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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMES WINDLEY, JR., Defendant and Appellant.	B227580 (Los Angeles County Super. Ct. No. PA061792)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Modified and, as so modified, conditionally reversed in part and remanded with directions.

David L. Polsky, 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, Daniel C. Chang and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant James Windley, Jr. guilty of three counts of assault with a firearm on a peace officer and of first degree residential burglary. On appeal, he contends that the assault convictions must be reversed because (1) there is insufficient evidence of either his intent to shoot his gun or that he knew one of the victims was a peace officer; (2) the prosecutor committed misconduct by misstating the law on intent; and (3) the trial court misinstructed the jury on the law of assault. He also contends that the trial court abused its discretion by denying his *Pitchess*[1] motion as to one of the three peace officers he assaulted, and he asks us to independently review the in camera hearing concerning the records of the other two officers. We conditionally reverse the judgment and remand so that the trial court can conduct an in camera hearing under *Pitchess*, and we modify the judgment to correct a sentencing error.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

On December 17, 2008, around 9:20 a.m., Sigrid Kodama was in her car when she saw Black men in a bluish-purple small sedan. "Creeped" "out" because the men stared at her, Kodama followed them. After stopping to talk at a park, one man got back into the car and drove to the neighborhood while the other two men, who wore backpacks, walked toward Oak Ridge Drive. Kodama called the police.

Around the same time, D'ette Corona was driving on Oak Ridge Drive when she saw two Black men wearing hooded sweatshirts looking at houses as a blue sedan slowly trailed behind. Corona saw the driver's profile, but she did not see the faces of the two men walking, one of whom wore a yellow sweatshirt. At trial, she identified Windley as the driver. Corona called the police.

Detectives Mike McPheeters, Jeffrey Jackson, and Sammy Soehnel responded to the calls. Detective McPheeters wore a green raid jacket with a sheriff's star, " 'Sheriff' " on the back, and patches on the shoulders. Detective Jackson wore a

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

bulletproof vest with a "Sheriff's Department" patch on the back and an embroidered star on the front. Detective Soehnel wore a badge on his belt. The detectives drove a dark gray Crown Victoria with a red light in the center of the windshield and yellow amber lights in the rear window. McPheeters drove, Jackson sat in the front passenger seat, and Soehnel sat in the back.

As the detectives approached an apartment complex, McPheeters saw a blue, four-door Kia. In the Kia were three Black men, who saw the detectives. The men looked scared or startled. To follow the Kia, Detective McPheeters made a U-turn, at which time the Kia sped up. The Kia swerved and crashed into parked cars. Lonnell Diggs got out from the front passenger seat and ran. M.V. (a juvenile) got out of the back seat, and Detective Jackson saw a gun in his hand. Detective McPheeters saw Windley, a black revolver in his left hand, get out of the driver's seat and run.

Detective Jackson yelled, "Gun[!]" Detective McPheeters pulled his gun out and moved to his car's front fender, saying, "Sheriff's Department, stop" several times. Windley and Diggs ran and jumped a fence. Windley ran up the stairs in an apartment complex. At the top of the stairs, his upper body spinning to the right as he ran, Windley turned towards Detective McPheeters. As Windley turned, the detective saw the barrel of Windley's gun point at the detective and his partners. Windley was looking at Detective McPheeters and in his direction. With his left hand, Windley held the gun between his belly button and nipples. At this time, Detective McPheeters was standing at the car, Detective Jackson was on the car's other side, and Detective Soehnel was in the back seat of the car.

Fearing for his and his partners' lives, and believing that the gun was pointed at them, Detective McPheeters fired his gun four times. The gun flew out of Windley's hand. Windley turned away and ran into a breezeway, disappearing from sight. The detectives tried to pursue him, but Jackson ran into a tree and injured himself.

McPheeters called for assistance and, within minutes, backup units arrived.[2] Windley, Diggs, and the juvenile were found in the area in and around the apartment complex and were arrested.

Items found in the Kia or at the location where Windley, Diggs, and the juvenile were taken into custody belonged to the Montes family, whose house on Oak Ridge Drive had been burglarized earlier that morning.

II. Procedural background.

On September 8, 2010, a jury found Windley guilty of counts 1 to 3, assault with a firearm on a peace officer (Pen. Code, § 245, subd. (d)(1)),[3] and of count 4, first degree residential burglary (§ 459). As to counts 1 to 3, the jury found true personal gun-use enhancements under sections 12022.5, subdivisions (a) and (d), and 12022.53, subdivision (b).

