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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **MICHAEL L. ROBERTS,** **Defendant and Appellant.**	**A111329** **(Del Norte County Super. Ct. No. CRPB04-5192)**

Defendant Michael Roberts appeals his conviction by jury trial of resisting an executive officer (Pen. Code, § 69).[1] The trial court sentenced defendant to three years in state prison to be served consecutive to the sentence he was currently serving. Defendant raises numerous claims of error on appeal. We agree with defendant that his sentence must be vacated, but reject his other contentions.

BACKGROUND

Defendant was an inmate at Pelican Bay State Prison. On May 4, 2004, he was taken to Sutter Coast Hospital for knee surgery. On May 5, he was discharged from the hospital. Sergeant Wood, who is employed by the prison and was serving as the hospital coverage sergeant that day, received the discharge instructions and called for the transportation team. The team included Sergeant Heflick, Officer Tygart, Officer McDevitt, and Officer Witt. When the team contacted defendant, he became

[1] All undesignated section references are to the Penal Code.

argumentative and said, “I’m not going anywhere until I see a doctor.” Defendant refused to get dressed.

Officer Witt handcuffed defendant and defendant’s leg restraints were undone. The officers tried to put defendant’s pants on for him but defendant started kicking, screaming, and thrashing around. Sergeant Wood held defendant’s right leg to keep the stitches from tearing, Officer McDevitt held defendant’s left arm, and Officer Tygart held defendant’s right arm. Officers McDevitt and Tygart tried to force defendant’s hands down to secure defendant’s handcuffs to his waist chain, but defendant resisted and clutched his hands close to his chest. As the officers were trying to bring down defendant’s hands, defendant sat up, leaned forward, and bit Officer McDevitt’s hand. Officer McDevitt then used his palm to push defendant’s face down to the right.

Defendant continued to yell and, as he did so, blood was spewing from his mouth. Officer McDevitt noticed the blood coming out of defendant’s mouth and put a bed sheet and then a pillowcase over defendant’s head to prevent the blood from getting on anyone in the room. Another officer then retrieved a “spit hood” which replaced the pillowcase. Defendant was finally secured and transported to the prison.

Defendant testified on his own behalf, and explained he was in a lot of pain the day after his surgery and was very tired. The officers came into his room and demanded he get dressed. Defendant wanted an explanation of the surgical procedure that had been performed and asked to see a doctor. As the officers pulled his hospital gown and blankets off, defendant admitted to being “a little demanding” about talking with a doctor. Defendant did not resist when officers placed the handcuffs on him. As the officers began to force defendant into his jumpsuit, Officer McDevitt was pushing defendant’s head into the pillow with his palm over defendant’s eyes and his fingers over defendant’s mouth. When another officer grabbed defendant’s knee, defendant yelled out in pain and ended up with a finger inside his mouth. Defendant let the finger go and stated that if he bit anyone, it was not intentional. Immediately after the finger left his mouth, defendant was punched in the face. Defendant continued to scream with blood

coming out of his mouth and was soon smothered by a pillow. He was then lifted up in the bed sheet, taken outside and thrown into the transportation van.

As a result of this incident, defendant was charged with battery by an inmate on a noninmate (§ 4501.5) for allegedly biting Officer McDevitt's finger, and resisting an executive officer (§ 69) for his use of force and violence against Officers McDevitt, Witt, and Tygart in the performance of their duties. Defendant was also charged with one prior felony conviction alleged as a strike (within the meaning of §§ 1170.12, 667 subds. (b)-(i)). The trial court found there was a failure of proof as to defendant's prior conviction and refused to give an instruction as to that charge. The court declared a mistrial and dismissed the battery count pursuant to the People's motion. Defendant was found guilty of the second count of resisting an executive officer.

DISCUSSION

I. *The Trial Court Did Not Err in Denying Defendant's Pitchess Motion.*

Prior to trial, defendant filed a *Pitchess* motion for discovery of peace officer personnel records (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531), requesting various personnel records relating to Officers McDevitt, Tygart, and Witt. The trial court held a hearing and denied the motion "based upon the insufficiency of the grounds to establish discovery of the officers' personnel records." The court held it was not enough that the defendant felt the officers harbored ill feelings toward him or that he disputed how the events happened. Defendant contends the trial court erroneously denied his *Pitchess* motion and imposed too high a burden to show good cause. We disagree.

In *Pitchess*, the California Supreme Court "established that a criminal defendant could 'compel discovery' of certain relevant information in the personnel files of police officers by making 'general allegations which establish some cause for discovery' of that information and by showing how it would support a defense to the charge against him." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019.) "[T]he California Legislature codified the holding of *Pitchess* by enacting Penal Code sections 832.7 and 832.8 as well as Evidence Code sections 1043 through 1045." (*Warrick*, at p. 1019.)

