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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KEVIN BREWER, Defendant and Appellant.	A127746 (Alameda County Super. Ct. No. C160049)

I. INTRODUCTION

Appellant, who represented himself at trial, was convicted of continuous sexual abuse of a child and aggravated sexual assault on a child. He contends that the trial court erred in denying his belated motion for appointment of counsel, and in refusing to allow him to impeach the victim with the fact that she had made a prior unsustained allegation that she had been sexually molested. In the unpublished portion of this opinion, we reject these contentions, and affirm the conviction.

Appellant also contends that he was entitled to presentence conduct credit. In the published portion of this opinion, we conclude that appellant is correct that he was entitled to such credit, even though he was sentenced to an indeterminate prison term with a maximum of life. Accordingly, we modify the judgment to reflect the additional credit.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.A., III.A.1., III.A.2., and III.B.

II. FACTS AND PROCEDURAL BACKGROUND

A. Facts

The victim, appellant's daughter L.D.,[1] was born in early 1990. L.D. lived with her mother, and appellant lived with them sporadically, including the period when L.D. was four or five years old. He stopped living with them after he and L.D.'s mother broke up because he hit L.D.'s mother. Appellant continued to visit with L.D. after that, however, and he frequently took L.D. to the park or other locations for a few hours.

According to L.D., by the time she was five years old, appellant started repeatedly touching her on the vagina with his hands. As time went on, his sexual touching of her escalated, and appellant refused to stop when she asked him. When she was eight or nine years old, he began having sexual intercourse with her. During the ensuing three or four years, and possibly longer, appellant often took L.D. to a park at night to play basketball, and forced her to have sex with him when she lost, which was most of the time. This occurred 10 to 20 times in one park, 10 to 20 times in another park, and once in appellant's van while it was parked at the Berkeley Marina. Appellant also had intercourse with L.D. in a motel where they stayed during trips to visit L.D.'s grandfather. L.D. could not recall the specific dates of any of these incidents.

When L.D. was 13 or 14 years old, she told someone that an older man, whom she did not name but who was apparently identified as appellant, had sexually molested her in a hotel. This information was reported to a child protective services agency (CPS). When CPS attempted to investigate, however, L.D. refused to cooperate with them, and the matter was not pursued.

Appellant's molestation of L.D. continued until, at age 14 or 15, she was arrested for robbery, taken to juvenile hall, convicted of battery and being an accessory, and

[1] The victim is referred to in the briefs and record by her real first name and a fictitious last name. Her first name is sufficiently uncommon that in order to protect her privacy more fully, we will refer to her as "L.D.," using the initials of the fictitious name used to identify her in the record.

placed in a group home.[2] While L.D. was detained at juvenile hall, appellant sent her a sexually explicit letter that was intercepted by the staff and turned over to a probation officer, who contacted the police. L.D. at first declined to cooperate with the police investigation, but later changed her mind because appellant was "nasty and disrespectful" to her by leaving sexually explicit messages on her voicemail.

L.D. played one of appellant's voicemail messages for a police detective, who recorded it and had it transcribed. The message referred in very explicit terms to appellant's past experience of having had sexual intercourse with L.D. In addition, L.D. showed the detective an exchange of text messages between herself and appellant, in which she sent him a message saying, "fuck you," and he responded, "I'd love to." L.D. also gave the detective numerous letters appellant had sent her, several of which included explicit sexual content, and referred to the fact that they had "continued to have sex for a very long period of time." Appellant continued to send L.D. letters after he was ordered not to contact her. L.D. received two letters from appellant right before trial, but discarded them without reading them.

Appellant admitted sending L.D. letters, including the ones she received right before trial in violation of a court order, and admitted that he had L.D.'s name tattooed on his chest. He argued, however, that what appeared to be sexually explicit content in his letters was actually just "how black folks talk," or at least how he, as a self-described "ghetto person," expressed himself.

