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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN KEN KLEIN,

Defendant and Appellant.

G050783

(Super. Ct. No. 13CF3175)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg and Gary S. Paer, Judges. Affirmed.

Sarita Ordonez, 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, Assistant Attorney General, Peter Quon, Jr., and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Steven Ken Klein was convicted of felony driving under the influence (DUI). On appeal, he contends the superior court erred in refusing to review the personnel file of one of the officers present during his arrest. Related to that issue, he also asks us to review the record of the in camera review of the personnel file of the two other officers present during his arrest. Additionally, he argues the trial court erred in instructing the jury pursuant to CALCRIM No. 2111. We conclude the superior court did not err in denying defendant's *Pitchess*¹ motion for a review of the personnel file of Sergeant Winick. Defendant failed to make the requisite showing to compel disclosure. As requested, we reviewed the court's in camera proceeding wherein it examined the records of two other police officers and find the court did not err in concluding the officers' files contained no discoverable information. Lastly, we find the jury was not misinstructed. Accordingly, we affirm the judgment.

I

FACTS

The information charged defendant with one count each of felony DUI (Veh. Code,² §§ 23152, subd. (a), 23550.5, subd. (a); count one), and felony driving with a blood-alcohol concentration (BAC) of 0.08 or greater (§§ 23152, subd. (b), 23550.5, subd. (a); count two). It further alleged defendant suffered a prior strike conviction within the meaning of California's "Three Strikes Law" (Pen. Code, §§ 667, subs. (d), (e)(1), 1170.12, subs. (b), (c)(1)), suffered three prior convictions for DUI within 10 years, and served a prior term in state prison (Pen. Code, § 667.5, subd. (b)). Defendant waived his right to a jury trial on his prior convictions which were then bifurcated from the trial on the substantive offenses.

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

² All further undesignated statutory references are to the Vehicle Code.

The jury found defendant guilty of the charged offenses. Defendant subsequently admitted the prior conviction allegations. The court struck the “strike” conviction allegation pursuant to Penal Code section 1385, subdivision (a) and sentenced defendant to three years on count one plus one consecutive year for the state prison prior. The court imposed a three-year concurrent term on count two, but ordered that sentence stayed pursuant to Penal Code section 654.

The Prosecution’s Case

At approximately 8:30 p.m., on October 2, 2013, Officer Bryan Thaete of the Orange Police Department saw a Mini Cooper without a front license plate, as required by law, exit a strip mall. Thaete decided to stop the driver and talk to him about the violation. He followed the Mini Cooper for four or five blocks before effectuating the stop. Thaete observed nothing wrong with the driving during the time he followed the Mini Cooper driven by defendant.

Thaete made contact with defendant and asked for his driver’s license, car registration, and proof of insurance. Defendant “fumbled through his wallet for a moment” and looked at Thaete “with a blank stare.” Thaete noticed the odor of an alcoholic beverage emanating from defendant’s breath and person, and that defendant’s eyes were watery and bloodshot, signs of intoxication.

Defendant did not have a driver’s license and handed Thaete his California identification card. Thaete looked at the identification and asked if defendant still lived in Upland. Defendant said, “No, I live in Upland.”

The officer asked defendant if he had been drinking that night and defendant said he had not. Thaete asked where defendant was coming from and defendant said he was coming from a Thai restaurant in the strip mall. Defendant denied having come from The Pump Room, a bar in the strip mall.

Thaete gave defendant a horizontal gaze nystagmus test, the results of which tended to indicate a blood-alcohol level of 0.08 or higher. Thaete asked defendant to perform a series of field sobriety tests but defendant refused, stating, in slurred speech, he would only do what is required by law.

Thaete arrested defendant for DUI and transported defendant to the Orange Police Department, where defendant elected to take a breath test. Thaete's partner, Officer Justin McGowan, administered the test. The first test was administered at 9:33 p.m., and the result showed defendant had a 0.11 percent BAC. The second test was given at 9:37 p.m., with a 0.10 result. McGowan initialed the printout by the statement that he observed the individual for 15 minutes before administering the test, and signed the printout as the person who administered the test. At McGowan's instruction, defendant placed his thumbprint on the printout.

