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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. TRAVIS ANTHONY AKINS, Defendant and Appellant.	B175562 (Los Angeles County Super. Ct. No. KA050387)

APPEAL from a judgment of the Superior Court of Los Angeles County. Abraham A. Khan, Judge. Affirmed.

Darden & Associates, Inc., and Christopher A. Darden for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters, Supervising Deputy Attorney General, and J. Michael Lehmann, Deputy Attorney General, for Plaintiff and Respondent.

Travis Anthony Akins appeals from the judgment rendered following a jury trial in which he was convicted of two counts of assault with a semiautomatic firearm, with findings of firearm use under Penal Code section 12022.5 (undesignated section references are to that code), and one count each of shooting at an occupied vehicle, possession of an assault weapon, and possession of a firearm by an ex-felon. The jury acquitted appellant of two counts of attempted murder, arising from the assaults.[1]

Sentenced to a term of 17 years, appellant assigns the following as errors: (1) deficiencies in a search warrant; (2) denial of a *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); (3) admission of statements obtained allegedly in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*); (4) admission of an unduly suggestive identification; (5) refusal to appoint an eyewitness evidence expert; (6) failure to instruct with CALJIC No. 17.01; (7) use of sentencing factors not found by the jury; and (8) cumulative error. We conclude there was no prejudicial error, and affirm the judgment.

FACTS

Viewed in accordance with the governing rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence at trial showed that early on August 28, 2000, Melissa Garcia and Joe Gutierrez were parked, in Garcia's van, in front of the house at which appellant, his wife and family resided, on Calle Senita in Walnut. They were waiting for the arrival of a friend of Gutierrez's, who lived nearby. At about 4:00 a.m., a woman, whom Garcia initially described as a tall, blonde Caucasian, came out of the house, went to a trash can, and returned inside. Garcia moved the van a short distance. Then a black male, shirtless and wearing sweatpants, appeared behind the van,

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[1] Appellant's trial followed our reversal of the judgment for a previous conviction of the same offenses and also the attempted murder counts. On that appeal, we found that numerous errors of constitutional magnitude cumulatively required a new trial.

holding a handgun. He made some hostile statements to Gutierrez, and Garcia drove the van away.

Not knowing the area, Garcia stopped at a nearby location, but then began to drive back to Calle Senita. A small red car drove up alongside, driven by a woman Garcia later identified as appellant's wife (Ditas Akins). A black male, whom Gutierrez later identified as appellant, got out of the car and began firing a handgun at the driver's door of the van, leaving a bullet hole in it. Garcia drove up a dead-end street and stopped. Gutierrez realized his foot was bleeding, as he had been shot.

Garcia and Gutierrez proceeded to a shopping center location, where they had arranged to meet two of Gutierrez's friends. Garcia soon went home, after giving Guitierrez a bullet she had found in the van. Gutierrez's friends took him first to a clinic and ultimately to Intercommunity Hospital, where his wound was treated. Los Angeles County Sheriff's Deputy John Abe and his partner went to the hospital, where Gutierrez's friends turned over the bullet from the van. Deputy Abe also interviewed Gutierrez about the incident.

The deputies proceeded to Garcia's residence, where they were shown the bullet hole in the van door, and also Garcia's ankle, with a metal fragment lodged in her shoe. The deputies drove Garcia to Calle Senita, where she pointed out appellant's home, number 19845. She then directed them to the location of the shooting, where the deputies recovered two cartridge casings.

The chief investigating officer, Sheriff's Deputy Steven Kays, ascertained from Department of Motor Vehicles (DMV) records that appellant had outstanding traffic warrants, and that his physical description roughly fit those the victims had given of the assailant. Deputy Kays obtained a search warrant for the Calle Senita address, which he and several deputies served on November 1, 2000. At various places, the deputies found a Ruger P85 gun case, a .223 caliber Ruger semiautomatic rifle with pistol grip and folding stock, a box of .223 caliber ammunition, two.223 banana clip magazines, two Glock 9 millimeter magazines, and one 9 millimeter round.

