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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

THOMAS MORENO,

Defendant and Appellant.

B235421

(Los Angeles County
Super. Ct. No. GA075185)

APPEAL from a judgment of the Superior Court of Los Angeles County. Candace J. Beason, Judge. Affirmed.

Melissa J. Kim, 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; Victoria B. Wilson, Supervising Deputy Attorney General; and Erika D. Jackson, Deputy Attorney General for plaintiff and respondent.

INTRODUCTION

Defendant Thomas Moreno filed an insurance claim alleging that his customized motorcycle was stolen out of his driveway. Several months after the insurer paid the claim, the police impounded a motorcycle matching the description of Moreno's stolen vehicle. Moreno attempted to retrieve the impounded vehicle and denied that he had ever filed an insurance claim. He was arrested and charged with insurance fraud (Pen. Code, § 550 subd. (a)(10)), defrauding an insurer (Pen. Code, § 548, subd. (a)) and perjury by declaration (Pen. Code, § 118, subd. (a).)

During a pretrial hearing, a police officer testified that he impounded the motorcycle because a confidential serial number indicated that it had been reported stolen. On cross-examination, the officer asserted that the location of the serial number was privileged under Evidence Code section 1040. The trial court upheld the officer's assertion of privilege and ruled that the information was not material within the meaning of Evidence Code section 1042. The jury convicted Moreno on all counts.

On appeal, Moreno argues that his conviction should be reversed because: (1) the location of the serial number was material to his defense; and (2) the court committed instructional error. He also asks that we review the in camera proceedings conducted by the trial court pursuant to his motion for production of documents under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We affirm the conviction.

FACTUAL AND PROCEDURAL BACKGROUND

A. Events Preceding Moreno's Arrest

In May of 2007, defendant Thomas Moreno contacted Progressive Insurance and reported that a 1993 Harley Davidson motorcycle that he purchased from William Rausch had been stolen out of his driveway. Moreno met with a Progressive claims adjuster, David Perard, and provided a copy of his driver's license, a photograph of the stolen motorcycle, several receipts for customized parts and a key to the ignition. Moreno estimated that the motorcycle was worth \$45,000 because it had a customized paint job

by a well-known motorcycle artist. Perard, however, informed Moreno that his insurance policy was limited to the fair value of the vehicle, which was estimated to be approximately \$13,000, plus an additional \$7,000 for customized components. As part of the claims process, Moreno signed an “affidavit of theft” memorializing his statements under penalty of perjury and assigned ownership of the vehicle to Progressive. Progressive then issued Moreno a payment of approximately \$20,000.

Five months after Progressive paid the claim, California Highway Patrolman Robert Holtz and several other members of the CHP’s vehicle theft unit attended “the Love Ride” motorcycle festival in Pomona, California. Holtz noticed an unattended motorcycle that did not have any license plates, suggesting that it was unregistered. Based on his visual inspection, Holtz concluded that the vehicle was a special construction motorcycle consisting of numerous Harley Davidson parts that had been attached to a different type of frame. Holtz recovered a secret Harley Davidson serial number from a component of the motorcycle and ran the number through a special database accessible to law enforcement. The database indicated that the part came from a 1993 Harley Davidson that had been reported stolen by Progressive Insurance. Holtz waited for the owner of the vehicle to arrive. The owner, however, never came and Holtz impounded the motorcycle.

Shortly thereafter, Moreno, identifying himself as “Thomas Miranda,” called the police and inquired about the impounded motorcycle. Moreno informed Officer Holtz that he had recently built the motorcycle for his friend, Gabriel Castaneda, who did not have time to register the vehicle before attending the “Love Ride” festival. During a subsequent call, Moreno, who continued to identify himself as Thomas Miranda, told Holtz that he wanted to “come clean” about the true owner of the motorcycle. Moreno stated that his step-father, Scott Holloway, was the actual owner of the vehicle motorcycle and that he and Holloway would come to the station to provide proof of registration and ownership.

Prior to meeting with Moreno, Holtz obtained a file from Progressive Insurance regarding the stolen motorcycle associated with the secret serial number recovered from

the impounded vehicle. The file indicated that an insurance claim had been paid to Thomas Moreno and included a copy of Moreno's driver's license. The file also contained a photograph of the stolen vehicle, an ignition key and several receipts for customized parts. The photograph of the stolen motorcycle appeared to match the impounded vehicle. In addition, the key from the insurance file fit the ignition of the impounded motorcycle.

On November 4, 2007, Officer Holtz met with Moreno, who did not bring any identification. Moreno claimed that he had left his license in the car and that his wife had driven off with it. Officer Holtz presented a copy of the driver's license from the Progressive file, but did not disclose how he had obtained it. Moreno confirmed that it was his license. When Officer Holtz asked Moreno why he had initially identified himself as "Miranda," he denied ever calling himself by that name.

