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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALVIN CRAIG DENNIS et al., Defendants and Appellants.	B215124 (Los Angeles County Super. Ct. No. BA343559)

APPEAL from judgments of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Reversed with directions.

Catherine Campbell, under appointment by the Court of Appeal, for Defendant and Appellant Alvin Craig Dennis.

Holly J. Jackson, under appointment by the Court of Appeal, for Defendant and Appellant James Ray Lee.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and G. Tracey Letteau, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, Alvin Craig Dennis and James Ray Lee, appeal from their convictions for sale (Health & Saf. Code, § 11352, subd. (a)) and possession for sale of cocaine base. (Health & Saf. Code, § 11351.5.) Mr. Lee admitted: he was previously convicted of a serious felony (Pen. Code, §§ 667, subds. (a)(1), (b) – (i)); he served five prior prison terms (Pen. Code,[1] § 667.5, subd. (b)); and he had a prior conviction for controlled substance sale. (Health & Saf. Code, § 11370.2, subd. (a).) As to Mr. Lee, the trial court struck all of the section 667.5, subdivision (b) prior prison term and the serious felony enhancements. (§ 1170.12.) Mr. Dennis admitted that he served six prior prison terms (667.5, subd. (b)) and committed a prior serious felony. (§ 1170.12) As to Mr. Dennis, the trial court struck the prior serious felony and all but three of the prior prison term enhancements.

Mr. Lee argues the trial court improperly denied his motion to compel production of peace officer personnel records. Mr. Dennis argues the trial court improperly: denied his motion to compel production of peace officer personnel records; sustained the prosecutor's official privilege claim concerning an observation post; and admitted opinion testimony. Mr. Dennis further argues there was insufficient evidence to support the jurors' implied finding a usable amount of cocaine base was recovered. We conditionally reverse the judgments so the trial court may conduct an in camera hearing and review peace officer records for evidence of untruthfulness and determine if disclosure is necessary, whether there is sufficient prejudice to permit reversal. If the judgments are reinstated, the fines must be enhanced with additional assessments, a penalty, a surcharge and fees.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) At approximately 3:50 p.m. on July 14, 2008, Los Angeles Police Officer George Mejia was working with the central narcotics enforcement detail in the skid row area. Officer Mejia and an individual identified only as Officer Alvarado were working in the area of San Julian Street between Fifth and Sixth Streets. The officers were watching for narcotics transactions. Officer Mejia was in an observation position approximately 20 feet from ground level on the east sidewalk of San Julian Street. Officer Mejia was using binoculars.

Officer Mejia saw Mr. Zappia on the west side of San Julian Street approximately 20 to 30 feet north of Sixth Street. Mr. Zappia, a white male approximately 35 to 40 years old, was wearing a white T-shirt and dark pants. Mr. Zappia approached Mr. Lee, who was wearing a black and brown shirt and blue shorts. After a brief conversation, Mr. Lee and Mr. Zappia walked northbound on San Julian Street. Mr. Zappia handed Mr. Lee some green paper currency. Officer Mejia observed this with his binoculars when they were approximately 60 to 70 feet away. Officer Mejia was able to see Mr. Lee's and Mr. Zappia's faces as they walked toward San Julian Street. Mr. Lee and Mr. Zappia walked further northbound to a black iron fence where they met Mr. Dennis. Mr. Lee handed the green paper currency to Mr. Dennis. Officer Mejia's binoculars allowed him to see this transaction from approximately 40 to 50 feet away. Mr. Dennis put the currency in his left front pants pocket. After a brief conversation, Mr. Dennis pointed across the street in an eastbound direction toward the mission.

Mr. Lee and Mr. Zappia walked across the street where they met another African-American male. After a brief conversation, the African-American male reached into his pants pocket and removed a plastic bindle. The unidentified man handed the plastic bindle to Mr. Lee. Officer Mejia was approximately 20 feet away from where this

activity took place. With his binoculars, Officer Mejia could see the bindle to be clear plastic with numerous off-white solid rocks resembling cocaine base inside. Mr. Lee and Mr. Zappia walked back across the street to where Mr. Dennis stood. Mr. Lee ripped open the clear plastic bindle and gave one of the off-white solids to Mr. Zappia. Mr. Zappia took the off-white solid and placed his hand in his pocket. Mr. Zappia began walking southbound on San Julian Street. As soon as he saw the drug transaction, Officer Mejia alerted his team to make the arrest.

Officer David Chapman was working with the narcotics team as a "plain clothes" chase officer. Officer Chapman and an officer identified only as Officer Avila were working in an unmarked police car on July 14, 2008. They were directed to detain and arrest a white male, Mr. Zappia, who was involved in the transaction. Within 30 seconds, Officers Chapman and Avila detained Mr. Zappia at Sixth and San Julian Streets. Officer Mejia confirmed they had detained the right person. Officer Avila searched Mr. Zappia. Officer Avila found an off-white solid resembling rock cocaine in Mr. Zappia's left pants pocket.

