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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. REGINALD MARTIN, Defendant and Appellant.	A125400 (Alameda County Super. Ct. No. C159213)

Defendant Reginald Martin appeals his jury-trial conviction for the first-degree murder of Travis Vaughn. Defendant contends: (1) the trial court erred by denying his *Batson-Wheeler* motion after the prosecutor exercised a peremptory challenge to remove an African-American member of the jury pool;[1] (2) the trial court erred by admitting evidence that defendant possessed firearms. We affirm.

PROCEDURAL BACKGROUND

In October 2008, the Alameda County District Attorney (DA) filed an information accusing defendant in count one of murdering Travis Vaughn with malice aforethought on or about April 20, 2001, in violation of Penal Code section 187, subdivision (a).[2] In count two of the information, the DA accused defendant of attempting to murder Kenshon Smith with malice aforethought on or about March 15, 2000. In regard to both

[1] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

[2] Further statutory references are to the Penal Code unless otherwise noted.

counts, the information alleged that defendant personally discharged a firearm causing great bodily injury (§§ 12022.7, subd. (a), 12022.53, subd. (c) and 12022.53, subd. (d)) and personally used a firearm (§§ 12022.5, subd. (a) and 12022.53, subd. (b)). With respect to count two, the information further alleged that defendant committed attempted murder willfully, deliberately and with premeditation (§ 664, subd. (a)).

On February 11, 2009, the jury found defendant guilty of first degree murder of Travis Vaughn and found true the allegation that defendant personally and intentionally discharged a firearm in the commission of the offense. The jury found defendant not guilty of the attempted murder of Kenshon Smith as charged in count two.

On May 8, 2009, the trial court sentenced defendant to a term of fifty years-to-life in state prison. Defendant filed a timely notice of appeal on July 6, 2009.

FACTUAL BACKGROUND

The evidence introduced at trial, viewed in the light most favorable to the judgment, showed the following facts relating to the murder of Travis Vaughn:[3] On the evening of April 20, 2001, Barbara Cockerham was driving home via Market Street in Oakland. As she approached the intersection of Market and 53rd Street, Cockerham heard three gunshots. Within seconds of hearing the gunshots, Cockerham made a left turn onto 53rd Street and could see the entire block down to Adelaide Street. The block was deserted, no one was walking or running along the sidewalk and there were no other vehicles driving on 53rd Street. Cockerham noticed the body of a man lying on the sidewalk to her left. Thinking the man might need assistance, Cockerham pulled over and called the police. The 911 dispatch center received Cockerham's call at 9:46 p.m. and police and ambulance services were dispatched to the scene.

Upon their arrival, police officers found Travis Vaughn lying outside of the residence located at 923 53rd Street bleeding from gunshot wounds. Vaughn was transported to Highland Hospital and died a week later from his wounds. An autopsy

[3] Facts relating to the charge of attempted murder in count two are not discussed here as they are not relevant to the resolution of the issues raised in this appeal.

subsequently revealed that a bullet entered Vaughn's mouth and lodged in his spine. This bullet wound to the mouth rendered Vaughn instantly quadriplegic and was identified by the county coroner as the cause of death.

As part of the investigation conducted at the scene, one of the officers recorded the license plate number of a blue Cadillac, license No. 3KNT719, parked on the street in front of 923 53rd street. A subsequent Department of Motor Vehicles search showed the vehicle was registered to defendant and listed his address as 923 53rd Street. Police also collected and examined the victim's clothes, which ambulance personnel had cut from his body. A spent bullet was recovered amongst the victim's clothes. Police also recovered part of a "metal jacket" bullet casing on the sidewalk near the victim's head. At trial, a police firearms and ballistics expert testified that the bullet found in the victims clothes, the metal jacket fragment recovered from the sidewalk near the victim, as well as the bullet removed from the victim's spine during the autopsy were separate .38 special or .357 Magnum full metal jacketed bullets. All three bullets were fired from the same gun. The gun was either a .357 or .38 revolver. The firearms expert also testified that a .38 special, a .357 and a .44 revolver could look the same to an observer because the models could differ only in the diameter of the muzzle.

