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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL DEALBA, Defendant and Appellant.	B241085 (Los Angeles County Super. Ct. No. PA069070)

APPEAL from an order of the Superior Court of Los Angeles County. Harvey Giss, Judge. Affirmed as modified.

Jerry Smilowitz, 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 E. Mercer and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Daniel Dealba was convicted of misdemeanor evading a police officer and unlawful possession of a firearm after he led police on a slow car chase during which he defenestrated the firearm. He contends the trial court committed evidentiary errors, he received ineffective assistance of counsel, and his sentence was unauthorized and asks that we review the trial court's in camera examination of police personnel records. We agree that part of defendant's sentence was unauthorized but otherwise affirm.

BACKGROUND

On October 30, 2010, defendant drove to a Jack-in-the-Box restaurant in San Fernando to speak to his daughter about disputes she had been having with her boyfriend, Andy Jimenez. A loaded handgun was under the front seat of defendant's vehicle. Defendant met Jimenez at the restaurant and the two got into a fight in the parking lot. The police were called, and when Officer Irwin Rosenberg of the San Fernando Police Department arrived, he saw defendant returning to his own vehicle on foot. Rosenberg twice ordered defendant to stop in a loud, commanding voice from a distance of approximately 15 feet, but defendant got into the vehicle and drove over a parking bumper, sidewalk and street curb to exit the parking lot and enter the street.

Defendant was closely pursued by Officers Tony Cox and Walter Dominguez, driving a marked black and white patrol car with activated lights and siren. He drove at slow speeds east on Pico Street, turned left into a second parking lot, traversed that lot, exited and turned left on Celis Street, right on San Fernando Mission Boulevard, and left into a third parking lot, that of Jimmy's Burgers restaurant (Jimmy's), followed by Cox and Dominguez. Defendant then threw a loaded handgun out of the window of his vehicle and proceeded to traverse and exit the Jimmy's parking lot, turning right onto San Fernando Road and then right on Maclay Avenue, where he eventually stopped and was arrested.

A search of defendant's vehicle produced an axe handle and one .22-caliber cartridge. The handgun was recovered from the Jimmy's parking lot.

Defendant was interviewed by Police Sergeant Anthony Vairo. He told Vairo he had bought the handgun from a friend and admitted he knew as he drove away from Jack-

in-the-Box that it was in the car. Defendant signed a statement summarizing the interview.

Defendant was charged with possession of a firearm by a felon (count 1; Pen. Code, § 12021, subd. (a)(1)),[1] possession of ammunition (count 2; § 12316, subd. (b)(1)), carrying a loaded firearm with a prior conviction (count 3; § 12031, subd. (a)(1)), carrying a loaded firearm with a prior conviction while in a vehicle (count 4; § 12031, subd. (a)(1)), carrying an unregistered firearm (count 5; § 12031, subd. (a)(1)), and evading an officer (count 6; Veh. Code, § 2800.1, subd. (a)). Trial proceeded on counts 1, 2, 3, 5 and 6. Count 4 was then dismissed as cumulative and count 3 was dismissed for failure of proof.

At trial, defendant testified he did not hear Officer Rosenberg order him to stop before getting into his car and did not know Cox and Dominguez were following him until he noticed their lights and siren while in the Jimmy's parking lot. He testified, "I tried to park, but there was no parking. I tried to park in the mall—there was no parking—to interrupt any citizens." Contrary to his police statement, defendant testified the gun belonged to his 20-year-old son, who had purchased it several years earlier. He testified he was not present when his son bought the gun and did not realize it was in the car until seconds before he threw it out the window.

The jury found defendant guilty of possession of a firearm and ammunition, carrying an unregistered firearm and evading police (counts 1, 2, 5 and 6). He was sentenced to three years eight months in prison, comprising the three-year high term on count 1 plus eight months on count 5, and a consecutive one year on count 6 to be served in any penal institution. He was also sentenced to three years on count 2, the term to run concurrent with his other sentences and to be stayed. Defendant timely appealed.

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[1] Undesignated statutory references will be to the Penal Code.

DISCUSSION

A. Exclusion of Hearsay Evidence

Defendant contends the trial court erred in excluding evidence that Anthony Dealba, defendant's son, had told a defense investigator over the phone that the gun belonged to him. He had put it in defendant's car two days prior to the incident, with defendant's knowledge, when he and defendant planned to go shooting at an uncle's ranch. Defense counsel argued the evidence should be admitted despite its hearsay nature because Anthony's statement constituted an admission against interest because he was too young to purchase a handgun. Counsel explained she had not been able to get in contact with Anthony and he had not appeared to testify, in derogation of the court's order and despite issuance of a body attachment. Counsel represented that Anthony's girlfriend told her "they believe based on some phone calls that they received that he is in immigration custody somewhere near San Diego."