Officer Thomas Brown and another officer identified only as Officer Trejo were also working as narcotics team chase officers on July 14, 2008. Officer Mejia gave the officers a description of Mr. Lee. Officer Mejia informed them that Mr. Lee was involved in a narcotics transaction. Officers Brown and Trejo detained Mr. Lee on San Julian Street between Fifth and Sixth Streets across from the mission. Mr. Lee was handcuffed. Officer Brown noticed Mr. Lee's hand held an object. Officer Brown took the item, a clear plastic object that contained white solids that were consistent with rock cocaine. Officer Trejo recovered currency totaling $34 from Mr. Lee's breast pocket, including a 10-dollar bill, 3 five-dollar bills, and 9 one-dollar bills. A glass rock cocaine pipe was also found in Mr. Lee's front waistband area. The small bills were consistent with denominations recovered from those arrested for drug possession in the area. It was also common for those who engage in narcotic sales in the area to also use drugs.

Officer Paul Valencia was also working as a chase officer with the narcotics enforcement team on July 14, 2008. Officer Valencia was wearing a uniform and driving a black and white patrol car. Officer Mejia signaled Officer Valencia to apprehend Mr. Dennis. Mr. Dennis was detained on San Julian Street north of Sixth Street near a black iron gate. Officer Valencia confirmed with Officer Mejia that the correct individual had been detained. Officer Valencia searched Mr. Dennis. Officer Valencia recovered: a plastic container from Mr. Dennis's right front pocket; $116 from Mr. Dennis's left front pants pocket, including five 20-dollar bills, a single 10-dollar bill, and six one-dollar bills; and two glass pipes from Mr. Dennis's sweatshirt front pocket. Officer Valencia had been a police officer for 15 years. In Officer Valencia's experience, the items in Mr. Dennis's possession were consistent things possessed by traffickers involved in street level drug sales.

Detective Arthur Gamboa was an undercover narcotics detective assigned to the central division narcotic enforcement detail. Detective Gamboa and a partner, identified only as Detective Kitsmer, were working undercover on July 14, 2008 in an unmarked police car. Detective Gamboa received a signal from Officer Mejia to detain Mr. Bishop, who was on the east sidewalk in front of the Union Rescue Mission. Detective Gamboa detained Mr. Bishop. Detective Gamboa then searched Mr. Bishop. Detective Gamboa recovered $9 from Mr. Bishop in the denominations of one, five, and four one-dollar bills.

Officer Mejia believed that Mr. Dennis was working in concert with others to sell cocaine base. Officer Mejia based that opinion on the fact that Mr. Dennis received money from Mr. Lee, who had accepted the cash from the buyer. Mr. Dennis then directed the buyer and Mr. Lee to another individual. That person handed Mr. Lee the cocaine base. Thereafter, there was an exchange of narcotics between Mr. Lee and Mr. Zappia. Although Mr. Dennis never touched the cocaine, he did take the currency used to purchase it. Officer Mejia believed Mr. Lee possessed the cocaine base purchased from Mr. Bishop for purposes of sales. Mr. Lee accepted the narcotics from

Mr. Bishop and then gave the drugs to the buyer who had initially provided the money. In his experience in the area of the Fifth Street corridor, Officer Mejia was aware that those who sell drugs often also use narcotics. Oftentimes, narcotics dealers involve those who use drugs to sell the contraband to others. In return, the dealers give the individuals narcotics for their own use. It is also common for those the police stop for drug sales in the area to have cocaine pipes in their possession. Those who sell narcotics on skid row often wrap their cocaine rocks in clear plastic. The parties stipulated that the single white solid item recovered from Mr. Zappia's pocket was found to contain cocaine base, weighing 0.13 grams net. The parties also stipulated that the white solid substances recovered from the bag in Mr. Lee's hand contained 3.07 grams of cocaine base.

III. DISCUSSION

A. Peace Officer Personnel Records

1. Mr. Lee's Motion

Mr. Lee argues that the trial court improperly denied his motion to compel disclosure of the peace officer personnel records. Mr. Lee sought disclosure of peace officer personnel records for Officers Mejia, Alvarado, Brown, and Trejo. (Evid. Code, § 1045, subd. (b); *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019; *People v. Mooc* (2001) 26 Cal.4th 1216, 1226; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535-540.) Mr. Lee also moved to discover any exculpatory evidence pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, 87.

