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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHRISTIAN MARTINEZ SEDANO, Defendant and Appellant.	B232371 (Los Angeles County Super. Ct. No. GA081658)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dorothy L. Shubin, Judge. Affirmed.

Law Office of G. Martin Velez and G. Martin Velez, 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, Michael R. Johnsen and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Christian Martinez Sedano of vandalism (§ 594, subd. (a))[1] with the finding that he had committed the crime for the benefit of a street gang (§ 186.22, subd. (b)(1)(A)). After defendant admitted a 2008 robbery conviction (§ 211), the trial court sentenced him to six-year term.

In this appeal, defendant contends that the evidence is insufficient to sustain his conviction. We disagree. He also contends that trial counsel provided ineffective assistance because he did not object to a portion of the gang expert's testimony and that the trial court erred in failing to submit CALCRIM No. 358. We find no prejudicial error and therefore affirm the judgment.

STATEMENT OF FACTS

1. *Factual Overview*

The crime is gang related. Defendant is an active and long-time member of the Barrio Elmwood Rifa (BER), one of Burbank's original gangs. In this case, the People successfully prosecuted him for vandalism after he was seen spray painting gang-related graffiti on a wall in BER's territory.

2. *The Prosecution's Case-in-Chief*

During the evening of November 11, 2010, Burbank Police Officer Todd Burns and his partner Officer Cheng were on foot monitoring traffic near a high school football game.[2] A man told them that "somebody" was spray painting the rear wall of a pet store located 100 yards away. Officer Burns looked in the direction of the pet store. The area around the pet store was well lit by streetlights

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

[2] Officer Cheng did not testify at trial.

and floodlights on the businesses. Officer Burns had an unobstructed view and saw a "tall and thin" man in dark clothes standing at the pet store's rear wall. The man was moving his right hand "up and down and back and forth" "above his head." Officers Burns and Cheng mounted their motorcycles and drove to the pet store, arriving within 30 seconds. While riding to the pet store, Officer Burns did not see anyone leave the area.

When the officers arrived, defendant and two other men (Giovanni Rios and Jaime Oliveros) were standing in a walkway between the pet store's rear wall and a dumpster. Defendant was "taller" and "thinner" than Rios and Oliveros. Neither Rios nor Oliveros matched the "body type" of the individual Officer Burns had just seen standing at the pet store's rear wall. Defendant wore a plaid shirt, "like a large Pendleton," that had white, blue and black stripes.[3] Rios and Oliveros wore dark clothes, "large comfortable hoodies." "Trigger," "BER" and "X3" had been spray painted in silver on the pet store's wall. As Officer Burns stood at the wall, he smelled fresh spray paint, "the smell you get from aerosol spray cans." Officer Burns spotted a can of silver spray paint 30 to 40 feet away from defendant and his companions.[4] Officer Burns and his partner patted the three men down for weapons and handcuffed them. As Officer Burns was patting down defendant, defendant told him that he was on parole for robbery. Officer Burns saw that defendant had gray paint—the same color as had been used on the wall—on his left thumb. Neither Rios nor Oliveros had paint on his hands.

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[3] On redirect examination, Officer Burns explained that when he first saw the man spray painting the wall 100 yards away, his clothes "appeared to me to be dark," "with the back lighting and where he was standing."

[4] The police lifted five fingerprints from the spray paint can. Four prints were of such poor quality that no comparison could be made. The fifth print was of good quality but did not match defendant.

The police transported the three men to the Burbank city jail. Defendant was placed in a holding cell where Burbank Police Officer Todd Burke had an unobstructed view of him. Officer Burke heard a scratching noise and saw defendant using the zipper on a black sweat shirt to etch "something into the metal door frame." Officer Burke told defendant to stop whereupon defendant "turned and threw . . . the sweatshirt onto another [man] in the [holding] cell." Officer Burke looked at the area and saw "an incomplete E" on the door. In addition, Officer Burke saw "BER" etched in an area in which defendant had been previously standing.[5]

Detective Jeff Barcus, a qualified gang expert, testified as follows. BER is one of the original gangs in Burbank, having started "in the late '80s, early '90s." The gang has approximately 15 active members. Its primary activities "range from simple vandalism to weapons violations, narcotics violations, and attempted murder." The gang's symbols include "BER" and "EW." BER members spray paint graffiti, including its symbols, to mark its territory, to instill fear in the community and to warn rival gangs "that they are present and alive in that territory."

