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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DWAYNE GILES, Defendant and Appellant.	2d Crim. No. B166937 (Super. Ct. No. TA066706) (Los Angeles County)

Appellant Dwayne Giles was sentenced to prison for a term of 50 years to life after a jury convicted him of first degree murder and found true an allegation that he had personally discharged a firearm causing great bodily injury or death. (Pen. Code, §§ 187, subd. (a), 189, 12022.53, subd. (d).) He contends he was denied his Sixth Amendment right to confront witnesses because the trial court admitted hearsay evidence of statements by the murder victim regarding a prior act of domestic violence. He also argues that his conviction must be reduced to second degree murder because the evidence was insufficient to show that he acted with premeditation and deliberation. We conclude appellant has forfeited his Confrontation Clause arguments through his own wrongdoing and the evidence was sufficient to support the judgment.

FACTS

Appellant dated Brenda Avie for several years. On September 29, 2002, he was staying at his grandmother's house along with several other family members. Appellant was out in the garage socializing with his niece Veronica Smith, his friend Marie Banks, and his new girlfriend Tameta Munks when appellant's grandmother called

him into the house to take a telephone call from Avie. He then returned to the garage and spoke to Munks, who then left.

Avie arrived at the house about 15 minutes later, after Munks had already left. She conversed with Smith and Banks in the garage for about half an hour. Smith went into the house to lie down and heard Avie and Banks leaving the garage together. A few minutes later, she heard appellant and Avie speaking to one another outside in a normal conversational tone. Avie then yelled "Granny" several times, and Smith heard a series of gunshots.

Smith and appellant's grandmother ran outside and discovered appellant holding a nine millimeter handgun and standing about 11 feet from Avie, who was bleeding and lying on the ground. Appellant's grandmother took the gun from him and called 911. Smith drove appellant away from the house at his request, but he jumped out of her car and ran away after they had traveled several blocks. Appellant did not turn himself in to police and was eventually arrested on October 15, 2002.

Avie had been shot six times in the torso area. Two of those wounds were fatal; one was consistent with her holding up her hand at the time she was shot; one was consistent with her having turned to her side when she was shot; and one was consistent with the shot being fired while she was lying on the ground. Avie was not carrying a weapon when she was shot.

Appellant testified at trial and admitted shooting Avie, but claimed he had acted in self-defense. He explained that he had a tumultuous relationship with Avie and was trying unsuccessfully to end it. Avie would get very jealous of other women, including Tameta Munks, whom he had been dating. Appellant knew that Avie had shot a man before she met him, and he had seen her threaten people with a knife. He claimed that Avie had vandalized his home and car on two separate occasions.

According to appellant, he had a "typical" argument with Avie when she called him on the telephone on the day of the shooting. He told her Munks was at the house and Avie said, "Oh, that bitch is over there. Tell her I'm on my way over there to kill her." Appellant told Munks to leave because he was worried about the situation, and

Avie arrived soon after. Appellant told everyone to leave and began closing up the garage where they had congregated. Avie walked away with Marie Banks, but she returned a few minutes later and told appellant she knew Munks was returning and she was going to kill them both. Appellant stepped into the garage and retrieved a gun stowed under the couch. He disengaged the safety and started walking toward the back door of the house. Avie "charged" him, and appellant, afraid she had something in her hand, fired several shots. Appellant testified that it was dark and his eyes were closed as he was firing the gun. He claimed that he did not intend to kill her.

Marie Banks testified that she had seen appellant and Avie get into arguments before. Avie seemed angry when she came to appellant's grandmother's on the day of the shooting, and she talked to appellant for about half an hour until appellant told everyone to leave. Avie and Banks left together, but as they were walking away they saw Tameta Munks. Avie said, "Fuck that bitch. I'm fixin' to go back." She walked back toward appellant's grandmother's house and Banks went home. Banks did not see the shooting itself.

DISCUSSION

Right of Confrontation—Forfeiture by Wrongdoing

A few weeks before the shooting in this case, police officers investigated a report of domestic violence involving appellant and Avie. Evidence about the incident was offered by the prosecution to prove appellant's propensity for domestic violence under Evidence Code section 1109. Officer Stephen Kotsinadelis testified that when he and his partner responded to a call on September 5, 2001, appellant answered the door, apparently agitated, and allowed him to enter. Avie was sitting on the bed, crying. Kotsinadelis interviewed Avie while his partner spoke to appellant in a different room. Avie said she had been talking to a female friend on the telephone when appellant became angry and accused her of having an affair with that friend. Avie ended the call and began to argue with appellant, who grabbed her by the shirt, lifted her off the floor, and began to choke her with his hand. She broke free and fell to the floor, but appellant climbed on top of her and punched her in the face and head. After Avie broke free again,

appellant opened a folding knife, held it about three feet away from her, and said, "If I catch you fucking around I'll kill you."

