Filed 12/27/16 P. v. McNeal CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. PETER IVAN MCNEAL, Defendant and Appellant.	B260489 (Super. Ct. No. BA391776) (Los Angeles County)

Peter Ivan McNeal appeals his conviction, by jury, of oral copulation of I.P., a child under 10 years of age, in violation of Penal Code section 288.7, subdivision (b).[1] The trial court sentenced appellant to a term of 15 years to life in state prison. He contends: his conviction is not supported by substantial

[1] This was appellant's second trial. The jury was unable to reach a unanimous verdict on the first trial.

All statutory references are to the Penal Code unless otherwise stated.

evidence because the victim's testimony is not reliable; he received ineffective assistance of counsel at trial[2]; the trial court erred in allowing evidence of a sex offense he committed against another child; he was denied due process when the trial court refused to release I.P.'s school records; the cumulative effect of these errors rendered his trial fundamentally unfair; and his sentence violates state and federal constitutional prohibitions against cruel and unusual punishment. We affirm.

Facts

In 2009, I.P., her parents Johann and M., and her sister "[E.]" were visiting Los Angeles from Massachusetts. They stayed with M.'s sister and spent Thanksgiving at the home of M.'s cousin, J. King. I.P. was three years old at the time. King and his wife invited about 20 people for Thanksgiving dinner, including I.P.'s family. Appellant, his then-wife, his eight-year-old daughter and his six-year-old son were also guests at the party. During the party, appellant took one of King's sons, his own son and I.P. outside to play catch. Appellant was the only adult who played outside with the children.

That evening, after the party was over, I.P. spontaneously asked her parents, "Why did that man want to put his penis in my mouth?" One of the parents asked I.P. what she had said. I.P. repeated her question. Her parents asked which man did that. I.P. replied, "The man with the ball." Later, M. and I.P. took a bath together, as they often did. While they were in the bathtub, M. asked I.P. if I.P. wanted to show her what

---

[2] Appellant has filed a petition for writ of habeas corpus (B269374) alleging the same ineffective assistance of counsel claims. In a separate order, filed concurrently with this opinion, we have denied the petition for writ of habeas corpus.

happened. There was a large stainless steel thermos on the bathtub rim. I.P. picked up the thermos, held it to her crotch so that it stuck straight out from her body and told M. to, "Say aah, and open your mouth." Then, I.P. put the thermos into M.'s mouth and moved her hips back and forth. M. asked I.P. what she did then. I.P. replied, "I said, Yuck!"

I.P.'s parents debated what they should do to minimize I.P.'s trauma. They eventually decided to do nothing, believing that I.P. would eventually forget the incident. They did not tell the Kings about I.P.'s disclosure.

A few days later, I.P. and her family returned to Massachusetts. I.P. did not mention the sexual assault again for nearly two years. In mid-November 2011, I.P. told her parents that during the Thanksgiving party, she played ball outside with the man who put his penis in her mouth and told her to suck on it. They were in the bathroom at her cousin Braden's house. The bathroom was white and had a big window. The man put his penis in her mouth more than once. After the "second round," the man took a cupcake out of his pocket and gave it to her. After the third time the man put his penis in her mouth, he took her out of the bathroom. I.P. also said it felt like the man punched her while she was in the bathroom with him.

Other Crimes Evidence

On December 11, 2009, 15 days after he sexually assaulted I.P., appellant was doing volunteer work at the charter school his son attended. While he was working outside, he came upon then six-year old M.K. who was playing in the school courtyard, waiting for her mother to finish volunteering. Appellant asked her if she wanted some Skittles. Appellant took the candy out of his pocket, walked down a path away from the

school, and beckoned for M.K. to follow. When they reached some bushes, appellant told M.K., "close your eyes and open your mouth." She did as she was asked, thinking he was going to put some Skittles in her mouth. When she opened her eyes again, M.K. saw appellant's erect penis. M.K. went back to the classroom where her mother was working.

M.K. told her mother about the incident before they left the campus that day. Her mother reported the incident to the school's volunteer coordinators, who in turn informed one of the school directors. When the director arrived, the whole group went to the street to a police station, where M.K. made a statement. Appellant was prosecuted and given a probationary "sentence."