Moreno informed Holtz that, since their phone conversations, Scott Holloway had registered the impounded motorcycle. He then presented various DMV forms indicating that the vehicle was registered to Holloway and "T&T Customs," which was a motorcycle business owned by Moreno and his stepfather. Each of the forms appeared to be signed by Holloway.

Officer Holtz showed Moreno the photograph of the motorcycle from the Progressive file and Moreno stated that it "looked like" the motorcycle he had built for Holloway. Moreno indicated that the motorcycle was a "special construction" fabricated from various parts he had taken from other motorcycles or obtained at swap meets. During their discussion, Moreno denied that he had ever owned, insured or filed an insurance claim for a 1993 Harley Davidson. When Officer Holtz asked Moreno about the 2007 insurance claim, Holtz said he had forgotten that he filed the claim.

Officer Holtz also spoke to Scott Holloway, who had driven to the police station with Moreno but had elected to stay outside. Holloway informed Holtz that he did not own the impounded motorcycle and had never seen the vehicle. Holloway further stated that he had agreed to come to the police station to help Moreno, but that he did not want to get in any trouble. Holtz then arrested Moreno.

B. Information and Pre-Trial Proceedings

1. Information and motion to suppress

On April 22, 2009, the County of Los Angeles district attorney filed an information charging Moreno with one count of insurance fraud (Pen. Code, § 550 subd. (a)(10)), one count of defrauding an insurer (Pen. Code, § 548, subd. (a)) and one count of perjury by declaration (Pen Code, § 118, subd. (a).)

Prior to trial, Moreno filed a motion pursuant to Penal Code section 1538.5 requesting the suppression of “any and all VIN numbers”; “[a]ny and all paperwork provided by Thomas Moreno”; and “[a]ny and all statements made by Thomas Moreno.” Moreno asserted that Officer Holtz lacked probable cause to search Moreno’s motorcycle at the Love Ride festival and that any evidence gathered after the search was inadmissible as “fruit of the poisonous tree.” The district attorney opposed the motion, arguing that “the examination of identifying numbers located in plain view on a motorcycle parked in a public parking lot, and the subsequent running of those numbers through a CHP database, d[id] not constitute an unlawful ‘search’ within the meaning of the Fourth Amendment.”

At the suppression hearing, Officer Holtz testified that, while attending the Love Ride festival, he saw a “special construction motorcycle . . . parked amongst many other bikes.” Holtz explained that although the motorcycle had numerous Harley Davidson parts, the frame was not made by Harley Davidson. Holtz checked a vehicle identification number located on the frame and discovered that the motorcycle was not registered. Holtz stated that he was able to view the VIN without touching or moving the vehicle.

Holtz further testified that, after running the VIN, he “checked some other components and at that point . . . realized there was one component part in particular that was from a stolen motorcycle.” When asked how he was able to determine that “the particular component was from a stolen bike,” Holtz responded “it’s a specialized component, but anything other than that I have to invoke 1040, 1042 of the Evidence Code. Request any further discussion of that takes place in an in camera hearing or in the

Judge's chambers." Holtz confirmed, however, that he did not have to touch the motorcycle to obtain the secret serial number from the component. He also stated that he ran the serialized component number through a database, which was maintained by law enforcement and the National Crime Insurance Bureau.

After the prosecutor finished questioning Holtz, the trial court asked Moreno's attorney whether she wanted to conduct a cross-examination. In response, the attorney stated: "the defense position would be that because the officer is not answering questions pursuant to 1040, that either his testimony be struck or that the court go in chambers, but if the court wishes me to start some inquiry . . ." The court agreed that it would have to go in chambers to evaluate Holtz's assertion of privilege, but invited defense counsel to ask any initial questions she might have.

Moreno's attorney asked Officer Holtz a series of questions about the location of the specialized serial number and the database that indicated a component of the impounded motorcycle was from a stolen vehicle. Although Holtz provided some basic information about the database, he declined to disclose the identity of the component on which the serial number was located.

Based on this testimony, Moreno's attorney reiterated her request that the court strike all of Holtz's testimony "based on [his] assertion of privilege . . ." In support of her objection, counsel explained that, "[i]n this particular case the way the information would affect the defense is the following: At this point what we have is the blind word of law enforcement indicating that there is a number that matches to make him believe this is a stolen number. The defense is in a position of not being able to appoint any experts . . . to investigate the veracity of the investigator's statement, that the location and the number if provided to defense would assist us not only in determining the credibility, that it matches any previously-reported stolen bike number, whether or not there would be an explanation as to why a part could match[,] . . . getting into the whole aspect of motorcycles being objects that are . . . completely built up or . . . can be[] parts . . . taken from different vehicles. So the defense is in a position where we cannot determine whether that number is one that was ever reported stolen or whether if a motorcycle had

been reported stolen whether . . . there would be an explanation on it being on a fully built up bike as opposed to being from a stolen [sic] , . . . [¶] Then just the general inability to cross-examine the investigator regarding the truth and veracity.”

