Filed 5/7/18 P. v. Godoy CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JORGE MARIO GODOY, Defendant and Appellant.	B280892 (Los Angeles County Super. Ct. No. BA434355)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Judgment of conviction affirmed; remanded for further proceedings.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jorge Mario Godoy was convicted by a jury of second degree murder with a firearm use enhancement. Sentenced to 25 years to life in prison, Godoy appeals. He contends the trial court made instructional errors, requiring reversal, and the matter must be remanded to allow the trial court to exercise its discretion to strike or dismiss the firearm enhancement pursuant to recently amended Penal Code section 12022.53, subdivision (h).[1] We affirm Godoy's conviction, but remand the matter to allow the trial court to exercise its discretion and determine whether to strike or dismiss the firearm enhancement.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

In March 2015, appellant Godoy was living in his friend Luis Arambula's car, in front of Arambula's Huntington Park apartment. The apartment was located across the street from a park. Godoy was a drug addict, and used methamphetamine, heroin, PCP, and other substances on a daily basis. Arambula was Godoy's drug contact. The victim, Daniel Ivan Santamaria Ramirez, who lived in the park, was also a friend of Godoy's.

On the evening of March 5, 2015, Godoy and Arambula smoked methamphetamine and then sat outside in Arambula's front yard and porch area, which was enclosed by a waist-high fence. At approximately 10:00 p.m., Godoy's friends, 18-year-old Alfredo Acevedo and a man known as "Barber," arrived at the apartment on their skateboards. Shortly thereafter, Arambula went inside the apartment and Barber left. According to

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

Acevedo, Ramirez arrived and said he wanted to borrow Arambula's pellet gun because "some kids" were trying to steal his belongings, he had been in "a couple fights," and he wished to "scare them off or something." Ramirez remained outside the fenced area. Godoy told Ramirez to " 'shut up' " because a neighbor walked by when Ramirez asked to borrow the gun. Godoy twice asked if Ramirez wanted to " 'catch that fade,' " that is, fight. Ramirez "backed down," stating that he had better things to do or " 'bigger problems to deal with.' " Two or three weeks earlier, Ramirez had also declined Godoy's challenge to fight. Godoy got out of his chair and moved closer to the fence, upon which Ramirez was leaning. Ramirez backed up. Acevedo told Godoy, " 'Now is not the time. Don't fight him.' " Ramirez did not lunge at Godoy, make his hands into fists, or do anything indicating he wished to fight. However, Godoy pulled a Ruger revolver from his pants, aimed it at Ramirez's head, and fired a single shot, hitting Ramirez's face and fatally wounding him. Godoy appeared angry when he shot.

Immediately after shooting Ramirez, Godoy fled the scene with the gun. According to Acevedo, Godoy's expression indicated he was scared and "didn't know what the hell he just did." Godoy fled to his mother's apartment a few blocks from the shooting scene. When he arrived, he was in a panicked state. Godoy told his family that he had gotten into an altercation with another man, hit the man with the gun, and the gun went off. He said he did not intentionally shoot. Godoy repeatedly asked his family not to call the police, but when he took a shower his mother took the gun and his brother called the police. Godoy's sister gave the gun to detectives who responded to the call.

Police found Ramirez's body in Arambula's driveway, in a large pool of blood. There were no weapons near his body. Acevedo identified Godoy as the shooter from a six-pack photographic lineup.

The gun used to shoot Ramirez, which was registered to Arambula, was a .44 caliber Ruger revolver. According to expert testimony presented by the prosecution at trial, it could not be fired unless the trigger was pulled. Hitting the gun against something would not cause it to fire. Forensic analysis of the gun and Ramirez's wound revealed the shot was likely fired from a distance of greater than 3 and less than 12 inches from Ramirez's face. Ramirez did not have a contact wound, indicating the gun was not touching him when it was fired. The firearms expert could not rule out the possibility that if the gun was moving in a punching motion when it fired, the recoil could be mistaken for contact with the victim.

