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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

NICKELIS DARNELL BLACKWELL et
al.,

Defendants and Appellants.

B228214

(Los Angeles County
Super. Ct. No. GA074689)

APPEALS from judgments of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Affirmed as modified.

Sara H. Ruddy, under appointment by the Court of Appeal, for Defendant and Appellant Nickelis Darnell Blackwell.

Kim Malcheski, under appointment by the Court of Appeal, for Defendant and Appellant Rayshawn Blackwell.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Theresa A. Patterson, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, Nickelis and Rayshawn Blackwell, were each convicted of one count of first degree murder (Pen. Code,¹ § 187, subd. (a)) and four counts of attempted willful, deliberate and premeditated murder (§§ 664, 187, subd. (a)). Nickelis² was also convicted of two counts and Rayshawn of one count of being a felon in possession of a firearm. (§ 12021, subd. (a)(1).) The jury found the crimes were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) The jury found true firearm use enhancements under section 12022.53, subdivisions (b), (c), (d) and (e)(1). Nickelis was sentenced to an indeterminate term of 160 years to life plus a consecutive determinate term of 40 years. Rayshawn was sentenced to an indeterminate term of 144 years to life plus a consecutive determinate term of 40 years. We modify the judgments and affirm as modified.

II. EVIDENCE

A. Prosecution Evidence

1. Overview

We view the evidence in the light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 309; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) Defendants are cousins and members of a gang. On January 13, 2008, Sanders Rollins, defendants’ “Uncle Pete,” was shot and

¹ All further statutory references are to the Penal Code except where otherwise noted.

² For the sake of clarity, we refer to members of the Blackwell family—including defendants, Nickelis’s father, Ricky, Sr., and Nickelis’s brother, Ricky, Jr.—by their first names.

killed by rival gang members in front of the Blackwell home. While dying, Mr. Rollins was held by Nickelis. Defendants retaliated by shooting at individuals in rival gang territory on two occasions—the night after Mr. Rollins’s murder and the evening following his funeral.

2. July 11, 2006

More than a year prior to Mr. Rollins’s death, Officer Kevin Oberon responded to a shots fired report at the Blackwell residence, 1234 Sherman Avenue in Monrovia. When Officer Oberon arrived, Nickelis’s father, Ricky, Sr., was driving a purple Geo Metro into the driveway. There were four bullet holes in the passenger side of the vehicle. The rear window was shattered. Two expended bullets were found in the street in front of the residence. Officers found two .45 caliber cartridge cases in the driveway. Two bullets were found at a home across the street at about a 45-degree angle from the Blackwell residence.

3. January 14, 2008

Defendants heard their uncle’s killers lived near West Cypress and Primrose Avenues in Monrovia. On January 14, 2008, the day after Mr. Rollins died, as it was getting dark, Nickelis and Rayshawn borrowed Vernon Primmer’s smoke gray Dodge Magnum. Mr. Primmer gave the keys to Rayshawn. Rayshawn got in the driver’s seat. Nickelis sat in the front passenger seat. Mr. Primmer waited at defendants’ house. (Nickelis lived in the home at 1234 Sherman Avenue. Rayshawn visited there. For ease of reference, however, we refer to the Sherman Avenue residence as defendants’ home.)

Also on January 14, 2008, between 7 and 8 p.m., Flavio Duarte and a neighbor, Ambrocio Martinez, were walking on Magnolia Avenue in Monrovia. Mr. Duarte noticed a gray or light brown Dodge Magnum creeping up behind them. The vehicle’s headlights were unlit. When Mr. Duarte and Mr. Martinez turned onto West Cypress

Avenue, the car followed. The Dodge Magnum stopped with the passenger side, which was closest to the two men, about 15 feet away. Mr. Duarte and Mr. Martinez were standing on the sidewalk in front of Mr. Duarte's house. Words were said, but Mr. Duarte did not recall what they were. Shots were fired from the passenger side. The shots were rapid fire, like a machine gun. The assailant held the gun with two hands, one in front of the other. One bullet went through Mr. Martinez's jacket and T-shirt, but he was unharmed. Several bullet holes were found three to five feet above the ground on the front wall of Mr. Duarte's house. The scene of the shooting was less than two minutes from defendants' home. Mr. Martinez's son, Christian Martinez, was later charged with killing Mr. Rollins. Mr. Martinez was afraid to testify at trial because he still lived in the area where the shooting occurred.

