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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RAFAEL MARTINEZ-BERUMEN, Defendant and Appellant.	B232636 (Los Angeles County Super. Ct. No. GA080357)

APPEAL from a judgment of the Superior Court of Los Angeles County. Teri Schwartz, Judge. Affirmed.

Adrian K. Panton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Rafael Martinez-Berumen (appellant) of carrying a concealed dirk or dagger in violation of Penal Code section 12020, subdivision (a)(4).[1] In a separate trial, the court found that he had suffered a prior "strike" conviction within the meaning of section 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i). He was sentenced to four years in prison. On appeal, he contends that the trial court abused its discretion in ordering counsel to reopen closing statements after commencement of jury deliberations in response to the jury's inquiries. He also contends that this court must independently review the trial court's in camera hearing on his *Pitchess* motion for pretrial discovery. Finally, he contends that the trial court incorrectly calculated presentence custody credits. We order the abstract of judgment to be modified to reflect the correct presentence custody credits but otherwise affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 17, 2010, appellant was arrested in the city of Duarte by Los Angeles County Sheriff's Detective Joseph Morales and his partner Deputy Cesar Moreno.

Appellant was charged in the information with possession of a firearm by a felon (§ 12021, subd. (a)(1)) and possession of a concealed dirk or dagger. (§ 12020.)

At trial, both deputies testified they were on routine patrol just past midnight when they saw appellant shirtless, walking rapidly. Appellant appeared distraught and was sweating profusely on a cold night. The officers asked appellant if anything was wrong, and he answered "'I'm out looking for my bitch. She's a fucking night crawler.'" Morales and Moreno then asked appellant if he had any weapons and identification with him, and appellant stated he had both in his pocket and consented to a search of his body by the officers. Moreno found a fully extended knife in appellant's pocket, which was fixed in an open position.

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[1] All further undesignated statutory references shall be to the Penal Code.

Both Morales and Moreno testified the knife was not in plain view and Morales had to pull it out of appellant's pocket when they stopped appellant. They both used the word "concealed." Both deputies also testified that appellant readily admitted he had a knife in his pocket.

Accordingly, Morales and Moreno arrested appellant for possession of a concealed dirk or dagger.

The deputies both testified appellant told them that he had two young children at home alone. They put him in their patrol car and asked him where he lived. The deputies then went to the address he gave and encountered a woman who said she lived there with appellant and their two children. They searched the house and found a shotgun.

In defense, appellant called his girlfriend as a witness. She was detained by the deputies while walking home. They searched the house, which belonged to her father, and recovered a shotgun which her father kept in a closet. She testified she was not living with appellant at the time.

During deliberations, the jury sent a note to the court asking for the definition of "concealed," specifically asking the court: "Please clarify the definition of 'concealed'. If the defendant answers a question of having a knife, is that still 'concealed' when he admittedly states he has a knife in his pocket?"

Out of the presence of the jury, the trial court read the question to counsel. It stated it felt the answer to the jury's questions would be in the affirmative, but gave counsel an opportunity to argue the matter further and answer the jury's question, or to argue, and if their argument did not answer the question then the court would answer it. Defense counsel responded: "As to court's options that are being presented to us, the defense would rather argue than to have the court answer the question. But it would actually prefer to have the court refer the jurors to the jury instruction regarding concealment. But in lieu of that if that's not an alternative, then I would consent to – stipulate to argument." The prosecutor said he had no problem with rearguing, but requested the court to further instruct the jury.

The prosecution and defense counsel proceeded to present their closing re-arguments. The prosecution explained the nature of the knife to the jury by stating, "If it was in plain view, obvious to the naked eye from where the officer was at, probably you wouldn't have to ask that question: do you have any weapons? And [the officer] said he pulled the knife out of his pocket. It was inside his pocket." The prosecution followed this statement by advising the jury to give the terms "substantially" and "concealed" a plain ordinary English definition found in Webster's Dictionary or on "Wikipedia." The defense argued the jurors should use their common experience to define "substantially concealed." Defense counsel stated: "And in doing so, if you can't come to a conclusion that you are convinced beyond a reasonable doubt that [appellant] was concealing this and you have the evidence that he readily disclosed it to the officers that he did have a knife on him . . . then the law requires you to vote not guilty on this charge because every element has to be proven to you beyond a reasonable doubt."

The court then recessed for the noon hour. The jury indicated after the break it was deadlocked on one count. The court inquired of the jurors and eventually declared a mistrial on the weapon's possession count. The jury then announced it had reached a guilty verdict on the charge of carrying a dirk and dagger.

Appellant filed a timely appeal.

DISCUSSION

1. The Court Did Not Err in Reopening Closing Arguments to Answer the Jury's Inquiries on the Definition of "Concealed"

Appellant contends the trial court abused its discretion in asking the prosecution and defense to reopen closing arguments to answer the jury's question while the jury was deliberating. He argues that the trial court interfered with the jury's deliberative process and fact-finding role, violating his federal and state constitutional rights to a jury trial and due process.

