IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29084-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
ALEJANDRO MAGANA ARREOLA,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — A street gang called the Surenos refused to disperse from a public park after ordered to do so by a police sergeant. The sergeant saw the group wearing gang colors and flashing gang signs in the general area of a recent drive-by shooting. He arrested the group for failure to disperse, searched the defendant, and found drugs. We conclude that the gang's conduct created a substantial risk of injury or damage, and therefore the judge properly refused to suppress the drug evidence. We affirm the conviction for possession of drugs.

FACTS

The conviction here followed a stipulated bench trial. So the factual backdrop for

this appeal, largely memorialized in the judge's findings of fact, is a verity on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Alejandro Magana Arreola is a member of a gang—the Surenos. The gang had been involved in a shooting a couple of days earlier. Mr. Arreola was one of about 15 people gathered in front of a house in Toppenish, Washington. A number of the group wore blue clothing—blue bandanas, blue shoelaces, blue web belts that hung down, and shirts with the number 13 on them. And they flew a blue bandana. The clothing and bandana identified them as members of the Sureno gang with "Sur" or "13." A number of them were flashing gang signs and displaying gang tattoos. Toppenish Police Sergeant Jake Church saw the gathering, recognized three of them as members of the gang, and ordered them to disperse. One in the group told the sergeant that they had gathered to get a few photos of the "homies."[1]

The gang had been involved in a shooting two days earlier. The sergeant ordered the group to disperse because he was concerned about the potential for drive-by shootings and other gang-related violence. One asked the sergeant if they could go to Pioneer Park. He responded that he could not prevent them from going to the park but they could not group up as they had.

[1] A "homey" is "one who is from one's neighborhood, hometown or region – often used as a familiar form of address especially among inner-city youths," "a fellow member of a youth gang." Webster's Third New International Dictionary 95a (2002).

The gang dispersed but then 12 or 13 of them, including Mr. Arreola, gathered again in the park. And they again flashed gang signs while posing for pictures. Families and children were in the park and the gang and their activity were visible to those in the park and those outside of the park. The sergeant then arrested them for failure to disperse.

Yakima County Sheriff's Deputy Matthew Steadman assisted with the arrests. He patted Mr. Arreola down. And he learned of and arrested Mr. Arreola on authority of an outstanding arrest warrant. Deputy Steadman searched Mr. Arreola incident to that arrest and found two Vicodin pills.

The State then charged Mr. Arreola with possession of a controlled substance. He moved to suppress the pills. The court concluded that Mr. Arreola had committed a misdemeanor (failure to disperse) in the sergeant's presence and that gave the officer authority to arrest. The court then denied his motion. The case proceeded to a bench trial and the court found Mr. Arreola guilty of possession of a controlled substance on stipulated facts.

DISCUSSION

Mr. Arreola assigns error to the trial court's conclusion that he committed a misdemeanor (failure to disperse) in Sergeant Church's presence. He contends that

Sergeant Church then lacked probable cause to arrest him for the crime and necessarily that the search incident to that arrest was also improper.

We review the trial court's challenged conclusions of law de novo. *State v. Fry*, 168 Wn.2d 1, 5, 228 P.3d 1 (2010).

Police may arrest a person for a misdemeanor committed in his presence without securing a warrant. RCW 10.31.100; *State v. Walker*, 157 Wn.2d 307, 318, 138 P.3d 113 (2006). Sergeant Church, then, had probable cause to arrest Mr. Arreola for failure to disperse if the State showed that in the sergeant's presence (1) Mr. Arreola congregated with a group of three or more people, (2) the group conducted itself in a way that created a substantial risk of injury to person or property, and (3) Mr. Arreola failed to disperse when ordered to do so.

RCW 9A.84.020[2] provides:

> (1) A person is guilty of failure to disperse if:
> (a) He or she congregates with a group of three or more other persons and there are acts of conduct within that group which create a substantial risk of causing injury to any person, or substantial harm to property; and
> (b) He or she refuses or fails to disperse when ordered to do so by a peace officer or other public servant engaged in enforcing or executing the law.
> (2) Failure to disperse is a misdemeanor.

