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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. JOAN ELLEN RAINVILLE, Defendant and Appellant.	A143179 (Mendocino County Super. Ct. No. SCUKCRCR137254602)

A jury convicted defendant Joan Ellen Rainville of two counts of assault with a deadly weapon. While under the influence of alcohol, she drove a car through her neighbors' backyard during a social gathering, jumping the car onto the neighbors' porch before crashing it into the exterior wall of the master bedroom. Luckily, she did not injure her neighbors' friend, who was close to the car's path and was nearly hit, or the neighbors' 8-year old son, who was asleep in the master bedroom. On appeal, Rainville contends there was insufficient evidence to support the aggravated assault verdicts and the jury received erroneous instructions. We disagree and affirm.

FACTUAL BACKGROUND

During the evening of the Memorial Day holiday weekend, Clayton and Blair Carlson were socializing with their friends Eric Odlozil and Brandi Dazell in the backyard of their Ukiah home. The four were on the back porch, a concrete patio raised about 8-10 inches from the ground and connected to the Carlsons' master bedroom, where their 8-year-old son, Everett, was asleep.

Shortly before 9:00 p.m., a sedan crashed through the wooden fence which separated the Carlsons' backyard from the parking lot of an adjacent apartment complex. The car hit the patio, located approximately 15-17 feet away from the fence and came to a temporary stop. The driver-side-front tire had jumped the porch, but the passenger-side-front tire was stuck in the gravel below, still spinning. Though stuck, the car's engine continued to rev.

Dazell, who was seated on the patio with her back to the fence and was near the car's path, got up from her chair and avoided getting hit by the car. She testified the car's "bumper was right next to [her]" and that she "could touch it with [her] arm." Blair Carlson testified the car was "inches" from Dazell.

The Carlsons and their guests yelled for the driver to stop the car. The car, however, did not stop. It lurched forward and proceeded to hit the outside wall of the Carlsons' master bedroom. Even after the car hit the house, the car's tires continued to spin, and several witnesses testified the car's engine continued to rev.

Dazell checked on Everett in the master bedroom, where he slept about three feet from the wall impacted by the car. She discovered him unharmed, and he "slept through the whole thing."

Meanwhile, Odlozil approached the car and attempted to open the door but it was locked. He asked the driver, identified later to be Rainville, to unlock the door. She complied, and Odlozil opened the driver's side door, reached into the car over Rainville, shifted the gear to park, and turned off the ignition. Rainville did not interfere. Instead, she asked him something to the effect of "What's going on?" or "What's happening?"

Rainville then got out of the car, stood in the backyard for a moment, and walked away through the new hole in the fence towards the apartment building. Around this time, Clayton Carlson recognized Rainville as a next-door neighbor whom he had seen before. He testified Rainville had never been in his yard and he had no reason to think Rainville disliked him.

The two Ukiah police officers who arrived at the scene observed Rainville swaying back and forth and she had red, glassy eyes and dilated pupils. One of the

officers stated he "could smell the odor of an alcoholic beverage emitting from her person and breath." Asked by one of the officers if she had anything to drink, Rainville told him she had one beer and one glass of wine. She did not perform well on multiple field sobriety tests. A preliminary alcohol screening test confirmed the officer's belief she was impaired and registered her alcohol level at .266 percent.[1] Based on all of this, the officer arrested Rainville for driving under the influence. At the police station, Rainville took two breath tests which showed alcohol levels of .25 percent. The arresting officer also testified that based on a records check, he understood Rainville could only drive a vehicle with an ignition interlock device, which prevents a vehicle from starting if alcohol is detected on the driver's breath. The officer saw no interlock device when he inspected the car.

In addition to several alcohol-related misdemeanors, Rainville was charged with two counts of assault with a deadly weapon against Everett Carlson and Dazell.

At trial, the prosecution presented evidence of Rainville's four prior alcohol-related misdemeanors.

In 1996, a San Francisco police officer observed Rainville running a red light and failing to stay within her lane. She failed to yield to officers and led them on a low-speed chase through city streets. When she was first stopped, Rainville drove off as the officer walked up to her car, prompting police to activate their sirens and lights. When police ordered her to pull over, Rainville continued to drive through the city at 30 to 40 miles per hour. She stopped at a red light along with other cars, and the driver of the car in front of her had been instructed by police not to move in order to prevent Rainville from driving away. Police ordered Rainville to get out but she refused to comply, and maneuvered her car to make a right turn while police continued to pursue her. Rainville stopped only when the police managed to box her car in. One of the officers broke the driver side window and pulled Rainville out of the car. The vehicle reeked of alcohol. Inside were two empty bottles of rum and a paper cup containing and smelling of alcohol.

