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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHARLES O'NEAL, Defendant and Appellant.	A112206 (Del Norte County Super. Ct. No. CRF05-9752)

A jury convicted defendant Charles O'Neal of false imprisonment, assault by means of force likely to produce great bodily injury, infliction of corporal injury upon a cohabitant, and removal of a cellular telephone to prevent a call for police assistance. (Pen. Code, §§ 236, 245, subd. (a)(1), 273.5, 591.5 [all further section references are to this code].) The court sentenced defendant to an aggregate prison term of five years, eight months: four years for infliction of corporal injury upon a cohabitant; one year for assault; eight months for false imprisonment; and a concurrent 180-day jail term for removal of a cellular telephone.

Defendant claims three instances of instructional error: (1) failure to define assault for the jury; (2) failure to instruct on misdemeanor battery against a cohabitant as a lesser included offense of felony infliction of injury upon a cohabitant; and (3) failure to instruct the jury that it had to agree unanimously on the act constituting false imprisonment. Defendant also claims, in a petition for rehearing we granted, that he was wrongly denied a jury trial on facts used by the trial court to sentence him to an upper term of four years for infliction of corporal injury upon a cohabitant.

The court's failure to instruct the jury on the definition of assault was error, as the People concede. However, we find the error harmless because the factual question posed by the omitted assault instruction (whether defendant threatened physical force) was resolved adversely to defendant under other properly given instructions when the jury found defendant guilty of inflicting corporal injury (applying physical force) upon a cohabitant. We find no error in the court's decision not to instruct on a lesser included offense of simple battery without injury because uncontroverted evidence established that the victim suffered injury. We conclude that no unanimity instruction was required because the false imprisonment was not a series of discrete acts but a continuous course of conduct. Finally, we reject defendant's claim of sentencing error because imposition of the upper term was based on the fact of a prior conviction, and determination of that fact need not be submitted to a jury. Accordingly, we affirm the judgment.

I. FACTS

Defendant and Kathleen Brown met in the summer of 2004, and moved in together in March 2005. Defendant's conviction is based on events occurring on September 4, 2005, but those events are connected with earlier episodes of violence that Brown described for the jury. Brown explained that she decided to leave defendant in May 2005, and packed her belongings in her van. Defendant entered the van, where he choked her, threatened her with a knife, "pinned" her in the back of the van, and "basically held [her] against [her] will until the next morning when [she] was able to call the Crescent City Police Department and get them to come and rescue [her] from [defendant]." After the attack, Brown presented a letter to the district attorney's office in which Brown said: "I am tired of being kicked, pushed, choked, slapped, threatened and abused. Eventually he's going to succeed in killing me." Defendant was arrested and jailed until July 2005.

During defendant's incarceration, Brown became involved with another man and decided to move to Palm Springs. Defendant began calling Brown's cellular telephone within a day of his release in July 2005, and Brown met with defendant. Brown testified that she did not want contact with defendant but was afraid to refuse him. Brown said

that defendant threatened her parents, children, and friends. Defendant once told Brown "he was going to skin [her] 13-year-old son and have it delivered to [her] if [she] did not do what he wanted." Brown testified at the October 2005 trial that "still to this day I'm terribly afraid of Mr. O'Neal and what he has done in the past and what he's capable of doing if I don't do exactly what he says."

When Brown left in her van for Palm Springs in August 2005, defendant insisted on traveling with her. Brown complied but persuaded defendant to shower at a Los Angeles County rest stop en route, then drove away and left him there. Defendant repeatedly called Brown's cellular telephone over the next few days, and demanded his belongings from the van. Brown agreed to meet defendant at a Palm Springs area market. Brown thought she would be safe in a public place but defendant was in a rage. Brown testified: "He got into the van. And it started all over again. I was assaulted. I was made to do what he wanted." Brown remained in defendant's control until late that night, when she convinced him to let her use a store's bathroom. Brown found a broken lip liner pencil in the garbage and wrote a note saying she "was being held in the van against [her] will and to please call 9-1-1." The note was given to store security and the police were called. Defendant was taken to jail, and Brown was taken to the hospital where she was treated for injuries from defendant's attack: a bloodied nose, bruises, and contusions and scratches on her face, neck, and legs.

