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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOCELYN HERNANDEZ,

Defendant and Appellant.

F067435

(Super. Ct. No. BF145273A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Ann Bergen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Ryan B. McCarroll, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

On November 3, 2012, at approximately 1:00 a.m. a caller contacted 911 with a report of a possible drunk female who had just driven onto a street median in Bakersfield, California. A police officer responded moments later and discovered a Toyota Camry abandoned on the median. The officer traced the Camry's registration to appellant Jocelyn Hernandez, who resided a few blocks away. Approximately 25 minutes after the 911 caller alerted authorities, the officer knocked on appellant's door and she answered appearing very intoxicated. She initially denied driving but after further questioning she admitted she drove the Camry onto the median. She was arrested and approximately 45 minutes later her blood alcohol concentration was measured at .25 percent.

Following a jury trial, appellant was convicted of driving under the influence (Veh. Code, § 23152, subd. (a); count 1) and driving with a blood alcohol level of .08 percent or more (Veh. Code, § 23152, subd. (b); count 2). In a bifurcated proceeding, the court found true the following special allegations alleged for both counts: that appellant had suffered a prior felony conviction (Veh. Code, § 23550.5) for gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)); that her prior conviction was a serious felony (Pen. Code, § 1170.12, subds. (a)-(e)); and that she had previously served a term in prison and did not remain free of prison custody for at least five years (Pen. Code, § 667.5, subd. (b)).

Appellant was sentenced to an aggregate term of seven years as follows: the upper term of three years for count 1, which was doubled pursuant to the Three Strikes Law, plus a one-year enhancement for appellant's prior prison term. The six year sentence on count 2 was stayed pursuant to Penal Code section 654.

Appellant raises two issues on appeal.

First, she contends her admission of driving was admitted in violation of her Fifth Amendment right against self-incrimination under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and its progeny. She made her admission prior to receiving a *Miranda*

warning. She claims reversal of her convictions is required because the trial court's error was prejudicial under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

Second, prior to trial her counsel filed a motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) for discovery of the arresting officer's personnel files. The trial court denied the *Pitchess* motion without conducting an in-camera review, which appellant argues violated her rights to due process and a fair trial.

We find appellant's contentions to be without merit and affirm.

### **FACTUAL BACKGROUND**

#### **I. The Prosecution's Trial Evidence.**

##### **A. The 911 caller.**

On November 3, 2012, at approximately 1:00 a.m. Jerrad Massey was driving home from work on Stine Road in Bakersfield when a vehicle pulled out very slowly in front of him coming from a fast food parking lot. The vehicle was required to turn right but it drove straight towards the median. The vehicle did not have its lights activated. Massey had to swerve to avoid the vehicle, and he called 911 after he saw it drive onto the median. He turned back and drove past the scene, observing a woman in the driver's seat. The woman appeared unhurt but the vehicle appeared stuck on the median. Massey did not see anyone else in the vehicle.

At trial, Massey could neither identify nor rule out appellant as the woman he saw in the vehicle.

##### **B. Officer Edmond Jackson.**

On November 3, 2012, Bakersfield Police Officer Edmond Jackson was dispatched to the scene at approximately 1:03 a.m. and he arrived within minutes. He located a Toyota Camry "high-centered on the center median." The vehicle was unoccupied, but he found a fresh puddle of fluid at the driver's side door that smelled of beer. The puddle had broken pieces of brown glass in it.

Jackson determined appellant was the registered owner and he obtained her address, which was very close to the abandoned Camry. He drove to her residence, which only took two or three minutes, and he arrived at approximately 1:25 a.m.

Jackson, who is 6'5" tall, knocked on appellant's door and she answered. Appellant appeared intoxicated with an unsteady gait, red watery eyes, slurred speech, and her breath and person smelled of alcohol. At some point during their conversation he observed her leaning against the wall inside her doorway and sliding down to the ground while she spoke. Jackson asked her if she knew why he was there and she said her vehicle was "stuck around the corner." When asked, appellant admitted she had been drinking that day, but she denied driving the Camry when it became stuck on the median.

Jackson asked her how she knew her vehicle was stuck and appellant said she had been a passenger in a vehicle with "Mike" and they drove past her Camry. Appellant, however, did not know any additional information about Mike, such as his last name, a phone number, or where he lived.

Appellant stated that her son, Bricen Shoaf, drove the Camry. She provided Jackson with a telephone number for Shoaf, but the number was out of service. Jackson told appellant that he did not believe her and she needed to tell him the truth. He said he needed to file a report regarding the Camry and her son could be potentially accused of a hit-and-run. Appellant stated that her son was not the driver and she was the driver.

