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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

THE PEOPLE, Plaintiff and Respondent, v. DARYL GEAN FISK, JR., Defendant and Appellant.	B279806 (Los Angeles County Super. Ct. No. SA093504)

APPEAL from a judgment of the Superior Court of Los Angeles County, Upinder S. Kalra, Judge. Affirmed with directions.

Miriam K. Billington, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer, Deputy Attorney General, and Michael C. Keller, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Daryl Gean Fisk, Jr. appeals the judgment of conviction after a jury found him guilty of first-degree burglary (Pen. Code, §§ 459, 460, subd. (a) [count 1])[1], and resisting, delaying or obstructing a peace officer (§ 148 [count 4]). The jury also found true the allegations that appellant had a prior strike conviction within the meaning of the Three Strikes law (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)), a five-year prior serious felony conviction (§ 667, subd. (a)(1)), and three prior prison terms (§ 667.5, subd. (b)).

Appellant contends (1) the trial court abused its discretion in denying his mid-trial request for self-representation, (2) the prosecution committed prejudicial misconduct in his closing argument by including a faulty explanation of the reasonable doubt standard, and by vouching for his own credibility, (3) the cumulative effect of any errors requires reversal, and (4) the trial court minutes omit the fact that it struck the sentence enhancement for a prior burglary conviction. We conclude the prosecutor committed improper vouching during closing argument, but that it was not prejudicial. We affirm the judgment and direct the trial court to modify the minutes to accurately reflect the oral pronouncement of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, Charles Glick, lived in a condominium complex in Culver City. On May 22, 2016, at approximately 11:00 in the evening, Glick parked his car at the assigned space in the subterranean parking garage. The garage is accessible only by residents using a remote control or a "key box." Glick did not

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[1]All undesignated statutory references are to the Penal Code.

recall whether he locked the vehicle before walking up to his unit, but he typically locks his car doors. That evening, Glick left his work laptop in the backseat of his vehicle.

The next morning, the condominium office informed Glick that someone had broken into his vehicle, and that a detective had located his laptop. Glick's vehicle did not show signs of forced entry but it appeared that someone had rummaged through it. Glick filed a police report.

Culver City Police Officer Alan Campos testified that on May 23, 2016, at 3:50 in the morning, he and his partner were patrolling the area near Glick's residence. This area was experiencing a high volume of thefts. Officer Campos observed appellant walking down an alley behind Glick's parking garage. Appellant looked around and entered a carport. He then walked around several vehicles for about ten minutes. He called dispatch to set up a perimeter.

Appellant emerged from the garage after "zigzag[ing] between ports" for approximately 20 minutes. He was carrying a red backpack. Officer Campos activated the emergency lights on his patrol vehicle and exited the vehicle. After seeing the officers, appellant scaled an eight-foot fence and fled the scene. He was arrested shortly thereafter. Some six vehicles parked in the garage had been ransacked, with their doors left ajar.

The officers found a red backpack in a nearby storage unit, but appellant was not holding the backpack at the time of his arrest. The backpack contained two laptops, sunglasses, seven cellular phones, jewelry, currency, gift cards and a bottle of medication, along with appellant's identification card and iPod.

Detective Derek Brown was assigned to investigate the case. The home screen of one of the laptops found in the

backpack was marked that it belonged to Wells Fargo. Detective Brown called Wells Fargo, which confirmed the laptop was assigned to its employee, Glick.

Appellant was charged with burglary (count 1), grand theft (count 2), receiving stolen property (count 3), and willfully resisting, delaying or obstructing a peace officer in the performance of his or her official duties (count 4). The information further alleged that appellant had suffered a prior serious felony conviction and prior prison term for first-degree burglary in 2014, along with prior prison terms for corporal injury and eluding a pursuing peace officer.

A jury found appellant guilty on counts 1 and 4, and found the prior strike conviction and sentence-enhancement allegations to be true. The court granted the People's motion to dismiss counts 2 and 3 in furtherance of justice. (§ 1385.)

The trial court sentenced appellant to the low term of two years on count 1, doubled due to the prior strike (§ 667, subd. (e)(1)), plus five years for the prior serious felony conviction (§ 667, subd. (a)(1)), and one year for a prior prison term (§ 667.5, subd. (b)). The court originally stayed the remaining one-year prior prison term pursuant to section 1385, but later struck that enhancement. On count 4, the court sentenced appellant to 233 days in county jail, with credit for time served. This timely appeal followed.

DISCUSSION

I

Appellant contends the trial court erroneously denied his motion for self-representation under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). We disagree.