Police investigators also interviewed and obtained a statement from Paul Scott in connection with Vaughn's murder. In his statement, Scott said that he knew both the victim and defendant, and described the apartment where defendant lived on 53rd Street. Scott described an occasion, a few months prior to Vaughn's murder, where defendant drove up and pulled along side of Scott. From his vantage point looking into the car, Scott saw a black .357 revolver with a brown wooden grip lying in defendant's lap. Scott knew defendant sold drugs and assumed the gun was for his protection. Scott used to see defendant every day but since the shooting in question had seen him only once. According to Scott, defendant and the victim were good friends until Vaughn recently started "messing up" on drugs.

On the night of the Vaughn shooting, Scott was standing on San Pablo at 54th Street when he heard three or four gunshots. A few minutes later, Scott heard sirens and

saw police cars heading towards the scene. He went to see what was happening and was able to tell that there was a body on the street but he couldn't get close enough to identify the victim because police had the area cordoned off. Scott thought the defendant was the victim of the shooting because the body was lying right outside defendant's residence. However, several people at the scene told Scott that the victim was Vaughn.

Two or three days after the Vaughn shooting, Scott saw defendant at the store located at 54th and Adeline. Scott said something like, "What's up, man, I thought you had got shot." Defendant replied, "I don't get shot at, I do the shooting." Defendant told Scott that he and Vaughn got in an argument over money issues and because Vaughn had been "messing up" on drugs. Defendant said his sister thought Vaughn had a gun so she ran to fetch defendant's gun and gave it to him. According to defendant, one thing then led to another, "and I just popped him." Defendant also told Scott he was in a fix and was planning to flee Oakland. Scott stated he had not seen defendant since their meeting at the store.

On February 20, 2004, police arrested defendant's sister Rashonda Martin[4] on suspicion of attempted robbery of Lance Hurd, her ex-boyfriend. After interviewing Rashonda about the theft, police decided not to proceed with the investigation because the incident arose from a "love triangle" and the victim was not credible. However, the interviewing detective realized that Rashonda was defendant's sister and he also knew that defendant was a suspect in the Vaughn shooting. Therefore, he decided to ask Rashonda if she knew anything about the murder. After questioning her about the Vaughn murder, police took a recorded statement from Rashonda at 4:43 a.m. on February 21, 2004.

In her statement, Rashonda provided the following information: Rashonda and her family have lived at 923 53rd Street for almost 20 years. Defendant and the victim have been best friends since they were 16 years old. On the night of the shooting, Rashonda was at home with her sister Aleanna, her mother Brenda, and her step-father, Keith

[4] We will refer to Rashonda Martin by her first name to avoid any confusion with defendant Reginald Martin.

Kemp. At some point, defendant called and said, "I just need you to get my gun. Somebody's after me." Rashonda went to defendant's room and retrieved the gun from under his bed, where defendant told her it would be. The gun, a black revolver, was wrapped in a towel. Rashonda went outside with the gun just as defendant was pulling up in his blue Cadillac. Defendant parked in front of the house, rushed up to the front porch and took the gun from Rashonda. At the same time, Rashonda saw Travis Vaughn running down the street from the direction of Market. Defendant told Vaughn, "Get away from my house. I'm not going to tell you again." Vaughn replied, "Oh, you just gonna have to shoot me." Defendant shot Vaughn and Rashonda saw Vaughn twirl around. At that point, she ran into the house. Rashonda stated that after the shooting defendant must have run into the back yard, because a few minutes later she opened the back door and defendant came into the kitchen. He did not have the gun at that point.[5]

