

8 of 100 DOCUMENTS

**THE PEOPLE, Plaintiff and Respondent, v. JULIO CESAR PEREZ, Defendant and Appellant.**

D045732

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,  
DIVISION ONE**

2005 Cal. App. Unpub. LEXIS 10750

November 22, 2005, Filed

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**PRIOR HISTORY:** APPEAL from a judgment of the Superior Court of Imperial County, Ct. No. CF12520. Matias R. Contreras, Judge.

**DISPOSITION:** Affirmed.

**CORE TERMS:** fuck, kill, discovery, fucking, defense counsel, personnel, in camera, confronted, defaming, evening, upset, jail, hit, credibility, omission, cross-examination, rookie, cop, continuous course of conduct, good cause, materiality, impeach, asking, kidnapping, girlfriend, sealed, afraid, inside, night, lived

**JUDGES:** NARES, Acting P. J.; McDONALD, J., O'ROURKE, J. concurred.

**OPINIONBY:** NARES.

**OPINION:**

A jury convicted Julio Cesar Perez of simple kidnapping (count 3-Pen. Code, n1 § 207, subd. (a)) and making a criminal threat (count 9-§ 422). The court sentenced him to five years eight months in prison.

n1 All further statutory references are to the Penal Code unless otherwise specified.

Perez appeals, asking this court to conduct an independent review of the transcripts of the court's in camera hearing on his *Pitchess* n2 motion to determine whether the court erred in refusing [\*2] to disclose any complaints made against three Calexico Police Department officers that might have had a bearing on the officers' credibility as witnesses during the trial. Perez also contends that (1) the court's refusal to permit him to impeach the kidnapping victim, Adalberto Sanchez, with an act constituting moral turpitude was prejudicial error requiring reversal of his kidnapping conviction (count 3), and (2) the court prejudicially erred by failing to sua sponte instruct the jury under CALJIC No. 17.01 that it must unanimously agree on the facts constituting the single offense in count 9 of voicing a criminal threat against Calexico Police Department Officer Julio Diaz.

n2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 113 Cal. Rptr. 897 (*Pitchess*).

We conclude, based upon an independent review of the in camera *Pitchess* motion record, that the court's ruling on that motion was not an abuse of its discretion. We also conclude that any error regarding Perez's [\*3] attempt to impeach Sanchez was harmless, and the court did not prejudicially err by failing to sua sponte instruct the jury under CALJIC No. 17.01 with respect to count 9. Accordingly, we affirm.

**FACTUAL BACKGROUND**

*A. The People's Case*

During the evening on August 28, 2003, as Sanchez was alone and driving his red Honda Civic down Kloke Avenue in Calexico, Imperial County, a red Lexus pulled

up next to Sanchez's car on the right side, and the passenger, Perez, signaled Sanchez to pull over. Sanchez knew Perez from junior high school. In Spanish, Perez told Sanchez to stop. Sanchez tried to "speed [his] way up" to a stop sign because he was frightened. When Sanchez stopped his car at the stop sign, the Lexus stopped next to him. Perez said in Spanish, "Don't be a coward or it's going to be worse." Sanchez sped away toward his home, hoping that Perez would get discouraged, but the Lexus followed him.

As Sanchez neared his home, he saw his girlfriend's car and kept driving because he did not want to put her at risk. At a stop sign at Grant and Adler, the Lexus again pulled up next to Sanchez's car. Perez was very upset and screamed at Sanchez [\*4] to stop. Perez exited the Lexus and got into the passenger side of Sanchez's car uninvited. Perez told Sanchez, "Go straight, faggot." The Lexus turned right on Grant, and Sanchez drove straight on Adler.

Perez then ordered Sanchez to drive to Perez's grandmother's house. As Sanchez approached the street where Perez's grandmother lived, Perez told him to turn right, but Sanchez kept going straight because he was afraid. Perez became very upset and yelled at Sanchez, "turn right, faggot."

Sanchez, who wanted to drive to his mother-in-law's house, tried to calm Perez down. Perez ordered Sanchez to turn left on Nosotros Street and go to "Traker's" house. Sanchez complied and felt comforted when he saw some people outside. Perez was very mad and immediately hit Sanchez in the mouth with his fist. Sanchez stopped the car, which infuriated Perez. Perez said, "Go, there's people." When Sanchez tried to get out of the car, Perez said, "Don't get out or I'll stab you." Perez put his hand inside his pocket, and Sanchez believed he had a knife.

