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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS FERNANDEZ,

Defendant and Appellant.

B281624

(Los Angeles County
Super. Ct. No. NA104384)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesus I. Rodriguez, Judge. Affirmed.

Lynette Gladd Moore, 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, Idan Ivri and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Luis Fernandez (Fernandez) appeals from a judgment sentencing him to three years in state prison for willfully inflicting a corporal injury on a cohabitant resulting in a traumatic condition (Pen. Code, § 273.5, subd. (a))¹. Fernandez complains that his due process rights under the Fourteenth Amendment to the United States Constitution were violated when police failed to preserve a digital audio recording of the victim's statements. We disagree. Although the recording may have been "potentially useful" to Fernandez's defense, we find, pursuant to *Arizona v. Youngblood* (1988) 488 U.S. 51, 58 (*Youngblood*), that there was no due process violation because substantial evidence supports the trial court's finding that the police did not act in bad faith.

BACKGROUND

Via an information, the People charged Fernandez in count 1 with willfully inflicting a corporal injury on a cohabitant resulting in a traumatic condition (§ 273.5, subd. (a)) and in count 2 with dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1)).

I. Evidence at trial

A. MARIBEL R.'S 911 CALL

On June 12, 2016, Maribel R. called 911. She told the operator multiple times that a man who lived in her house was hitting her. She pleaded with the operator three times to send help. The recording of the 911 call was played for the jury.

B. MARIBEL R.'S TESTIMONY

On June 12, 2016, Maribel R. lived with Fernandez, her fiancé, in her home. As she was getting ready to go to work that

¹ All further statutory references are to the Penal Code.

night,² Fernandez slapped her once on the face, resulting in a bloody nose. She viewed two pictures of her face taken by police on the night of the attack, and testified that the pictures depicted “what happened to [her] as a result” of Fernandez hitting her. She acknowledged that she had blood around her mouth as a result of the slap but none around her nose, and that the blood on her mouth was from “whenever he slapped” her.

Maribel R. called the police after the attack. When the police officers arrived, she was crying. She did not recall telling the police that Fernandez punched her, grabbed her by the throat, or pushed her to the ground. She denied that Fernandez hit her multiple times with a closed fist. She denied that Fernandez grabbed her keys from her with force that injured her thumb. However, when shown a picture of her thumb taken on the night of the attack, she admitted that her thumb had become swollen. Maribel R. denied that Fernandez took the phone away from her when she tried to call 911, and denied that he threatened to kill her if she called the police.

The People showed Maribel R. a picture of her throat taken at the scene of the crime and she acknowledged that it depicted her on the night of the attack. When asked if the discoloration to her cheek and jawline was a result of her being hit that night, she responded, “I don’t know. I cannot tell you. I don’t know.” Maribel R. looked at a picture of Fernandez’s white T-shirt taken on the night of the attack, which was covered with small stains. When asked if the stains were a result of the blood from her mouth, Maribel R. replied, “I don’t know about that.”

² Maribel R. worked at Harbor UCLA Medical Center. Her shift started at 11:00 p.m.

C. OFFICER GARRION ORR'S TESTIMONY

Los Angeles Police Department (LAPD) Officer Orr and his partner drove to Maribel R.'s home on June 12, 2016 after receiving a radio call reporting domestic violence. As Officer Orr approached the residence, he heard screaming and yelling. As he and his partner were about to approach the door, Maribel R. came running out to them. She was crying and appeared very scared. She told the officers that her boyfriend had beaten her up, had a knife, and was threatening to kill her.

Fernandez came to the door, and the officers stopped him and detained him; he appeared angry and agitated. Officer Orr observed no wounds or marks on his face or body. The officers separated Maribel R. and Fernandez; Officer Orr had a further conversation with Maribel R. Maribel R. disclosed that, as she was about to leave for work, Fernandez became upset and forcefully snatched her keys out of her hand, injuring her right thumb. Maribel R. was in pain and was concerned that Fernandez had broken her thumb. She reported that Fernandez punched her in the face with a closed fist, grabbed her by the neck, threw her to the ground, and continued punching her. Maribel R. tried to call 911 but Fernandez took the phone away, threatening to kill her if she called the police. Fernandez told her that since he is not a United States citizen, he could get away with killing her by going back to Nicaragua. Maribel R. told Officer Orr that Fernandez had committed acts of domestic violence against her in the past.

