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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.

ANTONIO S. SCOTT,

Defendant and Appellant.

A107076

(Alameda County
Super. Ct. No. 144915A)

Antonio S. Scott was sentenced to a total term of 31 years-to-life following his jury trial convictions on various kidnapping, carjacking and robbery offenses. Scott timely appeals his convictions, contending the trial court erroneously admitted to his prejudice evidence of uncharged offenses. He also contends the prosecution failed to prove the deadly or dangerous weapon allegation based on his use of an unloaded paintball gun during the commission of the offenses. We conclude the trial court erred in admitting evidence of uncharged conduct, but affirm because the error was not prejudicial. We also conclude appellant's sentence was improperly enhanced pursuant to Penal Code section 12022, subdivision (b),¹ and, accordingly, we strike those enhancements.²

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

² Respondent's unopposed request to correct misstatements in Respondent's Brief, filed on December 7, 2005, is granted.

BACKGROUND

A jury found Scott guilty of carjacking, kidnapping and robbery offenses, and found true the allegation Scott used a deadly and dangerous weapon, to wit, a replica assault weapon. The trial court found true that Scott had a prior felony conviction for second degree robbery. The trial court imposed sentence as follows: Count 8 [carjacking in violation of section 215, subd. (a)], a midterm of 5 years doubled to 10 years for a prior felony pursuant to section 1170.12(c)(1), with a one-year enhancement for use of deadly or dangerous weapon pursuant to section 12022, subdivision (b)(1); Count 7 [false imprisonment with force or violence in violation of section 236], two years concurrent to sentence on count 8 and stayed pursuant to section 654; Count 6 [second degree robbery in violation of section 211], three years concurrent to sentence on count 8; Count 1 [kidnapping in the course of carjacking in violation of section 209.5, subdivision (a)], life in prison with parole eligibility after 14 years with a one-year enhancement for use of deadly or dangerous weapon pursuant to section 12022, subdivision (b)(1); Count 2 [kidnapping for robbery in violation of 209, subdivision (b)(1)], life imprisonment with parole eligibility of 14 years stayed pursuant to section 654, and; Count 4 [second degree robbery in violation of section 211], midterm of three years stayed pursuant to section 654. Count 3 [carjacking in violation of section 215, subdivision (a)] and count 5 [false imprisonment with force in violation of section 236] were dismissed upon the People's motion. A consecutive five year term was imposed pursuant to section 667, subdivision (a) for the prior felony, resulting in a total minimum term of thirty-one years.

At trial, the jury heard evidence of three incidents of carjacking, kidnapping and robbery in the same locale in Oakland in mid-to-late December 2002 against three separate victims, Santiago Buenrostro, Brigido Obregon, and Artemio Saucedo. Scott was charged and convicted of offenses only against Obregon and Saucedo. Before trial, a hearing was held on the People's motion to admit evidence of the Buenrostro crimes pursuant to Evidence Code section 1101, subdivision (b). The trial court ruled evidence of the uncharged Buenrostro conduct could be admitted at trial to show a common scheme or design. The People presented evidence of the uncharged Buenrostro crimes,

and the jury was instructed to consider it only if it tended to show a common scheme or plan. The three incidents and other relevant facts are described below.

A. The Charged Offenses

1. December 16, 2002 Incident Involving Victim Brigido Obregon

On December 16, 2002, Brigido Obregon stopped in his white Chevy Blazer at Pak'n Save in Oakland at around 6 p.m. Obregon heard voices behind him, felt what he took to be a gun pushed into his back, and was told to get in the rear of his vehicle. Obregon was placed in the middle of the back seat with a man on either side of him. A woman sat in the front passenger seat and another man was in the driver's seat; all these individuals were African-American. The man in the driver's seat wore a wig, a baseball hat, and his face was covered with a bandana from the nose down.

