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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANDREW KANAMU, Defendant and Appellant.	B227222 (Los Angeles County Super. Ct. No. LA059684)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Kellogg, Judge. Affirmed.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Blythe Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Andrew Kanamu of the first degree murder of Brandon Holman and found true that defendant had used a firearm. The trial court sentenced defendant to serve life in prison.

Holman had been sexually intimate with defendant's wife Adriana Kanamu while defendant was in prison. On appeal, defendant contends that the trial court erred in failing to give accomplice instructions as to the testimony of his wife. Defendant also contends that jury misconduct required the trial court to grant his motion for juror identifying information. We find that the trial court committed no prejudicial error and affirm.

BACKGROUND

Jack Melkonian returned on the evening of December 9, 2003, to his van parked near the "Palooka Pipes" store, a head shop in North Hollywood on Cahuenga Boulevard. After he got into his van, he saw a man wearing a "hoodie" who had a red and black bandana covering his face. Melkonian took notice because the man's appearance seemed "pretty odd." The man looked something like a "Ninja." Melkonian started his van's engine and heard a loud noise that sounded like a backfire. At first he thought it had come from his van, which was parked adjacent to the head shop. After inspecting his van, he got back into it and immediately saw the same man running down the sidewalk. The man threw off his hoodie and his bandana and "just took off." The man was wearing glasses and sweatpants with three stripes like "Adidas." A photograph taken from defendant's home showed him wearing the same kind of pants.

Holman worked part time at the "Palooka Pipes store." Another employee of the head shop, Lilia Martinez, witnessed Holman's murder on December 9, 2003, at about 8:00 p.m. Martinez could only provide a limited description of the killer. On this cold evening, a tall man entered the store alone with his hands in the pockets of his jacket. He was "fully covered," with something like a ski mask covering his face, so that only his eyes were showing. The man was wearing glasses. Holman said, "What's up man?" The man shot Holman, and Martinez briefly fled. Martinez called "9-1-1" at 8:27 p.m.

A bullet had struck Holman in the chest causing severe organ damage and his death. He had also suffered a fractured nose and multiple abrasions consistent with having been punched or beaten with a blunt force instrument and/or kicked.

About 10 to 15 minutes before the murder, Martinez had answered the telephone. A woman, who seemed to be disguising her normal voice by using a high pitch and said she was "Cynthia," asked for Holman. Martinez summoned Holman, but when he answered there was no one there.

Melkonian provided the investigating police officers with a description and helped make a composite drawing. Investigators showed Melkonian a photographic lineup of six persons, including defendant, wearing eyeglasses. Melkonian picked out defendant's photograph as looking most similar to the man he saw running on Cahuenga Boulevard. At trial, Melkonian testified that the pants that defendant was wearing in a photograph were similar to those worn by the man on Cahuenga. He also identified eyeglasses as being similar to the glasses he had observed. Defendant wore similar glasses.

Under a grant of immunity, Adriana Kanamu, defendant's wife, testified that she had been her husband's girlfriend since 1998 but had not married him until 2008. She had also been friends with Brandon Holman in high school. In 2001, however, Adriana and Holman had sexual intercourse together about 10 times. She had referred to Holman as her "play toy." During this period defendant was incarcerated in state prison. Adriana also referred to Holman by a nickname she used when she wrote to defendant or talked about Holman—"Ghost."

In December 2003, a couple of years after Adriana's sexual relationship with Holman ended, Holman had left a message at the home of Adriana's mother, indicating he wanted to make contact with Adriana. The message was contained in a note and included Holman's telephone number. Adriana's sister Maria gave Adriana this note. Holman also went to that house on several other occasions, looking unsuccessfully for Adriana.

On December 9, 2003, at 7:52 p.m. Adriana telephoned the Palooka Pipes store, spoke with a female, and asked for Holman. She then hung up. The 7:52 p.m. telephone

call was billed at 1 minute, the shortest period the telephone company recorded. Defendant had Adriana's cell phone, and they exchanged many phone calls that day, both before and after she called Palooka Pipes. Adriana had told defendant that she and Holman had had a sexual relationship, and defendant had become upset. Defendant was also aware that Holman was still trying to see Adriana. While he was in prison, defendant had written at least 26 letters, which Adriana identified at trial. In those letters, defendant repeatedly expressed concern that Adriana was having sexual affairs with various men, including Holman. Adriana testified that she had a sexual relationship only with Holman. Defendant was especially upset as to Holman. Defendant wrote in one letter, "I'm not stupid. I know you've been getting fucked." He also referred to Adriana as an "adulteress."

