not apply to an active participant in a criminal street gang (“active participant”)⁷ who is the sole perpetrator of

(...continued)

Appellant was also originally charged with assault with force likely to inflict great bodily injury (§ 245, subd. (a)(1)). (1 CT 40-43.) However, the prosecutor moved to dismiss this count prior to the start of trial. (1 CT 105.)

⁴ After a bench trial, the court found the strike and prior prison term allegations to be true. (1 CT 119.)

⁵ Section 1181, subdivision (6), states that a trial court may grant a new trial motion “[w]hen the verdict or finding is contrary to law or evidence[.]”

⁶ The gang enhancement requires that a person be convicted of a felony, and that the felony be “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[.]” (§ 186.22, subd. (b)(1).)

⁷ Throughout this petition, respondent will use the shorthand “active participant” to refer to a person who “actively participates in any criminal
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felonious criminal conduct.⁸ In reaching their conclusion, the majority disagreed with three published court of appeal cases that had reached the opposite conclusion (*People v. Ngoun* (2001) 88 Cal.App.4th 432, review denied July 7, 2001, S097592; *People v. Salcido* (2007) 149 Cal.App.4th 356, review denied July 11, 2007, S152686; *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1301-1308, review denied March 10, 2010, S179000), thus creating a split among the appellate districts. The dissenting justice disagreed with the majority's conclusion and believed that the published cases that had previously addressed the issue were correctly decided.

REASONS FOR REVIEW

I. WHETHER AN ACTIVE PARTICIPANT CAN BE GUILTY OF VIOLATING SECTION 186.22(A) WHEN HE OR SHE, ACTING ALONE, IS THE DIRECT PERPETRATOR OF FELONIOUS CRIMINAL CONDUCT, IS AN IMPORTANT QUESTION ON WHICH THERE IS A SPLIT OF AUTHORITY

As noted, the majority held that section 186.22(a) does not apply to an active participant who, acting alone, is the direct perpetrator of felonious criminal conduct. (Exh. A, maj. opn. of Blease, J. at pp. 2-7, 14-25.) In so doing, the majority found that three published cases that had previously addressed the issue were incorrectly decided. In addition, it also found that the drafters of CALCRIM had erred in drafting CALCRIM No. 1400, the pattern jury instruction on the crime.⁹ (Exh. A, maj. opn. of Blease, J. at p.

(...continued)

street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity.”

⁸ While the majority did not directly address the issue, their ruling presumably would also apply to an active participant who directly perpetrates felonious criminal conduct while acting in concert with a non-gang member or who aids and abets a non-gang member in committing felonious criminal conduct.

⁹ CALCRIM No. 1400 provides:

(continued...)

20, fn. 9.) This Court should address this important legal question presented in order to resolve a significant split of authority and to determine whether CALCRIM No. 1400 correctly states the elements of the crime. (Cal. Rules of Court, rule 8.500(b)(1).) It should hold that an active participant, who acts alone, and is the direct perpetrator of felonious criminal conduct, violates section 186.22(a).

Section 186.22(a) provides that:

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 a misdemeanor or felony].

“Contrary to what is required for an enhancement under section 186.22(b), section 186.22(a) does not require that the crime be for the benefit of the gang. Rather, it ‘punishes active gang participation where the defendant promotes or assists in felonious conduct by the gang. It is a

(...continued)

To prove that the defendant is guilty of this crime, the People must prove that:

1 The defendant actively participated in a criminal street gang;

2 When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;

AND

3 The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:

a. *directly and actively committing a felony offense;*

OR

b. *aiding and abetting a felony offense.*

(CALCRIM No. 1400 (Summer 2010 Ed.), italics added.)

substantive offense whose gravamen is the participation in the gang itself.’ [Citation.]” (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1334.)

At issue in the instant case is the phrase “who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang,” and whether an active participant can be guilty of the crime when he or she is the sole perpetrator of felonious criminal conduct.

By way of background, in *People v. Castenada* (2000) 23 Cal.4th 743, this Court addressed the meaning of the phrase “actively participates”¹⁰ in section 186.22(a). At issue was whether that phrase requires the prosecution to show that a defendant held a position of leadership in the gang or whether it is sufficient if the evidence establishes that the defendant’s involvement with the gang is more than nominal or passive. (*Id.* at pp. 745-746.) This Court concluded that the latter was sufficient. In discussing the specific issue, the Court made the following observations:

Here, section 186.22(a) limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang’s pattern of criminal gang activity. Thus, a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members[.]

(*Id.* at p. 749.) “The sponsors’ reply appears to state (albeit not with great clarity) what we have concluded here: a person liable under section 186.22(a) must aid and abet a separate felony offense committed by gang members.” (*Id.* at p. 750.) “As we have explained, section 186.22(a) imposes criminal liability not for lawful association, but only when a defendant ‘actively participates’ in a criminal street gang while also aiding and abetting a felony offense committed by the gang’s members.” (*Id.* at pp. 750-751.) And finally, “Moreover, as we have explained, every person

¹⁰ A phrase not at issue here.

incurring criminal liability under section 186.22(a) has aided and abetted a separate felony offense committed by gang members.” (*Id.* at p. 752.)

Seizing on the language in *Castenada*, the defendant in *People v. Ngoun*, *supra*, 88 Cal.App.4th 432, a Fifth District Court of Appeal case, argued there was insufficient evidence to support his conviction for violating section 186.22(a) because the section only applied to one who aids and abets felonious criminal conduct, not to direct perpetrators like himself. (*Id.* at pp. 434-435.) The *Ngoun* court reviewed the legislative history of the Criminal Street Terrorism Enforcement and Prevention Act of 1988 (the STEP Act)—which enacted section 186.22(a)—and stated that:

Given the objective and intent of subdivision (a), we find good reasons not to construe section 186.22, subdivision (a), in the restricted manner advocated by appellant and instead to conclude that this subdivision applies to the perpetrator of felonious gang-related criminal conduct^[11] as well as to the aider and abettor.

(*Id.* at p. 436.) In undertaking a statutory construction analysis, the court stated:

Under the language of subdivision (a), liability attaches to a gang member^[12] who “willfully promotes, furthers, or assists in

¹¹ This Court—in *People v. Abillar*, review granted August 13, 2008, S163905—is currently considering the issue of “whether the phrase felonious criminal conduct, appearing in Penal Code section 186.22, subdivision (a), should be interpreted to mean felonious gang-related criminal conduct.” Petitioner has argued that it does not. Briefing in the case is complete, and oral argument was held on October 5, 2010.

¹² Respondent notes that section 186.22(a) imposes liability on those who “actively participate[] in any criminal street gang.” Thus, a person who is not a member of a gang—an associate for example—but who actively participates in the gang can be guilty of violating section 186.22(a). (See *People v. Castenada*, *supra*, 23 Cal.4th at p. 753 [finding, among other things, that the defendant’s admissions to police officers of his “gang association or membership” was sufficient to prove he actively

(continued...)

any felonious criminal conduct by members of that gang.” (§ 186.22, subd. (a).) In common usage, “promote” means to contribute to the progress or growth of; “further” means to help the progress of; and “assist” means to give aid or support. (Webster's New College Dict. (1995) pp. 885, 454, 68.) The literal meanings of these critical words squares with the expressed purposes of the lawmakers. *An active gang member who directly perpetrates a gang-related offense “contributes” to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct. Faced with the words the legislators chose, we cannot rationally ascribe to them the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity[.]*

(*Id.* at p. 436, italics added.) Finally, the court addressed *Castenada* and concluded:

As we read *Castenada*, it does not stand for the proposition that only an aider and abettor is subject to liability under section 186.22, subdivision (a) and, for the reasons we have expressed, it would be a misconstruction of the statutory language and a perversion of the legislative intent to read the subdivision in such a narrow manner.

(*Id.* at p. 437.)

