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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOE DARIO ARTIGA, Defendant and Appellant.	B280883 (Los Angeles County Super. Ct. No. MA069765)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joel L. Lofton, Judge. Reversed in part, affirmed in part, and remanded for further proceedings.

David W. Scopp, 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, Yun K. Lee and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Joe Dario Artiga challenges his convictions for misdemeanor theft of lost property and for both possession for sale of and furnishing methamphetamine. We affirm the methamphetamine possession for sale conviction because the trial court properly allowed for impeachment purposes evidence of Artiga's previous conviction of the same offense. We reverse the furnishing methamphetamine conviction because that count was added at the end of trial even though there was no evidence bearing on that offense at the preliminary hearing. We reverse the theft conviction because there was no evidence that Artiga appropriated the lost property.

We also reverse the sentence enhancement imposed based on the finding that Artiga committed two prior strike offenses because the trial court did not properly advise him of his rights before Artiga, who was self-represented, admitted the truth of those allegations. We reject Artiga's contention that the trial court erred by imposing a crime lab fee assessment and remand for further proceedings, including readjustment of Artiga's award of custody credits.

FACTUAL AND PROCEDURAL SUMMARY

On October 18, 2016, Los Angeles County sheriff's deputies executed a search warrant at the Lancaster home of appellant Joe Dario Artiga where they found a baggy containing approximately 1.5 grams of methamphetamine, a syringe loaded with what looked like methamphetamine, and Artiga's cell phone, which contained several text messages between Artiga and several individuals asking to buy drugs from him. Deputies found a police badge on the headboard of Artiga's bed. It belonged to Deputy Jeffrey Williams, who had lost the badge approximately 14 days earlier. Williams's name and employee number were written on the back of the badge. Artiga told the deputies that he found a

"police badge" on the ground outside a liquor store a few days earlier. The badge looked like it had been stepped on or run over.

The district attorney charged Artiga with possession for sale of methamphetamine (Health & Saf. Code, § 11378) and misdemeanor theft of lost property (Pen. Code, §§ 485, 487, subd. (a).) The information also alleged that Artiga had one prior conviction for sale of narcotics (Health & Saf. Code, § 11370.2, subd. (c)), had suffered two prior strike offenses (Pen. Code, §§ 667, subds. (b)-(i), 1170.2, subds. (a)-(d)), and had served two prior prison terms associated with those strikes (Pen. Code, § 667.5, subd. (c)).

Artiga successfully sought to represent himself. At the October 2016 hearing where that motion was granted, he was advised that the prior conviction allegations against him "could amount to a fairly significant amount of time." The court asked Artiga if he understood this and he responded affirmatively. He signed an advisement and waiver of right to counsel form which stated that he understood he had the right to confrontation and against self-incrimination.

At a November 2016 preliminary hearing, Detective Shane Maloney, who had been present during the search of Artiga's home, testified that he had found numerous incriminating text messages on Artiga's cell phone "regarding narcotics activity; sales, in particular." He read three of these text message exchanges. The first included a message to Artiga stating: "Do you have any black? I'm in Lancaster trying to get something. I have $20." Artiga responded: "I said yes. Come by." Maloney testified that "black" was slang for heroin. The second message to Artiga read: "Can I buy some clear shit from you or I'll even pay [$]30 for one of those patches." Detective Maloney testified that "clear shit" was slang for methamphetamine. The third text message asked, "How much T," to which Artiga responded, "40. 50

not 4 typo." Maloney testified that T was short for "teener" which is slang for 1.75 grams of methamphetamine. He stated that the $50 price Artiga quoted was consistent with the street value of that amount of methamphetamine. He also opined that the evidence was consistent with possession for sale of methamphetamine.

