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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.

WILLIE JERRELL KELLY,

Defendant and Appellant.

E063631

(Super.Ct.No. FSB1401734)

OPINION

APPEAL from the Superior Court of San Bernardino County. Harold T. Wilson, Judge. Conditionally reversed and remanded with directions.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Lise Jacobson and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

When an armed security guard at a housing project asked defendant Willie Jerrell Kelly if he lived there, defendant began yelling and cursing. At one point, he said, “Well,

what if I just kick your ass, take your gun from you and shoot you with it?” The security guard was afraid; he remained afraid even after defendant left. As a result, defendant was convicted of making a criminal threat (Pen. Code, § 422, subd. (a)) and sentenced to four years in prison.

Defendant now contends:

1. There was insufficient evidence that the security guard’s fear was both reasonable and sustained.
2. The trial court erred by refusing to reduce defendant’s current conviction to a misdemeanor.
3. This court should review the sealed record of the in camera hearing on defendant’s *Pitchess* motion.<sup>1</sup>

We will hold that the sealed record demonstrates that the trial court did not comply with the prescribed procedures for ruling on a *Pitchess* motion. We find no other error. Accordingly, we will reverse conditionally, with directions to rehear the *Pitchess* motion and to reinstate the judgment if the motion is denied.

## I

### FACTUAL BACKGROUND

Only two witnesses testified at trial — victim Alexander Mercado and Officer Garrett Prinz.

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<sup>1</sup> A *Pitchess* motion is a motion for disclosure of information from a peace officer’s confidential personnel files. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

Mercado worked as a security guard for a company that was responsible for security at, among other things, public housing projects.<sup>2</sup> When he was on duty, he drove a marked patrol car. He wore a uniform and a badge, and he carried a handgun and a radio.

On January 13, 2014, sometime after dark, Mercado was called out to a housing project at Alturas Street and Cabrera Avenue in San Bernardino in response to a complaint that three people were loitering in front of a resident's home. He saw three people — defendant, another man, and a woman — who matched the description he had been given.

As these people were walking along the sidewalk, Mercado stopped his car, rolled down the window, and asked them if they lived in the area. This seemed to upset them. They started yelling at him and using profanity.

Mercado explained that someone had made a complaint about three people who matched their description. At that point, defendant stepped into the street and “charge[d]” toward Mercado's driver's-side door. Mercado was concerned about being trapped in his car, so he got out and closed the door behind him. At the same time, he radioed his dispatcher and requested assistance from his partner or from the police.

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<sup>2</sup> Previously, Mercado had been a police officer in Baldwin Park for about 17 years. For at least part of that time, he was a canine officer. He was impeached with his handling of an incident in which his police dog bit someone at his home. Although he was required to report the incident, he did not do so. About 10 months later, he was asked about it; he stated falsely that it was his own personal dog that inflicted the bite. On his very next shift, however, he contacted his supervisor and told him the truth. About a month and a half later, he resigned due to “personal family matters.”

Defendant came within three to six inches from Mercado's face. He was "moving his hands around, flailing . . ." The woman was just behind defendant. They both continued to yell and use profanity. Meanwhile, the other man walked away; Mercado lost track of where he was.<sup>3</sup>

Mercado felt that he could not move. He was afraid that defendant would try to grab his gun. To prevent that, he turned sideways and jammed the gun between his leg and his car. He tried to calm defendant down.

Defendant said, "Well, what if I just kick your ass, take your gun from you and shoot you with it?" This made Mercado afraid because his partner was at least 10 to 15 minutes away. Defendant also said he was an ex-parolee who had been in prison, where he had spent time in the Secure Housing Unit (SHU). Mercado knew this meant that defendant had committed a crime in prison and could be dangerous. This made him more afraid. He could smell alcohol on defendant's breath. This also made him more afraid, because it meant that defendant was unpredictable.