A. Legal Standard

A criminal defendant has a right to represent himself or herself at trial under the Sixth Amendment to the United States Constitution. (*Faretta*, *supra*, 422 U.S. at p. 807.) With certain exceptions, trial courts must grant a defendant's request for self-representation if it is made within a reasonable time *prior* to the commencement of trial. (*People v. Welch* (1999) 20 Cal.4th 701, 729.)

If a request for self-representation is not asserted within a reasonable time prior to trial, the defendant has the burden of justifying the delay. (*People v. Horton* (1995) 11 Cal.4th 1068, 1110.) This timeliness requirement "serves to prevent a defendant from misusing the motion to delay unjustifiably the trial or to obstruct the orderly administration of justice. [Citation.]" (*Ibid*.)

When ruling on a defendant's mid-trial request for self-representation, the court considers the reasons for the motion, the quality of counsel's representation, the defendant's proclivity to request a substitution of counsel, the length and stage of the proceedings, and any disruption or delay that might be expected to follow if the motion were granted. (*People v. Windham* (1977) 19 Cal.3d 121, 128–129 (*Windham*).) "[A] reviewing court must give 'considerable weight' to the court's exercise of discretion and must examine the total circumstances confronting the court when the decision is made. [Citation.]" (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397–1398.)

B. Background

On November 18, 2016, both parties announced they were ready to proceed to trial. Voir dire commenced the following day.

Several hours into voir dire, appellant announced his desire to "go pro per" because he "fe[lt] like there's a conflict of interest." The court advised appellant that his request was untimely because trial already had commenced. [2]

At the hearing on his *Faretta* motion, appellant told the court he was ready to proceed "right away." When asked if he planned to file any motions, appellant said he would file a motion to dismiss pursuant to section 995. Appellant indicated he was willing to proceed without pursuing a motion to dismiss after the court explained the motion would be untimely. Appellant stated that he understood he was not likely to obtain pro per privileges in county jail before trial, which was set to resume the following Monday morning (it was then 4:28 on Friday afternoon).

The court's preliminary ruling was to grant appellant's pro per request even though it was untimely. But the court did so with the understanding appellant was not seeking a continuance.

Appellant told the court he needed more paperwork. Counsel indicated he had given appellant all of the relevant paperwork, except documents related to jury selection and prosecutorial motions. Appellant also sought to view a videotape of his police interview. The court informed appellant that it was too late in the afternoon to appoint an investigator, which would be necessary in order to help him view the videotape in county jail. The court reiterated it would not delay trial.

Appellant insisted on reviewing the video before proceeding to trial. The court, after balancing the *Windham* factors, denied appellant's *Faretta* motion as follows: "The quality of the representation is fine. The defendant did not use the request to

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[2] Trial commenced when the empanelment of the jury has begun. (*People v. Harris* (1977) 73 Cal.App.3d 76, 83, fn. 2.)

go pro per when he had plenty of opportunity. The reason for the request appears to be because of conflict regarding legal strategy. It would be disruptive to delay the case, especially because of the Thanksgiving holiday and because of the number of jurors we've already lost. You could have previously moved to continue yesterday. I was told you didn't want to continue the matter. It would be disruptive for the trial for him to get the electronic media, that he cannot get this weekend, and he will not be in a position to view it before evidence starts, which we expect evidence will start on Monday."

The following Monday, the court elaborated that it was not reasonably likely appellant would be able to review the videotape prior to the continuation of trial. A delay in trial would be disruptive, in light of the upcoming Thanksgiving holiday, because the court had lost several jurors due to hardship, had time-qualified jurors, and a civilian witness was available "no later than Tuesday" (the following day). Counsel informed the court that appellant had received a copy of the police interview transcript.

C. Analysis

As we have noted, trial commenced when empanelment of the jury began. (*People v. Harris*, *supra*, 73 Cal.App.3d at p. 83, fn. 2.) Appellant had several opportunities to invoke his right to represent himself prior to trial. His request to do so took place after both sides had announced ready to proceed, the case was transferred to a trial department for jury trial, and the court was well into voir dire. Because it was untimely, appellant's motion was directed to the sound discretion of the trial court. (*Windham*, *supra*, 19 Cal.3d at pp. 128–129.)

In terms of discretionary relief, the trial court considered the relevant *Windham* factors before denying appellant's motion. Specifically, the court noted appellant's reason for the motion was a perceived, but unidentified conflict of interest about "legal strategy," and that the quality of counsel's representation "is fine." The case was in the middle of voir dire, and any delay would be highly disruptive since the court already had dismissed several jurors due to the upcoming holiday, several jurors had time limitations, and one witness was unavailable after the following Tuesday. It also was likely that a continuance would require the appointment of an investigator and arrangements for appellant to view the police interview video in county jail.

