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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LAMONT T. TARKINGTON AND DARRIS ALLEN, Defendants and Appellants.	B199860 (Los Angeles County Super. Ct. No. MA 034011)

APPEALS from judgments of the Superior Court of Los Angeles County. Carol C. Koppel, Judge. Judgments affirmed in part, reversed in part with directions.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant Lamont T. Tarkington.

Matthew D. Alger, under appointment by the Court of Appeal, for Defendant and Appellant Darris Allen.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Lamont T. Tarkington and Darris Allen appeal from their convictions of five counts of robbery and one count of commercial burglary. Defendants challenge the admission of certain evidence and the correctness of their sentences. We affirm the convictions and modify the sentences.

FACTS AND PROCEEDINGS BELOW

On December 14, 2005, at approximately 10:15 a.m., three men wearing masks, hooded sweatshirts and gloves entered a Bank of America branch inside a supermarket in Palmdale. The men ordered everyone to get down on the floor. One of the men stood in the lobby of the bank while the other two jumped over the counter and ordered the two tellers to open their cash drawers. Each of the men kept one hand inside his sweatshirt pocket and acted as if he was pointing a gun at the bank employees. While the two men behind the counter stuffed cash into bags the man in the lobby kept time, telling his partners "Bloods we got time" and then "Lets go Bloods." When the man in the lobby called out it was time to go, all three of the robbers immediately left the bank. A pack of red dye was mixed in with the money the robbers took. It was designed to explode if the currency was moved beyond a certain area. The bank had also recorded the serial numbers of some of the bills taken in the robbery.

A customer saw one of the men who had jumped the counter run out of the bank holding a bag in one hand and a gun in the other.

Another witness testified that she saw four masked men run from the supermarket, get into a white SUV parked at the curb with its engine running and drive away. The witness wrote down the license number of the robbers' get-away car and gave it to the police. The police later found the car abandoned a half a mile from the bank. It had been stolen. On the outside of the car's left rear passenger door the police found a finger print from Allen's left middle finger. The police also observed a line of red dye across the back of the rear seats and along the inside one of the rear doors. This suggested to the officers that a dye pack contained among the currency had exploded.

The day after the robbery the police located an exploded red dye pack approximately half a mile from where they found the get-away car.

At approximately 9:00 p.m. on the day of the robbery, police stopped a car registered to Tarkington and driven by Allen for a traffic violation. Tarkington, the only passenger, gave the police a false identification. Inside the car the officers found approximately $3,000 in a black plastic bag wedged between the driver's seat and the center console. They found additional money in a jacket on the back seat. The currency in the bag and the jacket were stained with red dye. Some of the money appeared to have been bleached in an effort to remove the dye. When the police searched Tarkington they found currency stained with red dye in one of his pockets. Two of the bills found inside the car had serial numbers that matched bills taken in the Palmdale robbery. When the police later inventoried the car they found a bag of coins covered with red dye.

Allen told police that he obtained the cash by selling his girlfriend's car to a man named Marcus Frye. A computer check showed no vehicle registered in the name of Allen's girlfriend and no information whatsoever on the name Marcus Frye. When the police told Allen that they were going to attempt to locate Frye, Allen changed his explanation regarding the cash and said that he obtained it by selling marijuana to a man named Mark. Asked where Mark lived, Allen said he was not a snitch and refused to answer the question.

At trial, one of the bank tellers testified that Tarkington had similar skin color, height and build as one of the robbers who had jumped over the counter and that Allen had similar skin color, height and build as the robber who stayed in the lobby keeping time.

Over the objections of Tarkington and Allen, the court permitted the prosecution to introduce evidence that Tarkington had pleaded guilty to robbing a Bank of America branch in Lancaster in 1997. The prosecution argued that the evidence was admissible because the 1997 robbery was sufficiently similar to the present one to show identity and a common plan or scheme.

