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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JIMMY GARCIA, Defendant and Appellant.	B229383 (Los Angeles County Super. Ct. No. BA372841)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alex Ricciardulli, Judge. Affirmed in part, conditionally reversed in part and remanded with directions.

Sheila Tuller Keiter, 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, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jimmy Garcia appeals from his conviction by a jury for resisting an executive officer.[1] He contends it was error to: (1) deny his *Pitchess* motion;[2] and (2) deny his request that the jury be given an optional paragraph in CALCRIM No. 226, regarding evaluating witness credibility. We reverse conditionally for the sole purpose of directing the trial court to conduct further *Pitchess* review.

FACTUAL AND PROCEDURAL BACKGROUND

A. The People's Case

Viewed in accordance with the usual rules on appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357), the evidence established that on June 23, 2010, defendant and Sonia M. had recently reignited their year-long romance after a two-week breakup. They had a lot to drink before going to meet Sonia's tenant, Victor Recinos, at about 12:30 a.m. in Echo Park to discuss Recinos teaching defendant how to drive a truck. While Recinos went to his truck to clean it up, defendant and Sonia walked around the park. They argued, but when the argument ended they ran through the park playing hide-and-seek. When Sonia slipped and fell, she called out to defendant for help in an exaggerated way. Appellant started walking toward Sonia. Recinos heard Sonia's calls for help. Concerned for Sonia's and defendant's wellbeing, Recinos grabbed a hammer and walked towards them. As he approached, Recinos saw defendant standing about 10 feet away from Sonia; Recinos did not have the impression that defendant was trying to hurt Sonia. In fact, defendant was trying to help Sonia up. As he was doing so, two police officers arrived at the scene and pointed weapons at Recinos and defendant.

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[1] Defendant was charged with making criminal threats, resisting an executive officer and corporal injury to a cohabitant. A jury found him not guilty of criminal threats and corporal injury to a cohabitant, but guilty of resisting. A two-year, mid-term, sentence was suspended and he was placed on three years formal probation. He timely appealed.

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

Defendant complied with the officers' instruction to let go of Sonia. As instructed, Sonia moved away from defendant and Recinos dropped to the ground, face down. Sonia recalled that defendant tried to explain that he could not get on the ground because he had a foot replacement. But the officers would not listen and tazed defendant until he was on the ground. Recinos could not see much from his position on the ground; he did not hear the police repeatedly order defendant to get on the ground, to stop resisting, or warn defendant that they would taze him.

Officers Michael Aguilar and Daniel Diaz had a different recollection of the incident. They were patrolling the park when they heard a woman hysterically screaming for help. The officers ran in the direction of the screams. Arriving upon the scene, they saw Sonia on the ground curled up in the fetal position; defendant was grabbing Sonia under her arms apparently trying to pull her towards the lake; Recinos was behind defendant and had a hammer in his pocket. The officers unholstered their handguns, identified themselves and told the men to get on the ground. Recinos complied, but defendant did not. Protesting that he had not done anything, defendant did not follow repeated instructions to get on the ground. The officers holstered their weapons and repeated the command, which defendant still did not heed. When Aguilar tried to grab defendant's arm, defendant pulled away. Defendant disregarded Aguilar's warning that he would taze defendant if defendant did not get on the ground. Defendant grabbed Sonia in a choke hold and ignored commands to let go of her. After Diaz pried defendant's arm from Sonia's neck, Aguilar tazed defendant. The tazing forced defendant to the ground, but he continued to disobey commands to stay down and instead struggled to get up so he was tazed again. Defendant continued swinging his arms. Only after he was tazed a third time were officers able to handcuff defendant. In the struggle with defendant, Aguilar sustained injuries to his knee, neck, shoulder and back. Sonia later told Aguilar that she screamed because during an argument defendant had threatened to kill her and drag her to the lake; when the police arrived she was struggling to get away from defendant. Recinos told Aguilar that he heard Sonia screaming and when he got to her he saw defendant on top of her.

B. The Defense Case

Sonia denied that defendant was ever abusive towards her. The night of the incident, she fell down on her own. A psychiatrist testified that defendant had the signs and symptoms of blunt trauma. He sustained a concussion, some cuts and scrapes, and injuries to his nervous system that could have occurred on the date of the incident. Sergeant Susan Kapoh, the officer in charge of investigating the officers' use of force in the incident, testified that the tazer had been deployed seven times.

C. Rebuttal

Defendant did not complain about any injuries when he talked to the responding firefighter. When defendant was booked into custody, he said the scrape above his eye was caused by a fall down some stairs. Another officer testified that she saw defendant walking to and from the police car the night of the incident without difficulty.