Defendants returned home 10 or 15 minutes after they left. Rayshawn stepped from the driver's seat and Nickelis got out of the passenger seat. Rayshawn returned the keys to Mr. Primmer. Mr. Primmer left shortly thereafter. About 10 minutes after the shooting, Officer Philip Nelson saw defendants jogging toward the Blackwell residence. They were coming from the direction of a fellow gang member's house. They did not have anything in their hands. The weapons used in the assault were never found.

Mr. Primmer was stopped by police officers as he was driving onto a freeway. Officers found three .45 caliber cartridge cases on the passenger side floorboard and a fourth near the center console. One hour after the shooting, Mr. Duarte identified Mr. Primmer's Dodge Magnum as the car involved in the shooting. Mr. Primmer was in custody for three to four days. After Mr. Primmer's release, Nickelis left him a phone message saying: "You fucking bitch, you're a fucking snitch. When I see you it's a war."

Dominique Harges was at home on Sherman Avenue the night Mr. Rollins was killed. When he heard the gunshots, Mr. Harges walked outside. Mr. Harges saw Nickelis holding Mr. Rollins. Detective Stewart Levin interviewed Mr. Harges in custody on September 27, 2008. The interview was recorded. Mr. Harges said the night after Mr. Rollins's murder he saw defendants leave their house in the Dodge Magnum.

When they returned, Rayshawn got out of the driver's side and Nickelis stepped from the front passenger seat. Mr. Harges was a reluctant witness at trial. Mr. Harges denied talking to Detective Levin. Mr. Harges denied telling any detectives about seeing defendants get out of Mr. Primmer's car. He denied that the voice on the tape of the recorded interview was his.

Investigating officers found two .45 caliber cartridge cases in the street following the January 14, 2008 incident. A civilian at the scene turned over two additional .45 caliber cartridge cases.

4. January 26, 2008

a. the shooting

On January 26, 2008, three teenagers—Samantha Salas, Jennifer Mandi and Abraham Ramos—had been drinking alcohol and smoking marijuana behind an apartment complex on Peck Road in Monrovia. The apartment complex abutted two gang territories. At about 9 p.m., Ms. Salas, Ms. Mandi and Mr. Ramos walked to the front of the complex and down the sidewalk. Mr. Ramos heard a noise that sounded like firecrackers. When he looked behind them, he saw two men holding guns and backing away. Mr. Ramos heard one separate shot followed by repeated shots, like machine gun fire. Mr. Ramos said one of the guns looked like an Uzi or a submachine gun. The other gun looked like a shiny revolver. The two men ran across Peck Road and turned on Wyland Way.

Ms. Mandi testified that as they were walking, Mr. Ramos looked behind them and then took off running. She heard someone say, "Hey, you, stop running." Ms. Mandi turned around and saw two Black men with guns. They were standing close together on the sidewalk, about 32 feet away. They were pointing their weapons at Ms. Mandi and Ms. Salas. The men were wearing black sweatshirts with hoods and black pants. They had bandannas over their faces. The two men started shooting. There were more than 10

shots. Ms. Mandi described one of the guns as square with a long clip. The bullets sounded like they were coming out really fast and it sprayed everywhere. The other gun was smaller and black.

Patricia Rivera was on a balcony in the apartment complex at the time of the shooting. She heard someone with a deep voice say: "Fucking bitches. Don't mess with [our gang]. That's what you get." Ms. Rivera heard several really fast very loud bangs. She testified: "To me it was like the first shot it was like four, and then the second shot was like so many."

Israel Mendez was walking down the sidewalk outside the apartment building when he heard the gunshots. He ducked between a truck and a car. He heard eight continuous shots. He saw two young men running away. They were dressed in black sweats with hoods. One was wearing a hat. The assailants ran away down Wyland Way.

Irene Wilson lived at the corner of Wyland Way and Graydon Avenue, near the apartment complex. Around 9 p.m., she looked out her French doors and saw a small, black sport utility vehicle with a rack on top parked on Graydon Avenue. When she heard the gunshots, she looked outside again. She saw two men running from the direction of Peck Road. One wore a black sweatshirt with a hood. The hood was over his head. The shorter one wore a round hat with a brim. Both wore black pants. The shorter man looked younger than the taller man, but she could not see their faces. They got into the black sport utility vehicle. The taller one got into the car on the driver's side. The shorter one entered on the passenger side. The car sped off northbound on Graydon Avenue at high speed. The scene of the shooting was three to four minutes from defendants' home.