Appellant began acting "nervous" and "scared" and asked if she was going to be arrested. She backed into her house. Appellant's roommate appeared. Jackson handcuffed appellant and walked her to his patrol vehicle to avoid any escalation. In the patrol vehicle, Jackson read appellant her *Miranda* rights and he drove her to the scene of the accident.

Appellant informed Jackson she is a recovering alcoholic who drinks until she passes out. She said she had been drinking four hours earlier but she fell asleep and woke about an hour before the accident. She drove to a store where she purchased two 32-

ounce bottles of beer and then she went to a fast food establishment. She stated that she drives to the same fast food establishment every time she drinks and she does not usually crash but the “curb is confusing.” She denied drinking anything after she returned home. She stated she dropped the recently purchased beer when she exited the Camry after the accident.

Appellant declined to take a field sobriety test. At approximately 2:15 a.m. and 2:18 a.m., appellant was twice tested with a portable evidentiary breath-testing device. Both tests registered a .25 percent blood alcohol concentration.

## **II. The Defense’s Trial Evidence.**

Appellant testified she is a binge drinker. She admitted to drinking all day and night before the accident, passing out sometime before noon on the day of the accident. She woke on November 2, 2012, when it was dark. She left her house about an hour later with a “hangover” but she did not feel impaired. She drove herself to a gas station where she purchased two 32-ounce bottles of beer and then she drove to the fast food establishment, which was across the street.

After she exited the fast food parking lot she accidentally drove onto the median because the road there is “tricky” due to it narrowing from two lanes to one, and cars are often speeding. She hit the median because she drove too far to the left to give room for approaching cars. She could not move her car off the median so she decided to walk home, which was about a three minute walk. She explained to the jury she had previously hit the median there in the daytime while sober because of the road conditions and the need to give room to approaching drivers.

Before she left a man stopped and offered her assistance. She believed his name was Mike. He attempted to move her vehicle, but it remained stuck. He offered to drive her home. As she gathered her belongings, the plastic bag containing the beer broke and one bottle fell and shattered outside her vehicle. Mike drove her home, where she began immediately drinking because she was upset about a recent breakup with her boyfriend,

concerned about finances, and worried about her vehicle. She consumed the beer she had just purchased and then found a bottle of vodka in the freezer. She drank approximately half a bottle of vodka. The vodka bottle was approximately the size of a wine bottle.

She drank while her roommate and Mike left to attempt to move her Camry. They returned and said law enforcement had arrived. She spoke with Jackson at her front door. She admitted that she initially told Jackson that her son was the driver. She did so because she was scared, very intoxicated, and believed she would be arrested for drunk driving.

Appellant's testimony differed from Jackson's testimony in many areas. She claimed she told Jackson she had been drinking when she returned home after going to the fast food establishment. She denied saying that she did not drink after returning home. She admitted telling Jackson she knew her vehicle was stuck, but denied saying she knew that because she had been a passenger in a vehicle. She denied telling Jackson she always drives to the fast food establishment when she has been drinking. She denied saying that she last slept an hour before driving. She stated she told Jackson she had previously crashed at that same median. She denied that Jackson asked her to take a field sobriety test. Finally, she claimed Jackson entered her home based on her invitation and interviewed her on her couch the "entire time."

### **III. Rebuttal Evidence.**

In rebuttal, Jackson testified that appellant did not tell him that she drank alcohol after the crash. She also did not tell him that she had crashed into the median on a prior occasion. He also stated their conversation occurred on her porch, noting he usually would not go inside a residence alone for his safety.

## **DISCUSSION**

### **I. Appellant's Fifth Amendment Rights were not Violated.**

Appellant asserts that her statements to Jackson were admitted in violation of her Fifth Amendment right against self-incrimination as set forth in *Miranda* and its progeny.

She also claims her statements made to Jackson postarrest should be excluded as “fruit of the poisonous tree.” She seeks reversal under *Chapman*, claiming the trial court’s error was prejudicial.

**A. Background.**

**1. The Evidence Code section 402 hearing.**

Prior to trial, appellant filed a motion in limine to exclude her statements she made to Jackson prior to the receipt of *Miranda* warnings. The trial court conducted a hearing pursuant to Evidence Code section 402. Below is a summary of Jackson’s relevant testimony from this hearing.

