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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN VALENCIA,

Defendant and Appellant.

E052500

(Super.Ct.No. FSB1000959)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. Affirmed with directions.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Raquel M. Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Jonathan Valencia, of first degree murder (Pen. Code,

§ 187, subd. (a)),¹ during which he intentionally discharged a firearm, causing death (§ 12022.53, subd. (d)). He was sentenced to prison for two consecutive terms of 25 years to life and appeals, claiming the trial court erroneously admitted evidence and instructed the jury. We reject his contentions and affirm, while directing the trial court to correct an error in the abstract of judgment.

FACTS

Defendant sometimes worked at and often slept in the sleeping area of the office of a San Bernardino car repair business owned by his mother's boyfriend (hereinafter, defendant's stepfather). The victim's brother-in-law, who was a friend of defendant's, testified at trial as follows: Three weeks before March 6, 2010, defendant agreed to give the victim, also his friend, his Ford Bronco (hereinafter the Bronco) in exchange for a gun defendant said was worth \$600 and \$200 in cash. Two weeks later, the victim gave defendant the gun, an unloaded .44 revolver. Defendant was supposed to give the victim the Bronco when the victim gave defendant the gun, but, instead, defendant said he would be right back—that he had to go pick-up his girlfriend so she could drive a vehicle back to where they were, so he would have a ride home from the exchange. However, defendant did not return that day with the Bronco. On March 6, 2010, between 7:00 and 8:30 a.m., the victim and his brother-in-law, in the victim's car, arrived at the auto repair shop, which was still closed, and asked an employee there where defendant was, as the

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Bronco was parked in front of the office, within the shop's closed and locked front gates. They had gone there in reference to the deal that had been made about the Bronco. The employee said defendant was not there. They planned to wait until defendant's stepfather arrived at the shop to ask him where defendant was, but 15 minutes after their arrival, they saw defendant in the Bronco, starting it. The brother-in-law walked up to the Bronco (the front gate had since been opened) before the Bronco moved and talked to defendant at the driver's seat window. Their discussion was not angry. The brother-in-law asked defendant, concerning the Bronco, "Johnny, what happened?" Defendant replied that he could not talk, that he didn't want any problems at his stepfather's shop and he asked to be allowed to pull the Bronco out of the shop's lot and park it outside. Defendant was neither angry nor loud. The brother-in-law returned to the victim's car and got in. Defendant then took off in the Bronco at a normal speed. The victim asked the brother-in-law what had happened and the brother-in-law told him. The victim then began following the Bronco in his car. They caught up to the Bronco at a light in San Bernardino and the victim stopped his car in front of the Bronco so it would not leave. The victim got out of his car and ran to the Bronco, angry. He went to the driver's side and said, "What happened?" The brother-in-law turned away from defendant and the victim to unlock the car door so he could get out and he heard a shot. He looked back and could not see the victim, but saw that defendant was leaving by putting the Bronco in reverse. After the brother-in-law got out of the victim's car, defendant hit the car and took off. The brother-in-law then saw that the victim was on the ground, fatally wounded.

A friend defendant had made over the Internet, then had more than 10 telephone conversations with, testified that, the week after the week of March 5, 2010, defendant called her and whispered that he was in a closet, he was in trouble and he would call her again. Later, defendant called and said he was on a bus to Tijuana because he had shot someone over a car or a disagreement about a car and he had with him the gun he had used. He added that a person had come to his stepfather's shop and disrespected him there. He also said proudly that he was "number one on Imperial or something most wanted." She then went on the Inland Empire Most Wanted Internet site, which reported that defendant had shot someone during a disagreement in San Bernardino. One or two weeks later, defendant called her from Mexico and said he was staying with an uncle in Tijuana and he knew he was wanted by the police. He said that a detective had spoken to him on the phone. He said he had left his vehicle in San Bernardino after "wiping it down" and the police would never find him. At some point, defendant told her that the shooting had taken place down the street from his stepfather's shop. In fact, it had occurred less than two miles from the shop.

