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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.

ISSA WAJEEL,

Defendant and Appellant.

E053644

(Super.Ct.No. FBA800796)

OPINION

APPEAL from the Superior Court of San Bernardino County. R. Glenn Yabuno, Judge. Affirmed as modified.

Andrew Reed Flier for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Steve Oetting and Collette C. Cavalier, Deputies Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Issa Wajeel appeals from his conviction of first degree murder (Pen. Code,¹ § 187, subd. (a)) and the true finding on an enhancement allegation that he personally discharged a firearm causing death (§ 12022.53, subd. (d)). Defendant contends (1) he was denied his constitutional right to effective assistance of counsel because his counsel failed to present any defense witnesses, failed to investigate, failed to lodge timely evidentiary objections, and failed to request relevant jury instructions; (2) the evidence was insufficient to support his conviction and the true finding on the enhancement allegation; (3) the trial court erred in failing to instruct the jury sua sponte on lesser included offenses; and the trial court abused its discretion in admitting character evidence. We have determined that an error in the abstract of judgment requires correction, but we have found no other error.

II. FACTS AND PROCEDURAL BACKGROUND

On July 3, 2008, Michael Firkins, a member of the United States Marine Corps stationed at Camp Pendleton, visited friends in Barstow. He left their house alone in his red Ford Ranger pickup truck between 8:00 and 8:30 p.m.

At about 11:35 p.m., police detectives responded to a report of shots fired near Barcelona Court in Barstow. They found a red Ford pickup truck stopped in the street with its headlights on. The pickup was not running, but the key was in the ignition in the “on” position, and the rear window was shattered. Firkins was slumped unresponsive in

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

the truck and was bleeding from a gunshot wound to the right side of his head. Firkins was transported to the hospital, where he was declared brain dead and later died from the gunshot wound. A pathologist testified that Firkins would not have been able to make any voluntary movements after receiving the shot to his head.

At the scene, the officers saw defendant standing on his porch at 28 Barcelona Court, holding a handgun. Defendant cooperated when told to place the weapon on the ground and walk away. The handgun, a Ruger .357-caliber magnum, contained six empty cartridges, indicating six bullets had been fired. The officers did not see any signs of forced entry to the front door of defendant's house. Defendant had recently undergone surgery on his leg and used crutches, although he could walk without them. One officer testified that defendant was wearing a robe; another officer testified that defendant was wearing boxer shorts and a T-shirt.

Police investigation revealed that the door to the gas cap was open on defendant's truck parked in front of his home, but the gas cap was on and secured. There was no evidence of damage to that truck or to two other vehicles parked in front of defendant's house. A fingerprint on defendant's truck was inconclusive as to whether it belonged to Firkins.

The rear window of Firkins's truck was shattered and there were bullet strike marks on it. Tire acceleration marks were found in the roadway about 60 feet from where the truck came to rest. A large gasoline or kerosene container, a plastic funnel, and a length of clear plastic tubing were found in the bed of Firkins's truck, and a long clear plastic hose was found on the seat in the cab. A receipt found under the driver's

seat showed that Firkins had purchased the kerosene can that morning. The gas tank of his truck contained about six gallons of fuel.

Several bullet fragments were recovered from Firkins's truck. The bullet trajectories indicated the shots had been fired from near the front door of defendant's house toward the street as the truck was traveling south. The tight pattern of the shots indicated that the shooter was an experienced marksman and that he was aiming at and trying to shoot the truck. A police detective opined that the shooter was bracing his gun hand with his other hand or was using a stationary object to support himself while shooting. Defendant had gunshot residue on his left hand. One of the bullets was matched to defendant's gun.

Defendant's oldest son testified he had been sleeping when defendant wakened him and told him to call the police. Defendant told him someone had broken into the house. Another son testified he had been sleeping in a rear bedroom and had not heard any gunshots.

James Allen Walker, defendant's neighbor, testified that he had awakened to the sound of two gunshots at around 11:30 p.m. on July 3, and he then heard a motor revving. He looked outside and saw a pickup truck in the middle of the street but did not see anyone in the truck. A minute or so later, he saw defendant and one or both of defendant's sons standing in front of their patio. He heard dogs barking, which made him think someone was climbing fences. Another neighbor heard one or two high-caliber gunshots followed by three rapid shots. He looked out and saw someone running or walking fast across defendant's lawn.

