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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARC ANTHONY KELLEY,

Defendant and Appellant.

F063623

(Fresno Super. Ct. No. F10905932)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Stephen G. Herndon, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Marc Anthony Kelley challenges his convictions of assault with a deadly weapon and resisting an officer, alleging evidentiary error in the admission of his prior violent contacts with police and trial court error in failure to review the personnel records of police officers under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We affirm.

STATEMENT OF THE CASE

On September 20, 2011, a Fresno County jury found appellant guilty of assault with a deadly weapon, a serious felony (Pen. Code,¹ § 245, subd. (a)(1), and two counts of resisting an officer (§ 69).

On October 20, 2011, the court sentenced appellant to a total term of 15 years 8 months in state prison. The court imposed the doubled four-year upper term on the assault count, imposed a consecutive five-year term for a violent felony (§ 667, subd. (a)(1)), and consecutive 16-month terms on each of the resisting an officer counts.

On October 24, 2011, appellant filed a timely notice of appeal.

STATEMENT OF FACTS

Testimony of Jimmy Perez

On November 22, 2010, appellant, Jimmy Perez, and other people were homeless and living in Pilibos Park in southeast Fresno. On that afternoon, Perez was barbecuing food at the park and was sitting with a number of friends, including Aaron Aylward and Matthew Ortega. Perez testified that appellant approached him and claimed that Perez has sexually assaulted one of his relatives. Appellant then began hitting Perez with a board that was “[a]bout six feet tall with a little point on the end ... a little tiny stick sticking out of it, like a point.” Appellant struck Perez five or six times on the arm and broke his limb and the board itself.

¹ All further statutory references are to the Penal Code unless otherwise stated.

Perez testified, “He [appellant] came to me. He was all loaded. He was on methamphetamine. He was loaded. He didn’t want to f***ing calm down or nothing. He just kept on hitting me.” The prosecutor asked Perez whether he had ever stolen anything from appellant. Perez said, “I don’t steal from him. I don’t steal from nobody. I’m a homeless guy. I don’t like stealing. If you’re homeless, you don’t steal.”

Testimony of Aaron Aylward

Aylward was sitting at a picnic table when appellant approached and began to speak with Perez. Aylward said appellant was “carrying a 2 x 4, I don’t know, maybe four or five feet long.” Appellant started circling the picnic tables near the barbecue but kept his eye on Perez. According to Aylward, appellant said he knew what Perez had done. Aylward also remembered appellant saying something about Perez raping his niece and then hitting Perez with the board. Aylward said appellant swung the board like an ax and caught Perez in the left arm. Aylward said appellant struck Perez at least two times and then walked away “towards the back end of the park,” near Willow Avenue. Aylward said that Perez had been drinking on November 22, and that Perez had been known to steal possessions from other people in Pilibos Park. However, Aylward said Perez and appellant had no problems in the past.

Preliminary Hearing Testimony of Matthew Ortega

Matthew Ortega was unavailable to testify as a witness at trial and his preliminary hearing testimony was read into the record. Ortega said he was preparing food and barbecuing in the park late on the afternoon of November 22 while others sat around a picnic table. Ortega testified that appellant angrily approached Perez, struck him several times with a long piece of two-by-four board, and then walked away. Ortega heard appellant say something about Perez raping his niece. Ortega said he was surprised by appellant’s anger because he saw appellant regularly and never saw him display that emotion.

Testimony of Melanie Dorian

Fresno Police Officers Melanie Dorian and Gregory Catton responded to Pilibos Park to investigate the incident. They contacted Perez, who was agitated and upset. He told the officers a black male adult had struck him with a board and that the man was still in the park. His left ear was bleeding and he was holding his left arm. Dorian observed a large bump on the forearm close to his elbow. Perez indicated that the suspect had gone to the northeastern portion of the park and the two officers contacted appellant there. Appellant was holding two long pieces of wood and appeared to be moving them in a martial arts style. Dorian said the two pieces fit together to form one piece of wood and that a sharpened wooden dowel about seven inches long had been affixed to the long piece of wood.²

The two officers ordered appellant to drop the sticks and he complied after hesitating several seconds. Dorian said that after hesitating, appellant first dropped one piece of wood and then the other. Dorian and Catton ordered him to raise his hands above his head because the two pieces of wood were within his reach and his hands were at his sides. Dorian said appellant bent his elbows and raised his hands, palms out, to the height of his chin. The officers then repeatedly ordered him onto his knees, but appellant went down only on one knee.³ Dorian explained that one knee was insufficient because, “He could easily push off of one knee and charge us or run away. He’s not controlled.” She also explained that “[w]hen his hands were at shoulder height, he was still glancing at the ground, glancing back at us, and I believed he was considering reaching down and grabbing the pieces of wood.”

