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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK ABELLA,

Defendant and Appellant.

C066010

(Super. Ct. No. 08F04720)

In the early morning hours of June 7, 2008, 17-year-old Frank Abella (defendant) and an acquaintance, James Washington, killed a mentally and physically handicapped man as he sat outside a 7-Eleven store sipping coffee. Tried separately as an adult, defendant was convicted of murder (Pen. Code, § 187, subd. (a); further undesignated section references are to the Penal Code), robbery (§ 211), and torture (§ 206). The jury also found defendant used a deadly weapon in connection with the murder and torture (§ 12022, subd. (b)(1)) and the murder occurred during the commission of the robbery (§ 190.2, subd. (a)(17)(A)). Defendant was sentenced on the murder under section 190.5,

subdivision (b), to life without the possibility of parole (LWOP), while sentence on the other offenses was stayed with the exception of a one-year enhancement.

After sentence was imposed in this matter, the United States Supreme Court issued its decision in *Miller v. Alabama* (2012) \_\_\_ U.S. \_\_\_ [183 L.Ed.2d 407] (*Miller*), holding that a *mandatory* LWOP sentence for a minor who commits murder amounts to cruel and unusual punishment.

Defendant appeals, contending: (1) there is insufficient evidence to support the robbery conviction or the finding that the killing occurred during the commission of a robbery; (2) there is insufficient evidence to support the torture conviction; and (3) the LWOP sentence amounts to cruel and unusual punishment in light of defendant's age, personal characteristics, and limited participation in the murder, and under *Miller*.

We reject defendant's first two contentions. On the third, we conclude the LWOP sentence is not disproportional to the offense or the offender and any possible error by the trial court in applying a presumption for LWOP under section 190.5, subdivision (b), was harmless.

#### FACTS AND PROCEEDINGS

During the early morning hours of June 7, 2008, defendant and Washington were hanging out together at an apartment complex in Rancho Cordova where defendant's mother lived. At the time, Washington was dating defendant's sister, E.G, who was also present. Defendant was several weeks shy of his 18th birthday.

At approximately 2:40 a.m., defendant and Washington walked to a nearby 7-Eleven store. The events that occurred thereafter were captured in large part on surveillance cameras mounted at the 7-Eleven and at an adjacent check-cashing store.

At approximately 2:50 a.m., defendant and Washington left the 7-Eleven and approached 50-year-old William Deer, who was sitting on a curb outside the check-cashing store drinking coffee he had just purchased at the 7-Eleven. Deer was both

mentally and physically handicapped due to a motorcycle accident more than 20 years earlier.

Earlier that evening, Deer's mother had dropped him off at a bus stop in Sacramento so he could visit friends in Rancho Cordova. At the time, Deer wore a fanny pack around his waist in which he carried various personal items, including a cell phone charger, a toothbrush, cigarettes, and money. He also carried with him a cell phone. Deer was wearing the fanny pack in the 7-Eleven approximately 30 minutes before he was approached by defendant and Washington.

What transpired during defendant's initial encounter with Deer is not altogether clear. However, what is clear is that, at some point, defendant and Washington beat, kicked and stomped on Deer and then ran from the scene.

Approximately 30 minutes later, Washington returned to the area with E.G. By that time, Washington had changed his shirt. They approached Deer, who was still lying where defendant and Washington left him. E.G. could see that Deer was hurt but he was still alive. Washington and E.G. departed.

Seven minutes later, defendant and Washington returned to where they had left Deer. Less than a minute later, they again ran from the scene.

Defendant and Washington returned a third time approximately 30 minutes later, this time with a BB gun. They shot Deer 19 times in the face and abdomen and then fled the scene.

Police were eventually dispatched to the 7-Eleven and found Deer still alive. They did not find a fanny pack or cell phone in the area; nor did they find any identification for the victim. Deer was taken to the hospital, where he later died. The cause of death was determined to be multiple blunt force head injuries plus multiple BB pellet injuries.

