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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. ROCKY CROWL, Defendant and Appellant.	A127221 (Humboldt County Super. Ct. No. CR093710)

The People appeal after the trial court granted the motion of Rocky Crowl (defendant) to dismiss the information on the ground that the prosecution violated his constitutional right to compulsory process by intimidating defense witnesses. On appeal, the People contend the prosecution did not violate defendant's right to compulsory process by charging two defense witnesses with having committed perjury at defendant's preliminary hearing. We shall affirm the trial court's order dismissing the information.

PROCEDURAL BACKGROUND

Defendant was charged by information with driving under the influence of alcohol or drugs (Veh. Code, § 23152, subd. (a)—count one); driving with a blood alcohol level of .08 or more (Veh. Code, § 23152, subd. (a)—count two), with the further allegation that his blood alcohol level exceeded .15 percent (Veh. Code, § 23578); and driving on a suspended or revoked license (Veh. Code, § 14601.2, subd. (a)—count three). It was further alleged as to counts one and two that defendant had committed an alcohol-related driving offense within the past 10 years (Veh. Code, § 23550), and as to count three that

defendant had suffered a prior conviction for driving with a suspended or revoked license (Veh. Code, § 14601.5, subd. (a)).

Defendant filed a motion to dismiss the information on the ground that the prosecutor had committed misconduct by dissuading defense witnesses from testifying. Following a hearing, on October 26, 2009, the trial court granted the motion and dismissed the information.

On December 22, 2009, the People filed a notice of appeal.

FACTUAL BACKGROUND

Charged Offenses[1]

Ferndale Police Officer Jason Hynes testified that, on June 16, 2009, at around 4:35 p.m., he saw a small, white car stall near the intersection of Main Street and Shaw Avenue in Ferndale; he was about 80 feet away from the stalled vehicle. The car, which was missing its front and rear windshields as well as its side rear windows, was splattered with blue paint, and had a hood that was about to fall off, started up again and passed within about 20 feet of where he stood. He saw three occupants inside the car. The driver had short dark hair and dark facial hair. The male passenger in the front seat was lighter skinned and had short light hair and facial hair. The female in the right rear passenger seat had dirty blond or light brown hair. The car was driving at the speed limit and was not swerving, but the absence of a windshield drew his attention.

Hynes saw the vehicle turn into a city parking lot. He wanted to investigate, so he went back to the Ferndale Police Department to get another officer to accompany him. About five minutes later, Hynes drove to the parking lot with Officer Frank. He saw the car, but there was no one inside. The officers started to look for the three people he had seen in the car and, about two minutes later, he saw them come around a corner. He recognized the man he had seen driving the car; he later identified the man as defendant.

[1] These facts are taken from the testimony presented at the preliminary hearing, held on August 12, 2009.

Defendant briefly ducked into a causeway, and then came back out.[2] After contacting defendant, Hynes observed signs that he was intoxicated, including a stalling walk, the smell of alcohol, red and watery eyes, and slurred speech.

While Hynes was talking to defendant, the other two people, defendant's girlfriend, Jessica Sneed, and his cousin, Christopher Crowl (Christopher), were five or more feet away. They did not appear to be under the influence of alcohol or drugs. Hynes said he had seen defendant driving, and defendant stated that he had been driving. Defendant said he came to Ferndale to buy cigarettes and told Hynes that he had drunk five beers earlier in the day. Sneed said defendant had consumed about four beers. At some point, Christopher asked, "What if I was driving?"

Hynes then conducted several field sobriety tests on defendant, which demonstrated a high level of intoxication. Defendant refused to take a final "walk and turn" test, telling Hynes to take him to jail. Hynes then arrested defendant. After Hynes placed defendant in the patrol car, defendant became combative; he yelled, swore, and banged his head on the rear seat. Once at the police station, defendant was a bit calmer, but still exploded at times. He told Hynes that "he would not stop. He would continue to drink and drive." A breathalyzer ("EPAS") test administered at the police station registered a blood-alcohol level of .245 percent.

Hynes acknowledged that both at the time of the incident and at the hearing, Christopher's hair and facial hair lengths were similar to defendant's hair and facial hair lengths. He also acknowledged that the two men were roughly similar in build.

Christopher testified that defendant is his cousin. On the day that defendant was arrested, Christopher, defendant, and defendant's girlfriend had driven from a friend's house in Loleta to Ferndale in a little white Geo automobile that they had borrowed from another cousin. Christopher drove the car from Loleta to Ferndale and into the city parking lot. The three of them then went into a liquor store. When they came back

[2] Hynes later found a six- or twelve-pack of beer and a pack of cigarettes in the causeway.

outside, a police officer made contact with them and began to question defendant. During that conversation, Christopher told the officer that he had been driving the car. The officer said to "shut up, I was lying and I wasn't drunk. Shut up and stay out of it."

Christopher testified that his and defendant's hair and beard lengths were pretty similar and that they are about the same height; defendant is a couple of years older than Christopher. He described defendant's hair color as "blondish brown" or "light brown," and his own hair color as "dark blond."

On cross-examination, Christopher acknowledged that he knew that defendant had some prior DUI convictions. He thought defendant had drunk a beer or two that day and was "[m]aybe a little buzzed."

