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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,		C067971
	Plaintiff and Respondent,	(Super. Ct. No. 10F04664)
v.		
MILTON BLAINE WILLIAMS,		
	Defendant and Appellant.	

Convicted of possessing heroin for sale and being a felon in possession of a firearm, defendant Milton Blaine Williams appeals, contending: (1) the trial court erred in allowing a portion of a search warrant affidavit to remain sealed and in denying his motions to traverse and quash the search warrant; (2) his trial attorney rendered ineffective assistance of counsel by failing to argue in the trial court that it violated his constitutional rights for the court to determine his motions to traverse and quash the warrant based on an in camera review of the sealed portion of the affidavit from which his attorney was excluded; (3) the trial court erred in admitting evidence of

a prior conviction of possessing heroin for sale on the issue of intent; (4) the prosecutor violated his constitutional rights by refusing to grant immunity to a proposed defense witness; and (5) the trial court abused its discretion in refusing to allow the defense witness to testify at all because the witness was going to assert his Fifth Amendment right against self-incrimination in response to some of the prosecutor's anticipated questions on cross-examination.

Finding no error and no violation of defendant's constitutional rights, we will affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

In July 2010, a magistrate signed a warrant authorizing the search of defendant's apartment for evidence relating to the use and sale of heroin. (At trial, the parties stipulated that defendant had "a longstanding addiction to heroin.") The magistrate also ordered two pages of the search warrant affidavit sealed to protect the identity of one or more confidential informants.

A few days later, law enforcement officers executed the search warrant. In the apartment they discovered, among other evidence suggestive of the sale of heroin, .17 grams of heroin in five separate pieces of plastic and a suspected pay-owe sheet on top of the refrigerator in the kitchen. They also discovered two firearms. And in the bedroom that belonged to the two 18-year-old sons of defendant's girlfriend, the officers found approximately 100 grams of marijuana in five plastic baggies.

Defendant was charged with possessing heroin for sale and being a felon in possession of a firearm. The complaint also alleged that defendant had a prior conviction of possessing a controlled substance for sale in 1999.

Before trial, defendant brought a motion, following the procedure set forth in *People v. Hobbs* (1994) 7 Cal.4th 948, to have the trial court conduct an in camera review of the sealed material to determine whether the sealing was proper, to traverse and quash the warrant, and to suppress the evidence found in the apartment. The trial court did so and (1) found that the affidavit was properly sealed, (2) denied the motion to traverse the warrant because "defendant's general allegations of material misrepresentation or omissions [we]re not supported," and (3) denied the motions to quash the warrant and suppress the evidence seized in the search because "there was probable cause for the issuance of the warrant."

Also before trial, defendant moved to exclude evidence of his prior possession with intent to sell. The prosecutor opposed the motion because he was "seeking to admit the prior conviction on . . . the issue of intent." The trial court ruled that the prior conviction would be admissible in the prosecution's case-in-chief to prove defendant's intent. Subsequently, the trial court admitted a certified copy of defendant's prior conviction of possession of heroin for sale.

During trial, defense counsel proposed to call as a witness Monroe Montgomery, one of the sons of defendant's girlfriend who lived in the apartment. Montgomery informed the court that if

called as a witness, he would assert his Fifth Amendment privilege against self-incrimination to any questions about whether the bedroom in which the marijuana was found, or the marijuana itself, was his. He would, however, answer questions about the alleged pay-owe sheet found in the search and would testify that the piece of paper actually "made reference to auto parts to a 1986 Buick Skylark that he was in the process of fixing up . . . and what the cost [of those parts] would be."

The court's initial inclination was to prohibit Montgomery from testifying because "it would be appropriate for the prosecution to explore" the topic of the marijuana found in the bedroom, and "allowing him to testify to some things while denying the People access to cross-examine him about things that are directly relevant to his credibility would be prejudicial to the People." The court, however, allowed defense counsel some time to find any case law that might "convince [the court] otherwise."