Five days later, defendant and Washington were arrested. They were charged with murder, robbery and torture and were tried separately. Defendant was ultimately convicted and sentenced as previously indicated.

The People request that we augment the record to include copies of exhibits and certain items of evidence presented at Washington's separate trial. We deny the request. The indicated items are not relevant to the matter before us and are unnecessary for our determination of the issues presented in this appeal.

## DISCUSSION

### I

#### *Sufficiency of Robbery Evidence*

Defendant contends there is insufficient evidence to support either the robbery conviction or the robbery special circumstance. The robbery conviction was in turn the basis of the felony murder conviction which, defendant contends, must also be reversed. Defendant argues, primarily, there is no evidence establishing that he and Washington took the victim's property and, therefore, such finding is based on speculation. We disagree.

In reviewing the sufficiency of the evidence supporting a conviction, we view the evidence in the light most favorable to the prosecution and determine if a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) “ ‘The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.’ ” (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting from *People v. Reilly* (1970) 3 Cal.3d 421, 425.) Reversal on the basis of insufficient evidence is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.)

Defendant contends the conclusion that either he or Washington took the victim's property is based on speculation. He argues no video surveillance evidence shows them holding the fanny pack or any of Deer's property as they walked away from the scene, and there were others who could have taken the property during the time the victim was incapacitated. According to defendant, "[t]o assume that because [the victim] had a fanny pack at 2:20 a.m. and did not have it at 4 a.m. that [defendant] took it because [defendant] also assaulted him is speculation about what could happen, not evidence of what did happen." Defendant argues a distinction must be made between reaching reasonable inferences from available evidence and pure speculation.

We agree a distinction must be made between reasonable inferences and speculation. But in the instant case, it is undisputed the victim had a fanny pack before he was approached by defendant and Washington and did not have it when approached by police approximately one and one-half hours later. On the other hand, it is also undisputed that, when defendant and Washington were arrested and their premises were searched five days after the assault, neither the fanny pack nor any of the victim's property was found.

Nevertheless, video surveillance photos show defendant and Washington running from the scene after their first encounter with the victim. Their backs are turned to the camera and their hands cannot clearly be seen. In other photos, defendant and Washington are shown approaching and leaving the scene during the second visit approximately half an hour later. Again, their hands are not clearly visible in the departure photos.

Two other people approached the victim during the time between defendant's first encounter with him and the arrival of police. J.S. was around the apartment complex with defendant and Washington during the early morning hours of June 7. He later told police that at one point defendant and Washington came back from the 7-Eleven and defendant was jumping around saying he and Washington had just beaten up some dude.

J.S. walked over to the 7-Eleven to see for himself. In the video surveillance photos, J.S. is shown approaching the victim and then walking from there to the 7-Eleven. As he walks away from the victim, J.S.'s hands are clearly visible and there is nothing in them. The only other person shown on the videos to have approached the victim was defendant's sister, E.G., who accompanied Washington to the 7-Eleven to check on the victim. When E.G. departed, she did not have anything in her hands. E.G. also testified at trial she did not take anything from the victim.

Hence, the inference that defendant and Washington took the victim's property does not flow simply from the fact they assaulted him, as defendant argues. It comes from the fact the victim had property before he was assaulted, he did not have the property one and one-half hours later, the surveillance evidence shows defendant, Washington and others walking away from the victim at various times during this period, but only the photos of defendant and Washington fail to show their hands. Photos of the others show they were not carrying anything away from the victim. On this evidence, a reasonable jury could conclude it must have been defendant and Washington who walked away from the victim carrying his property. This is not speculation but a reasonable inference from the available evidence. Thus, substantial evidence supports the robbery conviction and the robbery special circumstance.

## II

### *Sufficiency of Torture Evidence*

In a supplemental brief filed a month before oral argument in this matter, defendant contends there is insufficient evidence to support the torture conviction. We shall consider the issue notwithstanding its late introduction.