Jackson drove to appellant’s residence after he observed the Camry on the median and found the fresh puddle which smelled of beer. At that point Jackson did not know who had been driving the Camry.

Appellant answered her door when he arrived. Jackson stood just outside her door and she stood just inside her door. He immediately noticed that she showed signs of alcohol intoxication. Jackson asked her if she knew why he was there and she said it was probably because her vehicle was “stuck around the corner.”

Jackson asked appellant if she had been drinking and she said her last alcoholic drink was about four hours earlier. Jackson asked how she knew her vehicle was stuck on the median and she said she drove by it and saw it. She explained she rode with “Mike” and she saw her vehicle. She could not provide any more information regarding Mike or how to contact him. She indicated she had been home for 20 minutes and denied having anything to drink since she returned home.

Jackson asked if she drove the Camry, which appellant denied. She said she allowed her son, Bricen Shoaf, to drive it. Jackson asked for Shoaf’s contact information, which she did not want to provide. Jackson told her he needed to contact Shoaf to determine what happened to the Camry and why he left it on the median. Appellant would not give Jackson more information, saying she did not know where Shoaf was and

had no information. Jackson said he needed to complete a report and determine what happened. He said if he could not contact Shoaf he would write a report indicating Shoaf was responsible and detectives would look for him to charge him with a misdemeanor hit-and-run.

Jackson told appellant that he did not believe her and he thought she was the driver. Appellant gave Jackson a telephone number for Shoaf, which Jackson called but it was no longer in service.

At that point appellant admitted she was the driver. She began to ask if she was going to be arrested and taken to jail. She became “real agitated” and started stepping back into her house. Jackson entered her residence and placed her under arrest. He placed her in the back seat of his patrol vehicle where he advised her of her *Miranda* rights.

The entire interaction lasted approximately seven minutes from the time Jackson arrived at appellant’s home until when he arrested her.

## **2. The trial court’s ruling.**

Following Jackson’s testimony at the Evidence Code section 402 hearing, both counsel argued to the trial court focusing on whether appellant was in custody when Jackson spoke with her at the door. The court ruled appellant was not in custody when she made statements to Jackson at her door. As such, the trial court determined *Miranda* warnings were not required prior to the time appellant was actually placed under arrest.

### **B. Standard of review.**

*Miranda* applies only to “custodial interrogation,” which is questioning initiated by law enforcement officers after “““a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”” [Citation.]” (*People v. Ochoa* (1998) 19 Cal.4th 353, 401 (*Ochoa*)). *Miranda* is not involved if a “custodial interrogation” is lacking. (*Ibid.*)

“In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but ‘the ultimate inquiry is simply whether there [was] a “formal arrest or restraint on freedom of movement” of the degree associated with a formal arrest.’ [Citations.]” (*Stansbury v. California* (1994) 511 U.S. 318, 322; *California v. Beheler* (1983) 463 U.S. 1121, 1125.) The initial determination of custody depends on the objective circumstances of the interrogation, and not the subjective views of either the interrogating officers or the person detained. (*Stansbury v. California, supra*, at p. 323.)

An appellate court independently reviews the uncontradicted facts to determine whether the trial court rendered a proper legal conclusion. (*People v. Stansbury* (1995) 9 Cal.4th 824, 831.)

### **C. Analysis.**

Appellant argues a reasonable person in her position would not have believed she was free to leave under the totality of the circumstances. She claims Jackson’s physical size, the late hour, and the nature of the questions created a “police dominated” atmosphere. She contends she had nowhere to escape because Jackson stood in her doorway blocking it without informing her she could leave or refuse to answer questions.

Three cases are instructive regarding whether or not appellant was “in custody” when Jackson spoke with her on her front porch.

First, in *Beckwith v. United States* (1976) 425 U.S. 341 (*Beckwith*) two government agents interviewed the defendant in a private home where the defendant occasionally stayed. The agents made it clear they were investigating possible criminal tax fraud. The defendant was not advised of his *Miranda* rights and he made incriminating statements. The *Beckwith* court declined to require *Miranda* warnings under the circumstances because the defendant was not subjected to “custodial police interrogation.” [Citation.]” (*Beckwith, supra*, 425 U.S. at p. 345.) *Beckwith* held *Miranda* is not triggered based on the strength or content of the government’s suspicions

at the time of questioning but instead it is the ““compulsive aspect”” of the questioning that triggers constitutional requirements. (*Id.* at pp. 346-347.) Although the agents’ investigatory focus was on the defendant, he had not been taken into custody or had his freedom of action deprived in any significant way. *Beckwith*, however, noted that coerced confessions could result from a noncustodial interrogation where the suspect’s will to resist was overborne. (*Id.* at p. 348.) In such a situation, the reviewing court must examine the entire record to independently determine if the interview was free of coercion. (*Ibid.*)

