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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. XIAO YE BAI, Defendant and Appellant.	B276076 (Los Angeles County Super. Ct. No. GA075332)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jared D. Moses, Judge. Affirmed and remanded.

Joanna McKim, 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, Margaret E. Maxwell and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

Xiao Ye Bai appeals from his judgment of conviction of murder and attempted murder. Appellant argues that the court abused its discretion in ordering him restrained during trial and failed to instruct the jury on voluntary and attempted voluntary manslaughter. Appellant also argues that the prosecutor committed misconduct. In his supplemental brief, he asks that we remand the cause for the trial court to exercise its discretion whether to strike or dismiss the firearm use enhancements. We remand the cause for that purpose; in all other respects we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Around 10 p.m. on December 4, 2008, the victims, Zhe Li and Xiao Ming Liu, were at a private party at a restaurant in San Gabriel. At the party, Liu received a phone call, during which he mentioned appellant's name while arguing with someone at the other end of the line. Afterwards, Meng Zhang, another partygoer who had met appellant before, saw him outside the restaurant with three other men. Appellant told Zhang it was his birthday and he had been drinking. He also said he was looking for Liu, who was "f---ing up." Appellant moved a gun from the front to the back of his belt. Back inside the restaurant, Zhang passed Liu, who was heading out with a glass in his hand. Liu looked angry, and Zhang took the glass away from him.

There were many individuals outside the restaurant, including some from the party the victims were attending. The victims argued with a group that included appellant and between two and five other individuals. Some of those present tried to stop the argument. A brief fight, lasting seconds, broke out between Li and one of appellant's cohorts. Appellant stood a

short distance away and was not involved in the fight, but started shooting nevertheless.

Liu was wounded twice—in the arm and pelvic area. Li was shot nine times, resulting in ten wounds, and died at the scene. Some of his wounds were consistent with shots fired from behind and from above, after Li had turned and fallen face down on the ground. The lack of residue was consistent with shots fired from a distance.

The bullets were Smith & Wesson caliber .40. A Beretta pistol and ammunition clips capable of firing such bullets were recovered from appellant's home in Las Vegas, but the barrel of the gun had been replaced. Photographs and videos found on appellant's electronic devices showed him disassembling a similar handgun and posing with guns. (Some photographs also showed a lobster holding handguns and appellant holding the lobster.) Three witnesses, who were at the party with the victims and had met appellant before, identified him as the shooter.

In 2015, appellant was charged with the murder of Li (Pen. Code, § 187,[1] count 1) and the premeditated attempted murder of Liu (§§ 187, 664, count 2). Personal use and discharge of a firearm, as well as discharge causing great bodily injury, were alleged as to both counts. (§ 12022.53, subds. (b)-(d).) A separate enhancement for causing great bodily injury was later stricken. (§ 12022.7.) A multiple murder special circumstance, based on a 2012 murder conviction in Nevada, was alleged as to count 1. (§ 190.2, subd. (a)(2).)

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[1] Statutory references are to the Penal Code.

At trial, appellant's mother and godmother presented an alibi. The godmother testified that on the evening of the shooting, appellant had been at her house to celebrate his birthday and had left with his mother around 9 p.m. Appellant's mother confirmed the godmother's story and testified appellant had stayed at her house the rest of the night. Yet, appellant's godmother previously had told police that appellant left her house with a friend, and his mother had not previously mentioned the alibi.

The defense also elicited testimony from a witness at the restaurant, who had told police that he had seen four or five people fight one Asian man, but the witness did not know if appellant or the victims had been involved in the fight, or whether the fight had anything to do with the shooting. According to the witness, he heard shots about five seconds after he saw the fight.

The jury convicted appellant of first degree murder and premeditated attempted murder, and found the firearm allegations (§ 12022.53, subds. (b)-(d)) to be true. Appellant admitted his prior murder conviction. He was sentenced to life without the possibility of parole, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d) (count 1), and life with the possibility of parole, plus 25 years to life for the firearm enhancement under the same subdivision (count 2). The enhancements under section 12022.53, subdivisions (b) and (c) were stayed.[2] Appellant was credited

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[2] The abstract of judgment does not reflect the enhancements imposed under section 12022.53, subdivision (d). We correct this clerical error on our own motion. (*People v. Mitchell* (2001) 26 Cal.4th 181, 186–187.)

with 1,498 days of presentence custody and assessed fines and fees.