After holding an in camera hearing with Holtz and the district attorney, the court announced that it was “going to uphold the privilege at this juncture as to two things. Number one, exactly which part this number is located on as well as the exact location on that part. . . . Other than that, counsel’s been allowed to cross examine and gotten all of the information as it pertains to what the officer did in his investigation.” Moreno’s attorney inquired as to whether the court determined that the privileged “information was material,” and the court responded “yes.” The attorney then asked whether the court had determined “whether there would be any available remedies to the assertion of the privilege,” and suggested that an expert be appointed to review how Officer Holtz had obtained and processed the serialized component number. The prosecution stated that it was amenable to this resolution.

Moreno’s attorney asked the court if it intended to “take a recess on the 1538.5” until the expert had returned its findings. In response, the court stated that it was denying the motion to suppress because “it appears . . . from the evidence presented in open court that all this information was in plain view.” The court further stated that it would “appoint an expert” to “double check on the veracity of the information provided by the investigating officer . . . but deny the 1538.5 with an opportunity to renew it.” The court then directed the parties to select an expert.

2. Moreno’s motion for sanctions

Approximately one month after the suppression hearing, Moreno filed a motion for sanctions arguing that “due process require[d] disclosure of the location of the ‘serialized component part’ in order to properly prepare a defense.” More specifically, Moreno’s motion asserted that disclosure of the “specific location of the number in question” would enable the defense to retain an expert that could “test the credibility of the officer” and determine whether he had properly processed the serial number. The

motion further explained that although the court had previously requested the parties to select an expert, they had been unable to reach a suitable agreement. Thus, according to Moreno, the only appropriate remedy was to “strike any and all testimony for Officer Holtz.”

In its opposition, the district attorney argued that Moreno was not entitled to any “sanctions” because the location of the serial number was not “material” information within the meaning of Evidence Code section 1042. The district attorney contended that, given the extensive evidence demonstrating that the impounded motorcycle was the same vehicle that Moreno had previously reported stolen, there was “no reasonable possibility that disclosure of the exact location of the serialized number would exonerate[] the Defendant or cast doubt on Officer Holtz’s testimony.”

At the sanctions hearing, the court explained that it had previously attempted to avoid ruling on whether Moreno was entitled to a remedy for the government’s withholding of privileged information by offering “an option . . . satisfactory to both [parties].” The court noted that because the parties had been unable to agree on an expert, it was now forced to address the issue of “materiality.” The court further clarified that, to the extent its prior statements at the suppression hearing suggested it had found the privileged information to be material, it was going to “reconsider that issue.”

After hearing argument on the issue of materiality, the trial court ruled that the prosecution had provided substantial, independent evidence indicating that Holtz’s statements and findings regarding the secret serialized component number “[j]ust can’t be incorrect information.” The court also stated that, even if the information was incorrect, “it’s not that important because the rest of the investigation was the critical part of the investigation. Yes [the serialized component] led to the potential impounding of the motorcycle, but the crux of the case followed after that. It just seems . . . there is no way the bike would have been just impounded on a whim . . .”

C. Testimony at Trial

1. Prosecution's witnesses

At trial, the prosecution called David Perard, who processed Moreno's insurance claim in 2007; William Rausch, who sold the stolen motorcycle to Moreno; Officer Holtz; and Scott Holloway.

Perard and Rausch testified that the impounded motorcycle appeared to be the same vehicle that Moreno had purchased from Rausch and later reported stolen. Perard testified that, based on his comparison of images of the stolen vehicle and the impounded motorcycle, he saw no "differences between the[] two bikes." Perard explained that "everything externally on these bikes appear to be similar. It has very specific things on it that are custom, not stock. The bars and the chromed front end is one thing. But even details like the headlights and the passing lamps have aftermarket trim rings that are custom accessories, and both of them have them." Perard also stated that the fenders, the specialized paint job, the suspension, the custom fuel tank, the braided brake lines, the throttle, the chroming highlights on the engine and the exhaust system appeared to be the same on both vehicles. Perard further testified that, during the insurance claims process, Moreno had provided receipts for a "screaming eagle ignition," an air ride suspension and a "venom" 21-inch tire, all of which appeared on the impounded motorcycle.

Rausch provided similar testimony, stating that he had examined the impounded motorcycle and believed it was the vehicle he had sold to Moreno. According to Rausch, the impounded motorcycle had the same customized paint job, which included a red decal on the front fender and specialized pinstriping. The impounded vehicle also had the same oil drain hose, which Rausch had fabricated with his father, the same "aftermarket" designed gas cap, the same wear marks on the seat and the same suction cup marks on the rear fender. Rausch also reported that the impounded vehicle had the same foot controls, tires, wheels, gas shut off valve, odometer, handlebars, "fishtail exhaust system," rear splash pan, kickstand, rear turn signal, dash assembly, throttle cables, braided steel brake cable and brake rotors. Rausch believed that, with the exception of

some newly added parts, the impounded motorcycle was “exactly the same” as the one he sold to Moreno.

