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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL J. HORTON, Defendant and Appellant.	B230381 (Los Angeles County Super. Ct. No. TA104028)

APPEAL from a judgment of the Superior Court of Los Angeles County. John J. Cheroske and Allen J. Webster, Jr., Judges. Affirmed in part, reversed in part and remanded with instructions.

David L. Polsky, 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, Senior Assistant Attorney General, Victoria B. Wilson and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Horton was convicted of two counts of attempted murder (Pen. Code,[1] § 187/664) and one count of unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)). He contends on appeal that the trial should have been severed to separately try each count of attempted murder; that the trial court should have conducted an in camera hearing to review the personnel records of the investigating officer for potential discovery; that the court should have permitted Horton to represent himself at post-trial hearings; that he was entitled to a post-verdict hearing on his request to substitute counsel; and that this court should independently review the trial court's in camera hearing concerning the disclosure of the identity of a confidential informant. We conclude that the record contains insufficient information to permit a review of the request to disclose the identity of the confidential information, and therefore conditionally reverse the attempted murder convictions so that a hearing may be held pursuant to Evidence Code section 1042. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Horton was charged with two counts of attempted murder and one count of unlawful driving or taking of a vehicle, with multiple enhancement allegations attached to each count. The counts arose from separate incidents. The attempted murder charge in count 1 arose from the shooting of Travion Jackson. In count 2, Horton was accused of attempting to murder fellow gang member Derrick Schaffer by stabbing him with a knife. The unlawful taking of a vehicle charge arose from Horton's apprehension in Texas while driving a vehicle owned by a California resident who had not given permission for the vehicle to be taken or driven.

The trial court denied Horton's pretrial motion to try the attempted murder charges separately. The trial court also denied Horton's motion for discovery of the personnel records of the officer who prepared the photographic six-pack shown to witnesses, and

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

his request for disclosure of the identity of the confidential informant who provided information to the police.

Horton was convicted as charged. After the jury's verdict, he sought to represent himself. This motion was denied. Horton then requested that new counsel be appointed to represent him. The court denied this request as well. Horton appeals.

DISCUSSION

I. Motion to Sever

Horton initially requested that count 1 (attempted murder of Jackson) be tried separately from the other two charges, then later amended his request to seek separate trials for each of the three charged offenses. The court denied the motion. During trial, Horton again moved for severance, and the court denied this motion as well. On appeal, he asserts that the two attempted murders should have been separately tried.

Offenses of the same class are statutorily eligible for joinder but may be severed in the interest of justice at the discretion of the trial court. (§ 954.) "We review the denial of severance under a deferential abuse of discretion standard. [Citation.] Where the statutory requirements for joinder are met, the defendant must make a clear showing of prejudice to demonstrate that the trial court abused its discretion. [Citations.] [¶] In assessing potential prejudice, we examine the record before the trial court at the time of its ruling. The relevant factors are whether (1) the evidence would be cross-admissible in separate trials, (2) some charges are unusually likely to inflame the jury against the defendant, (3) a weak case has been joined with a strong case, or with another weak case, so that the total evidence may unfairly alter the outcome on some or all charges, and (4) one of the charges is a capital offense, or joinder of the charges converts the matter into a capital case. [Citations.]" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1128-1129, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 (*Doolin*).)

While acknowledging that the statutory prerequisites for joinder were met, Horton contends that it was an abuse of discretion to try the attempted murder counts together. He claims the charges should have been separately tried because there was little or no cross-admissible evidence, because of the inflammatory nature of the charges, and because of the potential spillover effect from the stronger case to the weaker case. We find no abuse of discretion here. The trial court denied the severance requests on the basis that the two attempted murder charges involved the same class of crimes; neither attempted murder case was stronger than the other; some evidence, at least as it pertained to gangs, would be cross-admissible; and a single trial would not be unduly prejudicial to Horton.

The evidence supports the trial court's conclusions. Although the evidence pertaining to the attempted murders was not cross-admissible, all the charges included gang enhancement allegations under section 186.22, and as a result, the evidence pertaining to those allegations was cross-admissible. The preliminary hearing transcript does not tend to suggest that either of the attempted murder charges would tend to inflame the passions of the jury against Horton on the other charge. Moreover, in both attempted murder charges Horton was personally identified by eyewitness or victim live testimony as the assailant, supporting the trial court's conclusion that neither charge was significantly stronger than the other for purposes of a spillover analysis.