² At trial, one of the two long pieces of wood measured 38 inches long and the other measured 48 inches long.

³ According to Dorian, appellant never said that he could not get down on his other knee because it hurt or was injured.

Dorian told appellant that he was in danger of being shot with a “less lethal” beanbag shotgun. Appellant did not respond to Dorian’s statement. Officer Catton attempted to grab appellant’s hands, and appellant began to fight with him. Dorian covered appellant as Catton attempted to “grab ahold of his hands.” Appellant struck Catton’s hands away. As appellant attempted to lie on his back, Dorian fired one shot, and the beanbag struck appellant in the lower chest/mid-torso area, without effect. Dorian determined the “less lethal” shotgun was not going to be an effective weapon against appellant and she did not shoot any more rounds.

Dorian said she and Catton engaged in “an ongoing physical struggle where we were constantly moving in to try to control his hands and Mr. Kelley was punching at us and kicking at us and causing us to back away” Dorian said Catton continued to struggle with appellant and Catton deployed his Taser three times.⁴ The Taser darts initially had an effect on appellant but, according to Dorian, appellant “was able to work through that and began to fight us again.” After the first deployment of the Taser, appellant stopped moving, and the officers unsuccessfully attempted to turn him on his stomach and handcuff him. When appellant worked through the effects of the first Taser, he punched and kicked at the officers. After the second application of the Taser, appellant tore Taser darts from his chest and then kicked Dorian in the collar bone

⁴ Dorian explained the functioning of a Taser in this fashion: “The Taser has a cartridge that fits on the end of it, and inside the cartridge are two darts and they are connected to two wires, and the wires are 25 feet long. They come in different lengths. You can deploy the Taser either [with or] without the cartridge, in which case you would have to push it up against somebody and it would, you know, only affect the area where they are struck, or if you fire it with the darts and both of the darts hit the target, it creates a circuit and it causes their muscles to seize, and usually they’re unable to move for several seconds. The Taser cycles about three seconds, so it would be three seconds of feeling that.” Dorian further explained that when Taser darts are affixed to an individual’s body, an officer can make multiple applications of the Taser. On cross-examination, Dorian said the Taser device has a voltage of 50,000. She added that individuals who are Tased frequently “clench up, ball up, [are] unable to move. However, Mr. Kelley seemed to be able to fight through it and continue to move.”

and diaphragm area, knocking the wind out of her. Dorian said the darts were still attached to appellant's body when Catton deployed the Taser a third time. The third application of the Taser did not subdue appellant, and he continued to kick at the officers. Dorian said they continued to struggle with him and tried to roll him over but he was very strong and "a skilled fighter." The officers eventually subdued appellant by each grabbing one of his hands and rolling him over on his stomach. Dorian handed her handcuffs to Catton, who placed them on appellant. Dorian said they were able to subdue appellant after he kicked at her a second time.

Officer Dorian said the struggle lasted around four minutes, and then the officers requested emergency medical services to obtain treatment for appellant's injuries. The emergency personnel took appellant to the hospital, and the officers went with him. At the hospital, appellant waived his rights and agreed to talk to Dorian. Appellant told Dorian he had consumed methamphetamine and Dr. Pepper that day. Appellant also said that he was present in Pilibos Park that day because "he likes to come to the park to watch the pretty females." Appellant said he saw one female who appeared to have been hurt by someone, although appellant admitted that he did not speak with her. Appellant said he knew this by looking in her eyes. After observing the female, appellant went near Perez and thought he heard Perez say under his breath that "he had done it." At that point, appellant ordered Perez to leave the park. After Perez refused, appellant struck him with one of the sticks.⁵ Appellant explained he struck Perez in order to "save face" in the park community because "he had told Mr. Perez to leave and Mr. Perez had not listened to him." Appellant told Dorian at the hospital that he did not know Perez and that "his leg had accidentally flown up" to hit her chest twice during their encounter. She acknowledged that appellant was wearing tennis shoes at the time of their contact.

