IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VICTOR WARE, et al. Defendants and Appellants.	)	Supreme Court No. S263923 Court of Appeal No. D072515 Superior Court No. SCD255884

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

HONORABLE LEO VALENTINE, JR., JUDGE

REPLY FOR APPELLANT NICHOLAS HOSKINS

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IN THE SUPREME COURT OF

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THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Supreme Court No. S263923
Plaintiff and Respondent,	)	Court of Appeal
v.	)	No. D072515
VICTOR WARE, et al.	)	Superior Court No. SCD255884
Defendants and Appellants.	)	

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HONORABLE LEO VALENTINE, JR., JUDGE

REPLY FOR APPELLANT NICHOLAS HOSKINS

ARGUMENT

I. Respondent Fails to Address The Question Raised About Whether A Defendant May Be Convicted Of A Conspiracy Based Entirely On Circumstantial Evidence Of A Conspiracy And Where The Only Connection To The Coconspirators Is Common Gang Affiliation And Social Media Posts Which Fail To Prove His Involvement In the Conspiracy.

A. Introduction

Respondent suggests that the evidence is sufficient to support Hoskins's conspiracy conviction based on the conclusions

of the Court of Appeal. (Answer at p. 17, citing *People v. Ware, et al.* (2020) 52 Cal.App.5th 919, 937-944.) Respondent 's argument is unpersuasive because the opinion, below is flawed in two respects. First the opinion, in the words of respondent, "found there was sufficient circumstantial evidence from which the jurors could conclude that petitioner knew of the conspiracy and 'had the deliberate, knowing, and specific intent to join the conspiracy.' (*People v. Ware, supra,* 52 Cal.App.5th at p. 941.)" (Answer at p. 20, see also p. 23.) Without conceding that Hoskins had the "deliberate, knowing, and specific intent *to join*" a conspiracy, such evidence, without more, is insufficient. For example, a jury is instructed as a necessary element of conspiracy, that a defendant "intended to agree *and did agree* with [one or more of]" the other defendants/co-conspirators to commit the alleged act. (CALCRIM No. 415, ¶ 1, emphasis added.) Regardless of whether an individual has the intent to agree, i.e., to join, here the evidence fails to prove Hoskins acted upon any intent and did, in fact, agree / join.

But more importantly, the Court of Appeal failed to address – and respondent in its answer evades – the question posed by this Court. What is at issue – the important issue of law – is whether an individual may be convicted for conspiracy (here, to murder) based on identification with a group (however unlikeable the group may be) compounded by the notoriety given to the group by him or her via social media. The following hypotheticals illustrate this point:

A white supremacist militia group numbers about 100 and several members of a hardcore subset within the militia conspire to kidnap a state governor. Militiaman X has not agreed to commit the kidnapping but his front lawn is festooned with militia paraphernalia and signs. Cell phones seized from the conspirators contain postings from him denouncing the governor and a lawful search of his phone yields multiple postings praising the "liberty loving" arrestees and protesting against the "oppressive' government. Would this be sufficient to render Militiaman X a co-conspirator? Hardly.

Second hypothetical: an organization has as its goal, "justice," and loudly protests in favor of Black Lives Matter. A small minority, on learning of a hedge fund CEO who rearranged corporate funds to benefit corporate officers to the detriment of low-end employees, first plans and then goes to the corporate headquarters to "liberate" (loot) many assets to distribute Robin-Hood style to the community. A member of the larger organization, whose wardrobe consists solely of BLM outfits and who continuously posts BLM messages on social media, hears of the "liberation" and rushes to corporate headquarters, where he/she takes photos as police arrive and posts those photos on social media. Has that member become a conspirator?

One final hypothetical: a small cadre of a large anti-abortion network conspire to murder an abortion doctor but are thwarted. Another very active, national spokesperson for the network posts on his/her social media accounts praise for the conspirators's dedication to the cause and contrasts their devotion

to "pro-life" in comparison to the murderers of the unborn. Again, has the spokesperson joined the conspiracy?

The foregoing hypotheticals present facts similar to those in Hoskins's case and illustrate the danger of conspiracy convictions based on circumstantial evidence and where the defendant's connection to the co-conspirators is common gang membership and generalized social media posts, insufficient to prove involvement in the conspiracy.

Review by this Court is necessary to resolve this important and unsettled question of law of statewide importance.

B. Respondent's Argument That Mr. Hoskins Failed To Establish A Valid Ground For Review Is Meritless And Unresponsive To The Question Identified By This Court.

