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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)**

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THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MANUEL GONZALES,

Defendant and Appellant.

C069513

(Super. Ct. No. 10F00012)

A jury found defendant Jose Manuel Gonzales guilty of violating Health and Safety Code section 11360, subdivision (a),<sup>1</sup> its verdict including the special findings that he furnished (or offered to furnish) marijuana, but did not transport more than 28.5 grams.<sup>2</sup> It was unable to reach a verdict on a charge of possessing marijuana for sale, and the trial court dismissed that count on the motion of the prosecution. The court granted

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<sup>1</sup> Undesignated statutory references are to the Health and Safety Code in effect at the time of defendant's December 2009 crime.

<sup>2</sup> One ounce is equal to 28.35 grams. Section 11360 punishes certain conduct only as a misdemeanor if less than 28.5 grams of marijuana are involved. Because we do not need to be *that* precise, we will make use of the avoirdupois measure.

probation conditioned (inter alia) on a one-year jail term, which it stayed pending appeal. It also granted defendant's request to remain on bail pending appeal.

On appeal, defendant asks us to review the trial court's in camera determination that certain police personnel files did not contain any discoverable materials. He also argues that the trial court erred in giving the prosecution leave to amend the information to charge a felony violation of section 11360, in failing to instruct the jury sua sponte on a "joint purchaser" defense, and in allowing the form of verdict used in this case. Finally, he claims we must reduce his conviction to a misdemeanor because of the finding that he did not transport more than one ounce of marijuana.

The trial court's in camera review of defendant's discovery request was impermissibly perfunctory. After a review of his remaining arguments, we do not find any other error. We thus shall conditionally reverse the judgment for the purpose of the trial court's conducting a new discovery hearing in camera.

We omit a separate statement of the procedural background and the facts in evidence at trial. We will incorporate the pertinent details in the Discussion where relevant.

## **DISCUSSION**

### **I. Amendment of the Information at Trial**

The complaint charged only a single count of possession of marijuana for sale. At the preliminary hearing, the parties stipulated "for the purposes of [the] preliminary hearing only" that the marijuana recovered from defendant was less than one ounce. The magistrate held defendant to answer, and deemed the complaint to be the information.

In an amended information, the prosecutor added a second count charging defendant with a felony violation of "Section 11352(a)" (*sic*) for either transporting, importing, selling, furnishing, administering, or giving away marijuana (or offering to do

any of those, or attempting to import or transport it). In pretrial proceedings, defense counsel objected on the ground that the evidence at the preliminary hearing (by virtue of the stipulation) did not prove that more than one ounce of marijuana was involved, and thus the offense could be charged only as a misdemeanor violation of section 11360, subdivision (b).<sup>3</sup> The prosecutor agreed. However, she noted her understanding that in fact the weight of the marijuana was more than one ounce; therefore, if the evidence at trial bore this out, she would move to amend the information again to conform to proof. The trial court modified the information accordingly (including, however, allegations of *selling* or *furnishing* in the count even though they do not appear in subdivision (b)).

At trial, the detective who arrested defendant testified that there was slightly more than one ounce of marijuana in defendant's car that was still fresh, which meant that as it dried it was possible for it to lose weight. A criminalist who later weighed the marijuana and found the total amount was just under an ounce also testified the difference in weight could be attributed to the marijuana drying out.

Based on this testimony, the prosecutor moved to amend the information to reinstate the felony charge. The trial court granted the motion (agreeing to instruct the jury that the misdemeanor was a lesser included offense).

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<sup>3</sup> Subdivision (a) of section 11360 proscribes transportation, importation, sale, furnishing, administration, or giving away marijuana, or offers to do so, or attempts to transport or import it. Subdivision (b) proscribes giving away or transporting less than an ounce of marijuana, offering to do so, or attempting to transport it. At least one court has assumed that the quantity limitation applies to forms of conduct in subdivision (a) that are not specified in subdivision (b). (*People v. Hua* (2008) 158 Cal.App.4th 1027, 1037 [no reasonable suspicion of commission of felony because officers did not observe the defendant "furnish" *more* than one ounce of marijuana to another].)

Defendant claims the evidence at the preliminary hearing failed to establish that the amount of marijuana at issue was more than one ounce.<sup>4</sup> He contends the trial court consequently erred in granting leave to amend the information, because Penal Code section 1009 prohibits an amendment “to charge an offense not shown by the evidence taken at the preliminary examination.” He also contends the amendment violated his right to notice of the charges against him.