The Fifth District again addressed the issue six years later in *People v. Salcido*, *supra*, 149 Cal.App.4th 356. Relying on what the court termed “an often misinterpreted statement made by our Supreme Court in [*Castenada*],” the defendant in *Salcido*—who was the direct perpetrator of the crimes in question—argued that he could not be guilty of violating section 186.22(a) unless he aided and abetted ““a separate felony offense’ in addition to an underlying gang-related felony offense.” (*Id.* at p. 366.)

(...continued)

participated in a criminal street gang within the meaning of section 186.22(a)].)

In rejecting the claim, the court again put in context the statements made by this Court in *Castenada*, reiterated its ruling in *Ngoun*, and rejected the defendant's attempt to distinguish that case.¹³ (*Id.* at pp. 367-371.)

The issue was next addressed in 2009 by Division 2 of the Fourth District Court of Appeal in *People v. Sanchez*, *supra*, 179 Cal.App.4th 1297. Citing *Castenada*, Sanchez—the direct perpetrator of several robberies—argued there was insufficient evidence to support his conviction for violating section 186.22(a) because it only applied to those who aid and abet felonious criminal conduct by other members of the gang. (*Id.* at p. 1306.) In rejecting the claim, the court extensively discussed and quoted *Ngoun* and pointed out that any statements in *Castenada* regarding aiding and abetting were dictum. (*Id.* at pp. 1306-1307.) Specifically, the court stated:

[A]s the *Ngoun* court noted, in *Castenada* itself, the Supreme Court was not actually called upon to decide whether evidence that the defendant perpetrated a felony could be sufficient to satisfy the promote/further/assist element. [¶] For precisely that reason, however, the language in *Castenada* equating the promote/further/assist element to aiding and abetting was dictum. On the other hand, the reasoning of *Ngoun*, which was *not* dictum, is compelling—a gang member who perpetrates a felony by definition also promotes and furthers that same felony. Thus, we do not believe that *Castenada* required the *Ngoun* court to come to any different conclusion.

¹³ The issue in *Salcido* arose because, at the time of trial, CALCRIM No. 1400—the instruction setting forth the elements of section 186.22(a)—stated that it only applied to aiders and abettors. (*People v. Salcido*, *supra*, 149 Cal.App.4th at p. 369.) Thus, the trial court had to modify the instruction so that it applied to a person who “willfully promoted, furthered or assisted by *either directly and actively committing a felony offense* or aiding and abetting felonious criminal conduct by members of that gang.” (*Id.* at p. 369, italics altered.) The court of appeal recommended that the CALCRIM authors modify the instruction and they did. (*Id.* at pp. 369-370.)

(*Id.* at p. 1307, original italics.) The court also noted that “a different—although related” argument to the one presented in *Ngoun* was “lurking” in the case before it. (*Id.* at p. 1307.) The court stated: “The promote/further/assist element requires that the defendant ‘promote[], further[], or assist[] in any felonious criminal conduct by [gang] members’ (Pen. Code, § 186.22, subd. (a), italics added.) One could argue that this element cannot be satisfied by evidence that the defendant perpetrated a felony alone or with nongang members[.]” (*Ibid.*) The court went on to note that the issue had been “squarely” presented and rejected in *Salcido* and adopted the reasoning set forth therein. (*Id.* at pp. 1307-1309.)

In the instant case, the majority concluded that *Ngoun*, *Salcido*, and *Sanchez* were all wrongly decided. In short, the majority concluded that: *Castenada* had correctly interpreted the language in section 186.22(a) to mean that one must aid and abet felonious criminal conduct in order to be guilty of violating the section; the court in *Ngoun* “wholly misse[d] . . . the grammar of the statute” in its analysis; and the CALCRIM drafters erred in amending CALCRIM No. 1400 to include liability for those who directly commit a felony. The majority based its conclusion on a literal, plural reading of the word “members[.]” finding that the statute “requires perforce that there be more than one participant[.]” and stating that “[i]t makes no sense to say that a person has promoted or furthered his own criminal conduct.” (Exh. A, maj. opn. of Blease, J. at p. 5.)

In addition, faced with the facts in *Castenada*, which involved two co-perpetrators committing a robbery in concert, the majority found “that perpetrators may come with the language of section 186.22(a).” (Exh. A, maj. opn. of Blease, J. at p. 21.) This is true, the majority concluded, because “*Castenada* does not rule out perpetrators who act in criminal conduct with other gang members[.]” and because “[t]he dividing line between actual perpetrator and the aider and abettor is often blurred.”

(Exh. A, maj. opn. of Blease, J. at pp. 21-22.) Thus, the majority believes that the statute applies to active participants who aid and abet a felony committed by other gang members and to co-perpetrators who are active participants and commit a felony while acting in concert, but does not apply to an active participant who commits a felony by him or herself or, presumably, to an active participant who commits a felony while acting in concert with non-active participants.

The dissent strongly, and correctly, disagreed with the majority's conclusion, pointing out that:

By insisting on the literal, plural definition of "members," the majority would preclude a conviction for active participation in a criminal street gang (§ 186.22(a)) where the leader of the Norteños, acting entirely alone, got into his car and drove into Sureño territory, shot and killed several Sureños, and pinned notes to their shirts reading, "Norteños Rule."

(Exh. A, dis. opn. of Sims, J. at pp. 5-6.) As the dissent stated:

In light of the purposes of the Street Terrorism Enforcement and Prevention Act, quoted above, I cannot believe the Legislature intended such an absurd result. "We must . . . give the [statutory] provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity. [Citation.]" [Citations.]

(Exh. A, dis. opn. of Sims, J. at p. 6.) The dissent argued that the word "members" should not be given its literal, plural meaning, pointing out that:

Section 7 provides in pertinent part, "Words used in [the [Penal Code] *sic*] in the present tense include the future as well as the present . . . the singular number includes the plural, and the plural the singular . . ." Subdivision 16 of section 7 further counsels that "Words and phrases must be construed according to the context . . ." By these rules, "members" can mean "member." It should.

(Exh. A, dis. opn. of Sims, J. at p. 4.) The dissent also agreed that the majority was correct in finding that one cannot “assist” himself, but pointed out that the majority was wrong about the “meaning of the words ‘promotes [or] furthers . . . in any felonious criminal conduct.’ Someone can ‘promote’ or ‘further’ felonious criminal conduct by committing the offense himself, without the participation of others.” (Exh. A, dis. opn. of Sims, J. at p. 7.)

The dissent quoted extensively from *Ngoun, Salcido, and Sanchez*, and pointed out that the statements in *Castenada* relied upon by the majority were dictum. (Exh. A, dis. opn. of Sims, J. at pp. 1-9.)

Respondent believes the dissent, the drafters of CALCRIM, *Ngoun, Salcido, and Sanchez* all correctly decided this issue. The majority’s opinion relies on dictum in *Castenada*, employs an overly restrictive grammatical interpretation, ignores the legislative intent of the STEP Act, and gives no deference to section 7.

In this case, the decision below will have wide-ranging consequences if left unreviewed. As noted by the Legislature in section 186.21, “there are nearly 600 criminal street gangs operating in California, and . . . the number of gang related murders is increasing.” Given the split among the courts of appeal, an active participant who engages in felonious criminal conduct by himself risks being convicted of violating section 186.22(a) in those counties falling under the jurisdiction of the Fourth and Fifth Appellate Districts. However, an active participant would not be subject to prosecution in those counties falling under the jurisdiction of the Third Appellate District. Further, given the split in authority, some trial courts in the First, Second, and Sixth Appellate Districts may follow the Third District Court of Appeal while others may follow the Fourth and Fifth Appellate Districts and CALCRIM No. 1400, thus creating the potential for

a lack of uniformity from county to county and, potentially, trial court to trial court.

Review is required to resolve the conflict in decisions among the courts of appeal, and to settle this important question of law.

