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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. STEVEN JACKSON, Defendant and Appellant.	B264585 (Los Angeles County Super. Ct. No. LA075502)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael V. Jesic and Gregory A. Dohi, Judges. Conditionally reversed with directions.

Stanley Dale Radtke, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Stephanie A. Miyoshi and William Frank, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Steven Jackson appeals from a judgment of conviction entered after a jury found him guilty of corporal injury to a spouse or cohabitant (Pen. Code, § 273.5, subd. (a)),[1] in the commission of which he personally used a deadly or dangerous weapon, a broom (§ 12022, subd. (b)(1)), and dissuading a witness from testifying (§ 136.1, subd. (a)). Jackson admitted a prior serious felony conviction, constituting a strike within the meaning of the three strikes law (§§ 667, subds. (a)(1), (b)-(i), 1170.12).

On appeal, Jackson contends the trial court violated his constitutional right to self-representation by revoking his pro. per. status without adequate cause. Jackson also challenges the sentence enhancement for use of a deadly or dangerous weapon on the basis that the four-foot hollow plastic broom he used was not a deadly or dangerous weapon. He also contends that the trial court failed to instruct the jury on late discovery provided by the prosecution and that denial of his *Pitchess*[2] motion was in error.

As to the revocation of Jackson's pro. per. status, we find the trial court failed to consider whether Jackson's conduct

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

[2] A defendant's motion for discovery of information in a police officer's personnel file that is relevant to the defendant's ability to defend against the charges is commonly referred to as a "*Pitchess* motion," based on the standard for discovery first articulated by our Supreme Court in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

affected the integrity of the trial and whether alternative sanctions were appropriate. We also conclude there is insufficient evidence to support the jury's finding that the broom was a deadly or dangerous weapon. Jackson's other contentions lack merit.

We conditionally reverse, and remand to the trial court for a hearing consistent with this opinion on whether Jackson's pro. per. status was properly terminated. If the court determines that Jackson is not entitled to represent himself in a new trial, the judgment should be reinstated, but the one-year weapon use enhancement and the five-year enhancement under section 667, subdivision (a)(1), must be stricken, and Jackson is to be resentenced. If the court determines that Jackson is entitled to represent himself, the trial court should order a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

Jackson was charged in an information with corporal injury to a spouse or cohabitant (§ 273.5, subd. (a); count 1); making criminal threats (§ 422, subd. (a); count 2); and dissuading a witness from testifying (§ 136.1, subd. (a); count 3). The information specially alleged as to count 1 that in the commission of the offense Jackson personally used a deadly and dangerous weapon, a broom, in violation of section 12022, subdivision (b)(1),[3] and that this caused the crime to be a serious felony

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[3] Section 12022, subdivision (b)(1), provides a sentence enhancement where the defendant personally uses a "deadly or dangerous weapon" in the commission of a felony. The information alleged, and the jury found true, that Jackson used a

pursuant to section 1192.7, subdivision (c)(23). The information also alleged as to counts 1 and 2 that Jackson had one prior conviction of a serious felony, which constituted a strike within the meaning of the three strikes law (§§ 667, subds. (b)-(j), 1170.12). The information alleged that the prior strike conviction supported a five-year sentence enhancement on counts 1 and 2 (§ 667, subd. (a)(1)). Jackson pleaded not guilty and denied the special allegations.

B. *Evidence at Trial*

1. *October 6, 2013 Domestic Violence Incident* (*§ 273.5; Count 1*)

Jackson and Laurence Yhuello, his girlfriend and business partner, lived together in an apartment in North Hollywood. On October 6, 2013 they got into an argument because Yhuello believed Jackson was not spending enough time with her. The argument escalated into a physical altercation when Yhuello threw a pineapple at Jackson. Jackson wrestled Yhuello to the floor, and physically restrained her. He had a phone charger around his neck, and Yhuello grabbed it and tried to pull the cord in order to hurt him. Jackson held Yhuello's arm so she could not pull the cord. Yhuello began to scream. Jackson put his hand over her mouth, and squeezed her jaw to stop her from

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"deadly *and* dangerous weapon" in the commission of the crime. However, the jury had been instructed with CALCRIM No. 3145 on the definition of a "deadly or dangerous weapon." Because we find there was not substantial evidence to support a finding that the broom was a deadly or dangerous weapon, the variance from the statutory language does not affect our analysis.

screaming. She recently had gum surgery, and one of her stitches popped open, causing her gum to start bleeding.

After Jackson let Yhuello up, she went into the bedroom. As she bent over to put on her shoes, she felt a burning sensation on her buttocks. She turned and saw Jackson holding a small "house" broom with both hands. The broom was about four feet tall[4] with a hollow plastic stick, a handle, and "hairs" on the end. Yhuello described the broom, but it was not introduced into evidence at trial.

Jackson hit her lower back, buttocks, and legs with the broom. Yhuello did not initially feel pain, but she felt pain later the following day. She also had noticeable bruises on her buttocks, chin, and arm. She did not receive medical treatment for her injuries.

After the incident, Yhuello went to the police station to report the incident. She spoke to Los Angeles Police Department (LAPD) Officer Oswaldo Pedemonte. Yhuello was crying and visibly upset. Yhuello described the incident, and Pedemonte took photographs of bruising and redness on Yhuello's chin and arm. He did not take photographs of her buttocks. The day after the incident Yhuello took photographs of her buttocks, chin, and arm with her cell phone, showing red and blue bruises.

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[4] Jackson asserts that the evidence showed that the broom was only two feet tall, relying on statements he made in his conversation with Yhuello in jail calls. However, the reference to the two-foot-tall broom is part of a conversation in which Jackson coached Yhuello on how she should testify at trial. Yhuello later testified that the broom came up above her waist to her sides, approximately four-feet high.

Yhuello gave her apartment key to LAPD Officer Nathan McDougle. When McDougle entered the apartment, he found Jackson sitting on the couch, and McDougle placed him under arrest. Jackson did not appear to have any visible injuries.

Yhuello told her adult children, Jennifer and Christopher Hatton, what had happened. As part of her description, Yhuello told Jennifer that Jackson had choked her.[5]

On October 8, 2013 Yhuello obtained a criminal protective order against Jackson. The order required Jackson to have no personal, electronic, or telephonic contact with Yhuello. The order states that "Defendant was personally served with a copy of this order at the court hearing . . . ."

2. *Prior Domestic Violence Incidents* (*Evid. Code, § 1109 Uncharged Conduct*)

At trial the People presented evidence of three prior domestic violence incidents involving Jackson. On November 9, 2012 LAPD Officer Freddy Gonzalez responded to Jackson and Yhuello's apartment after receiving a report of domestic violence. Yhuello appeared fearful of Jackson. Yhuello told Gonzalez that she had demanded that Jackson move out, and she threw his clothes around the apartment. They got into a fight, and Jackson used a PVC pipe to pin Yhuello to the wall. Gonzalez observed red marks on Yhuello's left shoulder area. Yhuello told Gonzalez

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[5] Yhuello similarly told Pedemonte that she screamed, and Jackson squeezed her lower jaw hard with one hand and put the other on her throat, restricting her airway. Jackson told her, "Stop talking or I will silence you forever." This statement was the basis of count 2 for making criminal threats. However, the jury found Jackson not guilty on this count.

she did not want a restraining order, and Jackson was not arrested.

