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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. TREDIS EARL FERGUSON, Defendant and Appellant.	B229759 (Los Angeles County Super. Ct. No. BA306078)

APPEAL from a judgment of the Superior Court of Los Angeles County, Marsha N. Revel, Judge. Affirmed.

Law Offices of Russo & Prince and Leslie Prince, 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, Jaime L. Fuster and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

This case is before us on appeal for the second time. In the original appeal, we affirmed the conviction of defendant and appellant Tredis Ferguson, struck a fine from the judgment, and remanded the case to the trial court to hold an in camera hearing under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).[1] On remand, the trial court granted discovery under *Pitchess*, held a hearing to determine if there was a reasonable probability of a more favorable result to defendant had the discovery been available at trial, and denied a motion to vacate the conviction.

Defendant contends he was prejudiced by the trial court's denial of his original motion under *Pitchess*, which deprived him of the opportunity to impeach Officer Jeffrey Dohlen, the primary prosecution witness. He also argues the trial court applied the wrong standard in assessing prejudice, it is reasonably probable there would have been a different result had Officer Dohlen been impeached, and he was denied his Sixth Amendment right to confront and cross-examine witnesses. We affirm.

FACTS[2]

Eusebio Saldana owned a 1995 green Ford Mustang. As of the evening of June 19, 2006, it was in good condition when he parked it in the garage of his Los Angeles home. When Saldana went to the garage the following morning, his Mustang was gone. Saldana had not given anyone permission to drive it. He had never met defendant. Saldana reported to the police that his car had been stolen. On June 29, 2006, he was informed that his Mustang had been recovered. Upon inspection, Saldana found his car had been damaged, in that the ignition was broken, the backseat upholstery was torn, and his battery had been taken. It cost Saldana approximately $4,500 to have the damage repaired.

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1 We grant defendant's motion for judicial notice of the record in the original appeal, No. B198407.

2 The facts are taken from our opinion in defendant's earlier appeal (B198407).

On June 29, 2006, Officer Dohlen and his partner Officer Pudelwitts were on patrol. At approximately 6:30 p.m., they were parked at a swap meet just west of Vermont Avenue near 43rd Street in their patrol car. They had an unobstructed view of the residence at 980 West 43rd Place. That location was subject to a "trespass letter," which entitled the officers to arrest persons not belonging there. Officer Dohlen saw a man and woman on the porch outside that residence. A green Ford Mustang drove up to the residence and stopped in front. The driver—defendant—exited the Mustang and walked to the porch.

The officers drove to the residence and approached the trio. As Officer Dohlen passed the Mustang, he noticed its engine was running and there was no passenger inside. Typical of stolen cars, the steering column had been removed and the ignition punched. No key was in the ignition. The officer verified that the Mustang had been reported stolen. Officer Pudelwitts found a screwdriver on defendant's person. There were two screwdrivers inside the Mustang, on the floor underneath the steering wheel, along with a large set of keys. Screwdrivers are often used to start stolen cars when no ignition key is available. The officers arrested defendant.

Defendant presented no evidence.

Defendant was convicted of the unlawful taking or driving of the vehicle of another (Veh. Code, § 10851, subd. (a)). The trial court found defendant had served three prior prison terms and suffered one prior conviction under the three strikes law. Defendant was sentenced to eight years in state prison.

Pitchess **Ruling and Defendant's Motion to Vacate the Conviction**

We concluded in defendant's earlier appeal that he had made the minimal showing required to warrant an in camera hearing on his *Pitchess* motion. The trial court ordered discovery of the names, addresses, and dates pertaining to five citizen complaints. Defendant subsequently filed a motion for disclosure of the verbatim complaints of four of the five persons on the grounds that two were deceased (Douglas Higgins and

Christian Cornejo) and two others could not be located (Kenneth Devon Haywood and Pablo Luis Gomez). The motion was granted.

