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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. JOEL MARTIN, Defendant and Appellant.	B232642 (Los Angeles County Super. Ct. No. KA089862)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles E. Horan, Judge. Affirmed.

John A. Colucci, 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, Steven D. Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Joel Martin (defendant) appeals from the judgment entered after a jury convicted him of murder in the second degree and a second jury found true the allegation that he had personally and intentionally used a firearm to commit the murder. Defendant contends that the trial court erred in the first trial by refusing to give a jury instruction on voluntary manslaughter based upon heat of passion, and by denying a jury request for a readback of defense counsel's closing argument. Defendant contends that the trial court erred in the second trial by precluding the jury from reconsidering defendant's guilt on the underlying murder charge. Finding no merit to defendant's contentions or that any error was harmless, we affirm the judgment.

BACKGROUND

1. Procedural history

Defendant was charged with the murder of Carlos Espinoza (Espinoza) in violation of Penal Code section 187, subdivision (a).[1] The information also alleged pursuant to section 12022.53, subdivisions (b), (c), and (d), that defendant personally used a firearm in the commission of the crime and that he personally and intentionally discharged the firearm, causing the victim's death. A jury found defendant guilty of second degree murder, but deadlocked on the firearm allegations, and after declaring a mistrial, the trial court scheduled a second trial solely as to those allegations. The second jury found them true.

On April 26, 2011, the trial court sentenced defendant to a total of 40 years to life in prison, comprised of 15 years to life for the murder, plus 25 years to life under section 12022.53, subdivision (d). As to the remaining two firearm enhancements, the trial court imposed terms of 20 years and 10 years respectively and stayed them pursuant to section 654. The court imposed mandatory fines and fees, ordered victim restitution, and awarded defendant 407 presentence custody credits.

Defendant filed a timely notice of appeal.

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

2. First trial

On February 4, 2009, Hazar Escamilla Parra (Parra), visited her friend Espinoza. Parra testified that Espinoza introduced her to a friend of his they met near the restaurant where they ate lunch but she did not see Espinoza argue with him or anyone else that day. After their visit Espinoza accompanied Parra to the bus stop near his home and waited with her for the bus. Parra was seated on Espinoza's lap on the bench when an older-model gray Astro van pulled up to the curb very close to them. Parra testified there were two people in the van, both in the front. The passenger pulled out a gun, said with a thick accent, "You Carlos?" When Espinoza acknowledged he was, the passenger fired his weapon. Espinoza pushed Parra out of the way, stood up and the shooter continued to fire, more than five times in all. Parra was not able to identify either the driver or the shooter.

The police arrived quickly, and Espinoza was able to answer their questions as they waited for medical assistance. Pomona Police Officers James Gibson and Dennis Cooper both testified that Espinoza said the shooter fired from the passenger seat of the van after saying, "Fuck you, Carlos." Espinoza also said that he knew the shooter from the neighborhood as "Huero" and that one of Huero's brothers had been shot and killed a month or two earlier at the nearby Guadalajara Market. Officer Cooper asked Espinoza about his quarrel with Huero. Espinoza said there had been no quarrel, but he had been a friend of the man who killed Huero's brother. Espinoza died later at the hospital from multiple gunshot wounds.

Crime scene investigator Sheri Orellana recovered a bullet and some bullet fragments at the scene. Firearms expert, Los Angeles Deputy Sheriff Edmund Anderson testified that the bullet was consistent with a nine-millimeter bullet, which was almost always fired from a semiautomatic pistol, and only rarely from a .38-caliber revolver. Anderson explained that among the differences between a semiautomatic pistol and a revolver, a semiautomatic could hold seven or more rounds of ammunition depending on the size of the magazine, and ejected shell casings when fired, whereas a revolver held six bullets and did not eject casings.

