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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **MICHAEL CHRISTOPHER PITTO,** **Defendant and Appellant.**	**A105164** **(Lake County** **Super. Ct. No. CR 033635)**

The principal issue in this appeal is whether CALJIC No. 17.15, regarding the Penal Code section 12022 arming enhancement, is a correct statement of the law under the California Supreme Court decision *People v. Bland* (1995) 10 Cal.4th 991 (*Bland*). In *Bland*, the Supreme Court held that "by specifying that the added penalty applies only if the defendant is armed with a firearm 'in the commission' of the felony offense, section 12022 implicitly requires both that the 'arming' take place *during* the underlying crime and that it have some '*facilitative nexus*' to that offense." (*Bland*, at p. 1002.)

In the published part of this decision, we conclude that by instructing that the "in the commission of the offense" element requires only that the arming occurred "at the time of commission of the offense," CALJIC No. 17.15 permits the jury to find the arming enhancement true without regard to whether there was a "facilitative nexus" between the presence of the firearm and the underlying offense. In this case, the instructional error was prejudicial and we reverse and remand with respect to the arming

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II, III and IV.

enhancement. In the unpublished parts of the decision, we reject Pitto's other claims on appeal and affirm the remainder of the judgment.

PROCEDURAL BACKGROUND

The information charged Michael Christopher Pitto with transportation and possession of methamphetamine for sale (Health & Saf. Code, §§ 11379, subd. (a) and 11378; counts one and two) and alleged that Pitto was personally armed with a firearm in the commission of those offenses (Pen. Code, § 12022, subd. (c)).[1] The information further charged that Pitto was a felon in possession of a firearm (§ 12021, subd. (a)(1); count three), with the allegations that he was released on bail at the time of the offense (§ 12022.1) and had suffered a prior drug conviction (Health & Saf. Code, § 11370.2, subd. (c)). Finally, the information charged two misdemeanors, that Pitto was under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a); count four) and was carrying a concealed weapon in a vehicle (§ 12025, subd. (a)(1); count five).

The jury found Pitto guilty on counts one, three, four, and five, and guilty of the lesser included offense of possession on count two. The jury found true the arming and prior drug conviction allegations, and the court found true the on-bail allegation.

In December 2003 the trial court sentenced appellant to 17 years 4 months in state prison.[2] As relevant to this appeal, the sentence included a four-year term for transportation of methamphetamine (count one), a four-year consecutive term for the arming enhancement, an eight-month consecutive term for the felon in possession of a firearm charge (count three), and an eight-month consecutive term for the on-bail enhancement. In February 2004 the trial court recalled the sentence and, following a hearing, increased the sentence for the on-bail enhancement from eight months to two years, for a total combined sentence of 18 years 8 months.

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

[2] The sentence was a combined sentence for this case; a case involving convictions for possession and transportation of controlled substances; and two other cases involving no contest pleas to possession of stolen property and evasion of a police officer charges.

FACTUAL BACKGROUND

In May 2003, officers of the Lake County Narcotics Task Force saw Pitto enter the parking lot of Twin Pines Casino, an area known for methamphetamine sales. The officers knew Pitto and knew that he was subject to a probation search condition.

Pitto parked the van he was driving and got out with his dog on a leash. It appeared that Pitto was taking the dog to a location where the dog could relieve itself. The officers detained Pitto and two of the officers searched Pitto's van. On the floor toward the rear of the van an officer discovered a black plastic garbage bag containing clothes and a cigarette package containing a plastic bag with a crystalline substance. It was subsequently determined that the bag contained about 12 grams of crystal methamphetamine. In a cardboard box located behind the driver's seat, about a foot or more away from the plastic bag, the same officer discovered a zippered pouch containing an unloaded .357 Ruger pistol and in a separate compartment of the pouch he found six rounds of ammunition. Also in the box were a carton of cigarettes, a phonebook, and other items.

At trial Pitto testified that when he was arrested he was on his way to Clear Lake for 10 or 11 days. He stopped at the casino because it was the first convenient location for his dog to relieve itself. He admitted that he was an addict and heavy user of methamphetamine and testified that the drugs found in the van were for personal use. The gun had nothing to do with the methamphetamine. The only reason he brought the gun with him to Clear Lake was because he was contemplating suicide, although he did not have a plan to do so on a specific date. He obtained the gun about four months before his arrest. Pitto's mother and brother corroborated that Pitto had been depressed and had been talking about committing suicide. They testified that Pitto hated guns.