Mercado told defendant that his dispatcher had called the police and the police were coming. Defendant replied, "I'm glad you called the police." The woman urged defendant to leave. Defendant had calmed down somewhat, but he still seemed angry, and he kept "opening and closing his hands into fists." About a minute later, defendant and the woman started walking away.

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<sup>3</sup> Mercado had told the police that he contacted the other man first; the other man left, and only after that did he contact defendant and the woman.

Mercado did not go after them because he was afraid. However, he tried to keep defendant in sight from a distance. Just then, Officer Prinz happened to drive by, and Mercado flagged him down.

Officer Prinz located defendant at a liquor store about a block away. At first, defendant was “confrontational” and “defiant.” He appeared to be intoxicated. He said that Officer Prinz had no right to contact him and no reason to stop him. After other officers arrived, however, defendant finally sat on the curb and allowed Officer Prinz to do a pat-down search for weapons.

Mercado repeatedly declined to estimate how long the entire confrontation lasted, except that it was less than an hour; it could have been less than a minute, but it could have been more than 15 minutes. Defendant was within inches of his face for “a few minutes.” He concluded that from the time he called for the police until they arrived, “[i]t seem[ed] like an eternity.”

## II

### PROCEDURAL BACKGROUND

After a jury trial, defendant was found guilty of making a criminal threat. (Pen. Code, § 422, subd. (a).) In a bifurcated proceeding, after defendant waived a jury, the trial court found two strike priors (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and five prior prison term enhancements (Pen. Code, § 667.5, subd. (b)) to be true. However, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, it struck one of the strike priors. Moreover, pursuant to Proposition 47, it redesignated five of defendant’s prior convictions as misdemeanors. Finally, it struck all of the remaining prior prison

term enhancements. As a result, defendant was sentenced to a total of four years in prison, along with the usual fines, fees, and miscellaneous sentencing orders.

### III

#### THE SUFFICIENCY OF THE EVIDENCE OF THE NECESSARY FEAR

Defendant contends that there was insufficient evidence that the victim was in sustained fear and that that fear was reasonable to support his conviction.

“““When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, 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.] We determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Citation.] In so doing, a reviewing court “presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”” [Citation.]” (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.)

The elements of the crime of making a criminal threat are ““(1) that the defendant “willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,” (2) that the defendant made the threat “with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,” (3) that the threat . . . was “on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the

person threatened, a gravity of purpose and an immediate prospect of execution of the threat,” (4) that the threat actually caused the person threatened “to be in sustained fear for his or her own safety or for his or her immediate family’s safety,” and (5) that the threatened person’s fear was “reasonabl[e]” under the circumstances.’ [Citation.]” (*In re George T.* (2004) 33 Cal.4th 620, 630, fn. omitted.)

“Sustained fear occurs over ‘a period of time “that extends beyond what is momentary, fleeting, or transitory.”’ [Citation.] ‘Fifteen minutes of fear . . . is more than sufficient to constitute “sustained” fear for purposes of . . . section 422.’ [Citations.]” (*People v. Wilson* (2015) 234 Cal.App.4th 193, 201.) “Even if the encounter lasts only one minute, a person who is confronted with a firearm held by an angry perpetrator and who believes his or her death is imminent, suffers sustained fear. [Citation.]” (*People v. Culbert* (2013) 218 Cal.App.4th 184, 190-191.)

Here, defendant was belligerent even before he uttered any threat. He kept his face just inches away from Mercado’s face as he yelled and used profanity. Mercado had already asked his dispatcher to send backup because he felt threatened. And he was already concerned that defendant might grab his gun.