Section 206 reads: "Every person who, with intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of

another, is guilty of torture. [¶] The crime of torture does not require any proof that the victim suffered pain.”

Defendant argues there is insufficient evidence he harbored the requisite intent to cause cruel or extreme pain and suffering. He asserts the jury was instructed the torture occurred when he and Washington shot the victim with the BB gun. Defendant argues that, at the time, he believed the victim was dead or unconscious, he shot the victim only one time in the chest at Washington’s direction, he did not think the shot would hurt the victim, and he did not intend to inflict pain. According to defendant, “[i]f he had wanted to inflict pain, he would have shot more than once.” Defendant further asserts that, “if [he] believed [the victim] was dead, or believed [the victim] could not feel pain, then [defendant] did not have the specific intent torture requires.” Defendant asserts there is no evidence to contradict his belief that the victim was unconscious and, to conclude otherwise, is “pure speculation and not ‘substantial evidence’ required to support the conviction.”

Defendant’s arguments are based solely on his own self-serving testimony, which the jury certainly was not required to accept. Defendant testified he hit the victim only one time and then only after the victim said he was going to pepper spray Washington and appeared to be pulling something out of his pocket. According to defendant, Washington proceeded to hit, kick and stomp the victim multiple times. Defendant asserts that, when Washington began hitting the victim, defendant walked away. Defendant testified that, before he and Washington returned to the scene the third time, a friend gave them a BB gun for protection in case the victim or his friends tried to jump them. According to defendant, on their return to the scene, he shook the victim to wake him up but the victim did not look like he was breathing. Washington then told him to shoot the victim, so he did so, but only once. Washington took the gun and started shooting the victim.

There was, of course, no contrary, direct evidence as to what occurred during these encounters, since the only other witnesses were Washington, who did not testify at defendant's trial, and the victim, who was permanently silenced by defendant and Washington. However, there is contrary circumstantial evidence. Detective Stanley Swisher testified that an individual who was present at the apartment told him that, after the initial beating of the victim, defendant returned to the apartment, was "amped up," and said they just "beat up some dude." This, of course, contradicts defendant's assertion that he hit the victim only once and walked away while Washington did the rest. More significantly, expert medical testimony was presented that the victim received seven BB wounds on the left side of his face, eight BB wounds on the right side of his torso, and four more to the torso. The victim was alive and breathing at the time. According to the medical expert, the shots on the right side of the body came from someone standing to the right of the victim and the shots on the left side came from someone standing on that side. Hence, defendant's claim that he shot the victim only once is not borne out by the rest of the evidence. And, taking defendant's assertion at face value that "[i]f he had wanted to inflict pain, he would have shot more than once," the jury could reasonably have concluded from this evidence that defendant in fact did want to inflict pain on the victim. And, notwithstanding defendant's contrary testimony, the jury could reasonably have concluded the victim was still alive at the time and defendant knew it. The totality of the evidence presented supports the torture conviction.

### III

#### *Cruel and Unusual Punishment*

Defendant contends the LWOP sentence imposed for the murder violates the state and federal prohibitions against cruel and unusual punishment. He argues that, notwithstanding the heinous nature of the crime, an LWOP sentence is disproportionate to his individual culpability, both because of his limited participation in the killing and

because of his youth, family background and reduced mental capacity. In his supplemental brief, defendant further argues that, because he was less than 18 years old at the time of the offense, and LWOP was the presumptive sentence for 16 to 18-year-olds under California law, the punishment violates *Miller's* categorical prohibition against mandatory LWOP for minors.