DISCUSSION

I. *The Section 12022 Arming Enhancement*

The trial court imposed a four-year consecutive sentence under section 12022, subdivision (c). That section provides "any person who is personally armed with a

firearm in the commission of a violation" of section 11379 of the Health and Safety Code shall be punished by an additional consecutive term of three, four, or five years. (§ 12022, subd. (c).)[3]

A. *CALJIC No. 17.15*

The trial court gave the standard CALJIC No. 17.15 instruction: "It is alleged in Counts 1, 2, and the violation of Health & Safety Code § 11377(a) which is a lesser crime to Count 2 that *in the commission of the felony* therein described, a principal was armed with a firearm, namely a .357 Ruger pistol. [¶] If you find a defendant guilty of the crimes thus charged, you must determine whether a principal in that crime was armed with a firearm *at the time of the commission or attempted commission of the crimes*. [¶] A principal in the commission of a felony is one who either directly and actively commits or attempts to commit the crime or one who aids and abets the commission or attempted commission of the crime. [¶] The term 'armed with a firearm' means knowingly to carry a firearm or have it available for offensive or defensive use. [¶] The word 'firearm' includes a pistol, revolver, shotgun, or rifle. [¶] The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true. [¶] Include a special finding on that question using a form that will be supplied for that purpose." (Italics added.)

The critical language is "[i]f you find the defendant guilty of the crimes thus charged you must determine whether a principal in that crime was armed with a firearm *at the time of the commission* or attempted commission of the crimes. . . . The term 'armed with a firearm' means knowingly to carry a firearm, or to have it available for offensive or defensive use." (CALJIC No. 17.15, italics added.) Relying on the

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[3] Section 12022, subd. (c) provides in full: "Notwithstanding the enhancement set forth in subdivision (a), any person who is personally armed with a firearm in the commission of a violation or attempted violation of Section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5, or 11379.6 of the Health and Safety Code, shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years."

California Supreme Court's decision in *Bland, supra,* 10 Cal.4th 991, Pitto contends that this language permitted the jury to find the enhancement true without determining whether there was a facilitative nexus between the firearm and the transportation of methamphetamine offense.

In *Bland,* while the defendant sat in a police car outside his house, officers searched the house and found 17.95 grams of cocaine in the defendant's bedroom closet. (*Bland*, *supra*, 10 Cal.4th at p. 995.) Under the bed in the same room the officers found a cache of unloaded firearms, including a semiautomatic rifle. (*Ibid.*) The defendant was convicted of possession of cocaine for sale and the jury found true an allegation that in the commission of the offense defendant was armed with an assault weapon within the meaning of section 12022, subdivision (a)(2). (*Bland,* at pp. 995-996.) In concluding that the enhancement was properly imposed, the *Bland* Court held that because drug possession is a continuing offense it was immaterial that the defendant was not present when the police discovered the drugs and rifle. (*Id.* at p. 1000.) Because the firearm was found in close proximity to illegal drugs in the defendant's bedroom, the jury could reasonably infer "(1) that the defendant knew of the firearm's presence, (2) that its presence together with the drugs was not accidental or coincidental, and (3) that, at some point during the period of illegal drug possession, the defendant was present with both the drugs and the firearm and thus that the firearm was available for the defendant to put to immediate use to aid in the drug possession." (*Id.* at pp. 1002-1003.) The Court continued, "These reasonable inferences, *if not refuted by defense evidence*, are sufficient to warrant a determination that the defendant was 'armed with a firearm in the commission' of a felony within the meaning of section 12022." (*Bland,* at p. 1003, italics added.)

In reaching its conclusion, the *Bland* Court discussed and defined the statutory elements of the section 12022 enhancement. "A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively." (*Bland, supra*, 10 Cal.4th at p. 997.) The *Bland* Court cautioned, however, that the fact of arming itself is not alone sufficient to justify imposition of the enhancement, "contemporaneous

possession of illegal drugs and a firearm will satisfy the statutory requirement of being ‘armed with a firearm in the commission’ of felony drug possession *only if* the evidence shows a nexus or link between the firearm and the drugs.” (*Id.* at p. 1002, italics added.) Federal courts have described this link as a “facilitative nexus” between the firearm and the drugs. (*Ibid.*) “Under federal law, . . . ‘the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement *cannot be the result of accident or coincidence*.’ (*Smith v. United States* (1993) 508 U.S. [223, 238], italics added.) So too in California.” (*Bland*, at p. 1002.)[4] The nexus requirement is implicit in the language of the statute. “[B]y specifying that the added penalty applies only if the defendant is armed with a firearm ‘in the commission’ of the felony offense, section 12022 implicitly requires both that the ‘arming’ take place *during* the underlying crime and that it have some ‘*facilitative nexus*’ to that offense.” (*Bland*, at p. 1002.)[5]

