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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDERICK M. COOLEY,

Defendant and Appellant.

A140953

(Solano County
Super. Ct. No. VCR212477)

INTRODUCTION

Defendant was a guest at a raucous party in a house that was searched by police for wounded persons and armed suspects after shots were fired at a car parked in front of the house. Defendant was uncooperative and was arrested for delaying and obstructing a police officer in the performance of his duties. (Pen. Code, § 148.)¹ The subsequent search of defendant's pockets incident to his arrest yielded several bindles of cocaine and he was charged with felony possession of cocaine base. (Health & Saf. Code, § 11351.5.) After an unsuccessful motion to suppress evidence (§ 1538.5), defendant pleaded no contest to simple possession of a controlled substance, a misdemeanor, and was placed on summary probation. (Health & Saf. Code, § 11377.)

In this appeal, defendant challenges the legality of the police entry into the house, his detention, arrest, and search. He also asks us to conduct an independent review of

¹ Unless otherwise indicated all further statutory citations are to the Penal Code.

two in camera hearings for *Pitchess*² material and challenges a “no weapons” condition of his probation, to which he did not object below. We reject defendant’s contentions and affirm.

STATEMENT OF THE CASE

On September 16, 2011, defendant was charged by felony complaint in Solano County with possession of cocaine base on September 3, 2011. (Health & Saf. Code, § 11351.5.) In November 2011, defendant filed a *Pitchess* motion to discover personnel records pertaining to the officer who searched him. The records were sought in connection with a motion to suppress. (§ 1538.5.) In December 2011, the court granted the discovery motion and, after an in camera hearing on December 16, ordered disclosure of seven incidents.

An information charging the same offense was filed in May 2012. In July 2012, defendant filed a motion to suppress evidence. (§ 1538.5.) The motion was heard and denied on August 20, 2012.

On September 4, 2013, defendant filed a supplemental discovery motion seeking additional records. On November 1, 2013, the motion was granted in part and a second in camera hearing was held that same day. One additional incident was ordered disclosed.

On January 24, 2014, defendant entered into a negotiated disposition. The prosecutor amended the information to add a second misdemeanor count charging simple possession of a controlled substance (Health & Saf. Code, § 11377). Defendant pleaded no contest to the misdemeanor and the felony count was dismissed. Imposition of sentence was suspended and defendant was placed on two years’ summary probation on

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

the condition, among others, that he not own or possess a firearm.³ Defendant timely appeals. (§ 1538.5, subd. (m).)

STATEMENT OF FACTS

Prosecution Witnesses.

Around 11:30 p.m. on September 3, 2011, Vallejo police dispatch received nine calls about a loud party that was in progress from callers in the vicinity of 796 Elmwood. The first caller reported hearing two guys arguing and loud music at 796 Elmwood at 11:17 p.m. During the third call, at 11:33 p.m., gunfire could be heard in the background as the third caller said something along the lines of, “Oh, my God. Shots are being fired. Shots are being fired.” That caller also reported seeing a full-size van speed away after the gunshots; the van turned right at Elmwood and Georgia, driving towards Hogan. Also at 11:33 p.m., another caller associated a black Nissan with the shots fired, and reported seeing someone running towards the middle school from 796 Elmwood. Other callers reported people running towards Hogan High School⁴ and a black SUV driving toward downtown. No caller gave a description of the shooter.

As a result of the calls, multiple police vehicles were dispatched to Fernwood and Georgia starting at 11:31 p.m. The first police officer arrived at 796 Elmwood at 11:35 p.m.

Sergeant Brett Clark heard patrol units being dispatched to the areas of Fernwood and Georgia, and 796 Elmwood, and he responded. While Sergeant Clark was en route, Officer Tai advised “everybody” that at 10:19 p.m. he and his partner, Officer Joseph, had arrested someone who was attending a party at 796 Elmwood for

³ At that same hearing, defendant also pleaded no contest to resisting arrest (§ 148) in an unrelated case and was placed on summary probation with the same conditions.

⁴ Hogan High School is located within 500 yards of 796 Elmwood.

being drunk in public. “[H]e said the shots were likely not from Fernwood and Georgia but that address on Elmwood.” As a result, Sergeant Clark and the other officers proceeded to 796 Elmwood.

When Sergeant Clark arrived, Georgia and Elmwood Streets were primarily clear, but he saw five subjects running from the street into the backyard of 796 Elmwood. A car parked in front of that address had sustained shotgun damage on the driver’s side, approximately six feet from the front yard. An expended casing was located three feet from the vehicle, in the street, and no further than nine feet from the yard. It appeared to be a drive-by shooting.

When Sergeant Clark arrived on the scene, neighbors “popped out” of their houses and pointed in the direction of 796 Elmwood. As the other police cars were arriving at the scene, “people were still running from the rear of the residence and then back into the backyard again.” The officers established a loose perimeter, and Clark walked up to the garage door. The odor of marijuana was emanating from the garage, and he could tell a large group of people was inside. The people were saying things like, “Be quiet. The police are here. Shut up.” Other officers corralled a large number of people in the backyard.