The case agent testified that he called defendant the morning of the murder and told him that he was investigating a case in San Bernardino; he believed defendant was involved and defendant needed to come to the station to talk about it. Defendant responded that he did not feel he needed to go to the station, that he had nothing to do with it and he was not responsible for the shooting. He said he would not turn himself in and he was thinking about leaving the country. He said he had talked to his stepfather and knew that the police had already searched the shop. When asked where the Bronco

was, he said he wasn't ready yet to give it up and he had plans to chop it up. He ended the conversation by saying, "Good luck finding me because I am gone." Five days later, defendant called the case agent and complained about his mother being harassed by the police. He asked why the police were looking for him in all the wrong places, i.e., his mother's house. The case agent told defendant that the police would continue to go to his mother's house until they found defendant. Defendant responded that he had something for the case agent, which the latter took as a threat. The case agent replied that he would make sure that his back was not turned and defendant could try whatever he wanted. Defendant called the case agent a girl. Defendant said he had a gang. In fact, defendant has Verdugo gang tattoos on his chest.

The fatal bullet had been fired from a .44 special or a .44 magnum caliber. Hollow point bullets consistent with this bullet were found in the sleeping area at the shop's office. The gun was never recovered. There was damage to the driver's side rear tail light and bumper of the victim's car. There was no damage to the Bronco, which had been parked away from the site of the shooting and was locked. An oily substance, similar to WD40, had been sprayed all over the interior, obscuring any DNA or fingerprints. Neither the stepfather's employee nor defendant's mother saw defendant at the shop after March 6, 2010; defendant's stepfather testified that defendant did not sleep there again after that date and defendant's mother testified that she did not know where defendant was staying after that date. The stepfather testified that defendant called him from Mexico and said he was staying at his uncle's there.

Defendant was the only witness for the defense. He testified that it was the

brother-in-law, not the victim, who agreed to buy the Bronco, and for \$2000. The brother-in-law said he would think about it and they never arrived at a firm deal, having discussed it only the one time, six weeks before the murder. He denied that the brother-in-law had given him a gun or anything. Defendant contradicted his stepfather's testimony that he had spent the night before the murder at the shop. He contradicted the testimony of the employee and the brother-in-law by saying that he warmed up the Bronco for 20 minutes the morning of March 6, during which time he went back into the office and came back out and sat in the vehicle for 10 minutes. He contradicted the brother-in-law's testimony when he testified that the brother-in-law said he wanted to talk to defendant about something at the shop but did not say what it was and the brother-in-law responded that that was alright and walked away, then defendant left after waiting another 10 minutes. Defendant testified that when the victim approached him after stopping his car in front of the Bronco at the light, the victim had one hand under his sweater, which caused defendant alarm because he didn't know what the victim had, despite the fact that up to this moment, they had been on good terms. When asked why he believed the victim had a problem with him, defendant responded, ". . . [I]t had to do with the car, obviously." However, defendant claimed that up to this point, he had had no conversation with the victim whatsoever about the Bronco, and he had discussed it only with the brother-in-law once six weeks before. Defendant explicitly denied that there had been any argument or anything disagreeable at the shop.² Defendant gave conflicting

² Therefore, the assertion in defendant's brief that, "[Defendant] testified that

[footnote continued on next page]

testimony about what happened next. First, he testified that the victim tried to reach for defendant with one hand, while keeping the other under his sweater, which made defendant believe that the victim had a gun, which caused defendant to reach under the seat of the Bronco for his gun and shoot the victim. Later, he testified that the victim reached for defendant after the victim saw that defendant had his gun and the victim reached towards the gun, then defendant pulled the trigger. Despite the evidence that the victim's car had been damaged, defendant testified that he drove around it and did not hit it. He testified he then continued driving to his girlfriend's house, but he denied telling her that he shot anyone. He claimed he stayed at her house for two weeks, then went to Mexico because he did not know what was going to happen—he knew the police were looking for him and he did not know the victim's family and feared them, although he claimed to have been at the victim's house many times for social gatherings and having met all of his family. He testified that he left the Bronco where the police found it because there was no place to park it at his girlfriend's. He claimed a friend gave him a ride to Mexico. He said he left the gun in the Bronco and left the vehicle unlocked. He claimed the gun had been given to him for free, it was loaded at the time but came with no extra ammunition and he did not buy any for it. He denied that the comparable ammunition found at the shop's office was his. He said that he told neither his mother