Based on these facts, a continuance may have necessitated discharge of the jury. "The fact that the granting of the motion will cause a continuance, and that this will prejudice the People, may be evidence of the defendant's dilatory intent." (*People v. Burton* (1989) 48 Cal.3d 843, 854.) We conclude the *Windham* factors weighed against granting appellant's motion; accordingly, the denial of appellant's mid-trial *Faretta* motion was well within the court's discretion.

II

Appellant argues the prosecutor committed two acts of misconduct. The first, concerns the prosecutor's description of the use of a Statute of Liberty puzzle metaphor in describing the reasonable doubt standard, and his corresponding description of the standard, which undermined the presumption of innocence. The second is that the prosecutor improperly bolstered his credibility by explaining to the jury why he moved to dismiss counts 2 and 3.

The applicable standards regarding prosecutorial misconduct are well-settled. A prosecutor's behavior violates the federal Constitution "'when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.]'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214–1215.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair constitutes prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."' [Citations.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

A. Prosecutor's Use of a Puzzle Metaphor to Explain the Reasonable Doubt Standard

In closing argument, the prosecutor explained the reasonable doubt standard as follows:

"Before I start arguing these facts, I wanted you to understand when you take a case and the particular facts, you put them in context with the other facts that you've heard. The fact that it's late at night and the defendant is out late at night means nothing by itself. That doesn't make him guilty. It's when you consider the late at night with all of the other evidence.

"And somebody explained it to me this way one time. Basically, it's like when you have a puzzle. Say it's a puzzle of like the Empire State Building—something that everybody knows—or statue of liberty. You start to put the puzzle pieces together. They don't mean anything by themselves. When they start to fit, you can start to see, even when you're completed with your puzzle, that, woah, this is the statue of liberty and this next piece, it's going to fit right there. I know because I know what the statue of liberty looks like.

"It's the same with evidence. You don't take each piece of evidence and evaluate it in a vacuum. You take each piece of evidence and evaluate it with all the evidence that is in consideration."

Later during closing argument, the prosecutor further expanded on the reasonable doubt standard: "I'm sure he's [defense counsel] going to talk a lot about reasonable doubt. Now, don't get hung up on reasonable doubt. Reasonable doubt is the same standard that we've been using in the criminal court justice system since the beginning of our democracy. You apply it to cases that are traffic citations all the way to murder."

Appellant objected to the prosecutor's argument to not "get hung up on reasonable doubt." He did not object to the puzzle and Statue of Liberty analogy. To preserve a claim of prosecutorial misconduct during argument, counsel is obligated to contemporaneously object and seek a jury admonition. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336.)

Appellant concedes he did not object to the analogy, but argues this court has the authority to reach the merits of his claim because his constitutional rights are at stake. Alternatively, he asserts the failure to object constituted ineffective assistance of counsel. Although the issue was not preserved for appeal due to counsel's failure to object, we exercise our discretion to address the merits of appellant's claim.

Counsel has significant leeway in discussing the legal and factual merits of a case during argument. (*People v. Centeno* (2014) 60 Cal.4th 659, 666 (*Centeno*).) "'[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements

[citation].' [Citations.]" (*Ibid*.) "It is thus misleading to analogize a jury's task to solving a picture puzzle depicting an actual and familiar object unrelated to the evidence." (*Id*. at p. 670.)

"The case law is replete with innovative but ill-fated attempts to explain the reasonable doubt standard. [Citations.]" (*Centeno*, *supra*, 60 Cal.4th at p. 667.) As articulated by the Supreme Court: "We have recognized the 'difficulty and peril inherent in such a task,' and have discouraged such '"experiments"' by courts and prosecutors. [Citation.] We have stopped short, however, of categorically disapproving the use of reasonable doubt analogies or diagrams in argument." (*Ibid*.)

On appeal, a defendant attacking the prosecutor's remarks to the jury must show that there was a reasonable likelihood the jury understood or applied the comments in an erroneous manner. (*Centeno*, *supra*, 60 Cal.4th at p. 667.) We do not infer that the jury drew the most damaging meaning from the prosecutor's statements. (*Ibid*.)