Sergeant Clark went to the front door and pounded on it with his flashlight. He heard loud talking inside the residence; people were saying not to open the door. After about a minute, a man and a woman answered the door, Ms. Melton and Mr. Pina.⁵ Both were extremely intoxicated. Sergeant Clark explained to the pair the police were there because “there had been shots fired, . . . and we needed to check to make sure there was nobody shot inside the house.” “Our sole purpose for being

⁵ There was no testimony as to whether Mr. Pina was a resident of the house; however, Sergeant Clark stated in his police report, which was attached to defendant’s initial discovery motion, that “[b]oth parties identified themselves to me as being the owners/tenants of this particular residence.”

there was to make sure we didn't have any victims of shootings or dead bodies, and I explained that to the folks. We weren't there to bust them for marijuana, or drinking, or whatever they were doing. We just needed to look for victims." At first, Ms. Melton was cooperative and agreed to let the officers enter, saying, "There's nobody shot. Come on in." However, Mr. Pina, who according to Clark was Ms. Melton's boyfriend, "was bullying her not to allow the police entry to determine whether or not we had a shooting victim inside the house." Clark asked Mr. Pina "if anybody inside his house had shot outside the house, and Mr. Pina said they had not. He confirmed there was nobody shot inside and shut the screen door, saying, "The police aren't coming in the house." The people inside were "jeering Mr. Pina on."

After negotiating with Mr. Pina for about two minutes, Clark swung his flashlight through the screen door, hitting Mr. Pina. The second time he swung the flashlight, Clark hit Mr. Pina in the clavicle "to get him off the door." However, Mr. Pina bent over and the flashlight glanced off, accidentally hitting Mr. Pina in the right forehead and Ms. Melton in the upper left shoulder or arm.

Approximately eight officers, including Clark, eventually forced entry into the residence. Clark saw approximately 30 people inside the main house and another 15 people in the garage. They were not sleeping; they were partying, and the party had gotten out of control. There was alcohol and a strong odor of marijuana in the house.

When the officers went in, the people were "all standing and milling about trying to get out of the way of the house, but then we ordered them on the ground and the majority of them complied." Clark explained he ordered everyone to the ground because "we didn't know if we had any armed people inside because oftentimes what occurs in these drive-by shootings, there's retaliatory shots being fired from the house, as well. We needed to determine whether or not we had any shooting victims

inside the house. We wanted to make sure we didn't have any armed subjects in the house.”

Clark then conducted a protective sweep of the house. He did not observe any weapons or injured people, nor did he observe anyone sleeping.

Officer Dustin Joseph also responded to the dispatch about “a loud fight, party where shots had been fired.” About an hour earlier, he had responded to a call about loud subjects and a party at 796 Elmwood. At that time, arrests had been made for public intoxication and urination. It was a very loud party involving over 30 people who were in the front and back yards, as well as in the house.

When he arrived at the residence the second time, he observed a shotgun shell on the lawn and a vehicle with a large hole in it parked in front of the residence. It appeared to have been struck with a shotgun round. Officers were attempting to make contact at the front door while five or six subjects tried to escape out the back of the residence. When they saw the police presence in the backyard they ran back inside the house and slammed the door.

Officer Joseph entered the house through the front door, which opened into a combined living/dining area. There were approximately 12 people in the room and he ordered all of them to get face down on the ground. Most people complied.

Defendant was located in between the dining and the living areas. He went down to the ground, but he was “fairly frantically” looking left and right “like he was trying to flee, escape, or plan an attack.” Defendant’s behavior caused the officer concern because a car in front of the house had been shot and there was a shotgun shell in the yard. Officer Joseph asked defendant to stop. He did not. Defendant also started using his hands and feet to wiggle away from the officer. Officer Joseph told defendant to move his hands away from his body. Instead, “[h]e actually started to move his left hand towards his waistband,” which caused Joseph “great alarm”

because people hide weapons such as knives or guns in their waistbands. Joseph again asked defendant to stop, but he did not. At that point, Officer Joseph drew a department-issued Taser and applied it to defendant. It hit defendant in the face. It did *not* appear to Officer Joseph that defendant had been drinking alcohol.

Defendant was eventually arrested and searched incident to that arrest. The search discovered a clear plastic bag with 11 individually packaged rocks of cocaine in defendant's left front pants pocket, and a cell phone and \$115 in cash in the right front pants pocket.

Officer Joseph did not observe anyone in the house who was bleeding or appeared to have been shot.

Defense Witnesses.

At the time of these events, Rachel Melton rented the house at 796 Elmwood and lived there with Michael Pina. Defendant was a friend of Mr. Pina's. Defendant had her permission the night of September 3 to spend the night if he did not feel like driving drunk. She "told all of my boyfriend's friends that if they needed to stay there that night, they could." She issued the invitation earlier in the evening, around 4:30 or 5:00 p.m., when defendant arrived, and the party consisted of a small group of people. Defendant had begun drinking already. She testified: "I didn't care if some of them just crashed on the couch, or in the living room, or in the spare bedroom." Later in the evening a lot of people she was not friends with and did not know arrived.

That night, she and her boyfriend, Michael Pina, together answered the front door to the police. She was standing to the right of Mr. Pina. "They wanted to come inside. They said that there had been a shooting, and they needed to make sure that nobody inside my house was shot or injured." She told them no one inside her house had been shot or was injured. When the police officer asked her for her

driver's license, she went to her room to get it and then came back and gave it to the police through the screen door. She did not give the police permission to enter, and neither did Mr. Pina. Mr. Pina told them, "You don't have a search warrant to come inside, and . . . I'm not letting you in. At that point, "they busted through [the door] with their flashlight," cracking Mr. Pina over the head twice in the process.

More than a dozen people were in the house when the police came the second time. Melton was not intoxicated. Mr. Pina had been drinking, but she did not know if he was drunk.