CONCLUSION

Accordingly, respondent respectfully requests that the petition for review be granted.

Dated: October 27, 2010

Respectfully submitted,

EDMUND G. BROWN JR.

Attorney General of California

DANE R. GILLETTE

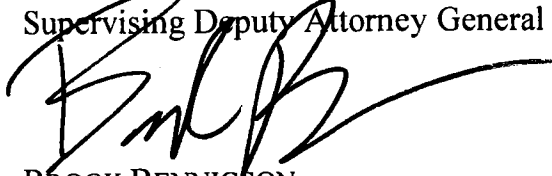
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A handwritten signature in black ink, appearing to read 'Bennigson', written over the printed name of Brook Bennigson.

BROOK BENNIGSON

Deputy Attorney General

Attorneys for Respondent

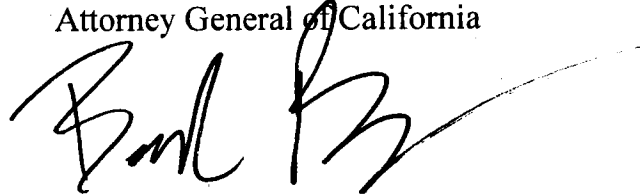
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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 2,856 words.

Dated: October 27, 2010

EDMUND G. BROWN JR.
Attorney General of California

A handwritten signature in black ink, appearing to read "Brook Bennigson", written over the printed name of the Deputy Attorney General.

BROOK BENNIGSON
Deputy Attorney General
Attorneys for Respondent

EXHIBIT A

CERTIFIED FOR PARTIAL PUBLICATION^{1*}

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

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COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT

BY _____ Deputy

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE RODRIGUEZ, JR.,

Defendant and Appellant.

C060227

(Super. Ct. No.
CRF07288)

APPEAL from a judgment of the Superior Court of Yuba County, James L. Curry, Judge. Reversed in part and affirmed in part.

Grace Lidia Suarez, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Charles A. French, Supervising Deputy Attorney General, Brook Bennigson, Deputy Attorney General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 8.110, this opinion is certified for publication with the exception of Parts I and III through V of the Discussion.

SEE CONCURRING AND DISSENTING OPINION

This case tenders the question whether the substantive criminal street gang offense, Penal Code section 186.22, subdivision (a), which concerns the active participation of a person in the criminal activity of a gang, applies to an attempted robbery by a member of a criminal street gang acting alone.²

Section 186.22 is part of the California Street Terrorism Enforcement and Prevention Act of 1988, also known as the STEP Act. (§ 186.20.) Section 186.22 contains two relevant provisions, a substantive offense in subdivision (a), and a sentence enhancement in subdivision (b)(1). The two subdivisions are meant to do different work. As we shall explain, much of the confusion in the case law construing subdivision (a) arises from a failure to distinguish the subject matters of the two subdivisions. Not all gang conduct is covered by subdivision (a); what is not covered by subdivision (a) is generally covered by subdivision (b)(1).

The defendant was convicted by a jury of attempted second degree robbery (Pen. Code, §§ 211/664, count I) and active participation in a criminal street gang (§ 186.22, subd.(a), count III). The jury found true an enhancement that he

² Undesignated statutory references are to the Penal Code.

committed the attempted robbery for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).)³

Subdivision (a) provides that "[a]ny 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 a felony or misdemeanor.

Subdivision (b)(1) provides for the enhancement of a felony sentence when the offense benefits a criminal street gang and is intended to promote the criminal conduct of the gang. (§ 186.22, subd. (b)(1).) The trial court granted defendant's motion for a new trial of the enhancement for lack of supporting evidence. The court explained: "It's beyond a reasonable doubt that Mr. Rodriguez is a member of a gang, the Norteños; that he was active. There is no evidence beyond that to support the gang enhancement. . . . [¶] . . . [W]e have no evidence that the area where the crime was committed had anything to do with gang

³ On the prosecutor's motion, the trial court dismissed a count of assault with a deadly weapon. (§ 245, subd. (a); count II.) The trial court found that defendant had suffered a prior robbery strike conviction (§§ 667, subds. (b)-(i), 1170.12), and had served a prior prison term for a controlled substance conviction. (§ 667.5, subd. (b).)

Defendant was sentenced to state prison for eight years and four months, consisting of six years (double the upper term) for the attempted robbery, 16 months (two-thirds the middle term) for the street gang offense, and one year for the prior prison term.

territory, gang turf. There was speculation from the experts that maybe Mr. Rodriguez's tattoos at least, in part, may have been visible, although the victim saw no tattoos. There was no gang language used during the attack. There were no gang signs. There is simply nothing beyond the fact that he is a gang member that would support that finding" (See *People v. Frank* (2006) 141 Cal.App.4th 1192, 1199.)⁴

On appeal the defendant contends this evidentiary hiatus also required the trial court to dismiss his conviction of the substantive, subdivision (a), criminal street gang offense for lack of substantial supporting evidence. He argues that the evidence fails to show a violation of the third element of the offense, that he "willfully promote[d], further[ed], or assist[ed] in . . . felonious criminal conduct by members of [his] gang." We agree.

It is not sufficient for conviction under subdivision (a), that the defendant knowingly and actively participate in gang activities. The defendant must promote, further or aid in the commission of a separate felony offense "by members of *that* gang," i.e, the gang in which he is an active participant. (Italics added.) The leading case is *People v. Castenada* (2000) 23 Cal.4th 743 (*Castenada*). The court said: "[S]ection 186.22(a) limits liability to those who promote, further, or

⁴ The Attorney General does not challenge the trial court's granting of a new trial on the issue of the gang enhancement. (§ 186.22, subd. (b)(1).)

assist a *specific* felony committed by gang members and who know of the gang's pattern of criminal gang activity. Thus, a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members" (*Id.* at p. 749, italics added.) This includes, on the facts in *Castenada*, the perpetration of a felony in concert with other members of a gang. (*Id.* at p. 745.) *Castenada* precisely reads the grammar of subdivision (a). "[To] assist[] in any felonious criminal conduct by members of that gang" is to aid and abet its commission. It requires perforce that there be more than one participant.⁵ The same is true of furthering or promoting criminal conduct by others. "[To] promote[or] further[] . . . felonious criminal conduct by members of [a] gang" requires that the perpetrator promote or further a "specific felony" (as *Castenada* says) of other members of the gang. It makes no sense to say that a person has promoted or furthered his own criminal conduct. The subdivision is not satisfied by an intention to promote, further or assist a gang in *its* primary activities, including the criminal offenses it customarily engages in. That is a matter that is covered by the enhancement provision of subdivision (b)(1), as to which the trial court granted a new trial.

Subsequent Court of Appeal cases say or suggest that *Castenada* is not limited to concerted action by members of a

⁵ The Attorney General conceded as much at oral argument.

gang in the commission of a separate felony, that subdivision (a) also applies to the sole perpetrator of an offense by a gang member without the criminal involvement of others who are gang members. (*People v. Ngoun* (2001) 88 Cal.App.4th 432 (*Ngoun*); *People v. Salcido* (2007) 149 Cal.App.4th 356 (*Salcido*)). *Salcido* reasons that in each of these two cases "[t]he evidence supports a reasonable inference that the [crimes] were intended by appellant to promote, further and assist the gang in its primary activities - the commission of criminal acts and the maintenance of gang respect.'" (149 Cal.App.4th at p. 368; italics added.) A recent case, *People v. Sanchez* (2009) 179 Cal.App.4th 1297, follows these cases.

In singling out the element of intention, a term that does not appear in subdivision (a), *Salcido* not only departs from the language of subdivision (a), and *Castenada's* straightforward reading of it, but replaces the third element of subdivision (a) with the third element of subdivision (b), the gang enhancement provision. The manifest difference is between aiding gang members in the commission of a separate crime and intending generally to aid the gang in its primary activities.