The next morning, Brown learned that defendant had been released from jail and had taken her van. Defendant said he would lead Brown to the van, but they walked for miles in 138 degree heat before locating it. Brown was hospitalized again, this time for dehydration. Defendant stayed with Brown at the hospital and continued to threaten her. Brown asked a hospital worker for help, and defendant was arrested. Brown drove home to Crescent City alone. Brown testified that she went home "to get [her] restraining order straightened out so hopefully this would have all been over."

The crimes at issue in this appeal occurred in September 2005, after Brown's return to Crescent City. Brown, despite her history with defendant, again agreed to meet with him. Defendant said he wanted some things from the van, and Brown met him at a

bar. Defendant threatened Brown "with all the horrible things he'd been threatening to do for a year" if she did not cooperate. Brown testified: "At that moment I was right back underneath his custody and control. I don't know any other way to put it." Brown and defendant drank at the bar, with Brown paying. Brown had over $1,300 in cash she planned to use to get an apartment in another town.

Defendant and Brown left the bar to get the van. They drove around town and then went to a restaurant where defendant worked. They were in the van in the rear parking lot when defendant demanded her money and told her to pull herself together because they were going to get something to eat at the restaurant. Brown gave him all her money. Brown testified that she did not care about the money or anything else at that point; she just wanted to get away. They "struggled" as Brown tried to get out of the van and away from defendant. Defendant grabbed Brown by her hair and arm, then her throat, and threw her into the back of the van. Defendant hit Brown in the face with the back of his hand several times, then "pinned" her on the bed in the van's rear compartment. He put his hands around her throat and choked her until she thought she would black out. Brown testified: "I honestly didn't think I was going to live through that night."

At this point, a restaurant waitress came out to investigate. The waitress, Ruby Ann Smith, testified at trial. Smith said it was about 2:00 a.m. on September 4, 2005, when a restaurant cook told her a woman was crying in a van behind the restaurant. Smith pretended to take a cigarette break outside, to "see if everything was okay." Smith approached the van and recognized defendant as a coworker. Smith heard a woman crying in the van and asked if everything was okay. Defendant told Smith everything was "fine" and that Brown was "drunk" and "just upset."

Smith looked inside the van and saw Brown crying hysterically in the back of the van. Smith had never seen Brown previously. Smith offered Brown water, and defendant requested a soda and cigarette for her. Smith went into the restaurant and returned with water and a soda. Smith asked Brown to come out of the van to an alcove with chairs where she could smoke a cigarette. Brown left the van and defendant

followed her and sat next to her in the alcove. Smith wanted defendant to "just let [Smith] talk" to Brown but defendant insisted on explaining Brown's condition. Defendant said that Brown was upset because she got drunk and lost $1,300 at a bar. Defendant said he made her leave the bar for the restaurant and, in an effort to "calm her down," pushed her down in the back of the van and choked her. Meanwhile, within minutes of leaving the van, Brown ran away as she continued to cry hysterically. Smith and defendant followed Brown, as Smith tried to "to find out what was going on."

Smith caught up with Brown and, thinking that maybe Brown did have too much to drink, brought her into the restaurant for something to eat. Defendant followed and sat in a booth across the table from Brown as Smith took their food order. Smith placed their order with the kitchen and returned to find defendant seated next to Brown, pushing Brown so that her head smacked up against the side of the booth. Smith testified that Brown's head was "smacking like she was a rag doll," and she was saying to defendant "whatever you say Charlie. Whatever you say. . . . [J]ust please stop." Smith told defendant to stop and to return to his side of the booth. Brown asked for a cigarette, and Smith took her outside to smoke.