Generally, peace officer personnel records "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).) Section 1043 of the Evidence Code requires a defendant to file a written motion for discovery of peace officer personnel files that includes "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation . . . ." (Evid. Code § 1043, subd. (b)(3).) Once good cause has been established, the trial court must examine the material in camera to determine its relevance to the case according to guidelines set out in Evidence Code section 1045. "A motion for discovery of peace officer personnel records is 'addressed solely to the sound discretion of the trial court.' " (*People v. Gill* (1997) 60 Cal.App.4th 743, 749, quoting *Pitchess v. Superior Court*, *supra*, 11 Cal.3d at p. 535.) A review of the lower court's ruling is subject to an abuse of discretion standard. (*Gill*, at p. 749.)

The California Supreme Court recently reviewed the sufficiency of a showing for a *Pitchess* motion in *Warrick*. The court concluded that "to obtain in-chambers review [of documents or information in the officer's personnel file that are potentially relevant to the claimed misconduct] a defendant need only demonstrate that the scenario of alleged officer misconduct could or might have occurred." (*Warrick v. Superior Court*, *supra*, 35 Cal.4th at p. 1016.) The court explained: "A showing of good cause is measured by 'relatively relaxed standards' that serve to '[ensure] the production' for trial court review of 'all potentially relevant documents.' " (*Ibid*.) The request for information must be "described with some specificity to ensure that the defendant's request is not so broad as to garner ' "all information which has been obtained by the People in their investigation of the crime" ' but is limited to instances of officer misconduct related to the misconduct asserted by the defendant." (*Id*. at p. 1021.) This specificity requirement also "enables the trial court to identify what types of officer misconduct information, among those requested, will support the defense or defenses proposed to the pending charges." (*Ibid*.) Furthermore, in order "[t]o 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* [citation] *that would support those proposed defenses*." (*Id*. at p. 1024, italics added.) "Counsel's affidavit must also describe a factual scenario supporting the claimed officer misconduct. That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report." (*Id*. at pp. 1024-1025.)

"To determine whether the defendant has established good cause for in-chambers review of an officer's personnel records, the trial court looks to whether the defendant has established the materiality of the requested information to the pending litigation. The court does that through the following inquiry: Has the defense shown a logical connection between the charges and the proposed defense? Is the defense request for *Pitchess* discovery factually specific and tailored to support its claim of officer misconduct? Will the requested *Pitchess* discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense? Under what theory would the requested information be admissible at trial?" (*Warrick v. Superior Court, supra*, 35 Cal.4th at pp. 1026-1027.)

Here, defendant's *Pitchess* motion sought discovery of materials relating to, among other things, the officers' history of false arrest, fabrication of charges, and dishonesty. Defendant attached his own declaration to his motion and asserted that the officers made false, misleading, and/or inaccurate statements in the crime/incident report. He underlined in black ink statements he claimed were false or misleading and attached the report to his declaration. These underlined portions related primarily to defendant's refusal to get dressed and his yelling, kicking and other resistant behavior. Defendant stated that he and Officer McDevitt had had verbal disagreements in the past and he felt the officers harbored ill feelings toward him. He stated that he had continuing problems with Officer McDevitt, who was assigned to the unit where defendant was placed. The motion also included a declaration by defendant's attorney stating that defendant was expected to testify at trial that the various correctional officers prepared false reports or engaged in other types of misconduct or improper tactics and the personnel files were

necessary to illuminate similar prior misconduct. Defendant's attorney stated his belief that the officers involved would be called as witnesses at trial. Also, defendant's attorney stated that material and substantial issues at trial would "include the character, habits, customs, and credibility of these [c]orrectional [o]fficers."

Although defendant's *Pitchess* motion contained some of the required elements, it lacked one critical component. Defendant stated that the officers made false, misleading, and/or inaccurate statements, but never articulated his proposed defense. He underlined various portions of the California Department of Corrections crime/incident report, implying that these statements were false or misleading, but he never set forth his version of what took place. His proposed defense might have been that he did not act in the way the officers alleged at all, that he acted in self-defense, or that his actions were involuntary reactions due to the pain he was experiencing or the medication he had taken. As the trial court stated, it is not enough to simply disagree with the officers' reports. *Warrick* requires that a defendant propose a defense to the charges and demonstrate that the material sought would support that defense. The trial court was not expected to review the officers' files for alleged misconduct to support any possible defense; rather, defendant needed to set forth his defense to properly focus the court's inquiry.

