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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

AFSAW ABEBE, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, Respondent; THE PEOPLE, Real Party in Interest.	B275435 (Los Angeles County Super. Ct. No. SA074504)

Petition for writ of mandate to order superior court to hold jury trial on once-in-jeopardy plea. Superior Court of Los Angeles County, George G. Lomeli, Judge. Petition denied. Order striking once-in-jeopardy plea is affirmed and the matter is remanded to the trial court for further proceedings. The order to show cause is discharged.

William S. Pitman for Petitioner.

No appearance on behalf of Respondent.

Jackie Lacey, District Attorney, Roberta Schwartz and Matthew Brown, Deputy District Attorneys, for Real Party in Interest.

By petition for writ of mandate, Afsaw Abebe asks this court to order the superior court to hold a jury trial on Abebe's plea of once in jeopardy. We conclude the superior court properly refused to hold a jury trial on this issue. Therefore, we will affirm respondent's order striking Abebe's once-in-jeopardy plea and remand to the trial court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Three codefendants—Cecil Laurent, Javier Angulo Romero, and petitioner Abebe—were charged in a five-count information with the murders of Jana Collins and her fetus, and the attempted murders of Kevin Green and Reggie Williams. (Pen. Code, §§ 187, 664/187(a)).[1] In addition, the defendants were charged with three special circumstance allegations (multiple murder, lying in wait, and gang-related murder), along with gang and firearm enhancements. (§§ 190.2, subd. (a)(3), (15), (22); 186.22, subd. (b); 12022.53.)

These charges arose out of a 2010 shooting on Corning Street in Los Angeles. The prosecution theory was that the crime was a gang-related shooting in retaliation for an earlier incident during which petitioner Abebe had been shot. Collins, the pregnant girlfriend of Green, was killed along with her fetus. Green and Williams were not hurt.

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

1. *The trial evidence.*

A joint trial of the three codefendants before Judge Elden Fox commenced with jury selection on July 13, 2015, and opening statements two weeks later. According to the People's account, which Abebe does not dispute, the trial evidence was as follows.[2]

For several years, the Playboy Gangster Crips and the Mansfield Family Gangster Crips had been feuding over control of narcotics sales in the West Los Angeles area. On April 6, 2010,[3] a fistfight broke out between members of the two gangs at a restaurant parking lot. Portions of the fight were recorded on video surveillance. Two hours later, surveillance footage captured an incident in the same parking lot during which an unidentified man shot Abebe, a Mansfield Family member, in the torso. The shooting was reported to law enforcement, but no witnesses came forward.

Los Angeles Police Department Detective John Jamison interviewed Abebe in the hospital days after the shooting. Abebe claimed that Playboy Gangster members were responsible for shooting him, but said he did not want to cooperate in the investigation and would be reluctant to identify anyone involved. Abebe was discharged from the hospital on April 14.

On May 3, Abebe rented a silver Jeep Commander SUV from Enterprise Car Rental in Los Angeles. The following day,

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[2] The only portions of the reporter's transcript that were provided to us concern the trial events occurring on August 17 and 18, 2015. As for the evidence presented during the three or so weeks prior to those dates, we rely on the People's account.

[3] All further date references are to the year 2010 unless otherwise specified.

Abebe, Romero, and Laurent went to the LAX Firing Range. An employee of the range testified the three defendants arrived together and that all three signed waiver forms in their correct names, which allowed them access to the range. The employee identified each of the defendants at the preliminary hearing. At trial, the employee testified she was unable to identify the defendants, but acknowledged that she had identified them at the preliminary hearing.

A little after 9:00 a.m. on May 5, Kevin Green, Jana Collins, and Reggie Williams arrived on Corning Street by car. Green and Williams belonged to the Playboy Gangster Crips, and Collins was pregnant with Green's child. Green parked and began walking to the rear of an apartment located at 1937 Corning, a known Playboy Gangster Crips hangout. Collins and Williams remained in the car. A man approached the victims' car on foot and fired several times into the driver's side. Collins was struck in the head by a single bullet; both she and her fetus died. Williams and Green were uninjured.

