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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN HUYNH, Defendant and Appellant.	B228291 (Los Angeles County Super. Ct. No. NA081657)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Affirmed in part, reversed in part, and remanded with directions.

Jennifer Peabody, 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, Stephanie A. Miyoshi and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

Jonathan Huynh appeals from his judgment of conviction by jury verdict of murder (Pen. Code, § 187, subd. (a)). He argues his constitutional rights to remain silent, to due process, and a fair trial were violated by the court's order that he could not present a defense without admissible evidence of the foundational basis, which could only come

from defendant's testimony. He also contends the trial court erred in denying his *Pitchess* motion, and that the court erred in imposing a $520 assessment and surcharge. Respondent concedes error with respect to the last issue.

We conclude that defendant's rights were not violated by the trial court's order that his testimony was necessary to lay a foundation for the defense that the victim died during a consensual episode of sexual asphyxiation. The trial court erred in denying defendant's motion for discovery of material in the personnel files of two investigating detectives, as related to the defense that his statements to them were coerced. We shall conditionally reverse the judgment to allow the trial court to conduct the appropriate in camera review, as we explain. We reverse as to the $520 penalty assessment imposed on the restitution fines.

FACTUAL AND PROCEDURAL SUMMARY

Defendant began dating Ms. Kate Yi while they were in high school. They had a turbulent relationship, breaking up after graduating in 2006, and resuming dating about a year later. Ms. Yi's friends disliked defendant and believed he was infatuated and obsessed with her. Defendant was Ms. Yi's first sexual partner. She was very conservative and religious.

In 2009 Ms. Yi was a nursing student at California State University, Long Beach. In January 2009, she moved into a two-bedroom apartment with Kimberly Ryman, a fellow student. The two had not known each other previously. Defendant stayed with Ms. Yi four to five nights a week. They bickered and argued a lot. Ms. Ryman considered defendant to be odd, immature, and awkward with a crazy look on his face. On one occasion, a neighbor who did not know defendant, had a conversation with him in which defendant demonstrated anger and intensity about his belief that Ms. Yi was not putting as much into their relationship as he was, and kept asking him for money.

On the afternoon of March 31, 2009, Ms. Ryman came back to the apartment but did not see Ms. Yi and defendant. Ms. Yi's purse, with items falling out of it, was on the floor in the hallway outside of Ms. Ryman's bedroom. Ms. Yi had never left her purse in

that condition before. Ms. Ryman went into her room, changed clothes, and came out. She put the items into the purse and set it near the wall in the hallway. Ms. Yi's bedroom door was closed and there was no noise coming from inside the room. Ms. Ryman went into the living room to put on her running shoes. Defendant walked out of the bedroom, looking sad. Ms. Ryman asked, "'Are you in trouble again?'" Defendant said, "'She hit me'" and touched his face. Ms. Ryman said, "'Oh.'" Ms. Ryman explained that she asked defendant if he was in trouble again because Ms. Yi "always got mad at him. He came out and moped out in the living room and I just talked to him usually."

Ms. Yi came out of her room, appearing angry. She said, apparently to defendant: "'Take your things and leave,' like, 'Just leave—hold on. Take your stuff too with you.'" Ms. Yi said she would get defendant's things because that way, he would get out faster. She went back into her room and came out with a pile of defendant's belongings. She opened the apartment door, and set the belongings inside next to the door. Then she got another pile, and set it outside. Ms. Yi did not say anything to Ms. Ryman. Ms. Yi told defendant to take his desk chair too. Both defendant and Ms. Yi were fully clothed.

It appeared to Ms. Ryman that Ms. Yi was breaking up with defendant. Ms. Ryman had never seen this type of interaction between them before. She tried to change her shoes as fast as she could because she wanted to leave Ms. Yi and defendant alone. While Ms. Yi was moving his property, defendant was just standing by the front door, looking sad. When Ms. Ryman left, Ms. Yi was standing next to defendant with her arms crossed, telling him to leave. Ms. Yi still appeared to be angry. Ms. Ryman left the apartment about 3:35 p.m.

While she was gone, Ms. Ryman received a call which displayed Ms. Yi's name on the caller identification. This was about 6:00 p.m. the same day. But Ms. Ryman missed the call, and called the number back later. Defendant answered Ms. Yi's phone, which was unusual. Ms. Ryman asked if Ms. Yi had called her. Defendant said "'No, it was me. I called you.'" Defendant said "'She got mad at me. And, fine, if you don't leave I'm going to leave.'" Defendant said he could not find Ms. Yi, and Ms. Ryman asked what she could do. Defendant asked her to help find Ms. Yi. Ms. Ryman still was

working out and had another errand, so she told defendant she would be back in an hour. Defendant asked her permission to wait for Ms. Yi at the apartment because he had her phone and keys. Ms. Ryman agreed, but thought he should leave if Ms. Yi wanted him to do so.

Ms. Ryman returned to the apartment between 7:15 p.m. and 7:30 p.m. to find it locked and empty. Only the bottom lock on the door was locked, not the deadbolt. The property belonging to defendant that Ms. Yi had placed near the front door and outside the front door was gone. Ms. Yi's sandals were gone, as were her purse, keys, and car. The door to Ms. Yi's bedroom was open. Ms. Ryman did not hear from either Ms. Yi or defendant that night or the next day. She tried to call Ms. Yi the next day on her cell phone, but did not reach of her. She also tried unsuccessfully to reach Ms. Yi by text message. Ms. Ryman became concerned on April 1 because Ms. Yi was always home, and because she was not there to pay her share of the rent, which was due that day.

Later that evening, Ms. Ryman's cat began acting strangely, sniffing at the closet where Ms. Yi was eventually found. The next day, on April 2, Ms. Ryman found a number for Ms. Yi's mother and called to say she could not locate Ms. Yi. Ms. Yi's parents arrived at the apartment about 7:00 p.m. on April 2. Ms. Yi's mother and Ms. Ryman searched Ms. Yi's room. Ms. Ryman found Ms. Yi's dead body in a small closet in the room. She ran from the apartment, screaming.

