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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO ESCOBEDO,

Defendant and Appellant.

B239133

(Los Angeles County
Super. Ct. No. VA114298)

APPEAL from the judgment of the Superior Court of Los Angeles County.

Robert Higa and Lori Ann Fournier, Judges. Affirmed as modified.

John P. Dwyer, 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, Assistant Attorney General, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendant and appellant Alfredo Escobedo was convicted by jury of one count of first degree murder and three counts of attempted first degree murder. Multiple firearm enhancements were found true. Defendant contends the trial court abused its discretion in denying his pretrial motion for discovery pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). Defendant also contends the abstract of judgment contains an error regarding the enhancements as to two of the attempted murder counts.

We conclude the court did not abuse its discretion in denying defendant's *Pitchess* motion. We therefore affirm the judgment of conviction. However, as respondent concedes, the abstract of judgment contains an error, and we therefore direct the superior court to modify the abstract to conform to the jury's verdict and the applicable law.

FACTS

The following statement of facts is based on the police reports attached as exhibit A to defendant's *Pitchess* motion. We do not summarize all of the facts in the trial record supportive of the jury's verdict as defendant has not raised a substantial evidence question for review.

In the early morning hours of February 21, 2010, Carlos Rodriguez was driving his father's minivan in the City of South Gate. Three of his friends, Nelson Lombardi, Jorge Carreon, and Christian Sandoval, were passengers in the van. The young men had left a friend's birthday party and were headed to Jack in the Box to get something to eat. While waiting at an intersection, they noticed a truck or sport utility vehicle (SUV) behind the minivan with its high beam headlights on. As they started to make a left turn, the SUV screeched its tires and pulled up alongside the driver's side of the minivan. The front passenger in the SUV pointed a gun out the passenger-side window and started shooting at the minivan. Rodriguez, driver of the minivan, was shot in the head. Lombardi, sitting behind the front passenger seat, was shot in the torso. Carreon and Sandoval were not hit. After the shooting, the SUV sped off and the minivan crashed into another vehicle. Lombardi, Carreon and Sandoval realized Rodriguez was unconscious and severely injured. Sandoval moved him out of the driver's seat and drove to the hospital.

Detective Roman Amador of the South Gate Police Department reported to the hospital and spoke with Lombardi. Lombardi denied seeing the individual who had shot at him and his friends. Carreon and Sandoval also denied seeing the shooter.

Rodriguez died from the gunshot wound to his head. After Lombardi was released from the hospital, his sister, Erika Peinado, contacted Detective Amador and told him she had spoken to Lombardi at the hospital and he told her he recognized the shooter as someone he knew as "Fredo." Peinado said Lombardi was willing to speak with the police about what happened. Detective Amador also received a phone call from Lombardi's mother who stated her son was afraid, but wanted to speak with the police to identify the shooter and explain what happened.

On February 23, 2010, less than 48 hours after the shooting, Lombardi went to the South Gate Police Department to speak with Detective Amador. Detectives John Duncan and Phil Guzman of the Los Angeles County Sheriff's Department interviewed Lombardi.

During the recorded interview, Lombardi said he and Rodriguez had been friends for years and regularly hung out together. Rodriguez, Carreon, Sandoval and he had been at a friend's birthday party. Rodriguez drove them in his father's minivan. They left the party to get something to eat. While waiting at an intersection, they noticed a truck or SUV shining very bright lights into the back of the minivan. The SUV then screeched its tires and pulled up along the driver's side of the van. Lombardi saw an individual he knew as Fredo, wearing a hat and sitting in the front passenger seat, start shooting at the minivan. He heard the windows break, and the sound of several gunshots, and realized he had been shot. After the minivan crashed to a stop, Sandoval moved the unconscious Rodriguez out of the driver's seat and drove to the hospital.

Lombardi told the detectives the SUV was red, and he believed it belonged to a friend of Fredo's who Lombardi knew only as "Kidd." Lombardi said he recognized the vehicle because Kidd tried to run down Lombardi and a friend in the street a few months before. He told them he thought Kidd and Fredo lived in the same apartment complex. Lombardi also said that Kidd and Fredo were members of a tagging crew called HMF,

that he and Rodriguez were members of a rival tagging crew called CTE, and that Fredo and Rodriguez had been in sort of a “feud.”

Detective Amador was able to identify defendant as possibly being the Fredo referenced by Lombardi. Detective Amador was aware of tagging crews in the neighborhood known as HMF or “Homicidal Maniac Family,” and CTE or “Crazy Times,” “Crazier Than Ever.” Detective Amador put together a six-pack photographic lineup (six-pack) for Lombardi to review, which contained a photograph of defendant. Detective Duncan showed the six-pack to Lombardi and he identified defendant as the shooter.