[footnote continued from previous page]

after the dispute at the . . . shop he was driving to his girlfriend's house . . .” is not supported by defendant's testimony and it is also contrary to the testimony of the brother-in-law, as already described.

nor his girlfriend that he had been falsely accused of the murder. He denied knowing the woman who testified that they had met over the Internet or having any phone conversations with her. He asserted that if his cell phone indicated that calls had been made to her, they were made by someone other than him using his cell phone. He denied that during a phone conversation with his mother, she told him that the police kept coming to her home to find him, which, of course, contradicted the testimony of the case agent that defendant called him complaining about the police harassment of his mother and asking why they were looking for him at his mother's.

ISSUES AND DISCUSSION

1. Admission of Evidence

During the testimony of the first witness for the prosecution, an employee of the shop, he was asked, without objection, if he had told a detective at the stationhouse that defendant had a .38 caliber handgun and that defendant had said that he would use it to kill anyone who bothered him or gave him problems. The employee replied, again without objection, "If I--yeah, if I tell him that, it's because there was another guy is [*sic*] sleeping there, living there,^[3] that's what [defendant], he tell him, the other guy." However, the employee went on to deny saying that defendant had told him this and showed him a gun. During cross-examination, the employee testified that while he had not seen defendant with a gun, someone told him that defendant had a gun and the

³ Defendant's stepfather testified that another of his employees was staying at the shop in March 2010.

employee was “a hundred percent [sure defendant] ha[d] a gun” but “[not] lately, . . . [b]efore.” He went on to testify that he saw defendant get in a mutual fist fight with one of the other employees and he was told that defendant grabbed a screwdriver “or something.” The employee added, “[W]ith the same guy where [defendant] got [into] the fight he always tell me what [defendant]--he has, you know, like you ask me or [the prosecutor] ask me what--one of those days to anybody he’s gonna kill, you know, or do something bad against them because” Defense counsel interrupted the employee to solicit testimony that the employee did not see defendant kill or shoot this other employee and defendant had a reason to be mad at this person.

Next, defendant’s stepfather testified and he denied telling the police that defendant had a temper and was involved in disputes. In fact, he testified that he never saw defendant in a dispute with anyone. In contradiction to this, a police sergeant testified that the stepfather told him that he had raised defendant and considered him a son, but defendant had a bad temper and was involved in disputes with his employees.⁴

Finally, the case agent testified, without objection, in contradiction of the employee’s assertion that he had never seen defendant with a gun. Over defendant’s double hearsay objection, the case agent went on to testify that the employee told him that defendant had told the employee that he would use the gun to kill someone if they gave him problems. Defendant here takes issue with this ruling.

⁴ The trial court overruled the only objection the defense made to this testimony, which was on the ground that the question was leading.

As to the first layer of hearsay, i.e., what defendant told the employee, as the People correctly point out, it was a statement of the defendant, a party to the action, and, therefore admissible as an exception to the hearsay rule. (Evid. Code, § 1220)⁵ The next layer of hearsay, that the employee said this to the case agent, was admissible, again as the People correctly assert, as an inconsistent statement (Evid. Code, § 1235)—inconsistent with the employee’s denial of making the statement during questioning by the prosecutor, which was not objected to by the defense. Also as the People correctly point out, Evidence Code 770,⁶ with which section 1235 requires compliance, was complied with because the employee was allowed to explain or deny his statement while testifying, as already described, and when his examination ended, he was excused subject to recall.

Defendant does not respond specifically to these points, but cites *People v. Noguera* (1992) 4 Cal.4th 599, 620, 621 for the proposition that the employee’s statement to the case agent was not admissible because the People used it to prove that defendant

⁵ Evidence Code section 1220 provides, “Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.”