Artiga pleaded not guilty to both counts and the case was called for a jury trial. Before trial, the court indicated its intention to bifurcate the prior prison term allegations from the trial on the charged offenses. Artiga responded that he had "stipulated to the priors." The court stated that Artiga had not yet formally done so and Artiga responded, "OK. So let me go ahead and stip [*sic*] to the prior and ask [that] it be bifurcated." The court explained that Artiga had the right to a jury trial on each of the alleged prior convictions and prior prison term allegations. The court gave Artiga a copy of the information so that he could follow along. On the first page of the information, the sentencing consequences associated with each of the prior conviction and prior prison term allegations were notated directly next to each allegation. Artiga admitted he had suffered the two prior strike convictions and waived jury trial on those allegations. He also admitted to and waived trial on all of the other prior prison term and conviction allegations made in the information. The court did not explain that Artiga had the right to confrontation or against self-incrimination.

On January 18, 2017, the information was amended to allege that Artiga had served two other prior prison terms (Pen. Code, § 667.5, subd. (b)). The court advised Artiga that he had the right to a jury trial on those allegations. He stated he understood this, admitted he had suffered the prior prison terms, and waived trial on the new allegations.

Before trial, the prosecution sought to admit evidence of Artiga's previous conviction for possession for sale of methamphetamine pursuant to Evidence Code section 1101, subdivision (b). The prosecutor argued that the evidence was admissible to demonstrate modus operandi or common plan or scheme because in both incidents Artiga had been found in possession of methamphetamine and a cell phone with numerous text messages discussing that substance. Artiga objected, arguing the evidence would be unduly prejudicial. The court admitted the evidence for the purpose of showing Artiga's intent, implicitly overruling Artiga's objection. During its case-in-chief, the prosecution was unable to present evidence of Artiga's prior conviction due to scheduling issues with a witness.

At trial, the prosecution presented more text messages found on Artiga's cell phone. In one, someone asked to borrow methamphetamine. Artiga replied that he would give the person methamphetamine "on credit." In another, someone else asked if Artiga would "front" him or her illegal narcotics.

Artiga testified in his own defense, admitting that he had been a methamphetamine user for decades. He stated that the people from whom he purchased drugs often texted him asking if they could buy drugs from him, but he would not respond. He told the jury that the text messages on his phone were mostly from female friends who asked to come over to use drugs with him. He stated that he gave these female friends drugs so that they would be "friendlier" and become "flirty."

On Artiga's direct examination of himself, he stated: "It's ironic, too, because when I got charged in sales before, I wasn't dealing. By that point, I already decided like there's no money in this. I'm just going to use." Although the prosecution had decided not to introduce evidence of Artiga's prior drug conviction, Artiga volunteered that, although he had pleaded guilty to a sales

offense, he had done so in the mistaken belief that he was pleading guilty to only a charge of simple possession.

On cross-examination, the prosecutor elicited the details of Artiga's 2011 arrest and plea to a charge of possession for sale of methamphetamine. Artiga again stated that he had believed he was pleading to simple possession. The court admitted the 2011 plea transcript showing that Artiga had pleaded guilty to possession for sale of methamphetamine.

After the defense rested, the prosecutor requested that the jury be instructed with CALCRIM No. 375, which instructs the jury to consider evidence of prior convictions admitted under Evidence Code section 1101, subdivision (b) for limited purposes and not for the defendant's propensity to commit a particular type of crime. The trial court denied that request because the prior conviction evidence had not come in under Evidence Code section 1101, subdivision (b); it had come in because Artiga "opened the door" by volunteering as part of his case that his prior sales-related conviction was for simple possession, rendering the evidence relevant to his credibility.[1]

Before the case was submitted to the jury, the prosecution moved to amend the information to add an allegation that Artiga had also violated Health and Safety Code section 11379, which penalizes furnishing, administering, or giving away methamphetamine. Artiga objected, stating that he had believed he was "fighting a sales case" and that he was "entitled to [a] prelim" on that allegation. The court granted the motion, stating

[1] The trial court said: "I was going to allow 1101B. If you had the text messages and the text messages were similar enough in that case and this case to show an absence of mistake or show intent, then I would allow in 1101B evidence. I'm not going to allow 1101B just based on the fact of his conviction because then that's going to propensity."

that "the People up until the case is submitted to the jury can add charges as long as they're proved up at the preliminary hearing."