Maribel R. had a swollen lip with dried blood around her mouth and a swollen thumb. To document her injuries, Officer Orr took pictures of Maribel R.'s face, neck, and hands. Orr also took pictures of Fernandez to document the spots of dried blood

on his white T-shirt. Fernandez did not have any observable injuries that would have caused blood to appear on his shirt.

Officer Orr never saw a knife and concluded that no weapons were used. Maribel R. did not have a black eye, old bruising, or any abrasions other than the bloody lip. The officers offered Maribel R. medical attention but she declined.

Officer Orr wrote a report on the night of the incident. He based the report on his personal observations, diagrams he had prepared documenting Maribel R.'s injuries, and on a recording of his conversation with Maribel R. Officer Orr's patrol car was equipped with a digital in-car camera video system (DICVS), which captured the audio portion of his conversation with Maribel R. In his report, Officer Orr documented complaints of pain, a swollen lip, blood around Maribel R.'s mouth, redness to her neck, and a swollen right thumb. Officer Orr personally observed Maribel R.'s injuries and testified that his report was an accurate reflection of what he heard Maribel R. say and the content of the audio recording.

Outside the presence of the jury, Officer Orr explained that the DICVS system is automatically activated whenever a patrol car responds to a high priority call. Officers are equipped with recording devices attached to their belts that record audio within a certain range of the patrol car after the officer exits the vehicle. When an officer completes his or her shift and drives the patrol car within a certain proximity of the station, the DICVS recording uploads to an LAPD database through wireless receivers placed at several points in the station.³ As a matter of

³ It is unclear from the record whether the officers themselves perform a specific act to initiate the upload, other than driving their vehicles. Officer Orr testified that "[a]t the

routine, when an officer returns to the station at the end of his or her shift, he or she relinquishes the recording device; the device is then assigned to another officer.

Officer Orr wore this recording device on his belt when he conducted his investigation at Maribel R.'s residence, and it recorded their conversation. He listened to the recording in the patrol car before returning his equipment to the station and before the DICVS material uploaded to the LAPD database.

Defense counsel requested a copy of the audio recording of Maribel R.'s conversation with Officer Orr. The People informed the court that, according to the LAPD, there was no audio documenting the investigation inside Maribel R.'s home. Only video of the officers approaching Maribel R.'s residence and later transporting Fernandez to the station had been uploaded to the database.

Proceedings resumed two days later. Defense counsel informed the court that the People had provided her with a disc of all material recovered from the database and that the audio which Officer Orr listened to in his squad car and used to prepare his report "no longer exists."⁴ When trial resumed, Officer Orr

end of [their] shift, [they] upload all [their] videos." He subsequently testified, however, that the DICVS material uploads wirelessly once the patrol car is within a certain range of the station, which suggests the process is automatic.

⁴ The record is silent as to how long the recording remained on the device worn by Officer Orr or in the DCIVS system in the patrol car. There is nothing in the record indicating when or how the recording would have been either erased or re-recorded in accordance with LAPD policy. In addition, DICVS recordings are not saved on tangible items such as a disc or thumb drive that Officer Orr could have removed and booked into evidence. All

testified that aspects of the DICVS system occasionally fail, including instances when the audio recordings have only partially uploaded. As a consequence of these known problems, and until the system was repaired,⁵ officers had been instructed at roll call to listen to the audio in the car before uploading it to the database.

D. FERNANDEZ'S TESTIMONY

Fernandez testified on his own behalf. At the time of the incident, he and Maribel R. were romantically involved. They were generally on good terms, but she was a "very unstable person" and they had disagreements. They never had "major problems" but she was very jealous. Twice, she kicked him out of her house; each time, he returned to Nicaragua but she would contact him, apologize, and convince him to come back.

