

PEOPLE v. NUNEZ

**THE PEOPLE, Plaintiff and Respondent,
v.
OMAR NUNEZ et al., Defendants and Appellants.**

No. B217501.

Court of Appeals of California, Second District, Division Eight.

Filed January 13, 2011.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant
Omar Nunez.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant Josue
Moreno.

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Deputy Attorneys General, for Plaintiff and Respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, J.

Defendants and appellants Omar Nunez and Josue Moreno appeal from the judgment entered following a joint jury trial in which both were convicted of two counts of assault with a firearm and two counts of criminal threats. Moreno was also convicted of battery and assault with a deadly weapon arising out of a separate incident. Nunez contends he was denied the right to confrontation, a fair trial and due process as the result of the denial of his motion for severance; Moreno contends insufficient evidence supported his assault with a deadly weapon conviction; Nunez and Moreno both contend insufficient evidence supported their assault with a firearm and criminal threats convictions; and Moreno contends the trial court erred in failing to give a unanimity instruction. We affirm.

PROCEDURAL BACKGROUND

Nunez and Moreno were jointly charged by amended information with assault with a firearm (counts 8 and 9) and criminal threats (counts 10 and 11); Moreno was also charged with misdemeanor battery (count 4) and assault with a deadly weapon (count 7); hate crime, principal armed, personal firearm use and criminal street gang enhancements were also alleged.¹ Following a joint jury trial, both defendants were convicted as charged. As to both defendants, the hate crime and criminal street gang enhancements were found true as to each count; as to Nunez, personal gun use enhancements were found true as to each count; as to Moreno, the principal armed enhancement was found not true on the assault with a deadly weapon conviction (count 7).

Moreno was sentenced to 14 years 8 months in prison; Nunez to 21 years.
Both defendants filed timely notices of appeal.

FACTS

Viewed in accordance with the usual rules on appeal (*People v. Zamudio* (2008) [43 Cal.4th 327](#), 357-358 (*Zamudio*)), the evidence established that in January 2008, the criminal street gang known as "Varrio Sans Street" or "Sans Street" was comprised mostly of Hispanics; the members

openly expressed a general antipathy towards African-Americans. Sans Street claimed territory in the City of Paramount, including where Paramount High School is located. Paramount High School is predominantly Hispanic and there is ongoing tension between Hispanic and African-American students. Moreno and Nunez, as well as codefendant Beltran, were admitted members of Sans Street and they flaunted their dislike of African-Americans. Moreno's girlfriend at the time, 15-year-old Elizabeth C., was a student at Paramount High School.

A. Counts 4 (Battery) and 7 (Assault With a Deadly Weapon) Against Moreno

On January 9, 2008, 16-year-old Isaiah F. was in the ninth grade at Paramount High School. He was not in a gang. After school that day, he was walking with two friends to the gym to play basketball when he encountered several male Hispanics, including Moreno. As Isaiah walked by, Moreno and his companions swore at them and gave them mean looks. After one of Isaiah's friends said something about not liking Mexicans, Moreno and four of his companions confronted Isaiah. Moreno asked Isaiah where he was from, which Isaiah understood as an inquiry about his gang affiliation. Isaiah replied that he was not in a gang. Moreno responded by punching Isaiah in the face and saying, "I'm going to get you niggers." During the ensuing fistfight, one of Moreno's companions pushed Isaiah to the ground, pulled out a pocket knife and swiped it at Isaiah. When people came to Isaiah's aid, Moreno and his companions left. A week after the incident, Isaiah identified Moreno as the person who punched him. The person who wielded the knife was not identified.

Moreno's girlfriend, Elizabeth, testified that she was standing next to Moreno when this incident occurred. She did not hear anyone say anything anti-Mexican. She saw Moreno hit someone.