Castenada rejected *Salcido's* view. "As we have explained, section 186.22(a) imposes criminal liability not for lawful association, but only when a defendant 'actively participates' in a criminal street gang while also aiding and abetting a felony offense committed by the gang's members." (23 Cal.4th at pp. 750-751.)

Since defendant was the sole perpetrator of an attempted robbery that did not involve felonious conduct by other persons, let alone members of the gang of which he was a member, we shall reverse the judgment of conviction for violation of section 186.22, subdivision (a). In all other respects we shall affirm the judgment.

FACTS

On May 10, 2007, defendant, who lived in Woodland, was in Marysville in Yuba County where his girlfriend lived. At approximately 10:23 p.m., Stanley Olsen stepped out of his truck and onto a Marysville street. A person behind him said something that he did not fully hear. Olsen turned and saw defendant, whom he did not recognize, coming up to him. Olsen asked defendant if he knew him; defendant responded with a racial epithet and a threat to kill Olsen. The defendant was wearing jeans and a T-shirt that covered his arms to five inches below the shoulder.

Olsen stood his ground while defendant approached him so that the two men's chests were touching. Defendant demanded money from Olsen and threatened to beat him up. Olsen told defendant that he "didn't have time for this" and that defendant "needed to get away from" him. Defendant then punched Olsen in the jaw.

After being punched, Olsen "grappled" with defendant and they went to the ground with defendant on top. When Olsen tried to get up, defendant punched him in the head and back. Olsen

received injuries above and below his right eye; below his left ear; and on his chin, left elbow, right hand, and left forearm.

Olsen got up, ran three or four steps, and turned to see if defendant was following, which he was not. Olsen told a friend to call the police.

A woman grabbed hold of defendant and pulled him into a nearby apartment where defendant's girlfriend lived. Officers arrived on the scene and were directed to where defendant had fled. The officers knocked on the door, announced their presence, and requested that the door be opened, but there was no response. Eventually the tenant, Serena Torres, defendant's girlfriend, contacted the officers and allowed them to search the apartment for defendant. Defendant's sister, Dena Rodriguez, who was present at the time in the apartment with her baby, told officers that defendant was in a locked bedroom and that he was the person they were looking for.

Officers found defendant hiding under the bed. He stated that he was sorry and that he had not wanted to be arrested because his parole agent had not authorized him to be in Marysville. At an ensuing field showup, Olsen identified defendant as his attacker.

At the jail following his arrest, defendant was asked whether he would have any problems being housed with southern or Sureño inmates. Defendant replied that "there's a possibility there would be a problem." Defendant was asked whether he was a gang member, and he answered, "Yes, maybe a little bit."

Jail inmates are classified "to make sure that inmates are housed with . . . like inmates, so there's no fighting and no problems." During this process defendant was asked if he was an active Norteño; he said, "Yes," and indicated that he was from Woodland. He also indicated that his rivals were "southerners." The classification officer noted that defendant had his surname and the words "northern warrior" tattooed on his back in red and black ink, which are colors used by Norteños.

Yuba County Sheriff's Sergeant Allan Garza was called as an expert on criminal street gangs. The jury was admonished that the facts to which he would testify would form a framework for his opinion and were not being admitted for their truth.

Garza estimated that there were 150 to 200 Norteños in Yuba County. Robbery was a primary activity of Norteños in the Yuba County area. Garza testified that he had conducted a robbery investigation of Anthony Matta, who was a validated Norteño according to the Yuba City Police Department. In August 2007, Matta had been convicted of grand theft from the person (§ 487, subd. (c)) with a gang allegation (§ 186.22, subd. (b)(1)). Documents related to Matta's conviction were introduced into evidence.

Garza testified that defendant's tattoos included the letter "N" and the number "14" on his chest. Because N is the 14th letter of the alphabet, the letter and number are commonly associated with the Norteño gang. The tattooed words, "northern" on the back of the tricep area of defendant's upper

left arm and "warrior," on the back of the tricep area of his upper right arm identify defendant as a warrior for the Norteño gang. Defendant's surname, Rodriguez, tattooed in red ink, was significant because Norteños have adopted red as their color. His tattoos of an Aztec warrior, skulls, and a helmet were significant because Norteño gang members have adopted the Aztec warrior as a symbol of their fierceness.

Garza testified, based upon a report by another officer and without conducting a background check on defendant, that during several police contacts in 1995 and 1999 (apparently in Yolo County), defendant admitted being a Norteño gang member and had been observed wearing gang colors and clothing and displaying gang hand signs.

Based on the foregoing facts, Garza opined that defendant was an active Norteño gang member. Based on a hypothetical question reflecting the facts of the case, as well as his opinion that some portion of defendant's tattoos would be visible if he were wearing a T-shirt, Garza opined that the attempted robbery of Olsen was committed for the benefit of the Norteño gang. There was no testimony that the victim of the attempted robbery saw the tattoos on the backs of defendant's arms. Garza opined that the crime benefited the gang because it proved to fellow gang members that defendant was willing to commit crimes for the gang; the crime instilled fear of the gang in the general citizenry, which made victims and witnesses afraid to testify against the gang; and this made it easier for

gang members to commit and get away with crimes.⁶ However, Garza had not conducted a background check of defendant and did not know whether he belonged to a subset of the Norteños in "the Yuba-Sutter area"

Marysville Police Sergeant Christian Sachs testified in the manner of an expert on criminal street gangs. The jury was admonished that the facts to which he would testify would form a framework for his opinion and were not being admitted for their truth. Sachs testified that members of the Norteño gang associate themselves with the colors red and black; wear red shoelaces and other red clothes; have gang tattoos; associate themselves with the number 14 because "N" is the 14th letter of the alphabet; may have one dot tattooed on one hand and four dots on the other, symbolizing the number 14; and may have certain unique hairstyles.

Sachs testified that there were more than three Norteños in the area and that robbery is a primary activity of the gang. Sachs investigated an attempted homicide case in Marysville in which three Norteño gang members--John Damian Williams, Steven Joseph Echevarria, and Alfredo Dominguez--stabbed someone who had made fun of their haircuts and was believed to be a member of a rival gang. The men were convicted and admitted an allegation that the crime was committed for the benefit of a

⁶ A gang expert "may not testify that an individual had specific knowledge or possessed a specific intent." (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513.)

criminal street gang. Documents related to the three gang members' convictions were introduced into evidence.

Sachs testified that he reviewed Woodland, Yolo County, police records from 1995 through 1999 that documented defendant's membership in the Norteño gang in that area, his admission of membership, and his having been seen in the company of other gang members. Sachs opined that, based on defendant's tattoos, his self-admission during a booking and classification process in Woodland, his red shoelaces, his red cigarette lighter, and the contents of the Woodland Police records, defendant was an active member of the Norteño gang.

Based on a hypothetical question Sachs opined that the present crime was committed for the benefit of a criminal street gang. The crime benefited the gang because it served to intimidate the public; made the public afraid of the gang and created the fear of retribution should anyone cross the gang; and served to intimidate actual and potential witnesses of crimes committed by the gang, thus causing witnesses to not come forward or cooperate with law enforcement.

DISCUSSION

I

Forfeiture

At the outset we consider the Attorney General's argument that defendant forfeited a challenge to the substantive offense

of section 186.22, subdivision (a).⁷ The People contend that defendant's failure to specify count III, the criminal street gang offense, in addition to the gang enhancement finding in his motion for new trial precludes him from challenging the sufficiency of the evidence in support of his conviction. We disagree.

A defendant is not required to bring a motion for new trial to preserve an issue regarding the sufficiency of the evidence supporting a conviction. "In the absence of a guilty plea, the sufficiency of the evidence to support a finding is an objection that can be made for the first time on appeal. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 262[]; *People v. Jones* (1988) 203 Cal.App.3d 456, 461[], disapproved on another ground by *People v. Tenner* (1993) 6 Cal.4th 559, 566, fn. 2[.]")" (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537.)

