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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

JAMES BAKER, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	B290472 (Los Angeles County Super. Ct. No. SA093470)
THE PEOPLE, Plaintiff and Respondent, v. JAMES BAKER, Defendant and Appellant.	B290565 (Los Angeles County Super. Ct. No. SA093470)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathryn A. Solorzano, Judge. Affirmed. Petition for Writ of Mandate Denied.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted James Baker of assaulting I.A., taking her vehicle without consent, and using a forged credit card to book a hotel room. On appeal, Baker contends the prosecutor committed a *Brady*[1] violation by failing to timely conduct a DNA analysis of bloody sheets found at the crime scene. He also contends two of his sentences should be stayed under Penal Code section 654.[2] We affirm the judgment. We also deny Baker's petition for writ of mandate related to the denial of his motion for new trial.

FACTUAL AND PROCEDURAL BACKGROUND

Information

Baker was charged by information with assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), driving or taking a vehicle without consent (Veh. Code, § 10851,

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1 *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

2 All undesignated statutory references are to the Penal Code.

subd. (a)), and forgery (§ 484f, subd. (a)).[3] It was further alleged that he caused great bodily injury to the victim in the commission of the assault.

People's Evidence

At trial, I.A. testified that Baker contacted her over social media and invited her to have a meal with him. I.A. is four feet 11 inches tall and weighs 100 pounds. Baker is six feet four inches tall and weighed around 220 pounds at the time.

I.A. drove her car to meet up with Baker and parked it at a Sheraton hotel. She and Baker then used a car sharing service to drive to a restaurant for dinner. Under pressure from Baker, I.A. had at least four shots of tequila and felt the effects of the alcohol. Before I.A. had a chance to eat much food, she and Baker left the restaurant using a car sharing service. Baker took a video of I.A. in the car exposing herself, but I.A. had no recollection of it.

The driver took Baker and I.A. to I.A.'s car, which Baker then drove to a Westin hotel. Several days earlier, Baker had used a forged credit card to purchase four nights stay at the hotel, totaling $2,081.13. I.A. was very drunk and stumbled out of the car and into the hotel.

The next thing I.A. remembered was Baker choking her in the hotel room until she blacked out. I.A. woke up around 5:30 a.m. the next morning. She was lying naked on the floor of the hotel room, with vomit and blood everywhere. There were numerous blood stains on the bedsheets. I.A.'s car keys and

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[3] Baker was also charged with a single count of theft, which was subsequently dismissed. The charge is not relevant to this appeal, so we do not discuss it further.

phone were missing. She called 911 because she felt like she was going to pass out.

When she arrived at the hospital, I.A. had bruising around her eye, forehead, neck, head, nose, shoulder, and hip. Her nose was broken into multiple pieces and one of her eyes was swollen shut. She had carpet burns on her scalp. Blood was coming out of her ears, which persisted for two weeks. There was bleeding inside her skull and swelling of her brain. I.A.'s treating physician characterized her injuries as life threatening, and explained they may have caused memory loss. I.A. spent nine days in the hospital.

A GPS tracking device in I.A.'s phone indicated it was located at a Marriot hotel in El Segundo. Police arrived at the hotel around 9:00 a.m., and they found Baker in the driver's seat of I.A.'s car.

Defense Evidence

Baker testified in his own defense. He admitted forging credit cards and said he was willing to plead guilty to the forgery charge.

As to the assault charge, Baker explained that he sent I.A. a message on social media asking if she wanted to go out to eat and drink with him. Baker believed I.A. was a prostitute, although he did not specify when he formed that belief.

Baker and I.A. went to dinner, drank a large amount of alcohol, and had sex at the hotel. Afterwards, I.A. demanded Baker pay her $500 because she missed work to spend time with him. Baker refused, and they had an argument.

Baker fell asleep and awoke when I.A. hit him in the back of the head with a bottle, which cut his head and caused it to bleed. Baker got up and swung his elbow, striking I.A. He then

started swinging and punched I.A. multiple times until she fell to the ground. Baker held I.A. down and took the bottle from her hand. I.A. continued to attack Baker, and he had to restrain her several more times. At the time, Baker did not realize the severity of I.A.'s injuries.

Baker then posted a message on social media seeking a nurse to video chat with him. A woman named Jeri responded, claiming to be a nurse. Baker asked Jeri to look at I.A.'s nose to see if it was broken. Jeri told Baker to put a cold compress on her nose, which he did.

