Case No. S275746

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	Case No. S275746
v.	)	Court of Appeal Case No. E075532
KEJUAN DARCELL CLARK, Defendant and Appellant	)	Riverside County Superior Court Case No. RIF1503800

APPEAL FROM THE RIVERSIDE COUNTY
SUPERIOR COURT

Honorable Bambi J. Moyer, Judge

APPELLANT'S OPENING BRIEF

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Under Appointment of the
California Supreme Court

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Introduction

This case addresses the issue of whether the prosecution can meet its burden of establishing a "pattern of criminal gang activity" under Penal Code section 186.22 as amended by Assembly Bill No. 333 (Stats. 2021, ch 699) by presenting evidence of individual gang members committing separate predicate offenses, or whether it must provide evidence of two or more gang members

working together during each predicate offense. Appellant argues the latter is required — that is, because the provision requires the gang members "collectively engage in" a pattern of gang activity, the prosecution must prove that two or more members committed each predicate offense.

Statement of Appealability

This is an appeal from a felony conviction following a jury trial and an affirmance on appeal. It is authorized by Penal Code section 1237.[1]

Relevant procedural and factual background[2]

Appellant was convicted of a burglary, a robbery and a rape committed in 2015. The charges arose from an incident where he had sex with the mother of a friend, who was burglarized at the same time by appellant's confederates. The accuser thereafter denied knowing appellant, and denied the sex was consensual. (*See People v. Clark* (2022) 81 Cal.App.5th 133, 138-142 for additional facts.)

The jury found the burglary and robbery charges were gang-related within the meaning of Penal Code section 186.22(b)(1)(c) (2 CT 359-363; 3 CT 584-585, 588-579.)

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[1] All further references will be to the California Penal Code unless otherwise specified.

[2] Inasmuch as the facts of the charged incident are not relevant to the present issue (the proper interpretation of AB 333), the facts presented here will be limited to that issue.

The trial court imposed a sentence of 20 years plus 90 years-to-life in prison, which included a 10 year term for the gang enhancement. (4 CT 919-920.)

The prosecution called a "gang expert," Riverside County deputy sheriff Richard Reyes to provide facts in support of the gang allegation. (5 RT 950.) He testified that appellant was a member of the Sex Cash Money (SCM) gang, and that the gang's primary activities included burglaries, robberies, weapon possession, drug sales, auto theft and assaults. (5 RT 1009.) Deputy Reyes knew of robberies and burglaries committed by the gang. (5 RT 1009.)

The prosecution asked Deputy Reyes about several crimes committed by SCM, and presented certified copies of six convictions in order to prove a pattern of criminal activity for purposes of the section 186.22, subd.(b) enhancement.

The convictions included a certified conviction for a 2014 robbery committed by CSM member Damon Ridgeway (5 RT 994, 1013, 1015-1016); a residential burglary committed by Ridgeway in 2009 (5 RT 994, 1013-1016); certified burglary convictions for the three co-perpetrators in the present case (5 RT 1017-1021); and a certified attempted burglary conviction involving the appellant in 2014. (5 RT 1023.)

The trial court instructed the jury with CALCRIM No. 1401, which described the elements of the section 186.22, subd.(b) gang enhancement at the time of the crime. (8 RT 1544.)

Overview of the section 186.22, subd.(b) gang enhancement and Assembly Bill 333

In 1988, the Legislature enacted the California Street Terrorism Enforcement and Prevention Act (the STEP Act). (See Penal Code section 186.20 et seq.) Among other things, the Act created a sentence enhancement for felony crimes committed "for the benefit of, at the direction of, or in association with any criminal street gang." (Section 186.22, subd. (b)(1); *People v. Valencia* (2021) 11 Cal.5th 818, 829.)

In 2021, the Legislature passed Assembly Bill 333 (2021-2022 Reg. Sess.), which became effective on January 1, 2022. The bill made various changes to the gang enhancement provision. First, it narrowed the definition of "criminal street gang" to require that any gang be an "ongoing, organized association or group of three of more members." (Section 186.22, subd. (f).)

Next, and as relevant here, whereas section 186.22, former subdivision (f) required only that a gang's members "individually or collectively engage in a pattern of criminal activity" in order to constitute "a criminal street gang," Assembly Bill 333 requires that any such pattern have been "collectively engage[d] in" by members of the gang. (Section 186.22, subd. (f).) Assembly Bill 333 also narrowed the definition of a "pattern of criminal activity" by requiring that the last offense used to show a pattern of criminal activity occurred within three years of

the date that the currently charged offense was alleged to have been committed, the offenses were committed by two or more "gang members" (rather than just "persons"), the offenses commonly benefitted a criminal street gang, and the acts establishing a pattern of gang activity must be offenses other than the currently charged offense. (Section 186.22, subd.(e)(1),(2).) The bill also narrowed what it means for an offense to have commonly benefitted a street gang, requiring that any "common benefit" be more than "reputational." (Section 186.22, subd.(g).) Finally, the bill added section 1109, which requires, if requested by the defendant, a gang enhancement charge be tried separately from all other counts that do not otherwise require gang evidence as an element of the crime.