⁵ Although Aylward testified the wood that appellant held was in the nature of a two-by-four piece of lumber, the officers referred to the broken wood as "sticks."

Testimony of Gregory Catton

Officer Catton testified he and Dorian were on patrol duty in southeast Fresno on the late afternoon of November 22, 2010. Catton said he and Dorian went to Pilibos Park at the corner of Lane and Winery Avenues, drove onto the park property, and contacted Jimmy Perez in the center of the park. Catton said Perez appeared a little intoxicated and had a lot of blood on his body. Catton saw injuries to Perez's left ear and also said "his left arm was deformed near the elbow and swollen." According to Catton, Perez said a person had approached him with a wooden pole, accused him of committing crimes against a family member, and then struck him in the head and arm with the pole. Perez did not point out the assailant to Catton but described him as a black male in his 50s dressed in a sweatshirt and shorts. Perez told Catton the individual had walked northeast into the park. Catton drove in that direction and located appellant in 10 to 15 seconds. Catton said appellant was holding two pieces of two-by-four wood, one in each hand. Catton explained, "[I]t looked like he was doing martial arts or that he knew what he was doing with the boards. He was twirling them and that kind of thing."

Catton recognized appellant from a prior contact and called out to him from a distance of 15 or 20 yards, "Marc, put the sticks down." Catton said he had his pistol drawn and pointed at appellant when he issued the command. Appellant did not immediately obey the command. Catton said he waived the sticks for about 10 seconds and posed in a threatening manner. Catton said appellant eventually placed the sticks about a foot away from his feet. When appellant dropped the sticks, Catton told him to place his hands on his head and walk toward the two officers. Appellant stood still and did not obey the commands. He eventually placed his hands at his sides "kind of in a cross position." Catton told appellant to get down on his knees, and he eventually got down on one knee. Appellant did not tell the officers he had something wrong with his legs, and Catton did not see a brace on either of appellant's knees.

Catton and Dorian ultimately approached appellant “at angles.” Catton had his gun in his hand and Dorian had the less lethal shotgun in her hands. Catton put his gun away when he was approximately two feet away from appellant. At that point appellant was on one knee and Catton grabbed appellant by the left wrist. Appellant slapped Catton’s hand away. Catton grabbed appellant’s arm and wrist again and tried to place him in a rear wrist lock. However, appellant struggled out of it and laid on his back. Catton said the weapons were still within appellant’s reach at that point. Catton said appellant rolled from side to side and kicked “with both of his feet up in the air towards myself several times, and I saw him kick towards Officer Dorian, also.” Catton said he and Dorian were “pretty much shoulder to shoulder” at this point in time.

While appellant was kicking in the air, Catton unholstered his Taser, explaining, “I was going to apply the Taser because I could create some distance between myself and Mr. Kelley kicking.” As Catton removed his Taser, he heard Dorian say, “Less lethal,” and then fire one round. Catton did not know whether the less lethal discharge hit appellant because it had no immediate effect on appellant. Appellant continued to kick and roll and would not submit his hands for cuffing. At that point, Catton applied the Taser and appellant became rigid and stopped moving for about five seconds, the normal cycle of the device. After the five seconds elapsed, appellant began to kick and roll again, despite Catton’s verbal commands to comply with the officers’ orders. Catton said he applied the Taser three or four more times.

Catton said appellant pulled the Taser darts from his skin and the device was no longer effective.⁶ Catton said appellant began to kick and fight the officers again. When Catton took time to manually reload the Taser, he saw appellant kick Dorian “hard” in the chest and leg area. Catton reloaded the Taser and applied it again. He said the Taser was effective during the five-second cycle and that appellant continued to fight and kick after

⁶ Catton said he had employed his Taser on 10 or 15 previous occasions and no one before had removed the Taser darts.

the cycle elapsed. After one application of the Taser, appellant rolled onto his stomach during the cycle and the officers were able to handcuff him. An ambulance took appellant to the hospital and the officers followed him there. Catton said the fighting between appellant and the officers took a minute and one-half. Catton saw Perez at the hospital and said he had lacerations on the top and front portion of his left ear.