On May 31, 2013 Yhuello called 9-1-1, stated that she and Jackson got into an argument, and that Jackson strangled her until she could not breathe, pushed her against a wall, slapped the back of her head, and pulled her hair. At trial Yhuello could not remember the specific details of the incident. LAPD Officer Sergio Moreno and his partner responded to the domestic violence radio call, and Moreno talked to Yhuello outside the apartment. Yhuello described the incident to Moreno, including that Jackson had pressed his two thumbs against her throat, causing her to stop breathing. Moreno observed redness to the back of Yhuello's neck. Moreno's partner photographed her injuries, including a black eye, bruised chin, and red marks on her neck.

On June 13, 2009 Jackson and his former girlfriend, Laurie Rose, were on the way home from dinner when they got into an argument. While Rose was driving on the freeway, Jackson tried to grab the steering wheel to pull the car over to the side of the road. Once Rose got off the freeway, Jackson began hitting her with both fists 10 or 15 times on her face, arm, and side. Rose suffered pain in her jaw, arm, side, and hip. She called the police the following day, and obtained a restraining order against Jackson.

3. *October 14, 2013 to November 20, 2013 Jail Calls to Yhuello (§ 136.1, Subd. (a); Count 3)*

Between October 14 and November 20, 2013 Jackson called Yhuello 42 times from jail. The calls were recorded. In an October 14, 2013 call, Jackson told Yhuello: "Don't show up to

court, you hear me?" Yhuello responded, "No, okay, I won't." Jackson told her, "they're going to be trying to get a hold of you . . . ." She told him, "Don't worry about it . . . I'm gone at 7:30 in the morning and I come home at 10 o'clock at night."

The following day Jackson called Yhuello, and asked if anyone had tried to get a hold of her. She said a detective had knocked on her door at 6:30 a.m. and left his card, but she did not call him. Jackson responded, "Yeah, good." He cautioned that the police were "going to try earlier and earlier," and said he was going to court on October 21. Yhuello told him not to worry because she was not answering the door. She said, "I'm going to keep myself invisible." Jackson then told Yhuello, "Even if they talk to you, you don't have to say anything," and "even if you go to court you don't have to say anything." He added, "Just sit there and be quiet . . . ."

Later in the conversation, Yhuello told Jackson, "I see that I got broomstick marks all over my legs and my butt." Jackson asked if "they" took pictures, and Yhuello responded, "No, I didn't show them my butt. They took pictures of my nose but my, my face, but that's it." She told Jackson that she had three bruises on her buttocks, and he was a "freaking maniac to hit me with a . . . broom stick when my back is turned to you." But she added, "no, they didn't see that." She told Jackson she took a picture of herself and emailed it to him. Jackson responded, "remember this line is not secure, okay?"

In a conversation on November 19, 2013, Jackson told Yhuello, "They're trying to pit us against each other." He then told her that "[i]n the police report, the cop said that I have beat you with a broom. . . . That is the only charge that I haven't been able to beat . . . because they're saying it's a deadly weapon, so

it's special allegations of beating someone with a broom." He added, "Putting a broom in my hand puts me in a coffin."

Jackson told Yhuello, "So you can't mention that I had a broom at all." She told him it was already on the record. He responded that he understood, "[b]ut when you get to trial, you can change your mind." "[L]ike look, when you go on the witness stand, I'm going to say, 'Did you see a broom in my hand?' You're going to say no. Did you see me go get a broom? No." He reiterated, "That's what you have to say. Remember that. You didn't see a broom in my hand and you didn't see me go get the broom, okay?' She answered, "Yes."

Later in the call they discussed Yhuello being contacted to testify at trial. Jackson told her, "They're going to contact you. Trust me. I need you to go to trial now. Remember, I told you not to show up, and you showed up and you talked? So now . . . you have to go to trial. You're my only witness." Jackson said that because Yhuello showed up at the pretrial, now he had to "fix it." He reminded her that she did not see the broom in his hand and did not see him go get it. She agreed, and said, "I didn't see anything." Yhuello said she would help him. He replied, "Good. It has to be done on the witness stand. Um, there can't be no mention of a broom."

C. *Jury Verdict and Sentencing*

The jury found Jackson guilty of corporal injury to spouse or cohabitant and found true the allegation Jackson personally used a deadly and dangerous weapon, a broom, in the commission of the crime. The jury also convicted Jackson on count 3 for dissuading a witness from testifying. As to count 2 for making

criminal threats, the jury found Jackson not guilty. Jackson admitted the alleged prior convictions.

The trial court sentenced Jackson to an aggregate term of 12 years eight months in state prison. On count 1 the court imposed the middle term of three years, doubled under the three strikes law, plus one year for the weapon use enhancement and five years for the prior serious felony conviction enhancement. The court imposed a consecutive term of eight months (one-third the middle term) on count 3.[6]

DISCUSSION

A. *The Trial Court Erred in Revoking Jackson's Pro. Per. Status*

1. *Proceedings Below*

a. *The trial court discusses the protective order with Jackson and grants his request for pro. per. status.*

On November 5, 2013, at the preliminary hearing setting, Jackson made a *Faretta*[7] motion to allow him to represent himself. The court[8] inquired of Jackson as to his educational

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[6] The information only charged Jackson with the prior conviction of a serious felony under the three strikes law on counts 1 and 2. Accordingly, the trial court only doubled the sentence on count 1.

[7] *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562] (*Faretta*).

[8] Judge Karen J. Nudell.

background, then told him he needed to fill out the pro. per. waiver forms.

The prosecutor noted that his office "made a pre-prelim[inary hearing] offer last week that was not even supposed to be held open until today, which I did as a courtesy to [defense counsel and Jackson], and did not amend to add these new allegations that stem from the fact that Mr. Jackson has been dissuading the victim from coming to court. He's been violating the protective order that's currently in place."

The prosecutor made a record of the plea offer, then added that if Jackson did not accept the offer on that date, the People were going to add at least one count of dissuading a witness and several counts of violating the protective order in place. The prosecutor added that "it might be in [Jackson's] best interest for him to really think about that before we put the case over and before he decides to represent himself." Jackson responded, "No." The prosecutor then told the court she would file the amended complaint and serve it that day.

The court proceeded to discuss with Jackson his signing of the pro. per. waivers. During this conversation, Jackson stated, "Another thing just for the record, Ma'am, I never knew that there was a protective order." The court advised Jackson that he was served with it in the arraignment court. The court told Jackson it had a copy of the order in its file. Jackson responded, "I was never given it. It was never given to me. I never signed anything." The court stated, "You didn't have to sign anything. It was read to you in open court." Jackson responded, "It was not. . . . I never was read it."