The Eighth Amendment to the United States Constitution “ ‘forbids only extreme sentences that are “grossly disproportionate” to the crime.’ ” (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1135.) A punishment also may violate the California Constitution if “it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted (*Lynch*)). In *Lynch*, the California Supreme Court suggested three areas of focus: (1) the nature of the offense and the offender; (2) a comparison with the punishment imposed for more serious crimes in the same jurisdiction; and (3) a comparison with the punishment imposed for the same offense in different jurisdictions. (*Id.* at pp. 425-427.) Disproportionality need not be established in all three areas. (*People v. Dillon* (1983) 34 Cal.3d 441, 487, fn. 38.)

The United States Supreme Court has identified two classes of cases that violate proportionality. “The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions . . . .” (*Graham v. Florida* (2010) \_\_\_ U.S. \_\_\_ [176 L.Ed.2d 825, 836] (*Graham*)). This second classification, in turn, “consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender.” (*Id.* at p. \_\_\_ [176 L.Ed.2d at p. 836].) Under the first subset, the high court has barred capital punishment for nonhomicide offenses. (*Kennedy v. Louisiana* (2008) 554 U.S. 407, 412 [171 L.Ed.2d 525, 534].) Under the second, the court has barred capital punishment for minors, even if

they commit murder. (*Roper v. Simmons* (2005) 543 U.S. 551, 578-579 [161 L.Ed.2d 1, 28].)

In *Graham*, the high court identified a hybrid category of juvenile offenders who commit nonhomicide offenses and concluded such offenders cannot be sentenced to LWOP. (*Graham, supra*, \_\_\_ U.S. at p. \_\_\_ [176 L.Ed.2d at p. 845].) More recently, in *Miller*, the high court concluded a *mandatory* LWOP sentence for a minor who commits even murder violates the Eighth Amendment. The sentencing court must instead have discretion to impose a lesser term.

In this matter, the jury found true the special circumstance that the murder of Deer occurred during the commission of a robbery (§ 190.2, subd. (a)(17)(A)), making it first degree felony murder. For an adult, such finding requires a sentence of death or LWOP. (§ 190.2.) However, because defendant was several weeks shy of his 18th birthday at the time of the offense, he was eligible for sentencing under section 190.5, subdivision (b), which permits either LWOP or 25 years to life.

Defendant contends the LWOP sentence in this case amounts to cruel and unusual punishment because it is disproportionate in light of the first *Lynch* factor, the nature of the offense and the offender (*Lynch, supra*, 8 Cal.3d at p. 425). Regarding the offender, defendant points to the fact he was only 17 at the time of the murder, he received little if any care from his mother while growing up, he frequently ran away from home to avoid foster care, he has an I.Q. of only 62, he had been in special education classes, and he dropped out of school in the ninth grade. Defendant also claims to have begun drinking alcohol at the age of 13 and drank to intoxication every day.

As for the offense, defendant downplays his own role in the robbery and murder by placing most of the blame on Washington. He asserts: “Although the nature of the crime itself was brutal, the evidence was uncontradicted that [defendant] was the lesser participant. [Defendant] testified he struck Deer only once at the initial encounter. [Citation.] He said he was walking away when Washington was kicking Deer.”

Regarding use of the BB gun, defendant acknowledges he brought it to the scene, but asserts “Washington encouraged him to use it.” According to defendant, he “shot Deer once in the chest, believing he was already dead and it would not hurt him,” and “Washington shot him so many times that [defendant] was shocked and ran away.” Defendant asserts his account of what happened is “uncontradicted.”

Defendant raised essentially these same arguments with the trial court in seeking imposition of the lower term of 25 years to life. However, the trial court rejected leniency. After first noting a legislative presumption for LWOP under section 190.5, the court explained:

“I’ve looked at each and every factor in aggravation, each and every factor in mitigation. I’ve also considered Penal Code Section 190.3, all the factors contained therein, but I do conclude that although there are some mitigating factors, such as the defendant’s lack of a significant criminal record; the defendant’s youth, although I think it is underscored that he was virtually weeks away from his 18th birthday; the defendant was intoxicated at the time, which I think that is born[e] out by the evidence in the case, and although this can be a mitigating factor under 190.3, I think in fairness it can also be viewed as an aggravating factor. . . . [¶] . . .