Although there were differences between the circumstances of the alleged attempted murders, Horton has not demonstrated that either charged crime was particularly likely to have inflamed the jury against him. He claims that the attempted murders were "brutal" and that the joint presentation of the charges to the jury would cause the jury to conclude that he must be guilty. These arguments are unpersuasive because they would essentially require all attempted murders to be tried separately despite the statutory preference for joint trials: It can always be said when there are charges from more than one incident tried together that a jury was "less likely" to think that the prosecutor had erred in bringing charges for multiple incidents than if there was only one accusation. Also, most attempted murders can be characterized as brutal; or if

not brutal, then violent, or calculated, or wanton, or having some other quality that could arguably make the accused appear in some respect worse or more "violent and dangerous than the ordinary defendant charged with attempted murder." The two attempted murders, both violent as attempted murders are wont to be, were relatively similar in their brutality, both involving attacks with a weapon on a single individual. We identify no particular likelihood that the joint trial of these offenses created a perception that the defendant was "a dangerous monster" that could have been avoided if the crimes had been tried separately. Neither of these arguments demonstrates an abuse of discretion by the trial court.

Horton also contends that trying the Schaffer stabbing alone would have illustrated only that gang members endanger each other when in conflict, but that combining this trial with the trial on the Jackson shooting (in which the victim was not a gang member) demonstrated the danger to the general public posed by gang warfare and by Horton, prejudicing him on the Schaffer charge. We are not convinced, however, that evidence that he attacked a fellow gang member would portray Horton as any less dangerous than would an attack on a person who was not a member of a gang, and the trial court was not required to draw such a conclusion. Horton has not shown that the simultaneous trial of the charge for attempted murder of a member of the public would make the jury any more likely to convict him of the attempted murder of another member of his gang.

Horton last argues that in fact the evidence of the Schaffer attempted murder was significantly weaker than the evidence of the Jackson shooting, noting that Schaffer was "not a very credible witness"; that there were supposed to have been three others present at the stabbing but none of them testified at the preliminary hearing; that evidence of motive was weak; and that the delay in prosecuting the crime reflected the weakness of the overall case. But as the trial court noted, Schaffer identified Horton as the person who stabbed him, and Horton and Schaffer were acquainted before the attack. We attach little significance to the fact that the prosecutor did not present all possible witnesses at the preliminary hearing or that the district attorney did not prosecute the crime earlier, and the slight evidence of Horton's motive for the attempted murder does not diminish

the strong evidence of his identity as the assailant. Horton has not made the clear showing of prejudice required to establish an abuse of discretion by the trial court in declining to sever the attempted murder charges here. (See *People v. Elliott* (2012) 53 Cal.4th 535, 552.)

II. Pretrial Discovery of Personnel Records

A party seeking discovery from a peace officer's personnel records through what is called a *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*)) must comply with Evidence Code sections 1043 through 1047. "[T]he *Pitchess* motion must describe 'the type of records or information sought' (Evid. Code, § 1043, subd. (b)(2)) and include '[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records' ([Evid. Code, § 1043], subd. (b)(3)). The affidavits may be on information and belief and need not be based on personal knowledge [citation], but the information sought must be requested with sufficient specificity to preclude the possibility of a defendant's simply casting about for any helpful information [citation]." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226 (*Mooc*).)

To set forth the materiality of the information sought, the affidavits must "provide a 'specific factual scenario' establishing a 'plausible factual foundation'" for the moving party's allegation of police misconduct. (*City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1146.) In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1026 (*Warrick*), the Supreme Court held that "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." "When a trial court concludes a defendant's *Pitchess* motion shows good cause for discovery of relevant evidence contained in a law enforcement officer's personnel files, the custodian of the records is obligated to bring to

the trial court all 'potentially relevant' documents to permit the trial court to examine them for itself." (*Mooc*, *supra*, 26 Cal.4th at pp. 1228-1229.)