Jessica Sneed testified that defendant had been her boyfriend for about six years. On June 16, 2009, she had been with defendant the whole day. While traveling in the white Geo to the parking lot in Ferndale, she was sitting in the back seat, Christopher was driving, and defendant was in the passenger seat. After being contacted by Hynes, "[w]e tried to tell him that Chris was driving and he didn't really want to listen to us. He wanted to start doing tests on [defendant]."

Sneed further testified that defendant and Christopher have "[k]ind of" similar appearances, although Christopher's hair is more a "reddish, dirty blond."

At the conclusion of the preliminary hearing, the trial court concluded: "In this matter for the purpose of preliminary hearing, there's a different burden of proof, of course, as compared to jury trial. I think there's going to be a problem with this case under the burden of reasonable doubt. However, for the purposes of preliminary hearing, there is sufficient evidence to hold the defendant to answer . . . ."

Hearing and Ruling on the Motion to Dismiss

On October 23, 2009, the trial court conducted a hearing on defendant's motion to dismiss the information. The court considered a recorded statement made by defendant after his arrest and while he was being transported to the police station. In the recording, defendant commented to the arresting officers, "I already know I was breaking the law. [¶] . . . [¶] Fucking ten DUI's. I'm going to hell. . . . Yeah, I know I shouldn't be

driving." Later, he said, "I don't know what's going on. . . ." Still later, he said, Well, . . . this is my fifth DUI. . . . Only I was coming down just for a fucking cigarette. Oh that's why I'm so pissed. I wanted a fucking cigarette. [¶]. . . [¶] Fucking cigarette. Oh I hate you guys. I hate all people. I can't believe this — for a fucking cigarette. . . . Oh well. I'll do the charges. . . . What the fuck was I thinking. I knew I was taking a chance. Not like this. 'Cause I gotta go to jail." Defendant then said his girlfriend didn't have a driver's license, and also said, "The only reason I was driving is because I know how to drive and she doesn't." He also said, "I shouldn't have been driving without a license." Finally, he said, "Fucking dumb ass. . . . fucking cigarette. . . . My fucking fifth DUI."

The court took judicial notice of the files in the perjury cases against Sneed and Christopher. On September 4, 2009, Humboldt County District Attorney's Office Investigator Wayne Cox had obtained felony arrest warrants for Sneed and Christopher based on their allegedly perjured testimony—that Christopher, not defendant, was driving on June 16, 2009—at defendant's preliminary hearing.

Sneed was arrested on September 4, 2009. After advising her of her *Miranda*[3] rights, Cox interviewed Sneed, who initially "maintained her story that Christopher Crowl, not Rocky Crowl, was the driver of the vehicle." After being cautioned against the repercussions of lying again, Sneed "began crying and hyperventilating." She eventually admitted that defendant had been driving and that Christopher had asked her to testify that Christopher was driving. She had agreed to do so because defendant " 'doesn't need a DUI.' "

Christopher was arrested on September 7, 2009. On the morning of September 8, Investigator Cox advised Christopher of his *Miranda* rights and then interviewed him. After Cox said that Sneed had told him the truth and implied that Christopher would go to prison if he continued to claim that he was driving, Christopher said that defendant had been driving earlier, but that he, Christopher, was driving when they pulled into the parking lot behind the liquor store. Because he did not want to go to prison for four

[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

years, Christopher eventually admitted that defendant was driving. He said that he had claimed to be driving because it would be defendant's fifth DUI and he did not want him to have to go to prison. He also said that he, defendant, and Sneed had decided together that Christopher and Sneed would testify that Christopher was driving.

On September 8, 2009, criminal complaints were filed against Sneed and Christopher charging each of them with perjury (Pen. Code, § 118) and being an accessory to a felony (Pen. Code, § 32).

The court also considered at the hearing a series of e-mails between Deputy District Attorney Ben McLaughlin and the office of Sneed's counsel, over the course of which the Deputy District Attorney insisted that Sneed not plead no contest, but that she plead guilty "under oath," "with a statement saying that she agreed to say [Christopher] was driving and that her statement to Wayne Cox was true and correct to the best of her recollection. . . . Memories can differ, but it needs to be clear that [defendant] was driving." When Sneed's attorney objected to a guilty plea "under oath," the Deputy District Attorney copied Sneeds's counsel on an e-mail in which he wrote that the plea offer would likely be withdrawn due to Sneed's rejection of the offer by refusing to plead guilty under oath.

Both Christopher and Sneed were called to testify at the October 23, 2009 hearing on defendant's motion to dismiss and both asserted their Fifth Amendment right not to testify when asked about the incident that took place on June 16, 2009.

Also at the October 23 hearing, defendant's father, Gary Crowl, testified that he drove Christopher and Sneed to defendant's preliminary hearing. They all rode together in the cab of his pickup truck, and he did not hear Christopher and Sneed discuss a plan to lie at the preliminary hearing about who was driving on June 16.