The prosecution introduced evidence intended to show that the defendants committed the robbery and burglary for the benefit of a criminal street gang, the 8 Trey Gangster Crips. We summarize that evidence below in our discussion of the gang and firearm enhancements.

Allen testified that he did not rob the bank or know anything about the robbery. He told the jury that he had formerly worked in local oil refineries where he used chemicals to clean toxic waste out of tanks after they had been emptied. After being shot in the head during a carjacking he could not continue working so he became a car thief, stealing cars for people who wanted certain parts. Allen admitted that he stole the car used in the robbery but stated he did not know how the vehicle would be used. He stole the car at the request of a man named Marcus Frye who promised to pay him $3500 for it. Frye paid him the money on the evening of the robbery. According to Allen, the money the police found in his possession was the money he received from Frye. During cross-examination the court required Allen to answer questions about what he had discussed with his attorney prior to his testimony.

The jury convicted both defendants of five counts of second degree robbery and one count of second degree commercial burglary.[1] The jury also found that the robberies and burglary were committed for the benefit of a criminal street gang and that as to the robbery counts a principal was personally armed with a firearm and personally used a firearm.

The court sentenced Tarkington to a term of 39 years, 4 months consisting of the upper term of 5 years for the robbery in count one and one-third the midterm for the remaining offenses doubled under the Three Strikes Law plus 10 years for the gang enhancement and an additional 10 years for the firearm use enhancement.

The court sentenced Allen to a prison term of 27 years, 8 months consisting of the midterm of 3 years for the robbery in count one and one-third the midterm for each

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1 The People concede and we agree that the sentence on the burglary conviction must be stayed under Penal Code section 654.

of the remaining offenses plus 10 years for the gang enhancement and 10 years for the firearm use enhancement.

Tarkington and Allen filed timely appeals.

DISCUSSION

I. EVIDENCE OF TARKINGTON'S PREVIOUS CONVICTION FOR BANK ROBBERY

Over the objection of Tarkington and Allen the court permitted the prosecutor to introduce evidence that Tarkington and previously been convicted of robbing a Bank of America branch in Lancaster.

The transcript of Tarkington's plea agreement was read to the jury. It showed the following facts. Tarkington entered the bank with two other men. Tarkington pointed a gun at tellers and customers and yelled "This is a robbery. Everyone get down." Tarkington stood in the lobby communicating with someone outside the bank on a walkie-talkie while the other two men leaped over the teller counter and collected money from the cash drawers. When Tarkington called out "Hurry up, we got to go" he and his cohorts left the bank with the money, jumped into a car and sped off.[2]

After the reading of the transcript the court instructed the jury that it could consider the evidence of the prior bank robbery "only if the prosecution has proved by a preponderance of the evidence that the defendant did, in fact, commit bank robbery in the past. [¶] . . . [¶] . . . If you decide that Mr. Tarkington committed the bank robbery in the past, then you may, but are not required to[,] consider that evidence for the limited purpose of deciding identity in this case." The court subsequently modified this instruction and told the jurors the prior robbery evidence could also be used to determine whether "the defendant had a plan or scheme to commit the offenses alleged in this case."

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[2] In making their arguments on appeal both sides refer to evidence regarding the Lancaster bank robbery not admitted at trial. We have not considered that evidence because it could not have affected the jury' s consideration of the identity issue.

A. Admission Of Prior Robbery Evidence Against Tarkington.

The People point to similarities between the bank robbery charged in this case and the earlier one to which Tarkington pleaded guilty. In each case: (1) there were four suspects;[3] (2) the robbery occurred at a branch of the Bank of America; (3) the robberies occurred in adjoining cities, Palmdale and Lancaster; (4) two of the robbers who entered the bank jumped over the counter while a third remained in the lobby; (5) the suspect in the lobby kept time and told the others when it was time to leave.

