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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.

RAJ C. GUPTA,

Defendant and Appellant.

B227002

(Los Angeles County  
Super. Ct. No. PA061844)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Barbara M. Scheper and Daniel B. Feldstern, Judges. Affirmed.

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Thomas Owen, 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, Assistant Attorney General, Steven D. Matthews and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

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Raj C. Gupta appeals from the judgment entered after a jury convicted him of transportation of a controlled substance and possession for sale of a controlled substance. Gupta does not challenge his conviction for transportation of a controlled substance, but contends that we should reverse the judgment as to his conviction for possession for sale of a controlled substance because the trial court prejudicially erred by failing to instruct the jury on the lesser included offense of simple possession. He also asks us to independently review the trial court's examination of sheriff deputy personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

1. *The Information, Denial of the Charges and Gupta's Self-representation*

An amended information, dated December 7, 2009, charged Gupta with transportation of a controlled substance (methamphetamine) (Health & Saf. Code, § 11379, subd. (a)) and possession for sale of a controlled substance (methamphetamine) (Health & Saf. Code, § 11378). The information specially alleged that Gupta had: (1) two prior serious or violent felony convictions, one for burglary (Pen. Code, § 459) and one for involuntary manslaughter (Pen. Code, § 192, subd. (b)), that qualified as strikes under the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)); (2) prior convictions for transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a)) and possession of a controlled substance (Health & Saf. Code, § 11351) that subjected him to an enhanced sentence under Health and Safety Code section 11370.2, subdivision (c); and (3) five prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). Gupta pleaded not guilty to the charges and, having voluntarily waived his right to counsel, represented himself in the proceedings against him.

## 2. *The Evidence Presented at Trial*

### a. *The People's Evidence*

About 8:30 p.m. on January 15, 2009, Los Angeles County Sheriff Deputies Derek Scharlin and Christopher Craft were in a parked patrol car monitoring an intersection in Santa Clarita due to complaints that drivers had been failing to obey the stop signs. They observed a gray Mazda pickup truck travel through the intersection without stopping at the posted sign and then initiated a traffic stop.

Deputy Craft approached the vehicle on the driver's side and smelled a strong odor of marijuana emitting from the truck. He asked the driver, identified as Gupta, for his driver's license and registration, which Gupta provided to the deputy. Gupta acted extremely nervous, as his hands were shaking and he was stuttering as he spoke to the deputy. Deputy Craft asked Gupta to exit the vehicle, which he did. The deputy searched Gupta's person and found two tightly wound bindles of cash in the front right pocket of Gupta's pants. Each bindle contained \$1,320 in mixed denominations. Deputy Craft did not believe that Gupta was under the influence of a controlled substance, nor did he find on Gupta's person items commonly possessed by users of a controlled substance, such as a glass smoking pipe, needle, syringe or razor blade.

Deputy Scharlin searched the truck after Gupta had exited it. In the rear portion of the cab of the truck, within arm's reach of the driver, Deputy Scharlin recovered a nylon bag containing four large Ziploc bags in which there were 23 individually wrapped, small bags. Each small bag contained a white substance, resembling methamphetamine. Six empty, large Ziploc bags were in the nylon bag as well. In the front part of the truck on the passenger side, Deputy Scharlin found a tightly wound bindle of cash, containing \$1,370 in mixed denominations, "underneath quite a bit of papers and napkins and various debris that were strewn on the seat." During the search, Deputy Scharlin noticed "the distinct smell of freshly burnt marijuana." No marijuana was in the vehicle, nor did Deputy Scharlin find any paraphernalia commonly used by people who ingest or smoke narcotics. Deputies Craft and Scharlin were the only deputies present at the stop at the time the narcotics were found in Gupta's vehicle.

Testing determined that the white substance in the small bags found in Gupta's truck was methamphetamine. The total amount of methamphetamine recovered was approximately nine ounces.

Detective John Skikas testified as a narcotics expert, opining that the methamphetamine found in Gupta's vehicle was possessed for sale. Detective Skikas based his opinion on the large quantity of the drug found in the vehicle, the packaging of the methamphetamine in small bags then placed in larger bags, the amount of cash recovered and the lack of any paraphernalia in the vehicle indicating that Gupta was using the drug or signs that Gupta was under the influence. According to Detective Skikas, the wholesale value of an ounce of methamphetamine for purchase by a seller is \$1,200 to \$1,400 per ounce, a price consistent with the three bindles of cash found during the search, two containing \$1,320 and one containing \$1,370. The small bags were typical of those used to sell narcotics in amounts ranging from a quarter of a gram to an eighth of an ounce. In addition, the quantity of methamphetamine found in the vehicle would yield approximately 12,500 individual doses of the drug, which far exceeds the amount that a user would possess, and has a street value of approximately \$25,000.