Respondent first argues that this Court should deny Mr. Hoskins's petition for review because he "has not shown why review is authorized or appropriate." (Answer at p. 16.) Respondent further argues that the resolution of the issue presented "is not an issue that would secure uniformity of law or answer a question of statewide importance." (Answer at p. 16.)

This Court requested respondent address a specific issue in its answer. In other words, by solely addressing petitioner's original petition, respondent is ignoring/evading the question proffered by the court.

Moreover, respondents' argument must also be rejected for the reasons cited in respondent's July 30, 2020, letter request to the Court of Appeal for partial publication of that court's unpublished opinion. The Court of Appeal granted that request

by order filed on July 31, 2020. (See Appendix A in Hoskins's Petition for Review.)

Respondent's July 30th letter states that the Court of Appeal opinion concluded that "a general agreement of gang members to kill rival gang members is sufficient to support a conviction for conspiracy to commit murder." Respondent adds, the opinion "applies an existing rule of law to a set of facts significantly different from those stated in published opinions; it modifies, explains, or criticizes with reasons given, an existing rule of law; and it involves an issue of continuing public interest."

In contrast, respondent's answer argues that this is not an issue that would secure uniformity of law or answer a question of statewide importance. (Answer at p. 16) Respondent's answer is directly contrary to the reasons cited in its request for publication and must therefore be rejected.

While Hoskins contends respondent's claim that he has failed to establish grounds for review is meritless and unresponsive to the issue identified by this court, for the reasons cited in Hoskins's petition for review and in respondent's July 30th letter, review of this issue is necessary because it presents an important question of law, involving an issue of continuing public interest.

II. The Evidence Cited in Respondent's Answer Fails To Address The Question Presented By This Court And Fails To Support Hoskins's Conspiracy Conviction.

A. The Social Media Posts And Other Evidence, Cited in Respondent's Answer, Relate Only To Undisputed Evidence Of Hoskins's Gang Membership And Generalized Expressions Of Hostility Toward Rival Gang Members With No Connection To Any Target Offense Or Agreement By Hoskins To Commit Such An Offense.

"Conspiracy is a "specific intent" crime [which] divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy." (*People v. Swain* (1996) 12 Cal.4th 593, 600.) "To sustain a conviction for conspiracy to commit a particular offense – here murder – the prosecution must show not only that the conspirators intended to agree *but also that they intended to commit the elements of <u>that</u> offense*.' [Citation]." (*Ibid*., italics original, underscoring added.) That evidence is absent as to Hoskins and respondent's answer fails to prove otherwise.

Respondent acknowledges Hoskins's conspiracy conviction was based entirely on circumstantial evidence. (Answer at p. 20.) Hoskins contends that evidence consists only of his common gang affiliation with the coconspirators and his generalized social media posts which fail to prove his involvement in the conspiracy.

Respondent evades the central issue and argues, instead, "[t]he conduct, relationship, interests and activities of petitioner with his fellow 5/9 Brim gang members before, during and after

the killings provided a strong evidentiary basis from which to infer that these individuals had reached a tacit agreement to commit the murders." (Answer at pp. 19-20; see also Court of Appeal Opinion at pp. 23, 25.) Respondent's answer contains a lengthy recitation of "relevant facts" offered to support the conspiracy conviction yet those facts provide no new information. Instead, the evidence cited in respondent's answer falls into two main categories: (1) undisputed evidence of Hoskins's gang membership; and (2) Hoskins's generalized social media posts. While, in one case, his social media post referred generally to a shooting incident of a cross-town rival, that post occurred *after* the shooting and provides no evidentiary link to Hoskins's involvement in that incident or to his involvement in any conspiracy.

Hoskins will not respond in detail to the lengthy recitation of the facts in respondent's answer, much of which has been addressed at length in his prior briefing. To summarize, respondent cites six examples of Hoskins's membership in the 5/9 Brim gang and his membership in the subset of the Brim gang known as the Hit Squad. Three of those examples were referenced in his social media posts. Hoskins did not dispute, at trial, evidence of his membership in the 5/9 Brim gang or his membership in the Hit Squad.

The important point is that none of the gang evidence cited in Respondent's answer connects Hoskins to any murder or conspiracy to commit murder. Moreover, Hoskins membership in the gang and the subset is not a crime and without more, it is

insufficient to prove his agreement to commit a crime. (See *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 ["Mere active and knowing participation in a criminal street gang is not a crime."].)