The trial court’s sua sponte duty to instruct on all relevant general principles of law extends to instructions on the elements of the charged offense or enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v. Rubalcava* (2000) 23 Cal.4th 322, 333-334.) By informing the jury that it only needed to determine whether Pitto was armed “at the time of the commission” of the offense, the instruction

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[4] The federal “counterpart” to California’s weapons enhancement law (*Bland*, *supra*, 10 Cal.4th at p. 1002) requires that the firearm possession occur “during and in relation to” the underlying offense. (18 U.S.C. § 924(c)(1).) “[T]he ‘in relation to’ language ‘allay[s] explicitly the concern that a person could be’ punished under § 924(c)(1) for committing a drug trafficking offense ‘while in possession of a firearm’ even though the firearm’s presence is coincidental or entirely ‘unrelated’ to the crime.” (*Smith v. United States*, *supra*, 508 U.S. at p. 238.)

[5] The *Bland* Court characterized an earlier decision, *People v. Fierro* (1991) 1 Cal.4th 173, as reaching a similar conclusion regarding a statute imposing additional penalties for use of a firearm “in the commission of” a felony. The *Fierro* Court “concluded that the statutory language ‘in the commission of a felony’ meant *any time during and in furtherance of the felony*.” (*Bland, supra*, 10 Cal.4th at p. 1001.)

mischaracterized the "in the commission of" element of the section 12022 enhancement.[6] As the *Bland* Court explained, "in the commission of" implies both a temporal aspect (that is, "during" or "at the time of") and a "facilitative nexus." (*Bland, supra*, 10 Cal.4th at p. 1002; see also *In re Tameka C.* (2000) 22 Cal.4th 190, 197 [following *Bland*].) The language of the instruction given does not adequately convey the facilitative aspect. Effectively, the jury was directed to find the enhancement allegation true if it found that Pitto was armed (that is, had a firearm "available for offensive or defensive use")[7] at the time of the offense, without regard to whether the presence and availability of the firearm was related to the transportation offense. Because it eliminates the "facilitative nexus" aspect of the "in the commission of" element of the section 12022 enhancement, CALJIC No. 17.15 is not a correct statement of the law. We do not decide whether the phrase "in the commission of" requires further explanation in a particular case. (See *People v. Estrada* (1995) 11 Cal.4th 568, 574.)

B. *The Instructional Error Was Not Harmless*

A trial court's failure properly to instruct on an element of an enhancement that increases the sentence for the underlying offense beyond its statutory maximum is federal constitutional error. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.) Because

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[6] The instruction mischaracterized one of the elements of the enhancement. Pitto, therefore, did not waive the challenge on appeal by failing to object below. (See Pen. Code § 1259 ["The appellate court may . . . review any instruction given, . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; *People v. Frazer* (2003) 106 Cal.App.4th 1105, 1116, fn. 5; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.)

[7] The phrase "for offensive or defensive use" is part of the definition of "armed" and cannot be read to inform the jury that the "in the commission" element requires a facilitative nexus between the firearm and the offense. A firearm can be available for offensive or defensive use at the time of an offense even if its presence is unrelated to the offense. For example, in *Bland* the assault rifle was located in the same room as the drugs and was thus available for use in defending the drugs; nevertheless the Court concluded that evidence that the presence of the rifle was accidental or coincidental, if credited by the jury, would have meant there was no facilitative nexus. (*Bland*, *supra*, 10 Cal.4th at pp. 995, 1002-1003.)

section 12022, subdivision (c) imposes an "additional consecutive term," it does increase the penalty for the underlying crime. (See *Sengpadychith* at p. 327; see also *People v. Black* (2005) 35 Cal.4th 1238, 1246-1247 & fn. 3 [§ 12022 enhancement increases the sentence above the range provided for the offense].) Accordingly, we must reverse the enhancement finding "unless it can be shown 'beyond a reasonable doubt' that the error did not contribute to the jury's verdict." (*Sengpadychith*, at p. 324, quoting *Chapman v. California* (1967) 386 U.S. 18, 24.)