Heidi D. testified that on the morning of the shooting, at about 8:00 a.m., she dropped off her child for daycare at the home of V.S., who lived across the street from 1937 Corning. Heidi saw two young Black men reclining in the front seats of a silver Jeep SUV, and saw another young man lying down in a car parked directly behind the SUV. She identified Abebe as one of the Jeep's occupants. However, the defense impeached Heidi's credibility with her extensive criminal and psychiatric history.

V.S. testified she witnessed the shooting through her home's front window. Prior to trial, she had tentatively identified Romero in a photo lineup as the gunman, but at the preliminary hearing and then at trial she recanted that identification. V.S

also testified that Heidi was untrustworthy.

Another eyewitness, Juan N., testified he saw only the immediate aftermath of the shooting. He identified a photograph of a silver Jeep SUV as the vehicle he saw flee from the scene. Abebe returned his rented silver Jeep a few hours after the shooting.

Cell phone tower evidence placed Abebe, Romero and Laurent in the area of the LAX Firing Range on May 4. Abebe's phone records showed him driving from the LAX Firing Range toward the general vicinity of the 1900 block of Corning Street later that night.

Laurent's cell phone was found at the crime scene immediately after the shooting. Phone records showed Laurent had received an incoming call approximately 15 minutes prior to the shooting. Laurent's phone had also received two incoming calls from a number registered to Romero's mother approximately 40 minutes after the shooting. Both calls went unanswered, but had been routed through the same cell phone tower as the call that had been received prior to the shooting. Phone records from the day before the shooting showed that Laurent had called Abebe's phone in the morning and again in the afternoon.

On May 6, the day after the shooting, Romero had a friend buy him a one-way plane ticket to Atlanta. Another friend told police that Romero said in July or August that he had left Los Angeles and could not return because " 'he did something bad.' "

When Abebe was arrested after the shooting, the police searched his residence and found large quantities of marijuana, a semiautomatic pistol, and various kinds of live ammunition. Some of those live ammunition rounds were of the same type as that found at the crime scene.

2. *Events leading to the mistrial.*

Abebe's writ petition concerns the trial proceedings before Judge Fox on August 17–18, 2015, and a subsequent hearing before Judge George Lomeli.

a. *Day one: August 17.*

During the morning session on Monday, August 17, there was a sidebar at which the prosecutor suddenly announced his intention to dismiss Laurent as a defendant and then immediately call him as the final witness in the prosecution's case-in-chief:

"The Court: We're at sidebar with counsel.

"[Prosecutor]: The People move to dismiss against Mr. Laurent and call him as their next witness.

"The Court: Okay. Did you let them[4] know?

"[Prosecutor]: No. We decided over the weekend.

"[Abebe's attorney]: I'd like a moment to digest that and let me determine –

"[Laurent's attorney]: Excuse me. This involves my client. Just dismissing would not be enough. Of course we want full immunity.

"[Prosecutor]: We'll give him use immunity for his testimony, and he's immune obviously from prosecution in this case.

"The Court: Jeopardy's already attached. It's done. Okay.

"[Abebe's attorney]: Can we have a moment? I'd love a little time to at least research it and see what could be done at this point.

"[Romero's attorney]: I'd like a couple days if that's the

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4 This was presumably a reference to the defense attorneys.

case. I'm not prepared to cross-examine.

"[Laurent's attorney]: Actually, the People are resting. Are you resting?

"[Prosecutor]: No, I'm not. I'm going to rest after I call him.

"The Court: I think he'd like to do it better this way [i.e., dismiss Laurent before resting] than with [an] 1118.1 [motion to acquit for insufficient evidence][5] and then ask to reopen.

"[Laurent's attorney]: Yes.

"[Prosecutor]: Probably just procedurally cleaner. [¶] . . . [¶]

"The Court: I'll give you a few minutes to digest it.

"[Abebe's attorney]: I'm not prepared to cross-examine. I don't know what he's going to say. I'd like an offer of proof as to what the questions are going to be. I'd like to find out if he's going to testify, if he's going to refuse, if he's going to be held in contempt. I don't know what's going to happen, so I'd like to have a moment. We should have been notified.

"[Laurent's attorney]: Yes. Exactly."

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5 Section 1118.1 provides: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right."

The trial court confirmed that the prosecutor's intention was to dismiss the case against Laurent. The court then called in the jurors and had them go to lunch. After the jury left, the prosecutor moved to dismiss the case against Laurent, and Laurent's attorney did not object.

