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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID NEVAREZ,

Defendant and Appellant.

E054202

(Super.Ct.No. FVA802017)

**OPINION**

APPEAL from the Superior Court of San Bernardino County. Dwight W. Moore, Judge. Affirmed in part and reversed in part with directions.

Robert Booher, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and William M. Wood and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

According to a police officer, defendant David Nevarez used a can of red spray paint to paint graffiti on a brick wall, a fence, a telephone pole, and an electrical pole.

When the officer tried to arrest him, defendant did not comply; instead, he tried to elbow the officer. They ended up rolling around in the street, wrestling and punching

each other. Defendant was subdued only after a second officer arrived and punched him in the face repeatedly.

According to defendant, someone else painted the graffiti; when defendant yelled at him, he ran away, dropping the spray can. Defendant had just picked it up when the first officer came along. Defendant tried to explain, but the officer put him in a chokehold and threw him to the ground. While defendant was on the ground, that officer handcuffed him, then punched him in the face.

Two of defendant's relatives testified that they saw several officers beating defendant while he was handcuffed.

A jury found defendant guilty of resisting an officer (Pen. Code, § 148, subd. (a)(1)) and vandalism causing damage of \$400 or more (Pen. Code, § 594, subd. (b)(1)). Defendant was placed on probation, on terms including 120 days in jail.

Defendant contends:

1. There was insufficient evidence that the vandalism caused at least \$400 in damages.
2. Defense counsel rendered ineffective assistance by failing to object to the prosecution's evidence that the vandalism caused at least \$400 in damages.
3. The prosecutor improperly argued that the \$400 threshold could be met by aggregating the damages done by each of defendant's four items of graffiti.

In addition, defendant asks this court to review the trial court's in camera ruling on his *Pitchess* motion.<sup>1</sup>

We will reject defendant's various challenges to the finding that the vandalism caused \$400 or more in damages. Accordingly, we will affirm the vandalism conviction. However, we will conclude that the trial court did err in ruling on the *Pitchess* motion. Accordingly, we will reverse the conviction for resisting an officer conditionally, with directions to hold a new *Pitchess* hearing; however, unless the trial court finds additional material that should have been disclosed and that the disclosure of this material would have resulted in a more favorable outcome for defendant, it must reinstate the judgment.

## I

### THE FINDING THAT THE GRAFFITI CAUSED \$400 OR MORE IN DAMAGE

Defendant raises multiple related issues regarding the finding that the vandalism caused damages of \$400 or more:

1. There was insufficient evidence of the amount of damages, because:
  - a. The evidence showed only the average cost of graffiti in general, rather than the actual cost of defendant's graffiti.
  - b. The average cost included administrative costs.
  - c. The evidence was inadmissible hearsay.

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<sup>1</sup> A "*Pitchess* motion" is a motion for discovery of a peace officer's confidential personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

d. The damages caused by each of defendant's four separate graffiti could not be aggregated.

2. Defense counsel rendered ineffective assistance by failing to object to the evidence on the following grounds:

- a. Inadmissible hearsay.
- b. Lack of qualifications to testify as an expert.
- c. Improper basis for expert testimony.

3. The prosecutor improperly argued that the damages caused by defendant's graffiti could be aggregated.

4. Defense counsel rendered ineffective assistance by failing to object to the prosecutor's argument that the damages caused by defendant's graffiti could be aggregated.

A. *Additional Factual and Procedural Background.*

1. *Evidence.*

Defendant's graffiti were removed by the City of Fontana's graffiti abatement team. The cleanup required a truck and a pressure washer, as well as repainting.

To prove the amount of damages done by defendant's graffiti, the prosecution called Officer Buddy Porch. Officer Porch had received training in graffiti abatement. He was a member of the gang unit and one of the founding members of a graffiti abatement unit within the gang unit. The graffiti abatement unit "would go out and clean up the various taggings throughout our city." Officer Porch was one of the people who

had determined “how we needed to keep track of it, how it was put into our system, and the various crimes that it would be applicable to.”