Defendant filed a motion to vacate his conviction under *People v. Gaines* (2009) 46 Cal.4th 172 (*Gaines*). He argued in the written motion that the testimony of the complaining citizens would have been admissible at the original trial to cross-examine and impeach Officer Dohlen. The contents of the complaints would undermine the trial court's confidence in the integrity of the verdict. Defendant argued Officer Dohlen was the only witness to testify to defendant's commission of the charged crime and the prosecution case depended upon his credibility. Under *Gaines*, defendant was entitled to have the conviction set aside because the new evidence was sufficient to undermine the trial court's confidence in the outcome.

The Hearing on the Motion

Chantae McDonald

McDonald testified that when she was driving in 2005, there was a car double-parked on 43rd Street, with an occupant speaking to a person on the sidewalk. A plain police car was behind that car. McDonald's car was behind the two vehicles. She sat there for a minute, put on her blinker, made sure there were no cars coming, and went around both cars, crossing a broken line on the wrong side of the road. Officer Dohlen stopped her car, approached and opened her car door, and "told me to get my ass out." She closed and locked the door and asked why she was being stopped. He said to "get her ass out" or he would pepper spray her. McDonald exited the car. Once the watch commander arrived, she was arrested for reckless driving and resisting arrest. She resolved the arrest by entering a plea to a charge of disturbing the peace. Officer Dohlen never told her why she was pulled over.

The trial court ruled that McDonald's testimony would not have been admissible to demonstrate that Officer Dohlen lied or fabricated evidence. If the officer told her to

"get her ass out of the car" it was rude and uncalled for, but Officer Dohlen did have a basis for the stop as McDonald did drive around two cars on the wrong side of the road. She did slam the door closed and the situation escalated, but a good disposition was reached.

Christopher Cornejo[3]

Christopher testified he received at least four tickets from Officer Dohlen that he did not deserve. He received one ticket for blocking a walkway, although he was merely walking on the street at the time. The officer got angry with Christopher for some reason, handcuffed him, and put him in the police car, where the officer flicked his nose to aggravate him. The friend who walked with Christopher was ticketed for possession of a tobacco product.

As Christopher waited at court with his mother on one of the tickets, Officer Dohlen approached and asked why he had bothered to come to court, because Christopher knew the officer "was going to get you," in an attempt to intimidate him. Christopher did not recall which ticket was involved in this court appearance, but there was no trial, and the ticket was either paid or dropped.

Christopher recalled another ticket for being out of school, although he told Officer Dohlen he "wasn't in school." That ticket was dismissed. Christopher was riding his bicycle home on another occasion when Officer Dohlen tried to stop him. Instead of stopping, Christopher continued to his home, entered the yard through an exterior gate, and then opened an inner gate, allowing the family's pit bull to come into the yard. Officer Dohlen, who had not entered the yard, said he could have shot the dog.

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[3] Christopher's mother, Christian, made a complaint in 2005 regarding Officer Dohlen. She died in 2007, after defendant's trial but before the hearing on the motion to vacate the conviction. We refer to Christopher and his mother by their first names, as they share the same surname.

Christopher denied letting the dog out to scare the officer, testifying the dog just got out of the backyard.

Recorded Statement of Christian (Exh. B)

Christian made a formal complaint against Officer Dohlen in 2005 in a recorded statement. She was with her son to contest two citations that were "falsely given to him in the first place." Seated on a bench while her son was in line, less than 20 feet away, she saw Officer Dohlen approach and ask what Christopher was doing there, because he had told Christopher not to fight this or come here, and he would harass Christopher or cite him every time he sees him. Christian thought it was unnecessary and intimidating. She identified herself as Christopher's mother. Officer Dohlen gave her dirty looks and walked away. She told Officer Dohlen she had it with his behavior and would speak to his watch commander that day.

Christian was not present for the incident in which Christopher let the pit bull into the yard, but she described the incident based on what she was told. Officer Dohlen gives Christopher a ticket whenever he came across him after the pit bull incident. Her first encounter with the officer was after the incident in which her son received a ticket for blocking the street. Later that day, Officer Dohlen brought Christopher home and told her that Christopher and his friend were blocking the middle of the street, and the friend had tobacco products. He cited her son for the tobacco even though it was not in his possession. Officer Dohlen also said he could get them evicted. Christian thought this was unethical and way out of line because they are not his tenants and not a problem. Officer Dohlen must have spoken with the landlord, because she is also an officer. Christian reluctantly stated her landlord told her she had spoken to Officer Dohlen. Officer Dohlen ticketed Christopher for being out of school, but it was during vacation from school and her son was on the way to job training. They went to court for the ticket, and it was taken care of.