On September 9, 2010, the jury found that Windley had two prior convictions, within the meaning of the Three Strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). The jury also found true enhancements under sections 667.5, subdivision (b), and 667, subdivision (a)(1). That same day, September 9, the trial court sentenced Windley, on count 1, to 25 years to life plus 10 years for the gun enhancement, plus a consecutive 25 years to life on count 4. Based on a prior prison term and conviction, Windley was sentenced to five-year (§ 667.5, subd. (b)) and one-year (§ 667, subd. (a)) terms. Sentences on counts 2 and 3 were ordered to run concurrent to the sentence on count 1.

DISCUSSION

III. Assault with a firearm on a peace officer.

Windley raises several contentions concerning counts 1 to 3, assault with a firearm on a peace officer. He first contends there is insufficient evidence of intent and of

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[2] Around this time, 9:45 a.m., Susan Wilkin was parked in her car at the Oak Tree apartment complex. She saw defendant crouching near a car and Diggs standing, holding a gun.

[3] All further undesignated statutory references are to the Penal Code.

knowledge that Detective Soehnel (one of three victims) was a peace officer. Next, he contends that the prosecutor committed misconduct by misstating the law on assault. Finally, he contends that the jury was misinstructed on the law of assault. We disagree with these contentions.

A. *Sufficiency of the evidence.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, 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. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

"Any person who commits an assault with a firearm upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be

punished by imprisonment in the state prison for four, six, or eight years." (§ 245, subd. (d)(1).)

Assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Assault is a general intent crime. (*People v. Williams* (2001) 26 Cal.4th 779, 782; *People v. Colantuono* (1994) 7 Cal.4th 206, 215-216.) Assault, therefore, does not require a specific intent to injure the victim. (*Williams*, at p. 784.) Rather, the "mens rea [for assault] is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery." (*Colantuono*, at p. 214.) "The pivotal question is whether the defendant intended to commit an act likely to result in such physical force, not whether he or she intended a specific harm." (*Id*. at p. 218, fn. omitted; see also *Williams*, at pp. 788, 790 [assault does not require a specific intent to injure the victim or a subjective awareness of the risk that injury might occur].) Thus, assault with a deadly weapon can be committed by pointing a gun at another person even if the gun is not pointed directly at the victim and the victim is in a protected place. (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263; *People v. McMakin* (1857) 8 Cal. 547, 549 [the drawing of a weapon is usually evidence of an intent to use it].)

The evidence here is more than sufficient to establish the intent element of the crime. Detective McPheeters testified that after Windley crashed his car, Windley got out of the car with a gun in his hand. Ignoring the detective's directive to stop, Windley ran up stairs, turned his body, and pointed the gun at the detective and his fellow peace officers. Windley held the gun in his left hand, at a level between his belly button and nipples. In immediate response, Detective McPheeters fired four shots at Windley, who dropped the gun. Windley's act of getting out of the car openly armed with a gun and, in the course of trying to escape, turning and pointing a gun at the detectives evidences an intent to commit "an act that by its nature will probably and directly result in injury to another."

Windley counters that this evidence is insufficient to establish intent because he didn't take a "position consistent with getting ready to fire his weapon" in that he didn't

turn around completely to face the detectives; he didn't raise the gun to shoulder level; he didn't take cover in anticipation of return fire; he issued no verbal threat to shoot; and he didn't try to shoot the detectives when he was in closer range. This view of the evidence is akin to asking us to reweigh it. But it is not the function of an appellate court to reweigh the evidence. "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

Windley's second contention is there is insufficient evidence he knew that Detective Soehnel was a peace officer. Relying primarily on evidence that the only identifying item Detective Soehnel wore was a badge on his belt and that the detective remained in the back seat of the car during the relevant events, making it impossible for Windley to see the badge, Windley argues he could not have known the detective was a peace officer, an element of the crime. (§ 245, subd. (d)(1) [to be guilty of assault on a peace officer, the defendant must know or reasonably should know that the victim is a peace officer engaged in the performance of his duties].)