On June 12, 2016, Fernandez was sitting on the couch in Maribel R.'s home when she came out of the bedroom and accused him of cheating. She threw something at him that he could not identify. She then attempted to hit him, but he ducked and she missed. Maribel R. then entered another room. When she returned to where Fernandez was sitting, she told him that she

that can be gleaned from the record is that the portion of the recording that captured Officer Orr's interview with the victim at the scene of the offense was not preserved due to a glitch in the LAPD's system that is supposed to upload these recordings to a database for preservation. In other words, there is no way to determine from the record how long the recording would have remained either in the patrol car or on the recording device worn by Officer Orr.

⁵ The record is silent as to whether the LAPD has since repaired the DICVS uploading system.

had hurt herself somehow and showed him that her mouth was bleeding. He tried to help her, but she refused. She sat on the couch and they talked; she was not crying. Only when the police arrived did she begin screaming and yelling for help.

II. Motion to dismiss

Defense counsel filed a motion to dismiss for failure to disclose exculpatory evidence, arguing the prosecution committed a *Brady*⁶ violation by failing to uncover and disclose the audio recording of Maribel R.’s conversation with Officer Orr. The court denied the motion.

At the hearing on the *Brady* motion, the People argued that the missing evidence, which documented the statements Maribel R. made to Officer Orr, was “entirely inculpatory” because the statements do nothing but “paint [Fernandez] in a negative light.”

Defense counsel argued that the lost audio recording of Maribel R.’s statements to Officer Orr was not only potentially exculpatory, but also would have been useful to impeach Maribel R.’s statements on the 911 call suggesting she had been struck multiple times. Defense counsel twice pointed out that there were issues of “[spoliation] and destruction of evidence.” Defense counsel argued that Fernandez’s right to a fair trial had been “irreparably injured,” not only because of the lost potential impeachment evidence but because the evidence no longer existed.

The trial court reminded counsel that Maribel R. had called 911—of her own free will and under the threat of injury—to report that Fernandez was attacking and injuring her. The court

⁶ *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

noted that the statements in the 911 call, combined with the fact that no one else was at the residence besides Fernandez, supports the People's position that the recording would not have been exculpatory.

In denying the motion, the trial court found the erasure or destruction of the recording not intentional, but negligent at worst. The court stated that there was nothing to indicate that Maribel R.'s injuries were accidental or self-inflicted, and noted that Maribel R. and Fernandez were the only two people in the home on the night of the attack. The court stated it was "fully convinced" that the loss of the audio recording does not reach *Brady*, and that the absence of the evidence does not amount to a mistrial.⁷

III. Verdict and sentence

On February 9, 2017, after approximately one hour and five minutes of deliberation, the jury returned a guilty verdict on count 1, finding that Fernandez willfully inflicted an injury on a cohabitant resulting in a traumatic condition. The jury acquitted Fernandez of dissuading a witness from reporting a crime.

On March 7, 2017, the trial court sentenced Fernandez to three years in state prison. On March 24, 2017, Fernandez filed a notice of appeal.

⁷ Although defense counsel filed a motion to dismiss for a *Brady* violation, she stated in court that she was seeking a dismissal or, in the alternative, a ruling granting a mistrial.

DISCUSSION

I. Standard of review

We review the trial court's denial of Fernandez's motion to dismiss for substantial evidence.⁸ (*People v. Duff*, *supra*, 58 Cal.4th at p. 549.) On review, the appellate court must determine "whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to support" the trial court's ruling that there was no violation of due process notwithstanding the loss or destruction of evidence. (*People v. Roybal* (1998) 19 Cal.4th 481, 510; *People v. Griffin* (1988) 46 Cal.3d 1011, 1022.) Substantial evidence is evidence that is "reasonable, credible, and of solid value." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

⁸ Fernandez suggests we review the motion de novo, citing *People v. Velasco* (2011) 194 Cal.App.4th 1258 for the proposition that the standard for reviewing a trial court's decision that evidence is or is not sufficiently exculpatory under *California v. Trombetta* (1984) 467 U.S. 479, 488 (*Trombetta*) is unsettled. (*Velasco*, at p. 1262.) Fernandez further supports his request for de novo review by claiming that the California Supreme Court applied a de novo review standard to a *Trombetta/Youngblood* claim in *People v. Beeler* (1995) 9 Cal.4th 953. First, the court in *Beeler* never articulated which standard of review they applied in evaluating the *Trombetta/Youngblood* claim. Second, *Velasco* was decided in 2011. The California Supreme Court has since established that a denial of a *Trombetta* motion is reviewed for substantial evidence. (*People v. Duff* (2014) 58 Cal.4th 527, 549.)