Officer Porch testified: “[M]yself and . . . an additional officer in my unit, we contacted the city of Fontana and contacted the subject that ran city works and asked him what the average was for cleaning up various types of graffiti.

“ . . . I contacted a subject that runs that department. Over a course of two months, we were able to come up with an approximate value of what it costs for each cleanup.” That figure was \$486.31.

This figure did not apply to minor cleanups; it applied only to cleanups that required a truck and a pressure washer. It included not only direct costs, but also overhead, such as the salaries of the unit administrator, secretaries, and other staff, the cost of maintaining the graffiti hot line, and the cost of maintenance and insurance for the truck. It assumed a two-hour minimum response, even if the cleanup actually took less time.

## 2. *Argument.*

In closing argument, the prosecutor stated: “[T]hey’ve estimated how much it costs per unit for your typical clean-up for graffiti . . . , and this is how they came up with the \$486.31 per location. *And there’s four locations in this case, so it’s about \$1945.24 in damage.*” (Italics added.)

### B. *Analysis.*

Vandalism is committed by defacing, damaging or destroying the property of another. (Pen. Code, § 594, subd. (a).) “If the amount of defacement, damage, or

destruction is four hundred dollars (\$400) or more,” the crime is a wobbler. (*Id.*, subd. (b)(1); see also Pen. Code, § 17, subd. (a).) Otherwise, it is a misdemeanor (Pen. Code, § 594, subd. (b)(2)).

1. *Expert opinion testimony.*

Defendant argues that Officer Porch was not qualified to give an expert opinion. Because defense counsel failed to object on this ground below, defendant also argues that this failure to object constituted ineffective assistance.

“ . . . ‘In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]’ [Citation.]” (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

“The decision whether to object to the admission of evidence is ‘inherently tactical,’ and a failure to object will rarely reflect deficient performance by counsel.

[Citation.]” (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1335.) This is not a case in which there could be no satisfactory explanation for defense counsel’s failure to object. If he had objected on this ground, the prosecution might have been able to introduce additional evidence of Officer Porch’s qualifications. Indeed, defense counsel could have reasoned that the jury would give the opinion less weight in the absence of such a foundation.

## 2. *Hearsay.*

Defendant also contends that Officer Porch’s testimony was inadmissible hearsay.

As discussed in part I.B.1, *ante*, Officer Porch testified as an expert, without objection. “An expert may generally base his opinion on any “matter” known to him, including hearsay not otherwise admissible, which may “reasonably . . . be relied upon” for that purpose. [Citations.] On direct examination, the expert may explain the reasons for his opinions, including the matters he considered in forming them. However, prejudice may arise if, “under the guise of reasons,” the expert’s detailed explanation “[brings] before the jury incompetent hearsay evidence.” [Citation.] [Citation.] ‘ . . . Evidence Code section 352 authorizes the court to exclude from an expert’s testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. [Citation.]’ [Citation.]” (*People v. Carpenter* (1997) 15 Cal.4th 312, 403.)

Defendant argues that, rather than stating an expert opinion, Officer Porch “merely parroted what he had heard from a city employee . . . .” Admittedly, Officer Porch did testify that he and a second officer asked a city employee “what the average was for

cleaning up various types of graffiti.” He also stated that the city employee “figured in” certain expenses. Nevertheless, he testified that “we” developed the average figure and that this was a process that took about two months.<sup>2</sup> It is reasonably inferable that Officer Porch participated personally.

Thus, Officer Porch could testify that, in his opinion, the total average cost of a graffiti cleanup was \$486.31, even though this opinion was based on hearsay. By and large, he did not testify to the underlying hearsay itself. For example, he did not testify to the itemized cost figures that he had considered in forming his opinion. It is arguable that he did testify to hearsay when he explained what costs were included; for example, when he testified that the \$486.31 figure included insurance on the truck, he at least implied that there was, in fact, insurance on the truck, something that he presumably knew only from hearsay and not from personal knowledge. However, such facts were not more prejudicial than probative.