Mr. Lee's motion requested materials relating to: "1. Any and all documents in the personnel records of Officers Mejia, Alvarado, Brown and Trejo that record any complaint registered with the agency by any inmate, fellow officer, or private citizen alleging any acts demonstrating racial or ethnic prejudice, illegal or false arrest, improper

tactics, dishonesty, false imprisonment, and/or false police reports. [¶] . . . [¶] 12. Any exculpatory evidence within the meaning of *Brady v. Maryland*[, *supra*,] 373 U.S. [at p.] 87." In the declaration in support of the motion, Mr. Lee's attorney, Ludlow B. Creary III, stated: "I am informed and believe that on July 14, 2008, at approximately 3:50 p.m., Mr. Lee was simply conversing with some people in front of a mission on San Julian Street. At no time did Mr. Lee exchange money for illegal drugs with any person in that area. The officers are fabricating the alleged exchange with Zappia, Dennis and Bishop. Neither the illegal drugs recovered from Zappia, nor the currency recovered from Dennis, came from Mr. Lee. [¶] The defense would use the materials requested to locate witness who would testify to the officers' character, trait, habit and custom of displaying bigotry and prejudice, fabricating facts, probable cause, confessions or admissions; planting evidence; being biased in a manner affecting the officers' credibility and/or judgment; illegally searching the seizing persons; or engaging in acts of dishonesty and/or moral turpitude, as well as to specific instances of misconduct by the officers of the nature alleged in this case. This evidence would be relevant and admissible to show that the officers have a propensity to engage in the alleged misconduct, and that they engaged in such misconduct in this case."

In denying Mr. Lee's motion, the trial court noted: "It appears to the court that Mr. Lee has not provided any explanation of why he was in this area known for blatant sales and use of narcotic, any explanation why he was singled out by the police officers for what is his allegation of grand conspiracy. [¶] It appears to the court that Mr. Lee has not met the foundational requirements under *Warrick* or *Thompson*. [¶] And the defense motion for *Pitchess* is denied."

2. Mr. Dennis's Motion

Mr. Dennis joins in Mr. Lee's arguments. However, in the trial court, Mr. Dennis filed his own motion. In the trial court, Mr. Dennis did not join in Mr. Lee's motion.

Thus, we will address the merits of Mr. Dennis's motion. Mr. Dennis filed the first peace officer personnel disclosure motion in this case on August 28, 2008. The motion sought disclosure of the peace officer personnel records of Officers Mejia and Alvarado. The motion sought the following materials: "(1) All complaints from any and all sources relating to acts of racial bias, gender bias, ethnic bias, sexual orientation bias, coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure; false arrest, perjury, dishonesty, writing of false police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude within the meaning of *People v. Wheeler* (1992) 4 Cal.4th 284 against officers: Alvarado [] and Mejia []. [¶] . . . [¶] (3) Any other material which is exculpatory or impeaching within the meaning of *Brady v. Maryland*[, *supra*,] 373 U.S. 83."

Counsel for Mr. Dennis, Evan Kitahara, declared: "1. I am informed and believe that Mr. Dennis was in the area of San Julian [Street] and 6th [Street], but at NO point while near or at this intersection area did Mr. Dennis engage in any drug sales activities. [¶] 2. I am informed and believe that Mr. Dennis was in the area 'hanging out' in his 'neighborhood' at or near the area of San Julian [Street] and 6th [Street]. 3. I am informed and believe that the area of the arrest was where Mr. Dennis often passes time and panhandles for pocket money. [¶] 4. I am informed and believe that at no point did Mr. Dennis receive money from Mr. Lee for drug sales reasons. [¶] 7. I am informed and believe that the [Los Angeles Police Department] officers, on a drug sting assignment, specially tasked to make drug arrests, realized their mistake and to cover up their mistake fabricated that it was Mr. Dennis that was selling drugs."

At the hearing on the motion, the trial court explained that the facts of this case were identical those in *People v. Thompson* (2006) 141 Cal.App.4th 1312, 1317. The *Thompson* opinion held the trial court had been justified in denying the Pitchess motion

"because there was no coherent, complete plausible explanation for the defendant's presence and explaining away the whole conduct" described by the police report. Thereafter, the trial court heard argument by counsel. In denying the motion, the trial court noted: "[T]here is no misconduct actually alleged by the defendant. That the actual conduct that is set forth in the police report there is no - - while the defendant claims that there are innocent explanations for it, he doesn't deny those very acts that are set out in the police report." Thereafter, the trial court denied the motion holding, "I don't think there has been an adequate threshold showing made."

3. An in camera hearing must held

Our Supreme Court has explained that the declaration accompanying the motion must set forth a specific factual scenario to support assertions of impropriety: "[Evidence Code] section 1043 . . . , subdivision (a) requires a written motion and notice to the governmental agency which has custody of the records sought, and subdivision (b) provides that such motion shall include, inter alia, '(2) A description of the type of records or information sought; and [¶] (3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that such governmental agency identified has such records or information from such records.'" (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81-83; see also *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1038; *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 9; *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1148-1149.) In *Warrick*, our Supreme Court further held that the moving party must show a "plausible scenario of officer misconduct" *and* "how the information sought could lead to or be evidence potentially admissible" at trial. (*Warrick v. Superior Court, supra,* 35 Cal.4th at p. 1026; see also *People v. Gaines* (2009) 46 Cal.4th 172, 182; *Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100, 1111-1112; *People v. Collins* (2004) 115