When Sanchez started driving again, Perez kept yelling at him and then punched him a second time. Perez asked Sanchez whether he had any money. [\*5] Sanchez replied that he had none. Sanchez stopped the car at Traker's house. Fearing that Perez was going to pat him down, Sanchez reached into his pocket, took out approximately \$ 170 and gave it to Perez, who said he wanted \$ 500 by the next day. When Sanchez said "No," Perez became very angry and told Sanchez he was "going to be worth shit." Perez demanded Sanchez's telephone number and told him he was going to get a call. Sanchez gave him a fake number. Perez warned Sanchez not to call the police or the situation was going to "be worse" because he knew where Sanchez and his daughter lived. Sanchez was frightened and believed that Perez was threatening to kill him. Perez tried to slap Sanchez, but Sanchez leaned back and Perez did not hit him. Perez

got out of the car, slammed the door, and told Sanchez, "Manana, tomorrow, Joshua is going to call you."

Sanchez drove back home, using an indirect route because he did not know whether Perez knew where he lived. When Sanchez arrived home, he got out of the car and met Carlos Gutierrez, an acquaintance, who asked him what happened. Sanchez told him he had been robbed. Sanchez did not tell Carlos who had robbed him because he did not [\*6] want Carlos to get involved. Noticing that Sanchez's face was red and a bloodstain was on his shirt, Carlos allowed Sanchez to use his cell phone. Sanchez was too nervous to dial his girlfriend Erika's telephone number, so Carlos dialed it for him.

Erika arrived at Sanchez's house as he was washing blood from his mouth. Erika called the police. Later that same evening, Calexico Police Officer Luis Casillas was dispatched to Calexico Street where he interviewed Sanchez, who was in shock, in connection with a robbery. Officer Casillas observed that the right side of Sanchez's face was swollen, and the inside of his mouth appeared to be bleeding. After the interview, Officer Casillas advised the dispatcher that Perez was the robbery suspect.

Also that same evening, Officer Diaz and several other officers were dispatched to 901 Nosotros Street in Calexico in response to a call about an argument between two men. One of the officers knocked on the front door, and the owner, Francis Ozuna, answered the door. Ozuna gave them permission to enter. Officer Diaz and two other officers went to a locked bedroom. Officer Fernando Lara announced his presence, the door started to open from the [\*7] inside, and the officers pushed the door open and found Perez crouched behind the door. Another officer ran in and handcuffed Perez. When Officer Diaz asked him why he was on the floor, Perez said, "Fuck you, rookie cop, don't be asking me no questions. Just get the fuck out of my face before I kill you."

The officers arrested Perez and took him to the police station. In the booking area, Perez told Officer Diaz to get out of his face and to stay away from him or he would kill him.

At around 11:00 p.m. that night, Officer Diaz and another officer were ordered to transport Perez to the Imperial County Sheriff's Office to book him into custody. When the officers approached the holding cell, Perez told Officer Diaz not to come near him because he would "fucking kill" him. Officer Diaz did not respond, and the other officer handcuffed Perez.

In the booking processing area, Perez told Officer Diaz to watch out when he got out of jail, because Perez would "take care of business." Perez repeatedly said he would kill Officer Diaz and also stated, "Fucking rookie cop, why you keep looking at me? Don't be looking at

me." Officer Diaz asked Perez why he was so upset, and Perez replied, [\*8] "Fuck you, rookie cop, don't be talking to me. Don't be asking me no questions." After finishing the processing paperwork, Officer Diaz backed away from Perez. Perez then said, "Why the fuck you backing away from me? Are you fucking scared of me? You know I'll fucking fuck you up."

At trial, Officer Diaz explained that he had backed away from Perez because Perez was not handcuffed and was only wearing leg irons. Officer Diaz was afraid Perez would spit at him or try to attack him. Perez lunged at him, saying, "I'll fuck you up." Perez was very upset and aggressive, and his fists were clenched as if he wanted to hit Officer Diaz. Perez continued threatening Officer Diaz, saying he would "fuck [him] up" and would "snipe [Officer Diaz's] ass" when he got out of jail. Officer Diaz testified he believed Perez's statements meant that Perez would shoot him. Perez also told Officer Diaz that he knew where he and his girlfriend lived. Officer Diaz testified that Perez's repeated threats made him fear for his life, and he believed Perez could carry out those threats.