Avie's hearsay statements to Officer Kotsinadelis were admitted over defense counsel's objection. The trial court ruled the statements were admissible under Evidence Code section 1370, which establishes a hearsay exception for certain out-of-court statements describing the infliction of physical injury upon the declarant when the declarant is unavailable to testify at trial and the statements are trustworthy.[1]

Citing the recent United States Supreme Court decision in *Crawford v. Washington* (2004) __ U.S. __ [124 S.Ct. 1354], which was issued after the trial in this case, appellant argues that the admission of Avie's statements to Officer Kotsinadelis violated his rights under the Confrontation Clause of the federal Constitution. (U.S. Const., 6th & 14th Amends.) In *Crawford*, the court held that "testimonial" hearsay was admissible only when the declarant was unavailable *and* the defendant has had an opportunity to cross-examine the declarant. Overruling former case law that permitted the introduction of hearsay evidence so long as it fell within a firmly rooted hearsay exception or contained particularized guarantees of trustworthiness, the court announced a new rule of constitutional law: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Id*. at p. __ [124 S.Ct. at p. 1374], overruling *Ohio v. Roberts* (1980) 448 U.S. 56, 66.) Appellant contends that Avie's statements to Officer Kotsinadelis were testimonial and should have been excluded.

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[1] Evidence Code section 1370 provides in relevant part, "(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: [¶] (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. [¶] (2) The declarant is unavailable as a witness pursuant to Section 240. [¶] (3) The statement was made at or near the time of the infliction or threat of physical injury. . . . [¶] (4) The statement was made under circumstances that would indicate its trustworthiness. [¶] (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official."

The resolution of this issue is not obvious from *Crawford* itself, which declined to "spell out a comprehensive definition of 'testimonial.'" (*Crawford v. Washington*, *supra*, __ U.S. at p. ___ [124 S.Ct. at p. 1374].) "Whatever else the term covers, it applies at minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; *and to police interrogations*. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Ibid*., italics added.) The court used "interrogation" in its "colloquial, rather than any technical legal, sense" (*Id*. at p. ___ [124 S.Ct. at p. 1365, fn. 4]), and some decisions interpreting *Crawford* have construed an initial interview such as the one conducted by Officer Kotsinadelis to be an "interrogation" producing testimonial statements. (E.g., *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1402; *Moody v. State* (Ga. 2004) 594 S.E.2d 350, 354; *State v. Clark* (N.C. 2004) 598 S.E.2d 213, 219-220.) Other courts, however, have concluded that informal statements to police about a crime that has just occurred are not the functional equivalent of in-court testimony and are not testimonial within the meaning of *Crawford*. (E.g., *Hammon v. State* (Ind. 2004) 809 N.E.2d 945, 952-953.)

We need not resolve whether Avie's statements to Officer Kotsinadelis were testimonial. Assuming they were, we agree with the Attorney General that appellant is barred from asserting a Confrontation Clause objection under the doctrine of forfeiture by wrongdoing. This doctrine embraces the equitable principle that a defendant who has rendered a witness unavailable for cross-examination through a criminal act (in this case, homicide) may not object to the introduction of hearsay statements by the witness on Confrontation Clause grounds. (See *United States v. Emery* (8th Cir. 1999) 186 F.3d 921, 926.) *Crawford* specifically recognized and accepted forfeiture by wrongdoing as an exception to its rule that confrontation is a prerequisite to

the admission of testimonial hearsay statements. (*Crawford v. Washington*, *supra*, __ U.S. at p. __ [124 S.Ct. at p. 1370].)

