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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY E. SMITH ,

Defendant and Appellant.

A106965

(Contra Costa County
Super. Ct. No. 05-031774-3)

I. INTRODUCTION

Appellant was convicted of making criminal threats against a police officer. (Pen. Code, § 422.)¹ He appeals claiming (1) the trial court erred in denying his motion, brought under the rule of *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), for an in camera inspection of the officer’s personnel file, (2) there was no substantial evidence to support the conviction, and (3) the trial court erred in not reducing his conviction to a misdemeanor under section 17, subdivision (b). We disagree with the latter two contentions, but agree that, under the facts and allegations before it, the trial court should have conducted an in camera review of the officer’s personnel files. Accordingly, we reverse and remand the case to the trial court to conduct such a review in accordance with directions to be set forth hereafter.

¹ All further citations are to the Penal Code, unless otherwise noted.

II. FACTUAL AND PROCEDURAL BACKGROUND

In the early evening of a drizzly December 15, 2002, Sergeant James Creekmore of the San Pablo Police Department responded to a call from the Salvation Army facility in that city concerning a suspicious person in its vicinity. Creekmore, who was aware of prior problems at the facility with homeless people scattering donated items around the property, found appellant sleeping in a cardboard box in the building's doorway. Clothing and toys were littered around the box. Creekmore told appellant he had "to move on" adding "[y]ou can't sleep here." Appellant arose, putting his back against the door to the building as he did so. Creekmore asked him if he was okay, and appellant responded that his back hurt. Creekmore asked if he needed an ambulance, but appellant responded in the negative.

Appearing angry to Creekmore, appellant put the hood on his sweatshirt up and then placed his hands in his pockets. For safety reasons, Creekmore told appellant to take his hands out of his pockets, which appellant did. He also told appellant to clean up the area around the cardboard box in which he had been sleeping; appellant made no response to this request but, instead, passed by Creekmore. When he was about six feet away, he turned and angrily asked: "What is your name?" Creekmore responded by saying, "Look, you just got to go." Appellant became more angry, and demanded: "What is your motherfucking name?" Creekmore responded: "Look, I'm Sergeant Creekmore. You've got to leave." As appellant walked away, he said: "If we were in a war, I hope you die. You should die tonight." As appellant walked to the sidewalk in front of the building, with Creekmore watching him, he said several more times: "You should die tonight, Creekmore" and "[y]ou're gonna die tonight," and "you should die."

Appellant kept moving, but then stopped and started to look down; Creekmore feared he was looking for a rock or something to throw at a window or a passing car. As appellant reached a tree on the sidewalk about 30 feet away from Creekmore, he picked up a three-foot long piece of two-by-four lumber off the ground and began moving it up and down in his hands. As he did so, he apparently became even more enraged and, as he continued to move the board up and down, yelled "I'm gonna kill you, Creekmore."

Creekmore feared for his safety and, as a consequence, drew his gun, pointing it downward, and began to back away from appellant. As he did so, he called on his radio for assistance. Appellant then charged at Creekmore, waving the board as he did so, and shouting repeatedly: “I’m gonna kill you, Creekmore.” As Creekmore retreated, he tried to maintain about a 30-foot gap between himself and appellant, notwithstanding the latter’s increase in speed toward him.

When appellant was about 15 feet away from him, Creekmore pointed the gun at appellant and yelled: “If you don’t drop the board, I’m gonna shoot your ass.” Nonetheless, appellant continued to move toward him, quickening his pace. Creekmore ordered him to drop the board five to ten times. When appellant had come to within about 10 feet of him, Creekmore shown the light on his gun into appellant’s eyes; appellant nonetheless continued his “charge” and began raising the board over his shoulder while still holding it with both hands. Creekmore, believing his safety was threatened, fired his gun at appellant; the latter, wounded by one of the bullets, dropped the board and fell to the ground, landing five feet away from Creekmore. The board landed about four to six feet away.

Almost immediately Creekmore saw a passer-by, one Robert Silveiria, behind him, and ordered him to stop as he was a potential witness. Silveiria complied.² Shortly thereafter, other officers arrived at the scene, searched appellant for weapons and assessed his injuries. Those turned out to be—after appellant was transported to and treated at John Muir Medical Center in Walnut Creek—several wounds to the face and right hand.