Tarkington maintains that the two robberies bore no distinctive "signature" which would permit the jury to infer from the manner in which he committed the 1997 bank robbery that he committed the current bank robbery.[4] Tarkington points to the testimony of the two tellers who each stated that "takeover" robberies such as the ones at issue are common. One teller testified that in the seven years she had worked at the bank in Palmdale where the current robbery occurred there had been three or four such robberies. The other teller testified that she had gone through four "takeover" robberies in the 12 years she had worked for Bank of America. Addressing the People's other alleged similarities, Tarkington notes that bank robbers often work in teams and hundreds of Bank of America branches are located in Southern California. Moreover, both robberies followed a generic plan: two robbers grabbed the cash while the third watched over the employees and customers and kept time. There is nothing exceptional about one robber keeping time because it is common knowledge that bank tellers can activate silent alarms notifying the police that a robbery is in progress. Tarkington also notes the numerous *dissimilarities* between the bank robbery he committed in 1997 and the robbery at issue in this case. In the prior robbery Tarkington openly displayed a gun. In this robbery, none of the suspects displayed a gun during the robbery, although

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3 In this case, one witness testified that he saw a fourth masked person run from the bank. The bank tellers and the other citizen witness testified to seeing only three.

4 Allen joins this argument.

one witness saw a robber holding a gun while running out of the bank. In the prior robbery Tarkington used a walkie-talkie to communicate with someone outside the bank. In this robbery no witness reported seeing a suspect with a walkie-talkie. In the prior robbery there was no mention of the Bloods. In this robbery one of the robbers frequently referred to his cohorts as Bloods. Finally, the People presented no evidence that in the prior robbery the robbers wore masks or disguises. In this robbery all the robbers wore masks that covered their noses and mouths, and also wore hooded sweatshirts and gloves.

We conclude that the trial court abused its discretion in admitting evidence of Tarkington's 1997 bank robbery. The two robberies did not contain any one feature so unusual and distinctive as to be "like a signature." (*People v. Carter* (2005) 36 Cal.4th 1114, 1148.) Nor can we say that the features of the two robberies considered together "virtually eliminated the possibility that anyone other than the defendant committed the charged offense." (*People v. Balcom* (1994) 7 Cal.4th 414, 425.)

We also conclude, however, that it is not reasonably probable that Tarkington would have obtained a better result had the evidence of the prior bank robbery not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The evidence against Tarkington, although circumstantial, was very strong. Less than 11 hours after the robbery the police arrested Tarkington while a passenger in his own car containing over $3000 in loot from the crime. The police even found some of that loot in Tarkington's pocket. Further supporting evidence of Tarkington's guilt included the testimony of one of the tellers who stated that Tarkington had the same or similar skin color, height and build as two of the robbers, Tarkington's giving the police a false identification at the traffic stop and the presence in his car of an unexplained bag of coins covered with red dye.

B. Admission Of Prior Robbery Evidence Against Allen

Allen argues that the trial court's error in admitting evidence of Tarkington's prior bank robbery prejudiced him because the court did not specifically instruct the

jury that the evidence could only be used to determine Tarkington's guilt or innocence, not his. (*People v. Miranda* (1987) 44 Cal.3d 57, 83.) We find no merit in this argument because the court adequately instructed the jury that the prior crime evidence pertained only to Tarkington.

Before the jury heard the evidence of Tarkington's prior conviction the court instructed: "The jury will only consider this testimony with respect to Mr. Tarkington and not to Mr. Allen." Immediately after the evidence was presented the court instructed the jury: "You may consider the evidence only if the prosecution has proved by a preponderance of the evidence that *the defendant* did, in fact, commit bank robbery in the past." (Italics added.) Even more specifically, the court instructed the jury: "If you decide that Mr. Tarkington committed the bank robbery in the past, then you may, but are not required to consider that evidence for the *limited purpose* . . . of deciding whether or not *the defendant* was a person that committed the offenses alleged in this case. *Do not consider the evidence for any other purpose*. . . . If you decide *the defendant* did commit the uncharged offense, that conclusion is only one factor to consider along with all the other evidence." (Italics added.) We believe a reasonable juror would understand the reference to "the defendant" as a reference to Tarkington since he was the only defendant with a prior robbery conviction. Finally, before the jury retired to deliberate the court reminded them: "I instructed during the trial that certain evidence was admitted only against a certain defendant. You must not consider that evidence against any other defendant."