The jury found Artiga guilty as charged. Artiga was sentenced as follows: to the midterm of two years for possession for sale of methamphetamine, doubled to four years under the Three Strikes Law (Pen. Code, §§ 667, subds. (b)-(i), 1170.2, subds. (a)-(d)). The court imposed the same sentence for Artiga's conviction for furnishing, administering, or giving away methamphetamine, but stayed imposition of the sentence pursuant to Penal Code section 654. Artiga was sentenced to a concurrent 180-day county jail term for his conviction of theft of lost property. The court struck the enhancements for Artiga's prior prison terms and prior narcotics conviction. Among other fines and fees, the court's minute order required Artiga to pay a crime-lab fee of $50 plus a $145 penalty assessment and a $10 surcharge (Health & Saf. Code, § 11372.5; Pen. Code, § 1464; Gov. Code, § 76000). However, the court did not orally pronounce the penalty assessment or surcharge associated with the crime-lab fee. Finally, Artiga was awarded 216 days of presentence custody credit, consisting of 108 actual and 108 conduct days.

DISCUSSION

1. *The Trial Court Erred by Allowing the Addition of the Furnishing Methamphetamine Charge*

Artiga contends that the trial court erred in granting the prosecutor's motion to amend the information by adding the charge of furnishing methamphetamine. He claims that charge was not supported by the evidence presented at the preliminary hearing. We agree.

Penal Code section 1009 allows the information to be amended in the trial court's discretion at any stage of the proceedings to charge an offense shown by the evidence presented

at the preliminary hearing. The trial court's decision to allow the amendment of an accusatory pleading will not be set aside absent a showing of abuse of discretion. (*People v. Bolden* (1996) 44 Cal.App.4th 707, 716.)

At Artiga's preliminary hearing, Detective Maloney testified that Artiga was engaged in "narcotics activity; sales, in particular" and read three text messages from Artiga's prospective clients in which prices and amounts were discussed. Evidence was also presented that Artiga used methamphetamine. Respondent contends that this evidence was sufficient to notify Artiga that he could be charged with furnishing methamphetamine because *other* text messages on his phone, later presented at trial, indicated that he had given away methamphetamine.

The plain language of Penal Code section 1009 limits our inquiry to evidence actually presented at the preliminary hearing. Although respondent is correct that Artiga would have known that the other text messages were on his phone, this does not make up for the prosecution's failure to present that evidence at the preliminary hearing. Even when the addition of a charge comes as "no surprise" to a defendant, it cannot be allowed unless supported by evidence presented at the preliminary hearing. (*People v. Winters* (1990) 221 Cal.App.3d 997, 1007.)

Respondent's reliance on Maloney's testimony that Artiga's phone showed evidence "particularly" of sales activity does not provide an inferential footing for the conclusion that this aside by the detective was sufficient to indicate Artiga was also furnishing, administering, or giving away methamphetamine, especially when it is viewed in the context of the strictly sales-related evidence that was admitted. Because there was no evidence presented at the preliminary hearing showing that Artiga had furnished

methamphetamine, the trial court erred by allowing the information to be amended to add that charge.

Both parties agree this is structural error not subject to harmless error analysis. (*People v. Dominguez* (2008) 166 Cal.App.4th 858, 868 [amendment to add charge not shown at preliminary hearing is "unquestionably prejudicial"]; *People v. Burnett* (1999) 71 Cal.App.4th 151, 177 ["[i]t is as a matter of law irrelevant whether a defendant is prejudiced by being prosecuted for an offense not shown by the evidence at the preliminary hearing"].) We will therefore reverse that conviction.

2. *There was Insufficient Evidence to Support the Theft of Lost Property Conviction*

Under Penal Code section 485, a defendant can be found guilty of theft if he or she "finds lost property under circumstances which give him knowledge of or means of inquiry as to the true owner, and . . . *appropriates such property to his own use, or to the use of another person not entitled thereto*, without first making reasonable and just efforts to find the owner and to restore the property to him." (Italics added; see also *People v. Zamani* (2010) 183 Cal.App.4th 854, 863 (*Zamani*) [conviction under Pen. Code, § 485 requires that defendant commit two acts; *finding* lost property and *appropriating* it].)