The trial court concluded defendant had made no showing that Anthony was unavailable to testify and excluded the investigator's evidence.

"Evidence of a statement by a declarant . . . is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.)

Assuming for the sake of argument that Anthony Dealba's ownership of a handgun would have so far subjected him to the risk of criminal liability that he would

not have made statements about the gun unless he believed them to be true,[2] defendant was not prejudiced by the exclusion of Anthony's statements. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The exculpatory value of the statements was weak to nonexistent, as Anthony stated he and defendant had planned to go shooting and defendant knew the gun was in his vehicle two days before the incident. At the time of the incident, section 12021 provided in pertinent part that "[a]ny person who has been convicted of a felony . . . . [¶] . . . and who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony." (Former § 12021, subd. (a)(1), (2), repealed Stats. 2010, ch. 711, § 4 (SB 1080).) Because Anthony told the investigator defendant knew the gun was in the car, his statement would have tended to inculpate defendant rather than exculpate him.

B. Admission of Defendant's Statement to Police

Defendant contends the trial court erred when it admitted the statement he made to police, particularly that pertaining to the purpose of his appearance at Jack-in-the-Box. Sergeant Vairo read a summary of the statement—which defendant had signed—into the record at trial. As pertinent here, Vairo testified [reading the summary], "It starts out 'I bought the 22-caliber revolver from a friend of mine about two years ago. I paid $100 for the gun. [¶] My daughter Tornia, T-O-R-N-I-A, works at the Jack-in-the-Box located at 314 San Fernando Mission Boulevard. She has been dating Andy Jimenez for the last four or five years and they [have] two kids together. They also live together at this time. [¶] I went to the Jack-in-the-Box to talk to Tornia about the situation between Tornia and

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[2] Defendant offered no authority below and offers none here supporting the proposition that purchase of a handgun by someone under 21 years of age would subject the purchaser to penal sanctions. Former Penal Code section 12071 and former section 967.15 of title 11 of the California Code of Regulations, upon which defendant relies, are inapposite. Former section 12071, which was repealed in 2012 (Stats. 2010, ch. 711, § 4), prescribed sanctions only for the unauthorized sale, not purchase, of firearms. Former section 967.15 of title 11 of the California Code of Regulations, which was repealed in 2006 (Register 2006, No. 26), set forth requirements with which a gun owner had to comply to obtain a basic firearms safety certificate, one of which was that the owner had to be at least 21 years old. The regulation contained no penal provision.

Andy. I contacted Tornia and told her that I wanted to talk to her, but she said that she just started work. Her shift ended at or will end at eight p.m. [¶] . . . [¶] I then noticed Andy, who was inside the business and acting like a gangster. We then both went outside the business and stood by each other's cars. [¶] Andy was talking shit to me when my daughter came outside to talk to me. Before she came out I took a stick that I had in my car and told them I was going to beat him with it, but I never swung it at him or approached him with the stick. I put the stick back into the car. [¶] I then talked to my daughter about the situation and I grabbed Andy by one of his feet. Andy was inside his car when I grabbed him and told him why does he want to be superman. [¶] I stopped what I was doing, got into my car and started to leave when I heard somebody say "Stop, police." I didn't know who it was. So I kept on going.'"

During closing argument, the prosecutor argued to the jury that defendant brought a loaded gun to the restaurant for the purpose of "combat" with Jimenez. The prosecutor argued defendant "was ready to rumble. He was ready to fight. He knew he had that gun within the vehicle, but according to his admission he only took out that stick. Maybe the gun was back up."

Defendant argues admission of his statement allowed the jury to speculate he intended and was prepared to use the gun against Jimenez, undermining the defense that he did not know it was in the car. He argues the evidence was irrelevant and, even if relevant, was inadmissible under Evidence Code section 352 because its probative value was substantially outweighed by its unduly prejudicial impact. We disagree.