Pomona Police Detective Mark McCann was one of the lead investigators in the December 2008 murder case of defendant's brother at the Guadalajara Market. He was also assigned to investigate this case. After a two-year search, Detective McCann found defendant living in New Mexico. Detectives McCann and Aguirre interviewed defendant in jail there after having him detained. A recording of the interview was played for the jury. Defendant admitted his nickname was "Huero." After many denials, defendant eventually admitted he shot Espinoza. Defendant had previously heard that Espinoza had spoken badly of his brother. Defendant claimed he was alone in the van driving to the carwash, when he happened to see Espinoza at the bus stop.[2] Defendant did not remember seeing Parra. He said, "I just -- I change -- I took off my seat belt and I changed seats. And I *(inaudible)*."

Defendant did not know how many rounds he fired, but that it was more than three. He told detectives that he bought the gun a few hours earlier from someone on the street. He did not remember what kind of gun it was, but later said it was a "3-8" that held 10 rounds in a clip, and that the casings were ejected into the van when he fired. Defendant later threw the gun away and abandoned the van. He told the detectives he "wasn't wanting to kill him"; he was "just . . . feeling something here."

Defendant presented no witnesses and did not testify at the first trial.

3. Second trial

a. Prosecution evidence

The prosecution presented the same evidence of defendant's guilt as was presented in the first trial. Parra testified that before the shooting she and Espinoza went to lunch at a restaurant and nothing unusual occurred during their visit until the old gray Astro van pulled up to the bus stop. Parra and Officers Gibson and Cooper gave essentially the same testimony regarding Espinoza's statements that the shooter was Huero, who lived a

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[2] He said, "I saw him 'cause he was *(inaudible)* saying that my brother was -- my brother was a piece of shit and it was good. It was good to him to they killed [*sic*]. And I was -- I was so pissed off, sir. . . . I was really, really . . . I wasn't -- where he living, I wasn't know where he used to live [*sic*]." "But things happened when I seen him. . . . I couldn't hold *(inaudible)*."

few blocks away, and whose brother had been shot at the Guadalajara Market by a friend of Espinoza's. The prosecution again presented testimony regarding the nine-millimeter bullet found at the scene, and the medical examiner again testified that the cause of death was multiple gunshot wounds. Defendant's recorded interview was played for the jury.

b. Defense evidence

After the defense rested without presenting evidence, the parties stipulated that a drug screen conducted by the coroner showed that Espinoza had .09 micrograms per milliliter of methamphetamine in his system, but it could not be determined when the victim consumed the drug or whether it had any intoxicating effect on him. After the jury began deliberating, the defense was permitted to reopen its case to present the testimony of two witness, Andrea Torres (Torres)[3] and defendant's sister Lorena Vacquz (Vacquz).

Torres testified that she lived near the scene of the shooting and although she did not know Espinoza, she knew his family and his sister. Torres was outside her trailer park at the time of the shooting, about 35 feet from the bus stop. She heard what she thought were firecrackers and then screams, looked in the direction of the noise, and saw the shooter and a van. There were seven or more shots in the space of five seconds, and before the gunfire stopped, she turned away to go inside to be with her baby. Torres saw two men in the van, dressed alike. The driver was the shooter. Torres described him as bald, hatless, wearing a white tank top, with many tattoos, one of which was a shark. Torres testified that five or 10 minutes earlier, she had seen defendant near a neighborhood fast food restaurant, arguing with a light-skinned Hispanic man in a black or gray van.

Vacquz testified that defendant had no tattoos on his face or neck, that as far as she knew he had not removed any tattoos, and had no scars from tattoo removal. Defendant pulled down his collar to show his neck to the jury.

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3 Torres had received a subpoena, but claimed that she forgot to come in earlier.

c. Rebuttal

Detective McCann testified that in his 2009 interview with him, defendant was thinner and wore his hair much shorter than during trial. Within a week after the shooting, Espinoza's sister telephoned Detective McCann, told him she knew Torres, and that Torres had contacted her and said she witnessed the shooting. Detective McCann called the number Espinoza's sister gave him, left a message, and located Torres at the trailer park after she did not return his call. Detective McCann estimated the distance from Torres's trailer to the bus stop to be 50 or 60 yards.