[2] We quote the current version of the statute, which was simply amended by Laws of 2011, chapter 336, section 410 to make the language gender neutral.

Mr. Arreola's challenge here on appeal raises a couple of concerns, one constitutional (the First Amendment right to assemble) and one factual (conduct that creates a substantial risk of injury to person or property). He urges that his group did nothing more than peaceably assemble. Appellant's Br. at 8. We limit our discussion to the statutory basis for the arrest, since we conclude that it is dispositive.

Mr. Arreola argues that he and the other members of the Surenos did not violate RCW 9A.84.020 because their conduct created only the possibility of injury to person or harm to property, not "a substantial risk" of the same. Mr. Arreola maintains that flashing gang signs did not create a substantial risk of injury because no rival gang saw them doing it. He says "substantial risk" means "clear and present danger" or "other immediate threat to public safety." Appellant's Br. at 9 (citing *State v. Dixon*, 78 Wn.2d 796, 808, 479 P.2d 931 (1971)). Neither Mr. Arreola nor the case he relies on defines either of these terms. Whether or not the conduct here is sufficient to support the elements of RCW 9A.84.020 is a question of law that we review de novo. *State v. Gomez*, 152 Wn. App. 751, 753, 217 P.3d 391 (2009). And while the correct standard of review is de novo, it is also obvious that whether the statute's criteria is met turns on the factual circumstances of every case, *see State v. Mayer*, 120 Wn. App. 720, 725, 86 P.3d 217 (2004), much like the conclusion probable cause or reasonable suspicion.

Again the essential facts here are undisputed and fairly distilled show:

- This was an assembly of a street gang—the Surenos—well known to the arresting officer.
- They were decked out in clothing and flew colors that identified them as members of that gang.
- They collected in the general area where a drive-by shooting had recently occurred.
- They collected in a public park where families and children were present and began flashing gang signs that were visible both in the park and outside of the park.

In *Dixon*, the state supreme court concluded that the former unlawful assembly statute (a predecessor statute to RCW 9A.84.020) did not violate the right to peaceful assembly because it criminalized only breaches of the peace. 78 Wn.2d at 806. The court held that "'[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.'" *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)). The predecessor statute did not use the term "substantial risk." *See* former RCW 9.27.060 (1909). *Dixon*, then, does not define RCW 9A.84.020's use of the term "substantial risk." Neither does the legislature.

"Words of a statute not particularly defined are to be given their ordinary, everyday meaning." *Dixon*, 78 Wn.2d at

804. "Substantial" means "something having substance or actual existence." Webster's Third New International Dictionary 2280 (1993). And "risk" means "the possibility of loss, injury, disadvantage, or destruction." *Id.* at 1961. A "substantial risk," then, is an existing, real, or actual possibility of loss or injury. And sufficient facts support Sergeant Church's belief that flashing gang signs under the circumstances here created a real possibility of loss or injury.

Sergeant Church has training in gangs and ongoing experience with them in the Toppenish area because of his job. Gangs in Toppenish are violent. They are regularly involved in homicides and drive-by shootings. And they challenge each other by flashing gang signs. When rival gangs "see these kinds of things, it results in . . . violent activity, almost every time. Sometimes even with police presence." Report of Proceedings at 10. And here in particular he knew that the house where Mr. Arreola's gang initially congregated had been hit in a drive-by shooting two days earlier.

We conclude that these facts support the conclusion that the conduct here created the necessary substantial risk of injury or damage to warrant the order to disperse required by RCW 9A.84.020(1) regardless of whether the Surenos had any right to assemble in the first place. Indeed, we express no opinion on the larger First Amendment question. The trial court then properly concluded that Mr. Arreola's warrantless arrest

was lawful.

We affirm the conviction.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.