Second, in *Berkemer v. McCarty* (1984) 468 U.S. 420 (*Berkemer*) an officer questioned the defendant following a traffic stop. The officer had the defendant perform a field sobriety test, which he failed. The defendant admitted to consuming two beers and smoking marijuana, and he was arrested. *Berkemer* held the defendant was not “in custody” for purposes of *Miranda* prior to his arrest. (*Berkemer, supra*, 468 U.S. at p. 441.) The time between the stop and the arrest was short, and the officer never communicated his intention to arrest the defendant. (*Id.* at pp. 441-442.) The relevant inquiry was how a reasonable man in the suspect’s position would have understood his situation. (*Id.* at p. 442.) A single police officer asked the defendant “a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists.” (*Ibid.*) *Berkemer* determined the interaction was not the functional equivalent of formal arrest and concluded the defendant was not taken into custody for purpose of *Miranda* until the officer arrested him. Accordingly, the defendant’s statements made prior to the arrest were admissible against him. (*Ibid.*)

Finally, in *People v. Merchant* (1968) 260 Cal.App.2d 875 (*Merchant*) a police officer received a tip from an informant that an ex-convict had a gun in his room at a certain address. Two officers went to the given address and the ex-convict opened the front door, although he kept shut an outside screen door. The officer confirmed the ex-convict’s name, and inquired if he was an ex-convict with a gun in his possession. The

defendant answered affirmatively to the questions and was arrested. *Merchant* held the defendant was not in custody for purposes of *Miranda* because the appearance of two officers in plainclothes outside his front screen door did not amount to an arrest or detention. (*Id.* at p. 878.) The defendant could have closed the front door and retreated into his house. The defendant's freedom of action had not been deprived in any significant way. (*Ibid.*)

The *Merchant* court noted that when an investigation reaches the stage of accusation, the accused is entitled to be effectively informed of his or her constitutional rights. The Court of Appeal, however, determined the officers engaged in a routine police investigation which was carried out in an inoffensive manner. When the officers interviewed the defendant they did not yet know whether a crime had occurred and their interest was "purely exploratory." (*Merchant, supra*, 260 Cal.App.2d at p. 879.) *Merchant* also noted the exchange could have resulted in the police abandoning their investigation if the defendant had provided different answers. (*Id.* at pp. 879-880.) The questioning was not designed to elicit a confession but was part of an investigation to obtain information about facts which the police did not know. Accordingly, the officers were not required to give *Miranda* warnings prior to the defendant's incriminating admissions. (*Id.* at pp. 880-881.)

Here, appellant has failed to establish she was subjected to restraints comparable with a formal arrest even if Jackson's investigatory focus was on her. (*Berkemer, supra*, 468 U.S. at p. 441; *Beckwith, supra*, 425 U.S. at p. 348.) Jackson approached appellant in order to investigate why the Camry was abandoned on the median and to determine who had been driving it. Jackson's appearance outside appellant's front door did not amount to an arrest or detention. (See *Merchant, supra*, 260 Cal.App.2d at p. 878.) Jackson's questions were part of a routine police investigation carried out in an inoffensive manner. Appellant was asked a modest number of questions by a single police officer for approximately seven minutes. Appellant could have refused to answer

the door, declined to answer Jackson's questions, or she could have closed the front door and retreated into her house. Appellant was never told she was going to be arrested and her freedom was not restrained until after she made her admission of driving. (*Berkemer, supra*, 468 U.S. at pp. 441-442; accord, *Stansbury v. California, supra*, 511 U.S. at p. 322.) Accordingly, appellant was not in custody for purposes of *Miranda* prior to the time Jackson actually handcuffed her. (*Berkemer, supra*, 468 U.S. at p. 442.) Consequently, the statements appellant made to Jackson prior to her formal arrest were admissible against her. (*Ibid.*)

Appellant relies on *United States v. Craighed* (9th Cir. 2008) 539 F.3d 1073 (*Craighed*); *United States v. Kim* (9th Cir. 2002) 292 F.3d 969 (*Kim*); and *People v. Ceccone* (1968) 260 Cal.App.2d 886 (*Ceccone*). This reliance is misplaced.