Testimony of Clifton MacDonald

Fresno Police Officer Clifton MacDonald testified that he obtained witness statements in connection with the November 22, 2010, incident. He said he spoke to Aaron Aylward, who had been at the park at the time of the incident. Aylward said he and his friend, Jimmy, were sitting on benches in the center of Pilibos Park and someone named Mark was standing nearby. Aylward heard Marc mutter something under his breath and then proceed to circle the benches. According to Aylward, Marc told Jimmy that “he knew what he did.” Jimmy responded, “ ‘I don’t know what you’re talking about.’ ” Marc continued to circle the benches and said, “ ‘You’re gonna pay. I know you raped my niece.’ ” Marc said the niece’s name was “Kayla.” Jimmy replied, “ ‘I don’t know what you’re talking about. I don’t know your niece.’ ” Aylward said Marc was holding a wood stick with nails at one end and struck Jimmy in the shoulder with the stick. When Jimmy jumped off the park bench, Marc struck Jimmy an additional four to six times in the shoulder, head, and back. Although four or five other people were present in Pilibos Park at the time of the interview, MacDonald did not talk to anyone else.

Defense Evidence

Appellant testified on his own behalf. Appellant said Perez had approached him on two occasions prior to November 22, 2010, and demanded cash and beer at knifepoint. Appellant also said that Perez had stolen his personal possessions on other occasions. Appellant said he approached Perez on the afternoon of November 22 and politely asked him for the return of his personal possessions. In making the request, appellant told

Perez, “I didn’t appreciate how he recklessly eye-balled or raped my niece when she came up to the park to pick me up one day.” Appellant explained that Perez leered at his niece and other Sunnyside High School students and made sarcastic remarks and sexual innuendos. Appellant said Perez became very hostile and angry, turned red, and made a racial slur. According to appellant, Perez then put his hands in his jacket pocket and then pulled out a knife with a four-to-six-inch blade. On an earlier occasion, Perez allegedly told appellant, “ ‘I can get away with carrying this knife because I am considered crazy ... so I won’t get in trouble.’ ”

Appellant said Perez lunged at him several times with the knife and said appellant did not know what he was talking about. At that point, appellant picked up a board to protect himself. Appellant said he struck Perez with the board to disengage the knife. Appellant said the knife struck Perez’s arm and ear. Although appellant’s blows did not cause Perez to drop the knife, Perez responded by throwing canned goods at appellant. At that point, appellant went to the “northeast corner” of the park, away from appellant and his friends.

Appellant said police officers arrived at the scene and ordered him to drop the sticks. Appellant said he complied with their command. Appellant said he complied with the officers’ order to raise his hands above his head but could not comply with their order to get down on both knees. Appellant explained that he had surgery on his left knee, which prevented him from getting down “all at once on two knees.” Appellant said he explained this condition to the officers.⁷ Appellant also said he eventually complied

⁷ According to Officer Dorian, appellant did not mention an injury to his leg on the date of the incident in Pilbros Park. She said she had contact with him in May 2010 and at that time appellant was wearing a leg brace. Dorian said she questioned the necessity for appellant’s brace in 2010, testifying: “Early in the afternoon when I contacted him [in May 2010], he was wearing a brace. He made a big deal out of being unable to bend his leg to get in the patrol car. Later in the evening I had reason to come in contact with him again, at which point he ran from us full sprint weaving, dodging back and forth. He looked like a football player, you know, running down the field. He

with the officers' orders to lay face down on his stomach. After he did so, he experienced convulsions and blacked out from being Tased. Appellant said the officers applied the Taser multiple times, but he did not try to punch either of them. He said he was in pain and could not really understand what the officers were saying. He also said he could not see or control his body because of the Tasing.