On January 9, 2008, Oakland police officers interviewed defendant's father, Reginald Martin, Sr. (Martin Senior), at his home in Woodland. Martin Senior told the officers he used to live in New Orleans. During Martin Senior's time in New Orleans, defendant lived with him for about three months. About a month after defendant began living with him in New Orleans, Martin Senior noticed defendant was crying and asked him what was wrong. Defendant said he shot a guy three times with a .44 Magnum. Defendant told his father that when the victim came around to the house he (defendant) motioned to his sister Rashonda to get his gun. After defendant and the victim began arguing, defendant lost his temper and shot the victim three times, including once in the head. Defendant told Martin Senior that the shooting occurred right outside the house at 923 53rd Street and that Rashonda saw it happen. Martin Senior said he knew the victim because the victim and defendant went to junior high school together. Martin Senior also said that he was familiar with the .44 Magnum in question: He stated, "I have seen the gun. I have held the gun in my hand." Martin Senior stated he only knew about the

[5] The murder weapon was never recovered.

Vaughn shooting because defendant told him about it: Martin Senior never read anything about the shooting or talked to Rashonda about it.

In a search of defendant's apartment subsequent to his arrest, police found a Louisiana driver's license issued in defendant's name and bearing his photograph. Defendant's Louisiana driver's license was issued on May 11, 2001, about three weeks after Vaughn's murder.

On January 22, 2008, the DA filed a complaint charging defendant with the murder of Travis Vaughn. Paul Scott, Rashonda Martin and Martin Senior all appeared at trial as witnesses for the prosecution. All three professed a reluctance to testify and recanted his or her pre-trial statement. Rashonda and Martin Senior testified that they did not tell the truth when they spoke to the police about the Vaughn murder and Scott disavowed all memory of what he told the police about the matter. The prosecutor played the taped statement of each of these three witnesses to the jury. The jury was provided with copies of the transcript of each of the interviews to assist them in listening to the tapes.

DISCUSSION

Defendant challenges the judgment on two grounds. First, defendant contends his state and federal constitutional rights were violated when the prosecutor exercised a peremptory challenge to remove an African-American member of the jury pool (Juror M.) without a race-neutral justification. Second, defendant contends the trial court committed prejudicial error by allowing evidence of defendant's possession of firearms. We address each issue in turn.

A. Denial of Defendant's *Batson-Wheeler* Motion

1. Background

Voir dire of the jury began with 18 prospective jurors. After questioning the first 18 prospective jurors, each side exercised 3 peremptory challenges and another six prospective jurors were seated. Juror M. was not among the jurors seated in this group. After further questioning, the parties engaged in a second round of peremptory

challenges. Again, each side exercised three additional challenges and thereafter the trial court seated six more jurors. Juror M. was among the prospective jurors seated in the latter group. Voir dire continued and the prosecutor questioned Juror M. in pertinent part as follows:

"Prosecutor: Your daughter works for the Oakland Police Department?

Juror M.: Yes, she does.

Prosecutor: She still works there?

Juror M.: Yes.

Prosecutor: And she's a police officer?

Juror M.: Yes, she is.

Prosecutor: I don't want to assume, but do you have positive feelings about the Oakland Police Department because of that?

Juror M.: Well it's a choice that she made. I don't get involved with the choices she's made to be a police officer.

Prosecutor: I mean all things considered, would you rather her not be a police officer?

Juror M.: Again, she made that choice, and she's making me feel that, and she's chosen this profession and for me not to worry."

Subsequently, defense counsel followed up with another question to Juror M. about her daughter as follows:

"Counsel: [Juror M.], you seem to hesitate about how do you feel about your daughter being an Oakland police officer. Was your hesitation because it is a job that is potentially dangerous or are there other concerns that you had?

Juror M.: Well, it is a dangerous job, but she's chosen to be a police officer.

[¶] . . . . [¶]

Counsel: In terms of the fact that your daughter is a police officer, do you think that you are going to think that a police officer is going to be more honest –

Juror M.: No.