Defendant testified in his own behalf. He was very drunk and awake when the police arrived. Defendant did not see the police come into the house. He was sitting in a chair in the dining room area and first saw the police when he got up to look inside the living room because there was an argument going on there. No one was on the floor at this point. He was never ordered to the ground specifically. Then he heard, "Get down, get down." As he was going to the ground, Officer Joseph tased him in the forehead with a Taser dart. At that point, defendant fell to the ground. He did not give the police permission to search his pockets.

Rebuttal.

Sergeant Clark testified Melton obtained and produced her driver's license, but not at his request.

DISCUSSION

I. Defendant's Motion to Suppress Evidence Was Properly Denied.

Defendant contends his suppression motion (§ 1538.5) should have been granted. He argues his privacy expectation in Ms. Melton's residence as an invited overnight guest was sufficient to permit him to challenge the police entry. He argues the police entry was illegal because Mr. Pina, a presumptive cotenant, refused to permit the police entry, no exigent circumstances justified the entry, and no facts justified entry under the emergency

aid doctrine. Defendant also argues his detention and arrest were illegal because the police did not have a reasonable suspicion of criminal activity to justify ordering everyone to the ground, they lacked probable cause to tase defendant and arrest him for momentary noncompliance with an order, use of the Taser was excessive force, and multiple illegalities require reversal of the judgment.

The trial court denied the suppression motion because, “on balance under the totality of the circumstances,” it did not find “the actions here were unreasonable in light of the information known to the officers.” For the reasons set forth below, we agree with the trial court’s overall finding of reasonableness, if not necessarily with its specific reasoning.

Standard of Review.

“In reviewing a ruling on a motion to suppress, we defer to the trial court’s factual findings when supported by substantial evidence, but we exercise our independent judgment in determining whether, on the facts so found, the search was lawful. [Citation.] A warrantless search is presumed to be unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search. [Citation.]” (*In re D.C.* (2010) 188 Cal.App.4th 978, 982.)

Citing Justice Scalia’s concurring opinion in *United States v. Arvizu* (2002) 534 U.S. 266, defendant argues we should review de novo the *inferences* to be drawn from the trial court’s factual findings, if not the factual findings themselves. (*Id.* at p. 278; see also *Ornelas v. United States* (1996) 517 U.S. 690, 700–705 [Scalia, J. dissenting] .) Neither the United States Supreme Court nor the California Supreme Court has adopted Justice Scalia’s proposal. As an intermediate appellate court we are bound to apply the deferential substantial evidence standard of review to the trial court’s factual

findings and inferences, as directed by our Supreme Court in numerous cases.⁶ (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. See, e.g., *People v. Ayala* (2000) 24 Cal.4th 243, 279; *People v. Glaser* (1995) 11 Cal.4th 354, 362 [“We defer to the trial court’s factual findings, express or implied, where supported by substantial evidence.”].)

Defendant Has Not Shown He Had An Expectation of Privacy in Ms. Melton’s Home.

Defendant argues that because he had an “open invitation” from Ms. Melton to spend the night, he had an expectation of privacy in the premises which permits him to challenge the way the police gained entrance into the house. The trial court ruled “there’s a difference . . . as to whether someone has permission to stay versus they are in fact going to stay as an overnight guest, so I’m not entirely convinced that the defendant has standing to contest the entry.” “I’m going to find . . . the evidence is insufficient to show that in fact the defendant was going to be an overnight guest. There was certainly an invitation. I think that invitation does not indicate that the defendant was going to stay.”

Although the People have the burden of showing a warrantless search is justified (*People v. Rogers, supra*, 46 Cal.4th at p. 1156), the defendant must first shoulder the burden of showing that his own Fourth Amendment rights were violated by the challenged actions of the police. (*Rakas v. Illinois* (1978) 439 U.S. 128, 132, fn. 1; *People v. Jenkins* (2000) 22 Cal.4th 900, 972.) The moving party must show “ ‘an actual (subjective) expectation of privacy,’ [citation] . . . [and that the] subjective expectation of privacy is ‘one that society is prepared to recognize as “reasonable,” ’ [citation].” (*Smith v. Maryland* (1979) 442 U.S. 735, 740.)

⁶ California courts must apply federal law in deciding whether the exclusionary rule applies in search and seizure cases. (*In re Lance W.* (1985) 37 Cal.3d 873, 886–887; *People v. Rogers* (2009) 46 Cal.4th 1136, 1156, fn. 8; Cal. Const., art. 1, §§ 13, 28, subd. (d).)

Overnight guests have an expectation of privacy in their temporary quarters in their host's home because "it is unlikely that [the host] will admit someone who wants to see or meet with the guest over the objection of the guest." (*Georgia v. Randolph* (2006) 547 U.S. 103, 113 (*Randolph*), quoting from *Minnesota v. Olson* (1990) 495 U.S. 91, 99 (*Olson*)). "By contrast, a casual, transient visitor does not have a reasonable expectation of privacy in his host's home." (*United States v. Berryhill* (6th Cir. 2003) 352 F.3d. 315, 317.) Put differently, "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." (*Minnesota v. Carter* (1998) 525 U.S. 83, 90.)