Appellant said he spoke with Officer Dorian at the hospital. He claimed she intimidated him by placing her hand on the Taser while speaking with him. He denied telling Dorian that he was on methamphetamine that day. On cross-examination, appellant admitted he was convicted of felonious assault on June 29, 2007. However, he denied having an encounter with Dorian in May 2010, a number of months before the incident underlying this case. Appellant said he defended and protected himself against Perez because Perez lunged at him with a knife. Appellant said he did not hit or kick the two officers. Appellant admitted that he had a previous encounter with Dorian, and that she knew he had used methamphetamine in the past. Appellant also said that at their prior encounter, Officer Dorian "told me that the next time she sees me, every time she sees me she's gonna bust me. She's gonna haul me in."

Rebuttal Evidence

Officer Dorian testified that appellant was not Tased because of prior incidents with police. She said that force was applied in this instance because the situation dictated it. She explained, "My prior experience with Mr. Kelley, my knowledge of his methamphetamine use, my knowledge from training and experience that people who use methamphetamine are unpredictable and dangerous, the situation at hand in which Mr. Kelley was holding the weapons with which he had actually injured somebody, visible very distinct injury, we felt the need, I felt the need to use force to protect myself, to protect my partner, to protect the number of people that were at the park. There were

looked like he was in very good health." Dorian added that she could not observe anything wrong with his leg when he ran at the time of that second contact in May 2010.

people playing soccer. There were families. There were a lot of people at the park that day.” Dorian said she did not threaten appellant to get him to speak with her at the hospital and did not hold her Taser when she spoke with him.

DISCUSSION

I. THE TRIAL COURT DID NOT ERR BY ADMITTING OFFICER DORIAN’S TESTIMONY ABOUT PRIOR CONTACTS WITH APPELLANT.

Appellant contends the trial court erroneously admitted Officer Dorian’s testimony about “a prior violent contact with appellant some months before the current charged offense.” Appellant acknowledges “the District Attorney sought to introduce this testimony ... to explain Officer Dorian’s reactions to appellant’s conduct on November 22,” but nevertheless contends the admission of the evidence of past contacts constituted prejudicial error.

A. Procedural History

On September 14, 2011, appellant filed a trial brief and motions in limine. Appellant moved to exclude any reference to Officer Dorian’s alleged prior contacts with appellant, asserting: “[A]ny references to the alleged prior contacts create an inference that Mr. Kelley is a career felon and/or trouble maker. Such evidence has no probative value as it is not necessary to prove a fact that is of consequence to this action and creates a substantial danger of undue prejudice to Mr. Kelley.” At the contested hearing on the motion, the prosecutor argued, “It goes to her reasonableness of use of force. Her prior contacts with Mr. Kelley were resisting. In fact, one of the victims [of the earlier contacts] was the same [officer], Melanie Dorian ... it explains the reasonableness [of] her conduct, and that’s part of PC 69’s elements.”

In response to questioning by the court, defense counsel acknowledged that the defense position was that excessive force had been used and that Officer Dorian’s prior contacts were relevant. However, counsel stated, “I’m just nervous because the jury might perceive as he’s like a career felon, a troublemaker, that’s my concern.” The court

noted, “It would be admitted for a limited purpose and instructed on under a limited purpose, would it not?” Defense counsel replied, “Well, if the Court was inclined to allow it, I would request that there would be in limine instructions.” The court acknowledged counsel’s concern and said, “[I]f there is specific conduct that has relevance here, we’ve got to instruct the jury as to the proper way to consider it.” Later in the proceedings on the in limine motions, the prosecutor noted that Dorian’s prior contacts with appellant went to her reasonableness and her actions on November 22, 2010. The prosecutor further noted, “Officer Dorian could only speak to her own personal experience or things she witnessed directly, and I’ve instructed her as such and will instruct her again.” The court advised, “[T]here are not to be any disparaging comments reflected upon status or incarceration or probation or anything of that nature. It would be directly limited to her personal prior contact with Mr. Kelley that would affect her actions in this particular event.” The court further advised, “I think that she can talk about the prior contact and the fact that she has had a physical confrontation.”

