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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARIO ALEXANDER VALENCIA, Defendant and Appellant.	B280918 (Los Angeles County Super. Ct. No. VA132691)

APPEAL from judgment of the Superior Court of Los Angeles County, Raul A. Sahagun, Judge. Affirmed in part and remanded with directions.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Marc A. Kohm and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant Mario Alexander Valencia of the murder of Joey Galan and the attempted murder of Paul Oquendo. The jury found true the allegations that the crimes were committed with premeditation and deliberation. It also found true accompanying firearm allegations. Appellant contends there was insufficient evidence to support the jury's finding that he committed the offenses with premeditation and deliberation. He also claims the trial court committed instructional and sentencing errors. Finally, he contends the matter should be remanded for the trial court to exercise its discretion under Senate Bill No. 620 (2017-2018 Reg. Sess.) (SB 620) to strike the firearm enhancements. For the reasons stated below, we conclude there was no reversible error. However, we will remand the matter for the trial court to exercise its discretion whether to strike the firearm enhancements. Accordingly, we affirm the convictions, vacate the sentence and remand for resentencing.

PROCEDURAL HISTORY

A jury convicted appellant of the first degree murder of Joey Galan (Pen. Code, § 187, subd. (a), 664; count 1),[1] and of the attempted murder with premeditation and deliberation of Paul Oquendo (§ 187, subd. (a), 664; count 2.) As to both counts, the jury found true the allegation that appellant personally and intentionally discharged a firearm proximately causing great bodily injury or death (§ 12022.53, subds. (b)-(d)).

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

The trial court sentenced appellant to a total term of 50 years to life in state prison, consisting of 25 years to life on count 1, plus 25 years for the accompanying firearm enhancement. As to count 2, the court imposed a concurrent term of life imprisonment, plus 20 years for the firearm enhancement.

Appellant timely appealed.

STATEMENT OF THE FACTS

A. *The Prosecution Case*

Paul Oquendo testified that on November 13, 2013, at around 5:00 p.m., he drove to the City of Bell Gardens to pick up his little brother, Joey Galan. Galan was with Brian Baez and Abel Talavera at Talavera's house. Galan, Baez and Talavera were members of Marijuana Addicts or MRA, a tagging crew. Oquendo was a member of Notorious, a street gang.

After Oquendo arrived, the four men walked to a nearby liquor store to buy blunt wraps to smoke marijuana. On the way back to Talavera's house, Oquendo saw a red truck pass by. Galan appeared upset and chased after the truck**.** The other three men followed Galan, chasing after the vehicle. However, no confrontation occurred, and the men returned to Talavera's house.

At Talavera's house, the men smoked marijuana. Because they had more marijuana, they decided to buy more blunt wraps. As Oquendo, Galan and Baez were walking to the liquor store, they passed appellant's home. Oquendo saw two men -- later identified as appellant and Carlos Prado -- exit a parked red truck and approach them. Appellant walked into the middle of the street, while Carlos stopped at the sidewalk. Appellant confronted Galan and said, "What's up?" or "What's up,

motherfucker?" Galan responded, "What's up?" Appellant then said, "This is Lynwood Mob." Galan replied, "I don't give a fuck. This is MRA." According to Oquendo, appellant was a known member of the Lynwood Mob street gang with the moniker "Dollar."

Oquendo told Galan to calm down, and said, "You guys need to relax." Appellant then said, "Oh, shut up you bitch." Galan retorted, "My brother ain't no bitch." Appellant responded, "Well, what's up? Watcha wanna do?" Galan then walked toward appellant. When Galan was about three feet away, appellant pulled out a handgun and shot Galan. Oquendo then lunged toward appellant, who shot him in the waist before fleeing. Oquendo grabbed Galan and assisted him to Talavera's house. About five minutes later, the police responded to the scene. Later, Oquendo texted a friend that Galan had been shot by "bitch ass Dollar from Lynwood Monkeys."

On cross-examination, Oquendo admitted that two weeks before the shooting, on October 30, 2013, Galan had shot a Playboys gang member on Muller Street, several blocks away from Talavera's house. Oquendo also testified that earlier in the week, Galan had a fist fight with appellant. Oquendo was aware of a prior incident in which Galan had videotaped himself beating up some kids who had crossed out his tagging. The video recording of the beating was played for the jury.

