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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. EDWIN OLIVARES, Defendant and Appellant.	B267331 (Los Angeles County Super. Ct. No. BA389990)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, appellant Edwin Olivares was convicted of assault with intent to commit rape. He maintains that the trial court erred in determining that he was competent to stand trial. We reject his contention and affirm.

RELEVANT PROCEDURAL BACKGROUND

On February 1, 2011, an information was filed charging appellant with assault on Lauren N. with intent to commit rape (Pen. Code, § 220, subd. (a)(1)). Appellant pleaded not guilty.[1]

Prior to trial, the trial court declared a doubt regarding appellant's competency to stand trial and suspended criminal proceedings (§ 1368 et seq.). On August 30, 2012, appellant was found not competent to stand trial. Later, on June 9, 2015, the court found that appellant was competent to stand trial and reinstated the criminal proceedings against him. Shortly before trial, when appellant's counsel declared a doubt whether appellant was competent to stand trial, the court concluded there were no grounds sufficient to support a re-examination of that question.

After a jury found appellant guilty as charged, the trial court sentenced him to the upper term of six years in prison. Appellant was awarded custody credits totaling 1485 days. This appeal followed.

FACTS

The prosecution presented evidence that on October 15, 2011, during the evening, Lauren N. visited a Hollywood nightclub with some friends. After attending the nightclub, she went to an apartment, where she drank six or seven

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[1] All further statutory citations are to the Penal Code.

shots of vodka and became intoxicated. Upon leaving the apartment, she lost consciousness while searching for a bus in order to go home. Erica Cero and Rene Colorado, who were traveling in a car, noticed appellant carrying Lauren. Colorado left the car and found appellant lying on Lauren behind a low boundary wall. Appellant moved as if engaged in sex. Although appellant told Colorado that Lauren was his girlfriend, Colorado asked Cero to make a 911 call. When Lauren appeared to resist appellant, Colorado tried to pull appellant off Lauren. Colorado was assisted by passersby, including Jameson Willis. Police officers soon arrived and separated appellant from Lauren. Appellant's penis was out of his pants, and Lauren's shorts were down, exposing her vagina. At trial, Lauren testified that she neither knew appellant nor agreed to have intercourse with him.

Appellant presented no evidence.

DISCUSSION

Appellant contends that during the trial, the court erred in concluding he was competent to stand trial. For the reasons set forth below, we reject his contention.

A. *Governing Principles*

Under the United States Constitution and state law (§ 1367 et seq.), "[a] defendant who is mentally incompetent cannot be tried or adjudged to punishment. [Citations.] A defendant is mentally incompetent to stand trial if, as a result of mental disorder or developmental disability, the defendant is 'unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.' [Citation.]" (*People v. Marshall* (1997) 15 Cal.4th

1, 31, quoting § 1367, subd. (a) (*Marshall*); *People v. Mai* (2013) 57 Cal.4th 986, 1032 (*Mai*).)

The trial court is obliged to conduct a competency hearing when the defendant presents "substantial evidence of incompetence" (*Mai, supra,* 57 Cal.4th at p. 1032), that is, "'evidence from which a reasonable jurist would entertain a bona fide doubt concerning competency'" (*People v. Mendoza* (2016) 62 Cal.4th 856, 884 (*Mendoza*)). The court must conduct a hearing when such evidence is presented at any time prior to judgment.[2] (*People v. Jones* (1991) 53 Cal.3d 1115, 1153 (*Jones*).) The defendant has the burden of proving incompetency by a preponderance of the evidence. (*Marshall*, *supra,*15 Cal.4th at p. 31.)

Here, appellant challenges neither the August 2012 incompetence determination nor the June 2015 competence determination. He contends that after the June 2015 determination, the trial court erred in declining to conduct a "serious inquiry" into his competence to stand trial, arguing that even before selection of the jury, his conduct demonstrated a lack of competence.