Defense counsel interjected, "It is interesting, your honor, that I do not have a copy in my file. So there's some question."

The prosecutor offered to serve Jackson at that time, and the court said it would read the order to Jackson. Defense counsel asked to hold off until they returned to court that afternoon.

Later that day the court accepted Jackson's waivers, and granted him pro. per. status. The court also granted Jackson indigent funds for his defense. The record does not indicate that Jackson was served with or read a copy of the protective order at the hearing. The court set the preliminary hearing for November 15, 2013.

b. *The trial court has a second discussion of the protective order with Jackson, then revokes his pro. per. status.*

During a January 21, 2014 pretrial hearing on discovery, the prosecutor provided to Jackson, among other things, CD's and transcripts of Jackson's jail calls to Yhuello. The prosecutor brought to the court's[9] attention "that there are approximately 40 or so additional jail calls. This defendant continues to call our victim in violation of the court order." Jackson responded, "I was never given a court order to stay away." The prosecutor told the court there was a protective order, and provided the court a copy of the file-stamped October 8, 2013 order.

The trial court initially told Jackson, "I'm suspending your [tele]phone privileges. Period. And if you make one more phone call or use your pro. per. status to some—in some way contact the victim I'm going to revoke your pro. per. status. I may actually revoke your pro. per. status. I want to make sure I am doing it properly because it's my guess you're using your telephone

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9 Judge Michael V. Jesic.

privileges to contact the victim." The court stated that the minute order would reflect that Jackson's telephone privileges were terminated.

After a break in the proceedings, the trial court stated that it had "a copy of a valid protective order, which was served on the defendant." The prosecutor pointed out that this was the October 8, 2013 order. The court stated that the order "specifically says here that the defendant is not to have any personal, electronic, telephonic, or written contact with the protected person." The court inquired, "what is the nature of the phone calls?" The prosecutor responded, "There were some calls made in the first CD where he specifically tells her not to come to court . . . . But they do involve his court appearances and the facts of the case . . . ." The prosecutor noted she had two CD's of jail calls, with a total of 20 calls between October 21, 2013 and November 15, 2013.[10]

Jackson responded that he previously asked his attorney if there was a protective order against him, and she told him that "one was never given." He added that at a previous hearing the prosecutor tried to give him a copy of the protective order, but the court did not allow it because it needed time to read the order to him. Further, Jackson recounted that his attorney did not have a copy of the order. Jackson stated, "that's in the minutes each time I came to court or that I asked for the protective order and it was never granted."

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[10] The prosecutor referred to calls made on November 15, 2014; however, we assume she intended to refer to calls made in 2013 because the hearing was held in January 2014.

When the court noted that the order stated Jackson was personally served, Jackson protested, "I never received it. I even stated that in court four different times. And it's in the minutes." The trial court responded, "You can state all you want. There's notice that it was personally served on you." The court then ruled, "And so based on that and based on a continuing—that you are continuing to violate the court's order . . . not to contact the [victim], your pro. per. status is now terminated." The court also read into the record the minute order from October 8, 2013, which stated, "Court orders in findings defendant is served with a copy of the protective order in open court."

2. *Standard of Review*

We review a trial court's decision to terminate a defendant's pro. per. status under the abuse of discretion standard. (*People v. Carson* (2005) 35 Cal.4th 1, 12 (*Carson*); *People v. Doss* (2014) 230 Cal.App.4th 46, 54 (*Doss*).) In doing so, we "accord due deference to the trial court's assessment of the defendant's motives and sincerity as well as the nature and context of his misconduct and its impact on the integrity of the trial in determining whether termination of *Faretta* rights is necessary to maintain the fairness of the proceedings." (*Carson*, *supra*, at p. 12; *Doss*, *supra*, at p. 54.)

3. *A Defendant's Pro. Per. Privileges May be Revoked Where the Defendant's Conduct Seriously Threatened the Core Integrity of the Trial and Lesser Sanctions Cannot Ensure a Fair Trial*

"The Sixth Amendment . . . implies a right of self-representation." (*Faretta*, *supra*, 422 U.S. at p 821.) As the

Supreme Court held in *Faretta*, "It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' [Citation.]" (*Id*. at p. 834; accord, *People v. Butler* (2009) 47 Cal.4th 814, 824-825 (*Butler*).)

However, the right of self-representation is not absolute. (*Faretta*, *supra*, 422 U.S. at p. 834 & fn. 46; *Butler*, *supra*, 47 Cal.4th at p. 825.) The trial court "'may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct,'" where the conduct "threatens to 'subvert "the core concept of a trial" [citation] or to compromise the court's ability to conduct a fair trial [citation]' . . . . [Citation.]" (*Butler*, *supra*, at pp. 825, 826.) This is true whether the misconduct occurs inside or outside the courtroom. (*Id*. at p. 826; *Carson*, *supra*, 35 Cal.4th at p. 8.)

Less serious misconduct may justify restrictions on a defendant's pro. per. privileges, but it does not justify depriving a defendant of the right to self-representation. (*Carson*, *supra*, at p. 13 [the defendant's improper acquisition of a murder book and prior attempts to suborn perjury and possibly intimidate a witness did not support revocation of pro. per. status without determination by court whether the defendant's conduct "seriously threatened the core integrity of the trial"]; *Ferrel v. Superior Court* (1978) 20 Cal.3d 888, 892 [where the defendant violated jail rules, resulting in suspension of pro. per. privileges, court should have warned the defendant of dangers of

representing himself under these circumstances, but should not have revoked his pro. per. status].)[11]

The court's inquiry should address "how the misconduct threatened to impair the core integrity of the trial." (*Carson*, *supra*, 35 Cal.4th at p. 11; accord, *Butler*, *supra*, 47 Cal.4th at p. 826.) It is true, as argued by the People, that a defendant's intimidation of a witness could be a sufficient ground for a court to find that the defendant's conduct has undermined the integrity of the trial such that his pro. per. status should be revoked. "One form of serious and obstructionist misconduct is witness intimidation, which by its very nature compromises the factfinding process and constitutes a quintessential 'subversion of the core concept of a trial.' [Citation.]" (*Carson*, *supra*, 35 Cal.4th at p. 9.) "Threatening or intimidating acts are not limited to the courtroom. [Citation.] When a defendant exploits or manipulates his in propria persona status to engage in such acts, wherever they may occur, the trial court does not abuse its discretion in determining he has forfeited the right of continued self-representation." (*Ibid.*)

However, in considering whether to revoke a defendant's pro. per. status, the court must consider a number of factors, including "the availability and suitability of alternative sanctions." (*Carson*, *supra*, 35 Cal.4th at p. 10.) Further, "[m]isconduct that is more removed from the trial proceedings, more subject to rectification or correction, or otherwise less likely to affect the fairness of the trial may not justify complete

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11 *Ferrel v. Superior Court*, *supra*, 20 Cal.3d 888 was abrogated to the extent it held that a defendant's status may only be revoked based on in-court conduct, but it otherwise remains good law. (See *Butler*, *supra*, 47 Cal.4th at pp. 826-827.)

withdrawal of the defendant's right of self-representation. [Citations.] The court should also consider whether the defendant has been warned that particular misconduct will result in termination of in propria persona status." (*Ibid*.)

