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Washington State
Court of Appeals
Division Two

February 6, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTIAN ATLEY NEWTON, Appellant.	No. 49486-8-II UNPUBLISHED OPINION

JOHANSON, J. — Christian Atley Newton appeals his jury trial conviction for second degree burglary. He argues that (1) the trial court erred when it admitted statements he made to an officer during a second police interrogation following his invocation of his right to silence, (2) the trial court erred in admitting a trespass notification purportedly signed by him because there was no evidence establishing that he was the person who signed the notice, (3) the evidence was insufficient to support his conviction because there was no evidence that he was unlawfully on the premises, and (4) trial counsel's failure to object when the State elicited evidence that Newton had invoked his right to silence was ineffective assistance of counsel. In a pro se statement of additional grounds (SAG), Newton also challenges the admission of certain late-disclosed evidence during trial and contends that the prosecutor has a history of improper behavior. We hold that (1) because Newton's statement was spontaneous and not in response to interrogation, the trial court did not err when it admitted the statement, (2) Newton fails to establish that the trial court

erred when it admitted the trespass notification, (3) the evidence was sufficient to support the conviction, and (4) Newton does not establish ineffective assistance of counsel because he does not show that his counsel's failure to object was prejudicial. In addition, we do not reach the issues in Newton's SAG because he either fails to identify the issue sufficiently or the issue relates to matters outside the appellate record. Accordingly, we affirm.

FACTS

I. BACKGROUND

A. BURGLARY

On November 3, 2015, Abigayle Frias was working in the asset protection department of a Walmart when she saw Newton and Matthew Perron enter the store. Recognizing Perron from a prior incident, Frias contacted law enforcement and went out onto the sales floor to watch Newton and Perron.

Frias watched as Newton walked through the store and placed several items in a reusable store bag that he was carrying. Newton eventually walked past the cash registers towards an exit door.

As Newton passed through the first exit door leading to a foyer and approached the second exit door that led outside, Corporal Steve Timmons and his partner from the Aberdeen Police Department came up behind Newton. When Corporal Timmons's partner grabbed Newton's arm, Newton pulled away, dropped the bag containing the merchandise just inside the store, and tried to run. The officers caught Newton and took him to the ground. After a brief struggle, the officers handcuffed Newton, arrested him, and transported him to jail.

After Newton's arrest, Frias reviewed the store's files of previous shoplifters and, after searching the file by Newton's name, located a photograph of Newton among the photographs and a trespass notice excluding "Christian A. Newton" from Walmart property. Report of Proceedings (RP) (Dec. 11, 15, 16, 2015) at 62.

B. NEWTON'S POSTARREST STATEMENTS

At the jail, Corporal Timmons attempted to interview Newton. Corporal Timmons read Newton his *Miranda*[1] rights. Newton acknowledged that he understood his rights and invoked his right to silence. Corporal Timmons ended the interview and returned Newton to his cell.

About 45 minutes later, Sergeant Ross Lampky went to the jail to attempt to ask Newton about the officers' use of force during the arrest. Sergeant Lampky reminded Newton of his *Miranda* rights and told him that he wanted to talk about the two officers' use of force during the arrest and to determine if Newton had any injuries.

According to Sergeant Lampky, on the way to the interview room and not in response to any questioning, Newton admitted that he had tried to steal items from Walmart and asked if this interview would help him obtain some leniency. Sergeant Lampky responded that Newton probably knew more about the process than he (Sergeant Lampky) did and that part of the process would be "between the court [and] his attorney." RP (Dec. 11, 15, 16, 2015) at 18. Sergeant Lampky then interviewed Newton about the use of force and any injuries, photographed Newton's back, and gave Newton some ibuprofen.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

II. PROCEDURE

The State charged Newton with second degree burglary. Newton moved to suppress his statement to Sergeant Lampky.

A. SUPPRESSION HEARING

At the suppression hearing, Corporal Timmons and Sergeant Lampky testified about their interviews with Newton as described above. In addition, Sergeant Lampky testified about his department's use-of-force protocol.

