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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. ANDREW KENNEDY, Defendant and Appellant.	B229757 (Los Angeles County Super. Ct. No. BA369077)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. Reversed.

Jeffrey Lewis, 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, Senior Assistant Attorney General, Eric E. Reynolds, Lauren E. Dana and Toni R. Johns Estaville, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Andrew Kennedy appeals from the judgment entered following a jury trial in which he was convicted of selling cocaine base and employing a minor to sell or carry cocaine base. (Health & Saf. Code, §§ 11352, subd. (a), 11353.) Defendant contends the trial court abused its discretion and violated defendant's confrontation rights by limiting his cross-examination and impeachment of his juvenile accomplice, who testified for the prosecution. We agree and reverse.

BACKGROUND

Around 6:00 p.m. on March 12, 2010, Los Angeles Police Department Officer Alonzo Williams and Detective Michael Saragueta were working undercover as members of a team attempting to purchase narcotics from a street dealer in the vicinity of Stanford Avenue and Seventh Street in downtown Los Angeles. (All undesignated date references pertain to 2010.) Williams walked past a black Saab parked on Stanford Avenue. Defendant was in the driver's seat and a young woman was in the passenger's seat. Defendant asked Williams if he was "straight" and called him "O.G." The prosecutor asked Williams what that meant, but Williams simply testified that he knew it was "street terminology used by street dealers." Williams responded to defendant by saying, "I [am] cool," and kept on walking. Williams informed his team by radio of defendant's statement.

Saragueta testified that his team informed him of the black Saab, so he walked down Stanford on the opposite side of the street, crossed the street, and approached the Saab. Danielle B., a minor who was seated in the passenger seat of the Saab, asked Saragueta what he needed. Saragueta considered this to be a reference to drugs. He stepped up to the open passenger-side window, looked inside the car, and replied, "A 20," meaning "$20 worth of drugs. In that particular area specifically it refers to rock cocaine." Defendant had "two rocks . . . or two off-white solids resembling rock cocaine" in his left hand. Defendant passed the rocks to Danielle, who handed them to Saragueta. Saragueta handed Danielle four $5 bills that he had previously photocopied to record their serial numbers. Defendant said "something to the effect that . . . the money

better all be there." Saragueta assured him it was, walked away, and signaled his team to close in and arrest defendant. Defendant and Danielle drove away, but were stopped nearby by uniformed police officers.

The rocks handed to Saragueta were analyzed and found to contain cocaine base. From the console or driver's seat of defendant's car, police recovered two minute crumbs of off-white solid resembling rock cocaine. They were not tested. No paraphernalia or other controlled substances were found in the car or on defendant. Police recovered $9 from Danielle and the four prerecorded $5 bills used as buy money, and an additional $23 in the pocket on the Saab's passenger door. Defendant had no money.

Danielle, who was 14 years old at the time of the offenses and at the time of trial, testified under a grant of use immunity. The jury was told that this meant that nothing she said "here today to this jury" could be used against her. Danielle testified that she was introduced to defendant a couple of months before March 12. On March 12, she and defendant met up by chance. They were not happy to see one another. They talked for 30 or 40 minutes, then she got into his car and he drove away. They drove around for about an hour, but Danielle did not remember where they went or whether they stopped anywhere. Danielle testified she did not remember whether defendant asked her to help him sell rock cocaine in exchange for pay, but she remembered saying that to the police, and she told them the truth. Danielle subsequently testified that she did not remember anything she said to the police and that defendant asked her to help him "sell rock that day, that evening" and offered to pay her, though he did not actually pay her.

Danielle testified that she was in the car with defendant on March 12 when Saragueta approached. Danielle initially admitted that she asked him what he needed, which was an offer to sell him drugs. On cross-examination, Danielle denied saying anything to Saragueta, then testified she did not remember. Defendant handed Danielle two rocks and she handed them to Saragueta, who handed her a $20 bill. Asked if it was "four fives," she changed her testimony and said Saragueta gave her four $5 bills. She put the money in the door pocket and they drove away, but were quickly stopped by

police. Defendant told her she should keep some of the money on her side of the car. She testified that she did not remember whether defendant told her that the purpose of her keeping money on her side of the car was that she would not be searched if they were stopped by the police, but she did recall telling the police that.

On cross-examination Danielle denied that the police pressured her to make a statement or told her that they would let her go home if she made a statement saying that defendant asked her to help him sell drugs.