Here, during a period of time in which Horton was representing himself, he filed a *Pitchess* motion seeking the personnel records of Sergeant Robert Dean. That motion was not filed until weeks after the date set for the hearing, and the trial court accordingly notified Horton that if he wanted to pursue discovery under *Pitchess*, he should file a properly noticed motion. Once Horton elected to be represented by counsel, his attorney filed a new *Pitchess* motion. The trial court denied the motion on the basis that Horton had failed to establish good cause for the discovery of Dean's personnel records. We find no error.

In his moving papers,[2] Horton failed to articulate "a plausible scenario of officer misconduct" that was both internally consistent and supported the defense proposed to the charges. (*Warrick*, *supra*, 35 Cal.4th at p. 1026.) Horton's attorney identified Dean as the person who prepared a photographic lineup. He described several contacts between Horton and Dean prior to Horton's arrest on the attempted murder charges. Specifically, he alleged that twice Dean had performed unwarranted vehicle stops and searches on Horton; that he had threatened that he would plant a gun on Horton if Horton

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[2] On appeal, Horton contends that we must look to both the defective motion he personally filed and to the later motion submitted by counsel as we address this issue. Horton presents no authority to support the argument that a declaration submitted in conjunction with a facially defective motion rejected by the court as untimely filed must nonetheless be considered in conjunction with the appellate review of a later, properly-noticed motion, nor are we aware of any authority supporting this contention. Horton also offers no legal support for his contention that his inclusion of the statement in the notice of motion that the proper *Pitchess* motion was based, inter alia, "on all the papers and records on file in this action," conferred an obligation on the trial court to consider all documents previously filed in the action, even documents supporting a motion that was rejected as procedurally improper, to determine whether they offered a basis for discovery of the officer's personnel records. We are not prepared to impose such a duty on the trial courts or to relieve counsel of the obligation to present *Pitchess* motions that contain the relevant information and evidentiary showing to permit the trial court to assess the appropriateness of the requested discovery. We consider the *Pitchess* motion that the court decided, not the one that it rejected because it was not filed until November 2009 but purported to give notice of a hearing date in October 2009.

did not provide information to him; and that he had made false statements at Horton's parole hearing. He also alleged that in an unrelated matter Dean had filed a false search warrant affidavit. These scattershot allegations did not amount to an internally consistent assertion of specific police misconduct that supported Horton's anticipated defense; in fact, Horton made no attempt to describe a link between the officer's alleged misconduct and his defense. Accordingly, the trial court did not err when it concluded that Horton had failed to demonstrate good cause for the discovery of Dean's personnel records.

III. *Faretta v. California*

As established in *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), every defendant has the constitutional right of self-representation, but "in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial." (*People v. Windham* (1977) 19 Cal.3d 121, 127-128 (*Windham*).) "When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1365.)

In this bifurcated trial, Horton moved to represent himself after the verdict had been returned on the substantive offenses but before the trial took place on the prior conviction allegations. Horton contends that the trial court erred in denying his self-representation motion because it was timely made and he had an absolute right to self-representation. We disagree. In *People v. Givan* (1992) 4 Cal.App.4th 1107, 1115 (*Givan*), this court held that "the nature of a bifurcated prior conviction trial leads us to determine that the fundamental right to self-representation is not timely asserted after a verdict is rendered on the primary offense. A request is timely for purposes of invoking an absolute right to self-representation if it is made before the commencement of the trial on the primary offense." Because Horton made his *Faretta* motion after the verdict had been returned on the primary offense and before the priors trial, the motion was made at midtrial and was therefore addressed to the sound discretion of the court. (See *ibid.*)

Horton does not acknowledge the *Givan* decision but attempts to distinguish a similar decision, *People v. Rivers* (1993) 20 Cal.App.4th 1040 (*Rivers*) on the basis that in that case, the defendant made a midtrial request to assume his representation from that point forward in the trial. Horton claims that in contrast, he "only wanted to represent himself on a new trial motion." Our review of the transcript reveals no indication that Horton limited his request for self-representation to the new trial motion. To be sure, Horton expressed more than once that he was requesting self-represented status at that stage in the proceeding so that he could "adequately prepare a motion for retrial," but at no point in the transcript of the hearing did we find any statement that he intended to represent himself only with respect to the new trial motion. To the contrary, he said that he wanted to represent himself for the first reason that "I do feel that my attorney was incompetent. And two, I do have—I do have retrial issues as far as new evidence, as I stated, and several other issues that I do believe exercising my *Faretta* rights and representing myself, I could adequately do a better job than my current attorney. And that would be affording me a complete opportunity [to] receive a fair trial and a complete defense." We understand Horton's words to be a request that he assume self-represented status in the case, not as a request to file a single motion independently with the contemplation that it would be followed by the resumption of representation by counsel. Indeed, when the court made efforts to identify whether Horton was complaining about the performance of his attorney but wanted to be represented by counsel, Horton unequivocally stated that he did not seek a hearing to request the appointment of new counsel. If he had intended to be represented by counsel as soon as he had litigated his new trial motion, presumably he would have expressed his desire for new, competent counsel at those further proceedings when the court inquired as to whether he was seeking new counsel. Accordingly, Horton has not established a basis for distinguishing his request from the requests in *Rivers* and *Givan*, and we find no justification for concluding that Horton's request was not untimely for being made midtrial.