Cal.App.4th 137, 151.) An officer's personnel records are not relevant to any issue without such a showing. (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1020; *People v. Collins, supra,* 115 Cal.App.4th at p. 151.) We review the trial court's ruling denying a disclosure request for an abuse of discretion. (*Pitchess v. Superior Court, supra,* 11 Cal.3d at p. 535; see also *People v. Lewis* (2006) 39 Cal.4th 970, 992; *Alford v. Superior Court, supra,* 29 Cal.4th at p. 1039; *People v. Memro* (1985) 38 Cal.3d 658, 684, overruled on a different point in *People v. Gaines, supra,* 46 Cal.4th at p. 181, fn. 2.)

As our Supreme Court reiterated in *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71: "We discussed what constitutes a good cause showing of materiality in *Warrick v. Superior Court*[*, supra,*] 35 Cal.4th 1101. The supporting affidavit 'must propose a defense or defenses to the pending charges.' (*Id.* at p. 1024.) To show the requested information is material, a defendant is required to 'establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events.' (*Id.* at p. 1021.) . . . [¶] Counsel's affidavit must also describe a factual scenario that would support a defense claim of officer misconduct. ([*People v.*] *Warrick, supra,* 35 Cal.4th at pp. 1024-1025.) . . . 'In other cases, the trial court hearing a *Pitchess* motion will have before it defense counsel's affidavit, and in addition a police report, witness statements, or other pertinent documents. The court then determines whether defendant's averments, "[v]iewed in conjunction with the police reports" and any other documents, suffice to "establish a plausible factual foundation" for the alleged officer misconduct and to "articulate a valid theory as to how the information sought might be admissible" at trial.' (*Id.* at p. 1025.)" (*Garcia v. Superior Court, supra,* 42 Cal.4th at p. 71.)

We agree with defendants the outcome of this case is controlled by *Warrick v. Superior Court, supra,* 35 Cal.4th at pages 1024-1025. Mr. Creary's and Mr. Kitahara's declarations stated that: their respective clients in fact did not possess or participate in

the sale of cocaine base; the contents of the police report to the contrary is the result of fabrication; the defense as to both clients is the detectives are fabricating their respective client's participation in the multi-faceted drug transaction; and prior incidents of fabrication may be admissible to show the officers acted in conformity with the alleged prior misconduct. (*Ibid*.; see *Garcia v. Superior Court*, *supra*, 42 Cal.4th at p. 71.) This was sufficient to warrant reviewing the requested peace officer personnel records in chambers for prior instances of untruthfulness.

This is a proper case for a conditional reversal. Upon remittitur issuance, the trial court is to conduct an in camera hearing and review allegations of untruthfulness in all four officers' personnel records. If no records are discoverable, the trial court is to then reinstate the judgments subject to the modifications to the fines we have ordered in part III(C) of this opinion. If the trial court orders disclosure of some or all of the requested records, they are to be disclosed to defense counsel with a protective order. Defense counsel may then decide to disclose the records to the prosecution and seek a reversal of the judgments. The trial court is to then determine if the failure to grant the disclosure motion was prejudicial as to each defendant who has received records, revealed their contents to the prosecution and sought a reversal of the judgments. In assessing prejudice, the trial court is to apply the standard of reversible error discussed in *People v. Watson* (1956) 46 Cal.2d 818, 836 as applied in *People v. Johnson* (2004) 118 Cal.App.4th 292, 305 and *People v. Hustead* (1999) 74 Cal.App.4th 410, 422. If the trial court finds any of defendants, either singularly or collectively, were not prejudiced, the judgments are to be reinstated as to the relevant individual subject to the modifications we have ordered in part III(C) of this opinion. Any defendant who has not suffered prejudice may appeal from any order reinstating the judgments. If the trial court finds there was prejudice within the meaning of the *Watson* decision, a new trial is to be ordered to any count where the accused has been prejudiced.

B. Evidentiary Issues

1. Officer Valencia's Opinion Testimony

Mr. Dennis argues the trial court improperly admitted the "expert" opinion testimony of Officer Valencia. Mr. Dennis argues, "No foundation was laid for the expertise required to be able to state that the money in [his] pocket was consistent with street level drug sales: the officer did not recount the basis of his expertise, nor did he state a factual basis for such an opinion." As set forth previously, Officer Valencia testified that he had been a police officer for 15 years and was working as a chase officer on the narcotics enforcement team. Officer Valencia detained Mr. Dennis following Officer Mejia's signal regarding those involved in the drug transaction. Officer Valencia found $116 in Mr. Dennis's pocket, including five 20-dollar bills, one 10-dollar bill, and six 1-dollar bills. The prosecutor then inquired regarding the money, "Is that consistent with street level drug sales, in your experience?" Mr. Kitahara, Mr. Dennis's counsel objected stating: "Objection. Foundation." The objection was overruled. Officer Valencia answered, "In my experience, yes."