DISCUSSION

I. Heat of passion

Defendant contends that the trial court erred in refusing to instruct the jury that voluntary manslaughter is a lesser included offense of murder when the defendant kills in a heat of passion upon adequate provocation.

Malice is negated, and murder reduced to voluntary manslaughter, when the defendant kills "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201.) The facts and circumstances that would arouse the passions of an ordinarily reasonable person of average disposition must be viewed objectively. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1143.) To be legally sufficient, provocation must be conduct of the victim, measured under an objective standard. (*People v. Moye* (2009) 47 Cal.4th 537, 549-550.) Heat of passion also has a subjective component which looks to the defendant's state of mind to determine whether, in fact, he acted in the heat of passion. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.)

The trial court is not required to instruct the jury on this theory unless the instruction is supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 156, 162 (*Breverman*).) Here the trial court found insufficient evidence of

provocation by the victim and no evidence that defendant acted in a heat of passion. Defendant acknowledges that the only evidence of provocation was defendant's belief that Espinoza had said at some unspecified time that defendant's "brother was a piece of shit and it was good. It was good to him to they killed [*sic*]." The only evidence of defendant's state of mind was his statement to detectives that he "was so pissed off" because of Espinoza's statement, and "things happened when I seen him. . . . I couldn't hold *(inaudible)*." He "wasn't wanting to kill him"; he was "just . . . feeling something here."

Defendant compares these facts with those of *People v. Brooks* (1986) 185 Cal.App.3d 687 (*Brooks*), where the defendant learned from witnesses at the crime scene that his brother had been stabbed to death; the defendant immediately searched out the suspect, and then shot him two hours later. (*Id*. at pp. 691-692.) The appellate court held that the sudden disclosure of such an event would be sufficient so long as the defendant's belief in the disclosure was reasonable. (*Id*. at p. 694.)

Defendant's comparison is too strained to have any application here. The rumor here was not that the victim had killed defendant's brother, as in *Brooks*, but merely that Espinoza had insulted defendant's brother. Words may be sufficiently provocative if they "would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]" (*People v. Lee* (1999) 20 Cal.4th 47, 59.) Obscenities, taunts, and epithets do not ordinarily drive a reasonable person to act rashly or without due deliberation or reflection. (*People v. Najera* (2006) 138 Cal.App.4th 212, 226.) It is thus doubtful that a rumor that the victim had insulted a murdered brother's memory would incite the homicidal passion of the ordinary reasonable person.

Further, there was no evidence in this case that the disclosure of the insult was sudden or that defendant's belief in the rumor was reasonable. In *Brooks*, the defendant saw the suspect detained in a police car and spoke to witnesses within a short time after his brother's murder. (*Brooks, supra*, 185 Cal.App.3d at pp. 691-692.) As respondent observes, defendant did not say when he first heard the rumor, but admitted to deputies that he did not go looking for Espinoza at that time. Defendant became angry when he

saw Espinoza at the bus stop at some unknown amount of time later. As defendant's brother was killed two months earlier, defendant could have heard the rumor two months before he killed Espinoza or two days before, as Detective McCann surmised. Provocation is not legally sufficient under circumstances that would give the ordinarily reasonable person time to '"cool[] off."' (*People v. Moye, supra*, 47 Cal.4th at p. 551, quoting *People v. Dixon* (1995) 32 Cal.App.4th 1547, 1551-1552.)

There was simply no evidence to suggest that defendant acted suddenly or even soon after hearing the rumor. Defendant contends that this *absence* of evidence of a cooling-off period supported giving the instruction because the prosecution bore the burden of negating heat of passion. On the contrary, a heat of passion instruction is not warranted without evidence of a "temporal relationship between the alleged provocation and killing . . . ." (*People v. Dixon, supra,* 32 Cal.App.4th at p. 1555, fn. 3.)