"When . . . a midtrial request for self-representation is presented the trial court shall inquire *sua sponte* into the specific factors underlying the request thereby ensuring a

meaningful record in the event that appellate review is later required. Among other factors to be considered by the court in assessing such requests made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. Having established a record based on such relevant considerations, the court should then exercise its discretion and rule on the defendant's request." (*Windham, supra,* 19 Cal.3d at p. 128.)

Although the court repeatedly referred to Horton's ability to represent himself effectively, an improper basis for denying a request for self-representation (*Doolin, supra,* 45 Cal.4th at p. 454), the record demonstrates that the trial court extensively considered appropriate factors in denying the self-representation request. The court discussed the high quality of representation that Horton had received and inquired thoroughly into Horton's complaints about his counsel; explored in depth Horton's proclivity to request substitute counsel and his prior stint as a self-represented litigant; inquired into the reasons for the request; considered the stage of the trial and the fact that numerous serious issues still remained to be resolved; and devoted considerable attention to its perception of the disruption that would follow if Horton represented himself. The court's remarks reveal the court's concern about Horton's disruptive behavior: "[Y]ou are one of these kind of people, you know everything and nobody can tell you nothing because you are bright and smart, personable and charming, all these other adjectives." When Horton criticized his counsel as incompetent, the court said, "[Y]ou've had outstanding counsel. [¶] I still think part of the issue here is, you know, you know what you want to do and nobody can tell you and you are never wrong." The court likened Horton to a Monday morning quarterback ("always right about everything") and characterized him as believing himself to be superior in intelligence to all the other participants in the process: "Mr. Horton knows more than everybody. The judges and the lawyers and the police. Mr. Horton, basically, . . . is one of the smartest people on Earth and you can't tell you nothing. That's part of the problem. That's why you are in

this situation right now, because you know everything. That is your problem, and nobody can tell you that. And in your mind, you know, when God made you, God had a good day and God ain't had a day like that since. That's pretty much how you come off." These unusually blunt assessments demonstrate the court's perception that Horton would disrupt trial proceedings if he represented himself. We defer to the trial court's assessment of the defendant's demeanor in evaluating whether a motion for self-representation should be granted (*People v. Welch* (1999) 20 Cal.4th 701, 735, overruled in part on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89) and cannot conclude that the trial court abused its discretion here.

IV. *People v. Marsden*

Once the court had denied Horton's request to represent himself, Horton requested a hearing under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) to seek the appointment of new counsel in place of present counsel. The court agreed to hold a *Marsden* hearing when Horton's counsel could attend. The following day Horton requested that the promised hearing take place. The court, apparently not remembering the proceedings and its prior statement, told Horton, "I indicated to you yesterday that I was going to deny the *Marsden* hearing. We spent a lot of time yesterday talking about that. I indicated to you that my tentative was to deny it. But the only reason I did not deny it before was because Mr. Yanes was not here. But I don't need any additional comments or any additional statement from you because we spent quite a bit of time yesterday. I was very candid, forthright to you and indicated to you that my tentative would be to deny the *Marsden*, which is what I plan to do. [¶] And so if there is a *Marsden*, I am going to deny it at this time and you will not be allowed to represent yourself." As Horton observes, the trial court had not held a *Marsden* hearing the previous day, nor had it announced a tentative ruling to deny the request for appointment of new counsel. Horton, therefore, contends that the court committed reversible error by failing to hold a hearing on his *Marsden* motion.