Michael Earl Huey, who lived across the street from defendant, was awakened when he heard what he thought was two firecrackers, and his dogs “just went ballistic.” He looked outside, and he heard a loud thump on the swamp cooler in his backyard. He believed someone was in his backyard and he started to go outside through his garage door, but police officers told him to close his garage. A detective searched his backyard the morning of July 4 but found no evidence that anyone had been in the yard, and there was no damage to the fence or the swamp cooler. Huey later noticed that part of his fence was “all caved in,” a ladder that had been leaning against the outside wall had been knocked over, someone had stepped through the spokes of a bicycle in the yard, and some of the grills on his swamp cooler were caved in.

The jury found defendant guilty of first degree murder (§ 187, subd. (a)) and found true the allegation that he personally discharged a firearm causing death (§ 12022.53, subd. (d)). The trial court sentenced defendant to an indeterminate term of 50 years to life.

Additional facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. Assistance of Counsel

Defendant contends he was denied his constitutional right to effective assistance of counsel because his counsel failed to give an opening statement, failed to present any expert witnesses or character witnesses, failed to investigate, failed to lodge timely evidentiary objections, and failed to request relevant jury instructions.

1. Standard of Review

To establish ineffective assistance of counsel, a defendant has the burden of proving both that his counsel's performance was deficient under an objective standard of professional responsibility and that there is a reasonable probability that but for his counsel's errors, he would have obtained a more favorable result at trial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) In examining claims of ineffective assistance of counsel, we give great deference to counsel's reasonable tactical decisions. (*People v. Hinton* (2006) 37 Cal.4th 839, 876.) If the record on appeal fails to shed light on why counsel acted or failed to act, we reject a claim of ineffective assistance unless counsel was asked for an explanation and failed to provide one or no satisfactory explanation exists. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Such claims are often more appropriately raised in a petition for writ of habeas corpus, in which the defendant may present more evidence concerning counsel's reasons for his actions or omissions. (*Id.* at pp. 265-267.)

2. Analysis

(a) Failure to retain experts or call witnesses

Defendant contends his counsel should have called a drug expert, physicians, and a psychologist to testify as to the effect of stress, his medical condition, and his prescription medications upon his state of mind, and his counsel should have retained a crime-scene reconstruction expert. In *People v. Datt* (2010) 185 Cal.App.4th 942, the defendant claimed his trial counsel had provided ineffective assistance by failing to present an eyewitness identification expert. The court held that defendant's contention

“fail[ed] at its origin. He has not shown that his trial counsel *could have* presented any *favorable* expert testimony.” (*Id.* at p. 952.) The court further explained that even though the defendant had produced testimony at a motion for new trial “that a reasonably competent attorney would have *consulted* an expert on eyewitness identification,” he produced no evidence that his trial counsel had failed to do so. (*Id.* at p. 953.)

Here, likewise, the record before us does not disclose what actions, if any, trial counsel undertook to consult expert witnesses, nor has defendant shown that expert witnesses could have provided favorable testimony. Thus, defendant’s claim is not properly brought on direct appeal. (*People v. Datt, supra*, 185 Cal.App.4th at p. 953.)

(b) Failure to make an opening statement

Defendant contends his counsel provided ineffective assistance by failing to make an opening statement. However, courts have recognized that the decision to waive an opening statement may be a reasonable trial strategy. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 [“The decisions whether to waive opening statement and whether to put on witnesses are matters of trial tactics and strategy which a reviewing court generally may not second-guess.”].) Because the record does not reveal why defense counsel elected not to present an opening statement, defendant’s claim fails on direct appeal. (*Ibid.*)

(c) Failure to investigate

Defendant contends his counsel provided ineffective assistance by failing to investigate. However, the record before us is devoid of any factual support for that claim,

and the claim is therefore not properly brought on direct appeal. (*People v. Datt, supra*, 185 Cal.App. 4th at pp. 951-953.)

(d) Failure to object to evidence that Firkins was in the military

Defendant contends his counsel provided ineffective assistance by failing to object to the fact that the victim was in the military. However, he has failed to explain how the admission of that information was unduly prejudicial and has failed to demonstrate any probability that the exclusion of that evidence would have resulted in a more favorable verdict. Thus, his contention fails the second prong of the *Strickland* test.

(e) Failure to request jury instructions

Defendant contends his counsel provided ineffective assistance by failing to request relevant jury instructions and only perfunctorily objecting to other jury instructions regarding his state of mind. As we discuss at more length below, the evidence did not support instructing the jury on theories of voluntary manslaughter, involuntary manslaughter, or excusable homicide. Counsel cannot be faulted for failing to request an inapplicable instruction. (See *People v. Lam* (2010) 184 Cal.App.4th 580, 583.)