Having found no helpful case law, defense counsel requested that the prosecutor offer Montgomery use immunity. Noting that the marijuana was "indicative . . . of a possession for sale charge," the prosecutor declined to offer Montgomery immunity and argued that if Montgomery testified he would want to cross-examine Montgomery about the marijuana.

The trial court acknowledged that Montgomery's testimony about the piece of paper would be "relevant and goes to a material issue," but the court declined to allow him to testify

because he intended to claim privilege and refuse to testify about the marijuana.

Defense counsel argued to the jury that defendant "did not possess the heroin . . . for purposes of sale. . . . He possessed it for his own use." The jury rejected that argument and found defendant guilty of both charges. The trial court sentenced him to an aggregate term of nine years in prison. Defendant timely appealed.

## DISCUSSION

### I

#### *Motions To Traverse And Quash*

#### *The Warrant And Suppress Evidence*

Under *Hobbs*, "[o]n a properly noticed motion by the defense seeking to quash or traverse [a] search warrant" where any portion or all of the search warrant affidavit has been sealed, "the lower court should conduct an in camera hearing . . . . It must first be determined whether sufficient grounds exist for maintaining the confidentiality of the informant's identity. It should then be determined whether the entirety of the affidavit or any major portion thereof is properly sealed, i.e., whether the extent of the sealing is necessary to avoid revealing the informant's identity." (*People v. Hobbs, supra*, 7 Cal.4th at p. 972.)

"If the affidavit is found to have been properly sealed, and the defendant has moved to traverse the warrant, the court should then proceed to determine whether the defendant's general allegations of material misrepresentations or omissions are

supported by the public and sealed portions of the search warrant affidavit . . . . Generally, in order to prevail on such a challenge, the defendant must demonstrate that (1) the affidavit included a false statement made 'knowingly and intentionally, or with reckless disregard for the truth,' and (2) 'the allegedly false statement is necessary to the finding of probable cause.'" (*People v. Hobbs, supra*, 7 Cal.4th at p. 974.)

"If the trial court determines that the materials . . . before it do not support defendant's charges of material misrepresentation, the court should simply report this conclusion to the defendant and enter an order denying the motion to traverse." (*People v. Hobbs, supra*, 7 Cal.4th at p. 974.)

"Similarly, if the affidavit is found to have been properly sealed and the defendant has moved to quash the search warrant [citation], the court should proceed to determine whether, under the 'totality of the circumstances' presented in the search warrant affidavit . . . , there was 'a fair probability' that contraband or evidence of a crime would be found in the place searched pursuant to the warrant. [Citations.] In reviewing the magistrate's determination to issue the warrant, it is settled that 'the warrant can be upset only if the affidavit fails as a matter of law . . . to set forth sufficient competent evidence supportive of the magistrate's finding of probable cause, since it is the function of the trier of fact, not the reviewing court, to appraise and weigh evidence when presented

by affidavit as well as when presented by oral testimony.'"  
(*People v. Hobbs, supra*, 7 Cal.4th at p. 975.)

"If the court determines, based on its review of all relevant materials, that the affidavit . . . furnished probable cause for issuance of the warrant . . . , the court should simply report this conclusion to the defendant and enter an order denying the motion to quash." (*People v. Hobbs, supra*, 7 Cal.4th at p. 975.) "In all instances, a sealed transcript of the in camera proceedings, and any other sealed or excised materials, should be retained in the record along with the public portions of the search warrant application for possible appellate review." (*Ibid.*) On appeal, we review for abuse of discretion. (*See id.* at p. 976.)

Here, defendant asks us to review the trial court's determinations under *Hobbs*. Having reviewed the sealed portion of the search warrant affidavit, we find no abuse of discretion. The trial court correctly determined that disclosure of any portion of the factual allegations set forth in the confidential portion of the affidavit would effectively reveal the informant's identity and therefore those materials were properly sealed. Additionally, the trial court correctly determined that there was nothing to suggest any material misrepresentations or omissions were made by the affiant in applying for the search warrant and that the affidavit set forth sufficiently reliable and competent evidence to support the magistrate's finding of probable cause to issue the warrant. Therefore, the trial court properly denied defendant's motions.