Sergeant Lampky testified that the use-of-force protocol and the questions he asked Newton were intended to determine whether there were any "issues with the force," any risk exposure for the department and the city, and any injuries that needed to be addressed. RP (Dec. 11, 15, 16, 2015) at 14. Sergeant Lampky further stated that a use-of-force interview is different than a routine or suspect interview and denied having attempted to conduct a "[s]uspect interview" or asking any questions related to Newton's guilt or why he was in the store. RP (Dec. 11, 15, 16, 2015) at 16.

Newton also testified at the suppression hearing. Newton confirmed that Corporal Timmons had advised him of his *Miranda* rights, that he (Newton) had understood his rights, that he had declined to make a statement, and that he was then returned to his cell.

Newton further testified that Sergeant Lampky did not read him his rights and did not tell him (Newton) why he was being taken to an interview room. Newton testified that Sergeant Lampky just took him to the interview room and "asked [him] . . . well what happened with the officers?" RP (Dec. 11, 15, 16, 2015) at 25. Newton stated that he told the sergeant that the officers kneed him in the groin and stomped on his back. Newton further testified that at one point

Sergeant Lampky asked him if there was anything else Newton wanted to say, which Newton interpreted as an open-ended question about the incident in general. Newton stated that he responded, "[W]hat do you want me to do, tell you that I stole and I am guilty?" RP (Dec. 11, 15, 16, 2015) at 25.

The trial court denied the motion to suppress and issued the following findings of fact and conclusions of law:

> **UNDISPUTED FACTS**
>
> . . . .
>
> 4.
>
> The Defendant was transported to the Aberdeen Police Department. Corporal Timmons later contacted the Defendant at the Aberdeen jail and read the Defendant his *Miranda* rights.
>
> 5.
>
> The Defendant acknowledged that he understood his rights, both verbally and by signing an Advisement to [sic] Rights form. The Defendant told Corporal Timmons that he did not want to talk. The Defendant did not request an attorney[.]
>
> 6.
>
> Sergeant Lampky later contacted the Defendant related to a Use of Force Interview[.] Sergeant Lampky reminded the Defendant that he had previously been advised of his rights and that he had declined to be interviewed by Corporal Timmons.
>
> 7[.]
>
> Sergeant Lampky advised the Defendant that he was there to interview him about the circumstances of his arrest related to the force used by the officers to detain him. The Defendant stated that he understood.
>
> 8.
>
> Sergeant Lampky advised the Defendant that he could not make him any offers, that the Defendant knew how the system worked, and that any leniency or alterations to the charges would be at the discretion of his attorney and the courts.
>
> 9[.]
>
> The Defendant then advised that he did not wish to make a statement other than to say he had been kneed in the balls by the "Asian guy[.]"
>
> 10.
>
> Sergeant Lampky asked the Defendant questions related to his injuries and about the Defendant allegedly grabbing Corporal Timmons near his holster during his arrest. The Defendant stated that his upper back and balls hurt and denied trying to grab anything, stating that he had only been trying to stop himself from falling during his arrest.

DISPUTED FACTS

1[.]

It was disputed whether or not Mr. Newton [was] interrogated by Sergeant Lampky[.]

2.

It was disputed that before Sergeant Lampky asked him any questions, the Defendant stated that he was guilty and that he did steal from Walmart. It was further disputed that the Defendant also asked Sergeant Lampky if the interview would help him in any way with the charges.

Based upon the foregoing findings of fact, the court enters the following:

CONCLUSIONS OF LAW

. . . .

2.

The Defendant was read his *Miranda* rights by Corporal Timmons prior to any attempt to question him.

3.

The Defendant invoked his right to remain silent with regard to speaking to Corporal Timmons.

4.

An invocation of rights, including the right to remain silent, does not restrict officers from re-contacting a defendant. Sergeant Lampky's contact with the Defendant for a Use of Force Interview was not a violation of the Defendant's rights.

5.