"When a competency hearing has already been held and the defendant has been found competent to stand trial, . . . a trial court need not suspend proceedings to conduct a second competency hearing unless it 'is presented with a substantial change of circumstances or with new evidence' casting a serious doubt on the validity of that finding." (*Jones*, *supra*, 53 Cal.3d at p. 1153, quoting *People v.*

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[2] In this context, "[c]ounsel's assertion of a belief in a client's incompetence is entitled to some weight. But unless the court itself has declared a doubt as to the defendant's competence, and has asked for counsel's opinion on the subject, counsel's assertion that his or her client is or may be incompetent does not, in the absence of substantial evidence to that effect, require the court to hold a competency hearing." (*Mai*, *supra*, 57 Cal.4th at p. 1033.)

Zatko (1978) 80 Cal.App.3d 534, 548.) To establish such a doubt, "[m]ore is required than just bizarre actions or statements by the defendant . . . ." (*Marshall*, *supra*, 15 Cal.4th at p. 33.) Furthermore, the court "may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant's mental state." (*Jones*, *supra*, 53 Cal.3d at p. 1153.)

The trial court's denial of a second competency hearing is examined for an abuse of discretion. (*People v. Huggins* (2006) 38 Cal.4th 175, 220 (*Huggins*).) "Reviewing courts give great deference to a trial court's decision whether to hold a competency hearing. '"'An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper.'"' [Citations.]" (*People v. Marks* (2003) 31 Cal.4th 197, 220, quoting *Marshall*, *supra*, 15 Cal.4th at p. 33.)

B. *Underlying Proceedings*

1. *August 2012 Incompetence Determination*

In May 2012, at a pre-trial hearing, appellant displayed confusion regarding the charges against him. The trial court suspended the criminal proceedings and declared a doubt regarding his competence to stand trial. Appellant was examined by three experts -- two psychiatrists and a psychologist -- two of whom opined that appellant lacked competence to stand trial due to a psychotic disorder. Those two experts reported that appellant appeared to hear "'diabolic'" voices or noises. In August 30, 2012, the trial court found that appellant was not competent to stand trial and committed him to a state hospital for treatment to restore his competency

pursuant to section 1370. Appellant's maximum period of confinement was to end on August 30, 2015.[3]

2. *June 2015 Competence Determination*

In progress reports to the trial court dated November 14, 2013 and April 15, 2014, the medical director of Atascadero State Hospital stated that appellant was not competent to stand trial.[4] According to the reports, appellant had recounted a long history of hallucinations and delusional beliefs relating to devils and witchcraft, and had been diagnosed with schizophrenia, paranoid type. Although psychotropic medications had lessened his symptoms, he had made little progress in the section 1370 treatment program and refused to participate in interviews for the progress reports.

On February 23, 2015, the medical director of Atascadero State Hospital submitted a certificate of mental competency regarding appellant.[5]

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[3] "A defendant who, as a result of a mental disorder, is adjudged not competent to stand trial on a felony charge may be committed to a state hospital for no more than three years." (*People v. Reynolds* (2011) 196 Cal.App.4th 801, 806; see § 1370, subd. (c)(1).) After the maximum confinement period has ended, such a defendant who remains incompetent to stand trial may be placed in a specific type of conservatorship or, alternatively, the felony charge may be dismissed, although the defendant remains potentially subject to further commitment. (*People v. Reynolds*, *supra*, 196 Cal.App.4th at p. 806.)

[4] After a defendant is found incompetent to stand trial, the medical director of the state mental hospital to which the defendant is committed must submit reports to the court at statutorily defined intervals charting the defendant's progress. (*People v. Karriker* (2007) 149 Cal.App.4th 763, 780-781; § 1370, subd. (b)(1).)

[5] When the medical director "determines that the defendant has regained mental competence," he or she is obliged to "immediately certify that fact to the court by filing a certificate of restoration . . . ." (§ 1372, subd. (a).) Upon
(Fn. continued on next page.)

The accompanying report stated that although appellant had "displayed some minor symptoms of psychosis" during his hospitalization, he had manifested no such symptoms for the previous six months. The report recommended that he continue taking certain prescribed medications.