Defendant also argues that Officer’s Porch’s testimony violated the confrontation clause as construed in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]. However, “*Crawford* does not undermine the established rule that experts

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<sup>2</sup> Officer Porch’s exact words were: “Over a course of two months, we were able to come up with an approximate value of what it costs for each cleanup.”

Defendant reads this as meaning that the average was based on just two months’ worth of data. We disagree. We read it as meaning that the average took two months to calculate; however, it was based on data covering an unspecified period of time. In any event, to the extent that the testimony was ambiguous, we must construe it in the light most favorable to the judgment. Defense counsel could have used cross-examination to clarify it but did not.

can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. *Crawford* itself states that the confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' [Citation.]" (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210 [Fourth Dist., Div. Two]; accord, *Williams v. Illinois* (2012) \_\_\_ U.S. \_\_\_, \_\_\_ [132 S.Ct. 2221, 2228] [plur. opn. of Alito, J.]; see also *id.* at p. \_\_\_ [132 S.Ct. at p. 2255] [conc. opn. of Thomas, J.]

We also note that defense counsel did not object to Officer Porch's testimony below. Thus, he forfeited any contention that it was inadmissible hearsay, as well as any contention that it violated *Crawford*. Defendant argues that confrontation rights can only be waived knowingly and intelligently. Waiver, however, is not the same thing as forfeiture. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 636, fn. 16.) A *Crawford* claim can be forfeited by failure to raise it at trial. (*People v. Riccardi* (2012) 54 Cal.4th 758, 827, fn. 33.)

Defendant also argues that hearsay does not constitute substantial evidence. In judicial proceedings, however, "under a[] long-standing rule, 'incompetent hearsay admitted *without objection* is sufficient to sustain a finding or judgment.'" (*Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1268.)

Defendant cites cases involving administrative proceedings (e.g., *Gregory v. State Bd. of Control* (1999) 73 Cal.App.4th 584, 597) or dependency proceedings (e.g., *In re Lucero L.* (2000) 22 Cal.4th 1227, 1244-1245.) Such proceedings, however, have their own special rules that hearsay is insufficient to support a finding, though only if it is admitted over an objection. (Gov. Code, § 11513, subd. (d); Welf. & Inst. Code, § 355, subd. (c)(1).) And here, once again, defense counsel did not object.

Defendant cites only one case involving ordinary criminal proceedings, *People v. Vournazos* (1988) 198 Cal.App.3d 948. There, the court held that there was insufficient evidence to support the amount of a restitution award, but only because there was insufficient evidence of how it had been calculated, not because it was based on hearsay. (*Id.* at pp. 958-959.) Thus, we conclude that Officer Porch's testimony, even if inadmissible hearsay, was substantial evidence.

Finally, defendant contends that his trial counsel's failure to object on hearsay grounds constituted ineffective assistance. We reject this contention because, as we have already held, Officer Porch's testimony was admissible, despite being based on hearsay.

Separately and alternatively, we also reject this contention because this is not a case in which there could be no satisfactory explanation for the failure to object. It is conceivable that, if defense counsel had objected, the prosecution could have laid a foundation for the admission of all of the hearsay on which Officer Porch relied under the business records exception to the hearsay rule. (Evid. Code, § 1270 et seq.)

3. *The use of an average.*

Next, defendant argues that the average cost of a graffiti cleanup was insufficient evidence of the actual cost of cleaning up his particular graffiti.

“When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] ‘Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.’ [Citation.]” (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) “‘An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise.’ [Citation.]” (*People v. Streeter* (2012) 54 Cal.4th 205, 241.)