II. Merits

A. THE AUDIO RECORDING WAS ONLY POTENTIALLY USEFUL TO FERNANDEZ

Under the due process clause of the Fourteenth Amendment, law enforcement has a duty to preserve evidence that “might be expected to play a significant role in the suspect’s defense.” (*Trombetta, supra*, 467 U.S. at p. 488.) The threshold inquiry in establishing whether a defendant’s due process rights have been violated is to determine whether the destroyed evidence was “material exculpatory” evidence or only “potentially useful” evidence. (*Youngblood, supra*, 488 U.S. at pp. 57–58.)

Lost or destroyed evidence is materially exculpatory when it possesses “an exculpatory value that was apparent before the evidence was destroyed.” (*Trombetta, supra*, 467 U.S. at p. 489.) If a defendant is able to make this showing, he or she need not demonstrate law enforcement acted in bad faith. All that is required is that the lost evidence “be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” (*Ibid.*)

Here, we find that substantial evidence supports the trial court’s finding that the audio recording of Maribel R.’s statements to Officer Orr did not possess an exculpatory value that was apparent before it was lost. Officer Orr testified that Maribel R. told him that Fernandez punched her multiple times, grabbed her by the neck, threw her to the floor, and threatened to kill her. These statements are inculpatory, not exculpatory and supported by the photographs of Maribel R.’s injuries shown to the jury. Furthermore, the court determined the recording was not exculpatory after listening to Maribel R.’s statements to the 911 operator that Fernandez was attacking her. Only Maribel R.

and Fernandez were at home at the time of the attack, and there is no credible evidence in the record that her injuries were accidental or self-inflicted. Although Fernandez testified that Maribel R.'s bloody lip was the result of an accident, the court clearly did not credit his version of events; we find no reason to second-guess the court's judgment.

Since the evidence possessed no exculpatory value evident before it was lost or destroyed, our inquiry now turns to whether the lost audio recording would have been "potentially useful" to Fernandez. (*Youngblood*, *supra*, 488 U.S. at p. 58.) Under *Youngblood*, evidence is potentially useful when "no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Id.* at p. 57.)

Fernandez relies on *People v. Alvarez* (2014) 229 Cal.App.4th 761 (*Alvarez*), to argue that the lost audio recording was potentially useful. In *Alvarez*, a destroyed surveillance video may have shown that two defendants in a three defendant robbery case were either not involved or were only minimally culpable. The victim in *Alvarez* testified that it was the third defendant that snatched a gold chain from around his neck, and that the other two defendants had made threatening statements. (*Id.* at p. 766.) *Alvarez* and the second codefendant—Cisneros—claimed they had nothing to do with the robbery, and alleged that the officer who questioned the victim repeatedly asked him in several different ways whether *Alvarez* and Cisneros provided back up for the third defendant. (*Ibid.*) According to Cisneros and *Alvarez*, the victim eventually succumbed to the false notion the officer had planted in the victim's mind, and implicated *Alvarez* and Cisneros. (*Id.* at p. 774.) The Fourth District Court of Appeal found that the surveillance video—which was erased

and recorded over before anyone had the opportunity to review it—was potentially useful to Alvarez and Cisneros’ defense because it had the potential to either exonerate or considerably reduce their culpability. (*Id.* at p. 775.) They may have been liable as aiders and abettors, for example, or the video may have demonstrated that the crime was a theft rather than a robbery. (*Ibid.*) While the court could not conclude the evidence met the *Trombetta* standard of possessing an exculpatory value that was evident before it was destroyed, Division Three could “readily” find that the video was potentially useful within the meaning of *Youngblood*. (*Alvarez*, at p. 776.)