## II

### *Ineffective Assistance Of Counsel*

Defendant contends that by reviewing the sealed portion of the search warrant affidavit in camera, the trial court violated his constitutional rights to effective assistance of counsel, to present an effective defense, and to a public trial.

Acknowledging that his trial attorney did not raise these arguments in the trial court, defendant contends we should nonetheless reach them on appeal "under the rubric of ineffective assistance of counsel." Doing so, we conclude that defense counsel was not ineffective.

In the trial court, defendant specifically asked the court to "conduct an in camera review" of the sealed portion of the search warrant affidavit pursuant to the procedure spelled out in *Hobbs*. The trial court did so, and defendant never argued for anything more. Now, on appeal, defendant argues that his trial attorney provided ineffective assistance of counsel by failing to challenge the *Hobbs* procedure as violative of his rights to effective assistance of counsel, to present an effective defense, and to a public trial.

The People contend (among other things) that defendant's "argument is foreclosed by *Hobbs*." According to the People, "[t]he *Hobbs* court implicitly rejected [defendant]'s Sixth Amendment right to counsel claim and expressly rejected the Fourteenth Amendment due process claim. The *Hobbs* court also implicitly determined that the procedures outlined therein did not offend one's public trial guarantee."

In reply, defendant asserts that the arguments his trial counsel should have made were not addressed in *Hobbs* at all, and in any event "trial counsel should have raised them in order to preserve the issues for further review by the California Supreme Court, and by the federal courts."

With respect to one of his arguments, defendant is plainly wrong, because the right to present an effective defense absolutely was addressed in *Hobbs*. At the outset of its opinion, the Supreme Court noted that "[t]he issue posed in this case reflects the inherent tension between the public need to protect the identities of confidential informants, and a criminal defendant's right of reasonable access to information upon which to base a challenge to the legality of a search warrant." (*People v. Hobbs, supra*, 7 Cal.4th at p. 957.) The court later noted that this "right of reasonable access," or "right to discovery," "is based on the fundamental proposition that the accused is entitled to a fair trial and *the opportunity to present an intelligent defense* in light of all relevant and reasonably accessible information." (*Id.* at p. 965, italics added.) Thus, the decision in *Hobbs* clearly took into account a criminal defendant's right to present a defense.

This analysis does not entirely answer defendant's "right to present a defense" argument, however, since he essentially claims his trial attorney should have raised any arguments that were already resolved in *Hobbs* "to preserve [them] for further review by the California Supreme Court, and by the federal courts." We disagree.

As defendant acknowledges, to prevail on his claim of ineffective assistance of counsel he must show that his trial attorney's assistance was objectively unreasonable under prevailing professional norms. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) In determining whether counsel's performance was deficient, however, we must "in general exercise deferential scrutiny." (*Ibid.*) Here, such deferential scrutiny leads us to the conclusion that defendant's trial attorney did not act in an objectively unreasonable manner when she failed to argue, in essence, that following the *Hobbs* procedure does not adequately protect a defendant's right to present an effective defense.

In attempting to convince us that the argument he thinks his trial attorney should have made has merit, such that trial counsel should have raised it in the trial court at the very least to preserve it for appellate review, defendant relies on *McCray v. Illinois* (1967) 386 U.S. 300 [18 L.Ed.2d 62] for the proposition that an informant's identity need not be disclosed if the trial court determines, based on "evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant." (*Id.* at p. 305 [18 L.Ed.2d at p. 67].) In quoting from *McCray*, defendant underlines the phrase "evidence submitted in open court and subject to cross-examination," but he then fails to explain what he thinks the significance of that phrase is. Indeed, other than providing that single quotation, defendant makes no effort to explain *McCray* or how it relates to

his argument that the *Hobbs* procedure does not adequately protect a defendant's right to present an effective defense.<sup>1</sup>

In the end, the import of defendant's argument appears to be that a court can *never* decline to disclose to a criminal defendant a portion of a search warrant affidavit if doing so leaves the defendant's trial counsel "in the impossible position of attempting to traverse the search warrant when [s]he [i]s completely in the dark about the critical contents of the affidavit in support of the warrants." We agree with the People that that argument is foreclosed by *Hobbs*. More importantly, though, because defendant fails to support his argument with any persuasive reasoning or authority, we conclude that this was not an argument defendant's trial counsel was duty bound to raise in the trial court, and her failure to do so was not unreasonable.