B. Counts 8 and 9 (Assault With a Firearm) and Counts 10 and 11 (Criminal Threats) Against Both Defendants

On January 15, 2008, 17-year-old Nigee W. was in the 12th grade at Paramount High School. At about 3:30 p.m. that day, Nigee and his friend, Shawanta H., were walking through a gas station parking lot toward Fabulous Burgers when a friend said something that caused Nigee to turn around; Nigee saw a car driven by Beltran coming towards him; Nunez was in the front passenger seat, Moreno was in the back passenger seat on the driver's side and there was a female in the back seat. When the car stopped, Nigee and Nunez looked at each other for about 10 seconds. Nunez said he was from "Sans Street," which Nigee recognized as the name of a Hispanic gang. Nunez then threw some gang signs and used a racial slur; Beltran did the same. Some of the 20 or so African-American students gathered at a nearby bus stop responded with racial slurs of their own. Nigee and Shawanta did not use any racial slurs. Nigee told Beltran and Nunez that he did not care where they were from and said, "If you want to do something you can get out and fight." Beltran and Nunez got out of the car. Nigee testified that Beltran said, "We're going to kill you niggers and we don't care about you niggers and stuff like that." Nunez said, "We're going to kill you guys." Beltran pulled what looked like a nine millimeter semiautomatic out of his waistband or pocket while at the same time saying, "We're going to kill you, you're a nigger, and we don't care." Although his attention was focused on Beltran, Nigee saw that Nunez was holding a chrome-plated semiautomatic. Beltran and Nunez were standing between 12 and 15 feet away and looking directly at Nigee and Shawanta as they made the threatening statements, but neither Beltran nor Nunez ever pointed their guns at Nigee or Shawanta. Meanwhile Moreno, who had remained in the car during the first moments of the exchange, had gotten out and was standing next to the car, yelling out the gang name, "Sans Street." Although Nigee had not been afraid when Beltran and Nunez first stepped out of the car and he anticipated a fistfight, he became afraid when he saw the guns. The sight of the guns caused Nigee to back

up, Shawanta did the same. The encounter, which Nigee estimated lasted about seven minutes but felt longer, ended when a policeman in a marked patrol car drove up. A video tape of the incident taken by a security camera was played for the jury.

The officer whose appearance ended the encounter, Deputy Sheriff Stephen Capra, testified that he was in a marked patrol car observing the students leaving Paramount High School when he noticed a car pull up to a group of African-American students congregated at a nearby bus stop. Capra saw three male Hispanics — Beltran, Nunez and Moreno — get out of the car and confront the African-American students. While one of the African-American students was trying to get his attention, Capra drove towards the bus stop. As he pulled up, Capra saw Beltran point a black semiautomatic at the African-American students, who began screaming and running away. Capra did not see Nunez or Moreno with a gun; he did not see any of the African-American students with a gun. Drawing his weapon, Capra instructed Beltran to show him his hands. Beltran ignored the instruction as he, Nunez and Moreno got into Beltran's car and drove away. A five-minute car chase ensued, during which Capra occasionally lost sight of the fleeing car. After Beltran crashed, he, Nunez and Moreno ran away but were eventually apprehended. Capra searched the car but did not find a gun. Another officer retraced the route of the pursuit looking for a gun but did not find one. An officer who watched the pursuit from a police helicopter did not see anything thrown out of the car window during the pursuit.

Elizabeth testified that she was in the car with Moreno, Nunez and Beltran when Beltran pulled into the gas station. Elizabeth recalled that a number of African-American students were gathered around a bus bench. To these students, Beltran said, "Fuck niggers." Nunez and Moreno repeated the comment and the African-Americans responded in kind. Elizabeth remained in the car while Beltran, Nunez and Moreno got out and all three engaged in a fistfight with the African-American students. During the fight, Elizabeth heard Beltran say, "I'm going to kill you niggers." Nunez and Moreno said only, "Fuck niggers." When Elizabeth saw a police officer approach, she got out of the car and walked away. The next day, Elizabeth went to the school to apologize to the African-American students who were attacked by Beltran, Moreno and Nunez. At the school, she told Detective Gabriella Herrera what she had seen. Elizabeth spoke to Herrera again shortly before trial. Herrera testified that Elizabeth told her she saw Beltran holding a gun; Elizabeth thought Nunez was also holding a gun, but was not sure. But at trial, Elizabeth maintained she never saw any guns that day; she thought Nunez might have had a gun because of the way he reached his hand into his pants during the incident, but since he never pulled out a gun, Elizabeth concluded that he did not have one. Elizabeth was afraid that if she testified that Beltran, Nunez or Moreno had a gun, she or someone in her family would be hurt.