The California Supreme Court has not addressed the applicability of forfeiture by wrongdoing to a Confrontation Clause violation, but the doctrine has a lengthy history and is recognized by the federal courts and those of several sister states.[2] (E.g., *United States v. Carlson* (8th Cir. 1976) 547 F.2d 1346, 1359; *State v. Gettings* (Kan. 1989) 769 P.2d 25, 28-29; *Holtzman v. Hellenbrand* (N.Y. 1983) 460 N.Y.S.2d 591, 597; *People v. Moore* (Colo.Ct.App. 2004, 01CA1760) __ P.3d __, __ [2004 WL 1690247, *4].) More than a hundred years ago, the United States Supreme Court explained the rule as follows: "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own [the accused's] wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." (*Reynolds v. United States* (1879) 98 U.S. 145, 158.) To put it more bluntly: "The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him." (*United States v. Thevis* (5th Cir. 1982) 665 F.2d 616, 630, superseded by statute on other grounds as stated in *United States v. Zlatogur* (11th Cir. 2001) 271 F.3d 1025, 1028.)

Appellant argues that a defendant forfeits a Confrontation Clause objection through wrongdoing only when he is charged with or is under investigation for a crime, and wrongfully procures the witness's absence from trial with the intent of preventing testimony about that crime. He relies on *United States v. Houlihan* (1st Cir. 1996) 92 F.3d 1271, 1280, in which the court described the doctrine of forfeiture by wrongdoing as applying when the defendant "(1) causes a potential witness's unavailability (2) by a

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[2] One Court of Appeal recently held that forfeiture by wrongdoing barred the defendant's *Crawford* challenge to a statement by the murder victim that was introduced as a dying declaration. (*People v. Jiles* (Sept. 16, 2004, E034087) __ Cal.App.4th __ [2004 D.A.R. 11681].)

wrongful act (3) undertaken with the intention of preventing the potential witness from testifying at a future trial." Appellant correctly notes that in this case, there was no evidence he shot Avie with the intention of preventing her testimony at some future trial.

Houlihan's formulation of forfeiture by wrongdoing was primarily a response to a defense argument that the doctrine did not apply when a witness was murdered before formal charges were filed against the defendant. (*United States v. Houlihan*, *supra*, 92 F.3d at pp. 1279-1280.) Although the opinion contains language suggesting that a killing must be motivated by a desire to silence the victim to trigger a forfeiture of the right to confrontation, we see no reason why the doctrine should be limited to such cases. Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness's unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable. Other courts have applied forfeiture in cases where the defendant is charged with the same homicide that rendered the witness unavailable, rather than with some underlying crime about which the victim was going to testify. (See also *United States v. Emery*, *supra*, 186 F.3d at p. 926; *United States v. Miller* (2d Cir. 1997) 116 F.3d 641, 667-668; *State v. Meeks* (Kan. 2004) 88 P.3d 789, 794, 615; *People v. Moore*, *supra*, __ P.3d at p. __ [2004 WL 1690247, *4].)[3]

Appellant notes that if forfeiture by wrongdoing is applied to cases in which the defendant is on trial for the very crime that has rendered the witness unavailable, the trial court will be required "'to conclude in essence, as a predicate for

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[3] Rule 804(b)(6) of the Federal Rules of Evidence establishes a hearsay exception for "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was *intended to*, and did, procure the unavailability of the declarant as a witness." (Italics added.) Our analysis here is not confined by a comparable statutory provision. (Contrast Evid. Code, § 1350.)

admissibility of the evidence, that the defendant is guilty of the very crime with which he is accused.'" This "problem" does not undermine the equitable reasons for the forfeiture doctrine and does not present the trial court with any undue procedural difficulty.

In a case where hearsay statements of a homicide victim are offered in the face of a Confrontation Clause objection, the court will have to determine the preliminary facts necessary for the admission of the evidence, as it would with any other hearsay statement. (Evid. Code, § 310, subd. (a).) If the prosecution urges the court to rule that the defendant forfeited a Confrontation Clause objection by unlawfully and intentionally killing the victim, the court will determine forfeiture as a preliminary factual issue. In making this determination, it may consider the evidence admitted thus far at trial and may hold a hearing to take additional evidence outside the presence of the jury. (Evid. Code, § 402, subd. (b).) Assuming there is sufficient evidence to demonstrate forfeiture, the court will admit the evidence. This ruling will not infringe in any way upon the ultimate question for the jury's resolution--whether the defendant is guilty beyond a reasonable doubt of the homicide as charged.

A court is not precluded from determining the preliminary facts necessary for an evidentiary ruling merely because they coincide with an ultimate issue in the case. For example, qualifying hearsay statements by coconspirators may be admissible against a defendant who is charged with conspiracy, even though the existence of the charged conspiracy is a preliminary fact that must be proved by a preponderance of the evidence before the statement is admitted. (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61-63; *People v. Cooks* (1983) 141 Cal.App.3d 224, 311-312.) The court is no less able to make a threshold determination as to whether a defendant charged with murder unlawfully caused the victim's death for purposes of the forfeiture rule.