It was Sergeant Lampky's intention to conduct a Use of Force Interview[.]

6.

Sergeant Lampky did not conduct an interrogation.

7[.]

The Defendant's statements to Sergeant Lampky that he was guilty and that he stole from Walmart and his inquiry as to whether the interview would help the Defendant in any way with the charges were made and not the result of an interrogation by Sergeant Lampky[.]

8.

The Defendant's statements to Sergeant Lampky are admissible.

Clerk's Papers (CP) at 43-46. The case then proceeded to trial.

B. TRIAL

The State presented testimony from Frias, Corporal Timmons, and Sergeant Lampky. Newton did not present any witnesses.

1. FRIAS'S TESTIMONY AND INTRODUCTION OF TRESPASS NOTICE

In addition to testifying to the facts above, Frias testified about Walmart's trespassing process and how the store kept the records related to the trespass notices and shoplifters. Frias testified that records of every shoplifting case were maintained in a computer database and in binders. These records included copies of trespass notices and photographs of the shoplifters. Frias also testified that after the officers arrested Newton, she returned to her office, searched Newton's name, and found a photograph that she recognized as Newton "in [the store's] pictures." RP (Dec. 11, 15, 16, 2015) at 57.

Newton objected to Frias's testimony about any file or photograph of Newton, arguing that this evidence had not been introduced and was "hearsay" because it was not based on her personal knowledge and that there was no evidence establishing that Newton had signed the trespass notice, which was signed by a "Christian A. Newton" rather than "Christopher Atley Newton."

The State argued that the trespass notice was admissible as a business record. The State asserted that it was admissible but that Newton could argue that it was not signed by him. The trial court admitted the trespass notice.

During Frias's testimony, Frias also described video clips of the incident as they were played for the jury.

2. CORPORAL TIMMONS'S TESTIMONY

As he did in the suppression hearing, Corporal Timmons testified that he had advised Newton of his *Miranda* rights and attempted to interview him. The State asked Corporal Timmons how Newton responded to the corporal's interview request. Corporal Timmons responded, "[Newton] chose not to talk to me." RP (Dec. 11, 15, 16, 2015) at 94. The State then asked

Corporal Timmons what he did after Newton said he did not want to talk; Corporal Timmons responded that he ended the interview and returned Newton to his cell. Defense counsel did not object to the State's questions or Corporal Timmons's responses.

3. SERGEANT LAMPKY'S TESTIMONY

Sergeant Lampky also testified at trial about the use-of-force policy. As he did in the suppression hearing, Sergeant Lampky testified about his interaction with Newton. The sergeant testified that he told Newton why he was there and the purpose of the interview, reminded Newton that Corporal Timmons had already read him his rights, and acknowledged that Newton had chosen not to make a statement. Defense counsel did not object to this testimony.

Sergeant Lampky also testified that Newton "stated that he was guilty, been to [Walmart], he had done that crime, and he wanted to know if talking to [the sergeant] or provided [sic] statement would provide any lenience toward the event." RP (Dec. 11, 15, 16, 2015) at 101-02. On cross-examination, Sergeant Lampky reiterated that Newton had stated, "I am guilty, I did the crime, is this going to help me?" RP (Dec. 11, 15, 16, 2015) at 104.

The jury found Newton guilty of second degree burglary. Newton appeals.

ANALYSIS

I. SUPPRESSION ISSUE

Newton first argues that the trial court erred when it admitted Newton's admission to Sergeant Lampky.[2] Newton contends that he had already invoked his right to silence and that the

[2] Although Newton mentions his right to counsel in his argument, at no time did Newton ask for counsel, so his right to counsel is not at issue. *See State v. Wheeler*, 108 Wn.2d 230, 237, 737 P.2d 1005 (1987).

questioning was not routine background or biographical questions necessary for the booking procedure that were not subject to the right to silence. The State responds that Newton's statement was admissible because it was a spontaneous statement by Newton that was not in response to interrogation. We agree with the State.