Baez's account of the shooting was similar to Oquendo's. Baez testified that on the first trip to the liquor store, he noticed the red truck passing by. He recognized appellant as a passenger in the vehicle. Just prior to the shooting, Galan moved toward Carlos, who was standing on the sidewalk. Carlos backed away

and then appellant, who was standing in the street, pulled out a gun and shot Galan.

Jose Prado testified that on November 13, appellant had asked him for help in moving furniture out of appellant's mother's house to appellant's new home. Jose drove with appellant and Carlos to appellant's mother's house, but parked next to a nearby alley rather than in front of the house. After parking, Jose noticed that appellant and Carlos had left the truck and were walking toward appellant's mother's house when a group of men approached. He heard two "pop[ping]" sounds before seeing appellant run back toward him. Jose did not open the door to his truck, and appellant ran past. Jose then drove into the alley where he picked up his brother Carlos and left the scene. He did not return to help appellant continue with the move.

On November 19, 2013, Jose and his then-girlfriend, Yvette Tapia, were stopped and detained on suspicion that Jose was a suspect in the shooting of Galan. Jose and Tapia were placed in the backseat of a patrol vehicle where they conversed about the shooting. Jose denied that during the conversation, he told Tapia that appellant had seen one of his enemies and had shot him.

At trial, Tapia denied telling officers that Jose had told her he was present when Galan was killed. A recording of Tapia's taped interview with the police was played for the jury. During the interview, Tapia told the officers that she knew who shot Galan: "Jose's friend, Dollar." Tapia explained that Jose had told her that "Dollar [had] seen one of his enemies, so he ran . . . toward[] the liquor store." Jose then saw "Carlos and Dollar go over there and he seen Dollar shoot him." When presented with her taped statements, Tapia explained that she did not receive

the information from Jose, but instead had "heard" "[a]round the area" about the shooting.

Dr. Cho Lwin, a forensic pathologist, opined that Galan died from a gunshot wound to the chest. Based on the lack of stippling, he opined the shot was fired from a gun that was three or more feet away from the decedent.

Ashley Hurtado testified she was driving by the crime scene when she heard the shooting. She looked and saw one man fall down and two others run away. She recognized one of the men who ran away as Carlos Prado. They were next door neighbors.

Bell Gardens Police Officer Esteban Perez testified that he searched appellant's former bedroom in his mother's house. Perez did not see anything suggesting that items in the room were being prepared for a move, such as moving boxes or packing materials.

Ashley Saenz, who had a child with appellant, acknowledged telling police officers that appellant was a member of the Lynwood Mob street gang. On November 13, 2013, she and appellant were relaxing in their new home; they were tired from moving items from appellant's mother's house the prior day. Although Saenz believed that appellant stayed with her all day on November 13, she stated that she had taken a long nap that afternoon. Appellant was at home before and after her nap.

Bell Gardens Police Detective Edward Roberts testified as the prosecution's gang expert. Edwards testified that Lynwood Mob and Notorious are criminal street gangs in Bell Gardens. MRA is a tagging crew that is considered the "junior varsity" for the Bell Gardens Locos, the primary street gang in Bell Gardens. He testified that in gang culture, saying "What's up?" to someone

could be viewed as a challenge which could result in a violent confrontation. He opined that when confronted, gang members would not back down because to do so would be "a loss of face."

B. *The Defense Case*

Sarah Saucillo, appellant's sister, testified that appellant was known as "Dollar" because when he was a child, he pronounced his middle name Alexander as "A dollar." Saucillo took care of their mother and lived in their mother's home. Appellant had recently moved out with his girlfriend Saenz. According to Saucillo, on November 13, 2013, sometime between noon and 2:00 p.m., appellant came to the house to pick up some furniture being stored in the garage. She told him to come back later and he left. At around 4:30 p.m., she left to pick up her younger sisters at their school. She returned around 5:30 p.m. to find the police had cordoned off the area.

Maria Granados and Victor Mejia went to school with Galan. They testified that on October 30, 2013, they observed Galan shooting at a man named Fernando on Muller Street in Bell Gardens. After the victim fell to the ground, Galan ran away.