M.K. and I.P. did not know each other; their parents also had never met. One of the guests at the King's Thanksgiving party had children who attended the same school as M.K. and appellant's son. After that Thanksgiving weekend, I.P.'s parents had little contact with the Kings. M.K.'s mother sent an e-mail to the parents of students at M.K.'s school, describing appellant's conduct. There is no evidence I.P.'s parents saw the e-mail or spoke to anyone about M.K.

Discussion

Substantial Evidence. Appellant contends the judgment is not supported by substantial evidence because I.P.'s disclosure, made two years after the original incident and uncorroborated by any physical evidence, is not reliable. We are not persuaded.

As in every substantial evidence case, we review "'the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable,

credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.)" (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.) The question is "'"whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.]' (*People v. Earp* (1999) 20 Cal.4th 826, 887.)" (*People v. Farnam* (2002) 28 Cal.4th 107, 142.) We "presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. . . . The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) We may not re-weigh the evidence or second-guess credibility determinations made by the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Simply put, if the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Farnam, supra*, 28 Cal.4th at p. 143.)

The testimony of a single witness is sufficient to prove a disputed fact and support a conviction, unless her testimony is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "'"To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable

suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations.]". . ." (*People v. Barnes* (1986) 42 Cal.3d 284, 306.) A witness's testimony will not be considered inherently improbable unless it is "'so inherently incredible, so contrary to the teachings of basic human experience, so completely at odds with ordinary common sense, that no reasonable person would believe it beyond a reasonable doubt.'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 996.)

I.P.'s testimony was not "physically impossible or inherently improbable[.]" (*People v. Young, supra*, 34 Cal.4th at p. 1181.) She first reported her sexual assault on the day it occurred, described it in detail, and identified appellant as the perpetrator. Her initial report included nothing that was physically impossible or "'so completely at odds with ordinary common sense, that no reasonable person would believe it beyond a reasonable doubt.'" (*People v. Hovarter, supra,* 44 Cal.4th at p. 996.) I.P.'s subsequent disclosure, made two years later, was consistent in many respects with her initial report. Specifically, she reported the same type of sexual assault and she continued to identify appellant as her abuser. A rational trier of fact could have found I.P.'s testimony believable. It constitutes substantial evidence in support of the judgment.

Ineffective Assistance of Counsel. Appellant contends he received ineffective assistance from his counsel at trial because counsel: did not demonstrate that I.P.'s parents knew about the incident with M.K.; did not call an expert witness to explain how I.P.'s parents corrupted her memory; did not present evidence regarding the height of the bushes where

appellant assaulted M.K.; did not present evidence regarding the kinds of desserts available at the Thanksgiving party; and admitted appellant's guilt during closing argument. We are not persuaded.

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

'"Tactical errors are generally not deemed reversible; and counsel's decisionmaking must be evaluated in the context of the available facts. (*Strickland v. Washington* [(1984)] 466 U.S. [668], 690 . . . .) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." (*People v. Pope* [(1979)] 23 Cal.3d [412,] 426 . . . fn. omitted.) Finally, prejudice must be affirmatively proved; the record must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *People v. Ledesma* [(1987)] 43 Cal.3d [171], 217-218.)' (*People v. Bolin* (1998) 18 Cal.4th 297,

333; [citations omitted].)" (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

Appellant raised each of these ineffective assistance claims in a motion for new trial. The trial court heard appellant's supporting evidence, taking additional testimony from I.P.'s parents, the Kings, and appellant's former wife. After considering the new evidence, the trial court rejected each claim, concluding there was no reasonable probability that any of the omitted evidence would have had an impact on the verdict. It found "a complete absence of proof at this hearing that there was any, quote, linkage, unquote" between the parents of I.P. and M.K. Had I.P.'s parents known about appellant's assault on M.K., the trial court reasoned, they would have told the police officers to whom they reported I.P.'s molestation. More importantly, the trial court reasoned, defense counsel could not have been expected to introduce evidence that rumors circulated about appellant being a child molester. "That stands on its head everything that all of us [who have] been in this criminal justice system know about how trials are conducted."