b. *The Defense's Evidence*

Richard Kovacs testified that he had met Gupta at a job site in November or December 2008 and lived in Santa Clarita, not far from the intersection where the deputies had stopped Gupta. In December 2008 or January 2009, Kovacs met with Gupta to show him work that Kovacs had done at his in-laws' house. The next time Kovacs saw Gupta was in jail about a week before Gupta's trial, where Kovacs was awaiting transfer after pleading no contest to forgery, possession of a stolen handgun and possession of methamphetamine and being sentenced to two years in state prison. Gupta told Kovacs about the incident with the deputies, and Kovacs reported that he had a similar story. According to Kovacs, the charges against him stemmed from an incident during which Deputy Craft had stopped him while driving because he did not have a front license plate. During the stop, Kovacs showed Deputy Craft that the license plate was inside of his

truck. Deputy Craft asked Kovacs to exit the truck and for permission to search the vehicle, but Kovacs refused. Deputy Craft opened the truck's door, pulled Kovacs out and searched the vehicle. The deputy found four counterfeit bills and a stolen handgun. Deputy Craft then went to Kovacs's house, entered the home office and had the safe opened. Inside the safe was a "little bit" of marijuana, but Deputy Craft said the marijuana had come from Kovacs's vehicle and that he had smelled marijuana emitting from the cab of the truck. Kovacs maintained that, after the search, a cellular telephone and \$1,500 cash were missing from the safe. He denied smoking marijuana, but admitted to having some in his house.

Gupta's father testified that Gupta lived with him on January 15, 2009, and that he had rented rooms in his house and his daughter's house to Brazilians, who spoke both English and Portuguese. Gupta's father saw Brazilians drive Gupta's truck.

Gupta testified, stating that the money found by the deputies had been earned by him working as a day laborer. Although he had some paycheck stubs, he did not have any for the period from August 2008 to January 2009. According to Gupta, he had the cash bindles with him on January 15, 2009 because he had gone to an auction that day hoping to buy a new car, and the money was separated into three bindles because he wanted to buy three cars. When the deputies stopped him, he was coming from a meeting he had with Kovacs to discuss the possibility of Kovacs's helping him with work at his father's homes. Gupta was unaware that narcotics were in his vehicle. He loaned his truck to others, including the Brazilians. The nylon bag containing the drugs had Portuguese writing on the outside of it, and Gupta did not know that it was in his vehicle. Gupta said that he had found items that were not his in his truck on prior occasions and then thrown them away, and if he found methamphetamine worth \$25,000 in his truck he would have thrown it away. Gupta said a deputy in plain clothes, in addition to Deputies Craft and Scharlin, who were in uniform, was present at the scene of his stop and that deputy had asked him whether he would consent to a search of the vehicle. Gupta explained that he had told the deputy in plain clothes that he would not consent to a search, yet Deputy Craft had searched his person and Deputy Scharlin, along with the

deputy in plain clothes, had searched his truck. After the deputy in plain clothes asked Gupta for consent to search and Gupta refused, Deputy Craft said that if Gupta were refusing the search then he must have something to hide. There was no marijuana odor in his truck, and no marijuana or anything relating to it was found in the vehicle. Gupta admitted prior convictions for first degree burglary in 1985, possession for sale of a controlled substance and involuntary manslaughter in 1992 and offering to sell methamphetamine in 1997. He was in prison from 1997 to 2005.

### 3. *The Jury's Verdict and Sentencing*

The jury found Gupta guilty of transportation of a controlled substance and possession for sale of a controlled substance. The jury also determined that the cash found on Gupta's person and in his car, totaling \$4,010, was subject to forfeiture under Health and Safety Code section 11470, and the trial court declared a forfeiture. Gupta waived his right to a jury trial on the allegations relating to his prior convictions and prior prison terms and admitted that he had a prior serious or violent felony conviction for burglary that qualified as a strike under the Three Strikes law and two prior convictions that subjected him to an enhanced sentence under Health and Safety Code section 11370.2, subdivision (c), and that he had served five prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).<sup>1</sup>

The trial court sentenced Gupta to a state prison term of 12 years, consisting of the middle term of three years for transportation of a controlled substance in count 1, doubled pursuant to the Three Strikes law, plus two 3-year terms based on his prior convictions qualifying him for sentencing under Health and Safety Code section 11370.2,

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<sup>1</sup> The trial court dismissed the allegation regarding Gupta's prior serious or violent felony conviction for involuntary manslaughter, and Gupta admitted only his prior serious or violent felony conviction for burglary, based on the People's statement that they would not pursue the case as a third strike for Gupta.

subdivision (c). Pursuant to section 654, the court stayed execution of sentence on the conviction in count 2 for possession for sale of a controlled substance. It elected not to punish Gupta's for his five prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

## DISCUSSION

### 1. *The Trial Court Did Not Err by Declining to Instruct the Jury on Simple Possession*

The trial court declined to instruct the jury with respect to count 2 for possession for sale of a controlled substance on the lesser included offense of simple possession. According to the court, the evidence was insufficient to warrant the instruction. Gupta contends that the court erred. We disagree.

