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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KEITH REAGAN CARTER, Defendant and Appellant.	B271107 (Los Angeles County Super. Ct. No. BA424194)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory Dohi, Judge. Affirmed.

Jared G. Coleman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, William H. Shin and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Keith Reagan Carter (defendant) appeals from his conviction of evading a peace officer causing injury, challenging the trial court's reopening of the preliminary hearing to hear additional testimony. Defendant also requests review of the in camera hearing on his *Pitchess* discovery motion.[1] We find no merit to defendant's contention, and after reviewing the sealed transcript of the in camera *Pitchess* hearing we conclude that the trial court properly exercised its discretion in finding no discoverable materials. We thus affirm the judgment.

BACKGROUND

Defendant was charged in a one count information with evading a peace officer causing injury, in violation of Vehicle Code section 2800.3, subdivision (a). It was alleged that defendant had suffered a serious or violent felony conviction, within the meaning Penal Code sections 667, subdivisions (b) through (i), and 1170.12[2] (the "Three Strikes" law), and for purposes of section 667, subdivision (a)(1). It was further alleged, for purposes of section 667.5, subdivision (b), that defendant had suffered a prior conviction for which he served a prison term, and failed to remain free of custody for a period of five years.

A jury found defendant guilty as charged. Defendant waived his right to a jury trial on the prior conviction allegations, and the trial court found them to be true. On March 17, 2016, the trial court sentenced defendant to a total term of 19 years in

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[1] See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); *People v. Jackson* (1996) 13 Cal.4th 1164, 1220; Penal Code sections 832.5 and 832.7; Evidence Code sections 1043 through 1045.

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

prison, comprised of the high term of seven years, doubled as a second strike, plus five years pursuant to section 667, subdivision (a). Defendant filed a timely notice of appeal from the judgment.

Preliminary hearing testimony

At the preliminary hearing, Los Angeles Police Officer Rodolfo Sarmiento testified that on April 28, 2014, he was driving a marked police vehicle with his partner, Officer Alex Abundis, when they passed a parked black TrailBlazer SUV. A check of the license plate number suggested the car was stolen, so Officer Sarmiento made a U-turn to return to the car. As the officers came within a block of it, the SUV began moving. As the officers followed, the TrailBlazer sped up, failed to stop at a stop sign, and continued to accelerate. When Officer Sarmiento was able to catch up to the SUV, he activated the overhead lights and siren, and notified dispatch. In response to the lights and siren the SUV accelerated, causing pedestrians to scramble out of its way. At one point, the SUV crossed into the opposite lane, causing oncoming cars to brake suddenly. The SUV then turned and continued travelling at about 45 to 50 miles per hour in a 35 miles per hour zone. The SUV reached speeds of 65 to 75 miles per hour, and failed to stop for several stop signs. Finally, when the driver of the SUV attempted a sharp turn, the vehicle collided with a house, flipped over twice, and landed on its passenger side.

The officers stopped, got out of their car, and ran toward the SUV, where the driver was seen making his way to the back of the vehicle, and then unsuccessfully attempting to exit through the jammed rear hatchback door. Another occupant of the vehicle was in the front passenger seat, unable to move. After Officer Abundis called for ambulances, the passenger was extracted, screaming in pain, with obvious injuries to her forehead and right

arm. Both defendant and his passenger were then transported to the hospital.

The entire pursuit lasted about a minute and a half, covering a distance of about 1.2 miles. At times the police car was directly behind the SUV, with its red forward facing lights activated. A police airship was overhead during the pursuit, and other police units arrived on the scene right after the collision. The pursuit, collision, and aftermath were recorded on the police vehicle's video camera.

Officer Sarmiento identified defendant in court as the driver of the SUV.

DISCUSSION

I. Correction of preliminary hearing testimony

A. Section 995a request

Defendant contends that the court erred in allowing testimony to correct an omission in the evidence at the preliminary hearing, rather than remanding the matter to the magistrate for that purpose. He also contends that the alleged error affected the jurisdiction of the court to try him, and thus requires reversal of his conviction without regard to prejudice.

