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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARSHALL KEITH STARKS,

Defendant and Appellant.

D060092

(Super. Ct. No. SCN266758)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Affirmed.

A jury found Marshall Starks sexually abused his daughter's 14-year-old girlfriend during a sleepover. The jury found Starks guilty of two counts of penetration by a foreign object with a victim under age 16 and three counts of committing a lewd act upon a child 14 or 15 years of age. (Pen. Code, §§ 289, subd. (i), 288, subd. (c)(1).) The court imposed a two-year sentence.

On appeal, Starks contends the court erred by: (1) allowing the prosecutor to present expert testimony about children and their reporting patterns in child sexual abuse cases; and (2) denying his probation request. We reject these contentions and affirm.

FACTS AND PROCEDURE

Factual Summary

During the summer of 2009, 14-year-old A spent substantial time at the home of T, her best friend. T lived with her father (defendant Starks) and her three siblings. Starks frequently gave A advice on school and other matters, and A thought of him as a father figure, role model, and mentor. At the time, A was being raised by a single mother.

On July 11, 2009, A spent the night at T's home. Late at night, A and T were in the living room where they had been watching movies. A was lying on one of the couches and T was asleep on the other couch. Starks walked in the room, sat next to A, and started playing with her hair. According to A's testimony, Starks then moved his hand down A's leg, put his hand up through her shorts, and started rubbing her vagina, ultimately penetrating her vagina with his finger. While pretending to be asleep, A shuffled to the end of the couch. Starks moved with her, rubbing her chest, breast, and stomach until he slid his hand through the top of her shorts and again penetrated her vagina with his finger. After A crossed her legs, Starks tried to open her legs but was unsuccessful. Starks then shuffled A's hair and got up and left the room.

A acknowledged at trial that she did not scream or fight with Starks or wake up T who was sleeping on the next couch. A said that while Starks was touching her she "didn't really know what to do" and she was "kind of in shock." She said "this is somebody I trusted and somebody that I looked up to." A said that when Starks left the room, "I just kept my eyes closed I wanted to push it away, and I was freaking out." She said she did not tell T right after the event because it "was embarrassing" and she did not want to "start anything or have [T] become upset with me." A said she had "never kissed a boy before . . . let alone had someone go inside my pants. It was just uncomfortable and embarrassing"

About two days later, A told T generally what had happened. T did not believe her and insisted her dad was not a "creeper." She asked A not to say anything because her dad was all she and her siblings had and she did not want to be taken away from him.

Shortly after, Starks took T and her friends (including A) to an amusement park (Knott's Berry Farm) for T's birthday. A interacted with Starks in a normal fashion during the trip. During the next two weeks, A spent several additional nights sleeping at T's house.

About three or four weeks after the couch incident, A went to visit her aunt for the weekend. A and her aunt have a very close relationship. On her way home from the visit, A related the details of Starks molesting her to her aunt. A did not want her aunt to tell anyone because A was embarrassed and did not want to hurt her best friend or her

best friend's family. A's aunt and uncle persuaded her to tell her mother and to report the molestation to the police.

After an initial police report, the case was assigned to Detective Nicole Davis. Detective Davis interviewed A and recommended that she place a controlled call to Starks.

A agreed and placed the controlled pretext call to Starks. After speaking with Starks about unrelated matters, A asked whether he "remember[ed] when I spent the night at your house that one night?" and asked Starks to "promise . . . that you're not going to tell anyone" Starks responded "Okay, I promise." A then said, "I was like — I didn't know why you did that." Starks said that he "freaked myself out because I . . . was thinking that you were somebody else." Starks also said that, "it was weird for me too," and that he cared about her more than she knew. Twice he said he wished she was 18 rather than 14. At one point, A said, "I kind of have feelings for you too," to which Starks responded, "Good. I thought so. And I see that." Starks then told A she was different for him than most kids and stated, "So what — what do I tell people, I'm in love with a 14 year old." When A falsely told Starks, "I think I kind of liked it that night" and she never felt that way before, Starks replied, "Oh, why thank you" and said "So we'll have to wait until you're 18." A followed that by asking, "Why can't we do it again?" Starks replied, "Oh, my goodness. It's up to you. I guess."