Section 1138 provides: "After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

"When a jury asks a question after retiring for deliberation '[s]ection 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law.' (*People v. Smithey* (1999) 20 Cal.4th 936, 985.) But '[t]his does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information.' (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)" (*People v. Eid* (2010) 187 Cal.App.4th 859, 881-882.) We review any error under section 1138 for an abuse of discretion. (*Ibid.*)

When the jury submitted its question regarding the concealed nature of the weapon, the court discussed the matter with counsel and provided them with a choice to have the court answer the question or to argue the matter further, or to have a combination of these choices. Defense counsel stipulated that he would prefer the court to refer the jurors to the jury instructions regarding concealment, but stated he would argue the matter in the alternative. Both the prosecution and defense were allowed to address the jury about the definition of "concealed" and whether appellant's admission to having a knife meant that the weapon was concealed.

The record shows that defense counsel consented to re-opening arguments to address the jury's questions, thus "[w]here, as here, appellant consents to the trial court's response to jury questions during deliberations, any claim of error with respect thereto is waived." (*People v. Bohana* (2000) 84 Cal.App.4th 360, 373, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.)

In his reply brief, appellant cites *People v. Montero* (2007) 155 Cal.App.4th 1170, arguing that an identical situation was presented when the trial court refused to give a clarifying instruction about the definition and application of the element of "control" in a narcotics possession charge. The court consulted with counsel and determined that the jury was not requesting a clarification of a jury instruction, but instead was requesting instruction on how they should deliberate. (*Id.* at pp. 1178-1179.) The court of appeal held the trial court did not abuse its discretion in directing the jury to re-read a standard instruction because that instruction explained the concept of control. Any detailed response given by the trial court would have thrust the court into the jury's role of determining a crucial element of the crime. (*Id.* at p. 1180.)

Here, the court did not usurp the jury's function in determining whether the knife was concealed, and it allowed counsel to argue the particular facts of the case. The prosecutor re-read a portion of the argument describing the elements of the crime, and then referred to the instruction on circumstantial evidence. Further, in light of the court's broad discretion over the way that it may choose to answer the jury's questions and its decision to allow both sides to answer the questions, appellant was not prejudiced by the way the court proceeded. "[W]hen faced with questions from the jury, including that they have reached an impasse, 'a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least consider how it can best aid the jury.'" (*People v. Young* (2007) 156 Cal.App.4th 1165, 1171, citing *People v. Beardslee, supra*, 53 Cal.3d 68 at p. 97; italics omitted.) The court did not aid the jury in a way that coerced them to return a verdict that would either favor or criminalize appellant. It did not give a specific definition of the term "concealed" to the jurors, nor did it prejudice appellant by allowing only the prosecution to argue in the re-opened closing arguments. The proceedings were neutral, giving both the prosecution and defense counsel the opportunity to argue and satisfy the jury's inquiries. Thus, the court did not abuse its discretion in re-opening arguments to clarify the jury's question and appellant's constitutional rights were not violated.

2. The *Pitchess* Motion

Prior to trial, appellant filed a motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, requesting information from the personnel files of the arresting officers relating to conduct that amounts to moral turpitude or lack of honesty and credibility, "including but not limited to allegations of false arrest, planting evidence, fabrication of police reports, fabrication of probable cause, false testimony, perjury, writing false police reports to cover up excessive force, complaints of excessive force, false or misleading internal reports including medical and overtime, and other acts of dishonesty and fabrication." The declaration submitted in support of the *Pitchess* motion alleged that the deputies fabricated the events. Appellant's justification for requesting the information was that he denied making statements to the deputies concerning his home address and the shotgun found there. He also denied giving police consent to search his person. The court granted the motion insofar as there were "any complaints regarding fabrication as it relates to consent to search or probable cause to detain." Appellant's counsel further requested any complaints as to dishonesty or fabrication. The court conducted an in-camera hearing. It found that there was nothing discoverable in the records reviewed.

Appellant contends the trial court erred because it searched only for complaints of fabrication relating to "consent to search or probable cause to detain." Appellant argues that this limitation was overly restrictive and requests that we conduct an independent review of the *Pitchess* proceedings.

Evidence Code section 1043 provides in pertinent part, "(a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records . . . the party seeking disclosure shall file a written motion . . . [which] . . . shall 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. . . ."

We review the lower court's ruling on a motion for access to law enforcement personnel records under the abuse of discretion standard. (*People v. Cruz* (2008) 44 Cal.4th 636, 670, citing *Pitchess, supra*, 11 Cal.3d 531, 535.) Further, "'[i]n criminal cases, the court retains wide discretion to protect against the disclosure of information which might unduly hamper the prosecution or violate some other legitimate governmental interest.'" (*People v. Cruz, supra*, 44 Cal.4th at p. 670.)

The party requesting the information must first make a showing that the information is material to his case. (§ 1043; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83.) Next the party must state upon reasonable belief that the governmental agency actually has the records. Once this threshold showing of good cause is met, the court must review the documents in camera to determine its relevance.