Thus, the defendant in *Olson*, who "had been staying" at a friend's apartment (*Olson, supra*, 495 U.S. at p. 94), did have an expectation of privacy in the residence when it was searched. The defendant in *Jones v. United States* (1960) 362 U.S. 257, who had a key to a friend's apartment, kept a suit and shirt there, and had slept there "maybe a night" at the time of the search, also had an expectation of privacy in the friend's apartment. (*Id.* at p. 259; *Olson*, at pp. 97–98.) But the defendant in *People v. Cowan* (1994) 31 Cal.App.4th 795, who was not an overnight guest but had "a standing invitation" to visit the apartment, the owner's permission to be in the apartment with another occupant, to get a soda out of the refrigerator, use the bathroom, and otherwise have "full use of the facilities" on the day the apartment was searched (*id.* at p. 798), did not have an expectation of privacy in the apartment because he "did not demonstrate that he had authority to be in the apartment alone, to enter without permission, to store anything there, to invite anyone (with or without the host's approval), or to visit without advance notice." (*Id.* at p. 800, fn. omitted.)

In this case, the record shows defendant, a friend of Mr. Pina, had already been drinking when he arrived at the barbecue around 4:30 or 5:00 p.m. Ms. Melton, Mr. Pina's girlfriend, issued him and the few other guests present at that time a conditional invitation to spend the night if they felt too drunk to drive home at the end of

the evening. According to Sergeant Joseph, defendant was not drunk when he was detained, although the trial court seemed to credit defendant's testimony "admit[ing] he was very drunk."

Neither Ms. Melton nor defendant testified he accepted the invitation or intended to spend the night in light of his condition. Such a record, without more, does not compel a finding in favor of defendant that he *did* accept the invitation or *did* intend to spend the night. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527–1528.) It is not unheard of for intoxicated guests to drive home, despite their drunken condition, or to change their minds several times during the course of an evening about whether they will be staying the night. On these facts, we cannot say the trial court erred in tentatively concluding defendant here failed to carry the burden of distinguishing himself from a person who has a "standing" or "open" invitation to spend the night but is no more than a casual, transient visitor at the time the police enter the residence to be searched.

The Police Did Not Enter the Premises with Consent.

Alternatively, the court found if defendant was an overnight guest with an expectation of privacy in the residence, Ms. Melton initially gave police consent to enter before "Mr. Pina stepped in and slammed the door shut." When defense counsel suggested that under *Georgia v. Randolph, supra*, 547 U.S.103, the objection of one cotenant vitiates the consent of another, and that he "didn't brief it because [he] didn't envision it as a possible issue," the court ruled: "Okay. That may be the case. Albeit it's not entirely clear, it appears that there was initial consent. Whether Mr. Pina—the officers knew he was a cotenant there at the time, I'm not sure there was specific testimony on that. I understand your position. I think that may be a valid point, but those are my rulings for today."

Georgia v. Randolph, supra, 547 U.S. 103, indeed establishes that "if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector,

nearby but not invited to take part in the threshold colloquy, loses out.” (*Id.* at p. 121, distinguishing *United States v. Matlock* (1974) 415 U.S. 164 & *Illinois v. Rodriguez* (1990) 497 U.S. 177.) Here, Mr. Pina came to the door to confront the police alongside Ms. Melton, unlike the numerous people who jeered at the police from behind the couple. Sergeant Clark, who viewed Mr. Pina as Ms. Melton’s boyfriend, stood at the door negotiating with Mr. Pina for two minutes before whacking the screen door with his flashlight. According to Ms. Melton, several of the invited guests were friends of Mr. Pina.

It is true Sergeant Clark was not asked and therefore did not testify whether he knew Mr. Pina was a cotenant. However, “[a]s with other factual determinations bearing upon search and seizure, determination of consent to enter must ‘be judged against an objective standard: would the facts available to the officer at the moment . . . “warrant a man of reasonable caution in the belief” ’ that the consenting party had authority over the premises?” (*Illinois v. Rodriguez, supra*, 497 U.S. at p. 188.) The circumstances surrounding the encounter between Mr. Pina, Ms. Melton and Sergeant Clark, viewed objectively, supports the reasonable inference Clark understood Mr. Pina was a cotenant and not, as the Attorney General suggests, just “another party-goer” who was “bullying” Ms. Melton. In our view, the court’s consent finding is not supported by substantial evidence.

Entry Into the Residence Was Justified by the Need to Locate and Assist Possible Shooting Victims and to Ferret Out Possible Armed Subjects.

Assuming arguendo defendant had an expectation of privacy and the police did not enter with consent, defendant argues the police lacked probable cause and exigent circumstances to believe there were either armed suspects or injured persons inside the house. He also argues the circumstances did not justify entry under the emergency aid doctrine. The trial court ruled: “I think the gunshot issue is a significant factor in the ultimate analysis: One, the officers get there; initially, there’s some calls about a loud

party, then there were shots fired When the officers arrive, it's corroborated they see people running into the yard. The officers' actions at the door, I find to be reasonable: One, to check on the people and also to check on, in fact, whether there might be individuals who might be armed in the residence. While that was not a stated reason, that does not necessarily seem unreasonable in light of the situation."

It appears to us the trial court found the police entry justified under *both* the exigent circumstances exception to the warrant requirement *and* the emergency aid doctrine. The Attorney General takes the view the court ruled *only* on exigent circumstances and therefore declines to provide argument on the application of the emergency aid doctrine. We view the search in this case as clearly justified by the need to search for possible shooting victims and we therefore express no opinion as to whether probable cause or exigent circumstances were also shown.

"[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment. [Citations.]" (*Mincey v. Arizona* (1978) 437 U.S. 385, 393–394.) “ ‘ “The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. [Citations.] [L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” ’ ” (*Brigham City v. Stuart* (2006) 547 U.S. 398, 403 (*Brigham City*)). “ ‘ “There is no ready litmus test for determining whether such circumstances exist, and in each case the claim of an extraordinary situation must be measured by the facts known to the officers.” ’ ” (*People v. Panah* (2005) 35 Cal.4th 395, 465.)