By an information filed September 18, 2003, appellant was charged with three counts. The first count alleged assault with a deadly weapon or by means likely to produce great bodily injury on a peace officer. (§ 245, subd. (c).) The second count

² Silveiria later gave a statement to the police and testified for the prosecution at both the preliminary hearing and at trial. Insofar as pertinent to the *Pitchess* issue, his testimony will be summarized in part III, A, *post*.

charged resisting an officer by force or violence (§ 69), while the third charged the making of criminal threats. (§ 422.) In connection with the latter two counts, the information alleged that appellant had personally used a deadly or dangerous weapon. (§ 12022, subd. (b)(1).) In connection with all three charged offenses, the information also charged that appellant had two prior “strike” convictions within the meaning of sections 667, subdivisions (b)-(i), and 1170.12, and two prior serious felony convictions within the meaning of section 667, subdivision (a)(1).

On September 30, 2003, appellant filed a motion for discovery, specifically seeking the personnel records of Sergeant Creekmore. In part III *post*, we will detail his pertinent allegations; suffice it to say for now that, on November 6, 2003, the trial court denied this motion.

After a 10-day jury trial and a little over four hours of deliberation, on January 29, 2004, the jury found appellant guilty on all counts. However, regarding count one, it found him guilty of assault on a peace officer by means of force likely to produce great bodily injury *but not* assault with a deadly weapon. Consistently, it also found untrue the use-of-a deadly weapon allegation.

On April 16, 2004, a court trial was held on the prior conviction allegations. On May 14, 2004, the court found all of those allegations to be true but, also, granted appellant’s motion for a new trial regarding counts one and two.³ The court left intact his conviction on the section 422 (criminal threats) count—count three of the information.

On June 4, 2004, the court struck the two prior strike convictions (see §§ 667, subd. (b)-(i), 1170.12), stating on the record its several specific reasons for so doing. It sentenced appellant to the mid-term of two years for his conviction on count three, to which were added two consecutive five-year terms for appellant’s prior serious felony

³ The defense argued, and the court apparently agreed, that the trial court had improperly allowed the jury to get, over defense counsel’s objection, two separate verdict forms regarding count one.

convictions, for a total prison term of 12 years. Pursuant to the prosecutor's motion, on June 11, 2004, the court dismissed counts one and two. Appellant filed a timely notice of appeal.

III. DISCUSSION

A. *The trial court erred in denying appellant's Pitchess motion.*

Within the past few months, our Supreme Court has reaffirmed, if indeed not strengthened, the right of criminal defendants to access relevant personnel files of police officers, a right originally articulated in *Pitchess* and later codified in sections 832.7 and 832.8, as well as Evidence Code sections 1043-1045.

In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*), the court reversed a court of appeal's denial of a petition for a writ of mandate asking for a writ directing the trial court to permit an in camera inspection of the arresting officers' personnel files. In that case, the trial court had denied, and a court of appeal had twice denied writ review concerning, a defendant's *Pitchess* motion for the personnel files of three Los Angeles police officers who had arrested him for illegal possession of cocaine. The officers, who were patrolling a well-known drug-sales area in Los Angeles, had stopped their patrol car and approached the defendant. They asserted that he had in his hand a "baggie" containing rock cocaine and, when he saw them, fled spilling the cocaine onto the sidewalk and street. The defendant's version was that he had fled the officers because he feared they were about to arrest him because of an outstanding parole warrant (*Warrick, supra*, 35 Cal.4th at p. 1017) and that, as he fled them, other persons in the area deliberately strewed rock cocaine *they had* onto the ground to avoid police scrutiny and arrest. (*Ibid.*)

In its second denial of defendant's petition for a writ of mandate seeking to overturn the trial court's denial of his *Pitchess* motion, the appellate court held that the moving defendant had not satisfied the second prong of *Pitchess*, i.e., had not set forth a plausible factual scenario for his claim of officer misconduct. More specifically, the Court of Appeal held that the defendant had not shown a "degree of reasonable probability, a degree of apparent credibility greater than mere possibility." (*Warrick*,

supra, 35 Cal.4th at p. 1018.) Our Supreme Court disagreed, holding that the appellate court had “applied a stricter standard for obtaining in-chambers review of officer personnel information than is required by law.” (*Ibid.*)

