Filed 6/20/12 P. v. Cajas CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY CAJAS, Defendant and Appellant.	B230566 (Los Angeles County Super. Ct. No. LA064924)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth A. Lippitt, Judge. Affirmed in part, reversed in part, and remanded.

Michael Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Defendant and appellant, Anthony Cajas, appeals the judgment entered following his conviction for possession of a firearm by a felon, with prior serious felony and prior prison term findings (former Pen. Code, §§ 12021, subd. (a)(1), now § 29800, subd. (a)(1), 667, subd. (b)-(i), 667.5).[1] He was sentenced to state prison for a term of six years.

The judgment is affirmed in part, reversed in part, and remanded for further proceedings.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

At 11:00 p.m. on April 22, 2010, Los Angeles Police Officer Jose Moya and his partner, Officer Freddie Piro, went to the rear parking lot of an apartment complex in Van Nuys. Officers Thomas and Pungchar[2] arrived at about the same time and initially stayed in front of the complex.

As Moya and Piro approached a carport area, they saw defendant Cajas and two other men. There was a strong smell of marijuana and one of Cajas's companions was holding a glass pipe. Piro told the men to keep their hands where he could see them, and he used his flashlight to signal Thomas and Pungchar to come to the rear of the apartment complex. Cajas started running toward the north wall of the complex. This wall was five or six feet high and it bordered an adjacent apartment complex. In a loud voice, Officer Moya ordered Cajas to stop, but Cajas kept running. Moya testified he chased after Cajas. As they were running, Moya saw Cajas reach under his shirt or sweater and into his front waistband, and then toss a black object that looked

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] This spelling is taken from Officer Thomas's testimony; the name is also spelled "Pungrchar" elsewhere in the record.

like a gun over the wall. Piro, who was following directly behind Moya, testified he saw Cajas reach into his waistband area, pull out a gun, and throw it over the wall.

Moya grabbed Cajas's sweater and ordered him to stop running, but Cajas kept going and tried to climb over the north wall. He failed, however, because Moya was holding onto him. Cajas then ran toward the west wall, with Moya still holding onto his sweater. Cajas tried to jump the wall, but he hit his head on it instead. Cajas then started running eastward, but he tripped over a ladder and fell to the ground. Moya jumped on top of him and a struggle ensued because Moya was unable to control Cajas by himself.

Thomas testified he and Pungchar were still at the front of the apartment complex when they responded to Piro's call for assistance: "I saw their flashlight, and they told us to come to the back. [¶] During that time as we were making our way to the west side of the driveway of that building, we heard commotion and yelling, so we ran back to the rear to assist them." Once he reached the rear of the complex, Thomas saw Cajas going toward the west wall, dragging Moya behind him. As Thomas watched, Cajas, Moya and Piro all tripped over a ladder and fell to the ground. Thomas "got on top of the defendant's left shoulder area to keep him from resisting and trying to break free." "At some point, I applied a handcuff on the left wrist, and I advised the other officers that I had a handcuff on that wrist. I was unable to get another wrist to complete the cuffing because it was dark and ivy was hanging from the wall." Cajas ignored Thomas's order to surrender his other hand. Finally, one of the other officers grabbed Cajas's right wrist and Thomas was able to clamp on the second handcuff. At that point, Cajas stopped resisting.

Piro testified that during this struggle he punched Cajas in the face in order to subdue him: "[W]hen [Cajas] tripped and we were trying to take him in custody, he was thrashing around, just trying to turn and twist and keep his arms from being handcuffed. At that point, after I was notified that Officer Thomas had put the handcuff on his left hand, I was trying to gain control of his right arm[ ]. [¶] When I first finally grabbed his arm, I couldn't pull it out because it was intertwined in ivy.

I couldn't get his arm out. I had to . . . reach in there. And I was yelling at him to stop moving around, because I couldn't get his arm out of the ivy. I said, 'Stop moving. I'm trying to get it out.' I grabbed his wrist, and I had to actually remove twines to get his hands out of the ivy. [¶] When I finally pulled his hand out . . . he tried to pull it away from me and trying to thrash to get away from me so I struck him in the face."