Christian asked Officer Dohlen to work with her. She is strict with her children and would work with him. Her main concern is her kids. The citations were bogus. She declined to participate in a mediation program in which the citizen and officer meet to try to work out their differences.

The trial court ruled that Christopher largely testified to his perception of why Officer Dohlen acted as he did. His mother's state of mind was influenced by what her son told her. She believed he had been given a ticket for possession of tobacco products, but her son testified it was his friend who was ticketed. The court stated it was unclear what happened when Christopher received the ticket for blocking the walkway. As to the citation for not being in school, Officer Dohlen was not required to take Christopher's word that he did not have to be in school. In those circumstances, the officer may write the ticket, and if there was a defense, the ticket would be dismissed. The incident with the pit bull in the yard was just a question of perceptions. While the officer's conduct might have been rude, the court found no evidence of lying, and Christopher's testimony would not have been admitted to show that Officer Dohlen lied.

Recorded Statement of Pablo Gomez (Exh. A)

Gomez's recorded statement was received into evidence. In his 2006 complaint, he stated he made a turn into the parking structure for his residence. He had not committed any traffic offenses. He parked and exited his car, when officers told him to stop and asked for identification. An officer said there was a felony warrant in his last name. He was placed in handcuffs for his safety. Gomez had an injury from being cuffed in a previous case in which he made a complaint. He was told to shut up and deal with it in court. The officer was very disrespectful to him. He was given a ticket.

In a later interview, Gomez explained that officers turned their vehicle around to catch him. Gomez drove into his parking structure and exited the car when he was stopped and asked for identification. When Gomez asked why, he was told to just sit tight and be quiet. His vehicle was searched without permission. He was placed in

handcuffs after a felony warrant in his last name was discovered. He told the officer he had an injury from a prior incident. The officer was very disrespectful. After it was discovered he was not the person named in the warrant, Gomez was released. He spent seven to ten minutes in handcuffs. A supervisor arrived at the scene, said it was not right for him to be in handcuffs, and ordered them removed. He wanted to complain about the incident.

The trial court reviewed Gomez's complaint, which the court deemed to be an allegation of rudeness because the officer told him to shut up. Counsel for defendant advised the court he did not know why Gomez was cited. Even had Gomez testified, the trial court could not say "that that would make the difference and a reasonable probability of the verdict being any different than it was."

Recorded Statement of Douglas Higgins[4] *(Exh. C)*

Higgins, a minister, was interviewed in October 2005 at the Southwest Station. He was there to make a complaint against Officers Dohlen and Pudelwitts. He was driving his new $350,000 Lamborghini when he was pulled over by the officers while driving on Martin Luther King Boulevard. Officer Dohlen asked if Higgins was on probation or parole, which irritated him. He provided his license and proof of insurance as requested. Higgins took exception to being asked if he had any warrants. Officer Pudelwitts asked how fast the car would go. Higgins said it was brand new, so he did not know but was told it would go 240 miles per hour. Officer Pudelwitts said he was proud of Higgins, which Higgins felt was a sarcastic comment. Officer Dohlen said he was driving in the wrong place, and he should be on the Autobahn. Higgins was again offended, because he can afford whatever he wants in America and drive it anywhere.

Officer Pudelwitts said they pulled Higgins over because there was no front license plate on the car. Higgins said there is no front plate because the car is new. He

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4 Higgins died in 2009.

felt he was stopped because he is Black and driving an expensive car in "the jungle." Officer Dohlen returned his license and proof of insurance and told Higgins to watch his speed. Officer Pudelwitts said Higgins was "pulling the race card." Officer Dohlen then wrote him a speeding ticket. Higgins requested to speak to a supervisor.