Argument

The gang enhancement must be reversed because the prosecution failed to prove two predicate offenses committed "collectively" by SCM members.

There is currently a spit of authority among the courts of appeal interpreting the requirements for showing that gang "members collectively engage in, or have engaged in, a pattern of criminal gang activity." (Section 186.22, subd. (f).)[3] In *People v. Delgado* (2022) 74 Cal.App.5th 1067, 1072, the court found the

[3] Respondent agrees in its supplemental brief filed in the Court of Appeal that the provisions of AB 333 apply retroactively to this case because it is not final on appeal. (Respondent's supplemental brief, p. 1, citing *In re Estrada* (1965) 63 Cal.2d 70, and *People v. Sek* (2022) 74 Cal.App.5th 657, 667.)

requirement … that gang members 'collectively engage' in a pattern of criminal gang activity, means the People were required to prove that two or more gang members committed each predicate offense …" In contrast, the court in the present case, *People v. Clark*, *supra*, 81 Cal.App.5th at pp. 145-146 disagreed with *Delgado*'s interpretation of "collectively" in subdivision (f), finding instead that "a pattern of criminal gang activity may be established by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion."

The decision in *Delgado* followed *People v. Lopez* (2021) 73 Cal.App.5th 327, 344-345, which compared the former section 186.22, subd. (f), to the current version.[4] Prior to AB 333, a criminal street gang was defined as "'an[y] *ongoing organization, association, or group* of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated criminal acts], having a common name or common identifying sign or symbol, and whose members *individually or collectively* engage in, or have engaged in, a pattern of criminal gang activity." (Section 186.22, subd. (f), italics added.) (*People v. Lopez*, *supra*, 73 Cal.App.5th at p. 344.) The *Lopez* court found that, while the People had proven gang members had individually engaged in a

[4] *Lopez* was decided before AB 333 went into effect, so it refers to the current version and the version effective January 1, 2022. *Lopez*'s "current" version is now the former version of section 186.22.

pattern of criminal activity, "Assembly Bill 333 will require the prosecution to prove collective, not merely individual, engagement in a pattern of criminal gang activity." (*Id*. at p. 345.) No evidence was introduced at trial to show that the predicate offenses "constitute collective criminal activity" by the gang. (*Ibid*.)

In *Delgado*, the court found that subdivision (f)'s term "collectively" required that the predicate offenses be committed by multiple gang members. The *Delgado* court noted that the changed definition of a "criminal street gang" in section 186.22, subdivision (f), now requires proof that members of a gang "collectively engage in, or have engaged in, a pattern of criminal gang activity." That change meant the prosecution must prove that two or more gang members committed each predicate offense. (*Id*. at pp. 1072-1073.)

Noting that the previous version of section 186.22, subd. (f), stated that gang members must "individually or collectively" engage in a pattern of criminal gang activity while the current version only uses the term "collectively" to describe the pattern of gang activity, the *Delgado* court "read the term 'collectively' in a common sense manner to mean what it says—committed by more than one person, and not, as argued by the People, individually but on a different day." (*Id*. at pp. 1088-1089.) The court rejected the prosecution's interpretation that "removal of the word 'individually' simply means it is no longer sufficient for a single individual to commit both predicate offenses on different days, but rather, a

different individual must commit each offense. Such a minimal change to the statute is inconsistent with the Legislature's intent to significantly limit the scope of the gang enhancement." (*Id*. at p. 1089.)

In line with principles of statutory construction, the *Delgado* court gave the statute's words their plain and common sense meaning, at the same time looking to "the entire substance of the statute ... to determine the scope and purpose of the provision." (*People v. Delgado, supra*, 74 Cal.App.5th at p. 1088.) Where the "statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Ibid*.) *Delgado's* understanding of the term "collectively" was consistent with the Senate Rules Committee's analysis of AB 333, which described subdivision (f)'s amendment as requiring that "engagement of a pattern of criminal activity ... be done by members collectively, not individually." (*Id*. at p. 1089.) *Delgado* concluded that "[i]f subdivision (f) were read to "limit application of the gang enhancement to situations where individual gang members committed two predicate offenses on separate occasions," that interpretation "would do little to further [AB 333's] legislative purpose." (*Ibid*.)

The court in the present case (*Clark)*, looking at the same language as *Lopez* and *Delgado*, reached a different conclusion. (*People v. Clark, supra*, 81 Cal.App.5th at pp. 143-146.) It held that "a pattern of criminal gang activity may

be established by (1) two gang members who separately committed crimes on different occasions, or (2) two gang members who committed a crime together on a single occasion." (*Id*. at pp. 145-146.) The *Clark* court relied on the plain language of subdivision (e)(1)'s alternative options: the prior "offenses were committed on separate occasions or by two of more members" and asserts that since the statute's terms are clear and unambiguous, the reviewing court need go no further. (*People v. Clark, supra*, 81 Cal.App.5th at p. 144.) *Clark* opined that the statute would not be satisfied if "one gang member committed two crimes on two different occasions" because that would not show that "'members'" (plural) of "the gang are collectively involved in criminal activity." (*Ibid*.)