The detectives, however, were in a Crown Victoria with a red light on the front windshield and amber lights in the rear windshield. When they drove past the Kia driven by Windley, the Kia's occupants looked surprised or startled, which suggests they knew that the Crown Victoria's occupants were peace officers. And when the detectives began to follow the Kia, Windley sped up, ultimately losing control and crashing the car. Immediately on crashing, all of the car's occupants, including Windley, got out and ran. Windley could certainly have seen that there were three people in the detectives' car. From his attempt to flee in the car and on foot, it is reasonable to infer that Windley knew that peace officers were pursuing him. Moreover, if Windley didn't know peace officers

were pursuing him, he knew this soon after crashing his car. Detective McPheeters wore a green raid jacket identifying him as a member of the sheriff's department. And when the detective exited his car, he yelled at Windley to "stop," "Sheriff's Department."

This evidence is sufficient to establish that Windley knew or reasonably should have known that Detective Soehnel was a peace officer.

B. *Prosecutorial misconduct.*

Windley next contends that the prosecutor committed misconduct by arguing he did not have to prove defendant intended to shoot the gun.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" (*Ibid.*; see also *People v. Thompson* (2010) 49 Cal.4th 79, 126.) Misconduct that infringes upon a defendant's constitutional rights mandates reversal of the conviction unless the reviewing court determines beyond a reasonable doubt that it did not affect the jury's verdict. (*Chapman v. California* (1967) 386 U.S. 18.) A violation of state law only is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the untoward comment. (*People v. Watson* (1956) 46 Cal.2d 818.)

Counsel has "broad discretion in discussing the legal and factual merits of a case," but "it is improper to misstate the law." (*People v. Bell* (1989) 49 Cal.3d 502, 538, cited in *People v. Mendoza* (2007) 42 Cal.4th 686, 702.) Windley contends that the prosecutor

misstated the law on assault when he said Windley didn't need to "think in his head: I'm going to fire the gun. . . . Just the mere act of him pointing the gun is all that is required." This could be interpreted to imply that Windley could merely brandish the gun (see, e.g., § 417) and not intend to use the gun. This seems to contravene the law on assault, namely, that assault occurs when the defendant commits an act that by its nature will probably and directly result in injury to another. (*People v. Williams, supra*, 26 Cal.4th at p. 788.) Windley need not have intended to harm the detectives to commit assault. But Windley must have intended to engage in an act that might result in a battery, even if he thought his actions would not harm the victim. (*Ibid.* & fn. 3.) To the extent the prosecutor was suggesting that defendant was guilty of assault even if he never intended to use the gun in a way that might result in a battery, that is not the law.

When a claim of misconduct focuses on comments the prosecutor made before the jury, the question is whether there is a reasonable likelihood the jury construed or applied any of the complained of remarks in an objectionable fashion. (*People v. Samayoa, supra*, 15 Cal.4th at p. 841.) We must place the challenged statement in context and view the argument as a whole. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.) The challenged statement was made in the course of the prosecutor discussing the elements of assault with a firearm on a peace officer. After correctly stating the elements, the prosecutor added: "And defendant Windley pointed the barrel in the direction of all three of them or in the vicinity of all three of them. And that was the act that's, by its nature, would directly and probably result in the application of force to someone because when you point a gun at someone, it's one of the strongest applications of force you can have without actually hitting them, without actually physically touching them." He continued: "It's pointed right at the detectives. And that was on purpose. That was willful. [¶] Now, when the defendant acted, he was aware of the facts that would lead a reasonable person to realize that his act, by its nature, would directly and probably result in the application of force to someone. [¶] The defendant Windley pointed the gun, he did so for a reason. It wasn't [an] accident. It was willful, as I have shown, but there was also a reason behind it, a motive. He was trying to scare the deputies. He was trying to buy

himself some time, and his partners who were also trying to escape so they could get—out of the view of these detectives, they could go and hide and hopefully get away so they wouldn't find them, and they could get away and not be caught with the burglary they committed. [¶] . . . [¶] . . . [H]e's telling the detectives proceed with caution, watch out, don't run so fast because I got this. And if you are going to come after me, you need to know that I have this. That's the message he is trying to convey. [¶] When the defendant acted, he had the present ability to apply force with a firearm, and a lot of this kind of overlaps a little bit, but—Windley was at the top of the stairs, again, looking down at the detectives. He had the gun in his hand, and the gun was loaded. [¶] He had all the present ability in the world to apply force. All he had to do was turn, which he did, and point that barrel of the gun at the detectives. [¶] Now, remember—and this is also said in the jury instruction, *the People are not required to actually prove that the defendant actually intended to use the force against someone when he acted, meaning that the defendant doesn't have—actually have to fire the gun. He doesn't even need to think in his head: I'm going to fire the gun. It's irrelevant. It doesn't matter. Just the mere act of him pointing the gun is all that is required.*" (Italics added.)