This brings us to the degree of proof necessary for the trial court to admit hearsay evidence based on the defendant's forfeiture of his Confrontation Clause rights. Our colleagues in the Third District have concluded that when a defendant is alleged to have forfeited his Sixth Amendment right to appointed counsel through misconduct, the trial court should find the facts supporting forfeiture by clear and convincing evidence.

(*King v. Superior Court* (2003) 107 Cal.App.4th 929, 949.) This standard is equally appropriate when, as here, the Sixth Amendment right that is allegedly forfeited through misconduct is the right to cross-examination.

There was clear and convincing evidence that appellant procured Avie's unavailability through criminal conduct--in this case, a criminal homicide. Although he claimed at trial that he lawfully shot her in self-defense, the evidence supporting this theory was weak and it is inconceivable that any rational trier of fact would have concluded the shooting was excusable or justifiable. Appellant has forfeited his Confrontation Clause challenge to Avie's statements.[4]

Our holding today is a narrow one. Though we recognize that a defendant may forfeit the ability to assert the constitutional right of confrontation as to hearsay statements by a victim he or she has killed, the application of this rule is subject to several limitations.

First, forfeiture by wrongdoing does not automatically render hearsay statements by an absent witness admissible. Prior statements by an unavailable witness must still fall within a recognized hearsay exception. In this case, Avie's statements were admissible under Evidence Code section 1370 so long as they did not run afoul of *Crawford*. Appellant's procurement of Avie's absence operates as a forfeiture of his right to claim a Confrontation Clause violation under *Crawford*, but it did not provide an independently sufficient basis for admitting Avie's statements. The equitable doctrine of forfeiture by wrongdoing must therefore be distinguished from Evidence Code section

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[4] The issue of forfeiture by misconduct was not litigated below because the evidence of Avie's hearsay statements was admitted under a statutory hearsay exception that appeared to be valid at the time of appellant's pre-*Crawford* trial. (See *People v. Kons* (2003) 108 Cal.App.4th 514, 522 [upholding Evidence Code § 1370].) We address the issue for the first time on appeal because it was undisputed that Avie was unavailable to testify because of her death and that her death was the result of appellant's actions. (See *People v. Moore*, *supra*, __ P.3d at p. __ [2004 WL 1690247, *4].) An evidentiary ruling, such as the one admitting Avie's statements to Officer Kotsinadelis, will be upheld on appeal if it is correct on any theory, even if the trial court did not rely on that theory in making its ruling. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

1350, which establishes an independent hearsay exception in serious felony cases for out-of-court statements made by an unavailable witness when "there is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant."[5] (See also Fed. Rules Evid., rule 804(b)(6).)

Second, a defendant can only be deemed to have forfeited his right of confrontation through an intentional criminal act. Although we have concluded that the defendant need not additionally possess the purpose of rendering the witness unavailable for trial, it is not enough to commit some act that incidentally produces that result. In this case, for example, Avie was killed because appellant intentionally fired a gun at her; it is perfectly appropriate to conclude that in doing so, he forfeited his right to confront her in the event her hearsay statements were offered as evidence in some future criminal prosecution. By contrast, if Avie had instead been killed in an unintentional automobile collision while appellant was driving, he would have been the technical cause of her unavailability at any future trial, but his actions could not be construed as a forfeiture of his right to confront her as a witness.

Third, because forfeiture by wrongdoing is equitable in nature, the trial court cannot apply the doctrine when it would be unjust to do so. Avie's hearsay statements to Officer Kotsinadelis were admitted under a statutory hearsay exception that required a finding of trustworthiness. (See Evid. Code, § 1370, subd. (a)(4).) It is not clear whether *non*testimonial hearsay statements are still subject to the pre-*Crawford* method of assessing Confrontation Clause challenges, which asked whether the hearsay was admitted under a firmly rooted hearsay exception or bore particularized guarantees of

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[5] This hearsay exception is predicated on the same general principles as forfeiture by wrongdoing and, as such, appears to survive *Crawford*. (*Crawford v. Washington*, *supra*, __ U.S. at p. __ [124 S.Ct. at p. 1370].) It does not apply to Avie's hearsay statements because there was no evidence that appellant killed her "for the purpose of" preventing his arrest or prosecution.

trustworthiness. (See *Crawford v. Washington*, *supra*, __ U.S. at p. __ [124 S.Ct. at pp. 1368-1370, 1374].) It may, however, be unjust to use the forfeiture doctrine to admit a hearsay statement that does not contain sufficient indicia of trustworthiness. A defendant may reasonably be deemed to have forfeited the right to challenge reliable and trustworthy hearsay if his intentional and wrongful conduct makes the declarant unavailable; it is not so clear that he forfeits his right to challenge all hearsay statements against him, no matter how unreliable.