Berenice Lippman worked as a bartender at The Pump Room on October 2, 2013. She started work that night about 6:00 p.m., and defendant entered about a half an hour later. It appeared to Lippman that defendant had been drinking before he got to bar. Lippman poured defendant a 25-ounce Coors Light beer. He drank three of them that night. He left around 8:30 p.m., about two hours after he arrived. Lippman thought he was drunk, but not so intoxicated that she could not serve him.

Fernando Manaloto, a forensic scientist with the Orange County Crime Laboratory, explained alcohol's effect on a person and how the body absorbs and eliminates alcohol. For a male who weighs 230 pounds, as defendant did, to have a BAC of 0.10 or 0.11 percent, it would require him to consume between six and a half and seven and a half standard alcoholic drinks. In terms of beers consumed, it would be 12-ounce glasses of four percent beer.

Manaloto said that had defendant consumed three 25-ounce glasses of Coors Light beers from 6:30 p.m. to 8:30 p.m., that would equate to six and one-quarter standard drinks. Based on that drinking pattern, Manaloto opined defendant's BAC

would be 0.03 at 9:37 p.m. (the time of the second breath test). Manaloto said he could not extrapolate back an hour from the time of defendant's first test at 9:33 p.m., to determine defendant's BAC at that time, because defendant would have still be in the absorption stage. He conceded defendant's BAC could have been less than 0.10 at the time he was stopped by the police, as he may have still been in the absorptive stage at that point. However, Manaloto said the intoxylzer result gave an accurate reading of defendant's blood-alcohol level.

The Defense Case

Defendant presented expert testimony as well. Darrell Clardy retired from the sheriff's department where he was a supervising forensic scientist. He has bachelor of science degrees in chemistry and biochemistry, a master of science degree in biological physics, and two doctorate degrees in psychology. When presented with a hypothetical matching defendant's height, weight, a drinking pattern of three 25-ounce Coors Light beers from 6:30 to 8:30 p.m., and breath test results of 0.11 at 9:33 p.m. and 0.10 at 9:36 p.m., Clardy estimated a BAC of between 0.03 to 0.07 at the time of driving, with an expectation the individual would probably be "somewhere around" 0.04 or 0.05. He opined defendant was not driving with a BAC of 0.08 or greater.

II

DISCUSSION

A. Review of Sergeant Winick's File

In *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531, the California Supreme Court "held a criminal defendant could obtain discovery of certain law enforcement personnel records upon a sufficient showing of good cause. [Citation.]" (*Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 630.) The Legislature subsequently "codified the privileges and procedures surrounding" *Pitchess* motions.

(*Ibid.*) Penal Code section 832.5, subdivision (a)(1) requires law enforcement departments to investigate complaints against their personnel. The complaints and the reports of the resulting investigations must be maintained in either the officer's personnel file or such other files as designated by the officer's agency. (Pen. Code, § 832.5, subd. (b).) Records maintained pursuant to Penal Code section 832.5 "are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." (Pen. Code, § 832.7, subd. (a).)

"[O]n 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.] Good cause for discovery exists when the defendant shows both "materiality" to the subject matter of the pending litigation and a "reasonable belief" that the agency has the type of information sought.' [Citation.]" (*People v. Gaines* (2009) 46 Cal.4th 172, 179.) The showing of materiality only requires the defendant to "demonstrate a 'logical link between the defense proposed and the pending charge' and describe with some specificity 'how the discovery being sought would support such a defense or how it would impeach the officer's version of events' [citation]." (*Id.* at p. 182.) The specificity requirement only requires a plausible assertion of a factual scenario that might have occurred. "Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1026.)

A trial court has broad discretion in ruling on a *Pitchess* motion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.) We review the court's decision for an abuse of discretion. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221.)

The materiality of the information sought to be disclosed is generally shown via a declaration from counsel. In the present case, defendant's trial counsel alleged that Winick arrived at the scene of the traffic stop in this matter as a backup

officer. According to the declaration, Winick administered the breath test to defendant, not McGowan, as McGowan testified at the preliminary examination. The trial court did not err in denying defendant's *Pitchess* motion without conducting an in camera review in connection with defendant's request insofar as it sought records in Winick's file. Winick did not testify at trial, either as a prosecution witness or as a defense witness. Neither did Winick file any police reports in this matter. That being the case, and given defendant did not testify Winick administered the breath test to him, even had Winick's personnel file contained information of the kind sought by defendant, the evidence would not have been material. It would not have caused a reasonable jury to conclude that Winick, not McGowan, administered a breath test to defendant. In other words, defendant's motion failed to establish a logical link between his assertion that Winick administered the breath test and complaints of misconduct on Winick's part.