After Cajas was finally subdued, Moya jumped over the north wall. There he saw a gun on the ground next to a car. Thomas testified he witnessed Pungchar take possession of this gun.

A.S. lived in the apartment complex on the other side of the north wall. At 11:00 p.m. on April 22, 2010, A.S. was inside his apartment when he heard people arguing or yelling, and then someone said, "Get him," or "Get her." "After that, I got up and looked out and watching, you know, was hearing all this noise. *And after it quieted down just a little bit, it was like seconds, then I heard like a loud bang* . . . or something. And then I looked again. Like, I see someone toss something, and I noticed something on the ground." (Italics added.) A.S. described this "bang": "[I]t was a hard hit. Like if it hit one of the cars that was parked, and then . . . like clack, clack, clack. It hit the car and it bounced off the car, and it kept bouncing on the ground. Like a clacking sound." Immediately before that loud bang, A.S. had heard a noise as if someone were climbing on top of his garbage can.

A.S. looked outside and saw a gun on the ground next to his neighbor's car. The gun had not been there earlier in the day. A.S. did not actually see anyone throw anything over the wall or climb onto his garbage can, but testified he recognized the initial sound as the one he usually heard when someone stepped on his garbage can while climbing over the wall.

A.S. called 911, and he later saw several police officers at the spot where he had seen the gun.

Piro testified that when Cajas was searched at the police station he was wearing a belt around his midsection or the bottom of his ribs. The belt had "a slit in it to where the firearm could fit perfectly in the – it looked like two pieces of leather, and it looked like it had been separated so the firearm could fit in there perfectly."[3] Cajas was wearing basketball shorts. Thomas also testified he saw this belt when Cajas's shirt was removed: "He had a belt that was affixed to his – it would be above his waist area between his abdomen and chest area."

2. *Defense evidence.*

Cajas testified that on the night in question he was sitting on a milk crate in the carport of the apartment complex. He and two other people were smoking marijuana. A fourth man was urinating near a parked truck. Cajas saw this fourth man jump over the wall as soon as the police arrived. Cajas started running when this happened. Because he was on parole, he feared he would be sent to jail for smoking marijuana.

Cajas denied having tried to jump over the wall. He was running away from Moya when he caught his foot in the ladder. Piro came up from behind and hit Cajas in the back of the neck with his forearm, causing Cajas's head to hit the wall. Thomas grabbed Cajas and pushed him down on the ladder, and then Piro punched Cajas in the eye. Cajas suffered multiple injuries from this assault and had to be hospitalized. He had not been wearing a belt that night; nor did he have a gun or throw a gun over the wall. Cajas acknowledged having two prior felony convictions.

Malcolm Garland testified about an unrelated incident involving Officer Piro that occurred in March 2008. Garland saw Piro and Officer Ricardo Gutierrez harassing a kid on the street and "roughing him up." Garland, who was holding a glass of liquor, approached the officers and asked if there was a problem. The officers immediately "rushed" Garland: "They turned away from the kid, and they stepped up to me fast and hard." "They said, 'Get back. Get back. This is none of your business.

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[3] Apparently a section of the stitching that bound together the two halves of the belt had been cut, opening up a space into which the gun could be fitted.

Stay out of the business." When Garland started writing down the officers' license plate number, Gutierrez grabbed Garland and handcuffed him. Piro said Garland had caused a bicycle to swerve and they were going to give him a traffic citation, but Garland testified there had not been any bikes in the area. Garland refused to sign the citation because the allegations were fabricated. He was then driven to the police station. During the ride, Piro was very upset: he "[s]tarted going off in the car. It was like he was crazy." The officers told their supervisor Garland had been drunk and out of control, which was untrue. Based on his interaction with Officer Piro that day, Garland did not believe he was a truthful person.