A few days later, Detective Davis spoke with Starks, who indicated he believed the detective was inquiring about the time A fell asleep on him. Starks said A was

watching a movie with his daughter when he sat next to A to ask about her cell phone and at some point during the movie he fell asleep. When he awoke, A was asleep across his lap, one of his hands was on her buttocks, and the other was on the small of her back. Starks said he was half-awake and A's blonde hair reminded him of his ex-wife, so he brushed the hair aside to reveal the face. Realizing it was A, he lifted her off of his lap, covered her with a blanket, and left the room.

Starks was charged with offenses relating to the July 11 couch incident, including two counts of penetration by a foreign object and three counts of a lewd act upon a child 14 or 15 years of age (placing his hand on A's vagina, rubbing A's legs and stomach, and placing his hands on A's breasts). Starks was also charged with two counts of lewd conduct that allegedly occurred in the weeks before the couch incident (once kissing A on the mouth and once rubbing A's thighs).

Trial

During trial, A testified at length about the July 11 couch incident as summarized above. A said that after reporting the incident, she was harassed by T and her friends, and was forced to transfer to a new high school. Additionally the jury heard testimony from various witnesses about A's reports of the incident, including testimony by A's aunt, A's mother, and Detective Davis.

Over defense objections, the court also permitted the prosecutor to present expert testimony about children and their reporting patterns in child abuse cases. As detailed below, Deborah Davies, a forensic interviewer and supervisor at the Pomona Children's

Advocacy Center, testified about common disclosure patterns and developmental factors applicable to child sexual abuse to help the jury understand that child abuse victims generally do not immediately report abuse, do not often fight back, and often report in stages. Dr. Premi Suresh, a pediatrician who evaluates children for suspected abuse or neglect, also testified that abuse or molestation cases commonly lack physical findings or signs of injury.

Starks testified on his own behalf and categorically denied sexually assaulting A. Starks acknowledged he was in the room with his daughter and A the evening of July 11, but claimed he fell asleep during one of the movies and when he awoke he was "shocked" to find A asleep across his lap. He testified that one of his hands was on the small of her back and the other hand was on her hip or buttocks area. At the time, his daughter (T) appeared to be awake and watching the television. Because Starks was half-asleep, A's hair reminded him of his ex-wife, but when he brushed the hair away from her face and looked at her, he lifted A's head and shifted his body out from under her. He then covered A with a blanket and went to bed.

Defense counsel extensively cross-examined A and sought to establish that A's story changed over time and elicited evidence showing A interacted with Starks on a normal basis shortly after the incident (including continuing to sleep over at T's house and on the trip to Knott's Berry Farm). Defense counsel also questioned witnesses to whom A had reported the abuse, seeking to show inconsistencies in A's story. Defense counsel additionally elicited testimony that A had a dramatic character, a tendency to

seek attention, and a tendency to say things that were "over the top." Defense counsel additionally called several character witnesses, who testified that Starks had successfully served in the United States Navy and is a respectful, caring and meticulous person. This evidence also showed Starks was a responsible single parent to his four children.

Jury Verdict and Sentence

The jury found Starks guilty of two counts of penetration by a foreign object with a victim under age 16 and three counts of committing a lewd act upon a child 14 or 15 years of age pertaining to the July 11 couch incident. However, the jury acquitted Starks of the other two charged counts pertaining to A's testimony that Starks had previously kissed her on the lips and touched her thighs.

After a sentencing hearing, the court rejected Starks's request for probation and sentenced Starks to a total prison term of two years.