Here, it is undisputed that the cost to repair (as opposed to the diminution in value) was an appropriate measure of damages. (See *Pfingsten v. Westenhaver* (1952) 39 Cal.2d 12, 24.) In some cases of vandalism, it may be possible to ascertain the exact cost of repair — for example, when the owner of the vandalized property has actually had it repaired by a private company, at an arm’s-length price. Here, however, because the city evidently did not charge for its services, the cost to repair could not be shown by an actual price. Hence, it was necessary to come up with an approximation.

Defendant complains about the fact that the average included administrative costs as well as direct costs. However, it would seem proper to consider administrative costs in estimating a market price. A business that priced its services so low that it failed to recover its administrative costs would soon go broke. If anything, the average was lower than a market price, because it did not include all of the costs that a private enterprise would have, such as advertising and profit.

In support of this argument, defendant cites *Luis M. v. Superior Court* (2012) \_\_\_ Cal.App.4th \_\_\_ [2012 Cal.App. LEXIS 1140]. There, the court held that a minor who committed graffiti vandalism could not be ordered to pay the administrative costs of graffiti abatement as restitution under Welfare and Institutions Code section 730.6. It explained: “Section 730.6, subdivision (h)(1), provides that the restitution award must be in an amount ‘sufficient to fully reimburse the victim . . . for all determined economic losses incurred as the result of the minor’s conduct.’ . . . [¶] The general costs of maintaining vehicles and equipment used in graffiti abatement and of contract services for tracking graffiti are not economic losses incurred as a result of a minor’s vandalism. These costs fall into the category of monies expended for graffiti abatement, which are not economic losses for which restitution is available under section 730.6. [Citations.]” (*Luis M.*, at pp. \*9-\*10.) Here, however, Welfare and Institutions Code section 730.6 does not apply; neither does any statute with any similar language.

Defendant argues that there was no evidence of the range of cleanup sizes; the wider the range, the less likely it was that the average accurately reflected any particular cleanup. He also argues that there was no evidence of the size of the cleanup of his

particular graffiti, in relation to the average. Actually, there was at least *some* evidence on these points. Officer Porch did testify that he excluded cleanups so small that they did not require a truck and a pressure washer. It is reasonably inferable that, once a truck and pressure washer have to be dispatched, cleanups do not vary much in cost.

In any event, this argument goes to the weight of the evidence, not its admissibility. Defendant had the opportunity to raise all of these issues on cross-examination. He could even have called other employees of the graffiti abatement unit and/or his own expert. He could have subpoenaed city records. Such evidence might have raised a reasonable doubt in the minds of the jurors. If sufficiently compelling, it might even require us to conclude that the average was not substantial evidence. However, that did not happen in this case.

Significantly, if the approximation turned out to be way above the statutory minimum — if, for example, Officer Porch testified that the average graffiti cleanup cost \$50,000 — there would be no question that the approximation would constitute substantial evidence. The jurors could properly conclude that the prosecution had proven beyond a reasonable doubt that the damages were \$400 or more. Thus, the mere fact that a figure is an average does not mean it is not substantial evidence.

We may assume without deciding that if, conversely, the approximation turned out to be right at or even close to the statutory minimum, it would not be substantial evidence. (See *People v. Alicea* (1969) 25 N.Y.2d 685, 686 [254 N.E.2d 915, 306 N.Y.S.2d 686] [“proof of an average value only slightly above the statutory level, in the absence of evidence of the condition of the particular [property], [i]s . . . inadequate to

sustain a conviction”].) In this case, however, Officer Porch’s approximation was more than 20 percent above the statutory minimum. Moreover, defendant did not introduce any evidence that this was not a reasonable margin for error. On this record, the average constituted substantial evidence.