Thus, the court instructed the jury not just once but four times that the evidence that Tarkington committed a previous bank robbery could be considered solely as evidence of Tarkington's guilt of the current bank robbery and could not be used as evidence of Allen's guilt. We presume the jury followed the court's instructions in this regard. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

II. EVIDENCE OF ALLEN'S MISDEMEANOR FIREARM CONVICTION

Allen elected to testify in his own defense. Before he testified his counsel asked the court for a ruling on what priors of Allen's, if any, would be admissible as impeachment. The prosecutor informed the court that he intended to ask Allen on cross-examination whether he had ever carried a loaded firearm in a public place and only planned to impeach him with the prior conviction of carrying a loaded firearm in a public place if he denied the conduct. The prosecutor never stated why the conduct was relevant and defense counsel never objected on the ground of relevance. Defense counsel, instead, argued that regardless of what his client testified, the evidence of his conviction should not be admitted on the ground that a misdemeanor could not be used for impeachment, and also on the ground that evidence of the conviction would be unduly prejudicial. The court ruled the conviction could be used if Allen testified because it was relevant to show that he was "familiar with firearms," and Evidence Code section 352 did not bar its introduction.

As a result of the court's ruling, defense counsel sought to minimize the prejudicial impact of the gun evidence by asking Allen to admit to the conviction on direct examination and allowing Allen to provide an explanation for his conduct.

On appeal, Allen argues that the court's allowing the prosecution to introduce Allen's firearm conviction was wrong for three reasons. Evidence that Allen had carried a firearm in a public place sometime in the past was irrelevant to any issue in the case and therefore the prosecutor could not have asked him about that conduct merely for the purpose of contradicting it. The fact of the conviction could not be used for impeachment because the crime was a misdemeanor and it did not involve moral turpitude. And, even if relevant, the evidence of conviction was unduly prejudicial and should have been excluded under Evidence Code section 352.

We agree that the trial court erred in ruling that the prosecutor could ask Allen whether he had ever carried a loaded gun in public but we conclude that the error was not prejudicial.

Evidence that Allen was "familiar with firearms" was irrelevant to any issue in the case because it had no "tendency in reason to prove or disprove" any element of the People's case. (Evid. Code § 210.) Although evidence is relevant if it has "any tendency in reason to prove or disprove the truthfulness" of a witness's testimony (Evid. Code § 780) the prosecution cannot elicit otherwise irrelevant testimony on cross-examination merely for the purpose of contradicting it. (*People v. Mayfield* (1997) 14 Cal.4th 668, 748.)

It is not reasonably probable, however, that Allen would have obtained a more favorable result had this evidence not been admitted. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Allen concedes that his counsel's strategy of informing the jury of his firearm conviction on direct examination, rather than allowing the prosecutor to raise it on cross-examination, "likely reduced the damaging effect of the prior conviction." The evidence of Allen's guilt was even stronger than Tarkington's. Not only was Allen found in possession of the stolen loot less than 11 hours after the robbery, his fingerprint was on the get-away car and one of the tellers testified that Allen had the same or similar skin color, height and build as two of the robbers. In addition, Allen's conflicting explanations of how he came to be in possession of over $3,000 from the Palmdale bank robbery added further support to his guilt. (*People v. Robinson* (1964) 61 Cal.2d 373, 400.)

Furthermore, the evidence of Allen's past gun possession did not connect Allen to the bank robbery. We do not credit Allen's speculation that the jury might have used the gun possession evidence as character evidence to infer that he was a "violent criminal" and therefore the kind of person who would commit the armed robbery of a bank. The prosecution did not make this argument to the jury.[5] Moreover, there was no evidence that Allen had previously committed a crime of violence with or without a

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5 The prosecutor made only a brief reference to Allen's conviction for carrying a gun, noting it as one example among others showing that Allen "is a man that does whatever he chooses, given the situation."

gun. He testified without contradiction that he purchased the gun for self-defense after he was shot in the head and seriously injured and that after his arrest for carrying the gun he never carried a gun again.