Godoy testified in his own behalf, as follows. When Acevedo and Barber arrived at Arambula's apartment, Arambula told Godoy that he wished to confront Barber about items he believed Barber had taken from Arambula's garage without permission. Arambula retrieved his revolver and asked Godoy to hold it " 'just in case.' " Godoy put the gun in his pocket. Arambula and Barber argued, but Godoy helped mediate an end to the dispute. Arambula went inside and Barber left. When Ramirez arrived, he told Godoy he needed to talk to Arambula so he could borrow Arambula's revolver. Ramirez said he had "fucked . . . up" two people, other persons "from back home" were "messing with him," and he wanted to go "take care of some business back home." Godoy asked Ramirez when they were going to fight, apparently as a result of Godoy's objection to

Ramirez's practice of bringing high school students to areas where drugs were being used. Ramirez replied " '[n]ot right now' " because he had "bigger problems." Godoy decided he would not give Ramirez the gun. He was afraid Ramirez would hurt or kill someone with it. The men continued to argue about the gun, with Ramirez outside the fence and Godoy inside it, about a foot away from each other. Godoy pulled the gun from his pocket and showed it to Ramirez, saying " 'you ain't getting it because I got it.' " Ramirez continued to ask for the gun, and then reached over the fence for it. Reflexively, Godoy stepped back and punched Ramirez in the face with the hand that was holding the gun. It accidentally fired. Godoy acknowledged that he might have had his finger on the trigger, and might have accidentally pulled the trigger when he made a fist to land the punch. Frightened after the shooting, Godoy fled with the gun to his mother's house. He had not intended to shoot Ramirez or to kill him; it was an accident.

Godoy admitted knowing the gun was inherently dangerous, but he had not known whether it was loaded. Shortly after the shooting he told a detective he was not scared of Ramirez; he knew he could beat Ramirez up because he (Godoy) used to be a boxer. At trial he confirmed that he had never been afraid of Ramirez and was not afraid of him the night of the shooting. Godoy believed he and Ramirez would eventually fight each other. However, in Godoy's experience, it was common for friends to physically fight when there was tension between them, and then smoke and drink together afterwards as if nothing had happened.

Godoy admitted suffering a felony conviction in 2014 for automobile burglary.

Godoy's mother testified that he was "[e]xtremely high" when he arrived at her residence after the shooting. He cried, hit himself on the head with the gun, and stated he did not know what he had done.

2. *Procedure*

A jury convicted Godoy of second degree murder, and acquitted him of first degree murder. (§ 187, subd. (a).) It found Godoy personally used a firearm (§ 12022.53, subd. (b)), but found allegations he personally discharged the gun not true. (*Id.*, subds. (c), (d).) The trial court sentenced Godoy to 15 years to life in prison for the murder, plus 10 years for the firearm enhancement, for a total of 25 years to life. It ordered victim restitution in the amount of $7,338.20, and imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, and a criminal conviction assessment. Godoy appeals.

DISCUSSION

1. *The trial court did not commit instructional error*

Godoy argues the trial court erred by (1) failing to sua sponte instruct the jury on "perfect" self-defense, and (2) declining his request to instruct on voluntary manslaughter on an imperfect self-defense theory. He contends the purported errors violated his due process rights, and require reversal. We disagree.

a. *Additional facts*

The trial court instructed the jury on first and second degree murder, and on involuntary manslaughter. Godoy did not request, and the court did not give, an instruction on self-defense. The court declined Godoy's request for a voluntary manslaughter instruction on an imperfect self-defense or defense of others

theory. It concluded such an instruction would be inconsistent with Godoy's defense at trial, and there was no evidence to support a finding Godoy believed he, or anyone else, was in imminent danger.[2]

b. *Applicable legal principles*

A trial court must instruct the jury on all general principles of law relevant to the issues raised by the evidence, including lesser included offenses, and defenses on which the defendant relies and that are not inconsistent with his theory of the case, whether or not the defendant makes a formal request. (*People v. Moye* (2009) 47 Cal.4th 537, 548; *People v. Abilez* (2007) 41 Cal.4th 472, 517.) Instruction on a lesser included offense is required when there is evidence the defendant is guilty of the lesser offense, but not the greater. (*People v. Whalen* (2013) 56 Cal.4th 1, 68; *People v. Thomas* (2012) 53 Cal.4th 771, 813.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) The existence of *any* evidence, no matter how weak, will not justify instructions on a defense or a lesser included offense. (*People v. Whalen, supra*, at p. 68; *People v. Wyatt* (2012) 55 Cal.4th 694, 698.) In deciding whether there is substantial evidence we do not

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[2] Godoy's counsel expressly stated he did not wish the jury to be instructed on accident. A trial court has no duty to sua sponte instruct with CALCRIM No. 3404 on the "defense" of accident. (*People v. Anderson* (2011) 51 Cal.4th 989, 996-997.) The claim that a homicide was committed by accident amounts to a claim that the defendant acted without forming the required mental state, and therefore instructions on the intent or mental state requirement of the charged crime adequately convey the relevant legal principles. (*Id.* at p. 997.)

evaluate the credibility of the witnesses, a task for the jury. (*People v. Wyatt*, *supra*, at p. 698; *People v. Manriquez* (2005) 37 Cal.4th 547, 585.)