The report further concluded that although appellant refused to cooperate with section 1370 programs and claimed an inability to understand his legal situation, that conduct was "not the result of a genuine cognitive disorder, but a volitional attempt to avoid returning to court." The report stated: "Since the time of the last court progress report . . . , [appellant] has continued to make no progress in treatment. On the unit, he has been observed acting appropriately with peers, socializing, watching TV, horse-playing, and following unit rules and routine. He is able to remember to sign out to different groups, is able to engage in activities with peers, and does not exhibit any cognitive deficits on the unit. However, he continuously refuses to attend [section] 1370 treatment . . . ." The report further stated: "When asked about his legal situation, he repeatedly states 'I don't know,' or 'I don't remember.' He claims he is unable to recall simple information such as the role of the judge, the names of the guilty and not guilty pleas, and the simple names of his charges. However, on several occasions . . . [appellant] was able to recall his charges, most of the court pleas, the plea bargain process, and the roles of court personnel."

In concluding that appellant was competent to stand trial, the report stated: "Although [appellant] claims that he does not know any information pertaining to his legal situation, his attempt to present [as] impaired appears to be a volitional

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submission of the certificate, the defendant must be returned to "the committing court" for further proceedings. (§ 1372, subd. (a)(2) & (3).)

attempt to avoid returning to court and facing his legal situation. His treatment team . . . have attempted to gain more in-depth information regarding malingering or neuropsychological diagnosis; however, [appellant] continues to refuse to participate in interviews and further psychological testing. . . . [¶] . . . He does not display any cognitive deficits or psychiatric impairment that would interfere with his ability to engage in activities appropriately, and his ability to not remember information is exclusive to [section] 1370 treatment activities. . . . It is likely [appellant] has the capacity to cooperate with his attorney but may choose not to, to appear more impaired in order to avoid facing his legal situation."

Upon receipt of the certificate of mental competency, at defense counsel's request, the trial court appointed a psychiatrist to conduct an additional evaluation of appellant. On June 9, 2015, following that evaluation, defense counsel agreed that appellant was competent to stand trial. The trial court found that appellant was competent to stand trial, relying on the February 17, 2015 report from the medical director of the Atascadero State Hospital.

3. *Pre-Trial Request for Inquiry into Competency*

On August 11, 2015, at a hearing shortly before trial, the court addressed a proposed plea agreement authorizing a four-year prison term and requiring appellant to register as a sex offender. The prosecutor noted that because appellant's custody credits exceeded the term to be imposed under the plea agreement, he could "walk out . . . of jail." The prosecutor further remarked that although the upper term for the offense charged against appellant was six years, his actual maximum period of imprisonment was 85 percent of that term, that is, five years and four months. Defense counsel told the court that appellant wanted "[n]o trial" and "[n]o registration."

After explaining the proposed agreement to appellant, the court asked what he wanted to do. Appellant replied, "Get out because I'm not under state law." The following exchange occurred:

"The Court: Well, in order to get out you have to accept the prosecution's offer. Are you willing to do that?

"[Appellant]: No, I don't accept. I don't accept.

"The Court: Okay. Then we are having a trial.

"[Appellant]: I don't accept that either.

"The Court: There's no alternatives. It's either a trial or a plea.

"[Appellant]: I don't know.

"The Court: Well, I guess we have a trial."

The court then directed the prosecutor to supply appellant with clothes suitable for the trial, which was to begin the next day.

The following morning, appellant appeared in the courtroom wearing a jail uniform. When the court explained that he was entitled to wear street clothes during the trial, appellant replied, "I'm fine like this," and further asserted, "I'm not accepting a trial." The court again described the proposed plea agreement, stating, "[Y]ou would be released today although . . . you [would] have to register as a sex offender. Is that something you would want to do?" The following exchange ensued:

"[Appellant]: No, no, never.

"The Court: So even if you don't want to do it, will you do it?

"[Appellant]: Because the people who arrested me don't exist anymore.