Defendant’s first claim rests on his premise that the amount of marijuana is material to his conviction for furnishing or offering to furnish, which he bases on various grounds (equal protection among them) and the assumption in *Hua*. Even if we agreed—which we do not, as we explain later (pt. IV., *post*)—it does not mean the trial court was precluded from granting leave to amend to allege a felony violation because the evidence at the preliminary hearing did not establish a quantity of more than one ounce. A greater quantity of marijuana does not involve a different *offense*; it simply affects the *penalty* for the offense established in the evidence at the preliminary hearing. (Cf. *People v. Robinson* (2004) 122 Cal.App.4th 275, 281-282 [may amend to add allegation of petty theft with a prior without evidence at preliminary hearing of prior, because this affects punishment for theft and is not a substantive offense].)

Defendant’s alternative claim rests on an unduly narrow view of the source of notice of the charges against him as being *limited* to the preliminary hearing. To the contrary, the amended information put defendant on notice at the outset of trial that he was charged with misdemeanor conduct under section 11360, and the prosecutor at that time gave notice of her intent to charge him with a felony under that statute if the evidence at trial warranted. This notice of potential felony exposure also explodes his

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<sup>4</sup> He does not otherwise assert the evidence at the preliminary hearing failed to establish a felony violation of section 11360.

additional claim of *reasonable* detrimental reliance (which he contends resulted in his trial counsel's subsequent choice<sup>5</sup> in his opening statement to concede guilt of misdemeanor transportation of less than one ounce of marijuana). Moreover, defendant does not clearly articulate how his litigation strategy could have any effect on the empiric *facts* of the marijuana's weight at his arrest and at the time of testing. We therefore reject this argument.

## **II. Joint Purchase Instruction**

### ***A. A Brief Overview of the Evidence at Trial***

An undercover detective observed what he believed to be a drug transaction in a strip mall parking lot in which defendant supplied something to another man who had arrived in a separate car. When defendant drove off, the detective had another officer follow him, who observed defendant go into a residence and then leave very shortly after. Defendant then drove to another strip mall. Another car arrived, and a man got out. He went to sit in defendant's passenger seat. The detective, with assistance from other peace officers, stepped up to the car. There was money on the console between defendant and the other man, and defendant had a large sum of money on his person. There was a small amount of marijuana wrapped in white plastic on the console, and a larger quantity in a plastic cup. Finally, there were envelopes covered with calculations on the outside.

Defendant testified that he had met with a woman at the first strip mall. He admitted buying an ounce of marijuana at the residence. The man he met at the second strip mall was a friend he had called to play pool at a place in the strip mall. The friend had called earlier to ask if defendant had any marijuana. Defendant told the friend he was bringing some for them to smoke beforehand; he denied any intent to sell marijuana

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<sup>5</sup> Considering defendant admitted transporting marijuana in his testimony at trial (see pt. II., *post*), it would not appear that defense counsel had any alternative to conceding guilt.

to the friend. The cash on his person was to buy a money order to pay his rent. The cash on the console was gas money.

***B. No Duty to Instruct on this Defense***

The joint purchase defense (as defendant terms it, no pun intended presumably) draws a distinction “between one who sells or furnishes” drugs and “one who simply participates in a group purchase.” (*People v. Edwards* (1985) 39 Cal.3d 107, 113.) It applies *only* where the participants in a drug acquisition were equally involved in a purchase for personal use, in which case “it cannot reasonably be said that [any of the] individual[s] has ‘supplied’ [the drug] to the others.” (*Id.* at p. 114.) However, “[w]here one of the copurchasers takes a more active role in instigating, financing, arranging[,] or carrying[ ]out the drug transaction, the ‘partnership’ is not an equal one and the more active ‘partner’ may be guilty of furnishing to the less active one.” (*Id.* at p. 114, fn. 5.)<sup>6</sup> *Edwards* believed that “few cases” would involve “a copurchase by truly equal partners.” (*Ibid.*)

The duty to instruct on a defense sua sponte arises where it appears a defendant is relying on the theory, or substantial evidence supports it and it is consistent with the actual theory of the case. (*People v. Maury* (2003) 30 Cal.4th 342, 424.)

Defendant argues the trial court was obligated to instruct on this defense sua sponte (or trial counsel was ineffective for failing to request an instruction) because he had testified that his friend had earlier asked if defendant had marijuana to share, and defendant bought it for the purpose of sharing it with the friend, not selling it to him. He

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<sup>6</sup> Contrary to defendant’s characterization, this is not “dicta” but an explanation of the boundaries of a defense that recasts the provision of drugs from one person to another during use as being part of a mutual adventure. This prevents an extension of the defense as defendant requests to acts of mutual use *without* mutual acquisition.

claims the degree to which their partnership was equal was a question of fact for the jury to resolve.

