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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR A. CARRILLO,

Defendant and Appellant.

B235883

(Los Angeles County
Super. Ct. No. BA375752)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Lisa B. Lench, Judge. Affirmed in part, reversed in part and remanded.

David Reis Mishook, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margret E.
Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Edgar A. Carrillo appeals from the judgment entered upon his conviction of illegally possessing a firearm in violation of Penal Code section 12021, subdivision (a)(1) for the purpose of benefiting a criminal street gang pursuant to Penal Code section 186.22, subdivision (b)(1).¹ On appeal appellant makes three contentions: (1) substantial evidence does not support the true finding on the gang enhancement, (2) this court should review the *Pitchess* determinations of the lower court, (3) the trial court erred in its sentencing of appellant under section 667.5, subdivision (b). As we shall explain, appellant's argument that the substantive evidence does not support the gang enhancement finding is without merit. However, this court agrees that the trial court erred in denying appellant's *Pitchess* motion for an *in camera* review of an officer's records. Lastly, the trial court should have stricken, rather than stayed, the one-year enhancement for the prior prison term enhancement.

FACTUAL AND PROCEDURAL BACKGROUND

On September 8, 2010, Detective Timothy Stack was on duty with his partner driving from the Wilshire police station to the downtown Criminal Courts Building. While passing through the area of Queen Anne and Pico Boulevard, Officer Stack and his partner observed a person the officers believed to be dressed consistent with a member of the Mid City Stoners, the dominant street gang in that area. Officer Stack was assigned to the Wilshire Division Gang Impact Team and charged with identifying and documenting any gang members in the Wilshire area. The individual he observed, later identified as appellant, was standing next to a phone booth and a blue cloth item sat on top of the phone booth next to him. Because of his duty to identify and document any gang members in the area, the officer contacted his counterparts Detective Jones and Detective Talbot to inform them of his observations. Officer Stack did not make contact with appellant because he was enroute to court and his partner was on light duty status.

¹ All references to statute are to the Penal Code unless otherwise indicated.

Detectives Jones and Talbot responded to Officer Stack's request to investigate appellant's activities and travelled to the area of Queen Anne and Pico in an unmarked vehicle. When they arrived there was no one in the area fitting the description given by Officer Stack, so the officers continued westbound to investigate a nearby park where there was a history of gang related crime. While driving past the Queen Anne Park, the officers observed appellant, who fit the description given by Officer Stack, standing in the picnic area with a woman. Appellant held a blue cloth item in his hands when the officers first observed him. When the officers turned the car around to park, appellant placed the item on a retaining wall behind him. The officers believed appellant might be concealing a weapon within the blue cloth item and decided to approach appellant to investigate.

The officers exited their vehicle and approached appellant, who began walking away from the wall where he had placed the blue cloth item. The officers asked appellant whether he was armed and about the contents of the blue item – a sweatshirt. Appellant stated that the blue cloth item did not belong to him. The officers identified appellant as Edgar Carrillo and searched him because of his parole status. They also searched the blue cloth item; officers found a black semiautomatic pistol and seven live rounds. They additionally found blue gloves in appellant's pants with black grease marks that seemed to match the grease marks on the firearm. Appellant had various gang tattoos and was dressed in a manner consistent with the local street gang, the Mid City Stoners.

In a one-count information filed October 8, 2010, appellant was charged with unlawful possession of a firearm by a felon in violation of section 12021, subdivision (a)(1). The information specially alleged, pursuant to section 186.22, subdivision (b)(1)(A), appellant had committed the offense for the benefit of, at the direction of or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members. The information also specially alleged appellant had suffered one prior serious or violent felony conviction within the meaning of the Three Strikes law (section 667.5, subds. (b)-(i); 1170.12, subds. (a)-(d)), one prior felony conviction for which he had served prison terms within the meaning of section

667.5, and one prior conviction under section 667, subdivision (a)(1). Appellant pleaded not guilty and denied the special allegations.

The jury convicted appellant of one count of possession of a firearm by a felon (§ 12021, subd. (a)(1)). He was additionally convicted of a gang enhancement for the first count (§ 186.22, subd. (b)(1)), an enhancement for having a prior strike offense (§§ 667 & 1170.12), and an enhancement for having previously been convicted of a serious felony (§ 667, subd. (a)(1)). The trial court sentenced appellant to the upper term of three years for possession of a firearm. This term was doubled to six years pursuant to section 667. Appellant was given three years under section 186.22, subdivision (b)(1) and received an additional five years pursuant to section 667, subdivision (a)(1). The court imposed and stayed a one-year term under section 667.5, subdivision (b).