Respondent cites to evidence in Hoskins's cell phone of gang-related photographs which amounts to nothing more than additional undisputed evidence of his gang membership. (Answer at p. 9.) Respondent cites further evidence of Hoskins's alleged "OG" status in the Brim gang and his allegiance to the gang. (Answer at pp. 13-14.) Yet, again, his alleged status as an "OG" is not a crime and does not connect him to any murder or conspiracy to commit any of the target offenses of murder.

The second category of evidence cited in the answer relates to Hoskins's generalized social media posts which also fail to connect him to any specific target offense or agreement to commit such an offense. Respondent cites five examples of Hoskins's social media posts which allegedly reference shooting incidents *after* they occurred. Hoskins will not address each of those incidents in detail because such evidence has been addressed at length in his prior briefing, the messages were posted *after* the shooting incidents, and such evidence again fails to show Hoskins's connection to any target offense or conspiracy to commit such an offense.

Respondent's reliance on Hoskins's Facebook post from February 21, 2013, is a particularly egregious example of social media evidence used against him in an effort to connect him to a shooting that occurred more than a year before Hoskins posted

the Facebook message. (See Answer at p. 8.) Respondent cites the social media post in reference to a shooting incident that occurred on January 3, 2012, where shots were fired at a house in West Coast Crip gang territory. (Answer at p. 8.) Respondent then states, "[p]etitioner later posted a photograph on his Facebook account of fellow gang member [Timothy] Hurst standing on the same corner as the shooter in the January 3rd shooting." (Answer at p. 8.) However, respondent fails to mention that the Facebook photograph was uploaded on Hoskins's account on February 21, 2013 – more than a year after the 2012 shooting incident. (35 RT 4932.) No evidence in that Facebook post connects Hoskins to the January 3, 2012, shooting incident or to any conspiracy to commit that offense. Moreover, additional evidence in the record shows Hurst was standing near the location of the shooting that occurred a year earlier, but was standing "50 to 75 feet away from where the shooters were standing." (35 RT 4935.) Respondent fails to explain the relevance of this Facebook post to Hoskins's conspiracy conviction.

Respondent also cites to an April 9, 2012, Facebook post (overt act number 11) discussed in more detail in Hoskins's petition for review at page 15. The social media post refers only to "cKrossys" (cross-town rival gang members) getting hit, but doesn't refer to any specific shooting incident. Most importantly, as respondent acknowledges, the April 9th Facebook message was posted five and six days *after* two shootings allegedly committed

by fellow 5/9 Brim members in rival territory.[1] (Answer at p. 10.) Hoskins's Facebook post does not support a reasonable inference that he knew about the shootings before they occurred or that he was involved in those shootings, or that he agreed or conspired with anyone to commit those offenses.

Respondent cites to evidence of the August 27, 2013, shooting incident at Byreese Taylor which was the subject of Hoskins's gang conspiracy conviction. (Answer at p. 11.) Respondent notes that Brim member Timothy Hurst was convicted of an unspecified offense related to that incident. (Answer at p. 11, fn. 6.) However, the Court of Appeal opinion reversed Hoskins's conviction on the gang conspiracy count based on a failure of proof. (Opn. P. 27.) In an apparent attempt to connect Hoskins to the August 27th shooting, respondent nevertheless cites evidence that Hoskins's DNA was found in Hurst's minivan and Hurst's cell phone had Hoskins's contact information. (Answer at p. 11.) Yet, respondent fails to include information that Hurst and Hoskins grew up next door to each other, in an area claimed by West Coast Crips, and the two are close childhood friends. (35 RT 4931; 36 RT 5207-5208.) Respondent again fails to explain how the evidence from the

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[1] Two Brim members were convicted of attempted murder in a shooting on April 4, 2012. Another Brim member's DNA was found on a handgun used in a separate shooting incident on April 3, 2012. However, the record does not disclose whether any Brim member was convicted of an offense relative to the April 3rd incident.

August 27, 2013, shooting supports Hoskins's conspiracy conviction.

Respondent cites further evidence that *six months before* the August 27, 2013, shooting incident, Hoskins posted on Facebook a photograph of Hurst at a location in rival gang territory *about a mile from the August 27th shooting*. (Answer at pp. 11-12.) The relevance of this social media post is not explained. However, respondent states that on the morning of the shooting, another Brim member posted photographs on Instagram of himself and Hoskins in rival gang territory, *also about a mile from the shooting*, throwing up gang signs. (Answer at p. 12.) While respondent contends that Hoskins and the other Brim member were "challenging and promoting the killing of Crips," the record shows that Hoskins was forming a "W" with his hands, for West Coast Crips, and "flipping it off with his right hand." (35 RT 5022.) While his gestures were admittedly disrespectful, they are insufficient evidence that he promoted or instigated any particular crime. And, while the record indicates "metadata" from the Instagram post included a reference to Crip killers, another Brim member, not Hoskins, posted that Instagram message. (35 RT 5021-5022.) No evidence shows Hoskins participated in that post or even knew about it. As he explains in his petition and prior briefing, speculation is not evidence.