DISCUSSION

A. Denial of Defendant's Pitchess Motion Was An Abuse of Discretion

Defendant contends denial of his *Pitchess* motion for discovery of complaints of excessive force and dishonesty against the arresting officers was error because the requisite showing of good cause and materiality was made.[3] The motion relied for the

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[3] Defendant's *Pitchess* motion sought, among other things, "All complaints from any and all sources relating to acts of aggressive behavior, violence, excessive force, or attempted violence of 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 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 against officer(s) Diaz [badge number], Aguilar [badge number], and Sgt. Ceberio [badge number]. Defendant specifically

most part on the conflicts in Sonia's preliminary hearing testimony and the arrest report. The trial court denied the motion, finding defendant had not "presented a plausible alternative to the facts as alleged in the police report." As we shall explain, the trial court erred.

1. Standard of Review

We review *Pitchess* orders under the abuse of discretion standard. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.) Any error in denying a *Pitchess* motion is subject to harmless error analysis. (See *People v. Memro* (1985) 38 Cal.3d 658, 684, disapproved on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) To establish prejudice, we "determine if there was a reasonable probability that the outcome of the case would have been different had the information been disclosed to the defense." (*People v. Hustead* (1999) 74 Cal.App.4th 410, 422.) Denial of a *Pitchess* motion is harmless where "extensive evidence" links the defendant to the crime. (*People v. Samuels* (2005) 36 Cal.4th 96, 110.)

2. Procedure to Obtain *Pitchess* Discovery

Pitchess procedures, the sole and exclusive means by which citizen complaints against police officers may be obtained, are codified in Penal Code sections 832.7 and 838, and Evidence Code sections 1043 and 1045. (*Brown v. Valverde* (2010) 183 Cal.App.4th 1531, 1539.) A *Pitchess* motion must include, among other things, an affidavit showing good cause for the discovery sought. (Evid. Code § 1043, subd. (b); *Brown*, at p. 1539; see also *Galindo v. Superior Court* (2010) 50 Cal.4th 1, 12.) To show good cause, the defendant must "demonstrate[ ] both (1) a 'specific factual scenario' that

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requests production of the names, address, dates of birth, and telephone numbers of all persons who filed complaints, who may be witnesses, and/or who were interviewed by investigators or other personnel from the Los Angeles Police Department, the dates and locations of the incidents complained of, as well as the date of the filing of such complaints."

establishes a 'plausible factual foundation' for the allegations of officer misconduct, and (2) that the misconduct would (if credited) be material to the defense . . . ." (*Giovanni B. v. Superior Court* (2007) 152 Cal.App.4th 312, citations omitted; see also *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71 [factual scenario may consist of a denial of the facts asserted in the police report; plausible scenario of officer misconduct is one that might or could have occurred, a scenario is plausible when it asserts specific misconduct that is both internally consistent and supports the proposed defense].) The threshold showing of good cause required to obtain Pitchess discovery is "relatively low." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83, 94, accord, *Garcia,* at p. 70.)

3. Plausible Factual Foundation For a Claim of Excessive Force

Here, counsel's declaration in support of the *Pitchess* motion stated, "Prior to conducting any investigation into the matter Officer Aguilar deployed his tazer. After [defendant] was tazed the first time both Officer Aguilar and Diaz had him on the ground, [with] Mr. Diaz on top of him and they deployed their tazer again. It is defense's information and belief that after being tazed the first time [defendant] never ran from the officers after they took him to the ground. Yet Officer Aguilar deployed his tazer again. [Defendant] was then tazed a fourth time as they were trying to place him in handcuffs. At this point [another officer] arrived at the scene and [as he tried] to grab [defendant's] legs he advised Officer Diaz and Aguilar to taze [defendant] a fifth time." This specific factual scenario is sufficient to support a claim of excessive force. As such, counsel's declaration established a plausible foundation for an allegation of excessive force, and the trial court erred in not granting the *Pitchess* motion as to documents relating to excessive force.

4. Plausible Factual Foundation For a Claim of Fabrication of Probable Cause

Regarding fabrication of probable cause, counsel's declaration states that the arrest report is contradicted by Sonia's preliminary hearing testimony, in which she denied telling the officers at the scene that defendant threatened to throw her in the lake, was

dragging her to the lake, or that she feared for her life. Sonia also denied that defendant put her in a choke hold during the incident. Like the excessive force allegations, this specific factual scenario established a plausible foundation for an allegation of fabrication of probable cause and the trial court erred in denying the *Pitchess* motion as to responsive documents relating to dishonesty.

5. Prejudice

We cannot say the error in denying defendant's *Pitchess* motion was harmless in this case. First, the jury acquitted defendant of two of the three crimes he was charged with arising out of this incident. If the officer's credibility was impeached by a showing that they had a history of using excessive force and/or fabricating probable cause to arrest, it is reasonably likely the jury would have reached a more favorable result on the resisting arrest claim, as well.

6. Remedy

The proper remedy when a trial court has erroneously rejected a showing of good cause for *Pitchess* discovery is a conditional reversal with directions to the trial court to review the requested documents in chambers on remand and to issue a discovery order, if warranted. If the trial court determines that there are no relevant documents to be disclosed, the trial court should reinstate the judgment. If, however, the trial court determines that there are relevant documents, it should order disclosure and allow the defendant an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability that the outcome would have been different had the information been initially disclosed. (*People v. Gaines, supra,* 46 Cal.4th at pp. 180-181.)

B. The Trial Court Did Not Err In Omitting an Optional Paragraph From CALCRIM No. 226

Defendant contends the trial court erred in denying his request that the jury be instructed, pursuant to CALCRIM No. 226, that one of the factors it could consider in

assessing witness credibility was: "Has the witness engaged in [other] conduct that reflects on his or her believability?"[4] The "other conduct" which defendant argues warrants the instruction is the evidence of excessive force used by the officers. Defendant claims the trial court incorrectly believed the instruction was triggered only by evidence of conduct involving moral turpitude. We find no error.

We review jury instructions to determine whether "the trial court 'fully and fairly instructed on the applicable law.' [Citation.] ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of

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[4] As given, CALCRIM No. 226 reads: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are: [¶] How well could the witness see, hear, or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember and describe what happened? [¶] What was the witness's behavior while testifying? [¶] Did the witness understand the questions and answer them directly? [¶] Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? [¶] What was the witness's attitude about the case or about testifying? [¶] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? [¶] How reasonable is the testimony when you consider all the other evidence in the case? [¶] Did other evidence prove or disprove any fact about which the witness testified? [¶] Did the witness admit to being untruthful? [¶] Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently. [¶] If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject. [¶] If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest."

understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) An erroneous failure to instruct on one of the factors the jury may use to judge witness credibility is evaluated under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of a more favorable result in the absence of the error]. (*People v. Murillo* (1996) 47 Cal.App.4th 1104, 1108.)

CALCRIM No. 226 sets forth the factors relevant to witness credibility as to which the trial court has a sua sponte duty to instruct. (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 554 [trial court's sua sponte duty].) Bracketed paragraphs set forth additional factors which may be relevant to evaluating witness credibility, but as to which the trial court has no sua sponte duty. The omitted factor at issue here, "Has the witness engaged in [other] conduct that reflects on his or her believability?" is one of those bracketed paragraphs. In denying defendant's request to add that factor to the instructions to be given to the jury, the trial court stated its opinion that the phrase "any other conduct" in the pattern jury instruction referred to "*Wheeler* type behavior," such as moral turpitude. (See *People v. Wheeler*, *supra*, 4 Cal.4th at p. 297, fn. 7 [immoral conduct is admissible for impeachment purposes, whether or not it produced a felony or misdemeanor conviction].) In other words, the trial court viewed this bracketed paragraph from CALCRIM No. 226 as the equivalent of the bracketed paragraph in CALJIC No. 2.20 which identifies "past criminal conduct of a witness amounting to a misdemeanor," as a factor which may be considered in assessing credibility.[5]

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[5] See also CALJIC No. 2.23.1, which reads: "Evidence showing that a witness engaged in past criminal conduct amounting to a misdemeanor may be considered by you only for the purpose of determining the believability of that witness. The fact that the witness engaged in past criminal conduct amounting to a misdemeanor, if it is established, does not necessarily destroy or impair a witness's believability. It is one of the circumstances that you may consider in weighing the testimony of that witness."

Defendant has cited no authority, and our independent research has found none, that requires the omitted paragraph be given where there was no evidence of past conduct amounting to a misdemeanor. Even assuming for the sake of argument that there is such a requirement, any error in not giving the instruction was harmless in this case. The jury was instructed that in evaluating witness credibility, they could consider "anything that reasonably tends to prove or disprove the truth or accuracy of that testimony." They were also instructed that they could consider: "Did other evidence prove or disprove any fact about which the witness testified?" During closing, defense counsel argued that the police officers used excessive force and lied about it to their superiors and in court. Counsel concluded: "Ladies and gentleman, this whole case, everything that they're asking you to believe turns on the credibility of two officers, Officer Aguilar and Diaz. Everything. And they have, again, shown you that they're liars. Based on that evidence, ladies and gentlemen, and based on what you've seen and heard here, you must come back with a verdict of not guilty on all counts." Under these circumstances, it is not reasonably probable defendant would have had a more favorable result if the trial court had given the one omitted paragraph from CALCRIM No. 226.

DISPOSITION

The judgment is conditionally reversed in part with directions. On remand, the trial court must conduct an in camera inspection of the requested peace officer personnel records relating to excessive force, falsified police records, or acts of dishonesty. In all other respects, the judgment is affirmed. If the trial court's inspection on remand reveals

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The CALCRIM equivalent to CALJIC No. 2.23.1 is CALCRIM No. 316, alternative B, which reads: "If you find that a witness has committed a crime or other misconduct, you may consider that fact [only] in evaluating the credibility of the witness's testimony. The fact that a witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable." CALCRIM No. 316 must be given on request. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052.) CALCRIM No. 316 was neither given, nor requested in this case.

no relevant information, the trial court shall reinstate the judgment of conviction and sentence. If the inspection reveals relevant information, the trial court shall order disclosure, allow appellant 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 initially disclosed.

RUBIN, ACT. P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.