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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL VERNON HORNER,

Defendant and Appellant.

G050242

(Super. Ct. No. 12CF2916)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed in part, reversed in part, and remanded for further proceedings.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

Daniel Vernon Horner appeals from a judgment after a jury convicted him of four counts of committing a lewd act upon a child under 14 and possession and control of child pornography and found true multiple victim enhancements. Horner argues the precharging delay concerning three of the lewd act offenses caused him actual prejudice and insufficient evidence supports the trial court's order he undergo AIDS testing. We disagree with Horner's claim he suffered actual prejudice as a result of the precharging delay. However, we reverse the trial court's order requiring him to undergo AIDS testing and remand the matter for the trial court to determine whether there was probable cause for Horner to undergo AIDS testing.

FACTS

Harry S.

In October 2006, nine-year-old Harry S. lived with his mother, Lorena S., and two sisters in a motel in Los Angeles County. Lorena was friends with Horner and she allowed him to take Harry for the day. However, Horner claimed he ran out of gas and lost his cell phone and the day excursion turned into an entire weekend at his home in Orange County. Although Horner lived with his girlfriend's parents, no one was home that weekend. During that weekend, Horner insisted Harry take four showers. Horner joined Harry in the shower and sexually assaulted him during each shower—Horner would rub Harry's penis for 10 to 15 seconds. Horner also touched Harry's penis outside of the shower in the bathroom.

On one occasion, Harry got out of the shower and Horner ordered him to "turn around" and put his hands on the wall. Horner threatened to hit and spank Harry if he told anyone. When Harry refused, Horner spanked Harry's bare buttocks and responded, "Is that proof enough for you?"

On another occasion, after Harry showered and had dressed, Horner told him to drop his pants and his underwear. When Harry refused, Horner pulled down Harry's pants and underwear. He threatened Harry again and spanked him twice on his

bare buttocks. At some point Horner threatened Harry with a knife. Horner approached Harry from behind, held a knife to his penis, and said, “Have faith and trust, if you tell, I will cut it off.”

Horner also kissed Harry that weekend. The first time was during the second shower. After Horner rubbed Harry’s penis, Horner kissed him on the cheek. During the fourth shower, Horner “French kissed” Harry, inserting his tongue into Harry’s mouth. Harry estimated Horner kissed him four to six times that weekend.

Horner drove Harry to Lorena’s on Sunday night. Harry, upset and confused, told his two sisters what had happened. Harry’s oldest sister, Vanessa, told Lorena and they took him to a Los Angeles Sheriff’s station the next morning. Harry spoke to a sheriff’s deputy with Lorena present. Harry explained how Horner had repeatedly showered naked with him, rubbed his penis, threatened to cut off his penis with a knife, and hit him. Harry recalled the deputy suggesting he “[g]ive it a week.” The deputy reported the matter to the Department of Child and Family Services; the report should have also been sent to the Orange County Sheriff’s Department.

Shortly thereafter, Harry and his family moved to Arizona. Eventually, Horner joined Harry’s family in Arizona and lived with them for a while. Harry and Lorena forgave Horner but did not forget what he had done. Harry avoided being alone with Horner, although they lived with him on several occasions over the course of the next six years. Authorities never contacted Lorena or Harry.

Vincent J.

In August 2012, Horner agreed to help his friend’s sister, Rosalyn M., babysit her three-year-old son Vincent J. in Orange County. One night, Rosalyn noticed discoloration and bruising around Vincent’s genitals, above and on his penis. When she asked him what happened, Vincent indicated Horner slapped his penis. Rosalyn touched Vincent’s bruise to confirm it was a bruise and Vincent, said, “Owie.” Rosalyn called child protective services and they advised her to take Vincent to a doctor and not to

confront Horner or let him be alone with Vincent. Rosalyn photographed Vincent's injuries with her cellular telephone.

The next day, Rosalyn took Vincent to the hospital where officers documented his injuries. That same day, officers contacted Horner, who was still at Rosalyn's home. Horner denied knowing Vincent was injured, with the exception of a skinned knee. He denied hitting, spanking, or abusing Vincent.