This conclusion still leaves us with defendant's assertion that his trial attorney was ineffective because she did not challenge the *Hobbs* procedure as violative of his rights to effective assistance of counsel and a public trial. As we have noted, the People contend these arguments were implicitly rejected in *Hobbs*. With respect to the right to effective assistance of counsel at least, we agree. In the course of its opinion in *Hobbs*, the Supreme Court specifically discussed a

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<sup>1</sup> It is also worth noting that the passage from *McCray* that defendant quotes in his brief does not consist of any part of the court's holding in that case. Instead, the passage quoted refers to a holding by the Illinois Supreme Court that the United States Supreme Court was simply discussing. (See *McCray v. Illinois, supra*, 386 U.S. at p. 305 [18 L.Ed.2d at p. 67].)

then-recent decision by the New York Court of Appeals in which that court had rejected a defendant's claim that "'a suppression procedure conducted without his participation violate[d] his constitutional right to due process of law and the effective assistance of counsel.'" (*People v. Hobbs, supra*, 7 Cal.4th at pp. 967-968, quoting *People v. Castillo* (1992) 80 N.Y.2d 578 [607 N.E.2d 1050], italics added.) It makes little sense that our Supreme Court would have found *Castillo* "particularly instructive" (*Hobbs*, at p. 967) without considering, at least implicitly, the interplay between the in camera proceeding the court concluded was appropriate and the right to effective assistance of counsel specifically discussed in *Castillo*.

With this in mind, we conclude that defendant's trial attorney here did not act unreasonably in failing to argue to the trial court that the *Hobbs* procedure violates a defendant's right to effective assistance of counsel. The Supreme Court in *Hobbs* plainly understood that the in camera procedure it was adopting would prevent defense counsel from being able to view the sealed portions of the affidavit and formulate arguments based on that information, and yet the court approved that procedure as the best way to safeguard *both parties'* rights -- "the state's 'strong and legitimate' interest in protecting the confidentiality of its informants" and a "defendant's 'limited but viable' right to raise a pretrial challenge to the validity of [a] search warrant." (*People v. Hobbs, supra*, 7 Cal.4th at p. 967.) Because nothing defendant argues on this point in our court persuasively undercuts the Supreme Court's reasoning and

decision in *Hobbs*, trial counsel was not unreasonable when she failed to advance this argument in the trial court.

That leaves us with defendant's argument based on the right to a public trial. As with defendant's other two arguments, however, we conclude that his trial attorney was not ineffective for failing to assert this argument in the trial court.

Defendant premises this argument on *Waller v. Georgia* (1984) 467 U.S. 39 [81 L.Ed.2d 31], where the United States Supreme Court held that a "party seeking to close [a suppression] hearing [to the public] must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." (*Id.* at p. 48 [81 L.Ed.2d at p. 39].) In defendant's view, the use of the *Hobbs* in camera procedure in this case violated the strictures of *Waller* because (1) "[t]he prosecution failed to offer any specificity as to the 'compelling interest' in keeping the identity of the confidential informant, or any portion of the affidavit, secret"; (2) "the procedure utilized by the trial court was overbroad" because "[i]t is inconceivable that all of the information in the sealed portion of the affidavit was crucial to protecting the [informant's] identity"; and (3) "it does not appear that the trial court considered any less drastic alternatives" (like disclosing only to defense counsel and not to defendant) and "the trial court made no findings adequate to support the decision to exclude the public and the defense."