DISCUSSION

A. Denial of Severance Was Not an Abuse of Discretion

Nunez contends he was denied the right to confrontation, a fair trial and due process as the result of the denial of his motion to sever his case from that of Moreno. He argues that evidence that Moreno encouraged Elizabeth to testify falsely was prejudicial to Nunez. We find no error.

"When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials." (Pen. Code, § 1098.) "Denial of a severance motion may be an abuse of discretion . . . if evidence relevant to some but not all of the counts is highly inflammatory [or] if a relatively weak case has been joined with a strong case so as to suggest a possible 'spillover' effect that might affect the outcome" (*People v. Cummings* (1993) [4 Cal.4th 1233](#), 1283 (*Cummings*)). Severance may be appropriate ""in the face of an incriminating confession, prejudicial association with

codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." [Citation.]" (*People v. Champion* (1995) [9 Cal.4th 879](#), 904, disapproved on another point in *People v. Ray* (1996) [13 Cal.4th 313](#), 369, fn. 2.)

Whether denial of a severance motion was an abuse of discretion is decided on the basis of facts known at the time the trial court ruled on the motion. (*Cummings, supra*, 4 Cal.4th at p. 1284.) But even if denial was not an abuse of discretion at the time of the ruling, a conviction may be reversed where consolidation resulted in "a gross unfairness . . . such as to deprive the defendant of a fair trial or due process of law." (*People v. Turner* (1984) [37 Cal.3d 302](#), 313, overruled on other grounds in *People v. Anderson* (1987) [43 Cal.3d 1104](#), 1115.)

Here, Nunez moved for severance of his trial from that of his codefendants under *Aranda-Bruton*, based on admissions Beltran and Moreno made to the police.² Following an unreported discussion with counsel, the People agreed to try Beltran separately; the minute order states that the trial court granted the severance motion as to Beltran, but denied it as to Moreno. During Nunez and Moreno's joint trial, Moreno's statements were not admitted into evidence. But Elizabeth testified that both Beltran and Moreno contacted her and urged her to falsely testify that the African-Americans started the January 15 incident by saying "Fuck Mexicans," that the African-Americans had guns and that Beltran, Nunez and Moreno did not have guns. Elizabeth testified that Nunez never contacted her. The jury was admonished not to consider Moreno's statements to Elizabeth for any purpose whatsoever as to Nunez.³

On appeal, Nunez argues that he was denied due process because, notwithstanding Elizabeth's testimony that Nunez did not contact her and the instruction, the jury may have used the evidence that Moreno contacted Elizabeth against Nunez. We are not persuaded. Moreno's statement to Elizabeth did not implicate Nunez and did not suggest that Nunez was guilty of anything. In light of Elizabeth's testimony that Nunez never contacted her and the limiting instruction, which we presume the jury followed (*People v. Coffman* (2004) [34 Cal.4th 1](#), 83), Nunez has not shown that he suffered any gross unfairness amounting to a denial of due process as a result of being jointly tried with Moreno.

B. Moreno's Conviction for Assault With a Deadly Weapon Was Supported by Substantial Evidence

Moreno contends there was insufficient evidence that he aided an assault with a deadly weapon in the incident on January 9, 2008 (count 7). He argues an assault with a deadly weapon (a knife) was not a natural and probable consequence of the battery (fistfight) which Moreno admits he committed against Isaiah. We disagree.