In August 2004 Officer Diaz interviewed Ema Silva, who lives on Nosotros Street, about an incident that she observed in [\*9] front of her house in late August 2003. Silva, who knew Sanchez's girlfriend Erika, told Officer Diaz that in the evening she saw a red compact car driven by Sanchez stop in front of her home. She also told Officer Diaz that she heard the passenger scream at Sanchez in Spanish, "Turn around, faggot! Go back the other way!" Silva also told Officer Diaz that she saw the passenger hit Sanchez several times.

#### B. *The Defense*

Perez's brother-in-law, Benito Valenzuela, claimed that Perez and Sanchez got along fine.

Perez's mother, Raquel Perez, testified that Officers Diaz and Lara drove by the house on several occasions and provoked and teased Perez by "throwing kisses" at his brother, Johnny, and making gang signs at him, and that the officers had shined lights at him and other family members.

Officer Casillas testified that on August 28, 2003, at around 7:20 p.m., he responded to a disturbance call regarding two people fighting in a car at 900 Nosotros Street. He left the scene at around 7:25 p.m. Other officers remained in the area for officer safety because the initial call had referred to Perez, who was a gang member known to carry weapons.

#### C. *The People's Rebuttal* [\*10]

Officers Diaz and Lara testified they never drove by Perez's home and threw kisses or made gang signs at members of the Perez family, and they never shined lights on anyone.

### DISCUSSION

#### I

#### *PITCHESS MOTION*

Perez asks this court to conduct an independent review of the sealed transcripts of the court's in camera hearing on his *Pitchess* motion to determine whether the court erred in refusing to disclose any complaints made against Officers Diaz, Lara or Casillas that might have had a bearing on the officers' credibility as witnesses during the trial.

#### A. *Background*

##### 1. *Pitchess Motion*

In his *Pitchess* motion, Perez sought numerous personnel record documents in the possession of the Calexico Police Department pertaining to Officers Diaz, Lara and Casillas. n3 Perez claimed that the supporting declaration of his counsel n4 "described many wrongs that the officers involved in the investigation . . . of this case have committed against [him], his brothers and other residents of the Calexico area."

n3 Perez's notice of motion stated in part: "The categories of files and records sought are: any and all records, documents, audiotapes, videotapes, photographs, writings in electronic media (i[.].e[.,] computer or e-mail), internal affairs memoranda and reports, transcripts, and any other evidence relating to the following: citizen complaints, counseling of the officers, disciplinary actions against the officers, use of excessive force, violations of persons' or suspects' constitutional rights, harassment by the officers, falsifying information, complaints that the officers have forced or attempted to force people to distort or falsify information accusing a suspect of a crime, and complaints by other law enforcement personnel or public officials against the officers."

[\*11]

n4 Jose C. Rojo.

In his supporting declaration, defense counsel stated, on information and belief, that (1) Officer Lara was a former gang member who had harassed Perez, his brothers, and other residents of Calexico; (2) Officer Lara and "his Officer partner" had made derogatory remarks to Perez and his brothers in "an attempt to provoke them"; (3) Officer Diaz had also repeatedly harassed Perez and his brothers, and, the day before Perez was arrested in this matter, Officer Diaz harassed Perez by detaining him, ordering him out of a car, searching his personal belongings, and "belittling" him before releasing him; (4) outside of a local bar, Officer Diaz was involved in a violent incident unrelated to his duties as a police officer; (5) Officer Casillas had previously stopped Perez, interviewed him and threatened him without provocation, and had been involved in harassing Perez's family; (6) the officers had attempted to induce and force people to testify against Perez and his brothers regarding crimes they had not committed and had made physical and verbal contact with Perez to provoke him; [\*12] (7) the officers failed to follow "proper investigatory procedures as dictated by the Calexico Police Department" while investigating crimes in which Perez was either the victim or the suspect; and (8) the information requested in the *Pitchess* motion was material and relevant to Perez's defense because it would "show the investigation of the present case [was] not motivated by legitimate law enforcement purposes and [would] undermine the credibility of the witnesses against [Perez] at trial."