Defendant was charged with a violation of Vehicle Code section 2800.3, which is defined as a violation of Vehicle Code section 2800.1, with serious bodily injury. (Veh. Code, § 2800.3, subd. (a).) A violation of Vehicle Code section 2800.1 occurs when a driver "willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle . . . if all of the following conditions exist: [¶] (1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) The peace officer's motor vehicle is distinctively marked. [¶] (4) The peace officer's motor vehicle is

operated by a peace officer . . . , and that peace officer is wearing a distinctive uniform." (Veh. Code, § 2800.1, subd. (a).) Evidence of each of the enumerated elements was presented at the preliminary hearing, except that the pursuing officer was wearing a distinctive uniform.

Two days before the case was called for jury trial, defendant filed a motion pursuant to section 995, to dismiss the information. In general, a section 995 motion is brought to set aside the information, on the ground that "the defendant had been committed without reasonable or probable cause." (§ 995, subd. (a)(2)(B).) Defendant's section 995 motion is not included in the appellate record; however, it was apparently based upon the assertion that defendant had been committed without reasonable or probable cause because no evidence was presented at the preliminary hearing that the pursuing officer was wearing a distinctive uniform.

In response to defendant's section 995 motion the prosecutor asked the trial court for leave to supplement the preliminary hearing testimony, pursuant to section 995a, which provides in relevant part: "(b)(1) Without setting aside the information, the court may, upon motion of the prosecuting attorney, order further proceedings to correct errors alleged by the defendant if the court finds that such errors are minor errors of omission, ambiguity, or technical defect which can be expeditiously cured or corrected without a rehearing of a substantial portion of the evidence. The court may remand the cause to the committing magistrate for further proceedings, or *if the parties and the court agree*, the court may itself sit as a magistrate and conduct further proceedings . . . . [¶] (2) Any further proceedings conducted pursuant to this subdivision may include the taking of testimony and shall be deemed to be a part of the preliminary examination." (Italics added.)

The trial court allowed the prosecution to call Officer Abundis, who testified that he and Officer Sarmiento were in uniform that day, similar to the uniform he was wearing in court. The court noted for the record that the officer was wearing an "L.A.P.D. navy blue uniform with badge, neck tie, name tag, utility belt, the whole nine yards." Defense counsel declined cross-examination. The trial court found that the uniform element had been satisfied, and denied the defense motion to dismiss.

Defendant claims to have objected to having the trial court act as magistrate, and thus the parties did not all agree to the procedure, as required by section 995a, subdivision (b)(1). Although the record does not show that defense counsel expressly agreed to having the trial court hear the supplemental evidence, she did not specifically object to the procedure. She did object to allowing the prosecution the opportunity to present *any* supplementary evidence, and she asked that the court simply grant the section 995 motion to dismiss the information. As respondent observes, once the court denied that request and decided to hear the evidence, there was no specific objection to proceeding in the same court. Defense counsel merely said, "May I just lodge an untimely objection?" The court replied, "Noted." Defense counsel's failure to object to a procedure employed by the trial court may be deemed to be implied consent to the procedure. (Cf. *People v. Francis* (1969) 71 Cal.2d 66, 74-75 [amendment of information].)

B. No jurisdictional error

Assuming that defense counsel's unspecific objection was sufficient or that section 995a requires an express agreement, we reject defendant's contention that the alleged error was a jurisdictional one which requires reversal per se. Defendant has cited no authority directly relating to consent under section 995a.

Instead, defendant contends that a trial court loses jurisdiction to try a defendant whenever it fails to follow all procedural rules relating to the formation of the information.

Defendant fails to make any distinction between errors which affect the fundamental jurisdiction of the court and errors which amount to an excess of jurisdiction. A lack of fundamental jurisdiction is "'"an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." [Citation.]'" (*People v. Lara* (2010) 48 Cal.4th 216, 224, quoting *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) A court may have fundamental jurisdiction but lack the power to act without the occurrence of certain procedural prerequisites; when it does so, it acts in *excess* of jurisdiction. (*Lara*, at pp. 224-225; *Abelleira*, at p. 288.)