The purpose of defense counsel's declaration is to make the showing necessary to require the court to conduct an in camera hearing to review the officer's personnel file. To do so, the declaration "must propose a defense or defenses to the pending charges." (*Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1024.) The sole justification in counsel's declaration for seeking Winick's personnel records was the assertion that Winick administered the breath test, not McGowan as Thaete's police report stated and as McGowan testified at defendant's preliminary examination. Whether Winick has had complaints about having filed false police reports in the past has minimal, if any, relevance in a case where Winick filed no reports. The declaration does not explain how obtaining entries from Winick's personnel records would assist defendant in proving Winick administered the breath test to defendant instead of it having been administered by the McGowan. (*Ibid.*)

B. *The In Camera Pitchess Hearing*

Defendant requested that we review the transcript of the in camera hearing to determine whether the court erred in not ordering the contents of the personnel files of Thaete and McGowan disclosed to the defense. (*People v. Mooc* (2001) 26 Cal.4th 1216.) “A trial court’s ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion. (*Pitchess v. Superior Court* [, *supra*,] 11 Cal.3d [at p.] 535.)” (*People v. Hughes* (2002) 27 Cal.4th 287, 330.) A sealed transcript of the in camera hearing held below was made part of the appellate record. We reviewed the transcript and conclude the trial court did not abuse its discretion in refusing to disclose the contents of Thaete and McGowan’s personnel files. (*Ibid.*)

C. *CALCRIM No. 2111*

In order to prove defendant violated Vehicle Code section 23152, subdivision (b), the prosecution was required to prove beyond a reasonable doubt that he “drove a vehicle and . . . when driving, his BAC was 0.08 percent or more.” (*People v. Beltran* (2007) 157 Cal.App.4th 235, 240.) In connection with that count, the jury was instructed pursuant to CALCRIM No. 2111 as follows: “The defendant is charged in count [two] with driving with a blood-alcohol level of 0.08 percent or more in violation of Vehicle Code section 23152[, subdivision] (b). To prove that the defendant is guilty of this crime the People must prove that: one, the defendant drove a vehicle; and two, when he drove, the defendant’s blood-alcohol level was 0.08 percent or more by weight. [¶] If the People have proved beyond a reasonable doubt that the sample of the defendant’s breath was taken within three hours of the defendant’s driving, and that a chemical analysis of the sample showed a blood-alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant’s blood-alcohol level was 0.08 percent or more at the time of the alleged offense.” We review de novo the propriety of instructions given the jury. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

Defendant complains the court denied him due process when it instructed the jury pursuant to CALCRIM No. 2111. We disagree. While it is possible for the instruction to result in unconstitutional mischief depending upon the facts of a given case, this is not such a case.

An instruction that informs the jury that it must accept the presumption if it finds the facts underlying the presumption is said to contain a mandatory presumption. The United States Supreme Court has found a mandatory presumption instruction denies a criminal defendant a fair trial. A mandatory presumption “may affect not only the strength of the ‘no reasonable doubt’ burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. [Citations.] In this situation, the Court has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide. [Citations.] To the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption’s constitutional validity is logically divorced from those facts and based on the presumption’s accuracy in the run of cases. It is for this reason that the Court has held it irrelevant in analyzing a mandatory presumption, but not in analyzing a purely permissive one, that there is ample evidence in the record other than the presumption to support a conviction. [Citations.]” (*County Court of Ulster Cty. v. Allen* (1979) 442 U.S. 140, 157-159, fns. omitted.)

That being said, “Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an ‘ultimate’ or ‘elemental’ fact—from the existence of one or more ‘evidentiary’ or ‘basic’ facts. [Citations.] The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and

elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. [Citations.]" (*County Court of Ulster Cty. v. Allen, supra*, 442 U.S. at p. 156.)