Clark criticized *Delgado* for not recognizing the plain language of the statute and because its interpretation renders the alternative option that "the offenses were committed on separate occasions" as surplusage. (*People v. Clark, supra*, 81 Cal.App.5th at p. 145.) *Clark* was unpersuaded by *Lopez* because *Lopez* "did not provide a plain language analysis of the statute pertaining to the phrases (A) "members collectively" (§ 186.22, subd. (f)); and (B) "the offenses were committed on separate occasions or by two or more members (§ 186.22, subd. (e)(1))." (*People v. Clark, supra*, at p. 145.)

Delgado and *Lopez* have the better argument. There is a dissonance between subdivision (e)(1), which, in order to establish a "pattern of criminal

activity," states that predicate offenses "were committed on separate occasions or by two or more members" and subdivision (f) which requires that gang "members collectively engage in, or have engaged in, a pattern of criminal gang activity." Both subdivisions appear to give meaning to the phrase "pattern of criminal activity."

"Collectively" is defined as "as a whole group rather than as individual persons or things." (< https://www.dictionary.com/browse/collectively >, accessed January 8th, 2023.) A common sense reading of "members collectively engage in, or have engaged in, a pattern of criminal activity" is that the members as a group engage in a pattern of criminal activity. That reading is at odds with *Clark*'s reading of subdivision (e)(1) which defines "pattern of gang activity" as "offenses … committed on separate occasions or by two or more members." *Clark*'s reading makes "collectively" surplusage and is inconsistent with the legislative intent of narrowing the reach of California's gang laws.

Members cannot collectively commit a crime if only a single person is implicated in the crime. Both the plural "members" and the qualifying term "collectively" must be given meaning. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476 [Courts should "give effect and significance to every word and phrase of a statute."].) The common sense reading is that members acting together must engage in a pattern of criminal activity.

The correctness of this reading is supported by the fact that the former (pre-AB 333) subdivision (f) required that "members *individually or collectively* engage in, or have engaged in, a pattern of criminal gang activity." (Emphasis added.) The fact that the Legislature removed the term "individually" from the statute is significant. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1337 ["'Where changes have been introduced to a statute by amendment it must be assumed the changes have a purpose … .'"]; *Williams v. Garcetti* (1993) 5 Cal.4th 561, 568 ["an intention to change the law is usually inferred from a material change in the language of the statute"]; *People v. Valentine* (1946) 28 Cal.2d 121, 142 ["It is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law"].) *Delgado*'s and *Lopez*'s reading of the statute give meaning to this change in a way that comports "with the Legislature's intent to significantly limit the scope of the gang enhancement." *(People v. Delgado, supra*, 74 Cal.App.5th at p. 1089.)

Delgado's reading of the statute is also consistent with this Court's interpretation of the former section 186.22. In *People v. Gardeley* (1996) 14 Cal.4th 605, 623, this Court found that the statutory definition of "criminal street gang" required that it have "members who individually or collectively have actually engaged in "two or more" acts of specified criminal conduct committed either on separate occasions or by two or more persons." *Gardeley* combines the

elements in subdivision (e) with those in subdivision (f) to reach an overall definition of "criminal street gang." *Delgado* takes a similar approach with the new version of the statute.

Moreover, *Delgado*'s reading of this ambiguity is consistent with the principle that "[w]here the statute is susceptible of two reasonable constructions, a defendant is ordinarily entitled to that construction most favorable to him." (*Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 488.)

Delgado's reading is consistent with that given the changes made by AB 333 described in this Court's opinion in *People v. Tran* (2022) 13 Cal.5th 1169, 1207, finding "Assembly Bill 333 requires that any [pattern of criminal activity] have been 'collectively engage[d] in' by members of the gang" and "narrowed the definition of a 'pattern of criminal activity' by requiring that … the offenses were committed by two or more gang 'members,' as opposed to just 'persons.'" In *Tran*, this Court reversed the gang enhancement "because the jury was not presented with any discernible theory as to how [gang] members 'collectively engage[d] in' these predicate crimes …" (*Id.* at p. 1208.) A similar result should occur here, and appellant's gang enhancement should be reversed because there was no discernable theory as to how CSM members collectively engaged in the predicate crimes.

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Conclusion

Appellant respectfully requests that this Court find the prosecution failed to prove members of SCM collectively engaged in a pattern of gang activity for purposes of section 186.22, subd.(f), and reverse the decision of the Court of Appeal.

Dated: January 23, 2023

Respectfully submitted,

s/Patrick Morgan Ford
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Attorney for Appellant
KEJUAN DARCELL CLARK

Certificate of Compliance

I, Patrick Morgan, certify that the within brief consists of 3,348 words, as determined by the word count feature of the program used to produce the brief.

Dated: January 23, 2023

s/Patrick Morgan Ford
PATRICK MORGAN FORD

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STATE OF CALIFORNIA
Supreme Court of California

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