To the contrary, there is an absence of *any* evidence of the friend's participation in the acquisition of the marijuana other than in the purported joint *use* of the marijuana. The friend's role was *entirely* passive. Defendant was thus not entitled, either sua sponte or on request, to an instruction on this defense and as a result neither the trial court nor trial counsel failed in their duties to him.

### **III. The Verdict Form Was Proper**

The trial court's use of a special verdict form in this case triggers a firestorm of criticism from defendant. We are not persuaded.

At trial, defense counsel made a general objection to the form of verdict, asserting that "some of the special findings are unnecessary and confusing, and probably different than the local legal culture." (The meaning of the latter phrase eludes us, but ultimately that is not of any consequence).

On appeal, defendant first asserts the combination of a general verdict (an unadorned finding of guilty or not guilty of the charged offense) and a special verdict (findings of fact that leave rendering of the judgment to the court) is not authorized by statute. (Pen. Code, §§ 1151, 1152/1154.) However, as he concedes, cases such as *People v. Davis* (1995) 10 Cal.4th 463, 511 and *People v. Neely* (1993) 6 Cal.4th 877, 897-898, have nonetheless found that "hybrid" general verdicts (those that identify the legal theories on which the jury based its general verdict) are permissible as long as they do not interfere with the jury's deliberative process.

Defendant insists the present verdict is invalid because it is a combination of a general verdict as to a felony violation of section 11360 and a special finding that "suggest[s]" his guilt of misdemeanor transportation. This represents a misinterpretation

of the nature of the special findings in this case. Each of them *if true* would be a valid theory for a felony conviction.<sup>7</sup> The jury’s finding with respect to the theory of transportation indicates *only* that it rejected this theory as a basis for a felony violation (presumably on the basis of quantity), not that it affirmatively found defendant *guilty of the misdemeanor*. The trial court had made the misdemeanor the subject of a *separate* instruction and verdict form as a lesser included offense, and had instructed that the jury could not reach a verdict on the lesser offense until after it had unanimously agreed that defendant was not guilty of the greater crime. Defendant has failed to establish any interference with the jury’s deliberative process in this regard or any other. We therefore reject his argument.

#### **IV. Defendant Is Properly Convicted of a Felony**

To reiterate, it is a felony violation of section 11360 to transport, *import, sell, furnish, administer*, or give away marijuana, or offer to do so, or attempt to transport or *import* it. (§ 11360, subd. (a).) It is a misdemeanor to transport or give away less than one ounce, or offer to do so, or attempt to transport it. (*Id.*, subd. (b).) The emphasized conduct in subdivision (a) is not included in subdivision (b). Defendant contends we *must* construe all conduct in subdivision (a)—or at least the act of furnishing—as being included in subdivision (b) as a matter of statutory interpretation and application of principles of equal protection. We disagree.

Defendant argues the literal language of the statute cannot control because there would be an absurd result contrary to the legislative purpose (*Rehman v. Department of Motor Vehicles* (2009) 178 Cal.App.4th 581, 586, 588), as he believes “furnish” and “give away” are interchangeable, and thus the same conduct would violate either subdivision (which he also asserts—without citing any authority—would imbue a

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<sup>7</sup> The court instructed the jury on all three felony theories.

prosecutor with too much discretion in charging offenses under section 11360). To the contrary, we find that “give away” is at one end of a range of conduct (with “sale” at the other end), while “furnish” spreads across the middle of the range for all *other* forms of actively making marijuana available *without* giving it away or selling it (such as barter).<sup>8</sup> The Legislature incorporated a definition of “furnish” for purposes of the Health and Safety Code (see § 11016) derived from the Business and Professions Code to mean: “*supply by any means, by sale or otherwise.*” (Bus. & Prof. Code, § 4026, italics added.) We have found this encompasses any affirmative step of supplying, giving, or providing alcohol to a minor, including *authorizing another* to take alcohol and provide it to a minor. (*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1157-1158.)

Since “furnish” and “give away” are *not* equivalents, we are not presented with an absurd result such that we can disregard the unambiguous legislative exclusion of importing, selling, furnishing, or administering from misdemeanor treatment (cf. *People v. McRoberts* (2009) 178 Cal.App.4th 1249, 1256 [as with legislative additions, cannot treat legislative deletion as meaningless]), all of which involve conduct at least slightly more culpable than merely giving away marijuana or carrying it around. This also defeats defendant’s skeletal equal protection argument, because those who furnish more than one ounce are not similar to those who give away less than one ounce of marijuana. As *Hua* did not provide an analysis for its application of the quantity limit to the act of furnishing, we decline to follow its ruling. Consequently, defendant is properly subject to felony punishment.