At trial, Officer Dorian testified on direct examination that she and Officer Catton arrived at Pilibos Park on November 22 and saw appellant waving sticks “in a martial arts fashion.” She testified, “I recognized him from prior contact and I yelled his name, Marc Kelley, to get his attention.” During the prosecution’s case-in-chief, Dorian testified that she questioned appellant at the hospital, and he said he had mixed methamphetamine with Dr. Pepper on the afternoon of November 22. During the direct examination in the defense case, appellant said, “[S]he [Dorian] looked pretty angry when she came up because of previously meeting.” He explained, “She told me that the next time she sees me, every time she sees me she’s gonna bust me. She’s gonna haul me in.” On cross-examination in the defense case, the prosecutor asked appellant about his methamphetamine use on November 22. Appellant said he had Gatorade and food that day but did not tell Dorian he had mixed methamphetamine with Dr. Pepper. When asked about the latter point, appellant said, “I told her in a previous encounter, that’s how

she knows. She arrested me, and that's how she knows." On rebuttal, Dorian testified she had prior experience with appellant and knew of his methamphetamine use. She also testified that from her training and experience, she knew that people who use methamphetamine can be unpredictable and dangerous.

B. Appellant's Specific Contention

Appellant contends the jury was presented with two different versions of events and "it is more than reasonable to infer that the jury, once having heard appellant engaged in similar conduct with Officer Dorian on a prior occasion, would find that he resisted attempts to handcuff him and kicked her in the current case. In this case there was no issue as to identity, motive, common design or plan. None of the normal reasons for admitting testimony under [Evidence Code] section 1101(b) existed in this case. The only reason was to establish that appellant was a person who had shown a propensity to violently resist law enforcement officers when contacted by them."

C. Analysis

Appellant's contention must be rejected for several reasons. First, Officer Dorian did not testify about prior contacts with appellant in which appellant resisted Dorian or obstructed the performance of her official duties. At most, the evidence showed that appellant and Dorian had prior contacts, and that she was aware of his methamphetamine usage from those contacts. Second, the motion in limine at trial was based on "relevancy and [section] 352 of the Evidence Code." Appellant did not move in limine or interpose an objection based on Evidence Code section 1101, the statute relied on in his appellate briefs. Questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal. (*People v. Seijas* (2005) 36 Cal.4th 291, 302.)

Finally, at the September 14, 2011 hearing outside the jury's presence, the court asked defense counsel, "As I understood our informal discussions, Mr. Moore, wasn't part of your position here that there was excessive force used [by the officers]?" Defense

counsel responded, “Yes, there was.” The court then asked, “And, therefore, wouldn’t all of that [evidence of prior contacts between Dorian and appellant] be relevant?” Counsel replied, “It would. I’m just nervous because the jury might perceive [that appellant is] like a career felon, a troublemaker, that’s my concern.” From the entirety of the record, it seems clear that appellant and Dorian had a contact prior to November 22, 2010, and that appellant had used methamphetamine before seeing Dorian and Catton on November 22, 2010. However, the two brief references to Dorian’s prior contact with appellant and appellant’s consumption of methamphetamine and soda did not equate to a depiction of appellant as a career felon or troublemaker. Moreover, these two brief references in the prosecution’s case-in-chief fell far short of appellant’s assertion that the trial court admitted “testimony of Officer Dorian regarding prior violent contacts with appellant.”

Appellant must be mindful that he was charged with two counts of resisting an executive officer (§ 69). Section 69 sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law. The second is resisting by force or violence an officer in the performance of his or her duty. (*In re Manuel G.* (1997) 16 Cal.4th 805, 814-815.) Section 69 is designed to protect police officers against violent interference with performance of their duties. While the object of the offense may not be to attack a peace officer, its consequence is frequently to inflict violence on peace officers or subject them to the risk of violence. (*People v. Martin* (2005) 133 Cal.App.4th 776, 782.) A violation of section 69 does not require a showing of the state of mind of the recipient of the threat. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153.) Nevertheless, evidence of appellant’s prior contact with Dorian was probative to the extent it showed that appellant knew that Dorian was performing her duty when he acted and whether or not she used unreasonable or excessive force in the performance of her duties (CALCRIM No. 2652).

The trial court did not commit reversible evidentiary error arising from Officer Dorian's testimony about her prior contact with appellant.

II. THE TRIAL COURT DID NOT ERR BY DECLINING TO CONDUCT A *PITCHESS* REVIEW OF THE PERSONNEL RECORDS OF THE CHARGING OFFICERS.

