Filed 5/10/07 P. v. Stiles CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRUCE EDWARD STILES, Defendant and Appellant.	E040964 (Super.Ct.No. FSB054865) OPINION

APPEAL from the Superior Court of San Bernardino County. Kenneth Barr, Judge. Affirmed; modified in part.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr., Supervising Deputy Attorney General, and Pat Zaharopoulos, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Bruce Edward Stiles appeals his conviction of three arson-related charges with associated enhancements. On appeal, defendant contends: (1) the evidence was insufficient to support his conviction on two counts; (2) the one-year concurrent enhancement for one prison prior must be stricken because the underlying prison term was served concurrently with the term for another prison prior; (3) the trial court's finding of identity in defendant's prior convictions deprived defendant of his right to trial by jury on the prior convictions; and (4) his sentence for attempted arson should be reduced to the middle term because the trial court imposed the aggravated term on the basis of facts not found by the jury. We agree with defendant's contention that the concurrent enhancement for a prison prior must be stricken. We find no other errors.

II. FACTS AND PROCEDURAL BACKGROUND

Defendant and Rudolph Magana had known one another since 1991 or 1992. In January or February 2005, defendant stayed at Magana's house a few days. On one occasion, defendant refused to leave when Magana requested him to. Defendant said, "'he didn't have to go anywhere and he could go anywhere he wanted.'"

Around November 5, 2005, Magana vacated his house in order to renovate it. On November 12, defendant came to the house where Magana was working. Magana asked him to leave, but he refused. Magana and defendant got into a fight during which defendant punched Magana in the face. A friend of Magana broke up the fight, and

defendant left after stating to Magana something like, “It is not over yet” and that he would be back.

On November 20, Anthony Aldrete, a neighbor of Magana, saw a bottle burning on the side of Magana’s house at 2:30 or 3:00 p.m. Aldrete put the fire out with a fire extinguisher. He did not see anyone in the area. Patricia Fea, an arson investigator, determined that two Molotov cocktails had been involved, but that one had failed to ignite. One of the Molotov cocktails was intact; it consisted of paint thinner in an Old Forester bourbon bottle. Fea also found a lighter on the street near the curb. No usable fingerprints were recovered from the bottle.

About 5:00 that same afternoon, Aldrete noticed a mid-sized white pickup truck parked in front of Magana’s garage. A person threw a liquid substance towards the garage door, and the pickup truck drove away. A short time later, the garage went up in flames. At trial, Aldrete testified he had been too far away to tell whether the person was a man or woman. A fire investigator testified, however, that Aldrete had stated at the scene that the person in the truck appeared to be a White male who was not wearing a shirt. Aldrete had also told the investigator that the man had been driving a newer model white Nissan Frontier extra-cab pickup truck. Fea determined that the fire had started at the garage door and had been intentionally set using an accelerant. The fire caused structural damage to the garage and destroyed all its contents.

That same day, Diane Braun had been visiting a friend, Terry Arceneaux, at his apartment when defendant came by to collect a $20 debt and to retrieve a shotgun.

Arceneaux told defendant he did not have the $20 and he had sold the shotgun. Defendant became angry. Braun asked Arceneaux to purchase some groceries for her. Arceneaux and defendant left at 2:30 p.m. and defendant returned by himself at about 3:35 p.m.

Defendant walked to the back of the apartment complex carrying an ice chest. Braun asked what he was doing, and defendant replied, "'anything he want[ed].'" Defendant carried in Braun's groceries and then left. He returned a few minutes later and went to the back of the apartment complex before again leaving. A short time later, a fire broke out at the back of the apartment complex. Detective Lance Stewart found gasoline inside a partially burnt cooler, and it appeared the fire had started at the cooler. An investigator was unable to lift any useable fingerprints from the cooler.

Braun testified that defendant drank hard liquor, including bourbon and vodka, and that defendant's favorite brands of bourbon were Wild Turkey and Jim Beam.

Around 10:30 p.m. on November 29, William Beaumont, a fire investigator with the San Bernardino Fire Department, was called to a fire at Magana's house. The fire, which burned some shrubbery, had been started by a Molotov cocktail, consisting of a Wild Turkey bottle containing gasoline and a cloth wick. No useable fingerprints could be lifted from the bottle.

Defendant's fiancée, Tamara Harbicht, testified she owned a silver Honda Element, and she had purchased a white Nissan Frontier pickup truck for defendant to use. Defendant also sometimes drove the Honda Element. Defendant worked as a house

painter, and he used paint thinner to clean his brushes. He carried brushes and paint thinner in the pickup truck and in the Honda Element. Harbicht kept a gasoline container in the Honda Element, and she had some river rocks in the car to be used for landscaping.