Relying on two cases which predate *Brigham City*, *supra*, 547 U.S. 398 and *People v. Troyer* (2011) 51 Cal.4th 599 (*Troyer*), defendant contends the emergency aid exception to the warrant requirement does not apply here because the police had dual

reasons for entering the home—to search for shooting victims and armed suspects—but lacked probable cause to believe that the premises to be searched contained either evidence or suspects. (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 753; *People v. Ray* (1999) 21 Cal.4th 464, 471.) He argues probable cause is excused when the police enter a dwelling for *noninvestigative* purposes only, and that *Brigham City* did not change “the requirement police officers also must have probable cause to believe that criminal activity exists within the dwelling before entering to perform emergency aid.” We disagree.

The United States Supreme Court granted certiorari in *Brigham City* precisely to dispel such misconceptions. (*Brigham City, supra*, 547 U.S. at pp. 402–403 [disapproving *United States v. Cervantes* (9th Cir. 2000) 219 F.3d 882, 890 “[U]nder the emergency doctrine, ‘[a] search must not be primarily motivated by intent to arrest and seize evidence’ ”].) On the contrary, *Brigham City* holds that “[a]n action is ‘reasonable’ under the Fourth Amendment, regardless of the individual officer’s state of mind, ‘as long as the circumstances, viewed *objectively*, justify [the] action.’ [Citation.] The officer’s subjective motivation is irrelevant. [Citations.] It therefore does not matter here—even if their subjective motives could be so neatly unraveled—whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence.” (*Brigham City, supra*, at pp. 404–405. See also *Troyer, supra*, 51 Cal.4th at p. 605.)

Furthermore, in *Troyer*, our Supreme Court specifically rejected the argument that “the objectively reasonable basis for a warrantless entry under the emergency aid exception must be established by proof amounting to ‘probable cause,’ which is defined as ‘“a reasonable ground for belief of guilt” ’ that is ‘particularized with respect to the person to be searched or seized.’ [Citation.] Defendant cites no high court authority grafting such a standard onto the emergency aid exception. Nor does the importation of a concept governing police officers ‘engaged in the often competitive enterprise of ferreting out crime’ [citation] make sense under the emergency aid exception, where the

police must make split second decisions as to whether someone is in need of immediate aid, not whether someone could be arrested for a crime. [Citations.] . . . [¶] [W]e must be mindful of what is at stake. The possibility that immediate police action will prevent injury or death outweighs the affront to privacy when police enter the home under the reasonable but mistaken belief that an emergency exists. [Citation.]” (*Troyer, supra*, 51 Cal.4th at p. 606.)

In *Troyer*, officers were dispatched to a residence to investigate a report that shots had been fired and a man had “ ‘possibly been shot twice.’ ” (*Troyer, supra*, 51 Cal.4th at p. 603.) On the porch of the residence police encountered a woman who “had been shot multiple times” and another man, Abeyta, who was bleeding from a head wound. Abeyta said two male shooters had fled in a vehicle. (*Ibid.*) An officer noticed blood on the front door of the house. (*Ibid.*) The officer asked Abeyta several times if anyone was inside the house. At first, Abeyta just stared; then he said he did not think so; finally he said no. (*Ibid.*)

The situation was loud and chaotic, and the officer “could not focus on whether there were any sounds coming from inside the residence. Under these circumstances, [the officer] decided that he had a responsibility to verify whether there were additional victims or suspects in the house.” (*Troyer, supra*, 51 Cal.4th at pp. 603–604.) Abeyta had keys to the residence but refused to give the police permission to enter. When the officer explained he would otherwise have to kick in the door because of the urgency of the situation, Abeyta unlocked the door. A team of officers announced their presence and, getting no response, entered the residence in search of victims and/or suspects. Eventually, contraband was found in a locked room. (*Id.* at p. 604.)

Our Supreme Court determined “[t]he record amply supported an objectively reasonable belief that one or more shooting victims could be inside the house.” (*Troyer, supra*, 51 Cal.4th at p. 607.) The Court noted the police dispatch stated shots had been fired “at” the house (*ibid.*) and a man had been shot twice. Abeyta’s head wound did not

“foreclose the reasonable possibility that the male victim described in the original dispatch was still at large.” (*Id.* at p. 608.) Blood on the door suggested a bleeding person had gone into or come out of house. (*Id.* at p. 607.) And Abeyta’s inconsistent answers about whether there was anyone inside the house “raised serious concerns” about the accuracy and reliability of his denial that anyone was inside. “Because the window blinds were closed, [the officer] could not peek inside to verify whether Abeyta’s final answer was the correct one, nor, given the chaos at the scene, could he hear whether any sounds were coming from inside the residence. Under these circumstances, and inasmuch as Albright did not know who lived at the residence or who had been the aggressor, an objectively reasonable basis existed to enter the residence to search for additional victims.” (*Troyer, supra*, at pp. 608–609.)

In our view, the circumstances known to the police here similarly supported an objectively reasonable belief that a person may have been injured during a drive-by shooting and had run into the house for help. Multiple shots—which could be heard on one of the calls to dispatch—had been fired at a car parked in front of the house. There were shell casings in the street *and* in the front yard, and the car had a large hole on the driver’s side from a shotgun blast, suggesting there had been a drive-by shooting (the shell in the street) and possibly a retaliatory round (the shell in the front yard). But the police found no injured person in the car.

