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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.

ANTHONY DAVIS,

Defendant and Appellant.

A142522

(Contra Costa County  
Super. Ct. No. 51402361)

Defendant Anthony Davis was arrested in November 2013 and was charged with offenses related to an alleged assault on his girlfriend and his conduct during the ensuing arrest. In connection with the alleged assault, he was charged with three felony counts, of which he was acquitted by a jury, and a misdemeanor count, which was dismissed for lack of evidence.<sup>1</sup> In connection with the arrest, he was charged with a felony count of resisting an executive officer, a felony count of possession of methamphetamine, and a misdemeanor count of possession of drug paraphernalia.<sup>2</sup> The jury found him guilty of

<sup>1</sup> The jury found Davis not guilty of infliction of corporal injury on a cohabitant under Penal Code section 273.5, subdivision (a), assault with force likely to cause great bodily injury under Penal Code section 245, subdivision (a)(4), and battery with serious bodily injury under Penal Code sections 242 and 243, subdivision (d), as well as various lesser included offenses of those crimes. The trial court dismissed a count of vandalism under Penal Code section 594, subdivision (a) after the prosecution rested. All further statutory references are to the Penal Code unless otherwise noted.

<sup>2</sup> These counts were brought under section 69 (resisting an executive officer), Health and Safety Code section 11377, subdivision (a) (possession of methamphetamine), and Health and Safety Code section 11364 (possession of drug paraphernalia).

the drug-related offenses, and it found him not guilty of resisting an executive officer but guilty of the lesser included misdemeanor offense of resisting a peace officer.<sup>3</sup> After striking various enhancements based on prior convictions, the trial court sentenced Davis to three years in prison for possession of methamphetamine, thirty days in county jail for possession of drug paraphernalia, and ninety days in county jail for resisting a peace officer.

On appeal, Davis challenges only his conviction for resisting a peace officer, contending that (1) we should independently review the trial court's ruling on his *Pitchess*<sup>4</sup> motion for discovery of the personnel records of the two police officers involved in his arrest and (2) the trial court improperly excluded evidence offered to impeach the testimony of one of those officers. We affirm.

## I. FACTS

In October 2013, Antioch Police Officer Kevin Kollo responded to a residence after the occupant reported that someone had broken her window. The occupant directed Officer Kollo to Nicole G., who was sleeping in a back bedroom and had several injuries on her face. Nicole G. reported that her boyfriend of two weeks, whom she knew only as "Dubee" and later identified as Davis, had punched her face several times after becoming suspicious that she had taken his money. She then left the garage where they were staying together and went to her friend's residence. She claimed that Davis eventually followed her there and broke the window after he was not allowed inside. Davis testified that, to the contrary, Nicole G. was injured after fighting with another woman.<sup>5</sup>

About a month later, Officer Kollo drove by the garage and saw that its door was open, which the garage's owner had informed him would indicate Davis's presence. Officer Kollo testified that after he called for backup, he approached the garage and saw

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<sup>3</sup> The conviction for resisting a peace officer was under section 148, subdivision (a).

<sup>4</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

<sup>5</sup> We omit further details about the assault on Nicole G. and the broken window because Davis was not convicted of any charges related to those incidents.

Davis inside. He asked Davis if he was “Dubee.” Davis said he was not, and he became “[a]gitated” and began walking quickly toward the officer. Concerned because Davis exhibited signs of being under the influence of methamphetamine and was wearing clothing in which it would be “easy to conceal weapons of all types,” Officer Kollo decided to pat search him.

Officer Kollo testified that Davis did not respond when asked to turn around, and the officer “had to kind of pull him around.” After Davis interlaced his fingers behind his head as directed but then tried to pull them apart, Officer Kollo handcuffed him. The officer then detained Davis, intending to transport him for an in-field lineup to see if he could be identified as “Dubee.” Meanwhile, Officer Rodger McKeon had arrived to assist.

Before placing Davis in the patrol car, Officer Kollo conducted a more thorough search and discovered a small box in Davis’s pocket that contained “a white crystal substance” later determined to be methamphetamine. Officer Kollo testified that as soon as he removed the box from Davis’s pocket, Davis grabbed the officer’s hand and “threw his head sideways at [him],” yelling that the box had been planted on him. Davis, on the other hand, testified that he never grabbed Officer Kollo’s hand and that he moved his head only after Officer Kollo touched his face and shined a flashlight in it.

Officer McKeon grabbed Davis and pushed him against Officer Kollo’s car. The two officers were able to bring Davis to the ground, but he continued to struggle. Officer Kollo testified that he tried to put a carotid hold on Davis by applying pressure to the side of his neck, but he was unsuccessful because Davis “kept trying to bite [his] arm every time [the officer] tried to get [his] hand under [Davis’s] neck.” Officer Kollo also testified that he punched Davis’s jaw, “but it had no effect on him.” In contrast, Davis claimed that he had hit his head on the ground and was screaming but was not “thrashing” or trying to bite.