We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense or a defense. (*People v. Trujeque* (2015) 61 Cal.4th 227, 271; *People v. Simon* (2016) 1 Cal.5th 98, 133; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

"The doctrine of self-defense embraces two types: perfect and imperfect." (*People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1168.) "Perfect" self-defense, which exonerates a defendant completely, requires that he had an honest and reasonable belief that the use of force was necessary to defend against an imminent threat of bodily injury against himself or another, and that he used no more force than was necessary to defend against that threat. (§ 197, subd. 1; *People v. Rodarte*, *supra*, at p. 1168; *People v. Moye*, *supra*, 47 Cal.4th at p. 550; *People v. Hernandez* (2011) 51 Cal.4th 733, 747; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 49-50.) Imperfect self-defense "is the killing of another human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury. [Citation.]" (*People v. Booker* (2011) 51 Cal.4th 141, 182; *People v. Simon*, *supra*, 1 Cal.5th at p. 132.) Because the reasonableness or unreasonableness of the defendant's belief is tested from the defendant's perspective, a trier of fact may consider a victim's prior threats and violence to corroborate the defendant's testimony that he feared for his or another's life. (*People v. Trujeque*, *supra*, 61 Cal.4th at p. 271.) Imperfect self-defense or imperfect defense of others is not a complete defense to a killing, but negates malice and reduces the offense to voluntary

manslaughter. (*Ibid.*; *People v. Elmore* (2014) 59 Cal.4th 121, 134; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) For both perfect and imperfect self-defense, the fear must be of imminent harm. (*People v. Trujeque*, *supra*, at p. 270; *People v. Humphrey*, *supra*, at p. 1082.)

c. *The trial court properly declined to instruct on perfect and imperfect self-defense*

The trial court here correctly omitted a self-defense instruction, because there was no substantial evidence from which the jury could have found Godoy acted in self-defense or the defense of others, and the instruction ran counter to his theory of defense at trial. Godoy did not testify that he intentionally shot Ramirez because he believed deadly force was required to defend himself or anyone else from an imminent attack. Instead, he testified that the gun accidentally discharged when he struck Ramirez with it. Crediting Godoy's account, the shooting was purely accidental. In general, an accidental shooting is inconsistent with an assertion of self-defense. (See, e.g., *People v. Villanueva*, *supra*, 169 Cal.App.4th at p. 50; *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357 ["self-defense imports an intentional shooting; it does not apply to an accidental one"].) A trial court has no duty to sua sponte instruct on a defense that is inconsistent with the defendant's theory at trial. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1052 [trial court's duty to instruct sua sponte on a particular defense arises only if the defendant is relying on such a defense, or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant's theory of the case]; *People v. Barton* (1995) 12 Cal.4th 186, 197; *People v. Villanueva*, *supra*, at p. 49 ["If the defense is supported by the evidence but is inconsistent with the

defendant's theory of the case, the trial court should instruct on the defense only if the defendant wishes the court to do so."].)