“[Defendant] may have some mental or physical impairment. I don’t completely discount it, although I would say [defendant] sent this Court a letter, and I found it to be well written. There may have been one or two spelling errors, but whatever mental impairment [defendant] has, he’s made the best of what he has because the letter was well thought out. It was clearly organized. Had I not been made aware of what [defendant’s] purported IQ is, I would have been surprised after reading that letter to learn that he tested as low as he did. And again, that’s not by way of cross-examination of any kind of testing to contest what Dr. Heard is saying. Just indicating from my own perspective reading [defendant’s] letter to me, I think he’s done quite well if he does in fact have a mental deficit.

“I’ve also considered aggravating factors, and in Court’s view, the aggravating factors not only outweigh and are so substantial in comparison to any mitigating factor, that I believe it is the appropriate and justified sentence under these circumstances to impose what the legislative preference is as voted by the people in Proposition 115.

“I did consider the following aggravating factors: I considered the fact that this crime involved great violence, and in my view disclosed a high degree of cruelty, viciousness and callousness. I can’t think of a more cruel thing to do than to come back two additional times while a man is literally slowly dying and cannot defend himself, and then for the heck of it shooting him up with a BB gun just because. . . .

“But in my view, this is such a vicious and callous attack on what was, from hearing Mr. Deer’s mother this morning, a very vulnerable victim who knew no strangers, sitting on the curb drinking a cup of coffee, having enjoyed friendship and companionship. Must have been difficult, given his limitations and lack of ability to transport himself, having to rely upon others, having to rely upon public transportation to get him from one point [to] another. The fact is that he came to Rancho Cordova to see and visit his friends, and he decided to have a cup of coffee and enjoy it on the curb.

“You and your friend, for whatever reason--I think we all agree, there’s no good reason. For whatever reason you attacked what was a disabled, nice guy. And not only did you attack him, you came back twice, continued to beat him, then shot him up with a BB gun. That is, in my view, so vicious and so cruel and so callous, that that factor alone in the Court’s view substantially outweighs any of the mitigating circumstances, but again I did consider the fact that the victim was so exceedingly vulnerable, and I also considered the fact, [defendant], that this repeated assault on Mr. Deer involved planning.

“So notwithstanding the fact you were clearly intoxicated, no question about it, you did have the presence of mind to go back to your home, drink a little more, show other people, look at this guy dying on the sidewalk, go back, grab the gun, shoot him up.

It's beyond disturbing and a horrible way to die, and moreover, I think your actions forfeit your right to live among us. It forfeits your right to live amongst us.”

We agree with the trial court's assessment that, under the circumstances of this case, an LWOP sentence is not disproportionate to the nature of the offense and the offender. Most of defendant's argument to the contrary is based on his own self-serving testimony. Defendant may well have been the only eyewitness to the assault to testify at trial, making his testimony “uncontradicted.” But, as noted earlier, this is only because he and Washington silenced the only other witness by coming back twice to finish the job. The trial court was not required to accept defendant's declarations putting most of the blame on his accomplice, especially given the contrary circumstantial evidence noted above. In addition, defendant's testimony that he thought the victim was dead and shot him in the chest where it would not do any damage is internally inconsistent. If defendant really thought Deer was dead, why would it matter where he shot him? Defendant may have a low I.Q., but it is not so low that he could not recognize the value in coloring his testimony so as to deflect as much blame as possible. And defendant may have had a tough childhood, but that does not excuse the type of depraved conduct exhibited in this matter.

Defendant contends the LWOP sentence is nevertheless precluded by *Miller*, because he was under 18 at the time of the offense. United States Supreme Court precedent recognizes that age is an important factor in assessing the appropriate penalty for young offenders. In *Graham*, the court explained: “As compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’ [Citation.] These salient characteristics mean that ‘[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’ [Citation.]