Officer Holtz testified about the events that preceded Moreno’s arrest. Holtz explained that he impounded the motorcycle based on a confidential serial number he recovered from a Harley Davidson component of the vehicle. According to Holtz, this serial number was intended to “aid in theft recovery” and indicated that the component had come from a vehicle that had been reported stolen in 2007. On cross-examination, Holtz refused to disclose the specific location of the serial number, but stated that it was located on “a major component part.” He also stated that “if that . . . specific Harley Davidson part was removed off the bike that was at the Love Ride, it would be on the ground. It would not be able to stay up. And that’s as in depth as I’ll get . . .”

Holtz also testified about his conversations with Moreno, which had been recorded. Holtz asserted that, during those conversations: (1) Moreno initially identified himself as Thomas Miranda and claimed that Scott Holloway owned the impounded motorcycle; (2) when shown the photograph from the Progressive insurance file, Moreno stated that it appeared to be an image of the motorcycle he built for Holloway; (3) Moreno told Holtz that the impounded motorcycle contained parts he had removed from other vehicles or obtained at a swap meet; (4) Moreno denied that he had ever owned, insured or filed an insurance claim for a 1993 Harley Davidson motorcycle; (5) when Moreno was confronted with the documents related to his 2007 insurance claim, he said he had forgotten that he made the claim; and (5) the key in the Progressive file fit the ignition on the impounded vehicle.

Scott Holloway also testified at the trial, explaining that Moreno had asked him to help him get his motorcycle out of impound because he did not have a current driver’s license. Holloway stated he had not purchased the impounded motorcycle from Moreno or registered the vehicle with the Department of Motor Vehicles. He also denied ever signing the DMV forms Moreno presented to Officer Holtz.

2. Testimony of Thomas Moreno

Thomas Moreno testified on his own behalf. On direct examination, he asserted that, six or seven months after purchasing a motorcycle from William Rausch, he “deconstructed the bike” by removing several components. The motorcycle was then stolen and he filed a claim with Progressive. Moreno further testified that, after receiving the insurance payment, he built the motorcycle that was later impounded by Officer Holtz.

According to Moreno, when building the impounded motorcycle, he used several parts that were originally on the stolen vehicle, including, in part, the speedometer, the odometer, the lock ignition and the fenders. He argued that other similarities between the two motorcycles were coincidental. In support of his assertion that he had built the impounded motorcycle after his initial motorcycle was stolen, Moreno provided receipts for several parts he purchased after the insurance claim was filed.

Moreno admitted that he initially provided Officer Holtz a fake name, but claimed that he had done so only because his license was suspended. Moreno stated that his license was “habitual[l]y” suspended and that he wanted to avoid a seventh conviction for driving on a suspended license. He also admitted that he had signed Holloway’s name to the DMV documents that he presented to Officer Holtz.

On cross-examination, Moreno reiterated that he had removed numerous parts from the motorcycle he purchased from Rausch before it was stolen, and then placed those parts on the motorcycle impounded by Officer Holtz. In response to this testimony, the prosecution presented a recorded statement in which Moreno told Officer Holtz that it was “impossible” that any part from the Rausch motorcycle had been put on the impounded motorcycle. When confronted with this statement, Moreno explained that he simply meant that it was impossible that there were any stolen parts on the impounded vehicle.

The prosecution also asked Moreno to explain why one of the motorcycle part receipts he had produced was for a 16-inch rear wheel, but the impounded vehicle had an 18-inch front wheel. Moreno stated that, although he had submitted the receipts as

evidence that he had purchased certain parts after Rausch's bike was stolen from him, he was unsure whether the parts had actually been placed on the impounded motorcycle.

Moreno also stated that Rausch's testimony that almost every part on the impounded motorcycle matched the parts on the motorcycle that he had sold to Moreno was "a hundred percent" wrong. Moreno added that Rausch had "lied" when he claimed that he and his father had fabricated the drain plug that appeared on both motorcycles.

Moreno also admitted that he initially told Officer Holtz that he had never filed an insurance claim for a stolen motorcycle. When asked if this was a lie, Moreno stated "I was withholding information. If you want to call it lying, I'm okay with that." Moreno later admitted that his statements were a "lie." When asked why he had lied, Moreno stated that he felt Holtz was asking "absurd questions" that were "off the subject" and that the officer was trying to deceive him.

The prosecutor asked Moreno to confirm his prior testimony that he had forged Holloway's signature on the DMV forms that he presented to Officer Holtz. Moreno, however, denied signing the documents, stating that that he believed his mother had forged the signatures. When the prosecutor asked Moreno whether he recalled testifying earlier that day that he signed Schott Holloway's name to the DMV documents," Moreno responded "I don't recall that. . . . There's a lot of repetitive questions from me, so I'm like 'ok, ok.'"

