Filed 1/30/06 P. v. Thompson CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. KENNY WARREN THOMPSON, Defendant and Appellant.	B177075 (Los Angeles County Super. Ct. No. NA056521)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Sheldon, Judge. Affirmed in part.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, Lawrence M. Daniels and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

STATEMENT OF THE CASE

On February 4, 2004, the Los Angeles District Attorney filed an information charging appellant, Kenny Warren Thompson, with attempted willful, deliberate, premeditated murder (Pen. Code[1] §§ 664 & 187, subd. (a)) (Count1), with allegations he personally discharged a firearm, causing great bodily injury, personally discharged a firearm, and personally used a firearm (§ 12022.53, subds. (d), (c), and (b), respectively); and assault with a semi-automatic firearm (§ 245, subd. (b)) (Count 2), with the allegations he personally inflicted great bodily injury (§ 12022.7 (a)) and personally used a firearm (§ 12022.5 (subd. (a)). The information alleged as to both counts, that appellant committed the offense for the benefit of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)). Appellant pled not guilty and denied the special allegations.

A jury trial began on April 27, 2004. On May 3, 2004, the jury acquitted appellant of attempted murder in Count 1, but convicted him of assault with a semi-automatic firearm in Count 2. They also found that he personally inflicted great bodily injury (§ 12022.7 subd. (a)), personally used a firearm (§ 12022.5, subd. (a)), and committed the crime in association with a criminal street gang (§ 186.22, subd. (b)(1)).

On May 3, 2004, the trial court sentenced appellant to the upper term of nine years on Count 2, plus consecutives terms of three years for the section 12022.7, subdivision (a) enhancement, plus four years for the section 12022.5, subdivision (a) enhancement, plus four years for the section 186.22, subdivision (b)(1) enhancement. The total prison term imposed was 20 years. Appellant was ordered to pay a fine of $200 pursuant to section 1202.4, subdivision (b), and a $200 parole revocation fine was imposed and suspended pursuant to section 1202.45. Appellant was given 476 days of pre-sentence custody credit.

---

[1] All further undesignated statutory references are to the Penal Code.

STATEMENT OF FACTS

Prosecution Evidence

On April 12, 2003, at approximately 9:00 p.m., Tamika R. went to a party in Long Beach. Tamika was going to meet her friend, Courtney Goode, at the party. Prior to going inside the party, Tamika and approximately ten other people went across the street to the Top Value Market to purchase some items. Outside of the market, Tamika saw a woman she knew as "Nu Nu." Tamika said "What's up?" Nu Nu replied, "Don't speak to me." Tamika and Nu Nu started arguing. Nu Nu told Tamika that someone said Tamika had "punked" her." Nu Nu stepped back and lifted her shirt exposing the handle of a gun in her waist band. Nu Nu said, "I have heat for people like you." Tamika backed up into the crowd.

Appellant paced back and forth near the entrance of the market. Appellant argued with the people who were with Tamika. Nu Nu then apologized to Tamika saying that she mistook Tamika for someone else. Tamika accepted her apology and felt that the situation was resolved.

Nu Nu then started "messing" with other people with Tamika. Tamika saw the handle of a gun inside appellant's jacket. Appellant then pulled back on the slide of the gun. Appellant was "very loud" and "very angry, aggressive." Appellant talked to Tamika's friend's cousin. Appellant, Nu Nu, and their group then left and went towards 20th and Linden Avenue. Tamika and her group walked toward the party.

At approximately the same time, Courtney Goode was dropped off at the corner of 20th and Long Beach Boulevard by a friend. She saw the confrontation going on at the market. Goode walked toward Tamika and they met in the street. A friend of Tamika walked up to her and then turned towards appellant and said "What's up?" Over her shoulder, Tamika noticed appellant standing by himself on the corner of 20th and Long Beach Boulevard. Appellant replied, "What's up?"

About 30 seconds later, Tamika heard a gunshot. Goode saw appellant fire the shot. The bullet hit Tamika; entering her back near her spine and exiting through her

neck, just to the right of her adam's apple. Goode dropped to the ground. Appellant ran away. Goode got up and assisted Tamika.

Tamika was transported to a hospital, where she spent seven days as a result of her injuries. As a result of the injury, she sustained nerve damage and had to leave high school and be home schooled.

The police showed Tamika a photographic "six-pack" lineup and she immediately identified appellant's photo graph as the shooter. She was certain of her identification because no one else had been on the corner when she looked back. She also identified appellant at the preliminary hearing.