In addition, appellant testified, and provided corroborating documentary evidence, that he was incarcerated for significant portions of the time span during which he was accused of sexually abusing and assaulting L.D., i.e., January 19, 1996, through January 18, 2004. Specifically, the evidence indicated that appellant was in custody from December 19, 1995, through June 26, 1996; for nine months during 1998; from July 21,

[2] L.D. had been involved in the juvenile justice system earlier, but had only been placed in group homes, never in a locked facility. During that period, L.D. continued to see appellant, and spent periods of time with him after running away from her group homes.

2001, through February 26, 2002; for all but 82 days during the remainder of 2002; and for all but 49 days during 2003. There was no evidence, however, that appellant was in custody between June 27, 1996, when L.D. was about six and one-half years old, and July 20, 2001, when L.D. was about eleven and one-half years old, except for a period of nine months during 1998. Also, by appellant's own account, he was out of custody for a total of 131 days (more than 18 weeks) during 2002 and 2003, when L.D. was twelve to thirteen years old. Thus, appellant's alibi failed to account for significant parts of the time period during which the charged conduct occurred.

B. Proceedings in the Trial Court

A complaint was filed against appellant on March 14, 2008. After a preliminary hearing on December 17, 2008, appellant was charged on December 30, 2008, with one count of continuous sexual abuse of a child under the age of 14 (Pen. Code § 288.5, subd. (a)[3]), alleged to have occurred between January 19, 1996, and January 18, 2002; and one count of aggravated sexual assault on a child under the age of 14 (§ 269, subd. (a)(1)), alleged to have occurred between January 19, 2002, and January 18, 2004. The information alleged that appellant had one prior serious felony conviction qualifying as a "strike" (§ 667, subds. (b)-(i)), as well as seven other prior convictions, and that appellant had served four prior prison terms (§ 667.5, subd. (b)). The jury found appellant guilty on both counts.

Appellant admitted the prior strike, two additional serious felony convictions, and two of the prior prison terms. He was sentenced to a total of 61 years to life in prison, and given credit for 702 actual days of presentence custody, but no presentence conduct credit. This timely appeal ensued.

[3] All further statutory references are to the Penal Code unless otherwise noted.

III. DISCUSSION

A. Denial of Appellant's Request for Appointment of Counsel

1. *Background*

Prior to the preliminary hearing, attorney Andrea Auer was appointed to represent appellant. On January 23, 2009, and again on April 21, 2009, appellant made unsuccessful motions for substitution of counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). On May 29, 2009, appellant filed a motion to represent himself under *Faretta v. California* (1975) 422 U.S. 806. The court granted this motion, relieved Auer as counsel, and appointed an investigator to assist appellant in preparing for trial.

On November 2, 2009, after the case was assigned out to a trial department, appellant asked for appointed counsel. By then, over 18 months had passed since the complaint was filed, and appellant had been representing himself for over five months. A trial date of October 26, 2009, had been set at least since August 26, 2009. The trial court offered to reappoint Auer, who was familiar with the case and available to represent appellant at trial. Appellant did not want her as his counsel, however. The trial court denied appellant's request for a different attorney, finding that it was made in an effort to delay the trial, and was untimely.

Just over a week later, after the completion of jury selection on November 10, 2009, appellant changed his mind, and agreed to accept Auer as his counsel if the court reappointed her. By then, however, Auer was no longer available. The court declined to continue the trial in order to locate another attorney and give that person time to prepare. The court granted appellant's request for advisory counsel, however, and contacted several attorneys in order to try to locate someone who was willing to serve in that capacity. Before the presentation of evidence began, the court located and appointed advisory counsel, who assisted appellant throughout the trial, and participated extensively in the discussion of the jury instructions.

2. *Discussion*

Appellant now contends that the trial court violated his constitutional rights in denying his requests for reappointment of counsel. In reviewing the denial of a request

for reinstatement of counsel, we consider the following factors: (1) the defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel representation; (2) the reasons set forth for the request; (3) the length and stage of the trial proceedings; (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion; (5) the likelihood of the defendant's effectiveness in defending against the charges if required to continue to act as his own attorney; and (6) the reasons given by the trial court for the denial. (See *People v. Hill* (1983) 148 Cal.App.3d 744, 760.)

