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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAVID SERNA, Defendant and Appellant.	B283622 (Los Angeles County Super. Ct. No. VA143042)

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Torribio, Judge. Affirmed.

Patrick J. Hoynoski, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

David Serna was charged with second degree robbery (Pen. Code, § 212.5, subd. (c))[1] and second-degree attempted robbery (§ 213, subd. (b)) of two separate victims. After trial by jury, he was convicted of robbery and acquitted of attempted robbery. The court sentenced him to the low term of two years in state prison.

Serna contends the trial court erred and violated his constitutional right to present a defense by excluding surrebuttal evidence intended to cast doubt on the testimony from the arresting officer. He also contends the trial court abused its discretion in agreeing to review police personnel files pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) for complaints pertaining to false statements, false police reports, and fabrication of evidence but not for complaints of other conduct involving moral turpitude. Serna further asks us to review the personnel files examined by the trial court to determine whether it abused its discretion in finding no discoverable materials, which we have done. We find no error warranting reversal and affirm.

FACTUAL BACKGROUND

Around 7:00 p.m. on October 9, 2016, victims George and Raul were walking home when Serna approached them on a black BMX bicycle. Serna asked George if he could borrow his phone, and then said, "Never mind . . . Give me all your stuff before I shank you." George handed over his iPhone and a set of headphones. Serna made the same threat to Raul, but Raul responded he did not have anything on him. Serna said, "Get the

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[1] All statutory citations are to the Penal Code unless otherwise indicated.

fuck out of my face." George and Raul fled to George's house a few blocks away.

George told his parents what happened, and they told him to use the "Find My iPhone" application to locate his phone. On the first attempt, the application did not locate George's phone. After dropping Raul off at home, George and his parents flagged down Officer Saul Duran at around 7:25 p.m. and told him about the robbery. George described the suspect as a Hispanic male, about 5'8" tall, 140 pounds, 20 years old, with short hair, wearing blue jeans and a black backpack, and riding a black BMX-style bicycle.

A short time later, the "Find My iPhone" application alerted George to the location of his phone and he called the police. Officer Duran and his partner went to the location at around 8:15 p.m. Officer Duran observed a black BMX bicycle outside and two individuals inside the residence—Serna's brother Ever, who was walking around, and Serna, who was sleeping on a bed. Officer Duran knocked, had Ever step outside, and informed him they were investigating the robbery of an iPhone located inside the residence. Officers detained both Serna and Ever. Ever consented to a search of the premises.

Inside, Officer Duran observed a pair of blue jeans, a blue and black backpack, and a blue jacket. George's iPhone was recovered from a dresser drawer. Ever told Officer Duran, "I've never seen that phone here and that phone does not belong to me or my brother." The headphones were found inside a pocket of the blue jacket.

George was brought to the scene, where he identified Serna as the suspect. He also identified his phone, his headphones, and the black BMX bicycle. At trial, George and Raul both identified Serna as the perpetrator.

In defense, Serna testified that around 8:00 or 9:00 p.m. on the night of the robbery he had left a friend's house with another friend named Dominic Godinez. A man on a bicycle approached him and asked if he wanted to purchase a phone for $30. Serna offered $20. The man accepted the offer and left the location after the exchange. At some point Serna went home and the police showed up at his house. Serna denied he told Officer Duran that he bought the phone from a friend named "Dominic."

Godinez testified, confirming Serna's account that "some random guy" came up to them and sold Serna a phone for $20.

In rebuttal, Officer Duran testified that after he took Serna into custody and advised him of his rights, Serna had told him that he purchased the phone from his friend "Dominic" for $20. When asked on cross-examination if Ever told him who sold the phone to Serna, Officer Duran testified that Ever said he did not know.

DISCUSSION

I. The Trial Court Appropriately Denied Serna's Request to Recall his Brother as a Surrebuttal Witness

Serna contends the trial court erred and violated his constitutional right to present a defense when it refused to allow him to recall his brother Ever in response to Officer Duran's rebuttal testimony. The issue arose due to a conflict between Serna's testimony that he did *not* tell Officer Duran that he bought the phone from "Dominic" and Officer Duran's testimony that he did.