Accordingly, ‘juvenile offenders cannot with reliability be classified among the worst offenders.’ [Citation.] A juvenile is not absolved of responsibility for his actions, but his transgression ‘is not as morally reprehensible as that of an adult.’ ” (*Graham, supra*, \_\_\_ U.S. at p. \_\_\_ [176 L.Ed.2d at p. 841].)

In *Miller*, the high court followed up on *Graham* by holding that, even for murder, a juvenile offender cannot be subject to a *mandatory* LWOP sentence. Rather, because of the factors identified in *Graham*, the sentencing court must have discretion to impose a lesser punishment in light of the offender’s age and other relevant circumstances.

Defendant was sentenced under section 190.5, subdivision (b), which reads: “The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.”

In *People v. Guinn* (1994) 28 Cal.App.4th 1130 (*Guinn*), the Court of Appeal interpreted section 190.5, subdivision (b), to mean that “16– or 17–year–olds who commit special circumstance murder *must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life.” (*Guinn*, at p. 1141.) Later, in *People v. Ybarra* (2008) 166 Cal.App.4th 1069 (*Ybarra*), at page 1089, the Court of Appeal characterized section 190.5, subdivision (b), as creating a presumption for an LWOP sentence.

In *Miller*, the United States Supreme Court held a *mandatory* LWOP sentence imposed on a minor violates the Eighth Amendment. Defendant contends a presumptive LWOP sentence imposed pursuant to section 190.5, subdivision (b), is tantamount to a mandatory LWOP sentence, because it precludes consideration of age and the various factors associated with age as identified in *Graham*. Defendant argues the trial court in

this matter reached its sentencing decision before *Miller* was decided and thus without the benefit of the high court's injunction that age must be considered.

In *Miller*, the high court reached a relatively narrow holding: An LWOP sentence imposed upon a minor pursuant to a sentencing scheme that makes such sentence mandatory violates the Eighth Amendment. Section 190.5, subdivision (b), does not make an LWOP sentence mandatory. It gives the court discretion, upon a proper showing, to impose a lesser sentence. In *Miller*, the high court identified 15 states that make LWOP sentences discretionary for minors, including California. (*Miller, supra*, \_\_\_ U.S. at p. \_\_\_, fn. 10 [183 L.Ed.2d at p. 426].) The court specifically cited section 190.5, subdivision (b). Presumably, at the time it issued *Miller*, the high court was aware of *Guinn* and *Ybarra*'s conclusion that section 190.5, subdivision (b), creates a presumption for LWOP.

But we need not decide in this matter whether section 190.5, subdivision (b), violates *Miller* because of a presumption for LWOP or whether, in the alternative, the provision does not violate *Miller* because it does not in fact create a presumption for LWOP, notwithstanding *Guinn* and *Ybarra*. In this matter, the trial court assumed section 190.5, subdivision (b), creates a presumption but nevertheless went on to consider, in depth, the relevant aggravating and mitigating factors presented, including defendant's age. As to age, the court specifically noted that defendant was only a few weeks away from his 18th birthday at the time of the murder, making that a relatively minor factor. While *Miller* requires consideration of age, obviously the closer one gets to 18 the less significant this factor becomes.

The court thus exercised its discretion to consider defendant's age and other characteristics, along with the circumstances of the crime, in deciding nevertheless to impose an LWOP sentence. *Miller* requires nothing more. Hence, to the extent the trial court erred in applying a presumption for LWOP, that error was harmless. There is no question the court would have imposed an LWOP sentence even without a presumption.

We therefore conclude the sentence imposed does not violate *Miller* or otherwise amount to cruel and unusual punishment.

DISPOSITION

The judgment is affirmed.

\_\_\_\_\_ HULL \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ RAYE \_\_\_\_\_, P. J.

\_\_\_\_\_ DUARTE \_\_\_\_\_, J.