3. *Prosecution rebuttal evidence.*

Officer Gutierrez denied Garland's version of what happened in March 2008. Gutierrez and Piro had stopped a known gang member to insure he was complying with his probation conditions. Garland approached and asked why the officers were harassing a law-abiding citizen. Garland was holding an alcoholic drink and appeared to be intoxicated. He refused to comply with the officers' orders to back away.

Garland kept walking back and forth across the street and, at one point, he stepped into the path of a bicycle causing it to swerve. Piro wrote out a traffic citation, which Garland refused to sign. The officers had to let the gang member go because they were dealing with Garland. A supervisor came to the scene and explained that signing the citation did not constitute an admission of guilt, but still Garland refused to sign. He was ultimately arrested for interfering with a police investigation. Gutierrez testified he did not observe Piro do anything improper. Garland filed a complaint against the two officers, but his allegations were determined to be unfounded.

Piro testified and confirmed Gutierrez's version of the encounter with Garland.

CONTENTIONS

1. The trial court erred by excluding evidence showing Piro was biased against Hispanics.

2. The trial court erred by restricting the scope of Cajas's *Pitchess* discovery.

3. There was insufficient evidence to sustain the prior serious felony conviction and prior prison term enhancements.

DISCUSSION

1. *Bias evidence was not improperly excluded.*

Cajas contends the trial court erred when it precluded him from attacking Officer Piro's credibility by showing he was biased against Hispanics. This claim is meritless.

a. *Background.*

Several months before trial, Cajas filed a motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, requesting discovery of the personnel files of certain police officers. The motion alleged: "Cajas ran away from the police. He did not have a gun and did not reach into his waist band. He did not toss a gun or remove a gun from his person. He did not throw a gun over a wall. He did not . . . have a gun at all. The police used excessive force when they arrested him and planted the gun."

At trial, during Cajas's opening statement, defense counsel told the jury the evidence would show that when the officers arrived and saw people smoking marijuana, Cajas took off running: "And when he took off, that's a very bad thing because what happens when you take off, as you see which happened in this case, you get beat up. . . . [¶] And . . . the defense is this: when you run, you get beat up. And when you get beat up, there has got to be a charge against you, and that's exactly what happened. The charge is this gun. He did not have that gun on him. It wasn't his gun." "At the beginning when I asked you whether you thought it was possible that police officers sometimes plant evidence, you're going to find out when you hear all of the testimony and the inconsistencies that that's exactly the case right here, right now."

Thereafter, during a break between witnesses, the prosecutor asked for a hearing with regard to "the *Pitchess* witness." The prosecutor stated she expected Malcolm Garland to testify Officer Piro had made racist remarks about Hispanics during the March 2008 incident. The prosecutor objected to such testimony on the ground it would be more prejudicial than probative because there was no evidence Piro had made any racist remarks in this case.

The trial court said it had not previously been aware of any racism allegation: "When we talked about this Monday or Tuesday, you said misconduct or lying or planting evidence. There's nothing about calling somebody a racist. If that is the case, I agree with [the prosecutor]." Defense counsel argued Cajas had a right to show an adverse witness was dishonest or motivated by racial bias, and that Garland would testify Piro was dishonest and had made derogatory remarks about Hispanics.

The trial court replied: "Okay. I am going to settle this finally today. This is now the third day that we have been dealing with this issue, and this is also the first day I have heard anything about any racist allegation. [¶] You got up in opening statement . . . and said that you were going to say that the cops were liars, dishonest, misconduct. You had said that in your representation. There was nothing about any racism stuff. I said credibility is always important on any witness. Your *Pitchess* witness can testify, but it will not be on a racist comment. You said misconduct. You said planting evidence. You said liar."

When defense counsel explained he had not mentioned racism in his opening statement because he was not sure if Officer Piro would be testifying, and he did not think he would be allowed to call Garland if Piro did not testify, the trial court replied, "You might have said it to me on the 402, just a thought. We are done. This issue is over."