Ms. Yi's father pulled her body out of the closet. A man's leather belt was tightly pulled around her neck. Ms. Yi's mother loosened the belt, removed it, and threw it to the side. The parents cradled her body on the floor of the room and were in this position when the first police officer arrived at the scene. Ms. Yi had black panties stuffed in her mouth and was naked except for a thin shirt pulled up over her breasts. She had Advil pills stuffed up her nostrils. There was bleeding on Ms. Yi's head and near her buttocks and vagina and a mark on her forehead. There was a bruise on her cheek. Ms. Yi was 20 years old at the time of her death. She was 5 feet 4 inches tall and weighed 143 pounds.

Detective Daniel Mendoza investigated the scene. He noticed the room smelled unusually fresh, like laundry soap. The bedroom window was wide open, and fabric

softener sheets were on the floor of the closet and on Ms. Yi's buttocks. A plug-in air freshening device was emitting an odor. The belt next to Ms. Yi's body was 44 inches long, 1.5 inches wide, and had a significant amount of hair attached to it. DNA samples were collected from the body.

On April 3, police detectives learned that Ms. Yi's cell phone was pinging at the Block of Orange, a mall. Officers went to that location and found Ms. Yi's car parked in the lot. They watched the vehicle for seven hours. At about 6:00 p.m., defendant went to the vehicle, entered it using a key, and changed his shirt with one from the trunk. He then went back into the mall. Officers located him playing a game with other people in a game store. Detective Mendoza arrived at 8:00 p.m. and found defendant still playing games at the store. He and his partner identified themselves as police officers and told defendant they wanted to talk with him about a missing person report regarding Ms. Yi.

Defendant spoke with the officers in their unmarked police car. The first part of that interview was not recorded, but the second portion was. Based on incriminating statements defendant made, he was detained and transported to the Long Beach Police Station. Only the second part of defendant's interview at the Long Beach station was recorded, the first part was not. He admitted Ms. Yi died after he hit her during an argument.

Dr. Paul Gliniecki, the deputy medical examiner, concluded that the cause of death was asphyxia due to strangulation or obstruction of the airway, with a gag and sharp force injuries contributing to death. Asphyxia is lack of oxygen. Ms. Yi had extensive petechial hemorrhages (small blood spots) over her face, in her eyes, and in her mouth from the strangulation. She also had ligature marks across her neck and an internal bruise on the right side of the neck. The gag was a pair of panties stuffed into her mouth with her tongue rolled back. There were three separate incised or sharp force injuries to the back of the head, each with a depth of one-half inch. Ms. Yi also had a congested face. Dr. Gliniecki explained that this meant that blood vessels in the face had become engorged and burst, causing hemorrhages. In comparison to other strangulation cases, the petechial hemorrhages on Ms. Yi's face were "considerably" significant. There was

an abrasion on her neck and some other scattered abrasions. Fragments of ibuprophren or Advil pills were found in both nostrils. There were bruises and abrasions on her lips. She also had bruises on her hands, wrist, left side of the chest, and legs. There were bite marks on the tip of Ms. Yi's tongue.

There was no damage to Ms. Yi's hyoid bone, which is a semi-circular bone that encircles the neck. Dr. Gliniecki was asked whether it was unusual in a strangulation case to have an intact hyoid bone. He explained that in most strangulation cases, there is an intact hyoid bone with no fracture. The placement of the gag in Ms. Yi's mouth would have restricted air if she was alive when it was placed. Although ligature marks extended from ear to ear on the front of her neck, there were no ligature marks on the back of Ms. Yi's neck. Dr. Gliniecki testified that marks on the back of the neck could have been prevented if her hair was between her neck and the ligature. Alternatively, if the belt was pulled from side to side in a backward and upward motion, putting all of the pressure on the front of the neck, it would prevent ligature marks from appearing on the back of the neck. Dr. Gliniecki said this was not unusual. Ms. Yi's hair was below the shoulder in length.

Dr. Gliniecki testified that a strangulation victim typically passes out from lack of oxygen within 20 to 30 seconds, but takes six to seven minutes to die. In this case, the belt around the neck, the gag in the mouth, and the pills in the nostrils all would have blocked oxygen. The parties stipulated that defendant's semen was found in Ms. Yi's vagina and could have been deposited up to six days before death.

In an amended information, defendant was charged with one count of murder, with the special allegation that he used a knife in the commission of the crime (Pen. Code, § 12022, subd. (b)(1)). Defendant pled not guilty. He testified that Ms. Yi died during an episode of consensual sexual asphyxiation, a theory supported by a defense pathologist. The jury found defendant guilty of murder and found the knife use allegation true. Defendant was sentenced to an indefinite term of 25 years to life on the murder charge, with a one-year enhancement for use of a knife. Fines and restitution were ordered,

which we discuss as relevant in the last section of this opinion. This timely appeal followed.

DISCUSSION

I

Defendant argues the trial court erred by requiring that he testify in order to provide a foundation for defense expert testimony that Ms. Yi died as a result of consensual sexual asphyxiation. He also claims he was precluded from cross-examining Dr. Gliniecki on that theory of death. He argues that the ruling violated his constitutional rights to present a defense and to cross-examine a witness against him under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

A. Relevant Proceedings

Defense counsel sought admission of a private pathologist's report prepared by Gregory D. Reiber, M.D. Dr. Reiber reviewed Long Beach Police reports with respect to Ms. Yi's death, the autopsy report by Dr. Gliniecki, the transcripts of the preliminary hearing, and police interviews with defendant. He also reviewed crime scene and autopsy photographs. Dr. Reiber concluded that defendant's statement to the police describing Ms. Yi shaking as she died was "consistent with a terminal hypoxic seizure resulting from neck compression by ligature." He also concluded: "A lack of significant internal neck injury, the discontinuous nature of the ligature marks and absence of marks on [the] back of [the] neck all suggest that the belt was not used very forcefully; this is also consistent with erotic asphyxia that caused sufficient hypoxemia to produce fatal outcome. Victim's bruises on the upper extremities are generally consistent with the account of an altercation. The non-fatal stab wounds on the back of the upper neck are also consistent with the defendant's story, as is the finding of a pill in the nose. The fabric gag in the mouth may have been part of an initial erotic asphyxia event, but was not used as found at the scene, based on bite marks at tip of tongue. [¶] The cause of death is asphyxia resulting from compression of the neck by ligature; manner of death, homicide. The presence of a gag completely filling the mouth and the sharp force

injuries of the neck are likely perimortem to immediately postmortem and are not considered part of the cause of death, based on the autopsy evidence."