(f) Failure to conduct cross-examination of defendant's state of mind

Defendant contends his counsel provided ineffective assistance because he “did not, on cross examination, even properly focus and elaborate upon [defendant's] State of Mind.” Defendant provides no further argument or citation to authority to support his

contention. “A matter asserted in such a perfunctory manner is not properly raised.”
(*People v. Lindberg* (2008) 45 Cal.4th 1, 51, fn. 14.)

(g) Failure to request Evidence Code section 402 hearing

Defendant contends his counsel provided ineffective assistance by failing to request an Evidence Code section 402 hearing to limit or eliminate improper opinion testimony. Although he states the issue “will be further elaborated upon within this brief” (boldface omitted), the brief in fact contains no further reference to the issue. In his statement of facts, defendant states conclusionarily that certain expert testimony was improper or that defense counsel failed to object to certain testimony, but he fails to provide argument or citations to authority to explain his contention. We therefore deem the issue forfeited. (*People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4.)

B. Sufficiency of Evidence

Defendant contends the evidence was insufficient to support his conviction of first degree murder or the true finding as to the firearm allegation.

1. Standard of Review

When a criminal defendant challenges the sufficiency of the evidence to support his conviction, we “review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

2. Analysis

“In the context of first degree murder, “premeditated” means “considered beforehand,” and “deliberate” means “formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.” [Citation.]’ [Citation.] ‘The process of premeditation and deliberation does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly” [Citations.]’ [Citation.] ‘In [*People v. Anderson* (1968) 70 Cal.2d 15 [73 Cal.Rptr. 550, 447 P.2d 942]], we “identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing.” [Citation.] However, these factors are not exclusive, nor are they invariably determinative. [Citation.] “*Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]” [Citation.]’ [Citation.]” (*People v. Lee* (2011) 51 Cal.4th 620, 636.)

Defendant summarizes the evidence as follows: “[Defendant] is a 60 year old man^[2] with no criminal history. Further, [defendant] served in the United States military himself. [Defendant] is married, works hard and has a family. [Defendant] was inside his own residence when an intruder entered upon his property. It was late, [defendant]

² The probation report indicates defendant was born in March 1958, and he is thus 54 years old.

was sleeping and on prescription medication for a recent surgery. [Defendant] could barely stand or walk. [¶] . . . [Defendant shot towards the victim to either warn or scare him or strike the victim’s truck. By happenstance, one shot fatally struck the victim. Remember, the other bullets struck the truck.”

In short, defendant has set forth the evidence in the light most favorable to his argument; however, we are required to view the evidence in the light most favorable to the judgment. (See *People v. Johnson, supra*, 26 Cal.3d at p. 578.) Other evidence in the record established that defendant fired six shots in a “tight pattern” at Firkins’s pickup truck as Firkins was driving away. Four of the bullets, including the bullet that struck Firkins’s head, penetrated the rear window of the pickup. A detective testified that pattern of the shots indicated they had been fired by an experienced marksman who was aiming at and trying to shoot into the moving truck. From that evidence, the jury could reasonably infer defendant intended to kill his victim. (See *People v. Smith* (2005) 37 Cal.4th 733, 741.)

Although defendant purports to challenge the sufficiency of the evidence to support the firearm use allegation, he has not made any argument or cited any authority specifically addressing that issue. The issue therefore has not been properly raised. (*People v. Lindberg, supra*, 45 Cal.4th at p. 51, fn. 14.)

C. Jury Instructions

Defendant contends the trial court erred in failing to instruct the jury sua sponte on lesser included offenses of voluntary manslaughter and involuntary manslaughter and on self-defense and defense of property.

1. Standard of Review

We review de novo the trial court's failure to instruct on an assertedly lesser included offense. (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

2. Additional Background

The trial court stated there was no evidence to support giving CALCRIM Nos. 505 [Justifiable Homicide: Self-Defense or Defense of Another], 506 [Justifiable Homicide: Defending Against Harm to Person Within Home or on Property]; 511 [Excusable Homicide: Accident in the Heat of Passion]; 570 [Voluntary Manslaughter: Heat of Passion—Lesser Included Offense]; 571 [Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense], or 580 [Involuntary Manslaughter: Lesser Included Offense]. Defense counsel objected to the ruling.

3. Analysis

The trial court is required to instruct the jury on all lesser included offenses supported by the evidence, regardless of the theories of the case proffered by the parties. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) However, the trial court is required to instruct on a lesser included offense only when the record contains substantial evidence from which a reasonable jury could conclude that the defendant is guilty of the lesser crime. (*People v. Birks* (1998) 19 Cal.4th 108, 118.)