DISCUSSION

I. Admissibility of Expert Testimony

Starks contends the court erred by admitting Davies's expert testimony about general patterns of child abuse disclosure patterns to counter defense arguments that A's actions showed her abuse claims were not credible. He contends the evidence was not sufficiently beyond the common knowledge of the jury, as required by Evidence Code section 801.

A. Relevant Facts

Before trial, the prosecutor moved to admit Davies's testimony about children and their reporting patterns in child abuse cases. The prosecutor requested the admission of the expert testimony to dispel certain misconceptions about child molest victims because the defense would likely attack A's credibility on several grounds: (1) she did not immediately disclose the incident; (2) she did not appear frightened or upset immediately after the incident; (3) shortly after the incident A willingly went back to Starks's home and accompanied Starks and his family to Knott's Berry Farm; and (4) A gradually disclosed the abuse and did not immediately tell every detail of the abuse. Citing well-settled California law, the prosecutor argued the expert testimony was admissible because for many jurors A's actions would be counterintuitive and the expert testimony was needed to rebut challenges to A's credibility on the ground that she did not act consistent with being a victim.

Defense counsel acknowledged that this form of expert testimony is generally admissible under California law and the admission of the evidence was "certainly a call for the court," but argued the judicial decisions allowing the admission of the evidence were "outdated" because jurors were familiar with "the idea of what child molest is." In support, defense counsel mentioned the "To Catch A Predator" television show and the "well-known" John Gardner case. Defense counsel also said that during voir dire none of the jurors "raised their hand to indicate that they are victim to any of the myths or misconceptions as mentioned in the people's moving paper."

The prosecutor responded that the "To Catch a Predator" show and John Gardner case both concern unknown predators, whereas it is "a little bit more subtle when it happens in the context of this case, which is a man who is a Navy veteran, who [was] a father figure [to A]"

The court found the facts at issue in the case supported the admission of the evidence and granted the prosecutor's motion. The court stated that it was required to consider whether the expert testimony would be "helpful" to the jury and whether the evidence is admissible under Evidence Code section 352's balancing test. In permitting the admission of the evidence under these standards, the court found the evidence would assist the jury. The court noted that although some of the jurors might be aware of some of the misconceptions (including the fact that "people don't immediately make a report"), the court "tend[ed] to think it's helpful to" the jurors "as to some of these . . . myths." To prevent any misuse of the testimony, the court said it would give cautionary instructions before the expert testifies.

Thereafter, before expert Davies testified, the court gave the jury a limited-use instruction: "Let me tell you about two experts you will hear in this case and how you can use that evidence. The testimony of [Davies and Dr. Suresh are] admitted for a limited purpose. Their testimony is offered and may be considered by you *only* for the purpose of understanding a class of individuals, child victims of sexual assault or abuse that may behave in a certain way, or have a certain physical condition because of membership in this class of persons. *This evidence cannot be used for any other purpose.*"

Do not assume just because I give a particular instruction, that I am suggesting anything about the facts. [¶] The complaining witness, [A], may or may not be within that class of persons. This is for you to decide." (Italics added.) The court also gave the jury the standard expert-witness jury instructions, including that the jury is "not required to accept [an expert opinion] as true or correct" and that "[y]ou may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence."

In her ensuing testimony, Davies reiterated the limited nature of her opinions: "My role is to give information in general about what we know about disclosure patterns and developmental factors related to disclosure of child sexual abuse, not specifically on actual victims." In explaining these patterns and factors, Davies testified that children frequently delay disclosure of sexual abuse because they feel shame and embarrassment, they fear the consequences, and they worry about not being believed. She said that even children whose sexual abuse has been independently verified (such as when the abuse was videotaped or children who have sexually-transmitted diseases) will often deny the sexual abuse. She explained that children worry about what will happen to them, "or worse, about what will happen to the alleged offender or to other family members or people important to that particular child or individual." Davies said that adolescents typically report abuse to a trusted peer and depending on the reaction of that peer, will either continue the disclosure process or stop the process altogether.