James Carroll, a firearms examiner, testified that the cartridges found at the shooting scene had been 9 millimeter, fired by either a Glock or a Smith & Wesson semiautomatic pistol. Moreover, the single 9 millimeter round found at appellant's house had been worked upon by the same gun as the two cartridges, and the bullet found in Garcia's van could have been fired only by a Glock, or four other models of weapon.

On November 15, 2000, Deputy Kays showed Gutierrez a photographic six-pack, from which he identified appellant as the shooter in the case. At trial, Gutierrez again identified appellant, as both the shooter and the man who had shouted at him on Calle Senita.

Deputy Kays also made up a six-pack that included Ditas Akins' photo. He wanted to see whether she could be excluded from suspicion.[2] Ditas Akins was not Caucasian but Pacific Islander, and much shorter than the description Garcia had first given of the woman who drove with the shooter. In an initial show-up, which incorporated Ditas Akins's driver's license photo, Garcia expressed herself 80 percent sure that Akins was the driver. Kays did not consider that a positive identification, and he prepared another six-pack, using another photo of Akins.[3] Garcia was shown this display on January 4, 2001, and she positively identified Akins.

In his defense, appellant called Dr. William Shomer, a forensic psychologist and eyewitness identification expert. Dr. Shomer opined about the deficiencies of eyewitness identification by strangers, as well as other factors negatively affecting identification, including cross-racial and temporal elements. He criticized the six-packs used in the case, opining that with respect to appellant's and the initial one for Ditas Akins, their

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[2] Ultimately, Ditas Akins was charged with most of the same offenses as appellant. In the first trial, she was acquitted of all counts.

[3] Kays admitted he prepared a new display because the photo he originally used stood out from the rest of that six-pack, which he acknowledged raised concerns about suggestiveness.

photos stood out from the rest. Dr. Shomer opined that superior methods of conducting a photo identification would be to show the photos serially, to record the session, and to have someone who did not know who the suspect was conduct it.

DISCUSSION

1. Validity of Search Warrant.

Appellant contends his motion to suppress under section 1538.5 should have been granted, because the search warrant obtained and employed by Deputy Kays was invalid, for a number of reasons. Before assessing this contention, we consider respondent's argument that the contention is barred by the law of the case, having been disallowed on appellant's prior appeal.

In the previous appeal in this case, appellant tendered essentially the same challenges to the search warrant as he does now. We ruled, however, that because appellant had not renewed his challenge in the superior court, after denial of his section 1538.5 motion at the preliminary hearing, the issue was not subject to review on appeal, from the superior court's judgment. (See § 1538.5, subd. (i); *People v. Lilienthal* (1978) 22 Cal.3d 891, 896.) Respondent asserts that this ruling continues to govern review of the merits, notwithstanding that we generally reversed the prior judgment, and that appellant did make a renewed motion to suppress in the superior court on remand.

We do not agree. Our previous decision established that based on the record and proceedings then before us, appellant was not entitled to appellate review of his suppression contentions. We did not hold that this disability was permanent. Nor should it be, any more than failure to object to evidence at a first trial carries over to another trial and appeal after reversal and remand.

Appellant first argues that there was no probable cause for issuance of the warrant, because its supporting affidavit effectively declared that the weapons that were its principal subject would not be found at the Calle Senita home. The facts, however, are different. In his affidavit, Deputy Kays summarized the shooting, including the conclusion (from the shells found) that it had been committed with a 9 millimeter handgun. He recited how Gutierrez's description of the offender resembled appellant's,

and he connected appellant as a resident of 19845 Calle Senita, from DMV records. This presentation showed probable cause to search the residence, for both a 9 millimeter pistol and ammunition and for other guns for which proof of ownership could not be shown – the primary objects of the warrant.

In addition, Deputy Kays commenced the affidavit with a recital of his experience investigating gangs, his present assignment. In this summary of experience, the deputy stated that during the last 10 years, Los Angeles County gang members "do not keep guns at their primary residence ([e]specially after they have committed a crime or they suspect Law Enforcement know they have committed the crime)." Instead, members will give guns they own or have used to other members, girlfriends, or relatives to store.