Respondent also cites a Facebook post by Hoskins "on or about March 3, 2014 " (overt act 73), which states: "That's some gay sHit not Gansta yall getBacK taggin in the set? That's all yo

DeadHomie worth? That's why I kall yall cKraBs." (41 RT 6141; 4 CT 979; see Exhibit 41-128 – 35 RT 5000.) This social media post is discussed in detail in Hoskins's petition for review at pages 16-17. This is another egregous example of the misuse of social media evidence against Hoskins.

To summarize, this post was cited by the prosecutor at trial to show Hoskins's alleged involvement in the March 2, 2014 shooting at Carlton Blue, who was affiliated with the West Coast Crip gang. (41 RT 6188.) The prosecutor argued that this post is evidence that Hoskins is "encouraging the activities of not only his fellow Hit Squad members," but is also making sure the Crips know who is shooting at them. (41 RT 6188.) The prosecutor further argued that the post is evidence of Hoskins's "goal, as part of this group . . . to . . . kill Crips." (41 RT 6188.) However, the prosecutor acknowledged that this Facebook message was posted hours *after* the shooting incident involving Carlton Blue. (41 RT 6188.) Blue was not even mentioned in the post. And, the prosecutor's argument was contrary to the testimony of the gang expert that the post did not refer to the shooting at Blue.

The evidence shows the Facebook post did not relate to the March 2nd shooting at Blue or any other shooting at issue in this case. As explained in Hoskins's petition for review, the prosecution's gang expert explained that Crip gang member Paris Hill (not Carlton Blue) was the "dead homie" referred to in Hoskins's Facebook post and Hill's death was an internal killing by the West Coast Crip gang. (35 RT 5000-5001; 36 RT 5193, 5195.) Thus, that shooting was unrelated to the 5/9 Brim gang

and to any target offense in this case. Respondent fails to acknowledge the misuse of this evidence against Hoskins and merely cites the Facebook post as "complete disrespect to West Coast Crips . . . ." (Answer at p. 13.) Yet, disrespect to the rival gang does not constitute sufficient evidence of Hoskins's involvement in a conspiracy to commit the target offenses of murder.

Additional social media posts cited in respondent's answer confirm the generalized nature of that evidence. For example, respondent cites a December 16, 2013, post by Hoskins which states, "I'm tired of grinding, fighting, running, jail, death, stress, betrayal and everything else this game has to offer." The post adds, "[b]ut its what we signed up for." (Answer at p. 12.) Respondent cites another post from April 15, 2014, where Hoskins states, "ain't going to survive too much longer in Dago[,]" and "I can't keep my ass out of the mix." (Answer at p. 13.) Another post by Hoskins, two days later, was interpreted by the gang expert as Hoskins saying he and presumably his fellow gang members "had too much pride to walk away or take a loss, so they would not turn down a fight or gunfight ...." (Answer at p. 14.) Respondent cites additional social media posts by Hoskins which describe the gang culture and mentality, but fail to connect him to any target offense or conspiracy to commit such an offense.

The facts relied upon by the prosecutor at trial and cited in respondent's answer essentially render Hoskins and all 200-plus Brim members a party to the conspiracy. If the evidence cited by respondent is deemed sufficient, Hoskin's mere membership in

the gang and the subset, along with his generalized social media posts, which fail to connect him to any murder or conspiracy to commit murder, would established the requisite agreement. This is the epitome of guilt by association which cannot furnish the basis for a conspiracy. (See *People v. Donahu*e (1975) 46 Cal.App.3d 832, 840; see also *United States v. Garcia* (9th Cir. 1988) 151 F.3d 1243, 1246.)

B. The Cases Cited By Respondent Are Inapposite.

Respondent cites *People v. Manson* (1976) 61 Cal.App.3d 102, 126 (*Manson*), for the general proposition that "association, by itself, does not prove criminal conspiracy" however, respondent argues "it is a fact to be considered." (Answer at p. 12.) In fact, in *Manson,* the actual wording is: "it is a starting place for examination. [Citation.]" (*People v. Manson, supra,* 61 Cal.App.3d at p. 126.) While an affiliation may be a "starting place" from which to examine other evidence, respondent fails to cite to any other evidence – apart from Hoskins's generalized social media posts. Hoskins acknowledges evidence of his status in the gang and his allegiance to the gang, his prior arrest for possessing a firearm, and his social media posts which include apparent references to "snitching" by Brim member Timothy Hurst. While such evidence reflects his gang affiliation and mentality, it is insufficient evidence of his involvement in the alleged conspiracy. Respondent's reliance on *Manson* does not address the issue here and does not assist in determining Hoskins's involvement.