A few weeks later, Officer Natalie Nguyen went to Horner's home and interviewed him. This time Horner said he had not only noticed some bruising on Vincent but he photographed it. Horner maintained the only bruising he saw was near Vincent's abdomen, although the photographs he took showed bruising and red marks near Vincent's genitals. Horner claimed he did not tell officers about these injuries because he forgot. Horner denied causing the bruises and said he took the photographs because of an incident involving his son.

Nguyen learned of Harry's report when she ran Horner's name through the coplink database. When Lorena arrived at Horner's home while Nguyen was there, Lorena refused to speak to Nguyen. At some point, Lorena, Harry, and Horner agreed to tell Nguyen it had been a misunderstanding between Horner and Harry. However, Harry eventually told Nguyen the truth about Horner's sexual assaults. Officers found child pornography on Horner's computer that had been downloaded in February 2010 and March 2011. The pornography depicted young children engaging in or personally simulating sexual conduct.

Procedural Facts

In April 2014, an amended information charged Horner with the following: three counts of committing a lewd act upon Harry, a child under 14, in 2006 (Pen. Code, § 288, subd. (a), all further statutory references are to the Pen. Code, unless otherwise indicated) (count 1-genital touching; count 2-genital touching; and count 3-kissing); committing a lewd act upon Vincent, a child under 14, in 2012 (§ 288, subd. (a)) (count

4); and possession and control of child pornography (§ 311.11, subd. (a)) (count 5). The information alleged Horner committed the offenses against more than one victim (§ 667.61, subds. (b), (c) & (e)(5).

Before trial, Horner filed a motion to dismiss counts 1, 2, and 3 for violation of his speedy trial and federal and state due process rights because of the precharging delay. The motion was supported by the following two exhibits: the Los Angeles County Sheriff's Department 2006 incident report concerning Harry; and a 2012 Orange County Sheriff's Department report. The Orange County Sheriff's Department report stated the Los Angeles County Sheriff's Department never forwarded the 2006 incident report concerning Harry to the Orange County Sheriff's Department for investigation. Acknowledging he had the burden to establish actual prejudice before the prosecution was required to offer a justification for the delay, Horner provided a number of items he claimed established actual prejudice, including the fading of witnesses' memories, lost physical evidence, and the inability to locate and unavailability of witnesses. The prosecution filed an opposition arguing Horner's right to a speedy trial had not yet attached and his claims of actual prejudice were too speculative and conclusory. As to justification for the delay, the prosecution stated, "It does not appear [the Harry incident] report was forwarded to Orange County law enforcement officials in 2006." The prosecution argued the trial court should either deny the motion or alternatively decide the motion after trial. At a hearing, the trial court, Judge Michael J. Cassidy, denied the motion without prejudice because Horner had not established actual prejudice.

Three weeks later, Horner filed a motion to dismiss counts 1, 2, and 3 for violation of his due process rights because of the precharging delay. With respect to actual prejudice, Horner provided many of the same items he did in his first motion. He added that a number of people who would have provided favorable testimony were deceased and his relationship with one witness had soured to the point she would not

testify on his behalf. The prosecution filed an opposition on the same grounds raised in its first opposition. At a hearing, the trial court, Judge W. Michael Hayes, deferred ruling on the motion until the case was set for trial and the trial judge could rule on the motion. The case was assigned to Judge Gary S. Paer for trial.

At a pretrial hearing, the trial court, Judge Paer, stated he read and considered the pretrial motions, including Horner's motion to dismiss and the prosecution's supplemental in limine motion asserting evidence concerning Harry was admissible as to the other counts pursuant to Evidence Code section 1108 and 1101, subdivision (b). After hearing argument, the court ruled it would delay ruling on Horner's motion to dismiss until the end of trial when it would be in a better position to assess any prejudice within the context of the entire case. The court indicated it would permit Horner to present any additional evidence at that time. The court also ruled evidence concerning Harry was admissible pursuant to Evidence Code section 1108, and Evidence Code section 1101, subdivision (b), to prove motive and intent.¹

At trial, the prosecution offered Harry's, Rosalyn's, and law enforcement officers' testimony as detailed above. As relevant here, defense counsel cross-examined Harry about his drug use and whether he was under the influence at the time of the incident in 2006; he said he was not. Counsel also cross-examined Harry thoroughly regarding Harry subsequently telling law enforcements officials Horner did not sexually abuse him.