The trial court must instruct the jury, whether sua sponte or on the defendant's request, on a lesser included offense "when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) "[T]he existence of "any evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.] "Substantial evidence" in this context is "evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]" that the lesser offense, but not the greater, was committed. [Citations.]' [Citation.]" (*People v. Moya* (2009) 47 Cal.4th 537, 553.) Simple possession of a controlled substance is a lesser included offense of possession for sale of a controlled substance. (*People v. Magana* (1990) 218 Cal.App.3d 951, 954.) As a result, the question in this case is whether substantial evidence demonstrated that Gupta possessed the methamphetamine found in his vehicle and had knowledge of its presence and its nature as a narcotic but did not have the intent to sell it. (See *People v. Rosales* (1964) 226 Cal.App.2d 588, 591-592 [intent to sell is element that turns simple possession into a possession for sale].)

The trial court did not err by declining to instruct the jury on simple possession, as the evidence did not warrant such instruction. The methamphetamine found in Gupta's truck was within his reach and packaged for sale, and additional packing material was recovered from the vehicle. The amount was so large that it would yield approximately 12,500 individual doses of the drug, thus more than an individual user would possess and with a street value of approximately \$25,000. Gupta had three bindles of cash, two in the amount of \$1,320 on his person and one in the amount of \$1,370 in his truck, all within the \$1,200 to \$1,400 range of the wholesale value for an ounce of methamphetamine. No evidence indicated that Gupta was under the influence of the drug, nor did he have any paraphernalia on his person or in the truck suggesting that he was a user of methamphetamine. Although Gupta attempted to implicate other individuals who he said had driven his truck, no evidence suggested that any of those persons was a user or seller of methamphetamine. Substantial evidence thus did not support an inference that Gupta possessed the methamphetamine and knew of its presence and nature but did not intend to sell it. No instruction on simple possession, therefore, was required. (See, e.g., *People v. Douglas* (1987) 193 Cal.App.3d 1691, 1695-1696 [no need to instruct on lesser included offense of simple possession of marijuana when defendant had 14 individual baggies in an area known for drug trafficking].)

*People v. Saldana* (1984) 157 Cal.App.3d 443, on which Gupta relies, is distinguishable. In that case, conflicting circumstantial evidence existed on whether the defendant possessed heroin with intent to sell it. On the one hand, an officer gave his expert opinion based on the amount, value and resale value per unit that the drug found in defendant's bedroom was possessed for sale. (*Id.* at pp. 451-452.) On the other hand, the defendant's brother, who was found in the basement of the house where the drugs were discovered, was a heroin user and seller, and some of the balloons of heroin recovered were cut open. (*Id.* at pp. 457-458.) The evidence thus supported an inference that the balloons were for personal use despite being packaged as if for sale and that the defendant possessed them for his brother's use and not for sale. (*Ibid.*) The jury, accordingly, should have been instructed on the lesser included offense of simple



possession. (*Id.* at p. 458.) In this case, however, no evidence existed that, although Gupta possessed the methamphetamine in his vehicle and knew of its presence and nature, he did not intend to sell it. On the contrary, Gupta had bindles of cash on his person matching the wholesale value of an ounce of methamphetamine. Moreover, in *Saldana*, although the trial court did not instruct on the lesser included offense of simple possession with respect to the charge for possession for sale of heroin, it did give a simple possession instruction in relation to the additional charge of possession for sale of marijuana. (*Ibid.*) The appellate court concluded the disparity in treatment between the two charged offenses in terms of the instructions, despite the “same quantum and type of evidence[,]” created the potential for jury confusion and thus constituted harmful error. (*Ibid.*) No such potential for jury confusion existed here.

Even assuming error in this case, the failure to instruct on the lesser included offense of simple possession was harmless. The large quantity of methamphetamine found in Gupta’s vehicle within his reach, the packaging, the three bindles of cash in the amount of the wholesale value of an ounce of methamphetamine and the lack of evidence that Gupta was under the influence, personally used the drug or possessed it but did not intend to sell it demonstrate that it is not reasonably probable that had the jury been instructed on simple possession it would have found that Gupta possessed the methamphetamine for personal use rather than for sale. (*People v. Breverman, supra*, 19 Cal.4th at p. 178 [error to instruct on lesser included offense in a noncapital offense prejudicial only if “it appears ‘reasonably probable’ the defendant would have obtained a more favorable outcome had the error not occurred”].)