The trial court reached similar conclusions with regard to appellant's other claims of ineffective assistance. For example, it concluded photographs showing the height of the bushes at M.K.'s school would not "have made any difference. People who do this stuff don't really care about the height of the bushes." Similarly, the trial court concluded jurors would have been unmoved by evidence that appellant could not have given I.P. a cupcake from his pocket because there were no cupcakes at the party. "The jury [did not] believe there were cupcakes in the pocket. So who cares about what the desserts were at the party?" Finally, the trial court was not persuaded that a memory expert

would have had any impact on the verdict. "Everybody knows that . . . the more time passes, the more your memory fades. Everybody knows that three-year-olds don't remember things as well as adults . . . . We don't need memory experts to tell us that."

Like the trial court, we are not persuaded that the representation appellant received from his counsel at trial fell below an objective standard of reasonableness. (*People v. Snow* (2003) 30 Cal.4th 43, 111.) Even if it had, there is no reasonable probability the verdict would have been different but for counsel's errors. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1003.) Additional evidence regarding the height of the bushes at M.K.'s school would not have altered the jury's verdict on whether appellant sexually assaulted I.P. Photographs of the bushes were in evidence and the jury heard testimony regarding their accuracy. Second, M.K. testified about the incident and the jury had the opportunity to assess her credibility. The same analysis applies to I.P.'s statement that appellant gave her a cupcake after forcing his penis into her mouth. Appellant's ex-wife testified there were no cupcakes at the Thanksgiving party. There is no reason to believe that additional evidence on this minor point would have affected the verdict.

Similarly, we are unable to conclude appellant suffered any prejudice because trial counsel failed to show a link between the victims' parents. The hearing on appellant's motion for new trial produced no evidence supporting appellant's claim that I.P.'s parents knew appellant exposed himself to M.K. Their only link to M.K. was through the Kings, who had friends with children in the same school as M.K. But the hearing on appellant's motion for new trial demonstrated that I.P.'s parents

had little communication with the Kings after Thanksgiving 2009 and did not learn about appellant's assault on M.K. until after they had reported the assault on I.P. Even if they had been aware of the assault on M.K., that knowledge would not explain I.P.'s initial disclosure, which occurred on Thanksgiving night. There is no reasonable probability the verdict would have been different had the jury heard appellant's unpersuasive evidence of a link between the victims' parents.

Appellant complains his trial counsel failed to call an expert witness on memory, to explain how I.P.'s parents corrupted her memory by talking with her about her disclosures. Like the trial court, we decline to second-guess this tactical choice by trial counsel. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) There is no reasonable probability that appellant would have achieved a more favorable verdict had counsel presented expert testimony. The jury heard evidence that I.P. initially disclosed her molestation on the night it occurred. She next mentioned the incident about two years later, volunteering a description of the event that was generally consistent with her first disclosure. The jury also heard about the conversations I.P. had with her parents and with the social worker in Massachusetts who interviewed I.P. for law enforcement. The jurors were capable of evaluating I.P.'s credibility, given her age and the lapse of time between the event and her parents' decision to report it to law enforcement. They did not require an expert witness to advise them that factors such as youth and delayed reporting are relevant to assessing the credibility of a witness.

Finally, during closing argument, appellant's trial counsel said, "And after considering all of that you will have no choice but to come back with the only reasonable verdict in this

case which is the verdict of guilty." Counsel was immediately corrected by the trial court, apologized and then corrected herself. Like the trial court, we are convinced jurors did not take this slip of the tongue seriously. In addition, the trial court's immediate correction removed any possible confusion. There is no reasonable probability that trial counsel's inadvertent misstatement impacted the verdict.

Prosecutorial Misconduct. Appellant contends the prosecutor committed misconduct with three statements. First, a witness testified that more than one year after appellant exposed himself to M.K., the witness went to the school and noted the bushes were not high enough to have concealed appellant. The prosecutor responded, "Okay. Perhaps they cut the bushes because someone had lured a child back there." Appellant contends this comment was argumentative and therefore misconduct. Second, during closing argument, the prosecutor argued that appellant is "not just a sexual predator. He's also a thief[,]" because he stole the innocence of his victims. This comment was misconduct, according to appellant, because it appealed to the passion or prejudice of the jury. In addition, the prosecutor argued appellant's "M.O. [was] little girls that don't know him and that he lures them with candy and molests them." Appellant contends the prosecutor was arguing "outside the evidence" because these comments suggest appellant had several other victims.