[1] It is unlawful to drive a motor vehicle with a blood-alcohol limit of .08 percent or more. (Veh. Code, § 23152 subd. (b).)

Rainville was unable to perform field sobriety tests, and officers concluded she was under the influence. Rainville stipulated to a conviction of misdemeanor driving under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a).

In 2001, in San Luis Obispo County, Rainville committed a misdemeanor violation of Vehicle Code section 23152, subdivision (b), for driving with a blood-alcohol level greater than .08 percent. She completed a DUI program.

In 2005, in Mendocino, a California Highway Patrol officer found Rainville in her car after it had backed into a tree off a coastal road. The tree, which had entangled the car, was perched on a cliff above the Pacific Ocean and separated the car from a sharp drop off. When Rainville emerged from the car, the officer smelled alcohol from the vehicle and on Rainville's breath and observed her eyes were red and watery and her speech was slow, slurred, and deliberate. Rainville failed a battery of field sobriety tests. Rainville was arrested. Her blood test indicated a blood alcohol level of .36 percent. Based on his investigation, the officer believed that Rainville was driving under the influence and backed her vehicle down a driveway and across the road and into the tree. Rainville pled guilty to a misdemeanor violation of alcohol-related reckless driving under Vehicle Code section 23103.5.

In February 2013, just a few months before she crashed into the Carlsons' backyard, Rainville was arrested in Ukiah after she rear-ended another car. The first officer at the scene thought she was disoriented. Rainville smelled of alcohol and was unsteady on her feet, and he had to hold onto her arm to steady her. The second officer at the scene observed that Rainville had red and watery eyes, slow, slurred speech, and deliberate movements, all signs of alcohol intoxication. She again failed a battery of field sobriety tests and had a .29 percent blood-alcohol level. Rainville pled no contest to a misdemeanor violation of driving with .08 percent or more alcohol in the blood under Vehicle Code section 23152, subdivision (b) and admitted her prior conviction for misdemeanor driving under the influence in 2005. The court ordered Rainville to not drive any vehicle without an ignition interlock device. She was also ordered to attend a multiple-offender program for 18 months and to abstain totally from alcohol. At the plea

proceeding, the court warned Rainville: "[B]eing under the influence of alcohol or drugs both impairs your ability to safely operate a motor vehicle. [¶] . . . [¶] [I]t is extremely dangerous to drive while under the influence of alcohol or drugs or both. And if you continue to drive while under the influence of alcohol or drugs or both and as a result of that driving someone is killed, you could be charged with murder." Asked whether she understood this, Rainville said she did.

At trial, Rainville did not testify. The jury convicted her of both felony counts of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).) She appeals.

DISCUSSION

A. Sufficiency of the Evidence

Rainville contends the evidence was insufficient to support her convictions of assault with a deadly weapon.

Standard of Review

" ' In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]' " (*People v. Golde* (2008) 163 Cal.App.4th 101, 108 (*Golde*).) We do not resolve credibility issues or evidentiary conflicts. Instead, we presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Analysis

"An assault is an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another." (*People v. Rocha* (1971) 3 Cal.3d 893, 899 (*Rocha*).) In order to convict on assault, the jury need only find that the defendant (1) willfully committed an act which by its nature would probably and directly result in the

application of physical force against another; and (2) was aware of facts that would lead a reasonable person to realize this direct and probable consequence of his or her act. (*People v. Williams* (2001) 26 Cal.4th 779, 790 (*Williams*).)

"[A]ssault requires only a general criminal intent and not a specific intent to cause injury." (*Williams, supra*, 26 Cal.4th at p. 782.) The crime does not require any intent to cause an application of physical force to another person, or a substantial certainty that an application of force will result. (*People v. Colantuono* (1994) 7 Cal.4th 206, 214–220 .) Nor does assault require a "subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Williams, supra*, 26 Cal.4th at p. 790.) " 'The mens rea for [assault] is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another." (*Golde, supra*, 163 Cal.App.4th at pp. 108.)