Appellant contends that it is an abuse of discretion for a trial court to deny a request for appointment of counsel when the trial has not yet started, citing *People v. Hill*, *supra*, 148 Cal.App.3d at pp. 760-761, and *People v. Cruz* (1978) 83 Cal.App.3d 308, 319-322. This argument ignores the fact that when appellant requested counsel *before* the start of trial, the court *granted* the request, provided that appellant would agree to be represented by Auer, who was available at that time.

Appellant attempts to justify his refusal of this offer by noting that he had previously filed two *Marsden* motions requesting that Auer be relieved. These motions were denied, however, and appellant does not argue on appeal that they should have been granted.[4] An offer to appoint competent counsel is not rendered constitutionally inadequate or otherwise improper by the fact that the attorney in question has been the subject of one or more *unsuccessful Marsden* motions. (See *Harris v. Superior Court* (1977) 19 Cal.3d 786, 795-797 [criminal defendant is entitled to appointment of competent, conflict-free counsel, but absent unusual circumstances, not to counsel of his or her own choosing].) Accordingly, by refusing the court's offer to reappoint Auer on November 2, 2009, appellant waived his right to have counsel appointed for him at that time.

[4] We have reviewed the sealed transcripts of appellant's *Marsden* motions, and it does not appear that the trial court erred in denying them.

Appellant did not renew his request for counsel until after jury selection was complete and the trial was about to begin. Even then, the court remained willing to reappoint Auer. Because she had become unavailable, however, granting appellant's motion would have required a continuance either until Auer became available again, or until another attorney could prepare. Disruption and delay are inevitable when a trial is continued after a jury has been selected, witnesses have made themselves available to testify, and opposing counsel is ready to proceed. Under the circumstances, the trial court did not abuse its discretion in denying appellant's last-minute request for counsel. (See *People v. Lawrence* (2009) 46 Cal.4th 186, 193-196 [standard for reviewing trial court's denial of motion to revoke self-represented status and reappoint counsel is whether court's decision was abuse of its discretion under totality of circumstances]; *People v. Gallego* (1990) 52 Cal.3d 115, 163-164.)

In any event, we agree with respondent that even if there was error, it was harmless. The facts of the case were straightforward; no complicated legal issues arose during trial; and the evidence against appellant was very strong. Through cross-examination of the prosecution's witnesses, as well as appellant's own testimony and documentary evidence, appellant succeeded in highlighting for the jury the few arguable weaknesses in the prosecution's case: appellant's partial alibi; L.D.'s inability to recall the exact dates of relevant events; L.D.'s juvenile delinquency record; and L.D.'s previous unsustained molestation accusation (see discussion *post*). The record indicates that appellant's advisory counsel actively assisted him, particularly during the colloquy regarding jury instructions. On this record, it simply is not reasonably probable that the outcome of the trial would have been more favorable to appellant if he had been represented by counsel. (See *People v. Ngaue* (1991) 229 Cal.App.3d 1115, 1126-1127 [state harmless error standard applies to denial of motion for appointment of counsel by defendant who has previously elected self-representation].)

B. Exclusion of Evidence of Victim's Prior Molestation Accusation

When L.D. was 12 or 13 years old, she told an adult that she was being molested by a 32-year-old man, whom she apparently did not identify. The adult contacted CPS,

which sent the police to L.D.'s home. When the police asked L.D. about it, however, she told them she had "made the whole thing up," so the matter was dropped. Prior to trial, appellant moved to impeach L.D. by introducing evidence of this unsubstantiated molestation report. The trial court ruled that presenting this evidence would involve an undue consumption of time, and declined to admit it based on Evidence Code section 352. Appellant was not permitted to ask L.D. about this incident when he cross-examined her.