Officer Fernando de la Torre testified he spoke to Danielle at the scene of her arrest, at the police station, and at the jail. At the station, Officer Pedroza advised her of her rights to silence and counsel pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. She did not make a statement at the scene of her arrest or at the police station; she first did so at the jail, after de la Torre re-advised her of her *Miranda* rights. She said she had met defendant through a friend about three months earlier, and at some point he asked her if she wanted to make money by helping him sell "rock." She agreed. She further told de la Torre that defendant wanted her to hold the money and "dope" because "he told her that because she's a female that she wouldn't get searched." Danielle further told de la Torre that just before the police pulled them over, defendant told her to put the money into the pocket on the passenger door. De la Torre denied "mak[ing] a deal" with Danielle. Danielle was released to her parents.

On June 17, defendant testified on his own behalf, and the prosecutor commenced his cross-examination of defendant late in the afternoon. The trial was continued to June 21, and the jury and defendant were ordered to return on that date. Defendant failed to appear on June 21 and did not return defense counsel's phone calls. The court found defendant was voluntarily absent from the trial, struck defendant's testimony, revoked his bail, and issued a bench warrant for his arrest. The trial concluded in defendant's absence.

The jury convicted defendant of selling of cocaine base and employing a minor to sell or carry cocaine base. The prosecutor declined to proceed on a prior prison term

enhancement allegation under Penal Code section 667.5, subdivision (b). Defendant was arrested on the bench warrant and appeared in court on November 19. The court sentenced defendant to the high term of nine years in prison for employing a minor to sell or carry cocaine base. The court imposed a five-year term for selling cocaine base, but stayed the term pursuant to Penal Code section 654.

DISCUSSION

Defendant contends that the trial court erred, in violation of both state evidentiary law and his constitutional rights, by preventing him from cross-examining Danielle on several points: (1) her pending juvenile petition for selling cocaine base arising from the March 12 sale to Saragueta, which was designed to show her subjective expectation of leniency and her motive for minimizing her own role while maximizing defendant's role; (2) her history of selling drugs (including whether she met defendant while she was engaged in a drug sale) to show that she "was an independent drug seller in general," defendant was not employing her to sell drugs, and defendant was not involved in the sale to Saragueta; and (3) Danielle's initial refusal to give police a statement, which was intended to show that the police promised leniency or pressured her into giving a statement, suggesting that she had a motive to fabricate the statement she ultimately gave.

As set forth in defense counsel's opening statement, the defense theory was that Danielle was selling drugs on her own initiative, without "any input from [defendant]," and defendant was a drug user who had "attempted to receive or purchase drugs from [Danielle]."

Before Danielle testified, the prosecutor sought to exclude any evidence of "the status of her case." The trial court questioned whether the jury should even learn that Danielle had been granted use immunity. Defense counsel opposed the potential exclusion, stating, "I think it would be extremely unfair and prejudicial to [defendant] for me not to be allowed to question this minor about the underlying facts of why she has immunity. [¶] She has a pending sale of cocaine case against her. My client has always asserted that this minor has a history of selling drugs, that she was the seller of these

drugs in this particular case, and that he was not employing her and was not the seller or one of the sellers in this particular case. I think it would be extremely unfair and prejudicial to [defendant] for me not to be allowed to cross-examine this witness about the fact that she has a pending sale of cocaine case and for me not to be allowed to ask her about her history of drug sales." After the trial court expressed concern about inquiry into "a lot of questions regarding a juvenile case pending," defense counsel asserted, "I believe that the defense has the right and the responsibility to question this minor about her history of drug sales. She's been accused of—" The court interrupted defense counsel to ask whether Danielle had any sustained petitions for drug sales. Defense counsel replied that there were no sustained petitions. The court stated that a history of selling drugs was not the issue, and the court saw no relevance in the pending juvenile petition. The prosecutor asserted that neither a history of drug sales nor the pending juvenile petition was relevant.

Defense counsel argued that he was entitled to cross-examine Danielle on the petition, even though it had not yet been sustained, and explained, "The relevance is that this witness has been charged with sales of cocaine, one of the charges that my client is being charged with." The court noted, "The jury knows that. The officer testified that he bought the narcotics from this young lady." Defense counsel continued, "And I think the fact that she's been charged with it is entirely relevant. I think the jury's going to wonder about whether she has been charged and—" The court interrupted to note that an instruction would tell the jury not to speculate on that point, then stated, "I don't see the relevance. You certainly can ask her what happened that day; but the fact that there's a case pending in juvenile court, I do not see the relevance to the proceedings, so I guess the People's request for limitation in that regard is granted."