Courtney Goode had arranged to meet Tamika at the party on Long Beach Blvd, but saw her at the Top Value, where two groups appeared to be in a confrontation. Courtney went towards Tamika and saw appellant standing alone on the street corner. Appellant said something, sounded frustrated, raised his arm, pointed at the crowd of people crossing the intersection and fired a single shot. Courtney dropped to the ground and appellant ran in the other direction. Later, Courtney picked out appellant's photo from a six-pack line up and again identified him as the shooter at the preliminary hearing.

Appellant was arrested on April 14, 2003, and his residence searched. Long Beach Police Department found Pittsburg Steelers jerseys and a yellow bandana. There was also "RTC" (meaning Rolling 20's Crips) and "YTL" (Young 20's Locs) written on the walls. Detective Hunt was unable to say for certain if this was appellant's bedroom.

Detectives Hunt and Gutierrez interviewed appellant in Long Beach "two days after the shooting." Appellant was advised of his constitutional rights and agreed to talk to the officers. Appellant said he was home playing video games on the night of the shooting. Appellant was told that he had been positively identified as the shooter, and he explained that a bunch of Insane Crips were trying to get back at him because of a fight a month earlier.

Appellant then admitted that he had an argument at Top Value with a man named "Miles" from the Insane Crips. Miles was saying "Young Foundation and "Insane" and got in appellant's face. Miles walked away. Appellant then said that he shot a nine-

millimeter gun into the crowd across the street to scare them. Appellant said he was with Nu Nu the night of the shooting. Appellant ran away from the scene and threw the gun onto the roof of an apartment building. Appellant's home was about two blocks from the shooting. Appellant said he had been wearing dark pants and a yellow jersey that night.

Detective Sean Hunt testified as the gang expert for the prosecution. He was assigned to the Gangs and Violent Crimes Division. He had been a police officer for ten years. As a gang officer, Hunt contacted up to 50 gang members each day in order to obtain information from them. Hunt had taken part in hundreds of gang investigations. He had previously testified as a gang expert. He was an expert on the Rolling 20's Crips and the Insane Crips gangs.

The Rolling 20's Crips gang had approximately 450 members. The "Young 20 Locs" was a subset and "younger generation" of the Rolling 20's. There were approximately 100 Young 20 Locs members. The Rolling 20's and Young 20 Locs use the same hand symbols of a "2" and a "0" to identify themselves. They primarily wear black and yellow and usually wear Pittsburgh Steelers gear. The Insane Crips had approximately 900 members.

Four or five months before the shooting, appellant admitted to Detective Hunt that he was a Rolling 20's Crips, or Young 20 Locs, gang member. The night of the shooting, appellant wore a yellow jersey, which was one of the colors that the Rolling 20's wore. This jersey informed everyone what gang appellant was from. The area where the shooting occurred was claimed by the Rolling 20's Crips. The Insane Crip's territory was from 21st and Lemon to Pine and 20th.

Detective Hunt testified that a gang member "put[s] in work" for a gang to gain respect from the older gang members. If a member from the Insane Crips comes into Rolling 20's territory, then the Rolling 20's gang member has to defend his "hood" and tell the Insane Crips gang member that he is in rival gang territory. A gang member is supposed to defend his hood and show that he is not afraid. A gang member who backs down from a rival gang member will be accused by older gang members of not backing

the hood and not being "down for the gang." A Rolling 20's gang member gains status within the gang when he stands up for his hood.

Detective Hunt had investigated various crimes, including robbery and murder, involving the Rolling 20's Crips and Young 20 Locs. Detective Hunt testified that those gangs would benefit by one of their members shooting into a crowd which included members of the Insane Crips, because it would show that the shooter was defending his hood.

Kenneth Allen and Donald Robinson were Rolling 20's Crips gang members. Allen and Robinson each pled guilty in Los Angeles Superior Court to shooting into a school zone.[2]

Defense Evidence

On April 12, 2003, Ronald Trimble was driving on Long Beach Boulevard around 9:30 p.m. He was stopped at a stop light near 20th Street and saw a group of eight or ten young people walking westbound across the street. A young African American youth, 15 to 17 years old, 5'7" to 5'10" tall, wearing a dark hooded sweatshirt, walked by the group. When he was about 15 or 20 feet away from the group, he turned around, pulled out a large chrome gun and fired at the group. The shooter then turned and jogged away. Trimble was unable to identify the shooter in the courtroom.

Trimble said he called 911 and the response was very slow. He then called the Long Beach Police Department and drove around the block. As he came up to 20th Street, he saw a Long Beach Police Officer who told him that he had been across the street and did not see or hear anything.