*People v. Vega* (2005) 130 Cal.App.4th 183, though not on point, supports our conclusion. There, the police had seized 42 kilogram-sized bricks of cocaine. (*Id.* at p. 186.) A criminalist testified that she had unwrapped and weighed eight of the bricks; by taking the average weight of these eight bricks and multiplying by 42, she had determined that the total weight of the cocaine was 41.487 kilograms. (*Id.* at p. 189.) A jury found true an enhancement allegation that the weight of the cocaine was over 40 kilograms. (*Id.* at p. 188.) The appellate court held that the criminalist’s testimony was sufficient evidence to support the weight enhancement. (*Id.* at p. 190.)<sup>3</sup>

Admittedly, the *Vega* court also observed that “this whole issue could have been avoided if the sheriff’s department had simply weighed the cocaine. . . . In reality this

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<sup>3</sup> The appellate court also stated: “[T]he outcome might have been different had defendants objected to [the criminalist]’s testimony as lacking a sufficient scientific basis.” (*People v. Vega, supra*, 130 Cal.App.4th at p. 191, fn. omitted.) It explained that she had not shown that she used a sampling technique that was generally accepted in the scientific community. (*Id.* at pp. 191-193.) It concluded, however: “Because defendants failed to move to exclude [the criminalist]’s testimony on the ground of lack of foundation they waived that argument on appeal.” (*Id.* at p. 193.)

Here, there was no evidence that Officer Porch used any “scientific technique” that the prosecution would have had to show was generally accepted in the scientific community. He seems to have used all of the available data, not just a sample. In any event, as discussed in part I.B.1, *ante*, defense counsel failed to object to his testimony based on lack of foundation, and we cannot say that this constituted ineffective assistance.

case should not be about opinion at all. The drugs weigh what they weigh. . . . We suggest . . . [that] the weight of the drugs be determined by actual measurement except in cases where the estimated weight is so far above the minimum level required for the enhancement no rational person could dispute the requisite level exists.” (*People v. Vega, supra*, 130 Cal.App.4th at pp. 192-193.) However, it did not hold that this was legally required; quite the contrary, it held that it was not. Moreover, while drugs may “weigh what they weigh,” in this case, as already discussed, it was necessary to come up with an approximation. Thus, *Vega* supports the use of an average under these circumstances.

#### 4. *Aggregation.*

Finally, defendant contends that the prosecution was not allowed to meet the \$400 threshold by aggregating the damages from each of the four items of graffiti.

As we held in parts I.B.2 and I.B.3, *ante*, there was sufficient evidence that each item of graffiti caused more than \$400 in damages. Thus, there was sufficient evidence to support the jury’s finding on this point, even without aggregation.

Defendant also contends, however, that the prosecutor “presented [a] legally incorrect theory” by stating in closing argument that the jury could aggregate the damages. The jury, however, was not actually allowed to decide the case on this theory, because it was not instructed on it. Somewhat to the contrary, it was given a unanimity instruction. (CALCRIM No. 3500.) It was also instructed: “If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.” (CALCRIM No. 200.)

Defendant's real argument is that the prosecutor committed misconduct by misstating the law in closing argument. (See *People v. Weaver* (2012) 53 Cal.4th 1056, 1077.) Defense counsel, however, forfeited this claim by failing to object and to request an admonition. (*People v. McDowell* (2012) 54 Cal.4th 395, 436.)

Defendant therefore argues that defense counsel's failure to object constituted ineffective assistance. As we will discuss, however, this is not a case in which there could be no satisfactory explanation for defense counsel's conduct.