Appellant timely appealed.

DISCUSSION

I. There is Sufficient Evidence to Sustain Appellant's Conviction of a Gang Enhancement Pursuant to Section 186.22, Subdivision (b)(1)

Before this court, appellant contends there was insufficient evidence to sustain his conviction on the gang enhancement. We disagree.

A. Evidence Presented at Trial

1. Arresting Officer's Trial Testimony

Los Angeles Police Officer Carlton Jones, a member of the Wilshire Gang Impact Team, testified at appellant's trial. Detective Jones was a 15-year veteran and had worked in the Wilshire Gang Impact Team for the past three years. The Wilshire Team focuses on gangs that border Hollywood division and Culver City, including the Mid City Stoners. Officer Jones and his partner were notified by another officer of appellant's location near Queen Anne Park and possible gang affiliation and told to investigate Carrillo's activities.

Officer Jones testified that he observed appellant in Queen Anne Park by a picnic area, carrying a blue cloth item, standing next to a female. Jones saw appellant place the blue cloth item on the wall behind him. Jones and his partner believed the blue cloth item might contain a concealed weapon and decided to approach appellant to investigate. When the officers approached appellant in the park appellant began to walk away from the blue cloth item. The officers asked appellant if he was armed and what was in the blue cloth item. Appellant told the officers that the item was not his. Officer Jones and his partner seized blue gloves with grease stains from appellant's back pockets that appeared to be consistent with grease stains on the blue cloth item. The officers opened the blue cloth item and revealed a black semiautomatic handgun with black grips and seven live rounds in the magazine.

2. The Gang Expert Trial Testimony

Officer Javier Hernandez testified as a gang expert on behalf of the people. He provided general background on gang culture and the Mid City Stoners. He testified that the Mid City Stoners (hereinafter MCS) have been a criminal street gang since the 1970's and are rivals with the Mara Salva Trucha gang, 18th Street gang, Playboys, Black P-stones, Rolling Twenties and Dukes. He further testified to two predicate MCS gang members and the crimes each member committed.

Officer Hernandez testified that Queen Anne Park is a MCS stronghold, a place where gang members congregate to conduct business. He testified that appellant was part of the Crenshaw clique within MCS as evidenced by appellant's "Crenshaw" facial tattoo and his admission of membership to the police. Officer Hernandez also testified that based on his knowledge of the MCS, Queen Anne park has a picnic area on high ground that is used by MCS members to oversee the park and lookout for rival gang members. Officer Hernandez identified the MCS gang territory on a map showing that Queen Anne Park is within MCS territory. Officer Hernandez explained that the various tattoos on appellant's face and body are related to the MCS, including tattoos appellant recently obtained.

Officer Hernandez offered his opinion on whether or not the possession of a firearm in a gang stronghold benefits the gang. He opined that having a gang member with a gun posted at a stronghold, protecting the stronghold from rival gang members, benefits the gang. Further, he opined that having armed gang members in the park assists in recruiting additional gang members and intimidating in the community by creating a fear of retaliation for testifying against gang members. Officer Hernandez also offered an opinion on how the possession of a firearm in this hypothetical would benefit an individual whose gang status would be increased by being armed.

3. Appellant's Testimony

Appellant testified at trial that he was at the park but was not in possession of the firearm or any blue gloves linking him to the firearm. He admitted that he was part of MCS and that he has recently received MCS related tattoos when he violated his parole and returned to prison. He testified that the police officers lied about the incident because the Los Angeles Police Department has a “grudge” against MCS because of an officer-related homicide in 2003.

On cross-examination, the prosecution inquired into appellant's gang affiliation. Appellant admitted he was affiliated with the MCS gang and confirmed that the gang expert's testimony was “somewhat” correct. Further, he admitted that when he was a gang member he would protect mid city by “posting himself” as a means of representing the gang and would fight rival gang members for territory if necessary. He additionally stated that gang territory is important to gangs and members use weapons to protect territory. Lastly, he testified that he has tattoos to show other people that he is part of the MCS gang and that he had received the “Crenshaw” clique tattoo in 2009 after he violated his parole.