At this point, the following colloquy occurred:

"[Abebe's attorney]: I would object and ask at a minimum for a continuance. I've had no discovery. I'm not prepared to go forward at this point. The prosecutor knew this at least a few days ago. We were not notified of it. [¶] The understanding was – it's sandbagging. And . . . whether or not they can do it is an issue, but whether they can sandbag like this is different, and we're entitled to notice and an opportunity to prepare.

"The Court: Okay. I don't have any issue with the opportunity to prepare. My belief in this matter is that counsel at least know something of some statements that I'm unaware of that apparently are attributable to Mr. Laurent.[6] And once it's determined that he's going to be a witness, then certainly I'll give counsel an opportunity to prepare any cross-examination as it relates to this.

"[Abebe's attorney]: Thank you. I would also ask that prior to him being called as a witness in front of the jury that there would be [a] 402 hearing outside the presence of the jury.

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6 The trial court apparently was referring to audiotaped statements Laurent had made to law enforcement shortly after the shooting. We understand from the parties' briefs that the trial court ruled the taped interview was inadmissible because it had been obtained in violation of Laurent's *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602] (*Miranda*).)

"The Court: Okay. On the issue of?

"[Abebe's attorney]: We don't know if he's going to assert some privilege. I know there may not be a privilege. We don't know if he's going to refuse to answer any questions, but I think that's something that should be addressed outside the presence. [¶] . . . [¶] There are cases on that. I would have researched them. I worked all weekend on other things, but certainly would have done the research, gotten the case law on that issue."

Following the lunch recess, the trial court sentenced Laurent on his plea to possession of a loaded firearm by a felon.

Still outside of the jury's presence, the trial court sought information regarding Laurent's prior statements to law enforcement, saying: "I would like to see a copy of whatever statement or statements may have been made by Mr. Laurent." But when the prosecutor apparently handed the court an entire transcript, Judge Fox said: "I didn't realize it was a transcript in its entirety. Okay. Can you give me sort of an overview as it relates to the statement that apparently is the subject of an audio recording in this matter?" The prosecutor said that on the day of his arrest, Laurent was interrogated at the police station where he initially "denied any involvement in this incident but eventually . . . confessed that he had in fact been there; that he saw Mr. Angulo Romero who he described as having the moniker Lil Swiss. [¶] . . . He said that . . . he saw [Romero] fire at the victim's vehicle and get into a silver SUV that was a rental, that was a newer silver SUV. He said that he was unable to see the driver, but he believed based on statements that [Abebe] made that [the driver] was K-Swiss[,] who he photo identified . . . [as] Mr. Abebe."

Asked if Laurent had indicated why he was at the scene,

the prosecutor stated: "He said he was there because he had spoken previously with the co-participants and said that he was just going there to scrap[,] to get in a fight, to get in a rumble and that he did not know that . . . a shooting would result."

The trial court asked, "Is Mr. Abebe's name mentioned by Mr. Laurent as someone who he'd spoken to before he went to the location[?]," to which the prosecutor replied, "I don't believe so." The following colloquy then occurred:

"The Court: I need you to clarify something . . . as to Mr. Abebe, . . . what did [Laurent] say about him being there or not being there?

"[Prosecutor]: He said . . . he believed that Mr. Abebe was there because he is the big homie to [Romero]. He said that Mr. Abebe admitted being there during the crime.

"The Court: Admitted to whom?

"[Prosecutor]: Admitted to Mr. Laurent.

"The Court: Okay. At some point after the crime.

"[Prosecutor]: Afterward. Mr. Laurent says that after the crime, he went to Abebe's residence and Mr. Abebe admitted that he had been there."

Judge Fox then proceeded to the issue of whether the prosecution should be able to call Laurent as a witness: "The cases provided to both counsel . . . [to wit, *People v. Lopez* (1999) 71 Cal.App.4th 1550 (*Lopez*) and *People v. Sisneros* (2009) 174 Cal.App.4th 142 (*Sisneros*)] discuss the issue that was raised this morning. [¶] The court is aware . . . that the fact that Mr. Laurent was going to become a witness in this matter was . . . made known apparently this morning for the first time, and that counsel have indicated to the court that there may be a need for some additional time to prepare cross-examination in

this matter. [¶] With that understanding, I'll hear from counsel. The cases I've cited I think are fairly informative and clear that at this point the court would make a determination out of the presence of the jury subject to arguments by counsel that Mr. Laurent no longer has any Fifth Amendment rights."