⁶ Evidence Code section 770 provides, “Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action.”

made threats of physical harm to the employee and carried them out. However, *Noguera* did not involve exceptions to the hearsay rule relevant here (or any others, for that matter). In *Noguera*, a neighbor and a co-worker testified to statements the deceased victim had made to them about her fear and hatred of defendant. (*Id.* at p. 620.) The People argued only that the statements were admissible for the non-hearsay purpose of demonstrating the victim's state of mind, and not for the hearsay purpose of proving the truth of the matters asserted therein. (*Id.* at p. 621.) However, the Supreme Court concluded, the victim's state of mind was not relevant. (*Id.* at p. 622.) *Noguera* has no application here.

Moreover, we agree with the People that even if the employee's statement to the case agent that defendant told him that he would use his gun to kill someone if they gave him problems had been erroneously admitted, there is no reasonable probability defendant would have enjoyed a different outcome had it not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)). This is so because of the weakness of the defense and because of all the other evidence that was admitted without objection by the defense about defendant's disposition, statements and behavior, set forth above, which suggested that he was violent and prone to get into disputes with others.

2. *Jury Instructions*

a. *Involuntary Manslaughter*

Defendant testified that he shot the victim because the victim was either reaching for him before he pulled his gun out and he feared the victim had a gun under his sweater or the victim was reaching for his gun after he pulled the gun out and defendant believed

the victim had a gun under his sweater. In fact, defendant testified, “I tried to defend myself” Defendant also asserted he tried to scare the victim, that he was not aiming at him or trying to shoot him when he fired and that he neither intended nor wanted to shoot the victim. However, he never testified that the gun went off accidentally.

The jury was instructed that second degree murder is a lesser included offense of the charged first degree murder, and voluntary manslaughter was a lesser included offense of the charged first degree murder and a lesser offense of second degree murder. The jury was also instructed that defendant was not guilty of either murder or manslaughter if he killed the victim in self-defense. The jury was presented with two theories of first degree murder-that he killed with premeditation and deliberation or that he killed by shooting from a motor vehicle. The jury was told that a murder may be reduced to voluntary manslaughter if defendant killed because of a sudden quarrel or heat of passion or if defendant killed in imperfect self-defense. The jury was told to consider any provocation in deciding between first and second degree murder and between murder and manslaughter.

Defendant here contends that the trial court had a sua sponte duty to instruct the jury on involuntary manslaughter because there was substantial evidence that defendant committed a misdemeanor, which he identifies as “assault and battery,” that resulted in the victim’s death. Of course, assault and battery are two distinct crimes. He also asserts that defendant committed the misdemeanor of brandishing a gun.

In *People v. Garcia* (2008) 162 Cal.App.4th 18, the defendant and the victim argued with each other while the defendant held a shotgun in his hand. (*Id.* at p. 23.)

According to the defendant, who claimed he was intoxicated at the time, the victim lunged at him and he thought the victim was going to try to fight him and he was concerned that the victim would take the shotgun. (*Id.* at pp. 23, 25.) The defendant claimed that he “just reacted” and jabbed or swung at the victim with the shotgun to back the victim up. (*Id.* at p. 25.) The defendant did not intend to hit the victim or to kill him. (*Ibid.*) According to the defendant, he did not aim to hit a specific place on the victim’s body, but he, in fact, hit the victim in the face, the victim fell down on to the sidewalk, fatally hitting his head. (*Id.* at p. 23.) Instructions on heat of passion and imperfect self-defense were given. (*Id.* at p. 25.) The appellate court rejected the defendant’s assertion that the trial court erred in refusing to instruct the jury on involuntary manslaughter, thusly, “[The defendant] unquestionably committed an assault with a deadly weapon/firearm . . . , an inherently dangerous felony, causing [the victim’s] death. . . . [The defendant’s] killing of [the victim] is properly classified as voluntary manslaughter, regardless of the absence of intent to kill. . . . [¶] . . . [I]n light of the undisputed evidence [that the defendant] assaulted [the victim] with a deadly weapon . . . , knocking him to the sidewalk where he hit his head and died, there was not sufficient evidence . . . [that] the killing . . . was involuntary manslaughter.” (*Id.* at pp. 26, 31-33.)