Ever's testimony became implicated because in the prosecution's case-in-chief, Officer Duran testified that when he located the phone, Ever said, "This doesn't belong to me and it doesn't belong to my brother." Ever similarly testified that he told Officer Duran, "I've never seen that phone here and that phone does not belong to me or my brother." During defense counsel's cross-examination of Officer Duran on rebuttal, counsel sought to ask Officer Duran whether Ever had told him that "Dominic" had sold Serna the phone. The trial court sustained its own objections for lack of foundation and did not permit the line of questioning. Officer Duran was permitted to testify that when he located the phone, Ever said he did not know who sold Serna the phone or where it came from.

Outside the presence of the jury, defense counsel requested to recall Ever to rebut Officer Duran's testimony, explaining: "It's my belief that Ever—how Ever just believed that Dominic was the one that sold the phone to [Serna] and said that to the police officer. Even if that belief was not based on his actual knowledge, I wanted to put him on to, I suppose, contradict the officer or at least explain where that information came from. Because our—our argument is that [Serna] did not say that Dominic sold him the phone but actually his brother said that Dominic sold him the phone." The prosecutor objected that Ever's proposed testimony would "call for hearsay and speculation. It also—I don't believe it's relevant because the officer indicated that he got that information from [Serna] and never stated that there was any information that was gleaned other than the one statement from [Serna's] brother." The court sustained the prosecutor's objections and denied defense counsel's request without comment.

" 'A trial court's decision to admit or exclude evidence is a matter committed to its discretion " 'and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " ' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1108.) To be admissible, evidence must be relevant, that is, having "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Evidence is not relevant if it leads only to speculative inferences. (*People v. Morrison* (2004) 34 Cal.4th 698, 711.)

Had Serna offered Ever's proposed testimony for the truth of the matter asserted—that Serna actually bought the phone from "Dominic"—it would have been inadmissible. Ever told Officer Duran he had never seen the phone, it did not belong to him or Serna, and he did not know where it had come from. Hence, if he told Officer Duran that Serna bought it from "Dominic," that statement was either pure speculation or based upon inadmissible hearsay from some unidentified source. (See *People v. Valencia* (2006) 146 Cal.App.4th 92, 103–104 ["In the absence of personal knowledge, a witness's testimony or a declarant's statement is no better than rank hearsay or, even worse, pure speculation."].)

Serna did not offer Ever's proposed testimony for its truth, however; he offered it to impeach Officer Duran's testimony that *Serna* was the one who had said he bought the phone from "Dominic." Yet, Ever's proposed testimony was irrelevant for this purpose. There was no evidence Ever was present when Officer Duran questioned Serna or had any other way to know whether Serna had actually made the statement to Officer Duran.

So Ever's testimony could not *directly* impeach Officer Duran. While Ever's testimony could have shown that he told Officer Duran that Serna bought the phone from "Dominic," that was not necessarily inconsistent with Officer Duran's testimony that Serna made a similar statement while in custody. In other words, Ever's testimony could not have supported the inference Serna wanted the jury to draw—that Officer Duran was lying because Ever was the *only* source of the statement that Serna bought the phone from "Dominic." The trial court acted within its discretion in concluding Ever's proposed testimony did not have "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action," including Officer Duran's credibility. (Evid. Code, § 210.)

Even if the court should have permitted Ever to testify, Serna suffered no conceivable prejudice. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [error harmless when no reasonable probability of more favorable outcome].) The main issue was Serna's identity as the perpetrator, and the evidence on that point was overwhelming. George identified him on the night of the robbery, and both George and Raul identified him at trial. George identified his phone, his headphones, and the black BMX bicycle at Serna's residence as the one used by the perpetrator. The suspect was wearing a blue jacket, and the headphones were found in the pocket of a blue jacket at Serna's residence. There was also a relatively short span of time between when the robbery occurred (around 7:00 p.m.) and when officers recovered the stolen items at Serna's residence (around 8:15 p.m.), which undermined Serna's version of how he obtained the phone. Any issue over Officer Duran's credibility would not have cast doubt on any of this evidence.