One, and possibly two, vehicles had been reported fleeing from the scene of the shooting, and people had been seen running from the house into the street. The police saw more people running from the yard into the house.

Under these chaotic circumstances, a police officer could reasonably conclude the car parked in front of 796 Elmwood was connected to one of the many people partying inside and around the house, and that if people had been sitting in the car at the time it was shot and damaged, they ran into the house. A police officer could also reasonably believe that the cartridge on the front lawn had been fired by someone who also could

have run back inside the house, and an armed person inside the house would pose a danger to police officers inside who were looking for shooting victims. Because both beliefs were objectively reasonable, and the officer's subjective intent is irrelevant, and the fact that Sergeant Clark relied on one but not the other to justify the entry into the house in his testimony does not change the analysis. The objective reasonableness of both those beliefs is not undermined by the fact that Ms. Melton and Mr. Pina denied there were injured victims inside. The police were not required to accept those denials at face value. (See *Troyer, supra*, 51 Cal.4th at p. 608.)

Nor is *Troyer* distinguishable because the police in that case saw blood on the front door and encountered bleeding persons on the front porch outside the house before they entered. Here, if the signs that someone may have been injured were more ambiguous, the evidence that a drive-by shooting had occurred in front of the house was irrefutable. In short, given shots fired, the chaotic scene, the shotgun shells and the damaged car, the police would have been remiss in their duties if they did not attempt to establish whether or not someone had been injured in the shooting.

Ordering the Occupants of the House to the Floor Was Reasonable.

Defendant argues he and others were illegally detained when they were ordered to the floor because “the circumstances facing the officers after entering 796 Elmwood did not give rise to a reasonable suspicion that a crime was in progress” We disagree suspicion of criminal activity by a particular suspect was required here. (See *People v. Souza* (1994) 9 Cal.4th 224, 231.)

Ordering defendant to the floor was a detention. (*People v. Glaser, supra*, 11 Cal.4th at p. 363.) However, the brief detention here was objectively justified by legitimate officer safety concerns. (*People v. Wilson* (1997) 59 Cal.App.4th 1053, 1060–1061.) Sergeant Clark testified that after gaining entry, he saw there were approximately 30 people inside the main house and another 15 people in the garage. People were “all standing and milling about trying to get out of the way of the house, but then we ordered

them on the ground and the majority of them complied.” Clark explained he ordered everyone to the ground because “we didn’t know if we had any armed people inside because oftentimes what occurs in these drive-by shootings, there’s retaliatory shots being fired from the house, as well. We needed to determine whether or not we had any shooting victims inside the house. We wanted to make sure we didn’t have any armed subjects in the house.”

The police have “the limited authority to detain the occupants of the premises while a proper search is conducted” in order to protect themselves and others from harm. (*Michigan v. Summers* (1981) 452 U.S. 692, 705.) In a related context, the police may, incident to an in-home arrest, “as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. *Beyond that*, however, . . . there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” (*Maryland v. Buie* (1990) 494 U.S. 325, 334, italics added.)

Defendant argues the authority to detain the occupants of house during a search or arrest is limited to situations where a warrant is first obtained, but we do not believe the rationale for the rule is so limited. (See *Earle v. United States* (D.D.C. 1992) 612 A.2d 1258, 1264 [protective sweep authorized where officers entered premises pursuant emergency exception based on report of gunshots]; *United States v. Starnes* (7th Cir. 2013) 741 F.3d 804, 810 [entry by consent; sweep of bedroom permissible]; *People v. Ledesma* (2003) 106 Cal.App.4th 857, 864 [entry for probation search; sweep permissible].) To be sure, the justification for the residential entry must satisfy the Fourth Amendment, whether it be a warrant, exigent circumstances, emergency aid, or consent, but once the police have lawfully entered the premises, in our view the authority

to detain the occupants depends on the officer safety needs posed by a particular situation.

“The touchstone for all issues under the Fourth Amendment and article I, section 13 of the California Constitution is reasonableness. [Citations.]” (*Ingersoll v. Palmer* (1987) 43 Cal.3d 1321, 1329.) “Reasonableness . . . is measured in objective terms by examining the totality of the circumstances.” (*Ohio v. Robinette* (1996) 519 U.S. 33, 39.) In the context at issue here, we look to the totality of circumstances “to determine if the means used by the police, including detention at gunpoint, were justified by the need of a ‘reasonably prudent’ officer [citation] to protect himself and others involved in the search.” (*People v. Glaser, supra*, 11 Cal.4th at p. 366.)

According to Sergeant Clark, there were 30 people milling around inside the house when he entered to search for possible gunshot victims and ordered everyone to the floor. The police entry had been precipitated by a well-documented drive-by shooting in which a car parked directly in front of the house had been damaged. He feared someone inside the house may have fired retaliatory shots, a suspicion that was objectively supported by the discovery of shell on the front lawn of the house, in addition to a shell found in the street. The hosts of the party were intoxicated, as were many of the guests, raising the chances that someone might do something stupid and dangerous. This scenario gave rise to an objectively reasonable suspicion that an armed person might be inside the house, or that an unarmed but intoxicated person might pose a threat of harm to the officers. So far as this record shows, the detention was brief, lasting a few minutes at most, and necessary to control a chaotic crowd while the police undertook an emergency search of the house for possible gunshot victims. The brevity of the detention here distinguishes this case from *People v. Gentry* (1992) 7 Cal.App.4th 1255, in which the detention lasted for three and one-half hours. (*Id.* at p. 1266.) Under these circumstances, ordering the occupants to the floor while the officers swept the house for injured victims or armed gunmen was reasonable.

