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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. BRANDON ALLEN, Defendant and Appellant.	B245581 (Los Angeles County Super. Ct. No. NA090861)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesse I. Rodriguez, Judge. Affirmed.

Melissa J. Kim, 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, Paul M. Roadarmel, Jr. and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Brandon Allen appeals from a judgment which sentences him to three years formal probation for possession of marijuana for sale in violation of Health and Safety Code section 11359. Allen contends the trial court committed various evidentiary errors which warrant reversal. Allen also requests we independently review the record on his motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 53 (*Pitchess*). We affirm the judgment.

FACTS

On December 14, 2011, Long Beach Police Department Detective Chris Thue, along with other detectives and officers, executed a search warrant at Allen's apartment. No one was home when the search began, but Allen arrived at the scene with his girlfriend and mother soon thereafter. The following items were recovered during the search: two bags of marijuana weighing a total of 91.967 grams found in a refrigerator, approximately a dozen empty and unlabeled prescription bottles, $2,170 in U.S. currency ($1,764 inside a safe and $406 from Allen's person), an unloaded shotgun and handgun (both guns were registered in Allen's name), and a box of new shotgun shells.

After Detective Thue advised Allen of his *Miranda*[1] rights, Thue asked Allen about the recovered items. Allen stated that the marijuana found in the refrigerator belonged to him, that he had a medical marijuana recommendation card from a doctor, and that the firearms belonged to him and were registered in his name. He also admitted to Thue he was unemployed and sold marijuana to help pay bills and to help buy furniture for a new place.

In June 2012, an information charged Allen with possession of marijuana for sale, with an allegation that a principal was armed during the commission of the offense. (Health & Saf. Code, § 11359; Pen. Code, § 12022, subd. (a)(1).[2] The charges were tried to a jury in late October to early November 2012.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

[2] All further undesignated statutory references are to the Penal Code unless otherwise stated.

At trial, the prosecution presented evidence which set out the events described above. Detective Christopher Bolt, an expert in possession marijuana for sale, testified that 91.967 grams would be worth approximately $1,820 and was the equivalent of 180 marijuana cigarettes.

Detective Thue testified about the search and stated he recovered a cell phone from Allen. He examined the cell phone and found the following five text messages that he believed to be consistent with narcotics sales: 1.) "If I get through the gate, can you get me a dime?" 2.) "Can I get a 30?" 3.) "Can you deliver me a dime?" 4.) "If I try to get through the gate, can I get a fat dime?" 5.) "What up Bear? Can you deliver a dime?" Based on training and experience, Thue believed the text messages were consistent with narcotics sales. Thue testified the term "dime" means $10 worth of a drug. A "30" means $30 dollars worth. A "fat dime" means a generous $10 portion.

Allen testified in his own defense. He denied telling the officers he sold marijuana to pay the bills because he was unemployed. He testified instead that he was employed as his mother's caregiver and he did odd jobs for cash, such as paint houses and lay tile. He presented evidence showing his 2011 gross income was $5,911. He said he had just taken some money out to go shopping with his mother and girlfriend.

Allen confirmed the marijuana found in the apartment was his, but he had a medical marijuana recommendation card issued October 15, 2011, which allowed him possession of it for personal use. Sometimes, he and a fellow card holder would consolidate their purchases to save approximately 15 to 20 percent. For example, he received several text messages from Nell, a fellow card holder with a club foot who had trouble getting to the dispensary. In one text, Nell asked him, "What up, Bear? Can you deliver a dime?" Allen explained this text meant that Nell wanted him to go to the dispensary to buy marijuana and deliver it to her. He stated he probably called her back to explain he could not deliver the marijuana, but he would be willing to help her get to the dispensary. On the same day, Nell also texted, "If I try to get in the gate, can I get a fat dime?" In this text message, Allen stated, Nell was willing to come to him. As a result, she was entitled to a larger portion of the "bulk" marijuana purchase than if he had

to drive her to purchase it. He also testified he sometimes received text messages from people asking him to buy marijuana for them using his recommendation card. In those situations, he would turn them down. In addition to buying "in bulk" with another card holder, Allen also had a relationship with a grower and had received marijuana in exchange for doing odd jobs.