In *Carson*, the court found that the record was insufficient to show that these factors were considered even though there was evidence before the trial court that the defendant had acted improperly in taking a copy of the murder book, and that he had previously attempted to suborn perjury and possibly intimidated a prosecution witness. (*Carson*, *supra*, 35 Cal.4th at p. 13; see also *People v. Becerra* (2016) 63 Cal.4th 511, 519-520 [reversing conviction where there was no factual support in the record for the trial court's finding that the defendant had been dilatory in his preparation of the case, which was the basis for the trial court's revocation of his pro. per. status].)

Similarly, in *Doss*, the court found the defendant posed a serious security risk from his behavior and use of his telephone privileges to conduct illegal business from jail and threaten a codefendant. (*Doss*, *supra*, 230 Cal.App.4th at p. 52.) The Court of Appeal noted that "at least some of this conduct may have justified a revocation of in propria persona status." (*Id*. at p. 57.) However, the court reversed the judgment because the trial court did not consider alterative sanctions, in particular, the possibility of revoking the defendant's telephone privileges. (*Ibid*.)

4. *The Trial Court Failed To Consider the Impact of Jackson's Conduct and Imposition of Lesser Sanctions*

In this case, the trial court initially suspended Jackson's telephone privileges, finding that Jackson was likely using his

telephone privileges to contact Yhuello. It was only after a break in the proceedings during which the court reviewed the protective order that it decided, based on Jackson's violation of the protective order, to terminate his pro. per. status.

However, it appears from the record that the court never listened to the calls or reviewed a transcript to determine whether Jackson's conduct on the calls threatened to impair the integrity of the proceedings. To the contrary, the court asked the prosecutor, "[W]hat is the nature of the phone calls?" The prosecutor responded that Jackson told Yhuello not to come to court and discussed the facts of the case. The prosecutor did not provide any additional details on how Jackson was coaching Yhuello as to her trial testimony.

Moreover, while Jackson initially urged Yhuello not to come to court, she did appear, and on a later call Jackson urged her to show up as his witness at trial. Thus, it does not appear that Jackson's continued self-representation would have caused Yhuello not to appear at trial.

While it is true that Jackson deliberately sought to subvert the trial by telling Yhuello what questions he was going to ask and how she should answer them, the trial court did not have before it a record showing that Jackson had coached Yhuello on what to say. Rather, it made its decision based on Jackson's violation of the protective order by contacting Yhuello. The prosecutor had informed the court that Jackson discussed "his court appearances and the facts of the case," but not that Jackson told her how to answer his questions. The court could have found that Jackson's conduct in coaching Yhuello as to her testimony in court would have prevented a fair trial if Jackson represented

himself and examined Yhuello, but the court did not hold a hearing based on these facts or make such a finding.

Thus, it was reversible error for the trial court to revoke Jackson's pro. per. status without considering the impact of his actions on the conduct of the trial and whether alternative sanctions could protect the integrity of the proceedings. As our Supreme Court held in *Butler*, the trial court should have considered the lesser sanction of revoking Jackson's telephone access without terminating his pro. per. status. (*Butler*, *supra*, 47 Cal.4th at pp. 826-828; see also *Doss*, *supra*, 230 Cal.App.4th at p. 57 [trial court erred in failing to consider revoking the defendant's telephone privileges instead of his pro. per. status where he was using his privileges to threaten the codefendant and conducting illegal business].)[12]

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[12] The trial court based its ruling solely on the fact that Jackson violated the protective order by calling Yhuello, yet Jackson repeatedly insisted that he was never served with the order nor was it read to him in court. Jackson's attorney similarly represented that he had never received the order. The prosecutor did not serve Jackson with the order at the November 5, 2013 preliminary hearing setting, although the order was discussed. Even assuming the protective order was served on Jackson, as indicated in the protective order, however, we find his violation of the order—without findings as to whether this would obstruct the conduct of the trial—did not alone justify termination of his pro. per. status. A defendant could, for example, violate a protective order by calling the victim without attempting to influence his or her testimony. While on appeal we know Jackson intimidated Yhuello in an effort to influence her testimony, which could have supported revocation of his pro. per. status, this information was not before the trial court when it revoked Jackson's pro. per. status.

A trial court abuses its discretion when its ruling "rests on an error of law." (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 742; *In re Ray M.* (2016) 6 Cal.App.5th 1038, 1051.) The improper revocation of a defendant's pro. per. status is reversible error per se, and not subject to harmless error analysis.[13] (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8 [104 S.Ct. 944, 79 L.Ed.2d 122] ["Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless"]; *People v. Becerra*, *supra*, 63 Cal.4th at p. 520 [""Erroneous denial of a *Faretta* motion is reversible per se. [Citation.]" [Citations.] The same standard applies to erroneous revocation of pro. per. status"']; *People. v. Joseph* (1983) 34 Cal.3d 936, 946 [same].)

As our Supreme Court stated in *Carson*, "Under the circumstances, we consider it prudent to return the matter to the trial court for a . . . hearing as to the reasons for and necessity of terminating [the] defendant's right of self-representation." (*Carson*, *supra*, 35 Cal.4th at p. 13; see also *Doss*, *supra*, 230 Cal.App.4th at p. 58 [remanding case to allow trial court to determine "whether Doss's self-representation would threaten the core integrity of a new trial"].) We likewise conditionally reverse the judgment, and remand the matter to the trial court

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[13] Because improper revocation of a defendant's pro. per. status is reversible error per se, we cannot consider as part of our analysis the numerous intimidating calls made by Jackson to influence Yhuello's testimony, which calls were not before the court.

for a hearing on whether Jackson's pro. per. status was properly terminated.[14]

Because the trial court may determine that Jackson's *Faretta* rights were properly terminated, we will address the other contentions Jackson raises on appeal.

B. *There Was Not Substantial Evidence To Support the Jury's Finding that the Plastic Broom Used by Jackson Was a Deadly or Dangerous Weapon*

1. *Standard of Review*

Where the sufficiency of the evidence to support an enhancement is challenged, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the [enhancement true] beyond a reasonable doubt." (*People v. Albillar* (2010) 51 Cal.4th 47, 60; accord, *People v. Franklin* (2016) 248 Cal.App.4th 938, 947.) We draw all reasonable inferences in favor of the jury's finding, presuming the existence of every fact the jury could reasonably deduce from the evidence in support of that finding. (*People v.*

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[14] We do not reach the issue addressed in *Doss* of whether the trial court may consider the conduct of Jackson after the court's ruling in determining whether Jackson should be allowed to represent himself at a new trial. (See *Doss*, *supra*, 230 Cal.App.4th at p. 58.) The Court of Appeal there held, after supplemental briefing by the parties, that the trial court could consider incidents after the court's ruling, including the defendant's threat to kill a witness before the witness testified. (*Id*. at p. 58 & fn. 13.)