Because assault is an "unlawful attempt," the prosecutor correctly stated he didn't need to prove that Windley actually fired the gun. (§ 240.) And when the prosecutor added that Windley didn't have to think he was going to fire the gun and that pointing it was enough, the prosecutor might have been inartfully emphasizing that assault is not a specific intent crime, namely, Windley need not have a specific intent to injure the victim or have a subjective awareness of the risk that injury might occur.

Even if we were to find that the prosecutor misstated the law, it was not prejudicial. The comments were isolated. And, as we discuss below in Section C, the jury was properly instructed with CALCRIM No. 860, which told the jury Windley had to have committed an act with a firearm "that by its nature would directly and probably result in the application of force to a person." We must presume the jury followed the instructions. (*People v. Gray* (2005) 37 Cal.4th 168, 231.) To find Windley guilty of assault, the jury had to find that pointing the gun would result in a use of force. If the

jury believed that Windley was simply trying to scare the detectives, then there was no "act" that would directly and probably result in the use of force against the detectives. Because the jury was properly instructed, we conclude that it is not reasonably probable that a more favorable outcome would have resulted in the absence of any error.

Windley's trial counsel did not object to the prosecutorial misconduct; and therefore, he alternatively contends that his trial counsel provided ineffective assistance. (See generally, *People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746; *Strickland v. Washington* (1984) 466 U.S. 668, 687.) Because we have concluded that any error due to prosecutorial misconduct was harmless, Windley's ineffective assistance of counsel claims also fails, because he cannot establish prejudice. (*People v. Cleveland* (2004) 32 Cal.4th 704, 746.)

C. *Instructional error.*

Windley argues that any prosecutorial misconduct was compounded by CALCRIM No. 860, which was ambiguous and should have been modified, sua sponte by the trial court, to clarify that Windley had to intend to shoot the detectives. We disagree.

"An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words." (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.) Thus, a single jury instruction that alone "could [be] confusing" may not constitute error if an accompanying instruction clarifies any potential confusion. (*People v. Simpson* (1954) 43 Cal.2d 553, 566.) We consider the instructions as a whole and " ' "assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." ' " (*People v. Holmes* (2007) 153 Cal.App.4th 539, 545-546.)

The jury was instructed that the People had to prove: "1. The defendant did an act with a firearm that, by its nature, would directly or probably result in the application of force to a person; [¶] 2. The defendant did act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its

nature would directly or probably result in the application of force to someone; [¶] 4. When the defendant acted, he had the present ability to apply force with a firearm to a person; [¶] 5. When the defendant acted, the person assaulted was lawfully performing his duties as a peace officer; and, [¶] 6. When the defendant acted, he knew or reasonably should have known that the person assaulted was a peace officer who is performing his duties. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage. [¶] The People are not required to prove the defendant actually intended to use force against someone when he acted. No one needs to actually have been injured by the defendant's act, but if someone was injured, you may consider that fact along with all the other evidence in deciding whether the defendant committed an assault." (CALCRIM No. 860.)

This instruction informed the jury that merely pointing the gun, with no additional intent to use it in some manner (e.g, shooting it or hitting someone with it), is insufficient to constitute assault. Twice, the instruction told the jury that Windley had to do an act with a firearm "that by its nature would directly and probably result in the application of force" to a person. Pointing a gun with no intent to use it would not be such an act. We therefore do not agree that the jury could have misapplied the instruction.

IV. *Pitchess.*

Windley filed a *Pitchess* motion requesting Detectives McPheeters's, Jackson's, and Soehnel's records. The trial court granted the motion and held an in camera hearing as to Detectives Jackson and McPheeters only and denied the motion as to Detective Soehnel. Windley contends that the trial court abused its discretion by denying the motion as to Detective Soehnel. Windley also asks us to review independently the in camera hearing regarding Detectives McPheeters's and Jackson's records.