Appellant testified in his own defense. According to appellant, he and his girlfriend Ashley Saenz moved from his mother's house into an unfurnished apartment on November 12, 2013. Appellant owned a .25-caliber handgun that he had purchased for protection due to a recent incident. Appellant stated that he was walking with Ashley when a car pulled up, passengers in the car threw gang signs, and the car began following him. Baez was one of the passengers in the vehicle. Appellant denied being a member of the Lynwood Mob, but acknowledged that his brother had associated with the gang.

Appellant stated that he was not with Ashley all day long on November 13, 2013; Ashley was lying when she testified to the contrary. According to appellant, on November 13, he went grocery shopping in the morning. At around noon, he left with Carlos for work in West Los Angeles. However, they could not do any work because they "ran out of materials." Appellant asked Carlos to stop by his mother's house to pick up a sofa, table and refrigerator for his new home. When they arrived, appellant's sister told him to come back later. Carlos then dropped appellant off at his home. Later that afternoon, Jose picked up appellant and Carlos, and they went to appellant's mother's house. They decided not to park in front because they did not want to block the driveway, and the items were in the garage. They did not park by the side gate because it was locked, and appellant's mother had lost the key to the gate.

Appellant testified that as he was walking along the sidewalk to his mother's house, he noticed a group of four men walking toward him. Appellant reacted by walking into the street. Appellant testified he recognized Baez from the recent car chase incident. Prior to the incident, appellant also had heard about the "Galan shooting." Additionally, although appellant had never met Oquendo, he had heard of the name and knew Oquendo's reputation as a violent gang member.

Appellant testified that neither he nor Carlos said "What's up?" to any of the four individuals. Galan approached Carlos in a threatening manner and said "What's up, motherfucker?" Carlos responded by saying, "What's up?" The other men approached appellant. He thought he saw Oquendo holding a weapon in his hand. Appellant responded by pulling out his handgun. He could not recall what happened next. "Just all I know is Galan was the

one who ended up in front of me, and that's who I shot." After the shooting, he ran back home. He did not tell Ashley what had happened.

On cross-examination, appellant clarified that of the four men who he encountered that day, he recognized only Baez. Although he had heard about the shooting on Muller Street, he did not know Galan was involved until after the shooting. Asked whether Galan had "done anything to you?" appellant stated, "I don't know the guy." Appellant had no prior "beef" with Oquendo, and did not know whether Oquendo was dangerous. He also acknowledged that Baez's group was "boxed in" by Carlos in front, appellant to one side, and the gate of appellant's mother's house on the other. Appellant also testified that a few days after the shooting, he gave the .25-caliber handgun to a neighbor for disposal.

DISCUSSION

A. *Substantial Evidence Supports the Jury's Finding That the Offenses were Committed with Premeditation and Deliberation.*

Appellant contends the evidence was insufficient as a matter of law to support the jury's findings of premeditation and deliberation as to each count. When a defendant challenges the sufficiency of the evidence, "the reviewing court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.) "We apply the same principles in

reviewing the sufficiency of the evidence to support a special circumstance finding." (*People v. Casares* (2016) 62 Cal.4th 808, 824 (*Casares*).) ""Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.]' [Citation.] ""The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly"" [Citations.]" (*Ibid.*, quoting *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) In determining whether the evidence presented at trial could sustain a finding of deliberation and premeditation, courts generally examine evidence relating to motive, planning and manner of killing. A reviewing court need not accord any of these categories of evidence any particular weight, and the court is not limited to these categories of evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1183, citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.)

Here, the evidence supports the jury's determination that appellant planned the shootings. Appellant testified that a few weeks before the incident Baez was among a group of people who had chased him. That incident led him to acquire a handgun. Minutes before the shooting, Baez and the others chased appellant, who was in Jose's red truck. When appellant saw Baez and his companions Galan and Oquendo walking past his mother's house, he told Jose that he had seen an enemy. Appellant and Carlos then exited Jose's truck to confront Baez's group. A jury could reasonably infer that upon seeing Baez and his companions, appellant planned to initiate a confrontation that would likely result in the death of Baez or his friends. (See *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 294-295

[jury's finding of premeditation and deliberation supported by evidence that defendants targeted victims in retaliation for prior murder of fellow gang member by Crips gang members: "A reasonable inference, therefore, is that defendants formed the intent to commit premeditated and deliberate murder as early as when they asked the driver to turn the car around and return to the gas station to confront [the victims], who fit the profile of retaliatory targets, whether or not they actually belonged to the Crips gang."].) Moreover, carrying a weapon to the scene of the crime makes it "'reasonable to infer that [appellant] considered the possibility of homicide from the outset.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1250; see also *People v. Lee* (2011) 51 Cal.4th 620, 636 [finding of premeditation supported, where fact that defendant carried a loaded handgun indicated he had considered the possibility of a violent encounter].)