Preliminarily, Mr. Dennis's failure to specifically object that Officer Valencia was not qualified to give an "expert" opinion forfeits the issue on appeal. The California Supreme Court has held that a failure to challenge the qualifications of witnesses offering opinions based on special skill, training and experience at trial forfeits the issue on appeal. (*People v. Williams* (1997) 16 Cal.4th 153, 194-195; *People v. Roberts* (1992) 2 Cal.4th 271, 298; *People v. Bolin* (1998) 18 Cal.4th 297, 321.) Moreover, our Supreme Court has held: "Under California law, error in admitting evidence may not be the basis for reversing a judgment or setting aside a verdict unless 'an objection to or a motion to exclude or to strike the evidence . . . was timely made and *so stated as to make clear the specific ground of the objection or motion* . . . .' (Evid. Code, § 353, subd. (a), italics added.) 'In accordance with this statute, we have consistently held that the "defendant's

failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable. [Citations.]' (*People v. Seijas* (2005) 36 Cal.4th 291, 302.) Although no 'particular form of objection' is required, the objection must 'fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling.' ([*People v.*] *Partida* [(2005)] 37 Cal.4th [428,] 435.)" (*People v. Zamudio* (2008) 43 Cal.4th 327, 354.) In this case, Mr. Kitahara merely said, "Objection. Foundation." Mr. Kitahara offered no further explanation. This objection failed to specify that Officer Valencia did not possess sufficient expertise to offer the opinions he did. As a result, Mr. Dennis has forfeited the issue on appeal. Because Mr. Lee made no objection at the time of trial, he too has forfeited the issue here.

Notwithstanding the forfeiture, Officer Valencia's testimony was admissible as either a lay or an expert witness. Evidence Code section 800 states: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony." (See *People v. Farnam* (2002) 28 Cal.4th 107, 153.) Officer Valencia's opinion was based on matters of common experience that did not require scientific knowledge. (Evid. Code, § 800; *People* v. *McAlpin* (1991) 53 Cal.3d 1289, 1306-1308.) Officer Valencia was investigating a crime. He was performing those duties by gathering all relevant evidence, including the items he found on Mr. Dennis's person. The trial court could reasonably admit the testimony within its discretion in permitting the lay opinion testimony.

Officer Valencia's opinion testimony could also be reasonably admitted as expert opinion testimony. We review a trial court's decision to admit opinion testimony based on a witness's special skill knowledge, training and experience for an abuse of discretion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45; *People v. Prince* (2007) 40 Cal.4th 1179,

1222.) Our Supreme Court has held: "In determining the admissibility of expert testimony, 'the pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury.' [Citation.]" (*People v. Lindberg, supra,* 45 Cal.4th at p. 45; *People v. McDonald* (1984) 37 Cal.3d 351, 367, overruled on a different point in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.)

Evidence Code section 720 provides: "(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert. [¶] (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony." (See also *People v. Bolin, supra,* 18 Cal.4th at p. 321; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651.) Evidence Code section 801 provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (See also *People v. Brown* (2004) 33 Cal.4th 892, 905-908; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088; *People v. McAlpin, supra,* 53 Cal.3d at p. 1300; *People v. Cole* (1956) 47 Cal.2d 99, 103.)

Officer Valencia had 15 years of experience as a police officer. Officer Valencia was working with the narcotics enforcement team. In that capacity, he had the opportunity to observe the circumstances surrounding the sales of drugs in the skid row area. Although additional qualifying testimony was not solicited, a trial court could

reasonably admit the opinion testimony as matters beyond the scope of a juror's understanding.

In any event, even if the testimony was improperly admitted, its admission was harmless. As noted in the statement of the facts, no defense was provided. The prosecution case was essentially uncontroverted. In light of the entire record, it is not reasonably possible that the jury would have returned a more favorable verdict but for the assumed error. (*People v. Jablonski* (2006) 37 Cal.4th 774, 833; *People v. Ervin* (2000) 22 Cal.4th 48, 103.)

2. There was substantial evidence of a usable amount of cocaine base

Mr. Dennis argues that there was insufficient evidence that the cocaine base constituted a usable amount. Mr. Lee joins this argument. We disagree. In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: "[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432; see *People v. Wilson* (2008) 44 Cal.4th 758, 806; *People v. Carter* (2005) 36 Cal.4th 1114, 1156; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 319; *People v. Bolin, supra,*18 Cal.4th at p. 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Reversal on this ground is unwarranted unless it

appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

The California Supreme Court has held: "The essential elements of possession of a controlled substance are 'dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. Each of these elements may be established circumstantially.'" (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242; *People v. Williams* (1971) 5 Cal.3d 211, 215; see also *People v. Morales* (2001) 25 Cal.4th 34, 41; *People v. Tripp* (2007) 151 Cal.App.4th 951, 956.) Our Supreme Court has explained: "[O]ne may become criminally liable for possession . . . of a controlled substance, based upon either actual or constructive possession of the substance. [Citation.] Constructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another. [Citation.]" (*People v. Morante* (1999) 20 Cal.4th 403, 417; *People v. Rogers* (1971) 5 Cal.3d 129, 134.) Our Supreme Court in *People v. Rubacalba* (1993) 6 Cal.4th 62, 66, reviewed the decisional law regarding a "usable" quantity of a controlled substance and concluded, "[T]he amount of cocaine needed to produce a narcotic effect and the purity of the substance need not be proven in order to establish a usable quantity." (See *People v. Stafford* (1972) 28 Cal.App.3d 405, 413-414.)