Horner offered the following testimony. Horner's friend from church testified she met him in Fall 2011 and she believed Horner and Harry had a caring relationship. Two of Horner's friends testified they had observed Harry act normally

¹ The trial court later instructed the jury with a modified version of CALCRIM No. 1191, "Evidence of Uncharged Sex Offense," to state they were *charged* offenses and the burden of proof was beyond a reasonable doubt and not preponderance of the evidence.

around Horner. The social worker who investigated the allegations found evidence Horner physically abused Vincent but she did not find evidence of sexual intent. However, she did not consider the allegations concerning Harry or the child pornography found on Horner's computer.

Finally, defense counsel called Lorena and questioned her about Horner's vehicle and whether she stole it. Lorena testified Horner gave her permission to drive the vehicle. Defense counsel impeached Lorena with her prior voluntary manslaughter conviction, the fact she was bipolar and was not taking her medications at the time she and Harry reported appellant's sexual abuse, and the fact she was arrested for fraud and forgery.

The jury convicted Horner of all the counts and found true the multiple victim enhancements. Weeks later, Horner renewed his motion to dismiss counts 1, 2, and 3 for violation of his due process rights because of the precharging delay and submitted affidavits, including one from his counsel, Adam Vining, and Orange County Public Defender investigator, Tony Tersigni.

In his affidavit, Vining provided the following list of items demonstrating the precharging delay caused Horner actual prejudice: Horner's memory of the events eight years earlier had faded and he was unable to recall events; several people who lived with Horner would have testified he did not commit the alleged crimes but they are all now in the Philippines and he was unable to locate them; Horner's grandmother, who was now deceased, would have provided him with an alibi defense; Horner believed Harry and Lorena would have cooperated and spoken with defense counsel had the prosecutor timely filed the charges; the defense was unable to locate Vanessa, who would have testified Harry's allegations were false; physical evidence, including Harry's medical records, text messages between Horner and Lorena, surveillance video concerning another alleged instance where Horner molested Harry, and Lorena's criminal history were unavailable or lost; a few days before the alleged incident, Lorena stole Horner's

vehicle and when Horner threatened to report Lorena to the police, Lorena caused Harry to fabricate the sexual abuse story; the defense was unable to locate his ex-wife and her family members and two mental health professionals who would have testified concerning Lorena stealing his car; Horner's ex-wife and her family would no longer provide an alibi defense for him because their divorce complicated her immigration status and their relationship had deteriorated; the child protective services professional who took the report from Harry in 2006 was unavailable and would have testified he did not think further investigation was warranted; Harry's grandfather, who was now deceased, would have testified Harry admitted while Horner was present that he fabricated the allegations; the defense was unable to locate numerous witnesses who were at a party when Harry stated he fabricated the allegations against Horner; two witnesses the defense could not locate would have testified Harry subsequently spent time alone with Horner and Harry used drugs; one witness, who was now deceased, would have testified Lorena subsequently left Harry alone with Horner; evidence concerning Lorena's criminal history had been destroyed and Horner was unable to impeach her credibility; and he could not locate other individuals who would have provided him with favorable character evidence.

In his affidavit, Tersigni detailed the unsuccessful efforts he made to contact Horner's ex-wife and her family, Harry's family, various officers, child protective services and mental health professionals, and other people who would allegedly provide favorable testimony for Horner.

At a hearing the following week, the trial court indicated it had read and considered all the previously filed motions. Conceding "the six-year delay . . . by the police[]" was negligent, the prosecutor contended there was "no evidence" Horner suffered actual prejudice because the evidence detailed in Vining's affidavit was irrelevant, speculative, and inadmissible.