Defendant points to no authority supporting his assertion that application of the *Hobbs* procedure -- which governs generally how a trial court must proceed when all or a portion of a search warrant affidavit has been sealed and the defendant seeks to quash or traverse the warrant -- must be adapted in each case to the strictures of *Waller*. With respect to the first stricture from *Waller*, the Supreme Court essentially held as a matter of law in *Hobbs* that the state has an overriding interest in maintaining the confidentiality of its confidential informants that may be prejudiced if a sealed search warrant affidavit is unsealed to allow a defendant to mount a pretrial challenge to the warrant. Whether that overriding interest is likely to be prejudiced in a given case is part of the determination the trial court makes during the in camera proceeding. With respect to the second stricture from *Waller*, the trial court's in camera examination of the sealed portion of the affidavit, which is subject to appellate review, adequately ensures that the sealing of the affidavit is no broader than necessary to serve the interest in maintaining confidentiality. With respect to the "reasonable alternatives" aspect of *Waller*, we note that disclosure of information to defense counsel is still disclosure, and the Supreme Court in *Hobbs* implicitly rejected the idea that the state's interest in maintaining confidentiality could be adequately protected in this manner (otherwise the court could have been expected to craft an in camera procedure that involved defense counsel but not the defendant). Finally, on the issue of findings, we perceive that

nothing more is necessary under *Waller* than what the trial court recited here.

In short, finding no merit in defendant's right to public trial argument, we conclude his trial counsel did not act unreasonably in failing to make this argument in the trial court. Accordingly, defendant has failed to show that he received ineffective assistance of counsel.

### III

#### *Evidence Of Prior Conviction Of Possession For Sale*

Defendant contends the trial court erred in admitting evidence of his prior conviction for possessing heroin for sale to prove his intent in this case. We disagree.

"Evidence Code section 1101, subdivision (a) generally prohibits the admission of evidence of a prior criminal act against a criminal defendant 'when offered to prove his or her conduct on a specified occasion.' Subdivision (b) of that section, however, provides that such evidence is admissible when relevant to prove some fact in issue, such as motive, intent, knowledge, identity, or the existence of a common design or plan." (*People v. Lindberg* (2008) 45 Cal.4th 1, 22.)

"The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence." (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379.) "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense

to support the inference that the defendant probably acted with the same intent in each instance. . . . The decision whether to admit other crimes evidence rests within the discretion of the trial court." (*People v. Lindberg, supra*, 45 Cal.4th at p. 23.)

Here, defendant offers a panoply of reasons why it was error to admit his prior conviction for possessing heroin for sale to prove his intent in this case. First, he contends that because the prosecution offered "only the documentary evidence that there had been such a conviction, and presented no facts relating to the conduct which led to that conviction," there was an inadequate showing that the prior offense was "sufficiently similar" to the charged offense to support an inference that he acted with the same intent in both instances.

We reject this assertion. Subject to the requirement of materiality, "other crimes evidence . . . may . . . be admitted if it '(a) "tends logically, naturally and by reasonable inference" to prove the issue upon which it is offered.'" (*People v. Guerrero* (1976) 16 Cal.3d 719, 724.) The mere fact that defendant possessed heroin on a prior occasion with the intent to sell it tends logically, naturally, and by reasonable inference to prove that he possessed it with the same intent on this occasion. Certainly his intent on the prior occasion does not prove his intent on this occasion irrefutably, but it does have some "tendency in reason" to prove his later intent. (See Evid. Code, § 210 [defining "'[r]elevant evidence'"].) And while the details of the prior offense might have made the evidence *more* probative of his later intent, those details were

not required to make the evidence of the prior conviction at least minimally relevant.

Defendant next contends the evidence of his prior conviction was "entirely cumulative and unnecessary," but in making this argument he misapprehends its source and thus misapplies the concept of cumulative evidence. Cumulative prior crimes evidence is not inadmissible because it is "of little probative value," as defendant argues. Rather, such evidence may be inadmissible if its probative value is outweighed by its potential for undue prejudice because evidence of other crimes can be "extremely inflammatory." (*People v. Williams* (2009) 170 Cal.App.4th 587, 610.) Here, the mere fact that the prosecution relied on other evidence as well to prove defendant possessed the heroin for sale did not make the evidence of his prior conviction inadmissible as cumulative or unduly prejudicial.