On October 26, 2009, the trial court granted defendant's motion to dismiss. In explaining its ruling, the court found the following facts: Between the August 12, 2009 preliminary hearing and September 4, someone in the prosecutor's office listened to the tape of defendant and the arresting officers and formed an opinion that Sneed and Christopher committed perjury at the preliminary hearing. On September 4, the

prosecutor obtained arrest warrants for Sneed and Christopher. At Investigator Cox's request, Sneed was arrested at about 12:45 p.m. on September 4, and was interviewed by Cox at the jail 45 minutes later, at about 1:30 p.m. The court found that Cox "basically told [Sneed] that she was lying, that she had committed perjury, and that the D.A.'s Office would be able to prove that she had committed perjury, and that the punishment for that was two years, three years, or four years in prison. Miss Sneed was extremely reluctant to change her story, but Investigator Cox was very insistent. He wouldn't give up. And he tried, basically, everything he could, all of his tactics to get her to change." Even after Sneed hyperventilated, "Cox went ahead with his insistent questioning" until Sneed admitted she had lied at the preliminary hearing. The court also noted that because she was arrested on the Friday of a three-day weekend, Sneed necessarily remained in jail over the long weekend.

With respect to Christopher, the court noted that he was arrested on Labor Day and interviewed by Cox the next morning at 7:00 a.m., which was "extremely unusual." Cox used the same techniques and asked the same kinds of questions as he did with Sneed and, again, Christopher "was extremely steadfast in his position, reluctant to change. And after Investigator Cox tried, basically, in my opinion, everything he could think of, he finally got . . . the witness to agree that . . . his testimony had not been true."[4]

The court observed how unusual prosecution's conduct was in arresting and questioning Sneed and Christopher for a nonviolent offense. As the court stated: "It is so out of the ordinary. [Cox] wanted to—I think twofold, he wanted to convict the defendant here, Mr. Rocky Crowl, of felony driving under the influence, and he wanted to convict the two witnesses of perjury. And he went to extraordinary lengths—you know—as you compare what's normally done with what was done in this case." The

[4] For example, in his questioning of both witnesses, Cox falsely told Sneed and hinted to Christopher that the car, with defendant driving, had been captured on videotape by a surveillance camera. He also told them that they could mitigate how much trouble they were in by admitting that defendant was driving.

court had never seen a so-called *Ramey*[5] warrant used in "this kind of a case . . . where there's nothing that critical timewise." In addition, other than in welfare fraud cases, the court had seen a perjury charge only once in 12 years on the bench, and that was in a murder case where the prosecutor believed a witness lied in court after agreeing to testify truthfully in exchange for a plea agreement in another case.

The court continued: "Clearly, someone in the District Attorney's Office was very upset at the witnesses for what they believed was perjury, and they were worried that this felony D.U.I. . . . they were afraid this person would walk." The court believed this fear was based on the prosecution's knowledge that (1) defendant likely would not testify at trial so that his incriminating statement would not be admissible (assuming the entire recording did not violate *Miranda*), (2) these two witnesses would be the only defense witnesses, and (3) the magistrate at the preliminary hearing had questioned whether there would be enough evidence to convict defendant. The court further stated that the prosecutor's office knew there were potential problems with the case because of the "ballpark" resemblance between defendant and Christopher. "And so I think somebody realized this case is in trouble."[6]

The court then observed that the "net result" of the prosecution's actions was that Sneed and Christopher would "take the Fifth" at defendant's trial both because of the

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[5] *People v. Ramey* (1976) 16 Cal.3d 263; now codified at Penal Code section 817. When there is probable cause to arrest an individual, police may obtain a *Ramey* warrant to arrest that person in his or her home before criminal charges are filed. (See, e.g., (*Goodwin v. Superior Court* (2001) 90 Cal.App.4th 215, 218.) As the trial court noted, such a procedure is used infrequently, primarily in situations in which it is critical to arrest a suspect immediately.

[6] Deputy District Attorney Ben McLaughlin, who appeared on behalf of the District Attorney's Office at the hearing on the motion to dismiss, stated at the hearing and in his written opposition to the motion that, following the preliminary hearing, Deputy District Attorney Randy Mailman listened to the recording of defendant's statements to the arresting officers, and "acted within her purview as a deputy district attorney to have charges investigated that she thought were sustainable. She received information pursuant to the investigation. The D.A.'s Office acted on that information."

pending perjury and accessory after the fact charges and "also, because it doesn't take a mental genius to realize that if they testified at trial the same way they did at the preliminary hearing they're gonna be charged additionally with perjury," given that Cox "had already told them that they're guilty" and "that it could be proved that they were lying." The court concluded, after reviewing all of the facts, that defendant's due process rights were violated.

In terms of a remedy, the court asked whether the People were willing to allow the witnesses' preliminary hearing testimony to be used at trial, and Deputy District Attorney Ben McLaughlin said no. The court therefore dismissed the charges in this case as well as in pending probation violation matters.[7]

DISCUSSION

I. *Violation of Defendant's Right to Compulsory Process*

The People contend the trial court improperly found that the prosecution violated defendant's constitutional right to compulsory process by charging Christopher Crowl and Jessica Sneed with having committed perjury at defendant's preliminary hearing.