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[5] Initially, the People charged a second count of vandalism based upon defendant's actions in the holding cell. However, that count was dismissed on the People's section 1385 pretrial motion because "defendant had pled to that incident [as] a Burbank case, case No. OBR03214." The People then moved, pursuant to Evidence Code section 1101, subdivision (b), to introduce evidence of the incident at trial. Over defense objection, the trial court granted the motion. In this appeal, defendant does not challenge that ruling.

At trial, the jury was instructed pursuant to CALCRIM No. 375, the pattern instruction about evidence of an uncharged offense. The instruction explained that the People had "presented evidence that the defendant committed another offense of vandalism that was not charged in this case," and, that if the People proved the uncharged offense by a preponderance of the evidence, the jury could consider the uncharged offense on several issues, including defendant's identity as the person who committed the charged act of vandalism and whether defendant acted with the intent to promote criminal conduct by a street gang.

On several occasions, defendant had told Detective Barcus that he was a BER member and that his street moniker was "Lil Bugsy." In fact, defendant, who is 28 years old, has been a BER member for at least seven years. He is considered a "legacy" member because his older brother is a long-time BER member. Defendant has two gang tattoos: "Elmwood" across his abdomen and "BER" on his upper back. 17-year-old Oliveros and 19-year-old Rios are also BER members.

Detective Barcus further testified that he had responded to the crime scene shortly after defendant and his two companions had been detained. The pet store is in BER territory. As Detective Barcus walked toward the wall with the graffiti, he "could smell the distinct smell of the aerosol and the paint in the air. [The smell] got stronger as [he] got close to the location." He touched the graffiti and "it was still tacky to the touch as if it was freshly applied." Detective Barcus explained the freshly painted graffiti as follows: "Trigger" is Oliveros' moniker and "BER" are the gang's initials. "X3" represents the number 13 which, in turn, stands for M, the 13th letter of the alphabet. M represents BER's "ties to the Mexican Mafia and their loyalty to that." Detective Barcus testified that the fact that part of the graffiti include Oliveros' moniker did not necessarily mean that Oliveros had applied the graffiti. He explained: "It could mean [Oliveros] wrote this *or it could mean [Oliveros] was present when this was applied.*" (Italics added.) "A lot of times what will happen is a gang member will apply graffiti to a wall, but he won't be alone. . . . When gang members do apply graffiti, they tend to do it in groups . . . one person can concentrate on applying the graffiti [and the others] can act as lookouts." It is common for a gang member to write another member's moniker to indicate that individual was at the scene and to show respect for him. A BER legacy member (such as defendant) would spray paint the moniker of a younger gang member (such as Oliveros) to encourage the new member "to become more active" in the gang.

As will be explained in more detail below, Detective Barcus testified that, in his opinion, defendant spray painted the graffiti on the pet store's rear wall and etched the graffiti in the holding cell "for the benefit, promotion, and furtherance of the [BER] gang itself."

3. *The Defense Case*

Burbank Police Officer Stephen Santiago interviewed Oliveros the night the three men were arrested. Initially, Oliveros denied being a member of BER and knowing either defendant or Rios. Oliveros claimed that "[h]e was just walking by when [the] officers showed up." However, later that evening, Oliveros told Officer Santiago that he was a BER member; that his moniker was "Trigger"; and that he was responsible "for tagging the wall" of the pet store. When Oliveros continued to maintain that he did not know either defendant or Rios, Officer Santiago asked how that was possible since each man was a BER member. Oliveros replied: "[H]e didn't care or just really didn't have a response." Officer Santiago saw no paint on Oliveros' hands or clothes and asked how that was possible if he (Oliveros) had spray painted the wall. Oliveros "just shook his head and didn't say anything. He didn't have an explanation."

Jessica Levin testified as a defense witness. She has known "many" BER members for "over ten years." The evening of November 11, 2010, she and defendant (with whom she had been "good friends" for "a year and a half" and who she knew to be a BER member) had stopped at the McDonald's next to the crime scene. Defendant introduced her to some of his friends, including Rios. Levin went to the restroom and when she returned, she saw defendant and two of his friends being arrested. Prior to defendant's arrest, she never saw him spray paint or pick up a spray paint can that evening.