Before jury selection, the prosecution notified the court that it intended to move to exclude Dr. Reiber's report. The court initially indicated that it had not read the report, but said if Dr. Reiber had made assumptions about which only the defendant could have knowledge, then Dr. Reiber would not be allowed to testify about the report unless the defendant took the stand. The court then read the report and said that it "talks about the description and the defendant's story in this particular case, which if it comes from any other source would be self-serving hearsay, so unless the defendant takes the stand . . . ." Defense counsel interjected that the prosecution could put the defendant's story into evidence. The court ruled that Dr. Reiber would not be allowed to testify unless the defendant took the stand "because the assumption goes to defendant's quote unquote, 'story' which is what is listed here and he apparently interviewed the defendant. So if the defendant takes the stand then he can use the expert, obviously."

Defense counsel clarified that the interview to which Dr. Reiber referred was the police interview of defendant, not a personal interview with him. The court said this was understood, but that Dr. Reiber appeared to be relying on the defendant's self-serving hearsay. The prosecutor then said that she anticipated using defendant's statements to the police officers about how the death occurred. Her position was that defendant's statements were not consistent with Dr. Reiber's conclusions about cause of death, "which is the reason why the People believe that the defendant would need to testify in order for the doctor's foundation to be laid." The court said it agreed, and that it was an issue of foundation.

The issue was revisited by defense counsel before he cross-examined Dr. Gliniecki, the medical examiner. Defense counsel asked permission to cross-examine Dr. Gliniecki about Dr. Reiber's report. The court ruled: "You cannot do that. You know why, procedurally if your client does not take the stand, you cannot call your coroner. What if your client decides he does not want to take the stand, then the cat is out

of the bag." The court said it would order Dr. Gliniecki to return for cross-examination after defendant and Dr. Reiber testified.

After lengthy cross-examination of Dr. Gliniecki, at sidebar defense counsel informed the court that he would like to examine the witness about sexual asphyxia. He said: "However, I understand that, at this moment there is no foundation for the sexual asphyxia, so . . . [b]efore the foundation is laid, I want to do it. I'd like to do it now while he [Dr. Gliniecki] is here . . . ." The court responded that it had already ruled that this line of questioning would not be allowed unless defendant took the stand. But it also said that Dr. Gliniecki would be made available to be recalled.

Defendant testified in his own defense. He said that he and Ms. Yi had used the belt during sex at least 20 times. He usually used the belt from a position behind her. It was always consensual and they were not aware of any danger the practice posed. After arguments, they would have makeup sex.

Defendant and Ms. Yi argued over money on March 31. Ms. Yi became furious and hit and kicked defendant. He shoved her away and left the bedroom. While he was in the living room with Ms. Ryman, Ms. Yi came out with a pile of his belongings and threw it outside the door. She was still angry and told defendant to get out. She returned to her room and came out a second time with another pile of defendant's things, which she left outside the door. After a time, Ms. Yi returned to her bedroom, followed by defendant. Eventually they both cried, then started having sex. Ms. Yi got a belt out and together they put it around her neck. As they had intercourse, defendant pulled on the belt, but not hard enough to hurt anyone. On previous occasions, the belt had not left any marks and had not been uncomfortable for Ms. Yi.

When defendant moved, Ms. Yi did not respond. He turned her over and slapped her slightly. He thought she was still breathing, but was not sure. So he got the stethoscope and tried to listen for a heartbeat. He heard no heartbeat but she was still breathing. He tried mouth to mouth breathing and pushed on her stomach, but did not know how to do CPR. He tried to get the belt off but it was stuck. Then he tried to cut it off with a knife, which was unsuccessful. He cut her neck instead. Ms. Yi had started

shaking. He knew she was not alive, so he put the panties in her mouth, the pills in her nose, and put her in the closet. He did not call paramedics because her heart had already stopped. He grabbed some things and ran away because he was scared. On appeal, counsel for defendant describes the cross-examination of defendant as "vigorous, unrelenting and debilitating."

After defendant testified, Dr. Reiber testified. He described erotic asphyxia. He said there were a number of findings in this case consistent with erotic asphyxia. The marks on Ms. Yi's neck from the belt were not continuous and were fairly light in color. There was almost no internal neck injury, no injury to the hyoid bone or structure of the voice box, and the ligature mark did not involve the back of the neck. There were no head injuries to indicate Ms. Yi had been knocked out. In his opinion, one of the marks on her neck was caused by the pressure of the belt on her body as positioned in the closet after death. Dr. Reiber opined that the cuts to the back of Ms. Yi's neck were inflicted either shortly before or after death. He testified that the panties most likely were placed in Ms. Yi's mouth after she bit her tongue in the dying process. Dr. Reiber did not observe any skin injuries around the neck that would have resulted from fingernail scratches. This suggested to him that Ms. Yi did not attempt to pry the belt from her neck. The only major differences he had with the medical examiner's conclusions were that the gag and knife wounds did not contribute directly to the cause of death.