In this case, the parties stipulated to the fact that the single white solid item recovered from Mr. Zappia's pocket was found to contain cocaine base, weighing 0.13 grams net. The parties also stipulated that the white solid substances recovered from the bag in Mr. Lee's hand contained 3.07 grams of cocaine base. In this case, the stipulated measurement of the substance; plus the other evidence is sufficient to support the jury's implied finding that there was a usable quantity of cocaine base.

3. Disclosure of Officer Mejia's observation post

a. factual and procedural background

Mr. Dennis argues the trial court improperly sustained the prosecutor's official privilege claim regarding the evidence related to the police officer's surveillance post and thereafter refused an adverse inference jury instruction related thereto. By way of joinder, Mr. Lee raises the issue as well. After the jury selection was completed and trial was set to commence, the parties indicated there was an issue related to the disclosure of the surveillance officers' location. The prosecutor requested an in camera hearing be held to support the need for confidentiality regarding the exact location pursuant to Evidence Code section 1040.[2] Counsel for Mr. Dennis, Mr. Kitahara, argued that the exact location was material to the defense because Officers Mejia and Avila made a number of observations of defendants walking down and crossing the street. Mr. Kitahara acknowledged that the issue had been discussed at length at the preliminary hearing. The trial court pointed out that the arrests occurred some nine months earlier and any obstructing trees might be different. In addition, the trial court noted the parties had announced they were ready for trial without having filed a motion on the issue. The prosecutor argued that the disclosure of the officers' location would place those who

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[2] Evidence Code section 1040 states in part: "(a) As used in this section, 'official information' means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made. [¶] (b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and; [¶] . . . [¶] (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered."

work at the location in danger. The prosecutor indicated the officer could testify as to his approximate location, elevation, distance and angle of his view without disclosing the exact location. The trial court indicated that an in camera review would be conducted during the lunch hour after trial had begun.

After opening statements, the prosecutor, Liza T. Tom, called Officer Mejia as her first witness. In the jurors' presence, Officer Mejia testified that his observation post on July 14, 2008 was about 20 feet from ground level on the east sidewalk of San Julian Street. Officer Mejia stated he was using binoculars with a strength of "10 by 50" while watching the transaction. The observation post was one of the main ones used on a weekly basis. In the jurors' presence, the prosecutor then inquired, "Are you permitted to disclose exactly where that observation post is?" Officer Mejia responded, "No." When asked, "[W]hy not?" Officer Mejia stated: "Well, the main reason is for the safety of the actual security personnel that lets us use the location and also for the fear that we're also - - if it's known that we're - - the officers are up there using that post, then more than likely it won't be of use to us anymore." Mr. Kitahara then objected, "[T]here's an objection on foundation grounds."

A sidebar conference followed. Mr. Kitahara argued that pursuant to Evidence Code section 913[3] no comment may be made on the assertion of the Evidence Code section 1040 official information privilege. Mr. Kitahara argued that Ms. Tom had waived the official information privilege by commenting on it and making an improper

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[3] Evidence Code section 913 states: "(a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding. [¶] (b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding."

inquiry during direct cross-examination. The trial court noted that Mr. Kitahara let the testimony come in without raising an objection until after Officer Mejia responded. The trial court did not consider the privilege waived, ruling: "[I]t looks like counsel knows the distance from the defendant, the distance as far as elevation, the distance as far as whether it's north, south, east or west. So I think that it's pretty obvious where they were as far as what building. [¶] Also, based on what you told me, you know they're looking out a window. It certainly - - and I'm going to conduct an in camera. But it certainly doesn't benefit - - the people that allow officers to come and use their window, it doesn't benefit them to have the people on the street knowing which citizens are allowing their window to be used for observations." The trial court indicated it would consider striking the testimony regarding "the people there and the security reasons." Mr. Kitahara requested that the testimony be stricken and the jury admonished. Thereafter, the trial court instructed the jury: "Ladies and gentlemen, I'm going to strike a portion of the last answer. This is struck: 'Well, the main reason is for the safety of the actual security personnel that lets us use the location and also for the fear that we're also - - if it's known that we're - - the officers are up there using that post, then more than likely it won't be of use to us anymore.' [¶] That's stricken. Okay?" Officer Mejia continued to testify. Officer Mejia stated that it was daylight and sunny at the time he observed the drug transaction. Officer Mejia said he had no trouble seeing through his binoculars. Officer Mejia indicated he was at a place that he regularly used to make observations on Sixth Street and there was nothing obstructing his view.