During a later period, after Holman had been killed, when Adriana was corresponding less frequently with defendant while he was incarcerated, defendant wrote, "The last time this happened, you were fucking a ghost, so who dies this time[?]" "Ghost" refers to Holman.

After Holman's murder and while defendant was in jail, defendant wrote a letter dated December 16, 2004. In it he wrote to Adriana, "December 9. Today would be an anniversary for what?"

In 2008, 10 years after defendant first became Adriana's boyfriend, he was arrested, charged with Holman's murder, and incarcerated in the county jail. While he was in the jail, he asked Adriana to marry him so she could not be compelled to testify against him. They then got married.

Defendant told Adriana to get rid of some guns for him. She gave the guns away.

DEFENSE

Adriana also testified on defendant's behalf, saying that when she called Palooka Pipes on December 9, 2003, she was just returning Holman's call and was told Holman was not there. Adriana worked for a dentist who owned apartment buildings in Glendale. Adriana testified that she was partially employed as his property manager. The day after Holman was killed, she took photographs of a water heater in a Glendale apartment

building. The water heater bore a tag showing "12-09-03." Defendant had supposedly installed the water heater on the previous day. But on cross-examination, Adriana admitted that she had no personal knowledge that any work was being done there at the time of the murder.

John Hickman was a journeyman plumber who worked with defendant at Arroyo Plumbing of Arcadia. Defendant and Hickman did side jobs together after their work hours (7:00 a.m. to 3:30 p.m.) were over. They would leave their employer's plumbing truck at Arroyo Plumbing's Arcadia yard and drive their own vehicles to the side jobs. Hickman testified that they were working such a side job, which defendant had procured, at some apartments in Glendale on the night of Holman's death, December 9, 2003. A tag, as photographed later by Adriana, was placed on a water heater at the apartments. Hickman was also in possession of a note stating that the project lasted from 4:00 p.m. to 11:00 p.m. that night.

Hickman claimed defendant was always nearby during that job on December 9, 2003. But Hickman also admitted that he didn't like his work partners to interrupt their work with cell phone calls. He did not remember defendant using the cell phone, although telephone records showed many calls the evening of the murder. Hickman admitted that his problems with alcohol and drugs affected his mind. He admitted to a detective that he was drinking Bacardi Gold, an alcoholic beverage, on the night of the murder and may have left the job site early to get home at 7:00 p.m.

DISCUSSION

I. The Trial Court's Error in Failing to Give Sua Sponte Accomplice Instructions Was Harmless.

Defendant contends that his wife Adriana Kanamu was an accomplice and that, because she testified as a witness for the People, the trial court committed error by failing to give the jury appropriate accomplice instructions. The Attorney General concedes that there was sufficient evidence for the jury to treat Adriana as an accomplice and that failure to give such an instruction was error. But the Attorney General argues that the error was harmless. We agree.

The California Supreme Court in *People v. Guiuan* (1998) 18 Cal.4th 558, 569 (*Guiuan*), required that a sua sponte accomplice instruction be given when the evidence supports it. We have modified the language of CALCRIM No. 334 so it appears here as the trial court should have given it. As modified, the instruction reads:

> "Before you may consider the testimony of Adriana Kanamu as evidence against Andrew Kanamu regarding the crime of murder, you must decide whether Adriana Kanamu was an accomplice to that crime. A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if:
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> 1. He or she knew of the criminal purpose of the person who committed the crime;
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> AND
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> 2. He or she intended to, and did in fact, aid or, facilitate the commission of the crime or participate in a criminal conspiracy to commit the crime.
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> The burden is on the defendant to prove that it is more likely than not that Adriana Kanamu was an accomplice.
> An accomplice does not need to be present when the crime is committed.
> A person may be an accomplice even if he or she is not actually prosecuted for the crime.
> If you decide that Adriana Kanamu was not an accomplice, then supporting evidence is not required and you should evaluate her testimony as you would that of any other witness.
> If you decide that Adriana Kanamu was an accomplice, then you may not convict the defendant of murder based on her testimony alone. You may use her testimony to convict Andrew Kanamu only if:
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> 1. Adriana Kanamu 's testimony against Andrew Kanamu is supported by other evidence that you believe;
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> 2. That supporting evidence is independent of Adriana Kanamu's testimony;
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> AND
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> 3. That supporting evidence tends to connect the defendant to the commission of the crime.
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> Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of murder, and it does not need to support every fact about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.
> Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