"The right of an accused to compel witnesses to come into court and give evidence in the accused's defense is a fundamental one." (*People v. Jacinto* (2010) 49 Cal.4th 263, 268 (*Jacinto*).) The Sixth Amendment provides that " '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . .' This constitutional guarantee, generally termed the compulsory process clause, applies in both federal and state trials. [Citation.]" (*Ibid.*, quoting *Washington v. Texas* (1967) 388 U.S. 14, 15, fn. 1.) "Article I, section 15 of the California Constitution similarly guarantees as a matter of state constitutional law that

[7] In ruling that dismissal of the charges was necessary, the court stated that it did not like this result because, if defendant had in fact been driving while under the influence, he should be punished for it. It also commented: "And it's also the case that the witnesses here that we're talking about very well may have committed perjury. There's evidence to suggest that that's true. And what's gonna happen in those cases, I don't know. But the situation is that the law has to apply equally no matter what kind of a case it is. . . ."

'[t]he defendant in a criminal cause has the right . . . to compel attendance of witnesses in the defendant's behalf. . . .' [The California Supreme Court], as the final arbiter of the meaning of the California Constitution, has likewise found the state constitutional right to compel the attendance of witnesses a basic component of a fair trial. [Citations.]" (*Jacinto*, at p. 269.)

As our Supreme Court has explained, "[a] criminal defendant's rights under the compulsory process clause can be infringed in several ways. 'They include, for example, statements to defense witnesses to the effect that they would be prosecuted for any crimes they reveal or commit in the course of their testimony. [Citations.] They also include statements to defense witnesses warning they would suffer untoward consequences in other cases if they were to testify on behalf of the defense. [Citations.] Finally, they include arresting a defense witness before he or other defense witnesses have given their testimony.' [Citation.]" (*Jacinto*, *supra*, 49 Cal.4th at p. 269, quoting *In re Martin* (1987) 44 Cal.3d 1, 30-31 (*Martin*); accord, *People v. Bryant* (1984) 157 Cal.App.3d 582, 590.)

To prevail on a claim of interference with the right to present witnesses under the compulsory process clause, a defendant must establish three elements. "First, he must demonstrate prosecutorial misconduct, i.e., conduct that was 'entirely unnecessary to the proper performance of the prosecutor's duties and was of such a nature as to transform a defense witness willing to testify into one unwilling to testify.' [Citations.] [¶] Second, he must 'establish interference, that is, a causal link between the prosecutorial misconduct and the defendant's inability to present the witness.' [Citations.] In this regard, the [defendant] is 'not required to prove that the conduct under challenge was the "direct or exclusive" cause. [Citations.] Rather, he need only show that the conduct was a substantial cause. [Citations.] The misconduct in question may be deemed a substantial cause when, for example, it carries significant coercive force [citation] and is soon followed by the witness's refusal to testify [citation].' [Citation.]" (*In re Williams* (1994) 7 Cal.4th 572, 603 (*Williams*), quoting, *inter alia*, *Martin*, *supra*, 44 Cal.3d at p. 31; accord, *Jacinto*, *supra*, 49 Cal.4th at pp. 269-270.) " 'Finally, the defendant must

show the testimony he was unable to present was material to his defense.' [Citations.]" (*Jacinto*, at p. 270.)[8]

In the present case, the People primarily address the first element—prosecutorial misconduct—in arguing that defendant's due process right to compulsory process was not violated, but briefly argue, in addition, that defendant was not deprived of the opportunity to present meaningful evidence.[9]

A. *Prosecutorial Misconduct*

According to the People, "courts do not find misconduct because a prosecutor charged a witness with perjury *after* the witness has committed that offense. Such action differs materially from a prosecutor's threats to a witness about anticipated testimony. It is entirely *within* the proper performance of a prosecutor's duties to investigate and charge a completed crime." Thus, they continue, the arrest, interrogation, and filing of charges against the two witnesses in this case amounted to conduct that was not " 'entirely unnecessary to the proper performance of the prosecutor's duties' " (*Williams supra*, 7 Cal.4th at p. 603) and, therefore, the trial court's finding of prosecutorial misconduct cannot be sustained.

In support of this argument, the People rely on *Williams*, *supra*, 7 Cal.4th 572 and *Jacinto*, *supra*, 49 Cal.4th 263. In *Williams*, our Supreme Court held, in habeas corpus proceedings, that the prosecution did not interfere with the petitioner's right to present witnesses when it, *inter alia*, (1) indicted and arrested one defense witness for perjury in

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[8] The parties seem uncertain about the applicable standard of review for a claim alleging violation of the right to compulsory process. While the cases generally do not explicitly discuss the standard of review, most appear to be applying the substantial evidence standard. (See, e.g., *People v. Stewart* (2004) 33 Cal.4th 425, 472 ["We find the trial court's conclusions adequately supported by the record"].) We adhere to that approach in this opinion, although we also conclude that the result would be the same utilizing either the substantial evidence or abuse of discretion standard of review.