After the three men struggled for several minutes, Officer McKeon informed Officer Kollo that he was going to deploy a taser on Davis. At the time, Davis was facedown and using his feet to push off of the patrol car. When Officer McKeon

deployed the taser on Davis, Davis briefly stopped struggling but then started up again. Officer McKeon then hit Davis on the thigh with a flashlight. Davis testified that he was moving his legs because he was trying to get away from the taser, not because he was trying to escape or kick the officers.

Officer Kollo testified that it was only after two other police officers arrived that Davis was successfully taken into custody and placed in the patrol car, where he kept struggling “violently.” Paramedics eventually arrived and gave Davis an injection to sedate him, after which he was transported to a hospital. Neither Officer Kollo nor Officer McKeon could remember any injuries on Davis’s face, but Davis testified that his face was bleeding and he received a CAT scan at the hospital. After the arrest, a glass pipe used to smoke methamphetamine was recovered from Davis.

## II. DISCUSSION

### A. *The Trial Court Properly Resolved Davis’s Pitchess Motion.*

Before trial, Davis filed a *Pitchess* motion seeking discovery of personnel information disclosing prior misconduct by Officers Kollo and McKeon. The trial court determined that there was good cause for an in camera review of the officers’ personnel records. On appeal, Davis asks us to independently review the transcript of the in camera hearing to “determine whether any police personnel records were incorrectly withheld.” The Attorney General does not oppose the request. Our review reveals no error.

Davis’s *Pitchess* motion sought discovery of records “indicating prior or current complaints, investigations, or reports in which allegations of excessive force, corruption, threats, theft, falsehoods (in whatever form), illegal arrests and/or searches, the fabrication of charges and/or evidence, dishonesty, and improper tactics . . . involving” Officer Kollo or Officer McKeon were made. Davis claimed that he was entitled to such discovery based on the theory that the officers had acted with excessive force and were lying about the arrest’s circumstances. The trial court found that Davis had made a sufficient initial showing to require an in camera review of the officers’ records.

A police records custodian then brought to court both officers' personnel files. After conducting an in camera review of the files, the trial court ordered that the names and contact information of two witnesses who had alleged that Officer Kollo used excessive force during a 2009 incident be disclosed to the defense. The court determined that there were otherwise no documents subject to disclosure.

In *Pitchess*, our state Supreme Court held that “a criminal defendant [can] ‘compel discovery’ of certain relevant information in the personnel files of police officers by making ‘general allegations which establish some cause for discovery’ of that information and by showing how it would support a defense to the charge against [the defendant].” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019.) This holding was later codified in sections 832.5, 832.7, and 832.8 and Evidence Code sections 1043 through 1047. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226; see also *Warrick*, at p. 1019.) *Pitchess* and the resulting statutory scheme attempt to balance a criminal defendant’s “due process right to a fair trial” with an officer’s “strong privacy interest in his or her personnel records.” (*Mooc*, at p. 1227.)

To obtain discovery of an officer’s personnel records, a defendant must file a motion that includes an affidavit establishing “good cause.” (Evid. Code, § 1043, subd. (b)(3).) Establishing good cause requires the affiant to “propose a defense or defenses to the pending charges” and “articulate how the discovery sought may lead to relevant evidence or itself may be admissible direct or impeachment evidence [citations] that would support those proposed defenses.” (*Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1024.)

If, as here, the trial court finds good cause for discovery, it conducts an in camera hearing to review the officer’s personnel file. The custodian of records must bring all “ ‘potentially relevant’ ” records for the court’s review (*People v. Mooc, supra*, 26 Cal.4th at p. 1226), be placed under oath (*People v. White* (2011) 191 Cal.App.4th 1333, 1340), and state for the record whether other documents in the personnel file “were deemed irrelevant or otherwise nonresponsive” and, if so, why. (*Mooc*, at p. 1229.) The court then determines, subject to a variety of limitations and exceptions, whether any of

the proffered documents are relevant and should be disclosed. (*Ibid.*; see Evid. Code, § 1045, subs. (a), (b).) To enable appellate review for an abuse of discretion, the court “should . . . make a record of what documents it examined before ruling on the *Pitchess* motion,” whether by retaining copies of the documents or identifying them for the record. (*Mooc*, at pp. 1228-1229.) Although our record does not contain the personnel files that the custodian of records brought to court, their contents were described at the in camera hearing. A transcript reflecting such descriptions “is adequate for purposes of conducting a meaningful appellate review” of a court’s determination whether personnel files contain any material subject to disclosure. (*People v. Myles* (2012) 53 Cal.4th 1181, 1209.)

We perceive no abuse of discretion by the trial court. It swore in the custodian, reviewed the potentially relevant portions of the files, and ensured that a description of each of the documents reviewed appeared in the record. As none of those descriptions suggest that additional material information existed that was not disclosed, Davis is not entitled to relief on his *Pitchess* claim.

*B. The Trial Court Did Not Abuse Its Discretion by Excluding Evidence Offered to Impeach Officer Kollo’s Testimony.*

Davis claims that the trial court erred by excluding under Evidence Code section 352 (section 352) a video recording of Officer Kollo’s actions during an unrelated incident. The defense wanted to use this recording to impeach Officer Kollo’s testimony that he did not use excessive force when arresting Davis. We conclude that there was no error.