To the extent defendant specifically relies on Evidence Code section 352 to argue that the trial court should not have admitted the evidence of his prior conviction, we are again not persuaded. There was nothing particularly inflammatory or prejudicial about proof that defendant was convicted of possessing heroin for sale in 2009. Defendant's concern that "[t]he jury might well have made the conclusion that since [he] had, in 2009, been involved in possession for sale of heroin, that he was likely to have been involved in the same crime in 2010" is a concern only with the *legitimate* use of prior crimes evidence here. Since there was no issue of identity, because defendant admitted he possessed the heroin, the only real issue

in the case was whether he possessed it for personal use or for sale. Evidence that he had possessed heroin a few years earlier with the intent to sell it was relevant to prove that he possessed it with the same intent this time, and the use of the evidence for that purpose was absolutely permissible in this case.

Defendant contends that even if his prior conviction was admissible, it was error to allow the prosecution to prove it "solely through the use of documents, not testimony." Not so. To the extent defendant's argument is premised on the hearsay rule, "Evidence Code section 452.5, subdivision (b) creates a hearsay exception allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred."<sup>2</sup> (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.) Defendant argues that the Supreme Court disagreed with *Duran* on this point in *People v. Chatman* (2006) 36 Cal.4th 344, but he is mistaken. It is true that in *Chatman*, the Supreme Court relied on its earlier opinion in *People v. Wheeler* (1992) 4 Cal.4th 284, 297-300 for the proposition that "[m]isdemeanor convictions themselves are not admissible for impeachment, although evidence of the underlying conduct may be admissible subject to the court's exercise of

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<sup>2</sup> "An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record." (Evid. Code, § 452.5, subd. (b).)

discretion." (*Chatman*, at p. 373.) But *Wheeler* predated the enactment of Evidence Code section 452.5 by four years (see Stats. 1996, ch. 642, § 3), and the court in *Chatman* failed to discuss or even mention that fact, let alone mention *Duran*. Accordingly, *Chatman* cannot be construed as disagreeing with *Duran*, particularly in light of the fact that the conclusion in *Duran* flows ineluctably from the plain language of the statute: "A [certified] official record of conviction . . . is admissible pursuant to Section 1280" -- that is, under the official records exception to the hearsay rule -- "to prove the commission . . . of a criminal offense . . . ." (Evid. Code, § 452.5, subd. (b).)

As for defendant's argument that using only the fact of conviction, proved through documents, "would frustrate the use of Evidence Code section 352," that argument is no more availing. Essentially defendant's complaint is that he was not able to put up a stronger argument for excluding the evidence under section 352 because the prosecution offered only a certified record of the conviction and not testimony about the facts underlying the conviction. But it is elemental that any application Evidence Code section 352 had to this case was in relation to the evidence that was offered, not to evidence that *might* have been offered. Just because defendant might have been able to mount a stronger "prejudice verses probative value" challenge to evidence of the facts underlying his prior conviction does not mean it was error for the court to allow the prosecution to omit those facts and offer only the fact of the

conviction itself, as proven by a certified record of that conviction, to prove that defendant previously possessed heroin with the intent to sell it.

In summary, defendant has failed to show any error in the use of his prior conviction to prove intent.

#### IV

##### *Failure To Grant Immunity To A Potential Defense Witness*

Defendant contends his constitutional rights were violated by the prosecutor's refusal to grant immunity to Montgomery.<sup>3</sup> We can dispense with this argument in relatively short order.

In *People v. Williams* (2008) 43 Cal.4th 584, the California Supreme Court observed that "[t]he grant of immunity is an executive function, and prosecutors are not under a general obligation to provide immunity to witnesses in order to assist a defendant." (*Id.* at p. 622; see also *In re Williams* (1994) 7 Cal.4th 572, 609 ["California cases have uniformly rejected claims that a criminal defendant has the same power to compel testimony by forcing the prosecution to grant immunity"].) Defendant asserts that the statement in *Williams* was dictum because the court resolved the defendant's argument there not on

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<sup>3</sup> To some extent, defendant's argument appears to be directed at *the trial court's* actions. For example, he asserts that "under the circumstances of this case the trial court should have granted judicial use immunity to witness Montgomery." In his reply brief, however, defendant disavows any claim of error by the trial court. Accordingly, our focus is strictly on whether defendant's constitutional rights were violated by *the prosecution's* actions here.

the merits, but on the basis of forfeiture. While this appears to be true (see 43 Cal.4th at p. 624), it makes no difference because "[e]ven if properly characterized as dictum, statements of the Supreme Court should be considered persuasive.