Appellant now contends that this ruling was an abuse of discretion. (See *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1449 [abuse of discretion standard applies on review of trial court's decision to exclude evidence].) A trial court's exercise of discretion under Evidence Code section 352 "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

A prior false report of sexual assault or molestation may be used to impeach the complaining witness in a sex crime case, but in order for such evidence to have significant probative value, the proponent must show that the prior report was in fact false. (*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1456-1458.) In the present case, the only evidence appellant could offer to show that L.D.'s prior report was untrue was L.D.'s own statement to the police that she had "made the whole thing up." L.D.'s retraction alone was not sufficient to show that the report was false. L.D. emphasized in her testimony that she had "never cooperated" with CPS when they attempted to investigate abuse allegations involving her, including allegations against appellant. Yet presenting additional proof that the prior report was untrue would have required a considerable expenditure of time and resources.

Moreover, as already noted, appellant was permitted to, and did, impeach L.D. with her retraction of her prior molestation accusation against him, as well as her juvenile delinquency record. Accordingly, the evidence of her prior retracted allegation against an unknown third person would have been cumulative.

For all of these reasons, we cannot conclude that the trial court abused its discretion in determining that the probative value of the additional impeachment evidence was outweighed by concerns of consumption of time. Moreover, given the strength of the prosecution's case and the other ways in which appellant was permitted to impeach L.D.'s credibility, it is not reasonably probable that the outcome of the trial would have been more favorable to appellant if the additional impeachment evidence had been admitted. Accordingly, even if we were to find an abuse of discretion, we would still affirm on the ground of harmless error. (See *People v. Franklin* (1994) 25 Cal.App.4th 328, 337.)

C. Denial of Presentence Conduct Credit

Appellant was given custody credit only for the actual number of days he spent in custody before he was sentenced. He argues that he should also have received the additional credit provided for under section 4019, which is generally referred to as presentence conduct credit. The trial judge did not give appellant presentence conduct credit because he believed it was not available to anyone sentenced to an indeterminate term with a maximum of life in prison (an indeterminate life sentence). Appellant contends this was error.

This argument raises an issue of statutory interpretation. Accordingly, we review it de novo as a question of law, and begin with the text of the relevant statutes. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *Krug v. Maschmeier* (2009) 172 Cal.App.4th 796, 800; *People v. Schoppe-Rico* (2006) 140 Cal.App.4th 1370, 1379.) "Section 4019 is the general statute governing credit for presentence custody. Absent contrary authority, 'a defendant receives what are commonly known as conduct credits toward his term of imprisonment for good behavior and willingness to work during time served prior to commencement of sentence. [Citations.]' [Citation.]" (*People v. Philpot* (2004) 122 Cal.App.4th 893, 907 (*Philpot*).) The portions of

section 4019 applicable in this case[5] provide that "[w]hen a prisoner is confined in a county jail . . . following arrest and prior to the imposition of sentence for a felony conviction" (§ 4019, subd. (a)(4)), then "for each six-day period in which a prisoner is confined in . . . a facility as specified in this section, one day shall be deducted from his or her period of confinement unless . . . the prisoner has refused to satisfactorily perform labor as assigned . . . ," and an additional "day shall be deducted . . . unless . . . the prisoner has not satisfactory complied with the reasonable rules and regulations" applicable to the facility. (§ 4019, subds. (b)(2), (c)(2) [quoted provisions applicable to certain prisoners, including those convicted of continuous sexual abuse of a child]; accord, former § 4019, subds. (b), (c) [quoted provisions applicable to all prisoners].)