Defense counsel argued the prosecution waited to gain a tactical advantage and the delay prejudiced Horner. The trial court disagreed, explaining the prosecution could not have purposefully delayed prosecution because it did not receive the incident report concerning Harry until 2012.

Against defense counsel's advice, Horner presented argument. Horner stressed he was prejudiced because two witnesses the defense could not locate would have testified concerning Lorena's motive for persuading Harry to fabricate the sexual abuse allegations—Lorena stole Horner's vehicle and feared prosecution. The trial court stated defense counsel examined Lorena about the vehicle.

The trial court denied Horner's motion to dismiss counts 1, 2, and 3 for precharging delay because Horner did not establish actual prejudice. The court explained the offenses occurred in Horner's home with no one present except him and Harry and thus there was no eyewitness testimony regarding the incident. The court added Harry's immediate reporting of the incident overcame the assertion Harry fabricated the offenses, and defense counsel thoroughly and effectively cross-examined Harry and explored the prior inconsistent statements. The court characterized Horner's contention memories have faded as "boilerplate" that was entirely speculative. The court cited to specific portions of Vining's affidavit concluded it was either speculative, without foundation, irrelevant, speculative, hearsay, or inadmissible opinion evidence. The court stated defense counsel was permitted to cross-examine Harry about his drug use and "severely impeached" Lorena's credibility with her criminal history and her parenting skills, or lack thereof.

The trial court sentenced Horner to 55 years to life in prison as follows: count 1-15 years to life; count 2-consecutive term of 15 years to life; and count 4-consecutive term of 25 years to life. The court imposed concurrent terms on counts 3 and 5. The trial court ordered Horner to undergo AIDS testing pursuant to section 1202.1 without comment or objection from Horner.

DISCUSSION

I. Precharging Delay

Horner argues the trial court erred by denying his motion to dismiss counts 1, 2, and 3 because the precharging delay caused him actual prejudice and the prosecution's justification for the delay did not outweigh the actual prejudice. As we explain below, Horner failed to demonstrate actual prejudice.

“The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution protect a defendant from the prejudicial effects of lengthy, unjustified delay between the commission of a crime and the defendant's arrest and charging. [Citations.] Such prearrest or precharging delay does not implicate the defendant's state and federal speedy trial rights [citation], as those rights do not attach until a defendant has been arrested or a charging document has been filed. [Citation.] [¶] When, as here, a defendant does not complain of delay after his arrest and charging, but only of delay between the crimes and his arrest, he is ‘not without recourse if the delay is unjustified and prejudicial. “[T]he right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.” [Citation.] Accordingly, “[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay.” [Citation.]’ [Citation.] [¶] Prejudice may be shown by “‘loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.’” [Citations.] And although the federal constitutional standard

for what constitutes sufficient justification for delay is unclear [citation], . . . ‘the law under the California Constitution is at least as favorable for the defendant in this regard’ as federal law. [Citation.]” (*People v. Cowan* (2010) 50 Cal.4th 401, 430 (*Cowan*).)

“““In the balancing process, the defendant has the *initial* burden of showing some prejudice before the prosecution is required to offer any reason for the delay [citations]. The showing of prejudice requires some evidence and cannot be presumed. [Citations.]”” [Citation.]” (*People v. Alexander* (2010) 49 Cal.4th 846, 874 (*Alexander*).) We defer to the trial court’s factual findings if substantial evidence supports them, and we review a trial court’s ruling on a motion to dismiss for prejudicial prearrest delay for an abuse of discretion. (*Cowan, supra*, 50 Cal.4th at p. 431.)

Here, the trial court properly denied Horner’s motion to dismiss because he did not satisfy his initial burden of establishing he suffered actual prejudice from the precharging delay. Horner’s case for actual prejudice rests on the following evidence.