Allen's doctor confirmed he provided Brown with a medical marijuana recommendation to manage his mild depression, anxiety, insomnia and obesity-related joint pain. He testified the recommendation permitted Allen to possess up to half a pound of marijuana, which equaled approximately 224 grams, much more than the 91.967 grams found in Allen's apartment. Allen further testified and presented paperwork to show he purchased a shotgun legally from Big 5 in response to a memo sent out by the apartment manager about crimes in the area. Allen stated the pill containers were used and belonged to his mother.

Allen's mother corroborated Allen's testimony that he helped care for her due to an unspecified medical condition. Allen's girlfriend also corroborated his testimony they were shopping that day. Family friends Veda Simms, who worked for the Los Angeles Police Department, and Xavier Simms, who worked for a juvenile corrections agency, testified to Allen's character as a law-abiding citizen.

On November 2, 2012, the jury returned a verdict convicting Allen of the drug offense, and finding the firearm allegation not true. He was sentenced as described above and appealed.

DISCUSSION

On appeal, Allen challenges the trial court's admission of the five text messages on the following grounds: (1) admission of four of the text messages violated section 1054.1 and violated his right to due process and a fair trial; (2) the text messages were inadmissible hearsay and their admission violated his Sixth Amendment right to confront witnesses against him; and (3) the text messages were not properly authenticated. After briefing by the parties was completed, the United States Supreme Court issued its opinion in *Riley v. California* (2014) 134 S.Ct. 2473, 2485 (*Riley*), which held that police officers

generally may not, without a warrant, search digital information on cell phones seized from defendants as incident to an arrest. We requested letter briefs from the parties addressing the effect *Riley* had, if any, on this case.

Allen also contends the trial court improperly responded to a question from the jury during its deliberations by providing the dates and times on the cell phone which indicated when two of the text messages were sent. Finally, Allen requests we independently review the trial court's *Pitchess* hearing for error, if any.

We find no error and affirm.

I. Admission of the Text Messages

On the day trial began, the prosecutor indicated he wanted to admit certain text messages from Allen's cell phone. The prosecutor initially identified only one specific text (Text 1)—"Hey, if I get through the gate, can I get a dime?" Detective Thue testified at the preliminary hearing to seeing Text 1 and noted it in the police report. Although he wanted to bring in the cell phone itself and present other text messages, the prosecutor admitted he did not yet know which specific texts he wanted because "I don't know all the statements on the phone." Allen objected to their admission on several grounds. The trial court initially agreed to admit only Text 1, finding it relevant and not hearsay. It refused to admit any others.

Shortly after the court's ruling, Detective Thue arrived with the cell phone and the prosecutor presented four additional text messages to defense counsel which he believed related to the sale of narcotics. Defense counsel objected to their admission on the grounds the disclosure was untimely, violated *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), and the messages were hearsay. The trial court reconsidered its previous ruling and allowed the additional four texts to be admitted. The trial court reasoned, "You had notice of it. I agree that you have not seen the actual messages. You had notice of this since at least at the latest June 13th that there were several messages on the phone. The phone has been there. The defense for whatever reason had not made a formal discovery [request]. I understand that the People have an obligation to turn over the discovery. It has always been there. It has not been lost. Therefore, I think that in this

case, even though it is late as to the specific messages, you've always known it; your office has always known it." The text messages were admitted and both Allen and Thue testified about them at trial.

A. The Alleged Delay in Discovery

Allen first argues the trial court erred in denying his request to preclude the admission of the four later-identified texts. We are not persuaded.

California's reciprocal discovery law requires both sides in a criminal case to reveal their witnesses and evidence at least 30 days before trial. (See § 1054 et seq.) In particular, section 1054.1, subdivision (c), requires the disclosure of "[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged." In addition, section 1054.7 provides in relevant part that the disclosure "be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred."

