

(TAKEN FROM *PEOPLE v. MANUEL ALEX TRUJILLO*, H026000
CROSS-APPELLANT'S OPENING BRIEF)

I. EXCLUSION OF DEFENSE EVIDENCE THAT SMITH HAD PREVIOUSLY COMMITTED PERJURY ABOUT BEING THE VICTIM OF A CRIME TO OBTAIN BENEFITS WAS PREJUDICIAL ERROR UNDER STATE LAW AND VIOLATED APPELLANT'S FEDERAL DUE PROCESS RIGHT TO PRESENT A COMPLETE DEFENSE.

A. Procedural Background

The court conducted a hearing outside the presence of the jury to determine the admissibility of Gordon Complin's testimony concerning Smith's quitting his job at Texaco and getting unemployment benefits. (RT 561-576.) Mr. Complin was sworn and examined.

Early one morning, about 4:45 a.m., Smith called the Texaco personnel office and left a message saying he had been threatened by another employee over the phone and wanted to leave his job, but wanted to make sure he got unemployment benefits. (RT 564.) Complin and the Texaco human resources department asked Smith if he would make a police report, asked to investigate the incident and asked how they could resolve it to his satisfaction. (*Ibid.*) Smith did not want to do any of that. At 7 p.m. that night, Smith called Complin and said he would not be in to work any more and wanted his unemployment benefits. (*Ibid.*)

Smith applied for unemployment, but was denied when Complin said Smith had left the job without notice and that Texaco wanted him to work and was willing to protect him from any threat of bodily harm. (RT 564-565.) Smith then appealed the denial of benefits, and there was a hearing before a judge at which Smith and Complin testified under oath. (RT 565.)

Smith's testimony at the hearing differed greatly from what he had

originally told Complin. In the original story to Complin, Smith said he did not know who the person that threatened him was, and that there was only one call. (RT 566.) At the hearing, he said he knew who it was, and that he had been threatened over a period of two to three weeks before he reported it to Complin. (RT 569.) He said he was willing to make a police report, which he had not been. (*Ibid.*) Also, he said at the hearing that the threatening caller was a man, and the only other man who worked at the Texaco station was Complin. (RT 566-567.) Finally, he told the judge that he had a head injury and his doctor had told him that even a slight blow to the head would kill him. (RT 567.) Smith won his appeal and was granted benefits. (RT 567.)

The defense argued for the admissibility of the evidence as showing that Smith had previously lied under oath, and as evidence of a common plan to take a minor situation, and exaggerate it to gain benefits. (RT 570-571.) The prosecution claimed the evidence was impeachment on a collateral matter and asked the court to exclude the testimony. (RT 571-572.) The court ruled that Complin's testimony as to whether Smith said the person threatening him was male or female, and the fact Complin and Smith were the only males, was the only testimony he would permit, and only if Smith were recalled to testify and asked about it. (RT 573-575.) Defense counsel reiterated that the statements were not being argued to prove the truth of what Smith said, but that Smith had contradicted himself. (RT 575.) The court said that was not an exception to the hearsay rule, and the evidence concerning a threat would not be admitted unless Smith were recalled. (RT 576.)

Complin was called as a witness before the jury and testified to Smith's employment, the fact he submitted a medical clearance when hired, worked regularly and did not display any symptoms such as memory loss, lack of concentration, nausea, or sensitivity to light and noise, either while working,

or even after he quit, up to February, 2002. (RT 599-605.) There was no questioning about how Smith left his job, or anything about his contradictory statements made first to Complin and then later under oath at the unemployment benefits appeal hearing.

B. The Trial Court's Exclusion of Defense Evidence Pursuant to Evidence Code Section 352 Was An Abuse of Discretion.

The trial judge excluded evidence concerning Smith's prior misconduct in exaggerating an alleged offense against him in order to receive benefits. He did so under Evidence Code section 352, concluding that such testimony was "vaguely relevant, barely relevant, but the probative value as to [sic] a completely collateral matter." (RT 573.) The trial judge's analysis was erroneous, and the resulting exercise of discretion to exclude the evidence was an abuse of discretion.