Since a defendant "need not be subjectively aware of the risk that a battery might occur [citation]," the mental state for assault is a "species of negligent conduct." (*People v. Wright* (2002) 100 Cal.App.4th 703, 706 (*Wright*).) "Where the negligent conduct involves the use of a deadly weapon, [such as] a vehicle, the offense is assault with a deadly weapon. Thus, any operation of a vehicle by a person knowing facts that would lead a reasonable person to realize a battery will probably and directly result may be charged as an assault with a deadly weapon." (*Ibid.*) A defendant, however, "may not be convicted based on facts he did not know but should have known." (*Williams, supra*, 26 Cal.4th at p. 788.)

People v. Aznavoleh (2012) 210 Cal.App.4th 1181 (*Aznavoleh*), relied on by both parties, is particularly instructive. In *Aznavoleh*, the defendant "deliberately ran a red light while racing another vehicle on a busy city street" even though his passengers repeatedly told him to slow down. (*Id.* at p. 1189.) The defendant saw another vehicle start turning left as he was approaching the intersection but "made no effort to stop, slow down, or otherwise avoid a collision with [that] vehicle." (*Ibid.*) The court affirmed the

defendant's conviction of assault with a deadly weapon, finding that "an objectively reasonable person with knowledge of these facts would appreciate that an injurious collision, i.e., a battery, would directly and probably result from his actions." (*Ibid.*)

Like the court in *Aznavoleh*, we conclude there was substantial evidence for the jury to reasonably convict Rainville of assault with a deadly weapon.

There was sufficient evidence for a jury to conclude Rainville willfully engaged in conduct constituting the assault. The evidence shows Rainville was alone in the car, sitting in the driver's seat. She crashed through a fence and into the backyard of her neighbors' home, where people lived and socialized. When the car stalled on the patio, witnesses testified the car engine continued to rev. The car lurched forward and smashed into the outside wall of the Carlsons' master bedroom, where according to some testimony, the engine continued to rev. After she crashed into the house, she got out of the car and walked towards her apartment building. With Rainville as the sole operator of the car and with the constant revving of the engine during the entire ordeal, the jury could reasonably have deduced Rainville intentionally drove the car and pressed forward until it crashed into the Carlsons' home. The fact Rainville was able to exit the car and walk away supports a permissible inference that she was conscious throughout the incident. On this evidence, a reasonable jury could find Rainville willfully engaged in the conduct constituting the assault.

There was also sufficient evidence for a jury to conclude Rainville was aware of facts that would lead a reasonable person to realize an injurious collision was a direct, natural, and probable consequence of her impaired driving. Rainville had four prior misdemeanors for driving under the influence. Following her fourth misdemeanor that took place just a few months prior to her crash into the Carlsons' backyard, she was under a court-order to abstain from alcohol and to not drive any car without an ignition interlock device. The court had explicitly warned her about the dangerousness of driving under the influence, and Rainville indicated she understood.

On the night of the crash, the evidence shows the Carlsons and their guests, who were socializing on the porch 15 to 17 feet away from the fence along the Carlsons'

backyard, saw Rainville's car approaching as soon as the fence came down. Dazell was close to the car's path, from an arm's length to "inches" away. Before the car crashed into the Carlsons' house, the Carlsons and their guests yelled for the car to stop. Not heeding these screams, Rainville proceeded to hit the exterior wall of the master bedroom with the car. Based on this evidence, a jury could reasonably conclude that just as the Carlsons and their guests saw Rainville, she, too, was able to see them and their surroundings. This included Dazell in particular in the path of the car's trajectory with the Carlsons' house behind her.

A jury could also reasonably deduce based on the yells for her to stop and the fact Rainville did not stop or turn off the car in such close quarters with the home immediately ahead of her, she was aware her actions could lead to an application of physical force against someone. (See *Aznavoleh*, *supra*, 210 Cal.App.4th at pp. 1189 [sufficient evidence of assault when defendant "made no effort to stop, slow down, or otherwise avoid a collision" notwithstanding warnings from others to slow down].) On this evidence, a jury could reasonably find Rainville was aware of facts that would lead a reasonable person to realize an injury would directly, naturally, and probably result from her conduct.

None of the arguments Rainville advances convinces us a different conclusion is appropriate under the facts of this case.