Thus, in general, the failure to follow a statutory procedural rule is merely an excess of jurisdiction. (*People v. Silva* (1981) 114 Cal.App.3d 538, 549.) "'Most procedural steps, including those which are regarded as "mandatory," are not jurisdictional. Errors or omissions in compliance with them are not fatal to the fundamental subject matter jurisdiction of the court [citation] nor to its jurisdiction to act.' [Citation.] 'Frequently, the term, "jurisdictional" has been used to describe the mandatory nature of the rule. [Citations.] However, "[t]he term 'jurisdiction' is used in many senses. [Citation.] The term is not synonymous with 'mandatory' . . . ." [Citations.] The failure to comply with a mandatory procedural rule does not render a ruling void.' [Citation.]" (*People v. Valdez* (1995) 33 Cal.App.4th 1633, 1638-1639 (Valdez).)

We agree with respondent that the alleged error did not deprive the trial court of jurisdiction. "Illegalities in pretrial commitment proceedings, other than those which are 'jurisdictional in the fundamental sense,' are not reversible error

per se on an appeal from the subsequent trial. Rather, 'defendant [must] show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination.' [Citation.]" (*People v. Alcala* (1984) 36 Cal.3d 604, 628, quoting *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.) Thus, to become jurisdictional error in the fundamental sense, it must be shown to have infringed a fundamental right of defendant. (*Valdez, supra*, 33 Cal.App.4th at p. 1639.)

The authorities on which defendant relies do not hold otherwise, as they involved, not merely a failure to adhere to statutory procedures, as defendant suggests, but a violation of the "constitutional mandate" that the information charge only those crimes shown by evidence presented in a preliminary hearing or before a grand jury. (*Jones v. Superior Court* (1971) 4 Cal.3d 660, 664-666; see *People v. Nogiri* (1904) 142 Cal. 596, 598; *People v. Burnett* (1999) 71 Cal.App.4th 151, 177; *People v. Winters* (1990) 221 Cal.App.3d 997, 1004-1007; *People v. Bomar* (1925) 73 Cal.App. 372, 378; Cal. Const., art. I, § 14.) Here, defendant expressly acknowledges that the error did not violate his right to due process, and he makes no other constitutional claim.

Defendant suggests that the court had no jurisdiction to proceed without his consent because it was the wrong court. He points out that even after the unification of the municipal and superior courts, "the basic procedural steps -- the filing of a complaint before a magistrate, the holding of a preliminary examination before a magistrate, and the filing of an information and arraignment on the information before a superior court judge -- remain the same." (*People v. Crayton* (2002) 28 Cal.4th 346, 359.) Since trial court unification, however, the magistrate and the trial judge are both judges of the superior court even though

they serve different functions. (See generally, *People v. Richardson* (2007) 156 Cal.App.4th 574, 586.) The superior court has jurisdiction in all felony proceedings. (See Cal. Const., art. VI, § 10.) "'[T]he jurisdiction of a multijudge, multidepartment superior court is vested in the court as a whole and if one department exercises authority in a matter which might properly be heard in another such action, although 'irregula [r],' it does not amount to a defect of jurisdiction.' [Citation.]" (*People v. Madrigal* (1995) 37 Cal.App.4th 791, 795.) Thus, if the trial court erred in this case by hearing the additional evidence without defendant's consent, it did not deprive the court of its jurisdiction.

C. No prejudice

"No judgment shall be set aside . . . for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) A miscarriage of justice due to state law error occurs when it appears that a result more favorable to the appealing party would have been reached in the absence of the alleged error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) It is the defendant's burden to demonstrate the reasonable probability of a different result. (See *People v. Hernandez* (2011) 51 Cal.4th 733, 746.)