Section 2933.1, subdivision (c), operates as an exception to section 4019. It provides, in pertinent part, that "[n]otwithstanding Section 4019 or any other provision of law, the maximum credit that may be earned against a period of confinement in, or commitment to, a county jail . . . following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a)." The "person[s] specified in [section 2933.1,] subdivision (a)" include "any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 . . . ." (§ 2933.1, subd. (a).) The

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[5] Section 4019 was amended in 2009, effective January 25, 2010 (the 2010 version), to increase the formula for awarding presentence conduct credits to some prisoners. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) The Supreme Court has granted review to resolve a split in authority over whether the 2010 version of section 4019 applies to defendants whose cases were still pending on appeal on the statute's effective date. (See, e.g., *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963; *People v. Rodriguez* (2010) 182 Cal.App.4th 535, review granted June 9, 2010, S181808.) Section 4019 was amended again, effective September 28, 2010 (the 2011 version). (Stats. 2010, ch. 426, § 2.) The present case is not affected by either set of amendments, however. Given the nature of appellant's crime, he is ineligible for the additional conduct credit granted by the 2010 version, both by virtue of section 2933.1, and under the 2010 version of section 4019 itself. (Compare former § 4019, subds. (b), (c), with the 2010 version of § 4019, subds. (b)(2), (c)(2).) Accordingly, our discussion does not draw any distinction among the 2011, 2010, and former versions of section 4019.

offenses listed in subdivision (c) of section 667.5 include one of the offenses of which appellant was convicted, that is, continuous sexual abuse of a child in violation of section 288.5. (See § 667.5, subd. (c)(16).) Thus, as appellant concedes, if he is entitled to presentence conduct credit, it is limited to 15 percent of his actual days in custody.

Notably, neither section 2933.1 nor section 4019 contains any express provision making defendants ineligible for presentence conduct credit if they receive an indeterminate life sentence. If anything, section 2933.1 implicitly provides to the contrary, because it puts a limitation on the presentence conduct credit available to persons convicted of any of the offenses characterized as violent felonies by section 667.5, subdivision (c), several of which carry mandatory indeterminate life sentences.[6] If defendants who receive indeterminate life sentences were thereby ineligible for any presentence conduct credit, there would be no need for a statutory provision limiting the amount of such credit available to those defendants.

As section 4019 on its face grants presentence conduct credit to all defendants, and neither that statute nor any other creates an exception applicable to all defendants sentenced to indeterminate life sentences, the court in *Philpot*, *supra*, 122 Cal.App.4th 893, held that a defendant sentenced to an indeterminate life sentence under the three strikes law is eligible for conduct credit.[7] More than four years later, the Legislature amended section 4019 to increase the number of days of presentence conduct credit available to some prisoners. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) In so

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[6] For example, the violent felonies defined by section 667.5 include violations of section 12308 and section 12310, subdivision (b), which mandate life sentences for explosion of a destructive device either with intent to commit murder or causing mayhem or great bodily injury. (See § 667.5, subd. (b)(13).)

[7] In *People v. Duff* (2010) 50 Cal.4th 787, the California Supreme Court cited *Philpot*, with apparent approval, for the general proposition that "[t]he circumstance that a defendant is sentenced to an indeterminate sentence does not preclude the earning of presentence conduct credit. [Citations.]" (*Id.* at p. 793.) The quoted statement was dictum, however, because the holding in *People v. Duff* was that the defendant was ineligible for conduct credit under a separate statute denying conduct credit to persons convicted of murder (§ 2933.2, subd. (c)), even though his murder conviction had been stayed under section 654. (50 Cal.4th at p. 795.)

doing, however, the Legislature left untouched the interpretation of the statutory scheme adopted in *Philpot*, *supra*, 122 Cal.App.4th 893. (See § 4019 (2010 version), subds. (b), (c), as amended eff. Jan. 25, 2010.) Moreover, the Legislature included in the amendment a provision making persons convicted of certain crimes (including certain violent felonies, which, as noted *ante*, carry mandatory indeterminate life sentences) ineligible for the *increased* conduct credit, but *retaining* their eligibility for the lower, pre-amendment amount of such credit. (See § 4019 (2010 version), subds. (b)(2), (c)(2), as amended eff. Jan. 25, 2010.) If a statute is amended after being construed in a published judicial opinion, and the Legislature does not modify the statute so as to invalidate the court's interpretation, we may assume that the prior judicial interpretation comported with the legislative intent. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1087-1088.)