[9] The People do not argue that the causation element was not satisfied in this case, and we agree with their implicit admission that the causation element was in fact satisfied. (See *Williams*, *supra*, 7 Cal.4th at p. 603.)

past cases two days before the petitioner's evidentiary hearing on his habeas petition was scheduled to begin, and (2) indicted another defense witness for perjury some months before the hearing was to take place. (*Williams*, *supra*, 7 Cal.4th at pp. 605-606.) With respect to the first witness, the record reflected that he had informed the prosecutor, well before his indictment, that his statement in a prior declaration that another witness had lied at the petitioner's trial was itself a lie and, further, that he would so-testify at the petitioner's hearing. (*Ibid*.) Based on these facts, the court concluded that, despite the timing of the witness's indictment and arrest and his refusal to testify at the hearing, the petitioner had failed to show how the government's conduct in arresting the witness for perjury "was wholly unnecessary to the performance of its duties and was of such a character as to transform [the witness] from a willing witness to one who refused to testify." (*Id*. at p. 606.)

As to the second witness, the record showed that he was indicted for perjury months before the petitioner's evidentiary hearing was set to begin. (*Martin*, *supra*, 44 Cal.3d at p. 606.) The court rejected the petitioner's argument that the purpose of the indictment was to intimidate the witness and keep him from testifying, given that the evidence showed that the prosecution was not apprised that the witness was a possible witness at the defendant's hearing until eight months after his indictment. (*Ibid*.)[10]

Thus, in *Williams*, the evidence affirmatively showed that the government had *not* indicted the two witnesses to force them or other witnesses to invoke their Fifth Amendment rights at the petitioner's evidentiary hearing. The *Williams* court did not

[10] The court also rejected the claim of prosecutorial misconduct as to three other witnesses who invoked their Fifth amendment rights at the petitioner's evidentiary hearing. The court found that the petitioner had not established misconduct since there was no evidence that the indictments of the other two witnesses (see text, *ante*) "were unnecessary to the performance of the prosecution's duties." (*Williams, supra*, 7 Cal.4th at p. 607.) Contrary to the People's interpretation, the court's conclusion simply reflects, in light of the fact that the indictments of the other two witnesses did not constitute prosecutorial misconduct, that any intimidation other potential witnesses felt could not constitute prosecutorial misconduct based on those indictments.

address whether arresting defense witnesses for perjury before a defendant's trial in the distinct circumstances presented here could constitute interference with that defendant's right to present witnesses.[11]

In *Jacinto, supra*, 49 Cal.4th 263, 269, the defendant claimed that the prosecution had violated his compulsory process rights when the sheriff released a defense eyewitness, following his release from jail, to federal immigration officials, "knowing he would most likely be deported and thus unavailable to testify on defendant's behalf." Our Supreme Court found that the defendant had not satisfied the first element necessary to demonstrate such a violation: prosecutorial misconduct. First, it was the sheriff—acting independently and not at the prosecutor's behest—who released the witness to immigration officials, and the sheriff's acts could not be attributed to the prosecution. (*Id.* at pp. 270-271.) Second, even if the sheriff could be characterized as a member of the prosecution team, United States Immigration and Customs Enforcement (ICE) had issued a federal immigration detainer for the witness once he was released from jail and, as the court observed, "The federal government's power over immigration issues is supreme. [Citations.] Faced with an immigration detainer from ICE, the sheriff and his employees properly complied, as a matter of comity, by releasing [the witness] to ICE's custody." (*Id.* at pp. 272-273.) Third, the court observed that the defendant "was not powerless to ensure that [the witness] would appear at his trial," given that there were procedures potentially available to the defendant to make certain the witness could testify, either in person or by deposition. (*Id.* at pp. 273-274.)

Jacinto thus is factually distinguishable from the present case in several ways and does not provide support for the People's generalized argument that "the prosecutor does not commit misconduct when he engages in conduct that is legally permissible or

[11] Indeed, it would seem that if the *Williams* court believed that a defense witness's perjury arrest or indictment prior to testifying at a defendant's trial could never constitute prosecutorial misconduct, it would not have needed to go through the analysis it did before concluding that there had been no interference with the defendant's compulsory process rights under the particular facts of the case.

authorized, even though that conduct ultimately results in the loss of a material defense witness."

The California Supreme Court's analysis in *Martin, supra*, 44 Cal.3d 1 is more relevant to our inquiry than the cases cited by the People. In *Martin*, a prosecution investigator arrested Stephen Aguilar, the first defense witness to testify at the petitioner's trial, just outside the courtroom in the presence of people the investigator knew to be defense witnesses who had not yet testified, immediately after Aguilar gave testimony that contradicted that of the prosecution's key witness. (*Id*. at p. 33.) At the time of the arrest, the investigator saw no sign that Aguilar was going to flee. (*Id.* at p. 34.) In an opinion granting the petitioner's petition for writ of habeas corpus, our Supreme Court found that although there was no direct contemporaneous evidence of prosecutorial interference with the petitioner's constitutional right to present the testimony of witnesses at trial, this evidence, along with evidence that another defense witness subsequently invoked his Fifth Amendment rights and refused to testify on the petitioner's behalf, constituted circumstantial evidence from which the existence of such misconduct could be inferred. (*Id*. at pp. 33-34.)