Later in the evening of that same day, Detectives Duncan and Guzman interviewed Lombardi’s brother, who told the detectives he spoke to Lombardi at the hospital on the night of the shooting. Lombardi told his brother that night the shooter was Fredo and they talked about how Fredo was “always threatening” Rodriguez.

Detectives Duncan and Guzman also interviewed Carreon and Sandoval. Carreon told the detectives he saw the shooter was wearing a hat, but did not get a look at his face because he ducked down at the sound of gun shots and the shattering of the window next to him. Carreon said the SUV was a faded red color. Carreon said Lombardi told him it was Fredo who shot at them. Like Carreon, Sandoval told the detectives he did not see the shooter. Sandoval said he knew Rodriguez had “a beef” with someone named Fredo and that both Lombardi and Carreon were saying Fredo was the shooter.

The next day, Detectives Guzman and Duncan spoke with Peinado, Rodriguez’s older sister. She explained Lombardi told her at the hospital Fredo had shot at them. She knew who Fredo was because of an incident that occurred several months earlier in October 2009. Rodriguez, Lombardi, and some of their friends were talking in front of Peinado’s home. A party was going on across the street. At some point, defendant, who had been at the party, walked by Peinado’s home and confronted her brother. Defendant pointed a gun at him and threatened him or called him a name. After he left, Rodriguez told his sister the man who pointed the gun at him was Fredo. Peinado was shown a six-pack, and she identified defendant as the individual who had threatened her brother.

South Gate Police Department officers went by the apartment building where Lombardi said he believed Kidd lived. A red Jeep Cherokee was located there. The police determined it was registered to a Moises Salas. Salas was detained and brought to the South Gate Police Department to be interviewed.

On February 24, 2010, Detectives Guzman and Duncan interviewed Salas. Salas confirmed he owned the red Jeep Cherokee and had purchased it about five months earlier. He told the detectives that on Saturday night, he had been driving the jeep and that defendant, and defendant's brother, were with him. The three of them had gone to two different clubs. Salas admitted he was a member of HMF, as well as another tagging crew called PSE.

Salas initially denied knowing Rodriguez and Lombardi, but eventually conceded he knew who they were and that he had had some "rumbles" with Lombardi and his crew in the past. He denied ever trying to run down Lombardi with his jeep. Salas also said defendant and Rodriguez, who he knew as "Blems," talked "smack" with each other all the time.

When the detectives told Salas his jeep was identified as having been involved in a driveby shooting incident early Sunday morning, he initially denied any knowledge. Salas then admitted that after leaving the last club, they came up on a gray or beige minivan. Defendant was sitting in the front passenger seat of his jeep and defendant's brother was sitting in the back. Salas did not know defendant had a gun. Salas said he pulled up next to the minivan and defendant started shooting. Salas thought defendant would just yell something or talk "smack" like usual.

Defendant was detained and brought to the police station. Detectives Guzman and Duncan interviewed defendant, after he waived his rights and agreed to speak with them. He denied any knowledge of the shooting. Defendant said he had been out with his brother at the movies on Saturday, and Salas joined them later on and they went to some clubs. They left the clubs and drove around. Defendant's brother was riding with Salas in the jeep, and defendant was in a grey Chrysler with their friend Armando Ruiz.

Defendant said they also drove by the Jack in the Box and then went home. He denied having any problems with Rodriguez or Lombardi.

Detectives Guzman and Duncan told defendant that Salas had identified him as the person who had shot at the minivan early Sunday morning, killing Rodriguez. Defendant then told investigators he had lied earlier about being in the Chrysler. He admitted to being in the front passenger seat of Salas's jeep, and that his brother was sitting in back. Defendant also admitted he had confronted Rodriguez in October 2009 in front of his sister's house, but maintained that he had not shot at anyone.

Detectives spoke with defendant's brother, who claimed that he, defendant and Salas had been in Salas's jeep, but had only gone to a few nightclubs Saturday night. He denied being a member of HMF and he did not remember any shooting that night.

PROCEDURAL BACKGROUND

Defendant was charged by information with the first degree murder of Rodriguez (Pen. Code, § 187, subd. (a))¹, and three counts of the attempted first degree murder of Lombardi, Carreon, and Sandoval (§ 187, subd. (a), § 664, subd. (a)). As to all four counts, it was specially alleged that defendant personally used and discharged a firearm in the commission of the offenses. (§ 12022.53, subds. (b), (c).) As to counts 1 and 2 (concerning victims Rodriguez and Lombardi), it was further alleged defendant used a firearm causing death or great bodily injury. (§ 12022.53, subd. (d).) A fifth count was pled arising from the incident in October 2009 when defendant assaulted victim Rodriguez in front of his sister's house. (§ 245, subd. (a)(2).) Moises Salas was named a codefendant in counts 1 through 4. He is not a party to this appeal and is mentioned only as relevant for context.