Another witness, Vivian Roundtree was waiting at a red light at 20th Street on Long Beach Boulevard when a group of young males stopped in the middle of the intersection. She rolled down her window to ask them to move and heard two groups of

---

[2] On October 9, 2001, Allen and Robinson pled guilty to a violation of §626.9, subdivision (d); Los Angeles Superior Court case no. NA 048306.

young men arguing with each other. Someone said, "Hey, cuz, they got a gun," and she heard a shot. She could not describe the shooter or identify anyone in the courtroom.

Roundtree backed her car up to Willow, where the police pulled up behind her and stopped her. Officer Loren Dawson interviewed her at a nearby Taco Bell. She described the suspect as 15 or 16 years old, 5'5" tall, and 140 pounds. She also said the suspect used a small black handgun. The police asked her if she saw or heard the shooting. She told them that the people in the middle of the street and on the corner of 20th Street were responsible. She said that the people involved were Black males about 15 or 16 years old. She testified at trial that she did not see a gun.

Asia Blount was at the party on Long Beach Boulevard and saw Goode standing outside, talking on a cell phone, at the time of the shooting. Blount continued on into the party. Goode also went inside the party and then walked back outside. Blount did not see appellant at the party or standing outside of the Top Value that evening. She did not hear anyone yelling gang names. She did hear the gunshot, but did not see anyone standing on the corner.

Tamika entered the party with a group of boys. These boys were "already getting into it with other boys that were already in there." Blount walked outside and stood in front of the bus stop. This crowd of people, including Tamika, from the party walked across the street. Blount heard a gunshot while she was standing in front of the party. Blount said she could not identify the shooter. People ran into the party saying that Tamika had been shot. Goode did not run to help Tamika.

CONTENTIONS ON APPEAL

Appellant contends that there was insufficient evidence to establish the following elements of the gang enhancement allegation: 1) insufficient evidence to prove that appellant committed the offense "in association with or for the benefit of a criminal street gang"; 2) insufficient evidence of the gangs' "primary activity," and, 3) "insufficient evidence to prove the gangs committed the required number of crimes within the

statutory period.[3] Appellant also contends the court violated his Sixth Amendment rights by imposing the upper term for the assault conviction based on factors not proved to a jury beyond a reasonable doubt."

Appellant argues:

> The sum total of the evidence relating to this point was Hunt's testimony that 'during the course of [his] career as a detective' he 'investigated' crimes ranging from 'battery, to robbery, all the way up to murder' that the Rolling 20's Crips and the Young 20's Loc's 'had been involved in." . . . Hunt did not describe what his 'investigat[ions]' disclosed or what was the extent of the gangs' 'involvement.' He did not describe whether the Rolling 20's Crips or Young 20's Locs actually committed or attempted to commit these crimes; the gangs equally could have been 'involved' in these crimes as victims. Even assuming the gangs *did* commit the crimes, Hunt did not discuss the frequency of their commission, or whether 'the commission of one or more of the statutorily enumerated crimes [was] one of the group's 'chief' or 'principal' occupations.' (*Sengpadychith* [(2001)] 26 Cal.4th [316] at p. 323.) In other words, there was no 'evidence that the group's members *consistently and repeatedly* . . . committed criminal activity listed in the gang statute.' (*Id*. at p. 324, emphasis in original.) And there certainly was no evidence whatsoever that one of the gang's primary activities was 'shooting into a school zone area,' as instructed by the court in its definition of 'criminal street gang.' (CALJIC No. 17.24.2 . . . .) [¶] Hunt's testimony here was nothing more than 'conclusional.'"

Respondent argues that there was "overwhelming evidence to prove appellant, a self-admitted gang member, committed the gang enhancement within the meaning of section 186.22, subdivision (b)." Respondent's position is that the following evidence was sufficient to support the gang allegation in this case:

> "On the night of the shooting, appellant was wearing a yellow jersey, informing rival gang members that he was a Rolling 20's Crips gang member. Prior to the shooting, someone in appellant's crowd said 'Rolling something,' which was an obvious reference to appellant's gang, the Rolling 20's Crips. . . . Appellant, an admitted Rolling 20's Crips gang member, told Detective Hunt that he had an argument with a rival gang member from the Insane Crips prior to the shooting.

---

[3] Section 186.22, subdivision (e) requires that 'at least one of these [enumerated] offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense . . . ."

Appellant admitted shooting into the crowd of people, which included the rival gang member."