The manner of the assault also supported a finding of premeditation. Appellant positioned himself in such a way that Baez's group was boxed in. They could only retreat, which would have amounted to a loss of face. When Oquendo tried to defuse the encounter, appellant could have walked away and entered his mother's residence. However, he escalated the confrontation by calling Oquendo a bitch. Moreover, appellant shot Galan only after Carlos backed away from Galan, suggesting that Carlos knew appellant planned to shoot Galan.

The fact that appellant did not shoot Baez does not preclude a finding of premeditation and deliberation. The jury could conclude that appellant was seeking revenge on Baez's group, not necessarily revenge against Baez specifically. Moreover, even had appellant planned to shoot only Baez, it is reasonable to infer that he also planned to shoot any of Baez's

companions who intervened. (See *People v. Kelly* (1990) 51 Cal.3d 931, 957 [even if defendant initially planned only to sexually assault young girl, his killing of girl's brother who tried to interfere was "willful, deliberate and premeditated beyond a reasonable doubt"].) Indeed, appellant testified he fired the handgun after being rushed by Baez and Oquendo. However, he ended up killing Galan. In sum, substantial evidence supports the jury's finding that the murder of Galan and attempted murder of Oquendo was willful, deliberate and premeditated. (See *People v. Solomon* (2010) 49 Cal.4th 792, 829 [finding of premeditation and deliberation can be based upon nature of crime].)[2]

B. *The Trial Court did not Err in Rejecting Defense Counsel's Request for Pinpoint Instructions.*

During trial, appellant's counsel requested the court instruct the jury to consider appellant's mens rea as it related to the issues of provocation and self-defense. Counsel's proffered pinpoint instructions would have directed the jury to consider evidence (1) that Galan had threatened or harmed others in the past and (2) that appellant knew Galan had threatened or harmed others in the past. The trial court denied the requested instructions in light of the fact that appellant had testified he had not previously met Galan and had no personal knowledge of Galan's prior conduct. However, the trial court did instruct the

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[2] As we conclude that there is a least one viable ground for the jury's finding of premeditation and deliberation, we decline to consider whether substantial evidence would have supported the jury's finding under the alternative special circumstance of lying-in-wait.

jury that, "If you find that the defendant received a threat from someone else that he reasonably associated with Joey Galan, you may consider that threat in deciding whether the defendant was justified in acting in self-defense or defense of another."

Appellant contends the trial court committed prejudicial error in rejecting the proffered pinpoint instructions, as they were supported by substantial evidence, were nonargumentative and were nonduplicative. We disagree. Appellant testified that the only person he recognized was Baez. He further stated that at the time of the incident, he did not know that the shooting on Muller Street was committed by Galan, and he specifically asserted that he did not know Galan. Thus, no substantial evidence supported appellant's personal knowledge of Galan's reputation for dangerousness or prior conduct. (See *People v. Tafoya* (2007) 42 Cal.4th 147, 165 ["evidence that [victim] was dangerous was relevant to defendant's claim of self-defense only if defendant knew of [victim's] reputation for dangerousness and was afraid of him"].) In short, the trial court did not err in denying the request for pinpoint instructions.

In any event, any error was harmless beyond a reasonable doubt. Although the jury was not directed to consider evidence that Galan had harmed or threatened appellant in the past, they were instructed to consider evidence that persons reasonably associated with Galan -- such as Baez -- had harmed or threatened appellant in the past. (See *People v. Minifie* (1996) 13 Cal.4th 1055, 1060 ["evidence of third party threats is admissible to support a claim of self-defense if there is also evidence from which the jury may find that the defendant reasonably associated the victim with those threats"].) The jury heard evidence that Baez was one of several persons who had recently chased

appellant, causing him to fear for his safety. Evidence that Galan harmed or threatened appellant in the past would have been merely cumulative. In sum, the failure to give the pinpoint instructions was harmless.