The law regarding aggregation in vandalism cases is unsettled. In theft cases, under the so-called "*Bailey doctrine*," when "a number of takings, each less than [the statutory minimum for grand theft] but aggregating more than that sum, are all motivated by one intention, one general impulse, and one plan, the offense is grand theft. [Citations.]" (*People v. Bailey* (1961) 55 Cal.2d 514, 519.) Conversely, "a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan. [Citation.]" (*Ibid.*)

*In re David D.* (1997) 52 Cal.App.4th 304 [Fifth Dist.] assumed that the *Bailey doctrine* could apply to vandalism but held that it does not apply when each act of vandalism has a different victim. (*Id.* at pp. 309-311.) It explained, "Application of *People v. Bailey* has been limited not only to the crime of theft, but generally to thefts involving a single victim." (*Id.* at p. 309, fn. omitted.) Curiously, however, in a

footnote, the court stated, “We do not intend to imply . . . that the *Bailey* doctrine can never be appropriate to a theft or thefts from multiple victims.” (*Id.* at p. 309, fn. 3.)

Thereafter, *In re Arthur V.* (2008) 166 Cal.App.4th 61 [Fourth Dist., Div. One] held squarely “that the rule announced in *Bailey* applies with equal force to the offense of vandalism.” (*Id.* at p. 67.) In the case before it, both of the charged acts of vandalism (to a car windshield and a cell phone) had the same victim. (*Id.* at pp. 65, 69.) In a footnote, however, the court stated: “To the extent that *David D.* can be read to suggest that a workable dividing line can be drawn between cases involving multiple victims and those involving only one victim, we cannot agree because the existence of multiple victims will not *necessarily* preclude aggregation. For example, an offense consisting of the spray painting of one’s name across property owned by multiple persons would clearly be properly aggregated into a single count, despite the presence of multiple victims. Thus, rather than creating some artificial dividing line, ‘the number of victims involved is only one factor to be considered in determining whether there is one intention, one general impulse, and one plan.’ [Citations.]” (*Id.* at p. 68, fn. 4.)

Here, defendant vandalized a brick wall, a fence, a telephone pole, and an electrical pole. It appears that each of these items had a different owner. Thus, under *David D.*, it would seem that aggregation would not apply; however, footnote 3 in *David D.* makes it hard to say for certain. On the other hand, under *Arthur V.*, it would seem that aggregation could apply; however, the discussion of multiple victims in *Arthur V.* was dictum.

Thus, if defense counsel had objected to the prosecutor’s argument, he could not be sure that the trial court would uphold the objection, because the law was uncertain. If the trial court ruled in favor of the prosecutor, there was a risk that the prosecutor might even ask the judge to instruct the jury that aggregation was appropriate. As we have already discussed, the instructions as they stood, and particularly the unanimity instruction, at least implied that it was not.

In addition, defense counsel argued in closing — consistent with defendant’s own testimony — that defendant was not guilty of vandalism at all because he did not paint the graffiti. There was a certain tension between this argument and the argument that defendant was guilty, but only of misdemeanor vandalism. Defense counsel could reason that objecting to the prosecutor’s argument would have highlighted this tension. (See *People v. Stewart* (2004) 33 Cal.4th 425, 509 [“reasonable counsel may well have determined that an objection would be unwise, either because the challenged conduct was not improper or because an objection . . . likely would have served to highlight matter that might be unfavorable to defendant”].)

## II

### *PITCHESS* MOTION

Defendant asks us to review the trial court’s in camera ruling on his *Pitchess* motion.

#### A. *Additional Factual and Procedural Background.*

Before trial, defendant filed a *Pitchess* motion regarding the two arresting officers. The Fontana Police Department (the Department) opposed the motion.

The trial court held a hearing in camera, attended only by the Department's attorney and the Department's custodian of records. It limited the issues to the use of excessive force. After reviewing the documents the custodian had brought and questioning the custodian, the trial court found that some of the incidents to which the documents related were irrelevant. However, it found that other incidents were potentially relevant, and it ordered that the names, addresses, and telephone numbers of the percipient witnesses be disclosed to defense counsel. With respect to incidents in which defendant himself was the complaining witness, it ordered that defendant's statements be disclosed to defense counsel.