"Upon a showing both that the defense complied with the informal discovery procedures provided by the statute, and that the prosecutor has not complied with section 1054.1, a trial court 'may make any order necessary to enforce the provisions' of the statute, 'including, but not limited to, immediate disclosure, [contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence,] continuance of the matter, or any other lawful order.' (§ 1054.5, subd. (b).) The court may also 'advise the jury of any failure or refusal to disclose and of any untimely disclosure.' (*Ibid*.)" (*People v. Verdugo* (2010) 50 Cal.4th 263, 280.) We review a trial court's evidentiary ruling for an abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.)

The trial court did not abuse its discretion by failing to preclude the text messages because the fact that more than one text message was involved was disclosed to the defense. At the preliminary hearing, Detective Thue testified another detective involved in the search advised him that he found text messages on Allen's cell phone related to

marijuana sales. Detective Thue indicated he saw Text 1. In addition, Detective Thue opined the marijuana was possessed for sale based on, among other things, the text messages. We find this sufficient "disclosure" to satisfy the requirements of the statute. Certainly, Allen knew the prosecution intended to rely on *text messages* rather than *a text message* to support the intent to sell. The later-identified text messages were sufficiently similar—requesting a certain amount of marijuana—that it would not have been a surprise to Allen. In addition, the cell phone has been in the possession of the police since it was seized from Allen on the day of his arrest. There is nothing in the record to indicate Allen's counsel was prevented from examining the cell phone from the Long Beach Police Department's evidence locker, as is frequently done with real evidence.

Allen argues he could have presented a defense through other witnesses and not by his own testimony had the existence of the additional four texts been disclosed to him in a timely manner. Specifically, he could have investigated the individuals who texted him to buttress his defense that he purchased marijuana in bulk with other card holders. Allen argues the trial court should have precluded the admission of the four later-identified text messages. Even assuming there was a delay in disclosing the text messages, he was not entitled to their preclusion from trial.

If the prosecution does not comply with its discovery obligations, the trial court may make any orders necessary, "including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." (§ 1054.5, subd. (b).) Though a trial court has discretion in these matters, that discretion is not unfettered. "The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted." (§ 1054.5, subd. (c).) This directive to exhaust all other sanctions before prohibiting the admission of the evidence applies to the presentation of real evidence as well. (*People v. Superior Court* (*Mitchell*) (2010) 184 Cal.App.4th 451, 459.) Allen could have, but did not, seek a continuance to conduct the investigation he complains was denied to him.

Neither did he request a jury instruction relating to the late disclosure. In failing to exhaust other sanctions available, Allen was not entitled to an immediate and automatic exclusion of the text messages.

We also find the alleged failure to timely disclose the text messages did not compromise Allen's right to due process and a fair trial under the Sixth and Fourteenth Amendments. *Brady* obligates the prosecuting attorney to disclose certain evidence. The prosecution violates due process when it withholds evidence that is favorable to the accused and is material either to guilt or to punishment. (*Brady*, *supra*, 373 U.S. at p. 87; *In re Sassounian* (1995) 9 Cal.4th 535, 543.) Evidence is "favorable" to the accused "if it helps the defense or hurts the prosecution." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "Evidence is material if there is a reasonable probability its disclosure would have altered the trial result." (*Ibid.*)

Thus, to merit relief on this basis, Allen must show both the favorableness and the materiality of the four text messages not timely disclosed by the prosecution. He has failed to do so. Allen himself admits the text messages are "inculpatory" and not exculpatory.

B. Hearsay

Allen next contends the trial court erred in admitting the five text messages as this evidence amounted to inadmissible hearsay. Allen also argues the admission of the texts violated his Sixth Amendment right to confront witnesses against him, as he had no opportunity to challenge the persons who had sent the texts to his cell phone, citing to *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). He is mistaken.