A. LEGAL PRINCIPLES

"We review challenged findings of fact entered after a CrR 3.5 hearing for substantial evidence and review de novo whether the trial court's conclusions of law are supported by its findings of fact." *State v. Rosas-Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013). Unchallenged findings of fact are verities on appeal. *State v. Elkins*, 188 Wn. App. 386, 396, 353 P.3d 648 (2015).

Police must give *Miranda* warnings when a suspect is subject to custodial interrogation by an agent of the state. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). "Without *Miranda* warnings, a suspect's statements during custodial interrogation are presumed involuntary" and are therefore inadmissible. *Heritage*, 152 Wn.2d at 214.

If a defendant has indicated "'in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.'" *State v. Wheeler*, 108 Wn.2d 230, 237, 737 P.2d 1005 (1987) (quoting *Miranda*, 384 U.S. at 473-74); *see also Elkins*, 188 Wn. App. at 397-98. "Law enforcement officers may, however, resume questioning under certain circumstances even if the defendant has [previously] asserted his right to silence." *Elkins*, 188 Wn. App. at 397 (citing *Wheeler*, 108 Wn.2d at 238).

Further questioning is allowed if

> (1) . . . the right to cut off questioning was scrupulously honored; (2) . . . the police [did not engage] in further words or actions amounting to interrogation before

> obtaining a waiver; (3) . . . the police [did not engage] in tactics tending to coerce the suspect to change his mind; and (4) . . . the subsequent waiver was knowing and voluntary.

Wheeler, 108 Wn.2d at 238. A defendant may waive a previous exercise of his constitutional rights by his own voluntary and unsolicited actions without first having the *Miranda* warnings reread to him. *State v. Boggs*, 16 Wn. App. 682, 687, 559 P.2d 11 (1977).

"[T]here is no bright-line rule that law enforcement officers must always fully readvise a defendant of his or her *Miranda* rights." *Elkins*, 188 Wn. App. at 396. Instead, the question of "whether a defendant's rights have been scrupulously honored must be determined on a case-by-case basis." *Elkins*, 188 Wn. App. at 396. The primary concern is that the defendant understands his rights and understands that those rights are still in effect. *Elkins*, 188 Wn. App. at 401.

Additionally, even if a defendant invoked his right to remain silent, the police may ask routine questions during the arrest and booking process because this type of questioning rarely elicits an incriminating response. *Wheeler*, 108 Wn.2d at 238. A defendant may assert the right to silence to resist only "compelled explicit or implicit disclosures of incriminating information." *Doe v. United States*, 487 U.S. 201, 212, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988).

B. DISCUSSION

Most of Newton's argument focuses on whether his statement to Sergeant Lampky was in response to interrogation. Newton contends that the sergeant's questions went beyond collecting the type of routine background information during the booking process that is allowed under *Wheeler*.

In *Wheeler*, our Supreme Court held that law enforcement officers can ask a defendant routine booking questions (such as certain biographical questions) even though the defendant had

previously invoked his right to silence. 108 Wn.2d at 238. The court noted that this exception exists because the questions asked in this context "rarely elicit an incriminating response." *Wheeler*, 108 Wn.2d at 238. But the court also acknowledged that there was a risk for "'potential . . . abuse by law enforcement officers who might, under the guise of seeking objective or neutral information, deliberately elicit an incriminating statement from a suspect.'" *Wheeler*, 108 Wn.2d at 239 (internal quotation marks omitted) (quoting *United States v. Booth*, 669 F.2d 1231, 1238 (9th Cir. 1981)).

The *Wheeler* court then found that the officer's questioning in that case exceeded the bounds of the normal, routine background information collected at booking because the officer asked the defendant if he knew his co-defendant. 108 Wn.2d at 237, 239. The potentially incriminating value of this question demonstrated that the State had failed to sustain its burden to prove that the defendant's right to silence was scrupulously honored. *Wheeler*, 108 Wn.2d at 239.