After reviewing its 1974 holding in *Pitchess*, the adoption of the subsequent statutes, and later pertinent holdings of both it and various courts of appeal, the court explained the basis for its reversal thusly: “What the defendant must present is a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent [police report, etc.] documents. [Citations.] . . . ¶ . . . Here, the Court of Appeal concluded that to be plausible a factual foundation must be reasonably probable or apparently credible and not merely possible. In so doing, the Court of Appeal imposed a greater burden on the party seeking *Pitchess* discovery than required by our prior cases or the statutory scheme. To require a criminal defendant to present a *credible* or *believable* factual account of, or a motive for, police misconduct suggests that the trial court’s task in assessing a *Pitchess* motion is to weigh or assess the evidence. It is not. A trial court hearing a *Pitchess* motion normally has before it only those documents submitted by the parties, plus whatever factual representations counsel may make in arguing the motion. The trial court does not determine whether a defendant’s version of events, with or without corroborating collateral evidence, is persuasive--a task that in many cases would be tantamount to determining whether the defendant is probably innocent or probably guilty. [Citation.] ¶ Moreover, a credibility or persuasiveness standard at the *Pitchess* discovery stage would be inconsistent with the statutory language and with our previous decisions requiring only that defense counsel’s affidavit or declaration supporting a defendant’s *Pitchess* motion be made on information and belief. [Citations.] As we have previously noted, the legislative history of section 1043 shows that the ‘Legislature expressly considered and *rejected* a requirement’ that counsel’s affidavit be made on personal knowledge. [Citation.] Because defense counsel would only rarely be present when the alleged officer misconduct occurred, counsel has little information to offer based on counsel’s personal knowledge. ¶ What standard must a moving party meet to show a ‘plausible’ factual foundation for the *Pitchess* discovery requested? We conclude

that a plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges. A defendant must also show how the information sought could lead to or be evidence potentially admissible at trial. Such a showing ‘put[s] the court on notice’ that the specified officer misconduct ‘will likely be an issue at trial.’ [Citation.] Once that burden is met, the defendant has shown materiality under section 1043.” (*Warrick, supra*, 35 Cal.4th at pp. 1025-1026.)

In the present case, appellant’s specific factual scenario was proffered via three declarations from his trial counsel, a Contra Costa County deputy public defender. The first, filed September 30, 2003—12 days after the filing of the information—contained what appear to be the usual “boilerplate” allegations. However, it also included the following clearly customized allegation: “Defendant contends that the conduct of Officer Creekmore of the San Pablo Police Department was unlawful in that he intimidated, threatened and harassed Mr. Smith, that he misrepresented the nature of his contact with Mr. Smith in his police reports and testimony, and that he used excessive force in his contact with Mr. Smith. This contention is supported by the police reports in this case as well as the conflicting testimony of Mr. Robert Silveiria and Officer Creekmore regarding the alleged actions of the defendant prior to Officer shooting the defendant in the face. Defendant further contends that it is likely that citizen complaints charging Officer Creekmore with abuse of his power, misrepresenting/lying, harassing conduct, and use of excessive force have previously been filed against him and that he may have a habit or custom of this type of conduct.”

A second, pre-hearing declaration by counsel, filed on October 16, 2003, included the following key portion relating to the reports of the police regarding what witness Silveiria saw and heard—or, more accurately, did not see or hear: “Robert Silveiria testified that he observed the contact between Mr. Smith and Officer Creekmore. Mr. Silveiria testified further that he never saw anything in Mr. Smith’s hands during Mr. Smith’s approach toward Officer Creekmore, including a 2x4, and when Officer

Creekmore shot Mr. Smith in the face. Mr. Silveiria also testified that he heard no words exchanged between Officer Creekmore and Mr. Smith at the time he observed them in the parking lot.”

After the prosecution had filed an opposition to appellant’s *Pitchess* motion, the matter was argued to the trial court (the Honorable Joyce Cram) on October 31, 2003, and then taken under submission. At that oral argument, most of the contentions of trial defense counsel pertained to the issue of whether appellant had, on the night in question, acted in “self defense” against Creekmore’s actions and whether the latter had used “excessive force” against appellant. But appellant’s counsel did stress, additionally, the variance between Silveiria’s testimony regarding what he heard out of appellant’s mouth and Creekmore’s statements that appellant had repeatedly threatened him.