Appellant relies on *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 (*Katzenberger*) to support his position. *Katzenberger* held that a Power Point presentation used by the prosecutor during closing argument, which consisted of puzzle pieces forming a picture of the Statute of Liberty to help explain the reasonable doubt standard, improperly invited the jurors to guess or jump to a conclusion without considering all of the evidence. (*Id*. at pp. 1262, 1267.) This approach is "completely at odds with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt." (*Id*. at p. 1267.) Nevertheless, *Katzenberger* found the error to be harmless, noting that defendant argued vigorously against the

prosecutor's illustrated analogy, and that the court reread the reasonable doubt instruction to help clarify the issue. (*Id*. at pp. 1268–1269.)

Appellant's case is distinguishable from *Katzenberger*. Although the prosecutor relied on puzzle pieces and the Statue of Liberty to help explain the reasonable doubt standard, he did not use a Power Point presentation or other image of the statue, nor did he suggest a quantitative measure for negating reasonable doubt. It is "[t]he prosecutor's use of an easily recognizable iconic image along with the suggestion of a quantitative measure of reasonable doubt combined to convey an impression of a lesser standard of proof than the constitutionally required standard of proof beyond a reasonable doubt" which constitutes misconduct. (*Katzenberger*, *supra*, 178 Cal.App.4th at p. 1268; accord, *People v. Otero* (2012) 210 Cal.App.4th 865, 872.) That did not occur in this case.

Even assuming the prosecutor's analogies during closing argument constituted misconduct, we conclude any error was harmless under either the state or federal standard for harmless error. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [error is not reversible unless it is reasonably probable the defendant would have achieved a more favorable result]; *Chapman v. California* (1967) 386 U.S. 18, 24 [constitutional error requires reversal unless it is harmless beyond a reasonable doubt].)

Before closing argument, the trial court advised the jury that "[t]his is only argument. It is not evidence." Further, the trial court instructed the jury with the standard reasonable doubt instruction.[3] The court also instructed with CALCRIM No. 222,

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[3] "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence

which provides: "[n]othing that the attorneys say is evidence. In their . . . closing arguments, the attorneys discuss the case, but their remarks are not evidence . . . Only the witnesses' answers are evidence." We presume the jury followed the trial court's instructions that correctly defined the reasonable doubt standard. (*People v. Doolin* (2009) 45 Cal.4th 390, 444.)

Moreover, the evidence against appellant was overwhelming. Officer Campos observed appellant casing the parking garage for several minutes. He emerged from the garage carrying a red backpack. Appellant fled the scene and jumped a fence after Officer Campos activated the emergency lights on his vehicle. Several cars were left ransacked. The backpack contained several stolen items, along with appellant's identification card and iPod. The totality of the evidence points unerringly to appellant's guilt. Thus, any error related to the prosecutor's explanation of the reasonable doubt standard was harmless. (See *People v. Boyette* (2002) 29 Cal.4th 381, 424 [prosecutorial misconduct is harmless in light of the strong evidence of defendant's guilt].)

Appellant fails to establish prejudicial error with respect to the prosecutor's reliance on the analogy of puzzle pieces and the Statue of Liberty to help explain the reasonable doubt standard.

B. Vouching

Appellant contends the prosecutor committed misconduct during closing argument by impliedly vouching for his credibility when he explained why he moved to dismiss counts 2 and 3. According to appellant, this approach "tended to bolster him by highlighting his fair-mindedness and mercy on the accused." We

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need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." (CALCRIM No. 220.)

agree that the prosecutor's approach constituted misconduct, but we find it was harmless in this case.

Appellant originally was charged with four crimes, including grand theft and receiving stolen property (counts 2 and 3). During a break in the trial, the prosecutor informed the court that he planned to move for dismissal of these two counts in the presence of the jury, because he failed to prove that the value of the computer exceeded $950. When the court asked him why, he responded, "because I want them to know I dismissed them."

The court initially opined the prosecutor was not entitled to explain his reason for dismissal to the jury. Appellant asserted the court should admonish the jury not to use the dismissals as evidence of the prosecutor's credibility. The court determined that the prosecutor was permitted to move for dismissal in front of the jury, but cautioned him to "be careful" not to use the dismissal in order to bolster his own credibility. The prosecutor moved to dismiss counts 2 and 3 in front of the jury; the court granted the motion.

The prosecutor began closing argument, stating, "before I argue you this case, I want to tell you why I dismissed count 2 and count 3." The court sustained appellant's objection but denied his request for a sidebar. The court advised appellant he "can make the record later", and admonished the prosecutor to focus his argument on the evidence. The prosecutor then argued "counts 2 and 3 weren't proved to you beyond a reasonable doubt." Appellant lodged another objection on the same ground, but it was overruled.