Fourth, we have required that forfeiture be proven by clear and convincing evidence before it can be the basis for admitting hearsay evidence over a Confrontation Clause objection. Although an argument can be made in favor of the preponderance-of-the-evidence standard applicable to most determinations of preliminary fact (see *People v. Herrera*, *supra*, 83 Cal.App.4th at pp. 61-63), this higher standard should help to ensure that forfeiture will only be found where it is clearly warranted. In cases where the evidence supporting forfeiture is seriously disputed, we expect that trial courts will find insufficient evidence of forfeiture and require confrontation as a precondition to testimonial hearsay evidence.[6]

Fifth, in those cases where the court finds forfeiture of a Confrontation Clause objection based on the defendant's commission of an intentional criminal act, the jury shall not be advised of the finding. The hearsay evidence will simply be admitted over the defendant's objection, and the jury will draw no inference about the ultimate issue of guilt based on the ruling itself.

With these qualifications, we have no problem concluding that in this case forfeiture by wrongdoing is both amply supported by the record and equitable under the circumstances. Appellant cannot be heard to complain that he was unable to cross-

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[6] By statute, the federal hearsay exception for forfeiture by wrongdoing is subject to a preponderance standard. (*United States v. Zlatogur*, *supra*, 271 F.3d at p. 1028.) However, the equivalent hearsay exception in California, Evidence Code section 1350, requires clear and convincing evidence of the facts amounting to forfeiture.

examine Avie about her prior, trustworthy statements to law enforcement when it was his own criminal violence that made her unavailable for cross-examination.

Sufficiency of the Evidence--Premeditation and Deliberation

Appellant contends the evidence was insufficient to prove that he acted with the premeditation and deliberation necessary to support his conviction of first degree murder. As with any challenge to the sufficiency of the evidence, we review the entire record to determine whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The evidence must be viewed in the light most favorable to the judgment, and reversal is unwarranted unless it appears "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We will uphold a judgment against a sufficiency challenge when the circumstances reasonably justify the jury's factual findings, even if the circumstances could be reconciled with a contrary finding. (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

In the context of a first degree murder conviction, "premeditated" means "considered beforehand" and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (CALJIC No. 8.20; *People v. Mayfield* (1997) 14 Cal.4th 668, 767.) "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .'" (*Mayfield*, at p. 767.)

Viewed in the light most favorable to the judgment, the evidence showed that appellant retrieved a loaded gun from inside the garage after Avie returned to the house. He prepared it to fire by disengaging its safety and then shot her six times in the torso area of her body. One of the investigating officers testified that a semiautomatic firearm such as the one used by appellant fires only once each time the trigger is pulled, meaning that appellant would have had to pull the trigger for each shot. A reasonable

jury could infer that appellant made a cold and calculated decision to take Avie's life after rapidly weighing the considerations for and against this course of action. (See *People v. Mayfield*, *supra*, 14 Cal.4th at p. 767.)

Citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, appellant argues that a finding of premeditation and deliberation must be supported by evidence of a motive to kill, planning activity, or an exacting manner of killing. He acknowledges that his professed desire to end his relationship with Avie gave him some motive to kill her, but claims this circumstance was too "speculative" to itself support a first degree murder verdict. The factors enunciated in *Anderson* provide a framework for evaluating the evidence of premeditation on appeal, but they are neither necessary nor exclusive. (*People v. Pride* (1992) 3 Cal.4th 195, 247.) In any event, an application of those factors tends to support, rather than refute, the first degree murder verdict in this case. Appellant's desire to end his relationship with Avie supplied a motive to kill, his retrieval of the gun from the garage was evidence of planning, and the number and placement of the shots fired "was entirely consistent with a preconceived design to take his victim's life." (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 768.) The evidence of premeditation and deliberation was more than adequate to support the verdict of first degree murder.

The judgment is affirmed.

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COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Victoria M. Chavez, Judge

Superior Court County of Los Angeles

Marilyn G. Burkhardt, 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, Lawrence M. Daniels, Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.