Respondent also cites *People v. Tran* (1996) 47 Cal.App.4th 759, 772-773, for the proposition that "association or gang membership may be a factor in finding substantial evidence of a conspiratorial agreement. (See Answer at p. 21.) However, *Tran* is inapposite because that case did not involve gang membership or rivalry and the facts are significantly different from Hoskins's case.

In *Tran,* the reviewing court found the evidence sufficient to support the jury's finding that the defendants conspired to murder one of two shooting victims. (*Id.* at pp. 763, 772.) The two defendants/appellants were armed with firearms and went to a restaurant where one appellant entered and shot a victim in the head. The other appellant waited outside. Thus, both appellants were present and participated in the near-fatal shooting – one as a direct perpetrator and the other, described as a "lookout and backup," directly aided and abetted that shooting. (*Id.* at p. 772.)

In contrast, in Hoskins's fact-intensive case, no evidence connects him to any target offense (murder) or to an agreement to commit such an offense. *Tran* is inapposite for the reasons discussed and does not address the question presented.

Last, respondent cites *People v. Superior Court* (*Quinteros*) (1993) 13 Cal.App.4th 12, which is also inapposite. (See Answer at pp. 21-22.) The underlying incident in that case began with an altercation between the defendant and the eventual decedent which occurred in a restroom at a state beach. (*Id.* at p. 18.) The

altercation escalated and the defendant summoned nearby gang friends. The escalation resulted in a deadly fight. (*Id.* at p. 19.)

The Court of Appeal concluded there was sufficient evidence in the information, which was set aside, to support the charges which included murder and conspiracy. (*Id.* at pp. 15, 20.) The court specifically found the evidence "sufficiently shows the existence of an agreement coupled with the requisite specific intent (to find the two intruders and beat them up), along with overt acts . . .[assaults on certain victims] *in which defendant directly participated* . . . ." (*Id.* at p. 21; emphasis supplied.) The court added that "the evidence at the preliminary hearing sufficiently establishes that defendant, along with his fellow gang members, designed to go and at the very least beat up [two victims] who had been involved in the previous confrontation with defendant." (*Ibid.*)

In sum, the defendant in *Quinteros* was present at the scene of the fatal altercation, he instigated the altercation, he summoned his affiliates and he directly participated in the deadly melee. The facts in that case are qualitatively different than the social media postings used to convict Hoskins of conspiracy.

The foregoing cases cited in respondent's answer fail to address the question presented and are inapposite for the reasons discussed.

In sum, review is necessary to resolve this important and unsettled question of law of statewide importance.

CONCLUSION

For the reasons set forth above, appellant respectfully requests that review be granted.

Respectfully submitted,

/s/ Nancy Olsen
Nancy Olsen
Attorney for Appellant
Nicholas Hoskins

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.360(b)(1), I certify that the length of the foregoing REPLY BRIEF, as determined by the word count feature of my word processing program, contains 4,002 words.

/s/ Nancy Olsen
Nancy Olsen
Attorney for Appellant
Nicholas Hoskins

PROOF OF SERVICE

I, the undersigned, declare that I am over 18 years of age, employed in the County of San Diego, and not a party to the instant action. My business address is P.O. Box 231153, Encinitas, CA 92023-1153. My electronic service address is nancyeolsen@gmail.com. I served the attached **REPLY BRIEF** as follows:

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Manuel L. Ramirez, Esq.	Michael V. Daniele, Esq.
David Polsky [Counsel for Ware]	Lynda Romero [Counsel for Simpson]

Court of Appeal, Fourth Appellate District, Division One (per Supreme Court TrueFiling policy)

USPS: On November 2, 2020, I served the following person at the following address, by placing a copy of the document in a sealed envelope, with the correct postage, and depositing it in the United States Postal Service, at Encinitas, California:

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Facility B, Building 5, Bed 211
P.O. Box 4490
Lancaster, CA 93539

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed on November 2, 2020 at Carlsbad, California.

/s/ Nancy Olsen
Nancy Olsen

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. WARE**
Case Number: **S263923**
Lower Court Case Number: **D072515**

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/s/Nancy Olsen

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Olsen, Nancy (132419)

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