In *People v. McGee* (1947) 31 Cal.2d 229, 238, the California Supreme Court observed, “If defendant . . . discharged the pistol with intent only to frighten, and not to shoot deceased, and such act was not done in the exercise of defendant’s right of self-defense, he could be found guilty of involuntary manslaughter.” In *McGee*, the defendant

fired in a very dark bar from a distance of six or eight feet while the gun was still in his pocket. (*Id.* at pp. 233, 235.) However, here, defendant claimed self-defense and he fired in broad daylight from very close range and with the gun so situated that the bullet hit the victim's chest. Thus, there was no substantial evidence of an assault other than with a deadly weapon. Defendant shooting the victim was simply not misdemeanor activity. (See *People v. Benavides* (2005) 35 Cal.4th 69, 103; *People v. Parras* (2007) 152 Cal.App.4th 219, 228.)

Defendant cites *People v. Cameron* (1994) 30 Cal.App.4th 591, 603, in support of his position, but it does not. In *Cameron*, the appellate court observed, “[A]n unlawful killing that results from a voluntary battery using force likely to cause great bodily harm but without malice is more sensibly classified, for purposes of culpability, as voluntary manslaughter, regardless of the absence of intent to kill.” (*Id.* at p. 605, fn. 8.)

As to brandishing, the People correctly point out that in *People v. Lee* (1999) 20 Cal.4th 47, which defendant cites in support of his position, the defendant was very drunk and the shooting occurred while defendant and the victim, his wife, were struggling with each other with the gun between them, which defendant had obtained after they initially pushed and shoved each other. (*Id.* at p. 53.) *There was no evidence as to how the gun was actually fired.* Immediately after the gun went off, the defendant held the victim and begged her not to die. (*Ibid.*) The fatal wound was contact or near-contact. (*Ibid.*) The California Supreme Court concluded that the jury should have been instructed on involuntary manslaughter as a result of brandishing under circumstances where the jury could have reasonably found that the gun was accidentally fired during the scuffle. (*Id.* at

p. 61.)

People v. McKinzie (1986) 179 Cal.App.3d 789, 794, also cited by defendant, notes that neither pointing the gun at the victim nor firing it is an element of brandishing. This merely supports our position that defendant shooting the victim was more than mere brandishing.

We do not find that defendant's claims that he did not intend to shoot the victim and he just wanted to scare him, absent *any* evidence that the gun went off accidentally, which were inconsistent with his claim that he shot the victim in self-defense, do not mean that he committed only a simple assault or battery or a brandishing, and not an assault with a deadly weapon.

To the extent it was error for the trial court not to instruct sua sponte on involuntary manslaughter on either of these theories, we agree with the People that given the weakness and internally contradictory nature of the defendant's claims, the many conflicts between his trial testimony and that of other witnesses and the physical evidence, and the strength of the prosecution's case, as already described, there is no reasonable probability that jurors would have reached a different verdict had such instructions been given. (*Watson, supra*, 46 Cal.2d at p. 836.)

b. *Firearm Enhancement*

Defendant correctly points out that the firearm enhancement under section 12022.53, subdivision (d) does not apply when a person shoots "in [the] lawful use of self-defense" and does not apply to manslaughter (including an imperfect self-defense killing) and he appears to argue that because there was evidence supportive of either

perfect or imperfect self-defense, we should reverse the jury's true finding as to this enhancement. However, the jury rejected both of these defenses by convicting defendant of first degree murder. Therefore, there is no basis for us to reverse this finding.