Evidence Code section 1200, subdivision (a) defines hearsay as "a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." "Except as provided by law, hearsay evidence is inadmissible." (Evid. Code, § 1200, subd. (b).) Requests ordinarily do not constitute hearsay because "[a] request, by itself, does not assert the truth of any fact . . . ." (*People v. Jurado* (2006) 38 Cal.4th 72, 117.) California courts have relied on differing

theories to hold that phone calls requesting to purchase narcotics are not inadmissible hearsay. (Compare *People v. Morgan* (2005) 125 Cal.App.4th 935, 940-941 (*Morgan*) with *People v. Nealy* (1991) 228 Cal.App.3d 447, 450-451 (*Nealy*).)

In *Nealy*, police officers testified they answered several phone calls from individuals interested in buying cocaine during their search of the defendant's residence. (*Nealy, supra,* at pp. 450-451.) The appellate court concluded the calls were not hearsay, reasoning, "subject to Evidence Code section 352, and appropriate editing, when a police officer participates in a telephone conversation where he is lawfully executing a search warrant and hears a third person offer to purchase a controlled substance, testimony thereon is not made inadmissible by the hearsay rule and may be received as circumstantial evidence tending to show the controlled substance seized at that location was possessed for purposes of sale." (*Id.* at p. 452; see also *People v. Ventura* (1991) 1 Cal.App.4th 1515, 1517-1519.)

In *Morgan*, the appellate court addressed substantially similar facts and "conclude[d] that under the provisions of California's Evidence Code the caller's oral expressions are hearsay, but that case law, recognized and accepted when the Evidence Code was adopted and continuing thereafter, has created an exception to the hearsay rule for this reliable type of evidence." (*Morgan, supra,* 125 Cal.App.4th at p. 937.) The court reasoned, "While the ultimate fact the statement is offered to prove is not the matter stated, the truth of the implied statement is a necessary part of the inferential reasoning process. The statement is relevant only if the caller actually wants drugs as he states. If he does not want drugs, and is asking for them only to cause trouble for the defendant or as a crank call, then the call has no relevance because it is not circumstantial evidence that defendant is selling drugs. It is the caller's genuine desire for drugs and his belief that he can obtain them by calling the defendant's number that creates the inference that defendant's drugs are possessed for purposes of sale." (*Id.* at p. 944.)

Such "implied assertions" are not barred by the hearsay rule because they do not display the untrustworthiness characteristic of assertions subject to exclusion under the hearsay rule. (*Morgan, supra*, 125 Cal.App.4th at p. 944.) The court stated: "The rationale for not treating an implied assertion as an assertion subject to the hearsay rule is that it is primarily conduct and not intended as an assertion. To the extent conduct . . . rather than simply words are involved, the implied assertion is more reliable. . . . [¶] This rationale applies to the [request by phone] in this case. The caller was not intending to assert that [the defendants] were selling methamphetamine; rather, he was attempting to purchase methamphetamine. Because actions speak louder than words, the caller's statements were more reliable than the usual hearsay statement." (*Ibid*.) As a result, the *Morgan* court treated admission of the caller's statement as an exception to the hearsay rule rather than nonhearsay. (*Id.* at p. 945.)

We need not decide here whether the nonhearsay, circumstantial evidence theory under *Nealy* is correct or the implied assertion, hearsay exception theory under *Morgan* is, as both render the text messages admissible. As in *Nealy* and *Morgan*, the five text messages were requests for various quantities of marijuana. Whether the five texts messages are viewed as nonhearsay statements or as implied assertions admissible under a hearsay exception, the trial court in Allen's current case did not err in admitting the text messages. We decline to depart from the authority presented by *Nealy* and *Morgan* as Allen suggests. We are not convinced by Allen's spare argument that both *Morgan* and *Nealy* were wrongly decided.

Neither are we persuaded the trial court erred in admitting the text messages over Allen's *Crawford*[3] objection. "[T]he Confrontation Clause applies only to testimonial hearsay." (*Davis v. Washington* (2006) 547 U.S. 813, 823.) Testimonial statements consist of "statements, made with some formality, which, viewed objectively, are for the primary purpose of establishing and proving facts for possible use in a criminal trial."