Defendant then said, “Well, what if I just kick your ass, take your gun from you and shoot you with it?” He also said that he was an ex-convict who had spent time in the SHU. Mercado testified that these threats made him afraid. He testified that defendant remained within three to six inches of his face for “a few minutes.” In addition, from the time when Mercado told defendant that the police had been called, it was approximately another minute before the woman convinced defendant to leave. According to Mercado,

the whole confrontation could have lasted more than 15 minutes. Even after defendant left, Mercado was still too afraid to follow him. Most important, Mercado testified that “[i]t seem[ed] like an eternity” before the police arrived. This last statement, even standing alone, would support a finding that his fear was not momentary, fleeting, or transitory.<sup>4</sup>

Defendant compares this case to *In re Ricky T.* (2001) 87 Cal.App.4th 1132. There, a 16-year-old high school student got angry with his teacher, used profanity, and said either “I’m going to get you” (*id.* at p. 1135) or “I’m going to kick your ass.” (*Id.* at p. 1136.) The teacher testified that he felt physically threatened. (*Id.* at p. 1135.) He ordered the student to go to the school office, and the student complied. (*Id.* at pp. 1135, 1140.) Neither the school nor the teacher contacted the police until the next day. (*Id.* at p. 1138.) The appellate court held that there was insufficient evidence of sustained fear. (*Id.* at pp. 1139-1141.)

Unlike the student in *Ricky T.*, defendant did not submit to authority immediately — or ever. First, he charged toward Mercado; then he stood within three to six inches of Mercado’s face, yelling, cursing, and flailing his hands around. This continued for what

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<sup>4</sup> Mercado testified that his partner was 10 to 15 minutes away. He also testified that his partner arrived at the same time as the police did. The People conclude that it is a reasonable inference that the incident lasted 15 minutes.

On cross-examination, however, defense counsel brought out the fact that this was inconsistent with Mercado’s concession that the whole incident could have lasted less than a minute. Mercado then asked to clarify why he “believe[d]” his partner was 10 to 15 minutes away; he started to say that this was based on a “discuss[ion]” he had had with his partner, but defense counsel cut him off. The implication was that his partner turned out to be closer than he believed.

seemed to Mercado like an eternity. Finally, unlike the teacher in *Ricky T.*, Mercado contacted the police immediately.

Defendant argues that Mercado was a “seasoned officer” who “was used to hearing angry utterances during the stressful circumstances of making arrests.” That would be viewing the evidence in the light most favorable to defendant; but that is not how the substantial evidence standard works. In the face of a credible threat, even a veteran police officer is entitled to be afraid, even if (as we would hope) he or she does not cave in to the threat; certainly a jury could so find.

Defendant also argues that Mercado was armed with a firearm. Mercado, however, was worried that defendant would try to get his gun away from him. Rather than draw his gun, he made it unavailable by squashing it between his leg and his car. This was not unreasonable. If we were to hold that an armed security guard in a heated confrontation with a menacing stranger must either draw his weapon or submit to being threatened with impunity, we would be promoting violence.

Next, defendant argues that Mercado “was safely inside his car” and could have driven away. This ignores the fact that, by the time defendant actually made the charged threats, Mercado had already gotten out of the car.

Finally, defendant argues that he “walked away after making the statement to Mercado, demonstrating that he had no intention of following through on the alleged threat.” This does not change the fact that, before he walked away, Mercado was in sustained fear. Moreover, the mere fact that defendant had walked a block away did not mean he was no longer a threat. Mercado did not go after him because he was still afraid.

We therefore conclude that there was substantial evidence that Mercado reasonably was in sustained fear.

#### IV

#### REFUSAL TO REDUCE THE CURRENT OFFENSE TO A MISDEMEANOR

Defendant contends that the trial court erred by refusing to reduce his current conviction to a misdemeanor.

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

Defendant had seven prior felony convictions — one for robbery, one for assault with a deadly weapon, and five for petty theft with a prior; the trial court redesignated the latter as misdemeanors pursuant to Proposition 47. He had ten prior misdemeanor convictions. He committed the current offense just seven months after getting out of prison.

Before sentencing, defendant filed a written request to reduce his current conviction to a misdemeanor under Penal Code section 17, subdivision (b). The prosecution opposed the request “based on the defendant’s extensive criminal record.” The trial court denied the request.