Prosecutorial misconduct is subject to harmless error analysis. (*People v. Prieto* (2003) 30 Cal.4th 226, 260.) As our Supreme Court has explained: "Under the federal Constitution, a prosecutor commits reversible misconduct only if the conduct infects the trial with such "'unfairness as to make the resulting

conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 . . . .) By contrast, our state law requires reversal when a prosecutor uses 'deceptive or reprehensible methods to persuade either the court of the jury' (*People v. Price* (1991) 1 Cal.4th 324, 447 . . .) and "'it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct'" (*People v. Wallace* [(2008)] 44 Cal.4th [1032,] at p. 1071 . . . .) To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm. (*People v. Tafoya* [(2007)] 42 Cal.4th 147, 176.)" (*People v. Davis* (2009) 46 Cal.4th 539, 612; see also *People v. Valdez* (2004) 32 Cal.4th 73, 122.)

None of the statements rises to the level of prejudicial prosecutorial misconduct. First, while appellant's trial counsel objected to the prosecutor's comment about the bushes, counsel did not ask that the jury be admonished to disregard it. The claim is not preserved for review. (*People v. Davis*, *supra*, 46 Cal.4th at p. 612.) Had the claim been preserved, we would reject it. It would have been reasonable for the jury to infer that the height of the bushes could have changed between the incident with M.K. and the trial. The comment did not involve deceptive or reprehensible methods of persuasion and there is no reasonable probability that a result more favorable to appellant would have been reached had the comment not been made. Like the trial court, we conclude the prosecutor's statement regarding the height of the bushes was so "minor [ ] that it didn't have anything to do with the outcome of the case."

We reach the same conclusion with regard to the prosecutor's closing argument. Appellant did not object to the comments at issue and appellate review of the claim is therefore forfeited. Moreover, there is no reasonable likelihood the comments caused unfair prejudice. It is not deceptive or reprehensible to remind a jury that sexual assault causes the victim to suffer emotional damage. Similarly, the argument that appellant chose victims who were strangers because they were less likely to identify him later was a fair inference from the evidence rather than an appeal to passion or prejudice. There was no prejudicial misconduct.

Evidence of Other Crimes. Appellant contends the trial court erred when it admitted evidence that appellant exposed himself to M.K. because the evidence consumed an undue amount of time and confused the jury. There was no error.

In sex crime prosecutions, evidence of uncharged sexual offenses is presumed admissible without regard to Evidence Code section 1101, if the evidence is not inadmissible under Evidence Code section 352. (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 405.) "Propensity evidence is made admissible in sex offense cases by Evidence Code section 1108, which provides in relevant part: 'In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] section 352.' In *People v. Falsetta* [(1999) 21 Cal.4th 903,] our Supreme Court upheld the constitutionality of section 1108 because, among other reasons, the trial court could exclude the evidence if the court believed its prejudicial nature outweighed its probative

value, its production would consume an undue amount of time, or it would confuse the issues or mislead the jury." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40, fn. omitted.) The trial court had broad discretion to determine whether evidence of other sex offenses is admissible. Its determination will not be disturbed on appeal absent a showing that the trial court acted in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Here, the trial court correctly concluded that the exposure of appellant's penis to M.K. was admissible to show his propensity to sexually assault I.P. The two crimes occurred two weeks and one day apart. Both involved very young girls who were strangers to appellant. Each offense occurred when other adults were nearby, requiring appellant to conceal his actions from them. Appellant completed at least one act of oral copulation with I.P.; it is reasonable to infer that he intended to commit the same offense against M.K. This evidence was admissible to demonstrate appellant's "possible disposition to commit sex crimes." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 915.)

Appellant contends evidence of his offense against M.K. should have been excluded because the evidence was "confusing and inflammatory." We disagree. As noted above, appellant's offenses against the two victims shared several common characteristics, but they were not so similar that jurors would have difficulty distinguishing between them. The victims were of different ages and the crimes occurred in different locations. Nor was the evidence regarding M.K. "inflammatory" or unduly prejudicial. Appellant's offense against M.K. was less

serious than his crime against I.P. because he was unable to force M.K. to orally copulate him. There is no reason to believe the evidence regarding M.K. had any unique tendency to evoke an emotional bias against appellant or an irrational response from jurors. (*People v. Jones* (2012) 54 Cal.4th 1, 62.)