Davies additionally said, "most of the cases we see are situations where the alleged offender is known to the child and [has] a very positive and important

relationship in that child's life." She said that in such situations teenagers are "far better able to appreciate the potential negative consequences to making a disclosure, both to themselves and others." When asked about the victims' compliance during the abuse, Davies stated that fighting back is "not frequently seen." When the victim had a trusting relationship with the abuser, they frequently report that "they kind of froze" or might have pretended to be asleep.

B. *Governing Legal Principles*

California courts, including this court, have long held expert testimony is admissible to rebut common misconceptions about child abuse victim behavior. (See *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301; *People v. Perez* (2010) 182 Cal.App.4th 231, 243-245; *In re S.C.* (2006) 138 Cal.App.4th 396, 418; *People v. Yovanov* (1999) 69 Cal.App.4th 392, 406-407; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1747; *People v. Housley* (1992) 6 Cal.App.4th 947, 957; *People v. Stark* (1989) 213 Cal.App.3d 107, 116; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 734-735; *People v. Bowker* (1988) 203 Cal.App.3d 385, 392-394; see also *People v. Brown* (2004) 33 Cal.4th 892, 905-906; *People v. Bledsoe* (1984) 36 Cal.3d 236, 247-248.) This rule is based on Evidence Code section 801, subdivision (a) which permits expert testimony on a subject "that is sufficiently beyond common experience that the opinion of [the] expert would assist the trier of fact" (See *People v. Brown, supra*, 33 Cal.4th at p. 905.) Because child/adolescent sexual abuse victims often act contrary to what would be expected for a normal crime victim, it has been widely recognized by California

courts that expert testimony is helpful to a jury on these issues. (See *People v. Patino, supra*, 26 Cal.App.4th at p. 1745.)

However, expert testimony on common reactions of child molestation victims is admissible only "for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation." (*People v. Patino, supra*, 26 Cal.App.4th at p. 1744.) The expert testimony "is not admissible to prove that the complaining witness has in fact been sexually abused." (*People v. McAlpin, supra*, 53 Cal.3d at p. 1300.) Because of the danger that a jury will improperly use the expert testimony to infer the abuse occurred, California courts have imposed certain limitations on the admission of the evidence. (*People v. Housley, supra*, 6 Cal.App.4th at p. 955; *People v. Bowker, supra*, 203 Cal.App.3d at pp. 393-394.)

First, the expert testimony must be targeted to a specific misconception suggested by the evidence. (*People v. Housley, supra*, 6 Cal.App.4th at p. 955; *People v. Bowker, supra*, 203 Cal.App.3d at pp. 393-394.) In this regard, the misconception must be raised by the evidence before the expert will be permitted to explain the reactions of child abuse victims as a class. (*People v. Patino, supra*, 26 Cal.App.4th at p. 1745.) However, the defense need not specifically identify the issue before the evidence is admitted. (*Ibid.*) Instead, "it is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation." (*Id.* at pp. 1744-1745; see also *People v. Sanchez, supra*, 208 Cal.App.3d at pp. 735-736 [once "the credibility issue was

already fully present in the case[,] . . . the rehabilitative evidence on this issue was appropriately admitted"].)

Second, the jury must be instructed that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true, but is admissible solely to show that the victim's reactions are not inconsistent with having been molested. (*People v. Housley, supra*, 6 Cal.App.4th at pp. 955, 958-959.)

C. Analysis

In challenging Davies's testimony, Starks concedes the expert's testimony "was in accordance with guidelines set forth in applicable and controlling California law." We agree. The testimony was limited to explaining specific misconceptions suggested by the events surrounding A's claimed abuse, including the fact that A did not immediately report and continued to interact with Starks on a "normal" basis, A did not fight back during the act, A did not initially appear to be traumatized or upset, and A reported on a piecemeal basis. Moreover, the court twice specifically admonished the jury that the testimony was not intended and should not be used to determine whether A's molestation claim was true, but was admissible solely to support an inference that her reactions were not necessarily inconsistent with having been molested.