Defense counsel then returned to the matter of questioning Danielle about prior drug sales. The trial court asked how a history of such sales would be relevant to the charges against defendant. Counsel explained that it was relevant to whether defendant "was employing her because if she has a history of being an independent drug seller,

selling on her own, or if she has a history of working for other individuals, I think it is entirely relevant in deciding whether it's likely that [defendant] was her employer." The court deferred ruling on the issue until after Danielle's direct testimony.

Before defense counsel commenced his cross-examination of Danielle, he renewed the request to question her about prior drug sales, explaining, "I do think that in light of the circumstances that she's testifying to and in light of the information that I have from my client regarding [Danielle's] drug-selling activities prior to this date, I believe that in order for me to be able to effectively cross-examine her I would need to be allowed to question her about her drug sales activities on this day." Counsel further explained, "[I]n light of the fact that she was selling drugs on this particular day and in light of my defense in this case, which is that she was in fact selling to [defendant]—not at his direction, providing drugs to [defendant]—not at his direction, I think that in order for me to effectively cross-examine her I need to be allowed to ask her about whether and when she had sold on prior occasions." The prosecutor objected that any prior narcotic sales by Danielle were irrelevant, and the court agreed, stating, "I just don't see the relevance that she was selling drugs. The issue is what she did that day." Defense counsel explained that prior drug sales by Danielle also reflected upon her credibility, as well as supporting the defense theory that Danielle, not defendant, was the drug seller when Saragueta made his purchase. The court precluded the desired cross-examination, saying, "I just don't see the relevance. I see it as an attempt to dirty up the water regarding the witness, but I don't see the relevance to what occurred on this day."

During Danielle's cross-examination, counsel asked, "[W]hen you were first arrested back in March, after this incident, at first you refused to give a statement to the police; correct?" The prosecutor objected on the ground of relevance. Outside the presence of the jury, defense counsel explained, "I have reason to believe the reason why she gave the statement implicating [defendant] was that the police officers told her that if she gave such a statement that she would be allowed to be taken home, that she would be allowed to have her parents come pick her up. In fact, that's what ended up happening."

The court allowed defense counsel to ask Danielle whether the police told her they would let her go home if she made a statement, but not whether she initially refused to make a statement, then later agreed to do so. The court noted, "I know she's not the defendant here, but you want to use it against her, that she didn't talk to the police, when she had an absolute right not to talk to the police." Danielle testified that the police did not pressure her to make a statement or tell her they would let her go home if she made a statement saying that defendant asked her to help him sell drugs.

Near the end of Danielle's cross-examination, she testified that she had originally met defendant through an introduction. Defense counsel asked who had introduced them, and the prosecutor objected on the ground of relevance. Counsel made no offer of proof, and thus failed to preserve his appellate claims regarding this area of inquiry. (*People v. Eid* (1994) 31 Cal.App.4th 114, 126.)

"'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of an action." (Evid. Code, § 210.) "A party can offer evidence, by proffered extrinsic evidence or by cross-examination of a witness, to attack the credibility of a witness, if such evidence tends reasonably to establish that the witness has a motive to fabricate, or some other motive, that tends to cause the giving of untruthful testimony, even though there may be no reasonable basis for the existence of such a motive." (*People v. Allen* (1978) 77 Cal.App.3d 924, 931 (*Allen*).) "This evidence, offered to show a bias, a prejudice or a motive to fabricate, is evidence of a state of mind" that "show[s] a motive for untruthfulness or undue prosecution pressure." (*Id.* at pp. 931–932.)

In *Allen*, the defendant was charged with committing an armed robbery outside a casino with a minor accomplice on August 13, 1976. The minor had been identified by the victims and was captured in the vicinity of the crime scene a short time after the robbery. The defendant was arrested the next day based upon information given to the police by the minor and his mother. (*Allen, supra*, 77 Cal.App.3d at p. 928.) At the

defendant's trial, the minor testified that the robbery was the defendant's idea and defendant had the gun during the robbery. The trial court allowed the defendant to cross-examine the minor about the pending juvenile proceeding stemming from the robbery outside the casino, but prevented defendant from cross-examining either the minor or his mother about two other robberies, one of which was the subject of another juvenile petition pending against the minor. (*Id.* at pp. 929, 931, fn. 8.) On appeal, the defendant argued that he was "prejudicially denied the right to present evidence by cross-examination of the minor of a motive to fabricate or other motive from which the jury could infer untruthful testimony." (*Id.* at p. 930.)