DISCUSSION

I

Appellant argues he was prejudiced by the unjustified use of physical restraints during trial. A defendant may not be physically restrained in the jury's presence without "a showing of a manifest need." (*People v. Duran* (1976) 16 Cal.3d 282, 290–291.) Such need may arise from "unruliness, an announced intention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . .' [Citation.]" (*People v. Cox* (1991) 53 Cal.3d 618, 651.) The decision to restrain a defendant during a jury trial is reviewed for abuse of discretion. (*People v. Hill* (1998) 17 Cal.4th 800, 841.) That decision may not be delegated to security or law enforcement personnel. (*Ibid*.) The unjustified use of restraints has been deemed harmless where the restraints were either not visible at all or only briefly visible to the jury, and where they did not prevent the appellant from testifying or participating in his own defense. (*People v. Anderson* (2001) 25 Cal.4th 543, 596; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583–584.)

Here, the court's initial decision to restrain appellant with a stealth belt was made on the recommendation of a sheriff's deputy, who had security concerns because appellant already was serving a life term without possibility of parole for his Nevada murder conviction, and was "a very skilled martial artist, in excellent physical condition." In ruling on defense counsel's objection, the court agreed appellant had not disrupted the

proceeding "in a physical or violent" manner. The court stated that it generally deferred to the sheriff's department on matters of security, but made its own independent evaluation, and concluded the use of a stealth belt was appropriate "in the abundance of caution," based on the deputy's concerns.

Appellant wore a stealth belt during the morning jury selection on the first day of trial, but refused to come out of lockup after recess, claiming the belt "jangl[ed] a little bit." The court considered the case law requiring a finding of a manifest need for restraints to be ambiguous and restated the deputy's safety concerns, to which it added its own concern about appellant's "tendency to speak out in court." Defense counsel relayed appellant's belief that jurors seated in the audience could see the stealth belt. A sheriff's deputy confirmed that the belt could be seen "a little bit" from the back, but the court observed that no jurors sat directly behind appellant, and a desk obstructed the view of the back of his chair. The court acknowledged the belt may have made noise even if that noise was not audible in the front of the courtroom. The prosecutor represented that appellant's then-girlfriend and codefendant in the Nevada case had solicited the murder of the prosecutor in that case.

An hour of voir dire took place in appellant's absence, after which he expressed his wish to rejoin the trial. Outside the jury's presence, the court acknowledged it had been under the mistaken impression that a finding of a manifest need was not necessary because the stealth belt was not visible; it then explicitly found there was a manifest need for restraints based on the available information. Appellant again complained the belt made noise, and claimed to have seen two jurors try to look at his back. The

court explained the deputies had placed a necktie around the belt to muffle any noise. Appellant agreed, "It's better now. I have no problem.
Thank you." The next day, the court stated that the belt was not audible and was not inhibiting appellant's movement in his chair. Appellant acknowledged he had no continuing problem with the belt.

Respondent argues the court's finding of a manifest need for the use of restraints was justified in light of appellant's prior criminal history, the threat to the prosecutor's safety by the codefendant in the Nevada case, the court's statement that appellant was "a little too gregarious and too flamboyant for comfort," and his martial arts training. We find these rationalizations questionable. It is clear from the record that the court did not come up with the idea of using restraints on its own, but initially agreed with the deputy's safety concerns without considering whether they amounted to a manifest need. (Cf. *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 391 [use of restraints was not suggested to court].) The record also indicates that the court tolerated appellant's garrulousness in pretrial proceedings—it allowed appellant to speak out freely, engaged him in conversation, and called having him in the court room "a pleasure," despite the gravity of the charges against him. There is no indication that appellant's statement, "This is bullshit, all bullshit," upon exiting the courtroom during an early hearing had given the court any concern. The only time the court warned appellant not to speak out was immediately before jury selection began, and when appellant raised his hand, the court directed him to talk to defense counsel. Appellant complied. Thus, there is no indication appellant had engaged in

nonconforming or disruptive conduct that had caused any real concern to the court before the use of restraints was proposed by the sheriff's deputy.

The use of physical restraints may not be justified by appellant's incarceration on another murder conviction absent evidence of disruptive conduct while in custody. (See *People v. Hawkins* (1995) 10 Cal.4th 920, 944, overruled on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110, and *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) Here, there was no evidence that appellant had been violent or physically disruptive while in custody, and his brief refusal to come out of lockup was in direct response to the court's decision to restrain him. Nor was the court presented with evidence that a violent organization or appellant's codefendant in the Nevada case could disrupt the California proceeding. (Cf. *People v. Bryant, Smith and Wheeler*, *supra*, 60 Cal.4th at pp. 391–392 [defendant was member of violent organization that had previously disrupted court proceedings].)