Appellant contends the trial court committed reversible error by denying his request for a pretrial review of the personnel records of Officers Dorian and Catton under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

A. Procedural History

On July 11, 2011, appellant filed a motion for pretrial discovery under *Pitchess*. His counsel stated in an accompanying declaration: "The information contained in the personnel files of Officer Catton and Officer Dorian would be used by the defense to enable it to effectively cross-examine the officers during the trial for impeachment, in that Mr. Kelley herein alleges that Officer Dorian and Officer Catton used excessive force, and may have falsified their investigation reports in order to support the probable cause for the charged offenses." Counsel also declared on information and belief that "from time to time persons who have been arrested and/or detained by Officer Dorian and Officer Catton have made complaints to their police agencies alleging they have also been victims of excessive force, aggressive conduct, violence, fabrication, or falsification of police reports."

The court conducted a hearing on the motion on August 15, 2011. Defense counsel argued: "Your Honor, I think in the motion we lay out that Mr. Kelley ... was tasered multiple times, shot with a ... rubber gun. He complied with [the] officers['] request, and I think the officers conducted in – it was excessive force." Counsel for the Fresno Police Department custodian of records stated, "The police department does indicate that he was shot with the less lethal [beanbag shotgun]. It indicates all the things [defense] Counsel is saying. The only issue here is whether in Mr. Kelley's [case] – it

[the report] doesn't say he didn't resist arrest. It doesn't give [any] factual basis for getting into in camera”

The trial court denied the motion stating: “Well under Evidence Code [section] 1043, a motion to discover a peace officer's personnel records [has] to be supported by an affidavit that shows good cause and supports materiality of the requested information. And that all depends on the sufficiency of the factual allegations. [¶] You failed to state any plausible factual allegations or any scenario of excessive force other than what has already been stated as having occurred. Therefore the motion is denied due to the insufficiency of the affidavit and declaration.”

B. Appellant's Specific Contention

Appellant contends “the trial court refused to even examine the records in camera although they were apparently present in court with counsel representing the Fresno Police Department. It seems totally unreasonable, based upon appellant's motion and declarations, to fail to review the records and determine whether or not either Officer Catton or Officer Dorian had a history of aggressive behavior toward arrestees or other citizens. In this case there was clearly a difference of opinion as to what occurred between appellant and the officers on November 22. [¶] If the file contained complaints of excessive force against either officer, disclosure of the complainants and permitting appellant to investigate those complaints was clearly in order.”

C. Applicable Law

In *Pitchess, supra*, 11 Cal.3d 531, the Supreme Court recognized that a criminal defendant has a limited right to discovery of a peace officer's confidential personnel records if those files contain information that is potentially relevant to the defense. To initiate discovery, a defendant must file a motion seeking such records. The motion must include affidavits showing good cause for the discovery or disclosure sought, and set forth the materiality thereof to the subject matter involved in the pending litigation. (Evid. Code, § 1043, subd. (b)(3).) Good cause requires the defendant to establish a

logical link between a proposed defense and the pending charge, and to articulate how the discovery would support such a defense or how it would impeach the officer's version of events. The threshold for establishing good cause is relatively low. The proposed defense must have a plausible factual foundation supported by the declaration of defendant's counsel and other documents. A plausible scenario is one that might have or could have occurred. "The 'defendant must also show how the information sought could lead to or be evidence potentially admissible at trial. Once that burden is met, the defendant has established materiality under [Evidence Code] section 1043.' [Citation.]" (*People v. Moreno* (2011) 192 Cal.App.4th 692, 700-701; *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 69.)

If the defendant establishes good cause, the trial court must review the requested records in camera to determine what information, if any, should be disclosed. Subject to certain statutory exceptions and limitations, the trial court should disclose to the defendant such information that is relevant to the subject matter involved in the pending litigation. An appellate court reviews the denial of a *Pitchess*, *supra*, 11 Cal.3d 531 motion for abuse of discretion. (*People v. Moreno, supra*, 192 Cal.App.4th at p. 701.) "[A]ll discretionary authority is contextual." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) All exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue. Nevertheless, the abuse of discretion standard is deferential. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.) An appellate court does not substitute its judgment for that of the trial court. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) An exercise of trial court discretion is reviewable only for abuse and "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Carmony, supra*, 33 Cal.4th at p. 377.)