Before Officer Kollo testified, the defense revealed that it had obtained a video recording of the officer “approaching [a] civilian [at] a rapid pace and punch[ing] that civilian in the face” without provocation during the incident involving the two witnesses whose information was ordered disclosed in response to Davis’s *Pitchess* motion. The trial court observed that the recording was irrelevant absent evidence “of some excessive force in [Davis’s] case,” and it reserved ruling on the recording’s admissibility until such evidence was introduced.

Based on the eventual testimony of Officer Kollo that he had punched Davis, the trial court held a hearing under Evidence Code section 402 to determine whether to admit the video recording. Officer Kollo watched the recording, which was approximately 11 seconds long, and he admitted that he was the officer shown. Officer Kollo explained that a shooting had occurred several minutes before the recorded incident, and he had received a description of the suspect and the suspect's vehicle. A large fight related to the shooting broke out at a nearby 7-Eleven store, where the recording was made, and he responded to the scene. He saw a man there who matched the shooting suspect's description sitting in a car that matched the suspect's vehicle's description. The man was talking to another man who was standing outside the car. Believing that the men might be armed and wanting to secure the scene, Officer Kollo ordered the standing man "several times" to get in the car. Only after the man repeatedly refused to comply did the officer "push[] him real hard with [the officer]'s hand." An internal investigation cleared Officer Kollo of wrongdoing, and there was no civil litigation related to the incident.

The trial court excluded the video recording under section 352. The court explained that the incident described by Officer Kollo had "virtually no similarity" to Davis's arrest and a "minitrial" would be required to put the recording in its complete context. The court ruled that, given the recording's lack of probative value, its admission would require an "undue taking of time." In reaching its ruling, the court did not watch the recording but instead "accepted [the defense]'s description of it" as involving a punch, not a push.

Impeachment evidence, even if otherwise admissible, may be excluded under section 352 when "its probative value is substantially outweighed by the probability that its admission will . . . necessitate undue consumption of time[.]" (§ 352; see *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 750.) We review a trial court's ruling under section 352 for an abuse of discretion, which requires a showing that the ruling " "was

palpably arbitrary, capricious, or patently absurd[.]”<sup>6</sup> (*People v. Nguyen* (2013) 212 Cal.App.4th 1311, 1331.) In particular, “ “the latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.” [Citation.]’ ” (*People v. Lewis* (2001) 26 Cal.4th 334, 374-375.)

Davis begins by arguing at length that the video recording was admissible for impeachment purposes, both to show Officer Kollo had a common plan to use excessive force and to contradict the officer’s claim that he did not use excessive force against Davis. We will assume, as did the trial court, that section 352 was the only bar to the recording’s admission.

Davis claims that the trial court erred by concluding that the video recording “ “wouldn’t be of assistance to the jury,” ” characterizing his arrest as “similar” to the recorded incident because both involved Officer Kollo’s responding to a perceived lack of compliance by “punch[ing] the man in the face.” Aside from a punch being thrown, however, the two sets of circumstances had little in common. As such, the recording was of limited value in demonstrating that Officer Kollo had a pattern of using excessive force or was lying when he claimed not to have used excessive force against Davis. Indeed, an internal investigation concluded that Officer Kollo had not used excessive force during the earlier incident. The court did not abuse its discretion by finding that the recording would be unhelpful to the jury in determining whether Officer Kollo used excessive force against Davis.

Davis also claims that admission of the video recording would not have required a “minitrial” because the trial court could have limited the evidence to the recording itself and Officer Kollo’s testimony explaining the incident. He argues that it “would have

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<sup>6</sup> Davis acknowledges that this standard of review applies to a trial court’s evidentiary rulings, yet elsewhere he argues that we should apply de novo review, citing the principle that “ “to the extent the trial court’s ruling depends on the proper interpretation of the Evidence Code, . . . it presents a question of law[.]’ ” (Quoting *People v. Walker* (2006) 139 Cal.App.4th 782, 795.) He does not explain how that principle is applicable here, however, and we agree with the Attorney General that de novo review is inappropriate.

likely taken only a few minutes” to play the recording and then allow the prosecution the chance “to rehabilitate Officer Kollo” by asking him follow-up questions. The court indicated, however, that it was unwilling to permit the recording to be played without giving the officer the chance to “tell us what else happened and how it happened,” which could have consumed a large amount of time given that the recording captured only a snippet of the incident. Moreover, the court appeared to agree with the prosecution that if the recording were admitted it would be appropriate “to allow in every incident of . . . resisting arrest that Officer Kollo has been involved in in his entire career to rebut [the] claim” that he acted with excessive force. We cannot say the court abused its discretion in concluding that the recording’s minimal probative value was substantially outweighed by the time that would be required to put the earlier incident in context given Officer Kollo’s vindication in the internal investigation. Because the ruling was proper under section 352, we also reject Davis’s contention that the recording’s exclusion violated his constitutional rights. (See *People v. Snow* (2003) 30 Cal.4th 43, 90.)

### III. DISPOSITION

The judgment is affirmed.

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Humes, P.J.

We concur:

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Margulies, J.

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Dondero, J.