Fernandez claims that his case is similar to *Alvarez* because the audio recording “could have been the means of establishing a reasonable doubt that [he] struck Maribel R. repeatedly and pushed her down,” and that it “could have persuaded the jury that Maribel R. spoke the truth at trial, and that [Fernandez] should have been acquitted.” We conclude that had the audio recording corroborated Maribel R.’s testimony that Fernandez slapped her once and gave her a bloody nose, it may have been potentially useful to the extent that it might have reduced Fernandez’s culpability. At most, it could have cast reasonable doubt that Fernandez possessed the required mens rea to injure Maribel R., i.e., that he willfully or purposefully inflicted a physical injury. While we do not agree that the audio recording could have led to an acquittal, we cannot say that it would not have led to Fernandez being charged with or convicted of a lesser crime—such as misdemeanor battery—had it corroborated Maribel R.’s testimony. We therefore conclude that the lost audio recording was, at best, only potentially useful to

Fernandez. As a result, our inquiry turns to whether the LAPD acted in bad faith.

B. THERE WAS NO BAD FAITH BY THE POLICE

The trial court found that the LAPD's failure to preserve the audio recording of Maribel R.'s statements to Officer Orr was not intentional but rather "something between a mistake and negligent." Negligence alone will not support a finding of bad faith. (*Youngblood, supra*, 488 U.S. at p. 58 [failure of police to refrigerate clothing and test semen samples was "at worst" merely negligent].) As *Youngblood* suggests, the defense must demonstrate something akin to "official animus" or a "calculated effort to circumvent the disclosure requirements established by *Brady v. Maryland* and its progeny." (*Trombetta, supra*, 467 U.S. at p. 488; accord *People v. Angeles* (1985) 172 Cal.App.3d 1203, 1214 [good faith is "the absence of malice and absence of design to seek an unconscionable advantage over the defendant"].)

Fernandez relies on *Alvarez, supra*, 229 Cal.App.4th 761 and *U.S. v. Zaragoza-Moreira* (9th Cir. 2015) 780 F.3d 971 (*Zaragoza*) to argue that the police acted in bad faith when they lost the audio recording that captured Maribel R.'s conversation with Officer Orr. Fernandez's reliance on these cases is misplaced.

In *Zaragoza, supra*, 780 F.3d 971, the defendant was charged with bringing drugs through a port of entry into the United States. The defendant asserted she acted under duress because two drug cartel members told her that, unless she taped the drugs to her stomach and brought them through the border, they would harm her family. (*Id.* at p. 976.) While being detained by a government agent, she repeatedly asserted that she did not want to commit the offense and attempted to make

herself obvious while in the pedestrian line by making noises, “ ‘wiggling around,’ ” patting her stomach, and throwing her passport on the ground. (*Id.* at pp. 975–976.) She did not directly alert border inspectors because one of the cartel members was standing “ ‘shoulder to shoulder’ ” with her in line. (*Id.* at p. 974.) The video footage of the pedestrian line at the port of entry was automatically recorded over despite a defense request to preserve any and all videos in the custody of the government. (*Id.* at pp. 976–977.) The Ninth Circuit held that the destroyed video was potentially useful to support the defendant’s claim of duress not only because it may have corroborated the defendant’s statements that she made efforts to attract the attention of border agents, but because it may have shed light on the extent to which the cartel member accompanying her oversaw and controlled her. (*Id.* at p. 978.)

In both *Alvarez, supra*, 229 Cal.App.4th 761 and *Zaragoza, supra*, 780 F.3d 971, law enforcement officials knew that video camera surveillance existed that would have documented the crimes in real time yet they never made any attempts to preserve or even view the videos before they were destroyed. (*Alvarez*, at p. 777; *Zaragoza*, at p. 980.) Fernandez’s case is readily distinguishable.

Here, law enforcement did at least attempt to preserve the audio recording. The record shows that the LAPD developed a system to preserve any video or audio recordings of police investigations by wirelessly uploading them to a database.