The recording then contains Higgins's review of what had happened in the incident. He turned off the engine, provided his driver's license and proof of insurance, and was asked if he was on probation or parole. Higgins believed that when the officer saw he was Black, the officer made a negative connotation and asked if he was on probation or parole, which Higgins found offensive. The question was asked because he is Black and was driving through 'the jungle." Had the officer merely explained why Higgins was stopped, he would have understood. It was rude to say he should be on the Autobahn. The comment was sarcastic. Higgins was "heated" because he is a minister and that is his dream car. He likes driving it in that area to show a Black man can own a nice vehicle. Officer Pudelwitts was sarcastic throughout the encounter.

The trial court observed that Higgins took exception to being asked if he was on probation or parole, because he believed the question was asked due to his race. The court noted that officers often ask that question as a matter of course. The court did not believe the officers could tell Higgins's race before he was stopped, so he was not stopped because of his race. The court did not see anything improper in the comment suggesting Higgins drive the car on the Autobahn. Higgins did not deny that he was speeding, and the court found no evidence of lying, deceit, planting of evidence, or racism. Higgins's complaint would not have been admissible at trial.

Recorded statement of Kenneth Haywood (Exh. D)

Haywood made his complaint in 2005 and was the subject of two interviews. In the first interview, Haywood said he and a friend named Carris Moore had gone to an office, where Moore had an appointment. Haywood, who was driving, backed into a handicap parking space. Moore entered the building. Haywood was smoking a cigarette.

A police vehicle parked bumper to bumper to Haywood's car. Officer Dohlen asked if Haywood was on parole. Haywood said he was on parole with two months left. Officer Dohlen said he did not believe in rehabilitation and prisoners should do all of their time. Officer Dohlen handcuffed Haywood. He called Haywood "little nigger" and "cupcakes" and threatened to send him back to prison. The car was searched, resulting in the seizure of marijuana from a backpack belonging to Moore. Officer Dohlen said both were going to jail. Haywood asked why he was going to jail, because the marijuana was in Moore's wallet and backpack. Officer Dohlen told him to "Shut the fuck up nigger." Haywood admitted that he may have possessed half a bag of marijuana. He did not have the other baggies and did not know where they came from. Officer Dohlen said he was going to "max" him out because Haywood was going back to prison. Haywood described three officers—Dohlen, Pudelwitts, and a third officer. Officer Pudelwitts told Officer Dohlen to remove the handcuffs, take Haywood around the corner, and he bet Haywood would shut up. Another officer was close enough to hear Officer Dohlen call him a "nigger." Because he had been appointed an attorney and a case had been filed, the interviewing officer on the complaint could not talk to Haywood further about the case. The interview terminated so the investigator could contact Haywood's attorney.

Haywood was re-interviewed with the permission of his attorney and Haywood's representative at his parole hearing. He stated that his friend Moore was going to an appointment and Haywood was looking for job leads. He backed into a parking spot, and an unmarked car pulled up. Moore was already out of the car and had gone into the office. Officer Dohlen asked if Haywood was on parole. When he said yes, the car was searched. The backpack had Moore's identification, and Haywood said it belonged to Moore. He was told to shut the fuck up. The officer asked his name, how long he was on parole, and said "you people" need to do all your time. When Haywood asked what he meant, Officer Dohlen said to "shut the fuck up" or he would "pen fuck him." He asked why Haywood was selling drugs to kids. Another officer said to take Haywood around the corner, take off the cuffs, and kick his ass. A social worker from the building said

Moore and Haywood had an appointment. The officer asked why she was helping them. She said she works for parole and that is what she does.

The officer only found half a bag of marijuana in Haywood's front pocket. Haywood has an allergic reaction to handcuffs. Somehow they came up with 15 bags of marijuana from Haywood's waistband. Haywood did not have the 15 bags of marijuana and would not bring them into custody, because he has been searched too many times. In reality, Haywood had six months left on parole but said it was only two months. He checked in regularly to his parole officer and is not an "asshole." He is trying to get his kids back and going to parenting class. At the station, they kept bringing in "fictitious" sergeants to talk to him.

In the second interview, Haywood denied that Officer Dohlen called him "the N word," even after the recording of his earlier statement was replayed so he could hear him repeatedly make that claim. He did recall the use of the word "cupcakes," but he did not believe he was called "the N word."