Horner contends he met his burden of showing actual prejudice from the precharging delay because numerous witnesses who lived at his house and would have testified concerning circumstances that weekend in 2006 were out of the country. First, Horner has never asserted there were any witnesses who could testify concerning what transpired between him and Harry. There could not be, as the evidence at trial demonstrated the only two people at the home that weekend were Horner and Harry. Harry testified he at no point saw anyone at the house that weekend. Because the evidence demonstrated Horner and Harry were home alone that weekend, testimony from people who lived at the house was of no evidentiary value and was irrelevant.

Horner also contends two county mental health professionals would testify Horner called them sometime in October 2006 and reported Lorena had stolen his vehicle. Horner asserts this evidence was relevant because it tended to support his theory Lorena had a motive to persuade Harry to fabricate the sexual abuse allegations against Horner. First, Harry’s out-of-court statements to the extent they were relevant were

hearsay, and Horner offers no argument on the basis of their admissibility. Nor does he explain when he made the statements—was it before he learned of Harry’s accusations or after when he had a motive to report his vehicle stolen? Second, defense counsel questioned Lorena about Horner’s vehicle and whether she stole his vehicle. To the extent, if at all, Horner’s out-of-court statements to county mental health professionals were admissible, this evidence was of no evidentiary value as they were potentially self-serving and too speculative.

Horner asserts as many as seven witnesses would testify that at a party Harry said he fabricated the sexual abuse allegations against Horner. Again, Harry’s out-of-court statements to the extent they were relevant were hearsay, and Horner offers no argument on the basis of their admissibility. Additionally, Horner offers no specifics as to the party. Was the party in 2006 in which case Horner was aware of the accusations and evidence Harry fabricated the sexual abuse allegations? Horner’s self-serving statements Harry admitted fabricating the sexual abuse allegations at some unknown time was too speculative to have any evidentiary value. Moreover, the jury heard other evidence Harry subsequently stated Horner did not sexually abuse him.

Horner’s reliance on *People v. Chatman* (2006) 38 Cal.4th 344 (*Chatman*), to argue a lay witness may testify another witness is lying both glosses over an important distinction and is of no help in this case. Horner cites to a portion of *Chatman* where the court, citing to Dean Wigmore’s evidence treatise, characterizes the legal cliché evidence that usurps the province of the jury is inadmissible as ““empty rhetoric”” that should be repudiated. (*Id.* at p. 380.) After characterizing lay opinion from those who had no personal knowledge of the facts of the case as unhelpful, the *Chatman* court stated, “There is a difference between asking a witness whether, in his opinion, another is lying and asking that witness whether he knows of a reason why another would be motivated to lie.” (*Id.* at p. 381.) Here, none of the witnesses who Horner asserted would testify had personal knowledge of the facts of the case. Additionally, neither at trial nor on appeal

has he cited to any *admissible* witness testimony Harry had a motive to lie. At trial, defense counsel elicited testimony from Harry and Lorena suggesting they had a motive to lie, and during closing argument, counsel argued they had a motive to lie. The jury was not persuaded by that evidence and rejected the defense's theory of the case.

Finally, Horner argues the following list of lost evidence resulted in actual prejudice: Harry's medical records; Horner's and Lorena's text messages; surveillance video concerning another alleged instance where Horner molested Harry; and Lorena's criminal history. Horner does not discuss each piece of lost evidence or how this evidence would have supported his defense. Harry's medical records were of little if any relevance because there was no evidence Horner inflicted any significant injuries that had lasting effects. Horner has failed to explain and we frankly are unsure of what relevance the text messages between Horner and Lorena have on the issue of whether Horner sexually abused Harry. Similarly, video surveillance footage from sometime in 2006 that would establish Harry falsely accused Horner of sexual abuse on another occasion is also too speculative to have any evidentiary value. At trial, defense counsel thoroughly cross-examined Harry about the inconsistencies in his testimony of the October 2006 events and his subsequent statements to law enforcement authorities. Finally, the jury heard evidence of Lorena's criminal history and defense counsel thoroughly impeached her credibility with that history and the poor choices she made as a parent. Horner detailed the above evidence in his motion to dismiss, the trial court considered and rejected it, and Horner has not satisfied his burden on appeal of demonstrating the court's ruling was arbitrary, capricious, or patently absurd. (*Cowan, supra*, 50 Cal.4th at p. 431.) Thus, the trial court properly concluded Horner did not establish the precharging delay resulted in actual prejudice.