Serna contends the case was close and must have turned on Officer Duran's credibility because the jury asked several questions about the evidence related to the attempted robbery of Raul and ultimately found Serna not guilty of that count. Those circumstances do not demonstrate the jury believed the robbery count involving George was close. As we have explained, it was not. Even if the jury did struggle with Officer Duran's credibility, Ever's testimony would not have tipped the scale in favor of Serna for the reasons we have explained. On this record, there was no reasonable probability of a more favorable outcome had the trial court admitted Ever's proposed testimony.

For similar reasons, we reject Serna's constitutional argument that he was prevented from presenting a defense. (*People v. Cunningham* (2001) 25 Cal.4th 926, 999 ["Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right."].)

II. The Trial Court Properly Ruled on the *Pitchess* Motion

Serna filed a pretrial *Pitchess* motion for disclosure of complaints in Officer Duran's personnel file pertaining to fabrication of evidence, false arrest, perjury, dishonesty, false police reports, false or misleading internal reports, and "any other evidence of misconduct amounting to moral turpitude within the meaning of *People v. Wheeler* (1992) 4 Cal.4th 284 [(*Wheeler*)]." The motion rested on Serna's attack on Officer Duran's veracity. Specifically, Serna argued Officer Duran falsely stated in a police report that Serna said while in custody that he had bought the phone from his friend "Dominic."

Serna claimed he never said that to Officer Duran and instead said he had purchased it from an unidentified man who approached him and Dominic on a bicycle.

The trial court granted the motion for "false statements, false police reports, [and] fabrication of evidence." After an in camera hearing during which a Sergeant from the Huntington Park police department testified, the court found no discoverable items.

Serna contends the court abused its discretion in refusing to order disclosure of complaints involving *any* act of moral turpitude, not just complaints involving false statements, false police reports, and fabrication of evidence. He also requests that we review the sealed transcript of the hearing to determine whether the trial court properly found no discoverable materials. We review the trial court's rulings regarding *Pitchess* motions for abuse of discretion. (*People v. Cruz* (2008) 44 Cal.4th 636, 670.)

When a defendant seeks discovery from a peace officer's personnel records, he or she must file a written motion identifying the "type of records or information sought" and supported by "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records." (Evid. Code, § 1043, subds. (b)(2)-(3); see *People v. Mooc* (2001) 26 Cal.4th 1216, 1226 (*Mooc*).) "[T]he information sought must be requested with sufficient specificity to preclude the possibility of a defendant's simply casting about for any helpful information." (*Mooc, supra,* at p. 1226.)

If the trial court finds that the defendant has shown good cause, the custodian of records should bring to the court any documents that are "potentially relevant" to the defendant's motion. (*Mooc, supra,* 26 Cal.4th at p. 1226.) The court then reviews the documents in camera and should disclose to the defendant " 'such information [that] is relevant to the subject matter involved in the pending litigation.' " (*Ibid.*, quoting Evid. Code, § 1045, subd. (a).) To ensure meaningful appellate review, the trial court must "make a record of what documents it examined before ruling on the *Pitchess* motion." (*Mooc, supra,* at p. 1229.)

"Good cause" justifying in camera review is measured by " 'relatively relaxed standards' that serve to 'insure the production' for trial court review of 'all potentially relevant documents.' " (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016.) Good cause requires "a defendant seeking *Pitchess* discovery to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events. This court has long required that the information sought must be described with some specificity to ensure that the defendant's request is not so broad as to garner ' "all information which has been obtained by the People in their investigation of the crime" ' but is limited to instances of officer misconduct related to the misconduct asserted by the defendant." (*Id.* at p. 1021.)

Serna contends any complaints in Officer Duran's personnel file involving acts of moral turpitude were discoverable because a witness may generally be impeached with prior acts of moral turpitude. (See, e.g., *Wheeler, supra,* 4 Cal.4th at p. 295

["[N]onfelony conduct involving moral turpitude should be admissible to impeach a criminal witness."].) However, "only documentation of past officer misconduct which is *similar* to the misconduct alleged by defendant in the pending litigation is relevant and therefore subject to discovery." (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1021 (*California Highway Patrol*).) Serna did not make that showing here.