4. *The People's Rebuttal Case*

Detective Barcus again testified as a gang expert. He is familiar with situations in which two gang members, one a juvenile and the other an adult, are arrested and the juvenile takes responsibility for the crime. Detective Barcus explained that the juvenile's taking responsibility benefits both individuals. The juvenile "make[s] a name for himself" by "tak[ing] responsibility for a crime." "[T]aking the rap or the blame for the crime . . . would gain [him] notoriety amongst the other gang members, especially the senior gang members, the higher-ups would see that as a sign of respect for the juvenile to do that for the adult." "And [the juvenile's] willingness to do this a lot of times is because that juvenile is under 18, and [he] fall[s] under a different court that is generally more lenient for a crime that [he] would be taking the blame for." The adult gang member benefits because "depending on that adult's criminal history, they're facing potential jail time or prison time or parole violations. They would be exonerated by the juvenile taking full blame for that."

5. *Closing Arguments and the Jury's Verdict*

The prosecutor argued that the circumstantial evidence established defendant's guilt beyond a reasonable doubt. Relying upon CALCRIM No. 224 ("Circumstantial Evidence: Sufficiency of Evidence"), defense counsel argued that the circumstantial evidence could reasonably be interpreted to point to defendant's innocence and that as a result, the jury must acquit defendant.

After deliberating 92 minutes, the jury found defendant guilty.

DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE

Defendant contends that "the evidence may have been sufficient to raise a suspicion of [his] guilt, but was insufficient to support the verdict." According to him, "[t]he record as a whole . . . demonstrates that the jury's verdict was based on speculation and conjecture, requiring reversal." We are not persuaded.

The standard for assessing a contention of insufficient evidence to sustain a criminal conviction is well settled. We must "review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) This standard applies when, as in this case, the prosecution relies primarily upon circumstantial evidence. (*Ibid*.) Thus, even if "the circumstantial evidence might be reasonably reconciled with the defendant's innocence, this alone does not warrant interference with the determination of the trier of fact. [Citations.] Whether the evidence presented at trial is direct or circumstantial, under [controlling precedent] the relevant inquiry on appeal remains whether *any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Towler* (1982) 31 Cal.3d 105, 118-119.) Consequently, "'[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'" (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Here, Officer Burns was informed that a man was spray painting the rear wall of the pet store. He looked toward the pet store. The area was well lit. Officer Burns saw a tall thin man standing in front of the wall. The man was

moving his right hand in a motion consistent with applying spray paint. Within 30 seconds, Officer Burns arrived at the scene. During that time, no one left the area. When the officer arrived, he found defendant, Rios and Oliveros, all of whom are BER members. Defendant was taller and thinner than Rios and Oliveros. Fresh graffiti had been applied to the wall using silver spray paint. Officer Burns recovered a can of gray spray paint nearby. The graffiti represented defendant's gang, including its initials, the moniker of one of its members apprehended at the scene, and its ties to the Mexican Mafia. The pet store is in BER territory. Defendant had gray paint on his left thumb whereas neither Oliveros nor Rios had paint on his hands. This constitutes substantial evidence from which a reasonable jury could find that defendant had committed vandalism even though Officer Burns could not identify defendant as the man he had seen spray painting the wall.

To support a contrary conclusion, defendant relies upon, among other things, the facts that Officer Burns testified that the man he initially saw from a distance of 100 yards wore dark clothes whereas defendant, when apprehended, wore a plaid shirt with black, blue and white stripes (but see fn. 3, *ante*); the moniker that had been painted on the wall belonged to Oliveros, not to defendant; and Oliveros told Officer Santiago that he (Oliveros) was responsible for the graffiti. Defendant's approach is not persuasive. Defense counsel made the same arguments to the jury but the jury rejected them when, after 92 minutes of deliberation, it found defendant guilty. Essentially, defendant asks us to reweigh the evidence and substitute our judgment for that of the jury. We decline to do so. "Due process of law does not require a reviewing court to reweigh evidence or redetermine witness credibility. In fact, it would distort the process if this court, reading a 'cold' record, substituted its judgment for that of the trier of fact who saw and heard the live witnesses. Our role is to determine the legal sufficiency of the found facts and

not to second guess the reasoning or wisdom of the fact finder." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946.)

B. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Defendant contends that trial counsel provided ineffective assistance because he failed to object when the prosecutor asked Detective Barcus (the qualified gang expert) whether defendant had acted to promote BER when he spray painted gang graffiti on the wall and etched the gang's initials in the holding cell. Defendant argues that the detective "improperly testified regarding [his] subjective knowledge and intent" and that if defense counsel had objected, the trial court would have sustained the objection. We conclude the failure to object was not prejudicial.

1. *Factual Background*

During the prosecutor's redirect examination of Detective Barcus, the following occurred without any objection from defense counsel.

> "Q [Defense counsel asked you] if a gang member can still be an active participant in a gang even though they're in custody, and I believe you said yes; is that correct?
>
> "A Correct.
>
> "Q *In fact, in this case, you've been told about an incident where the defendant is etching an E while in custody at the Burbank holding cell; is that right?*
>
> "A *Correct.*
>
> "Q *And would promoting his gang in the Burbank city jail, what benefit would that have for a gang, if you know?*

"A *Specifically in the Burbank jail in the holding area where [defendant] was, promoting the gang by placing an E or a BER would have great influence on anybody coming into that jail, not only gang members but general population, just general people coming in in general they would see there's obviously influenced by the Elmwood gang within that jail.*

"*Once they go from our jail, the prisoners or arrestees are eventually transferred to county jail and knowing that Elmwood has a stake in the Burbank jail gives them further credit once they get to county jail. . . .*

"Q Tagging or graffiti, you mentioned vandalism as one of the crimes that the Barrio Elmwood Rifa participate in; correct?

"A Correct.

"Q Under the category of vandalism, is tagging one of them?

"A Yes.

"Q And tagging is another word for graffiti?

"A Correct.

"Q And you mentioned earlier that placing graffiti in your neighborhood or in your territory you said that that instills fear in the community and you also testified that it makes the presence of the gang known in that area; correct?

"A Correct.

"Q . . . *The fact that the defendant placed that graffiti there on [the wall of the pet store], do you have an opinion whether or not that's for furtherance or in association with the gang Barrio Elmwood Rifa?*

"A I do.

"Q What is that opinion?

> *"A It's exactly for that reason. It's for the benefit, promotion, and furtherance of the gang itself. Like I said earlier, there were thousands of people within a hundred, 200 yards of where the graffiti was applied, and they were attending a football game.*
>
> "*Not only were the families there that live in the community, but there were also rival gang members, influential juveniles that may be participating in tagging crews that were going to be leaving that game and going directly past where this graffiti was applied. Having that graffiti up would definitely promote that gang and further that gang to not only put – instill fear in the community but also for rival gangs to see that when they leave the game*." (Italics added.)

2. *Discussion*

A claim of ineffective assistance of trial counsel is subject to a two-prong test. To prevail, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) he was prejudiced in that there is a reasonable probability that the result of the trial would have been different absent the alleged deficient representation. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*People v. Williams* (1997) 16 Cal.4th 153, 215.)

As for the first prong of the test, "the failure to make objections is a matter of trial tactics which appellate courts will not second-guess." (*People v. Torres* (1995) 33 Cal.App.4th 37, 48.) "If [, as here,] the record on appeal fails to show why counsel . . . failed to act in the instance[s] asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.) In that regard, at the time of

trial (Feb. 2011), the courts of appeal had issued conflicting decisions about the extent to which an expert witness could testify that a defendant committed a crime to benefit his gang. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 620-621 and cases discussed therein.) Further, the California Supreme Court had granted review to decide whether an expert could give such opinion testimony in response to a hypothetical question. (*People v. Vang* (2010) 185 Cal.App.4th 309, review granted Sept. 15, 2010, S184212.)

While this appeal was pending, the California Supreme Court filed its opinion in *People v. Vang* (2011) 52 Cal.4th 1038.[6] It held that in response to a hypothetical question, a properly qualified expert witness could give an opinion that a crime was committed to benefit the defendant's gang as long as the question was based on evidence presented at trial. The court explicitly rejected the defense argument that there was a requirement "to disguise the fact the questions are based on the evidence." (*Id*. at p. 1041.)

The Supreme Court's opinion, however, does not resolve the issue posed in this case: whether expert opinion testimony is proper if it is not given in response to a hypothetical question. Here, the prosecutor asked Detective Barcus for his opinion whether this defendant (not a hypothetical defendant) sprayed painted the gang graffiti on the pet store to benefit BER and whether defendant acted to benefit his gang when he etched gang graffiti in the holding cell. On that point, the Supreme Court observed: "It appears that in some circumstances, expert testimony regarding the specific defendants might be proper. (See *People v. Valdez* (1997) 58 Cal.App.4th 494, 507, cited with approval in *People v. Prince* (2007) 40 Cal.4th

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[6] The Supreme Court filed its opinion after defendant filed his opening brief but before the Attorney General filed her respondent's brief and defendant filed his reply brief. In the latter two briefs, neither party addressed the Supreme Court's decision.