The standard of review for a claim of insufficiency of the evidence is well known. To determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we review the whole record, viewing the evidence in the light most favorable to the prosecution and presuming in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. The same standard applies where the prosecution relies primarily on circumstantial evidence. (*Zamudio, supra*, 43 Cal.3d at p. 357.) The elements of aiding and abetting are (1) knowledge of the unlawful purpose of the perpetrator, (2) the intent or purpose of committing, facilitating, or encouraging commission of the crime, (3) by act or advice, aiding, promoting, encouraging or instigating the commission of the crime. (Pen. Code, § 31; *In re Eduardo M.* (2006) [140 Cal.App.4th 1351](#), 1358.) Although presence at the scene of a crime is not alone sufficient to constitute aiding and abetting (*People v. Nguyen* (1993) [21 Cal.App.4th 518](#), 529-530), it is a factor that may be considered along with

companionship, flight and conduct before and after the crime. (*People v. Jones* (1980) [108 Cal.App.3d 9](#), 15.)

In addition to being held criminally liable for a crime he intends to aid and abet (the target crime), a defendant may also be held criminally liable for any other crime that was the "natural and probable consequence" of the target crime. (*People v. Prettyman* (1996) [14 Cal.4th 248](#), 261.) To find a defendant guilty of aiding and abetting a crime other than the target crime, a jury must find that the defendant aided and abetted the target crime, the defendant's confederate committed an offense other than the target crime and the offense committed "was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Id.* at p. 262.) A crime that is reasonably foreseeable is the natural and probable consequence of the target crime without regard to whether the defendant actually foresaw the charged crime would be committed. (*People v. Mendoza* (1998) [18 Cal.4th 1114](#), 1133.) In other words, the test is objective, not subjective.

Courts have consistently held that more violent crimes are the natural and probable consequence of a battery involving gang members. For example, in *People v. Godinez* (1992) [2 Cal.App.4th 492](#), 499-500, the court held that a fatal stabbing of a rival gang member either during or after a fistfight was a natural and probable consequence of the fistfight. And in *People v. Olguin* (1994) [31 Cal.App.4th 1355](#), 1375-1376, the court held that the defendant's punching of the victim during a gang confrontation foreseeably led to the victim being fatally shot by a fellow gang member.

Here, there was undisputed evidence that Moreno was a member of the Sans Street gang and that the gang expressed hatred for African-Americans. On January 9, 2008, Moreno punched Isaiah, an African-American, after inquiring about his gang affiliation; one of Moreno's companions then swung at Isaiah with a knife. When bystanders came to Isaiah's aid, Moreno fled the scene in a car along with his knife-wielding companion. Gang expert Detective Herrera testified that if one gang member is involved in a physical altercation, any other gang members present will step in and backup their fellow gang member. In Herrera's experience, gang members carry guns for protection and to challenge "rival gang members or individuals like in this case that they dislike for the color of their skin." Although Herrera testified specifically about gang members carrying guns, her testimony can reasonably be understood to mean that gang members carry weapons for protection. This constitutes substantial evidence to support Moreno's conviction of assault with a deadly weapon based upon an aiding and abetting theory. It was reasonably foreseeable that one of Moreno's companions would be armed with a weapon, which in this case was a knife, and would use it to backup Moreno in a physical altercation with Isaiah, a nongang member.

C. Nunez and Moreno's Convictions for Assault with a Firearm Were Supported by Substantial Evidence

Moreno and Nunez contend insufficient evidence supported their convictions for assault with a firearm arising out of the incident on January 15, 2008 (counts 8 and 9). Nunez also contends insufficient evidence supported the personal gun use enhancement found true as to him. Nunez argues there was no evidence he pointed a loaded gun at Nigee or Shawanta, or that he aided and abetted Beltran. Moreno contends there was even less evidence to support his conviction on an aiding and abetting theory. We disagree.