In any event, as respondent also notes, there was insufficient evidence of defendant's state of mind to determine whether he was in fact moved by his feelings to act. We are mindful, as defendant cautions, that the evidence should be viewed in a light most favorable to defendant to determine whether the instruction was warranted. (See *People v. Stewart* (2000) 77 Cal.App.4th 785, 795-796.) However, it must appear that the defendant's reason was "'disturbed or obsessed by some passion'" and that this passion caused him to act. (*People v. Berry* (1976) 18 Cal.3d 509, 515, quoting *People v. Logan* (1917) 175 Cal. 45, 48-49.) The passion must be a "'[v]iolent, intense, high-wrought or enthusiastic emotion.' [Citations.]" (*People v. Borchers* (1958) 50 Cal.2d 321, 329.) Defendant's claim that he was "pissed off" and "feeling something" -- without more -- does not describe intense emotions. Also, "things happened" is not an expression of cause and effect.

We conclude that the trial court did not err in refusing the instruction. Moreover, we would find no prejudice even if the court had erred. Error in omitting an instruction is assessed for prejudice under the standard of *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*Breverman, supra,* 19 Cal.4th at pp. 165, 178.) Under that standard, no prejudice is shown unless the defendant demonstrates that a more favorable result was

probable absent the error. (*Watson*, *supra*, at p. 836.) As respondent points out, there was no evidence that Espinoza made the rumored statements, no basis for defendant to reasonably believe that he made the statements, no evidence of a temporal relationship between defendant's hearing the rumor and the shooting, and no basis to conclude that an ordinarily reasonable person would act as defendant. Due to the insubstantial nature of the evidence, giving the instruction was not reasonably likely to produce a more favorable result.

II. Readback

Defendant contends that the trial court erred in the first trial when it ruled that it lacked authority to grant the jury's request to have defense counsel's closing argument read back to them.

In refusing the requested readback the trial court stated: "I can't do that. The law does not allow that." Respondent agrees that the court erred, but contends that the error was harmless. We agree. A trial court is not required to permit a readback of counsel's argument, but may do so in its discretion. (*People v. Sims* (1993) 5 Cal.4th 405, 452-453 (*Sims*), disapproved on another ground by *People v. Storm* (2002) 28 Cal.4th 1007, 1031-1032.) The trial court's refusal to exercise its discretion, based upon an erroneous belief that it lacked authority, is error reviewed for prejudice under the test of *Watson*. (*Sims, supra*, at p. 453.) Under the *Watson* test, it is defendant's burden to demonstrate prejudice by establishing "a reasonable probability that error affected the trial's result." (*People v. Hernandez* (2011) 51 Cal.4th 733, 746.)

Defendant contends that with a repetition of defense counsel's argument it is reasonably probable that the jury would have found the firearm allegations not true. He contends that this point is demonstrated by the jury's question: "Can defendant be convicted of murder if he did not do the shooting?"

No prejudice results from the trial court's omission when "[t]he theory argued by the defense . . . was not of such complexity that its repetition was necessary in order for defendant to receive the full benefit of the adversarial process" and the disputed issue was covered by jury instructions which were available to the jury in written from. (*Sims*,

supra, 5 Cal.4th at p. 453.) The trial court instructed the jury regarding liability as an aider and abettor and made the instructions available in written form. Further, the court answered the jury's question, as follows:

> "The answer is yes, but if and only if the jury finds beyond a reasonable doubt that he is a principal in the crime as defined in those instructions, and all of the court's instructions, obviously. I would add this proviso, though. If a defendant in a case is found guilty of murder as an aider and abettor, as opposed to the actual shooter, the firearm allegations cannot be found true as well. The firearm allegations -- the personal use, the personal discharge, and the personal discharge causing death -- requires that the defendant himself personally discharge. Okay?"