The jury was instructed that if it convicted defendant of first degree murder or any lesser offense, it must decide whether the People had proved the allegation that defendant personally and intentionally discharged a firearm during the crime causing death. The elements of that enhancement were given, as was the requirement that the People had the burden of proving it beyond a reasonable doubt and if they did not, the jury must find that it had not been proven. The parties and the trial court had previously acknowledged that the allegation under section 12022.53, subdivision (d) did not apply if the jury convicted defendant of manslaughter and in the event that it so convicted defendant, and further found this allegation to be true, the trial court would construe the finding to be pursuant to section 12022.5⁷ which does apply to manslaughter. Hence, the jury was charged with making a factual finding independent of the restrictions on the application of section 12022.53, subdivision (d).

Defendant here contends that because section 12022.53, subdivision (d) does not apply to either perfect or imperfect self-defense, the jury should have been so instructed and the failure to instruct them requires reversal of the finding. However, as we have

⁷ Section 12022.5 provides, "(a) Except as provided in subdivision (b), any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense."

already observed, by agreement of the parties, the section 12022.53, subdivision (d) allegation was converted into a factual allegation, untethered to any Penal Code provision, that defendant personally discharged a firearm in the commission of the crime of which the jury found him guilty (a pre-requisite), that he intended to discharge the firearm and that his act caused the death of a person. A true finding meant that if the jury had already found defendant guilty of murder, the requirements of section 12022.53, subdivision (d) had been met and if the jury had already found defendant guilty of manslaughter, the requirements of section 12022.5 had been met. Therefore, there was no need to spell out for the jury that if defendant killed the victim in perfect self-defense, in which case he would have been acquitted, and the jury would not even be considering whether the allegation was true, it was a “defense” to the application of the enhancement, and if it found that he killed the victim in imperfect self-defense, in which case it would have convicted him of voluntary manslaughter, it would have been a “defense” to the application of the enhancement *under section 12022.53, subdivision (d)*, but not under section 12022.5. Additionally, the fact that the jury convicted defendant of first degree murder, as stated before, demonstrated, unequivocally, the jury’s rejection of either defense. Having rejected both perfect and imperfect self-defense in concluding that defendant was guilty of first degree murder, it would have been silly to, once again, require the jury to consider the same two defenses in connection with the enhancement—and we are positive the jury’s position would have been the same as to the enhancement

as it was to the defenses.⁸

In connection with the instruction on perfect self-defense, the jury was told that the People had the burden of proving beyond a reasonable doubt that the killing was not justified (by self-defense) and if the People had not met this burden, the jury was to find defendant not guilty of murder or manslaughter. The jury was also told that the People had the burden of proving beyond a reasonable doubt that defendant was not acting in unreasonable self-defense and if they had not met this burden, the jury must find defendant not guilty of murder. The burden of proof of the absence of either perfect or imperfect self-defense was thereby conveyed to the jury. Had defendant wanted this requirement specified as to the gun allegation, it was his obligation to request it. (*People v Gonzales* (2011) 51 Cal.4th 894, 939.)

DISPOSITION

⁸ In *People v. Watie* (2002) 100 Cal.App.4th 866, the appellate court concluded that the failure to instruct the jury that perfect self-defense is a defense to a section 12022.53, subdivision (d) enhancement and that the People had the burden to prove that defendant did not act in self-defense when he committed the acts triggering the application of the enhancement did not require reversal of the enhancement because the absence of such an instruction was harmless beyond a reasonable doubt in light of the jury's rejection of perfect self-defense as evidenced by his conviction of all the charges and the true finding as to the enhancement. (*Watie*, at p. 886.) Defendant argues that *Watie* should not apply because it pre-dated *Apprendi v. New Jersey* (2000) 530 U.S. 466. However, defendant cites no authority holding that the absence of perfect or imperfect self-defense is an element of the enhancement for which a jury must be instructed. *Watie* concludes, as we do, that under the circumstances here, the failure to instruct the jury could not possibly have prejudiced defendant.

The trial court is directed to amend the abstract of judgment to show that a consecutive term of 25 years to life was imposed for the firearm enhancement, rather than a term of 25 years as the abstract currently states. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

KING
J.

CODRINGTON
J.