Defendant cites *People v. Hustead* (1999) 74 Cal.App.4th 410 to support his position on appeal; however, *Hustead* confirms the inadequacy of defendant's motion. In *Hustead*, the defendant was charged with felony evasion of arrest and claimed the police report contained material misstatements. Hustead sought *Pitchess* discovery of whether the officer had a history of misstating or fabricating facts in his police reports. Hustead's counsel asserted in his declaration that the officer made material misstatements, including fabricating the defendant's dangerous driving maneuvers. (*Hustead*, at pp. 415-417.) Counsel further stated that the defendant asserted he did not drive in the manner described by the report and that his driving route was different from that found in the report. Counsel asserted that a material and substantial issue in the trial would be the character, habits, customs, and credibility of the officer. The Court of Appeal found that these assertions were sufficient to establish a plausible factual foundation for an

allegation that the officer made false accusations in the report and to demonstrate that the defense would be that the defendant did not drive in the manner suggested by the police report and, therefore, the charges were not justified. (*Id*. at p. 417.) The Court of Appeal found the trial court abused its discretion in failing to hold an in camera hearing to review the officer's files with respect to acts of dishonesty. (*Id*. at pp. 416, 418.) However, *Hustead* does not assist defendant, because in *Hustead* the defendant proposed a specific defense.

We also reject defendant's claim of a violation under *Brady v. Maryland* (1963) 373 U.S. 83. Under *Brady*, a prosecutor must disclose material evidence that is favorable to the defendant. (*Id.* at pp. 86-87.) "California's *Pitchess* discovery scheme 'creates both a broader and lower threshold for disclosure than does the high court's decision in *Brady* . . . .' " (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1319, quoting *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 14.) " '[I]f a defendant cannot meet the less stringent *Pitchess* materiality standard, he or she cannot meet the more taxing *Brady* materiality requirement.' " (*Thompson*, at p. 1319, quoting *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1474.)

II. *No Unanimity Instruction Was Required.*

Defendant next contends the trial court erred by failing to give, sua sponte, the jury instruction on unanimity set out in CALJIC No. 17.01.[2] He contends there were several acts upon which he might have been found guilty of resisting an executive officer, such as kicking, or biting, or refusing to get dressed.

Courts generally require one criminal act is charged, but the evidence tends to show the commission of more than one such act, "either the prosecution must elect the

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[2] CALJIC No. 17.01 provides: "The defendant is accused of having committed the crime of __ [in Count__]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count __] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count __], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) However, even when the prosecution proves more unlawful acts than were charged, no unanimity instruction is required where the acts proved constitute a continuous course of conduct. When two offenses are so closely connected in time that they form part of one transaction, no unanimity instruction is required. (*People v. Diedrich* (1982) 31 Cal.3d 263, 282.)

The California Supreme Court concluded that the purpose of the unanimity instruction governs its use. (*People v. Russo* (2001) 25 Cal.4th 1124, 1134-1135.) "The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed [the defendant] guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' " (*Ibid*.)

The trial court was not required to give the unanimity instruction. Defendant's actions constituted a continuous course of conduct and were so closely related in time that they constituted part of the same transaction. Although it is true that evidence showed defendant kicked, yelled, bit, and thrashed about, these actions all occurred as the officers were attempting to dress defendant to leave the hospital on the morning of May 5, 2004, and they were all part of the same criminal event of resisting the officers. Defendant's various actions were offered as evidence to show how the crime was committed. As *Russo* stated, unanimity as to exactly how the crime was committed is not required. Defendant was continuously kicking, thrashing, and yelling and the jury was not required to decide the precise extent of each.

III. *There Was Sufficient Evidence for a Conviction Under Section 69.*

Defendant contends that the evidence adduced at trial was not sufficient to sustain his conviction for resisting an executive officer under section 69 and emphasizes the

distinction between an executive officer and a ministerial officer. He proceeds to argue that the prosecution failed to present any evidence establishing that any of the correctional officers were executive officers, and not merely ministerial officers. This distinction lacks merit. Section 69 expressly applies to resisting an executive officer, but section 77 states that certain provisions, including section 69, apply to administrative and ministerial officers, in the same manner as if they were mentioned therein.[3]

IV. *The Trial Court Did Not Err in Admitting Officer Tygart's Testimony.*

Defendant next contends that the trial court erred in admitting the allegedly speculative testimony of Officer Tygart and that this speculation usurped the function of the jury to determine matters of fact and guilt. On direct examination, Officer Tygart testified without objection that he saw defendant "place his mouth on . . . [Officer McDevitt's] hand and bit[e] his hand." Officer Tygart explained that defendant "just leaned forward and reached down and bit him." On cross-examination, defense counsel asked, "[I]sn't it true that [defendant] said to you in the van afterwards that he did not mean to bite . . . Officer McDevitt; it just happened?" Officer Tygart responded, "That he just did, yeah."