The Supreme Court commented about the trial court's duty to give a sua sponte accomplice instruction whenever a witness testifies whom the jury might determine to be an accomplice. The court concluded that "whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies: 'To the extent an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.' Such a pretailored instruction is applicable regardless which party called the accomplice." (*People v. Guiuan*, *supra*, 18 Cal.4th at p. 569.)

The California Supreme Court applies the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818 where the trial court fails to give an accomplice instruction. (*People v. Box* (2000) 23 Cal.4th 1153, 1208-1209.) Where a defendant is not prejudiced by the failure of the trial court to give an appropriate accomplice instruction and the jury would not have reached a verdict more favorable to the defendant if such an instruction had been given, the judgment against the defendant may be affirmed. (*Id*. at p. 1209.)

The only evidence directly implicating Adriana in the murder of Holman was the 7:52 p.m. telephone call made from Adriana's home to Palooka Pipes. Adriana admitted making the telephone call but denied hanging up after ascertaining that Holman was at the store. Telephone records showed that someone at Adriana's home had called the store at about the time Martinez answered the telephone. Adriana incriminated herself by admitting that she had made the telephone call. But she claimed that the female who answered told her that Holman was not there. Adriana also testified that she called merely to return the call that Holman had made to her. Even then it could be argued that, if Adriana was not part of a murder plot but knew of defendant's intentions, she had called simply to warn Holman.

Adriana's testimony, which inculpated defendant but did not make Adriana an accomplice, was essentially about defendant's motive. She had been sexually intimate

with Holman while defendant was in prison. She had admitted that relationship to defendant. He had been angry or upset about Holman. She testified that, although defendant thought she had intimate relationships with several other men, defendant was especially upset as to Holman.

She did identify the letters defendant had written from prison. But identifying those letters did not make her an accomplice. In any event, they would have been admitted with or without Adriana's testimony through other witnesses.

Adriana's testimony against defendant was thoroughly corroborated. The telephone call from a female at Adriana's home was established through telephone records. That phone call occurred a few minutes before Holman was shot. The defendant's letters themselves described his anger about Holman and indicated the relationship of that anger to Holman's death. Defendant wrote, "The last time this happened you were fucking a ghost, so who dies this time?" The "Ghost" reference is to Holman. Later when defendant was in custody in jail, he wrote to Adriana, "December 9. Today would be an anniversary for what? Hmm"

Jack Melkonian identified defendant as a person who looked like the person he saw running from Palooka Pipes, discarding the mask and hoodie as he ran. He also identified defendant's glasses and his striped pants as being similar to those worn by the man.

Finally, Adriana's testimony was in great measure favorable to defendant and helpful to him. It would have been most difficult for any juror to view with distrust her testimony regarding the telephone call to Palooka Pipes, the letters from defendant, and his animosity toward Holman and somehow not also view with distrust the testimony she gave which portrayed defendant's behavior in the most favorable light.

The trial court viewed the case—after much of the evidence had been presented—as "a perfect circumstantial evidence case." The trial court stated that the 7:52 p.m. telephone call may be argued "two ways. One, it was a call, even though it was not testified to, that goes to [the] premeditation, deliberate stage, as well, if they [i.e., the jury] believe that the call was made . . . because Brandon wasn't working at this place

with a regular schedule. Find out, A, if he was there. If he was there, hang-up, or [if] it was that they knew he was there and whoever called was calling to warn, whatever the case may be. There's so many different [*sic*]."

And with regard to defendant's letters from prison and jail, the trial court said "those letters cut both ways. They give motive, as for the People, they also give the inflamed passion and the state of mind of . . . the letter writer, showing an obsession, if not a compulsion, jealousy, if not even further." Most of all, Adriana helped provide an alibi for her husband, explaining that he was at work installing water heaters at the time of the murder. She authenticated photographs that she testified taking the day after Holman was killed, showing the tag with the date "12-09-03" written on it.