On cross-examination, Dr. Reiber testified that it was possible that Ms. Yi was alive when the gag was put in her mouth but was defenseless from lack of oxygen due to strangulation with the belt. After viewing a photograph of Ms. Yi's hair, he agreed that it was possible that there were no ligature marks on the back of her neck because her hair was between the skin and the belt. There was hair entwined in the belt. Dr. Reiber was presented with a hypothetical by the prosecution based on the one foot height differential between defendant and Ms. Yi. He agreed that if the taller person was pulling the ligature upward and toward the back, that would result in ligature marks primarily to the front and sides of the neck, but not the back. Defendant did not ask that Dr. Gliniecki be recalled for additional cross-examination on the sexual asphyxiation defense.

B. Legal Principles

Dr. Reiber's testimony was premised on the preliminary fact that defendant and Ms. Yi were engaged in consensual sexual asphyxiation immediately prior to her death. "When the relevance of proffered evidence depends on the existence of a preliminary fact, the proponent of the evidence has the burden of producing evidence as to the existence of that preliminary fact. (Evid. Code, § 403, subd. (a)(1).) The proffered evidence is inadmissible unless the trial court finds sufficient evidence to sustain a finding of the existence of the preliminary fact. (*Ibid.*; see also *People v. Marshall* (1996) 13 Cal.4th 799, 832 ['the trial court must determine whether the evidence is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence'].) 'The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion.' [Citations.]" (*People v. Bacon* (2010) 50 Cal.4th 1082, 1102–1103.)

These principles apply to the opinions offered by an expert witness. "'[T]he value of an expert's opinion depends on the truth of the facts assumed.' [Citation.] 'Where the basis of the opinion is unreliable hearsay, the courts will reject it.' [Citations.] It is settled that a trial court has wide discretion to exclude expert testimony, including hearsay testimony, that is unreliable. [Citations.]" (*People v. McWhorter* (2009) 47 Cal.4th 318, 362 (*McWhorter*).) It is established that an expert witness's opinion "'may not be based "*on assumptions of fact without evidentiary support* [citation], *or on speculative or conjectural factors* . . . . [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?" [Citation.]' (*People v. Richardson* (2008) 43 Cal.4th 959, 1008, italics added.)" (*People v. Moore* (2011) 51 Cal.4th 386, 405 (*Moore*).) We review a ruling on the admissibility of expert testimony for abuse of discretion. (*Id*. at p. 406.)

C. Arguments

Defendant argues that the trial court's ruling requiring him to testify in order to provide a foundation for Dr. Reiber's testimony put his "right against self-incrimination on a collision course with his rights to present a defense and a fair trial, where one had to yield to the other." He also contends the trial court misunderstood the factual basis for the sexual asphyxiation defense. Defendant asserts that a foundation was laid by prosecution evidence, including the testimony of Dr. Gliniecki, defendant's second statement to police officers at the station, the condition of the body when discovered, his relationship with Ms. Yi, evidence that he and Ms. Yi recently had sexual intercourse, and the absence of vaginal trauma. He contends that since there was evidence to support the defense of sexual asphyxiation, it was error to require him to testify before allowing Dr. Reiber to testify and permitting cross-examination of Dr. Gliniecki about whether Ms. Yi died during an episode of sexual asphyxiation.

1. Asserted Trial Court Misunderstanding

Defendant argues that the trial court erroneously believed that Dr. Reiber relied on a personal interview with him, rather than on his statements to the police, in forming his opinions regarding cause of death. Although the trial court initially appeared mistakenly to believe that Dr. Reiber had spoken with defendant before writing his report, this misapprehension was immediately corrected by both defense counsel and the prosecutor. They made it clear that Dr. Reiber was relying on statements made to police officers. The court stated that it understood, but that the statements were "self-serving hearsay" and that the statements made by defendant to the police were not consistent with the facts on which Dr. Reiber's opinion was based and therefore there was an issue of foundation. Defendant disputes the characterization of his statements to the police as "self-serving," arguing instead that they were inculpatory because he admitted to engaging in an act which caused Ms. Yi's death, concealing her death, and lying to law enforcement. He reasons therefore that the court abused its discretion because it did not act in an informed manner.

As respondent points out, after counsel clarified that Dr. Reiber was relying on defendant's statements to police officers, the trial court said the problem with admission

of the testimony was lack of foundation. When he sought to cross-examine Dr. Gliniecki on sexual asphyxiation, defense counsel acknowledged: "I understand at this moment there is no foundation for the sexual asphyxia . . . ." Defense counsel continued: "Before the foundation is laid, I want to do it [examine on sexual asphyxia]. I'd like to do it now while he is here . . . ." The court reminded counsel of the ruling that this subject could not be raised without a foundation and offered to make Dr. Gliniecki available later if an adequate foundation was laid.

On this record, we conclude that the trial court did not base its ruling on the erroneous belief that Dr. Reiber had personally interviewed defendant about engaging in sexual asphyxiation which led to Ms. Yi's death. Defendant did not demonstrate abuse of discretion on this ground.

2. Other Claimed Foundation for Evidence of Sexual Asphyxiation

Defendant cites evidence that established that he and Ms. Yi had been in a long-term romantic and sexual relationship. He asserts that while there was evidence of the presence of his semen in Ms. Yi's vagina, there was no evidence of traumatic injury to her external genitalia or anus. In addition he relies on evidence that she was found undressed from the waist down and her bra was pulled up above her breasts. From this, he asks that we conclude there was a sufficient foundation that he and Ms. Yi were engaged in consensual sexual asphyxiation at the time of her death.

Forensic evidence regarding the belt around Ms. Yi's neck, the ligature marks, and the condition of her neck are also cited by defendant as evidence that she died during consensual sexual asphyxiation. He refers to evidence that while there were ligature marks to the front of her neck, there were none on the back of the neck. In addition, there was no damage to Ms. Yi's hyoid bone (in her neck), no swelling or edema on the larynx or injury to the vital organs of the throat, and only one small internal bruise under the ligature marks. There were no fingernail marks to suggest that Ms. Yi had attempted to loosen the belt.