After Obregon was in the vehicle, the assailants stripped him of money, rings, chain and bracelets. The man in the bandana held a big gun. They drove off, but Obregon could not see where they were going because he was told to keep his head down. After about ten to fifteen minutes, the car stopped and Obregon was taken into an apartment. The three men took Obregon into a bedroom with the window covered by a piece of sheetrock, where he was robbed of his wallet, beeper and shoes. Later, the man in the bandana came into the room and demanded pin numbers for Obregon's credit cards. He was carrying the gun and wearing Obregon's ring and bracelet, and he threatened to shoot Obregon unless Obregon gave him the pin numbers.

Obregon estimated he was held in the apartment for about 20 hours. Eventually, Obregon was placed in his truck, driven close to San Leandro, and left there after his assailants told him not to look where they were going and to wait a few minutes before leaving. After five or ten minutes, Obregon drove home and called the police.

During his captivity at the apartment, and for only seconds on each occasion, Obregon twice observed through the open bedroom door the man in the bandana without his disguise. Obregon did not identify Scott as the man in the bandana from a photo line-up about a week after the incident but did identify the woman as Scott's co-defendant

Sandra Miller. When shown the same photo display at the preliminary hearing, Obregon chose two males as possibly being the assailant, one of whom was Scott. At trial, Obregon unhesitatingly identified Scott as the man he described as wearing the disguise and handling the gun. Obregon testified that People's Number 8 (black paintball gun) was the weapon used in the offense, and an arresting officer described the weapon (People's 8) as an assault type pistol that shoots paintballs but not bullets.

2. December 24, 2002 Incident Involving Victim Artemio Saucedo

On December 24, 2002, at around 7:30 p.m., Artemio Saucedo drove his Ford Thunderbird to an apartment on 89th Avenue, Oakland, in response to a for-rent advertisement posted in a local store. Inside the apartment were a man and two women, one heavy set and one thin. Saucedo was kept waiting for a few minutes before the man got up and pointed a gun at him. Saucedo later described the weapon to the police as a big bazooka-like gun and, at trial, identified the black paintball gun (People's 8) as the gunman's weapon. The gunman told the heavy set woman to search Saucedo, and she took his wallet and car keys. At one point someone knocked on the front door and Saucedo was hastily ushered into a bedroom with a mattress on the floor and the window covered by a piece of sheetrock. There, the gunman demanded the correct pin number for Saucedo's ATM card. After obtaining the pin number, the gunman left the apartment, leaving the thin woman alone to guard Saucedo. After awhile, the thin woman fell asleep, and Saucedo escaped. Once outside the apartment, Saucedo saw his car was gone, so he ran all the way home and called the police from there. On December 30, Saucedo identified Scott from a photo lineup as the gunman and also identified Sandra Miller as the heavy-set woman who took his wallet and car keys. Saucedo also identified Scott at trial as the gunman at the apartment.

B. Uncharged Incident Involving Victim Santiago Buenrostro

On the evening of December 15, 2002, Santiago Buenrostro was driving his blue 1989 Toyota Corolla on International Boulevard near 88th and 89th Avenues when he stopped at a pedestrian crosswalk. A man got in the rear driver's-side door and put a gun

to Buenrostro's head. Another man got in the rear passenger side door and a woman got into the front passenger seat. All were African-American. Buenrostro was ordered to make a right turn and after a few blocks told to stop. During that time, his assailants took his wallet, watch and ring.

While the car was stopped, Buenrostro was pushed into the back seat, and the man who had been sitting in the rear passenger-side seat took over the wheel. The assailants drove around for about twenty or thirty minutes before they stopped at what Buenrostro took to be an ATM machine, because the man who had the gun asked Buenrostro for his pin number. After about an hour, the car stopped somewhere in West Oakland. The man in the back of the car pulled Buenrostro out and threw him on the ground. The two men took his boots. They stood Buenrostro up and walked him to the edge of the lot. Buenrostro started to scream. The men pushed Buenrostro face down in the mud and punched and hit him. Buenrostro pretended to be unconscious, and after he heard the assailants drive away in his car, he stood up and went to the first house he saw to call the police.

