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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DAMEN D. WINSTON,<br><br>Defendant and Appellant. | B268926<br><br>(Los Angeles County Super. Ct. No. MA061845) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles Chung, Judge. Affirmed as modified.

David W. Scopp, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Damen Winston was convicted of transporting marijuana and possessing it for sale. He contends the possession for sale conviction must be reversed because, in instructing the jury on this charge, the court did not instruct on his affirmative defense that he possessed the marijuana legally under the Compassionate Use Act of 1996 (CUA) and Medical Marijuana Program Act (MMPA). He argues that the transportation conviction also must be reversed, because the jury instructions omitted the "for sale" element retroactively added to the crime subsequent to his trial. Defendant further contends that the trial court improperly denied portions of his *Pitchess*[1] motion, and withheld discoverable materials from him. He requests that we independently review the confidential records and trial court's ruling on his *Pitchess* motion and correct a clerical error in the minute order documenting his sentence. The Attorney General does not oppose these requests, which we grant.

We agree with defendant that the court erred in instructing the jury on the possession for sale and transportation counts. However, we conclude that the errors were harmless beyond a reasonable doubt. We further conclude, after our in-camera review, that the trial court properly adjudicated defendant's *Pitchess* motion. We agree with defendant and the Attorney General, however, that the sentencing minute order must be corrected, and we direct the clerk of the superior court to prepare a corrected minute order. We otherwise affirm.

**PROCEDURAL HISTORY**

An amended information charged defendant with two marijuana-related felonies: (1) possession for sale (Health & Saf.

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

Code, § 11359[2]) and (2) transportation (former § 11360, subd. (a)).[3] A jury convicted defendant of both crimes and found true an allegation that the transportation involved more than 28.5 grams of marijuana.

The trial court suspended imposition of sentence on the transportation count and ordered three years of formal probation. The court imposed and suspended an identical sentence on the possession for sale count, which it stayed pursuant to Penal Code section 654. Defendant timely appealed.[4]

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[2] All further statutory references are to the Health and Safety Code unless otherwise indicated.

[3] As we discuss more fully below, section 11360 was amended after defendant's trial to clarify that "'transport' means to transport for sale." (§ 11360, subd. (c).) "The practical effect of this amendment is that transportation of [marijuana] for sale as opposed to personal use is now an element of the offense that must be decided by the jury by proof beyond a reasonable doubt." (*People v. Ramos* (2016) 244 Cal.App.4th 99, 102-103.) The Attorney General agrees that this amendment applies retroactively to defendant. (See *In re Estrada* (1965) 63 Cal.2d 740, 744, 748.) At the time of defendant's conviction, however, the offense was merely transportation of marijuana, not transportation of marijuana for sale.

[4] We stayed the proceedings to enable the trial court to consider and resolve defendant's petition to reduce both convictions to misdemeanors pursuant to section 11361.8, which was added to the Health and Safety Code with the passage of Proposition 64 in November 2016 and allows "a person currently serving a sentence of conviction" for various marijuana-related offenses to petition for recall and resentencing. We lifted the stay when defendant's counsel informed us that the trial court granted defendant's petition, resentenced him to one day of county jail (time served), and placed him on summary probation.

## FACTUAL BACKGROUND

### I. Prosecution Evidence

Los Angeles County Sheriff's Deputies Lee Warren and Larry Pico were patrolling Lancaster in a marked vehicle on January 14, 2014. Warren was driving and Pico was seated in the front passenger seat. They were driving south on Kingtree Avenue around 1:40 p.m. when they saw defendant driving northbound in a black Nissan. Both deputies observed that defendant was not wearing a seat belt.

Warren and Pico both looked at defendant, and Warren testified that he and defendant made eye contact. Both deputies testified that defendant slowed and pulled over. After the patrol car passed his car, defendant "pulled out from the curb line and proceeded northward." Warren then made a U-turn and conducted a traffic stop of defendant's vehicle.

Warren and Pico exited their patrol car and approached defendant's vehicle on foot. As they neared, they noticed an "odor of marijuana" emanating from the vehicle. Pico "contacted" the passenger of the vehicle, while Warren approached the driver's side and asked defendant if there was marijuana in the car. Warren testified that defendant said there was.

Warren searched defendant and recovered an orange vial containing a plastic baggie from his jacket pocket. The vial contained approximately three grams of marijuana; additionally, the baggie contained approximately six grams of marijuana. In the trunk of the car, Warren found two glass jars. One contained approximately 26 grams of marijuana, and the other contained "green marijuana residue." Pico searched the interior of the car and found a plastic baggie containing approximately 0.75 grams of marijuana in the center console and three empty plastic

baggies in the back seat. Despite recovering a total of approximately 36 grams, or 1.25 ounces, of marijuana,[5] Warren and Pico did not find any drug paraphernalia or items used to ingest marijuana, such as a bong, rolling papers, or blunt wrappers.

Warren found $158 in cash and a cell phone on defendant's person. Warren testified that he asked defendant if he could look at the cell phone, and defendant, who was "cooperative," "calm," and "friendly," said that he could. Warren found text messages from individuals listed in defendant's phone as "Deray" and "Kenny CDS." Based on their content, Warren opined the messages were "requesting the sale of marijuana" from defendant.

Warren testified that defendant "agreed to speak" about the case after being read his *Miranda*[6] rights. Defendant told Warren that "sometimes he'll give marijuana to his friends in exchange for gas money, and that sometimes he'll let his friends smoke some of his marijuana just because they are his friends. And, additionally, he said all the marijuana in the vehicle belonged to him." Pico, who was present during the conversation, also testified that defendant "indicated that he doesn't sell marijuana and he smokes out his friends sometimes. And in return, they give him gas money. He also stated that he wasn't a drug dealer . . . . He also indicated that all the marijuana we found in the car belonged to him."

Based on his training and experience in the area of narcotic sales, Warren opined that defendant "possessed the marijuana

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[5] One ounce equals approximately 28.5 grams. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1547 & fn. 10.)

[6] *Miranda v. Arizona* (1966) 384 U.S. 436.

for transportation and for the purpose of sales." Warren testified that several circumstances led him to that conclusion: the quantity of marijuana, from which he opined over 100 typical marijuana cigarettes could be made; the way the marijuana was packaged, in "sellable" quantities valued at approximately $10, $20-$30, and $40-$50; the additional plastic baggies in the vehicle; the currency "in denominations that are consistent with street-level sales," the text messages requesting marijuana from defendant; defendant's statements about giving marijuana to his friends in exchange for money; and the lack of drug paraphernalia or inebriation indicating personal use. Warren conceded on cross-examination that defendant did not have pay-owe sheets or anything to weigh the marijuana with in the car, but testified that his opinion remained the same even without those indicia of sales. Warren also testified that his opinion would remain the same if drug paraphernalia or less money were present.

Warren opined that a "moderate user" of marijuana would consume about two to three grams of marijuana per day, and a "heavy" or "very heavy" user might consume six grams or up to "an eighth of an ounce" per day. He further testified that medical marijuana patients were "allowed" to possess up to eight ounces of marijuana.[7] Warren said that defendant did not proffer a

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[7] As defendant points out in his opening brief, "[t]he CUA does not specify an amount of marijuana that a patient may possess or cultivate, but simply imposes the requirement that the marijuana must be for the patient's 'personal medical purposes.' [Citations.] This medical purposes requirement has been judicially construed to mean '"the quantity possessed by the patient . . ., and the form and manner in which it is possessed, should be reasonably related to the patient's current medical

medical marijuana card, and he did not ask defendant if he had one.

## II. Defense Evidence

Defendant testified that, on January 14, 2014, he was driving to his girlfriend's mother's house to attend a barbecue. His girlfriend's mother had given him approximately $170 in cash to repay a debt and purchase some items for the barbecue, and defendant had been at the grocery store picking up green onions and barbecue sauce. He also had stopped at the liquor store to purchase some beer and "blunts for marijuana use." Defendant's purchases were in plastic bags in the back seat of his car. Defendant saw the Sheriffs' deputies as he was pulling out of the liquor store parking lot. He was wearing a seat belt at the time.

Defendant pulled his car to the side of the road when he saw police lights. He looked into the rearview mirror and saw two deputies "getting out of the car, out of their cruiser, with their guns up." The deputies aimed the guns into the car and ordered defendant out of the vehicle. Defendant told Warren he had one type of marijuana in his jacket pocket and another type in the trunk of the car. Warren put defendant against the car and patted him down. Warren also placed his hands inside defendant's boxer shorts, between his buttocks, and beneath his genitals.

At some point during the encounter, Warren searched defendant's cell phone, which was not password protected.

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needs.'" [Citation.]" (*People v. Orlosky* (2015) 233 Cal.App.4th 257, 267 (italics omitted).) Any error on this issue was immaterial to this case, however, as the amount of marijuana recovered during the traffic stop was well below eight ounces.

Defendant did not give him permission to do so. Defendant likewise did not make any statements to Warren about trading marijuana for gas money or smoking with his friends. He claimed it would be "ridiculous" to exchange marijuana for gas money, and further testified that marijuana was too expensive to share with his friends or smoke for recreational purposes. Defendant testified that the only statement he made to Warren after receiving his *Miranda* warnings was to inquire about a comment Warren made about "trading up for [his] freedom." Warren explained to defendant that he "had to give him a cocaine dealer for him to let me go." Defendant did not know any cocaine dealers.

Defendant testified that he possessed the marijuana on his person and in his vehicle for his personal use; he used it to treat back pain from a work injury that did not respond to conventional treatment. Defendant did not weigh his doses of marijuana, but estimated he used an "excessive" and "embarrassing" five to 10 grams per day. Defendant testified that he had a medical marijuana card, and told the deputies that it was in the glove compartment of his car. According to defendant, the deputies "just viewed it" and "didn't really come back and say anything about it."

Defendant explained that his doctor recommended two different strains of marijuana, sativa to deal with pain during the day and indica to help him sleep at night. Defendant typically purchased both varieties from a dispensary in North Hollywood, and bought in bulk quantities of one or two ounces at a time to save money. Defendant kept the different strains in different containers. He carried small quantities on his person and stored larger quantities in jars he kept in the trunk of his car. The

containers were "sometimes" labeled to reflect the different varieties of marijuana they contained, but sometimes the dispensary would "run out of labels."

Defendant carpooled to the dispensary with an acquaintance, Deray. Deray's text message saying he "needed a half" was referring to marijuana, but he was not asking defendant to sell it to him; he was indicating that he wanted a ride to the dispensary. Defendant did not know the sender of the other marijuana-related text message, "Kenny CDS," very well and did not save Kenny's phone number to his cell phone. Defendant's friend Johnny knew Kenny and saved the number sometime during the three-to-four month period in which he borrowed defendant's cell phone. Johnny returned the phone to defendant before defendant's arrest.

Defendant's girlfriend, Valon Harris, testified that defendant was a heavy user of marijuana in January 2014. On the day defendant was arrested, there was a barbecue at her mother's house and defendant was sent to the store to buy supplies. When he did not return, Harris's mother called his cell phone. When a police officer answered, Harris's mother handed the phone to Harris. The officer told Harris that defendant was in the back of a patrol vehicle and might be taken into custody.

Shortly thereafter, Harris went to the location of the traffic stop and saw defendant "being hauled off in a police car." Harris got into defendant's vehicle and drove it home. Harris testified that the vehicle was "trashed": there were "groceries in the back seat that were no longer in the bag that had been thrown in the back seat, green onions, two alcohol beverages, a pack of potato chips and some packages of blunts."

Harris testified that she talked to defendant every day on his cell phone. Defendant let a man named Johnny use his cell phone for a period of about four months.

Harris's mother, Gwendolyn Anthony, testified that she sent defendant to the store on January 14, 2014. He was supposed to buy green onions for the barbecue, and she had given him "some change" to do that. She also had given him $170 to repay a debt she owed him.

### III. Rebuttal Evidence

On rebuttal, Warren testified that he did not order defendant out of his car at gunpoint. He searched defendant in broad daylight on a Tuesday afternoon and did not stick his hands in defendant's pants. Warren was not wearing gloves when he searched defendant and would not have conducted a strip or cavity search without them.

Warren did not make or receive any calls on defendant's cell phone after he recovered it. He did not see Pico use the phone either. Defendant never told Warren that he loaned his phone to another person or that he had a medical marijuana card. There were no medical marijuana labels on the packaging of the marijuana recovered during the stop. Warren did not see any groceries in defendant's car. He did not ask defendant about cocaine or "trading up."

## DISCUSSION

### I. Jury Instructions

Defendant argues that both of his convictions must be reversed due to improper jury instructions. As to the possession for sale count, he contends that the trial court committed per se reversible error by failing to sua sponte instruct on his CUA defense. As to the transportation count, he contends that the

retroactive addition of a "for sale" element to the crime subsequent to his conviction means the jury instructions on that count omitted an element of the offense and thereby deprived him of his right to a jury trial. Although we agree with defendant that the court erred, we conclude that both errors are subject to harmless error review, and that any instructional error in this case was harmless beyond a reasonable doubt.

**A. Possession for Sale**

Defendant's theory at trial was that he did not intend to sell the marijuana he possessed; he claimed it was for his personal use pursuant to a doctor's recommendation. This theory has its basis in the CUA and MMPA.

The CUA, enacted by voters in 1996, provides that sections 11357 and 11358, which respectively prohibit the possession and cultivation of marijuana, "shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient." (§ 11362.5, subds. (b)(1)(A) & (d); *People v. Mower* (2002) 28 Cal.4th 457, 463; *People v. Colvin* (2012) 203 Cal.App.4th 1029, 1035.) The CUA "was not intended to decriminalize marijuana on a wholesale basis nor eviscerate this state's marijuana laws." (*People v. Mitchell* (2014) 225 Cal.App.4th 1189, 1204; see also *People v. Mentch* (2008) 45 Cal.4th 274, 286, fn. 7.) Indeed, section 11362.5, subdivision (b)(2) provides that nothing in the CUA "shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes"; "[t]he acts of selling, giving away, transporting, and growing large quantities of marijuana remain criminal" under the CUA. (*People v. Rigo* (1999) 69 Cal.App.4th 409, 415.)

The MMPA was enacted by the Legislature in 2003 to "address issues not included in the [CUA], so as to promote the fair and orderly implementation of the [CUA] and to '[c]larify the scope of the application of the [CUA].'" (*People v. Mentch*, *supra*, 45 Cal.4th at p. 290. As is pertinent here, section 11362.765, added to the Health and Safety Code by the MMPA, provides that certain individuals, including "a qualified patient or person with an identification card who transports or possesses marijuana for his or her own personal medical use," "shall not be subject, on that sole basis, to criminal liability under Section . . . 11359 [or] 11360 . . . ," the statutes under which defendant was convicted. (§ 11362.765, subds.(a) & (b)(1).) The MMPA thus "expressly extends a CUA defense to the marijuana crimes of transportation, and possession for sale, *insofar as the marijuana was possessed and/or transported by an eligible patient for his or her personal medical purposes*." (*People v. Wright* (2006) 40 Cal.4th 81, 101 (*Wright*) (conc. & dis. opn. of Baxter, J.) (italics in original)). However, "nothing in [section 11362.765] shall authorize the individual to smoke or otherwise consume marijuana unless otherwise authorized by [the MMPA], nor shall anything in [section 11362.765] authorize any individual or group to cultivate or distribute marijuana for profit." (§ 11362.765, subd. (a).)

The trial court advised the parties prior to trial that "having a medical marijuana recommendation or prescription is not a true defense to the charge of possession for sale," but said it would allow evidence of defendant's medical marijuana recommendation "for the purpose of negating the intent to sell element of the crime."[8] The court further noted that a medical

[8] To prove the crime of possession of marijuana for sale, the

marijuana recommendation "would be a defense to the simple possession" of marijuana, which was a lesser included offense of possession for sale. Defense counsel did not challenge these statements, and defendant subsequently testified at trial about his medical marijuana recommendation and personal cannabis use.

Defense counsel did not ask the trial court to instruct the jury regarding the CUA defense on any charge or lesser included offense thereof. The court did not instruct the jury regarding the CUA defense on the possession for sale count. However, the court instructed the jury with variations of CALCRIM No. 3412, the pattern CUA defense instruction, four times during the course of the instructions—in connection with the transportation count as well as in connection with the lesser included offenses of both the transportation and possession for sale counts. The jury was thus repeatedly advised that "[p]ossession or transportation of marijuana is lawful if it is authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana for personal medical purposes when a physician has recommended or approved such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt

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prosecution must prove beyond a reasonable doubt that the defendant knowingly possessed a usable amount of marijuana with the intent to sell it. (*People v. Montero* (2007) 155 Cal.App.4th 1170, 1175-1176; see also CALCRIM No. 2352.)

that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime."[9]

Defense counsel argued that defendant possessed the marijuana for his own personal medical use and did not intend to sell it. She also explicitly told the jury, in conformance with the trial court's statements and instructions, that the CUA "is a defense to transportation and simple possession if Mr. Winston is authorized under this Act."

Defendant now contends the trial court had a sua sponte duty to give the CUA defense instruction in connection with the possession for sale charge as well. We consider this argument despite defendant's failure to request the instruction below, because a trial court has a sua sponte duty to instruct on an affirmative defenses when it appears the defendant is relying on such a defense or there is substantial evidence supportive of such a defense, and it is not inconsistent with the defendant's theory of the case. (*People v. Boyer* (2006) 38 Cal.4th 412, 469; see also *People v. London* (2014) 228 Cal.App.4th 544, 565.) An abdication of this duty affects the defendant's substantial rights, such that his or her failure to object does not bar the appeal. (*People v. Ramirez* (2015) 233 Cal.App.4th 940, 949; see also Pen. Code, § 1259.) We review the claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

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[9] The court gave this version of the instruction on the charged transportation offense and its lesser included offense of transporting not more than 28.5 grams of marijuana. The court gave a slightly different version that omitted the language regarding transportation in connection with the lesser included offenses of simple possession of more than 28.5 grams and simple possession of not more than 28.5 grams.

Defendant and the Attorney General disagree as to whether the CUA defense is truly an "affirmative" one upon which the trial court has a duty to instruct. Defendant relies heavily on *People v. Windus* (2008) 165 Cal.App.4th 634 (*Windus*) for the proposition that such a duty exists.

In *Windus*, the defendant was charged with possession of marijuana for sale (§ 11359) after law enforcement found approximately 1.6 pounds (735.2 grams) of marijuana in his motel room. (*Windus*, *supra*, 165 Cal.App.4th at p. 637.) The defendant told detectives he used approximately one ounce of marijuana per week for "medical reasons," and showed them "what appeared to be an expired medical marijuana card." (*Ibid.*) Prior to trial, the defendant claimed he was entitled to present a CUA defense because he was a "qualified patient" within the meaning of the CUA and MMPA. (*Id.* at p. 638.)

The prosecution moved to exclude evidence supportive of this defense. (*Windus*, *supra*, 165 Cal.App.4th at p. 638.) At the ensuing Evidence Code section 402 hearing, the defendant's physician testified that he had recommended medical marijuana to defendant on two occasions but had not specified a dosage. (*Ibid.*) Both of these recommendations were made more than three years prior to the defendant's arrest; the physician had not examined defendant in several years and did not see him again until nearly a year after his arrest. (*Ibid.*) The physician testified that the defendant's marijuana use was "'on the high side,'" but was consistent with defendant's claim that he treated his severe chronic pain by ingesting rather than smoking marijuana. The doctor opined that eating marijuana requires four to eight times the amount that is normally smoked, and that it would be appropriate for the defendant to possess three to six

pounds of marijuana. (*Ibid.*)

The trial court ruled that the defendant could not present his CUA defense to the jury. (*Windus*, *supra*, 165 Cal.App.4th at p. 639.) Although the court found that the defendant was a qualified patient whose physician recommended marijuana to treat a severe medical condition, it concluded that the defense was not available because "'that particular physician did not make a recommendation, nor did any other physician make a recommendation that [the defendant] possess more than eight ounces of marijuana at one time for that purpose.'" (*Ibid.*) Deprived of his defense, the defendant entered a plea of no contest. (*Ibid.*)

On appeal, the defendant argued that he presented sufficient evidence that the amount of marijuana he possessed was consistent with his medical needs for the purpose of presenting his CUA defense to the jury. We agreed. (*Windus*, *supra*, 165 Cal.App.4th at p. 640.) We concluded that the defendant presented sufficient evidence to permit the jury to decide if the marijuana he possessed was for his personal medical needs. (*Ibid.*) We explained that where "the accused possesses marijuana and has a physician's recommendation that he use the drug to treat an ailment set forth in the CUA, he is entitled to present a CUA defense to the jury." (*Id.* at p. 641.) We further held that there is no requirement that the physician's recommendation approve a specific dosage of marijuana, and that it is up to the trier of fact to decide whether the quantity a defendant possesses is reasonably related to his or her medical needs. (*Id.* at p. 643.)

The Attorney General responds that defendant's reliance on *Windus* is "misplaced," because "the trial court in this case did

not prevent appellant from presenting evidence that he lawfully possessed the marijuana for personal [use] under the CUA. Appellant testified at trial that he possessed the marijuana for personal use and that he had a medical marijuana card that authorized his possession of the marijuana to treat a back injury. Defense counsel subsequently argued the import of the CUA on the charges. Because appellant was not precluded from presenting CUA evidence or arguing its application *to the charged crimes*, *Windus* is inapposite."

We disagree. Although defendant testified about the reason for his marijuana possession generally, his counsel was unable to argue—and the jury was not informed—that medical possession could serve as a defense to the possession for sale charge. The jury instructions precluded defense counsel from arguing that the CUA defense applied to *all* of defendant's charged crimes, rather than a subset of them.

The Attorney General further contends that defendant was not entitled to the instruction in any event because the CUA "did not provide a defense to the charge that he possessed the marijuana for sale." Because the CUA "only applied to marijuana that was possessed for personal use," and the offense of possession for sale requires the prosecution to prove intent to sell, "the CUA was necessarily inapplicable" if the prosecution met its burden of proof. Therefore, the argument continues, defendant was not mounting a true "affirmative defense" that would exonerate defendant even if the prosecution met its burden. (See *People v. Anderson* (2011) 51 Cal.4th 989, 996-997; Black's Law Dict. (10th ed. 2014) p. 509, col. 1 ["affirmative defense"].) Rather, he was presenting evidence to refute one element of the prosecution's case—intent to sell—and accordingly the court did

not have a sua sponte duty to instruct on the CUA defense. Instead, defendant needed to request an instruction if he desired it. (*People v. Anderson*, *supra*, 51 Cal.4th at pp. 996-997.)

We are not persuaded that the CUA, as supplemented by the MMPA, "does not provide a defense to a charge that a defendant possessed marijuana for purposes of sale." Section 11359 is expressly listed among the sections under which a "qualified patient . . . who transports or processes marijuana for his or her own personal medical use" cannot be subject to liability on the "sole basis" of his or her medically motivated actions. (§ 11362.765, subds. (a) & (b)(1).) Of course, as Justice Baxter recognized in *Wright*, the MMPA only applies to the crimes of possession for sale and transportation of marijuana "insofar as the marijuana was possessed and/or transported by an eligible patient for his or her personal medical purposes." (*Wright*, *supra*, 40 Cal.4th at p. 101 (conc. & dis. opn. of Baxter, J.) (italics omitted).) But that does not mean a defendant's use of the defense only attacks one element of the crime; it means that where "the accused possesses marijuana and has a physician's recommendation that he use the drug to treat an ailment set forth in the CUA, he is entitled to present a CUA defense to the jury." (*Windus*, *supra*, 165 Cal.App.4th at p. 641.) Entitlement to an instruction on a defense goes hand in hand with entitlement to present the defense; a defense unsupported by an appropriate instruction is of little practical value. Indeed, the use notes for CALCRIM No. 2352 ("Possession for Sale of Marijuana") direct the trial court to instruct on the CUA defense "[i]f the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful" use for medical purposes. Just like the defendant in *Windus*,

defendant met that burden and accordingly should have received the instruction. (See *People v. Mower*, *supra*, 28 Cal.4th at pp. 476-482; *People v. Jackson* (2012) 210 Cal.App.4th 525, 533.)

Defendant contends that failure to instruct on the CUA defense is reversible per se, but our Supreme Court has concluded it is subject to harmless error review. (See *Wright*, *supra*, 40 Cal.4th at pp. 98-99.) The Supreme Court has not resolved whether such review is made under the "reasonably probable" standard of *People v. Watson* (1956) 46 Cal.2d 818, or the more stringent "harmless beyond a reasonable doubt" standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*Wright*, *supra*, 40 Cal.4th at p. 98.) We need not resolve the issue here, as any instructional error on the CUA defense in this case was harmless beyond a reasonable doubt.

A trial court's failure to instruct the jury sua sponte on the CUA defense is "harmless beyond a reasonable doubt under circumstances in which 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant . . . .'" (*Wright*, *supra*, 40 Cal.4th at pp. 98, 99.)

Here, the jury necessarily rejected the factual predicate of the omitted CUA defense—that defendant possessed the marijuana solely for his personal medical use. Under the instructions it was given, the jury had the option of acquitting defendant of possession for sale if it believed he lacked the intent to sell the marijuana. It also had the option of convicting him of simple possession if it was convinced by his claim that the

marijuana was solely for his personal, non-medical use. Indeed, defense counsel urged the jury to avail itself of these options, arguing that the case concerned "[p]ossession and transportation of marijuana for personal use," not intent to sell. Instead, the jury found beyond a reasonable doubt that defendant possessed marijuana with the specific intent to sell it. "'[T]he jury necessarily resolved, although in a different setting, the same factual question that would have been presented by the missing instruction' [citation], in a manner adverse to defendant. We conclude, therefore, that the [alleged] instructional error [would be] harmless under any standard of prejudice." (*Wright*, *supra,* 40 Cal.4th at p. 99.)

**B. Transportation**

Defendant also contends that his conviction for transporting marijuana must be reversed due to instructional error. Subsequent to defendant's conviction, but while his appeal was pending, the Legislature amended section 11360 to require the prosecution to prove that a defendant transported marijuana for the purpose of sale. (See § 11360, subd. (c).) Thus, a new element has been added to the crime. The Attorney General agrees with defendant that the amendment applies retroactively to defendant's case. (*People v. Ramos*, *supra*, 244 Cal.App.4th at p. 103.) The parties differ as to whether defendant's conviction should be reversed because the jury was not instructed on the new element of the offense, that the marijuana be transported for sale. Defendant argues that the omission of an element of the offense from the jury instruction is reversible per se, or at the very least was prejudicial error. The Attorney General argues that we should conclude the omission of the "for sale" element was harmless beyond a reasonable doubt, because the jury found

that defendant possessed the marijuana for sale.

We agree with the Attorney General that the omission of an element of the crime from a jury instruction is subject to harmless error review under *Chapman v. California*, *supra*, 386 U.S. 18. The Supreme Court recently clarified in *People v. Merritt* (2017) 2 Cal.5th 819, 821 that the failure to instruct on elements of a charged crime, while a "serious constitutional error," is subject to harmless error rather than reversible per se analysis "if the error at issue does not "'vitiat[e] *all* the jury's findings."'" Here, the omission of an instruction regarding the "for sale" element of the transportation crime[10] did not vitiate any of the jury's other findings, such as its finding that defendant transported more than 28.5 grams of marijuana. It is accordingly subject to harmless error analysis and is reversible "unless harmless beyond a reasonable doubt." (*People v. Merritt*, *supra*, 2 Cal.5th at p. 822.) Defendant urges us to follow *People v. Ramos, supra*, 244 Cal.App.4th at pp. 103-104, which held that failure to instruct on the "for sale" element in connection with a charge of transporting heroin was reversible per se and was not harmless. We decline to do so under the facts of this case and in light of *People v. Merritt*, which post-dates *Ramos* and is binding on this court under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.

The jury was instructed that it had to find the following five elements true beyond a reasonable doubt to convict

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[10] We note that the trial court, perhaps aware of the bill amending section 11360, effective January 1, 2016, which was enacted in the weeks before defendant's summer 2015 trial, stated prior to trial that "transportation would require that it be for purposes of sale under the law."

defendant of the charged offense of transporting more than 28.5 grams of marijuana: (1) defendant unlawfully transported a controlled substance; (2) knew of its presence; (3) knew the substance was a controlled substance; (4) knew that the substance was marijuana; and (5) the marijuana weighed more than 28.5 grams. The jury was further instructed that transportation of marijuana was lawful under the CUA if defendant transported an amount reasonably related to his own medical needs for his own personal medical purposes, and that the prosecution had the burden of proving beyond a reasonable doubt that defendant was not authorized to possess or transport marijuana for medical purposes. The jury rejected the CUA defense and convicted defendant of the charged transportation crime.

The jury also found defendant guilty of possessing the very same marijuana for sale. It therefore found that the prosecution had proved, beyond a reasonable doubt, that defendant "intended to sell" the marijuana "when he possessed it." Since the same marijuana was at issue in both charges, and was in defendant's car being transported, it necessarily follows that the jury concluded it was being transported for sale. Defendant asserts that "it is possible to possess marijuana for sale but to transport it for another purpose, such as to store it or show it to a friend." While this may be true in the abstract sense, on the record here the evidence regarding possession and transportation—and defendant's theory of defense on both charges—was identical. This distinguishes the case from *Ramos*, in which the court stated in dicta that the lack of a "for sale" finding as to transportation of heroin could not be deemed harmless in light of the jury's finding that defendant possessed methamphetamine for

sale. (*Ramos*, *supra*, 244 Cal.App.4th at p. 104.) Methamphetamine and heroin are different drugs, and a finding that the defendant intended to sell one does not necessarily mean he or she intended to sell the other. Here, there was a single drug at issue, no dispute as to its amount or location, and the jury found that defendant possessed it with the intention to sell it despite the availability of lesser included offenses lacking that element. The jury further rejected defendant's CUA defense on the transportation charge. This record does not contain evidence that could rationally lead to a contrary finding on the omitted "for sale" element. (See *Merritt*, *supra*, 2 Cal.5th at p. 832.) We accordingly conclude the error was harmless beyond a reasonable doubt.

## II. *Pitchess* Motion

### A. Applicable Legal Principles

A criminal defendant seeking discovery of law enforcement personnel records that may be relevant to his or her defense must employ a procedural mechanism known as a "*Pitchess* motion." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225 (*Mooc*).) "When a defendant seeks discovery from a peace officer's personnel records, he or she must 'file a written motion with the appropriate court' (Evid. Code, § 1043, subd. (a)) and identify the proceeding, the party seeking disclosure, the peace officer, the governmental agency having custody of the records, and the time and place where the motion for disclosure will be heard (*id.*, subd. (b)(1)). In addition, the *Pitchess* motion must describe 'the type of records or information sought' (Evid. Code, § 1043, subd. (b)(2)) and include '[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating

upon reasonable belief that the governmental agency identified has the records or information from the records' (*id.*, subd. (b)(3))." (*Id.* at p. 1226.) The affidavits need not be based on personal knowledge, but must request information with sufficient specificity "to preclude the possibility of a defendant's simply casting about for any helpful information." (*Ibid.*)

The defendant's submission must demonstrate "good cause," which our Supreme Court has described as a requirement that the defendant establish "not only a logical link between the defense proposed and the pending charge, but also . . . articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1021.) The affidavit or declaration of counsel proposing the defense(s) "must also describe a factual scenario supporting the claimed officer misconduct" that is "plausible when read in light of the pertinent documents." (*Id.* at pp. 1024, 1025.) That is, it must describe a scenario "that might or could have occurred." (*Id.* at p. 1026.) The affidavit need not provide corroboration or provide a motive for the alleged officer misconduct. (*Id.* at p. 1025.) In some cases, an affidavit consisting merely "of a denial of the facts asserted in the police report" may satisfy these requirements. (*Id.* at p. 1024.) The affidavit also "must articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence" that would support the proposed defense(s). (*Id.* at p. 1024.)

"If the trial court concludes the defendant has fulfilled these prerequisites and made a showing of good cause, the custodian of records should bring to court all documents 'potentially relevant' to the defendant's motion." (*Mooc*, *supra*, 26

Cal.4th at p. 1226.) "The trial court 'shall examine the information in chambers' (Evid. Code, § 1045, subd. (b)), 'out of the presence and hearing of all persons except the person authorized [to possess the records] and such other persons [the custodian of records] is willing to have present' (*id.*, § 915, subd. (b); see *id.*, § 1045, subd. (b) [incorporating *id.*, § 915]). Subject to statutory exceptions and limitations, . . . the trial court should then disclose to the defendant 'such information [that] is relevant to the subject matter involved in the pending litigation.' (*Id.*, § 1045, subd. (a).)" (*Ibid.*) The disclosed information typically is subject to a protective order to maintain its confidentiality.

**B. Defendant's Motion**

Prior to trial, defendant filed a *Pitchess* motion for discovery of the names and addresses of all persons who filed complaints or witnessed incidents prompting complaints against Warren and Pico for "violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, perjury, dishonesty, 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."

Counsel's declaration alleged that the narrative of defendant's arrest and search contained in Warren's incident report was false, and that defendant's contrary version of events was the true one. According to his report, Warren stopped defendant for a seat belt violation. When he approached the car, he smelled marijuana. Defendant told Warren there was marijuana in the car and on his person. Warren searched

defendant and found marijuana, a cell phone, and $158 in currency. Meanwhile, Pico detained the front passenger and searched the vehicle, recovering more marijuana and three empty plastic bags. Warren searched the trunk and found a jar containing marijuana. With defendant's consent, Warren searched defendant's cell phone and found text messages he believed to be consistent with marijuana sales. Warren read defendant his *Miranda* rights, after which defendant stated that all the marijuana in the vehicle was his. He further claimed that he sometimes gave marijuana to his friends, and "smokes out" with them in exchange for gas money.

Defendant's version of events differed. According to defendant, "Mr. Winston is pulled over for a minor traffic violation. When the deputies approach, they order him out of the vehicle at gun point. Once he is out, Deputy Warren inquires as to why Mr. Winston's button on his shorts is broken and why his zipper is partially down. Mr. Winston tells them it's broken. Without consent or notice, Deputy Warren conducts a search whereby he puts his hands down Mr. Winston's pants and reaches under his testicles as well as sliding his hand up and down Mr. Winston's buttocks in an apparent search for drugs. The deputies inquire as to whether he has any marijuana and Mr. Winston tells them that he has two different grades in his pockets, and additional marijuana in the car. He also presents to the deputies a medical marijuana card. He is then placed in the patrol vehicle while both deputies search the vehicle. The deputies had also taken Mr. Winston's cell phone during the initial search. At no point did either deputy ask for permission to search, nor did they inform him that they intended to search, contrary to the deputies' allegation that they obtained consent.

Once the search of the vehicle was over, both deputies approached to ask about the text messages. Mr. Winston tells both deputies he is not selling marijuana to his friends, and Mr. Winston denies the statements attributed to him in the arrest report by Deputy Warren. He told them that he was on his way to smoke and that he smokes a lot due to a worker's comp injury."

Based on this submission, and over objections by the Sheriff's Department, the trial court found good cause to "go in-camera on Warren as to dishonesty." It denied the motion in all other respects. After its in-camera review, the trial court determined that certain complaints against Warren were discoverable and issued a "protective order with a one-week compliance date." The prosecution later requested and received access to the same discoverable materials, subject to the same protective order.

**C. Analysis**

**1. Partial Denial of Motion**

Defendant contends that the trial court erred in two ways: (1) by completely denying his *Pitchess* motion as to Pico, "since he acted in concert with Warren" in detaining, searching, and allegedly obtaining a confession from defendant; and (2) by denying the motion "as to the fabrication of evidence and use of excessive force by Warren." We review the court's rulings for abuse of discretion. (*Pitchess*, *supra*, 11 Cal.3d at p. 535; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.)

We find no abuse of discretion in the court's denial of the motion as to Pico. Both the incident report, which Warren prepared, and defense counsel's affidavit described Pico as playing a minimal role in defendant's arrest and search. Pico searched the car and found marijuana and baggies, but

defendant's version of events did not dispute the presence of either item, or otherwise claim that the evidence against him was fabricated. Defendant did not allege that Pico participated in the alleged invasive search of his person, or the search of his cell phone. Defendant "denie[d] the statements attributed to him in the arrest report by Deputy Warren," but such denial does not implicate Pico's honesty or challenge his preparation of a report. Unlike the defendant in *Brant v. Superior Court* (2003) 108 Cal.App.4th 100, on which he relies, in his narrative defendant did not dispute that he committed the minor traffic offense for which he was stopped. Even if he had, the report does not indicate that Pico, the passenger in the sheriff's cruiser, had any role in initiating the stop. Nor does the report refute defendant's contention that he presented "the deputies" with his medical marijuana card; it is silent on that topic.

We likewise find no abuse of discretion in the trial court's denial of the motion as to "the fabrication of evidence and use of excessive force" by Warren. As noted above, defendant's motion did not contest the presence of any evidence retrieved from his car or person. He did not dispute the presence of the text messages, or claim they were fabricated. Defendant challenged only the veracity of Warren's claims that he made comments about "smoking out" his friends and giving them marijuana in exchange for gas money. The trial court's grant of the motion as to records of Warren's dishonesty was broad enough to encompass many of the other, overlapping categories requested in the *Pitchess* motion, such as allegations of perjury, writing false reports, or fabricating charges or evidence. Defendant argues that Warren used excessive force by pointing a gun at him and conducting an invasive search. But the affidavit in support of

defendant's motion did not allege that the search was excessively forceful so much as improperly invasive, and his claim that a gun was pointed at him was disputed on this point and defendant's version was not credited.

### 2. Independent Review of In Camera Proceedings

Defendant also requests that we independently examine the materials the custodian of records produced during the in camera hearing on his motion to determine whether it abused its discretion in excluding discoverable materials. The Attorney General agrees that we may do so. Indeed, as *Mooc* recognizes, a trial court must make an appropriate record of the personnel file documents it reviews to ensure that meaningful appellate review is possible, and "the Court of Appeal could . . . itself review[ ] those documents . . . and determine[] whether the trial court abused its discretion in refusing to disclose any" of the officer's records. (*Mooc*, *supra*, 26 Cal.4th at p. 1228.) We requested the records from the Sheriff's Department and have examined them to determine whether the trial court abused its discretion in deciding which were discoverable. (See *ibid.*; *People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221.) Our review revealed no abuse of discretion by the trial court.

## III. Sentencing Minute Order

Defendant and the Attorney General agree that the minute order documenting defendant's sentence does not accurately reflect the trial court's oral pronouncement of sentence. Specifically, the minute order does not indicate that the sentence on count 1, the possession for sale count, was stayed pursuant to Penal Code section 654, as the trial court orally ruled. Just as an abstract of judgment is not the judgment of conviction—it

merely digests or summarizes the judgment, and may not add to or modify it—the minute order in this case is not the judgment of conviction. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Jones* (2012) 54 Cal.4th 1, 89.) "When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties." (*People v. Jones*, *supra*, 54 Cal.4th at p. 89.) We therefore order the minute order to be corrected to conform to the actual sentence originally stated by the trial court, namely that the imposition and suspension of sentence on count 1 was stayed pursuant to Penal Code section 654. We note that this correction serves merely to ensure that the record is accurate, as defendant has since been resentenced to one day of county jail (time served), and placed on summary probation.

**IV. Cumulative Error**

Finally, defendant contends there was cumulative error. "To the extent there are a few instances in which we have found error or assumed its existence, no prejudice resulted. The same conclusion is appropriate after considering their cumulative effect." (*People v. Valdez* (2012) 55 Cal.4th 82, 181.) Similarly, the cumulative effect of any errors in this case was not prejudicial.

**DISPOSITION**

The judgment is modified to reflect that the sentence on count 1 is stayed pursuant to Penal Code section 654. As modified, the judgment is affirmed. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation a certified copy of an amended minute order that

reflects the modification.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.