In *Ceccone, supra*, 260 Cal.App.2d 886, police officers stopped the defendant for running a red light and suspected the defendant of auto theft when he could not produce either a driver's license or registration. The defendant was ordered out of the vehicle whereupon one officer observed what he believed were illegal drugs in capsule form in the vehicle. Upon closer inspection, the officer also found a bag containing what appeared to be marijuana. When asked, the defendant confirmed the bag had marijuana. (*Id.* at pp. 888-889.)

On appeal, the *Ceccone* court determined the interrogation became custodial once the officer had probable cause to believe the defendant was driving a stolen vehicle, and was in possession of illegal capsule drugs and marijuana. At that point, the officer was not expected to permit the defendant to leave. Because the police had probable cause and it was not expected they would permit the suspect to leave, the defendant was in custody. (*Ceccone, supra*, 260 Cal.App.2d at p. 893.) As such, the *Ceccone* court determined *Miranda* warnings were required before the questioning continued. (*Ibid.*)

Here, unlike in *Ceccone*, appellant was not detained while she spoke with Jackson on her front porch and Jackson did not have probable cause to arrest her prior to her

admission that she drove the Camry. Appellant's argument that Jackson was not going to permit her to "evade arrest" so that she was "effectively" in custody while they spoke on the porch is without merit. *Ceccone* is distinguishable.

In *Craighead, supra*, 539 F.3d 1073, eight officers from three different law enforcement agencies executed a search warrant of the defendant's residence due to a belief he possessed child pornography. The defendant was told he was free to leave and he would not be arrested that day. (*Id.* at p. 1078.) However, several officers spoke with the defendant for 20 to 30 minutes in a storage room at the back of his house. The door was closed and the defendant was not read his *Miranda* rights. One officer leaned against the door in such a way as to block the defendant's exit from the room. The defendant did not feel that he was free to leave and he admitted that he had downloaded child pornography. (*Id.* at pp. 1078-1079.)

On appeal, *Craighead* determined the questioning occurred in a "police-dominated atmosphere." (*Craighead, supra*, 539 F.3d at p. 1083.) Eight armed law enforcement personnel entered his home, he was escorted to a storage room, and he was questioned while an armed guard stood near the door. The defendant reasonably believed he was not free to leave. (*Id.* at p. 1089.) Accordingly, the Ninth Circuit held *Miranda* warnings were required and the defendant's self-incriminating statements should have been suppressed. (*Ibid.*)

Here, Jackson questioned appellant alone and he did not enter her home prior to her admission. Appellant was not confined to an enclosed space. This record does not establish a police dominated atmosphere. *Craighead* is distinguishable.

Finally, in *Kim, supra*, 292 F.3d 969, police officers executed a search warrant at the defendant's place of business while her 18-year-old son was in charge. The defendant and her husband went to the business to check on their son. The police allowed the defendant to enter the business but barred her husband's entrance. Once she was inside the police ordered the defendant to speak English, which was not her first

language and which she did not speak well. The police prevented her from speaking with her son, with one officer telling her to ““shut up.”” (*Id.* at p. 971.) The defendant was not handcuffed but she was directed to sit in a particular area and at least two officers sat and stood around her. The police questioned the defendant for at least 30 minutes in English before an interpreter arrived, and she was questioned for another 15 to 20 minutes. The defendant was not given *Miranda* warnings and she made incriminating statements regarding drugs sold from her business. (*Id.* at p. 972.)

On appeal, the *Kim* court held the defendant had been in custody for purposes of *Miranda* because a reasonable person in her circumstances would not have felt free to leave. (*Kim, supra*, 292 F.3d at p. 974.) The defendant voluntarily entered her business not to speak with police but because she was worried about her son. Under the circumstances the defendant would not have understood she could end the questioning especially after police ordered her to shut up, isolated her from her son and husband, and then questioned her. (*Id.* at p. 975.)

Here, Jackson did not isolate appellant from others, did not direct where she could or could not stand, and did not force her to communicate in a particular language. As noted above, Jackson’s conversation with appellant lasted approximately seven minutes. A reasonable person in appellant’s circumstances would not have felt a compulsion to make incriminating admissions. *Kim* is distinguishable and does not dictate reversal.

Appellant’s remaining arguments are also unpersuasive. She speculates that Jackson quickly determined he was investigating a driving under the influence crime because he discovered spilled alcohol near the abandoned Camry. She claims his questions to her reflected that belief when he asked if she knew why he was there, observed that she showed signs of intoxication, and then said he did not believe her. She also contends Jackson became coercive when he threatened to report appellant’s son for a hit-and-run.