Captain John Payan of the San Bernardino Fire Department set up a surveillance at Magana's house with Investigator Mike Koster at about 9:00 p.m. on November 30. When Captain Payan arrived at the house, he noticed a strong odor of gasoline coming from the front (the west side) of the house. He walked around the house, but he did not see any gasoline cans. Several windows on the north side of the house were boarded up, but the bathroom window was intact.

About 11:00 p.m., Captain Payan saw a silver Honda Element pull up in front of Magana's house and park facing traffic. The headlights were turned off, but the parking lights were left on. A White man about six feet tall[1] got out of the car, walked to the north side of the property, and returned a minute later. Captain Payan could not tell if the man was carrying anything. When the man returned to the Honda Element, Captain Payan pulled his car up with his bright lights and red flashing grill lights on to block the man from leaving, but the man drove over the curb and sped away.

Captain Payan and Investigator Koster gave chase to the Honda Element, which drove erratically at a high rate of speed. The California Highway Patrol joined the pursuit, and the driver of the Honda Element, defendant, eventually yielded and pulled over. Captain Payan and Investigator Koster recovered two lighters from defendant's

pockets and a partially full gasoline container, a glass jar, a gray bandanna containing residue of a medium petroleum distillate such as paint thinner, and a river rock from inside the Honda Element.

The next day, Captain Payan found two river rocks, similar to the one found in the Honda Element, on the north side of Magana's house, near the bathroom window, which was broken. Captain Payan smelled gasoline near the bathroom window. Investigator Koster discovered a green watering can that smelled strongly of gasoline in the area where Captain Payan had noticed the odor of gasoline the night before. A sample of liquid from the watering can was found to contain gasoline and a medium petroleum distillate such as that found on the grey bandanna.

Magana's house was about three miles, or a seven to nine minute drive, from Arceneaux's apartment.

Defendant was charged with seven counts of arson and arson-related charges in connection with the fires at Magana's house and behind Braun's apartment complex. He was convicted of arson of a structure in connection with the November 20 fire at Magana's garage (count 4) (Pen. Code,[2] § 451, subd. (c); arson of property in connection with the incident at Braun's apartment complex on November 20 (count 5) (§ 451, subd. (d)); and attempt to burn in connection with the incident at Magana's house on November 30 (count 1) (§ 455). The jury found him not guilty of possession of or

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[footnote continued from previous page]

[1] The probation report indicates that defendant is 5 feet 11 inches tall.

attempt to use a destructive device to injure or destroy (§ 12303.3) on November 29 as alleged in counts 2 and 6, and arson of property (§ 451, subd. (d)) on November 20 and 29, as alleged in counts 3 and 7. The jury found true the allegations that defendant had suffered five prison priors.

The trial court sentenced defendant to the aggravated term of six years for count 4, a consecutive eight months (one-third the middle term) for count 1, and a consecutive eight months (one-third the middle term) for count 5. The court further sentenced defendant to a consecutive four years (one year each for four of the prison priors) and to a concurrent one year for the fifth prison prior.

III. DISCUSSION

A. Sufficiency of Evidence

Defendant contends the evidence was insufficient to support his convictions in counts 1 and 4.

1. Standard of Review

In reviewing a claim of insufficiency of the evidence, this court examines the entire record in the light most favorable to the judgment and determines whether it contains substantial evidence that is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Lewis* (2001) 25 Cal.4th 610,

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[footnote continued from previous page]

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

642.) We view the evidence in the light most favorable to the judgment, and we presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Carpenter* (1997) 15 Cal.4th 312, 387.) We do not reweigh the evidence or substitute our assessment of the witnesses' credibility for that of the fact finder. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1089.) If substantial evidence supports the verdict, we do not reverse the judgment simply because the circumstances might have supported a contrary finding. (*People v. Lewis*, *supra*, at pp. 643-644.)

2. Analysis

a. Count 4 – Arson

Defendant was found guilty of arson of a structure in violation of section 451, subdivision (c) in count 4, based on the burning of Magana's garage on November 20. Arson is a general intent crime. (*People v. Atkins* (2001) 25 Cal.4th 76, 84.)