Counsel: - - than somebody who just works on the street?

Juror M.: No."

After questioning Juror M. and some further questioning of seated jurors, the parties exercised additional challenges in a third and fourth round of challenges. The prosecution did not challenge Juror M. in the third or fourth round of preemptory challenges. The court filled the jury box with six additional prospective jurors after each round of challenges. In the fifth round of challenges, defense counsel exercised six peremptory challenges and the prosecutor passed the jury six times with Juror M. seated in the jury box. In the sixth round, defense counsel exercised her remaining two challenges and the prosecutor excused Juror M. exercising his sixteenth peremptory challenge. Defense counsel's *Batson-Wheeler* motion followed.

2. Applicable Legal Standards

The use of peremptory challenges to exclude prospective jurors based on race violates the right to trial by a jury drawn from a representative cross-section of the community under the California Constitution, as well as the equal protection clause of the federal Constitution. (See *People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*); *People v. Burgener* (2003) 29 Cal.4th 833, 863 (*Burgener*).) Trial courts employ a three-step inquiry to determine the merits of claims under the state and federal Constitutions that the prosecutor used a peremptory challenge to exclude a prospective juror based on race: "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. (Citation.)" (*Lenix, supra,* 44 Cal.4th at pp. 612-613.)

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. (Citation.) 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges " ' "with great restraint." ' [Citation.]" We presume that a prosecutor uses peremptory challenges in a constitutional manner and

give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' (Citation.)" (*Lenix, supra,* 44 Cal.4th at pp. 613-614.)

3. Analysis

Here, defendant objected to the prosecutor's exercise of a peremptory challenge to remove Juror M., an African-American prospective juror, from the jury pool. In step one of the *Batson-Wheeler* analysis, the trial court found an inference that Juror M. was excluded based on her racial identity. Accordingly, the trial court proceeded to step two of the analysis and asked the prosecutor to explain the basis for his challenge.

At this step, a prosecutor asked to explain his conduct "must provide a ' "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' (Citation.) 'The justification need not support a challenge for *cause*, and even a "trivial" reason, if genuine and neutral, will suffice.' (Citation.) A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. (Citations.)" (*Lenix, supra,* 44 Cal.4th at p. 613.)

Here, the prosecutor stated race-neutral reasons with respect to the exercise of a peremptory challenge against Juror M. The prosecutor classified his reasons as "subjective" and "objective." His subjective reason for exercising the peremptory challenge at issue was Juror M.'s "odd way" of describing her response to the fact that her daughter worked for the Oakland Police Department. In this regard, the prosecutor noted that Juror M. described her daughter's position as a police officer "as a choice that her daughter made" and did not express "a sense of pride and joy" that her daughter was a police officer. The prosecutor apprised the court that this response led him to believe that Juror M. "disapproved of her daughter's choice or that she was not happy that [her daughter] was with the police department." The "objective" reasons offered by the prosecutor in defense of his peremptory challenge to Juror M. were that he passed the jury six times while Juror M. was on the panel, the challenge was a strategic choice because he had unused peremptory challenges and preferred another juror who was not

yet on the panel, and an African-American woman remained on the jury after he challenged Juror M. We find that the prosecutor met his obligation at the second stage of the *Batson-Wheeler* enquiry to provide a " ' "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' (Citation.)" (*Lenix, supra,* 44 Cal.4th at p. 613.)

At the third and final step of the *Batson-Wheeler* inquiry, " 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' (Citation.) In assessing credibility, the court draws upon its contemporaneous observations of the voir dire." (*Lenix, supra,* 44 Cal.4th at p. 613, fn. omitted.)