However, *Miranda* requirements were not triggered based on the strength or content of Jackson's suspicions at the time of questioning. Instead it is the “““compulsive aspect””” of the interrogation that triggers constitutional requirements. (*Beckwith, supra*, 425 U.S. at pp. 346-347.) This record does not establish that Jackson's questioning was so coercive as to overbear a reasonable person's will to resist.

Moreover, Jackson's subjective intent or plan is not relevant to whether *Miranda* warnings were required. Instead, the inquiry is how a reasonable person in appellant's position would have understood her situation. (*Berkemer, supra*, 468 U.S. at p. 442.) A reasonable person here would not have understood she was under arrest, going to be arrested, or would be detained for a lengthy period of time prior to making her admission. The trial court did not err because *Miranda* warnings were not required.<sup>1</sup>

## **II. The Trial Court did not Abuse Its Discretion in Denying the *Pitchess* Motion.**

Appellant contends her constitutional rights to due process and a fair trial were violated after the trial court abused its discretion in denying her pretrial *Pitchess* motion without conducting an in camera review. She seeks a conditional reversal with directions for the trial court to review the requested documents in chambers.

### **A. Background.**

Prior to trial, appellant's trial counsel filed a *Pitchess* motion to discover Jackson's personnel file, including any citizen complaints, academy and performance evaluations, and psychiatric and/or psychological records probative for his “propensity for excessive force, false police report writing, conduct unbecoming an officer, and dishonesty.”

It was alleged Jackson fabricated evidence when describing the events leading up to appellant's arrest, he was dishonest, and he wrote a false report. The motion argued

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<sup>1</sup> Because prearrest *Miranda* warnings were not required, we will not address appellant's contentions that her postarrest statements should have been excluded as “fruit of the poisonous tree” or that she suffered prejudice under *Chapman, supra*, 386 U.S. at page 24.

that Jackson “may have been involved in similar misconduct in the past and that such material information may be found in [the] personnel records and complaints lodged . . . with the Bakersfield Police Department.”

In support of the motion, appellant’s trial counsel submitted a declaration indicating the requested documents were necessary to impeach Jackson. Appellant’s counsel alleged that Jackson’s account of the incident was “false and misleading.” It was also alleged that Jackson gave false testimony at the preliminary hearing. A copy of Jackson’s initial offense report was attached to the *Pitchess* motion as exhibit A.

**1. Jackson’s report and preliminary hearing testimony.**

In his initial report, Jackson summarized his encounter with appellant at her doorway, noting that her roommate appeared. The roommate stated he had been asleep and a “commotion” woke him up approximately five minutes before Jackson arrived. The roommate described the “commotion” as appellant “entering the residence talking about her vehicle being stuck.” Jackson’s report stated he entered appellant’s residence only after her admission of driving.

At the preliminary hearing, Jackson confirmed that aspect of his report, testifying that while speaking with appellant her roommate came out of his bedroom and stated he woke up five minutes prior to Jackson’s arrival. When asked why he woke up, the roommate stated a “commotion” occurred when appellant “came in talking about her car being stuck five minutes ago.”<sup>2</sup>

**2. The disputed facts.**

In support of the *Pitchess* motion, appellant’s counsel alleged that Jackson did not have a conversation with her on the porch and, instead, he questioned her inside her home. In addition, it was alleged that appellant’s roommate described the time period

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<sup>2</sup> The jury did not hear this testimony at trial after the trial court sustained a defense hearsay objection. Appellant’s roommate did not testify at trial.

when Jackson arrived as “far different” than what appeared in Jackson’s report and how Jackson testified at the preliminary hearing.

Appellant’s counsel asserted that these discrepancies were material to the defense because Jackson’s version of the events was different from appellant’s description. It was alleged that citizen complaints regarding Jackson’s past “fabrication of evidence, falsification of information, and false testimony” may establish his “habit or custom of such inappropriate conduct.”

### **3. The opposition and the trial court’s ruling.**

The Bakersfield City Attorney’s Office filed an opposition arguing “no alternative plausible scenario is presented in the declaration. [Appellant] counsel’s declaration does not provide good cause for disclosure of the records sought. Therefore, review of confidential personnel files for the records mentioned above should be denied.” The opposition also argued that disclosure of Jackson’s psychiatric or psychological information was unwarranted as privileged pursuant to Evidence Code section 1014.