Because of the nature of the crime, evidence of arson is often circumstantial. (*People v. Beagle* (1972) 6 Cal.3d 441, 449 (*Beagle*), overruled on other grounds by *People v. Castro* (1985) 38 Cal.3d 301, 307-308.) In *Beagle*, the Supreme Court noted that courts have relied on a number of factors when affirming arson convictions when the sufficiency of evidence has been challenged. (*Id.* at pp. 449-450.) Those factors include motive evidenced by a threat (*People v. Watkins* (1968) 262 Cal.App.2d 687, 688-689); the defendant's prior presence in the building (*People v. Curley* (1970) 12 Cal.App.3d 732, 735-736); the defendant's possession of inflammatory materials (*id.* at pp. 735-736); the defendant's presence in the vicinity at the time of the fire (*People v. Alexander* (1960)

182 Cal.App.2d 281, 283-286, superseded by statute as stated in *People v. Sexton* (1995) 33 Cal.App.4th 64, 70); evidence of intentional cause of a fire (*People v. Clagg* (1961) 197 Cal.App.2d 209, 212); more than one fire with temporal and spatial proximity (*People v. Cole* (1968) 258 Cal.App.2d 656, 658-659); and the defendant's possession of an instrumentality used to start a fire (*People v. Wolfeart* (1950) 98 Cal.App.2d 653, 654-655).

Here, the record contains evidence corresponding to almost all of the factors listed in *Beagle, supra,* 6 Cal.3d 441. The evidence showed motive, in that defendant had had a fight with Magana on November 5 and had made a threat that "[i]t is not over yet" and that he would be back. Defendant had stayed at Magana's house in the past. A man meeting defendant's description and driving a vehicle similar to one defendant was known to drive was seen at the scene of the fire. The evidence indisputably showed that the fire had been intentionally set. This circumstantial evidence amply supported defendant's conviction of count 4.

(b) Count 1 – Attempted Arson

Defendant was found guilty of attempted arson in count 1 based on the incident at Magana's house on November 30. Section 455 defines the offense as "[t]he placing or distributing of any flammable, explosive or combustible material or substance, or any device in or about any structure, forest land or property in an arrangement or preparation with intent to eventually willfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of the same." Intent is generally proved by the surrounding

circumstances because direct proof of intent is rare. (See *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.)

The evidence supported the jury's verdict finding defendant guilty of attempted arson in count 1. As noted above, the jury could reasonably infer a motive from defendant's fight with and threat to Magana. After fleeing from Magana's house, defendant was found in possession of instrumentalities that could be used to set a fire – a gray bandanna that contained petroleum distillate reside, gasoline, and lighters. A green watering can was located on the premises after defendant had been there; Captain Payan had not seen the watering can when he had walked around the property earlier that night. Liquid in the watering can contained both gasoline and petroleum distillate similar to that in the gray bandanna.

We conclude the evidence was amply sufficient to support defendant's conviction of attempted arson in count 1.

B. Sentence Enhancement for Prison Prior

Defendant contends the trial court erred by imposing a concurrent term for one prison prior allegation rather than striking the term.

1. Background

Evidence that defendant had been convicted of five prior felonies and had served prison terms was submitted to the jury, and the jury found true the allegations that defendant had suffered five prison priors.

The evidence showed that two of the prior prison terms had been served concurrently. On March 21, 1997, defendant received probation in San Bernardino Superior Court case No. FVI05458. On June 27, 1997, defendant was sentenced to state prison in San Bernardino Superior Court case No. FSB14819. An abstract of judgment dated July 14, 1998, indicated that at a hearing on July 10, 1997, defendant's probation in San Bernardino Superior Court case No. FVI05458 was terminated, and he was committed to state prison to serve a sentence concurrent with his sentence in San Bernardino Superior Court case No. FSB14819. In a sentencing memorandum, the People recommended that defendant should receive a total of four years for the five prison priors.

The trial court stated that it "agree[d] with the People's position that regarding the five one-year enhancements, that sentencing is only appropriate for four years and that FVA 05458, and FSB 01489 [*sic*] were served concurrently." In pronouncing sentence, the trial court stated, "for the enhancement alleged pursuant to Penal Code Section 667.5(b), the one noted earlier – 05458, and FSB 04181 [*sic*], only one term of one year will be for those two since they were served consecutively [*sic*] pursuant to California law." The trial court imposed consecutive sentences for the other four prison priors. Although the trial court did not expressly so state at the sentencing hearing, the minute order reflects that the trial court ordered "[a]s to prior 4, the Court imposes 1 years [*sic*] and 0 months. Prior # 4 to run concurrent to sentence imposed." Defendant contends this was error, and the fifth enhancement should instead have been stricken.