Abebe's attorney responded that he understood Laurent was going to refuse to answer any questions,[7] and therefore "my position would be that [Laurent] can't be impeached with [his] prior statement because he's not a witness, he's not sworn, he's not answering any questions, and we would not have [an opportunity] to cross-examine or confront him."[8]

When the trial court replied that Laurent would be "subject to the full panoply of questioning by the district attorney with orders by the court to answer those questions," Abebe's attorney objected that allowing the prosecutor to question Laurent about his police statement would be "a violation of our Sixth Amendment right to confrontation" and would be "extraordinarily prejudicial." He asserted: "It would deprive our

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[7] Laurent's counsel confirmed this during a sidebar discussion. Laurent's counsel also informed the court that the prosecutor had "told me that if my client refuses to testify, he's going to file a case against him and add a gang allegation which I think is highly improper because at this point I see it as a threat . . . ."

[8] Counsel's point was that Laurent's prior statements could not be introduced into evidence if Laurent refused to testify. (See *California v. Green* (1970) 399 U.S. 149, 158 [90 S.Ct. 1930] [confrontation clause not violated by admitting declarant's extra-judicial prior inconsistent statement *if* "declarant is testifying as a witness and subject to full and effective cross-examination"].)

clients of a fair trial because the jury just hears that Laurent confessed from the D.A.'s mouth without giving us any opportunity to really contest that. [¶] If the inference they want to draw is . . . that [Laurent's] not going to say anything because he's a gang member or that he's got fear of the gang or something like that, I think that's a different story, but not as to every question. And I think the court should carefully consider and limit the questions that the District Attorney can ask the witness. [¶] I think the full panoply as the court put it is just way too much and doesn't further any purpose in the trial."

Judge Fox concluded he could not assume that Laurent would refuse to testify, saying: "Let's see how it plays out, counsel. I haven't heard him refuse to testify." The court also ruled it would not conduct an Evidence Code section 402 evidentiary hearing at that time, stating, "Based on what the representations are at this point, I want him on the witness stand and I want him under oath." The jury re-entered the courtroom. Laurent was called to the stand and refused to be sworn. The following colloquy then occurred:

"The Court: Okay. I will advise the jurors Mr. Laurent is no longer a defendant in this matter. [¶] Please raise your right hand. Mr. Laurent, please raise your right hand. I'm ordering you to raise your right hand, Mr. Laurent. [¶] Take a seat, sir. Mr. Laurent, I've determined you no longer have any Fifth Amendment right to remain silent. . . . You're going to answer all questions asked by counsel. . . . [¶] Mr. Hanrahan [the prosecutor] you may inquire. Defendant refuses to raise his right hand or have an oath administered.

"[Romero's attorney]: . . . I think there has to be some sort of swearing in.

"The Court: You may proceed."

The prosecutor asked his first question: "Mr. Laurent, have you ever spoken with a detective about this case?" When there was no response, the court ordered Laurent to answer, and then held him in contempt when Laurent again made no response. Then, over continuing defense objections, the prosecutor proceeded to ask Laurent about 30 questions, some having to do with his possible fear of gang retaliation,[9] but most apparently coming directly from Laurent's police statement and addressing the question of what Laurent purportedly knew about the shooting. Laurent remained recalcitrant and non-responsive. Although Judge Fox held him in contempt multiple times, Laurent stayed silent while the prosecutor continued to pose such questions as: "When you met with the detectives the day that you were arrested, you said that you saw Lil Swiss [i.e., Romero] do the shooting; is that correct?"; "And you told the detectives that you knew that K-Swiss [i.e., Abebe] was there too because he admitted that to you; is that right?"; "Did you prepare even a diagram for the detectives showing them how everybody was positioned during the shooting?"; and, "Did you tell the detectives that the first shot you saw Lil Swiss fire was actually from the silver SUV?"