I.A. was still angry and tried to attack Baker again, so Baker decided to leave the hotel room. He initially wanted to sleep in I.A.'s car in the hotel parking lot, but the valet would not allow it. So instead, he drove to the parking lot of a nearby hotel and slept in the car. In the morning, Baker tried to call I.A., but realized her phone was in the car. He got breakfast and drove to a different hotel, where he was eventually arrested.

After his arrest, Baker gave a statement to police about the assault, but left out that I.A. hit him with a bottle. Baker explained that he was living in Houston at the time and was worried that if he said I.A. attacked him, he would be required to return to California to testify as a witness. He also explained that he was indifferent as to whether I.A. would go to jail for the attack. Baker said that had he known the extent of I.A.'s injuries, he would have told the police the truth. On cross-examination, Baker admitted he fabricated most of what he told police about the assault.

To support his claim of self-defense, Baker presented evidence that his DNA was found in samples taken from under I.A.'s fingernails. He also called as a witness Sarah Dutton,

who followed him on social media. Dutton testified that she saw social media messages between I.A. and another man named Kevin. In those messages, Kevin asked I.A. whether it was true she hit Baker with a bottle. I.A. responded, " 'Yeah, I hit [him] with a bottle while he was sleep. [He] had me fucked up. He should have gave me the money he owed me. I don't fuck for free. But he didn't have to do that—he didn't have to do me that bad, though. I hope his bitch ass get fucked in jail.' "

Baker further presented testimony from Cindy Swintelski, who is a nurse practitioner employed at the UCLA Rape Treatment Center. Swintelski examined Baker the day he was arrested, and she documented scratches and abrasions on his shoulder, neck, and arms. The injuries were not bleeding and did not require medical attention. Baker did not tell the nurse he suffered any other injuries or that he had been hit in the head with a bottle. The nurse did not notice any swelling or bruising on his head, and Baker denied suffering any pain. There were scattered blood specks on his white shirt.

Baker's Attempt to Cause a Mistrial

After closing arguments, Baker asked the court to instruct the jury that the People destroyed evidence of the hotel bed sheets. The prosecutor responded that the bedding had not been destroyed. Baker accused the prosecutor of lying and complained that he had received an unfair trial.

Baker became agitated during the discussion and had to be removed from the courtroom. While in lockup, Baker said he was going to attempt to force a mistrial to avoid conviction. He eventually agreed to sit silently in the courtroom. After the jury returned for final instructions, however, Baker loudly remarked, "That was my blood on the bed. [¶] . . . [¶] They didn't want to

show—they don't want me to show that that was my blood on the bed. I got D.N.A. evidence. If I'm guilty, why they so scared of one sheet of paper, one little sheet of paper? That's it." Baker was removed from the courtroom.

Verdict and Sentencing

The jury convicted Baker of the offenses summarized above and found true the great bodily injury allegation. After denying Baker's motion for new trial, the court sentenced him to the high term of four years for the assault, plus an additional three years for the great bodily injury allegation. It imposed the high terms of three years on the other counts, and ordered those sentences to run concurrently to the principal term.

Baker timely appealed.

DISCUSSION

I. Baker Has Not Shown a *Brady* Violation

Baker contends the prosecutor's failure to test the sheets for DNA prior to trial constituted a *Brady* violation. We disagree.

A. Background

1. Pre-Trial Hearings

In November 2016, Baker elected to represent himself. He then filed a motion to dismiss based on alleged destruction of evidence, including the hotel bedding. Before the court decided the motion, it reappointed counsel at Baker's request. Baker subsequently withdrew the motion.

At a February 7, 2017 hearing, the prosecutor represented that Baker had requested DNA analysis of samples taken from I.A.'s fingernails, which would support his self-defense theory. The prosecutor agreed to the request and said it would take approximately 30 days to receive the results.

About a month later, on March 8, 2017, Baker's trial counsel asked for more time for discovery and to discuss the evidence with the main prosecutor, who was out of the country at the time. Counsel informed the court the defense was "requesting the sheets from the room and the broken bottle and the recorded interview with the victim." The following exchange occurred:

"The Court: You want to have some testing done on that sheet?

"[Trial Counsel]: Correct.

"The Court: Okay.

"[Trial Counsel]: We want to get it first and foremost, but I'm going to sit down with [the main prosecutor] and we're going to go over all the evidence he intends to present at trial."

On March 20, 2017, Baker told the court he did not want to waive time, and the court ordered the parties return on March 24 as day seven of 10 for trial. On that date, trial counsel said she needed more time to make arrangements for an out-of-state witness. The court stated it would find good cause for a continuance, even over Baker's objection. Nonetheless, it asked Baker if he was willing to waive time. Baker responded that he had no choice because the court would waive time whether or not he consented. He eventually agreed to go to trial no later than April 5.