The prosecutor continued: "We did not prove that to you. So it could have remained as a petty theft but this is not a petty theft case. [¶] . . . [¶] The defendant in this case on May 23rd

committed multiple residential burglaries, arguably a dozen residential burglaries. [¶] We only have one. He's fortunate there's only one charge of a residential burglary in this case."

"'[Closing] argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.'" (*People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1584.) It is misconduct for prosecutors to bolster their case by invoking their personal prestige or reputation, or the prestige or reputation of their office. (*Ibid.*) Similarly, "'statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct.' [Citations.]" (*People v. Bolton* (1979) 23 Cal.3d 208, 212.)

The prosecutor's explanation of the reasons underlying the dismissal of counts 2 and 3 was not a fair comment on the evidence before the jury because appellant was no longer charged with these counts. His argument that appellant committed "arguably a dozen residential burglaries" and that appellant was "fortunate" he was only charged with one burglary were based on his personal beliefs, not evidence, which is impermissible. (*People v. Medina* (1995) 11 Cal.4th 694, 758 ["prosecutors should not purport to rely on their . . . personal beliefs based on facts not in evidence when they argue to the jury"].) It appears the prosecutor attempted to bolster his credibility by relying on the fact that he moved to dismiss counts 2 and 3 for insufficient evidence. This approach invited the jury to convict appellant of the remaining charges based on the prosecutor's credibility and personal beliefs.

Nevertheless, we conclude the prosecutor's misconduct did not prejudice the outcome of appellant's trial. The court

instructed the jury, verbally and in writing, that counsel's argument is not evidence. The written instructions also told the jury not to speculate, "in any way," why appellant was no longer charged with deciding counts 2 and 3.

We presume the jury followed the court's instructions (*People v. Doolin*, *supra*, 45 Cal.4th at p. 444), and conclude the court's failure to sustain appellant's objection to the prosecutor's closing argument was harmless in light of these instructions. (E.g., *People v. Loker* (2008) 44 Cal.4th 691, 740 [error in overruling defendant's objection to prosecutor's injection of personal beliefs was harmless in light of court's admonishment against considering prosecutor's personal views, and reminder that arguments of counsel are not evidence].) The prosecutor's comments were not "too clearly prejudicial for such a curative instruction to mitigate their effect. . . ." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 644.)

Finally, as we have discussed, the evidence of appellant's guilt was strong. We are satisfied that any error related to the prosecutor's vouching was harmless. (See *People v. Boyette*, *supra*, 29 Cal.4th at p. 424; see also *People v. Loker*, *supra*, 44 Cal.4th at p. 740.)

III

Appellant contends reversal is required because of the cumulative prejudice arising from all of the purported errors below. To the extent any error occurred below, we conclude that the combined effect was harmless, and that appellant did not endure an unfair trial. (See *People v. Boyette*, *supra*, 29 Cal.4th. at p. 468.)

IV

Appellant argues the clerk's transcript must be corrected to reflect that the trial court struck the sentence enhancement for his prior burglary conviction, rather than staying the imposition of sentence for the enhancement.[4] We agree the trial court's minutes should be amended to accurately reflect the oral pronouncement of judgment.

The jury found true the allegation that appellant suffered a prior burglary conviction in case No. YA087874, and that he served a prison term for that crime. At sentencing on December 12, 2016, the trial court *stayed* imposition of the one-year sentence enhancement (§ 667.5, subd. (b)) pursuant to section 1385. Four days later, the trial court recalled the sentence because it "failed to state certain legal terminology" during the first sentencing hearing. The court re-imposed the same sentence except, this time, it *struck* the punishment for the prior burglary conviction on the ground that it "is already imposing a five-year sentence pursuant to 667(a)(1) in that case." The corresponding minute order does not reflect that the trial court elected to strike the one-year enhancement, rather than stay imposition of punishment.

This court is authorized to direct the trial court to correct clerical errors and omissions in its records. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) The correction of clerical errors serves to ensure that court records "conform to and speak the truth. [Citations.]" (*In re Roberts* (1962) 200 Cal.App.2d 95, 97.)

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[4] The clerk's transcript refers to a portion of the appellate record, which includes the trial court's minutes. (Cal. Rules of Court, rule 8.320(b)(3).) It is the trial court's minutes, not the clerk's transcript, which warrants amendment.

The Attorney General does not oppose appellant's request. Accordingly, we direct the trial court to amend the minutes to reflect its decision to strike the one-year enhancement for the prior burglary conviction in case No. YA087874.

DISPOSITION

The trial court is directed to correct the minutes to reflect that it struck the one-year enhancement for appellant's prior burglary conviction in case No. YA087874. The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.