On this record, the court did not err in admitting the evidence to disabuse jurors of commonly held misconceptions about how child abuse victims behave.

Starks nonetheless contends that this court should reject the well-settled California law permitting such testimony because "the public has been thoroughly educated" about

"how sexually abused children behave or react in the wake of such alleged abuse." Starks urges this court to create a new rule rejecting the admissibility of general expert testimony about child abuse victims as a class.

These arguments are without merit on the record before us. First, the California Supreme Court has continued to recognize the admissibility of expert evidence for the purposes of " 'disabus[ing] jurors of commonly held misconceptions about sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior." ' ' (*People v. Brown, supra*, 33 Cal.4th at pp. 905-906; *McAlpin, supra*, 53 Cal.3d at pp. 1300-1301.) We are bound to follow the clear import of our high court's rulings. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As one California Court of Appeal recently held in response to a similar contention, "we discern no reason to depart from recent precedent . . ." (*People v. Perez, supra*, 182 Cal.App.4th at p. 245.)

Second, the record before us contains no facts supporting Starks's claim that the public no longer has misconceptions about how sexually abused children and teenagers behave after a trusted adult sexually abuses the minor. Although Starks cites to jury comments during voir dire, these comments are not part of the appellate record. Further, the trial judge, who heard the juror comments and observed the juror demeanor, said he found the expert testimony would be "helpful" to the jurors even if some jurors were aware of some misconceptions. This conclusion is amply supported by the record. The victim was a 14-year-old teenager at the time of the event, but who appeared at trial (two

years later) to be articulate and relatively confident in her testimony. There is nothing in the record showing the jurors would necessarily understand that an average teenager would have kept silent when her best friend's father was sexually molesting her (while her friend was a few feet away) or would have been reluctant to tell her mother about the abuse immediately after the incident. Finally, there is no evidence to support defense counsel's assertion the public is "thoroughly educated" concerning these issues. The references used to support Starks's argument (a television program and a highly publicized criminal case) were insufficient to establish this claim.

Under Evidence Code section 801, expert testimony is admissible on any subject "sufficiently beyond common experience" if the expert opinion would "assist the trier of fact." The admissibility of expert opinion under this code section "is a question of degree." " (*People v. McAlpin, supra*, 53 Cal.3d at p. 1299.) " "The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." ' ' " (*Id.* at pp. 1299-1300.) Further, a court has broad discretion in deciding whether the expert opinion would be helpful to the jurors and

thus admissible under this code section. (See *People v. McDowell* (2012) 54 Cal.4th 395, 425-426.)

Under these principles, the court did not abuse its discretion in concluding that because 14-year-old A acted in numerous ways that would lead a layperson to question whether she was telling the truth about the sexual abuse (e.g., delayed reporting, freezing and not fighting back during the abuse), but which are consistent with reactions that commonly occur with child/teenage sexual abuse victims, it would be helpful for the jury to understand the manner in which this class of victims often responds.

Further, Davies made clear in her testimony that she was not opining on A's credibility and instead was merely describing the typical behavior/reactions of the class of child victims. Her testimony was couched in general terms, and described behavior common to abused victims as a class, rather than any individual victim. During closing arguments, both counsel emphasized the limited nature of Davies's testimony and told the jurors that her testimony was not intended to provide an opinion on whether A was telling the truth in the case. The court twice instructed the jury on the limited use of Davies's testimony.

Relying on a Pennsylvania Supreme Court decision issued about 20 years ago, Starks urges this court to hold that as a matter of law expert testimony on child abuse victim behavior is inadmissible because it usurps the jury's function to determine credibility. (*Commonwealth v. Dunkle* (Pa. 1992) 602 A.2d 830.) We reject this argument on the record before us. *Dunkle* held as a matter of law expert testimony

concerning the typical behavior pattern exhibited by sexually abused children was not admissible under Pennsylvania law to explain misconceptions about victim behavior because delays in reporting are "well within the range of common [juror] experience." (*Id.* at pp. 832-838.) *Dunkle's* reasoning is contrary to more recent California law. Additionally, the *Dunkle* court's holding is unpersuasive in light of the broad discretion afforded to a trial court under California law in deciding whether to admit expert testimony, including whether certain expert evidence is helpful to a particular jury.