B. *Analysis.*

Under *Pitchess*, “on a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. [Citation.] . . . If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.] Subject to certain statutory exceptions and limitations [citation], ‘the trial court should then disclose to the defendant “such information [that] is relevant to the subject matter involved in the pending litigation.”’ [Citations.]” (*People v. Gaines* (2009) 46 Cal.4th 172, 179.)

In *People v. Mooc* (2001) 26 Cal.4th 1216, the Supreme Court outlined the procedure to be followed at the in camera hearing. “[T]he custodian of the records is obligated to bring to the trial court all ‘potentially relevant’ documents to permit the trial court to examine them for itself. [Citation.] . . . Documents clearly irrelevant to a

defendant's *Pitchess* request need not be presented to the trial court for in camera review. But if the custodian has any doubt whether a particular document is relevant, he or she should present it to the trial court. Such practice is consistent with the premise . . . that the locus of decisionmaking is to be the trial court, not the prosecution or the custodian of records. The 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. A court reporter should be present to document the custodian's statements, as well as any questions the trial court may wish to ask the custodian regarding the completeness of the record. [Citation.] [¶] The trial court should then make a record of what documents it examined before ruling on the *Pitchess* motion." (*Id.* at pp. 1228-1229.)

The record of the in camera hearing is sealed, and appellate counsel for the defendant and for the People are not permitted to view it. (See *People v. Hughes* (2002) 27 Cal.4th 287, 330.) As a result, an appellate court, on request, must independently review the sealed record. (*People v. Prince* (2007) 40 Cal.4th 1179, 1285.)

““A motion for discovery of peace officer personnel records is ‘addressed solely to the sound discretion of the trial court.’ [Citation.] A review of the lower court ruling is subject to the abuse of discretion standard.” [Citation.]” (*People v. Cruz* (2008) 44 Cal.4th 636, 670.)

If the trial court erred, the appropriate appellate remedy is a conditional reversal. If the error consists of failure to follow the proper procedure, we direct the trial court to

hold a new *Pitchess* hearing. (*People v. Wycoff* (2008) 164 Cal.App.4th 410, 415.) If there is discoverable information in the officer's personnel file, the trial court must order discovery. It must then give the defendant an opportunity to show that the information would have been admissible, or that it would have led to the discovery of admissible evidence. The defendant also must show a reasonable probability that the discovery would have resulted in a more favorable outcome for him or her at trial. If the trial court finds such a reasonable probability, it must order a new trial; otherwise, it must reinstate the judgment. (*People v. Johnson* (2004) 118 Cal.App.4th 292, 304-305; *People v. Husted* (1999) 74 Cal.App.4th 410, 422-423.)

1. *The adequacy of the record.*

The record does not include copies of the actual documents that the trial court reviewed. However, while this is highly recommended, it is not absolutely required, as long as the sealed reporter's transcript "is adequate for purposes of conducting a meaningful appellate review." (*People v. Myles* (2012) 53 Cal.4th 1181, 1209.) In this case, the transcript indicates the nature of each incident, as well as the trial court's reasons for requiring or refusing disclosure. This is sufficient.

2. *Failure to swear the custodian.*

An in camera *Pitchess* hearing is an evidentiary hearing; any witness at the hearing, including the custodian of records, should be sworn. (Evid. Code, § 710; *People v. Mooc, supra*, 26 Cal.4th at p. 1229, fn. 4.)

In *People v. White* (2011) 191 Cal.App.4th 1333, the appellate court held that the trial court erred by failing to have the custodians sworn at a *Pitchess* hearing. (*White*, at

pp. 1339-1340.) It observed: “[A]dministering the oath to the custodians of records who testify at *Pitchess* hearings is necessary to establish the accuracy and veracity of the custodians’ representations regarding the completeness of the record submitted for the court’s review. [Citation.] The integrity of the custodian’s testimony in this regard is also necessary to ensure that ‘the locus of decisionmaking’ at the hearing ‘is to be the trial court, not the prosecution or the custodian of records.’ [Citation.]” (*Id.* at p. 1340.)