Garland was later called as a defense witness. He testified Piro had roughed up a kid and lied about Garland's actions during the 2008 incident.

b. *Discussion.*

Cajas contends the trial court erred when it ruled he could not question either Garland or Piro about racial bias in an effort to attack Piro's credibility. Cajas argues this amounted to prejudicial constitutional error because it improperly prevented him from putting on a defense, and that the error required a reversal of his conviction. We disagree. Cajas's claim is predicated on a misreading of the trial court record, both as to the procedural background of this issue and as to its merits.

(1) *Legal principles.*

The courts have routinely turned back attempts to convert ordinary evidentiary rulings into issues of constitutional dimension. "Defendant claims his constitutional rights to due process, to present a defense, to confront the evidence against him, and to a reliable and nonarbitrary determination of guilt were violated by the trial court's evidentiary rulings. [Citations.] His attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive. 'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. . . . Accordingly, the proper standard of review is that announced in *People v. Watson* [(1956) 46 Cal.2d 818, 836 . . . , and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension . . . .' [Citation.]" (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.)

" 'While cross-examination to test the credibility of a prosecution witness is to be given wide latitude, its control is within the discretion of the trial court, and the trial court's exclusion of collateral matter offered for impeachment purposes has been consistently upheld.' " (*People v. Redmond* (1981) 29 Cal.3d 904, 913; see *People v. Hayes* (1999) 21 Cal.4th 1211, 1266 & fn. 15 [precluding impeachment of prosecution witness on collateral matter did not restrict defendant's Sixth Amendment right to

confrontation]; *People v. Quartermain* (1997) 16 Cal.4th 600, 625 [trial court did not abuse discretion by excluding impeachment on collateral matter].)

(2) *Trial court did not bar Cajas from cross-examining Piro about racial bias.*

Cajas asserts the prosecutor objected to defense counsel cross-examining Piro about racial bias. This is inaccurate. The record clearly shows the prosecutor only objected to having *Garland* testify about Piro's anti-Hispanic comments.[4] Cajas's trial attorney manifested the same understanding when he told the trial court the "issue is this witness being able to testify that this officer is a dishonest officer," and "it is reversible error if I get shutdown if I have a witness that says he's biased against my client." Moreover, the trial court's ruling on the prosecutor's objection was clearly limited to Garland's testimony: "Your *Pitchess* witness can testify, but it will not be on a racist comment. You said misconduct. You said planting evidence. You said liar."

And although the trial court may have been speaking in shorthand during this hearing on the prosecutor's objection, the record demonstrates the court had decided it was not going to interrupt the trial at that point to hold yet another evidentiary hearing on this issue. It appears there had already been several other *Pitchess* discussions and now defense counsel was suddenly proposing to have Garland testify about something other than Piro's dishonesty and use of excessive force. Moreover, the trial court had already admonished the parties it was concerned about holding a jury together in a case going to trial just ten days before Christmas.[5]

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[4] As the Attorney General points out, it is not clear from the record exactly what Garland was proposing to say with regard to Piro's statements.

[5] Just the day before this *Pitchess* discussion, the trial court had told the parties: "I cannot express to you when I say 10:00 it means 10:00. You all have time schedules, I don't. But jurors are not going to be happy to be on jury duty this week and next week. . . . Just like you all, they're going to be on vacation, and they're not going to want to come back Monday for further deliberations, assuming we get to that point. So in the future when you are ordered back at a time, please be here. It's just

The record is clear the trial court did not prohibit Cajas from cross-examining Piro about his racial bias. Hence, Cajas's reliance on *In re Anthony P.* (1985) 167 Cal.App.3d 502, is misplaced. In that case, the minor was accused of having committed a sexual battery on a fellow high school student. The alleged victim, who was white, testified the minor asked her for a date and, when she refused, he grabbed her bust, buttocks and crotch. The minor was African-American. While cross-examining the girl, defense counsel asked if she were prejudiced against black people, which she denied. Counsel then asked, "Would it offend you if a black person asked you for a date?" (*Id.* at p. 506.) Because the prosecutor's objection to this question was sustained, the court of appeal reversed the juvenile court's wardship finding: "The case against appellant hinged entirely on the credibility of one witness . . . . The trial judge allowed defense counsel to pose only one question on the issue of this witness' possible bias against persons of appellant's race. . . . [T]his violated appellant's constitutional right to cross-examine the witnesses against him and [we] therefore reverse." (*Ibid.*)