At one point while he was still driving the car, Buenrostro tried to open the door to escape. The man behind him struck him on the back of the head with the gun, and the woman in the passenger seat punched him on the cheek with her fist. Buenrostro described the weapon used in the incident as a six-inch blue revolver. Buenrostro identified none of his assailants. He could not identify Scott as one of the perpetrators either at trial or from an earlier photographic line-up. Nor was he able to give a height and weight description to the police following the incident of any of the assailants.

D. Other Relevant Details

On December 18, 2002, Oakland Police Officer John Cowles conducted a search at Apartment 4, 1347 89th Avenue on a matter related to his duties on the Beat Health Unit dealing with problem properties in the community. In a bedroom in the apartment, Cowles found a vehicle registration document stating the license plate and name of the registered owner (Santiago Buenrostro). Cowles stated Scott was not present when he

searched the apartment, and he had no information Scott lived at that address. He also stated the police had received several complaints about the apartment being a problem property associated with drugs and prostitution.

On December 23, 2002, Officer Daniel Sakai spotted the blue 1989 Toyota Corolla, license number 2RXV 314, belonging to Santiago Buenrostro, parked in the 1300 block of 89th Avenue. Officer Sakai testified that the Pak'n Save on Hegenberger Road (where Obregon was abducted) is within a mile or so of the 1300 block of 89th Avenue where he found Buenrostro's vehicle.

On December 27, 2002, Officer Parkinson found Saucedo's light blue Thunderbird parked outside 1347 89th Avenue, an address Parkinson associated with suspected carjacking activities. Parkinson and other officers subsequently went up to apartment 4 at that location and were allowed in by the occupant, Charlotte Johnson. Scott and Sandra Miller were found in a bedroom in the apartment with a mattress on the floor and the window covered with sheetrock. At the foot of the mattress was a black pistol grip type assault gun, together with a smaller handgun.³ The police handcuffed Scott and Miller and sat them on a couch in the living room. Miller asked for her jacket. Officer Marv Jackson searched the jacket before handing it to Miller. The keys to Saucedo's Thunderbird were found in a pocket of Miller's jacket. Later that day, Officer Jadallah interviewed Scott at the Eastmont Police Station and noticed that Scott was wearing the large gold ring with a Star of David stolen from Brigido Obregon. At trial, Obregon identified the ring as the one taken from him.

Scott did not testify in his defense. In closing argument, defense counsel attacked the reliability of Obregon's and Saucedo's identifications of Scott and argued the prosecution failed to place Scott at the scene of the crimes beyond a reasonable doubt and that police were tipped off about Scott by a drug-dealing informant who was possibly the perpetrator.

³ There is no evidence in the record connecting this handgun to any of the crimes at issue.

DISCUSSION

A. *Evidence of Uncharged Conduct*

1. *Evidence Code § 403(a)*

For evidence of the uncharged Buenrostro crimes to be admissible, the trial court first had to find that there was sufficient evidence from which the jury could find by a preponderance of evidence that Scott was one of Buenrostro's assailants. (Evid. Code § 403, subd. (a); *People v. Simon* (1986) 184 Cal.App.3d 125, 131-132.) We review the trial court's determination on this issue for abuse of discretion. (*People v. Marshall* (1996) 13 Cal.4th 799, 832-833.)

Scott contends the trial court abused its discretion with respect to the preliminary fact of his involvement in the Buenrostro carjacking and robbery because the only circumstantial evidence linking him to those crimes was: (1) the registration document for Buenrostro's vehicle was found in a bedroom in the apartment where Scott was arrested about ten days later; (2) Buenrostro's vehicle was found on the same block as the apartment where Scott was arrested about four days later. Not so. There was other evidence presented at the hearing which linked him to the Buenrostro crimes. Specifically, only four days after police found Buenrostro's carjacked vehicle, they found Saucedo's carjacked vehicle in the same location, right next to the apartment where they contemporaneously arrested Scott. When police arrested Scott and his female accomplice Miller, they found the keys to Saucedo's carjacked vehicle in Miller's jacket pocket. Nonetheless, it is still a close question whether the trial court abused its discretion by inferring from all the circumstantial evidence that Scott was involved in the Buenrostro carjacking. However, we need not decide whether this evidence provided the trial court with adequate support for its ruling at the 403 hearing because there is a more fatal flaw to the admission of this evidence.