Appellant argues that this language refutes any notion and probable cause that the 9 millimeter pistol used in the shootings would be found at the house. But apart from the fact that the statement was not tendered for probable cause, was a generalization, and was probably irrelevant, it only described the habits of gang members. Yet nothing in the affidavit accused appellant of being a gang member. Therefore, the statement appellant emphasizes did not bear on him, and did not supersede the other parts of the affidavit and the totality of circumstances that established probable cause. (See *People v. Schilling* (1987) 188 Cal.App.3d 1021, 1024-1025.)

Appellant also claims that the affidavit lacked probable cause because the information provided was "stale," in that the warrant was sought and obtained two months after the shooting. We disagree. "[T]he question of staleness depends on the facts of each case." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 380.) Here, Deputy Kays had determined after the shooting that appellant resided at Calle Senita, and the firearms equipment subject to the warrant was not ephemeral.

Appellant further challenges the warrant on grounds first that the affidavit did not disclose to the magistrate that appellant's traffic warrants were several years old. But this did not render them invalid and, more important, the existence of the warrants was not significantly probative of probable cause. The same is true of Deputy Kays's oral answers to the issuing magistrate's questions, regarding the timing of the warrant

application and about nighttime service, which were not given under oath or transcribed. Those responses did not constitute an oral statement in lieu of the warrant affidavit, under section 1526, subdivision (b), and they did not detract from the showing of probable cause. The motion to suppress was properly denied.

2. Pitchess *Discovery Motion.*

The trial court denied appellant's motion for discovery of the confidential personnel files of Deputy Kays and two of his colleagues who had participated in executing the search warrant, Sergeant Anita Geisler and Deputy Mark Shaughnessy. (See Evid. Code, § 1043; *Pitchess, supra,* 11 Cal.3d 531.) The court did so on the basis of inadequacy of counsel's declaration in support of the motion, but also stated that the denial was "without prejudice if you want to renew it and bring in an additional declaration." Appellant did not so renew the motion, and respondent argues that the failure to do so means that the claim has not been preserved for appeal, by a definitive ruling. We do not agree. Appellant chose to stand on his original motion, which had been denied. That ruling is subject to review.

Appellant's motion sought discovery of "personnel records and records of any investigation, complaint or administrative punishment" of the three deputies, including witness statements and psychological test reports. Appellant's counsel filed a declaration to show good cause. (Evid. Code, § 1043, subd. (b)(3).) The declaration stated, as grounds of relevance and materiality, that appellant intended to show that the deputies did not find the assault rifle where they claimed, in an area arguably within appellant's possession, because the rifle was not "apparent" there in a videotape the deputies took before conducting the search. Further, Deputy Kays allegedly had a history of filing false police reports. Counsel supported this allegation by reference to what he had been told by the mother of a minor whom Deputy Kays had arrested within the last five years, after allegedly witnessing him spray-painting graffiti on a wall. The mother told counsel that witnesses reported seeing no graffiti on that wall, and the case against the minor was dismissed by the prosecution after it realized Kays' report had been false. Appellant suggested that the discovery material might contain "complaints of a like nature" against

the deputies, which could lead to proof of a character trait, habit, and custom for engaging in "similar deceptive practices." Second, the declaration purported to incorporate by reference the motion to suppress, and stated that the defense had alleged false statements in the warrant affidavit. In addition, Deputy Kays was allegedly biased against appellant, and had caused a witness to identify him from a six-pack "suggestively." Therefore, evidence that the deputy had in the past engaged in filing false reports, or other dishonest practices, was material. Attached to the affidavit were a police report of the search and seizure, and several supplemental reports about the case.

To establish good cause for discovery through court inspection of officer personnel records, a defendant must assert a theory of defense and also a plausible factual scenario of police misconduct – one that might or could have occurred – which would support that defense. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1034, 1036.) Discovery may not extend beyond materials supporting the type of misconduct claimed. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1220.) A trial court's ruling on a *Pitchess* motion is reviewed for abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228.) Under these criteria, appellant's motion fell short.