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is that which tends in reason to establish material facts. (Evid. Code, § 210; *People v. Harris* (2005) 37 Cal.4th 310, 337.) Under Evidence Code section 352, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352). "The trial court has broad discretion both in determining the relevance of evidence and in assessing whether its prejudicial effect outweighs its

probative value." (*People v. Horning* (2004) 34 Cal.4th 871, 900.) A court abuses its discretion when its ruling "falls outside the bounds of reason." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

Defendant's statement to Sergeant Vairo established a reason for him to fear an encounter with police and was probative to the prosecution's theory that he willfully fled with the intent to evade them. The Vehicle Code defines felony evading as willfully fleeing or attempting to elude a pursuing peace officer's motor vehicle while "operating a motor vehicle and with the intent to evade" the officer. (Veh. Code, § 2800.1, subd. (a).) Defendant's statement established he went to Jack-in-the-Box to confront his daughter during her working hours about a "situation" involving her and Jimenez, then went outside with Jimenez and brandished a weapon at him. His motive for confronting Jimenez and use of a weapon gave him reason to fear penal consequences if he was apprehended by police, which gave him a reason to evade them.

The prejudicial impact of the evidence, if any, was minimal. Defendant argues the evidence supported the inference that he intended to use the gun to confront Jimenez, and thus permitted the jury to speculate he knew it was in his car and hence his possession. But nothing in defendant's statement indicated either that he knew Jimenez would be at the restaurant or, finding him there, that he intended to use the gun. On the contrary, defendant first confronted Jimenez with no weapon and then brandished only an axe handle. He never used the gun. This supported defendant's claim that he did not know the gun was in the car. Defendant's argument that the jury could infer he was returning to his vehicle to get the gun when police intervened is pure speculation.

Moreover, any alleged error in admitting the evidence was harmless. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) To warrant reversal there must be a reasonable probability "a result more favorable to the appealing party would have been reached in the absence of the error." (*Ibid*.) A reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than *abstract possibility*. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) Even if defendant's statement tended in reason to show he knew the gun was in his car, defendant admitted

elsewhere in the statement that the gun was his, that it was in the car, and that he threw it out the window so as not to be caught with it. Given these admissions, no reasonable probability exists that the jury would have reached a different verdict had evidence concerning defendant's motive for going to the restaurant been omitted.

C. Ineffective Assistance of Counsel

During closing argument, defendant's trial counsel told the jury, "even if my client didn't realize that the officers were behind him prior to getting to Jimmy's, he knew they were there when he was at Jimmy's. That's the whole reason why he tossed the gun, right? [¶] We all know what we're supposed to do when we see a police vehicle behind us with lights and a siren on. We stop, and either it's for us or they move around us and they continue on going, which we're all relieved for. [¶] So he had an obligation to stop at Jimmy's. Police could have directed anybody else around to get around the vehicles and whatever. [¶] So he could have stopped. He didn't stop. He continued on. [¶] He's guilty of evading. That's a pretty easy call, but this case is really about possession and knowledge regarding the gun and the ammunition in the car."

Defendant contends that by conceding guilt as to the evading charge, his counsel rendered ineffective assistance requiring reversal. We disagree.

A claim that counsel was ineffective requires a showing, by a preponderance of the evidence, that counsel's performance fell below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's unprofessional errors, defendant would have obtained a more favorable result. (*In re Jones* (1996) 13 Cal.4th 552, 561.) Defendant must overcome presumptions that counsel was effective and that the challenged action might be considered sound trial strategy. (*Ibid.*) To prevail on an ineffective assistance claim, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. (*People v. Majors* (1998) 18 Cal.4th 385, 403.) We consider counsel's overall performance throughout the case, evaluating it from counsel's perspective at the time of the challenged act or omission and in light of all the circumstances. (*People v. Bolin* (1998) 18 Cal.4th 297, 335.) "To the extent the record on appeal fails to disclose why counsel acted or

failed to act in the manner challenged, we will affirm the judgment 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .' [Citation.]" (*Id*. at p. 333.)

Defendant contends there could be no satisfactory explanation for his counsel's admission during closing argument that he was guilty of evading police because it undermined his credibility and contradicted his claim that he had no intention to evade them.

We have reviewed the closing arguments and find nothing improper or incompetent in counsel's performance. Defendant was charged with misdemeanor evading and felony gun possession. His counsel's strategic decision to admit guilt as to the evading charge and focus on the more serious possession charges is easily understandable, as she could reasonably believe the evading charge to be a lost cause. Defendant admitted during cross-examination that he heard someone say "Stop, Police" before he got into his vehicle in the Jack-in-the-Box parking lot, drove over the sidewalk and curb to get to the street, and knew police were behind him at least by the time he reached the Jimmy's parking lot, where he discarded the gun. Yet he continued through that lot, exited onto the street, turned at another street, and continued for a time before stopping, all with a police car following closely behind with its lights and siren activated. Defendant admits on appeal he did not want to stop "because there were no open parking spaces there," which echoes his claim at trial that he "tried to park, but there was no parking," and he did not want to "interrupt any citizens."