## 2. The court's in camera review and rulings

The court conducted an in camera review of the personnel files of all three officers. The court found one citizen complaint against Officer Diaz, involving a claim of excessive force during a detention, to which the defense was entitled to discovery, and ordered that defense counsel be given the name, address and phone number of the complainant, as well as a copy of the complaint. The court indicated the file contained two counseling memos regarding Officer Diaz, but found they were not relevant to any issues in this case, and therefore the defense was not entitled to discovery of the memos.

The court also found one citizen complaint [\*13] against Officer Lara to which the defense was entitled to discovery, and the court ordered that defense counsel be given the name, address and phone number of the complainant.

With respect to Officer Casillas, the court found no complaint, no "write-ups," "absolutely nothing" in his file that would be relevant to any of the issues raised by the defense.

## B. Applicable Legal Principles and Standard of Review

Section 832.7, subdivision (a) provides in part: "Peace officer . . . personnel records and records maintained by any state or local agency pursuant to [Penal Code] Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code."

Evidence Code sections 1043 and 1045 prescribe the procedures for discovery and require the moving party to file a written motion that includes an affidavit showing "good cause" for the disclosure sought and the "materiality [of the records] to the subject matter involved in the pending litigation. [\*14] " (Evid. Code, § 1043, subd. (b)(3).) These statutes were enacted to codify the California Supreme Court decision in *Pitchess, supra*, 11 Cal. 3d 531, which permitted discovery of police officer files on a proper showing of materiality, relevance and necessity, and to curtail record shredding and discovery abuses that allegedly occurred in the wake of the *Pitchess* decision. (See *City of Los Angeles v. Superior Court* (2003) 111 Cal.App.4th 883, 889.)

The *Pitchess* statutory scheme recognizes that evidence contained in a law enforcement officer's personnel file may be relevant in a lawsuit, but that the officer "has a strong privacy interest in his or her personnel records and that such records should not be disclosed unnecessarily." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1227.) To balance these competing interests, the Legislature "required the intervention of a neutral trial judge, who examines the personnel records in camera . . . and orders disclosed to the defendant only those records that are found both relevant and otherwise in compliance with statutory limitations. In this manner, the Legislature [\*15] has attempted to protect [a party's] right to a fair trial and the officer's interest in privacy to the fullest extent possible." (*Ibid.*; *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53.)

Under the statutory scheme, a party seeking discovery of a peace officer's personnel records must follow a two-step process. (*People v. Mooc, supra*, 26 Cal.4th at p. 1226.) First, the party must file a written motion describing the type of records sought, supported by "affidavits showing good cause for the discovery . . . , setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records." (*Ibid.*, quoting Evid. Code, § 1043, subd. (b)(3).) In this regard, the declaration must establish a "specific factual scenario" establishing a "plausible factual foundation" for the allegations of police misconduct. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85-86, 260 Cal. Rptr. 520 (*City of Santa Cruz*).)

Under the statutory scheme, the standards [\*16] for a showing of good cause are "relatively relaxed." (*City of Santa Cruz, supra*, 49 Cal.3d at p. 84.) Information is material if it "will facilitate the ascertainment of the facts and a fair trial." [Citation.] (*Ibid.*; see *Brant v. Superior Court* (2003) 108 Cal.App.4th 100, 106.) "[A] declaration by counsel on information and belief is sufficient to state facts to satisfy the 'materiality' component of [Evidence Code section 1043]." (*Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 51.)

Second, if "the trial court concludes the defendant has fulfilled these prerequisites and made a showing of good cause, the custodian of records should bring to court all documents 'potentially relevant' to the defendant's motion. [Citation.] The trial court 'shall examine the information in chambers' (Evid. Code, § 1045, subd. (b)), 'out of the presence and hearing of all persons except the person authorized [to possess the records] and such other persons [the custodian of records] is willing to have present' [citation]. Subject to statutory exceptions and limitations . . . [\*17] . . . the trial court should then disclose to the defendant 'such information [as] is relevant to the subject matter involved in the pending litigation.' [Citation.]" (*People v. Mooc, supra*, 26 Cal.4th at p. 1226; Evid. Code, § 1045, subd. (a).)