3. *Verdict*

The jury convicted Moreno on all counts. The court sentenced Moreno to two years in prison on each count, with each sentence to be served concurrently. Moreno filed a timely appeal.

DISCUSSION

On appeal, Moreno argues that the trial court erred by failing to require Officer Holtz to disclose the location of the confidential serial number or, alternatively, imposing sanctions for withholding the information. He further contends that the trial court committed instructional error and requests a *Pitchess* review.

A. The Trial Court Did Not Err in Permitting Officer Holtz to Withhold the Location of the Confidential Serial Number

Moreno raises two arguments regarding the trial court's ruling that Officer Holtz was not required to disclose the location of the confidential serial number that he recovered from the impounded motorcycle. First, Moreno asserts that the location of the serial number does not qualify as "privileged" information under Evidence Code section 1040. Second, he argues that, to the extent the information is privileged, the trial court erred in concluding that the information was not material within the meaning of Evidence Code section 1042.

1. The location of the serial number qualifies as privileged information under Evidence Code section 1040

Moreno contends that the trial court erred in concluding that the location of the confidential serial number – more specifically, the component on which the number appeared – qualified as privileged information. Evidence Code section 1040 provides a privilege against public disclosure of "official information." Official information is defined as "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (§ 1040, subd. (a).) Public entities have a privilege to refuse to disclose official information if "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice . . ." (§ 1040, subd. (b).) The People have the burden to demonstrate that the privilege applies. (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1317.)

In this case, Officer Holtz asserted the privilege as to the identity of the component on which the confidential serial number was located. According to Holtz, the serial number was a theft prevention mechanism known only to law enforcement and Harley Davidson. Holtz further indicated that, by utilizing the serial number and a special database, law enforcement is able to determine the vehicle that the component

originally came from. This serialized component appears to aid vehicle theft prevention in two ways. First, if an individual has tampered with or removed a vehicle identification number from a motorcycle, the confidential number on the component provides an alternative mechanism of identifying the vehicle. Second, if an individual has removed the serialized component from a stolen vehicle, and placed it on a separate vehicle, the serial number enables law enforcement to determine that the part came from a stolen vehicle.

Two prior published decisions considered similar confidential information related to vehicle theft prevention and concluded that it qualified as privileged “official information” within the meaning of section 1040. In *In re David W.* (1976) 62 Cal.App.3d 840 (*David W.*), the defendant was charged with stealing an automobile. At trial, a police officer testified that although the standard VIN tag had been removed from the vehicle, officers were able to recover a “secret VIN” number from an undisclosed location within the car. The officer then “made a check of the number and received a teletype report pointing out that the vehicle identification number was from a stolen vehicle.” (*Id.* at p. 845)

On cross-examination, defense counsel asked the officer to identify the location of the “secret VIN.” The officer, however, asserted that the information was privileged, explaining that “confidentiality” was necessary “to enable police to identify stolen cars.” (*Id.* at p. 846) The trial court sustained the privilege and the defendant was subsequently convicted.

On appeal, the defendant argued that the location of the VIN was not “privileged within the meaning of section 1040 . . .” (*David W., supra*, 62 Cal.App.3d at p. 847.) The appeals court rejected the argument, explaining “[w]e agree with the trial court that the privilege, claimed by the petitioner and the police officer, was properly invoked. To allow public knowledge of the location of the secret identification number would destroy its very purpose and would remove a valuable investigatory device that may lead to the discovery of vehicle thefts.” (*Ibid.*)

In *People v. Marghzar* (1987) 192 Cal.App.3d 1129, the defendant was charged with stealing an automobile and presenting a fraudulent insurance claim. At trial, a police officer testified that he utilized a secret “check digit” formula to determine that the VIN on the recovered vehicle had been “changed since the vehicle left the manufacturer.” (*Id.* at p. 1134.) An expert witness from the National Auto Theft Bureau testified that the insurance industry had devised the “secret formula . . . to determine whether a VIN is valid or fictitious.” (*Ibid.*) When the officer and the expert witness were asked to disclose the formula, both witnesses asserted the information was privileged and declined to answer.

On appeal, the court concluded that the “check digit” formula was privileged information within the meaning of section 1040: “In the case at bar it is clear that if the formula which produces the check digit were revealed, an important investigatory tool would be destroyed. Thus, disclosure of the information is against the public interest.” (*Marghzar, supra*, 192 Cal.App.3d at p. 1135.)