Ms. Salas was shot eight times in the head, neck, arm, back and thigh. She died as a result of her wounds. She was not a gang member nor was she associated with any gang. Ms. Mandi was shot in the hip. She was in a coma for nearly two weeks. She spent two to three months in the hospital and underwent multiple surgeries.

b. the investigation

Police officers recovered from the scene fifteen .45 caliber cartridge cases, three 9-millimeter cartridge cases, and multiple expended bullets and bullet fragments.

Mr. Ramos identified Nickelis in a photographic lineup. Mr. Ramos had seen defendant in the neighborhood. Mr. Ramos denied stating Nickelis was one of the assailants. Mr. Ramos said Nickelis looked something like one of the two men, but he was guessing. Mr. Ramos identified Rayshawn saying, "This person looks like the guy that shot us." In court, as before, Mr. Ramos testified he had seen Nickelis around the neighborhood. Following the shooting, Mr. Mendez told detectives the two men appeared to be Black or Latino, but he never saw their faces. Mr. Mendez identified Nickelis in a photographic lineup. Mr. Mendez did so based on Nickelis's skin color and general appearance. At the preliminary hearing, Mr. Mendez testified he saw the perpetrators' faces from the side. At trial, Mr. Mendez denied he had seen their faces. Ms. Mandi was unable to identify anyone in the photographic lineups. At trial, she testified defendants had characteristics or qualities similar to the assailants. She said Rayshawn's eyes looked familiar and Nickelis's body type was similar to one of the men.

On November 26, 2008, Detective Timothy Brennan interviewed Douglas Ross. Mr. Ross was in custody on \$50,000 bail. Detective Brennan promised to cite Mr. Ross out of jail. Mr. Ross told Detective Brennan that he was at defendants' home after Mr. Rollins's funeral. Everybody's mind was on revenge. Mr. Ross saw Nickelis, Rayshawn, and a third man identified only as Snipe, put two loaded weapons, an Uzi and a 9-millimeter handgun, in Snipe's green Chevy Monte Carlo four-door vehicle. (The authorities were unable to identify Snipe's true name.) Rayshawn put the bag with the weapons in the trunk. The three men drove away. Snipe was driving. Rayshawn was in the front passenger seat. Nickelis was in the back. When they returned, Nickelis was distraught. He said he killed her, "I laid her down." Rayshawn put his arm around Nickelis and said, "We good, we did this for our uncle." Later, Nickelis told Mr. Ross, "They are never going to find that gun, I got rid of it at the spot." Mr. Ross did not want

to testify at trial. Mr. Ross testified he lied to Detective Brennan; he made up the whole story. When he quoted Nickelis as saying “I laid her down,” he was lying. Mr. Ross claimed he fabricated the story because detectives threatened him by suggesting he might be a suspect in the January 26, 2008 shooting. Also, Mr. Ross was in custody on \$50,000 bail and he was told he would be released if he explained what had happened.

Detective Levin and others executed a search warrant at defendants’ residence on January 29, 2008. Officers found an empty gun case stamped “Intratec Tec-9 Series Made in USA.” They also found a metal magazine for a 9 millimeter Intratec Tec-9 Luger firearm. Mr. Primmer had seen Nickelis fire a weapon that looked like a Tec-9 on an earlier occasion. Officers also searched a black Yukon sport utility vehicle that was parked in front of the Blackwell home. The vehicle was registered to Nickelis’s fraternal twin brother, Ricky, Jr.

Nickelis was arrested on January 6, 2009, more than 100 miles from home. Detective Levin interviewed Nickelis that same day. Initially, Nickelis denied any involvement in the January 14, 2008 shooting. Later, Nickelis admitted he was one of the assailants. He explained that he had heard the people who killed Mr. Rollins lived in that area. He claimed, however, that he was not trying to kill anyone and he just shot his weapon in the air. He knew the victims were not gang members. And he did not want to shoot them. Nickelis denied that he owned a .45 caliber weapon. He claimed to have given the gun used in the shooting to someone else.

Robert Keil, a sheriff’s criminalist, testified the .45 caliber ammunition used in the January 14 and 26, 2008 shootings were fired from the same weapon. The .45 caliber ammunition also matched that recovered following the July 11, 2006 incident when Ricky, Sr.’s car was shot up. (The prosecution theorized that someone at the Blackwell residence had lost control of the Uzi and shot up the car.)

B. Defense Evidence

Mr. Ross testified in Nickelis's defense. Mr. Ross said he decided to implicate defendants after he saw their images in a newspaper.

Detective Edward Godfrey testified concerning the questioning of Mr. Ramos about the January 26, 2008 shooting. Mr. Ramos said he only saw one of the assailants, who might have been Black, but whose face was covered by a bandana. Mr. Ramos also said he thought he saw a chrome revolver, possibly a .357.