Exercises of discretion to exclude evidence pursuant to Evidence Code section 352 are reviewed under an abuse of discretion standard. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070.) However, exclusion of evidence that is highly probative, when none of the discretionary reasons for exclusion exists, constitutes an abuse of discretion. (*Id.*, at pp. 1070-1071.)

The trial court analyzed the evidence as being probative only as to a collateral matter. This analysis was erroneous. The evidence was highly probative on the issue of Smith's general credibility, and was highly probative on the issue of whether Smith was "working the system" in the present case by exaggerating an event that might serve as a basis for obtaining benefits. These issues were not collateral in this case, but went to the heart of the defense. The theory of the defense was that Smith was lying about the degree of force used by appellant and exaggerating his injuries in order to obtain a disability waiver so he would not have to work while receiving general

assistance, spousal support from his wife due to his alleged disability, and additional narcotics medications, at a time when doctors were becoming reluctant to prescribe him any more. While the defense could point out that Smith was more likely to get the benefits he was seeking by exaggerating the seriousness of the assault, there was little hard evidence of actual dishonesty in his statements to various doctors, despite some inconsistencies and his failure to tell multiple doctors treating him about the others. However, the evidence from Complin that was excluded showed that Smith would go to the extent of lying under oath in order to get the benefits he sought.

A reasonable fact finder, hearing Complin's evidence, could conclude that Smith had exaggerated what he originally claimed happened vis a vis the threat which caused him to leave his job, and that he had thereby committed perjury when testifying under oath at the unemployment appeal hearing.

This evidence was highly relevant to the issue of Smith's credibility. It was highly relevant to prove Smith's character for dishonesty. Evidence Code section 780, subdivision (e), states that in determining the credibility of a witness, a court or jury may consider any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony, including "[h]is character for honesty or veracity or their opposites." While Evidence Code section 787 states that evidence of specific instances of a witness's conduct relevant only as tending to prove a trait of character is inadmissible, this section was repealed pro tanto in criminal cases by the adoption of article I, section 28, subdivision (d) of the California Constitution. (*People v. Harris* (1989) 47 Cal.3d 1047, 1080-1082; *People v. Wheeler* (1992) 4 Cal.4th 284, 290-292.) Thus, specific instances of misconduct involving dishonesty or moral turpitude are relevant and admissible, unless properly excluded by statutory rules relating to privilege or hearsay, or Evidence Code sections 352,

782 (rape shield law) or 1101-1103.

The evidence of Smith's prior misconduct presented by Complin's excluded testimony showed his character for dishonesty in a very persuasive fashion. While proof that a witness has told a lie in the past may have relatively little tendency to show a character trait for dishonesty if the subject matter was trivial or the consequences of untruthfulness slight, here the evidence was that Smith had lied under oath on a matter quite material to the subject of that hearing. Thus, the evidence had great probative value in determining whether administration of the oath in the present case was likely to have any effect in producing truthful testimony from Smith.

All conduct of a witness evidencing moral turpitude is relevant and potentially admissible to impeach a witness's credibility. (*People v. Ayala* (2000) 23 Cal.4th 225, 273.) And forms of misconduct which involve dishonesty are more probative to the issue of credibility than misconduct involving moral depravity, such as crimes of violence. (*People v. Castro* (1985) 38 Cal.3d 301, 315.) "Obviously it is easier to infer that a witness is lying if the felony of which he has been convicted involves dishonesty as a necessary element than when it merely indicates 'bad character' and 'general readiness to do evil.'" (*Ibid.*) Perjury is obviously a crime in which dishonesty is an element. (*People v. Chavez* (2000) 84 Cal.App.3d 25.)

The evidence was also probative to demonstrate that Smith was engaging in this case in a common design or plan of exaggerating any injury or threat in order to obtain money without working. (Evid. Code § 1101, subd. (b).) Under Evidence Code section 1101, subdivision (b), evidence that a person committed a crime, civil wrong or other act is admissible when relevant to prove a fact such as common design or plan. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.) As *Ewoldt* stated, "evidence of uncharged

misconduct must demonstrate ‘not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of whether they are the individual manifestations.’” (*Id.*, at p. 402.) The degree of similarity needed to show a common plan is less than that necessary to prove identity, but more than necessary to show similar intent. (*Ibid.*) There was a high degree of similarity between Smith’s conduct in exaggerating under oath the threats he earlier claimed to have received in order to get unemployment benefits, and his conduct in exaggerating under oath the forcefulness of the assault and the extent of his injuries in order to get spousal support, disability exemptions, and prescription narcotics.