In this case, the trial court ruled in favor of the prosecutor at the third stage of the *Batson-Wheeler* inquiry, concluding that his proffered race-neutral explanations were credible and sincere. The trial court ruled as follows: "Based on my observations of [the prosecutor's] conduct throughout jury selection, the fact that he had passed this juror a number of times, thereby having a willingness to have her on the jury, I do not find his ultimate peremptory challenge of her to be based on a motion [sic] of discrimination against an African-American." The court added that "the ultimate analysis is whether the explanation given by the prosecutor is pretextable. My analysis based on a comparable analysis of all the jurors that were excluded by the prosecutor and were not excused by the jury [sic] convinces me that the prosecutor's proffered reasons were not pretextable and that there was not a discriminatory motive for the excuse. So that is my ruling."

Defendant argues that the prosecutor's proffered explanations for exercising a peremptory challenge against Juror M. were pretexts designed to disguise racial prejudice. The trial court found to the contrary. That finding is reasonable and supported by substantial evidence. Juror M.'s responses to questions probing her attitude towards her daughter being an Oakland police officer were non-responsive. The record shows that she did not give a direct answer to the prosecutor's specific question about whether

she had positive feelings about law enforcement because her daughter was a police officer. On account of Juror M.'s non-responsiveness, the prosecutor harbored doubts about whether Juror M. disapproved of her daughter being a police officer. Moreover, the trial court evaluated the prosecutor's stated reasons in light of the prosecutor's conduct and demeanor throughout jury selection (see *Lenix, supra,* 44 Cal.4th at p. 613), and whether the prosecution's pattern of excusals and acceptances during the peremptory challenge process revealed any discriminatory intent towards African-American jurors, (see *People v. Carasi* (2008) 44 Cal.4th 1263, 1294-1295 [examining the prosecution's "pattern of excusals and acceptances during the peremptory challenge process" for any "obvious discrimination towards female jurors"]). In short, the record reflects the trial court made a "sincere and reasoned effort to evaluate the nondiscriminatory justifications offered." (*Burgener, supra,* 29 Cal.4th at p. 864.) Accordingly, the trial court's conclusion that the prosecutor's reasons were sincere is entitled to deference on appeal. (*Ibid.*)

Furthermore, the grounds on which defendant asks this court to reject the conclusion reached by the trial court regarding the prosecutor's challenge to Juror M. are not persuasive. According to defendant, the prosecutor's racial animus is shown by (1) the fact that Juror M. was "a prototypical prosecution-orientated juror"; (2) the fact that the prosecutor remarked that he "actually liked [Juror M.]," found her to be a "perfectly acceptable juror" but "preferred" another prospective juror; and, (3) comparative juror analysis shows that the prosecutor did not challenge two Caucasian jurors "who had strong ties to law enforcement, and who both ultimately remained on the jury."

First, defendant's characterization of Juror M. as "a prototypical prosecution-orientated juror" is beside the point. The prosecutor challenged Juror M. because, based on the non-responsive nature of Juror M.'s answers to his questions about her daughter being a police officer, he believed that Juror M. "disapproved of her daughter's choice or that she was not happy that [her daughter] was with the police department." The prosecutor was entitled to exercise a challenge on this nondiscriminatory basis. (See

Lenix, supra, 44 Cal.4th at p. 613 ["A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. (Citations.)"].) Second, the validity of the prosecutor's nondiscriminatory response is not undermined by his prefatory statement that he "actually liked [Juror M.]." Third, defendant's comparative juror analysis lacks merit. Comparative juror analysis involves a comparison of challenged prospective jurors and seated jurors (see *Miller-El v. Dretke* (2005) 545 U.S. 231, 241) and is "one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination," (*Lenix, supra,* 44 Cal.4th at p. 622). Here, defendant asserts that the prosecutor's proffered reason for striking Juror M. applied just as well to two Caucasian jurors (Juror No. 7 and Juror No. 10) who were ultimately seated on the jury. Defendant is correct that Jurors 7 and 10, like Juror M., "had strong ties to law enforcement." However, the answers provided by Jurors 7 and 10 to the prosecutors questions, unlike the non-responsive answers given by Juror M., were completely positive regarding their ties to law enforcement.[6] Therefore, contrary to defendant's assertion, Juror M. and Jurors 7 and 10 were not similarly situated on this issue. Thus, defendant's comparative juror analysis necessarily fails. (Cf. *Miller-El v. Dretke, supra,* 545 U.S. at p. 241 ["If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step"].)