2. *Common Scheme or Plan*

Scott contends that even if the trial court did not abuse its discretion in linking Scott to the Buenrostro crimes, it erred by admitting evidence of those crimes to show

common scheme or plan because evidence of a common plan was irrelevant to the main issue in the case—identity. We agree.

In *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*), the Supreme Court discussed the different purposes for which evidence of uncharged conduct may be admitted. The Supreme Court stated evidence of uncharged conduct could be introduced to show: (1) intent; (2) common design or plan; or, (3) identity; and noted there are “subtle but significant” differences among the three: “Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. [¶] Evidence of a common design or plan is admissible to establish that the defendant committed the act alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, [i]n proving design, the act is still undetermined. [¶] Evidence of identity is admissible where it is conceded or assumed that the charged offense was committed by someone, in order to prove that the defendant was the perpetrator.” (*Id.* at p. 394, fn. 2.) The Supreme Court underscored the importance of these distinctions, stating: “[I]t is imperative that the trial court determine specifically what the proffered evidence is offered to prove, *so that the probative value of the evidence can be evaluated for that purpose.*” (*Id.* at p. 406) (Italics added.)

In this case, the trial court purportedly admitted evidence of the Buenrostro incident to show Scott engaged in a common scheme or plan, not for intent or identity. But this is not a case where defendant offered an innocent explanation for his conduct or disputed he committed any wrongdoing despite his presence at the scene of the crime—in such circumstances “the act is still undetermined” and evidence of uncharged conduct to show a common scheme or plan is highly probative on the issue of whether defendant committed the wrongful act as alleged. (*Ewoldt, supra*, 7 Cal.4th at p. 394-395 & fn. 2; see also *People v. Balcom* (1994) 7 Cal.4th 414, 422-426 [evidence of subsequent rape and robbery properly admitted to show common scheme or plan where defendant conceded he engaged in sexual intercourse with the victim but claimed he did not use a gun and victim voluntarily consented].) However, there was no dispute here that

Obregon and Saucedo suffered as they described at the hands of their assailants—the contested issue was whether Scott was the individual wielding the replica assault weapon against them. In this situation, the existence of a common scheme or plan had no probative value, was not relevant to any issue in the case, and amounted to inadmissible propensity evidence. (See Evidence Code section 1101, subd. (a); see also *Balcom*, *supra*, 7 Cal.4th at p. 422 [evidence that defendant committed an uncharged offense may be admitted “if relevant to prove some *relevant* fact other than the defendant’s character” (italics added).]) Accordingly, the trial court erred by admitting evidence of the Buenrostro crimes under the theory of common scheme or plan.⁴ (See *Ewoldt*, *supra*, 7 Cal.4th at p. 406 [noting “in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible”].)

B. Prejudice

Scott contends the erroneous admission of evidence of the Buenrostro crimes violates both the Federal and State Constitutions. Under the State Constitution we may not reverse a judgment absent a “miscarriage of justice.” (Cal. Const., art. VI, § 13.) To find a miscarriage of justice, we must be persuaded it is “reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

⁴ We do not reach the issue of whether evidence of the Buenrostro crimes may have been admissible on the issue of identity. The People never sought to admit the Buenrostro evidence to prove the identity of Scott as the perpetrator of the Obregon and Saucedo offenses, the trial court stated the evidence was not being admitted for identity, and the jury was instructed only to consider the evidence as tending to show a common scheme or plan.