In this case, however, Cajas was not precluded from exploring Officer Piro's racial bias through cross-examination. Rather, the trial court merely excluded extrinsic evidence of Piro's allegedly racist comments in a two-year-old, unrelated incident because Cajas had waited until midtrial to announce he wanted to introduce such evidence. This was not an abuse of discretion. The fact defense counsel thereafter failed to question Piro on this issue, despite the trial court's permission to do so, does not entitle Cajas to relief. (See, e.g., *People v. Boyette*, *supra*, 29 Cal.4th at p. 429 [although trial court erred by ruling defendant could not ask witness Surrell about specific threats from Johnson, this error was harmless because "[d]efendant was allowed by the trial court to ask Surrell whether she was afraid of Johnson, but [defendant] did not do so"].)

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not negotiable. You all want to have your trial, that is fine. But it's going to be on our schedule and in order to get these jurors out in time for the holiday."

(3) *Exclusion of racial bias evidence could not possibly have prejudiced Cajas.*

But even assuming, arguendo, that the trial court somehow erred by excluding evidence of Piro's racial bias, either through his cross examination or through Garland's testimony, we would conclude the error was harmless under any standard of review. That is because the only purpose of the evidence would have been to give Piro a motive for planting evidence against Cajas, and the evidence overwhelmingly showed the police did not plant evidence in this case.

Cajas's primary method of demonstrating prejudice is to artificially inflate the importance of Piro's testimony. He calls Piro variously "perhaps the key prosecution witness," "the chief prosecution witness," and the "key to the prosecution case." These assertions are not supported by the record. Cajas claims Piro "was the only one who testified that he saw appellant throw a gun," but this is inaccurate because Officer Moya also testified he saw Cajas throw a gun. Cajas points to Moya's initial testimony that he only saw Cajas throw "a black object that appeared to be a gun," but this testimony was immediately clarified when Moya testified to his "belief" that this object "was a gun" which Cajas threw over the wall. Moya also testified he alerted Piro verbally to what he had seen by calling out "Gun." Hence, the evidence showed both Moya and Piro saw the gun.

In addition to these two eyewitnesses who saw Cajas throw a gun over the wall, and Officer Thomas's testimony about watching Officer Pungchar recover the discarded weapon, there was evidence showing Cajas had been unnecessarily wearing a leather belt which had been altered to accommodate the discarded gun.[6] Cajas's credibility was impeached by his prior convictions and, although there had

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[6] The prosecutor argued to the jury: "[Y]ou can see how there is a slit vertical in the belt. That can perfectly fit the gun. This slit isn't made by normal wear and tear. This belt was made for the purpose of carrying a firearm. . . . [¶] There's no reason why the defendant should be wearing this belt on his person when he's wearing basketball shorts. He's not wearing regular pants. He's wearing basketball shorts."

been two other eyewitnesses to the incident, one of whom was a friend of five or six years whom Cajas had gone to visit that night, neither potential witness was called by the defense to corroborate Cajas's testimony.

But there was even more inculpatory evidence. Although Cajas began the trial by telling the jury the gun had been planted by police officers in order to cover up their use of excessive force during his apprehension and arrest, the prosecution evidence was fatally inconsistent with this theory. A.S.'s testimony demonstrated that, regardless of who threw the gun over the wall, *it had happened at the very outset of the incident, not at the end* of the incident after Cajas had been apprehended and allegedly beaten by the officers.[7] Hence, the evidence showed the putative *motive* for planting the gun, i.e., to cover up the officers' assault on Cajas, could not have arisen until *after* the gun had already been thrown over the wall.