Newton contends that this case is similar to *Wheeler* because the State has failed to show that use-of-force interviews are the same as routine booking procedures because use-of-force interviews involve matters that are closely related to the charged offense and have the potential of revealing incriminating evidence (such as evidence that could be relevant to a resisting arrest or assault charge). He asserts that because the potential for abuse is higher in this context, Sergeant Lampky's questions were improper and demonstrated that he did not scrupulously honor Newton's right to cut off questioning.

But Newton's argument ignores the fact that, unlike the defendant in *Wheeler*, Newton made his statement spontaneously, before any interrogation occurred. Although Sergeant Lampky told Newton that he wanted to talk to him about the use of force, the trial court concluded that

Newton's statement was "not the result of an interrogation."[3] CP at 46. This is supported by Sergeant Lampky's testimony that Newton made his statement while they were on their way to an interview room after the sergeant had advised Newton of why he wanted to talk to Newton, not in response to any questioning.[4] As noted above, a defendant may waive a previous exercise of his constitutional rights by his own voluntary and unsolicited actions without first having the *Miranda* warnings reread to him. *Boggs*, 16 Wn. App. at 687. Such is the case here.

The unchallenged findings show that although Sergeant Lampky did not fully readvise Newton of his *Miranda* rights, Newton had been previously advised of those rights and had exercised those rights. Upon contacting Newton and before attempting to conduct the use-of-force interview, Sergeant Lampky reminded Newton that he had been advised of those rights and recognized that Newton had declined to be interviewed. These findings demonstrate that the sergeant knew that Newton had asserted his *Miranda* rights and was attempting to respect Newton's decision not to give a statement. This supports the conclusion that Newton's rights were scrupulously honored. *See Elkins*, 188 Wn. App. at 402-03 & n.12 (a full readvisement of *Miranda* rights, although preferable, is not required when the totality of the circumstances demonstrates that the defendant has knowingly and voluntarily waived his or her rights).

[3] Although the trial court characterized this as a conclusion of law, it appears to actually be the trial court's resolution of a disputed factual issue. Accordingly, we treat the issue of whether Newton's statement was in response to an interrogation as a finding of fact. *Riley-Hordyk v. Bethel Sch. Dist.*, 187 Wn. App. 748, 759 n.11, 350 P.3d 681 (2015) ("A finding of fact that is mislabeled as a conclusion of law will be reviewed as a finding of fact.").

[4] Although Newton testified otherwise, whether the trial court believed Newton's testimony or Sergeant Lampky's testimony is a credibility issue that we will not review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Additionally, nothing remotely suggests that Sergeant Lampky engaged in any coercive tactics. And, as discussed above, the State demonstrated that Sergeant Lampky did not attempt to interrogate Newton before Newton voluntarily waived his rights by spontaneously making his statement. Thus, all four requirements under *Wheeler* have been met, and the trial court did not err when it denied the motion to suppress.

II. ADMISSION OF TRESPASS NOTICE

Newton next argues that the trial court erred when it admitted the trespass notice into evidence because the State did not present any evidence that Newton was the person named in the trespass notice and, without such evidence, the trespass notice was not relevant. This argument fails.

Newton relies on *State v. Hunter*, 29 Wn. App. 218, 627 P.2d 1339 (1981). In *Hunter*, we held that (1) "[w]here a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction" and (2) "[i]t must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action." 29 Wn. App. at 221. But *Hunter* is a sufficiency of the evidence case; it does not say that the evidence is not admissible.

Because Newton fails to cite to any authority supporting his assertion that the admission of the trespass notice was improper, this argument fails. *See* RAP 10.3(a)(6) (requiring citation to legal authority).

III. SUFFICIENCY CLAIM

Newton further argues that the evidence was insufficient to prove that he unlawfully entered or remained in the Walmart.[5] He contends that because there was no evidence identifying him as the person who signed the trespass notice, it was mere conjecture and speculation that he was the person who had been excluded from Walmart premises. This argument also fails.

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Homan*, 181 Wn.2d at 106.