B. Standard of Review

“In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the

defendant guilty beyond a reasonable doubt.” (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.)

We may reverse for lack of substantial evidence only if “upon no hypothesis whatever is there sufficient substantial evidence to support” the conviction or the enhancement. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1508.) If the verdict is supported by substantial evidence, we accord due deference to the verdict and will not substitute our evaluations of the witnesses’ credibility for that of the trier of fact. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196.) Substantial evidence includes circumstantial evidence and the reasonable inferences this evidence allows. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) “Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt.” (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

C. Relevant Law for Section 186.22, Subdivision (b)(1) Gang Enhancement

Appellant contends that the gang enhancement to his felony possession of a firearm was not supported by substantial evidence. Section 186.22 is “a provision of the California Street Terrorism Enforcement and Protection Act of 1988, also known as the STEP Act.” (*People v. Castenada* (2000) 23 Cal.4th 743, 744-745, fn. omitted.) Section 186.22, subdivision (b)(1) is an enhancement which provides that, “. . . any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, [be punished] in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted. . . .” (§ 186.22, subd. (b)(1).)

Thus, the trial court can impose the enhancement only if the prosecution establishes both of the following prongs beyond a reasonable doubt: first, that the defendant committed a felony (a) for the benefit of, (b) at the direction of, or (c) in

association with a criminal street gang; and second, that in connection with the felony, the defendant harbored the specific intent to (a) promote, (b) further, or (c) assist in any criminal conduct by gang members. (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1358.) At issue here is whether there was sufficient evidence that defendant's illegal possession of a firearm was gang-related rather than a personal crime.

In reviewing the sufficiency of a gang enhancement, courts have held that gang expert testimony alone is insufficient to find an offense gang related. (*People v. Ferraez*, *supra*, 112 Cal.App.4th at p. 931; *People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.) Accordingly, "the record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang." (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762.)

a. For the Benefit of the Street Gang

In order to satisfy the first prong of the enhancement the prosecution must show that appellant possessed a firearm "for the benefit of, at the direction of, or in association with a criminal street gang." (*In re Daniel C.*, *supra*, 195 Cal.App.4th at p. 1358.) The record shows that appellant was affiliated with the Mid City Stoners criminal street gang, but since appellant was not accompanied by any Mid City Stoners members when he was in possession of this firearm, the prosecution has the burden of showing that appellant possessed the firearm "at the direction of" or "for the benefit of" the Mid City Stoners. (See, *id.* at pp. 1358-1359 [holding "in association with" a criminal street gang within the meaning of section 186.22 can be satisfied by committing a crime with fellow gang members]; see also, *People v. Albillar* (2010) 51 Cal.4th 47, 60 [same].)

There was substantial evidence to sustain the jury's finding that the possession of the gun in the park was for the benefit of the street gang. Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was "committed for the benefit of . . . a [] criminal street gang" within the meaning of section 186.22, subdivision (b)(1). (*People*

v. Albillar, supra, 51 Cal.4th at p. 63; see, e.g., *People v. Vazquez* (2009) 178 Cal.App.4th 347, 354 [relying on expert opinion that the murder of a non-gang member benefited the gang because “violent crimes like murder elevate the status of the gang within gang culture and intimidate neighborhood residents who are, as a result, ‘fearful to come forward, assist law enforcement, testify in court, or even report crimes that they’re victims of for fear that they may be the gang’s next victim or at least retaliated on by that gang”]; *People v. Romero* (2006) 140 Cal.App.4th 15, 19 [relying on expert opinion that “a shooting of any African-American men would elevate the status of the shooters and their entire [Latino] gang”].)

Appellant admitted that he was a member of the MCS. The prosecution was able to show that Queen Anne Park, where appellant was arrested, was within MCS territory and considered a known gang hangout. The gang expert also testified that Queen Anne Park was a gang stronghold for the MCS and MCS must have a visible gang presence at this park to ensure that other gangs do not encroach on their territory. On cross-examination, even appellant himself admitted that MCS members would “post up” as a means of representing the gang and protecting territory. Further, appellant admitted that when he was a gang member he would be willing to fight and use weapons to protect territory for MCS.