When Abebe and Romero asked for a mistrial, the trial court ruled: "All counsel have a right to ask him questions. He just refuses to answer those questions, and I'm not going to have

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[9] For example, the prosecutor asked: "Are you afraid of these two guys here, K-Swiss [i.e., Abebe] and Lil Swiss [i.e., Romero]?" and "Are you afraid of being labeled a snitch by the Mansfield Family gang?"

the system or this trial manipulated by a witness who in this case had absolutely no right to do what he did. Whether he did it on the advice of counsel or not, I don't know. [¶] But at this point in time the court believes that its position in regard to allowing him to be seen and heard which amounted to absolutely no words being spoken and questioned to determine whether he intended to answer any question at any point in time is appropriate based on my review of the case law. Motion for a mistrial is denied."

The People rested immediately thereafter, and the trial court denied the ensuing defense motions for acquittal under section 1118.1.

b. *Day two: August 18.*

The following day, the defendants again moved for a mistrial and this time the trial court granted it. Judge Fox said he had taken the evening recess to do additional legal research regarding the applicability of *Lopez* and *Sisneros*, and had now concluded — based on *People v. Murillo* (2014) 231 Cal.App.4th 448 (*Murillo*)[10] — that he had made a mistake: "[I]t appears

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[10] In *Murillo* (also a gang-related shooting), a witness had identified the defendant in a pretrial photo array, but then refused to testify at trial. The trial court then allowed the prosecutor to ask the witness 110 leading questions about his extra-judicial statements and display the photographic lineups in which he had identified the defendant. The Court of Appeal reversed the defendant's conviction: "We agree with Murillo that the trial court should have granted a mistrial. The court denied his right to confront witnesses and irreparably damaged his right to a fair trial when it allowed the prosecutor to ask Valencia unlimited leading questions about his out-of-court statements. [Citations.]" (*Murillo*, *supra*, 231 Cal.App.4th at pp. 454–455.)

that the court committed error in regard to allowing many of the questions that were asked in this case." Judge Fox expressed frustration at this outcome: "I am very, very distressed by this whole process. I feel the court was sandbagged, and I also feel that in light of six weeks of investment of time, I'm looking for any excuse to proceed with the trial and continue, but I am not going to put my imprimatur on a case in which the court believes it probably should have recessed the proceedings and done further research." Judge Fox said he "should have permitted some of the questions which [he] did, but some of the questions . . . the court [now] perceives to be a way to obtain evidence as a back-door effort to get statements which in particular identify [Romero] and [Abebe] as being . . . participant[s]." The judge added, "The issue . . . is in what manner and how much . . . can the court allow the jury to hear in order to establish the fact that the witness is either afraid or refusing to cooperate."

The following colloquy then occurred:

"The Court: Well, as reluctant as I am to suggest that an in limine motion might have been appropriate, Mr. Pitman [Abebe's attorney], I guess in this case I probably should have taken your advice.

"Mr. Pitman: Well, I did ask for a 402.

"The Court: Okay. Let's –

"Mr. Pitman: It is what it is. I do think that the questions were intentionally asked in a manner that would elicit the content of the confession and put that in front of the jury."

The afternoon session began out of the jury's presence. The trial court explained it had reviewed the transcript of Laurent's time on the stand and concluded that while some of the

questions had been appropriate, others had been improper. After assessing the prejudice flowing from the improper questions, the court granted defendants' motion for a mistrial.

3. *The denial of Abebe's double jeopardy plea.*

At this point, the case was sent to Judge Lomeli to conduct the retrial, and on December 11, 2015, Abebe entered a plea of "once in jeopardy" to all charges.[11] On April 11, 2016, Abebe filed a motion for a jury trial on his plea of once in jeopardy and joined codefendant Romero's motion to dismiss all the currently-pending charges with prejudice. In his motion for a jury trial, Abebe asserted that "[a]t the time of his arrest, Laurent made several statements to the police that directly incriminated himself and the co-defendants. The statements were deemed to be in violation of *Miranda* and were not admissible against him."[12] Abebe complained that "[i]n the presence of the jury, Laurent refused to take the oath and remained mute during his entire time on the witness stand. The prosecution, taking complete advantage of the situation,

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[11] Minute orders included with Abebe's writ petition reflect that he also filed a motion to dismiss on double-jeopardy grounds, but no separate motion papers were included in support of his writ petition. The People filed written opposition to the motion to dismiss.