The trial court did instruct the jury as follows:

"You cannot find the defendant guilty based on the testimony of an accomplice unless [that] testimony [is] corroborated by other evidence which tends to connect the defendant with the commission of the offense. . . ." The instruction further elaborated on the nature of corroborating evidence and how the jury should evaluate it. The jury was not, however, instructed that they should determine whether or not Adriana Kanamu was an accomplice. But the jury was informed that Adriana was testifying under a grant of immunity. It is thus highly doubtful that the jury did not examine Adriana's testimony with care and caution, viewing it with distrust.

The jury arguments of counsel show that accomplice instructions focusing on Adriana as a witness would not have substantially altered the arguments. Also such instructions would not have altered the outcome of the trial.

In discussing provocation and the cooling off period involved in a voluntary manslaughter, the prosecutor (Deputy District Attorney Daniel Akemon) spoke of Adriana's 7:52 p.m. telephone call as possibly "the triggering event." Very little in the prosecutorial argument portrays Adriana specifically as an accomplice, but that the prosecutor is wary and suspicious about her testimony is clearly evident. The prosecutor argued that defendant's marriage in jail to Adriana "backfired on him because the court ordered Mrs. Kanamu to testify pursuant to the immunity agreement." The implication in

the argument is that defendant's consciousness of guilt spawned the sudden marriage because defendant knew Adriana's testimony would not be helpful. The deputy district attorney described defendant's plan as an attempt to suppress evidence. He stated that Adriana was "in cahoots with Mr. Kanamu." (In his rebuttal argument, the prosecutor stated that Adriana was "doing everything in her power to cover for him [i.e., defendant.]")

The prosecutor stated that defendant "killed Brandon Holman to control Adriana . . . to exact his revenge against her source of infidelity." In other words, even defendant's postmurder references to "Ghost" and his death was a reminder that "their sick little game cost the life of Brandon Holman."

Regarding the 7:52 p.m. telephone call, the prosecutor discussed the difference between what Lilia Martinez testified to and what Adriana testified to. Martinez said that when she answered the telephone, the woman calling seemed to be disguising her voice and gave the name Cynthia. When Holman picked up the phone, no one responded. Adriana, on the other hand, claimed that she hung up because the woman who answered at the store said Holman was not there.

The prosecutor inferred that the phone call "was Adriana setting him up, confirming he was there so that Kanamu could go kill him." Thus, the prosecutor's argument was that Adriana took part in the commission of the crime (i.e., was an accomplice) and was a witness to be distrusted. But the deputy district attorney also stated, "But the point is: any way you slice it, no matter why she's calling . . . the fact that she called connects Kanamu with the crime."

The defense attorney (Robert Corrado) described the trial's evidence as "100 percent" circumstantial. He summed up the prosecutor's case against defendant as "really two things. It's Melkonian and the letters and conversations. Ain't no more."

The defense attorney also talked to the jury about Adriana as a witness and stated that "if you decide [she] was an accomplice, that is, was in cahoots with my client, then she's an accomplice, and that's the reason she was given immunity." The defense attorney also noted that an accomplice must be corroborated.

It is very apparent that, had the trial court given more complete accomplice instructions, focusing on the only accomplice in the case (Adriana), the final arguments of trial counsel would not have been any different than they were. Likewise the jury would not have evaluated Adriana's testimony with any more care and caution or viewed its substance any differently. Clearly the trial court's error was harmless.

II. The Trial Court Properly Denied Defendant's Motion to Disclose the Jurors' Identifying Information.

Defendant contends that the defense allegation of jury misconduct required the trial court to grant defendant's motion to disclose the jurors' identifying information. We disagree.

Where a trial court denies a petition, filed under Code of Civil Procedure 237,[1] to disclose juror information, the appellate court reviews that denial under a deferential

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[1] Code of Civil Procedure section 237 provides in pertinent part:

"(a)(1) The names of qualified jurors drawn from the qualified juror list for the superior court shall be made available to the public upon request unless the court determines that a compelling interest, as defined in subdivision (b), requires that this information should be kept confidential or its use limited in whole or in part.

"(2) Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors, as defined in Section 194, consisting of names, addresses, and telephone numbers, shall be sealed until further order of the court as provided by this section.

"(3) For purposes of this section, "sealed" or "sealing" means extracting or otherwise removing the personal juror identifying information from the court record.