First, Rainville contends "evidence of an act of driving under the influence, without more, is insufficient for a conviction of assault because driving under the influence is not an assaultive act." She warns that "**every** act of driving under the influence would always be liable for assault" if driving while impaired constituted an assaultive act. This argument disregards the totality of the evidence supporting Rainville's assault convictions. The record shows there was indeed "more" beyond intoxicated driving demonstrating willful conduct. Rainville drove into a neighbors' backyard where people were socializing, narrowly missing one of the Carlsons' guests. She crashed the car into the outside wall of a bedroom where a boy was sleeping. The car's engine continued to rev throughout the entire ordeal. Further, Rainville's four prior

misdemeanors for driving under the influence, the court orders to abstain from alcohol and to not drive cars without an ignition interlock device, and the prior court warning about the dangerousness of her conduct are additional facts that bear upon whether she is guilty of assault. Rainville's assault here is by no means based on an isolated act of driving a car while under the influence of alcohol.

Contrasting her own situation, Rainville points to *Wright* and *Aznavoleh* as cases with assaultive acts and asserts "an assault cannot be predicated merely on the generic act of driving under the influence and must be tethered to a specific assaultive act as in *Wright* and *Aznavoleh*."

In *Wright*, the court affirmed jury convictions of a defendant for assault with a deadly weapon for driving his pickup truck "close to persons with whom he had contentious relations." (*Wright, supra*, 100 Cal.App.4th at pp. 705, 724.) The defendant had driven fast toward a woman in a crosswalk, forcing her to jump out of the way. (*Id.* at p. 707.) Another time, he drove at high speed directly toward a man with whom he had an altercation. (*Id.* at p. 708.) "[T]he jury was permitted to convict [the] defendant of assault if it determined, under an objective view of the acts, that an application of physical force on another person was reasonably foreseeable." (*Id.* at p. 724.) In *Aznavoleh*, discussed earlier, the court affirmed a jury conviction of a defendant who raced a car at high speeds through a red light and ultimately struck another vehicle the defendant saw beforehand. (*Aznavoleh*, *supra*, 210 Cal.App.4th at p. 1189.)

In our view, both cases support Rainville's conviction. She drove a car through a neighbors' backyard where people were socializing. Her actions forced Dazell to get out of the way. Rainville ultimately crashed into a home where someone was sleeping. These acts constitute the assaults against Dazell and Everett Carlson. On this evidence, a jury could have reasonably deduced Rainville drove the car with the same intentionality as the defendants in both *Wright* and *Aznavoleh*. We understand neither *Wright* nor *Aznavoleh* involved drunk driving, but Rainville's voluntary intoxication presents no defense (*Rocha*, *supra*, 3 Cal.3d at p. 896), and it does not make her conduct less intentional.

Second, Rainville likens her case to the seminal proximate cause case of *Palsgraf v. Long Island R. Co.* (1928) 248 N.Y. 339. However, Rainville fails to explain the import of *Palsgraf* for her defense other than claiming "as in *Palsgraf*, the state's theory of liability is too attenuated." No matter, we are not confronted with a civil claim regarding Rainville's negligence and whether Dazell and Everett Carlson were foreseeable plaintiffs. In the context of criminal assault with a deadly weapon, what is required is an awareness of facts that would lead a reasonable person to realize an injurious collision was a direct, natural, and probable consequence of the defendant's conduct. (*Williams*, *supra*, 26 Cal.4th at p. 788.) As discussed earlier, that is satisfied here. There is no requirement a defendant foresee her victim's injury. "[A]n assault does not require an intent to cause injury to another person, or an actual awareness of the risk that injury might occur to another person." (*Aznavoleh*, *supra*, 210 Cal.App.4th at p. 1187.) To the extent Rainville contends either is needed, that is not the law.

Lastly, Rainville contends there was insufficient evidence she willfully committed an assault, noting the record fails to show her acts of accelerating the car through the fence and into the Carlsons' house were intentional or on purpose. She points to the questions she posed to Odlozil when he open the car to turn it off—i.e., "what's going on?" or "what's happening?"—and the absence of any animus between her and the Carlsons, and suggests this evidence demonstrates the lack of any intent to depress the car's accelerator. These contentions require that we reweigh the evidence, which we may not do. (*Aznavoleh*, *supra*, 210 Cal.App.4th at p. 1186.) The jury heard the evidence Rainville refers to as well as the evidence that she was the driver of the car that crashed into the Carlsons' house and the car continuously revved throughout the incident. Construed in the light most favorable to the judgment, we conclude that substantial evidence supports the verdict the jury reached.

B. Jury Instructions

Rainville next contends the trial court erred by instructing the jury that the act of driving under the influence was a valid theory for conviction of aggravated assault. She

also argues the court erred by not instructing the jury it had to find "an intentional assaultive act" in order to convict her of assault with a deadly weapon.