Hajek and Vo (2014) 58 Cal.4th 1144, 1197, disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Franklin*, *supra*, 248 Cal.App.4th at p. 947.)

2. *Governing Law*

Section 12022, subdivision (b)(1), provides: "A person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense."

In determining whether an object is a "deadly or dangerous weapon," the courts have divided weapons into two classes: "instrumentalities that are weapons in the strict sense, such as guns and blackjacks; and instrumentalities which may be used as weapons but which have nondangerous uses, such as hammers and pocket knives. [Citation.] Instrumentalities in the first category are "'dangerous or deadly'" per se. [Citation.] An instrumentality in the second category is only "'dangerous or deadly'" when it is capable of being used in a "'dangerous or deadly'" manner and the evidence shows its possessor intended to use it as such. [Citation.]" (*People v. Burton* (2006) 143 Cal.App.4th 447, 457; see also *People v. Aguilar* (1997) 16 Cal.4th 1023, 1029 [considering definition of "deadly weapon" for purposes of § 245, subd. (a)(1), charge for assault with a deadly weapon].) It is undisputed that a broom falls in this second category of weapons.

In *People v. Aguilar*, *supra*, 16 Cal.4th 1023, the court held as to this second category of weapons that "[o]ther objects, while not deadly per se, may be used, under certain circumstances, in a

manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue." (*Id.* at p. 1029.) The court in *Aguilar* reversed the conviction under section 245, subdivision (a), finding that hands and feet used to cause harm were not "deadly weapons" as used in the statute. (*Aguilar*, *supra*, at p. 1036.)

The phrase "dangerous or deadly," for purposes of section 12022, subdivision (b), has been defined as meaning that the defendant "'struck someone with an instrument capable of inflicting great bodily injury or death. [Citations.]' [Citation.]" (*People v. Hajek and Vo*, *supra*, 58 Cal.4th at p. 1197; accord, *People v. Wims* (1995) 10 Cal.4th 293, 302.) The term "'great bodily injury' is defined as 'a significant or substantial physical injury' beyond that which is inherent in the underlying offense. (§ 12022.7, subd. (f) . . . .)" (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047.)

In considering whether a defendant used a dangerous or deadly weapon, the courts have focused on the nature of the victim's injuries. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 224-225 [finding unknown object was dangerous or deadly weapon where victim received 20 stitches for her injuries]; *People v. Burton*, *supra*, 143 Cal.App.4th at p. 457 [finding the defendant must have used dangerous or deadly weapon where the victim received over 200 stitches and doctor testified that sharp object must have caused injury].)

The courts have also addressed what constitutes great bodily injury in the context of the sentence enhancement under section 12022.7 for a felony where a person intentionally and

personally inflicts "great bodily injury" in the commission of the offense. "An examination of California case law reveals that some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of 'great bodily injury.' [Citations.]" (*People v. Washington*, *supra*, 210 Cal.App.4th at p. 1047 [comparing California and Illinois law for purpose of whether prior conviction was a strike under California law]; accord, *People v. Escobar* (1992) 3 Cal.4th 740, 750 [evidence sufficient to support jury finding of great bodily injury based on "extensive bruises and abrasions over the victim's legs, knees and elbows, injury to her neck and soreness in her vaginal area of such severity that it significantly impaired her ability to walk"].)

In *People v. Beasley* (2003) 105 Cal.App.4th 1078 (*Beasley*), the court considered whether a broom and a plastic vacuum attachment used by the defendant to strike the victim on her arms and shoulders were deadly weapons supporting a conviction for assault with a deadly weapon under section 245, subdivision (a)(1). The court found that the evidence did not support a finding that the broom was used as a deadly weapon: "It is certainly conceivable that a sufficiently strong and/or heavy broomstick might be wielded in a manner capable of producing, and likely to produce, great bodily injury, e.g., forcefully striking a small child or a frail adult or any person's face or head. [Citation.] . . . [The defendant] did not strike [the victim's] head or face with the stick, but instead used it only on her arms and shoulders. She did not describe the degree of force [the defendant] used in hitting her with the stick, and neither the stick itself nor photographs of it were introduced in evidence. The record does not indicate whether the broomstick was solid wood or a hollow tube made of metal, fiberglass, or plastic. Its

composition, weight, and rigidity would necessarily affect the probability and likelihood that it could cause great bodily injury." (*Beasley*, *supra*, at pp. 1087-1088.)

The court also considered the injuries to the victim, and found that in contrast to the severe bruising in *Escobar* and other cases with "bruises and severe swelling" and "multiple 'serious' abrasions, lacerations, bruises, and swelling," in *Beasley* the "bruises on [the victim's] shoulders and arms are insufficient to show that [the defendant] used the broomstick as a deadly weapon." (*Beasley*, *supra*, 105 Cal.App.4th at p. 1088.)

As to the vacuum cleaner attachment, the victim testified that it was "made of plastic and used to clean the ceiling or in corners." (*Beasley*, *supra*, 105 Cal.App.4th at p. 1088.) The victim testified that the blows to her shoulder and back hurt, and her bruises were visible one week later. Neither the vacuum attachment nor a photograph of it was introduced into evidence. (*Ibid.*) The court concluded that the evidence was insufficient to establish that the plastic vacuum attachment, which the court assumed was hollow given its function, was likely to produce significant or substantial injury, and therefore could not support a finding that it was used as a deadly weapon. (*Ibid.*)

3. *There Was Insufficient Evidence That Jackson Used the Plastic Broom in a Manner Likely to Cause Significant or Substantial Bodily Injury*

Here, Yhuello testified that Jackson hit her on the lower back, buttocks, and legs with a four-foot broom with a hollow plastic stick. As in *Beasley*, there was no evidence that Jackson swung the broom with force likely to cause "significant or substantial bodily injury" (§ 12022.7, subd. (f)), nor did he hit her

on her head, face, or other sensitive area of her body. Neither the broom nor a photograph of the broom was introduced at trial. The impact initially caused a burning sensation, but it was not until the next day that Yhuello had pain and bruising on her buttocks. Yhuello's photographs of her buttocks showed red and blue bruises, but none of the bruises was described as severe. She did not receive any medical treatment for her injuries.

The injuries to Yhuello are in stark contrast to those found sufficient for an object to be a dangerous or deadly weapon in *People v. Alvarez*, *supra*, 14 Cal.4th at p. 179 (victim needed 20 stitches), *People v. Escobar*, *supra*, 3 Cal.4th at p. 750 ("extensive bruises and abrasions" and soreness so severe it impaired victim's ability to walk), and *People v. Burton*, *supra*, 143 Cal.App.4th at p. 457 (victim needed 200 stitches).

We conclude, as in *Beasley*, that there was insufficient evidence that the plastic broom used here to hit Yhuello on the buttocks, back, and legs was "'an instrument capable of inflicting great bodily injury or death.'" (*People v. Hajek and Vo*, *supra*, 58 Cal.4th at p. 1197.) The enhancement for use of a deadly or dangerous weapon is therefore not supported by substantial evidence, and must be stricken.