Here, it does not appear reasonably probable that the jury was influenced by evidence of the Buenrostro crimes to Scott's prejudice or that the admission of the evidence affected the verdict. At trial, both Obregon and Saucedo identified the replica assault weapon used against them, the same weapon found at the foot of the bed in the room where Scott was arrested. At the time of his arrest, Scott was wearing Obregon's Star of David ring. Saucedo observed both Scott and Sandra Miller at length and at close quarters during his ordeal, identified both at the first opportunity in a photo line-up, and identified Scott at trial. Scott and Miller were found together in a bedroom in the apartment on 89th Avenue, at which time Miller had the keys to Saucedo's vehicle in her jacket pocket and Saucedo's vehicle was parked outside the apartment. Obregon identified Miller at the first opportunity at a photo lineup but did not pick out Scott. At a subsequent preliminary hearing, he narrowed the identification to two photos, one of which was of Scott. Obregon was never asked to identify Scott from a physical lineup, but at trial he unhesitatingly identified Scott as his assailant. In the face of such compelling evidence, and after "an examination of the entire cause," we conclude there is no reasonable probability here a result more favorable to Scott would have been reached if evidence of the Buenrostro crimes had not been admitted. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

Scott also asserts the erroneous admission of evidence of the Buenrostro crimes violates his rights to due process under the Federal Constitution. Where, as here, defendant did not object at trial on Federal Due Process grounds, Scott may make only a "very narrow due process argument" on appeal as to whether the admission of evidence of the Buenrostro crimes had the "additional legal consequence of violating due process." (*People v. Partida* (2005) 37 Cal.4th 428, 435.) The erroneous admission of evidence results in a due process violation "only if it makes the trial *fundamentally unfair*." (*Id.* at p. 439, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70.)

The high court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." (*Dowling v. U.S.* (1990) 493 U.S. 342, 352-353.) In this regard, the high court stated judges "are to determine only whether the action complained

of . . . violates those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions, [citation] and which define ‘the community’s sense of fair play and decency’ [citation].” (*Ibid.*) As we have already noted, the evidence linking Scott to the Buenrostro crimes was weak. Moreover, the jury was instructed that evidence of the Buenrostro crimes could not be considered to prove Scott is a person of bad character or had a disposition to commit crimes. The jury was also instructed not to consider the Buenrostro evidence for any purpose unless it found by a preponderance of the evidence Scott committed those crimes, and was cautioned and reminded that before Scott could be found guilty of *any* crime charged, the evidence as a whole must persuade it beyond a reasonable doubt Scott was guilty of that crime. In light of the insubstantial evidence linking Scott to the Buenrostro crimes, and the limiting instructions provided by the trial court, we cannot hold that the introduction of evidence of the Buenrostro crimes “merits th[e] kind of condemnation” necessary to find a violation of fundamental fairness in the trial proceedings. (*Dowling, supra*, 493 U.S. at p. 353.)

C. *Deadly or Dangerous Weapon Use Allegation*

Scott contends the evidence was insufficient to prove the section 12022, subdivision (b) allegation he used a deadly or dangerous weapon in committing the charged offenses. He asserts a paintball gun incapable of firing bullets, unlike a real gun, is not a deadly or dangerous weapon as a matter of law, and there is no evidence Scott intended to actually use it as a weapon if circumstances required. (AOB 60-64.) The People, on the other hand, contend the paint ball gun is dangerous per se, and even if not, it is a club-like instrument capable of producing great bodily injury through blunt force, as evidenced by the fact that Scott “hit Buenrostro with a gun.” In assessing this contention, we “ ‘must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] We presume the

existence of every fact the trier of fact could reasonably deduce from the evidence [citation.]” (*In re Bartholomew D.* (2005) 131 Cal.App.4th 317, 322.)

For purposes of section 12022, subdivision (b), there are two categories of dangerous or deadly weapons: First, there are instruments like guns and dirks that are “weapons in the strict sense of the word and are ‘dangerous or deadly’ to others in the *ordinary use* for which they are designed and may be said as a matter of law to be dangerous or deadly weapons.” (*People v. Reid* (1982) 133 Cal.App.3d 354, 365 (*Reid*.) Second, there are instruments “which are not weapons in the strict sense of the word, but which *may* be used as such, such as razors, pocket knives . . . hammers . . . and other sharp or heavy objects. These are not weapons in the strict sense of the word and are not ‘dangerous or deadly’ to others in the ordinary use for which they are designed. As such they may not be said as a matter of law to be dangerous or deadly weapons. . . . When it appears that an instrumentality other than one falling within the first category is *capable* of being used in a dangerous or deadly manner, *and* it may be *fairly inferred* from the evidence that its possessor *intended* on a particular occasion to use it as a weapon should the circumstances require, its character as a dangerous or deadly weapon may be established, at least for the purposes of that occasion.” (*Reid, supra*, 133 Cal.App.3d at p. 365 [citing *People v. Graham* (1969) 71 Cal.2d 303, 327-328].)