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[3] *Crawford, supra*, 541 U.S. 36 [admission of out-of-court testimonial statements violated a defendant's right to cross-examination unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine].)

(*People v. Cage* (2007) 40 Cal.4th 965, 984, fn. 14, italics omitted.) None of the five text messages could be viewed as statements made for the purpose of establishing or proving facts at a criminal trial. Indeed, we assume the authors of those text messages sincerely hoped their messages would not be used at a criminal trial.

C. Authentication

Allen also contends the trial court erred in admitting the five text messages because they were not properly authenticated. We disagree. "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) "Circumstantial evidence, content and location are all valid means of authentication [citations]." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383.)

Here, it is undisputed that it was Allen's cell phone. Detective Thue testified at trial that he recovered the phone while executing a search warrant, that he found the phone on Allen, and that he and another detective reviewed the text messages on the phone. In his testimony, Allen did not deny it was his cell phone or that he received the text messages. Indeed, he explained the contents of the text messages in his testimony. These facts constitute sufficient authentication. In any case, there was no objection based on a lack of authentication. Thus, Allen has failed to preserve this issue for review. (*People v. Sims* (1993) 5 Cal.4th 405, 448 [failure to object to introduction of transcript of tape-recorded interview for lack of authentication waives issue on appeal].)

D. *Riley*

The Fourth Amendment protects individuals from "unreasonable searches and seizures." To deter such conduct by law enforcement, the U.S. Supreme Court created the exclusionary rule, a sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation. (*Davis v. United States* (2011) 131 S.Ct. 2419, 2423 (*Davis*).) *Riley* involved two separate cases which raised a common question construing the Fourth Amendment: "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been

arrested." (*Riley, supra,* 134 S.Ct. at p. 2480.) In each case, the defendant's cell phone was searched after his arrest and evidence obtained from the cell phone was used to charge the defendant with additional offenses. In a unanimous decision, the U.S. Supreme Court held the police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. (*Id.* at p. 2495.) Under *Riley*, the evidence gleaned from such an illegal search may be subject to exclusion following a motion to suppress. (*Id.* at p. 2481.)

Although *Riley* was decided over two years after the search of Allen's cell phone, "[a] high court decision construing the Fourth Amendment . . . applies retroactively to all convictions that were not yet final at the time the decision was rendered." (*People v. Hoyos* (2007) 41 Cal.4th 872, 893, fn. 10, overruled on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919.) This retroactive application of new rules for criminal prosecutions affects cases, such as this one, which are pending on review. (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328.)

Allen contends the officers' perusal of the text messages on his cell phone falls under *Riley*. That is, they were required to obtain a warrant before searching his cell phone.[4] Allen urges us to reverse and remand the matter so he may determine whether to file a motion to suppress. The People contend *Riley* is inapplicable because the officers reasonably relied on the validity of California Supreme Court precedent in executing the search, citing to *Davis, supra,* 131 S.Ct. 2419. We are persuaded by the People's argument and find no reason to reverse.

In *Davis*, the police conducted a search which complied with then-binding precedent articulated in *New York v. Belton* (1981) 453 U.S. 454. The defendant was convicted. While his appeal was pending, the U.S. Supreme Court overruled *Belton.* (*Davis, supra,* at p. 2423.) Nevertheless, it declined to exclude the evidence obtained by the search, holding, "the harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.' [Citation.]" (*Id.* at p. 2429.)

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[4] Although a warrant was issued to allow the police to search Allen's apartment, that warrant did not include a search of Allen's cell phone.

"Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, [the *Davis* court held] that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." (*Ibid.*)

Similarly here, the officers conducted the search of Allen's cell phone in reasonable reliance on then-binding precedent: the California Supreme Court decision in *People v. Diaz* (2011) 51 Cal.4th 84, 93 (*Diaz*). *Diaz* held that the police were entitled to search the contents of a cell phone without a warrant if it was incident to a lawful arrest. (*Ibid.*) Just as in *Davis,* suppression would do nothing to deter police misconduct because it was not misconduct to search a cell phone incident to an arrest in 2011. The good faith exception to the exclusionary rule applies.