[12] The *Miranda* violation would not have made Laurent's statements to the police inadmissible as to Abebe and Romero (see *People v. Varnum* (1967) 66 Cal.2d 808, 812 [*Miranda* is "violated only when evidence obtained without the required warnings and waiver is introduced against the person whose questioning produced the evidence"]); as to them, however, Laurent's statements to the police were hearsay.

essentially read Laurent's confession into the record in the form of unanswered questions and then rested. This was a clear and obvious violation of the remaining defendants' Fifth and Sixth Amendment rights to due process and confrontation."

In reply, the People argued: "[T]he prosecutor did precisely what the court ruled that he could do. No prosecutor could goad a court into declaring a mistrial by following the court's rulings. No prosecutor could anticipate that he even risked a mistrial by following the court's rulings."

Judge Lomeli agreed with the People, reasoning that the key issue was whether the prosecutor had committed misconduct by putting Laurent on the stand and questioning him, in light of the fact that Judge Fox had specifically allowed it. Judge Lomeli concluded the prosecutor "did not propound questions that the trial court had clearly and previously ruled could not be inquired about," and thus—because the defendants had failed to establish the existence of prosecutorial misconduct—there was no need to reach the issue of the prosecutor's intent in questioning Laurent. As Judge Lomeli explained: "[T]here has to be a finding, that's a prerequisite, whether you want to call it misconduct, impropriety, or conduct by the prosecutor, that the trier-of-fact or the court . . . can then look at the intent behind that conduct. [¶] I'm saying he never got that far, because, unlike all the cases that I cited and I read, those cases all have to do where [*sic*] the prosecutor deviated in some fashion or another from a prior order or a motion in limine. That didn't occur in this case, so I'm saying you didn't even get that far." Judge Lomeli denied the defense motion to dismiss and granted the People's motion to strike the defendants' plea of once in jeopardy.

4. *This writ's immediate procedural background.*

Abebe filed a writ petition in this court on June 10, 2016, and asked for a stay of trial proceedings. In his writ, Abebe contended that Judge Lomeli had erroneously granted the People's motion to strike the once-in-jeopardy plea, and that we should remand to let the jury decide the merits of the double jeopardy claim. We granted a temporary stay and requested preliminary opposition on June 16. Thereafter, we received informal opposition from the People and a reply brief from Abebe. We issued an order to show cause on September 22, 2016, and subsequently received a formal return and traverse from the parties.

CONTENTION

Abebe contends Judge Lomeli erred by granting the People's motion to strike his once-in-jeopardy plea without having a jury decide the plea's factual merit.

DISCUSSION

1. *Legal principles.*

Although the general rule is that a defendant who successfully moves for a mistrial may be retried without violating his or her double jeopardy rights, there is a recognized exception if the defendant was intentionally goaded into seeking the mistrial by prosecutorial misconduct. (*People v. Batts* (2003) 30 Cal.4th 660, 679–680 (*Batts*).) "The federal Constitution prohibits a retrial when the prosecution commits misconduct with the intent to provoke a mistrial. (*Oregon v. Kennedy* (1982) 456 U.S. 667, 675–679 [102 S.Ct. 2083] [*Kennedy*].) Similarly, the double jeopardy clause of the California Constitution bars retrial when misconduct 'results in a defendant's successful motion for mistrial' and either (1) the prosecution intentionally

committed misconduct to trigger a mistrial or (2) the prosecution believed an acquittal was likely, committed misconduct to thwart the acquittal, and the misconduct deprived the defendant of the reasonable prospect of an acquittal. [Citation.]" (*People v. Peoples* (2016) 62 Cal.4th 718, 750.) Claims that the prosecutor has committed misconduct with the intent to provoke a mistrial are frequently referred to as "*Kennedy*-type" claims.