III. EVIDENCE OF ALLEN'S COMMUNICATIONS WITH HIS ATTORNEY

During Allen's cross-examination the following colloquy took place between the prosecutor [P], defense counsel [N], the trial court [TC] and Allen [A].

"[P]: In preparation for your testimony you talked to your attorney about what you were going to be testifying about. Right?

"[N]: Well, now, your Honor, that's --

"[P]: Preparation, your Honor.

"[N]: Well, I guess, I guess it's a yes or no question, I guess.

"[TC]: Overruled. You may answer.

" . . .

"[P]: In preparation for you testifying today and on Friday, you spoke to your attorney regarding about what you were going to be testifying about. Right?

"[A]: Yes.

"[P]: And you had a chance to review the reports regarding this case. Right?

"[A]: I didn't review any reports.

"[P]: Okay. You didn't go - - - your attorney didn't go over the reports with you about what was alleged during the course of the case?

"[N]: Your Honor, I object to this line of questioning under the attorney-client privileges in the United States Constitution and the - - -

" . . .

"[TC]: Overruled. You may answer.

"[A]: What he talked to me about was trying to get me not to testify.

" . . .

"[P]: No sir; it's a yes or no. But did you talk to him about the reports?

"[A]: No.

"[P]: You didn't talk to him about any of the reports?

"[A]: No.

"[P]: Never seen any of the reports in this case. Right?

"[A]: I've seen them.

"[P]: So you know what's in those reports. Right?

"[A]: Yes."

A. Evidence That Allen Discussed His Testimony With His Attorney

Allen contends the court erred in allowing the prosecutor to ask him whether he had discussed his forthcoming testimony with his attorney. The record shows that Allen's attorney withdrew his objection to this question and, in any event, permitting the question did not violate the attorney-client privilege.

After Allen's attorney objected to the question whether Allen had discussed with his attorney what he was "going to be testifying about," and before the trial court ruled on the objection, Allen's attorney stated: "Well, I guess, I guess it's a yes or no question, I guess." We interpret counsel's statement as a withdrawal of the objection based on his realization that it is the contents of an attorney-client communication that are privileged, not the fact that a communication took place. (*State Farm & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 640.)

B. Evidence That Allen And His Attorney Discussed The Police Reports

The court erred in permitting the prosecutor to ask Allen whether he and his attorney had "go[ne] over the reports . . . about what was alleged during the course of the case."

This question went beyond asking Allen whether he and his attorney had discussed his testimony. The question asked Allen if he and his attorney had discussed a particular aspect of his testimony, the police reports. As our Supreme Court explained in *Samuels v. Mix* (1999) 22 Cal.4th 1, 27, "[u]nless the client waives the privilege,

neither he nor the attorney he consulted can be compelled to disclose the substance of their discussions."

Furthermore, allowing the prosecutor to ask Allen what subjects he discussed with his attorney led Allen to blurt out: "What he talked to me about was trying to get me not to testify." Allen argues that this concession might have led some jurors to conclude Allen's attorney did not believe Allen's denial of involvement in the robbery and his explanation for the marked money the police found in his possession when the police arrested him.

In context, we find the error harmless. Given the strong evidence of Allen's guilt, discussed above, it is not reasonably probable that the violation of his attorney-client privilege affected the verdict. (*People v. Michaels* (2002) 28 Cal.4th 486, 538.)