As noted above, Silveiria was a witness to at least part of the altercation between appellant and Creekmore and the shooting and wounding of appellant. According to his initial statement to the police, given and recorded on December 16, 2002 (and later introduced as an exhibit at trial), Silveiria was walking past the Salvation Army building when he heard what was, apparently, the first and perhaps second shot being fired. Immediately, he focused on the interaction between the men who turned out to be appellant and Creekmore, and described how, even after the first two shots, appellant was “running right towards” Creekmore. But both in this statement and, later, at the preliminary hearing, Silveiria denied hearing any words being spoken by either man. More specifically, Silveiria’s testimony was that the only sound he heard appellant make as he was charging Creekmore was a “grunting sound.” Silveiria conceded that possibly he heard no words exchanged between the two men because he had his “hood on” and, as he testified later at trial, he is totally deaf in one ear. But, for whatever reason, Silveiria did not support Creekmore’s version of appellant’s verbal threats.

At the conclusion of this first argument on the motion, the trial court indicated a desire to do “some more research” on the issue before it and, accordingly, continued the hearing until the following week. Before the continued hearing, specifically on November 4, 2003, trial defense counsel filed a third declaration. However, its

allegations pertained exclusively to the issue of whether appellant was “armed” with the piece of two-by-four when he ran at Creekmore or whether, as appellant contended, he ran unarmed at Creekmore and did so in “self defense” because the latter had already fired his gun at him. Nothing was said in this declaration regarding the only count on which appellant was convicted—and the only one thus now relevant—the criminal threats count.⁴

On November 6, 2003, the trial court heard further oral argument on appellant’s motion, almost all of it pertaining to the first two counts, i.e., whether or not there was a plausible factual scenario regarding appellant’s physical actions toward Creekmore and the latter’s alleged use of excessive force; it then denied the motion.

In light of our Supreme Court’s holding in *Warrick*, we think this ruling was incorrect. This is so principally because the record contains differing—albeit perhaps only slightly so—versions regarding whether appellant uttered any threatening words to Creekmore before the latter fired the shots at him. Creekmore’s version, in his preliminary hearing testimony, was that appellant uttered repeated threats to him before he fired any shots at all, and that he *then* fired four shots at appellant who then fell to the ground.

Silveiria’s version was set forth twice prior to the hearing on the *Pitchess* motion and was somewhat different. He stated that he heard one or possibly two shots, turned and saw appellant charging at Creekmore while uttering a grunting noise—but nothing more—as he did so, after which Creekmore fired again and appellant fell to the ground.

⁴ Both *Warrick* and an earlier Court of Appeal case cited approvingly by it, *People v. Husted* (1999) 74 Cal.App.4th 410, 417 (*Husted*), make clear that the “specificity requirement” of *Pitchess* “excludes requests for officer information that are irrelevant to the pending charges.” (*Warrick, supra*, 35 Cal.4th at p. 1021.) The appeal before us relates only to the criminal threats count of the information, the trial court having granted a new trial on, and later dismissed, the first two counts. In view of that state of affairs, we conclude that anything in the *Pitchess* motion relevant to only those counts, e.g., whether appellant was or was not brandishing a two-by-four as he charged Creekmore, is no longer pertinent to this appeal.

To be sure, and as noted above, Silveiria conceded in his pretrial statements that he might not have heard any words pass between the two men because he had his hood up because of the bad weather. Further, at trial, he conceded that he was totally deaf in his left ear. Notwithstanding those eminently possible explanations for Silveiria's failure to hear any threats from appellant to Creekmore, the fact remains that the record reflects a difference between Silveiria's and Creekmore's versions of the critical events regarding the criminal threats count. Under the "plausible scenario" standard set forth in *Warrick*, that difference is sufficient to require the grant of a *Pitchess* motion.

Since, unlike *Warrick*, the trial in this case has been completed, the question naturally arises: "And then what?" Fortunately, our Supreme Court has, at least twice, made clear that any error regarding the denial of a *Pitchess* motion is evaluated under a standard prejudice analysis. (See *People v. Memro* (1985) 38 Cal.3d 658, 684; *People v. Marshall* (1996) 13 Cal.4th 799, 842-843; see also *People v. Gill* (1997) 60 Cal.App.4th 743, 750.) And in *Warrick* the court cited approvingly, on several issues, the Fifth District's decision in *Hustead*, *supra*, 74 Cal.App.4th 410.