##### B. *Discussion.*

The crime of making a criminal threat is a “wobbler,” meaning it can be treated, in the trial court’s discretion, as either a felony or a misdemeanor. (Pen. Code, § 17, subd. (b)(1), 422, subd. (a); see generally *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

“[T]he fact a wobbler offense originated as a three strikes filing will not invariably or inevitably militate against reducing the charge to a misdemeanor. Nonetheless, the current offense cannot be considered in a vacuum; given the public safety considerations underlying the three strikes law, the record should reflect a thoughtful and conscientious assessment of all relevant factors including the defendant’s criminal history. [Citations.]” (*People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at p. 979.)

“On appeal, . . . ‘[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ [Citation.] Concomitantly, ‘[a] decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” [Citations.]’ [Citation.]” (*People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at pp. 977-978.)

Basically, defendant argues that this was a relatively nonserious instance of making a criminal threat. He offers a laundry list of supposedly mitigating factors — he was intoxicated; he did not have a weapon; he did not injure or even touch Mercado; Mercado could have stayed in his car; Mercado was armed; and, eventually, defendant just walked away. The trial court, however, did not have to view all of these as mitigating. For example, defendant’s intoxication actually made Mercado more afraid. Although Mercado was armed and defendant was not, defendant threatened to take

Mercado's gun by force and to shoot him with it. The fact that defendant did not injure Mercado does not reduce his culpability for making a criminal threat; if he *had* injured Mercado, his increased culpability would have exposed him to conviction for additional crimes, e.g., assault or battery. In part III, *ante*, we discussed why the facts that Mercado was armed, that Mercado could have stayed in his car, and that defendant walked away did not make Mercado's fear any less reasonable.

Most important, the trial court could properly deny defendant's request based on his extensive criminal history. The trial court cut defendant ample slack by striking one of his strike priors — thus sparing him from a life sentence — and by striking his prior prison term enhancements. Even assuming it accepted every one of the mitigating factors that defendant lists, the trial court could still conclude, based on his incorrigible recidivism, that he deserved to be punished as a felon, with a substantial prison term.

## V

### *PITCHESS*

Defendant asks us to review the sealed record of the in camera hearing on his *Pitchess* motion. The People do not oppose the request.

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

Defendant was previously charged with making the same criminal threat against Mercado in case No. FSB1400230. We do not have the full record in that case, but we

take judicial notice of the register of actions.<sup>5</sup> It shows that defendant filed a *Pitchess* motion, seeking personnel records of Mercado (as a former police officer) and Officer Prinz. Both officers' police departments filed oppositions. On April 11, 2014, after holding an in camera hearing, the trial court denied the *Pitchess* motion.

The People then dismissed that case and refiled the same charge in this case. Once again, defendant filed a *Pitchess* motion regarding both officers. Once again, their police departments filed oppositions.

On June 13, 2014, the trial court held separate in camera hearings with respect to each officer.<sup>6</sup> It found no discoverable evidence regarding Officer Prinz. It found one discoverable complaint file with regard to Mercado (i.e., relating to the dog bite incident) and ordered it produced.

#### 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

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<sup>5</sup> In our tentative opinion (see Ct.App., Fourth Dist., Div. Two, Internal Operating Practices & Proc., VIII), we notified the parties that we intended to take such judicial notice. (Evid.Code, § 455, subd. (a).)

<sup>6</sup> In this opinion, we reveal the contents of the transcripts of the in camera hearings only to the extent necessary to fulfill the constitutional requirement that we state reasons for our opinion. (Cal. Const., art. VI, § 14.) In doing so, we have not found it necessary to reveal any of the contents of the officers' confidential personnel files.

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.] . . . 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 must be sealed; neither appellate counsel for the defendant nor appellate counsel for the People is allowed to read it. (See *People v. Hughes* (2002) 27 Cal.4th 287, 330.) Thus, on request, the appellate court must independently review the sealed record. (*People v. Prince* (2007) 40 Cal.4th 1179, 1285.)