Although Horner's failure to demonstrate any actual prejudice is a fatal flaw that forecloses the need to address the prosecution's justification for the delay *People v. Jones* (2013) 57 Cal.4th 899, 921, we briefly address this element. "Purposeful

delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.” (*People v. Nelson* (2008) 43 Cal.4th 1242, 1256.)

Contrary to Horner’s repeated claims otherwise, there was no evidence the prosecution delayed prosecuting Horner for counts 1, 2, and 3 for a tactical advantage. In fact, there was evidence, the Orange County Sheriff’s Department 2012 report, indicating it had never received the Los Angeles County Sheriff’s Department 2006 report regarding Harry. The trial court concluded, and we agree, the delay was the result of negligence and not a purposeful delay to gain an advantage. This was not a situation where the Orange County Sheriff’s Department received the report in 2006, realized it was Harry’s word against Horner, and waited for a second complaint. Horner’s claim this was the state of the evidence is belied by the record. Therefore, the trial court properly denied Horner’s motion to dismiss counts 1, 2, and 3 for precharging delay.

II. AIDS Testing

Horner argues insufficient evidence supports the trial court’s order requiring him to undergo AIDS testing because the trial court made no findings to support the order and a review of the record discloses no evidence supporting the order. The Attorney General agrees the court failed to make express findings to support the order but contends the record discloses evidence to support the order. The sole issue is whether Horner’s act of French kissing Henry on four separate occasions that October 2006 weekend require Horner to undergo AIDS testing.

Section 1202.1, subdivision (a), provides “the court shall order every person who is convicted of . . . a sexual offense listed in subdivision (e), . . . to submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) within 180 days of the date of conviction.” “Lewd or lascivious conduct with a child in violation of [s]ection

288” (§ 1202.1, subd. (e)(6)(A)(iii)), is listed as one of the offenses requiring the court order such a test if the court “finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim[.]” (§ 1202.1, subd. (e)(6)(A).)

An order compelling an AIDS/HIV test pursuant to section 1202.1 may be challenged on appeal for insufficiency of the evidence even absent an objection because involuntary testing is “strictly limited by statute” and conditioned on a probable cause finding and “[w]ithout evidentiary support the order is invalid.” (*People v. Butler* (2003) 31 Cal.4th 1119, 1123.) “Under the substantial evidence rule, a reviewing court will defer to a trial court’s factual findings to the extent they are supported in the record, but must exercise its independent judgment in applying the particular legal standard to the facts as found. [Citations.]” (*Id.* at p. 1127.) “[I]f the trial court orders testing without articulating its reasons on the record, the appellate court will presume an implied finding of probable cause. [Citation.]” (*Ibid.*) “[T]he appellate court can sustain the order only if it finds evidentiary support, which it can do simply from examining the record.” (*Ibid.*)

Both Horner and the Attorney General cite to the United States Health and Human Services website. Citing to information on the website, Horner argues AIDS cannot be transferred through saliva. Citing to other information on the website, the Attorney General responds AIDS can be transmitted through deep open mouthed kissing if the person has sores or bleeding gums and blood is exchanged. In other words, this issue requires us to consider Horner’s oral hygiene. This we cannot do on a cold record. Thus, the appropriate remedy is to remand the matter to the trial court to give the prosecution the opportunity to offer evidence, if any exists, to support such an order. (*Butler, supra*, 31 Cal.4th at p. 1129.)

DISPOSITION

The order for AIDS testing is reversed and the matter is remanded for an evidentiary hearing. (*Butler, supra*, 31 Cal.4th at p. 1129.) In all other respects, the judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.