First, appellant made no showing of possible misconduct by two of the officers, Sergeant Geisler and Deputy Shaughnessy. Nothing suggested any misbehavior by Shaughnessy, and Geisler's only connection was as the person who found the assault rifle near a file cabinet, where appellant charged it had not been on the videotape. But this theory of fabrication was deflated by the showing in the affidavit's police report that the gun was reported found inside a box, leaning against the file cabinet, a location in which it naturally would not have been externally visible. There was no basis for discovery of these two officers' personnel records.

The motion was also lacking with respect to Deputy Kays. First, the motion was overbroad in its request for discovery of all complaints and discipline, of whatever type. At best, appellant could properly seek only records regarding filing false reports, or perhaps engaging in other work-related falsehood. Second, however, the affidavit did not make out a case for such pursuit. Appellant proposed to prove, first, that something

amiss had happened regarding the finding of the rifle. But the declaration disclosed there was no factual basis for this claim. Second, appellant claimed that Deputy Kays had uttered falsehoods in his warrant affidavit. But the motion to suppress, reviewed above, did not identify any such falsehoods. And the conclusory references to bias and a witness's identification did not relate to falsification, or any other specified type of misconduct.

Appellant did not show good cause for discovery of personnel records of the three deputies, and denial of his *Pitchess* motion was not an abuse of discretion.

3. Appellant's Statements Following Arrest.

Appellant contends that statements he made to sheriff's deputies when the search warrant was executed should have been suppressed because made in violation of *Miranda v. Arizona, supra*, 384 U.S. 436. We discuss in succession the two sets of statements at issue.

The first involved Sergeant Geisler. When the deputies arrived at the Calle Senita home, appellant was arrested for his traffic warrants, and was handcuffed. He was not admonished under *Miranda*. It was stipulated that he was in custody, although he was seated in the living room along with his four young children and his father. Sergeant Geisler testified that a Suburban vehicle was parked blocking entry into the garage, which was subject to search. She entered the house and asked whether anyone knew where the keys to the vehicle were. Appellant stated he did, and he provided her with several possible locations, one of which was "my cabinet" in the garage. When Sergeant Geisler went to the garage, she found two cabinets, one with drawers and one with doors. She returned and asked which cabinet appellant meant, and he volunteered to show her. They walked to the garage, and appellant identified the cabinet. It contained a bowl of keys, but none of them belonged to the Suburban.

Appellant contends that his foregoing statements should have been excluded because they were made without *Miranda* warnings while he was in custody. He particularly complains of his identification of the cabinet as his, arguing that the inquiry about it was incriminating because evidence was found in and adjacent to the cabinet.

For the most part, however, appellant's statements to Sergeant Geisler, including the initial designation of the cabinet, were spontaneous, and therefore not subject to *Miranda.* (*People v. Ray* (1996) 13 Cal.4th 313, 336-337.) And appellant's decision to walk with the officer, and his identification of the cabinet, were in response to a practical question, not "'words or actions . . . that the police should know are reasonably likely to elicit an incriminating response.'" (*Id.* at p. 336, quoting *Rhode Island v. Innis* (1980) 446 U.S. 291, 301), particularly as viewed from the suspect's standpoint. (*Innis,* at p. 301.) Appellant's statements to Sergeant Geisler were not the product of interrogation within the meaning and coverage of *Miranda*. (*Innis,* at pp. 300-301.)

Appellant's second challenge concerns a statement he made to Deputy Kays, after the house had been secured, the family members assembled, and before the search began, near 6:00 a.m. The deputy asked appellant where the children's mother was, or possibly where appellant's wife was. Kays testified he made the inquiry out of concern both to account for all the residents, and about the children's welfare. Appellant responded that his wife worked in a drugstore in Orange County, that she left for work at 4:30 a.m., and that she was there. Appellant claims that this was an incriminating question and answer, in that it provided linkage between himself and the events outside the house before the shooting.

Deputy Kays' question appears to have been in the nature not of custodial interrogation, but rather an inquiry from administrative and perhaps security concerns. The deputy did testify, however, that whether women were among the house's occupants, and why one had taken out trash at 4:00 a.m. on the morning of the shootings, were within the scope of his investigation. But even assuming arguendo a *Miranda* violation occurred in this regard, it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) The prosecutor ultimately called a payroll officer from Ditas Akins's employment, who testified that her normal start time at work, in Fountain Valley, was 5:00 a.m., her work week was Sunday through Thursday, and she had been absent from work on Monday, August 28, 2000, and the next day, using sick leave and a vacation day respectively. From this witness, the jury learned more about appellant's

wife's employment location and timing than appellant's answer to Deputy Kays provided. Any error in allowing that answer was harmless.