2. Analysis

Section 667.5 provides, "Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows: [¶] . . . [¶] (b) . . . where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction." Subdivision (e) of section 667.5 provides, "The additional penalties provided for prior prison terms shall not be imposed for any felony for which the defendant did not serve a prior separate term in state prison." A "prior separate prison term" means "a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes, including any reimprisonment on revocation of parole which is not accompanied by a new commitment to prison, and including any reimprisonment after an escape from incarceration." (§ 667.5, subd. (g).)

In *People v. Jones* (1998) 63 Cal.App.4th 744, the court held that only one enhancement for prior prison terms was proper when the defendant had served concurrent terms in two prior felony cases. The court noted, "Courts have consistently recognized that [the language of section 667.5, subdivisions (b) and (g)] means that only one enhancement is proper where concurrent sentences have been imposed in two or more

prior felony cases." (*Id.* at p. 747 and cases collected.) Citing *People v. Jones* with approval, the Supreme Court in *People v. Riel* (2000) 22 Cal.4th 1153, struck a "redundant" prison term finding. (*Id.* at p. 1203.) The court explained, "The jury made two findings of a prior prison term, one for each [prior felony] conviction. However, the enhancement was for the prison term, not the convictions. (§ 667.5, subd. (b).) Defendant had two felony convictions, but he served only one prison term. Accordingly, we must strike the redundant second prison term finding." (*Ibid.*)

Here, likewise, we are required by the holding in *People v. Riel, supra,* 22 Cal.4th 1153, to strike the concurrent enhancement for the prior prison term.

C. Right to Trial by Jury on Prior Convictions

Defendant contends he was denied his right to trial by jury on the prior convictions.

1. Factual Background

The information alleged that defendant had suffered five prison priors under section 667.5, subdivision (b). The allegations were tried by jury. However, before the case was submitted, the trial court determined that defendant was the person named in the documentary evidence that was to go to the jury. Without objection, the trial court instructed the jury that "'the defendant is the person named in the certified prior convictions'" in the exhibits.

2. Forfeiture

The People contend defendant has forfeited any challenge to the procedure by which the prior conviction allegations were found to be true because he failed to object in the trial court on the basis now asserted on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 278 [the right to jury trial on prior prison term allegations is statutory rather than constitutional, and the erroneous deprivation of a jury trial on such allegations may be forfeited by failure to object]; *People v. Epps* (2001) 25 Cal.4th 19, 29 (*Epps*) [same].) Nonetheless, to forestall any claim of ineffective assistance of counsel, we will address the issue on the merits. (See *People v. Norman* (2003) 109 Cal.App.4th 221, 229-230 (*Norman*).)

3. Analysis

By statute, the trial court has the power and obligation to determine identity in connection with prior conviction allegations. Specifically, section 1025, subdivision (c), states that "the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury." In *Epps*, *supra*, 25 Cal.4th at p. 25, the court explained the limited factual inquiry for the jury: "Though subdivision (c) of section 1025 gives the question of identity to the court, the question whether the alleged prior conviction ever occurred, when legitimately at issue, remains for jury determination under subdivision (b)."

Defendant argues, however, that *Almendarez-Torres v. United States* (1998) 523 U.S. 224, the authority on which section 1025, subdivision (c) was based, has been

eroded by subsequent United States Supreme Court decisions, and section 1025, subdivision (c), violates the Sixth Amendment right to trial by jury. In support of this position, defendant cites *Shepard v. United States* (2005) 544 U.S. 13, 26 [holding that the inquiry whether a prior conviction that resulted from a guilty plea is a prior offense under the Armed Career Criminal Act (18 U.S.C. § 924(e)) "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information"]; *Blakely v. Washington* (2004) 542 U.S. 296, 303-304 (*Blakely*) [explaining that "the relevant '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"]; and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) [holding 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."].)

Nonetheless, we are bound by the California Supreme Court's decision in *Epps*, *supra*, 25 Cal.4th at p. 29, under *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455, and we therefore reject defendant's argument.

D. Imposition of Aggravated Sentence

Defendant contends the trial court erred by imposing the aggravated term for his conviction of attempted arson because the court based its sentencing decision on facts not found by the jury. (*Blakely*, *supra*, 542 U.S. at pp. 303-304.) Defendant filed a

supplemental brief to address the effect of *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) __ U.S. __ [127 S.Ct. 856, 166 L.Ed.2d 856].