A *Pitchess* motion for discovery of peace officer personnel records is "addressed solely to the sound discretion of the trial court, which has inherent power to order discovery when the interests of justice so demand." (*Pitchess, supra*, 11 Cal.3d at p. 535.) "A review of the lower court's ruling is subject to an abuse of discretion standard. [Citations.]" (*City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1145.) "The term judicial discretion 'implies absence of arbitrary determination, capricious disposition or whimsical thinking.' [Citation.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72, 120 Cal. Rptr. 577.) "Discretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered." (*Ibid.*)

### C. Analysis

We have reviewed the sealed reporter's transcript of the in camera [\*18] hearing on Perez's *Pitchess* motion regarding the personnel files of Officers Diaz, Lara and Casillas. During that hearing, as reflected in the sealed transcript, the trial court gave a reasonably detailed description of each document it reviewed within the personnel files. Its delineation of the documents as reflected in the sealed transcript is sufficient to permit appellate review of its rulings. We conclude the trial court properly exercised its discretion in determining that no other documents or information contained in the personnel files should be disclosed to the defense in this matter.

## II

### EXCLUSION OF PURPORTED IMPEACHMENT EVIDENCE

Perez contends his kidnapping conviction should be reversed because the court prejudicially erred by refusing to permit him to impeach Sanchez (the kidnapping victim in this case) during cross-examination with evidence of an act that Perez claims constituted insurance fraud and moral turpitude that would have undermined Sanchez's credibility. Asserting that Sanchez's credibility was the "central issue" concerning the kidnapping offense alleged in count 3, Perez suggests that the court's exclusion of the impeachment evidence violated [\*19] his constitutional rights, including his rights under the confrontation clause of the Sixth Amendment to the United States Constitution. Perez also maintains that "while neutral witnesses witnessed the activity in the car (i.e., a fight, yelling), it was entirely ambiguous as to its cause and what it represented. Put another way, was it [Perez] forcefully ordering Sanchez to drive him around the area (kidnapping) or was it Sanchez giving [Perez] a ride as [Perez] berated him for spreading lies about [Perez] in Mexico[?]" For reasons we shall explain, we conclude any such evidentiary error was not prejudicial.

#### A. Background

During cross-examination, defense counsel asked Sanchez: "At some point you told friends that you were going to get your car stolen so you can get paid by the insurance company?" The prosecutor objected, arguing the question was beyond the scope of direct examination and irrelevant. The court sustained the objection and admonished the jury to disregard the question.

Defense counsel then told the court, "Your Honor, I believe I have the right to impeach this witness with acts of dishonesty and acts of falsehood, and I do have grounds to ask that [\*20] question." Noting that defense counsel had "made the record," the court reiterated its ruling sustaining the objection.

#### B. Applicable Legal Principles

A trial court "retains discretion to admit or exclude evidence offered for impeachment." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9, citing Evid. Code, § 352 n5 & *People v. Douglas* (1990) 50 Cal.3d 468, 509, 268 Cal. Rptr. 126.)

n5 Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) ne-

cessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' The right of confrontation, which is secured for defendants [\*21] in state as well as federal criminal proceedings, [citation], 'means more than being allowed to confront the witness physically.' [Citation.] Indeed, 'the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'" [Citation.] (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678, 89 L. Ed. 2d 674 (*Van Arsdall*)).

Constitutional error in denying a criminal defendant's right to cross-examine an adverse witness under the confrontation clause of the Sixth Amendment "does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." (*Van Arsdall, supra*, 475 U.S. at p. 682.) Confrontation clause errors are reviewed under the harmless error standard announced in *Chapman v. California* (1967) 386 U.S. 18, 24, 17 L. Ed. 2d 705. (*Van Arsdall, supra*, 475 U.S. at pp. 680, 684.) In *Van Arsdall*, the United States Supreme Court explained that in *Chapman* it "rejected the argument that all federal constitutional errors, regardless of their nature or the circumstances of the case, require reversal of a judgment of [\*22] conviction. The Court reasoned that in the context of a particular case, certain constitutional errors, no less than other errors, may have been 'harmless' in terms of their effect on the factfinding process at trial. Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. [Citations.]" (*Van Arsdall, supra*, 475 U.S. at p. 681.)

### C. Analysis

We shall assume, without deciding, that the court erred by refusing to allow defense counsel to question Sanchez about, and introduce impeachment evidence of, an alleged act by Sanchez that Perez claims involved moral turpitude. The question we must decide is whether any such error was prejudicial.