When the jurors were excused for lunch, the trial court conducted an in camera hearing regarding the Evidence Code section 1040 privilege. We have read the transcript of the in camera hearing. Following the in camera hearing, the trial court indicated that it would not order disclosure of the location. The trial court noted: "You are entitled to ask questions regarding distance, elevation, direction, whether it was conducted through a window or no window, whether there's tinting on the window, whether there's anything that blocks the observations, but I will not be ordering the disclosure of the location based

on the information provided to me in camera." The trial court further explained that the disclosure was also being denied based upon the untimeliness of the request. Mr. Kitahara indicated that he would request that the jury be instructed pursuant to Evidence Code section 913, subdivision (b). The trial court suggested that Mr. Kitahara draw up an instruction for its consideration. Counsel for Mr. Lee, Mr. Creary, then joined the arguments raised by Mr. Dennis.

Mr. Kitahara's proposed instruction read: "In this case, there was testimony as to the assertion of an Official Information Privilege regarding the location of the observation post. [¶] I am instructing the members of the jury that: [¶] No presumption arises, favorable or unfavorable to any party in this case, because of the exercise of the privilege; and that the jury may not draw any inference therefrom as to the credibility of the witnesses or as to any matter at issue in the proceeding." After hearing the arguments of counsel, the trial court questioned what negative inference could be drawn against the defendants. In refusing to give the proposed instruction, the trial court noted: "I don't see that there is any party that is adversely affected because of the unfavorable inference that can be drawn by the officer saying, I'm not giving that location's address because there's a privilege. [¶] If anyone was going to have a negative inference from that, I imagine it would be the officer. I imagine the jury would think, why isn't the officer giving us the location? I don't see the - - this says, at the request of a party who's adversely affected. [¶] I don't see any way that your client is going to be adversely affected because the officers aren't turning over an address nor can I find any case that suggests that this is the type of situation that would imply privilege against self-incrimination."

b. The trial court could properly refuse to order disclosure of the place from which Officer Mejia made his observations

In *People v. Haider* (1995) 34 Cal.App.4th 661, 664 our colleagues in Division Two of this appellate district held: "The government has a privilege to refuse to disclose the exact location of a surveillance site if the public interest in preserving the confidentiality of that information outweighs the need for disclosure. [Citation.]" (See also *People v. Lewis* (2009) 172 Cal.App.4th 1426, 1431, ["[T]he location of a police surveillance post falls within the ambit of the privilege granted by section 1040"]; *People v. Garza* (1995) 32 Cal.App.4th 148, 153-154; *In re Sergio M.* (1993) 13 Cal.App.4th 809, 813.) Evidence Code section 1042, subdivision (a)[4] requires that even if the privilege applies, the trial court may make an order or finding of fact adverse to the public entity where the privileged information is material to the defense. (See *People v. Haider, supra,* 34 Cal.App.4th at p. 665.) The test of materiality is not simple relevance. Rather, it is whether nondisclosure might deprive defendant of his or her due process fair trial right. (*People v. Lewis, supra,* 172 Cal.App.4th at p. 1435; *People v. Garza, supra,* 32 Cal.App.4th at pp. 153-154.) In addition, the defendant must demonstrate there was a reasonable possibility that the surveillance location could constitute material evidence which could result in his or her exoneration. (*In re Sergio M., supra,* 13 Cal.App.4th at p. 814; *People v. Walker* (1991) 230 Cal.App.3d. 230, 237-238.) We review the trial court's ruling on discovery issues such as the grant of the Evidence Code section 1040 privilege for abuse of discretion. (*City of Santa Cruz v. Municipal Court, supra,* 49 Cal.3d at pp. 83-84; *People v. Memro, supra,* 38 Cal.3d at p. 689.)

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[4] Evidence Code section 1042 states in part: "(a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material."

As set forth above, Officer Mejia's testimony established that his observation post was located about 20 feet from ground level on the east sidewalk of San Julian Street and was one of the main ones used on a weekly basis. It was daylight and sunny at the time Officer Mejia observed the drug transaction. Officer Mejia said he had no trouble seeing through his binoculars, which had a power of 10 by 50. Officer Mejia indicated he was at a post that he regularly used to make observations on Sixth Street and there was nothing obstructing his view. Mr. Dennis argues that the location of the observation post was relevant to Officer Mejia's ability to watch the "admittedly difficult physical conditions of a crowded area" that was a significant distance from where the unfolding events occurred. Mr. Dennis further argues the disclosure was necessary to properly cross-examine Officer Mejia. However, as was explained in *People v. Garza, supra,* 32 Cal.App.4th at pages 154-155, the fact that the officers conducting the surveillance were able to communicate by radio with the chase officers and give detailed descriptions of the defendants and their activities suggests that there were no obstructions or impediments to seeing the transactions. Moreover, as we held in *People v. Walker, supra,* 230 Cal.App.3d at page 237, "[I]f we adopt defendant's analysis [that location is always material], the trial court would be required to strike testimony in any case in which a confidential surveillance location is used regardless of its materiality under the facts of the particular case. We do not believe that such a mechanical result is either justified or mandated by law." (See also *People v. Haider, supra,* 34 Cal.App.4th at p. 669.)