"The Court: So you're seeing [*sic*] whether or not they're still going to come to court?

"[Appellant]: No, I don't know anything about that.

"The Court: What do you mean they don't exist anymore?

"[Appellant]: Well, I'm never going to see them.

"The Court: Why?

"[Appellant]: Well, I've never seen them. As far as I'm concerned they don't exist.

"The Court: But they're going to come."

At the court's request, the prosecutor described the testimony she intended to present from the key witnesses to the assault. When appellant responded, "[W]e didn't do anything," the following dialogue occurred:

"[The prosecutor] Okay. That's why you have a right to a trial.

"[Appellant]: No, I already had a trial.

"The Court: Pardon me?

"[Appellant]: I already had a prelim.

"The Court: The prelim is . . . like a pretrial. It goes before the trial. After the prelim comes the trial.

"[Appellant]: No, I'm not accepting a trial.

"The Court: . . . If you don't accept the prosecution's offer, I think it's very likely that we are going to have a trial.

"[Appellant]: No."

Following that remark, the trial court ruled that there was to be a trial.

Defense counsel then declared a doubt regarding appellant's competence, arguing that since the June 2015 competence determination, appellant had declined to accept any course of action open to him, refused to assist in developing a defense, and insisted that he was "federal, not state." Counsel also voiced a concern whether appellant had the ability to testify on his own behalf. According

to counsel, appellant's refusal to cooperate in his defense appeared not to be "entirely volitional," but due to a "disconnect."

The prosecutor contended appellant was engaged in a "delay tactic," stating: "I believe he's malingering, and I believe he's just refusing to cooperate because he understands full well that the People are running out of time [to commence a trial]."

Following these arguments, the court asked appellant whether he was interested in "entering a plea in this case of no contest, getting out today and not registering as a sex offender." Appellant answered, "Never because I'm not."

The court then declined to conduct a second competency inquiry, concluding that there was no evidence casting serious doubt on the June 2015 competence determination or establishing a substantial change of circumstances. The court observed that appellant's behavior was consistent with the February 2015 competency report, according to which appellant acted inappropriately and appeared to display cognitive limitations only when his legal situation was raised. As the court noted, appellant had refused to participate in treatment programs and interviews relating to his legal situation, and sometimes claimed not to understand simple legal concepts.

4. *Subsequent Events*

Prior to the presentation of evidence at trial, defense counsel asserted a continuing objection to the court's denial of a second competency hearing. Following Lauren N.'s testimony, defense counsel told the court that appellant showed no interest in the trial, declined to discuss witness testimony, and refused to wear street clothes. Later, when counsel again remarked that appellant was not attending to the trial, the court replied: "I don't agree because I have watched him

look at the witnesses [and] move his head. . . . [S]ometimes he looks down and sometimes he looks up." The court noted, however, that it could not determine whether appellant was "participating."

During discussions regarding the jury instructions, defense counsel stated that he was unable to present evidence supporting a consent defense because appellant declined to testify. When the trial court asked appellant whether he intended to testify, he replied, "No. I'm not going to testify to anything." Following the close of the prosecution's case-in-chief, appellant did not testify and presented no evidence in his defense.

After the court instructed the jury, defense counsel stated that appellant appeared to be asleep during the reading of the instructions. When the jury found appellant guilty as charged, the trial court asked whether appellant waived his right to be sentenced within 20 days. Because appellant appear to nod his head, the court stated, "[T]he answer is yes." Appellant replied, "Never. Never." Later, appellant refused to leave his cell for the sentencing hearing, and the court continued the hearing in order to ensure his appearance.

C. *Analysis*

We see no error in the trial court's determination that appellant's conduct before and during the trial demonstrated no "substantial change of circumstances" supporting a second competency hearing (*Jones*, *supra*, 53 Cal.3d at p. 1153). In connection with such a hearing, "'the test . . . is competency to cooperate, not cooperation.'" (*People v. Hightower* (1996) 41 Cal.App.4th 1108, 1112, quoting *People v. Superior Court* (*Campbell*) (1975) 51 Cal.App.3d 459, 464.) As explained below, appellant's conduct before the trial court conformed to his persistent refusal to address his legal situation, as described in the February 2015

report, and otherwise suggested no new or renewed incapacity to cooperate with his attorney.