Both Tanya Armstrong—Nickelis's sister—and Cedric Wiley—Mr. Rollins's friend—offered alibi evidence. They testified they were with Nickelis throughout the evening of Mr. Rollins's funeral. Further, Nickelis was home all night but for a brief trip out to get food.

III. DISCUSSION

A. Confidential Informants

Defendants argue it was error to refuse to disclose the identities of two confidential informants. The trial court conducted an in camera hearing on July 1, 2010. (Evid. Code, § 1042, subd. (d).) The trial court ruled: “[T]he court reviewed and met with the detectives that had contact with both of the witnesses and informants and the court determined that neither of the informants’ confidential information will be turned over. The court found that there is no exculpatory evidence [for either of] the confidential informant[s] So neither of those witnesses will be disclosed.” We have reviewed the sealed transcript of the in camera hearing. The trial court properly denied defendants’ motion. There was no reasonable possibility nondisclosure might deprive the defendants of a fair trial. (Evid. Code, § 1042, subd. (d); *People v. Lawley* (2002) 27 Cal.4th 102, 160.)

Nickelis argues it was error not to afford him an opportunity to submit written questions to be asked during the in camera hearing. (See *People v. Hobbs* (1994) 7 Cal.4th 948, 973 [search warrant affidavit].) Nickelis forfeited this contention by failing to make such a request in the trial court. (See *Priestly v. Superior Court* (1958) 50 Cal.2d 812, 819 [defendant forfeited claim informant's identity should have been revealed by failing to bring a motion in the trial court]; *People v. Gorg* (1958) 157 Cal.App.2d 515, 520-522 [same].) At trial, Nickelis was represented by Thomas White. Nickelis has not established Mr. White was ineffective for failing to request an opportunity to submit written questions. Even if Mr. White's performance was deficient, there was no prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 694, 697; *People v. Lawley*, *supra*, 27 Cal.4th at p. 136; *People v. Williams* (1988) 44 Cal.3d 883, 937.) The trial court's questioning at the in camera hearing was thorough. The trial court's ruling on the official information privilege has not led to the suppression of any testimony favorable to defendants.

B. Pretrial Motion to Exclude Testimony

Defendants argue they were denied effective assistance of counsel because their lawyer ineptly litigated a pretrial motion to exclude the testimony of Mr. Keil, the sheriff's criminalist. Defense counsel challenged the expected testimony of Mr. Keil. Counsel argued Mr. Keil's opinion that .45 caliber cartridge cases from several shootings were fired from the same firearm was subjective and not supported by acceptable science. The trial court held an Evidence Code section 402 hearing during which Mr. Keil testified concerning his methods. At the conclusion of the hearing, the trial court found there was no evidence Mr. Keil's methods were subject to debate or were an unaccepted practice in the relevant scientific community. The trial court ruled defense counsels' arguments went to the weight of the evidence rather than its admissibility.

We need not determine whether defense counsels' performance was deficient because defendants have failed to establish, as a demonstrable reality, there is a

reasonable probability of a different result. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 694, 697; *People v. Lawley*, *supra*, 27 Cal.4th at p. 136; *People v. Williams*, *supra*, 44 Cal.3d at p. 937.) There is no evidence the trial court misunderstood the legal context of the arguments or improperly applied the law. It is not reasonably probable the decision on the motion would have been more favorable to defendants had trial counsel cited legal authority. And defendants have not shown defense counsel overlooked any evidence Mr. Keil’s specific methods were contrary to accepted practice in the scientific community. Further, the jury was instructed it was not required to accept an expert witness’s testimony. Under the circumstances of this case, defendants’ ineffective assistance of counsel claim would be more properly raised, if at all, in a habeas corpus petition. (*People v. Vines* (2011) 51 Cal.4th 830, 876; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

C. Aider And Abettor Liability

Rayshawn argues the trial court committed reversible federal constitutional error by failing to properly instruct the jury on the mental state necessary for aider and abettor liability for murder and attempted murder.³ Defendant contends CALCRIM No. 400 was misleading insofar as it described an aider and abettor as “equally guilty” with the perpetrator; an aider and abettor may be found guilty of a lesser homicide-related offense than that committed by the actual perpetrator. (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165.) Defendant asserts the evidence connecting him to the two shootings was weak and the jury could have found he had no intent to kill—he intended only to scare the victims or to send a

³ Nickelis joined in Rayshawn’s arguments on appeal. However, Nickelis has not argued the aider and abettor instruction was misleading as applied to *his* circumstances. Therefore, we consider the aider and abettor instruction issue only as to Rayshawn. (*People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11.)

message to a rival gang. CALCRIM No. 400 is a generally correct statement of law. (*People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1163-1164; see *People v. Lopez*, *supra*, 198 Cal.App.4th at p. 1118.) Defendant forfeited his contention by failing to object to the instruction, or to request modification or clarification. (*People v. Lopez*, *supra*, 198 Cal.App.4th at pp. 1118-1119; *People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1163.)