Evidence of defendant's semen on Ms. Yi's body, the absence of external traumatic injury to her vaginal area or anus, and the condition of her body when

discovered constitutes generic evidence of sexual behavior but does not support a conclusion that she and defendant were engaged in consensual sexual asphyxiation which caused her death. According to Dr. Gliniecki, the semen could have been deposited as much as six days before death. He also testified that in the majority of strangulation cases he had worked on, the hyoid bone was intact. He testified that there were two possible explanations for the absence of ligature marks on the back of Ms. Yi's neck. The first was that her hair may have been between her skin and the belt. This was supported by evidence that Ms. Yi's hair extended below her shoulders and the significant amount of her hair caught up in the belt. Alternatively, he opined that if the belt was pulled from side to side and in a backward and upward motion, putting all pressure on the front of the neck, there would be no ligature marks on the back of the neck.

We conclude that the forensic evidence alone was not sufficient to establish a foundation for the sexual asphyxiation defense.

3. Defendant's Statements to Law Enforcement

Defendant contends that the foundation for the sexual asphyxiation defense was laid by his statements in the interview recorded at the Long Beach Police Department. During that interview, appellant described using a belt on Ms. Yi's neck during sex because it made her feel better. On the day she died, they had consensual intercourse while using the belt for sexual asphyxia. A physical altercation then broke out during which Ms. Yi had the belt around her neck. During this altercation, defendant said he hit her in the neck and she fell to the floor, and started making a gurgling sound. From this, defendant argues: "While it is clear that Kate did not die as a result of a punch to the neck, appellant's statement to law enforcement allowed for the distinct possibility that Kate died during an episode of erotic asphyxia as Dr. Reiber concluded in his report."

This argument is contrary to the sequence of events described by defendant in his statement to law enforcement officers. He described having intercourse with Ms. Yi while he pulled on a belt around her neck at her request. In the middle of that episode, Ms. Yi started talking about money. Defendant stopped having sex with her and an

argument broke out over whether Ms. Yi only wanted defendant for money. Defendant said Ms. Yi started hitting him and kicking him in the testicles. He walked out to the living room and spoke with Ms. Ryman.

According to defendant's statement to police, he then returned to the room and resumed having sex with Ms. Yi, who put the belt back around her neck. "And then we were having sex, and then, and then I got back up, or I asked her if this is still a money thing and if she is only doing this for that. And I know I shouldn't have asked her because it made her angry again. And that's when she (unintelligible) and that's when I finished it and I asked her and she shoved me and I was like what are you doing, what did I do? I just want to figure it out so I don't feel like I'm being used. And I'm being selfish first time ever. And then I thought I was hoping [Ms. Ryman] would go back in and talk to Kate so she wouldn't hit me anymore. Because your [*sic*] not suppose to hit people." Then he said he was about to leave and Ms. Yi said she was about to leave too. But first, he wanted to talk one last time to settle the relationship.

According to the statement, defendant said Ms. Yi started hitting him again and "that's when I finally punched her once." He said this was when Ms. Yi fell down and "she started making gurgling sound." From that point in the interview, defendant described trying to revive Ms. Yi as she died, and concealing her body in the closet.

This account, if credited, establishes that defendant and Ms. Yi had stopped having sex before the physical altercation during which she fell to the ground gurgling. Once intercourse ended, according to defendant, Ms. Yi was able to get up and physically attack him by hitting him. She was able to talk and argue with him. This evidence does not support the defense theory that Ms. Yi died accidentally during an episode of consensual sexual asphyxiation.

Nor does anything else in defendant's other statements to law enforcement officers support that theory. When he first spoke to officers in the police car at the mall, defendant denied any knowledge of Ms. Yi's whereabouts. He said he had broken up with her and was not concerned about what was going on with her. Instead, he asked the officers about fingerprinting and whether they had triangulated or pinged Ms. Yi's

telephone. In the second statement, recorded in the officers' car parked at the mall, defendant said he had had sex with Ms. Yi twice two or three days before, using a condom each time. He described the argument over money. In this version, when Ms. Yi put his belongings outside the apartment, she told him to leave. When he did not, she left. He told the officers that Ms. Yi sometimes liked rough sex, being pushed on her chest or stomach with his hands. He did not say they used a belt during sex the last time he saw her. Detective Mendoza's description of the unrecorded portion of his interview with defendant at the Long Beach Police Department made no mention of sexual asphyxiation.

D. Analysis

Defendant argues that this case is akin to the prejudicial error that occurred in *People v. Lawson* (2005) 131 Cal.App.4th 1242 (*Lawson*) and *People v. Cuccia* (2002) 97 Cal.App.4th 785 (*Cuccia*). We disagree. *Lawson* arose in a different context. In that case, the defendant was arrested on a narcotics charge. When arrested, he was accompanied by Theresa Martinez. The defense attempted to call Martinez as a witness, although copies of a defense investigator's notes of an interview with her had not been provided to the prosecution and she was not listed as a defense witness. The trial court found defense counsel had wrongfully withheld Martinez's name from the witness list. As a sanction, the court refused to allow Martinez to testify and ordered Lawson to call his next witness. When informed by counsel that Martinez was the only planned defense witness, the trial court said that Lawson could either call another witness or rest. Since the defense had no one else available to describe his version of events, defendant took the stand and testified. (*Id*. at p. 1244.) After Lawson testified, the prosecutor corrected the record, revealing that a previous prosecutor on the case had known about Martinez, and had given her name and field identification card to the defense. The prosecution had not attempted to locate or interview Martinez because she was viewed as favorable to the defense. The court then reversed itself and allowed Martinez to testify. During closing argument, the prosecutor attacked Lawson's credibility with his prior convictions. The

jury was instructed it could consider the importance of the defense failure to turn over the investigator's notes of the Martinez interview. (*Id*. at p. 1245.)

The Court of Appeal held that the trial court erred in barring Martinez's testimony because it was based on a misapprehension of the facts, and other sanctions were available. There was no indication that the appellant himself contributed to the omission of Martinez's name from the witness list. Although Martinez was later allowed to testify, the damage had been done in that the jury learned of the appellant's four prior convictions. The instruction on the discovery violation also was found to be error. The errors were prejudicial. (*Lawson*, *supra*, 131 Cal.App.4th at p. 1249.)