The information at issue in this case – the location of a confidential serial number – is substantially similar to the information considered in *David W. and Maghzar*. The serial number is an anti-theft mechanism that allows law enforcement to identify and recover stolen vehicles and stolen motorcycle parts. At trial, Officer Holtz indicated that the utility of the confidential serial number would be compromised if its location were disclosed to the public.¹ (See *David W., supra*, 62 Cal.App.3d at p. 847 [disclosing location of confidential VIN “would destroy its very purpose and would remove a valuable investigatory device that may lead to the discovery of vehicle thefts”];

¹ The defendant has requested that we review the in camera portion of the reporters’ transcript “to determine for itself whether the government privilege was properly invoked.” The People do not object to this request and “acknowledge[] that this Court may conduct an independent review of the in camera hearing to determine . . . whether [the trial court] properly exercised its discretion in deciding not to disclose the privileged information.” Pursuant to the defendant’s request, we have reviewed the transcript of the in camera proceeding, which contains additional evidence that: (1) the serial number is a confidential, anti-theft mechanism; (2) the utility of the serial number would be compromised if its location were disclosed to the public.

Marghzar, supra, 192 Cal.App.3d at p. 1135 [disclosing “digit check” formula that enables law enforcement to detect false VINs would destroy its utility].)

Moreno, however, contends that a secret number pertaining to an individual part on a motorcycle is “substantially different” than a secret VIN number that applies to an entire vehicle. According to Moreno, “[u]nlike a VIN, a component part . . . on a motorcycle may have been removed from a motorcycle that is subsequently stolen. In other words, a component part can be removed from a motorcycle and lawfully possessed if it was removed before the remainder of the motorcycle was stolen.” We fail to see the relevance of Moreno’s argument. Regardless of whether a component with a confidential serialized number could conceivably be removed from a motorcycle that is later stolen, and then placed on a non-stolen vehicle, the serial number still serves as an “investigatory device that may lead to the discovery of vehicle thefts.” (*Id.* at p. 847.) Moreover, the utility of the confidential serial number would likely be compromised if its location were disclosed to the public. Accordingly, the location of the serial number qualifies as privileged “official information.”

2. *The trial court did not err in concluding that there was no need for an adverse finding because the location of the serial number was not material within the meaning of section 1042*

Moreno further contends that, even if the location of the serial number is privileged, the trial court erred when it concluded that the government could withhold the information without sanction because it was not material to the case. We review the trial court’s determination of materiality for abuse of discretion. (*People v. Walker* (1991) 230 Cal.App.3d 230, 237-238 (*Walker*).)

a. *“Materiality” under Evidence Code section 1042*

Evidence Code section 1042, subdivision (a) provides that when a claim of official privilege is sustained in a criminal proceeding, the trial court is to “make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material.” Thus, under section 1042, “an adverse finding [or other form of sanction] is only required if the

privileged information is material.” (*In re Sergio M.* (1993) 13 Cal.App.4th 809, 814 (*Sergio M.*); *David W.*, *supra*, 62 Cal.App.3d at 847; see also [“the privilege need not be disclosed or sanctions applied unless the privileged information *is material*”].)

“[T]he test of materiality is not simple relevance; it is whether the nondisclosure might deprive defendant of his or her due process right to a fair trial. [Citation.]” (*People v. Lewis* (2009) 172 Cal.App.4th 1426, 1441 (*Lewis*)). To establish materiality, the defendant has “the burden of showing that in view of the evidence, there was a reasonable possibility that the [privileged information] could constitute material evidence on the issue of guilt which would result in his exoneration.” (*Walker*, *supra*, 230 Cal.App.3d at p. 238.) This “reasonable possibility” standard is akin to the federal “harmless error” standard. (Cf. *People v. Wilson* (2008) 43 Cal.4th 1, 28 [the state standard for evaluating prejudicial effect of penalty phase error – whether “there is a reasonable possibility the error affected the verdict” – is “effectively the same” as the federal “harmless beyond a reasonable doubt” standard]; *Chapman v. California* (1967) 386 U.S. 18, 23-24 [explaining that there is “little if any difference” between “reasonable possibility” standard and “harmless beyond a reasonable doubt” standard].)

The issue of “materiality” has arisen most frequently in the context of confidential police surveillance locations. (See generally *Hines v. Superior Court* (1988) 203 Cal.App.3d 1231, 1234 [section 1040 applies to a confidential “surveillance location”]; *Lewis*, *supra*, 172 Cal.App.4th at pp. 1432-1438 [summarizing numerous cases analyzing materiality of confidential surveillance location].) Our courts have concluded that, in such cases, the “the location from which the surveillance was performed is not material, for the purpose of section 1042’s adverse finding requirement, if the accuracy of the testifying officer’s testimony about the surveillance observations is unquestioned, or at least is sufficiently corroborated by independent evidence such that there is no realistic possibility that disclosing the surveillance location would create a reasonable doubt in the minds of a reasonable jury about the officer’s veracity.” (*Id.* at p. 1438.)

b. The trial court did not abuse its discretion in concluding that the location of the serial number was not material

Moreno argues that the location of the confidential serial number was material because it would have allowed him to test the credibility of Officer Holtz's assertions that: (1) he identified a confidential serial number on a component of the impounded motorcycle; and (2) the serial number indicated that the component was associated with a vehicle that had been reported stolen. Given the evidence presented at trial, however, there is no reasonable possibility that revealing the specific component on which the serial number appeared would have resulted in Moreno's exoneration. Moreover, Moreno's statements regarding the secret serial number are corroborated by significant independent evidence.