The trial court thus grossly underestimated the relevance and probative value of the proffered evidence both to impeach Smith’s credibility and to demonstrate he was employing a common design or plan by his willingness to exaggerate under oath any injury or threat to gain benefits. These were not “collateral matters,” but issues that went to the heart of the case.

The trial court did not actually identify any of the factors enumerated in section 352 as justifying the exclusion of relevant evidence, i.e., undue consumption of time, substantial danger of undue prejudice, confusion of issues, or misleading the jury. The direct and cross examination of Complin during the hearing outside the presence of the jury took only ten transcript pages, so that there was no basis for finding undue consumption of time were the evidence to be presented. (*People v. Harris* (1998) 60 Cal.App.4th 727, 739 [testimony 25 transcript pages in length “cannot be viewed as protracted” in analyzing whether its admission would require undue consumption of time].) There was no apparent danger of “undue prejudice,” that is, “evidence which uniquely tends to evoke an emotional bias against . . . [one party] . . .

and which has very little effect on the issues.” (*People v. Wright* (1985) 39 Cal.3d 576, 585.) There was no apparent danger that the evidence lead to the confusion or misleading of the jury.

Thus, evidence with great probative value to the central issues in the case, whether Smith was credible and whether he was exaggerating the severity of the assault for his own personal benefit, was excluded despite the nonexistence of any factor justifying its exclusion. The California Supreme Court has found an abuse of discretion in similar circumstances.

Thus, in *People v. Minifie, supra*, 13 Cal.4th 1055, the trial court excluded evidence that a defendant had been threatened by a third party associated with the person whom the defendant had shot after a confrontation in a bar. The trial court ruled the evidence inadmissible and said even if admissible it would exclude it under Evidence Code section 352. The California Supreme Court found the evidence was admissible on the issue of whether the defendant had acted in self defense, and further found the trial court had abused its discretion in excluding the evidence under section 352. The Supreme Court noted the substantial probative value of the excluded evidence which was “at the heart of the defense case.” (*Id.*, at p. 1020.) It also noted that presentation of such evidence would not have represented an “undue” consumption of time, and that there was no risk of prejudice. The excluded evidence would not have confused the issue, but “would have further illuminated the situation the jury was required to evaluate.” (*Id.*, at p. 1071; see also *People v. McAlpin* (1991) 53 Cal.3d 1289, 1309-1310, fn. 15 in which the court found an abuse of discretion in exclusion of favorable character evidence in a child molestation prosecution.) When a trial court grossly undervalues the probative value of proffered evidence, and finds it outweighed by nonexistent reasons justifying exclusion, an abuse of section 352 discretion

has occurred. That is what happened in the present case.

C. Exclusion of the Evidence Violated Appellant's Federal Constitutional Right to Present a Defense.

As the United States Supreme Court unanimously held in *Crane v. Kentucky* (1986) 476 U.S. 683, 690: “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [citation] or in the Compulsory Process or Confrontation Clause of the Sixth Amendment [citations], the constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’ [Citations] . . . Th[e] opportunity [to be heard] would be an empty one if the state were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant’s claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor’s case encounter and ‘survive the crucible of meaningful adversarial testing.’ [Citation.]”

The California Supreme Court has recognized that the trial court’s authority under Evidence Code section 352 to exclude relevant evidence must yield to the federal constitutional right to present evidence. (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.) In *Babbitt*, the court noted that the principle applied “only to ‘relevant and material’ evidence.” (*Ibid.*) It stated that *People v. Reeder* (1978) 82 Cal.App.3d 543, 553 “correctly stated” the following principle: “Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense we do not mean to imply, however, that a defendant has a constitutional right to present all relevant evidence in his favor, no matter how limited in probative value such evidence will be so as to preclude the trial court from using Evidence Code

section 352.” (*People v. Babbitt, supra*, 45 Cal.3d at p. 684.) *Babbitt’s* holding on this point has been cited with approval more recently in *People v. Marshall* (1996) 13 Cal.4th 799, 836 and *People v. Cunningham* (2001) 25 Cal.4th 926, 998.