In addition to the protection of gang territory, the expert testified that having a gang member posted in a gang stronghold is advantageous for the gang because it ensures that the community is aware of the gang’s violent presence. The expert also testified that having an armed presence gains even more gang notoriety and increases the gang’s reputation for viciousness. This theory is supported by the facts at trial. Appellant was wearing all blue when arrested, which was consistent with the colors of MCS, and had recently obtained visible tattoos highlighting his gang affiliation.

Accordingly, in light of this evidence, a jury could reasonably infer appellant was at the park to defend gang territory based on the location of where appellant possessed the weapon, the gang representations appellant made through his tattoos and choice of clothing, and the expert’s opinion that possession of a firearm in a stronghold is

considered advantageous for the gang. (See *People v. Vazquez*, *supra*, 178 Cal.App.4th at p. 354.) This court must accord due deference to the verdict and cannot substitute our evaluations of the credibility of the expert or the defendant for that of the trier of fact. (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1078.) This evidence is sufficient for a reasonable trier of fact to determine that appellant possessed the weapon for the benefit of the Mid City Stoners.

b. Specific Intent to Promote/Further/Assist Criminal Conduct

The second prong of the enhancement is the defendant committed the crime “with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).) The enhancement does not require the defendant act with specific intent to promote, further, or assist a gang; “the statute requires only the specific intent to promote, further, or assist criminal conduct by gang members.” (*People v. Albillar*, *supra*, 51 Cal. 4th at p. 67.)

Circumstantial evidence of intent is sufficient. “There is rarely direct evidence that a crime was committed for the benefit of a gang. For this reason, ‘we routinely draw inferences about intent from the predictable results of action. We cannot look into people’s minds directly to see their purposes. We can discover mental state only from how people act and what they say.’ [Citation.]” (*People v. Miranda* (2011) 192 Cal.App.4th 398, 411-412.) Additionally, if substantial evidence otherwise establishes that the offense was gang related, the jury reasonably may infer that the defendant had the specific intent to promote, further, or assist criminal conduct by gang members. (*People v. Albillar*, *supra*, 51 Cal. 4th at pp. 67-68.)

While this court will accord due deference to the trier of fact, the specific intent prong of section 186.22 requires more than a gang expert hypothesis. (*In re Frank S.*, *supra*, 141 Cal.App.4th at p. 1199.) In *In re Frank S.*, the court held that allowing an expert to opine on a defendant’s specific intent for the possession of a weapon without any other substantial evidence “opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended.” (*Ibid.*) Further, the court has been cautious of converting section 186.22,

subdivision (b)(1) into a general intent crime by affirming convictions based solely on expert opinion on a person's intent. (*People v. Ramon* (2009) 175 Cal.App.4th 843, 853 [refusing to hold as a matter of law that two gang members in possession of illegal or stolen property in gang territory are acting to promote a criminal street gang].)

The appellant relies on *In re Frank S.* to support his position that his conviction is unsupported by the evidence. In *In re Frank S.* the court held that since the prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense, a reasonable jury could not find that the crime was committed with intent to benefit the gang based solely on a gang expert's opinion. (*In re Frank S.*, *supra*, 141 Cal.App.4th at p. 1199.) Further, the minor told the officers that the only reason he was carrying a knife was because he had been jumped two days prior. (*Ibid.*)

However, the stark lack of evidence in *Frank S.* is not present in appellant's case. Here, appellant admitted to the officers that he was a MCS member. He wore MCS colors. He had visible and recent MCS tattoos and possessed a firearm in a tactical position in a gang stronghold within gang territory. Based on these facts, the gang expert testified that appellant possessed the weapon for the benefit of the gang, with intent to promote the criminal activities of the gang within the park. Accordingly, the holding of *In re Frank S.* does not assist appellant.

Appellant's reliance on *People v. Ochoa* is not dispositive either. In *Ochoa* the court held that evidence a gang member committed a crime alone combined with an expert witness's unsubstantiated opinion that the crime was committed for the benefit of the gang was not sufficient to find gang enhancement allegations true. (*People v. Ochoa*, *supra*, 179 Cal.App.4th at p. 665.) In *Ochoa*, the gang expert had no evidence upon which to claim that the defendant's carjacking benefited the gang in any way. There was no evidence that the gang member bragged about the crime, the victim knew a particular gang committed the crime, or that any gang members besides the defendant even rode in the car. (*Id.* at pp. 662-663.) The court determined that the lack of any evidence

supporting the expert's gang opinion was insufficient to support the gang enhancement. (*Id.* at p. 665.)