The jury foreman replied, "Understood." Later, when the foreman reported that the jury was deadlocked, with a vote of 10 to 2 in favor of finding the gun allegations true, the trial court asked the jurors individually whether anything such as additional argument by counsel, instruction by the court, rereading of testimony, or anything else might help to resolve the deadlock. Each juror answered no.

In sum, the court's instructions to the jury, coupled with their indication that they understood, demonstrated that their concern was not of such complexity that repetition of the defense argument was necessary. Moreover, there was no specific argument on this point. Defense counsel's summation was devoted to avoiding a first degree murder verdict with the argument that defendant did not intend to kill Espinoza and thus did not harbor the mental state required for first degree murder. Counsel's strategy proved to be effective as the jury found defendant guilty of second degree murder. There was nothing in the closing argument that would have compelled the jury to find the firearm enhancement not to be true. Thus defendant has not demonstrated prejudice under the *Watson* standard. (See *Sims*, *supra*, 5 Cal.4th at p. 453.)

Without analysis, defendant contends that the trial court's error resulted in the denial of his rights to due process and a fair trial under the United States Constitution, and that defense counsel rendered ineffective assistance by failing to provide the court with authority on the issue. We do not reach undeveloped claims. (See *People v.*

Freeman (1994) 8 Cal.4th 450, 482, fn. 2.) And we would not reach any claim of ineffective assistance of counsel due to defendant's failure to demonstrate prejudice. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

In any event, if we reached the constitutional claims, we would conclude, beyond a reasonable doubt, that the absence of a readback of counsel's argument did not contribute to the verdict. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Defense counsel did not argue in the first trial that defendant was not the shooter, and we find nothing in the his summation that might have answered the jury's question or assisted the jury in any manner with regard to the gun allegations.

III. Collateral estoppel

Defendant contends that the Fifth and Sixth Amendments to the United States Constitution prohibited retrial of the gun allegations alone, without permitting the jury to consider defendant's guilt on the underlying charge.

Defendant argues that this amounted to an offensive use by the prosecution of collateral estoppel or issue preclusion. Collateral estoppel and issue preclusion are synonymous concepts which mean "'that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' [Citation.]" (*People v. Santamaria* (1994) 8 Cal.4th 903, 911-912 & fn. 2, quoting *Ashe v. Swenson* (1970) 397 U.S. 436, 443.)

Defendant contends that the trial court's following instruction to the jury amounted to a prohibited offensive use of collateral estoppel:

> "This case is somewhat unique . . . in the sense that the defendant has been charged with the commission of the crime of murder. . . . The defendant is also charged in count 1 with having personally and intentionally discharged a firearm during the commission of that murder which caused the death of the decedent alleged in count 1. The guilt or innocence of the defendant for the crime of murder is not before you. It has already been addressed. You will be asked, however, to decide whether the evidence in this trial proves that the defendant personally and intentionally

discharged a firearm during the commission of the crime which caused the death."[4]

In an attempt to make this contention clear, defendant explains: "In making this argument [defendant] does not suggest that an enhancement upon which a jury had hung may not be retried to another jury. Nor does [defendant] suggest that a second jury may overturn the previous murder conviction. [Defendant] contends, rather, that a jury may not be precluded from independently considering guilt of the qualifying murder in deciding its verdict on the section 12022.53 enhancements where the conviction on the murder is not yet final."

As respondent correctly notes, it is settled that when a jury convicts the defendant on the underlying crime but deadlocks as to the facts alleged for purposes of a sentence enhancement allegation, retrial of the sentencing facts before a new jury is proper without a retrial of the underlying crime. (*People v. Anderson* (2009) 47 Cal.4th 92, 104-105, 123-124 (*Anderson*).) The rule extends to enhancements such as the personal use of a firearm alleged pursuant to section 12022.53. (See *Anderson*, at pp. 101-102 [listing examples of sentencing facts].) This procedure results in no violation of the double jeopardy or due process clause of the Fifth Amendment or the jury trial guarantee of the Sixth Amendment. (*Anderson*, at pp. 98, 117-118, 123-124.)