The Attorney General also argued in *Martin* "that the arrest of Aguilar was proper as a constitutionally reasonable seizure of the person and as such was proper insofar as petitioner's compulsory-process rights were concerned." (*Martin, supra*, 44 Cal.3d at p. 35.) The court rejected this argument, explaining that it does not follow that government conduct that does not violate the Fourth Amendment guarantee against unreasonable searches and seizures necessarily does not violate the Sixth Amendment's recognition of a defendant's right to present evidence on his own behalf. (*Ibid*.) The court concluded: "It is clear to us that the prosecution committed misconduct under the Sixth Amendment in arresting Aguilar when and where it did: [the investigator] engaged in activity that was completely unnecessary under the circumstances—he was under no legal or practical compulsion to make the arrest in the presence of defense witnesses and

the press—and was of such a character as 'to transform [a defense witness] from a willing witness to one who would refuse to testify' [Citation]." (*Ibid.*)[12]

Likewise, in the present case, simply because the District Attorney's Office is authorized to arrest, interrogate, and charge people suspected of committing crimes, including perjury, does not mean it has *carte blanche* to engage in activity apparently designed to—and certainly with the effect of—undermining a defendant's right to compulsory process. As in *Martin*, even assuming the prosecution's conduct was otherwise proper, the timing and manner of the arrest, interrogation, and perjury charges filed against Christopher and Sneed were "completely unnecessary under the circumstances," as was the use of a *Ramey* warrant, and support the inference that the prosecution interfered with defendant's constitutional right to present the testimony of witnesses at trial. (*Martin, supra*, 44 Cal.3d at pp. 33, 35.)[13]

Similarly, in *Bryant, supra*, 157 Cal.App.3d 582, 588-589, the sole non-police witness to the defendant's traffic stop was arrested for perjury allegedly committed at defendant's preliminary hearing. The witness subsequently refused to testify at defendant's probation revocation hearing only after the prosecutor warned the witness that he would be facing another count of perjury if he testified consistently with his preliminary hearing testimony. (*Ibid.*) The appellate court held that the government's

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[12] The *Martin* court observed that it had come to the same conclusion as the Fourth Circuit Court of Appeals in *Bray v. Peyton* (4th Cir. 1970) 429 F.2d 500, 501, which held that the prosecution committed misconduct when it arrested a defense witness during trial, before he had testified, finding it " 'difficult to imagine' " that the incident would not intimidate both the witness who was arrested as well as other defense witnesses. (*Martin, supra*, 44 Cal.3d at p. 35.)

[13] In *People v. Lucas* (1995) 12 Cal.4th 415, 458, which distinguished *Martin* and is similarly distinguishable from the present case, our Supreme Court found that there was no "evidence the witness was arrested in connection with this case or that his arrest on an unrelated warrant was engineered by the prosecutor, or indeed, that the prosecutor even knew about it. Thus the case is not like [*Martin*] in which we said the prosecutor acted improperly in causing a defense witness to be arrested as he left the stand, in an evident effort to intimidate him and prevent further testimony. [Citation.]"

coercive action caused this material witness to become unavailable, thereby violating the defendant's constitutional right to a fair trial. (*Id*. at p. 588.)

Here, as the trial court stated, given the nature of the prosecution's conduct, Sneed and Christopher plainly did not need to be reminded of the pending charges and the potential for additional charges to be filed before they exercised their Fifth Amendment rights.

In addition, as the trial court found at the hearing on defendant's motion to dismiss, the evidence in the record regarding the prosecution's conduct raises a red flag regarding the motive for this highly unusual conduct.[14] Moreover, regardless of motive, these actions are circumstantial evidence of misconduct, given that it is "difficult to imagine" that the prosecution's conduct would not have intimidated both witnesses. (*Bray v. Peyton*, *supra*, 429 F.2d at p. 501; see also *Martin*, *supra*, 44 Cal.3d at pp. 33-

[14] The People assert that the trial court's opinion that the extraordinary measures taken in this case reflect a goal of subverting defense testimony does not constitute substantial evidence of improper motives. They then go on to discuss the evidence of perjury supporting their conduct. First, a finding of improper motives is not necessary to our analysis. (See *Martin*, *supra*, 44 Cal.3d at p. 31.) Second, neither the trial court nor this court need blind ourselves to the fact that perjury is committed regularly in our courtrooms but, nevertheless, perjury prosecutions are extremely rare. We need not ignore the clear inference that the nearly unheard of conduct by the prosecution in this case was designed to intimidate these witnesses and keep them from testifying for defendant. Third, the evidence of perjury was by no means overwhelming in this case. As the magistrate presiding over the preliminary hearing noted at the conclusion of that hearing: "I think there's going to be a problem with this case under the burden of reasonable doubt." Moreover, at the hearing on the motion to dismiss, the trial court noted that the prosecution knew "there were some potential problems with the case because, arguably, [defendant], who is cousins with the witness Christopher Crowl, there was at least some resemblance—that could be arguable as to how much—but they were in the ballpark of looking like each other. And so I think somebody realized this case is in trouble." Indeed, this was a case of conflicting evidence and witnesses, a classic case for a jury trial. (See *Bryant*, *supra*, 157 Cal.App.3d at p. 592, fn. 5, quoting *Rosen v. United States* (1918) 245 U.S. 467, 471 [discussing " 'the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury' "].)