A. *Denial of the Pitchess motion as to Detective Soehnel.*

1. Additional facts.

Windley filed a *Pitchess* motion seeking all complaints "relating to acts of aggressive behavior, violence, excessive force, or attempted violence of excessive, [*sic*]

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 false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude" against Detectives McPheeters, Jackson and Soehnel.

In support of the *Pitchess* motion, Windley's trial counsel stated in her declaration: "In this case, it is the information and belief of the defense that Mr. Windley accompanied a friend, who was driving his girlfriend's car to an apartment complex in Santa Clarita. His friend collided with a car in the parking lot and Mr. Windley got out and went to locate a person known to him in the apartment complex. Mr. Windley denies possessing or pointing a gun at the sheriff deputies. Mr. Windley alleges falsification of an arrest report in this case. Mr. Windley also alleges racial profiling as he and the driver of the car are black and were in a predominately white community. [¶] Defendant also alleges that Detective McPheeters used excessive force by firing his weapon into the apartment complex in defendant's direction." (Underlining in original omitted.)

At the hearing on the *Pitchess* motion, counsel for the Los Angeles County Sheriff's Department argued that Detective Soehnel, in his police report, did not state he saw Windley fire a gun (a key issue being who was the shooter), and therefore the motion did not support discovery of his records. Defense counsel responded that Windley, among other things, was denying he possessed or pointed a gun at the detectives, that an arrest report was falsified, and that Detective McPheeters used excessive force. The court said: "Right, but there does not appear, again, to be any information—I'm looking at the report written by Detective Soehnel, and he makes no statements regarding that [Windley] holding a weapon. He did not—he does not indicate he saw a weapon. [¶] . . . [¶] So as to Detective Soehnel, I do not think an adequate basis has been proven to have

an in-camera regarding him, as it does not appear there's any conflict in his statement with respect to what the defense is claiming."

The trial court proceeded to conduct an in camera hearing as to Detectives McPheeters and Jackson only, after which the court concluded there was no discoverable information as to either detective.

2. Applicable law.

On a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer who is accused of misconduct against the defendant. (*People v. Gaines* (2009) 46 Cal.4th 172, 179; Evid. Code, § 1043 et seq.) "To initiate discovery, the defendant must file a motion supported by affidavits showing 'good cause for the discovery,' first by demonstrating the materiality of the information to the pending litigation, and second by 'stating upon reasonable belief' that the police agency has the records or information at issue. [Citation.]" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.) If a defendant shows good cause, the trial court examines the material sought in camera to determine whether disclosure should be made and discloses "only that information falling within the statutorily defined standards of relevance." (*Ibid*.)

"There is a 'relatively low threshold' for establishing the good cause necessary to compel in camera review by the court. [Citations.]" (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1316.) To establish good cause, "defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges" and articulate how the discovery sought might lead to relevant evidence. (*Warrick v. Superior Court*, *supra*, 35 Cal.4th at p. 1024.) The defense must present "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." (*Id.* at p. 1026.) "Depending on the circumstances of the case, the denial of facts described in the police report may establish a plausible factual

foundation." (*Thompson*, at p. 1316.) Trial courts are vested with broad discretion when ruling on *Pitchess* motions (*People v. Memro* (1995) 11 Cal.4th 786, 832), and we review a trial court's ruling for abuse of discretion (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228).

3. Windley made a showing of good cause as to Detective Soehnel.

Windley presented a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents. (*Warrick v. Superior Court*, *supra*, 35 Cal.4th at p. 1025.) In the declaration submitted in support of the *Pitchess* motion, defense counsel said that Windley was *not* the driver of the car that crashed; he was the passenger. He also denied possessing or pointing a gun at the sheriff's deputies. Detective Soehnel, in his report, identified Windley as the driver. Because Detective McPheeters identified the driver of the car as the man who pointed the gun, the driver's identity was a key issue. By denying he was the driver, Windley suggested that the police reports were false. This constituted a specific factual scenario of officer misconduct, and therefore, Windley met his burden of establishing good cause. The trial court abused its discretion by not granting the motion as to Detective Soehnel.