On redirect examination, the People asked Officer Tygart: "From what you saw that morning, is there any doubt in your mind whether . . . defendant intended to bite?" Defense counsel objected that the question "calls for a conclusion that he's not capable of." The trial court overruled the objection and Officer Tygart responded, "I'm pretty sure he intended to bite him." The district attorney asked Officer Tygart if he could again describe why, and Officer Tygart responded, "Because he went out of his way to lean forward."

"A lay witness may testify to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding of his testimony." (*People v. Farnam* (2002) 28 Cal.4th 107, 153; Evid. Code, § 800.) We review the trial court's

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[3] Section 77 provides: "The various provisions of this title, except Section 76, apply to administrative and ministerial officers, in the same manner as if they were mentioned therein."

admission of the lay witness testimony for an abuse of discretion. (*Farnam*, at p. 153-154.) In *Farnam*, the California Supreme Court found that the trial court acted within its discretion by permitting a correctional sergeant to testify that the defendant stood "in a posture like he was going to start fighting." (*Id.* at p. 153.) The court explained that the sergeant's testimony "was based on his personal observations that [the] defendant was being 'very defiant' about the court order and physically stood with his hands at his side and left foot forward." (*Ibid*.) Furthermore, the court noted that such perceptions are within common experience, and certainly within the experiences of the correctional sergeant who testified. (*Ibid*.)

Similarly, the trial court here acted within its discretion in permitting Officer Tygart's testimony. We cannot say that Officer Tygart's testimony lacked a rational basis or failed to clarify the rest of his testimony. Officer Tygart was standing opposite Officer McDevitt and was holding onto defendant's right arm. He was involved in the struggle that occurred and in a good position to observe the contact between defendant's mouth and Officer McDevitt's hand. Officer Tygart's statement that he was "pretty sure" defendant intended to bite served to clarify his perception of what had taken place. It is within common experience to perceive if someone makes an active attempt to bite someone rather than an unanticipated contact. Furthermore, Officer Tygart had already presented his concrete observations of what happened (explaining that defendant leaned forward, reached down and placed his mouth on Officer McDevitt's hand); but, this account alone would not differentiate an intentional bite from defendant's account that Officer McDevitt's hand fell into defendant's mouth during the commotion. In this way, Officer Tygart clarified his testimony that defendant's actions appeared intentional rather than accidental. The ruling was appropriate.

V. *The Sentence by the Trial Court Must be Vacated*

Finally, defendant contends that the trial court violated the principles of *Blakely v. Washington* (2004) 542 U.S. 296, by imposing the aggravated sentence without jury findings relative to any aggravating factors.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court applied the Sixth Amendment to the United States Constitution and held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490.) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by defendant. When a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v. Washington*, *supra*, 542 U.S. at pp. 302-305.) In *Cunningham v. California* (2007) __ U.S. __ [127 S.Ct. 856, 860], the United States Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Ibid.*, overruling on this point *People v.* Black (2005) 35 Cal.4th 1238, vacated in *Black v. California* (2007) __ U.S. __ [127 S.Ct. 1210].)

Finally, in *Washington v. Recuenco* (2006) __ U.S. __ [126 S.Ct. 2546, 2551], the United States Supreme Court held that *Blakely* error was not structural error, but instead subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. (Accord, *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.) Thus, any error the trial court made in considering an aggravating circumstance is harmless under *Chapman*, if we conclude, beyond a reasonable doubt, the jury would have found that circumstance true.

The trial court decided to impose the aggravated term after balancing three aggravating factors against one mitigating factor. In aggravation, the court found the following factors: (1) defendant has engaged in violent conduct indicating a serious danger to society (Cal. Rules of Court, rule 4.421 (b)(1)); (2) his prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness (Cal. Rules of Court, rule 4.421 (b)(2)); and (3) defendant has

served a prior prison term (Cal. Rules of Court, rule 4.421 (b)(3)). Against these aggravating factors, the court stated "[i]n mitigation under rule 423, it was a somewhat unusual circumstance in that he was receiving medical treatment at the time and . . . apparently did want to speak . . . further to a doctor . . . ."

The trial court's reliance on the first aggravating factor to impose the upper term was inappropriate under *Cunningham, supra*. And, we are unable to conclude that this error was harmless under *Washington v. Recuenco, supra*. Even if we were to find that the other two aggravating factors relied upon were valid under *Cunningham* or harmless under *Washington v. Recuenco*, we are unable to find under *Chapman v. California, supra*, 386 U.S. 18, that beyond a reasonable doubt the trial court would have imposed the upper term even if it had not considered the first factor. Thus, imposition of the upper term was inappropriate, and we vacate the sentence and remand for further proceedings on this issue.

DISPOSITION

The case is remanded for resentencing. In all other respects the judgment is affirmed.

SIMONS, J.

We concur.

JONES, P. J.

Bruiniers, J.*

* Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.