In apparent response to this hole in the defense case, Cajas got up and testified about a mysterious fourth man who supposedly fled the moment the officers first arrived, jumped over the wall, and tossed the gun into A.S.'s yard. Even on appeal, Cajas asserts: "*Appellant's version of events was that the gun belonged to another man who threw the gun over the wall before escaping from the police*." (Italics added.) But again, although this revised defense theory accounts for A.S.'s testimony as to *when* the gun was tossed over the wall, it is entirely inconsistent with the "planted evidence" theory because it removes any *motive* the police would have had for planting the gun.

Hence, evidence that, in addition to covering up the use of excessive force, Piro had been motivated by racial bias could not have possibly done Cajas any good in defending against the charge of felon in possession of a gun, and therefore even the erroneous exclusion of such evidence would have been completely harmless.

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[7] All the other evidence showed Cajas was not finally subdued until after: Moya chased him back and forth; Moya and Cajas fell to the ground; Piro and then Thomas, who had to come running from the front of the apartment complex, joined the melee; Thomas struggled to handcuff Cajas and finally succeeded with Piro's help.

2. *The scope of Pitchess discovery was not improperly restricted.*

Cajas contends we must remand this case for further proceedings because the trial court erred improperly restricted his discovery of police personnel files. However, no remand is required because any error was necessarily harmless.

a. *Legal principles.*

"Evidence Code sections 1043 and 1045, which codified our decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 . . . , allow discovery of certain relevant information in peace officer personnel records on a showing of good cause. Discovery is a two-step process. First, defendant must file a motion supported by declarations showing good cause for discovery and materiality to the pending case. [Citation.] This court has held that the good cause requirement embodies a 'relatively low threshold' for discovery and the supporting declaration may include allegations based on 'information and belief.' [Citation.] Once the defense has established good cause, the court is required to conduct an in camera review of the records to determine what, if any, information should be disclosed to the defense. (Evid. Code, § 1045, subd. (b).) The statutory scheme balances two directly conflicting interests: the peace officer's claim to confidentiality and the defendant's compelling interest in all information pertinent to the defense. [Citation.]" (*People v. Samuels* (2005) 36 Cal.4th 96, 109.)

"What the defendant must present is a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1025.) "[A] plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Id*. at p. 1026.) The trial court's ruling on a *Pitchess* motion is reviewed for abuse of discretion. (*People v. Lewis* (2006) 39 Cal.4th 970, 992.)

Even if the trial court erroneously denies a *Pitchess* motion, reversal is not required unless the defendant can demonstrate prejudice. (See *People v. Samuels*,

supra, 36 Cal.4th at p. 110 ["even if the trial court erred because defendant made a showing of good cause in support of his [*Pitchess*] request . . . , such error was harmless [under *Watson*[8]]"]; *People v. Memro* (1985) 38 Cal.3d 658, 684, disapproved on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2 ["an accused must demonstrate that prejudice resulted from a trial court's error in denying [*Pitchess*] discovery"].)

b. *Discussion*.

Cajas filed a pretrial motion requesting *Pitchess* discovery as to Officers Moya, Piro and Puettmann, and he now contends the trial court erred by permitting discovery only as to allegations of excessive force, and only as to Officers Moya and Piro.

As to the restriction of discovery to Officers Moya and Piro, Cajas contends the trial court erred by not also granting discovery as to Officer Pungchar. But as Cajas acknowledges, his *Pitchess* motion "showed some confusion regarding Officer Pungrchar [*sic*] and Officer Puettman." At the *Pitchess* hearing, the deputy city attorney argued the motion should be denied as to Puettmann because his involvement had been limited to interviewing A.S., and that Officer Pungchar, who recovered the gun, was not named as a subject of the *Pitchess* motion. The trial court agreed: "Well, he's not even named so that's not at issue." Even in light of these comments, Cajas made no attempt to modify his *Pitchess* motion to seek discovery as to the officer who recovered the gun. Hence, the trial court did not err by failing to grant discovery as to Pungchar.