Probable Cause Supported Defendant's Arrest.

Defendant argues “the police had no probable cause to arrest [him] specifically for looking left or right as if about to escape, for wiggling, or for reaching toward his waistband. Therefore, the police acted unlawfully by shooting at him with a TASER and by searching him incident to the arrest.” We disagree.

For the purposes of addressing defendant’s argument, we have no quarrel with the proposition that Officer Joseph effected an arrest by tasing defendant. (See *Jackson v. Johnson* (D. Mont. 2011) 797 F.Supp.2d 1057, 1066.) In our view defendant’s evasive and alarming actions, which required Officer Joseph to tell defendant *three times* to cease and desist, thereby distracting him from looking for shooting victims, gave Officer Joseph ample probable cause to arrest him for delaying or obstructing an officer in the discharge of his duties. (§ 148.) Characterizing his behavior as mere momentary noncompliance with Officer Joseph’s command to remain motionless on the floor, and relying primarily on *People v. Quiroga* (1993) 16 Cal.App.4th 961, defendant argues that looking around, wiggling, and reaching for his waistband, amounted to no more than avoidance behavior which did not even justify a detention, much less an arrest.

“Cause to arrest exists when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime.” (*People v. Price* (1991) 1 Cal.4th 324, 410.)

“[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity,” and “innocent behavior frequently will provide the basis for a showing of probable cause.” (*Illinois v. Gates* (1983) 462 U.S. 213, 243, fn. 13.) Probable cause is less than proof beyond a reasonable doubt, preponderance of the evidence or a prima facie showing of criminal activity. (*People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1783, citing *Illinois v. Gates, supra*, at p. 235.)

As discussed above, defendant’s initial detention here was justified by officer safety concerns engendered by the fact of a recent drive-by shooting, not by suspicion of

criminal activity on his part. But when defendant began to look around as if wanting to escape, wiggled backwards away from the officer, and then started reaching for his waistband, all in the face of the officer's repeated directives to stop, Officer Joseph had objectively reasonable cause to believe that defendant could be reaching for a gun or a knife, which in his experience is often secreted in a waistband. That defendant's conduct could have been entirely innocent does not subtract from the probable cause equation. Defendant's actions distracted, delayed and obstructed Officer Joseph from the task at hand: detaining a large group of intoxicated persons while he and fellow officers attempted to locate injured victims or armed gunmen connected to the drive-by shooting.

People v. Quiroga, supra, 16 Cal.App.4th 961, is inapposite for at least two reasons. First, the situation in that case was not as fraught with danger to the police and others because no shots were fired. Second, *Quiroga* evaluated evidence adduced at trial, not at a hearing on a motion to suppress, and stands for the proposition that failure to respond with alacrity to police demands to sit down, when police are investigating a noisy party and marijuana usage, cannot support a conviction for a violation of section 148. (*Quiroga*, at pp. 964–966.) *Quiroga* does not compel the conclusion that defendant's actions here, in the context of a detention to facilitate a search for potential shooting victims or armed gunmen, did not provide Officer Joseph with probable cause to arrest defendant for violating section 148. The search of defendant's pockets incident to that arrest was proper.

The Claim That Taser Use Constitutes Excessive Force Requiring Suppression of Evidence Is Forfeited.

Defendant argues Officer Joseph's Taser use in this case constituted excessive force that invalidated his arrest and, presumably, required suppression of the contraband found in his pockets, although he does not explicitly say so. Our review of the record confirms that defendant did not raise this contention in his written motion to suppress or at the suppression hearing in the trial court. As a result, the trial court had no opportunity

to rule on the factual issue whether Taser use in this case was excessive, or the legal issue whether Taser use, if it is excessive, triggers the exclusionary rule. The contention is forfeited for failure to raise it below. (*People v. Clayburg* (2012) 211 Cal.App.4th 86, 93.)

Multiple Illegalities Did Not Occur.

Defendant argues that “multiple illegalities culminated in the TASER-ing and search incident-to-arrest” and require reversal of the judgment. We have found no illegalities; therefore, reversal is not required.

II. The Trial Court’s *Pitchess* Rulings Are Not Reviewable on This Appeal.

Defendant asks this court to conduct an independent examination of the sealed transcript of the in camera hearing on his *Pitchess* motion (*Pitchess v. Superior Court, supra*, 11 Cal.3d 531), as well as Officer Joseph’s personnel records, to determine whether the trial court ruled correctly. We deny the request because we find defendant has failed to preserve the issues for appellate review. In addition, there is no record of the first in camera hearing to review.

On November 14, 2011, defendant filed a *Pitchess* motion to discover all records pertaining to Officer Joseph that reflected allegations of police misconduct “involving any unauthorized use of force, any force excessive under the circumstances, any infliction of injury upon any complainant, any misconduct showing character for disregarding legally imposed duties as a peace officer, any failure to follow standard police procedures, including but not limited to illegal search or seizure under the Fourth Amendment, dishonesty, moral turpitude, falsifying or altering reports, falsifying or altering evidence, and fabrication of charges and/or evidence, and false testimony.” The records were sought in connection with a motion to suppress. (§ 1538.5.)

On December 16, 2011, the court granted the discovery motion as to Officer Joseph for in camera review of his personnel records for complaints relating to excessive force, false arrests, false reporting, and fabrication. The in camera review was conducted

the same day, and the court ordered disclosure of seven incidents concerning Officer Joseph.⁷ The court signed a protective order as to the disclosed documents and ordered them to be sealed in the court's file. The transcript of the in camera hearing was also sealed.

