

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)

ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed on October 25, 2004, be modified as follows:

1. On page 1, the second sentence of the "FACTS" section, beginning, "On September 29, 2002" is modified to begin, "On the night of September 29, 2002."

2. The following sentence is added to the end of the first paragraph (commencing on page 3 and ending on page 4) under the "DISCUSSION" section: "Officer Kotsinadelis saw no marks on Avie, but felt a bump on her head."

3. The last paragraph commencing on page 8 and ending on page 9, beginning, "This brings us to the degree of proof necessary" is deleted.

4. The first sentence of the first full paragraph on page 9, beginning, "There was clear and convincing evidence" is deleted. The following sentences are added in its place: "This brings us to the degree of proof necessary for the trial court to admit hearsay evidence based on a defendant's forfeiture of rights under the Confrontation Clause of the Sixth Amendment. Our colleagues in the Third District have

applied a standard of clear and convincing evidence when the defendant is alleged to have forfeited his Sixth Amendment right to appointed counsel through misconduct. (*King v. Superior Court* (2003) 107 Cal.App.4th 929, 949.) The People argue that the burden of proof should be preponderance of the evidence because: (1) Evidence Code section 115 provides that the burden of proof is preponderance except as provided by other law; (2) neither federal law nor the federal Constitution requires that forfeiture be proved by more than a preponderance; and (3) the truth-in-evidence provisions of article 1, section 28 of the California Constitution prevent us from applying a more stringent evidentiary standard than is required by the federal Constitution. We leave the issue of the appropriate burden of proof for another day, because in this case, there was clear and convincing evidence that appellant procured Avie's unavailability through criminal conduct--a criminal homicide." The remainder of this paragraph shall remain unchanged.

5. The full text of footnote 5, on page 10, is deleted and the following text is inserted in its place: "We reject the People's argument that the forfeiture of a Confrontation Clause objection by wrongdoing necessarily forfeits a hearsay objection to the same evidence. The rule proposed by the People would effectively create a hearsay exception for all statements by a witness whom the defendant has rendered unavailable. The narrow drafting of Evidence Code section 1350 demonstrates that the Legislature intended such an exception to apply only in very limited circumstances: when the crime charged was a serious felony, when the defendant killed or kidnapped the witness and when the defendant did so for the purpose of preventing arrest or prosecution. Adhering to the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), we will not imply a broader hearsay exception based on forfeiture by wrongdoing than that which has been specified by statute. (See generally *People v. Oates* (2004) 32 Cal.4th 1048, 1057.)"

6. The first full paragraph on page 11, beginning "Fourth, we have required," and including footnote 6, is deleted.

7. The second full paragraph on page 11, beginning, "Fifth, in those cases" is modified so that the first word of that paragraph, "Fifth," is replaced with the word "Fourth."

There is no change in judgment.

Appellant's petition for rehearing is denied.

Respondent's petition for rehearing is denied.