In the present case, the proffered evidence had significant probative value to the defense and was not on a “minor or subsidiary point.” (*People v. Cunningham, supra*, 25 Cal.4th at p. 998.) It went directly to Smith’s credibility on the crucial point of the case, the degree of force used in the assault. Nor was there any valid state justification for exclusion of the evidence. The exclusion of the evidence which had significant probative value to the defense thus constituted federal constitutional error.

The only remaining question is whether this issue is reviewable by this court. Generally, failure to specify the exact grounds for an objection to the admission of evidence may constitute a waiver (or more precisely, forfeiture) of the issue for purposes of appellate review. (Evid. Code § 353, subd. (a) [no reversal due to erroneous admission of evidence unless timely and specific objection].) However, where, as here, a party is seeking the admission of evidence and it is excluded, the rules of appellate review are set forth in Evidence Code section 354. Evidence Code section 354 provides:

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

- (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;
- (b) The rulings of the court made compliance with

- subdivision (a) futile; or
- (c) The evidence was sought by questions asked during cross-examination or recross-examination.

Here, appellant fully complied with subdivision (a) of section 354. The substance, purpose and relevance of the excluded evidence was thoroughly put before the trial court by the examination of Complin outside the jury's presence, and the argument of counsel.

The analysis of whether evidence is properly excluded under Evidence Code section 352 is based on the same factors as analysis of the federal constitutional right to present it: probative value to the defense versus valid state concerns for excluding it. A correct ruling under Evidence Code section 352 means that there has been no denial of the federal constitutional right to present a complete defense. "Although a criminal defendant is constitutionally entitled to present all relevant evidence of significant probative value in his favor, this does not mean the court must allow an unlimited inquiry into collateral matters; the proffered evidence must have more than slight relevancy." (*People v. Marshall, supra*, 13 Cal.4th 799, 836.)

No useful purpose is served by declining to consider on appeal a claim that merely restates, under alternate legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

Thus, this court should consider the issue of whether exclusion of Complin's testimony deprived appellant of his constitutional right to present all evidence of significant probative value.

D. Prejudice

It is apparent from the verdicts that the jury had a reasonable doubt as

to whether appellant robbed Smith or inflicted great bodily injury. However, it decided against appellant the extremely close question of whether the force used in appellant's assault was likely to produce great bodily injury.

The evidence that supported a finding of felony assault rested entirely on Smith's credibility. The most potent evidence of such force was Smith's testimony that appellant had repeatedly kicked Smith in the head after knocking him down. It was these kicks that caused Smith's claimed loss of consciousness. (RT 97-98.) The prosecutor rested heavily on the head kick testimony in argument. (RT 676-677: "But you don't even need to go there [consider Smith's alleged pre-existing head injury] to get the answer to your question on the felony assault . . . [I]f you take your foot then and drop kick him in the head, that qualifies. I don't care who you are. Any victim at that point is the subject of an assault by force likely to produce great bodily injury.")

The claim of being kicked in the head rested solely on Smith's testimony. The prosecution called only one eyewitness to the assault, Mark Meeuwissen. According to Mr. Meeuwissen, he jumped up to look out the window as soon as he heard the sound of a scuffle or fight. He saw Smith standing, then saw appellant punch Smith three or four times while Smith protected his head with his forearms and fists. He did not see appellant kick Smith, or Smith on the ground. None of the other eyewitnesses present throughout the assault, who would have seen head kicking if it had occurred, were called by the prosecutor.

Clearly, on the basis of the impeachment evidence that the defense was allowed to present, the jury questioned whether Smith sustained great bodily injury as he claimed. They entertained a doubt as to whether Smith's numerous symptoms involving post concussion symptoms were caused by the

assault or by Smith's long time use of prescribed narcotics. The admitted impeachment presented Smith as a pathetic case, a person who had become addicted and then suffered rebound headache symptoms, while believing he was not addicted and that all his symptoms were caused by his fall in 1998 and appellant's assault.