Our independent review has revealed two errors.

First, the trial court did not properly swear in the custodians of records. 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 at a *Pitchess* hearing sworn. (*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”].) Cases holding that defects in an oath can be forfeited (see *People v. Haeberlin* (1969) 272 Cal.App.2d 711, 716, and cases cited) do not apply, because the defendant has no opportunity to object.

In each of the in camera hearings here, the trial court told the custodian to raise his right hand and to “swear” that he had searched for and brought all relevant documents. Each custodian replied, “Yes . . . .” The trial court then asked the custodian additional questions, but without any additional formalities.

This was not an adequate oath. In California, an oath does not require any particular magic words; at a minimum, however, the witness must commit to tell the truth. (Code Civ. Proc., § 2094 [oath must “impress the person’s mind with the duty to tell the truth”]; Evid. Code, § 710 [witness must take oath, except that child under 10 or cognitively impaired person need only “promise to tell the truth”]; Pen. Code, § 119 [oath defined as “attesting the truth of that which is stated”].) The custodians here never did so. Even assuming the trial court’s use of the word “swear” implied truthfulness, it only asked the custodians to “swear” that they had brought all of the relevant documents; it did not ask them to “swear” to or otherwise to commit to tell the truth in their subsequent answers.

Second, the trial court relied on its ruling in the dismissed case. In each of the in camera hearings, it noted that it had heard the previous *Pitchess* motion on April 11, 2014. It then asked the custodian if there was any new material in the officer’s file since April 11, 2014. In Officer Prinz’s case, there was not; the trial court therefore did not order any material disclosed. In Mercado’s case, since April 11, 2014, the police department had located information regarding the dog bite incident; the trial court ordered this information disclosed.

The difficulty is that we have no record of what materials were produced and examined on April 11, 2014; as a result, we cannot intelligently review the trial court's exercise of discretion on June 13, 2014. This procedure failed to comply with the requirement of *Mooc* that the trial court must make a record of what documents it examined.

We do not mean to say that the trial court was required to redo — on the record — everything it had already done on April 11, 2014. We are in favor of judicial efficiency as much as the next jurist. One suggestion would be to have the court reporter prepare a transcript of the earlier hearing and to order it sealed and kept together with the transcript of the later hearing. But *something* had to be done to comply with *Mooc*.

The appropriate appellate remedy is a conditional reversal. We will direct the trial court to hold a new *Pitchess* hearing. If it finds that there is undisclosed but discoverable information in the officers' personnel files, it must order that information disclosed and it must allow defendant to file a motion for a new trial within a specified time. In any such motion, defendant will have the burden to show that (1) the information would have been admissible or would have led to the discovery of admissible evidence, and (2) there is a reasonable probability that the information would have resulted in a more favorable outcome for him at trial. Unless such a motion for new trial is allowed, filed, and granted, the trial court must reinstate the judgment. (*People v. Wycoff* (2008) 164 Cal.App.4th 410, 415; *People v. Johnson* (2004) 118 Cal.App.4th 292, 304-305; *People v. Husted* (1999) 74 Cal.App.4th 410, 422-423.)

VI

DISPOSITION

The judgment is reversed, subject to the following conditions. On remand, the trial court shall hold a new *Pitchess* hearing in accordance with this opinion. If it finds that there is undisclosed but discoverable information in the officers' personnel files, it must order that information disclosed and it must allow defendant to file a motion for a new trial within a specified time. In any such motion, defendant will have the burden to show that (1) the information would have been admissible or would have led to the discovery of admissible evidence, and (2) there is a reasonable probability that the information would have resulted in a more favorable outcome for him at trial. Unless such a motion for new trial is allowed, filed, and granted, the trial court must reinstate the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

CODRINGTON

J.