Artiga contends that his conviction for theft of lost property was not supported by substantial evidence because there was insufficient evidence presented that he used the police badge found in his possession. We agree.

We review the record in the light most favorable to the judgment to determine whether it is supported by substantial evidence. (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 52.) In conducting this review, "[w]e may not . . . reweigh any of the evidence, and we must draw all reasonable inferences in favor of the judgment below. [Citation.]" (*Ibid.*) We must reverse unless

the record shows substantial evidence supporting each element of the charged offense. (*People v. Johnson* (1980) 26 Cal.3d 557, 577.)

Artiga contends that the evidence shows only that he found the badge a short time before his arrest and planned to see whether a reward had been offered for its return. This, he contends, is insufficient to show that he appropriated the badge to his own use.

Respondent counters that Artiga's intent to see whether there was a reward in fact constituted substantial evidence that he appropriated the badge to his own use. Respondent cites *People v. Davis* (1998) 19 Cal.4th 301, 307, for this proposition, but it is inapplicable. At issue in *Davis* was whether a defendant's intent to demand a reward could satisfy the *intent* element of *theft* for the crime of larceny. The intent requirement for theft is not an element of theft of lost property under Penal Code section 485. (*Zamani*, *supra*, 183 Cal.App.4th at p. 863.) Therefore, the *Davis* court did not hold that intent to determine whether a reward is offered could satisfy the *use* element under Penal Code section 485.

Respondent's other citations likewise do not provide authority for concluding that Artiga appropriated to his own use the deputy's missing badge. (See *In re Greg F.* (1984) 159 Cal.App.3d 466, 468–469 [finding minor to be ward of court under Pen. Code, § 486 and *reversing* finding under Pen. Code, § 485 where minor asked for reward and did not return property when refused]; *Van Fleet v. West American Ins. Co.* (1935) 5 Cal.App.2d 125, 129 [finding officer had probable cause to arrest suspect who refused to return property unless he was paid reward].)

Unlike those decisions, there is no evidence that Artiga demanded a reward in exchange for returning the badge. Instead, he expressed a desire to see whether a reward might be offered,

but nothing more. Even if the jury disbelieved Artiga's version of events, we are left with mere speculation as to how and when Artiga acquired the badge and what he had done or planned to do with it.

Because there is not substantial evidence that Artiga appropriated the badge to his own use, we reverse his conviction for theft of lost property under Penal Code section 485.[2]

3. *The Court did not Err by Allowing Evidence of Artiga's Prior Conviction or by Refusing to Give CALCRIM No. 375*

Artiga argues the trial court erred when it admitted evidence of his prior conviction for selling methamphetamine as impeachment evidence and then refused to instruct the jury with CALCRIM No. 375. We disagree.

We review the trial court's evidentiary ruling under the abuse of discretion standard. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) We apply de novo review to the claim of instructional error. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

As discussed in our Factual and Procedural Summary, the trial court initially agreed to admit evidence of the prior conviction in order to show Artiga's intent for the current charge of possessing methamphetamine for sale. The prosecution never introduced such evidence, resting its case after stating there were scheduling problems with the witness it intended to call on that issue.

Despite that, Artiga volunteered information about the prior conviction during his own case, stating that he believed he had pled to only the crime of simple possession. The prosecution was then allowed on cross-examination to introduce evidence from the prior conviction plea transcript showing that Artiga in fact

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[2] As a result, we need not reach Artiga's contention that instructional error occurred in connection with this count.

understood that he was pleading to a sales-related offense. The evidence was admissible for that purpose. (Evid. Code, § 780, subd. (i); *People v. Turner* (2017) 13 Cal.App.5th 397, 408 [evidence of prior misconduct admissible to show existence or nonexistence of any fact to which defendant testifies]; Evid. Code, § 1101, subd. (c).)