The suppression motion was heard and denied on August 20, 2012.

On September 4, 2013, defendant, through new counsel, filed a supplemental discovery motion for (1) the "actual witness statements, incident reports and complaints associated with the list of 15 witnesses and complainants previously disclosed by the Court, as well as the Vallejo Police Department's Internal Affairs investigative records concerning each of those incidents, and (2) an in camera review of the Vallejo Police Department's current personnel file for Vallejo Police Officer Dustin Joseph (Badge #585) and disclosure of the additional witnesses or complainants who have reported or witnessed unlawful, unprofessional or unethical conduct by Officer Joseph on or after the date of the Court's in camera review of December 16, 2011."

In support of the motion, new counsel averred neither he nor prior counsel had been able to locate more than a few of the 15 complainants with the information already provided. The motion argued the information was necessary to properly defend defendant at trial.

⁷ A transcript of the in camera hearing is not available. In its stead, the court reporter filed an affidavit dated June 13, 2014 stating that her vehicle and its contents, including her laptops and various backups, were stolen on *November 17, 2012*, and the file of the in camera hearing for the date of *December 16, 2012*, was no longer in her possession. It appears the court reporter meant her file for the in camera hearing on *December 16, 2011* was stolen.

In his opening brief, defendant mistakenly asserts the seven incidents related to Sergeant De Jesus, who was present in court when the court announced its ruling after the in camera hearing, but was not involved in the incident at 796 Elmwood on September 11, 2011.

The motion was argued on November 1, 2013. The court ordered disclosure of written reports and witness statements based on anything that was disclosed at the initial *Pitchess* hearing, excepting the conclusion of any officer in any internal affairs investigations, if there were any. As to disclosure of incidents occurring after the last *Pitchess* hearing to the current time, the court denied the motion as to incidents of excessive force because defendant was not charged with a violation of section 148, and excessive force was not relevant to trial on the charge of violating Health and Safety Code section 11351.5. The court granted the motion as to false arrest, false reporting, fabrication of evidence or testimony and disclosed one additional incident.

Defendant did not renew his motion to suppress in light of the additional discovery. The litigation ended on January 24, 2014, when defendant pleaded no contest to a misdemeanor pursuant to a negotiated disposition.

Ordinarily, discovery matters are not appealable after a guilty or no contest plea. (*People v. Hunter* (2002) 100 Cal.App.4th 37, 42.) This is because by pleading guilty or no contest, a defendant admits the sufficiency of the evidence supporting the crime, and issues going to guilt or innocence may not be appealed after a plea. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1178.) An exception to this rule has been recognized where the discovery motion is relevant to litigation of a motion to suppress. (*People v. Collins* (2004) 115 Cal.App.4th 137, 149, 151.)

Here, the *Pitchess* motion was granted, information relating to seven incidents of misconduct by Officer Joseph was disclosed in 2011, and the suppression motion was litigated in August 2012. Over a year later, a second *Pitchess* motion was made, requesting additional information related to the seven incidents of misconduct previously disclosed, and additional discovery covering the time period from December 2011 to November 2013, for trial purposes. This motion was also granted, except as to information related to excessive force, because defendant was not charged with resisting arrest. An additional complaint against Officer Joseph was disclosed.

The second *Pitchess* motion related exclusively to trial issues. As such, review of the trial court's ruling may not be obtained after a plea. In our view, review of the first *Pitchess* motion is also barred. If defendant wanted to preserve any discovery issues as relevant to the suppression motion, he should have asserted that ground as well when he asked for additional information about the first seven incidents. Or, he could have renewed his motion to suppress in light of the new information. On the current record, it appears defendant abandoned any claim that the *Pitchess* discovery was relevant to suppression issues.⁸ We therefore decline to review the two in camera hearings and personnel records.

III. Defendant's Challenge To A "No Weapons" Probation Condition Is Not Well Taken.

In a supplemental brief, defendant argues it was error for the court to impose a probation condition prohibiting him from owning or having in his "possession, custody, or control . . . any firearms; dangerous deadly weapons; ammunition of any kind at any time in light of the 148 charge." Defendant did not object to the condition. In fact, invited to comment on the court's proposal to impose a no-weapons condition, defendant counsel responded: "I'd ask the Court to just limit it to firearms, Your Honor." For the first time on appeal, defendant contends the imposition of this condition was not reasonably related to his record, past behavior, future criminality or the drug possession charge for which he was placed on probation. (*People v. Lent* (1975) 15 Cal.3d 481, 486.)

Defendant forfeited this objection by his failure to raise it in the trial court. (*People v. Welch* (1993) 5 Cal.4th 228, 234-238; see also *In re Sheena K.* (2007)

⁸ In any event, there is no transcript of the first in camera hearing to review. So far as our records show, defendant made a motion to augment the record with the public and in camera transcripts of December 16, 2011, which we granted. We assume he was provided a copy of the court reporter's declaration regarding the theft of her file for that hearing date, which was not confidential. The next step would have been a motion in the trial court to settle the record. (Cal. Rules of Court, rule 8.346.) That was not done.

40 Cal.4th 875, 882.) Moreover, the condition was reasonably related to defendant's past conduct and future criminality, in light of the resisting arrest charge to which he pleaded no contest and for which he was also placed on probation at the same sentencing hearing that disposed of the drug possession charge. No error appears.

DISPOSITION

The judgment is affirmed.

DONDERO, J.

We concur:

MARGULIES, Acting P.J.

BANKE, J.