Even if the issue were properly before us, we would find any error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Nero*, *supra*, 181 Cal.App.4th at pp. 518-519; *People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1165.) The jury necessarily resolved the question of Rayshawn's intent under other instructions. The jury was instructed that to find a defendant guilty of murder or attempted murder required a specific intent or mental state: "For you to find a person guilty of these crime[s] . . . that person must not only intentionally commit the prohibited act, but must do so with a specific intent or mental state. The act and the specific intent or mental state required are explained in the instruction for that crime" (CALCRIM No. 252.) The jury was instructed that to find a defendant guilty of first degree murder or attempted murder, it must find the accused acted willfully, deliberately and with premeditation: "The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before committing the act that caused death." Moreover, the jury was further instructed a defendant is guilty of a crime based on aiding and abetting only if: "1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

The jury is presumed to have understood and followed the instructions. (*People v. Ledesma* (2006) 39 Cal.4th 641, 718; *People v. Sanchez* (2001) 26 Cal.4th 834, 852.) The jury found Rayshawn guilty of first degree murder and willful, deliberate, premeditated attempted murder. The jury necessarily concluded Rayshawn had an intent to kill. As instructed, the jury could not have concluded Rayshawn knew of Nickelis's intent to murder and intended to aid in that crime without also intending to kill. (See *People v. Lopez, supra*, 198 Cal.App.4th at pp. 1119-1120; *People v. Samaniego, supra*, 172 Cal.App.4th at pp. 1165-1166.)

D. Sentencing Issues

1. Assessments and Fees

The trial court orally imposed a \$30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)) and a \$30 court security fee (§ 1465.8, subd. (a)(1)) as to each of the two defendants. However, the trial court was required to impose the court facilities assessment and the court security fee as to *each count* of which each of the defendants was convicted. (*People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3 [court facilities assessment]; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866 [court security fee].) The judgment as to Nickelis must be amended to reflect \$210 in court facilities assessments and \$210 in court security fees. The judgment as to Rayshawn must be amended to reflect \$180 in court facilities assessments and \$180 in court security fees.

2. Presentence Custody Credit

Nickelis was arrested on January 6, 2009, and sentenced on October 13, 2010. The trial court awarded him 645 days of credit for actual presentence custody. He should have received credit for 646 days. (*People v. Smith* (1989) 211 Cal.App.3d 523, 525-527.) The judgment must be modified to so reflect.

3. The abstracts of judgment

This court may correct an abstract of judgment that does not accurately reflect the oral judgment of the sentencing court. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. High* (2004) 119 Cal.App.4th 1192, 1200.) Nickelis's abstract of judgment must be corrected to reflect that the: section 12022.53 subdivision (b) and (c) enhancements were imposed and stayed as to counts 2 and 3; section 12022.53, subdivision (b) enhancements were imposed and stayed as to counts 6 and 7; and section 186.22, subdivision (b)(1)(A) enhancements were imposed as to counts 5 and 8, not counts 1 and 8. Rayshawn's abstract of judgment must be corrected to reflect that: the enhancement on counts 6 and 7 was pursuant to section 12022.53, subdivisions (c) and (e)(1); as to counts 2 and 3 the section 12022.53, subdivisions (b) and (c) enhancements were imposed and stayed; and the three-year section 186.22, subdivision (b)(1)(A) enhancement was imposed as to count 4 rather than count 1. The trial court is to actively and personally insure the clerk accurately prepares a correct amended abstract of judgment which reflects the modifications to the judgment and abstract of judgment we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* ((2005) 128 Cal.App.4th 408, 425-426.)

IV. DISPOSITION

The judgment as to defendant, Nickelis Darnell Blackwell, is amended to reflect \$210 in court facilities assessments, \$210 in court security fees, and 646 days of actual presentence custody credit. The judgment as to defendant, Rayshawn Blackwell, is amended to reflect \$180 in court facilities assessments and \$180 in court security fees.

The judgments are affirmed in all other respects. Upon remittitur issuance, the abstracts of judgment must be amended consistent with the foregoing and part III(D)(3) of this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.