Generally, a second competency hearing is not required absent evidence of a substantial change in the defendant's competence, assessed in light of the "baseline" for that competence established in the first hearing. (*Huggins*, *supra*, 38 Cal.4th at p. 220.) As our Supreme Court has explained, when "[t]he prior finding was based on a thorough inquiry into [the] defendant's competency, . . . the evaluations made at that time and the verdict of competency must be viewed as a baseline that, absent a preliminary showing of substantially changed circumstances, eliminate[s] the need to start the process anew." (*Ibid*.)

An instructive application of that principle is found in *Mendoza*, in which the defendant was charged with the murder of three members of his estranged wife's family. (*Mendoza*, *supra*, 62 Cal.4th at pp. 861-865.) Prior to the trial, the court conducted a contested hearing regarding his competence before a jury. (*Id*. at pp. 870-871.) The defendant presented testimony from several psychiatrists and psychologists, who opined that he suffered from depression that rendered him unable to assist his counsel. (*Id*. at pp. 872-874.) The prosecution's experts acknowledged that the defendant was preoccupied with religion, but opined that he suffered from no mental illness or condition rendering him incompetent to stand trial. (*Id*. at pp. 874-878.) After the jury found the defendant was competent to stand trial, the matter proceeded to trial, during which the defendant showed little interest in his defense, expressed a preference to be subject to the death penalty and to not wear street clothes, wept in the courtroom, and made unusual statements to the court, including that the trial involved the protection of his children. (*Id*. at pp. 884-895.) Defense counsel made repeated requests for a second competency hearing, which the trial court rejected. (*Id*. at pp. 884-895.)

The California Supreme Court affirmed those rulings, concluding there was no evidence of a substantial change in circumstances following the initial competency determination.

Here, no showing of substantially changed circumstances was made. The June 2015 competence determination did not follow a contested hearing, but was based solely on the February 2015 competency report. According to that report, appellant's hallucinations and delusional beliefs had been alleviated by medications, and he manifested no ostensible cognitive impairments or inappropriate conduct except when asked to address his legal situation. The report stated: "[Appellant] does not display any cognitive deficits or psychiatric impairment that would interfere with his ability to engage in activities appropriately, and his ability to not remember information is exclusive to [section] 1370 treatment activities. . . . It is likely [appellant] has the capacity to cooperate with his attorney but may choose not to, to appear more impaired in order to avoid facing his legal situation."

Appellant's conduct before the trial court did not fall below the baseline set forth in the February 2015 competency report. There was no evidence that his hallucinations and delusional beliefs had resumed or that he acted incongruously in any context other than during the legal proceedings, where he displayed precisely the type of lack of cooperation foreseen by the report.[6] Appellant thus failed to make the preliminary showing required to begin "the process" of examining his competency "anew." (*Huggins*, *supra*, 38 Cal.4th at p. 220.)

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[6] We note that shortly after the trial court rejected the request for a second competency hearing, the prosecutor told the court that the bailiff observed appellant interacting normally with other inmates in the lockup.

Appellant contends that his rejection of the plea agreement, failure to testify, and lack of cooperation with his counsel mandated a second competency hearing, arguing that "[a]cting against self-interest is not rational." He concedes that his rejection of the plea agreement might be explained by a "rational desire" not to have to register as a sex offender, but maintains that his conduct, viewed collectively, was not rational. He places special emphasis on his failure to testify, arguing that he possessed a potential defense, as he told officers after his arrest that Lauren consented to intercourse with him. However, as explained above, a defendant's counterproductive acts at trial and lack of cooperation with counsel do not compel a second competency hearing absent evidence that the conduct stemmed from a new or renewed inability to cooperate or other substantial change of circumstances. (*Mendoza*, *supra*, 62 Cal.4th at pp. 884-895.) The record discloses no such evidence.[7]