Haywood again went over the sequence of events. This time he clarified that the officers were Dohlen, Pudelwitts, and Martin. The first two officers stayed with him while Officer Martin searched the car. Officer Pudelwitts was the one who said Officer Dohlen should take Haywood around the corner and whip his ass or kick his butt. Officer Dohlen was the one who asked why the social worker was helping them.

Officer Dohlen searched Haywood in the field. It was during a full search at the station, some three to four hours later, that marijuana was found in Haywood's waistband. Haywood maintained that he only had the half bag in his pocket. Haywood believed he was being charged with the marijuana found in Moore's backpack, but the investigator explained that the arrest report tied that marijuana only to Moore. Haywood then said he was not making an allegation that he was being charged with the evidence recovered from the car.

Haywood's complaint was about the15 baggies, which were not discovered in the initial search by Officer Dohlen. The investigator explained that the initial search in the field is just cursory for weapons. Haywood said Officer Dohlen would have found the

baggies in that search. Haywood believed Officer Dohlen put the marijuana in his waistband but does not know how, and it was another officer who recovered the marijuana. He also complained that he was not advised that it is unlawful to bring marijuana into the jail. He was not selling drugs to young people, and he had no money. Officer Dohlen was the only one who touched him, but Haywood did not see him plant the drugs. He is not truly allergic to handcuffs but has a bad reaction to going back to jail.

A woman from the office at the scene of the arrest had confirmed to the officers that Moore had an appointment and she was helping him because he is on parole and they help everyone. Haywood's prior offenses included joy riding, petty theft, possession of cocaine for sale, and robbery. He is on parole for robbery. The parole authorities did not care if he smoked marijuana in his house, and they do not test for the drug. He was not taking chances because he wants his children back.

The trial court reviewed Haywood's lengthy statements. The court noted that Haywood clearly accused Officer Dohlen in the first interview of using "the N word" but denied it two weeks later in a second interview. The court deemed it hard to be mistaken about the use of "the N word." This change in versions was significant in deciding Haywood's testimony would make a difference at trial. The officers had a right to go up to Haywood, who parked illegally in a handicap space. If Officer Dohlen said to "shut the fuck up before I pen fuck you," that might indicate a willingness to lie. There was no actual allegation that Officer Dohlen planted the evidence. The court found it hard to believe the jury would have thought Officer Dohlen planted 15 baggies during the cursory search for weapons and then sent Officer Martin to find it. Haywood has a lengthy record and had he testified, he would have been subject to impeachment. The court concluded that had Haywood testified before the jury it "would not have caused a reasonable probability that the verdict would be any different."

DISCUSSION

Defendant argues the trial court did not consider whether it was reasonably probable the result would have been different had Officer Dohlen been impeached with the information discovered pursuant to his *Pitchess* motion. Defendant contends the court mistakenly determined some of the evidence was not credible and would not have been admissible had it been available at trial. Defendant reasons the court "did not in fact consider whether it was reasonably probable that the result of the trial would have been different had Officer Dohlen been impeached with the *Pitchess* information. Instead, the trial court determined that some of the impeachment evidence was not credible and would not have been admissible at the trial even had it been available to appellant by the time of trial. Thus, the court did not reach the issue of its potential impact on the verdict." The court did not consider the cumulative effect of the impeachment evidence, which as a whole suggested a pattern of dishonesty, aggression, and racial prejudice. Defendant complains that denial of the ability to call the impeaching witnesses at trial resulted in deprivation of his Sixth Amendment right to confront and cross-examine witnesses.