The court further held that the error could not be deemed harmless: “Appellant cannot be expected to demonstrate prejudice because neither he nor his representative was present at the hearing . . . . The court’s finding that no [discoverable] documents existed was based entirely on [the custodian]’s unsworn testimony to that effect.

‘[U]nsworn testimony does not constitute “evidence” within the meaning of the Evidence Code.’ [Citations.] Under the circumstances, the record does not support the court’s ruling.” (*People v. White, supra*, 191 Cal.App.4th at p. 1340; see also *In re Heather H.* (1988) 200 Cal.App.3d 91, 97 [failure to swear child witness required reversal because “the court based its decision on evidence which was legally inadmissible and there was no other substantial evidence to sustain the court’s findings”].)

Here, it appears that the trial court never had the custodian sworn. The relevant minute order does not mention an oath; by contrast, the minute orders from the trial proper recite that witnesses were “sworn and testifie[d].” Likewise, the reporter’s transcript does not mention an oath, even though the reporter’s transcript of the trial notes that witnesses were sworn.

Under the authority of *White*, we conclude that the trial court erred and that the error requires a conditional reversal. *Pitchess* material was relevant, if at all, to the charge of resisting an officer; it was not relevant to the vandalism charge. Thus, this conditional reversal is limited to the resisting charge.

3. *Denial of disclosure of incident involving pepper spray.*

One officer's file included documentation of a complaint about an incident in which he used pepper spray and another officer (not involved in this case) used a taser. The trial court explained that it was not ordering any discovery related to that incident because "[t]he allegations in our present case . . . involve an allegation of hitting, beating, . . . and there's no allegation in the . . . complaint . . . related to hitting or striking . . . . I think pepper spray and hitting are two separately different concepts."

For purposes of discovery under *Pitchess*, "[r]elevant information . . . is not limited to facts that may be admissible at trial, but may include facts that could lead to the discovery of admissible evidence. [Citations.]" (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1087.) Generally speaking, when a defendant is claiming that the officer used excessive force, prior complaints are relevant and discoverable if they show a propensity to use excess force. (See *Pitchess v. Superior Court, supra*, 11 Cal.3d at p. 537; *City of Azusa v. Superior Court* (1987) 191 Cal.App.3d 693, 697; see also Evid. Code, § 1103, subd. (a)(1) [evidence of trait of victim's character is admissible when offered by defendant to prove conduct of victim in conformity with character trait].)

A past use of excessive force in the form of pepper spray has at least some "tendency in reason" to prove a present use of excessive force in the form of hitting or

beating. (See Evid. Code, § 210.) A propensity to use excessive force is not necessarily limited to one particular form of force. Violent people tend to be impulsive and to make use of whatever means are at hand. Even if not sufficiently relevant to be admissible, evidence of a past use of excessive force in the form of pepper spray is at least “relevant to the subject matter” so as to be discoverable. Accordingly, the trial court abused its discretion by ruling that defendant was not entitled to discovery regarding the past incident in which the officer allegedly used excessive force, solely because it involved pepper spray rather than hitting. This error, too, requires conditional reversal.

### III

#### DISPOSITION

The vandalism conviction is affirmed. The conviction for resisting an officer is reversed, on the following conditions. On remand, the trial court shall hold a new in camera *Pitchess* hearing in accordance with this opinion. It shall order discovery regarding the pepper spray incident unless it finds, for reasons that do not appear in the present appellate record, that this incident is not discoverable. If it orders the discovery of any material that has not been previously disclosed to defense counsel, it shall give defense counsel an opportunity to show a reasonable likelihood that the discovery of such material before trial would have led to a more favorable result for defendant. If it finds such a reasonable likelihood, it shall order a new trial on the charge of resisting an officer. Otherwise, it shall reinstate the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI

J.

We concur:

McKINSTER  
Acting P. J.

CODRINGTON  
J.