Further evidence provided to the jury in support of the gang allegation came from Detective Hunt.[4] He testified that he had investigated various crimes, including robbery and murder, involving the Rolling 20's Crips and Young 20 Locs. Detective Hunt said that those gangs would benefit by one of their members shooting into a crowd which included members of the Insane Crips, because it would show that the shooter was defending his hood.

The final evidence offered to support the enhancement was testimony by Detective Hunt that Kenneth Allen and Donald Robinson were Rolling 20's Crips gang members. Los Angeles Superior Court certified court records then showed that Allen and Robinson each pled guilty to shooting into a school zone. (See *ante*, fn. 2.)

STANDARD OF REVIEW

The scope of appellate review of this issue is narrow. "'The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. [Citation omitted.] The appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) In so determining, we "'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*Ibid.*) The evidence must be substantial, "that is, evidence which is reasonable, credible, and of solid value." (*Id.* at p. 578.) The ultimate inquiry is whether "'*any* rational trier of fact

---

[4] In California , the law is that gang culture and practices are a proper subject of expert testimony. California law permits a person with "special knowledge, skill, experience, training, or education" in a particular field to qualify as an expert witness (Evid. Code, § 720, subd. (a)) and to give testimony in the form of an opinion (Evid. Code, § 801).

could have found the essential elements of the [enhancement] beyond a reasonable doubt.'" (*Id.* at p. 576.)

DISCUSSION

I. Overview of applicable principles.

Penal Code section 186.22, subdivision (b)(1), imposes an additional term of imprisonment for any person "convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang . . . ." Section 186.22, subdivision (f), defines a "criminal street gang" as: "[A]ny ongoing organization, association, or group of three or more persons, whether formal or informal, having as *one of its primary activities the commission of one or more of the criminal acts enumerated* in paragraphs (1) to (25), inclusive, of [section 186.22] subdivision (e),[5] having a common name or common identifying sign or symbol, and whose *members individually or collectively engage in or have engaged in a pattern of criminal gang activity.*[6]" (Emphasis added.) Accordingly, in order to prove a gang enhancement, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a

---

[5] The felonies enumerated in section 186.22, subdivision (e), include assault with a deadly weapon, robbery, unlawful homicide or manslaughter, sale, possession for sale, transportation or manufacture of controlled substances, discharging a firearm from a motor vehicle, intimidation of a witness, grand theft of any firearm, vehicle or trailer, possession of a firearm capable of being concealed upon the person in violation of section 12101, subdivision (a) (1), and unlawful taking of a vehicle. (See § 186. 22, subds. (e)(1), (2), (3), (4), (6), (8), (10), (23).)

[6] Penal Code 188.22 (e): "As used in this chapter, "pattern of criminal gang activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." This requirement is met in this gang. Detective Hunt's testimony regarding the "RTC" and "YTL" describes their common name and common identifying signs and symbols.

common name or common identifying sign or symbol[7]; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a pattern of criminal gang activity by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period. (*People v. Villegas* (2001) 92 Cal.App.4th 1217.) In the following paragraphs, we discuss the evidence in this case, as it meets the above requirements.

II. Proof of Existence of "Criminal Gang": *"Primary Activity" and "Enumerated Offenses"*

In *People v. Sengpadychith* (2001) 26 Cal.4th 316, the California Supreme Court explained: "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*Id*. at p. 323.) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members consistently and repeatedly have committed criminal activity listed in the gang statute." (*Id.* at p. 324; see also *People v. Johnson* (1980) 26 Cal.3d 557, 576.) "Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities." (*Id*. at p. 323.)

The chief evidence of consistent and repeated criminal activity offered to prove that one of the primary activities of RTC and LOC was the commission of the specified crimes came from the following exchange during the direct examination of Detective Hunt.

> "Q. [by prosecutor]: What types of crimes have you investigated during the course of your career as a detective that the Rolling 20's Crips and the Young 20's Lows, their subset, have been involved in?
> A. [by Detective Hunt]: From battery to robbery, all the way up to murder."

The only additional evidence offered by the prosecution relevant to this factor was two multi-page exhibits; consisting of certified court records showing the convictions of Kenneth Warren [exhibit 14] and Donald Robinson [exhibit 15] in 2003 for the crime of shooting into a school zone. After the documents were marked and identified, Detective Hunt testified that he recognized the names of these individuals as members of the Rolling 20's Crips.

To fulfill the "primary activities" requirement, the evidence must show that members of the criminal street gang have engaged in at least two of certain enumerated "predicate offenses." (*People v. Gardeley* (1996) 14 Cal.4th 605, 621; *People v. Zermeno* (1999) 21 Cal.4th 927, 931.) The defendant's current offense may serve as evidence of one of the "predicate offenses." (*People v. Loeun* (1997) 17 Cal.4th 1, 10.)