(a) Self-defense or defense of another

Self-defense requires that “the defendant must actually and reasonably believe in the need to defend, the belief must be objectively reasonable, and the fear must be of

imminent danger to life or great bodily injury. [Citation.]” (*People v. Lee* (2005) 131 Cal.App.4th 1413, 1427.)

The record showed that Firkins was driving away from defendant’s house when defendant fired multiple shots into the rear window of his pickup truck. No evidence was presented that defendant actually believed in the need to defend, and, in any event, such a belief would not have been objectively reasonable under the circumstances. Moreover, a person exercising self-defense may use only reasonable force necessary under the circumstances. (*People v. Moody* (1943) 62 Cal.App.2d 18, 22.) Thus, a defendant may not use lethal force to repel a nonlethal attack. (*Ibid.*) We conclude no evidence supported an instruction on self-defense or defense of another.

(b) Defense of habitation

A homicide is justifiable “[w]hen committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein” (§ 197, subd. 2.) In addition, section 198.5 “creates a rebuttable presumption that a residential occupant has a reasonable fear of death or great bodily injury when he or she uses deadly force against an unlawful and forcible intruder into the residence. [Citations.] For section 198.5 to apply, four elements must be met. There must be an unlawful and forcible entry into a residence; the entry must be by someone who is not a member of the family or the household; the residential occupant must have used ‘deadly’ force (as defined in § 198.5) against the

victim within the residence; and finally, the residential occupant must have had knowledge of the unlawful and forcible entry.” (*People v. Brown* (1992) 6 Cal.App.4th 1489, 1494-1495.) A defendant is not entitled to that presumption when there has been no actual entry into the residence. Thus, in *People v. Brown*, the court held that the victim’s presence on the defendant’s porch at the time of the shooting did not entitle the defendant to an instruction on defense of habitation. (*Id.* at p. 1495-1496.)

In *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1360 [Fourth Dist., Div. Two], moreover, the court instructed that “the *intentional* use of deadly force merely to protect property is never reasonable. Accordingly, a homicide involving the intentional use of deadly force can never be justified by the defense of habitation alone. The defendant must also show either self-defense or defense of others, i.e., that he or she reasonably believed the intruder intended to kill or inflict serious injury on someone in the home. [Citations.]” When there has been no actual intrusion into the residence, no presumption applies that the defendant held a reasonable fear of imminent peril of death or great bodily injury. (*Id.* at p. 1362.)

Here, no evidence indicated either that Firkins forcibly entered defendant’s home or that defendant acted in the belief there was imminent danger to himself or others. Thus, defendant was not entitled to an instruction on defense of habitation.

(c) Accident in the heat of passion

A killing is excused if the defendant (1) acted in the heat of passion, (2) acted on sudden and sufficient provocation, (3) did not take undue advantage of the victim, (4) did not use a dangerous weapon, and (5) did not kill the victim in a cruel or unusual way.

(See § 195, subd. 2.) Here, defendant’s use of a dangerous weapon, a firearm, made an instruction on accident in the heat of passion inapplicable as a matter of law. (See *People v. Williams* (1965) 63 Cal.2d 452, 458 [stating that the jury could not have exculpated the defendants under section 195 when they used dangerous weapons, knives].)

(d) Voluntary manslaughter in the heat of passion

Voluntary manslaughter based on heat of passion has both a subjective element—that the killing actually was done in the heat of passion—and an objective element—that the heat of passion resulted from provocation “such that an average, sober person would be so inflamed that he or she would lose reason and judgment.” (*People v. Manriquez* (2005) 37 Cal.4th 547, 584, 585-586; § 192, subd. (a).)

Defendant argues he “was asleep, on medication, when an intruder intentionally entered upon his property,” and his “actions were not premeditated and thought out.” At trial, the evidence suggested, and the prosecutor agreed, that defendant may have interrupted Firkins in the act of siphoning gas from defendant’s vehicle. However, a petty theft is not sufficient to provoke a homicidal response in a reasonable person. Moreover, there was no evidence defendant’s “reason was actually obscured as the result of a strong passion” (*People v. Breverman, supra*, 19 Cal.4th at p. 163.) Defendant did not testify or present any witnesses, and there was thus little or no evidence concerning his subjective state of mind. (See *People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1016-1019 [there must be evidence, usually found in the defendant’s testimony, that he actually acted under the heat of passion].) Finally, “a passion for revenge cannot satisfy the objective requirement for provocation. [Citation.]” (*People v. Gonzales and*

Soliz (2011) 52 Cal.4th 254, 301.) We conclude the trial court did not err in failing to instruct the jury on voluntary manslaughter in the heat of passion.