As soon as they were outside, Brown ran away and defendant pursued her. Smith told defendant to stop and let Brown go. Defendant grabbed Brown by her arms, then pushed her against a wall and threw her to the ground. Smith repeatedly asked defendant to stop and tried to get in between him and Brown as defendant dragged Brown by her hair or neck to the van. As they reached the van, Brown got in and locked the door with defendant outside. Defendant had the keys and unlocked the door, as Brown tried to escape out the other side. Defendant grabbed Brown and dragged her back into the van kicking. Smith warned defendant she would call the police, and Brown started screaming to call 9-1-1. Smith dialed 9-1-1 on her cellular telephone and was speaking to the police when defendant grabbed the telephone from her hand and ended the call.

Defendant dragged Brown by her hair and arm toward sand dunes behind the restaurant. Brown was struggling to get away, and Smith "was afraid for her." Smith telephoned the police again, and ran after the couple. Defendant again took Smith's

telephone. Defendant ended the call and dropped the telephone in the sand. Defendant reached the dunes with Brown and had her on the ground in the weeds when the police arrived. Defendant ran away, and Brown was taken to the hospital where she was treated for cuts and bruises to her face, neck, arms, and legs. Her injuries were documented by photographs, which show red marks around her throat, a dislocated finger, and bruises on her arms and face.

Brown's testimony about events at the restaurant was generally consistent with Smith's testimony. However, Brown added that defendant threatened to slit her throat when dragging her to the sand dunes. It was also established at trial that Brown was diagnosed in 1997 with "[b]ipolar disorder and generalized anxiety disorder and acute panic attacks." On cross-examination, Brown admitted being charged in the past with theft and forgery.

The defense presented several witnesses in an effort to discredit Brown. Defendant's former girlfriend testified that defendant and Brown were both at the bar on the night of September 3, 2005, but they were not there together. The former girlfriend also said that Brown was drunk and standing outside the bar handing money to people. A friend of defendant's was also at the bar, and he testified that defendant did not command Brown to do anything. The manager of the restaurant where defendant worked testified that he was familiar with defendant and Brown as a couple, and that it was Brown who was "in charge, the boss, cut and dried." According to the manager, Brown "wore the pants" in the relationship. Defendant's mother testified that Brown professed love for defendant in August 2005, despite a previous "confrontation" between the two. The mother conceded that her conversation with Brown was over the telephone, and it was defendant who initiated the call. On cross-examination, the mother admitted that defendant was violent with his first wife.

The jury convicted defendant of false imprisonment, assault by means of force likely to produce great bodily injury, infliction of corporal injury upon a cohabitant, and removal of a cellular telephone to prevent a call for police assistance. (§§ 236, 245,

subd. (a)(1), 273.5, 591.5.) The jury acquitted defendant of robbery, making criminal threats, and stalking. (§§ 211, 422, 646.9, subd. (a).) Defendant appeals.

II. DISCUSSION

Defendant claims three instances of instructional error: (1) failure to define assault for the jury; (2) failure to instruct on misdemeanor battery against a cohabitant as a lesser included offense of felony infliction of injury upon a cohabitant; and (3) failure to instruct the jury that it had to agree unanimously on the act constituting false imprisonment. Defendant also claims that he was wrongly denied a jury trial on facts used by the trial court to sentence him to an upper term of four years for infliction of corporal injury upon a cohabitant. We turn to a discussion of each claim.

Failure to define assault for the jury

The court instructed the jury that defendant was accused of assault by means of force likely to produce great bodily injury, and defined great bodily injury. (CALJIC No. 9.02.) However, the court neglected to administer the jury instruction defining assault as a threatened application of physical force. (CALJIC No. 9.00.) The People concede that the court erred. It is well established that " '[t]he legal definition of an assault is not one commonly understood by [persons] familiar with the English language.' Therefore, in all cases in which a defendant is charged with simple assault or aggravated assault, CALJIC No. 9.00 which defines assault, or an equivalent instruction must be given *sua sponte* by the trial judge." (*People v. Valenzuela* (1985) 175 Cal.App.3d 381, 393, overruled on another ground in *People v. Flood* (1998) 18 Cal.4th 470, 484, 490 fn. 12 (*Flood*).)