As explained above, by instructing with CALJIC No. 17.15 the trial court directed the jury to find the arming enhancement true without regard to whether there was a "facilitative nexus" between the pistol and the methamphetamine. In most cases evidence that a firearm is kept in close proximity to illegal drugs will satisfy the nexus requirement because "a firearm's presence near a drug cache gives rise to the inference that the person in possession of the drugs kept the weapon close at hand for 'ready access' to aid in the drug offense." (*Bland*, *supra*, 10 Cal.4th at p. 1002.) Here, if the jury had been instructed properly and the issue on appeal was the sufficiency of the evidence to support the jury's verdict, the permissible inference from the proximity of the drugs and the pistol alone would be enough to satisfy the facilitative nexus requirement and we could affirm. However, the *Bland* Court made clear that the inference of a nexus can be contradicted by other evidence. (*Id.* at p. 1003 ["These reasonable inferences, *if not refuted by defense evidence*, are sufficient to warrant a determination that the defendant was 'armed with a firearm in the commission' of a felony within the meaning of section 12022," italics added].) Ultimately, whether the arming was "in the commission" of the underlying offense is a question of fact for the jury. (*People v. Masbruch* (1996) 13 Cal.4th 1001, 1007 ["Whether a defendant 'used a firearm in the commission of' an enumerated sex offense is for the trier of fact to decide"].)

One of Pitto's defenses to the section 12022 enhancement was that there was no nexus between the firearm and the methamphetamine.[8] Pitto testified that the gun had nothing to do with the methamphetamine; he was contemplating suicide and that was the only reason he brought the gun with him to Clear Lake. His mother and brother corroborated Pitto's testimony, testifying that Pitto had been depressed and contemplating suicide and that Pitto abhorred guns. Defense counsel emphasized this theory in his closing argument. Without expressly referring to the facilitative nexus requirement, he argued that there was no evidence that Pitto had the gun to protect the drugs and that the defense evidence showed that the only reason he had the gun was because he was contemplating suicide. After summarizing the evidence regarding the firearm, defense counsel stated, "We know what the gun was for. It wasn't to have anything to do with the drugs, offensive, defensive, or otherwise." Later, near the end of the defense closing, counsel emphasized again, "There's no evidence that he did not intend to use that gun on himself or that he had that gun for any other purpose." To further support the theory that Pitto did not arm himself with a firearm to protect the drugs, defense counsel pointed out that there was no evidence that Pitto possessed a firearm during any of his numerous previous contacts with the police.

The defense theory was valid under *Bland*: if the sole reason the gun was in the van was because Pitto was considering suicide, then its presence near the drugs was coincidental and there was no facilitative nexus; he was armed, but not "in the commission of" the transportation offense. Nevertheless, that defense was foreclosed by CALJIC No. 17.15, which directed the jury to find the enhancement true if the gun was available for offensive or defensive use at the time of the offense. This is a point the prosecutor hammered during the closing arguments. During rebuttal the prosecutor expressed skepticism about the theory that Pitto had the gun for the purpose of committing suicide, and particularly emphasized that even if that were true it would be

[8] Pitto's other defense to the enhancement was that the firearm was not available because it was unloaded and in a box near the rear of the van.

irrelevant under the instruction: "More importantly, look at the jury instruction. Read the jury instruction. [¶] The issue is not maybe he got that gun to kill himself at some time. That's not the issue. The issue is was it available. Was it available for him to use if he chose to do so." He continued, "Was the weapon available? That's the law; that's the issue, was it available."

Although it could be argued that a defendant who knowingly places a firearm in close proximity to illegal drugs creates a hazard deserving extra punishment, the section 12022 arming enhancement, as interpreted by the Supreme Court in *Bland*, requires that there be a facilitative nexus between the firearm and drugs. It is likely rare that a defendant would be able to present a credible argument that there is no facilitative nexus between illegal drugs and a firearm found in close proximity, but where such evidence is presented the issue must go to the jury and the enhancement finding cannot be based on availability alone. Here, Pitto presented evidence which, if believed, would prove that he was not armed with a firearm "in the commission" of the transportation offense. Pitto's evidence was not patently incredible and there was nothing connecting the pistol to the drugs aside from proximity. There was no evidence that Pitto possessed a firearm during any of his previous contacts with the police. Finally, the fact that the jury acquitted Pitto of possession with intent to sell suggests that it did not reject the defense testimony in its entirety.