"(4) This subdivision applies only to cases in which a jury verdict was returned on or after January 1, 1996.

"(b) Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and

abuse of discretion standard. (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1096-1097; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 991; *People v. Santos* (2007) 147 Cal.App.4th 965, 978.) Also, the trial court decision declining to hold a hearing on misconduct is reviewed for an abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317.)

What defendant labels as misconduct was determined by the trial court to be no more than juror confusion, which was immediately corrected. The facts related to defendant's claim of juror misconduct are these.

On April 1, 2010, the jurors indicated they had reached a verdict. The court reviewed the verdict forms and informed the attorneys that the jury had found defendant guilty both of first degree murder and voluntary manslaughter. In addition, the jury had found the firearm enhancements true as to the first degree murder charge but not true as to the voluntary manslaughter charge. The court noted, "Each and every time that I have instructed on the lesser but included I find this is a common problem."[2]

The court told the attorneys that it intended to reinstruct the jury about the procedure to follow in rendering verdicts where there is a lesser included offense as to the one charged. Defense counsel argued that the court had to accept the verdict as manslaughter. [3] When the court made a false start by giving an informal and abbreviated explanation of the procedure, the jury and the prosecutor indicated that the confusion was

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make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure."

[2] We also note that most of the appellate opinions reviewing issues similar to that raised here also involve instructions on lesser included instructions.

[3] There is no similar contention on this appeal, nor one of instructional error.

not dissipated. The court therefore reinstructed formally regarding the procedure when there is also a lesser necessarily included offense.[4]

The jury retired to deliberate again, returned in about 11 minutes with proper verdicts and was polled by the court. The jurors confirmed their verdicts. After the court ordered the verdicts entered, it set the matter for probation and sentencing proceedings, and the jurors left the courtroom. At that point, defense counsel stated that "during the polling Juror No. 10 broke down and is crying." The court replied that other jurors (Nos. 3 and 4) were also crying. Defense counsel then requested that the court talk to those jurors "just in case one of them might say that the others beat them up into agreeing."

The court commented that this case was "emotionally charged" and impacted not only the jurors but two families—those of the victim and of the defendant. The court noted that the jury's decisions affecting life and death were "tough" on the jurors. The court did not inquire further of the jurors and discharged them.

A week later, on June 8, 2010, counsel for defendant filed a "Petition for Order Disclosing Personal Juror Information (CCP § 237)." The motion was heard on June 18, 2010. The court denied the motion.

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[4] The court instructed as follows: "Defendant is accused of a lesser but included offense to count 1 of having committed the crime of voluntary manslaughter, 192, of the Penal Code. [¶] Every person who unlawfully kills another human being without malice aforethought but either with intent to kill or with conscious disregard for human life is guilty of voluntary manslaughter, in violation of Penal Code section192, subdivision (a)."

"If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the charged crime, you may nevertheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt the defendant is guilty of a lesser crime. [¶] The crime of voluntary manslaughter is lesser to that of murder to count 1. [¶] Thus, you are to determine whether the defendant is guilty or not guilty of the crime charged in count 1 or any lesser crime. In doing so you have the discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider or reach a tentative conclusion on all charges of the lesser crime before reaching any final verdict. However, the court cannot accept a guilty verdict on a lesser crime unless you unanimously find the defendant not guilty of the charged greater crime."

We agree with the trial court that defendant did not show good cause to release juror identifying information. There is nothing in the crying of jurors after rendering a verdict in an emotionally charged murder trial that in and of itself suggests juror misconduct. The trial court's determination that the verdict inconsistency was the result of juror confusion was a reasonable one, supported by the record. There was no jury misconduct, and defendant has not carried his burden in that regard, either in the court below nor here on appeal. The jury was confused about the procedure it was to use as to the verdicts, but the court's reinstruction corrected that confusion.

The statement of defendant's trial counsel that the court should talk to those jurors individually "just in case one of them might say that the others beat them up into agreeing," clearly illustrates that the defense allegation of misconduct is speculative. Such speculative allegations do not provide good cause to disclose juror identifying information. (*People v. Wilson* (1996) 43 Cal.App.4th 839, 852.)

The trial court committed no error in declining to interview the jurors individually, as they all verified individually that their verdict was that of first degree murder. Since no juror misconduct was shown, there was no good cause to disclose juror identifying information.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J. CHAVEZ, J.