As to Officers Piro and Moya, the city attorney argued any *Pitchess* discovery was irrelevant because of what A.S. had witnessed: "The hearing of [A.S.], an independent witness, the discovery of the gun, his credibility is not an issue in the *Pitchess* motion. There is no counter, plausible scenario proposed by the defense for

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[8] *People v. Watson* (1956) 46 Cal.2d 818.

how [A.S.] could have made those statements.[9] So we think this is one of those relatively rare *Pitchess* motion[s] that does not rise to the level and should be completely denied." It appears the trial court reasonably accepted this argument insofar as it related to the dishonesty issue.

In any event, as to all three officers, any error in denying discovery could not have prejudiced Cajas because, as explained *ante*, the evidence at trial was overwhelmingly at odds with a scenario in which the officers planted the gun in order to cover up their use of excessive force. Hence, we conclude the trial court did not err by restricting the scope of *Pitchess* discovery and, even assuming it did, there could not have been any prejudice.[10]

3. *Strike and prior prison term enhancements must be reversed.*

Cajas contends his sentence must be reversed because the prosecution failed to prove the "second strike" and prior prison term enhancement components of his sentence. The Attorney General properly concedes this claim has merit. We will vacate Cajas's sentence and remand to the trial court for further proceedings.

As the Attorney General acknowledges, the record shows Cajas admitted having been convicted of the felony that subjected him to the charged offense of felon in possession of a gun (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)), but he admitted neither that this prior qualified as a "strike," nor that he had suffered two qualifying prior prison terms under section 667.5. The trial court and the parties

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[9] The *Pitchess* information available from the police report said A.S. "heard a commotion in his rear yard. He heard someone yell, 'get him, get him!' He then heard a loud noise, that he described as someone climbing on top of his garbage can. Immediately after hearing that sound, he heard a loud bang, that he described as 'something metal that had hit the hood of his car,' which was parked in the rear lot behind his apartment. He immediately went to the window to see what it was that hit his car. He observed a handgun directly next to his vehicle . . . on the ground."

[10] Given this conclusion, we need not address Cajas's additional request that we undertake, under *People v. Mooc* (2001) 26 Cal.4th 1216, 1229, an independent review of the in camera *Pitchess* hearing conducted by the trial court.

discussed hearing the evidence necessary to prove up these allegations following the jury verdict, but that never happened. Instead, the trial court went ahead and pronounced sentence, and then concluded it lacked jurisdiction to reopen the case in order to allow the missing evidence.

Cajas argues that, due to this evidentiary deficiency, his sentence should not have been doubled under the Three Strikes law, and two years for prior prison term enhancements should not have been included, resulting in a proper sentence of only two years. However, as the Attorney General points out, the prosecution is not barred from proving these sentencing allegations at this time.

It is well-established that neither state nor federal double jeopardy guarantees apply to the trial of enhancement allegations in non-capital cases. (*People v. Monge* (1997) 16 Cal.4th 826, 843-845.) As *Monge* explained: "[I]n a trial of a prior conviction allegation, the factual determinations are generally divorced from the facts of the present offense, and the evidence does not overlap at all. Like a trial in which the defendant's age or gender is at issue, the prior conviction trial merely determines a question of the defendant's continuing status, irrespective of the present offense, and the prosecution may reallege and retry that status in as many successive cases as it is relevant [citations], even if a prior jury has rejected the allegation [citation]. If a jury rejects the allegation, it has not acquitted the defendant of his prior conviction status. [Citation.] 'A defendant cannot be "acquitted" of that status any more than he can be "acquitted" of being a certain age or sex or any other inherent fact.' [Citation.]" (*Id*. at p. 839.)

As a result, we conclude this case must be remanded to allow the People an opportunity to prove up the second strike and prior prison term allegations.

DISPOSITION

The conviction is affirmed. The sentence is reversed and the matter is remanded to the trial court for further proceedings consistent with this decision.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.