Standard of Review and Relevant Legal Principles

We review defendant's contentions under the standard utilized by our Supreme Court in reviewing claims of error for prosecutorial suppression of material evidence under *Brady v. Maryland* (1963) 373 U.S. 83. "Conclusions of law or of mixed questions of law and fact, such as the elements of a *Brady* claim (*DiLosa v. Cain* (5th Cir. 2002) 279 F.3d 259, 262, fn. 2), are subject to independent review. (*In re Lucas* (2004) 33 Cal.4th 682, 694.) Because the referee can observe the demeanor of the witnesses and their manner of testifying, findings of fact, though not binding, are entitled to great weight when supported by substantial evidence. (*Ibid.*)" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

"[A] trial court's determination that information in the requested records ought to have been disclosed is not equivalent to a finding that such information would have had any effect on the outcome of the underlying court proceeding—nor, indeed, even to a finding that such information would have been admissible . . . ." (*Gaines, supra,* 46 Cal.4th at p. 182.) "[A] defendant who has established that the trial court erred in denying *Pitchess* discovery must also demonstrate a reasonable probability of a different outcome had the evidence been disclosed. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 960; *People v. Samuels* [(2005)] 36 Cal.4th [96,] 110; *People v. Memro* [(1985)] 38 Cal.3d [658,] 685; *People v. Johnson* (2004) 118 Cal.App.4th 292, 305; *People v. Hustead* (1999) 74 Cal.App.4th 410, 421–422; see also *People v. Gill* (1997) 60 Cal.App.4th 743, 751 [new trial required if the *Pitchess* evidence would have been 'helpful' to the defense and of a nature 'to affect the outcome of his trial']; see generally Cal. Const., art. VI, § 13.)" (*Gaines, supra,* at p. 182.)

Analysis of the Merits of Defendant's Contentions

Contrary to defendant's contention, the trial court did state and apply the correct standard. At the commencement of the hearing on the motion to vacate the judgment, the court noted that the motion was made in reliance on *Gaines*. The court had listened to the recorded statements contained in exhibits A-D. The court made notes from the statements to reflect on whether there was prejudice and if "prejudice would amount to a reasonable probability that had the jurors heard that during the trial would they have reached a different conclusion." The court stated that the burden at the hearing was on defendant. The court's description of its task and the burden on the defendant is consistent with that set forth in *Gaines, supra,* 46 Cal.4th at page 182. Counsel for defendant did not suggest that the court had misstated its obligation under *Gaines*.

After hearing argument from both sides after the presentation of the evidence, the trial court stated that its duty was to make a determination of relevance and admissibility and then whether "it would have raised the reasonable probability of a different result."

Again, defense counsel did not object to the court's characterization of the standard to be employed, and understandably so, because the court's statement was not inconsistent with the language in *Gaines* that granting of *Pitchess* discovery does not mean that "such information would have been admissible," and the burden remains on the defendant to "demonstrate a reasonable probability of a different outcome had the evidence been disclosed." (*Gaines*, *supra*, 46 Cal.4th at p. 182.) There was no error in considering the admissibility of the purported impeaching evidence in conducting an analysis of prejudice as required by *Gaines*.

Defendant contends the trial court was dismissive of the probative value of some of the evidence, and the court did not consider the cumulative effect that the evidence might have had on the verdict, citing in particular to Christopher Cornejo's testimony that he was not blocking the sidewalk when ticketed. We agree with the trial court that Christopher's disagreement with Officer Dohlen over whether he should have been cited does not amount to admissible evidence of dishonesty on the part of Officer Dohlen. The same analysis applies to the truancy citation. The court correctly noted that Officer Dohlen was not required to accept Christopher's claim that school was not in session that day, and the matter was properly resolved in court. We also agree that the incident in which Christopher allowed the pit bull into the yard while Officer Dohlen was on the other side of the fence was not relevant to the officer's character for honesty, nor do we believe admission of that evidence would have influenced the verdict in defendant's trial. Although defendant argues otherwise, there is nothing in *Gaines* that required the trial court to make explicit findings on every aspect of Christopher's complaint about Officer Dohlen before determining that his testimony was either not admissible, or if it had been received, that it would not have changed the verdict.

We reach the same result as to Gomez's complaint that he had not committed a traffic offense and he was handcuffed. As the trial court pointed out, there was no evidence of why Gomez was cited, and he was handcuffed because he might have had a felony warrant. The trial court did not err in ruling his statement did not show dishonesty

on the part of Officer Dohlen, or if admitted before the jury, that it would have had any impact on the verdict.