A full reading of the proceedings demonstrates, however, that shortly after the trial court made the statements above it afforded Horton a full opportunity to explain the basis of his contention that he should have new counsel and to relate specific instances of his counsel's inadequacy. Horton told the court, "[W]e never discussed the matter of retrial issues," and his counsel then made an oral motion for new trial. As soon as counsel articulated the basis for the new trial motion, Horton interjected, "Your Honor, these are not my contentions for the issues of retrial. [¶] I apologize for speaking out loud. [¶] But these are not my intentions. There are several issues. The paper that my attorney just read I have different issues on here that he refuse[s] to bring up." Horton continued, "There w[ere] exculpatory witnesses that were not called on my behalf. My attorney felt he didn't want to call these witnesses. And the witnesses are willing to come in, and they were never interviewed by my attorney for his personal reasons of he didn't believe them. However, I'm afforded [*sic*] to have a complete defense. These witnesses were never called. And as well as my attorney, the reason why I wanted to go pro per is because my attorney would not argue his own ineffectiveness as being my attorney in trial. And I submit it. I submit with that."

The trial court told Horton that his desire to present particular witnesses "is not the standard by which we judge whether you receive a right to [*sic*] a fair trial, one; and two, whether the attorneys did a good job for you." The court told Horton, "[Y]ou had an adequate defense. You even testified on your own behalf. So you told the story and the jury didn't believe your version of the story. And frankly, I don't either." The court continued, "[Y]ou have had three of the best lawyers in the county. And as I indicated to you yesterday, if Jesus was your lawyer you still wouldn't like him either. So it's like Teflon. Nothing sticks and nobody is ever going to be good enough because you know everything. [¶] So I think you basically did have a fair trial. And I think Mr. Yanes did a great job and presented the witnesses, and I think probably would have assisted you, getting the people. There's no basis, I don't believe or have no knowledge that these folks would have come and made a difference. Probably would have prejudiced your

case more. So maybe in your mind you think they would have helped you. The court doesn't think so."

Horton argued that the person that he wanted to present as a witness was a person shown on a video screened for the jury: "The person was actually a person on the video. He's the actual person. He's willing to come in and testify that he's that person. I've been convicted as being that person. This is an exculpatory witness." He complained that his attorney had "not taken the time out to interview these witnesses, contact these witness[es], subpoena these witnesses as a competent attorney would do . . . ."

At that point, Horton's counsel attempted to intervene: "Your Honor, you've heard this from him already." The court responded, "That's okay." Defense counsel asked, "You going to let him rant and rant?" The court responded that it was going to allow Horton to raise the issues he wanted to raise: "I'm going to let him discuss what he—say what he has to say. I think that's only appropriate and professional." Defense counsel said, "He's been through this with you yesterday, hasn't he?" The court addressed Horton: "Discuss what you have to discuss with me, okay."

Horton told the court that his "main issue" was a motion he had filed when he represented himself that was supposed to be heard prior to trial, and that he was also unhappy about the exculpatory witness who was willing to testify but who was never subpoenaed because counsel felt he would not be a credible witness. "I have the guy who said it's him and I haven't been able to present this witness on the stand in my defense. And that is not afforded for me the opportunity for a fair trial." Once Horton finished speaking, the court said, "Anything else?" There was no response, and the court said, "I'm going to deny it, sir."

"[N]o single, inflexible procedure exists for conducting a *Marsden* inquiry." (*People v. Madrid* (1985) 168 Cal.App.3d 14, 18.) Unorthodox as the hearing may have been, when the trial court heard Horton articulate a specific dissatisfaction with his counsel, it changed course from its initial summary denial of the request for new counsel

and inquired thoroughly into Horton's complaints against his counsel.[3] This is exactly what *Marsden* requires: "When a defendant seeks discharge of his appointed counsel on the basis of inadequate representation by making what is commonly referred to as a *Marsden* motion, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of counsel's inadequacy." (*People v. Cole* (2004) 33 Cal.4th 1158, 1190; see also *People v. Sanchez* (2011) 53 Cal.4th 80, 90 ["at any time during criminal proceedings, if a defendant requests substitute counsel, the trial court is obligated, pursuant to our holding in *Marsden*, to give the defendant an opportunity to state any grounds for dissatisfaction with the current appointed attorney"].) Having given Horton the opportunity to present all his complaints about his representation, the court then denied his *Marsden* motion. We therefore conclude that the record does not support Horton's contention that no hearing was conducted on his request for the appointment of substitute counsel.