Godoy argues that the jury might have rejected his testimony and could have concluded he acted out of fear and in self-defense. We do not see how. Certainly, a jury may credit portions of a defendant's case while disbelieving others. (*People v. Elize* (1999) 71 Cal.App.4th 605, 610; *People v. Villanueva*, *supra*, 169 Cal.App.4th at p. 51 [defendant's assertion of accident may be disregarded by the jury in an appropriate case and will not foreclose a self-defense instruction, "when there exists substantial evidence that the shooting was intentional" and other requirements of self-defense are met]; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137 [substantial evidence to support an instruction may exist even in the face of inconsistencies presented by the defense itself].) But "[s]peculative, minimal, or insubstantial evidence is insufficient to require an instruction on a lesser included offense." (*People v. Simon*, *supra*, 1 Cal.5th at p. 132; *People v. Trujeque*, *supra*, 61 Cal.4th at p. 272.) There was no evidence here, either circumstantial or direct, from which the jury could have concluded, in contradiction to Godoy's own testimony, that he was actually afraid of the victim and purposely shot him due to a belief he was in imminent peril. Godoy testified that he was not afraid of Ramirez and believed he could best him in a fight. Godoy also testified he "didn't think at all once I saw him reaching for" the gun, but "just reacted." There was no evidence Ramirez had threatened or behaved violently toward Godoy either in the past or on the night of the shooting. (See *People v. Trujeque*, *supra*, at p. 272.) There was no evidence Godoy thought Ramirez wanted the gun to use against *him*; he testified Ramirez wanted the gun to "take care of

business" with other persons who were "messing with" him. Jurors could not have inferred from Godoy's testimony or any other evidence that Ramirez would have "used the gun on" Godoy had he obtained access to it, as Godoy argues. According to Godoy, he and Ramirez were friends, and their only disagreement regarded Godoy's concern that Ramirez had exposed high school students to drugs; there was no showing Ramirez was angry with Godoy. Godoy repeatedly challenged Ramirez to fight, not vice versa, and Ramirez repeatedly declined the invitation. In any event, in Godoy's experience a fight with a friend was not a life-threatening situation; it was common for him and his friends to physically fight to release tension and then socialize afterwards. Ramirez was unarmed, and Godoy did not state he believed otherwise. When Ramirez reached for the gun, he and Godoy were separated by a fence, and Godoy was able to step back from him. (See *People v. Simon*, *supra*, at p. 134 [where the record does not contain substantial evidence showing defendant actually believed he was in imminent danger of great bodily injury or death, trial court does not err by refusing instruction]; *People v. Manriquez*, *supra*, 37 Cal.4th at pp. 580-583 [rejecting claim that trial court improperly refused imperfect self-defense instruction, where the record was "devoid of evidence" supporting the defendant's subjective fear].) Under the foregoing circumstances, and contrary to Godoy's argument, the fact the victim purportedly reached for the gun was not substantial evidence supporting a self-defense instruction.

Nor could the jury have inferred Godoy was acting in defense of others. Even assuming arguendo that Godoy's testimony supported a conclusion that he believed Ramirez intended to shoot the persons who were "messing with him,"

there was no evidence showing any threat to these unnamed persons, who were located at another location, was imminent. "To satisfy the imminence requirement, '[f]ear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury. " '[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with*.' " ' " (*People v. Trujeque*, *supra*, 61 Cal.4th at p. 270.) There was no evidence of such imminence here.

Godoy cites *People v. Wickersham* (1982) 32 Cal.3d 307, in support of his contention that because he was "a foot away from an angry man bent on using the gun," who grabbed for the gun, the evidence was sufficient to support a self-defense instruction. But *Wickersham* does not assist him. There, the defendant and her husband were in the process of divorcing. According to the defendant, her husband was volatile, always seemed to be on the verge of striking her, and had sometimes worn a gun at their house. She had complained to police that he had made threats against her, had exposed a gun in a threatening manner, and had called her several times when drunk or enraged. (*Id.* at pp. 317-318.) She testified that she accidentally shot her husband when they scuffled over a gun he discovered in a closet in their home. (*Id.* at p. 322.) *Wickersham* concluded there was sufficient evidence to support an imperfect self-defense instruction, given defendant's testimony that, inter alia, the husband grabbed for the gun and attempted to take it from her; he had previously fought her for possession of a gun; he had made previous threats on her life; and her statements after the shooting – that her

husband went crazy and reached into a pocket where he carried a gun – lent support to the imperfect self-defense theory. (*Id.* at p. 328 & fn. 7.) *Wickersham* suggested in dicta that "[g]iven the background of reported threats by the victim, the jury could have found that a reasonable person in appellant's position, faced with an attack of this nature, would have been overcome by fear and acted to repel the attacker." (*Id.* at p. 327.)[3] As is readily apparent, in the instant matter there is no comparable evidence showing that Ramirez had ever threatened Godoy, or that Godoy had any reason to fear him.