We also know that the jury had trouble applying CAJIC 17.15 to the facts of the case. During deliberations, the jury asked for the meaning of "armed" and "availability" in the context of section 12022. The trial court re-read the portion of CALJIC No. 17.15 defining "armed with a firearm" and stated, "It's a question of fact as to whether or not this shows that firearm was available for offensive or defensive use. That would be within your purview alone, so I couldn't answer that question for you." The trial court did not offer any further clarification or explanation. The jury may well have been confused because the defendant was arguing that the pistol was unrelated to the methamphetamine, but the instruction foreclosed that theory, as the prosecutor told the jury.

We cannot conclude beyond a reasonable doubt that the erroneous instruction was harmless. (Cf. *Neder v. United States* (1999) 527 U.S. 1, 17.)

II. *Pitto's Claim Under Section 654*

Pitto contends that the imposition of an eight-month term on the felon in possession of a firearm charge (section 12021, subdivision (a)(1); count three) violates section 654 because that charge punishes the same act encompassed by the section 12022 arming enhancement. This claim is moot because we conclude above that we must reverse the finding and sentence on the enhancement.

III. *Pitto's Claim Under* Blakely v. Washington

Pitto contends that his four-year sentence for transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a); count one) must be reversed pursuant to *Blakely v. Washington* (2004) 542 U.S. 296, because the trial court committed constitutional error by imposing the upper term based on aggravating factors that were not supported by jury findings.

In *Blakely,* the United States Supreme Court held that a Washington state court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the " 'standard range' " of 49 to 53 months to 90 months based on the trial court's finding that the defendant acted with " 'deliberate cruelty.' " (*Blakely, supra,* 542 U.S. at p. 303.) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 that, " '[o]ther than the fact of 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.' " (*Blakely,* at p. 301.) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the "statutory maximum" is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely,* at pp. 303-304.)

After the instant appeal was fully briefed, the California Supreme Court decided *People v. Black* (2005) 35 Cal.4th 1238. The *Black* court held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id.* at p. 1244.) In reaching this conclusion, the *Black* court expressly stated that, under California's sentencing system, "the upper term is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi, Blakely,* and [*United States v.*] *Booker* [(2005) ___ U.S ___ [125 S.Ct. 738]]." (*Black, supra,* 35 Cal.4th at p. 1254.)

Black is binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We reject Pitto's contention that his upper term sentence for the transportation charge in count one violates *Blakely.*

IV. *Pitto's Claim Regarding the Sentence for the On-Bail Enhancement*

In February 2004 the trial court recalled the sentence pronounced in December 2003, stating "[T]he reason for the recall is to hear further argument on the issue of the Court's action in imposing one-third of the enhancement under Penal Code 12022.1, rather than the entire two years." At a hearing in March the trial court increased the sentence under section 12022.1 from eight months to two years and otherwise re-affirmed the sentence.

The trial court recalled the sentence under section 1170, subdivision (d), which authorized the trial court to "recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence." Pitto contends that the trial court violated the express language of this section by imposing a greater sentence for the on-bail enhancement. Respondent contends that the increased sentence was permissible because "[W]hen a trial court pronounces an

unauthorized sentence[,] [s]uch a sentence is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement." (*People v. Serrato* (1973) 9 Cal.3d 753, 764, disapproved on another ground in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) Respondent points out, and Pitto does not deny, that the trial court's original eight-month sentence was unauthorized because section 12022.1 "prescribes a mandatory two-year enhancement where the defendant commits a second offense while 'released from custody on a primary offense.' " (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 686.)

We need not decide whether section 1170, subdivision (d) can be read to limit the trial court's power to correct an unauthorized sentence because, in any event, *this* court has "inherent authority to correct" the unauthorized sentence. (*People v. Crooks* (1997) 55 Cal.App.4th 797, 811.) Even if the imposition of the greater sentence was not proper, we would be able to direct the trial court to modify the judgment to change the sentence on the section 12022.1 enhancement from eight months to two years. (*Crooks*, at p. 811 [correcting judgment on appeal].) Therefore, any error was harmless.[9]

DISPOSITION

The judgment is reversed with respect to the finding under section 12022, subdivision (c) and affirmed in all other respects. The case is remanded for further proceedings consistent with this opinion.

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[9] Pitto also contends that the increased sentence is unlawful because the order recalling the sentence referenced the wrong case number. He does not present reasoned argument or cite any authority for the proposition that such error provides a basis to vacate the sentence. Any such contention has been waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

GEMELLO, J.

We concur.

JONES, P.J.

STEVENS, J.

Trial court: Lake County Superior Court

Trial judge: Hon. Arthur H. Mann

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