On April 5, 2017, the prosecutor received the fingernail DNA results and provided them to the defense. Trial began on that date, and the jury returned its verdicts on April 14, 2017.

2. Motion for New Trial

Before sentencing, the court granted Baker's request to appoint substitute counsel to file a motion for new trial. At Baker's new counsel's request (hereinafter, defense counsel), the court ordered the prosecutor to complete DNA testing of the bed sheets.

Defense counsel eventually filed a motion for new trial arguing that Baker's trial counsel provided ineffective assistance by, among other things, failing to test the hotel sheets for DNA. He further argued a new trial was required due to newly discovered DNA evidence related to the sheets.

Defense counsel attached to the motion the results of DNA tests, completed after trial, of 18 separate reddish-brown stains found on the hotel bedding. I.A.'s DNA was matched to 16 of the 18 samples. One of those samples contained a mixture of I.A.'s and Baker's DNA. Four of the samples contained a mixture of I.A's DNA with another undetermined person's DNA. One other sample contained DNA from two undetermined persons, one of whom is male.

At the hearing on the motion for new trial, defense counsel represented that Baker's trial counsel requested the sheets be tested on March 8, 2017. Despite the request, the prosecutor first submitted the sheets for testing on June 6, 2017, after trial had concluded. Counsel argued the prosecutor's failure to timely submit the sheets for testing constituted a *Brady* violation.

The prosecutor responded that he originally requested a DNA analysis of the sheets in late January 2017, after Baker filed a motion to dismiss based on the destruction of evidence. The prosecutor was told it would take 90 days to complete the testing, which he relayed to trial counsel.

The court denied the motion for new trial. It explained: "Everybody went into trial knowing that those results were not back. Those results, in fact, had not been obtained, that no conclusion had been made. And the trial began with the defendant announcing ready knowing that he didn't have that information and knowing that it existed, potentially. [¶] And he made a choice to proceed to trial. Nobody forced him to do that. The record is clear that there was no pressure put on the defendant. The prosecution certainly wasn't trying to get to trial."

The court further explained the DNA results would not have changed the outcome of the case. The court noted that, although Baker claimed he was hit on the head with a bottle, the defense made no issue about the nurse examining a head injury and Baker did not tell the police about the wound.

Although the court had already denied the motion for new trial, it agreed to an additional hearing to clarify when the prosecutor first submitted the sheets for testing. At the hearing, the prosecutor told the court that, contrary to his earlier representations, the defense had not requested he perform a DNA analysis of the sheets prior to trial.[4] According to the prosecutor, in January 2017, Baker prepared a motion to dismiss based on his assertion that the sheets had been destroyed. In response, the prosecutor informed him the sheets had been preserved. Baker, however, did not request any DNA testing at that time. Baker's trial counsel subsequently requested a DNA analysis related to I.A.'s fingernails, which was done. Neither

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[4] The prosecutor had made several previous statements suggesting he attempted to have the sheets tested prior to trial at Baker's request.

Baker nor his trial counsel requested DNA testing of the sheets, and the case proceeded to trial.

Defense counsel responded that, even if Baker did not request testing, the prosecution had a duty to do so. The court ruled the motion for new trial remained denied.

B. Analysis

Under *Brady, supra*, 373 U.S. 83, the prosecution violates due process when it withholds material evidence that is favorable to the accused. (*People v. Mena* (2012) 54 Cal.4th 146, 160.) The prosecution must disclose such evidence, even if the defendant does not request it. (*In re Brown* (1998) 17 Cal.4th 873, 879.) " 'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.]" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042–1043.)

1. There Was No Suppression

Baker's *Brady* claim fails because he has not shown the prosecution suppressed evidence. "[E]vidence is not suppressed unless the defendant was actually unaware of it and could not have discovered it ' "by the exercise of reasonable diligence." ' " (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1049.) Here, the prosecutor did not hide from Baker the existence of the bloody sheets. To the contrary, he explicitly told Baker the sheets had been preserved. There is nothing in the record to even suggest the prosecutor prevented Baker from accessing that evidence and conducting testing on it.

We reject Baker's contention that the prosecutor suppressed evidence by failing to perform a timely DNA analysis of the sheets in response to his request.[5] *Brady* "does not stand for the proposition that a defendant has a federal constitutional right . . . to compel certain kinds of investigation." (*People v. Mena, supra*, 54 Cal.4th at p. 160; see *People v. Salazar, supra*, 35 Cal.4th at pp. 1048–1049 [the prosecution does not "have the duty to conduct the defendant's investigation for him"].) Moreover, until the DNA testing was actually performed, there could be no evidence to disclose. (See *People v. Mena, supra*, at p. 160 [*Brady* does not compel the prosecution to perform a lineup because, until the lineup is performed, there is no evidence to disclose].)