On March 13, 2013, the trial court heard appellant’s *Pitchess* motion. Appellant’s counsel submitted on the moving papers and the following exchange occurred:

“THE COURT: I am inclined to agree with the City, that there’s an insufficient basis to grant the request, which means there would not be an in-camera hearing. There are kind of conclusory statements that Officer Jackson’s statement regarding the roommate was inaccurate. That he did not state that he had been woken up by [appellant] only five minutes before. Doesn’t tell us what’s inaccurate in that statement, that he said four minutes, 59 seconds, five minutes, one second, or didn’t make any statement at all about that, and that the time period preceding when Officer Jackson got there is different. These are not, in the Court’s mind, material differences that[] would be sufficient to grant the request. So, you can argue.

“[DEFENSE COUNSEL]: Your Honor, my argument would be that what I included in my declaration that Officer Jackson’s report was inaccurate and did not include all of the roommate’s statements, would be sufficient in order to show good cause and for the in camera hearing to be granted.

“Simply because we do not state every specific detail that Officer Jackson got wrong or did not include in his report, in the defense opinion, does not mean that the in-camera hearing should not be granted and good cause has not been shown. [¶] When an individual such as [appellant] is disagreeing with what the -- well, rather in a situation like this when [appellant] is claiming that Officer Jackson’s report and testimony were inaccurate, I believe that is sufficient evidence to show good cause for the in camera hearing to be granted.

“THE COURT: Court ought not be, I hope I’m not dissuaded by the thoroughness of your declaration in terms of setting out the many details that [Jackson] did include in his report, but given the alleged inaccuracies or statements that were made that were not true, the Court’s still struggling with the idea that that’s a sufficient basis to grant the motion, subject to the hearing. Comments from the City?

“[CITY COUNSEL]: Yes, your Honor. Even those inaccuracies are not material to this case whatsoever. She’s not showing how the officer’s obligated to report every single thing that the roommate says when the roommate is not even on trial here. I don’t see how that’s relevant to this case.

“THE COURT: Anything further?

“[DEFENSE COUNSEL]: No, submit it.

“THE COURT: As it relates to the [*Pitchess*] motion, the [*Pitchess*] motion would be denied....”

## **B. Standard of review.**

Through a *Pitchess* motion, a criminal defendant may discover relevant documents or information in the otherwise confidential personnel records of a peace officer who is accused of committing misconduct against the defendant. (Evid. Code, § 1043; *People v. Gaines* (2009) 46 Cal.4th 172, 179 (*Gaines*)). If the defendant can establish good cause, the trial court must conduct an in camera review of the requested records to determine what information, if any, should be disclosed. (*Gaines, supra*, 46 Cal.3d at p. 179.) The defendant has a two-part showing to establish good cause: “first by demonstrating the materiality of the information to the pending litigation, and second by ‘stating upon reasonable belief’ that the police agency has the records or information at issue.”

(*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019 (*Warrick*), quoting Evid. Code, § 1043, subd. (b)(3).) “This two-part showing of good cause is a ‘relatively low threshold for discovery.’ [Citation.]” (*Warrick, supra*, 35 Cal.4th at p. 1019.)

To establish the required good cause under 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, supra*, 35 Cal.4th at p. 1024; see also *People v. Salcido* (2008) 44 Cal.4th 93, 146 [a “logical connection” must be established between the charges and the proposed defense to establish good cause for the granting of a *Pitchess* motion].) The trial court determines materiality based on the declaration filed in support of the *Pitchess* motion, the police report, and any other relevant evidence. (*Warrick, supra*, 35 Cal.4th at p. 1025.) The allegations in the declaration must be factually specific and tailored to support the claims of officer misconduct. (*Id.* at p. 1027.)

A trial court’s denial of a *Pitchess* motion is reviewed for an abuse of discretion. (*People v. Cruz* (2008) 44 Cal.4th 636, 670.) Under that standard, judicial discretion is abused only if the court exceeds the bounds of reason under all of the circumstances by making an arbitrary or capricious determination. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

### **C. Analysis.**

Appellant argues she offered a “specific factual scenario” in her counsel’s declaration that showed Jackson’s testimony to be false regarding her roommate’s statements and the location of her interview with Jackson. She contends her version of events was “plausible” and made her discovery requests relevant to impeach Jackson’s credibility. She asserts these discrepancies questioned the veracity of Jackson’s remaining statements in his report and testimony.