Cuccia, *supra*, 97 Cal.App.4th 785, on which defendant relies, also is distinguishable. In that case, the Court of Appeal concluded that the trial court erred in forcing the defendant to testify out of order and by refusing to allow him to testify after the prosecutor was allowed to reopen rebuttal. The cumulative errors violated the defendant's due process right to a fair trial. (*Id*. at p. 789.) The trial judge had warned counsel at the beginning of trial to have ample witnesses available to avoid having the jury inconvenienced by a wait for witnesses. It threatened to rule that counsel had rested its case if it ran out of witnesses. After the defense's sixth witness was called, but could not be located, the trial court reminded defense counsel of this warning. In the presence of the jury, the trial court said it recalled that the defense had planned to have the defendant testify and asked whether counsel had changed his mind. Defense counsel did not object, and the defendant testified until the evening recess. The next day the rest of the defense witnesses testified before the defendant was recalled to complete his testimony. (*Id*. at pp. 790–791.) Defense counsel requested a mistrial during a recess while closing arguments were underway. The trial court denied the motion. Based on the trial court's threat to consider his case rested if he did not testify, the *Cuccia* court concluded that the defendant's testimony was coerced. (*Id*. at pp. 791–792.) The trial court also erred in denying the defendant an opportunity to testify after the prosecution was allowed to reopen its case to present additional evidence. (*Id*. at p. 794.) The

cumulative effect of the two errors was found to have substantially impaired the defendant's right to a fair trial and the judgment was reversed. (*Id*. at p. 795.)

Coercion of the defendant in the manner discussed in *Lawson, supra,* 131 Cal.App.4th 1242 and *Cuccia, supra,* 97 Cal.App.4th 785 did not occur in this case. Defendant was not forced to the stand as a sanction for a perceived discovery violation or because he ran out of witnesses. Contrary to defendant's characterization, the issue is not whether his testimony was coerced, but rather whether he presented an adequate foundation for Dr. Reiber's testimony and his cross-examination of Dr. Gliniecki on sexual asphyxiation.

Moore, supra, 51 Cal.4th 386, is instructive. In that murder case, a prosecution criminalist described a small bloodstain on the living room carpet, the only bloodstain found in that room. Over defense objections based on lack of foundation and Evidence Code section 352, the criminalist was allowed to answer a hypothetical question assuming that the bloodstain was deposited by a human being and asking how the person had to have been positioned when the stain was made. The criminalist said the person had to be at or near the surface of the carpet, but on cross-examination said he could not determine whether the bloodstain was deposited from a person or an object. (*Id*. at p. 405.) The Supreme Court concluded that the hypothetical "was not rooted in the facts shown by the evidence; rather it was an '"assumption[ ] of fact without evidentiary support."' [Citation.] The hypothetical question thus called for an opinion without adequate foundation." (*Ibid.*) The *Moore* court explained: "[W]hen the proposed expert testimony rests on an assumption without any support in the trial evidence, the court does abuse its discretion in admitting it. Such testimony has little or no probative value, bears the potential to mislead the jury into accepting the unsupported assumption and drawing from it unwarranted conclusions, and thus cannot significantly 'help the trier of fact evaluate the issues it must decide.' [Citation.]" (*Id*. at p. 406.)

A foundational deficiency also was examined in *McWhorter, supra,* 47 Cal.4th 318. A mother and son were murdered in their apartment and found a week later. Because of the advanced decomposition of the bodies, no exact cause of death could be

determined, although both victims died as the result of homicide. The defendant and his wife had lived in an adjoining unit until one week before the murders. (*Id.* at pp. 324–325, 331.)

Based on examination of crime scene photographs, the defense forensic pathologist in *McWhorter* concluded that the deaths were due to carbon monoxide poisoning. The defendant's wife testified in support of the theory. When she and defendant moved out of the apartment next door to the victim's unit, defendant moved a washing machine into an adjacent water heater shed and caused a gas leak by bumping a natural gas valve leading to the water heater. Photographs of the crime scene showed that a bathroom window between the victims' apartment and the water heater shed was slightly open. Before trial began, the prosecution moved to exclude anticipated testimony of a defense forensic engineer that the deaths could have been caused by a lethal concentration of carbon monoxide produced by the water heater which entered through the partially opened window. The prosecution argued this report was inadmissible as based on speculation and conjecture. After an Evidence Code section 402 hearing, the trial court ruled his testimony inadmissible. (*McWhorter, supra,* 47 Cal.4th at pp. 361–362.)

The *McWhorter* court found no abuse of discretion in the ruling that the testimony was inadmissible on the grounds "it was unduly speculative, based on unreliable hearsay, and without an adequate foundation." (*McWhorter, supra,* 47 Cal.4th at p. 362.) The court concluded that the expert's assumption that an exhaust vent on top of the water heater had become dislodged by defendant, was based on unsubstantiated hearsay. This was because it was based on a defense investigator's report about an interview with defendant's wife, but the investigator was not called to testify and authenticate that report at the hearing. (*Ibid.*) Significantly, the wife's trial testimony contradicted information in the defense investigator's report attributed to her, and therefore did not furnish a factual basis for the engineer's opinion. She was not asked to authenticate the report of the defense investigator. (*Id.* at p. 362, fn. 16.) The court also pointed out that the engineer said his opinion hinged on whether the water heater exhaust vent had been

dislodged, but there was no evidence that this had occurred. (*Id*. at p. 363.) Finally, the water heater at the victims' unit had been replaced and discarded in the time between the murders and trial and no information was available about it. (*Ibid.*)

The Supreme Court in *McWhorter* rejected the defendant's claim that the asserted error in excluding the engineer's report was of constitutional dimension because it violated his Sixth Amendment right to present a defense. The carbon monoxide defense, although weak, was presented through the testimony of defendant's wife and the defense pathologist. (*McWhorter*, *supra*, 47 Cal.4th at p. 363; see also *People v. Cowan* (2010) 50 Cal.4th 401, 473–474 [ruling excluding certain evidence regarding defense did not amount to a refusal to allow defendant to present the defense through admissible testimony and evidence]; *Menendez v. Terhune* (9th Cir. 2005) 422 F.3d 1012, 1031–1032 [affirming trial court ruling that defendants were required to testify to lay foundation for defense that they murdered their parents because they feared imminent peril].)