Defendant filed a pretrial motion for *Pitchess* discovery seeking records of complaints against Detectives Duncan and Guzman of the Los Angeles County Sheriff's

¹ All further undesignated section references are to the Penal Code.

Department² for “falsifying police information/reports, planting evidence, fabricated testimony, fabricated evidence, reports of coerced confessions, and/or any other acts of unethical conduct.” Defendant argued evidence of the detectives’ past conduct in falsifying or tampering with witness statements to “build up a particular case or strengthen a weak identification” was relevant to his defense that he was not the shooter and that his identification as the shooter by the victims was suspect. Defense counsel’s declaration in support of the motion stated, on information and belief, that Detectives Guzman and Duncan “purposefully made false statements, coerced, intimidated, misled, orchestrated, and/or otherwise engineered a false identification from witness Lombardi in conjunction with witness Peinado in order to lead them to a suspect in the case.”

The court denied defendant’s motion and did not conduct an in camera review of any portion of the personnel files, finding “no specific facts showing any good cause” and no “specific allegations of misconduct” warranting review of the peace officers’ records.

The case proceeded to trial. Lombardi testified consistently with his pretrial statement to police. Codefendant Salas, who entered into a plea agreement with the prosecution, testified against defendant and identified him as the shooter, consistent with his pretrial statement. The jury found defendant guilty as charged on counts 1 through 4, and found true the firearm enhancement allegations. Specifically, as to counts 3 and 4, regarding victims Carreon and Sandoval, who did not suffer bodily injury, the jury found true that defendant personally used and discharged a firearm during the commission of the attempted murders in violation of subdivisions (b) and (c) of section 12022.53. The jury acquitted defendant of count 5. Defendant was sentenced to a total state prison term of 75 years to life. This appeal followed.

² The motion also referenced Detective Amador. However, Detective Amador was employed by the South Gate Police Department and not the Los Angeles County Sheriff’s Department, the entity to which defendant’s discovery motion was directed. The parties concede that review of Amador’s personnel files is not at issue in this appeal.

DISCUSSION

1. The Court Did Not Abuse Its Discretion in Denying Defendant's *Pitchess* Motion

A party seeking discovery from a peace officer's personnel records through a *Pitchess* motion must comply with Evidence Code sections 1043 through 1047. "[T]he *Pitchess* motion must describe 'the type of records or information sought' (Evid. Code, § 1043, subd. (b)(2)) and include '[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records' (*id.*, subd. (b)(3))." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) The affidavits may be on information and belief and need not be based on personal knowledge, but the information sought must be identified with sufficient specificity to preclude the possibility of a defendant simply fishing for helpful information. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85-86.)

To establish good cause, the affidavits must "provide a 'specific factual scenario' establishing a 'plausible factual foundation' " for the moving party's allegation of police misconduct. (*City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1146.) The factual allegations must be specific, factual, and unambiguous. (*Id.* at pp. 1147-1148.) Plausibility is satisfied if a defendant "demonstrate[s] that the scenario of alleged officer misconduct could or might have occurred"; the allegations need not be "reasonably probable or apparently credible." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016, 1025-1026 (*Warrick*)). Moreover, "[t]he trial court does not determine whether a defendant's version of events, with or without corroborating collateral evidence, is persuasive -- a task . . . tantamount to determining whether the defendant is probably innocent or probably guilty." (*Id.* at p. 1026.) "A showing of good cause is measured by 'relatively relaxed standards' that serve to 'insure the production' for trial court review of 'all potentially relevant documents.' [Citation.]" (*Id.* at p. 1016.)

A motion for discovery of peace officer personnel records is addressed to the sound discretion of the trial court. A review of the lower court's ruling is subject to an

abuse of discretion standard of review. (*City of San Jose v. Superior Court, supra*, 67 Cal.App.4th at p. 1145.)

Defendant contends his motion was meritorious and provided a proper showing of good cause for an in camera review of the detectives' respective personnel files. Defendant argues he was not in codefendant Salas's jeep at the time of the shooting, and therefore was wrongfully identified as the shooter. He alleged, on information and belief, the detectives, in conjunction with Peinado, created false police reports and tampered with witness statements, specifically Lombardi's, in order to obtain a suspect in the case. And, defendant argued that if prior complaints were made against the detectives about fabricating other witness statements, such evidence would be admissible, at a minimum, as impeachment of the detectives, supporting his defense that he was wrongly identified and that Lombardi's identification of him was suspect.