Hustead provides a roadmap for how the trial court should handle this issue on remand. It stated: "Finding the trial court erred in failing to provide an in camera review does not end the analysis; appellant must also demonstrate he was prejudiced from the denial of discovery. (*People v. Memro*, *supra*, 38 Cal.3d at p. 684.) We are unable to conclude that there is a reasonable probability that the discovery sought in this case would have led to admissible evidence helpful to appellant in his defense. [Citation.] There may not have been any complaints against [the arresting officer] for the type of conduct appellant sought. In that case, appellant would not have been prejudiced because access to the officer's file would not have led to any admissible evidence at trial. However, we must consider the possibility that such evidence may exist . . . [¶] . . . [W]e cannot say that there was any discoverable information in [the arresting officer's] file. Therefore, we will remand the case to the trial court to conduct an in camera hearing on the discovery motion. If there is no discoverable information in the file, then the trial court is ordered to reinstate the original judgment and sentence, and the judgment is

ordered affirmed. [Citation.] If, however, there is relevant discoverable information in the officer's file, . . . appellant should be given an opportunity to determine if the information would have led to any relevant, admissible evidence that he could have presented at trial. (*People v. Memro, supra*, 38 Cal.3d at p. 684.) If appellant is able to demonstrate that he was prejudiced by the denial of the discovery, the trial court should order a new trial. If appellant is unable to show any prejudice, then the conviction is ordered reinstated, and the judgment is ordered affirmed." (*Hustead, supra*, 74 Cal.App.4th at pp. 418-419; see also *id.* at p. 423 and, to the same effect, *People v. Johnson* (2004) 118 Cal.App.4th 292, 304-305 (*Johnson*.)

On remand, the trial court should follow the procedure set forth in *Hustead* and *Johnson*.

B. Substantial evidence supports the conviction of appellant for making criminal threats.

As noted above, the only count on which appellant was ultimately convicted was count three, which charged a violation of section 422. That section reads, in pertinent part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

It has been held, indeed relatively recently, that this section is applicable to threats against a police officer. In *People v. Schnathorst* (2004) 120 Cal.App.4th 1310, 1315, Justice Sims, writing for a unanimous panel of the Third District, rejected the contention that section 422 "does not extend to threats made against a police officer." He explained: "The fact that some crimes can be committed *only* against peace officers [citation] and other crimes are punished *more severely* when committed against peace officers

[citation], does not mean that peace officers are excluded from the protection of laws that apply to persons generally. [Citation.]” (*Id.* at p. 1316.)

Our Supreme Court has stated that there are essentially five elements inherent in a violation of section 422. In *People v. Toledo* (2001) 26 Cal.4th 221, 227-228 (*Toledo*), the court stated: “In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant ‘willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,’ (2) that the defendant made the threat ‘with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,’ (3) that the threat—which may be ‘made verbally, in writing, or by means of an electronic communication device’—was ‘on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,’ (4) that the threat actually caused the person threatened ‘to be in sustained fear for his or her own safety or for his or her immediate family’s safety,’ and (5) that the threatened person’s fear was ‘reasonabl[e]’ under the circumstances.” (See also *People v. Bolin* (1998) 18 Cal.4th 297, 337-340 & fn. 13.)

Appellant contends there was insufficient evidence upon which to sustain appellant’s conviction for violation of this section, particularly regarding whether (1) appellant specifically intended “‘to threaten to commit a crime resulting in death or great bodily injury with the further intent that the threat be taken as a threat, under circumstances sufficient to convey to the person threatened a gravity of purpose and an immediate prospect of execution’” (2) Creekmore’s fear was “‘reasonable under the circumstances,’” and (3) “‘viewed in their totality, the circumstances are sufficient to meet the requirement that the communication “convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat.’”” Put another way, appellant appears to challenge the sufficiency of the evidence to support factors (2), (3) and (5) as set forth in *Toledo*.

Our standard of review is, of course, whether there was substantial evidence to support the jury’s guilty verdict on this count. More specifically: “The appellate court “must review the whole record in the light most favorable to the judgment below to determine whether it discloses *substantial evidence*—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citations.] The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on “isolated bits of evidence.” [Citation.] [Citations.] The standard of review is the same in cases in which the People rely primarily upon circumstantial evidence. [Citations.] “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” [Citations.]” [Citation.] “Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.” [Citations.]’ [Citations.]” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.)