Respondent attempts to distinguish *Philpot*, *supra*, 122 Cal.App.4th 893, by pointing out that in that case, the defendant was serving an indeterminate life sentence under the three strikes law (*id.* at p. 907), whereas here, appellant's indeterminate life sentence was imposed under section 269, subdivision (a)(1), which mandates a sentence of 15 years to life for the rape of a child who is under the age of 14 and seven or more years younger than the assailant. Respondent provides no authority or analysis, however, to support the contention that this distinction makes a difference for the purposes of the present case.

Respondent also cites *In re Monigold* (1983) 139 Cal.App.3d 485 and *People v. Rowland* (1982) 134 Cal.App.3d 1 for the proposition that defendants who receive indeterminate life sentences are not entitled to presentence conduct credit. Neither of these cases changes our analysis.

In re Monigold, *supra*, 139 Cal.App.3d 485, involved a state prisoner who was serving an indeterminate life sentence for second degree murder, plus a determinate two-year enhancement for firearm use in connection with the same murder. (*Id*. at pp. 487-488.) The Department of Corrections denied the prisoner's request for conduct credit against the enhancement term, opining that he was ineligible for conduct credit because

the applicable statute—section 2931, subdivision (a)[8]—allowed conduct credit only for prisoners serving determinate terms. The Court of Appeal disagreed, holding that the prisoner was entitled to conduct credit against his enhancement term, even though the determinate sentence for the enhancement was imposed based on the same underlying crime as the indeterminate sentence. (*In re Monigold*, *supra*, at pp. 492-492.)

People v. Rowland, *supra*, 134 Cal.App.3d 1 involved a defendant convicted of murder. On appeal, the defendant contended he was entitled to presentence conduct credit. The Court of Appeal noted that "[i]t is true that a person sentenced to prison for life is not entitled to conduct credits," citing section 3046. Nonetheless, the court agreed with the defendant, because the statute under which he was convicted—i.e., "section 190, as enacted by the people in Proposition 7 at the November 1978 General Election" (*id.* at p. 13)—expressly provided that conduct credit would apply to reduce the minimum term of a person sentenced under that statute. (*Id.* at pp. 13-14.)

Thus, both *In re Monigold*, *supra*, 139 Cal.App.3d 485, and *People v. Rowland*, *supra*, 134 Cal.App.3d 1 involved different statutes governing conduct credit than the one involved in the present case. Therefore, any statement in those opinions that persons serving indeterminate life sentences are not entitled to conduct credit is entirely inapposite to the construction of section 4019, which—unlike the statutes involved in *In re Monigold* and *People v. Rowland*—is not subject to *any* express statutory exception making it inapplicable those serving indeterminate life sentences, and which—as amended effective January 25, 2010—*does* contain express provisions limiting the *amount* of presentence conduct credits available to those convicted of specified crimes, including some that carry mandatory indeterminate life sentences.

In short, respondent has not persuaded us that the interpretation of section 4019 in *Philpot*, *supra*, 122 Cal.App.4th 893 does not apply equally to appellant. Accordingly, appellant is entitled to section 4019 presentence conduct credits. As the *Philpot* court

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[8] By its own terms, section 2931 is inapplicable to persons, including appellant, whose crimes were committed after January 1, 1983. (§ 2931, subd. (d).)

explained, after appellant has served the minimum term of his indeterminate life sentence, the Board of Prison Terms may use appellant's section 4019 credits in determining appellant's release date. (See *Philpot*, *supra*, at p. 909.)

IV. DISPOSITION

The judgment is modified to reflect that appellant has 807 days of presentence custody credit, consisting of 702 days in actual custody and 105 days of conduct credit. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RUVOLO, P. J.

We concur:

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SEPULVEDA, J.

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RIVERA, J.

Trial Court:	Alameda County Superior Court
Trial Judge:	Hon. Joan S. Cartwright
Counsel for Appellant:	Law Offices of John F. Schuck, John F. Schuck
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