V. Confidential Informant Disclosure Request

While representing himself, Horton sought disclosure of the identity of the confidential informant who had supplied information to the police prior to his arrest. The trial court denied Horton's request at an in camera hearing outside Horton's presence, and on appeal he requests that this court review the court's ruling.

Under Evidence Code section 1041, subdivision (a), a public entity has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a law. The prosecution, however, "must disclose the name of an

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[3] "An in camera *Marsden* hearing is 'the better practice,' but a *Marsden* hearing in open court is permissible where . . . neither the defendant nor defense counsel asks for an in camera hearing and the defendant's complaints neither disclose information that conceivably could lighten the prosecutor's burden of proof nor involve evidence or strategy to which the prosecutor is not privy." (*People v. Lopez* (2008) 168 Cal.App.4th 801, 814.) Here, although the prosecutor should have been directed to leave because Horton's complaints implicated defense strategy, Horton has not contended, nor is there any indication in the record, that the presence of the prosecutor inhibited his free discussion of the facts surrounding his complaints with counsel.

informant who is a material witness in a criminal case or suffer dismissal of the charges against the defendant." (*People v. Lawley* (2002) 27 Cal.4th 102, 159.) "An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant." (*Ibid*.)

We have reviewed the transcript of the hearing and conclude that a conditional reversal is required to permit a full hearing under Evidence Code section 1042. The trial court did not conduct "a hearing at which all parties may present evidence on the issue of disclosure," as required by Evidence Code section 1042, subdivision (d): Rather than holding a public portion of the hearing and an in camera proceeding as contemplated by the statute, the court conducted the entire hearing in camera, effectively denying Horton the opportunity to present evidence on the question of whether the informant was a material witness on the issue of guilt. During the in camera proceeding, the court relied entirely upon an extremely brief and general presentation by the prosecutor concerning the information supplied by the confidential informant. The prosecutor advised the court how the information given by the informant was used by the police, but she did not describe what the information actually was and how the informant came to possess it, information essential to determining whether there existed a reasonable possibility that the informant could give evidence on the issue of guilt that might exonerate the defendant. (*Lawley, supra*, 27 Cal.4th at p. 159.) The trial court did not ask any questions after the prosecutor's three-sentence description of the information.

Therefore, in these proceedings the defendant had no opportunity at the hearing to present evidence concerning materiality; the prosecution did not provide sufficient information for a determination on the question of materiality to be made; and the court did not elicit the precise nature of the information the informant provided so that it could determine whether, under the facts of the case, the confidential informant was a material witness on the issue of guilt. As a result, the record lacks sufficient information to permit this court to review the trial court's ultimate ruling that the identity of the informant need

not be disclosed. Horton's convictions for attempted murder[4] must therefore be conditionally reversed and the matter remanded for a full hearing under Evidence Code section 1042 and a determination made on the evidence presented whether the confidential informant was a material witness. If, after the hearing has been held, the trial court finds no reasonable possibility the failure to disclose the informant's identity deprived Horton of a fair trial, the judgment with respect to counts 1 and 2 shall be reinstated. In the event there is a reasonable possibility the failure to disclose the informant's identity deprived Horton of a fair trial, the the reversal stands. (*People v. Lee* (1985) 164 Cal.App.3d 830, 833.)

DISPOSITION

The judgment with respect to counts 1 and 2 is conditionally reversed and the matter remanded to the trial court with directions to hold a further hearing under Evidence Code section 1042, subdivision (d). If, after the hearing has been held, the trial court finds no reasonable possibility the failure to disclose the informant's identity deprived Horton of a fair trial, the judgment with respect to counts 1 and 2 shall be reinstated. In the event there is a reasonable possibility the failure to disclose the informant's identity deprived Horton of a fair trial, the reversal stands. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.

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[4] Horton seeks only a reversal of the attempted murder conviction in count 1 on the basis of the failure to disclose the identity of the confidential informant, but we conditionally reverse both attempted murder convictions because it was acknowledged at the in camera hearing that the confidential informant provided information with respect to both attempted murder charges.