The majority of the generalized categories of records sought in defendant's motion are not logically related to the claimed officer misconduct of procuring fabricated witness statements. Documents related to "planting evidence," "fabricated evidence," and "coerced confessions" are not material to defendant's proposed defense. Defendant's motion did not identify any scenario based on defendant claiming to have been coerced into confessing, or otherwise that physical evidence was planted to support the charges filed against him. And, the request for records regarding "any other acts of unethical conduct" is overbroad. (See *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1023-1024 [overbroad discovery request for all personnel records reflecting nonfelony acts of moral turpitude pursuant to *Wheeler*³ was improper as it effectively abrogated the good cause requirement of Evidence Code section 1043 and would permit "fishing expeditions" into peace officer personnel records in "virtually every criminal case"].)

The trial court reasonably found defendant failed to show good cause for the discovery of records of complaints of "falsifying police information/reports" or

³ *People v. Wheeler* (1992) 4 Cal.4th 284 (*Wheeler*).

“fabricated testimony.” Defendant failed to articulate a plausible, factually specific scenario of officer misconduct. (*Warrick, supra*, 35 Cal.4th 1026.) The purported defense theory that defendant was not in the jeep at the time of the shooting and that Detectives Guzman and Duncan coerced Lombardi into identifying him as the shooter is not internally consistent with defendant’s voluntary statements to the detectives, or the pertinent documents presented in defendant’s motion. (*Id.* at p. 1025.) Other than denying he was the shooter, defendant has offered no plausible theory to explain why Peinado would misdirect the detectives to investigate defendant, or to explain how Lombardi was coerced.

Although Lombardi was initially reluctant to tell law enforcement the identity of the shooter, he told his brother on the night of the shooting defendant was the shooter, and while he was still in the hospital, he told Rodriguez’s sister, Peinado, defendant was the shooter. Shortly thereafter, he told the other victims, Sandoval and Carreon, that defendant was the shooter. Within 48 hours of the shooting, Lombardi voluntarily went to the police station to identify defendant as the shooter. The police reports state Peinado contacted Detective Amador shortly after the shooting to report that Lombardi had told her at the hospital that defendant was the shooter. Defendant does not in any way explain or present any plausible scenario to explain how Detectives Guzman and Duncan could have divined defendant as a suspect, why they would falsely accuse him, or how they coerced the various witnesses to falsely accuse him.

“*Warrick* permits courts to apply common sense in determining what is plausible, and to make determinations based on a reasonable and realistic assessment of the facts and allegations.” (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1318-1319 [affirming denial of *Pitchess* motion]; see also *People v. Galan* (2009) 178 Cal.App.4th 6, 12-13 [same].) The court did not abuse its discretion in finding defendant’s motion deficient.

2. The Error in the Abstract of Judgment Must Be Corrected to Conform to the Jury's Verdict and the Law

Defendant contends the abstract of judgment erroneously states the jury found the firearm enhancement true as to counts 3 and 4 pursuant to section 12022.53, subdivision (d), with a sentence imposed of 20 years to life, when it should reflect the jury found true the firearm enhancement pursuant to subdivision (c), with a statutory term of 20 years. Respondent concedes the error.

The record plainly reflects that, as to counts 3 and 4, defendant was charged with, and the jury found true, a firearm enhancement pursuant to section 12022.53, subdivision (c), for discharge of a firearm during the commission of a felony, and *not* pursuant to subdivision (d), which includes a finding that great bodily injury was caused. Counts 3 and 4 concerned victims Carreon and Sandoval who were not injured in the shooting. The statutory term for an enhancement pursuant to section 12022.53, subdivision (c) is a straight 20 years and *not* 20 years to life. Accordingly, the abstract of judgment must be corrected to conform to the jury's verdict and to reflect the correct statutory sentence. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The judgment is modified in the following respects: The firearm enhancement as to counts 3 and 4 is pursuant to section 12022.53, subdivision (c), and not to subdivision (d), with a corresponding sentence for each enhancement of 20 years, and not 20 years to life. The superior court is directed to prepare a certified copy of the abstract of judgment reflecting such modifications and to transmit same to the Department of Corrections and Rehabilitation forthwith. In all other respects, the judgment of conviction is affirmed.

GRIMES, J.

We concur:

BIGELOW, P. J.

RUBIN, J.