Even if the prosecution had a duty to test the sheets, the fact remains that Baker chose to go to trial before any testing had been completed. The trial court made clear that it was willing to continue the case to ensure Baker was fully prepared. Baker, however, insisted on going to trial knowing full well he would have to do so without the aid of the DNA evidence. To claim the prosecution suppressed evidence under such circumstances is, as the trial court put it, "preposterous."

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[5] Whether Baker requested the prosecutor perform a DNA analysis prior to trial is far from clear. Baker insists his trial counsel made such a request at the March 8, 2017 hearing, but the record does not support that assertion. Instead, it shows counsel requested the sheets from the prosecutor so *the defense* could perform the testing. Counsel never explicitly requested on the record that the prosecutor perform DNA testing prior to trial.

2. There Was No Prejudice

Baker's *Brady* claim additionally fails because he has not shown prejudice. Prejudice, for purposes of a *Brady* violation, "focuses on 'the materiality of the evidence to the issue of guilt or innocence.' [Citations.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]. A defendant instead 'must show a "reasonable probability of a different result." ' [Citation.]" (*People v. Salazar*, *supra*, 35 Cal.4th at pp. 1042–1043.) A "reasonable probability" means a probability sufficient to " 'undermine[ ] confidence in the outcome' on the part of the reviewing court." (*In re Sassounian* (1995) 9 Cal.4th 535, 544.)

Baker contends the DNA evidence was material because it supported his testimony that I.A. struck him on the head with such force that it caused him to bleed. According to Baker, the fact he was bleeding from the head indicates his subsequent use of force was reasonable, which is required for a claim of self-defense.

Contrary to Baker's assertions, the DNA evidence does little to show he was bleeding from the head. Although Baker's DNA was potentially present in samples that appeared to be blood stains, those samples also contained I.A.'s DNA. It is possible, therefore, that DNA from Baker's sperm, skin, or saliva simply mixed with I.A.'s blood to form the stains. Given Baker slept, had sex, and fought with I.A. on the bed, it would not be surprising that DNA from such a source would be present on the

sheets. Alternatively, it is possible the DNA simply came from one of the numerous scratches and abrasions Baker suffered, rather than a cut to his head.[6]

The jury also heard overwhelming evidence that Baker did not suffer a cut to his head. The nurse who examined Baker shortly after the incident did not document any wound to his head; nor did Baker disclose one to her. Baker similarly failed to tell police he suffered a head injury. His explanation for not doing so—that he did not want to be subpoenaed as a witness against I.A. and was indifferent to her being held accountable—strained credulity. Given such evidence, we doubt the DNA results would have persuaded the jury to give any additional credence to Baker's testimony that he suffered a cut to his head.

Even if the DNA results would have persuaded the jury Baker was bleeding from the head, it is still not reasonably probable the results of the case would have been different if the evidence were introduced at trial. To justify an act as self-defense, the defendant may not use more force than is reasonable under the circumstances. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064–1065.) Here, Baker's own testimony demonstrates he used excessive force. According to Baker, after being struck in the head with the bottle, he elbowed I.A. with significant force. This alone would have been sufficient to end any imminent threat of harm given I.A. was heavily intoxicated and less than half Baker's size. Baker, however, testified that he proceeded to

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[6] Baker implies the DNA could not have come from his scratches or abrasions because the examining nurse indicated they were not bleeding. The examination, however, took place hours after the assault. Common sense suggests the wounds would have stopped bleeding in that time.

punch I.A. multiple times and pin her to the ground. I.A., in turn, suffered life threatening injuries that required she remain in the hospital for nine days. The force used was clearly excessive under the circumstances, regardless of whether Baker suffered a head injury.

II. Baker's Sentences Need Not be Stayed Under Section 654

Baker contends his sentences on the forgery and vehicle offenses should be stayed pursuant to section 654. We disagree.

Section 654 provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a); see *People v. Harrison* (1989) 48 Cal.3d 321, 335.) Its prohibition of multiple punishments extends to situations in which the defendant commits several criminal acts during an indivisible course of conduct. (*People v. Beamon* (1973) 8 Cal.3d 625, 639; *Harrison, supra*, at p. 335.) Where, as here, the trial court did not discuss section 654, we must affirm the sentence if an implied finding that section 654 does not apply is supported by substantial evidence. (*People v. Mejia* (2017) 9 Cal.App.5th 1036, 1045.)