Artiga contends that he was "forced to" address his prior conviction due to the court's ruling that it could be admitted by the prosecution. We reject this contention. Competent defense counsel would have recognized that the prosecution had abandoned its attempt to introduce the prior conviction evidence and would not have offered the same evidence as part of his or her case in chief. As we see it, Artiga was not forced to introduce this evidence; he chose poorly in doing so. In effect, Artiga complains about a decision he made while acting as his own counsel, a claim he may not make. (*People v. Espinoza* (2016) 1 Cal.5th 61, 75.)

As for Artiga's claim concerning the failure to instruct the jury with CALCRIM No. 375, that instruction tells the jury how to evaluate and apply evidence of prior convictions admitted pursuant to Evidence Code section 1101, subdivision (b). (*People v. Peyton* (2014) 229 Cal.App.4th 1063, 1079.) Because the prior conviction evidence was not introduced on that ground, the instruction did not apply.

4. *Artiga was not Properly Advised of His Trial Rights Before Admitting the Prior Strike Conviction Allegations*

When accepting a defendant's admission of prior convictions, the trial court must advise the defendant of his or her "'right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea.'" (*People v. Lloyd* (2015) 236 Cal.App.4th 49, 57 (*Lloyd*), quoting *In re Tahl* (1969) 1 Cal.3d 122, 132.) A reviewing court will find a defendant's admission of a

prior conviction valid if the record affirmatively shows it was voluntary and intelligent under the totality of the circumstances. (*People v. Howard* (1992) 1 Cal.4th 1132, 1175 (*Howard*).)

Artiga contends that the trial court failed to advise him of his right against self-incrimination, his right to confront witnesses against him, and the potential sentencing consequences of his admissions. As a result, he argues that his waivers of trial on his prior strike convictions were not voluntary and intelligent and that the court's findings based upon those waivers must be reversed.[3] We agree.

In *People v. Mosby* (2004) 33 Cal.4th 353 (*Mosby*), a defendant challenged the validity of his admission of a prior conviction where the trial court had failed to advise him of his right to confrontation and right against self-incrimination. The California Supreme Court found that he had voluntarily and intelligently admitted the conviction, taking into consideration that he was represented by counsel, had just concluded a jury trial at which he exercised his right to remain silent and right to confrontation, and had prior experience with the criminal justice system, specifically having pleaded guilty to a crime. (*Id.* at pp. 364–365.)

Respondent contends that *Mosby* is analogous here and calls for an affirmance. Although there are some similarities between

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[3] The section in Artiga's brief discussing this issue contains a heading which states that he did not voluntarily and intelligently waive trial and admit to the prior prison term allegations. ~(AOB 43)~ Despite this, a fair reading of his brief is that it challenges only his waivers and admissions with respect to the prior strike conviction allegations. In any event, because the court struck the enhancements for Artiga's prior prison terms and prior narcotics conviction, any challenge to those admissions is moot.

that case and this one, we conclude they are insufficient to warrant an affirmance.

It is arguable, as respondent contends, that the circumstances as a whole show Artiga was properly advised of the penal consequences of his admissions. During the hearing at which he was granted the right to represent himself, Artiga was advised that his prior conviction allegations "could amount to a fairly significant amount of time" and Artiga stated he understood this. During his admission of the strike priors, Artiga was given a copy of the information in order to follow along. It stated the possible sentencing consequences of each prior conviction or prison term finding. Artiga's admission that he understood the connection between prior convictions and enhanced sentencing, coupled with the information provided to him about sentencing, could demonstrate that he was made aware of the possible sentencing consequences of admitting his prior strike convictions.

Even if that were so, however, we do not believe he was sufficiently advised of his self-incrimination and confrontation rights. Granted, Artiga had prior experience with the criminal justice system based on his conviction from around six years earlier. However, unlike the defendant in *Mosby*, Artiga was not represented by counsel. (*Mosby*, *supra*, 33 Cal.4th at p. 364.) Neither had he "*just* undergone a jury trial . . . ." (*Ibid.*) Instead, the limited advisements he received regarding the prior strike conviction allegations occurred before trial. (See *People v. Cross* (2015) 61 Cal.4th 164, 180 [waiver not voluntary and intelligent where it was taken before defendant exercised his right to confrontation]; *Howard*, *supra*, 1 Cal.4th at p. 1180 [waiver voluntary and intelligent where defendant was "actively represented by counsel"]; *Lloyd*, *supra*, 236 Cal.App.4th at p. 59 [admission of priors not voluntary and intelligent when not made immediately after trial].)