In *People v. Roder* (1983) 33 Cal.3d 491, the issue was whether, in light of *County Court of Ulster Cty. v. Allen, supra*, 442 U.S. 140 and *Sandstrom v. Montana* (1979) 442 U.S. 510, the trial court erred "in instructing the jury on the statutory presumption of guilty knowledge embodied in Penal Code section 496[, receiving stolen property]." (*People v. Roder, supra*, 33 Cal.3d at p. 494.) Under Penal Code section 496, if the prosecution proved the defendant was a secondhand dealer who acquired stolen property under circumstances that should have caused the defendant to make a reasonable inquiry into whether the seller had authority to sell the property, the defendant then has the burden of proving he made such inquiry. (Pen. Code, § 496; *People v. Roder, supra*, 33 Cal.3d at p. 500.) The court noted Penal Code section 496 was a "classic example" of an impermissible "mandatory presumption." (*Id.* at p. 501.)

Our Supreme Court reversed the conviction in *Roder*. That created a problem: how to deal with the "presumption on retrial." (*People v. Roder, supra*, 33 Cal.3d at p. 505.) To cure the constitutional issue created by Penal Code section 496, the court held that section 496 should be interpreted as involving a permissible inference, not a mandatory presumption. (*Id.* at p. 507.) Years later, our Supreme Court concluded "“Permissive presumptions” are not really presumptions at all. Instead, they are simply inferences drawn from evidence. They do not shift the prosecution's burden of production, and the jury is not required to abide by them. An instruction about a “permissive presumption” is really an instructed inference. [Citation.]”" (*People v. McCall* (2004) 32 Cal.4th 175, 183, fn. 5.)

In *People v. Beltran*, *supra*, 157 Cal.App.4th at page 240, the issue was whether CALJIC No. 12.61.1,³ an instruction similar to CALCRIM No. 2111, may be given when there is evidence that rebuts its permissible inference. The defendant in *Beltran* argued evidence presented at trial rebutted the permissible presumption in that case and consequently, the trier of fact was to decide the issue without reference to the presumption in the instruction, as required by Evidence Code section 604.⁴ He reasoned that because there was evidence his BAC was less than 0.08 at the time he drove, the jury should not have been instructed pursuant to CALJIC No. 12.61.1. (*People v. Beltran*, *supra*, 157 Cal.App.4th at pp. 242-243.)

The appellate court rejected the contention that it is error to instruct on a permissive inference whenever evidence at trial rebuts the permissible inference. (*People v. Beltran*, *supra*, 157 Cal.App.4th at p. 238.) Rather, the court held that “when used in appropriate cases, permissive inferences do not shift the burden of production or lower the prosecution’s burden of proof. Because they may or may not be drawn by the jury, they do not operate in an unconstitutionally pernicious manner. For these reasons,

³ In *Beltran*, the jury was instructed: “If the evidence establishes beyond a reasonable doubt that (1) a sample of defendant’s blood, breath or urine was obtained within three hours after he operated a vehicle and (2) that a chemical analysis of the sample establishes that there was 0.08 percent or more, by weight, of alcohol in the defendant’s blood at the time of the performance of the chemical test, then you may, but are not required to, infer that the defendant drove a vehicle with 0.08 percent by weight, of alcohol in the blood at the time of the alleged offense.” (*People v. Beltran*, *supra*, 157 Cal.App.4th at p. 239; CALJIC No. 12.61.1.)

⁴ “The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.” (Evid. Code, § 604.)

CALJIC No. 12.61.1 may be given regardless of whether there is other evidence admitted at trial ‘rebutting’ the inference. However, the use of permissive inferences is not permitted in all cases.” (*Id.* at p. 244.) Ultimately, the court concluded that giving a permissive inference instruction is improper when, based on the evidence presented at trial, there is “no rational connection between the proved fact and the fact to be inferred sufficient to justify the giving” of the instruction. (*Id.* at p. 238.) This was based on the understanding that while a permissive inference instruction “does not shift the burden of proof, it violates due process “if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.” [Citations.]” (*Id.* at p. 245, quoting *Francis v. Franklin* (1985) 471 U.S. 307, 314-315.)