Baker does not directly deny there is substantial evidence supporting an implicit decision not to apply section 654. Nonetheless, he contends the sentences must be stayed because the trial court made other findings at the sentencing hearing that would be inconsistent with a decision not to do so. Specifically, he points to several, somewhat ambiguous statements the court made while discussing whether to run the sentences

consecutively. Among other things, the court seemed to imply Baker had similar objectives in committing the assault and vehicle offense, although not the forgery offense. The court also suggested it believed all the crimes were committed during a "single period of [aberrant] behavior."[7] Baker contends that, given these statements, the court necessarily would have concluded the crimes were committed during a single course of conduct for purposes of section 654.

Even if we construe the court's statement in the light most favorable to Baker, they do not require his sentences for the forgery and vehicle offenses be stayed under section 654. A defendant may be punished for multiple crimes committed during a single course of conduct if he harbored multiple or simultaneous objectives, independent of and not merely incidental to each other. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267–268.) Here, Baker does not dispute, nor could he, that his objectives in committing the forgery were distinct from his objectives in committing the other crimes. Baker committed the forgery in order to defraud the hotel; several days later, he committed the other offenses due to a personal conflict with I.A. There is also no evidence to suggest Baker committed the forgery in furtherance

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[7] The court made these statements while discussing California Rules of Court, rule 4.425, which sets forth several factors the court should consider when deciding whether to impose consecutive rather than concurrent sentences. Among those factors are whether the "crimes and their objectives were predominantly independent of each other" and whether the "crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 4.425(a).)

of the other crimes. Under these circumstances, the trial court was not required to stay the sentence on the forgery offense, even if it found the crimes were committed during a single course of conduct.

The same is true of the sentence on the vehicle offense. A defendant who commits several criminal acts pursuant to a single objective may be subjected to multiple punishments if the acts are divisible in time. (*People v. Beamon*, *supra*, 8 Cal.3d at p. 639, fn. 11; *People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) To determine whether the acts are divisible in time, courts consider whether the defendant had an opportunity to reflect upon and renew his intent before committing the next act and whether each act created a new risk of harm. (*People v. Gaio*, *supra*, at p. 935; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1255.)

According to Baker's own testimony at trial, a significant amount of time passed between the assault and his taking I.A.'s vehicle. During that time, he was active on social media, video chatted with a nurse, and attempted to tend to I.A.'s injuries. This provided ample opportunity for Baker to reflect on his actions and renew his intent. Moreover, in taking the vehicle, Baker created a new risk of harm by limiting I.A.'s ability to leave the hotel to receive care for her injuries. Under these circumstances, the trial court could have reasonably concluded the assault and vehicle offenses were divisible in time and thus subject to multiple punishments.

Baker's reliance on *People v. Bauer* (1969) 1 Cal.3d 368 is misplaced. In *Bauer*, the defendant robbed three elderly women in a home and then fled in a car stolen from the garage. The Supreme Court reversed the defendant's sentences for both

robbery and automobile theft, reasoning: "[T]he evidence in the instant case does not show that the theft of the car was an afterthought but indicates to the contrary that the robbers, who while ransacking the house were carrying the stolen property to the garage, formed the intent to steal the car during the robbery if not before it." (*Id*. at p. 377.) Here, the evidence does not conclusively establish that Baker formed the intent to take the vehicle before or during the assault. On the contrary, substantial evidence supports a finding that he first formed the intent to take the vehicle well after the assault was complete. (See *People v. Fleming* (2018) 27 Cal.App.5th 754, 767 ["an assault is complete once the violence that would complete the battery is commenced"].)

III. Baker's Petition for Writ of Mandate is Denied

Shortly after the trial court denied his motion for new trial, Baker filed in this court a petition for writ of mandate challenging that order. We deferred ruling on the petition, which we now deny.

As a general rule, a writ of mandate will not issue if another adequate remedy is available to the petitioner. (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 366; *Villery v. Department of Corrections & Rehabilitation* (2016) 246 Cal.App.4th 407, 414.) The denial of a motion for new trial is reviewable on appeal from the final judgment. (§ 1237, subd. (a).) Baker, therefore, was free to assert in his appeal the same claims he raised in his petition for writ of mandate. Those issues he did not raise on appeal are forfeited.

Because Baker had an adequate remedy to challenge the denial of his motion for new trial, we deny his petition for writ of mandate.

DISPOSITION

The judgment is affirmed. The petition for writ of mandate is denied.

BIGELOW, P. J.

We Concur:

GRIMES, J.

WILEY, J.