(e) Voluntary manslaughter in imperfect self-defense

A killing is voluntary manslaughter under an imperfect self-defense theory when the defendant killed the victim in the unreasonable but good-faith belief in the need to act in self-defense. (*People v. Rogers* (2006) 39 Cal.4th 826, 883.) In that case, the court “cautioned that [the doctrine of imperfect self-defense] is ‘narrow’ and will apply only when the defendant has an actual belief in the need for self-defense and only when the defendant fears immediate harm that “‘*must be instantly dealt with.*’” [Citation.]” (*Ibid.*) The record before us contains no evidence from which the jury could have concluded defendant killed Firkins under an honest but unreasonable belief that he faced imminent threat of injury or death. Defendant did not testify as to his state of mind, and the objective evidence indicated Firkins was driving away while defendant was firing at his truck. Thus, the trial court did not err in failing to instruct the jury on voluntary manslaughter in imperfect self-defense.

(f) Involuntary manslaughter

An unlawful killing is involuntary manslaughter when killing occurred during the commission of a misdemeanor, a lawful act, or a felony that is not inherently dangerous, and the defendant did not intend to kill and did not act with conscious disregard for human life. (§ 192, subd. (b).)

Shooting a firearm at an occupied vehicle cannot be a predicate act for involuntary manslaughter because it is an inherently dangerous felony. (*People v. Chun* (2009) 45

Cal.4th 1172, 1188 [stating that “shooting at a vehicle that is actually occupied clearly is inherently dangerous”].) Thus, the trial court did not err in declining to instruct the jury on involuntary manslaughter.

D. Character Evidence

Defendant contends the trial court abused its discretion in admitting improper character evidence.

1. Additional Background

Defense counsel objected before trial to “any and all character evidence” concerning defendant. After hearing argument, the trial court ruled evidence of defendant’s “general reputation in the community for being arrogant or pompous, or traits of that nature,” would be excluded as irrelevant. However, the court ruled that defendant’s statements to his colleague, Lynna Heiden, concerning thefts of gasoline in the neighborhood would be admissible.

Thereafter, Heiden, who had worked with defendant at Barstow College and who lived in the same general area as defendant, testified she had had a conversation with defendant between August 2007 and June 2008 in which defendant said his motorcycle had been stolen, and he had pursued the thief. Defendant said he had used his car door to try to knock the person off the motorcycle and had beaten the person. Another person who heard the conversation said, “Well, that wasn’t very nice,” and defendant replied, “I wanted to kill him, but I just beat him.”

Heiden further testified that in May or June 2008, defendant told her he was upset about gasoline being siphoned from his vehicle. Heiden’s husband is a police officer, and

defendant asked her if she had heard about any other similar incidents. In the first week of June, defendant again complained about gas thefts and again asked her if she had heard of recent problems. Heiden told defendant to report the incidents to the police.

2. *Standard of Review*

We review the trial court's rulings on the admission of evidence under Evidence Code sections 352 and 1101 under the deferential abuse of discretion standard. (*People v. Davis* (2009) 46 Cal.4th 539, 602.)

3. *Analysis*

As a general rule, evidence of prior criminal acts is inadmissible to show bad character, criminal disposition, or probability of guilt. However, such evidence may be admissible when relevant to prove some material fact, such as motive, opportunity, intent, preparation, common plan or scheme, knowledge, identity, or absence of mistake or accident. (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403, superseded by statute on other grounds as stated in *People v. Robertson* (2012) 208 Cal.App.4th 965, 991.) Here, the challenged evidence was admitted to show defendant's motive and intent. For such evidence to be admissible to show the defendant's intent, ““the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.” [Citations.]’ [Citation.]” (*People v. Jones* (2012) 54 Cal.4th 1, 50.) We conclude the evidence was indeed relevant to prove the material facts of motive and intent. The trial court did not abuse its discretion in admitting the challenged evidence. (*People v. Davis, supra*, 46 Cal.4th at p. 602.)

E. Correction to Abstract of Judgment

On our own motion, we note that the abstract of judgment states in line 6.c that defendant was sentenced to 50 years to life on count 1 “PLUS enhancement time shown above.” His actual sentence was 25 years to life on count 1 with a consecutive enhancement of 25 years to life for the firearm use (§ 12022.53, subd. (d)). We will order the abstract of judgment amended accordingly.

IV. DISPOSITION

The trial court is directed to prepare an amended abstract of judgment reflecting that defendant’s sentence for count 1 was 25 years to life and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MILLER

J.