For the same reasons, we conclude there was no evidence from which the jury could have inferred Godoy acted in imperfect self-defense or imperfect defense of others. "[The imperfect self-defense] doctrine is narrow. It requires without exception that the defendant must have had an *actual* belief in the need for self-defense. . . . Put simply, the trier of fact must find an *actual* fear of an *imminent* harm. Without this finding, imperfect self-defense is no defense." (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) As explained *ante*, there was insufficient evidence showing Godoy had an actual fear of imminent harm. Thus, the trial court correctly declined the proposed instruction.

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[3] Notwithstanding its conclusion that the evidence supported an imperfect self-defense instruction, the *Wickersham* court concluded that the trial court was not required to instruct on imperfect self-defense because the defense had not requested and was not relying upon an imperfect self-defense theory. (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 329.) The court's conclusion that an imperfect self-defense instruction was not required to be given sua sponte was later disapproved by *People v. Barton*, *supra*, 12 Cal.4th at pages 200-201.

In sum, even piecing together the defense and the prosecution evidence in the manner most favorable to Godoy, there was no evidence that would have allowed the jury to conclude he intentionally shot Ramirez in the actual belief, reasonable or unreasonable, that he or another person was in imminent danger. Accordingly, there was no instructional error.[4]

2. *The matter must be remanded to allow the trial court the opportunity to exercise its discretion pursuant to amended section 12022.53*

When Godoy was sentenced in January 2017, imposition of a section 12022.53 enhancement was mandatory and the trial court lacked discretion to strike it. (See former § 12022.53, subd. (c), Stats. 2010, ch. 711, § 5; *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362–1363.) Accordingly, the trial court sentenced Godoy to an additional 10-year term for his use of a firearm. (§ 12022.53, subd. (b).) Effective January 1, 2018, the Legislature amended section 12022.53 to give trial courts authority to strike firearm enhancements in the interest of justice. (Sen. Bill No. 620 (2017-2018 Reg. Sess.), Stats. 2017, ch. 682, § 2.) As amended, section 12022.53 provides in pertinent part: "(h) The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." In supplemental briefing, Godoy contends his case must be

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[4] In light of our conclusion, we need not reach the parties' arguments regarding prejudice.

remanded to the trial court to allow the court to exercise its discretion to strike the firearm enhancement.

As the People correctly concede, the amendment to section 12022.53 applies to cases, such as appellant's, that were not final when the amendment became operative. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) Under *In re Estrada* (1965) 63 Cal.2d 740, we assume that, absent contrary evidence, an amendment reducing punishment for a crime applies retroactively to all nonfinal judgments. (*Id.* at p. 745; *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Vieira* (2005) 35 Cal.4th 264, 305-306.) The *Estrada* rule has been applied to penalty enhancements, as well as to amendments giving the court discretion to impose a lesser penalty. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.)

Although the People concede the amendments to section 12022.53 apply retroactively, they urge that remand is unnecessary because no reasonable court would exercise its discretion to strike the firearm enhancement here. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) We disagree. Generally, "when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed

discretion."[5] (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) Remand is required to allow the trial court to exercise its discretion, unless remand would be an idle act because the record shows the court would not have exercised its discretion even if it could have done so. (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901.)

Here, contrary to the People's argument, the record does not reflect that remand would be an idle act. At sentencing, the trial court observed the sentence was "pretty straightforward." We do not interpret this remark as an indication the trial court would inevitably have imposed the firearm enhancement, as the People suggest. The court's remark instead appears to reflect the fact that when sentence was imposed, it had little discretion under the applicable statutes. Nothing in the record indicates whether the trial court would have imposed the firearm enhancement had it possessed the discretion not to do so. (See *People v. Deloza* (1998) 18 Cal.4th 585, 599-600 [remand for resentencing appropriate where trial court did not understand it had discretion to impose concurrent rather than consecutive sentences].) Accordingly, the trial court must be given the opportunity to exercise the discretion conferred by Senate Bill No. 620. We express no opinion about how the court's discretion should be exercised.

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[5] Here, of course, the trial court did not misunderstand the scope of its discretion; it did not have discretion to strike the firearm enhancement prior to Senate Bill No. 620's effective date.

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded to allow the trial court to exercise its discretion and determine whether to strike or dismiss the section 12022.53, subdivision (b) firearm enhancement pursuant to section 12022.53, subdivision (h).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.