The People assert the paintball gun falls into the first category and is dangerous as a matter of law, relying on *People v. Lochtefeld* (2000) 77 Cal.App.4th 533 (*Lochtefeld*). Lochtefeld challenged his conviction for assault with a deadly weapon, contending that there was insufficient evidence to support a finding his pellet gun was a deadly weapon. (*Id.* at p. 538.) The Court of Appeal stated the “determinative question” was whether the pellet gun was capable of “inflicting great bodily injury.” (*Id.* at p. 540.) The court noted “the testimony demonstrated that Lochtefeld’s gun in normal operating condition would expel pellets at speeds in excess of those required to penetrate a significant distance into muscle tissue or to enter an eyeball, and thus it was easily capable of inflicting significant injury.” (*Id.* at p. 541.) “Because it was (1) a gun and (2) capable of inflicting great bodily injury, the pellet gun Lochtefeld used was a ‘deadly weapon’ as a matter of law,”

the court concluded. (*Ibid.*) Here, by contrast, there was no testimony whatsoever on the capability of the paintball gun to inflict great bodily injury, so there is no evidentiary basis on which to apply the rationale of *Lochtefeld* here.⁵ Moreover, we are loathe to conclude that paintball guns are ‘dangerous and deadly’ to others in the ordinary use for which they are designed when they are essentially a recreational tool.⁶ Thus, we cannot conclude the paintball gun used by Scott is deadly or dangerous as a matter of law.

We may still find the paintball gun is a deadly or dangerous weapon if it “is *capable* of being used in a dangerous or deadly manner, *and* it may be *fairly inferred* from the evidence that its possessor *intended* on a particular occasion to use it as a weapon should the circumstances require.” (*Reid, supra*, 133 Cal.App.3d at p. 365 [italics in original].) The paintball gun, even unloaded, was *capable* of being used in a deadly or dangerous manner because Scott could have used it as a club or bludgeon to beat his victims. However, there was no evidence Scott struck, or threatened to strike, either Obregon or Saucedo with the paintball gun.⁷ (*Cf. Reid, supra*, 133 Cal.App.3d at p. 367 [toy gun not dangerous per se and there was no evidence proving defendant intended to use it as a club]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1574 [no evidence to show starter pistol was a deadly or dangerous weapon as a matter of law or that defendant intended to use it as a bludgeon].) Accordingly, the assessments of one-year enhancements under section 12022, subdivision (b) must be stricken.

⁵ Indeed, the prosecutor conceded at trial the paintball gun was not dangerous per se and there was no evidence it was loaded with paintballs or even equipped to fire any kind of projectile and argued instead it was used primarily to instill fear.

⁶ For example, paintball team games are used in corporate teambuilding and training action seminars in the United States. See, e.g., www.corporateteambuilding.com.

⁷ We reject the People’s invitation to use evidence of uncharged conduct concerning a different gun (Buenrostro’s testimony that he was struck in the head by an assailant with a handgun) to find Scott used the paintball gun as a deadly or dangerous weapon against his victims in the charged offenses.

DISPOSITION

The enhancements under Penal Code section 12022, subdivision (b) for use of a deadly and dangerous weapon are stricken as to counts 1 and 8. In all other respects, the judgment is affirmed. The superior court shall send an amended abstract of judgment to the Department of Corrections reflecting the modification to the judgment.

Parrilli, J.

We concur:

McGuinness, P. J.

Siggins, J.