However, in the case at hand, the expert's opinion was supported by evidence presented at trial. The expert was able to rely on circumstantial evidence that appellant intended to promote the gang because appellant was a self proclaimed MCS member, dressed in visible gang attire, traveled across town to a gang stronghold, and possessed a weapon at a tactical location in an MCS stronghold. The faulty expert opinion in *Ochoa* is not similar to the expert opinion in this case.

In reaching this conclusion we note that our Supreme Court recently decided *People v. Rodriguez* (2012) 55 Cal.4th 1125, 150 Cal.Rptr.3d 533 which involved a challenge to conviction under section 186.22, subdivision (a), which is not at issue in this case. Nonetheless, in dicta in *Rodriguez*, the Court reaffirmed prior holdings which permit a defendant, such as appellant who commits a felony alone (here section 12021), to be subject to the gang enhancement under section 186.22, subdivision (b). (*People v. Rodriguez, supra*, 55 Cal.4th ___, 150 Cal.Rptr.3d at p. 544 [“A lone gang member who commits a felony will not go unpunished; he or she will be convicted of the underlying felony. Further, such a gang member would not be protected from having that felony enhanced by section 186.22(b)(1),”].) Using the appropriate, deferential standard of review and applying existing principles of law, we must affirm the jury's true finding on the special gang-enhancement allegation.

II. Pitchess Proceedings

Before this court, appellant contends that the trial court erred when it failed to conduct an *in camera* review of Officer Jones' personnel records. We agree.

A. Factual Background of the Pitchess Proceedings

Appellant filed a motion for pretrial discovery pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) requesting the peace officer personnel records of Officers Talbot and Jones. In support of appellant's motion, defense counsel attached his own declaration providing that the requested peace officer personnel records were necessary for the defense for the following reasons:

Upon information and belief, the defendant alleges that on September 3 [sic], 2010 he was in the park with his girlfriend, Irene Chinchilla. They were talking to one another in the park and the defendant had no object of any kind in his hands. The police officers (Talbot and Jones) came into the park and detained them without reasonable or probable cause. Mr. Carrillo admitted he was on parole and had been recently released from the state prison. Mr. Carrillo has visible tattoos. The police then [sic] produced a firearm and asked him if it was his gun. They never told him he had been seen with a weapon. He had not touched the weapon or the sweatshirt and was not aware of the allegation that he had been holding the sweatshirt until he was read the report. The police told him at the scene that he was being arrested because he is a gang member in a gang park and was standing close to the sweatshirt in which the gun was hidden. (Ms. Chinchilla corroborated defendant's statement that he never touched the sweatshirt in a statement to the police and the District Attorney on September 22, 2010.)

Appellant also attached Officer Talbot's police report. According to the police report Officers Jones and Talbot arrested appellant for section 12021, subdivision (A)(1), Felon in Possession of a Firearm. Officers requested additional filing for section 186.22, subdivision (b)(1), crimes committed in furtherance of a criminal street gang. Both Officers Jones and Talbot were listed as the arresting officers. However, Officer Jones alone was listed as the investigating officer in the police report.

At the hearing on appellant's *Pitchess* motion, the trial court said to defense counsel:

Real party concedes . . . [the defense has made a showing] as to Officer Talbot who wrote the report. [¶] As to [Officer] Jones, I tend to agree with real party that the showing has not been made as to [Officer] Jones. It's, albeit, admittedly, low. [¶] The report is written by Talbot and he does say, "we saw this," and, "we saw that," but he, Talbot, I believe, is the one who recovered the sweatshirt. . . . [¶] We also have the situation where one partner writes the report and purports to represent what his partner may have seen, but we don't really have any statement directly from Officer Jones and so it seems to me they haven't made a showing as to [Officer] Jones.

Defense counsel responded by attempting to explain that Officer Jones testified at the preliminary hearing that he observed appellant with the firearm. The court refused to allow the defense to “orally modify” his written motion and include this fact about Officer Jones’ testimony. Accordingly, the trial court granted appellant’s request to conduct an in camera hearing regarding the peace officer personnel records of Officer Talbot, but denied appellant’s request as to Officer Jones.