According to Holtz's testimony, he recovered a secret serial number from an undisclosed component of the motorcycle that indicated the component was from a vehicle Moreno had previously reported stolen. During his trial testimony, Moreno did not deny that many of the components on the impounded motorcycle – including, in part, the customized fenders and the ignition box – were originally on the motorcycle that he reported stolen. Moreno alleged, however, that he had taken those components off the motorcycle before it was stolen, kept them in his garage and then placed them on another motorcycle he built, which was later impounded.

During closing argument, Moreno's counsel emphasized that the defendant did not deny that the undisclosed serialized component was originally on the motorcycle that was reported stolen: "The District Attorney is saying there's one secret part. There's one part on the bike that cannot be replicated in any way. But . . . let's look at the all the things that's [sic] left out. [Officer Holtz] is not saying it's the same bike. [Holtz] is saying it's a component. What's the component? I have not been allowed to tell . . . The law doesn't allow it. That's absolutely fine. Is it a bolt? Is it a nut? What is it? What you didn't hear was that this component cannot come off with this bike. Now if you heard testimony that this component . . . cannot come off the original bike, the case would be closed. That's not the situation. We have heard no testimony that that part, whatever it

is, that component cannot come off the bike. And I submit to you that that component was sitting in my client's garage, and he put it back on Bike No. 2, and that is reasonable.”

Given Moreno's testimony – which specifically acknowledged that many of the components on the impounded motorcycle were taken off a motorcycle that was reported stolen – “we fail to see how the how the disclosure of [the specific component on which the number appeared] would result in the [defendant's] exoneration.” (*Sergio M., supra*, 13 Cal.App.4th at p. 814.) According to Moreno's own theory of the case, his guilt did not turn on whether or not the component had ever been on a vehicle that was reported stolen. He conceded that it had. Rather, the case turned on whether Moreno had in fact removed components before the motorcycle was stolen and then placed them on a different motorcycle. The jury clearly rejected that contention when it found him guilty of all charges.

Our conclusion that there is no reasonable possibility that revealing the location of the serial number would have exonerated the defendant is also supported by the overwhelming evidence of his guilt presented at trial. In a recorded conversation, Officer Holtz told Moreno that, based on his investigation, it appeared that certain parts on the impounded vehicle appeared to be the same parts that were on the motorcycle Moreno had previously reported stolen. In response, Moreno repeatedly told Officer Holtz that it was “impossible” that any parts from the stolen vehicle were on the impounded vehicle. These recorded statements directly contradicted Moreno's defense at trial, which was predicated on the assertion that he had taken parts off the motorcycle before it was stolen and then placed them on the impounded vehicle.²

² Moreno's testimony was also significantly undermined by his failure to provide any explanation as to why he did not inform Progressive that he had removed several key parts of the motorcycle before it was stolen. Moreno testified that two of the parts he removed from the stolen motorcycle were the ignition box and the fenders. At the time he filed his insurance claim, however, Moreno provided Progressive a key to the ignition of the stolen vehicle and stated the customized paint job (a portion of which was on the fenders) significantly increased the value of the stolen vehicle. There is no evidence,

In addition, two witnesses – Rausch and Perard – both testified that the motorcycle that Moreno reported stolen appeared to be the same motorcycle that was impounded. Both witnesses testified that almost every part on the two motorcycles was identical, including numerous specialized parts and the custom paint job. Moreover, Moreno admitted that when Officer Holtz showed him the photograph of the stolen motorcycle from the Progressive insurance file, he told Holtz it appeared to be the same motorcycle that had been impounded. The key that Moreno gave to Progressive also fit the ignition of the impounded vehicle.

The evidence also showed that Moreno repeatedly lied to Officer Holtz on a wide range of topics. Moreno initially gave Holtz a false name, identifying himself as Thomas Miranda; he claimed he had not attended the Love Ride festival and that Holloway owned the impounded vehicle; he denied ever owning a 1993 Harley Davidson or filing an insurance claim for a motorcycle. At trial, Moreno conceded that each of these statements was a lie.

Moreno also provided directly conflicting statements during the course of his trial testimony. On direct examination, he admitted that he forged Holloway’s signature on DMV documents. During cross-examination, which occurred later that day, he stated that his mother forged the signature and said he could not recall whether he had previously testified that he signed the documents.