The same standard applies, of course, to convictions under section 422. (See, e.g., *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1339-1342, superseded by statute on other grounds as noted in *People v. Franz* (2001) 88 Cal.App.4th 1426, 1441; *People v. Franz, supra*, 88 Cal.App.4th at pp. 1442-1448; *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431-1432; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 859.)

In the present case, the jury heard the testimony of Sergeant Creekmore, summarized above, concerning appellant’s repeated threats that “I’m gonna kill you, Creekmore” and “You’re gonna die tonight.” And all of these were, at least per Creekmore’s testimony, said while appellant was advancing on him while brandishing a piece of two-by-four. Clearly, this testimony satisfies the standard that the testimony of a

single witness may, and often does, constitute the requisite substantial evidence. But appellant argues, among other things, that (1) as noted in our discussion regarding appellant's *Pitchess* motion, Creekmore's testimony was not supported by witness Silveiria's version of the events and (2) any such threat was not reasonable because the jury *did not* find appellant guilty of assault with a deadly weapon and also found untrue the use-of-a deadly weapon allegation.

We are unconvinced. Regarding Silveiria's testimony, and as also noted above, he both told the police and testified that he did not hear or see *anything* between the two men until he first heard either one or two shots. But he also explained that there were at least two reasons he may not have heard any words passing between them: the fact that he had the hood of his jacket up and his total deafness in one ear.

As far as the reasonableness of Creekmore's fear of the threats, it is sufficient to note that (1) at least according to his version of events, appellant was advancing on him while brandishing a piece of two-by-four and (2) the jury found appellant guilty of assault with intent to commit great bodily harm (a conviction that was set aside on grounds other than the insufficiency of the evidence).

After the jury heard Creekmore's testimony, it was properly instructed regarding all the elements of a violation of section 422. It then took it only a little over four hours (after a 10-day trial) to find appellant guilty on all three counts. Under the circumstances, we have no difficulty in finding the substantial evidence test satisfied regarding appellant's conviction under section 422.

C. The trial court did not abuse its discretion by declining to reduce the section 422 conviction to a misdemeanor.

As will be noted from its terms (quoted above), a conviction for violating section 422 may result in either a one-year or less jail sentence, i.e., be a misdemeanor, or a prison term, i.e., be a felony. It is, in other words, a "wobbler," and a trial court has substantial discretion to determine whether a conviction for such an offense should be treated as a felony or misdemeanor. (§ 17, subd. (b); see *People v. Superior Court (Alvarez)* 14 Cal.4th 968, 977-982, and *People v. Hawkins* (2002) 98 Cal.App.4th 1428,

1457.) Appellant claims that discretion was abused in this case by the trial court's denial of his oral motion, made at the sentencing hearing, to reduce the conviction to a misdemeanor. We disagree.

At the sentencing hearing, the court before which the case was tried (the Honorable Richard Arnason) had before it a thorough probation report regarding appellant. It noted, among other things, that appellant took no responsibility for anything that happened on the night in question, and claimed that he had been "victimized by the system." It also noted appellant's substantial past criminal record, including seven (7) prior convictions, in California, Nevada, Oregon and Alaska, starting in 1980, as well as a substantial history of drug abuse. Indeed, appellant was on probation for a misdemeanor drug violation on the night of the incident in question, and there was apparently also testimony, although not in front of the jury, that he had been using cocaine within 48 hours of the incident in question.

The trial court declined to grant the motion to reduce the offense to a misdemeanor, saying "that would be inappropriate." Immediately thereafter, it denied appellant probation because of his two prior convictions for assault, one in Oregon and one in Alaska. In the course of so doing, the court noted that appellant "clearly has an extensive criminal record."

Under the circumstances, we find no abuse of discretion in the trial court's refusal to reduce appellant's section 422 conviction to a misdemeanor.

IV. DISPOSITION

The judgment is reversed and remanded with directions. On remand, the trial court must conduct an in camera inspection of the appropriate personnel records of Sergeant Creekmore for relevance. If that inspection reveals no relevant information, the trial court must reinstate the judgment of conviction. If, however, the inspection reveals relevant information, the trial court must order disclosure of it to appellant's counsel, allow appellant an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability that the outcome of the trial would have been different had the relevant information been disclosed initially.

Haerle, J.

We concur:

Kline, P.J.

Lambden, J.