That defendant was physically fit and capable of inflicting harm with his limbs alone does not show that he presented a safety concern absent evidence that he had engaged in violence or other disruptive conduct while in the courtroom or in custody, or that he, or individuals connected to him, posed a threat of violence or disruption. Nevertheless, assuming that on the record before us the use of physical restraints was unjustified, any error is harmless since there is no evidence the jury knew he wore a stealth belt during trial. Appellant's only complaints were that the belt made noise during the morning session of jury selection, that it may have been visible from the audience, and that two jurors may have tried to look at his back. By appellant's own

admission, the problem was resolved in the afternoon session. There is no evidence that any member of the jury as finally approved heard the noise of which appellant complained, realized its source, or saw the belt for any extended period of time. Nor is there any evidence that the stealth belt hampered appellant's defense. The use of the stealth belt, therefore, does not amount to a reversible error.

II

Appellant contends the court should have instructed the jury on voluntary and attempted voluntary manslaughter based on heat of passion and imperfect self-defense. The trial court has a duty to instruct on any lesser included offense of that charged "when the evidence raises a question as to whether all the elements of the charged offense were present, but not when there is no evidence that the offense committed was less than that charged. [Citation.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) The duty arises only when substantial evidence supports a reasonable conclusion "that the lesser offense, but not the greater, was committed [citation]"; it does not arise when there is merely "'*any* evidence . . . no matter how weak.' [Citation.]" (*Ibid.*)

"Manslaughter, a lesser included offense of murder, is an unlawful killing without malice. [Citations.] Malice is presumptively absent when a defendant kills 'upon a sudden quarrel or heat of passion' [citation], provided that the provocation is sufficient to cause an ordinarily reasonable person to act rashly and without deliberation, and from passion rather than judgment. [Citation.] Similarly, when a defendant kills in the actual but unreasonable belief that he or she is in imminent danger of death or great bodily injury, the doctrine of 'imperfect

self-defense' applies to reduce the killing from murder to voluntary manslaughter. [Citations.]" (*People v. Cruz*, *supra*, 44 Cal.4th at p. 664.)

Appellant relies on cases in which the manslaughter theory was based on substantial evidence that the defendant was provoked, intimidated, or apparently attacked by the victim with excessive force likely to cause death or great bodily injury. (See *People v. Breverman* (1998) 19 Cal.4th 142, 163–164 [evidence of mob armed with weapons trespassing on defendant's property, challenging him to fight, smashing his car, and causing "fear and panic" supported heat of passion instruction]; *People v. Barton* (1995) 12 Cal.4th 186, 192–193, 202–203 [defendant's testimony that victim "went berserk" when confronted about road rage and appeared to threaten defendant with knife supported both heat of passion and unreasonable self-defense instructions]; but see *People v. Moye* (2009) 47 Cal.4th 537, 553–554 [defendant's testimony that victim attacked him with bat may have supported imperfect self-defense instruction, but not heat of passion]; see also *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 [defendant was entitled to imperfect self-defense instruction for shooting victim who was choking him]; *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1263 [defense witnesses' testimony that someone shot at defendant first supported instruction on self-defense and imperfect self-defense]; *People v. Baker* (1999) 74 Cal.App.4th 243, 252 [evidence of defendants' intent to engage in fistfight supported voluntary manslaughter instruction where victim used baseball bat].)

Appellant argues that the jury could have reasonably inferred that appellant argued with the victims and was then confronted by Li's intimidating conduct that provoked him to

shoot in the heat of passion or imperfect self-defense. However, the evidence does not indicate who initiated the argument or physical confrontation outside the restaurant, what was said during the argument, or whether appellant actually believed he was in danger of death or great bodily injury during the several seconds of physical altercation that preceded the shooting. Appellant's suggestion that he was "outnumbered" is not supported by substantial evidence. Rather, the evidence indicates appellant arrived with between two and five companions, who argued with the two victims. The sole witness who told police that he saw four or five individuals attacking an Asian male did not identify appellant, or any of his companions, as the person under attack. Nor is there evidence that appellant went to the restaurant in order to celebrate his own birthday. Although his birthday was on the day of the shooting, and the victim's group had gathered at the restaurant for a party, there is no evidence that the party was for appellant's birthday. Rather, the evidence shows solely that appellant went to the restaurant looking for Liu after an argument on the phone.