1179, 1227.)[7] The question is not before us. Because the expert here did not testify directly about the defendants, but only responded to hypothetical questions, we will assume for present purposes the expert could not properly have testified about the defendants themselves." (*People v. Vang, supra,* 52 Cal.4th at p. 1048, fn. 4.)

Given the state of the law at the time of trial, it is a close question whether a reasonably diligent advocate would have objected to the prosecutor's questions and Detective Barcus' answers. However, we "need not determine whether counsel's performance was deficient [because in this case] it is easier to dispose of [the] ineffectiveness claim on the ground of lack of sufficient prejudice." (*Strickland v. Washington, supra,* 466 U.S. at p. 697, cited with approval in *In re Fields* (1990) 51 Cal.3d 1063, 1079.) As we now explain, defendant has failed to prove prejudice as a result of the alleged deficient representation. That is, he cannot establish that but for trial counsel's failure to object to Detective Barcus' opinion testimony, the jury would not have returned a true finding on the gang enhancement.

Defendant argues: "Detective Barcus' improper opinion testimony was the most compelling evidence offered by the prosecution on the issue of [defendant's] intent with respect to the gang enhancement." We disagree. Independent of the detective's opinion testimony, the prosecution presented substantial evidence that

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7 The referenced passage from *People v. Prince* reads: "Despite the circumstance that it is the jury's duty to determine whether the prosecution has carried its burden of proof beyond a reasonable doubt, opinion testimony may encompass 'ultimate issues' within a case. Evidence Code section 805 provides that '[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.' (See *People v. Valdez* [, *supra,*] 58 Cal.App.4th 494, 507 [a gang expert testified that the defendant was a member of a particular gang and that his activities were undertaken on behalf of the gang].)" (*People v. Prince, supra,* 40 Cal.4th at p. 1227.)

defendant spray painted "Trigger", "BER" and "X3" on the wall to benefit BER. Defendant is a long-time active member of BER. When arrested, defendant was accompanied by two BER members: Oliveros and Rios. "Trigger" is Oliveros' moniker. Defendant, as a legacy BER member, would spray paint the moniker of a younger gang member such as Oliveros to encourage him to become more active in the gang. Further, BER actively engages in vandalism to instill fear in the community and to make its presence known. The vandalism occurred in BER territory the evening of a high school football game. In light of this evidence and the fact that the prosecutor never relied upon Detective Barcus' opinion testimony about defendant's intent when she argued to the jury, we find that it is not reasonably probable that a result more favorable to defendant would have occurred (a not true finding on the gang enhancement (§ 186.22, subd. (b)(1)(A)) had defense counsel objected and the trial court excluded Detective Barcus' opinion testimony.

C. INSTRUCTIONAL ERROR

Lastly, defendant contends the trial court committed prejudicial error because it failed to submit sua sponte CALCRIM No. 358, "Evidence of Defendant's Statements." The pattern instruction provides:

> "You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s].
>
> "[Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]"

Defendant contends that the trial court had a sua sponte duty to submit this instruction because: (1) Officer Burns testified that defendant had told him that he was on parole for robbery and (2) Detective Barcus testified that defendant had admitted to him that he was a BER member. Assuming arguendo that this evidence required submission of CALCRIM No. 358, the failure to submit this instruction is reviewed under "the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more favorable to the defendant had the instruction been given. [Citations.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 393.)

"'"The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made." [Citation.] 'Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. [Citations.]'" (*People v. Dickey* (2005) 35 Cal.4th 884, 905.)

In this case, there was no such conflict. Defense counsel's cross-examination of Officer Burns and Detective Barcus never suggested that defendant had not made the statements; that either officer had inaccurately testified to the contents of the statements; or that either officer had inaccurately understood defendant's remarks. Further, defense counsel's closing argument never raised any of those potential points. And, the prosecutor never mentioned these statements in her closing and rebuttal arguments. In short, we find that the failure to submit

CALCRIM No. 358 was not prejudicial. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.