The record shows that during an extensive cross-examination of Sanchez, defense counsel adequately placed before the jury the question of Sanchez's veracity by repeatedly questioning him about whether he had "spread lies" about Perez, thereby defaming him, in Mexico. In response, Sanchez testified: "Yes, he mentioned

something [\*23] like that." The following exchange then took place between Perez's counsel and Sanchez:

"[Defense counsel:] He confronted you because you had been defaming his name in Mexicali?"

"[Sanchez:] I think that's what he was claiming.

"[Defense counsel:] And you told him, "Yes, I have.

"[Sanchez:] No.

"[Defense counsel:] Well, you noted that he was very upset with you?"

"[Sanchez:] Yes.

"[Defense counsel:] And you knew that it was because the name had been defamed in Mexicali?"

"[Sanchez:] Yes. According to him, yes."

Later during the cross-examination, defense counsel again attacked Sanchez's veracity by suggesting that Perez entered Sanchez's car with Sanchez's consent for the purpose of confronting Sanchez about Sanchez's defaming of Perez in Mexicali:

"[Defense counsel:] "[Perez] asked you for a ride two blocks away, right?"

"[Sanchez:] He didn't ask me for a ride.

"[Defense counsel:] Well, he told you he wanted to talk to you?"

"[Sanchez:] Yes.

"[Defense counsel:] He wanted to talk to you about your defaming his name in Mexicali?"

"[Sanchez:] He didn't say that.

"[Defense counsel:] Yesterday you told us that he did, sir, remember [\*24] that?"

"[Sanchez:] Yes, once he was in the car. But he didn't tell me, 'Pull over, I want to talk about you defaming my name.'

"[Defense counsel:] And you were afraid of Mr. Perez because he confronted you with something you had done in Mexicali?"

"[Sanchez:] No, he never confronted me.

"[Defense counsel:] You were afraid because you knew you had done something wrong in Mexicali about Mr. Perez' name?

"[Sanchez:] No.

"[Defense counsel:] Well, you knew if you had done something wrong he was going to confront you with it, right?

"[Sanchez:] He-I knew that he believed something that wasn't true, and he was mad at me for something I didn't do.

"[Defense counsel:] And he confronted you with that, right?

"[Sanchez:] Before that incident.

"[Defense counsel:] Well, he confronted you at that time with that?

"[Sanchez:] At the time he was inside my car, yes. It was the first time he actually confronted me personally about -- about that defaming thing.

"[Defense counsel:] And you told Mr. Perez that you, in fact, went into Mexicali and that you were sorry that you had done it?

"[Sanchez:] No.

"[Defense counsel:] Well, sir, you knew that Mr. Perez knew you [\*25] had been defaming his name?

"[Sanchez:] He believed that, yes.

"[Defense counsel:] And you knew that he was in your car confronting you with that?

"[Sanchez:] At the moment, no.

"[Defense counsel:] Well, he told you, didn't he?

"[Sanchez:] Once he was in the car.

"[Defense counsel:] Okay. And then the fight ensued, right?

"[Sanchez:] It wasn't a fight.

"[Defense counsel:] Well, he hit you, right?

"[Sanchez:] Yes.

"[Defense counsel:] But you also hit him back?

"[Sanchez:] No."

The foregoing record shows that the defense in this matter effectively placed before the jury the issue of Sanchez's veracity by repeatedly questioning him about whether he had told lies about Perez in Mexico. With respect to the kidnapping charge, however, the jury found that Sanchez was a credible witness, and overwhelming evidence supports Perez's conviction of that offense. We conclude that any error by the court in refusing to allow defense counsel to question Sanchez about the alleged insurance fraud was harmless beyond a reasonable doubt.

### III

#### *INSTRUCTIONAL ERROR*

Perez also contends the court prejudicially erred by failing to sua sponte instruct the jury [\*26] under CALJIC No. 17.01 n6 that it must unanimously agree on the facts constituting the single offense in count 9 of making a criminal threat against Officer Diaz. We reject this contention.

n6 CALJIC No. 17.01 provides: " The defendant is accused of having committed the crime of \_\_\_\_\_ [in Count \_\_\_\_\_]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count \_\_\_\_\_] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count \_\_\_\_\_], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

#### *A. Applicable [\*27] Legal Principles*

The principles governing a trial court's duty to instruct a jury sua sponte were explained in *People v. Eilers* (1991) 231 Cal. App. 3d 288, 292, 282 Cal. Rptr. 252: "'The trial court functions . . . as the jury's guide to the law. This role requires that the court fully instruct the jury on the law applicable to each particular case.' [Citation.] 'It is settled that in criminal cases, even in the ab-

sence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence.' [Citation.]"