Here, defendant appeals from a judgment of conviction after a jury trial. Accordingly, his challenge to the sufficiency of the evidence of gang participation is properly before us.

We also reject the Attorney General's argument that defendant fails to properly present the issue of insufficient evidence in his briefing. That is not correct. Defendant clearly argues that the trial court should have "dismissed the

⁷ Evidently confident of its procedural arguments, the Attorney General's brief omits any discussion of the merits of defendant's substantive claims. This was not helpful to the court.

charge" for insufficient evidence. Defendant's briefing suffices to apprise us of his contention and his analysis of the evidence adduced at trial. Thus, we proceed to consider the argument on the merits.

II

The Gang Participation Offense

Defendant contends the trial court should have dismissed his conviction of the substantive gang offense defined by section 186.22, subdivision (a), for insufficiency of the evidence to show that he participated in a felony with other gang members. He reasons that the evidence the trial court found insufficient in granting a new trial of the sentence enhancement (§ 186.22, subd. (b)(1)), the lack of substantial evidence connecting the offense to the gang, also is insufficient to sustain a conviction of the substantive gang offense (§ 186.22, subd. (a)). Resolution of the issue turns on the facts of the case and on a comparison of subdivision (a) with subdivision (b)(1).

We shall conclude that, although the subdivisions describe different aspects of gang involvement, the evidence that the trial court found was insufficient to support the gang enhancement is also insufficient to support the substantive gang participation offense.

A.

The Trial Court's Findings

After the jury found defendant committed an attempted robbery for the benefit of his gang (§ 186.22, subd. (b)(1)),

the trial court dismissed the enhancement allegation for insufficient evidence.

In doing so, the court explained: "The Court's convinced there is insufficient evidence for that finding to stand. It's beyond a reasonable doubt that Mr. Rodriguez is a member of a gang, the Norteños; that he was active. There is no evidence beyond that to support the gang enhancement. There's nothing about the crime that connects it to the activities of the gang other than the expert's statement that robbery is one of the crimes Norteños commit. The cases that I've read say there's got to be something more than gang membership and/or association.

"In this case, we have no evidence that the area where the crime was committed had anything to do with gang territory, gang turf. There was speculation from the experts that maybe Mr. Rodriguez's tattoos at least, in part, may have been visible, although the victim saw no tattoos.^[8] There was no gang language used during the attack. There were no gang signs. There is simply nothing beyond the fact that he is a gang member that would support that finding, and the Court will, in fact,

⁸ As noted, the only visible gang signs on defendant's arms below his T-shirt were on the backs of his triceps. The hypothetical from which Officer Sachs opined that the present crime was committed for the benefit of a criminal street gang was premised on the assumption that the T-shirt defendant was wearing during the attack allowed the display of some portion of his gang tattoos. There was no testimony that the victim of the attack saw the tattoos or any gang symbols.

grant the Defendant's motion for a new trial as to the gang enhancement."

The testimony showed that defendant had been a member of a Norteño gang in Woodland, Yolo County, and that his girlfriend lived in Marysville near where the attempted robbery occurred. The officers' testimony addressed the subject of gang activity in the area of Marysville and assumed that the Norteño gang in Marysville was connected with the Norteño gang in Woodland. They offered no testimony that the Yolo County Norteños were a subset of the Yuba County Norteños.

The trial court found that the only connection between the attempted robbery and a criminal street gang was defendant's active participation in the Norteños in Woodland, Yolo County. No evidence was tendered that defendant was involved with Norteños in Yuba County. As noted, the trial court said "we have no evidence that the area where the crime was committed had anything to do with gang territory, gang turf."

B.

Penal Code Section 186.22, Subdivision (a)

The STEP Act, in section 186.22, contains two relevant provisions, a substantive offense in subdivision (a), and a sentence enhancement in subdivision (b)(1). Since the precise language of each is important for the resolution of the substantial evidence issue, we quote them in full.

Subdivision (a) states in pertinent part: "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 as a felony or misdemeanor.

Subdivision (b)(1) provides, with exceptions not relevant here, that "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" be punished by an enhanced penalty consecutive to the punishment for the felony.

The subdivisions define different aspects of criminal gang involvement. The substantive offense defined in subdivision (a) has three elements. "[1] Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive [2] '[K]nowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,' and [3] . . . that the person 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.' (§ 186.22(a).)" (*People v. Lamas* (2007) 42 Cal.4th 516, 523.) The enhancement provision, subdivision (b)(1), also has three elements. With exceptions not relevant here, it requires (1) conviction of a predicate felony, (2) committed for the benefit of, at the direction of, or in association with a criminal street gang, and (3) with the specific intent to promote, further or assist in any criminal conduct by criminal street gang members. (§ 186.22, subd. (b)(1).)

The purpose of the enhancement is to enhance the sentence of a predicate felony that was committed both to benefit a criminal street gang and with the intent to promote, further or

assist any criminal conduct by its members. By contrast, the substantive offense defined by subdivision (a) requires that the defendant promote, further or assist separate "felonious criminal conduct by members of *that gang*," the gang in which the defendant is an active participant. (§ 186.22, subd. (a); italics added.) The operative distinction is the difference between the aiding and abetting of felonious conduct by gang members and the intention to do so.

The leading case is *Castenada, supra*. At issue was the meaning of the phrase "actively participates" in section 186.22, subdivision (a). The court said the Legislature in adopting the legislation was cognizant of the holding in *Scales v. United States* (1961) 367 U.S. 203 [6 L.Ed.2d 782], "that 'mere association with a group cannot be punished unless there is proof that the defendant knows of and intends to further its illegal aims.'" (23 Cal.4th at p. 749.) "This explains [said the court] why the Legislature expressly required in section 186.22(a) that a defendant not only 'actively participates' in a criminal street gang . . . , but also that the defendant does so with 'knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,' and that the defendant 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.' These statutory elements necessary to prove a violation of section 186.22(a) exceed the due process requirement of personal guilt that the United States Supreme Court articulated in *Scales*

. . . . [¶] . . . Here, section 186.22(a) limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang's pattern of criminal gang activity. Thus, a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members, as the Court of Appeal in [*People v. Green* [(1991)] 227 Cal.App.3d 692, 703-704, acknowledged." (*Castenada, supra*, 23 Cal.4th at p. 749.)

This definition was embodied in former CALJIC No. 6.50 (6th ed. 1996), and CALCRIM No. 1400. "To prove that the defendant willfully assisted, furthered, or promoted a crime, the People must prove [inter alia] that: [¶] 4. The defendant's words or conduct did in fact aid and abet the commission of the crime." (CALCRIM No. 1400.)

In the year following *Castenada, Ngoun, supra*, 88 Cal.App.4th 432, reasoned that it would be inconsistent with the objective and intent of subdivision (a) to restrict its language to aiders and abettors and not extend it to perpetrators. The court said: "Under the language of subdivision (a), liability attaches to a gang member who 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.' (§ 186.22, subd. (a).) In common usage, 'promote' means to contribute to the progress or growth of; 'further' means to help the progress of; and 'assist' means to give aid or support. (Webster's New College Dict. (1995) pp. 885, 454, 68.) The literal meanings of these critical words squares with the

expressed purposes of the lawmakers. An active gang member who directly perpetrates a gang-related offense 'contributes' to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct. Faced with the words the legislators chose, we cannot rationally ascribe to them the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity." (*Ngoun, supra*, 88 Cal.App.4th at p. 436.)⁹

What *Ngoun* wholly misses is the grammar of the statute. The terms "promote[], further[], or assist[]" modify the phrase "felonious criminal conduct by members of that gang," which *Castenada* says refers to "a *specific* felony committed by gang members" (*Castenada, supra*, 23 Cal.4th. at p. 749, italics added.) The reference to "by members of that gang," does not refer to the kinds of offenses which the gang may customarily commit. Thus, to assist in the commission of an

⁹ For these reasons the *Ngoun* court held it a misconstruction of *Castenada* to limit the language of subdivision (a) to aiders and abettors and suggested that the CALJIC committee revise the instruction. (*Ngoun, supra*, 88 Cal.App.4th at p. 437.) Subsequently, CALCRIM No. 1400 (rev.ed. Dec. 2008) was amended to add perpetrators to the instruction, to wit: "3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by: [¶] a. *directly and actively committing a felony offense*; OR [¶] b. *aiding and abetting a felony offense*." (Italics added.) However, in so doing CALCRIM No. 1400 blurred the express requirement that the offense involve the concerted action of others who are gang members.

offense, i.e., to aid and abet its commission, requires perforce that there be more than one participant. The same is true of promoting or furthering the criminal conduct of others.¹⁰ It makes no sense to say that a person has promoted or furthered his own criminal conduct.