Jackson also argues that this court should reverse imposition of the five-year sentence enhancement pursuant to section 667, subdivision (a)(1), which was imposed for the use of a dangerous or deadly weapon. We agree. Section 667, subdivision (a)(1), only applies where a defendant is "convicted of a serious felony who previously has been convicted of a serious felony . . . ." Because the crime becomes a serious felony only if the allegation of use of a deadly or dangerous weapon is found to

be true, the five-year sentence enhancement under section 667, subdivision (a)(1), must be stricken.

C. *The Trial Court Properly Refused Defense Counsel's Request for a Late Discovery Jury Instruction*

1. *Proceedings Below*

During the examination of Yhuello, the prosecutor inquired whether she told her children that Jackson shoved or strangled her. Defense counsel objected to the question at sidebar, arguing that the prosecutor made a late disclosure of Jennifer and Christopher Hatton as witnesses, and counsel was only provided with a partial recording of Jennifer's interview.[15] Defense counsel also objected that she had not had the opportunity to interview the Hattons.

The trial court[16] overruled the objection to Yhuello's testimony as to what she told her children. The court also ruled that one of the Hattons could testify, but that bringing in both would be "excessive." The court limited the testimony to whether Yhuello told her son or daughter that Jackson choked her. The prosecutor decided to call Jennifer as a witness. The court

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15 Defense counsel also objected to the testimony as hearsay, and argued that no showing had been made that the statements fell within the exception for prior inconsistent statements. (Evid. Code, § 1235.) The trial court found an inconsistency between Yhuello's testimony as to whether she told her children that Jackson choked her and the proffered testimony that she had told this to her children. Jackson does not object to this ruling on appeal.

16 Judge Gregory A. Dohi.

allowed defense counsel to talk to Jennifer "for a couple minutes" before she testified.

Defense counsel later requested that the court instruct the jury with CALCRIM No. 306[17] on late discovery. She stated that the discovery regarding the interviews of the Hattons was provided to her office on January 5, but she did not return from vacation until January 8. The trial was continued to the following week to allow defense counsel to prepare.[18] Defense counsel also reiterated that she only had a partial recording of the interview of Jennifer. Referring to her request for CALCRIM No. 307, she argued: "I think it's fair. I was not able to prepare as well with respect to the Hattons as I wanted to, quite frankly, and that isn't my fault."

In response, the prosecutor explained that she only "found out about these witnesses . . . through one of the jail calls where Ms. Yhuello mentioned that she told her son." The investigator interviewed the children over the phone, prepared a report, and provided the CD's to defense counsel "later that same day or the

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17 CALCRIM No. 306 provides in pertinent part: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. . . . [¶] . . . [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure."

18 Jury selection began on January 14, 2015. The discovery issue first came up during the examination of Jennifer on January 20, 2015.

next day."[19] She stated that while the CD of Jennifer's interview "does start sort of in the middle of a conversation," the report "reflects the whole conversation, for the most part." The prosecutor added, "We've turned everything over."

The trial court ruled, "There's no violation of [section] 1054 because the material didn't exist 30 days before trial. It was turned over quickly after it was uncovered." The court found that because there was no discovery violation, it was not appropriate to give CALCRIM No. 306.

2. *Standard of Review and Governing Law*

"'We generally review a trial court's ruling on matters regarding discovery under an abuse of discretion standard.' [Citations.]" (*People v. Thompson* (2016) 1 Cal.5th 1043, 1105; accord, *People v. Ayala* (2000) 23 Cal.4th 225, 299.)

Section 1054.1 of California's reciprocal discovery statute requires the prosecution to disclose to the defendant or his or her attorney "[t]he names and addresses of persons the prosecutor intends to call as witnesses at trial" and "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial . . . ." (§ 1054.1, subds. (a), (f).) "'Absent good cause, such evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial. (§ 1054.7.)' [Citation.]" (*People v. Verdugo* (2010) 50 Cal.4th 263, 280 (*Verdugo*).)

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19 Jennifer similarly testified that she was first contacted by the investigator two weeks before her testimony.

"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, . . . 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*.)" (*Verdugo*, *supra*, 50 Cal.4th at p. 280.)

3. *The Prosecutor Had No Obligation To Review the Jail Calls To Determine That the Hattons were Potential Witnesses Further in Advance of Trial*

Jackson contends that the prosecution had copies of all the jail calls made between October 14 and November 20, 2013, and therefore violated the discovery statute by waiting over a year—and just two weeks before trial—to attempt to interview the Hattons based on the calls. The question before this court is whether the prosecutor had an obligation to review the jail calls to determine possible additional witnesses further in advance of trial so that she could have disclosed the names and statements of the Hattons at an earlier date. We find no such obligation under the discovery statute, and thus no discovery violation.

Our Supreme Court's holding in *Verdugo* is directly on point. There, the court found the prosecutor had not violated the discovery statute by failing to disclose a detective's opinion that it was "'possible'" that the white mark on the murder victim's car was a paint transfer from a white car, where the defendant drove a black car on the night of the murder. (*Verdugo*, *supra*, 50 Cal.4th at pp. 287-289.) Defense counsel argued that if he knew

about the detective's opinion, he might have been able to locate a paint expert to testify the mark did not come from the defendant's black car, supporting the defendant's contention that he was not the shooter. The court rejected this argument, finding that "the prosecution cannot be faulted for failing to disclose [the detective's] nonexpert opinion about the white mark, because there is no evidence that the prosecution knew [the detective's] opinion. "'Although the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him.'" [Citation.]" (*Id*. at pp. 288-289; see also *People v. Zambrano* (2007) 41 Cal.4th 1082, 1133-1134 [finding prosecutor did not violate his discovery obligations by not disclosing to the defense a letter sent by the defendant's sister to the jail where the prosecutor's office was not aware of the existence of the letter, and the prosecutor had no duty "to discover and disclose evidence in the hands of other agencies"], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)[20]

The court in *Verdugo* also addressed the disclosure of required discovery close to or at trial. A detective testified at trial that he believed acceleration marks on the street near the

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[20] The court in *Zambrano* also found no discovery violation by the prosecutor's failure to produce a second letter from the defendant's sister to the prosecutor where the letter was inadvertently not produced, but the prosecutor had offered defense counsel on several occasions to go through his files to "'make sure that everything was turned over.'" (*People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1131, 1134.) The court held that the prosecutor did not "'have the duty to conduct the defendant's investigation for him.'" (*Id*. at p. 1134.)

murder scene matched the wheelbase of the front wheels on the defendant's car. The detective examined the defendant's car to reach this conclusion only three days before he testified, and provided the notes of his measurements on the morning of his testimony. (*Verdugo*, *supra*, 50 Cal.4th at pp. 286-287.) The Supreme Court found no violation of the reciprocal discovery statue, holding: "The prosecutor produced the notes to the defense the same morning that he received them, which satisfies the statutory requirement of immediate disclosure of materials that become known during trial. [Citations.] Although defendant claims he was 'taken by surprise and . . . unable to effectively counter this new evidence,' the prosecution had no duty to obtain the evidence sooner than it did. [Citation.]" (*Id*. at p. 287.)[21]

As the Court of Appeal similarly held in *People v. Hammond* (1994) 22 Cal.App.4th 1611, "[t]here is a significant difference between failure to gather evidence immediately or to find all evidence that might subsequently become important and willful failure to comply with discovery orders." (*Id*. at p. 1623.) In *Hammond*, a week before trial the defense disclosed to the prosecution that it intended to call as a witness a friend of the defendant who would testify that during the month of the charged burglary, the friend had allowed three or four other people to drive the defendant's car. The prosecutor then used an investigator to learn that an officer had stopped the defendant in his car the day before the burglary and a week before that. (*Id*.