I.P.'s School Records. I.P.'s behavior at school changed in the days before her 2011 disclosure to her parents. Appellant speculates that I.P.'s parents decided the behavioral changes were caused by her having been molested and then falsely accused appellant. In support of that theory, appellant's trial counsel subpoenaed I.P.'s school records. The trial court reviewed the records in camera, concluded they contained no discoverable information, and declined to disclose them to appellant's trial counsel.

The trial court did not abuse its discretion. There is no reasonable probability that I.P.'s school records contained discoverable information. I.P. first disclosed her assault, and identified appellant as her assailant, on the day the assault occurred, two years before these records were created.

Cumulative Error. Appellant contends the cumulative effect of these errors requires reversal. We disagree, because there was no error to cumulate. (*People v. Avila* (2009) 46 Cal.4th 680, 718; *People v. Bolin* (1998) 18 Cal.4th 297, 335.)

Sentence as Cruel and Unusual Punishment. The trial court sentenced appellant to a term in state prison of 15 years to life, as mandated by section 288.7. He contends this sentence violated the California and the federal Constitutions' prohibitions against cruel and unusual punishment. We are not persuaded.

A sentence violates our state constitutional prohibition against cruel and unusual punishment if it is so disproportionate to the crime for which it is imposed that the sentence "shocks the conscience and offends fundamental notions of human dignity." (Cal. Const., art. 1, § 17.) The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." (U.S. Const., 8th Amend.) "The appropriate standard for determining whether a particular sentence for a term of years violates the Eighth Amendment is gross disproportionality. That is, '[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime. [Citations.]' (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (conc. opn. of Kennedy, J.), citing *Solem v. Helm* (1983) 463 U.S. 277, 288.) Successful grossly disproportionate challenges are '"exceedingly rare"' and appear only in an '"extreme"' case. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73.)" (*People v. Em* (2009) 171 Cal.App.4th 964, 977.)

"'"'A tripartite test has been established to determine whether a penalty offends the prohibition against cruel . . . [or] unusual punishment. First, courts examine the nature of the offense and the offender, "with particular regard to the degree of danger both present to society." Second, a comparison is made of the challenged penalty with those imposed in the same jurisdiction for more serious crimes. Third, the challenged penalty is compared with those imposed for the same offense in other jurisdictions. [Citations.] In undertaking this three-part analysis, we consider the "totality of the circumstances" surrounding the commission of the offense. [Citations.]'

[Citation.]" [Citations.]' (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 569 [59 Cal.Rptr.3d 876].) A defendant has a 'considerable burden' to show a punishment is cruel and unusual (*People v. Wingo* (1975) 14 Cal.3d 169, 174), and '[o]nly in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive[ ] [citations]' (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494 [90 Cal.Rptr.2d 517].)" (*People v. Meneses* (2011) 193 Cal.App.4th 1087, 1092-1093.)

Appellant's sentence of 15 years to life does not violate either the California or the federal Constitution. We note that the crime at issue is a serious one. Appellant is a dangerous offender because, although he had only one prior conviction for a sex offense, both of his victims are very young girls who would likely be unable to identify him because he was a stranger. Appellant's sentence is proportional to those imposed under California law for other, similar offenses. (*People v. Meneses*, *supra*, 193 Cal.App.4th at p. 1093.) He fails to persuade us that his sentence is grossly disproportionate to either the seriousness of his offense or to the sentences that would be imposed in other jurisdictions. (*Ibid.*) As the court concluded in *Meneses,* "In sum, although the sentence in significant, so was the crime. It was not 'so disproportionate to the crime for which it [was] inflicted that it shocks the conscience and offends fundamental notions of human dignity' (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted) and was not cruel or unusual." (*Id.*, at p. 1094.)

Conclusion

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Frederick N. Wapner, Judge

Superior Court County of Los Angeles

Fay Arfa, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.