2. *The Trial Court Properly Determined, Based on Its In Camera Review, That Gupta Was Not Entitled to Disclosure of Pitchess Material*

“For approximately a quarter-century our trial courts have entertained what have become known as *Pitchess* motions, screening law enforcement personnel files in camera for evidence that may be relevant to a criminal defendant’s defense.” (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225, fn. omitted (*Mooc*); see *Pitchess, supra*, 11 Cal.3d 531.) To balance the defendant’s right to discovery of records pertinent to his or her defense,

and thus to a fair trial, with the peace officer's reasonable expectation that his or her personnel records remain confidential, the Legislature adopted a statutory scheme requiring a defendant to meet certain prerequisites before a trial court considers his or her request. (*People v. Prince* (2007) 40 Cal.4th 1179, 1284-1285; *Mooc*, at p. 1227; see Pen. Code, §§ 832.5, 832.7, 832.8; Evid. Code, §§ 1043-1047 [statutory scheme governing *Pitchess* motions].)

A defendant seeking to initiate discovery must file a written motion that includes “[a] description of the type of records or information sought[,]” supported by “[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.” (Evid. Code, § 1043, subd. (b)(2) & (3); *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019-1020.) “A showing of good cause is measured by ‘relatively relaxed standards’ that serve to ‘insure the production’ for trial court review of ‘all potentially relevant documents.’ [Citation.]” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016 (*Warrick*).) To establish good cause, the defendant must present a “plausible scenario of officer misconduct . . . that might or could have occurred.” (*Id.* at p. 1026.) A plausible scenario presents “an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges.” (*Ibid.*) Assessing credibility or persuasiveness at the *Pitchess* discovery stage is inconsistent with the statutory language. (*Ibid.*) Depending on the circumstances, the defendant’s factual scenario “may consist of a denial of the facts asserted in the police report.” (*Id.* at pp. 1024-1025.) Nevertheless, the defendant must request information with sufficient specificity to preclude the possibility that he or she is “simply casting about for any helpful information . . . .” (*Mooc, supra*, 26 Cal.4th at p. 1226.)

If the trial court concludes the defendant has made a good cause showing for discovery, the custodian of records must bring to court all documents “‘potentially relevant’” to the defendant’s request. (*Mooc, supra*, 26 Cal.4th at p. 1226.) The court then examines the documents in chambers with only the custodian of records and such

other persons he or she is willing to have present. (Evid. Code, §§ 915, subd. (b), 1045, subd. (b).) Subject to certain statutory exceptions and limitations, the court must disclose to the defendant “such information [that] is relevant to the subject matter involved in the pending litigation.”<sup>2</sup> (*Mooc*, at p. 1226; see also *Warrick*, *supra*, 35 Cal.4th at p. 1019.) “A trial court’s ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion.” (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

In his pretrial motion for *Pitchess* discovery, Gupta requested personnel records of Deputies Craft and Scharlin, as well as of the unnamed deputy in plain clothes who Gupta claimed had been present at the traffic stop, and Sergeant Gutierrez, who signed the arrest report. According to Gupta, the statement in the arrest report that there was a strong odor of marijuana emitting from his truck was untrue and, as a result, the deputies had fabricated probable cause to search his vehicle. Gupta maintained that no marijuana was found in the vehicle or reported to have been at the scene and thus there could not have been an odor of marijuana in his vehicle. In addition, Gupta said, the statement that he was shaking during the traffic stop was untrue, further demonstrating the deputies had fabricated probable cause to search the vehicle. Gupta claimed that the *Pitchess* materials requested would support his motion to suppress the evidence found in his vehicle and impeach the credibility of Deputies Craft and Scharlin, thereby supporting his defense to the charges. The trial court found good cause to review in camera the personnel files of Deputies Craft and Scharlin relating to dishonesty, making false police reports and fabrication of probable cause or other evidence. The court did not find good cause

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<sup>2</sup> The trial court must exclude from disclosure: “(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought. [¶] (2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code. [¶] (3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.” (Evid. Code, § 1045, subd. (b); see also *Mooc*, *supra*, at pp. 1226-1227.)

regarding Sergeant Gutierrez because he only had signed the arrest report and had not been present when the alleged misconduct occurred.

Although the reporter's notes of the original *Pitchess* hearing apparently were not found, the trial court conducted another hearing in camera on August 15, 2011, at which it again reviewed personnel records of Deputies Craft and Scharlin and summarized its findings that no discoverable *Pitchess* information existed. (See *Mooc, supra*, 26 Cal.4th at p. 1229.) At Gupta's request, we reviewed the sealed transcript of that hearing, as well as the records provided to the court. Based on our review, we conclude that the court properly exercised its discretion in determining that the personnel records did not contain any material appropriate for disclosure under *Pitchess*.

#### **DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.