C. *The Combination of CALCRIM Nos. 522 and 570 was not Defective.*

The jury was instructed with CALCRIM Nos. 520 (malice murder), 521 (first degree murder), 522 (provocation) and 570 (voluntary manslaughter).[3] As this court explained in *People v.*

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[3] The jury was instructed with CALCRIM No. 522 as follows:

"As for defendant Mario Valencia, provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide.

"If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter." It was instructed with CALCRIM No. 570 as follows:

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.

"The defendant killed someone because of a sudden quarrel or in the heat of passion if:

"1. The defendant was provoked;

"2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment;

"AND

"3. The provocation would have caused *a person of average disposition to act rashly and without due deliberation*, that is, from passion rather than from judgment.

Jones (2014) 223 Cal.App.4th 995 (*Jones*), "a subjective test applies to provocation as a basis to reduce malice murder from the first to the second degree: it inquires whether the defendant in fact committed the act because he was provoked. The rationale is that provocation may negate the elements of premeditation, deliberateness and willfulness that are required for that degree of the crime. [Citation.] But more is required to

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"Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

"In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

"It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.

"If enough time passed between the provocation and the killing for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.

"The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." (Italics added.)

reduce malice murder to voluntary manslaughter. For that, an objective test also applies: the provocation must be so great that, in the words of CALCRIM No. 570, it 'would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.'" (*Id*. at pp. 1000-1001.)

Appellant contends that the combination of CALCRIM Nos. 522 and 570 was likely to have misled the jury into concluding that the objective test applies both for reduction of first degree murder to second degree murder, as well as from murder to manslaughter. This court rejected the exact argument in *Jones*, s*upra*, 223 Cal.App.4th at page 1001, concluding that the instructions were "correct" and "accurately inform[ed]" the jury when to apply the objective test. We decline to revisit our holding. In short, there was no error in giving the instructions.[4]

D. *Section 12022.53, Subdivision (d) -- the Firearm Enhancement -- is Constitutional.*

Appellant contends that the trial court erred in imposing an additional 25 years to life sentence based upon the section 12022.53, subdivision (d) gun use enhancement, because the gun use was already included in the first degree murder charge. The California Supreme Court has rejected this argument. (See *People v. Sloan* (2007) 42 Cal.4th 110, 115-124 (*Sloan*); *People v. Izaguirre* (2007) 42 Cal.4th 126, 128-134 (*Izaguirre*).) Appellant also contends that *Sloan* and *Izaguirre* were wrongly decided because those decisions rejected double jeopardy claims on the

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[4] Our conclusion moots any claim of ineffective assistance of counsel for failing to object to the giving of the instructions, as there was no legal basis for an objection.

basis that the punishments were imposed in a single unitary proceeding. (See *Sloan*, *supra*, at p. 123; *Izaguirre*, *supra*, at pp. 133-134.) Although appellant argues that recent United States Supreme Court cases *suggest* the two cases are no longer good law, those cases have not been reversed. Accordingly, appellant's claims must be rejected. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

E. SB 620

Section 12022.53 provides sentence enhancements for the use of firearms in the commission of felonies. At the time of appellant's sentencing hearing in 2017, the trial court could not strike these enhancements. (See former § 12022.53, subd. (h) ["Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."].) However, effective January 1, 2018, SB 620 replaced the prohibition on striking the firearm enhancement in both sections with the following: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§§ 12022.5, subd. (c), 12022.53, subd. (h).)

Respondent concedes that SB 620 applies retroactively to nonfinal judgments, such as appellant's. Generally, where the trial court is unaware of the scope of its discretion during sentencing, the appropriate remedy is to remand the case for the court to exercise that discretion. (See *People v. Deloza* (1998) 18 Cal.4th 585, 600 [case remanded for resentencing where "trial court misunderstood the scope of its discretion"].) Here, because

SB 620 was not in effect at the time of sentencing, the trial court lacked discretion to strike the firearm enhancements at the time. Now that it has such discretion, the trial court should be afforded the opportunity to exercise it.

DISPOSITION

The convictions are affirmed, the sentence is vacated, and the matter is remanded for resentencing. The superior court shall exercise its discretion whether to strike any firearm enhancement imposed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.