The appellate court in *Allen* agreed that the trial court's limitation on cross-examination of the minor and his mother regarding the other robberies constituted prejudicial error. It explained, "What is relevant is the attitude or state or mind of the minor as to an expectation of leniency on all three robbery charges. The minor could believe that his identification of appellant as his partner in the robbery at the time he was in the juvenile detention immediately after his arrest would benefit him even if no one made a promise of leniency at that time or even if he did not know that such a promise had been made to his mother. The minor could have believed that if he failed to identify someone as his robbery partner after he was arrested on August 13, 1976, he would be facing a more severe punishment on all three robbery charges than on one or even two charges. These were matters that should have been presented to the trier of fact, the jury, to determine the state of mind of the minor and whether there was a motive to fabricate or a susceptibility of undue pressure. At the time of trial, the minor knew that there was an agreement that one charge of a robbery occurrence of April 15, 1976, was to be dismissed, that there was to be no filing on another charge for a robbery occurrence of June 15, 1976, and a juvenile disposition on the August 13, 1976, robbery occurrence [outside the casino]. Again, it was a question of fact for the jury to consider the minor's motive to fabricate after permitting appellant, by his lawyer, to cross-examine the minor about his state of mind, his expectation of leniency, his fear that a prior 'plea bargain'

would not be kept if he testified differently. [Citation.] It was error for the court to restrict the cross-examination as it prevented the appellant from effectively attacking the credibility of a key witness by showing a motive to fabricate." (*Allen*, *supra*, 77 Cal.App.3d at pp. 932–933.)

The *Allen* court rejected an attempt by the Attorney General "to minimize" the effect of the error on the basis of the cross-examination permitted by the trial court regarding the pending juvenile proceedings pertaining to robbery outside the casino: "The minor could have reasonably believed his punishment would have been greater for the three charges than for the one. . . . The appellant had a right to show that both the minor and his mother were possibly under greater prosecution pressure because of three recent robbery charges than only one." (*Allen*, *supra*, 77 Cal.App.3d at p. 933.)

As the *Allen* court noted, the erroneous denial of cross-examination designed to show the existence of bias, interest, or motive to fabricate is not only a violation of state evidentiary law, but also a violation of the federal and state constitutional rights of confrontation. (77 Cal.App.3d at p. 931, fn. 8.) "'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'" (*Davis v. Alaska* (1974) 415 U.S. 308, 315–316 [94 S.Ct. 1105].) "The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" (*Id.* at p. 316.) "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (*Id.* at pp. 316–317.) "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [106 S.Ct. 1431] (*Van Arsdall*).)

Although defendant did not expressly mention his constitutional confrontation rights as a basis for his need and entitlement to cross-examine Danielle in the trial court, we conclude he did not forfeit his constitutional claim. To the extent a federal constitutional argument raised for the first time on appeal does not "'invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert[s] that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution,'" it is not forfeited. (*People v. Tully* (2012) 54 Cal.4th 952, 979–980.) Here, the confrontation claims do not invoke facts or legal standards different from those of defendant's state law evidentiary claims and are thus not forfeited.

Defendant's desired cross-examination of Danielle regarding her pending juvenile petition based upon the same transaction as the charges against defendant was relevant to Danielle's credibility. As in *Allen*, Danielle's pending juvenile petition and the circumstances surrounding her ultimate statement to the police were relevant to show that Danielle's state of mind made her more susceptible to undue police or prosecution pressure or gave her a motive for untruthfulness, such as an expectation of leniency or an attempt to escape or minimize her own liability by shifting the principal blame onto defendant. The Attorney General argues that cross-examination regarding the pending charge was not necessary because the jury heard that Danielle was testifying under a grant of use immunity. If anything, this information may have provided Danielle with a false aura of veracity because the jury may have thought her immunity shielded her from any criminal liability for her conduct in the sale to Saragueta and thus eliminated any motive to fabricate or minimize her role. We note that the prosecutor promoted such a belief by arguing to the jury, "[Danielle] was granted immunity. There's no deal made with her on leniency. I mean, who knows what's going to happen with her? It's not for us to decide, it's not for me to tell you, and it's certainly not for you to speculate. [¶] But she wasn't granted leniency. She was granted use immunity. That means when she says something in here, like she said, I did what I did . . . it can't be used against her. She

can't be prosecuted over there in juvenile court—" The court sustained defense counsel's objection, but was not asked to admonish, and did not admonish the jury to disregard the argument. Even if the jury did not reach an erroneous conclusion regarding the effect of Danielle's immunity, knowledge that Danielle had been granted use immunity was in no sense comparable to revealing the existence and nature of her motive for untruthfulness. The Attorney General also argues cross-examination was unnecessary because defendant argued Danielle's bias, motive to make defendant look bad, and hope for leniency to the jury. But argument does not satisfy the right to cross-examine witnesses, and argument that Danielle testified falsely would have been more persuasive with an evidentiary foundation showing her motive to fabricate. The trial court erred by preventing defendant from cross-examining Danielle on this topic.