We do agree, however, that perpetrators may come within the language of section 186.22, subdivision (a). Perpetrators and aiders and abettors are both principals in the commission of a crime and it may be difficult or unnecessary to assign a particular role to the participants in collective criminal conduct. "[T]he dividing line between the actual perpetrator and the aider and abettor is often blurred. It is often an oversimplification to describe one person as the actual perpetrator and the other as the aider and abettor. When two or more persons commit a crime together, both may act in part as the actual perpetrator and in part as the aider and abettor of

¹⁰ Our dissenting colleague fears the consequences of this construction. He advances an in-terrorum example. He says: "The majority would preclude a conviction for active participation in a criminal street gang [subdivision (a)] where the leader of the Norteños, acting entirely alone, got into his car and drove into Sureno territory, shot and killed several Surenos, and pinned notes to their shirts reading, 'Norteños Rule.'" (Diss.opn. at pp. 5-6.)

Our colleague fails to note that subdivision (a) is not the sole gang provision at issue, this conduct would require a penalty enhancement pursuant to subdivision (b)(1) that is far greater than the penalty for violation of subdivision (a), a matter as to which the trial court has granted a new trial.

the other, who also acts in part as an actual perpetrator."

(*People v. McCoy* (2001) 25 Cal.4th 1111, 1120.)

Castenada does not rule out perpetrators who act in criminal concert with other gang members, as shown by the facts of the case. It described the defendant's offense as follows: "On the evening of October 16, 1995, Juan Venegas and Pimienta Castillo left a Pizza Loca restaurant in Santa Ana and were walking on nearby Sullivan Street when defendant and two companions^[11] began to follow them. Defendant pointed a handgun at Venegas and demanded money, while one of his companions made a similar demand of Castillo. Both victims said they had no money. Defendant then took Venegas's watch and tried to pull a gold chain off his neck. When Venegas broke away and screamed for help, defendant and his companions fled." (*Castenada, supra*, 23 Cal.4th at p. 745.) The *Ngoun* facts are similar. The defendant, an active gang member, went armed with other gang members to a party where rival gang members would be and fired into a crowd that included the rivals after asking a fellow gang member to "watch his back." (*Ngoun, supra*, 88 Cal.App.4th at p. 437.)

Subsequently, *People v. Salcido, supra*, read *Ngoun* to eliminate participation by members of a gang in the defendant's criminal conduct as an element of the offense. "[I]f the

¹¹ Elsewhere described as gang members. (*Castenada, supra*, 23 Cal.4th at p. 753.)

evidence proved any criminal conduct by Salcido, it was only as the perpetrator of the crimes establishing the felonious criminal conduct with which he was charged. This conduct included illegal possession of a weapon, receiving stolen property, carrying a loaded firearm in a vehicle, or carrying a concealed firearm in a vehicle." (*Salcido, supra*, 149 Cal.App.4th at p. 369.) Although "Salcido was accompanied by known gang members . . . there was no evidence they participated in Salcido's crimes." (*Id.* at p. 368.) The court then quoted from *Ngoun*: "[H]owever, '[t]he evidence supports a reasonable inference that the [crimes] were *intended* by [the defendant] to promote, further and assist the gang in its primary activities - the commission of criminal acts and the maintenance of gang respect.'" (*Ibid*; italics added.)

In so doing *Salcido* replaced the third element of subdivision (a) with the third element of subdivision (b)(1). The manifest difference is that subdivision (a) requires that the defendant actually participate as a principal in the felonious conduct of members of a gang, while subdivision (b)(1) requires that the defendant generally intend to promote "any criminal conduct by gang members"

Salcido chose to not follow *Castenada's* construction of subdivision (a) that "a person liable under section 186.22(a) must aid and abet a separate felony offense committed by gang members" (23 Cal.4th at p. 750) essentially because it exceeds the due process requirement of personal guilt articulated in

Scales, supra. The court said: "On its own, the statement arguably supports *Salcido's* position [that the section does not apply to an offense wholly committed by the defendant]. When read in context, however, it is part of the Supreme Court's explanation that section 186.22, subdivision (a), avoids punishing mere association with a disfavored organization and satisfies the due process requirement of personal guilt" (*Salcido, supra*, 149 Cal.App.4th at p. 367.)

Salcido and *Ngoun* were followed by *People v. Sanchez, supra*, 179 Cal.App.4th 1297, in rejecting the view that section 186.22, subdivision (a) "'imposes liability on perpetrators only if they commit the crime in concert with other gang members.'" (*Id.* at p. 1308.) *Sanchez*, like *Salcido* and *Ngoun*, does not parse the applicable language of section 186.22, subdivision (a).

Salcido does not explain why it can ignore a Supreme Court construction of a statute merely because it sets a standard in excess of that required by the United States Constitution. Nor does it explain how it equates the third elements of subdivisions (a) and (b)(1) by equating the actual participation in criminal conduct with the intention to do so. Lastly, although construing the terms "promote[]," "further[]" and "assist[]," it does not explain how the promotion of a separate crime is consistent with its view that no separate crime need be committed.

For these reasons we follow the explicit language of section 186.22, subdivision (a) and Castenada's straightforward construction of it. Since defendant was the sole perpetrator of an attempted robbery that did not involve felonious conduct by other persons, let alone members of the gang of which he was a member, we shall reverse the judgment of conviction for violation of section 186.22, subdivision (a).

III

Prosecutorial Misconduct

Defendant contends that, because victim Olsen had not observed any hand signs, tattoos, or other symbols related to gang activity and had not heard defendant make any gang-related statements, the prosecutor committed misconduct by offering--and the trial court abused its discretion by admitting--Sergeants Garza and Sachs's opinion testimony that the attempted robbery offense was gang-related.

Defendant did not move to exclude Sergeants Garza and Sachs's testimony on any ground, necessarily including undue prejudice or lack of relevance.¹² "A verdict or finding shall not be set aside, nor shall the judgment or decision based

¹² Defendant objected to the form of the hypothetical question put to Sergeant Garza. The objection was sustained. Shortly thereafter, the hypothetical was posed without further objection. Later, when Sergeant Sachs was asked a hypothetical question, defendant objected that a portion of his answer was nonresponsive and moved to strike. The objection was sustained and the answer was stricken. Several questions and answers followed without objection.

thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear *the specific ground of the objection or motion*; . . . ' (Evid. Code, § 353, italics added.) . . . The reason for the rule is clear—failure to identify the specific ground of objection denies the opposing party the opportunity to offer evidence to cure the asserted defect. [Citation.] 'While no particular form of objection is required [citation], the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.' [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 666-667.)

Nor did defendant object on the ground of prosecutorial misconduct. "'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review. [Citation.]" [Citation.]" (*People v. Parson* (2008) 44 Cal.4th 332, 359; see *People v. Lancaster* (2007) 41 Cal.4th 50, 81-82.) Because the jurors could have been admonished to evaluate whether defendant committed the attempted robbery solely on his own behalf, rather than on behalf of his gang, the failure to request the admonishment forfeits the point on appeal.