4. Remedy.

A trial court's erroneous denial of a defendant's *Pitchess* motion is not reversible error per se. (*People v. Gaines*, *supra*, 46 Cal.4th at p. 176.) Instead, "the failure to disclose relevant information in confidential personnel files, like other discovery errors, is reversible only if there is a reasonable probability of a different result had the information been disclosed." (*Ibid.*) The proper remedy is to conditionally reverse the judgment and remand the matter for an in camera review of the relevant records. (*Gaines*, at pp. 180-181.) If no relevant information is contained in the officer's records, the trial court is to reinstate the judgment and sentence. (*Id.* at p. 181; *People v. Hustead* (1999) 74 Cal.App.4th 410, 419; *People v. Johnson* (2004) 118 Cal.App.4th 292, 304-305.)

If the trial court determines that relevant discoverable information exists, it must order disclosure, allow Windley 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. (*People v. Gaines, supra*, 46 Cal.4th at pp. 181, 182; *People v. Hustead, supra*, 74 Cal.App.4th at p. 419.) If Windley is unable to show prejudice, the trial court is to reinstate the judgment and sentence. (*Gaines*, at p. 182; *Hustead*, at p. 422.) We therefore remand the case to the trial court for an in camera review of the relevant records as to Detective Soehnel. As further guidance for the trial court, the in camera hearing should be limited to issues of honesty. Windley's *Pitchess* motion alleged no excessive force against Detective Soehnel and the specific factual scenario appears limited to issues concerning false reports and honesty. The trial court shall determine relevance and discoverability under Evidence Code section 1045, based on the complaint and not on whether an investigating agency determined it was unfounded. (See *Gaines*, at p. 182.)

B. *Independent review of the in camera review of Detectives McPheeters's and Jackson's records.*

Windley asks us to conduct an independent review of the in camera hearing of Detectives McPheeters's and Jackson's records to determine whether the trial court provided all discoverable material to the defense. (See generally, *People v. Mooc, supra*, 26 Cal.4th 1216.)[4]

People v. Mooc, supra, 26 Cal.4th at pages 1228 through 1229, sets forth the procedure a trial court should follow in conducting an in camera hearing after the trial court has concluded a defendant has made a showing of good cause for discovery of relevant evidence contained in a law enforcement officer's personnel files. The custodian of records shall produce all potentially relevant documents for the trial court to review. "The custodian should be prepared to state in chambers and for the record what other

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[4] As we have said, the trial court granted the *Pitchess* motion as to Detectives McPheeters's and Jackson's records. The court failed, however, to state on what grounds it was granting the motion. The motion requested complaints related to excessive force involving only Detective McPheeters, the officer who fired his gun four times at defendant. Because Detective McPheeters was the only officer who used force, any excessive force complaints were relevant as to only him.

documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion. A court reporter should be present to document the custodian's statements, as well as any questions the trial court may wish to ask the custodian regarding the completeness of the record. [Citation.]" (*Mooc,* at p. 1229.)

We have reviewed the sealed reporter's transcript of the in camera hearing and conclude that the trial court did not fail to disclose discoverable information from the detectives' personnel files.

V. Sentencing

Based on a prior robbery conviction in case No. LA037015, the trial court sentenced Windley to a five-year term for a prior prison term under section 667, subdivision (a), and to a one-year term under section 667.5, subdivision (b). But only the enhancement carrying the greater term may be imposed when the prior offense qualifies as an enhancement under both sections 667, subdivision (a), and 667.5, subdivision (b). (*People v. Jones* (1993) 5 Cal.4th 1142, 1150-1152.) The one-year term imposed under section 667.5, subdivision (b), must be stricken.

DISPOSITION

The one-year term imposed under section 667.5, subdivision (d), is stricken. The clerk of the superior court is ordered to modify the abstract of judgment and to forward the modified abstract of judgment to the Department of Corrections. As modified, the judgment is conditionally reversed and remanded with directions to the trial court to conduct an in camera inspection consistent with the opinions expressed herein and as to Detective Soehnel only.

If the trial court's inspection on remand reveals no discoverable information, then the trial court must reinstate the original judgment and sentence. If the inspection reveals discoverable information, the trial court shall order disclosure of the names, addresses, and telephone numbers of individuals who have witnessed, or have previously filed complaints about, similar misconduct, that is, falsifying police reports, planting evidence, or perjury; allow Windley an opportunity to demonstrate prejudice; and order a new trial if there is a reasonable probability the outcome would have been different if the information had been disclosed. If Windley is unable to demonstrate prejudice, then the judgment and sentence must be reinstated.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.