While the parties agree on the existence of the error, they dispute the consequences of the error. Defendant insists that the error is reversible per se while the People maintain that reversal is not required because the error was harmless beyond a reasonable doubt. While there is some uncertainty about the standard of prejudice applicable to an instructional error that omits multiple elements of an offense, we believe that such an instructional error is a trial error subject to harmless error analysis. When

evaluating the consequences of an error, the relevant question is whether the error is a structural error (requiring automatic reversal) or a trial error (subject to harmless error analysis). (*Neder v. United States* (1999) 527 U.S. 1, 7-15.) Structural errors "comprise a very limited class of cases" and "have been found where there was a complete denial of counsel [citation], where the trial judge was biased [citation], where there was racial discrimination in the selection of the grand jury [citation], where there was a denial of self-representation [citation], where there was a denial of a public trial [citation], and where the reasonable doubt instruction was defective." (*People v. Magee* (2003) 107 Cal.App.4th 188, 193-194.) Harmless error analysis is utilized where improper instructions have been given on an element of an offense. (*Flood, supra,* 18 Cal.4th at pp. 492-503; *People v. Magee, supra,* at p. 194.)

Defendant acknowledges that failure to instruct on one element of an offense is subject to harmless error analysis but argues that failure to instruct on all, or most, elements of the offense is a structural error compelling automatic reversal. The argument relies on old precedent (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311-1315) that has been eclipsed by more recent authority. Both the United States and California Supreme Courts have clearly stated that the failure to instruct a jury on the statutory elements of an offense is a trial error subject to harmless error analysis. (*Neder v. United States, supra,* 527 U.S. at pp. 7-15; *Flood, supra,* 18 Cal.4th at pp. 492-503; accord *Mitchell v. Esparza* (2003) 540 U.S. 12, 16.) We recognize that neither high court has had occasion to review a case involving the omission of most elements of an offense, as opposed to a single element, from jury instructions. However, we believe that the omission of statutory elements of an offense, whether of one or multiple elements, is fundamentally a trial error and differs markedly from the limited class of constitutional errors that defy harmless error analysis.

We therefore turn to the question of whether it appears beyond a reasonable doubt that the omission of an instruction on the elements of assault did not contribute to this jury's verdict. (*Flood, supra,* 18 Cal.4th at pp. 504.) An instructional error is harmless where the verdict returned by the jury demonstrates that the jury necessarily found the

omitted elements in connection with other findings required by the instructions. (See *id.* at p. 506.) Here, the jury's finding that defendant inflicted corporal injury upon a cohabitant plainly demonstrates that the jury necessarily found the elements of assault. Assault is the attempted or threatened application of physical force, and infliction of corporal injury on a spouse is the completed application of physical force with resulting bodily injury. (CALJIC Nos. 9.00, 9.35.) In finding defendant guilty of applying physical force, the jury necessarily found that he attempted the application of force. (See *People v. Simington* (1993) 19 Cal.App.4th 1374, 1381 [failure to define assault harmless where jury found defendant guilty of battery].) It is thus clear beyond a reasonable doubt that the jury would have found defendant guilty of assault if instructed on the elements of the offense.

Failure to instruct the jury on misdemeanor battery

Defendant contends that the trial court erred in failing to instruct the jury on misdemeanor battery on a cohabitant (§ 243, subd. (e)(1)) as a lesser, necessarily included offense of felony infliction of corporal injury on a cohabitant (§ 273.5). The contention is without merit as the lesser offense was not supported by the evidence. What separates the greater from the lesser offense is the infliction of corporal injury or a " 'traumatic condition,' " which is defined as "a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by physical force." (§ 273.5, subd. (c).) Unlike some other felonies, which require serious or great bodily injury, the felony at issue here is established by the infliction of even minor injury, including facial redness and soreness caused by slapping. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 771.)