Perhaps anticipating our conclusion, defendant contends his trial counsel's failures to object and request a corrective admonition constitute ineffective assistance. We are not persuaded.

""[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" [Citation.]" (*People v. Avena* (1996) 13 Cal.4th 394, 418, fn. omitted.)

""[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged [,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

In this case, trial counsel was not asked for any explanation as to why he had failed to object to the sergeants'

testimony on the ground that the victim had not been subjectively aware of any gang involvement in the robbery attempt. There could be a very satisfactory explanation. (*People v. Mendoza Tello, supra*, 15 Cal.4th at pp. 266-267.)

If gang members could compel the exclusion of law enforcement expert opinion testimony simply by concealing from their victims all the evidence of their gang involvement, ingenious gang members would have an effective means of sidestepping the STEP Act. Advocating for such an absurd result would be futile. "Trial counsel is not required to make futile objections, advance meritless arguments or undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel. [Citation.]" (*People v. Stratton* (1988) 205 Cal.App.3d 87, 97, quoting *People v. Jones* (1979) 96 Cal.App.3d 820, 827.)

IV

Marsden Motion

Defendant contends the trial court erred by refusing to grant his *Marsden*¹³ motion. The claim has no merit.

A.

The prosecution's first four witnesses--Olsen, Sergeant Garza, jail intake Deputy Jerry Hulsey, and jail classification Officer Kimberly Ross Pollard, testified on December 18, 2007.

¹³ *People v. Marsden* (1970) 2 Cal.3d 118.

The next morning, before the jury entered the courtroom, the court conducted a *Marsden* hearing outside the presence of the prosecutor.¹⁴ Defendant explained that his "high hopes" for trial counsel had been "diminished" because the trial court had to "intervene in the court proceedings yesterday and object to what was going on."¹⁵

Defendant stated that he had asked trial counsel for any and all information that pertained to his case and, with a few exceptions, he had not received any information. Specifically, he had not received information related to Sergeant Garza or Officer Kimberly Ross Pollard. Defendant said that because of this, he had not had sufficient time to mount a defense. Defendant also stated that he was not comfortable with the composition of the jury. He stated that, although Olsen was the alleged victim, defendant was "feeling more like the victim here due to the fact [he was] being falsely accused."

In response, the trial court had trial counsel state his training and experience. Counsel next explained that defendant originally had been represented by another attorney from his office who had provided him the police reports. Counsel stated

¹⁴ Defendant does not raise any issues related to the *Marsden* hearing held on July 9, 2007.

¹⁵ The court sustained its own objection to Deputy Kimberly Ross Pollard's testimony regarding how a jail inmate's "comprehensive custody score" is calculated and how that score results in a classification of "minimum, medium or maximum."

that, since he had taken over defendant's representation he had provided copies of all discovery that he had received. Counsel explained that much of the discovery had been produced by Sergeant Garza; that the discovery from Garza was in a binder that counsel had with him in court; that he had discussed the information with defendant; that he offered to provide defendant a copy of all of the discovery; and that defendant had declined.

Regarding jury selection, trial counsel explained that he had excused a potential juror whom defendant did not want; that there were potential jurors in the audience that defendant wanted on the jury but who had not been seated in the jury box; that counsel personally had been satisfied with the composition of the jury; and that, even if he exhausted his 10 peremptory challenges, he did not know whether the jurors whom defendant wanted would be called, seated, or excused by the prosecutor.

Trial counsel explained that he had not objected during Deputy Kimberly Ross Pollard's testimony because he did not want to draw attention to the matters by objecting. Although Pollard had mentioned defendant's "C.D.C. card," defendant was not prejudiced because the jury was going to learn that defendant was on parole; as defendant was aware, counsel intended to use that information to his advantage to explain that defendant was hiding under the bed because his parole agent had not authorized him to be in Marysville, not because he had just robbed Olsen.

The trial court asked defendant for his response. Defendant did not remember ever declining copies of reports or

other discovery. Defendant had no knowledge that Sergeant Garza would discuss defendant's criminal history. Nor did he know what Deputy Pollard would testify to. Defendant complained that Sergeant Garza had effectively told the jury that defendant had a criminal history. In his view, the jury was "not supposed to know" anything about him.

The trial court denied the *Marsden* motion, stating that the showing defendant had made in support of the motion was "particularly weak." The court noted that it had observed defendant and counsel conferring during jury selection, and that, although it would be nice if they both were "on the same page," it was counsel who controls and makes the tactical decisions.

B.

On appeal, defendant argues that, "[i]n the present case, the court knew that the robbery victim had not provided any basis for the questions that were being asked of the so-called experts. It also knew that defense counsel failed to object. The court had evidence before it that counsel was not performing competently. It should have granted the *Marsden* motion." In defendant's view, a "well-informed attorney would have known that the prosecutor was asking improper hypothetical questions that did not have a foundation in the testimony of the one and only percipient witness to the attempted robbery. At the time the *Marsden* motion was made, the trial court knew that trial counsel failed to act in a manner expected of a reasonably

competent attorney and a more favorable result would occur in the absence of counsel's omissions."

Defendant's appellate argument is not based on any of the complaints that he had voiced during the *Marsden* hearing. Instead, the argument reprises his argument in part III, *ante*, that the expert testimony was inadmissible and objectionable because the victim had not seen or heard any references to gangs. For the reasons we have stated, that argument has no merit.

Defendant's *Marsden* motion was properly denied.

V

Penal Code Section 4019

The recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to credit, as he had prior convictions for a serious or violent felony. (Pen. Code, § 4019, subds. (b)(1), (2) & (c)(1), (2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

The judgment of conviction of active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a), count III) is reversed. In all other respects the judgment is affirmed.

BLEASE, Acting P. J.

I concur:

BUTZ, J.

I concur in parts I, III and IV of the majority opinion.

I respectfully dissent from the analysis and conclusion of part II. In my view, substantial evidence supports defendant's conviction for active participation in a criminal street gang, a violation of Penal Code section 186.22, subdivision (a).¹

In my opinion, two cases decided by the Court of Appeal for the Fifth Appellate District--*People v. Ngoun* (2001) 88 Cal.App.4th 432 (*Ngoun*) and *People v. Salcido* (2007) 149 Cal.App.4th 356 (*Salcido*)--are both correctly decided. These cases have been recently followed by Division Two of the Fourth Appellate District in *People v. Sanchez* (2009) 179 Cal.App.4th 1297 at pages 1307-1308. I would follow *Ngoun* and *Salcido* here.

In *Ngoun*, the court held "that Penal Code section 186.22 applies to the perpetrator, as well as to aiders and abettors, of criminal gang felonies." (*Ngoun, supra*, 88 Cal.App.4th at p. 434.)

In *Salcido*, the Court of Appeal approved the following jury instruction on section 186.22(a) given by the trial court:

"To prove that the defendant is guilty of this crime[,] the People must prove that, one, the defendant actively participated in a criminal street gang. Two, when the defendant participated in the gang[,] he knew that members of the gang engaged in or have engaged in a pattern of criminal gang activity. [¶] And,

¹ Undesignated statutory references are to the Penal Code. Subdivisions (a) and (b) of section 186.22 are referred to as section 186.22(a) and 186.22(b).

three, the defendant willfully promoted, furthered or assisted by either directly and actively committing a felony offense or aiding and abetting felonious criminal conduct by members of that gang." (*Salcido, supra*, 149 Cal.App.4th at pp. 365-366, 369.)

Section 186.22(a) and (b), provide, as pertinent, as follows:

"(a) 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.