In *People v. Bell* (2015) 241 Cal.App.4th 315 (*Bell*), the court concluded that, unless there are no factual determinations to be made and the case is one where prosecutorial intent can be decided as a matter of law, the defendant is entitled to a jury trial on a once-in-jeopardy plea predicated on a *Kennedy*-type double jeopardy claim. *Bell* explained: "The determination of whether a prosecutor intentionally goaded the defense into moving for a mistrial is one that necessarily ' "requires making inferences . . . ." ' [Citation.] The threshold issue in this case is whether a defendant who pleads once in jeopardy is entitled to have a jury make those inferences and ultimately determine the prosecutor's intent." (*Id.* at p. 339.) "Once the defense of former jeopardy has been raised by special plea, it is generally 'an issue of fact . . . which the jury alone possesse[s] the power to pass upon.' (*People v. Bennett* (1896) 114 Cal. 56, 59 . . . .)" (*Ibid.*) However, the jeopardy determination can become a question of law. The trial court may move to strike such pleas so long as "defendants are given an opportunity to present evidence concerning the goading issue . . . and the [trial] court determines that the facts are undisputed and give rise to only one reasonable inference." (*Id.* at p. 359)

2. *Abebe was not entitled to a jury trial on his once-in-jeopardy plea.*

Abebe contends Judge Lomeli erred by not referring the question of the prosecutor's intent to the jury for resolution. But before the issue of prosecutorial intent can be reached, Abebe must demonstrate that there was prosecutorial misconduct. We conclude he has failed to do so.

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action ' "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' [Citation.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 298.)

The People argue there could not have been any prosecutorial misconduct here because, "[a]s a matter of law, by following the [trial] court's rulings, the prosecutor could only have intended to proceed using proper means." The People rely on our Supreme Court's decision in *People v. Earp* (1999) 20 Cal.4th 826, 861(*Earp*), which held: " 'A prosecutor is not guilty of misconduct when he questions a witness in accordance

with the court's ruling.' [Citation.]"[13]

A witness' refusal to testify may warrant a jury conclusion that the witness is afraid of gang retaliation, or some similar inference. The People properly point out that "[t]he jury could have drawn adverse inferences from Laurent's improper failure to answer questions, if other evidence supported that inference. A witness who lacks a testimonial privilege may be required to take the stand in front of the jury, and refuse to answer any questions in front of them as well. [Citations.] The jury would then be allowed to *draw inferences* from that refusal, if supported by other evidence in the case."

"Once a court determines a witness has a valid Fifth Amendment right not to testify, it is, of course, improper to

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[13] In *Earp*, after rejecting a defense objection based on attorney-client privilege, the trial court ruled that the prosecutor could ask a witness if she had overheard a defense investigator tell the defendant's mother to change her preliminary hearing testimony. The prosecutor asked the question and the witness testified she did not recall hearing anything about that. On appeal, the defendant claimed the prosecutor had committed misconduct by asking the question. *Earp* held: "Defendant argues the prosecutor committed misconduct in asking MacNair whether she had heard the defense investigator's asking or telling Perusse to change her testimony. 'A prosecutor is not guilty of misconduct when he questions a witness in accordance with the court's ruling.' (*People v. Rich* (1988) 45 Cal.3d 1036, 1088.) That is what the prosecutor did here. Before the prosecutor's inquiry of MacNair, the trial court in a bench conference outside the jury's presence expressly allowed the prosecutor to conduct the questioning in issue." (*Earp*, *supra*, 20 Cal.4th at p. 861.)

require him to invoke the privilege in front of a jury . . . . [Citation.] But where a witness has no constitutional or statutory right to refuse to testify, a different analysis applies. Jurors are *entitled* to draw a negative inference when such a witness refuses to provide relevant testimony." (*People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554.) In *Lopez*, for example: "[O]nce the trial court was made aware the witness intended to claim a Fifth Amendment privilege, it made the proper inquiries and determined the testimony of the witness would be relevant, and the privilege did not apply. It then ordered [the witness] to testify before the jury. [The witness] took the stand and refused to answer questions, basing his refusal on a privilege he was not entitled to claim. We find, under these circumstances, that the jury was entitled to consider [the witness's] improper claim of privilege against him as evidence relevant to demonstrate exactly what the gang expert had opined: that gang members act as a unit to advance the cause of the gang and to protect their members." (*Id.* at pp. 1555–1556.) This is one of the negative inferences a jury may draw when a recalcitrant witness refuses to provide relevant testimony. Another example would be a witness who has been frightened into silence by fear of gang retaliation. (See *Sisneros*, *supra*, 174 Cal.App.4th at p. 152 [witness's courtroom conduct—refusing to testify or take the oath—was properly viewed by jury because it "provided strong support for the expert's opinion that [a particular gang] engaged in witness intimidation"].)