34.) The trial court observed that the "net result" of the prosecution's actions was that both witnesses would invoke their Fifth Amendment rights at defendant's trial, as they did at the hearing on the motion to dismiss, because of the pending charges against them as well as "because it doesn't take a mental genius to realize that if they testified at trial the same way they did at the preliminary hearing they're gonna be charged additionally with perjury."[15] (Cf. *Bryant, supra*, 157 Cal.App.3d at pp. 588-589.)

For these reasons, we reject the People's central argument: that, because there was probable cause to arrest the two witnesses for perjury, the prosecution's conduct cannot be considered " 'entirely unnecessary to the proper performance of the prosecutor's duties.' " (*Williams, supra,* 7 Cal.4th at p. 603.) On the contrary, as we have explained and as *Martin* makes clear, this extraordinary rush to first obtain a *Ramey* warrant, and then to arrest, insistently interrogate, and charge these two defense witnesses with the commission of nonviolent crimes was "completely unnecessary under the circumstances" given that Cox was "under no legal or practical compulsion" to take these actions when and in the manner he did. (*Martin, supra,* 44 Cal.3d at p. 35.)[16] Accordingly, we agree with the trial court's conclusion that Cox's conduct on behalf of the District Attorney's Office "was of such a character as 'to transform [each of the two witnesses] from a willing witness to one who would refuse to testify,' " and therefore constituted prosecutorial misconduct. (*Ibid*.)

Finally, the People argue that "[a]dopting a rule that the prosecutor must delay filing a legally authorized criminal complaint against a potential defense witness until

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[15] In this regard, it is notable that the District Attorney's Office insisted that Sneed plead guilty under oath, with a statement making clear that defendant was driving.

[16] In their reply brief, the People argue for the first time that the trial court did not find that the action was " 'wholly unnecessary' to the proper performance of the prosecutor's duties," and that, therefore, its ruling must have rested on a misunderstanding of the relevant law and cannot be upheld. Even were we to address this tardily raised point (see *People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2) [issues raised for first time in reply brief generally will not be considered on appeal]), we do not agree that the court's failure to use particular language in making its ruling undermines its thoughtful, thorough analysis.

that witness has testified at defendant's trial presents significant difficulties for the prosecutor," including challenges related to statutes of limitations, motions for dismissal based on pre-accusation delay, and potential loss of evidence. (See *People v. Pearson* (Mich.App. 1975) 232 N.W.2d 408, 410 affd. in part and revd. in part in *People v. Pearson* (Mich. 1979) 273 N.W.2d 856 [Michigan Court of Appeal refused to "place the stamp of judicial approval upon requiring prosecuting attorneys to delay for an indeterminate time the filing of charges because an accused is a witness in a separate case"].) We adopt no such rule here. Rather, we simply conclude, in the particular circumstances of this case, that the evidence in the record supports the trial court's finding that the prosecution's unnecessary urgency in arresting, forcefully interrogating, and filing perjury and accessory after the fact charges against Sneed and Christopher resulted in effectively precluding these previously willing defense witnesses from testifying at defendant's trial. This was misconduct.[17]

B. *Materiality*

The People claim that the record does not support a finding that Sneed and Christopher's testimony would have been material and favorable to defendant's defense because perjured testimony is not material testimony.

We conclude that the People have forfeited this issue on appeal because they expressly conceded in the trial court that the two witnesses' testimony was material to the defense. (Cf., e.g., *People v. Miller* (2007) 146 Cal.App.4th 545, 551 [where District

[17] Because we agree with the trial court's conclusion that prosecutorial misconduct occurred in this case, we are obligated to notify the State Bar of that misconduct with respect to the actions of Deputy District Attorney Ben McLaughlin and/or Deputy District Attorney Randy Mailman. (See Bus. & Prof. Code, § 6086.7, subd. (a)(2) ["[a] court shall notify the State Bar . . . "[w]henever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct . . . of an attorney"].) Although subdivision (a)(2) of section 6086.7 states that such notification must be made upon "modification or reversal" of a judgment, we do not interpret the statute as relieving us of our reporting obligation merely because the trial court found the misconduct before we did.

Attorney expressly conceded lack of probable cause for search, Attorney General could not justify search on that ground on appeal].)

To "demonstrate 'materiality,' " the defendant " 'must at least make some plausible showing of how [the] testimony [of the witness] would have been both material and favorable to his defense.' [Citation.]" (*Martin, supra,* 44 Cal.3d at p. 32, quoting *United States v. Valenzuela Bernal* (1982) 458 U.S. 858, 867.)

In any event, Sneed's and Christopher's expected testimony plainly was material. The truth of the perjury allegations had not been adjudicated at the time of the court's ruling on defendant's motion to dismiss, and the witnesses had never testified differently under oath. The court's mere acknowledgement that these witnesses *may have* committed perjury does not constitute an adjudication that they in fact did so. (See *Bryant, supra,* 157 Cal.App.3d at p. 592, fn. 5 ["It is not the court nor the prosecuting attorney's function to attempt to purge the court of a witness who might possibly offer perjured testimony. . . . Thus, the believability of the witness' testimony goes to its weight not its admissibility"]; compare *People v. Harbolt* (1988) 206 Cal.App.3d 140, 155 [where potential witness stated under oath that he had *not* committed crimes with which defendant was charged, materiality of his testimony was not demonstrated]; *U.S. v. Williams* (2d Cir. 2000) 205 F.3d 23, 30 [where trial court had found credible defense witness's testimony at defendant's second trial in which he recanted testimony presented at first trial, materiality was not shown].)