In this case, Officer Mejia had an unobstructed view of the drug transaction with high-powered binoculars on a sunny day. Mr. Dennis has not demonstrated that exact location of the surveillance location could have resulted in his exoneration. The trial court could properly: sustain the Evidence Code section 1040 privilege to maintain the confidentiality of the exact surveillance post; refuse a finding adverse to the prosecution under Evidence Code section 1042, subdivision (a); and refuse to give the adverse inference instruction. (*People v. Haider, supra,* 34 Cal.App.4th at p. 669; *People v. Garza, supra,* 32 Cal.App.4th at p. 154-155; *In re Sergio M., supra,* 13 Cal.4th at pp.

811-812.) Our independent review of the in camera proceedings relative to the Evidence Code section 1040 privilege supports the foregoing analysis.

C. Additional Fees and Penalty Assessments

The Attorney General argues that the trial court should have imposed an additional $20 section 1465.8, subdivision (a)(1) court security fee as to Mr. Lee and Mr. Dennis. We agree. (See *People v. Crittle* (2007) 154 Cal.App.4th 368, 371; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.) In the event, the judgments are reinstated, they are to be modified as follows. Although the abstracts of judgment reflect otherwise, the trial court imposed only one section 1465.8, subdivision (a)(1) court security fee as to each defendant. Therefore, a total of two section 1465.8, subdivision (a)(1) fees should have been orally imposed as to Mr. Lee and Mr. Dennis. In addition, the trial court imposed a single $50 Health and Safety Code section 11372.5, subdivision (a) laboratory fee as to each defendant. Both counts 1 and 2 are subject to such fees. (Health & Saf. Code, § 11372.5, subd. (a).)

In addition, the trial court should have imposed additional assessments, a penalty, fee and a surcharge on the Health and Safety Code section 11372.5, subdivision (a) laboratory fee. The $50 laboratory fee was subject to the following: a section 1464, subdivision (a) $50 penalty assessment; a Government Code section 76000, subdivision (a)(1) $35 penalty assessment; a $10 section 1465.7, subdivision (a) state surcharge; and a $15 Government Code section 70372, subdivision (a)(1) state court construction penalty; a $7 Government Code section 76000.5 penalty assessment; a $5 Government Code section 76104.6 deoxyribonucleic acid fee; and a $5 Government Code section 76104.7 deoxyribonucleic acid fee. Thus, the total amount owed by each defendant in addition to the Health and Safety Code section 11372.5, subdivision (a) $50 laboratory fee is $127 per count. (See *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1254-1257; *People v. Taylor* (2004) 118 Cal.App.4th 454, 456-457.) If the judgments are reinstated

defendants' sentences are to be modified to impose the Health and Safety Code section 11372.5, subdivision (a) fees as to both counts 1 and 2 and to add the related surcharge, assessments, fees and penalties set forth above as to each count. The trial court is to actively and personally insure the clerk accurately prepares correct amended abstracts of judgment. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

IV. DISPOSITION

The judgments are reversed and remanded for the limited purposes set forth in part III(A) of this opinion. If the judgments are reinstated, as to each defendant they are modified to impose Health and Safety Code section 11372.5, subdivision (a) fee, Penal Code section 1465.8 subdivision (a) and court security fees as to count 2 as to each defendant as well as the additional penalty assessments, penalty, surcharge, and fees described in part III(C) of this opinion. Upon remittitur issuance, if the judgments are reinstated, the clerk of the superior court shall prepare amended abstracts of judgment and forward copies of each abstract of judgment to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

I concur:

ARMSTRONG, J.

MOSK, J., Concurring and Dissenting

I concur in the reversal but with respect to Count 2 as to defendant Dennis, I believe that the reversal should not be constitutional.

Objecting on the basis of lack of foundation preserved the contention that the witness did not qualify as an expert because there was insufficient evidence of his qualifications. Thus, there was no forfeiture of that issue. Moreover, if the expert testimony was improperly admitted, that error was not harmless. Although a close question, the trial court, however, did not abuse its discretion in admitting the testimony.

There does not seem to be any basis for the conclusion that the 0.13 grams recovered was a useable amount. Accordingly, I would also reverse defendant Dennis's conviction under Count 2 to the extent the disposition was based on a finding of a violation of Health and Safety Code section 11351.5.

MOSK, J.