Even if defendant's admitted failure to stop in the Jimmy's parking lot did not unavoidably establish his intent to evade police, his counsel could reasonably conclude that given his admission to brandishing an axe handle in the Jack-in-the-Box parking lot, driving over the sidewalk and curb to reach the street, and throwing a loaded gun from a moving vehicle at the Jimmy's parking lot, the jury would not credit defendant's newfound concern for parking limitations and public safety and convenience. It is therefore entirely understandable that counsel made no sweeping declaration of innocence but instead adopted a more realistic approach, choosing to admit defendant

evaded police, and hope to establish he was reasonable and willing to admit culpability, which characteristics could be leveraged in defense of the more serious possession charges. (See *People v. Mayfield* (1993) 5 Cal.4th 142, 177 ["candor may be the most effective tool available to counsel"].) We conclude counsel's argument was reasonably competent in light of the evidence of defendant's guilt.

D. Impeachment with a Prior Conviction

Before trial, the prosecution indicated it intended to offer evidence that defendant had been convicted in 1998 for possession of cocaine base for sale. Defendant objected on the ground that the conviction was remote in time. The trial court recognized the 1998 conviction was somewhat remote but concluded defendant's overall criminal record, which reflected a 1990 conviction for possession of a controlled substance and a 1997 conviction driving while under the influence of intoxicants, crimes that admittedly did not involve moral turpitude, was sufficiently serious to disqualify him from being able to testify with the aura of veracity of one who has not sustained a prior felony conviction involving moral turpitude. Defendant had been sentenced to five years in prison for the 1998 conviction and was discharged from parole sometime thereafter.

During cross-examination defendant was asked over his counsel's renewed objection if he had been convicted in 1998 for possession of cocaine base for sale. He admitted he had. The trial court instructed the jury that in evaluating a witness's credibility it may consider whether the witness has been convicted of a felony. Defendant contends his prior conviction was too remote in time to be used for impeachment. We disagree.

"No witness including a defendant who elects to testify in his own behalf is entitled to a false aura of veracity." (*People v. Beagle* (1972) 6 Cal.3d 441, 453.) "Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment . . . in any criminal proceeding" (Cal. Const., art. I, § 28, subd. (f)(4)), but "trial courts retain their discretion under Evidence Code section 352 to bar impeachment with such convictions when their probative value is substantially outweighed by their prejudicial

effect." (*People v. Clair* (1992) 2 Cal.4th 629, 654.) "In exercising its discretion, the trial court must consider . . . (1) whether the prior conviction reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of a prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not testify out of fear of being prejudiced because of the impeachment by prior convictions. [Citation.] These factors need not be rigidly followed." (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.)

If a conviction "occurred long before and has been followed by a legally blameless life, [it] should generally be excluded on the ground of remoteness." (*People v. Beagle*, *supra*, 6 Cal.3d at p. 453.) Nevertheless, "there may be no conviction that is per se too remote to be used for impeachment." (*People v. Burns* (1987) 189 Cal.App.3d 734, 738.) In determining whether a prior conviction should be excluded as remote, the trial court may consider the length of time that has elapsed since the conviction, the length of sentence served on the prior conviction, the nature of the conviction, the age of the defendant at the time the previous crime was committed, and the defendant's conduct subsequent to the prior conviction. (*Ibid.*)

We review a trial court's admission of prior felony convictions for impeachment for an abuse of discretion. (*People v. Hinton* (2006) 37 Cal.4th 839, 888.) We will not disturb a trial court's exercise of its discretion to admit evidence of prior convictions for impeachment purposes "'unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]' [Citation.]" (*People v. Green* (1995) 34 Cal.App.4th 165, 182-183.)

We reject defendant's contention that the trial court erred by allowing impeachment with his prior conviction for possession of cocaine base for sale. The 13-year-old conviction admittedly involved moral turpitude and was not so remote in time as to require exclusion as a matter of law, and while defendant led an arrest-free life after serving his sentence for the 1998 conviction (the record does not indicate how long he

was in prison), the trial court could reasonably conclude his overall criminal record was relevant to his credibility. In any event, any error in admitting evidence of the 1998 conviction was harmless because defendant was impeached more by his own testimony than by the old conviction. He admitted to police that the gun was his, admitted under direct examination that it was in his vehicle and he discarded it because he did not want to be caught with it, and admitted under cross-examination that he willfully evaded police for a time (in order to find a parking spot). Given these admissions, it is not reasonably likely a more favorable result would have been reached had evidence of the prior conviction been excluded.