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[6] Juror No. 7's husband was a Santa Clara City Police Officer from 1975-1980. In response to a question in the written questionnaire regarding how she felt in general about law enforcement officers, Juror 7 replied that law enforcement officers "are heroes every day they go to work." Juror No. 10 stated in her questionnaire that her father "was a sheriff." In response to the question about her feelings towards law enforcement officers, Juror 10 replied that she felt "positively" towards them. In her written response to this question, Juror M. stated she has "great respect for what they have chosen to do." Juror M.'s emphasis on police officers doing "what they have chosen to do" echoes her oral responses to the prosecutor's questions regarding her daughter's position as a police officer.

In sum, defendant has failed to carry the "ultimate burden of persuasion" on the question of whether the prosecutor's challenge to Juror M. was racially motivated. (*Lenix, supra,* 44 Cal.4th at pp. 612-613.) Accordingly, we reject defendant's *Batson-Wheeler* challenge as a basis for overturning the judgment.

B. Evidence of Defendant's Possession of a Firearm

Defendant contends that the trial court committed prejudicial error, amounting to a violation of his right to due process under the federal Constitution and resulting in a miscarriage of justice under the state Constitution, when it admitted witness testimony that defendant possessed a handgun which was not positively identified as the murder weapon. Specifically, defendant challenges: (1) the introduction of Paul Scott's pre-trial statement that he saw defendant with a .357 firearm three or four months before the Vaughn murder; and, (2) the introduction of Martin Senior's pre-trial statement that he was familiar with a .44 magnum firearm owned by defendant. Defendant characterizes this testimony as evidence of criminal propensity, which the trial court erroneously admitted under Evidence Code section 1101, subdivision (b). We find defendant's contentions meritless.

Preliminarily, Martin Senior's statement that defendant told him that he [defendant] shot the murder victim three times with a .44 Magnum was a confession to the crime and properly admissible under Evidence Code section 1200. In relating defendant's confession, however, Martin Senior also stated, "I'm familiar with the gun. I have seen the gun. I have held the gun in my hand." It may be inferred from the preceding remarks that Martin Senior had access to the .44 firearm because it was in defendant's possession. Likewise, Paul Scott stated he saw defendant in possession of a .357 handgun a few months before Vaughn's murder. Further, evidence adduced at trial established that the murder weapon was either a .357 or .38 handgun, and that both those weapons can easily be mistaken for a .44 magnum handgun. Therefore, whereas neither Martin Senior's statement nor Paul Scott's statement established that the weapon they saw in defendant's possession "necessarily was the murder weapon, it might have been." (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1052 (*Carpenter*).) Accordingly, their

statements "did not merely show that defendant was a person who possesses guns," but showed that near the time of the murder he possessed a gun that might have been the murder weapon. (*Ibid.*) "The evidence was thus relevant and admissible as circumstantial evidence that he committed" the crime. (*Ibid.*)

In sum, because evidence that a witness saw the defendant in possession of a gun that could have been the murder weapon is relevant and admissible as circumstantial evidence of commission of the crime (*Carpenter, supra*, 21 Cal.4th at p. 1052), the trial court did not err in admitting the statements of Martin Senior and Paul Scott relating to defendant's possession of firearms. Moreover, because we conclude the trial court's evidentiary rulings were correct on this matter, defendant's attendant constitutional claims also fail. (See *People v. Panah* (2005) 35 Cal.4th 395, 482, fn. 31.)

DISPOSITION

The judgment is affirmed.

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Jenkins, J.

We concur:

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Pollak, Acting P. J.

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Siggins, J.