Newton's reliance on *Hunter* is appropriate here. As stated above, *Hunter* requires more than mere identity of names to prove an element of an offense. 29 Wn. App. at 221. But here there was evidence that Newton was the person named in the trespass notice because Frias testified that she identified both a trespass notice with the name "Christian A. Newton" *and* a photograph of Newton, whom she had seen in person, in the file of individuals who had been trespassed from Walmart property. Although Newton objected to Frias's testimony, the trial court overruled the objection and did not strike this testimony. Taking this evidence in the light most favorable to the State, Frias's testimony combined with the trespass notice was sufficient to allow the jury to find that Newton had been trespassed from Walmart property and that he therefore unlawfully entered or remained on the premises.

[5] To prove second degree burglary, the State had to prove that Newton "enter[ed] or remain[ed] unlawfully" in the Walmart. RCW 9A.52.030(1).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Newton next argues that he received ineffective assistance of counsel when defense counsel failed to object to Corporal Timmons's testimony referring to Newton's invocation of his right to silence. Because Newton fails to establish the required prejudice, this argument fails.

To establish ineffective assistance of counsel, Newton has the burden of establishing that (1) defense counsel's performance was deficient and (2) this deficient performance prejudiced Newton's case. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (quoting *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *State v. McLean*, 178 Wn. App. 236, 246, 313 P.3d 1181 (2013). To establish prejudice, Newton must show that there is a reasonable probability that the result would have been different had the deficient performance not occurred. *Grier*, 171 Wn.2d at 34.

Here, even presuming but not deciding that defense counsel could have successfully objected to Timmons's testimony about Newton's invocation of his right to silence, Newton cannot show prejudice because that same information came in through Sergeant Lampky's testimony and Newton does not challenge that testimony. Improper admission of evidence may be harmless error if there is other credible testimony and other uncontroverted evidence similar to the challenged testimony that was admitted without objection. *State v. Ramirez-Estevez*, 164 Wn. App. 284, 293,

263 P.3d 1257 (2011) (quoting *Ashley v. Hall*, 138 Wn.2d 151, 159, 978 P.2d 1055 (1999); *State v. Dixon*, 37 Wn. App. 867, 874-75, 684 P.2d 725 (1984)). Because Newton does not establish prejudice, his ineffective assistance of counsel claim fails.

V. SAG

In his SAG, Newton contends that the prosecutor presented new evidence during the trial that had not been submitted by the discovery deadline[6] and that the prosecutor has a history of withholding evidence. Because Newton does not identify what evidence he is challenging, we cannot address Newton's claim that the State presented evidence that it had not disclosed as of the discovery deadline. RAP 10.10(c) (appellant must inform the court of the nature and occurrence of alleged errors, and the appellate court is not obligated to search the record in support of the appellant's claims). Additionally, the prosecutor's history of conduct relates to matters outside the record, which we cannot address on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). Accordingly, Newton's SAG arguments do not entitle him to relief.

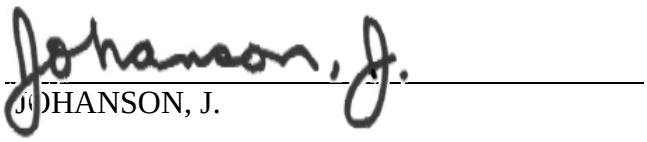
VI. APPELLATE COSTS

Newton also asks that we refuse to impose appellate costs if the State prevails. In its briefing, the State asserts that it is not seeking costs. Accordingly, we decline to impose appellate costs.

[6] Newton may be referring to the evidence related to the trespass notice and/or the photograph of Newton, but Newton does not specifically identify this evidence in his SAG.

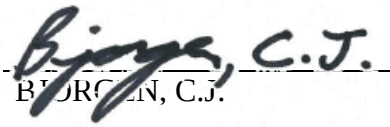
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

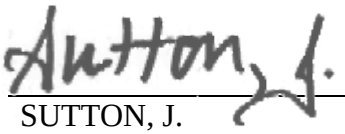


JOHANSON, J.

We concur:



BJORGEN, C.J.



SUTTON, J.