"Under the statute, the pattern of criminal gang activity can be established by proof of 'two or more' predicate offenses committed 'on separate occasions, *or* by two or more persons.' [Citation.] The Legislature's use of the disjunctive 'or' in the language just quoted indicates an intent to designate alternative ways of satisfying the statutory requirements. [Citations.] This language allows the prosecution the choice of proving the requisite 'pattern of criminal gang activity' by evidence of 'two or more predicate offenses committed 'on separate occasions' *or* by evidence of such offenses committed 'by two or more persons' on the same occasion. . . . " (*People v. Loeun, supra,* 17 Cal.4th at pp. 9-10, fn. omitted.)

There is no requirement that the "predicate offenses" must have resulted in convictions, as the statute speaks of both convictions and commissions, or attempted commissions, of certain specified offenses. (*In re Leland D.* (1990) 223 Cal.App.3d 251, 258.) Certified court records, including an abstract of judgment, may be used to establish the conviction for a predicate offense. The evidence need not show that the members

have engaged in two different enumerated offenses. Thus, for example, criminal street gangs that only commit robberies are not immune to the reach of the statute. (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002.)

In this case, the record contains evidence of only one of the offenses enumerated in section 186.22, subdivision (e); that being appellant's current violation of section 245, subdivision (a)(1). The prosecution presented no specific evidence of any other enumerated crime committed by another member of the Rolling 20's Crips within the statutory period. Contrary to respondent's suggestion, the gang expert's testimony was insufficient to establish another predicate offense. "Conclusional testimony that gang members have previously engaged in the enumerated offenses, based on nonspecific hearsay and arrest information which does not specify exactly who, when, where and under what circumstances gang crimes were committed, does not constitute substantial evidence. [Citation.]" (*In re Jose T.* (1991) 230 Cal.App.3d 1455, 1462.) Detective Hunt testified generally that the Rolling 20's Crips committed crimes to benefit their gang. However, the expert failed to specify what offenses the convictions were for, when the offenses occurred. His testimony was simply that he had investigated crimes involving the Rolling 20's Crips ranging from robbery to murder.

If the convictions of Warren and Robinson for shooting into a school zone were offered as predicate offenses, this crime is not among the enumerated crimes. Consequently, the testimony clearly failed to prove that a predicate offense had occurred under the definition provided in section 186.22, subdivision (e). We agree with appellant therefore that the evidence failed to establish that the gang's primary activities were the commission of enumerated crimes. Because the prosecution failed to prove the requisite predicate offenses, the evidence was insufficient to establish a pattern of criminal activity needed to prove the existence of a criminal street gang. Thus, a necessary element of both the gang enhancement and substantive gang offense was not satisfied. Accordingly, the court's order sustaining the allegation of Count 2 of the information accusing appellant of violation of section 186.22, subdivision (b)(1) must be reversed.

In view of this conclusion, we do not reach appellant's remaining contentions regarding the sufficiency of the evidence to support the criminal street gang enhancement.

III. High term sentence

In his opening brief appellant claims the trial court violated his Sixth Amendment rights in the imposition of the high term sentence on counts 1 and 2 "by imposing the upper term for the assault based on factors not proved beyond a reasonable doubt." Defendant's contention that the imposition of the high term on counts 1 and 2 violated his Sixth Amendment right to a jury trial is based on the holding of *Blakely v. Washington* (2004) 542 U.S. 296, that the maximum sentence a judge may impose is that permitted by the facts established by the jury verdict or admitted by the defendant.

The trial court's choice of the upper term for robbery was based on the court's findings of circumstances in aggravation, as required by section 1170, subdivision (b), and California Rules of Court, rule 4.420(a). Our Supreme Court, however, recently rejected equivalent contentions, and held that in light of *Blakely* and the succeeding case of *United States v. Booker* (2005) 543 U.S. 220, "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence . . . under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*People v. Black* (2005) 35 Cal.4th 1238, 1244.) Moreover, the court in *Black* concluded that "the high court's decisions [do not] compel the conclusion that the trial court's identification of aggravating factors, in selecting a sentence within the upper, middle, and lower term range of sentences provided under California law, is unconstitutional." (*Id*. at p. 1261.) We therefore reject appellant's Sixth Amendment contention.

DISPOSITION

The matter is remanded with directions to the trial court to strike the section 186.22(b)(1) gang enhancement. The trial court is directed to prepare an amended

judgment and forward a copy to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P.J.

We concur:

RUBIN, J.

FLIER, J.