In summary, without defendant's testimony, there was no evidence to support the defense that Ms. Yi died during a consensual episode of sexual asphyxiation. The trial court did not abuse its discretion in so ruling. This was an evidentiary ruling rather than coercion of defendant's testimony and thus there was no constitutional violation.

II

Defendant argues the trial court erred in denying his *Pitchess*[1] motion for production of the police personnel records of Detectives Rios and Mendoza, pursuant to Evidence Code sections 1043 and 1045. He frames this as a constitutional issue, a violation of his Sixth and Fourteenth Amendment right to confrontation as well as his right to a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The record on the motion and the briefing on this issue were all sealed by this court. We asked counsel to submit their views as to unsealing the record pursuant to

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[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

California Rules of Court, rule 8.46 (f). After counsel for appellant stated she had no objection to unsealing the record, and receiving no response from respondent, we ordered the record and briefs unsealed.

A. Relevant Trial Court Proceedings

Defendant's motion was extremely broad, seeking all complaints relating to acts of "aggressive behavior violence, excessive force, or attempted violence or excessive, racial bias, gender bias, ethnic bias, sexual orientation bias, coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure; false arrest, perjury, dishonesty, writing of false police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to any false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude within the meaning of *People v. Wheeler* (1992) 4 Cal.4th 284 . . . ." In addition, defendant sought records of any discipline imposed on the officers resulting from citizen complaint; exculpatory or impeaching evidence within the meaning of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*); and civil service commission hearing transcripts, contact information for witnesses, and findings regarding alleged misconduct by the officers. The motion was supported by a declaration of defense counsel. Copies of two police reports (supplemental reports Nos.18 and 43) were attached to the motion.

The City of Long Beach opposed the motion, arguing that it was overbroad, and sought material irrelevant to the defense and not properly the subject of a *Pitchess* motion (materials held by the prosecution, like *Brady* material and civil service records).

The motion's theory was that Detectives Rios and Mendoza lied in police reports when they said defendant agreed to be transported to the Long Beach Police Department to be interviewed and that he was told he could leave at any time during the interview. The supporting declaration by defense counsel stated: "Mr. Huynh was not free to leave, did not agree to be transported, and was prevented from leaving as he had requested by his detention. He was then coerced by the detectives into making a statement against his

will by both detectives' threats to never let him leave until he told them what they wanted to hear at which point he was promised that he could, finally, leave. Mr. Huynh was told by the detectives that he could not leave the police department until he told them what the detectives wanted him to say."

At oral argument on the motion, defense counsel said: "We are essentially saying that the detectives wrote a false report because they said that my client was and I quote 'advised he could leave at any time during the interview' but the police report states that later, in the police report, that he was told that he could not leave as he was being detained. So the police report contradicts itself. It says he agreed to be transported freely and voluntarily. It also says that he was told that he was detained and could not go anywhere. They filed a report that is wrong and incorrect. I don't know . . . why they would say something like he was free to leave and told him he was detained. Based on that, we would ask for information and [personnel] files regarding false police reports and dishonesty." At that, counsel submitted. Counsel for the City of Long Beach objected, arguing that under the relevant case law, a request for material regarding dishonesty is overbroad. In addition, he contended defendant had not demonstrated the claimed misrepresentation was material. Counsel objected that defendant had failed to specify which statements were coerced or whether they were material. He pointed out that defendant does not deny committing the crime, and contended there were no specific facts or alternate explanations as to what occurred. The trial court denied the motion, saying it was persuaded by the argument made by counsel for the City of Long Beach.

B. Legal Principles

In *Pitchess*, the Supreme Court held that a criminal defendant had a right to discover complaints of excessive force in a law enforcement officer's personnel file arising from the right to a fair trial and an intelligent defense. (*Pitchess*, *supra*, 11 Cal.3d at p. 535.) The procedure for such discovery was codified by the Legislature in Evidence Code section 1043 et seq. (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1085.) "[A] defendant must file a motion describing the type of records sought and showing, among other things, the materiality of the information to the subject of the

pending litigation and good cause for disclosure. ([Evid. Code,] §§ 1043, 1045.) 'To show good cause as required by section 1043, defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges. The declaration must 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*)].) 'Counsel's affidavit must also describe a factual scenario supporting the claimed officer misconduct.' (*Ibid.*) 'The court then determines whether defendant's averments, "[v]iewed in conjunction with the police reports" and any other documents, suffice to "establish a plausible factual foundation" for the alleged officer misconduct and to "articulate a valid theory as to how the information sought might be admissible" at trial. [Citation.] . . . What the defendant must present is a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents.' (*Id.* at p. 1025.) '[A] plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges.' [Citation.] Materials from an officer's personnel file reflecting dishonesty or nonfelony acts of moral turpitude do not become discoverable simply because a defendant argues that the officer will testify and might testify falsely. (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1023–1024 (*CHP*).)" (*Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1063–1064.) We review the trial court's ruling on a *Pitchess* motion for abuse of discretion. (*People v. Sanderson* (2010) 181 Cal.App.4th 1334, 1339 (*Sanderson*).)