Citing *County Court of Ulster Cty. v. Allen, supra*, 442 U.S. 140, the *Beltran* court summarized the *Ulster* decision as holding that when the permissible inference is but one piece of evidence of the defendant’s guilt—in other words the prosecution relies on the permissive inference instruction, but also introduced other evidence of the defendant’s guilt—the defendant is not denied due process by the instruction. (*People v. Beltran, supra*, 157 Cal.App.4th at pp. 244-245.) On the other hand, “[w]here the permissive inference is the only evidence offered by the prosecution to prove an essential element of the offense, and the jury finds the defendant guilty, it necessarily follows that the jury relied solely on the inference in order to convict. Consequently, the presumed fact must follow from the proved fact beyond a reasonable doubt.” (*Id.* at p. 245) Because the only evidence the jury could have relied upon in concluding the defendant had a 0.08 BAC or greater at the time of driving was the inference permitted by the instruction—that the alcohol test taken within three hours of driving showed a BAC of 0.08 or greater, so the jury could infer he drove with a 0.08 BAC or greater—the connection between the proven fact (the BAC test result of 0.08 or greater within three hours of driving) and the inferred fact (a BAC of 0.08 percent or

greater when driving) “had to be established beyond a reasonable doubt in order to pass constitutional muster.” (*Ibid.*)

In *Beltran*, the defendant was administered two preliminary alcohol screening (PAS) tests “significantly later than when” he was stopped. Both indicated defendant had a 0.08 BAC. (*People v. Beltran, supra*, 157 Cal.App.4th at p. 246.) The defendant was then taken to the police station where two more samples were obtained using an intoxilyzer device. Those tests indicated a 0.10 BAC. (*Id.* at pp. 238-239.) The *Beltran* court noted that either set of alcohol tests by themselves would have supported the giving of the instruction, but taken together they showed the defendant’s “BAC was *rising* from the time he was stopped until the intoxilyzer tests were administered.” (*Id.* at p. 246.)

At trial, the prosecution’s expert witness concluded that if the PAS tests were accurate, appellant’s BAC at the time he was stopped by the police was approximately 0.068, and when the results of the intoxilyzer device are taken into consideration, the defendant’s BAC would have been between 0.068 and 0.095 at the time he was stopped. The defendant’s expert opined defendant’s BAC was 0.06 at the time of the stop. The defense expert rejected the prosecution expert’s upper range of BAC because it required the defendant’s BAC to decrease and then increase over a short period of time without the additional consumption of alcohol. (*People v. Beltran, supra*, 157 Cal.App.4th at p. 239.)

Based on the facts in that case, the *Beltran* court concluded the instruction denied the defendant due process. “Taken as a whole, the connection between the proved fact (test result demonstrating a BAC of 0.08 percent or greater within three hours of driving) and the inferred fact (BAC of 0.08 percent or greater at the time of driving), which is an element of the charged crime, was not established beyond a reasonable doubt. Therefore, instructing the jury with CALJIC No. 12.61.1 was constitutional error that

improperly lowered the prosecution's burden of proof.⁵" (*People v. Beltran, supra*, 157 Cal.App.4th at p. 247.)

There was no denial of due process in this matter. Although defendant's expert opined defendant's BAC was below 0.08 at the time of his driving based on the assumption he had three 25-ounce beers over a period of two hours before driving, and the prosecution's expert testified it was possible defendant's BAC could have been below 0.10 percent at the time of driving, it must be remembered those statements were based on defendant only having the three 25-ounce beers that night. In fact, given *that* drinking pattern, the prosecution's witness opined defendant's BAC would have been 0.03 percent at the time of his second breath test, when the evidence was uncontradicted that his BAC was 0.10 at the time. There is a simple explanation for this. Whereas three 25-ounce beers for a man of defendant's size might be expected to give him a blood-alcohol level below 0.10 at the time of his driving, that is what he had to drink while he was at the bar. The bartender, however, testified it appeared defendant had been drinking *before* he arrived at her establishment.

Because the jury had this other evidence of drinking, we cannot say the connection between the test results obtained approximately an hour after driving and the inference to be drawn from that evidence (the inference in CALCRIM No. 2111) was not established beyond a reasonable doubt. (*People v. Beltran, supra*, 157 Cal.App.4th at p. 247.) Accordingly, we reject defendant's challenge.

⁵ "Even if the 'more likely than not' test were to apply here, we would find that the prosecution's evidence failed to rise to the level required to make the inference reasonable." (*People v. Beltran, supra*, 157 Cal.App.4th at p. 247, fn. 12.)

III
DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.