Respondent asserts appellant did not present a specific factual scenario of misconduct involving her roommate because her counsel's declaration did not explain how Jackson's version of events was inaccurate. Respondent also maintains appellant's motion did not propose a defense involving officer misconduct that was logically tied to the pending charges. As such, respondent argues the trial court did not abuse its discretion in denying the motion.

We agree with respondent. Appellant did not logically connect a proposed defense to the charges and failed to establish the materiality of the information to the pending litigation. (*People v. Salcido, supra*, 44 Cal.4th at p. 146; *Warrick, supra*, 35 Cal.4th at p. 1019.) On appeal she contends the dispute regarding her roommate's statement was material because she was home at least 20 minutes before Jackson arrived and she drank 32-ounces of beer and half a bottle of vodka during that time, which accounted for her intoxication. She also contends on appeal that the location of her interview was material regarding the "appropriateness of the interview under *Miranda*" and that Jackson conducted an illegal search.<sup>3</sup> These arguments, however, were not presented to the trial court in connection with the *Pitchess* motion.

Moreover, Jackson's report, and his testimony at both the preliminary hearing and the Evidence Code section 402 hearing, noted that appellant said she was home approximately 20 minutes before he arrived. Appellant told Jackson she did not have anything to drink after she returned home, and she said her last drink occurred approximately four hours before he interviewed her. Appellant's *Pitchess* motion did not dispute these facts. Her motion also did not contest her admission of driving, her

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<sup>3</sup> Approximately seven days prior to filing the *Pitchess* motion, appellant filed a motion to suppress pursuant to Penal Code section 1538.5 arguing that Jackson seized her without probable cause and without a warrant in violation of the Fourth Amendment. On March 13, 2013, the trial court denied her suppression motion. Appellant does not challenge that ruling in this present appeal.

appearance of intoxication, or her measured blood alcohol concentration of .25 percent. An abuse of discretion does not appear in this record based on the information presented to the trial court. (*Warrick, supra*, 35 Cal.4th at p. 1025 [trial court determines materiality based on the declaration filed in support of the *Pitchess* motion, the police report, and any other relevant evidence].)

Appellant relies on *People v. Husted* (1999) 74 Cal.App.4th 410 (*Husted*) for the proposition the trial court imposed an incorrect “requirement of specificity” in denying her *Pitchess* motion. This reliance is misplaced. In *Husted* the defendant was found guilty of felony evasion of arrest after he led law enforcement on a high speed and often dangerous vehicular chase through city streets. Prior to trial, the defendant filed a *Pitchess* motion which the lower court denied. The defendant sought personnel records to establish the primary officer’s “history of misstating or fabricating facts in his police reports.” (*Id.* at p. 416.)

On appeal, this court found error because the *Pitchess* motion asserted “material misstatements” in the officer’s report regarding how the defendant drove and the route used. (*Husted, supra*, 74 Cal.App.4th at pp. 416-417.) This court determined these allegations “were sufficient to establish a plausible factual foundation for an allegation that the officer made false accusations in his report.” (*Id.* at p. 417.) The defense attorney asserted that the officer’s “character, habits, customs and credibility” would be a material and substantial issue at trial. (*Ibid.*) The *Husted* court noted the allegations demonstrated a trial defense that the defendant “did not drive in the manner suggested by the police report and therefore the charges against him were not justified.” (*Ibid.*)

Here, appellant asserts her *Pitchess* motion proffered an “alternative factual scenario that, if true, necessarily meant that Officer Jackson’s report was not accurate.” However, unlike in *Husted*, appellant failed to establish the materiality of the disputed facts to the pending charges. Appellant’s allegations did not demonstrate a trial defense

or that the pending charges were the result of officer misconduct. *Hustead* is distinguishable and does not establish that the trial court abused its discretion.

In holding that the trial court did not abuse its discretion, we recognize that a *Pitchess* motion employs a relatively relaxed standard regarding materiality. (*Gaines, supra*, 46 Cal.4th at p. 179.) However, a general allegation that an officer lied is insufficient to “abrogate the strong ring of protection the Legislature and courts have erected around peace officer personnel records.” (*Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1069.) Appellant failed to establish the materiality necessary for the required “good cause” under Evidence Code section 1043. (*Warrick, supra*, 35 Cal.4th at p. 1024.) Accordingly, the trial court did not abuse its discretion in denying the motion.

**DISPOSITION**

The judgment is affirmed.

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LEVY, Acting P.J.

WE CONCUR:

\_\_\_\_\_  
KANE, J.

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POOCHIGIAN, J.