The record does show, however, that police were aware that uploading the recording was an unreliable means to preserve evidence, as Fernandez contends. The trial court heard testimony that, in 2016, there were instances in which the

system failed to properly upload all the recorded material. Fernandez suggests that, knowing of these failures, Officer Orr should have booked the audio recording into evidence. The record suggests, however, and Fernandez does not argue otherwise, that this would have been impossible. Officer Orr testified that the recordings to the DICVS system are not in a tangible form such that they can be copied to a CD or thumb drive. And, the record is silent on how long the recordings remain on an officer's recording device or in the patrol car's video system. Absent any evidence to the contrary, we cannot presume that Officer Orr had the capability of preserving the evidence other than by uploading it to the database.

The LAPD failed to preserve evidence that was potentially useful to Fernandez. There is no evidence, however, that this failure rises to the level of a calculated effort to circumvent *Brady*. Nor does it reveal any official animus or intent to seek an unconscionable advantage over Fernandez. Despite its known glitches, the LAPD attempted to preserve the recordings of Officer Orr's investigation by uploading it to their database. Furthermore, video portions were in fact recovered from the database and copied to a disc for defense counsel to review. Nothing in the record, however, suggests that the missing portion of the recording was intentionally destroyed in order to disadvantage Fernandez at trial. Accordingly, viewing the evidence in the light most favorable to the trial court's finding, we find there was substantial evidence that the police did not act in bad faith.

III. Forfeiture

Finally, we dispose of the People's contention that Fernandez forfeited appellate review on his

Trombetta/Youngblood claim because he only asked the court to consider the lost evidence as a *Brady* violation at trial.

“As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to the one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal.” (*People v. Yeoman* (2003) 31 Cal.4th 93, 117.) Furthermore, it is a “well-established principle that a reviewing court may consider a claim raising a pure question of law on undisputed facts.” (*Id.* at p. 118, citing *People v. Hines* (1997) 15 Cal.4th 997, 1061; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Ward v. Taggart* (1959) 51 Cal.2d 736, 742.)

Here, the facts adduced at trial regarding the content of the lost audio recording and the circumstances surrounding its loss are not in dispute. In determining whether the loss of evidence in this case amounts to a violation of Fernandez’s due process right to a fair trial, we need not consider any additional facts beyond those already presented to the trial court.

Having determined that all the facts necessary to evaluate a *Trombetta/Youngblood* error were adduced at trial, we must now turn our attention to whether, in evaluating Fernandez’s *Brady* claim, the trial court employed a “legal standard similar to that which would also determine” whether Fernandez is entitled to relief under *Trombetta/Youngblood*. (*People v. Yeoman, supra*, 31 Cal.4th at p. 117.) We find that it did.

The record strongly suggests that defense counsel and the trial court viewed the lost evidence not just through the lens of *Brady*, but with an eye toward the implications of lost or

destroyed evidence within the meaning of *Trombetta* and *Youngblood*. Twice, defense counsel turned the court’s attention to the fact that law enforcement had destroyed the evidence. And, the court exceeded the scope of a *Brady* analysis when it evaluated whether the police acted in bad faith; the trial court explicitly articulated on the record that the actions of the police were negligent at worst.

Although the trial court did not explicitly articulate a finding under *Youngblood*, *supra*, 488 U.S. 51 whether the lost evidence was “potentially useful” to Fernandez’s defense, it did find that the evidence was not sufficiently exculpatory or impeaching within the meaning of *Brady*. The court based its finding on the evidence from the 911 recording in which Maribel R. states—of her own free will and under the threat of injury—that Fernandez was attacking and injuring her. This evidence also supports a finding that the lost audio recording of Maribel R.’s statements to Officer Orr were only “potentially useful” to Fernandez’s defense within the meaning of *Youngblood*.

Accordingly, we find that the trial court’s analysis of the exculpatory and impeachment value of the lost evidence and the court’s finding that police did not act in bad faith, are sufficient to preserve the issue for appeal.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.*

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