D. Analysis

In this case, the court concluded that the affidavit of appellant's trial counsel was insufficient because it "failed to state any plausible factual allegations or any scenario of excessive force other than what has already been stated as having occurred." Although appellant's trial counsel acknowledged this ruling, counsel observed, "I think that the conduct in itself is sufficient." On appeal, appellant contends his motion and counsel's declaration "stated adequate grounds for the court to, at a minimum, review the officers' files *in camera* and determine[] what if any information was to be disclosed to the defendant."

"To show good cause as required by [Evidence Code] section 1043, defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges. The declaration must articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence [citations] that would support those proposed defenses." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024.) To obtain in-chambers review of documents or information in an officer's personnel file that is potentially relevant to claimed misconduct, "a defendant need only demonstrate that the scenario of alleged officer misconduct could or might have occurred." (*Id.* at p. 1016.) The defendant must "not only establish a logical link between the defense proposed and the pending charge, but also articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Id.* at p. 1021.) Counsel's affidavit must describe a factual scenario supporting the claimed officer misconduct. (*Warrick v. Superior Court, supra*, 35 Cal.4th at pp. 1016, 1021.)

In this case, the notice of motion filed July 11, 2011, characterized appellant's defense in this fashion: "[T]hat the involved officers, Dorian (V3320), and Catton (P1497), may have made deliberate false material misrepresentations and/or omissions in the incident report ... and/or used excessive force during the arrest of Mr. Kelley." The

accompanying declaration of counsel alleged: “Specifically, I am informed and believe to be true that Officer Dorian and Officer Catton used excessive force upon Mr. Kelley during this incident. The officers might claim Mr. Kelley was resisting therefore they initiate[d] enough force to effectuate the arrest.” (Italics omitted.) The written opposition of the custodian of records, filed August 2, 2011, observed: “Defense has not stated any defense or any logical connection between the charges the Defendant faces and their defense. Defense merely states that the force used was excessive and does not dispute the facts as set forth in the police reports.”

“ ‘[A]n affirmative defense is one which presumes the prima facie elements of the crime are true, but exculpates the defendant because of excuse or justification. [Citations.] Stated another way, an affirmative defense is one which does not negate any element of the crime, but is new matter which excuses or justifies conduct that would otherwise lead to criminal responsibility.’ ” (*People v. Spry* (1997) 58 Cal.App.4th 1345, 1368-1369.) Appellant cites no authority for the proposition that asserted false reports and excessive force on the part of law enforcement officers comprise an affirmative defense to section 69. As respondent notes on appeal, the prosecution did not dispute the nature and extent of the force employed by Officers Catton and Dorian and detailed in their police reports. The declaration of appellant’s trial counsel summarily accused the two officers of using excessive force but did not address or contradict the factual elements of the police reports, i.e., that appellant resisted arrest; failed to raise his arms, drop to both knees, and rest on his stomach upon the orders of the officers; kicked Dorian in the upper chest; and fought with Catton. Further, the declaration of appellant’s trial counsel did not aver the absence of resistance on appellant’s part or explain how the officers’ personnel records – records of past incidents, if any – would lead to relevant evidence or admissible impeachment evidence in this case, particularly where the officers fully acknowledged the types and degrees of force employed in the current incident.

In our view, appellant has not set forth a proposed defense, established a plausible factual foundation for the alleged officer misconduct, or articulated a valid theory as to how the requested information might be admissible at trial. Given the foregoing circumstances, appellant was not entitled to have the trial court review the requested records in camera to determine what information, if any, should be disclosed. (*People v. Gaines* (2009) 46 Cal.4th 172, 178-179.) The trial court did not abuse its discretion by declining to conduct an in camera *Pitchess* review of the officers' personnel records. (*Uybungco v. Superior Court, supra*, 163 Cal.App.4th at p. 1049.)

DISPOSITION

The judgment is affirmed.

Poochigian, J.

WE CONCUR:

Levy, Acting P.J.

Detjen, J.