4. Garcia's Identification of Appellant's Wife.

Appellant contends that the victim Garcia's identification of Ditas Akins, as the driver of the car involved in the shooting, should have been excluded, because it derived from impermissibly suggestive identification procedures, namely the two six-pack displays by Deputy Kays. In so contending, appellant initially meets an obstacle of standing, because the identification was not of himself but of an alleged companion at the time of the offense. Our Supreme Court has recognized a defendant's standing to challenge the identification of a cohort, but in situations where the identification is essential to prove the defendant's participation in the crime, and where the identification effectively destroys the defendant's defense. (*People v. Bisogni* (1971) 4 Cal.3d 582, 586.) Neither such condition appears here.

In any event, appellant's claim lacks merit. The first six-pack, with Ditas Akins's photo prominent, did not produce a positive identification by Garcia. Only the second one, with a more refined and less conspicuous photo, did. The constitutional test is whether the out-of-court procedures were "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (*Simmons v. United States* (1968) 390 U.S. 377, 384.) Any suggestiveness in the initial six-pack did not rise to this level, and Garcia's identification was not inadmissible.

5. Eyewitness Identification Expert.

Appellant contends he suffered an infringement of his right to effective counsel when the court, before trial, denied his motion for appointment of Dr. Shomer as an eyewitness identification expert. The standard for review of the denial or grant of such expert services to an indigent defendant is abuse of discretion. (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 321.) One reason why we cannot say that occurred here is that appellant has not documented that he qualified as an indigent. Moreover, as previously described, Dr. Shomer did appear as an expert witness for appellant at trial. And appellant has not shown that the expert's absence during some part of the pretrial

proceedings was unconstitutionally disabling. Appellant thus suffered no cognizable prejudice from the failure to appoint Dr. Shomer. (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 555.)

6. CALJIC No. 17.01.

Appellant asserts error in the failure either to require the prosecutor to elect a factual theory of the assault counts or to give CALJIC No. 17.01, which requires for conviction unanimity with respect to the act that constituted the offense. Appellant contends that this was required because, in final argument, the prosecutor declared that in addition to the shooting, the initial encounter outside the Calle Senita house could have involved the assaults.

The record does not confirm appellant's assertion. The prosecutor never argued that assaults occurred at Calle Senita, as opposed to the shooting site. Rather, after discussing the elements of assault and then of shooting at an occupied vehicle, the prosecutor explained the meaning of the firearm use allegation. Noting that such use could involve a menacing display of a weapon, the prosecutor stated, "So even the incident back over on Calle Senita would qualify for the personal use of a firearm. He had the gun, he made sure they saw it. He was waving it around, said something . . . ." Thus, the prosecutor referred to appellant's actions at the home to illustrate an aspect of an enhancement, not as an alternative commission of assault. That charge remained unitary, and no election or further instruction was required.[4]

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[4] Without citation to the record as required by California Rules of Court, rule 14(a)(1)(C), appellant also claims that CALJIC No. 9.00.1 (conditional threat) was given. Not so. Review of the record reveals that the instruction was not given, and indeed was withdrawn.

7. Sentencing Factors.

When sentencing appellant, the trial court imposed an upper base term and two consecutive terms, based on several aggravating factors under California Rules of Court, rule 4.421 which the court found applicable. Citing *Blakely v. Washington* (2004) 542 U.S. 296, appellant contends that the use of factors not found by the jury infringed his right to jury trial. Our Supreme Court, however, has held that no such violation inheres in this state's sentencing scheme. (*People v. Black* (2005) 35 Cal.4th 1238.)[5]

DISPOSITION

The judgment is affirmed.

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COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.

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[5] Because we have found effectively no error as appellant assigns, his closing contention of reversibly cumulative error lacks basis.