The good cause showing is a "'relatively low threshold for discovery.' [Citation.]" (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 70.) "If the defendant establishes good cause, the court must review the records in camera to determine what, if any, information should be disclosed. [Citations.]" (*Id.* at pp. 70–71.) "'[A] plausible scenario of officer misconduct is one that might or could have occurred.' ([*Warrick, supra*, 35 Cal.4th] at p. 1026.) A scenario is plausible when it asserts specific

misconduct that is both internally consistent and supports the proposed defense. (*Ibid.*) 'A defendant must also show how the information sought could lead to or be evidence potentially admissible at trial.' (*Ibid.*) A defendant who meets this burden has demonstrated the materiality requirement of [Evidence Code] section 1043. (*Warrick*, at p. 1026.)" (*Ibid.*) The *Warrick* court emphasized that in considering a *Pitchess* motion, "[t]he trial court does not determine whether a defendant's version of events, with or without corroborating collateral evidence, is persuasive—a task that in many cases would be tantamount to determining whether the defendant is probably innocent or probably guilty. [Citation.]" (*Warrick*, *supra*, 35 Cal.4th at p. 1026.)

Here, defense counsel outlined a plausible factual scenario that the officers coerced defendant's admissions by detaining him for questioning until he told them what they wanted him to say, contrary to the assertions in the police reports that defendant was free to go and went to the police station voluntarily for questioning. To the extent the discovery request sought evidence that Detectives Rios and Mendoza had coerced admissions by suspects in other cases, it demonstrated good cause warranting in camera inspection of the personnel files of these officers. But defendant's discovery request was overbroad. Good cause was not demonstrated for records other than Long Beach Police Department personnel records related to prior complaints that Detectives Rios and Mendoza engaged in conduct to coerce confessions from suspects and was properly denied as to these grounds.

Our conclusion as to good cause as to the possibility of coercion is supported by *Uybungco v. Superior Court* (2008) 163 Cal.App.4th 1043 (*Uybungco*). In that case, the officers stated that while attempting to quell a bar fight, Uybungco advanced on them in a threatening manner, then resisted arrest, and dislodged a window in a patrol car. Uybungco denied these claims. (*Id*. at p. 1047.) In a *Pitchess* motion, he sought evidence of, or complaints about, a variety of misconduct, including false statements in police reports, or false testimony. He submitted a supporting declaration saying the officers were the aggressors in the incident and denying wrongdoing. He specifically contended that the officers lied in their reports in describing his conduct. (*Ibid.*) The trial

court ruled that it would review the files for evidence related to excessive force as to two officers, did not clearly agree to review the files of those officers for false statements in police reports, and denied the motion entirely as to two other officers. (*Id*. at p. 1048.)

The Court of Appeal held that Uybungco's declaration alleging that he did not resist arrest, and that other statements about his misconduct in the police reports were false, satisfied the low threshold for in camera review "as they depict a scenario 'that might or could have occurred' and are plausible in that they 'present[ ] an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges.'" (*Uybungco*, *supra*, 163 Cal.App.4th at pp. 1049–1050, quoting *Warrick*, *supra*, 35 Cal.4th at pp. 1019, 1026.) The declaration was sufficient to compel the trial court to conduct an in camera review of the personnel records of the officers for information that they had previously included false information in a police report. The refusal of the trial court to do so constituted an abuse of discretion. (*Uybungco*, at p. 1050.)

"The remedy for a failure to conduct an in camera review in this situation was established in *People v. Gaines* [(2009)] 46 Cal.4th 172. As the *Gaines* court explained, the proper remedy 'is not outright reversal, but a conditional reversal with directions to review the requested documents in chambers on remand.' (*Id.* at p. 180.) 'After reviewing the confidential materials in chambers, the trial court may determine that the requested personnel records contain no relevant information.' (*Id.* at p. 181.) If so, the trial court shall reinstate the judgment. (*Ibid.*) Even if the in camera review reveals relevant information, reversal is not necessarily required. The defendant 'must also demonstrate a reasonable probability of a different outcome had the evidence been disclosed.' (*Id.* at p. 182.) If defendant does demonstrate such a probability, the court must order a new trial; if he does not, the judgment shall be reinstated. (*People v. Gaines*, *supra*, at pp. 181–182.)" (*People v. Moreno* (2011) 192 Cal.App.4th 692, 703, fn. omitted (*Moreno*).) The court in *Moreno* concluded that its reversal on these state law grounds for in camera review of discoverable materials made it unnecessary to reach the defendant's contention that he was denied his federal constitutional rights to due process,

confrontation, compulsory process, a fair trial, and a meaningful opportunity to present a complete defense. (*Id*. at p. 703, fn. 5.)

We will conditionally reverse in order to allow in camera review of discoverable materials to the extent, if any, they pertain to the claim defendant's statements were coerced, under the procedure outlined in *People v. Gaines, supra,* 46 Cal.4th 172 and *Moreno, supra,* 192 Cal.App.4th 692. In light of that disposition, we need not reach defendant's arguments that denial of his *Pitchess* motion violated his federal constitutional rights to confrontation, a fair trial, and due process. (*Moreno, supra,* 192 Cal.App.4th at p. 703, fn. 5.)

III

Defendant and the People agree that the trial court erred in imposing a $520 assessment and surcharge pursuant to Government Code section 7600 and Penal Code section 1464 on the restitution fine of $5,200 under Penal Code section 1202.4, subdivision (b) and on the parole revocation fine of $5,200 under Penal Code section 1202.45, which was stayed. We concur.

Penal Code section 1464 states that the penalty required by that statute does not apply to any restitution fine. (Pen. Code, § 1464, subd. (a)(1)(A).) Similarly, Government Code section 76000, subdivision (a)(3)(A) provides that the penalty imposed by that section does not apply to any restitution fine. (*People v. McHenry* (2000) 77 Cal.App.4th 730, 734.) Therefore, the order imposing the $520 penalty assessment must be reversed and the abstract of judgment modified to reflect that correction.

DISPOSITION

The judgment is conditionally reversed. Upon request by defendant following remand, the trial court shall conduct an in camera review of the discoverable material in the personnel files of Detectives Rios and Mendoza. If the trial court's inspection reveals no relevant information, the trial court must reinstate the judgment of conviction and the sentence. If the inspection reveals relevant information, the trial court must order

disclosure, allow defendant an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed. The order imposing the $520 penalty assessment under Penal Code section 1464 and Government Code section 76000 is reversed. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.