1. Factual Background

At the sentencing hearing, the trial court stated it found no mitigating factors under California Rules of Court, rule 4.423(a).[3] The trial court then found six separate factors in aggravation under rule 4.421(a) and (b), including that defendant's prior convictions were numerous and of increasing seriousness (rule 4.421(b)(2))[4] and that defendant's prior performance on probation and parole had been unsatisfactory (rule 4.421(b)(5)).[5] The trial court found that the factors in aggravation outweighed the mitigating factors. Defense counsel did not object on the basis that a jury trial was required on factors in aggravation.

2. Forfeiture

The People contend that because defendant failed to object in the trial court on the basis now urged on appeal, he has forfeited any challenge based on *Blakely*, *supra*, 542 U.S. 296. (See *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103 [holding that a *Blakely* challenge was forfeited by the defendant's failure to raise it in the trial court].) However, to forestall any claim of ineffective assistance of counsel based on failure to raise a

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[3] All further references to rules are to the California Rules of Court.

[4] The probation report reflects that defendant's criminal record dates back to 1980, and he has been convicted of eight felonies and three misdemeanors.

[5] The probation report reflects that defendant had had his probation revoked twice and had violated parole and had been returned to prison 12 times.

timely objection, we will address the issue on the merits. (*Norman*, *supra*, 109 Cal.App.4th at pp. 229-230.)

3. Analysis

Both *Apprendi*, *supra*, and *Blakely*, *supra*, recognized that "the fact of a prior conviction" may be found by a judge, even though any *other* fact that increases the maximum statutory penalty for a crime must be found by a jury. (*Apprendi*, *supra*, 530 U.S. 466, 490; *Blakely*, *supra*, 542 U.S. 296, 302.) California courts have interpreted broadly *Apprendi*'s exception for prior convictions. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222 (*Thomas*) [holding that the *Apprendi* exception for prior convictions refers broadly to recidivism enhancements].) Moreover, the California Supreme Court in *Epps*, *supra*, 25 Cal.4th 19, held the *Apprendi* exception applied not only to the determination that the defendant had suffered a prior conviction, but also to the determination that the conviction was for a serious felony for purposes of the three strikes law: "[O]nly the bare fact of the prior conviction was at issue, because the prior conviction (kidnapping) was a serious felony by definition under section 1192.7, subdivision (c)(20)." (*Epps*, *supra*, 25 Cal.4th at p. 28.)

Defendant argues that the jury was required to find the elements of "numerous and increasing in seriousness" and whether his performance on probation or parole had been satisfactory. However, based on *Thomas, supra,* 91 Cal.App.4th 212, and *Epps, supra*, 25 Cal.4th 19, we conclude it was proper, notwithstanding *Apprendi, supra,* 530 U.S. 466, and *Blakely*, supra, 542 U.S. 296, for the trial court to determine that defendant's

prior convictions were numerous or of increasing seriousness and that defendant's prior performance on probation or parole was unsatisfactory. Just as it was not a violation of *Apprendi* and *Blakely* for a court to determine that a prior conviction resulted in a prison term (*Thomas*) or that the conviction was for a serious felony (*Epps*), then it was not improper in this case for the trial court to determine those recidivist aggravating factors. Those determinations are just as closely connected to "the more broadly framed issue of 'recidivism'" (*Thomas, supra*, 91 Cal.App.4th at pp. 221-222) as were the determinations which were held to come within the *Apprendi* exception in *Thomas* and *Epps*.

Because these facts arise out of the fact of a prior conviction and so are essentially analogous to the fact of a prior conviction, constitutional considerations do not require the matters be tried to a jury and found beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at p. 488.) Also, as with a prior conviction, these facts can be established by a review of the court records relating to the prior offense. (*Almendarez-Torres v. United States, supra*, 523 U.S. at pp. 243-244.)

Furthermore, even if the trial court erred in relying on additional nonrecidivist aggravating factors in imposing the aggravated term, ultimately the aggravated term was properly based on several recidivist aggravating factors and on the trial court's finding that there were no factors in mitigation, and any error in relying on the additional recidivist factors was harmless regardless of the standard of review applied to such errors. Thus, in accordance with the analysis of *Blakely, supra*, 542 U.S. 296, the trial court was not required to afford defendant the right to a jury trial before relying on recidivist

aggravating factors supporting the imposition of the upper term. We therefore reject defendant's contention that *Blakely*, *supra*, and *Cunningham*, *supra*, 127 S.Ct. 856, require that his sentence be reversed or remanded.

IV. DISPOSITION

We modify the sentence to strike the concurrent enhancement imposed pursuant to section 667.6, subdivision (b). The trial court is directed to prepare an amended abstract of judgment. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

KING
J.