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[21] The court found numerous other discovery violations for failure to disclose evidence, but concluded there was "no possibility of cumulative prejudice." (*Verdugo*, *supra*, 50 Cal.4th at pp. 289-290.)

at p. 1618.) The prosecutor subpoenaed the officer, and first spoke with him the morning before he testified. (*Ibid*.)

The Court of Appeal held that the trial court properly found that there was no discovery violation, explaining "there is no general obligation to gather evidence," so "[t]here was no requirement that the district attorney find a rebuttal witness to [the friend's] testimony." (*People v. Hammond*, *supra*, 22 Cal.App.4th at p. 1624.) The court held further that under the circumstances, "appropriate disclosure would have only momentarily preceded the time the officer here was called as a witness." (*Ibid*.)

The court added that "[a] trial is not a scripted proceeding. . . . [D]uring the trial process, things change and the best laid strategies and expectations may quickly become inappropriate: witnesses who have been interviewed vacillate or change their statements; events that did not loom large prospectively may become a focal point in reality. Thus, there must be some flexibility. After all, the '"true purpose of a criminal trial'" is '"the ascertainment of the facts."' [Citation.]" (*People v. Hammond*, *supra*, 22 Cal.App.4th at p. 1624.)

Here, the jail calls were available to both the prosecution and defense counsel. Had defense counsel reviewed the calls in her possession, she would have had the same knowledge as the prosecutor that the Hattons were potential witnesses. We find the prosecutor had no obligation to review the calls in advance to '"'"conduct the defendant's investigation for him."'" (*Verdugo*, *supra*, 50 Cal.4th at pp. 288-289; accord, *Zambrano*, *supra*, 41 Cal.4th at p. 1134.) Once the prosecutor reviewed the calls, and had her investigator interview the Hattons, she immediately turned the recordings over to defense counsel.

In addition, defense counsel had 12 days from disclosure of the recorded interview of Jennifer Hatton to when she testified on January 20, 2015. As defense counsel conceded, "This was late. But they did give me a few days to prepare." Further, the trial court allowed defense counsel a brief opportunity to talk to Jennifer before she testified about what Yhuello had told her.

We conclude the prosecutor did not violate her discovery obligations, and thus the trial court properly found that a late discovery instruction should not be given.

D. *The Trial Court Did Not Err in Denying Jackson's* Pitchess *Motion*

1. *Trial Court's Denial of Jackson's* Pitchess *Motion*

While Jackson was representing himself, he filed a *Pitchess* motion seeking discovery of any evidence that Officer Pedemonte "engaged in acts of bias, dishonesty, or other acts of misconduct which are in any way relevant to the development of the defense in this manner [*sic*]." In support of his motion, Jackson submitted his own declaration stating that Pedemonte's police report was "a false portrayal of fact," that Jackson "denies now and will deny at trial that he made any criminal threats," and that the preliminary hearing transcript did not provide any "grounds for [a] credible threat." Jackson also stated that "[t]here is an audio recording of the alleged victim stating that the police report was wrong. It was never read back to her . . . before she signed it and she was never permitted to read it afterwards nor able to obtain a copy." However, Jackson did not provide the court with evidence of an audio recording or a signed record of the recording.

At the hearing on the motion, the court[22] told Jackson, "I just don't think that you set forth enough here for me to grant the *Pitchess* motion . . . . I understand you're not an attorney. But just because you asked to see someone's personnel records doesn't give you the right. And just because you say, well, I don't agree with what's written in the police report, that doesn't set up a scenario where you get to look in someone's records. I have no affidavit whatsoever that what happened that day is any different than what was written in the report, just vague accusations that it just didn't happen that way. But no alternative factual scenario and nothing to lead me to believe that something different happened."

Jackson responded, "Well, you have the preliminary transcripts that say quite the contrary. And the officer had the victim [go] to internal affairs and file[] a complete . . . ." The court interrupted Jackson, and denied the motion.

2. *Standard of Review and Governing Law*

We review the trial court's denial of a *Pitchess* motion for an abuse of discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039; accord, *Riske v. Superior Court* (2016) 6 Cal.App.5th 647, 657.)

Section 832.7, subdivision (a), provides that the personnel records of a police officer are "confidential," and "shall not be disclosed in any criminal or civil proceeding," except in compliance with Evidence Code sections 1043 and 1045. Evidence Code section 1043 requires a party seeking discovery of officer personnel records to file a motion seeking the documents,

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22 Judge Jesic.

with notice to the government agency that has custody or control over the documents. (Evid. Code, § 1043, subd. (a).) The motion must 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." (*Id.*, subd. (b)(3).)

"Good cause for discovery exists when the defendant shows both '"materiality" to the subject matter of the pending litigation and a "reasonable belief" that the agency has the type of information sought.' [Citation.]" (*People v. Gaines* (2009) 46 Cal.4th 172, 179; accord, *Riske v. Superior Court*, *supra*, 6 Cal.App.5th at p. 655.) "A showing of good cause is measured by 'relatively relaxed standards' that serve to 'insure the production' for trial court review of 'all potentially relevant documents.' [Citation.]" (*Gaines*, *supra*, at p. 179; accord, *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016 (*Warrick*).) If the defendant establishes good cause, the court must conduct an in camera review of the requested documents to determine what information, if any, should be disclosed. (*Gaines*, *supra*, at p. 179.)

Appellate courts have applied a two-step analysis for evaluation of whether a defendant has shown good cause for discovery. First, "a showing of 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." (*Warrick*, *supra*, 35 Cal.4th at p. 1021.) Second, the defendant

must show "a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Id.* at p. 1025.) As our Supreme Court held in *Warrick*, "a plausible scenario of officer misconduct is one that might or could have occurred." (*Id.* at p. 1026.) "[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." (*Ibid.*; accord, *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 72 [a defendant must "describe an internally consistent factual scenario of claimed officer misconduct"].)