"The requirement of jury unanimity in criminal cases is of constitutional origin." (*People v. Mickle* (1991) 54 Cal.3d 140, 178, 284 Cal. Rptr. 511, citing Cal. Const., art. I, § 16 & *People v. Jones* (1990) 51 Cal.3d 294, 321, 270 Cal. Rptr. 611.) As this court explained in *People v. Muniz* (1989) 213 Cal. App. 3d 1508, 1517, 262 Cal. Rptr. 743, "it is well established that the entire jury must agree upon the commission of the same act in order to convict a defendant of the charged offense. [Citation.]" In *Muniz*, we further explained that "it also is [\*28] well established that a trial court is not obligated to give an instruction-either requested or sua sponte-if the evidence presented at trial is such as to preclude a reasonable jury from finding the instruction is applicable. [Citation.]" "A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged." [Citation.] In other words, 'if under the evidence presented such disagreement is not reasonably possible, the instruction is unnecessary.' [Citations.]" (*Id.* at pp. 1517-1518.)

"When the evidence tends to show a larger number of distinct violations of the charged crime than have been charged and the prosecution has not elected a specific criminal act or event upon which it will rely for each allegation, the court must instruct the jury on the need for unanimous agreement on the distinct criminal act or event supporting each charge. [Citations.]" (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309 (*Avina*).

"Neither instruction nor election are required, however, if the case falls within the *continuous course of conduct exception*. This exception [\*29] arises in two contexts. The first is when the acts are *so closely connected that they form part of one and the same transaction*, and thus one offense. [Citation.] The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]" (*Avina, supra*, 14 Cal.App.4th at p. 1309, italics added.)

#### B. Analysis

Perez claims that although he was charged with only one count of making a criminal threat against Officer Diaz, at trial "the People presented multiple factual predicates, any one of which, if believed to have occurred and [if it] met the elements of the crime, could have constituted the charged crime in count [9]." However, he acknowledges that Officer Diaz's testimony showed at least seven such "factual predicates," as follows: (1) at the time of his arrest in the bedroom during

the evening of August 28, 2003, Perez told Officer Diaz, "Fuck you rookie cop, don't be asking me no questions. Just get the fuck out of my face before I kill you"; (2) later that same evening, in the booking area of the police station, Perez told Officer Diaz to get out of his face and to stay away [\*30] from him or he would "fucking kill" him; (3) at around 11:00 p.m. that night, when Officer Diaz approached the holding cell after he was ordered to transport Perez to the Imperial County Sheriff's Department jail facility, Perez told Officer Diaz not to come near him or he would "fucking kill" him; (4) that same night, as he was being processed at the sally port at the jail, Perez again told Officer Diaz not to get close to him or he would "fucking kill" him, and warned Officer Diaz to watch out when he (Perez) got out of jail because he promised he would "take care of business"; (5) soon thereafter, Perez Perez swore "on [his] father" who had "passed away," and "on [his] mother," that he would kill Officer Diaz, and then stated, "Fucking rookie cop, why you keep looking at me? Don't be looking at me"; (6) moments later, when Officer Diaz backed away from Perez after processing him, Perez told Officer Diaz, "Why the fuck you backing away from me? Are you fucking scared of me? You know I'll fucking fuck you up"; and (7) Perez, who was very upset and aggressive, then lunged at Officer Diaz with clenched fists, saying "I'll fuck you up" and threatening to "snipe" Officer Diaz's "ass" [\*31] (i.e., shoot him) when he got out of jail.

Perez's assertion that the continuous course of conduct exception (discussed, *ante*) does not apply because "the alleged facts occurred at different times, in different locations" is unavailing. The foregoing record shows that Perez made all of his threats to kill Officer Diaz during the course of a few hours the same night he was arrested, transported to jail, and booked. We conclude that Perez's repeated threats to kill Officer Diaz were so closely connected that they formed part of one and the same transaction, the continuous course of conduct exception thus applies, and the court did not err by refusing to sua sponte give the unanimity jury instruction set forth in CALJIC No. 17.01. (*Avina, supra*, 14 Cal.App.4th at p. 1309.)

#### DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.