## V. Discovery Motion

To compel discovery of confidential materials in peace officer personnel files (a right originating in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and later encoded in

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<sup>8</sup> The trial court instructed that furnishing marijuana does *not* include making a gift of it.

various statutes), a defendant must file an affidavit that establishes good cause in the form of a reasonable belief that the type of records requested are material to his defense and in the possession of the employing agency; only a relatively low threshold is necessary to compel discovery. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.) Upon a finding of good cause, the trial court must then review the records in camera and disclose “only that information falling within the statutorily defined standards of relevance.” (*Ibid.*)

As the trial court found good cause to hold the *Pitchess* hearing, we are not concerned with the substance of defendant’s showing. He requested the trial court to determine whether the personnel or other files of three law enforcement officers who were involved in his arrest contained any favorable material relating to his guilt, statements developed in the course of the investigation of the incident, and complaints against these officers relating to false arrests, falsification of evidence, or other matters bearing on their veracity. The following is the entirety of the court’s colloquy with the custodian of records at the in camera hearing:

“THE COURT: All right. And, [custodian of records for Sacramento County Sheriff’s Department], have you reviewed the request for the records?

“THE WITNESS: Yes, I have.

“THE COURT: And have you reviewed all of the locations where the records sought were located and conducted a complete and thorough search?

“THE WITNESS: Yes, I have.

“THE COURT: And do the records that you’ve brought today comprise those records that you found that fall within the scope of the order?

“THE WITNESS: Your Honor, there were no relevant records as to all three officers.

“THE COURT: Okay. All right. That being the case then, I guess that will conclude the in camera part of the hearing.”

Fundamental to the procedure under the statutory scheme that codifies *Pitchess* is “the intervention of a neutral trial judge” to examine the records and determine what documents, if any, should be disclosed. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1227.) “Documents clearly irrelevant to a . . . *Pitchess* request need not be presented to the trial court for in camera review”; however, “[t]he custodian should be prepared to state in chambers and for the record what **other** documents (or category of documents) not presented to the court **were** included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant’s *Pitchess* motion.” (*Id.* at p. 1229, emphasis added.) “Absent this information, the [trial] court cannot adequately assess the completeness of the custodian’s review of the personnel files, nor can it establish the legitimacy of the custodian’s decision to withhold documents contained therein. Such a procedure is necessary to satisfy the . . . pronouncement that ‘the locus of decisionmaking’ at a *Pitchess* hearing ‘is to be the trial court, not the prosecution or the custodian of records.’ ” (*People v. Guevara* (2007) 148 Cal.App.4th 62, 69, citing *Mooc* [sworn statement of custodian that records did not contain potentially discoverable materials was insufficient to satisfy trial court’s obligation to review records; since custodian’s sealed list of documents actually reviewed was not available for appellate review, must conditionally reverse for new hearing].)

The trial court failed to follow this procedure for proper *Pitchess* review. The custodian did not present any documents for review, and the court did not question the custodian about what documents or categories of documents *were* contained in the locations she reviewed. Rather, the trial court impermissibly deferred to the *custodian’s* judgment about whether disclosure was appropriate, and did not make a record of the

documents that were subject to her determinations. This leaves us unable to conduct any meaningful review on appeal.

Accordingly, we must conditionally reverse the judgment and remand for the trial court to conduct a new *Pitchess* hearing, at which it must *personally* review the personnel records (or obtain a list of their contents) and confirm the conclusion of the custodian of records. If, however, it finds there was discoverable evidence, it must then determine whether defendant was prejudiced from the denial of discovery. (*People v. Husted* (1999) 74 Cal.App.4th 410, 423.) Defendant does not supply any authority for his requested remedy of reversal with directions to dismiss the charges.

### **DISPOSITION**

The judgment is conditionally reversed. The cause is remanded to the trial court with directions to hold a new *Pitchess* hearing in which it shall either conduct its own review of the relevant records or obtain a list of the documents that the custodian reviewed. If the trial court finds there is in fact discoverable evidence, it shall then determine whether defendant was prejudiced from the denial of discovery. If the court confirms the lack of discoverable evidence or finds that defendant was not prejudiced from the denial of discovery, the judgment shall be reinstated as of the date of its ruling to that effect. Otherwise, the trial court shall conduct further proceedings as are warranted.

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BUTZ \_\_\_\_\_, J.

We concur:

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HULL \_\_\_\_\_, Acting P. J.

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DUARTE \_\_\_\_\_, J.