IV. THE GANG AND FIREARM ENHANCEMENTS

The jury found that Tarkington and Allen robbed the bank for the benefit of a criminal street gang (Pen. Code § 186.22, subd. (b)(1)) and that a principal used a firearm in the commission of that crime (Pen. Code § 12022.53, subd. (b), (e)(1)[6] but the jury did not, and was not asked to, find that either defendant *personally* used or discharged a firearm. The trial court sentenced each defendant to 10 years for the gang enhancement and a consecutive 10 years for the firearm use enhancement. The People concede, and we agree, that both enhancements should not have been imposed. Because the jury did not find that Tarkington or Allen personally used or discharged a firearm, their sentences could not be enhanced for the gang involvement in addition to the gun use.[7]

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6 All future statutory references are to the Penal Code.

7 Section 12022.53, subdivision (e)(2) states: "An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, *unless* the person personally used or personally discharged a firearm in the commission of the offense." (Italics added.) Here, the jury found that Tarkington and Allen committed the robbery for the benefit of a street gang but did not find that either defendant personally used a firearm.

Tarkington and Allen, however, also contend that even the 10-year enhancement for gun use in a gang crime (§ 12022.53, subds. (b), (e)(1)) should not have been imposed because that enhancement requires a principal to have used a gun *and* that the crime was committed for the benefit of the gang and here the evidence was insufficient to support either finding. We agree that the evidence does not support the gang enhancement. Therefore, we need not consider the sufficiency of the gun use evidence.

When a defendant challenges the sufficiency of the evidence, settled principles of appellate review require us to review the record in the light most favorable to the judgment and to presume the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment."'" (*People v. Bean* (1988) 46 Cal.3d 919, 932-933, quoting *People v. Hillery* (1965) 62 Cal.2d 692, 702.)

Here, the evidence showed that Tarkington admitted to police in 1997 that he was a member of the 8 Trey Gangster Crips (8 Trey). Photographs of Tarkington flashing 8 Trey gang signs, along with money from the robbery, were found in Tarkington's car when he and Allen were arrested. At least one of those photographs was taken in 2005, the same year as the bank robbery.[8]

The evidence described above supports a finding that Tarkington was an active member of the 8 Trey gang at the time of the robbery and also supports a finding that he

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8 In the photograph Tarkington has a Washington Nationals baseball cap resting on his knee. We take judicial notice that 2005 was the first year of the Washington Nationals baseball team. They were formerly the Montreal Expos.

was one of the robbers. There was no evidence, however, to support a finding that Tarkington or Allen robbed the bank for the benefit of the 8 Trey gang.

In support of the gang enhancement, the prosecution's gang expert answered "yes" when asked whether, in his opinion, a member of the 8 Trey gang who robbed a bank would have done so to benefit the gang. Bank robberies, he explained, usually produce large sums of money which the gang uses to buy drugs to sell in their territory, guns to protect their territory and fancy cars and jewelry which helps with recruiting young people into the gang. Bank robberies also enhance the image of the gang and make it easier for the gang to promote fear and intimidation among non-gang members.

The expert explained how a bank robbery benefits a gang, but the prosecution offered no evidence, including the testimony of the expert, from which the jury could reasonably conclude that Tarkington, or Allen (who was not an 8 Trey member), acted with those purposes in mind. On the contrary, the evidence showed that the robbers did not identify themselves as 8 Trey gang members, did not wear identifiable gang clothing or make gang signs and committed the robbery far from 8 Trey turf.

Because the evidence is insufficient to support the findings that Tarkington and Allen committed the robbery for the benefit of a gang, the gun use enhancement and the gang enhancement on which it depends must be stricken.

DISPOSITION

The convictions are affirmed. The gang enhancements as to each defendant are reversed with directions that they be dismissed and that the 10-year sentences on those enhancements be stricken. The court is also directed to modify Tarkington's sentence by striking the 10-year firearm use enhancement and staying the sentence on the burglary conviction. Allen's sentence is also to be modified by striking the 10-year firearm use enhancement and staying the sentence on the burglary conviction. The trial court is directed to prepare respective abstracts of judgment accordingly and forward certified copies of the corrected abstracts to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

HASTINGS, J.*

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* Retired Justice of the the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.