Allen argues the officers were not necessarily conducting the search incident to an arrest as they were in *Diaz* and therefore, the good faith exception may not apply. According to Allen, the record does not show the legal basis for the seizure of the data on his cell phone: "no witness ever established that the cell phone and its data were recovered pursuant to a search incident to his arrest. Officer Thue simply testified that he 'observed a cell phone recovered from the defendant,' but no one testified to the timing of appellant's arrest (that it preceded or followed the recovery and search of the contents of the phone) or more importantly to the legal theory relied upon in the seizure of the data from the cell phone . . . [record citation omitted] Thus, according to the facts presented, Thue could not rely on *Diaz* to lawfully recover any data from the phone."

While Allen objected to the admissibility of the text messages taken from his cell phone, he never challenged the validity of the search itself at trial. Having failed to file a motion to suppress on this ground, Allen may not now argue the search of the cell phone was not conducted incident to his arrest. In short, Allen has waived this argument. A challenge to the reasonableness of a search or seizure must be raised in the trial court to preserve the point for review. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896.) "[I]t would be wholly inappropriate to reverse a superior court's judgment for error it did not commit and that was never called to its attention." (*Ibid,* fn. omitted.) Having failed to

raise the issue at trial, Allen cannot now rely on a gap in the record to avoid the good faith exception articulated in *Davis.*

II. Admission of Dates and Times of Two Text Messages

Allen argues the trial court erred in providing information to the jury relating to the dates and times of two of the text messages. Allen challenges the admission of the date and time evidence on hearsay grounds. He also contends the trial court erred in providing the information to the jury because it was never properly admitted at trial. We are not persuaded by his arguments.

During jury deliberations, the jury asked: (1) "What are the replies to the text messages brought into evidence?" and (2) "What are the dates of the text and the defendant's response?" Defense counsel stated there was no evidence of any responses. The prosecutor was able to find the dates of two of the text messages, but not the others. He acknowledged he was not familiar with the cell phone and "just d[id]n't know how to work the phone." The trial court subsequently suggested he advise the jury that they had heard all the evidence in response to the first question and that he would provide the dates and times for two texts to the jury in response to the second question. Defense counsel did not object to the trial court's proposed answers.

We find Allen has waived these claims of error. (*People v. Robinson* (2005) 37 Cal.4th 592, 634.) Allen contends the trial court provided this information to the jury "[o]ver defense counsel's objection and argument that no such evidence had been admitted during trial." Allen misreads the transcript. When the questions were initially presented to the parties, defense counsel indicated he believed there was no evidence of any responses to the texts and the answer to question 2 was the same as to question 1.

> "The court: Now, Number 2, 'what are the dates of the text and the defendant's response?' [¶] So what do the text show? Where is the phone?
>
> "[Prosecutor]: I think it is in evidence.
>
> "[Defense counsel]: I don't believe there is any evidence to that. I think it is the same. There is no evidence. If they want to see the text, they can see the text."

Later, defense counsel concurred with the trial court's proposed responses to the questions, which included the dates and times of two texts. Having failed to object, Allen may not now challenge the trial court's response to the jury's question.

III. *Pitchess* Review

Allen filed a *Pitchess* motion seeking information relating to Detective Thue "making false police reports, lying in reports, claiming statements attributed to the defendant were never said, and thus statements were fabricated in police reports." The trial court granted the motion and conducted an in camera review of Detective Thue's personnel file. Allen has requested our court review the record independently to determine whether the trial court conducted a proper *Pitchess* hearing. Such review on appeal is proper under the procedures set forth in *People v. Mooc* (2001) 26 Cal.4th 1216.

We have reviewed the transcript of the in camera hearing and conclude the trial court conducted the hearing properly, describing the nature of all complaints, if any, against the detective. Further, we find the trial court did not abuse its discretion in ruling that certain material was discoverable.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.