B. Relevant Legal Principles

Although police officer personnel records are generally confidential, a criminal defendant is entitled to discover the content of such records if the information contained in the records is relevant to his ability to obtain a fair trial or to defend against pending charges. (*Pitchess v. Superior Court, supra*, 11 Cal.3d at pp. 536-538.) The process by which a criminal defendant may discover personnel records is codified in Evidence Code sections 1043 to 1045. Initially, the defendant must submit a motion accompanied by an affidavit or declaration “showing good cause for the discovery or disclosure sought” and “setting forth the materiality thereof to the subject matter involved in the pending litigation.” (Evid. Code, § 1043, subd. (b)(3).) “To show good cause as required by [Evidence Code] section 1043, [the] declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges” and “articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence [citations] that would support those proposed defenses.” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024 (*Warrick*).) The declaration “must also describe a factual scenario supporting the claimed officer misconduct.” (*Ibid.*)

To determine whether the defendant has established good cause for in-chambers review of an officer’s personnel records, the trial court makes the following inquiry: “Has the defense shown a logical connection between the charges and the proposed defense? Is the defense request for *Pitchess* discovery factually specific and tailored to support its claim of officer misconduct? Will the requested *Pitchess* discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense? Under what theory would the requested information be admissible at trial? If defense

counsel's affidavit in support of the *Pitchess* motion adequately responds to these questions, and states 'upon reasonable belief that the governmental agency identified has the records or information from the records' (Evid. Code § 1043, subd. (b)(3)), then the defendant has shown good cause for discovery and in-chambers review of potentially relevant personnel records of the police officer accused of misconduct against the defendant." (*Warrick, supra*, 35 Cal.4th at pp. 1026–1027.)

"[The] two-part showing of good cause is a 'relatively low threshold for discovery.'" (*Warrick, supra*, 35 Cal.4th at p. 1019, quoting *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83.) A defendant has met his or her burden if he or she "presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges" and the scenario described "is one that might or could have occurred." (*Warrick, supra*, 35 Cal.4th at p. 1026.) A defendant's factual scenario must be accepted if it is *plausible*; the trial court is not to weigh or assess the evidence in order to determine whether the scenario presented is "reasonably probable" or "apparently credible." (*Id.* at pp. 1020, 1025-1026.) "The relatively relaxed standards for a showing of good cause . . . [ensures] the production for inspection of all potentially relevant documents. The in camera review procedure and disclosure guidelines . . . guarantee, in turn, a balancing of the officer's privacy interests against the defendant's need for disclosure." (*City of Santa Cruz v. Municipal Court, supra*, 49 Cal.3d at p. 84.)

Although the threshold for establishing entitlement to *Pitchess* discovery is low, it is the defendant's burden to meet that threshold. He or she must make an initial showing that supports the materiality of the information sought. (*People v. Husted* (1999) 74 Cal.App.4th 410, 416.) The defendant is required to establish a "logical link between the defense proposed and the pending charge" and "also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Warrick, supra*, 35 Cal.4th at p. 1021.) In determining a *Pitchess* motion, the trial court will generally have before it pertinent documents, such as the police report. (See *People v. Hill* (2005) 131 Cal.App.4th 1089, 1098-1099, disapproved in part on

another ground in *People v. French* (2008) 43 Cal.4th 36.) But it is not the trial court's task to review the documents and develop a theory to support discovery of the requested information. Where the defendant fails to assert in the supporting declaration "a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents," the motion should be denied. (*People v. Hill, supra*, 131 Cal.App.4th at p. 1099.)

If the court orders disclosure, the custodian of the officer's records brings to court all the potentially relevant personnel records and, in camera, the trial court determines whether any of the records are to be disclosed to the defense. During the in camera hearing, neither the defense nor the prosecution is present. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226-1227 (*Mooc*).)