Defendant contends that *Anderson* is distinguishable and did not reach the issue presented in this case. We disagree and find defendant's authorities inapposite. For example, defendant relies in part on *Gutierrez v. Superior Court* (1994) 24 Cal.App.4th 153 (*Gutierrez*), where a defendant who had previously been convicted of attempted murder, was later tried for the murder of the same victim and erroneously precluded from relitigating the issue of identity. (*Id*. at pp. 169-170.) *Gutierrez* has no application here, as it did not involve a deadlocked jury or a sentence enhancement allegation, as did this case and *Anderson*. (See *Anderson*, *supra*, 47 Cal.4th at pp. 99-100.)

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[4] The instruction was given as an introductory instruction and nearly identical wording appeared in a final instruction.

Defendant also believes that the issue to be decided is illustrated in *People v. Burns* (2011) 198 Cal.App.4th 726 (*Burns*), which expressly distinguished *Anderson*. Like *Gutierrez*, *Burns* is inapplicable here as it did not involve the retrial of a sentence enhancement. In *Burns*, the defendant was charged with five crimes; the jury convicted him of two counts, including aggravated trespass, acquitted him of two counts, and deadlocked on one felony count. (*Burns*, *supra*, at p. 728.) Upon retrial of the deadlocked charge, the trial court instructed the jury that the defendant had committed aggravated trespassing, which the appellate court found to be an erroneous offensive use of the collateral estoppel doctrine, as the conviction of aggravated trespassing was still open to direct attack on appeal. (*Id*. at p. 733.) In distinguishing *Anderson*, the *Burns* court stated: "Nothing in our decision prevents the trial court from retrying an enhancement provision and instructing the jury that the defendant has already been convicted of the substantive offense." (*Burns*, at p. 733, fn. 3.) That is exactly what the trial court did in this case.

We find no error, nor do we perceive any prejudice from the instruction. The prejudice which results from an erroneous application of collateral estoppel is the preclusion of defenses and evidence that may not have been presented at the prior trial. (See *Gutierrez*, *supra*, 24 Cal.App.4th at p. 169.) Although defendant's prejudice argument is unclear, we construe it as follows: because the instruction implied that defendant had been convicted of murder and there was no formal instruction regarding aiding and abetting, the jury was irresistibly drawn to finding that defendant personally shot the victim.

First, we do not agree that the trial court's instruction regarding aiding and abetting was unclear. Before the evidence was presented, the court explained aider and abettor liability by giving a lengthy hypothetical example in which one person wishes to destroy a large window, enlists the help of a young man who can throw a ball well, hands him a rock, and encourages him to throw it into the window, which the young man does, breaking the window. The court explained that although the young man actually committed the crime, the other person would be an aider and abettor and both would be

held responsible under the law. The court then told the jury that determining whether defendant intentionally and personally fired a weapon was comparable to determining which person actually threw the rock in the court's example. The court's explanation clearly informed the jury that regardless of whether defendant had been convicted of murder, he may or may not have been the shooter, which was the jury's task to determine.

Second, defendant was not precluded from raising the issue of a second person who may have been the shooter or from presenting evidence on the issue. The same evidence of guilt presented in the first trial, including Parra's testimony that there were two men in the van, was presented in the second trial, and the defense presented two additional witnesses to cast doubt on defendant's admission that he was the shooter. Defense counsel was permitted to argue this theory twice in the second trial, before and after presenting his witnesses. In its final instructions, the trial court admonished the jury not to speculate about whether the second person had been or would be prosecuted, thereby making clear that it was the jury's task to determine which person was the shooter.

We conclude that there was no issue preclusion, defendant was not prevented from furthering a defense or presenting evidence, and that defendant thus cannot have suffered prejudice from the procedure followed by the trial court.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST