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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KEITH LAMAR LYNCH, Defendant and Appellant.	B224130 (Los Angeles County Super. Ct. No. YA073832)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven R. Van Sicklen, Judge. Affirmed.

Morgan H. Daly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Linda C. Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

During the early morning of November 19, 2008, Los Angeles County Deputy Sheriffs Ervin Francois and Cristina Martinez observed defendant Keith Lamar Lynch commit two traffic violations. They stopped him. As the deputies approached defendant's car, Deputy Martinez saw him drop a small object she suspected was contraband into the ashtray. After detaining him, Deputy Martinez retrieved the object: a plastic baggie containing .15 grams of cocaine with a street value between $5 and $10. Defendant was arrested and prosecuted for possession of cocaine base. (Health & Saf. Code, § 11350, subd. (a).)

Defendant filed a *Pitchess*[1] motion, claiming that the deputies had fabricated the reasons to stop him and suggesting that they had planted the contraband in the car. The trial court granted the motion, and, after conducting two in camera hearings, disclosed five complaints. The matter proceeded to a motion to suppress evidence. (Pen. Code, § 1538.5.) The deputies, defendant and one of the *Pitchess* witnesses testified. The trial court denied the suppression motion, resolving the credibility issues in favor of the People. A jury trial was had; again, both deputies, defendant and a *Pitchess* witness testified. Following less than two hours of deliberation, the jury convicted defendant. The trial court suspended imposition of sentence and placed defendant on formal probation for one year, under the terms and conditions of Proposition 36.

In this appeal, defendant raises multiple claims of error. First, he claims that the trial court, in several ways, improperly limited the scope of his *Pitchess* discovery. Second, he urges that the trial court abused its discretion in excluding some defense evidence from the hearing on his suppression motion. Third, he attacks three evidentiary rulings the trial court made during trial. Lastly, he

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

contends that the trial court abused its discretion in denying his motion for a mistrial. We find no prejudicial error and therefore affirm the judgment.

I. THE *PITCHESS* MOTION

A. *Factual Background*

Prior to trial, defendant filed a *Pitchess* motion seeking all complaints filed against Deputies Francois and Martinez. A declaration from defense counsel averred, in relevant part: "If the defendant was to testify in this case, he would state that the officers are being untruthful about how the events unfolded on November 19, 2008 which led to his arrest. He would state that the . . . officers are lying when they state that [he] did not stop at the limit line and did not signal, fabricating probable cause to stop [him]. Furthermore, [defendant] would state that he never had drugs in his vehicle in the ashtray and does not know the origin of the drugs and believes the officers may have planted the drugs in his car. . . . [H]e never had a bag with cocaine in the vehicle."

In addition, the motion requested the trial court "to examine" the two deputies' personnel files "for *Brady* material," arguing that "the *Pitchess* five-year limitation on discovery does not apply to *Brady* discovery examined by the court."

The trial court granted the *Pitchess* motion "in the areas of fabrication, planting and false police reports." It conducted two in camera hearings, and, after reviewing records dating back to 2004, ordered the disclosure of five complaints.[2] As will be explained in detail below, defendant called one of the complainants, Ronnie Littleton (Littleton), to testify first at the Penal Code section 1538.5 hearing and then at trial.

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[2] Reporter's transcripts of the two in camera hearings have been transmitted to this court under seal.

B. *Discussion*

Defendant contends that the trial court's disclosure order was erroneous on several grounds. We discuss each claim separately.

1. *Racial Bias*

Defendant first urges that the trial court erred in not granting the *Pitchess* motion to discover complaints about racial bias and racial profiling. We reject the argument, finding that defendant failed to establish that records of racial bias and profiling were relevant to any defense.

The *Pitchess* motion included a boiler-plate request for complaints relating to, among other things, "racial bias" in addition to complaints about fabrication of probable cause and planting evidence. The motion argued: "Evidence of an officer's racial bias is also relevant to show that he has a habit or character of targeting individuals of a certain race." However, the motion made no mention of defendant's race (African American) or the race of the two deputies (Deputy Francois is African American and Deputy Martinez is Hispanic) and defense counsel's declaration set forth only the theory that the deputies had lied about defendant's violations of the Vehicle Code and had (possibly) planted the contraband. Defendant offered *no* facts to suggest that the deputies had acted due to any racial animus. Defendant therefore failed to meet the requirement that he describe "a specific factual scenario" establishing a "plausible factual foundation" for the claim that the deputies had engaged in racial profiling. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1020, 1022.) As a result, defendant failed to establish good cause for an in camera review of records related to racial bias or profiling. (See *People v. Thompson* (2006) 141 Cal.App.4th 1312, 1318-1319.) In any event, we note that the trial court did order disclosure of the one complaint that

claimed racial profiling (as well as fabrication of justification for a traffic stop) and that complainant (Littleton) testified twice on defendant's behalf.

2. *Complaints More Than Five Years Old*

Defendant next urges that the trial court should have ordered production of the deputies' personnel records extending beyond the five years prior to his arrest[3] and reviewed those records "to discover exculpatory material under *Brady*." We disagree.

Evidence Code section 1045, subdivision (b)(1) excludes from disclosure "complaints concerning conduct occurring more than five years before the event or transaction" in issue. This limitation is constitutional. (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 10-13.) Defendant seeks to avoid the force of that conclusion by arguing that complaints more than five years old are discoverable if they constitute exculpatory evidence under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

Defendant misapprehends the scope of *Brady*. *Brady* does not impose any obligation on the judiciary. Instead, *Brady* requires the prosecution to "disclose any evidence that is favorable to the defendant and material on the issue of guilt or punishment. [Citations.] The *Brady* disclosure obligation encompasses both impeachment and exculpatory evidence, and exists regardless of whether the defendant makes a specific request for the information. [Citations.] 'The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge any favorable evidence known to the others acting on the government's behalf,' including the police.

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[3] Deputy Martinez joined the Sheriff's Department in 2000 and Deputy Francois joined in or around 2001.

[Citations.]" (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1471-1472 (*Gutierrez*).)

Gutierrez, a case that defendant does not discuss, rejected the defense argument that the prosecutor was required to review police personnel records beyond the five-year period to discharge its *Brady* obligation. *Gutierrez* explained: "The *Pitchess* procedure is the only avenue by which citizen complaints may be discovered. [Citation.] *Alford* [*v. Superior Court* (2003) 29 Cal.4th 1033] held that a prosecutor is not entitled to the fruits of a successful *Pitchess* motion made by the defense. [Citation.] While the prosecution is free to seek such information by bringing its own *Pitchess* motion in compliance [with the statutory procedure], 'absent such compliance . . . *peace officer personnel records retain their confidentiality vis-à-vis the prosecution.*' [Citation.] Given *Alford's* limitation on disclosure to prosecutors, the *Brady* review suggested by [the defense] is not tenable. . . . [A] 'prosecutor's duty under *Brady* to disclose material exculpatory evidence applies to evidence the prosecutor, or the prosecution team, *knowingly possesses or has the right to possess*' that is 'actually or constructively in its possession or accessible to it.' Because under *Alford* the prosecutor does not generally have the right to possess and does not have access to confidential peace officer files, [the defense] argument for routine [prosecutorial] review of the complete files of all police officer witnesses in a criminal proceeding necessarily fails." (*Gutierrez, supra*, 112 Cal.App.4th at p. 1475.)

In a similar vein, we reject defendant's argument that the trial court had an obligation to require production of the entirety of the two deputies' personnel files regardless of the five-year limit and to examine those files to determine if they contained evidence that required disclosure under *Brady*.[4] There "is no general

[4] In this case, the People filed a discovery motion but no *Pitchess* motion.

constitutional right to discovery in a criminal case, and *Brady* did not create one." (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559.) Consequently, we find that *Brady* does not require routine judicial review of the complete files of all police personnel records in a criminal prosecution. (See also *City of Los Angeles v. Superior Court, supra,* 29 Cal.4th at p. 15, fn. 3 ["We do not suggest that trial courts must routinely review information that is contained in peace officer personnel files and is more than five years old to ascertain whether *Brady* . . . requires its disclosure."].)

3. *Review of the In Camera Proceedings*

Defendant asks us to "independently examine the [sealed] record[s] of [the two *Pitchess* hearings] to ensure that the custodian of records made the necessary averments under oath and to determine whether the trial court abused its discretion in withholding certain complaints from disclosure."

We have independently reviewed the sealed reporter's transcripts. (See fn. 2, *ante*.) The custodian of records made the necessary averments under oath. The trial court's statements and findings during the hearings are sufficient to permit appellate review of its ruling. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.) The trial court's ultimate disclosure ruling is reviewed for abuse of discretion. (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086.) We conclude, based on review of the two transcripts, that the trial court properly exercised its discretion both in determining which complaints involved claims of fabrication of probable cause, planting of evidence and creation of false police reports and in declining to disclose complaints made by third parties. (See Evid. Code, § 1045, subd. (b)(3) ["In determining relevance, the court . . . shall exclude from

disclosure: [¶] . . . [¶] (3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit."].)

II. THE SUPPRESSION MOTION

Prior to trial, defendant moved to suppress the cocaine recovered from his car. (Pen. Code, § 1538.5.) Both Deputy Martinez and Deputy Francois testified as did defendant and his *Pitchess* witness Littleton. However, the trial court, relying upon Evidence Code section 352, declined to hear the testimony of another *Pitchess* witness Carol Johnson (Johnson). In addition, it denied the defense request to defer ruling on defendant's motion to suppress until it had heard a motion to suppress in an unrelated case (*People v. Vance*) in which the defense claimed Deputies Martinez and Francois had fabricated probable cause for a traffic stop.[5] The trial court ultimately denied defendant's motion to suppress, resolving the credibility issue in favor of the People. In this appeal, defendant contends that the trial court committed prejudicial error because it excluded what he claims was "material defense evidence." We disagree.

A. *Factual Background*

The prosecution called Deputy Martinez as its witness. Deputy Martinez testified that at approximately 2:00 a.m. on November 19, 2008, she and Deputy Francois were on patrol. They were travelling westbound on Century Boulevard behind defendant's vehicle. She saw that defendant failed to stop behind the limit

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[5] In the trial court as well as in this appeal, defendant has framed the issue at the suppression motion as whether the deputies had probable cause for the traffic stop. This characterization is inaccurate. "Reasonable suspicion of a Vehicle Code violation or other criminal activity justifies a traffic stop; probable cause is not needed. [Citations.]" (*People v. Watkins* (2009) 170 Cal.App.4th 1403, 1408.)

line (Veh. Code, § 21453, subd. (a)) and failed to signal before making a right hand turn (Veh. Code, § 22108). Deputy Francois activated the signals on their patrol car. Defendant stopped his car. The two deputies exited their vehicle. Deputy Martinez approached the passenger side of defendant's car and Deputy Francois approached on the driver's side. Deputy Martinez illuminated the interior of defendant's car with her flashlight. She saw defendant "raise his right hand and reach over to the ashtray of the vehicle and drop a small object" into an open ashtray. Based upon her training and experience, Deputy Martinez believed the object was contraband. The deputies detained defendant, placing him in their patrol vehicle. Deputy Martinez returned to defendant's car and retrieved a plastic baggie containing cocaine from the ashtray. The deputies arrested defendant for possession of a controlled substance.

Defendant testified to a contrary version of the events. According to him, the deputies were driving eastbound on Century Boulevard toward him, not westbound behind him as Deputy Martinez had testified. After the patrol car passed him, it made a U-turn and came up behind him. Defendant claimed that he stopped at the limit line and activated his turn signal before turning right. He stopped in response to the deputies' command. As the deputies approached his vehicle, he did not "put . . . or throw anything in an ashtray" but, instead, kept his hands on the steering wheel. He did not have any drugs on him or in the vehicle. While he was seated in the backseat of the patrol car, Deputy Francois (not Deputy Martinez) searched his car and "[t]hen . . . came back and put something on the hood . . . of the police car." Defendant did not know what the object was but opined the deputy "could have got it out of his pocket or any place" because "[i]t wasn't in my car," "it did not come out of my car."

During cross-examination, defendant testified: "I have never had narcotics in my possession." The prosecutor impeached him with his arrests in October and

December of 1985 for possession of a controlled substance. (Health & Saf. Code, § 11350, subd. (a).)

The trial court then permitted the defense to call Deputy Francois as "[i]mpeachment of Officer Martinez's testimony." Deputy Francois testified, as had Deputy Martinez, that their patrol car was going west on Century Boulevard behind defendant and that defendant violated two provisions of the Vehicle Code before being stopped. As he approached defendant's car, Deputy Francois "saw him moving about within the vehicle. [He] could see his right arm move, but [he] couldn't see what he was doing. [Deputy Martinez] saw it." After they had placed defendant in their patrol car, they returned to defendant's car. "[Deputy Martinez] recovered the item she saw him drop. She returned to the vehicle. [Deputy Francois] continued to search for more contraband" but found nothing more.

Lastly, the defense called Littleton, one of the individuals whose name had been disclosed during *Pitchess* discovery. Littleton, who is African-American, testified that Deputies Francois and Martinez had stopped him while he was driving his car on October 10, 2008. Littleton did not recall having violated any traffic law that evening. Littleton asked Deputy Francois why he had been stopped. The deputy replied "never mind," requested Littleton's license, registration and proof of insurance and asked "degrading" questions. During this encounter, Deputy Martinez shined her flashlight into Littleton's car. The deputies detained Littleton for approximately 30 minutes while he sat in his car. After issuing him a ticket, the deputies let Littleton depart from the scene.

Littleton, upset by the encounter, proceeded to the sheriff's station where he filed a complaint alleging, among other things, that he was the victim of racial profiling.

On cross-examination, Littleton conceded that his 1985 application to become a police officer had been rejected; that his 2000 application to be "a

nonsworn law enforcement personnel" "didn't pan out"; and that he was resentful as a result of two arrests that he believed were as "unjustified as" his stop by Deputies Francois and Martinez.

After Littleton completed his testimony, the defense indicated it wished to call Johnson, another African-American *Pitchess* witness who had been subject to a traffic stop by Deputy Francois. The court asked for an offer of proof. Defense counsel responded Johnson's testimony would address "fabrication of probable cause to stop by Officer Francois" but not "planting of drugs." Defense counsel explained that Johnson would deny Deputy Francois' claim that she had failed to stop at a limit line and had failed to signal.

The court responded:

> "The issue, though, to me is that: I can see where there might be an argument over whether I stopped at the line, whether I didn't, and a dispute, legitimate dispute about whether they stopped and they had a right to stop me.
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> "But where they just issue a ticket and don't plant drugs, it's starting to get cumulative. Because in this case we have something a lot more serious where drugs are alleged to have been planted. . . . I'm talking about motive. That's what I'm talking about. I mean, there's a difference in my mind between a dispute over whether you committed a traffic violation and then stopping someone for the purpose of planting evidence in their car. . . .
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> "[I]f I hear this witness [Johnson], there could be more, and then these deputies are going to be called to rebut all of this testimony."

After defense counsel conceded that Deputy Martinez had *not* been Deputy Francois' partner during the Johnson stop, the court stated:

> "[T]hat was a deal-breaker. I mean, [in this case] you're arguing [a] conspiracy between these two [Deputies Francois and Martinez] to fabricate traffic stops [and] [n]ow, I'm finding out

> they're not even together on this occasion [the Johnson stop]. [¶] So on [Evidence Code section] 352 grounds, I'm not going to allow it. [¶] . . . I'm now talking about time consumption. And I don't believe it's going to be that helpful, if there is no argument conspiracywise with regard to this new *Pitchess* witness [Johnson]. Because in this case [Deputies Martinez and Francois] were both in the car. In Littleton's case, they were both in the car. Arguably they saw – both saw the same thing and/or arguably both fabricated what they claimed they both saw.
>
> "So it doesn't really help me now with just one of them and a witness [such as Johnson] saying, I didn't run the stop sign or I didn't stop at the limit line or whatever she's going to say."

Before the matter recessed for the day, defense counsel asked the trial court "to consider hearing" the motion to suppress evidence in the unrelated case of *People v. Vance* (a motion that the trial court was scheduled to hear the next day) *before* resuming this case so that it could "take into consideration Mr. Vance's testimony as it relates to the fabrication of probable cause and take that into consideration in [defendant's] case as well. I know it's unorthodox to make such a request."[6] Defense counsel conceded that she did not even know if Vance was

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[6] We granted defendant's motion to augment the record to include the transcript of the hearing conducted on the suppression motion in *People v. Vance*. That hearing began after the trial court had ruled on defendant's motion to suppress and was conducted over three days: September 24, October 6, and November 13, 2009. In that case, Aaron Vance, an African-American, was charged with possession of nunchakus (former Pen. Code, § 12020, subd. (a)(1).)

The nunchakus were found in Vance's car after Deputies Martinez and Francois conducted a traffic stop on December 30, 2008 because Vance and his passenger were not wearing seat belts (Veh. Code, § 27315) and because Vance had failed to signal before making a turn (Veh. Code, § 22100, subd. (b).) Vance did *not* contest that the nunchakus belonged to him.

Vance testified and, claiming to be a victim of racial profiling, denied the vehicle code violations. In addition, Vance called a *Pitchess* witness (Johnson) in an attempt to impeach the deputies' testimony. Johnson testified that on May 28, 2008, Deputy

going to testify but asked that if he did for "the court to defer ruling on [defendant's] matter until the conclusion of that [*Vance*] hearing as well. I do believe it is relevant." The court noted that the request involved "a 352 issue" and that "[e]ach case is different." The court indicated: "I'll think about it, but . . . . [¶] I'm not likely to do it. I think I'm going to finish one then start another."

When proceedings resumed the next day, the court gave a tentative ruling on the suppression motion and heard argument from counsel. During defense counsel's argument, she stated: "[A]s I pointed out yesterday, I would ask the court again to reserve judgment on the 1538.5 until after Mr. Vance's hearing. I do believe it's relevant. The People would have an opportunity to cross-examine [Vance], if he was called to testify. And I do believe the testimony in that case, even if Mr. Vance doesn't testify, the testimony of the officers is relevant to [defendant's] case as it helps establish this pattern that I believe Officer Francois and Martinez are engaged in. This pattern of stopping people, fabricating probable cause, and then using it to search and justify any further possible illegal activity."

Ultimately, the court denied defendant's motion to suppress, having explained:

> "This is clearly a credibility case. Clearly it is. . . . I have to decide which version of events is more credible. And this is a unique case because we've had *Pitchess* witnesses, and that's something that is relatively rare in my experience.

Francois and another male deputy stopped her. According to Johnson, Deputy Francois was "very sarcastic" and would not tell her the reason for her stop. After Johnson refused to sign the traffic citation and a supervising sheriff came to the scene, Johnson was released without any ticket being issued.

The trial court denied Vance's suppression motion, finding him "to be a liar." As for Johnson, the court noted: "[T]here was just something odd about her."

Thereafter during defendant's trial, the issue of the quality of Johnson's testimony during the *Vance* suppression motion came up in a sidebar discussion. The trial court stated: "She [Johnson] was . . . all over the place. She was kind of a goofy witness."

"But I thought that Mr. Littleton was in parts credible. But I think he was exposed a little bit to some bias, and his situation really resulted I think in a dispute over whether he violated some basic traffic rules.

"The difference between [defendant's] case and [Littleton's] case is that . . . there was no [claim in Littleton's case that] evidence [was] planted. . . .

"What strikes me as the most telling issue regarding whether the deputies are to be believed or not is that with Mr. Littleton, he wasn't cited for drugs or anything like that. He was given a ticket for traffic. But [defendant] was immediately placed in the backseat of the patrol car. This wasn't just a traffic citation. What makes it credible is that he was taken right out of the car and put in the backseat of the patrol car. And then the car was searched. And that's the difference between the two cases.

". . . [In] Mr. Littleton's situation, and through the offer of proof [about] Carol Johnson[']s situation], they were just [given] tickets. And this is a case where [defendant] is alleging that [the deputies] planted evidence.

"It's hard for me to grab onto the idea that two deputies would risk careers over a little minuscule amount of cocaine in a car owned by someone they don't know, have had no previous contact with, when the best that's going to happen in a court situation is a Prop 36 plea. . . .

"And if this is what [the deputies] do, if they plant evidence on a regular basis, then why not plant it on Mr. Littleton or Ms. Johnson? *I don't think there's any evidence that the deputies lied here*. . . .

"But [defendant] was somewhat less than forthright with regard to having previously been stopped for drugs. He initially denied that, and then it was pointed out on his rap sheet that there were two stops in 1985 which he then remembered.

> "That's basically what tipped the scales in this case because it was very close credibilitywise. Nothing like that happened with regard to the deputies. . . . [¶]
>
> "And I know Mr. Vance's situation is totally different. Other people [were] in the car [with Vance], nunchakus [were found], . . . the seat belt violations [Deputy Francois claimed he saw in Vance's vehicle], and other things. So I don't think that it's at all relevant. [¶] But I think it would not be appropriate for me to consider Mr. Vance's case in connection with this case." (Italics added.)

B. *Discussion*

Defendant first contends that the trial court abused its discretion in excluding *Pitchess* witness Johnson from testifying at the suppression hearing. He argues that her testimony "bore directly on the deputies' credibility regarding the reasons for the traffic stop and thus its probative value far outweighed any risk of an undue consumption of time." We are not persuaded.

By the time the defense sought to call Johnson as a witness, the court had already heard defendant and Littleton testify. Littleton, like defendant, testified that he had been stopped for no legitimate reason by Deputies Martinez and Francois but Littleton, unlike defendant, had not claimed that the deputies had planted any drugs in his car. Defense counsel's offer of proof regarding Johnson was that she, too, would simply testify about an unjustified traffic stop by Deputy Francois and an unidentified male partner but would *not* claim that the deputies planted contraband on her. Because defendant's theory was that Deputies Martinez and Francois, acting in concert, had fabricated a justification to stop him and then (possibly) planted contraband, the trial court reasonably concluded that Johnson's testimony about Deputy Francois' actions with a deputy other than Martinez was only marginally relevant and would unduly consume court time. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681 ["The trial court is vested with wide

discretion in determining the relevance of evidence. . . . 'Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact in light of Evidence Code section 210, which requires that evidence offered to prove or disprove a disputed fact must have a tendency in reason for such purpose.'"].)

Defendant seeks to avoid this conclusion by arguing that since the ultimate issue at the suppression hearing was the legality of the deputies' traffic stop, it did not matter that Johnson failed to claim that the deputies had planted contraband on her. This argument misses the mark because it unreasonably parses defendant's theory of the case. Defendant's earlier *Pitchess* motion suggested that the deputies had planted the contraband. Based upon that showing, the trial court ordered disclosure of five citizen complaints relevant to that claim. Defendant's testimony at the suppression hearing insisted he had no drugs in the car when stopped and suggested that Deputy Francois had planted the cocaine. The underlying thrust of defendant's argument at the suppression hearing was that the deputies illegally stopped him in order to plant contraband and falsely arrest him for possession of a controlled substance. The trial court correctly recognized this point and therefore did not abuse its discretion in finding that Johnson's testimony would add little, if anything, on this issue and would unduly consume court time.

Defendant next contends that the trial court erred when it denied his request to defer ruling on his motion to suppress until the suppression motion in *People v. Vance* had been heard. Defendant concedes that this request was "unorthodox." Defendant's failure to cite any authority to support the request constitutes a forfeiture of his right to claim on appeal that the trial court's denial of the request was error. (*People v. Catlin* (2001) 26 Cal.4th 81, 133.) Nonetheless, the trial court's ruling was not an abuse of discretion on the facts of this case (Evid. Code, § 352; see also fn. 6, *ante*) and, in any event, could not have prejudiced defendant.

(*People v. Watson* (1956) 46 Cal.2d 818, 836.) Although Vance claimed that Deputies Martinez and Francois had illegally stopped him, Vance did not claim that the deputies had planted anything on him, including the nunchakus found in his car. Further, the trial court ultimately credited the deputies' testimony about the reasons for their stop when it denied Vance's suppression motion and made the express credibility finding that Vance was a liar.

Lastly, defendant claims that, taken together, the trial court's preclusion of Johnson's testimony and denial of his request to consider the testimony in the *Vance* suppression motion hearing violated due process because those rulings "denied [him] a full and fair opportunity to challenge the state's evidence at the suppression hearing." Not so. Because neither of those two rulings was, as explained above, an abuse of discretion, the trial court did not violate defendant's right to present a defense. "As a general matter, the 'application of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.'" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Here, defendant had a full and fair opportunity to contest the People's theory that the deputies' stop was legally justified by his two traffic violations. He examined both deputies, testified that he did not commit the traffic violations, and offered Littleton's testimony.

III. THE TRIAL

Defendant next attacks three evidentiary rulings made during trial. To properly evaluate those claims, we set forth first the evidence presented at trial.

A. *The People's Case-in-Chief*

Deputy Martinez testified, as she had at the suppression motion, about the reasons for stopping defendant at 2:00 a.m. (two vehicle code violations) and her

observation and seizure of the contraband. A criminalist testified that it was 0.15 grams of cocaine.

B. *The Defense Case*

Defendant testified that at approximately 1:30 a.m. earlier that evening, he was approached at a gas station by a woman he did not know. She identified herself only as Tanya. She was carrying several bags and a purse. She asked defendant for a ride to the Barbary Coast (a strip club), explaining she had no transportation. He agreed to take her, although it was four miles out of his way. She sat alone in the passenger seat of his car for three to four minutes while he pumped gas. The ashtray was closed. As promised, he took her to the Barbary Coast, located at the intersection of Western and Rosecrans. When she left his car, she took her belongings with her. As far as he knew, she did not "leave [him] a special token of her appreciation in the ashtray for giving her a ride."

Shortly thereafter, he was stopped by the deputies. As he had at the suppression hearing, defendant testified that he had committed no vehicular violations. When stopped, he immediately placed his hands on the steering wheel. He did not make any motions towards the ashtray. He did not have drugs on him or anywhere in the car, including the ashtray. He does not use drugs. Defendant testified: "I don't know where, if any drugs came from, where they came from."

Deputy Francois asked him if any passenger had been in the car. Defendant told him "yes." After Deputy Francois searched his car, he was told he was under arrest for possession of cocaine. He replied: "I didn't have no cocaine, sir. Where did you find some cocaine at?" Defendant claimed that a year before this arrest, Deputy Francois stopped him and searched his truck.

"Not too long after [he] was arrested," defendant tried "a couple" times to locate Tanya. "[He] rode around by the gas station. [He] went up by Western and

Rosecrans where [he] dropped her off." But he never went into the Barbary Coast or adjoining Taco Bell to ask about her.

Defendant admitted that he had been convicted in 1991 of giving false information to police officers and in 2001 of larceny. (In this appeal, defendant does not challenge the propriety of that impeachment evidence.)

Littleton, the *Pitchess* witness, testified as he had at the suppression motion. Deputies Martinez and Francois had stopped him without justification. Deputy Francois refused to tell him why he had been stopped and asked him a "degrading line of question[s]." Deputy Francois gave him a traffic ticket and released him. He (Littleton) filed a complaint that the deputies "didn't have any probable cause for the pull over, the stop."

C. *The People's Rebuttal Case*

Deputy Francois testified about the traffic stop of defendant essentially as had Deputy Martinez. In addition, he explained that the street value of the cocaine found in defendant's car was between $5 and $10.

Deputy Francois denied several portions of defendant's testimony. For one, he had never asked defendant if there had been passengers in the car and defendant never told him about Tanya. For another, he had never met or stopped defendant before the night in question (Nov. 19, 2008). And he denied having planted drugs on defendant.

Deputy Francois also refuted Littleton's version of his encounter with the deputies. He explained that Littleton had filed a complaint against him but that it "came back as unfounded." Deputy Francois denied engaging in racial profiling. He conceded three complaints had been filed against him in the last 18 months from individuals who did not believe they had committed traffic violations or who felt he had acted disrespectfully.

D. *The Parties' Closing Arguments*

Relying upon the deputies' testimony, the prosecutor argued she had established guilt beyond a reasonable doubt. She summarized: "If you believe the deputies that the defendant dropped it [the cocaine into the ashtray], then he's guilty." She dismissed the defense suggestion that the deputies had planted the cocaine, urging they would not lie under oath and risk their careers to convict an individual of possessing such a small amount of cocaine.

Defense counsel urged guilt had not been established beyond a reasonable doubt. Noting that the case involved a credibility determination, she argued that defendant's testimony "that he did not have these drugs" was "believable" and "reasonable." As for whether the cocaine had been planted by the deputies or left by Tanya, defense counsel simply noted: "I wish it was tidy. I wish I had an explanation, knew exactly what happened, where those drugs came from. Were they planted. Whether the lady left it."

E. *The Verdict*

After deliberating less than two hours, the jury convicted defendant.

IV. DEFENDANT'S EVIDENTIARY OBJECTIONS

A. *Limitation on Cross-Examination of Deputy Francois*

Defendant contends that the trial court impermissibly limited his cross-examination of Deputy Francois. He asserts that the court precluded him from asking the deputy whether he had testified at the suppression motion in *People v. Vance* in which Vance accused the deputy of racial profiling. Defendant claims that question was proper because Deputy Francois denied engaging in racial profiling. Building on that premise, defendant speculates that "in answering

questions about the *Vance* hearing in which he was accused of racial profiling, Deputy Francois may well have appeared defensive and evasive. . . . [E]ven a threshold level of inquiry may have opened the door to the introduction of impeaching evidence."

At the outset, we note that it is not clear that this claim has even been preserved for appeal. (Evid. Code, § 354, subd. (c).) Defense counsel's cross-examination of Deputy Francois never raised the issue of his testimony in the *Vance* hearing. The only reference to this issue occurred during a sidebar discussion while Deputy Francois was on the stand. Defense counsel stated: "I want to put on the record that I previously asked to go into Aaron Vance's motion, if he testified in a previous motion where he was accused of fabricating probable cause in the case of Aaron Vance. And the court previously denied me that request." Neither the court nor the prosecutor agreed or disagreed with this statement but the record contains no such request by defense counsel or ruling by the trial court.

In any event, assuming the claim has been preserved for appellate review, it lacks merit. For one thing, it is not clear exactly what questions defense counsel sought to ask. The simple fact that Deputy Francois testified at the *Vance* hearing was not relevant to any issues raised at defendant's trial. Further, any attempt by defense counsel to introduce statements from the *Vance* hearing for the truth of the matter asserted would have run afoul of the hearsay rule. (Evid. Code, § 1200.) And the issues litigated in an unrelated suppression motion—a motion ultimately denied because the trial court found that the defendant who accused Deputy Francois of racial profiling to be a liar (see fn. 6, *ante*)—were not relevant to this case. (Evid. Code, §§ 210, 352.) In sum, assuming arguendo that the trial court did deny the defense request to cross-examine Deputy Francois about the *Vance* hearing, its denial was not an abuse of discretion.

B. *Cross-Examination of Defendant*

Defendant next contends that the trial court improperly permitted the prosecutor to elicit the fact that he (defendant) never testified at the suppression motion about Tanya's presence in his car. We find no error.

1. *Factual Background*

At trial, the following exchange occurred during the prosecutor's cross-examination of defendant.

"Q Now, you were the only driver of that car that night?

"A Yes.

"Q And at 2:00 o'clock when the police stopped you, you were the sole occupant of that car?

"A Correct.

"Q And the car was registered to you?

"A Yes.

"Q Now, you've testified at the [§ 1538.5] hearing back in September; right?

"A Yes, I did.

"Q And your testimony was pretty extensive; right?

"A 'Extensive,' what do you mean by that?

"Q In your testimony back in September, you told what happened on that night; right?

"A Yes, I did.

"Q And, actually, that lady, Tanya, that you picked up, you never testified about that in September?

"A Correct.

"Q Never said that you picked her up at the gas station?

"A Well, I thought it was irrelevant because when I was stopped by the police –

"[PROSECUTOR]: Nonresponsive. Move to strike.

"THE COURT: Sustained. The answer will be stricken. Listen to the question. If you can answer it with 'yes' or 'no,' fine. If not, we'll let you explain. But listen to the questions and be responsive.

"[APPELLANT]: Okay.

"Q At that hearing, you never testified that you picked up Tanya at the gas station?

"A Correct.

"Q And at that hearing, you knew you were being accused of possession of illegal substance; correct?

"A Correct.

"Q And you never testified at that hearing that she was alone in your car for three to four minutes?

"A Correct.

"[DEFENSE COUNSEL]: Your Honor, I would object because I think that hearing was a probable cause determination, . . . it wasn't an issue that was even brought up.

"THE COURT: That's not an objection.

"[DEFENSE COUNSEL]: Well, relevance.

"THE COURT: Overruled.

"Q [PROSECUTOR]: And isn't it true that you actually didn't tell police on that night that you picked up Tanya?

"A No, I told Officer Francois. He asked me, 'Was there anybody in the car, in your passenger side?' I said, 'Yes.' He asked me was I coming from Western Avenue, and I told him – I told him that I was coming from the Harbor Freeway, yes.

"Q You volunteered that information to Deputy Francois?

"A Could you repeat your question, please?

"Q He just asked you out of the blue if there was a passenger in your car before?

"A Yes, he did."

Subsequently, defendant testified that he had not mentioned Tanya at the suppression motion because she "wasn't in the car when I was arrested or when I was stopped. [¶] . . . I didn't believe it was important at that time, but now that we're at trial, I want everything to come out."

2. *Discussion*

The Attorney General first contends that defendant's claim of error has not been preserved for appellate review because defense counsel did not object until after the prosecutor had posed her fifth question about defendant's failure to testify about Tanya at the suppression hearing. We disagree.

"The requirement that an objection to evidence be timely made is important because it 'allows the court to remedy the situation before any prejudice accrues.' [Citation.]" (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) In this instance, defense counsel did object while the cross-examination on the disputed issue (failure to mention Tanya at the suppression hearing) was taking place and made the objection now raised (lack of relevancy). The trial court ruled on the merits of the objection. If the trial court had decided to sustain the objection, it could have struck the preceding brief testimony and admonished the jury to disregard it, thereby curing any potential prejudice to the defense. We therefore find that the objection was sufficiently timely to preserve the claim. This finding negates any need to address defendant's argument that trial counsel's failure to object earlier demonstrates ineffective assistance of counsel.

We therefore turn to the merits of defendant's claim. He asserts: "[His] failure to mention Tanya at the suppression hearing was completely irrelevant to impeach his trial testimony." We disagree.

"It is settled that the trial court is given wide discretion in controlling the scope of relevant cross-examination." (*People v. Farnam* (2002) 28 Cal.4th 107, 187.) "'Cross-examination . . . "may be directed to the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given . . . on direction examination." [Citation.] The cross-examination is not "confined to a mere categorical review of the matters, dates or times mentioned in the direct examination."' [Citation.]" (*People v. Farley* (2009) 46 Cal.4th 1053, 1109.)

We find that the prosecutor's cross-examination was proper in light of defendant's testimony at the suppression motion. At the prior hearing, the following exchange occurred during cross-examination:

> "Q [PROSECUTOR] All right. And you were driving your vehicle that night; correct?

"A [DEFENDANT] Yes.

"Q *And you were the only person in that vehicle; correct?*

"A *Yes, I was.*

"Q And that is your car; correct?

"A Yes.

"Q And you're the only person that drives that car; correct?

"A Yes.

"Q *And so you have control over the entire vehicle because that's your car; correct?*

"A *Correct*." (Italics added.)

Through this testimony, defendant essentially asserted that he was the only person in his car that evening and that he had total control over it. But his trial testimony about Tanya materially conflicted with those assertions. He now claimed that not only had a third person (Tanya) been in the car, but she had been there alone for several minutes, thereby suggesting that she may have placed the cocaine in the ashtray. Thus, defendant's failure to mention Tanya at the prior hearing was relevant because it tended to suggest that his trial testimony about her presence in the car was a recent fabrication.

That the prosecutor at the suppression at hearing had not specifically asked defendant about the presence of any other passengers in the car the evening of the stop does not change this conclusion. The prosecutor's questions were sufficiently broad that if defendant had been transporting a passenger in his car a mere 30

minutes before his arrest, it is reasonable to expect that he would have offered that information, particularly since his testimony denied possession of the contraband and suggested that Deputy Francois had planted it. In a similar vein, we reject defendant's argument that "the fact that this topic [of Tanya] was not covered by the questions at the suppression hearing should not be surprising as the prior presence of a passenger was irrelevant to whether the deputies had probable cause for the traffic stop."[7] But defendant broadened the issues at the hearing beyond the legality of the initial traffic stop once he testified that he did not possess the cocaine and believed that it had been planted. In light of that testimony, one would reasonably have expected him to testify about Tanya to explain the presence of the contraband. His failure to do so was an appropriate point to explore on cross-examination. Finally, defendant had ample opportunity to testify at trial why he had not mentioned Tanya at the prior hearing. In sum, the trial court's overruling of defense counsel's relevancy objection was not an abuse of discretion.

C. *Impeachment of Defendant With Two 1985 Arrests*

Defendant next urges that the trial court committed prejudicial error when it permitted the prosecutor to impeach him with two 1985 arrests for possession of a controlled substance. We agree that the ruling was error but find that it was not prejudicial.

1. *Factual Background*

The issue arose as follows. After defendant testified that he did not use drugs, the prosecutor, in a sidebar conference, claimed this testimony had "opened

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[7] See footnote 5, *ante*.

the door for" impeaching him with his two 1985 arrests for possession of a controlled substance. The trial court stated it was unclear whether defendant had testified that he had *never* used drugs. It ruled that the prosecutor could ask that question, and if defendant replied "no," he could be impeached with his 1985 arrests.

Proceedings resumed in the jury's presence. The prosecutor asked defendant whether he had ever used drugs. Defendant admitted he had "experimented years back." The prosecutor asked if he had possessed drugs in the past. Defendant replied he had not. The prosecutor then asked him whether he had been arrested twice in 1985 for possession of drugs, once for cocaine and once for PCP. Defendant conceded the arrests. The prosecutor continued to embellish the impeachment by asking defendant about his testimony from the suppression hearing in which he had initially testified that he could not recall any prior drug arrests.

2. *Discussion*

The Attorney General first urges that defendant's claim of error has been forfeited because defense counsel never objected to this impeachment, either in the sidebar conference or during the prosecutor's cross-examination. The Attorney General is correct. (Evid. Code, § 353, subd. (a); *People v. Holt* (1997) 15 Cal.4th 619, 666-667.) Defendant responds that an objection would have been futile or, in the alternative, that the failure to object establishes ineffective assistance of trial counsel. In the interest of judicial economy and to prevent collateral attacks on the judgment, we reach the merits of the claim. (See, e.g., *People v. Norman* (2003) 109 Cal.App.4th 221, 229-230.)

"A witness may be impeached by evidence of the 'nonexistence of any fact' testified to by the witness. (Ev.C. 780(i).) In other words, if a witness is shown to

have testified erroneously as to any particular relevant matter, an inference of untrustworthiness may be drawn as to the rest of his . . . testimony. . . . Hence, evidence may be introduced to contradict or expose the error or falsity of the particular testimony." (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 340, p. 423.) However, the trial court retains the discretion to refuse this form of impeachment if it relates to a collateral matter. (*Id.*, at § 342, pp. 426-427.) A matter is collateral if it is not "'independently relevant to the issue being tried.'" (*People v. Wall* (1979) 95 Cal.App.3d 978, 986, quoting from the Cal. Law Revision Com. com. to Evid. Code, § 780.) In particular, "[a] party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted. [Citations.] This is especially so where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the party's questions." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744.)

In this case, the impeachment addressed a collateral issue: whether defendant had been arrested (but not charged or convicted) in 1985 for possession of a controlled substance. This evidence was not relevant to determining whether defendant possessed cocaine 23 years later when stopped by the deputies. Further, the record strongly suggests that the prosecutor, knowing that defendant had initially denied the arrests during his testimony at the suppression hearing, sought to cross-examine on this point in order to elicit an answer she could contradict. In light of these facts, the trial court should not have permitted this impeachment.

However, this error was not prejudicial. (*People v. Watson*, *supra,* 46 Cal.2d at p. 836.) The prosecutor never mentioned this impeachment in either her closing or rebuttal argument. Her argument that defendant was not credible relied upon his two misdemeanor convictions involving moral turpitude, his failure to testify about Tanya at the suppression motion, and the implausibility of the claim

that two deputies who had not met him before would have planted contraband on him.

Both counsel framed the issue to the jury as a credibility determination. In less than two hours, the jury resolved the credibility issue in favor of the People, implicitly finding Deputies Martinez and Francois believable. Their testimony constitutes overwhelming evidence of defendant's guilt.

V. MOTION FOR A MISTRIAL

Defendant contends the trial court abused its discretion in denying his motion for mistrial. He moved for a mistrial after the court sustained his objection to one question posed by the prosecutor to Deputy Martinez. We find no abuse of discretion in denying the motion.

A. *Factual Background*

During the prosecutor's redirect examination of Deputy Martinez at trial, the following exchange occurred:

> "Q [PROSECUTOR]: And at the hearing [on defendant's suppression motion], your credibility was challenged, just like it was being challenged today?
>
> "A [DEPUTY MARTINEZ]: Yes.
>
> "Q Now, to your knowledge, did the court determine there was probable cause for the stop?
>
> "[DEFENSE COUNSEL]: Objection. Relevance.
>
> "THE COURT: Sustained.
>
> "[PROSECUTOR]: Your Honor, to give judicial notice that the –

"[DEFENSE COUNSEL]: Objection.

"THE COURT: This is – no, I'm not going to. It's not relevant what some other court did on some other proceeding in this case outside the presence of the jury."

Shortly thereafter during a sidebar conference, defense counsel moved for a mistrial. The trial court denied the request. It explained: "I sustained your objection. They [the jury] didn't get any testimony on this subject. . . . [A]nd I specifically said in a very firm response to your objection that what happened in another hearing outside the presence of the jury was irrelevant, and it is."

At the close of trial, CALCRIM No. 222 was submitted to the jury. It explained, inter alia: "During the trial, the attorneys may have objected to questions. . . . I ruled on the objections according to the law. *If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did.*" (Italics added.) In a similar vein, before trial commenced, the jury was instructed, among other things: "If an objection is sustained to a question, do not guess what the answer might have been."

2. *Discussion*

"A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial." (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) The potential prejudice must be incurable by admonition or instruction. (*People v. Haskett* (1982) 30 Cal.3d 841, 854.)

Here, the trial court quickly sustained defense counsel's objection to the question and Deputy Martinez never answered it. The trial court clearly stated that what had happened at a prior hearing was irrelevant to this trial. Further, the jury was twice instructed to disregard any question to which an objection was sustained, and the jury is presumed to have followed these instructions.[8] (*People v. Harris* (1994) 9 Cal.4th 407, 426.) The trial court's denial of the mistrial motion was not an abuse of discretion.

VI. CUMULATIVE ERROR

Lastly, defendant contends the cumulative effect of the trial court's purported errors rendered his trial fundamentally unfair under the federal constitution. Not so. Only one of his claims of error has merit: the prosecutor's impeachment of defendant with his 1985 arrests. But, as explained, that error was not prejudicial. Accordingly, there was no cumulative error.

[8] Defendant's argument that some of the trial court's introductory remarks to the jury "nullified CALCRIM 222's admonition not to take questions as evidence" is without merit and warrants no discussion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.