Mooc requires that, at the time of the in camera hearing, the trial court facilitate appellate review of its in camera rulings as follows. "The trial court should . . . make a record of what documents it examined before ruling on the *Pitchess* motion. . . . If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined. Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision, whether to disclose or not to disclose, would be nonexistent. Of course, to protect the officer's privacy, the examination of documents and questioning of the custodian should be done in camera in accordance with the requirements of Evidence Code section 915, and the transcript of the in camera hearing and all copies of the documents should be sealed." (*Mooc, supra*, 26 Cal.4th at p. 1229, fn. omitted.)

"A trial court's decision on the discoverability of material in police personnel files is reviewable under an abuse of discretion standard." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220.) A court's ruling constitutes an abuse of discretion only when it falls outside the bounds of reason. (*People v. Galan* (2009) 178 Cal.App.4th 6, 12.)

C. Review of Officer Talbot's Personnel Records

We have independently reviewed the sealed reporter's transcript of the *in camera* hearings regarding the *Pitchess* discovery of Detective Talbot's records. We find the trial court's findings, as reflected in the sealed transcript, are sufficient to permit appellate review of its rulings and conclude that the trial court properly exercised its discretion in determining that there were no documents for disclosure.

D. The Trial Court Abused its Discretion when it Denied Appellant's Request for Discovery of the Personnel Records of Officer Jones

Here appellant proposed a factual scenario and a defense to the charge – he denied that he was in possession of the firearm in question in this case and claimed that Officers Talbot and Jones produced a firearm and fabricated the story that appellant was touching the sweatshirt containing the firearm. This scenario met the low threshold for an *in camera* review of Officer Talbot's records, which the court ordered.

However, the court improperly denied the *in camera* review of Officer Jones' records. Appellant's motion included a factual scenario where both Officers Talbot and Jones approached appellant, planted evidence on appellant, and lied. However unlikely, this scenario is plausible and calls into question the conduct of both Officers Jones and Talbot. A scenario in which Officer Jones lied about his observation of appellant is plausible since Officer Jones was present at the arrest of appellant and attests to the validity of the police report. The police report attached to the written motion indicates that both Jones and Talbot observed appellant holding the firearm and therefore any evidence of untruthfulness, misconduct or planting of evidence by Officer Jones would be logically linked to appellant's defense that the officers lied about his possession of the firearm. Accordingly, the court abused its discretion in denying the *Pitchess* motion with respect to Officer Jones.

This error requires that we reverse the judgment and remand this matter to the lower court to conduct an appropriate *in camera* review of Officer Jones' personnel records.

III. The Trial Court was Required to Strike Rather than Impose and Stay the One-year Enhancement under Section 667.5, Subdivision (b)

The appellant contends that the trial court should have struck rather than stayed the one-year enhancement for the prior prison term enhancement. In sentencing appellant, the trial court imposed a five-year term for the appellant's prior serious felony prior convictions under the terms of section 667, subdivision (a)(1) and imposed but stayed a section 667.5, subdivision (b) one-year enhancement for the prior prison term.

As appellant points out and the Attorney General concedes, the trial court erred in imposing both a consecutive five-year enhancement under section 667, subdivision (a)(1) for the felony conviction which gave rise to the prior prison term and the one-year enhancement under section 667.5, subdivision (b) for that prior prison term. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150-1153; *People v. Perez* (2011) 195 Cal.App.4th 801, 805.) Accordingly, the trial court should have struck rather than stayed the one-year section 667, subdivision (b) enhancement.

DISPOSITION

The judgment is reversed and the case is remanded with directions to the trial court to conduct an *in camera* hearing on appellant's discovery motion consistent with this opinion. (See *People v. Hustead*, *supra*, 74 Cal.App.4th at p. 423.) If the *in camera* hearing reveals discoverable information bearing on the officer's honesty which could lead to admissible evidence helpful to appellant in defense of the charge, the trial court shall grant the requested discovery, allow appellant an opportunity to demonstrate prejudice, and order a new trial if prejudice is demonstrated.

If the hearing reveals no discoverable information in Officer Jones' personnel file that would lead to admissible evidence helpful to appellant's defense, the trial court shall reinstate the original judgment, except for the portion of judgment imposing a one year enhancement under section 667.5, subdivision (b). The portion of the judgment imposing on Carrillo a one-year enhancement for a prison term prior under section 667.5, subdivision (b) is stricken. The trial court is directed to prepare an amended abstract of

judgment in accordance with this disposition and deliver it to the Department of Corrections and Rehabilitation.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.