The jury would have had to speculate that the victims, rather than appellant's group, started the argument, whether on the phone or at the restaurant, or initiated the fight. Without any evidence of what was said during the argument and with physical evidence suggesting appellant shot from a distance, a jury could not reasonably conclude that the victims' words were sufficient to provoke a reasonable person to act rashly, or that a momentary fight of unknown origin, nature and severity, in which appellant was not involved, constituted sufficient provocation or actually made appellant fear death or great bodily injury.

The court had no duty to instruct the jury on lesser included offenses on a speculative manslaughter theory based on weak or no evidence.

III

Appellant identifies three instances of prosecutorial misconduct in rebuttal and argues that all were prejudicial. Prosecutorial misconduct violates due process if the prosecutor engages in a pattern of misbehavior so egregious as to render the trial fundamentally unfair. (*People v. Bennett* (2009) 45 Cal.4th 577, 594–595; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Use of deceptive or reprehensible methods in an attempt to persuade the jury that is not so systematic or pervasive as to render the trial fundamentally unfair results in error under state law. (*Ibid.*) Prosecutorial misconduct does not require reversal absent prejudice to the defendant. (*People v. Cash* (2002) 28 Cal.4th 703, 733.) Where a claim of misconduct rests on the prosecutor's comments to the jury, "'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1202–1203.)

A. Misrepresentation of the Law

Concerned that the jury might hang between first and second degree murder on count 1, in rebuttal the prosecutor told the jury to "first decide whether we have proven murder" and then "find second degree." He elaborated: "So you find the second and then you discuss the first and try to get to the first, but make sure we get that second in there and then think about the first." The court sustained the defense's objection and immediately explained to the jury that the prosecutor's argument was contrary to the relevant jury instruction. After argument,

the court told the prosecutor that his argument was problematic because it could be interpreted as requiring the jurors to reach a formal verdict rather than a tentative decision on second-degree murder before considering first degree. The jury was then instructed in terms of CALJIC No. 8.75, which informed the jury that it may deliberate in any order and reach tentative conclusions on all charged and lesser included offenses, but before returning a final verdict it must either find defendant guilty of first-degree murder or unanimously acquit him of that crime, and then proceed to a verdict on second-degree murder. This instruction correctly reflected the principle that "'the jury may deliberate on the greater and lesser included offenses in whatever order it chooses, but that it must acquit the defendant of the greater offense before returning a verdict on the lesser offense.' [Citation.]" (*People v. Clark* (2016) 63 Cal.4th 522, 608.)

"[A]bsent some indication to the contrary, we assume a jury will abide by a trial court's admonitions and instructions." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1336.) Here, the jury was immediately admonished to disregard the prosecutor's argument as contrary to the jury instruction, and then was correctly instructed on how to reach a verdict on the murder charge. On this record, it is not reasonably likely that the jury was misled by the prosecutor's argument.

B. Comments about Appellant and Victim Li

The prosecutor played the video of appellant taking out the barrel of the gun and switching it and commented that appellant appeared to "take pride in what he's doing." He then commented that the picture with the lobster holding the guns suggested appellant's "infatuation with guns," which the prosecutor posited as a possible motive. Defense counsel did not

object, but appellant blurted out, "Almost sounds like a –," and was shushed by the court. After argument, the court asked defense counsel if he wanted the court to address what appeared to be appellant's frustration with the video. Counsel responded it was better not to draw attention to it.

The prosecutor ended the rebuttal with a series of questions, to which defense counsel did not object. The questions were about what Li was thinking when he involved himself in the argument, when appellant pulled a gun out, when Li felt the first shot, when he fell to the ground, when he felt the last shot, when some of the witnesses ran up to him before he died, when he could not talk, and when he died.

Appellant argues that the prosecutor committed misconduct by "[c]asting [a]spersions" on appellant's character that suggested he was "a gun toting criminal, proud of his firearm expertise," who would commit a premeditated murder. Appellant also argues that the questions about what Li must have thought improperly encouraged the jury to empathize with the victim and view the crime through his eyes. A claim of prosecutorial misconduct may be forfeited for lack of a timely objection and request for admonishment. (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) Recognizing that his claims of prosecutorial misconduct may be forfeited for lack of objection, appellant alternatively argues that counsel was ineffective for failing to object.

To establish ineffective assistance of counsel based on the failure to object to prosecutorial misconduct, a defendant must show both that counsel's performance was deficient, and that it is reasonably probable the verdict would have been more favorable to him absent counsel's deficiency. (See *People v. Hernandez*

(2004) 33 Cal.4th 1040, 1052–1053.) "We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions. [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 703) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we must affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there could be no satisfactory explanation for counsel's conduct. (*People v. Gray* (2005) 37 Cal.4th 168, 207.)