Although any prior drug sales by Danielle could also reflect a state of mind providing her with a motive for untruthfulness or making her more susceptible to police or prosecution pressure, defendant did not raise this theory of admissibility in the trial court and has not argued it on appeal. The theory of admissibility urged was essentially that prior drug sales by Danielle would tend to show the identity and intent of the actual seller, that is, Danielle was independently selling the cocaine base, not selling it on behalf of defendant. The only objection raised by the prosecutor was relevance, but the evidence defendant hoped to elicit was undeniably relevant. The Attorney General argues that the trial court's comment that the cross-examination was merely "an attempt to dirty up the water regarding the witness" indicates that the court precluded cross-examination on this topic pursuant to Evidence Code section 352. But none of the court's statements suggests it was engaging in an Evidence Code section 352 analysis by balancing the probative value of the potential testimony against the risk of undue prejudice or undue consumption of time. Instead, the court merely stated, repeatedly, that it did not see the relevance of the proposed cross-examination. Accordingly, we conclude the trial court erred in preventing defendant from cross-examining Danielle on this topic.

The sequence of events leading up to Danielle giving a statement to the police was relevant to the credibility of the statement she ultimately gave, in that the sequence might have supported an inference that she was induced to provide a false statement by psychological pressures or promises of leniency. In particular, Officer de la Torre spoke to Danielle at the scene but she made no statement; she was taken to the police station and given a *Miranda* advisement, but she did not waive her rights to silence and counsel; then she was taken to the jail, given a second *Miranda* advisement, waived her rights and made a statement to de la Torre. Although Danielle expressly denied that the police pressured her or promised she could go home if she gave them a statement, the actual sequence of events demonstrating a refusal to speak followed by the passage of time, being transported to jail, and additional attempts by police officers to get her to speak provided a basis for doubting her denials. That Danielle had a right not to speak to the police was irrelevant because she was a witness, not a defendant, and she did not testify that she refrained from making an earlier statement because she was invoking her right to silence. Accordingly, we conclude the trial court erred in preventing defendant from cross-examining Danielle about whether she initially refused to give a statement and why she changed her mind.

"[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* [*v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824]] harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-

examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Van Arsdall*, *supra*, 475 U.S. at p. 684.)

In assessing the prejudicial effect of the trial court's errors, we must assume that Danielle would have testified on cross-examination that her testimony and statement to the police were given with a subjective expectation or belief that she might avoid or reduce her own criminal liability for the sale of cocaine base to Saragueta or obtain lenient treatment for that offense; she had previously sold controlled substances on her own initiative, as opposed to selling on behalf of someone else; and she initially refused to speak to the police but the sequence of events and statements or promises by the police caused her to change her mind and agree to give a statement. Viewed in that light, we cannot conclude that the erroneous limitations on cross-examination were harmless beyond a reasonable doubt. Although the events to which Saragueta testified supported the prosecution's theory that defendant was employing Danielle to sell drugs, the circumstances did not establish unequivocally the nature of the relationship between defendant and Danielle with respect to the sale of cocaine base. If Danielle had a history of selling drugs on her own initiative, the situation may have been as described in the defense theory, making the error prejudicial as to both counts. Or the prosecution's theory may have been backward: Danielle may have been the actual drug seller, using defendant to hold the drugs to attempt to minimize her own criminal liability if they were caught. Notably, given defendant's presence in the car and his physical possession of the cocaine base, as Saragueta testified, employing Danielle to sell would seem to serve no purpose; it did not allow him to appear to be innocent or to use his time to perform other tasks while his employee was out on the streets selling. And the jury might have rejected some or all of Saragueta's testimony. Thus, Danielle's testimony regarding the arrangement between herself and defendant was crucial to support the prosecution's case for the Health and Safety Code section 11353 charge. The cross-examination the court permitted did not fill the void left by the court's erroneous rulings because it did not expose the significant factual bases providing Danielle with a substantial bias and motive

to give the police a false statement and to testify falsely. Without knowledge of the reasons for Danielle's bias and motive to fabricate, the jury would have been less inclined to accept the defense argument that she lied to the police and testified falsely or the defense theory that Danielle, not defendant, was the person who was selling drugs, and was doing so on her own initiative. Accordingly, we conclude the restrictions on cross-examination were not harmless beyond a reasonable doubt and thus require reversal of defendant's convictions.

In light of our disposition, we need not address defendant's contention, which the Attorney General aptly conceded, that the trial court erred by including the stayed count in its calculation of the restitution fine and the parole revocation fine.

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.