As the trial court explained when it ruled on the motion to dismiss, it was unlikely that defendant would testify, in light of the incriminating statements he made to police. Hence, "[y]ou take out the defendant and you take out the two defense witnesses, that's what you're left with[, the police officer's story that defendant was the driver]. It would be a pretty short trial." The record supports the trial court's finding that Sneed and Christopher's testimony " 'would have been both material and favorable to [defendant's] defense.' " (*Martin, supra,* 44 Cal.3d at p. 32.)

In sum, the trial court's conclusion that the prosecution in this case violated defendant's constitutional right to compulsory process is adequately supported by the record. (See, e.g., *People v. Stewart* (2004) 33 Cal.4th 425, 472.)

II. *Remedy*

The People contend that, even if there was a constitutional violation, the trial court's dismissal of the information was an abuse of discretion because a lesser sanction would have adequately protected defendant's right to a fair trial.

Specifically, the People assert that the court could have used Sneed's and Christopher's preliminary hearing testimony, which would have allowed defendant to present his defense at trial despite the witnesses' unavailability. In support of this argument they cite Evidence Code section 1291, which provides in relevant part: "(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (Cf. *People v. Conrad* (2006) 145 Cal.App.4th 1175, 1186 [in context of evidence lost due to prosecutorial delay, trial court abused its discretion when it dismissed action even though an intermediate remedy was available that would have mitigated prejudice resulting from delay]; cf. *People v. Woods* (2004) 120 Cal.App.4th 929, 937-939 [in affirming judgment of conviction following jury trial, appellate court held that defendant could not prove testimony of witnesses made unavailable due to prosecutorial misconduct was material since all of witness' proposed testimony was presented to jury in other ways].)

We conclude that the People are precluded from arguing that the court's dismissal of the information constituted an abuse of discretion in the circumstances of this case due to their active involvement in bringing about the dismissal. Their refusal to stipulate to the admissibility of the preliminary hearing transcript at trial invited the alleged error of which they now complain. (See, e.g., *People v. Perez* (1979) 23 Cal.3d 545, 549-550,

fn. 3 ["The doctrine of invited error applies to estop a party from asserting an error when 'his own conduct *induces the commission of error*' "].)[18]

Moreover, even if the People's refusal to stipulate did not technically constitute invited error, they have forfeited the issue on appeal by failing to raise it in the trial court. (See, e.g., *People v. Saunders* (1993) 5 Cal.4th 580, 590 [" ' "[I]t is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial" ' "].) The prosecutor made a tactical decision at the hearing on the motion to dismiss to, in essence, "object" to the admissibility of the preliminary hearing transcript at trial by refusing to stipulate to its admission, thereby preserving its right to appeal the trial court's substantive ruling and the consequent dismissal. It would be eminently unfair to permit the People to now argue on appeal that the court abused its discretion in refusing to let the case go forward using the preliminary hearing transcript after they refused to stipulate to the preliminary hearing testimony's admission, and then failed to argue to the trial court that it was nonetheless admissible under Evidence Code section 1291, subdivision (a)(2). (Cf., e.g., *People v. Miller*, *supra*, 146 Cal.App.4th at p. 551 [where prosecution could have pursued two arguments simultaneously in trial court, but chose not to do so, "[f]airness dictates the prosecution accept the consequences of its decision"]; *People v. Middleton* (2005) 131 Cal.App.4th 732, 737, fn. 2, quoting *Steagald v. United States* (1981) 451 U.S. 204, 209 ["the prosecution may lose the opportunity to challenge a defendant's standing to appeal 'when

[18] The People assert that the prosecutor could not ethically stipulate to admission of testimony he believed was perjured. They cite *People v. Jennings* (1999) 70 Cal.App.4th 899, 907, in which the appellate court stated that "a defense attorney has an ethical obligation not to present perjured testimony." First, we are doubtful that entering into a stipulation in the circumstances of this case would constitute the People's "presentation" of perjured testimony as discussed in *People v. Jennings*. Second, there is something unsettling about the People arguing here that in the trial court they could not have ethically agreed to the testimony's admission at trial while now strenuously arguing that the trial court erred when it dismissed the information rather than finding that same testimony admissible at trial.

it has acquiesced in contrary findings by [the trial court] or when it has failed to raise such questions in a timely fashion during the litigation' "].)

We therefore conclude that the People's actions in the trial court preclude them from now arguing that the trial court's decision to dismiss the information in this case constituted an abuse of discretion.

DISPOSITION

The trial court's order dismissing the information in this matter is affirmed. The Clerk/Administrator of this Court is directed to forward a copy of this opinion to the California State Bar for review and further proceeding, if appropriate.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Lambden, J.