E. Failure to State Reasons for a Consecutive Sentence

A sentencing court must state on the record at the time of sentencing the reasons for its sentence choices. (§ 1170, subd. (c).) Here, when the trial court ordered that the one-year sentence imposed on the evading conviction run consecutively to the sentence imposed on the conviction for gun possession, it failed to give a reason as required by section 1170. However, defendant's trial counsel did not request a reason, which waives the issue on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) Defendant contends his counsel's failure to request an explanation for the sentence constituted ineffective assistance requiring reversal. We disagree.

"[T]he purpose for requiring the court to orally announce its reasons at sentencing is clear. The requirement encourages the careful exercise of discretion and decreases the risk of error. In the event ambiguities, errors, or omissions appear in the court's reasoning, the parties can seek an immediate clarification or change. The statement of reasons also supplies the reviewing court with information needed to assess the merits of any sentencing claim and the prejudicial effect of any error." (*People v. Scott*, *supra*, 9 Cal.4th at p. 351.) "[A] defense attorney who fails to adequately understand the available sentencing alternatives, promote their proper application, or pursue the most advantageous disposition for his client may be found incompetent." (*Ibid.*)

But the record does not support defendant's argument that had counsel not failed to request a reason for imposition of a consecutive sentence on the evading charge there is a reasonable probability he would have received a concurrent sentence.

When a person is convicted of two or more crimes the trial court must direct whether the terms of imprisonment for the offenses are to run concurrently or consecutively. (§ 669, subd. (a).) In exercising discretion whether to impose concurrent or consecutive sentences, the court may consider any circumstance in aggravation or mitigation except elements that were used to impose an upper term for another offense. (Cal. Rules of Court, rule 4.425(b).) The court also may consider the relationship between the crimes, including (1) whether the crimes and their objectives were independent of each other, (2) whether they involved separate acts of violence or threats of violence, and (3) whether they were committed at different times or separate locations. (*Id*., rule 4.425(a).)

Here, the two primary offenses defendant committed were gun possession and evasion. The objectives of the crimes were independent and they were committed at different times and locations. And the evasion offense was accompanied by an act incompatible with the possession charge—defendant threw a loaded gun from a moving vehicle and left it for anyone to find. The possession and evading crimes were distinct enough that we do not think it reasonably probable the trial court would have ordered concurrent sentences upon being asked to explain the consecutive sentence.

Defendant argues the possession and evasion offenses were not independent of each other because he possessed the gun only during the car chase. To state the proposition is to refute it.

F. Other Sentencing Errors

Defendant contends the concurrent sentence imposed on count 5, for carrying an unregistered firearm, must be stayed pursuant to section 654 [a single act resulting in two crimes may be punished only once] because his act of carrying the firearm was the same act for which he was convicted on count 1 of possession of a gun by a felon. Respondent concedes the point and we agree. (*People v. Jones* (2012) 54 Cal.4th 350, 357 ["a single

possession or carrying of a single firearm on a single occasion may be punished only once under section 654"].)

The abstract of judgment includes an order directing defendant to pay attorney fees in the amount of $129 to the public defender's office, but the reporter's transcript contains no discussion pertaining to attorney fees. Defendant contends the order to pay attorney fees must be stricken because it was not part of the judgment. We agree. (*People v. Hartsell* (1973) 34 Cal.App.3d 8, 13 ["If the judgment entered in the minutes fails to reflect the judgment pronounced by the court, the error is clerical, and the record can be corrected at any time to make it reflect the true facts"].)

G. *Pitchess*[3] Motion

Before trial, defendant asserted five police officers involved in his arrest and subsequent interview made false statements and planted evidence. He filed a *Pitchess* motion requesting pretrial discovery of the officers' personnel records. The trial court ordered the production of the records for inspection, conducted an in camera review of them, and concluded no discoverable material existed. Defendant requests that we independently review the in camera proceedings to determine whether the trial court properly exercised its discretion in denying discovery. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1232; *People v. Wycoff* (2008) 164 Cal.App.4th 410, 414-415.)

After having independently reviewed the sealed reporter's transcript of the in camera hearing, we find no abuse of discretion. (*People v. Mooc, supra,* 26 Cal.4th at p. 1228.)

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[3] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

DISPOSITION

The judgment is affirmed. The clerk of the superior court is directed to correct the abstract of judgment to reflect that the sentence imposed on count 5 is stayed and the reference to attorney fees stricken.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.