Respondent contends that defendant cannot show prejudice, because the trial court did not err and there was no reasonable probability that the magistrate would have ruled differently. We agree. The trial court did not err in finding that the uniform issue was a minor omission which could be "expeditiously cured or corrected without a rehearing of a substantial portion of the evidence." (§ 995a, subd. (b)(1).) "[A] 'minor omission' refers to one that is *comparatively* unimportant

. . . when considered in relation to the balance of the evidence required in order to hold the accused to answer." (*Caple v. Superior Court* (1987) 195 Cal.App.3d 594, 602 (*Caple*).)

Defendant suggests that no omission can be minor when it results in the elimination of an element of the crime. We agree that to hold defendant to answer, "there must be *some* showing as to the existence of each element of the charged crime [citation]." (*Williams v. Superior Court* (1969) 71 Cal.2d 1144, 1148.) However, the question before the trial court is not simply whether the information would fail without an omitted element. "[G]auging the magnitude of the defect by its effect on the prosecution's case . . . would totally eviscerate section 995a, subdivision (b)(1), by permitting its use only when the omitted evidence was unnecessary in the first instance." (*Caple, supra*, 195 Cal.App.3d at pp. 601-602.) Rather, an omission may be deemed minor when it was "corrected by very brief testimony, did not involve a substantial rehearing of evidence, and, even assuming the omission prevented a finding of probable cause, did not go to the heart of the case." (*Id.* at p. 604.)

Defendant argues that the uniform element went to the heart of the case and required a substantial rehearing because the prosecution would be required to prove that he knew his pursuers were police officers. However, the basis for defendant's knowledge was already shown at the preliminary hearing when Officer Sarmiento testified that he was with Officer Abundis, driving a marked police vehicle while he pursued the stolen car for over a mile with overhead lights and siren activated, as defendant sped past stop signs endangering pedestrians and oncoming cars, with a police helicopter overhead. The magistrate could reasonably infer from this evidence that defendant most certainly knew he was being pursued by the police. (See *People v. Hudson* (2006) 38 Cal.4th 1002, 1010-1011.)

Defendant's comparison with *Garcia v. Superior Court* (2009) 177 Cal.App.4th 803, is misplaced. There, remand involved a substantial rehearing, as the omitted evidence went to the "core conduct, or actus reus, . . . of resisting arrest," and the preliminary hearing transcript contained "no facts from which the magistrate could have inferred that (1) defendant was subject to a lawful detention, (2) the officer made an attempt to detain defendant, and (3) defendant ignored or evaded the officer's attempt to lawfully detain him." (*Id*. at p. 821.)

Here, by contrast, the testimony was brief and correction of the omission essentially required a single question: Were the officers wearing distinctive uniforms? Officer Abundis testified that during the pursuit, he and Officer Sarmiento were in uniforms identical to what Officer Abundis was wearing in court. The trial court described the officer's uniform for the record. No rehearing is required where "the omitted statement essentially required only one additional question and answer." (*Caple, supra*, 195 Cal.App.3d at p. 603.) We conclude that the omission was minor.

We agree with respondent that as the trial court correctly found the omission to be minor, there is no reasonable probability that the result would have been different had the magistrate heard the very brief testimony of Officer Abundis. Thus, if the trial court erred in failing to remand the matter to the magistrate, any such error was harmless.

II. *Pitchess* review

Prior to trial, defendant brought a *Pitchess* motion for the discovery of all material in the personnel files of Officers Sarmiento, Abundis, Krieg and Rothmich. The trial court granted the motion, conducted an in camera review on the limited issue of falsity or false police reports, and determined that there were no discoverable items in the records produced.

Defendant requests that we review the sealed transcript of the in camera review for possible error. We review the trial court's determination for an abuse of discretion. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221.)

The records produced in the trial court were not retained, but during the in camera hearing the trial court examined and described each one, and stated reasons for its determination. We have the sealed transcript of that hearing before us, and find it alone sufficient to review the trial court's determination. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229.) Upon review we conclude the trial court properly exercised its discretion in determining that the documents produced complied with the scope of the *Pitchess* motion, and that none of the documents or information should be disclosed to the defense.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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