In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, the court ruled that the requirements of in-chambers review of officer records and exclusion of information that is irrelevant to the pending charges enable the trial court to identify which types of officer misconduct information will support the defenses proposed to the pending charges. "[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. This court has long required that the information sought must be described with some specificity to ensure that the defendant's request is not so broad as to garner '"all information which has been obtained by the People in their investigation of the crime"' but is limited to instances of officer misconduct related to the misconduct asserted by the defendant." (*Id.* at p. 1021, citing *Pitchess, supra,* 11 Cal.3d at p. 537.) The court gave an example where prior complaints of excessive force by arresting officers become "irrelevant" after charge of resisting arrest was dropped and remaining charge was irrelevant to the inquiry. (*Warrick v. Superior Court, supra,* 35 Cal.4th at p. 1021.)

In *People v. Hustead* (1999) 74 Cal.App.4th 410, the court held a defendant must demonstrate prejudice from the denial of discovery. A defendant would not be prejudiced when the police files requested would result in no discoverable information related to that which was presented at trial. (*Id.* at pp. 418-419.)

Here, the court searched only for complaints of fabrication relating to "consent to search or probable cause to detain." Appellant's request for discovery of false testimony, perjury, excessive force, writing false police reports, false or misleading internal reports, or other acts of dishonesty and fabrication was far beyond the scope of the case at hand. His only justification for requesting such a broad amount of information was that his version and his girlfriend's version of events was more credible than the officers' version. There was nothing else which would support his claim that the officers had lied or fabricated their report. Moreover, no other conduct by the officers was involved in this case other than detaining appellant and asking him for consent to search. Appellant did not show that such a broad range of information was material to this case. The court's decision to limit the type of complaints reviewed was well within the bounds of its discretion.

Furthermore, we have independently reviewed the sealed proceedings and have determined that no information of the nature being sought through the discovery motion was found in the personnel files. The court thoroughly discussed on the record each of the complaints filed against the officer and found no discoverable material to disclose to the defense. There is no basis to disturb the trial court's *Pitchess* ruling. (*People v. Ochoa* (2011) 191 Cal.App.4th 664, 674-675.)

3. Custody Credits

Appellant contends that he was awarded 261 days instead of 271 days in presentence custody credits because the record shows he was arrested on June 17, 2010 and sentenced on March 14, 2011. The record reflects that defense counsel incorrectly represented to the court that this period was 261 days instead of 271 days. The court

calculated the total credit as 261 actual days plus 130 days conduct credit, and appellant was awarded 391 days total credit.

For purposes of these calculations, we include the date of the arrest (*People v. Lopez* (1992) 11 Cal.App.4th 1115, 1124) and the date of sentencing (*People v. Smith* (1989) 211 Cal.App.3d 523, 525-526). The People concede that appellant is correct that he spent 271 actual days in custody.

At the time appellant committed the offense, the applicable custody credit statute provided that for each four-day period of confinement, a prisoner is entitled to have two days deducted unless the prisoner has refused to satisfactorily perform labor or has not satisfactorily complied with the reasonable rules and regulations of the facility. (Former § 4019, subds. (b)(1), (c)(1) as amended by Stats. 2009, ch. 28 § 50 (Sen. Bill No. 18).)[2]

However, subdivision (b)(2) of former section 4019 provided that if the prisoner "has a prior conviction for a serious felony, as defined in section 1192.7 or a violent felony, as defined in section 667.5, for each six-day period in which the prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily performed labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp." Likewise, subdivision (c)(2) provides that with a prior conviction for a serious or violent felony, for each six-day period in which a prisoner is confined, "one day shall be deducted unless he has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp." (Former § 4019, subds. (b)(2), (c)(2).)

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[2] This statute was in effect for the eight-month period from January 25, 2010 to September 27, 2010, and was applicable only to crimes committed during those dates. (*Payton v. Superior Court* (2012) 202 Cal.App.4th 1187, 1190; Stats. 2010, ch. 426 (Sen. Bill No. 76) § 2, eff. Sept. 28, 2010.)

Subdivision (f) provides that "if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody, except that a term of six days shall be deemed to have been served for every four days spent in actual custody for persons described in paragraph (2) of subdivision (b) or (c)." (Former § 4019, subd. (f).)

Appellant was found to have suffered a prior conviction for manslaughter under section 192. Voluntary manslaughter is defined as a serious felony in section 1192.7, subdivision (c)(1) and as a violent felony in section 667.5.

Under this formula, we divide by 4 the actual presentence days in custody (271), discounting any remainder, and then take that quotient (67) and multiply by 2 to calculate the number of conduct/work credits (134). That number (134) is added to the actual days in custody (271) to arrive at the total number of credits, 405. (See *People v. Culp* (2002) 100 Cal.App.4th 1278, 1283.)

Accordingly, we order that the judgment be modified to reflect 405 days of presentence custody credit.

DISPOSITION

The clerk of the superior court is directed to amend the abstract of judgment to reflect that appellant is entitled to 271 days of actual custody credit, plus 134 days of conduct credit, for a total of 405 days of presentence custody credit and to forward the amended abstract to the Department of Corrections and Rehabilitation. The judgment is affirmed as modified.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**