[Citation.]" [Citation.] [Thirty-five] years ago, Presiding Justice Otto M. Kaus gave some sage advice to trial judges and intermediate appellate court justices: Generally speaking, follow dicta from the California Supreme Court. [Citation.] That was good advice then and good advice now." (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.)

Recognizing that we might follow *Williams* despite his characterization of its relevant statement of law as dictum, defendant undertakes to explain why the nearly 40 years of California case law the Supreme Court cited in *Williams*, dating back to *In re Weber* (1974) 11 Cal.3d 703, does not actually stand for the proposition the Supreme Court asserted it does. Rather than engage defendant on this point, however, we choose to follow Justice Kaus's advice and adhere to our Supreme Court's position -- defendant had no right to require the prosecution to grant immunity to Montgomery so that he could give testimony favorable to defendant without fear that his testimony would be used against him.

V

*Exclusion Of Witness Invoking Fifth Amendment Privilege*

Defendant contends the trial court abused its discretion when the court ruled that Montgomery would not be permitted to testify because he had indicated he was going to assert his

Fifth Amendment privilege against self-incrimination if questioned about the marijuana found in the search. We find no abuse of discretion in the court's ruling.

"If a witness frustrates cross-examination by declining to answer some or all of the questions, the court may strike all or part of the witness's testimony. [Citation.] From this rule it follows logically that if, as here, the court determines in advance that the witness will refuse to answer such questions, the court may decline to admit the testimony in the first instance." (*People v. Price* (1991) 1 Cal.4th 324, 421.) "In deciding whether to strike . . . a defense witness's testimony based on his or her refusal to answer one or more questions, the trial court should examine "the motive of the witness and the materiality of the answer." [Citation.]' [Citation.] The court should also consider if less severe remedies are available before employing the 'drastic solution' of striking the witness's entire testimony. [Citation.] These include striking part of the testimony or allowing the trier of fact to consider the witness's failure to answer in evaluating his credibility." (*People v. Seminoff* (2008) 159 Cal.App.4th 518, 525-526, italics omitted.)

Defendant contends the trial court's preclusion of Montgomery from testifying was an abuse of discretion because "Montgomery's testimony on direct would have only gone to the

issue of whether the piece of paper was a drug 'pay-owe' sheet, or rather was a paper on which Montgomery had noted the price of parts for a car he was planning to restore." According to defendant, "[a]ny questions as to Montgomery's association with the marijuana found in the southeast bedroom were entirely collateral to this issue." But that is simply not true.

If the trial court had allowed Montgomery to testify that the piece of paper related only to car parts, but then claim his Fifth Amendment privilege as to any questions about the marijuana found in the bedroom, the prosecutor would have been unable to explore through cross-examination the possibility that the piece of paper was Montgomery's, but was in fact a pay-owe sheet relating to Montgomery's sale of marijuana, instead of defendant's sale of heroin. This would have allowed Montgomery to claim a noncriminal purpose for the piece of paper while preventing the jury from assessing whether he was lying because the piece of paper actually had a criminal purpose relating to him. In this way, the prosecution's ability to challenge the credibility of Montgomery's testimony would have been unfairly limited, and the jury would have been prevented from adequately assessing Montgomery's credibility. Under these circumstances, there was no abuse of discretion in prohibiting Montgomery from testifying.

DISPOSITION

The judgment is affirmed.

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ROBIE \_\_\_\_\_, J.

We concur:

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BLEASE \_\_\_\_\_, Acting P. J.

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HOCH \_\_\_\_\_, J.