But the complicating problem in this case is determining the permissible scope of examining a so-called "recalcitrant witness." It may often be difficult in practice to know exactly where to draw the line between proper and improper questions in

such a situation. Thus, while we disagree with the People's suggestion that a prosecutor can *never* commit misconduct by following a trial court's evidentiary ruling (that is, we would—hypothetically—assume that the knowing presentation of perjured testimony amounts to prosecutorial misconduct regardless of trial court approval), we conclude that in the particular circumstances of this case it was appropriate for the prosecutor to rely on the trial court's ruling that the questions asked of Laurent were not improper.

The case at bar is nothing like *Batts* or *Bell* because in those cases the prosecution *violated* the trial court's in limine ruling not to allow the jury to hear certain information. (See *Batts*, *supra*, 30 Cal.4th at pp. 669–671 [jury not to hear that unavailable hearsay declarant had died from other than natural causes]; *Bell*, *supra*, 241 Cal.App.4th at pp. 336–337 [jury not to hear that defendants had been arrested by a SWAT team].) Here, Judge Fox ruled that the prosecutor's questions were permissible. Not only did the court rule that Laurent would be "subject to the full panoply of questioning by the district attorney with orders by the court to answer those questions," but the court was rather adamant that it could not just assume Laurent would refuse to testify, that Laurent had no valid self-incrimination privilege remaining, and that "[b]ased on what the representations are at this point, I want him on the witness stand and I want him under oath." When Laurent refused to be sworn and his attorney said "I think there has to be some sort of swearing in," the court told the prosecutor to proceed.[14] In

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[14] Evidence Code section 710 provides: "Every witness before *testifying* shall take an oath or make an affirmation or

denying the defendants' first mistrial motion, Judge Fox said: "All counsel have a right to ask him questions. He just refuses to answer those questions, and I'm not going to have the system or this trial manipulated by a witness who in this case had absolutely no right to do what he did." Judge Fox repeatedly ordered Laurent to answer the prosecutor's questions and then held Laurent in contempt each time he refused to do so.

In light of this record, Judge Lomeli remarked that the prosecutor was "attempting to avail himself of the safeguards provided by a judicial ruling." Judge Lomeli later said: "I mean, the judge is the protector of the law. And if you can't look to that judge for guidance to avail yourself of that protection, then what are you left with?" We agree with the People's argument that the only reasonable conclusion the prosecutor could have drawn in these circumstances was that Judge Fox had approved his course of action in questioning Laurent. Moreover, it is very apparent that the legal issues here were far from crystal clear, and had caused even this experienced trial judge to undertake additional legal research in order to definitively determine that some of the

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declaration in the form provided by law, except that a child under the age of 10 or a dependent person with a substantial cognitive impairment, in the court's discretion, may be required only to promise to tell the truth." (Italics added.) Based on this statute, a discovery ruling was reversed in *People v. White* (2011) 191 Cal.App.4th 1333, 1339, because "the [trial] court failed to administer the oath to the two custodians of record who appeared at the in camera hearing. [Citation.]" But in the case at bar, Laurent never actually testified to anything, and therefore we cannot see how the oath requirement has any relevance to what happened.

questions he allowed the prosecution to ask were improper. The correct answer came down to a "matter of degree" rather than a simple case of complete right versus complete wrong. In these circumstances, we believe it was proper for the prosecutor to rely on Judge Fox's initial ruling that allowed the questioning of Laurent, and to rely on the rule that " '[a] prosecutor is not guilty of misconduct when he questions a witness in accordance with the court's ruling.' " (*Earp*, *supra*, 20 Cal.4th at p. 861.)

We conclude Judge Lomeli was correct in finding there was no prosecutorial misconduct here and, therefore, no need to resolve Abebe's plea of once in jeopardy by having a jury trial on the issue.

DISPOSITION

Abebe's petition for writ of mandate is denied and the matter is remanded to the trial court for further proceedings. The order to show cause is discharged.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GOSWAMI, J.

We concur:

EDMON, P. J.

ALDRICH, J.-