We are tasked with determining whether the record *affirmatively shows* that Artiga voluntarily and intelligently waived his rights to confrontation and against self-incrimination with respect to the prior strike conviction allegations. (*Howard*, *supra*, 1 Cal.4th at p. 1175.) As we see it, the record is at best unclear about Artiga's understanding of those rights when he admitted he suffered the prior strike convictions and waived jury trial on them. As a result, we cannot conclude this standard has been met, and the trial court's findings regarding the truth of those allegations must be set aside.

Both parties agree that a retrial of Artiga's prior strike conviction allegations is permissible. (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1421, overruled in part on other grounds in *People v. Farwell* (2018) 5 Cal.5th 295, 304.) We will therefore remand the matter for that purpose.

5. *The Crime Lab Penalty Assessments were Proper*

The trial court's minute order states that Artiga is to pay a crime-lab fee of $50, a $145 penalty assessment, and a $10 surcharge. (Health & Saf. Code, § 11372.5; Pen. Code, § 1464; Gov. Code, § 76000).

Artiga contends that the trial court erred, in part because it failed to orally pronounce the crime-lab fee assessment and surcharge, and in part because the $50 crime-lab fee imposed upon him is not subject to penalty assessment because it is a nonpunitive administrative fee. As to the latter contention, it fails because it is based upon the holdings of three Court of Appeal decisions—*People v. Webb* (2017) 13 Cal.App.5th 486; *People v. Watts* (2016) 2 Cal.App.5th 223; *People v. Vega* (2005) 130 Cal.App.4th 183—which were recently disapproved by the Supreme Court. (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1122, fn. 8.) As a result, the trial court did not err by imposing such penalty assessments.

As for the court's failure to orally pronounce the crime-lab assessment and surcharge, that error may be corrected on appeal through modification of the oral pronouncement. (*People v. Corrales* (2013) 213 Cal.App.4th 696, 702.) However, because we remand for a retrial of the prior conviction and prison term allegations, we leave it to the trial court to address those issues upon remand.

Respondent contends that the court erred when it imposed two rather than three criminal conviction assessments of $40 under Penal Code section 1465.8, subdivision (a)(1) and court security fees of $30 under Government Code section 70373 because it should have imposed one fee or assessment per conviction. Because we reverse Artiga's convictions for furnishing, methamphetamine and theft of lost property, any failure by the trial court to impose those fees in connection with those counts is now moot.

6. *Artiga is Entitled to Another Day of Custody Credit*

Artiga contends and respondent concedes that Artiga is entitled to an additional day of presentence custody credit. The failure to properly calculate custody and conduct credits can be corrected at any time. (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 591.) Defendants who are sentenced to prison are entitled to credit for each partial day spent in prejudgment custody. (Pen. Code, § 2900.5, subd. (a); *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48.)

Based on our review of the record, we agree with the parties that Artiga was given one less day of presentence custody credit than he had earned. He was arrested on October 18, 2016 and held until February 2, 2017, a total of 109 days. Because we reverse for a retrial on the various prior conviction and prison term allegations, instead of modifying the judgment, we leave it to the trial court to do so upon remand.

DISPOSITION

The judgment is affirmed as to Artiga's conviction under Health and Safety Code section 11378. His convictions under Health and Safety Code section 11379 and Penal Code section 485 are reversed. We remand for further proceedings on the prior strike conviction allegations. At resentencing following that retrial, the court shall modify Artiga's award of custody credits to reflect the correct amount of credits and orally pronounce and impose all required crime-lab fees, penalty assessments and surcharges.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MICON, J.*

We concur:

WILLHITE, Acting P.J.

COLLINS, J.

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*Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.