Given all of this evidence, Moreno has failed to carry his burden of showing there is reasonable possibility that he would have been exonerated if the jury had been informed of the specific component containing the serial number. (See *Walker, supra*, 230 Cal.App.3d at p. 238 [to establish materiality, defendant has “burden of showing that in view of the evidence, there was a reasonable possibility that the [privileged information] could constitute material evidence on the issue of guilt which would result in his exoneration”].)

however, that he informed Progressive that the ignition box or the fenders were not actually on the motorcycle at the time they were stolen.

The trial evidence also demonstrates that there is no reasonable possibility that disclosing the location of the serial number would “create a reasonable doubt in the jury’s minds” regarding the veracity of Officer Holtz’s statements that he recovered a confidential serial number indicating that a component of the motorcycle was from a stolen vehicle. The evidence showed that, after impounding the vehicle, Officer Holtz requested that Progressive Insurance provide a file relating to a prior claim for a stolen motorcycle. The file indicated that the insurance claim had been paid to Moreno and contained a photograph that was essentially identical to the impounded vehicle. It also contained a key that fit the ignition of the impounded vehicle. Moreno has provided no argument or theory as to how Officer Holtz could have possibly concluded the motorcycle was stolen or obtained that specific insurance file without the aid of the secret serial number.

B. The Trial Court Did Not Commit Instructional Error

Moreno argues that the trial court committed instructional error when it failed to reference count three, perjury by declaration, in a unanimity instruction. We find no error.

1. Factual summary

Moreno was charged with three separate counts. Count one alleged that Moreno committed the crime of “insurance fraud” (Penal Code, § 550, subd. (a)(1)) by presenting “a false and fraudulent claim for the payment of a loss and injury . . . under a contract of insurance.” Count two alleged that Moreno committed the crime of “defrauding an insurer” (Penal Code, § 558, subd. (a)) by disposing of his 1993 Harley Davidson motorcycle “with the intent to defraud and prejudice an insurer . . .” Count three alleged that Moreno committed the crime of “perjury by declaration” (Penal Code, § 118, subd. (a)) by “declar[ing] as true” a false “stolen vehicle report.”

At the conclusion of the trial, the court provided the following instruction regarding Moreno’s “perjury by declaration” charge: “The defendant is charged in count 3 with perjury by false affidavit in violation of penal code section 118(a). . . . The people

allege that the defendant made the following false statements: CHP form 180, insurance claim, and all DMV documents. You may not find the defendant guilty unless all of you agree that the people have proved that the defendant made at least one false statement and you all agree on which particular false statement the defendant made. . . .”

In addition, the court provided the jury a separate unanimity instruction regarding counts one and two: “The defendant is charged in Count 1 with insurance fraud: fraudulent claims; and in count 2, insurance fraud: destruction of insured property. The people have presented evidence of more than one act to prove that the defendant committed each of these offenses. You must not find the defendant guilty of these offenses unless you all agree that the people have proved that the defendant committed at least one of these acts and you all agree on which act he committed.”

2. The court did not commit instructional error

Moreno contends that “the trial court erred in not including the perjury count in the unanimity instruction” relating to the two insurance fraud counts. Moreno acknowledges that the court’s perjury instruction specifically informed the jurors that they could not find the defendant guilty of that offense unless they “agreed on which particular false statement the defendant made.” Moreno contends, however, that the court provided an “inconsistent instruction” when it provided a unanimity instruction on counts one and two that failed to reference the perjury charge.

We find no “inconsistency” in the trial court’s instructions. The court simply provided two separate instructions that discussed the unanimity requirement. The first pertained to the perjury charge and the second pertained to the two insurance fraud counts. There is no language in the second “unanimity instruction” suggesting that the jury should ignore the unanimity instruction given in regards to the perjury count. The mere fact that the court provided separate unanimity instructions for count three and for counts one and two does not, in itself, create any “inconsistency.” The instructions, considered as a whole, made clear to the jury that unanimity was required to convict the defendant of any of the counts.

C. The Trial Court Fulfilled its Duties under Pitchess v. Superior Court

Prior to trial, Moreno filed a motion under Evidence Code section 1043 and *Pitchess v. Superior Court, supra*, 11 Cal.3d 531, seeking the review of any personnel records of Officer Holtz regarding “complaints from any and all sources relating to acts of coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion, and or probable cause, illegal search and seizure, false arrest, perjury, dishonesty, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude . . .” The trial court granted the motion in part, agreeing to inspect personnel records in the areas of “fabricated police reports.” The court then reviewed the records in camera and found no discoverable information.

Moreno has requested that we conduct an independent review of the in camera portion of the trial court’s *Pitchess* proceedings and determine whether any discoverable information was withheld. (See generally *People v. Mooc* (2001) 26 Cal.4th 1216.) We have reviewed a sealed reporter’s transcript of the trial court’s in camera portion of the *Pitchess* proceeding and conclude that no further proceedings are required.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.