II. *Denial of Probation*

Starks also contends the court erred in denying his request for probation.

Starks was statutorily eligible for probation, but the court had wide discretion to determine whether probation was appropriate in this case. (See *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1530.) "Probation is an act of clemency that is granted only in the discretion of the judge." (*People v. Read* (1990) 221 Cal.App.3d 685, 689.) California Rules of Court, rule 4.414 sets forth factors relevant to the trial court's decision, including factors relating to the crime and factors relating to the defendant. "The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. . . . ' . . . 'In reviewing [the determination] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order . . . is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.' " (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.)

The trial court read and considered the probation report recommending a state prison sentence, the sentencing statements submitted by each party, and the statements of the victim and her mother provided to the probation department. In her statement, A said she remains "haunted" by the event and is no longer able to trust anyone, even those close to her. She said the assault was "life changing" and she feels responsible and "horrible for not realizing what [Starks's] intentions were [from] the very beginning." A said that "[h]aving someone that close to you do something that horrible makes me think that others who I consider close to me are capable of doing the same thing, and it scares me." A's mother likewise discussed the continuing negative impact of the sexual abuse on A's life.

In requesting probation, Starks emphasized the facts showing that he had no criminal background, his stable work history, his successful 20-year military career, the fact that he was successfully raising four children as a single parent, the likelihood that he would succeed on probation, and the fact that he posed no threat to A or to the community.

After considering all the circumstances and counsels' extensive arguments at the sentencing hearing, the court agreed that Starks would likely be capable of complying with probation conditions. The court also stated that it had "spent a lot of time thinking about this case" and that the probation issue was "not an easy decision." But the court ultimately concluded probation was not appropriate for several reasons relating to the circumstances of the crime. These reasons included the "devastating" emotional injury to

the teenage victim, the fact that Starks took advantage of a position of trust, the vulnerability of the victim given the "huge age difference" between the victim (14 years old) and Stark (48 years old), the fact there were no unusual circumstances (i.e., no alcohol involved and no actions by the victim indicating she was interested in engaging in the sexual acts), and the potential danger to others particularly because this action was so "out of character" for Starks. Under these circumstances, the court found Starks deserved a prison sentence.

These factors are proper considerations in the probation determination (see California Rules of Court, rule 4.414(a)(3), (4), (7), (9)), and the evidence fully supported the applicability of each of these factors. "Victim '[v]ulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act.' " (*People v. Weaver, supra*, 149 Cal.App.4th at p. 1314.) This definition certainly applies to A in this case, and Starks clearly took advantage of that vulnerability and A's trust in him. Additionally, A's statement to the probation officer made clear that she had suffered severe emotional injury. Although A's trial testimony showed that she was doing well in high school, the evidence also showed that the crime had a substantial and continuing negative impact on her life.

In challenging the court's conclusion, Starks emphasizes the various mitigating factors supporting a grant of probation. However, sentencing courts have wide discretion in weighing aggravating and mitigating factors. (*People v. Roe* (1983) 148 Cal.App.3d 112, 119.) "Indeed, a trial court may 'minimize or even entirely disregard mitigating

factors without stating its reasons.' " (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1258.)

The record shows the court was fully aware of the various mitigating factors supporting probation, including the fact that Starks was a highly "disciplined man," who was well-educated and successfully served in the military, and who did not have a criminal history and who would likely comply with probation conditions. But the court found these factors were outweighed by the factors warranting a prison sentence. We are satisfied the court considered all the relevant factors and made an informed decision in denying probation. The court did not abuse its discretion.

DISPOSITION

Judgment is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.