"(b) (1) . . . 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"

On this record, there is no dispute that substantial evidence supports the conclusion defendant actively participated

in a criminal street gang (the Norteños) with knowledge that its members engage in a pattern of criminal gang activity.

At issue is section 186.22(a)'s requirement that a violation occurs when one "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang" (Italics added.)

"Contrary to what is required for an enhancement under section 186.22(b), section 186.22(a) does not require that the crime be for the benefit of the gang. Rather, it 'punishes active gang participation where the defendant promotes or assists in felonious conduct by the gang. It is a substantive offense whose gravamen is the participation in the gang itself.' (People v. Herrera (1999) 70 Cal.App.4th 1456, 1467, fns. omitted.)" (People v. Martinez (2008) 158 Cal.App.4th 1324, 1334.)

Both *Ngoun*, *supra*, 88 Cal.App.4th at page 436 and *Salcido*, *supra*, 149 Cal.App.4th at page 368, concluded that the actual perpetrator of an offense can violate section 186.22(a). *Ngoun* reasoned, "An active gang member who directly perpetrates a gang-related offense 'contributes' to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct." (*Ngoun*, *supra*, 88 Cal.App.4th at p. 436.) This rings true to me, as it did with the *Salcido* court. (*Salcido*, *supra*, 149 Cal.App.4th at p. 367.) The majority "agree . . . that perpetrators may come

within the language of section 186.22, subdivision (a)." (Maj. Opn., ante, at p. 21.)

It appears that the real sticking point between the majority and *Salcido* is the majority's view that section 186.22(a) requires that the perpetrator act in concert with other gang members. The majority give the following statutory language in section 186.22(a) its strict literal interpretation: "promotes, furthers, or assists in any felonious criminal conduct by *members* of that gang" (Italics added.)

In this case, only one member of the gang--defendant--was promoting the felonious criminal conduct by himself committing an attempted robbery.

I would not insist that "members" be given its literal, plural meaning.

Section 7 provides in pertinent part, "Words used in [the [Penal Code] in the present tense include the future as well as the present . . . the singular number includes the plural, and *the plural the singular*" Subdivision 16 of section 7 further counsels that "Words and phrases must be construed according to the context" By these rules, "members" can mean "member." It should.

Section 186.22(a) is a part of the Street Terrorism Enforcement and Prevention Act. (§ 186.20 et. seq.)

Section 186.21 of that Act provides in pertinent part:

"The Legislature . . . finds that the State of California is in a state of crisis which has been caused by violent street

gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected. The Legislature finds that there are nearly 600 criminal street gangs operating in California, and that the number of gang-related murders is increasing. The Legislature also finds that in Los Angeles County alone there were 328 gang-related murders in 1986, and that gang homicides in 1987 have increased 80 percent over 1986. It is the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs."

"Faced with the words the legislators chose [in section 186.22(a)], we cannot rationally ascribe to them the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity." (*Ngoun, supra*, 88 Cal.App.4th at p. 436.)

By insisting on the literal, plural definition of "members," the majority would preclude a conviction for active participation in a criminal street gang (§ 186.22(a)) where the leader of the Norteños, acting entirely alone, got into his car and drove into *Sureño* territory, shot and killed several

Sureños, and pinned notes to their shirts reading, "Norteños Rule."

In light of the purposes of the Street Terrorism Enforcement and Prevention Act, quoted above, I cannot believe the Legislature intended such an absurd result. "We must . . . give the [statutory] provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity. [Citation.]" (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744, quoting *Marshall M. v. Superior Court* (1999) 75 Cal.App.4th 48, 55.)

The majority argue that the grammar of section 186.22(a) requires that the perpetrator must aid others. At issue is the requirement that, in order to violate section 182.22(a), a person "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang"

The majority argue: "[To] 'assist[] in any felonious criminal conduct by members of that gang' is to aid and abet its commission. It requires perforce that there be more than one participant. The same is true of furthering or promoting criminal conduct by others." (Maj. opn., ante, at p. 4, fn. omitted.)

The majority is right about the meaning of the word "assists." Someone does not "assist" himself.

But the majority are wrong about the meaning of the words "promotes [or] furthers . . . in any felonious criminal conduct." Someone can "promote" or "further" felonious criminal conduct by committing the offense himself, without the participation or aid of others. Thus, *Ngoun* explains: "Given the objective and intent of subdivision (a), we find good reasons not to construe section 186.22[(a)], in the restricted manner advocated by appellant and instead to conclude that this subdivision applies to the perpetrator of felonious gang-related criminal conduct as well as to the aider and abettor. Courts should give statutory words their plain or literal meaning unless that meaning is inconsistent with the legislative intent apparent in the statute. [Citations.] Under the language of subdivision (a), liability attaches to a gang member who 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.' (§ 186.22[(a)].) In common usage, 'promote' means to contribute to the progress or growth of; 'further' means to help the progress of; and 'assist' means to give aid or support. (Webster's New College Dict. (1995) pp. 885, 454, 68.) The literal meanings of these critical words squares with the expressed purposes of the lawmakers. An active gang member who directly perpetrates a gang-related offense 'contributes' to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct." (*Ngoun*, *supra*, 88 Cal.App.4th at p. 436.)

The grammar of section 186.22(a) does not preclude giving the term "members" a singular construction in accordance with the rule of section 7.

The majority argue that their construction of the statute is compelled by the opinion of our Supreme Court in *People v. Castenada* (2000) 23 Cal.4th 743. (Maj. Opn., ante, at pp. 21-22.) However, the court in *People v. Sanchez, supra*, 179 Cal.App.4th, correctly pointed out that *Castenada* was not called upon to decide whether section 186.22(a), requires a defendant to aid and abet other gang members or act in concert with them:

"[In *Castenada*] in addition to gang participation, the defendant was convicted of robbery and attempted robbery. (*People v. Castenada, supra*, 23 Cal.4th at pp. 745-746.) Victims Venegas and Castillo had been walking down the street together 'when defendant and two companions began to follow them. Defendant pointed a handgun at Venegas and demanded money, while one of his companions made a similar demand of Castillo. Both victims said they had no money. Defendant then took Venegas's watch and tried to pull a gold chain off his neck. When Venegas broke away and screamed for help, defendant and his companions fled.' (*Id.* at p. 745.) Thus, the defendant was the direct perpetrator of the robbery of Venegas; however, he was arguably only an aider and abettor of the attempted robbery of Castillo. To put it another way, there was substantial evidence that the defendant had aided and abetted a felony.

"In any event, as the court noted later in *Castenada*, there the defendant 'd[id] not contest . . . that through the robbery and attempted robbery . . . , he "promote[d], further[ed], or assist[ed]" felonious criminal conduct of [a] gang in violation of [] section 186.22(a).' (*People v. Castenada, supra*, 23 Cal.4th at p. 753.) Hence, as the *Ngoun* court noted, in *Castenada* itself, the Supreme Court was not actually called upon to decide whether evidence that the defendant perpetrated a felony could be sufficient to satisfy the promote/further/assist element.

"For precisely that reason, however, the language in *Castenada* equating the promote/further/assist element to aiding and abetting was dictum. On the other hand, the reasoning of *Ngoun*, which was not dictum, is compelling--a gang member who perpetrates a felony by definition also promotes and furthers that same felony. Thus, we do not believe that *Castenada* required the *Ngoun* court to come to any different conclusion." (*Sanchez, supra*, 179 Cal.App.4th at pp. 1306-1307.)

Castenada, supra, 23 Cal.4th 743, does not compel the result reached by the majority.

I would affirm defendant's conviction for violation of section 186.22(a). (*Salcido, supra*, 149 Cal.App.4th at p. 367.)

SIMS, J.

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

MAILING LIST

Re: The People v. Rodriguez
C060227
Yuba County
No. CRF07288

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rodriguez**

No.: **C060227**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 27, 2010, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 27, 2010, at Sacramento, California.

Declarant