The decisions upon which appellant relies are distinguishable. In *People v. Melissakis* (1976) 56 Cal.App.3d 52, 53, the defendant was charged with assault with intent to commit murder, and asserted a plea of not guilty by reason of insanity. Prior to trial, he was examined by three psychiatrists, two of whom found no evidence of a significant medical illness, and the trial court ruled that he

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[7] In a related contention, appellant suggests that his remarks to the court regarding the nonexistence of certain witnesses against him established that his delusions had returned. We disagree. The remarks comport with the February 2015 competency report, which observed that appellant often claimed not to recall information relating to his legal situation, even though he displayed no such cognitive deficits regarding other subjects. Furthermore, after the prosecutor described the testimony to be offered by the key witnesses, appellant asserted, "[W]e didn't do anything," and subsequently referred to his "prelim." In view of that conduct, the trial court reasonably concluded that appellant, in fact, understood that the witnesses against him existed.

was competent to stand trial. (*Id*. at pp. 56-57.) At trial, the defendant testified that he was the victim of a large conspiracy. (*Id*. at pp. 58-59.) After a jury found him guilty as charged, the trial court conducted a hearing on his sanity, at which the two psychiatrists who had previously opined that he was not mentally ill rendered contrary opinions based on his trial testimony. (*Id*. at p. 61.) Despite that new evidence, the trial court failed to revisit its prior ruling regarding the defendant's competence to stand trial. (*Ibid*.) Reversing the judgment, the appellate court concluded that the new evidence established a "substantial change of circumstances" mandating a competency hearing. (*Id*. at p. 62.) Such change was not shown here, however, as appellant's conduct at trial conformed to the baseline set forth by the February 2015 competency report.

In *Drope v. Missouri* (1975) 420 U.S. 162, 164, the defendant was charged with the rape of his wife. Prior to the trial, the court rejected defense counsel's request for a competency hearing. (*Id*. at pp. 164-166.) At trial, the defendant's wife testified that he needed psychiatric care, and that he had tried to choke her to death shortly before the trial. (*Id*. at p. 166.) Midway through the trial, the defendant tried to commit suicide. (*Id*. at p. 169.) Notwithstanding the defendant's conduct, the court conducted no competency hearing (*Id*. at pp. 168-169.) The United States Supreme Court held that was error, concluding that the defendant's "'pronounced irrational behavior'" created sufficient doubt regarding his competence to mandate a hearing. (*Id*. at p. 179, quoting *Pate v. Robinson* (1966) 383 U.S. 375, 385-386.) In contrast, the question here is whether there was sufficient evidence of changed circumstances to mandate a second competency hearing. No such hearing was required, as the progress report supporting the June 2015 finding of competence noted that appellant was likely to engage in the very conduct he displayed at trial.

In *People v. Castro* (2000) 78 Cal.App.4th 1402, 1410, the defendant was charged with child endangerment and other offenses. Defense counsel submitted a declaration that the defendant suffered from a developmental disability and sought a competency determination under subdivision (a) of section 1396, which requires that any such defendant be examined by the director of the regional center for the developmentally disabled. (*Castro, supra*, 78 Cal.App.4th at p. 1411.) Although the court authorized two psychiatrists to examine the defendant, it declined to order an examination by the director of the regional center. (*Id*. at pp. 1411-1413, 1418.) The appellate court reversed the judgment because the trial court did not afford the defendant the examination to which she was entitled under section 1396, subdivision (a). (*Castro, supra*, at p. 1418.) That holding was disapproved in *People v. Leonard* (2007) 40 Cal.4th 1370, 1390, fn. 3, to the extent it incorporated a rule of per se reversal for failure to comply with the statute. *Castro* is of no assistance to appellant, who has not claimed to be subject to a developmental disability. In sum, the trial court did not err in concluding that appellant was competent to stand trial.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.