There was uncontroverted evidence that Brown was injured. Brown and the independent witness, Smith, both testified that Brown had cuts and bruises from the attack. Photographs of Brown, admitted in evidence at trial, also document her injuries. On appeal, defendant points to evidence that Brown drank alcohol on the night in question, and claims that the jury could infer that her injuries were self-inflicted through

drunkenness. Any inference of self-inflicted injuries would be a product of imagination, not evidence. While Brown's consumption of alcohol was undisputed, there was no evidence that Brown fell, bumped into walls or did anything else in a state of inebriation that would account for the injuries she suffered. The only evidence of physical force applied to Brown was the evidence of defendant's attack. Brown's injuries included red marks on her throat consistent with her report that defendant choked her with his hands, and inconsistent with a self-inflicted accident. On this state of the evidence, the trial court was not required to instruct the jury on simple battery on a cohabitant (§ 243, subd. (e)(1)) as a lesser included offense of infliction of corporal injury on a cohabitant.

Failure to provide a unanimity instruction

Defendant next asserts that the trial court was obligated to instruct the jurors that they had to agree unanimously on the act constituting false imprisonment. (See CALJIC No. 17.01.) "When the evidence tends to show a larger number of distinct violations of the charged crime than have been charged and the prosecution has not elected a specific criminal act or event upon which it will rely for each allegation, the court must instruct the jury on the need for unanimous agreement on the distinct criminal act or event supporting each charge." (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309.) No instruction is required, however, " 'if the case falls within the continuous course of conduct' " exception, such as " 'when the acts are so closely connected that they form part of one and the same transaction, and thus one offense.' " (*Ibid.*)

Acts closely connected in time, location, and objective have been found to form a single transaction. (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294-1296.) In *Haynes*, this District Court of Appeal concluded that no unanimity instruction was required where the evidence showed that defendant assisted a robbery in a parking lot, then pursued the victim for several blocks and accosted the victim a second time to obtain the rest of the cash that had been torn during the first encounter. (*Id.* at pp. 1286, 1294-1296.) In finding a single transaction, the court noted that "[t]he two encounters were just minutes and blocks apart and involved the same property. The acts were successive,

compounding [and] part of a single objective of getting all the victim's cash." (*Id.* at p. 1296.)

Here, too, the evidence showed acts closely connected in time, location, and objective related to defendant's false imprisonment of Brown. On appeal, defendant argues that there were four distinct acts of false imprisonment: (1) confining Brown in the van at the restaurant parking lot; (2) blocking Brown's exit from the restaurant booth; (3) holding Brown by the arms in front of the restaurant; and (4) restraining Brown near the sand dunes behind the restaurant. Defendant's argument does nothing more than impose an arbitrary division on a single transaction. All of the acts occurred within an hour, were located in or around the restaurant, and furthered defendant's aim to control Brown. No unanimity instruction was required.

Sentencing

California's determinate sentencing law generally "prescribes three precise terms of imprisonment—a lower, middle, and upper term sentence." (*Cunningham v. California* (2007) ___ U.S. ___, 127 S.Ct. 856, 861 (*Cunningham*).) The middle term is imposed "unless there are circumstances in aggravation or mitigation of the crime," as determined by a judge. (§ 1170, subd. (b).) The United States Supreme Court recently held that the middle term is the maximum sentence that may be imposed by a judge unless an aggravating factor is proved to the jury beyond a reasonable doubt or is established by the defendant's admissions or prior convictions. (*Cunningham, supra*, at pp. 868-871.) The holding is an application of the high court's "bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Id.* at p. 868, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) *Cunningham* found that the middle term, and not the upper term, of California's sentencing triad is the relevant statutory maximum and disapproved the California Supreme Court's contrary holding in *People v. Black* (2005) 35 Cal.4th 1238, 1254-1261. (*Cunningham, supra,* at pp. 868-871.)

The United States Supreme Court's *Cunningham* decision was issued on January 22, 2007, three days before we issued our original opinion in defendant O'Neal's appeal. Defendant's appellate briefing never questioned his sentence. After we issued our opinion, defendant filed a petition for rehearing that raised, for the first time, a challenge to the trial court's imposition of an upper term sentence on defendant's conviction for infliction of corporal injury on a cohabitant. The People argue that defendant forfeited his sentencing claim by failing to raise it on appeal. While *Cunningham* was decided in January 2007, after the appeal was briefed and submitted, the People contend that the continuing validity of California's sentencing law became an "open question" when the United States Supreme Court took *Cunningham* under review in February 2006. Whatever the merit of the People's argument, we have elected to review defendant's sentence given the significant issues at stake and the inefficiency of passing on a claim of error that would reoccur in a petition for a writ of habeas corpus. We therefore granted rehearing on February 26, 2007, and now consider defendant's sentencing claim.