Defense counsel made it clear he did not want to draw attention to appellant's outburst during the prosecutor's comments concerning evidence of his infatuation with guns. Counsel's decision not to object to this line of argument was reasonable since it was based on evidence already admitted at trial, which showed appellant repeatedly posing with guns. Even appellant's mother had testified that appellant "likes guns." Appellant does not challenge the admissibility of the evidence on which the prosecutor commented. The prosecutor's comment that appellant was infatuated with guns and took pride in handling them was a fair commentary on the evidence and his inference of a possible motive from that evidence was reasonable. (See *People v. Avila* (2009) 46 Cal.4th 680, 712, fn. 13 [prosecutor's comment on defendant's possible motive for indiscriminately killing two people was "a reasonable inference from the record"].)

On the other hand, the prosecutor's series of questions regarding Li's thoughts during the shooting improperly invited the jurors to view the case through the victim's perspective and appealed to their sympathy. (See *People v. Shazier* (2014) 60 Cal.4th 109, 146 [prosecutors "generally may not appeal to

sympathy for the victims by exhorting the jurors to step into the victims' shoes and imagine their thoughts and feelings as crimes were committed against them"]; *People v. Seumanu, supra*, 61 Cal.4th at p. 1344 [prosecutor's appeal to jurors to view the crime through the murder victim's eyes was misconduct, albeit not prejudicial]; *People v. Fields* (1983) 35 Cal.3d 329, 361–363 [same].)

Respondent contends the prosecutor's questions were not excessive because they did not explicitly describe the victim's thoughts. But inviting the jurors to consider those thoughts necessarily asked them to view the shooting from the victim's perspective, which was improper. Yet, we do not find counsel's failure to object prejudicial. Contrary to appellant's suggestion, the brief series of questions at the end of the rebuttal cannot be said to have rendered his entire trial fundamentally unfair. (Cf. *People v. Hill* (1998) 17 Cal.4th 800, 823–835, 845–846 [reversing conviction due to cumulative prejudice from numerous instances of prosecutorial misconduct and other errors throughout trial].) Nor is a more favorable verdict reasonably probable. The jury was instructed not to be influenced by sympathy, and nothing in the record suggests that it was. The prosecutor did not appeal to the jury's sympathy with regard to Liu, the other victim; yet, the jury still found appellant guilty of his attempted premeditated murder based on the same shooting. That indicates the jury rejected appellant's alibi and concluded the shooting was premeditated.

On this record, we find neither reversible prosecutorial error nor ineffective assistance of counsel.

IV

In a supplemental brief, appellant asks that we remand the case to permit the trial court to exercise its discretion in respect to striking the firearm enhancements imposed in this case. We agree that remand is appropriate.

At the time appellant was sentenced, section 12022.53, subdivision (h) precluded a trial court from striking an allegation or finding of firearm use. Senate Bill 620, effective January 1, 2018, amends this statute to allow the sentencing court discretion to strike or dismiss a firearm use enhancement imposed under Penal Code section 1385. The amended statute provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§12022.53, subd. (h).) A change in the law which lessens punishment applies to all cases that are not yet final. (*In re Estrada* (1965) 63 Cal.2d 740, 745.) Respondent concedes the amended statute is applicable to this case.

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. Superior Court (Romero*) (1996) 13 Cal.4th 497, 530, fn.13; *People v. Myers* (1983) 148 Cal.App.3d 699, 704.) Defendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority

cannot exercise its informed discretion. [Citation.]" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

In our case, there was no "erroneous assumption" that the court lacked discretion to strike the firearm use enhancements; former section 12022.53, subdivision (h) prohibited the court from doing so. Rather, contrary to the argument of respondent, the trial court made no discretionary sentencing decision that might obviate the need for a remand. Under the amended statute, the court has discretion to strike the enhancements, and remand is necessary so the sentencing court may exercise its discretion.

We express no opinion as to how the trial court should exercise its discretion on remand. We conclude only that it is the trial court's function to exercise this discretion in the first instance.

DISPOSITION

The matter is remanded for the trial court to exercise its discretion under section 12022.53, subdivision (h). In all other respects, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect the enhancements imposed under section 12022.53, subdivision (d), and (should the court not file it) to forward a certified copy of the amended abstract to the Department of Corrections.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.