The court in *California Highway Patrol* rejected a similar argument under *Wheeler*. The defendant in that case sought discovery of complaints unconnected to the alleged officer misconduct but that could have been relevant to officers' credibility because they involved acts of moral turpitude. (*California Highway Patrol, supra,* 84 Cal.App.4th at p. 1023.) The court noted that *Wheeler* "did not address any issues relating to discovery of peace officer personnel records, and there is nothing in the decision to suggest that a defendant is entitled by virtue of the court's ruling to obtain any police personnel records reflecting moral turpitude without first making the good cause showing required by Evidence Code section 1043." (*California Highway Patrol, supra,* at p. 1024.)

Instead, "[o]ur Legislature has expressly provided protection to peace officer personnel records by establishing a statutory scheme prohibiting discovery except upon a written motion establishing good cause for the discovery and in camera review for relevance. The Legislature's intent 'manifestly was to protect such records against "fishing expeditions" conducted by defense attorneys following the *Pitchess* decision.' [Citation.] Moreover, our Supreme Court has approved the statutory scheme because it 'strikes a fair and workable balance between the need

of criminal defendants for "all relevant and reasonably accessible information" . . . and the legitimate concerns of peace officers to shield from disclosure confidential information not essential to an effective defense or otherwise obtainable from other nonprivileged sources.' [Citation.] [¶] To grant discovery of peace officer personnel records on the basis that *Wheeler* permits discovery of all personnel records reflecting officer misconduct involving moral turpitude, without requiring defendant to comply with the good cause requirement of Evidence Code section 1043, would have the effect of destroying the statutory scheme. Defendants could assert merely that police officers are known to lie, and thereby obtain discovery of all information contained in an officer's personnel records which potentially reflects on the officer's credibility. This procedure would effectively abrogate the good cause requirement set forth in the Evidence Code and approved and applied by our Supreme Court, by permitting fishing expeditions into the arresting officers' personnel records in virtually every criminal case." (*California Highway Patrol, supra,* 84 Cal.App.4th at p. 1024.)

This reasoning applies equally in this case. The court found good cause for disclosure of complaints that could be material to Officer Duran's veracity, that is, complaints involving false statements, false police reports, and fabrication of evidence. Those complaints—if they existed—would be directly tied to Serna's attack on Officer Duran's alleged false statement in his police report and could have bolstered Serna's defense that Officer Duran was not credible. But Serna's request for any other complaints involving unspecified acts of moral turpitude was completely untethered to Serna's specific attack on Officer Duran's truthfulness in the police report. It was precisely the

kind of fishing expedition prohibited by the good cause requirement in Evidence Code section 1043 and condemned in *California Highway Patrol*.

Serna cites *Brant v. Superior Court* (2003) 108 Cal.App.4th 100 (*Brant*) and *People v. Hustead* (1999) 74 Cal.App.4th 410 (*Hustead*), but both cases support the trial court's order here. In *Brant*, the defendant challenged the arresting officers' truthfulness, and the court found good cause to disclose " 'allegations of false arrest, planting evidence, fabrication of police reports, fabrication of probable cause, false testimony, perjury, . . . [and] making false arrests.' " (*Brant, supra,* at p. 108, fn. omitted.) Likewise, in *Hustead*, the defendant challenged the veracity of a police report, and the court found good cause to review the officer's personnel file "with respect to acts of dishonesty." (*Hustead, supra,* at p. 416.) In line with these cases, the trial court properly limited its order to disclosure of complaints involving false statements, false police reports, and fabrication of evidence.[2]

In response to Serna's unopposed request, we have reviewed the sealed record of the in camera *Pitchess* hearing. We conclude the trial court properly conducted the hearing and appropriately exercised its discretion in ruling that no

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[2] We reject Serna's conclusory argument that the denial of *Pitchess* review violated his federal constitutional right to disclosure of material evidence under *Brady v. Maryland* (1963) 373 U.S. 83. "[I]f a defendant cannot meet the less stringent *Pitchess* materiality standard, he or she cannot meet the more taxing *Brady* materiality requirement." (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1474.)

discoverable material existed. (*People v. Myles* (2012) 53 Cal.4th 1181, 1209; *Mooc, supra,* 26 Cal.4th at pp. 1228, 1232.)

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

ROGAN, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.