Evidence that the perpetrator drew a loaded weapon but did not aim it may nevertheless be sufficient to constitute an assault with a firearm. (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 41, p. 664.) For example, in *People v. Thompson* (1949) 93 Cal.App.2d 780, 782, the court held evidence that the defendant pointed a loaded revolver at the

ground, not directly at the victims, was sufficient to support a conviction for assault with a deadly weapon because the gun was in a position to be used instantly. More recently, in *People v. Chance* (2008) [44 Cal.4th 1164](#), 1168 (*Chance*), the court held that the present ability element of assault is satisfied when the defendant has attained the means and location to strike immediately. Accordingly, it found the evidence in that case sufficient to support a conviction of assault with a firearm even though the defendant did not point the gun at the victim. (*Id.* at p. 1176.) But attempting to shoot someone with an unloaded gun does not constitute an assault because there is no present ability to inflict injury. (*People v. Valdez* (1985) [175 Cal.App.3d 103](#), 110-111.) That a gun was loaded may reasonably be inferred from evidence that a gang member logically would not carry an unloaded gun in an area where gang violence was prevalent. (*People v. Rodriguez* (1999) [20 Cal.4th 1](#), 12.) One may aid and abet an assault with a firearm without personally using a firearm. (*People v. Rodriguez* (1998) [17 Cal.4th 253](#), 261.)

Here, substantial evidence supports Nunez's conviction as an actual perpetrator and the gun use enhancement. Nigee testified that he saw both Beltran and Nunez holding guns. Although Nigee testified that neither Beltran nor Nunez ever actually pointed a gun at him or Shawanta, under *Chance, supra*, actually pointing a firearm at the victim is not an element of the offense. As explained in *People v. Rodriguez, supra*, 20 Cal.4th at page 12, the jury could reasonably infer that the guns were loaded from evidence that there was an ongoing problem with violence between defendants' gang and African-American students at Paramount High School, the victims were African-American students at Paramount High School, and the incident occurred near the school. Under these circumstances, Beltran and Nunez logically would not be carrying unloaded guns in an area where gang violence was prevalent. That no gun was found is not determinative. Apart from the sufficiency of the evidence to support Nunez's conviction as the actual perpetrator, substantial evidence supported conviction of both Nunez and Moreno on an aiding and abetting theory. This includes Deputy Sheriff Capra's testimony that he saw Beltran point a black semiautomatic at the African-American students; Detective Herrera's testimony that if one gang member initiates an assault, other gang members present will assist him; and Elizabeth's testimony that Beltran, Nunez and Moreno all yelled racial slurs and all participated in the fistfight with the African-American students. Although Nigee did not hear Moreno utter any racial slurs, he saw Moreno standing outside of the car and heard him yelling out the name of the gang. Finally, when Capra arrived with gun drawn and instructed Beltran to, "Let me see your hands," Nunez and Moreno jumped back into the car with Beltran, who led Capra on a car chase; when the pursuit ended, Nunez and Moreno ran away. Nunez and Moreno's companionship with Beltran, conduct before and after the crime, presence at the scene, and flight afterwards constitute substantial evidence that Nunez and Moreno aided and abetted Beltran in the commission of an assault with a firearm upon Nigee and Shawanta.

D. Substantial Evidence Supports the Convictions for Making Criminal Threats

Moreno and Nunez both contend their convictions for making criminal threats against Nigee and Shawanta (counts 10 and 11) were not supported by substantial evidence. Both argue that there was insufficient evidence that either Nigee or Shawanta, who did not testify, was in a state of sustained fear. They are incorrect.

Penal Code section 422 makes it a felony to threaten "to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of

execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety" An element of the crime is that that the threat actually caused the victim "to be in sustained fear for his or her own safety" and that such fear was reasonable under the circumstances. (*People v. Fierro* (2010) [180 Cal.App.4th 1342](#), 1348 (*Fierro*).

In *Fierro*, while in line at a gas station, the defendant got into an argument with the victim, another motorist in line. The defendant lifted his shirt to display a weapon tucked into the waistband of his pants and, after haranguing the victim, said "'I should kill you. I will kill you,'" and "'I ought to kill you and [pointing to the victim's son, a passenger in the car] the stupid mother fucker too;'" the defendant said he ought to kill them "'right now.'" (*Fierro, supra*, 180 Cal.App.4th at p. 1346.) At trial, the victim testified that he was "'scared to death during the whole ordeal.'" (*Ibid.*) This court held the evidence was sufficient to support the defendant's conviction of making criminal threats. Regarding the element of sustained, reasonable fear, we observed that "the minute during which [the victim] heard the threat and saw appellant's weapon qualifies as 'sustained' under the statute. When one believes he is about to die, a minute is longer than 'momentary, fleeting, or transitory.' [Citation.]" (*Id.* at p. 1349.)