Standard of Review

" 'We determine whether a jury instruction correctly states the law under the independent or de novo standard of review.' " (*People v. Sigala* (2011) 191 Cal.App.4th 695, 698.)

Analysis

A trial court has a general duty "to instruct the jury on all general legal principles raised by the evidence and necessary for the jury's understanding of the case." (*People v. Mouton* (1993) 15 Cal.App.4th 1313, 1319.) The jury instructions are considered as a whole, and there is no error unless there is a "reasonable likelihood" that the jury misunderstood the instructions. (*People v. Clair* (1992) 2 Cal.4th 629, 662–663.)

We conclude the trial court's instructions to the jury under CALCRIM No. 875 and CALCRIM No. 375 were proper.[2]

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[2] The instructions given the jury under CALCRIM No. 875 stated:

"The defendant is charged in counts one and two with assault with a deadly weapon other than a firearm.

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person;

2. The defendant did that act willfully;

3. When the defendant acted, she was aware of facts that would lead a reasonable person to realize that her act by its nature would directly and probably result in the application of force to someone;

AND

4. When the defendant acted, she had the present ability to apply force with a deadly weapon other than a firearm to a person.

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that she intend to break the law, hurt someone else, or gain any advantage.

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

The touching can be done indirectly by causing an object to touch the other person.

The People are not required to prove that the defendant actually touched someone.

The People are not required to prove that the defendant actually intended to use force against someone when she acted.

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault.

Voluntary intoxication is not a defense to assault.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

A *deadly weapon other than a firearm* is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."

The instructions given the jury under CALCRIM No. 375 stated:

The People presented evidence that the defendant committed other offenses that were not charged in this case.

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the offenses. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

If the People have not met this burden, you must disregard this evidence entirely.

If you decide that the defendant committed the offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not:

The defendant knew of facts that would lead a reasonable person to realize that (her) act of driving a motor vehicle while under the influence of alcohol by its nature would directly and probably result in the application of force to someone; when she allegedly acted in this case.

In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offenses.

Do not consider this evidence for any other purpose except for the limited purpose of determining if the defendant had knowledge of of [*sic*] facts that would lead a reasonable person to realize that her act of driving a motor vehicle while under the influence of alcohol, by its nature would directly and probably result in the application of force to someone;

Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.

If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not

We disagree with Rainville's two principal contentions that the court erroneously instructed the jury that merely driving under the influence was a valid theory for aggravated assault and that the court failed to instruct on the necessity of an assaultive act. First, "[i]t is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations." (*Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205.) Rainville identifies nowhere in the record where the court instructed the jury that driving under the influence was enough to convict for assault with a deadly weapon. Second, the instructions given the jury—and which Rainville cites—belie her complaint. The court's recitation of CALCRIM No. 875 and CALCRIM No. 375 were proper and complete instructions on assault and how to weigh the possibility Rainville was driving under the influence at the time of the assault. In enumerating to the jury the People's burden of proof to prove Rainville's guilt—including the need for her to willfully have done an act which would directly and probably result in the application of force to a person— the court's instructions provided the jury with complete information necessary to decide whether Rainville committed assault with a deadly weapon.

Since Rainville does not identify any particular error in the court's instructions, Rainville claims the error arises from the prosecutor's closing argument. The prosecutor told the jury, "[T]he willful act we are talking about is driving under the influence . . . . We are not talking about she drove at somebody on purpose or tried to hurt somebody. The willful act is getting in a car, turning it on, being under the influence of alcohol." However, these statements presented the People's theory of the case, not the law that applies to it, and the jury was free to accept or reject the People's theory. These statements did not undermine the court's instructions. (*Golde*, *supra*, 163 Cal.App.4th at pp. 120–123.)

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sufficient by itself to prove that the defendant is guilty of counts one and two. The People must still prove every element of each charge beyond a reasonable doubt."

Also, the court instructed the jury: "You must follow the law as I explain it to you even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." We " 'presume that jurors treat[ed] the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' " (*People v. Thornton* (2007) 41 Cal.4th 391, 441.) We find no reason to depart from the presumption that the jury followed the court's admonition to follow the law as set forth in the jury instructions and that it used those instructions to reach its verdict. (See *People v. Welch* (1999) 20 Cal.4th 701, 773.)

Because we conclude the court properly instructed the jury, we need not address Rainville's contention of prejudice from the challenged instruction.

DISPOSITION

The judgment is affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.

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