Defendant takes issue with the trial court's analysis of the complaint of Higgins, contending the court erred in saying there was no evidence Higgins was not speeding, because Higgins stated he was not speeding. Defendant reads too much into the court's ruling. Higgins was upset at being pulled over and believed the stop was based on race, but as the trial court pointed out, there was evidence his race could not be detected from behind the vehicle. Higgins took offense at being asked if he was on probation or parole, viewing the question as racially motivated, but the court noted that officers often ask that question incident to a stop. The court was correct that there was no evidence Higgins was not speeding, and in fact, Higgins said that if he had just been cited without the questions and what he viewed as sarcastic comments about his car, there would have been no complaint. The trial court could reasonably conclude Higgins's complaint did not constitute evidence of lying by Officer Dohlen, nor would it have affected a jury verdict if presented at trial.

We reject defendant's argument that the trial court erred in ruling on the admissibility of Haywood's complaints and their potential impact on the verdict. It is difficult to imagine a competent defense attorney making a tactical decision to call someone like Haywood as a defense witness before a jury. Haywood expressly stated on more than one occasion in his first tape-recorded statement that Officer Dohlen had directed an offensive racial epithet to him. Despite the specificity of this allegation, just a few weeks later, Haywood inexplicably denied that Officer Dohlen had referred to him as "the N word," *even after his own recorded statement was played back to him*. Haywood also mistakenly believed he was arrested and being prosecuted for the marijuana found in Moore's backpack, which was not the case. When this was explained to Haywood, he withdrew that portion of his complaint. Haywood accused Officer Dohlen of being responsible for the 15 baggies of marijuana found in Haywood's waistband, but he had no explanation for how that occurred. Given Haywood's shifting and careless

accusations and his multiple felony convictions that were available for impeachment, the trial court correctly ruled his testimony could not have had an effect on the jury verdict.

Defendant argues the trial court erred in ruling that McDonald's complaint against Officer Dohlen would not have been admissible at trial. Defendant claims that had her complaint been considered along with the other *Pitchess* evidence, it would have established Officer Dohlen's character for being intemperate and unnecessarily aggressive and his tendency to issue citations without a factual basis when challenged. We disagree. The record fairly establishes that McDonald was stopped and cited when she drove on the wrong side of the road to get around two vehicles. This was a valid stop. She escalated the situation by slamming her car door and refusing to cooperate, which lead to a supervisor arriving at the scene and McDonald's arrest for violating Penal Code section 148. The ruling that McDonald's complaint would not have been admissible was entirely reasonable, and the evidence therefore could not have affected the verdict.

Defendant argues the approach of the trial court was inconsistent with our order remanding the case for further proceedings under *Pitchess*, because the court made rulings that certain evidence would not have been admissible, rather than focusing on whether there was a reasonable probability the evidence would have resulted in a more favorable verdict. This is incorrect. The trial court properly considered whether the defense established that the complaints would have been admissible at trial, as that determination is necessarily part of assessing the issue of prejudice. The fact that discovery is ordered under *Pitchess* does not establish the evidence is admissible. (*Gaines*, *supra*, 46 Cal.4th at p. 182.) The trial court would have been remiss had it not considered admissibility in determining if defendant had established prejudice.

Violation of the Right to Confront and Cross-Examine Witnesses

Defendant argues for the first time on appeal that the trial court's ruling resulted in the denial of his Sixth Amendment right to confront and cross-examine witnesses. The

issue is forfeited, as it was not presented in the trial court. (*People v. Dement* (2011) 53 Cal.4th 1, 23 ["Defendant did not object to admission of Johnson's prior statement, no exception to the general requirement of an objection is applicable, and thus defendant has forfeited on appeal his claim that admission of the statement violated his right to confrontation of witnesses."]; *People v. Mills* (2010) 48 Cal.4th 158, 212 ["Defendant's further claim that admission of the videotape was improper because it deprived him of his right to cross-examine the witnesses against him is forfeited for lack of a specific objection."].)

We also reject the contention on the merits. Defendant's contention is essentially that the procedure required by *Gaines* resulted in a denial of due process. Due process was satisfied by the discovery provided under *Pitchess*, the availability of counsel and an investigator to look into the evidence, and a full hearing before the trial court to determine if prejudice was established.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.