Here, Nigee testified that Beltran and Nunez were standing 12 to 15 feet away from him and Shawanta, holding weapons and repeating variations of the phrase "We're going to kill you niggers" and "We're going to kill you guys." As they did so, Moreno was standing nearby, calling out the name of their gang. Nigee testified that, when Beltran and Nunez displayed guns, he became afraid. Nigee estimated that the encounter, which ended when the marked patrol car drove up, lasted about seven minutes, although it felt longer. Capra testified that when Beltran pointed the gun at several of the students, "all the kids just started screaming and just everybody . . . started to run, running everywhere" From this evidence, the jury could reasonably infer that Beltran and Nunez caused Nigee and Shawanta to be in sustained, reasonable fear, the same fear more visibly demonstrated by the students that ran. That Shawanta did not testify and that Nigee did not describe his feelings of fear as expressively as did the victim in *Fierro*, who told the 9-1-1 operator that he was "scared shitless," does not compel a contrary result. The victims' state of mind could be inferred from the evidence that we have recounted.

Even if Nunez did not have a gun, the evidence was sufficient to support convictions of both Nunez and Moreno under an aiding and abetting theory. Evidence of their conduct before and after the incident — yelling the name of the gang and racial slurs, participating in the fistfight, fleeing in the car with Beltran and running away from police after the chase ended — supports an inference that they intended to promote and encourage Beltran in making criminal threats.

E. No Unanimity Instruction Was Necessary

Moreno contends the trial court erred in failing to give a unanimity instruction. He argues that there was a wide variety of acts by Nunez and Beltran that the jury could have found constituted assaults and/or criminal threats. We find no error.

A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged. (*People v. Maury* (2003) [30 Cal.4th 342](#), 422-423.) It is not required when the acts are so closely connected in time as to form part of one transaction. (*People v. Crandell* (1998) [46 Cal.3d 833](#), 875, overruled on other grounds by *People v. Crayton* (2002) [28 Cal.4th 346](#), 364-365.) No unanimity instruction is necessary if the defendant offers the same defense or defenses to the various acts constituting the charged crimes. (*People v. Jennings* (2010) [50 Cal.4th 616](#), 679.)

Here, the prosecution's only theory as to Moreno's liability for each charged offense was as an aider and abettor. There was no dispute as to what conduct by Moreno was alleged to constitute a

crime: as to count 7, Moreno punched Isaiah, a natural and probable consequence of which was Moreno's companion swiping at Isaiah with a knife; as to counts 8, 9, 10 and 11, Moreno encouraged and assisted Beltran and/or Nunez by yelling racial slurs, calling out the gang name and participating in the fistfight. Under these circumstances, no unanimity instruction was required.

DISPOSITION

The judgment is affirmed.
WE CONCUR.
BIGELOW, P. J.
FLIER, J.

Footnotes

1. Nunez and Moreno were jointly charged with a third codefendant, Anthony Beltran, but Beltran's trial was severed from that of Moreno and Nunez. Other counts were subsequently dismissed.

[Back to Reference](#)

2. *Bruton v. United States* (1968) [391 U.S. 123](#) (*Bruton*); *People v. Aranda* (1965) [63 Cal.2d 518](#) (*Aranda*), superseded by constitutional amendment as stated by *People v. Fletcher* (1996) [13 Cal.4th 451](#), 465.

[Back to Reference](#)

3. The trial court instructed: "The prior statements and testimony of [Elizabeth] regarding what Mr. Moreno during a telephone call subsequent to the day of the alleged crimes told her about the events of January 15th, 2008 and what she should testify to in court about those events was admitted only to assist you in evaluating the believability of [Elizabeth]. [¶] You may also consider this evidence of Mr. Moreno's statements as admissions against Mr. Moreno; however, this evidence was not admitted against Mr. Nunez and, therefore, you should not consider it as to Mr. Nunez for any purpose whatsoever."