Depending on the circumstances of the case, a defendant's "simple denial of accusations in the police report" may be sufficient, or a defendant may present "an alternative version of what might have occurred." (*Garcia v. Superior Court*, *supra*, 42 Cal.4th at p. 72; accord, *Warrick*, *supra*, 35 Cal.4th at p. 1026.) In some cases, "the trial court hearing a *Pitchess* motion will have before it defense counsel's affidavit, and in addition a police report, witness statements, or other pertinent documents. The court then determines whether defendant's averments, '[v]iewed in conjunction with the police reports' and any other documents, suffice to 'establish a plausible factual foundation' for the alleged officer misconduct and to 'articulate a valid theory as to how the information sought might be admissible' at trial.' [Citation.]" (*Warrick*, *supra*, at p. 1025.)

In *Warrick*, the Supreme Court found that the defendant had presented a "plausible scenario of officer misconduct" in a drug sale case where the police officer stated the defendant dumped rocks of cocaine on the ground and fled the scene, but defense counsel stated in his declaration that the defendant ran due to an outstanding parole warrant, "there were 'people

pushing and kicking and fighting with each other'" at the scene, and the police officers mistook defendant for the person who discarded the rock cocaine. (*Warrick*, *supra*, 35 Cal.4th at pp. 1016-1017, 1027.)

By contrast, in *People v. Sanderson* (2010) 181 Cal.App.4th 1334, the Court of Appeal affirmed the trial court's denial of a *Pitchess* motion where the defendant simply denied that he made the statements attributed to him by a police officer, who testified at the preliminary hearing that he heard the defendant say on the telephone that he was going to return with his friends and """kick their ass""" and that "'we got guns and we'll be back.'" (*Id.* at p. 1340.) The court noted that defendant did not deny making the telephone call or talking with the victims, and therefore "failed to present 'an alternate version of the facts' regarding the reason and nature of his telephonic exchange with [the victims]." (*Id.* at pp. 1340-1341; see also *People v. Thompson* (2006) 141 Cal.App.4th 1312, 1317 [finding the defendant's simple denial that he handed drugs to a police officer in exchange for money was not a sufficient showing for discovery because the defendant failed to provide "a nonculpable explanation for his presence in an area where drugs were being sold," or why he was singled out by police][23]; cf. *Uybungco v. Superior Court* (2008) 163

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[23] Jackson relies on the holding in *People v. Johnson* (2004) 118 Cal.App.4th 292, in which the Court of Appeal found that the defendant's attorney had provided a sufficient factual foundation for discovery by presenting a declaration that stated that the officer's account that the defendant had asked him to purchase drugs, using the slang names for the drugs, was untruthful. (*Id.* at p. 303.) While the court in *Johnson* found a simple denial of the officer's account was sufficient, because the case was decided before our Supreme Court's decision in *Warrick*, the court did not

Cal.App.4th 1043, 1050 [finding the defendant presented a plausible factual scenario that he did not resist police officers based on statements in his declaration that he was trying to break up a fight when the officers arrived, and the officers used excessive force in pepper spraying him, grabbing him, throwing him to the ground, and punching and kicking him].)

3. *Jackson Failed To Present a Plausible Scenario of Officer Misconduct*

In support of his *Pitchess* motion, Jackson relied on the denial in his declaration that he made a criminal threat against Yhuello and on Yhuello's preliminary hearing transcript, which he asserted did not provide "grounds for [a] credible threat." Jackson also argued that "[t]here is an audio recording of the alleged victim stating that the police report was wrong," but he did not provide the court with evidence of an audio recording. Neither did he provide any support for his assertion that Yhuello did not have an opportunity to listen to the audio recording or to sign a transcript of it. Absent evidence of an audio recording, this argument did not support Jackson's *Pitchess* motion.

Jackson's statement that he did not make a criminal threat against Yhuello likewise did not meet his burden to present a "plausible scenario of officer misconduct" because Pedemonte was not a witness to the criminal threat; rather, the question is whether Yhuello told Pedemonte that Jackson made a criminal threat toward her. We next consider whether Yhuello's preliminary hearing testimony was sufficiently inconsistent with

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analyze whether the defendant had presented a "plausible scenario of officer misconduct." (See *Warrick*, *supra*, 35 Cal.4th at p. 1026.)

the account given by Pedemonte to support Jackson's showing of a plausible scenario of officer misconduct. It was not.

Although Yhuello generally denied that Jackson made a threat toward her, she testified that Jackson stated, "I'm going to silence you. I'm going to make you silent." When asked for his exact words, Yhuello stated, "Be silent. Be quiet. Stop . . . Stop it. Stop yelling." She testified that Jackson said, "I will silence you. I will make you quiet. You will not talk. Stop talking. Be silent." Yhuello was only equivocal as to whether Jackson said he would permanently silence her—when asked if she told Pedemonte that Jackson said, "I will silence you forever," Yhuello responded, "Yeah—no, not forever." While the jury found Jackson not guilty of making criminal threats, Yhuello's testimony that Jackson told her, "I will silence you" was consistent with Pedemonte's testimony, except for her denial that Jackson used the word "forever."[24]

As to the other parts of the incident, Yhuello's testimony was largely consistent with that of Pedemonte. She testified that Jackson pressed his fingers into her cheeks, and that he "squeezed my cheeks." She testified she was screaming. Although Yhuello denied that Jackson put his hands on her throat, she testified that Jackson hit her with the broom. Specifically, she "felt the hit on my butt" from the broom, and testified, "my back hurt," referring to the "right butt part of my back," creating a "bruise." With respect to Jackson throwing a

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[24] The record does not reflect Pedemonte's specific statements in the police report. From the context of the questioning at trial, however, it appears that the police report reflects that Yhuello told Pedemonte that Jackson threatened her with the words, "I will silence you forever."

pineapple at her, Yhuello testified that she told Pedemonte that Jackson threw a pineapple at her, and that she had to duck to avoid being hit, but testified, "it was not true because . . . I threw the pineapple."

We conclude that, unlike the detailed factual showing made in *Warrick*, Jackson did not make a sufficient showing of "a plausible scenario of officer misconduct." (*Warrick*, *supra*, 35 Cal.4th at p. 1026.) Neither Jackson's denial that he made a criminal threat nor his assertions as to an audio recording provided a sufficient factual basis for his motion. In addition, Yhuello's testimony at the preliminary hearing, while not stating precisely what Pedemonte apparently wrote in his police report, supported Pedemonte's account that Jackson told Yhuello he would "silence her." Yhuello's testimony was also generally consistent with Pedemonte's description of what Yhuello told him about other aspects of the incident, including Jackson throwing a pineapple at her, squeezing Yhuello's cheeks, and hitting her with a broom on her buttocks. Accordingly, the trial court did not abuse its discretion in denying Jackson's *Pitchess* motion. (*Alford v. Superior Court*, *supra*, 29 Cal.4th at p. 1039.)

DISPOSITION

The judgment is conditionally reversed. The matter is remanded to the trial court for a hearing to determine whether Jackson's *Faretta* rights were properly terminated. If the trial court finds Jackson's *Faretta* rights were properly terminated, the court should reinstate the judgment, but strike the one-year enhancement for use of a deadly or dangerous weapon and the five-year enhancement under section 667, subdivision (a)(1). If the trial court determines Jackson's self-representation should not have been terminated, it should order a new trial.

FEUER, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

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