A felony conviction for infliction of corporal injury on a cohabitant carries a prison sentence of two, three, or four years. (§ 273.5, subd. (a).) The trial court imposed the upper term upon finding several circumstances in aggravation of the crime, and none in mitigation. Specifically, the court found that defendant has "engaged in violent conduct that indicates a serious danger to society"; that his "prior convictions as an adult or sustained petitions in juvenile dependency proceedings are numerous or of increasing seriousness"; and that he "has served a prior prison term." (Cal. Rules of Court, Rule 4.421, subds. (b)(1), (b)(2), (b)(3).) The court's findings were based on documentary records that included a 20-page rap sheet showing multiple assault convictions and other offenses, with prison incarceration.

The People note that two of the three factors used to impose the upper term (numerous prior convictions and having served a prior prison term) relate to defendant's prior convictions. California, and a number of other jurisdictions, have held that no jury trial right exists on either the precise fact of a prior conviction or the broader but related fact of recidivism. (*People v. McGee* (2006) 38 Cal.4th 682, 695-709; *People v. Thomas*

(2001) 91 Cal.App.4th 212, 215-223.) The United States Supreme Court seems to have reaffirmed this principle in *Cunningham*, where the court expressly endorsed a judge's use of prior convictions to impose an upper term. (*Cunningham, supra,* 127 S.Ct. at pp. 860, 868.)

Defendant disputes this interpretation of *Cunningham*, and maintains that the prior conviction exception to the jury guarantee is no longer viable or, at the least, is limited to the precise fact of a prior conviction. The aggravating facts found by the court here, argues defendant, extend beyond the fact of a prior conviction and include a determination that the prior convictions were numerous or of increasing seriousness. Defendant argues that even the prior prison term finding involves more than a showing of a conviction because not every conviction results in a prison commitment.

The issues defendant raises are now pending in the California Supreme Court. (E.g. *People v. Hernandez*, review granted Feb. 7, 2007, S148974.) Until we receive further direction from our high court, we are bound by existing precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450,455.) The California Supreme Court has previously rejected the argument advanced by defendant that the prior conviction exception is not viable or must be narrowly construed. (*People v. McGee, supra,* 38 Cal.4th at pp. 695-709.) In *McGee*, the court held that a defendant has no right to a jury trial on whether his prior conviction from another jurisdiction qualifies as a serious felony conviction under California's three strikes law. (*Id.* at p. 709.) In so holding, the California high court cautioned against dismissing the viability of the prior conviction exception without a clear directive from the United States Supreme Court, and approved of cases finding that the exception covers questions relating to recidivism, not merely the fact of prior conviction. (*Id.* at pp. 700-709.) This state precedent is not undermined by *Cunningham*, which did not depart from the United States Supreme Court's recognition of the prior conviction exception. Indeed, *Cunningham* reiterated the prior conviction exception. (*Cunningham, supra,* 127 S.Ct at pp. 860, 868.)

We conclude that, of the three aggravating factors considered by the trial court in this case, two were recidivist factors for which no jury trial was required. Defendant has

prior convictions that are numerous or of increasing seriousness, and he served a prior prison term. A single aggravating factor will support an upper term sentence. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) The trial court's error in relying on an additional aggravating factor to impose an upper term sentence was therefore harmless. (*Washington v. Recuenco* (2006) ___ U.S. ___, 126 S.Ct. 2546, 2551-2553 [denial of jury trial on sentencing factor subject to review for prejudice].)

III. DISPOSITION

The judgment is affirmed.

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Sepulveda, J.

We concur:

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Ruvolo, P. J.

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Rivera, J.