The excluded impeachment evidence, on the other hand, showed a calculating perjurer, not a self-deluded addict. The jury could accept most of Smith's testimony and come up with the verdict it reached. Smith did not say he saw appellant take his wallet, and it well could have been picked up by "A1" who was at the scene of the assault and returned the wallet soon afterward. It could have credited Smith's subjective description of his post-assault symptoms, but believed they were caused by the narcotics he had admittedly been taking in substantial quantities for years, and that Smith was a typical addict in denial. But to question his testimony about the head kicking, they would have to believe he was capable of consciously lying under oath. That is precisely what the excluded evidence showed. Its exclusion cannot therefore be reasonably deemed harmless beyond a reasonable doubt. Indeed, even under the more lenient *Watson* standard, a better result on the issue of whether the assault was with force likely to produce great bodily injury if the jury had heard the excluded evidence is much more than an abstract possibility. (See *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 918, stating that a reasonable probability of a better outcome under the *Watson* test "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.")

Thus under either test of error, exclusion of the evidence of Smith's prior perjury was prejudicial, and the court should reverse the judgment, or allow the prosecution the alternative of accepting a modification of the

conviction to the lesser included offense of misdemeanor assault, or suffer a complete reversal if they wish to retry appellant.

(TAKEN FROM *PEOPLE v. MANUEL ALEX TRUJILLO*, H026000
CROSS-APPELLANT'S REPLY BRIEF)

II. EXCLUSION OF DEFENSE EVIDENCE THAT SMITH HAD PREVIOUSLY COMMITTED PERJURY ABOUT BEING THE VICTIM OF A CRIME TO OBTAIN BENEFITS WAS PREJUDICIAL ERROR UNDER STATE LAW AND VIOLATED CROSS-APPELLANT'S FEDERAL DUE PROCESS RIGHT TO PRESENT A COMPLETE DEFENSE.

A. The excluded evidence had significant probative value to the main theory of the defense, and its exclusion, unsupported by any of the reasons permitting discretionary exclusion, was an abuse of discretion.

Cross-appellant argued in the opening brief that the trial court abused its discretion in excluding evidence from which the jury could have found that the alleged victim had a common scheme and plan of exaggerating or falsifying his victimization in order to obtain benefits. Cross-respondent claims that the trial court did not abuse its discretion, for a variety of reasons, each of which is unpersuasive upon analysis.

Cross-respondent first claims that allowing the defense to present evidence of Smith's prior exaggeration under oath to get unemployment benefits would "cause undue confusion and consumption of time . . . much more time than the section 402 hearing." (RB, at p. 11.) Cross-appellant anticipated such a claim, and pointed out that in *People v. Harris* (1998) 60 Cal.App.4th 727, 739, the appellate court had noted that testimony consuming only 25 pages of transcript "cannot be viewed as protracted" in terms of a section 352 analysis. (AOB, at p. 25.) Gordon Complin's testimony in the section 402 hearing was only eight transcript pages in length. (RT 563-570.)

Cross-respondent claims that his trial testimony would have been a lot lengthier because “Complin would presumably not testify before the jury in narrative form and would be subject to greater cross-examination.” (RB, at pp. 11-12.) An examination of the section 402 hearing shows that the direct examination proceeded basically by question and answer, meaning little additional time would be necessary for direct examination before the jury. Only tedious and repetitious cross examination could expand Complin’s total testimony on this point to somewhere beyond the 25 page length viewed as “not protracted” for section 352 purposes by *People v. Harris*. Given that the trial court has the discretion to curtail tedious and repetitious cross-examination, there would be no reason to anticipate undue consumption of time.

Cross-respondent seeks to propound “problems of proof” that justified the discretionary exclusion of the evidence. The first such presumed problem is that the proffered testimony was that it was inadmissible hearsay. (RB at p. 12.) However, Smith’s inconsistent statements were not offered to prove the truth of either, but the falsity of at least one. Thus, neither was offered for a hearsay purpose.

Evidence Code section 1200 defines hearsay evidence as “evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” Here, while the evidence was a statement made other than by a witness while testifying at the hearing, it was not offered to prove the truth of the matter stated, and so is not hearsay at all.

Admission of an extrajudicial statement for the non hearsay purpose of demonstrating its falsity is well established. Just recently in *People v. Crew* (2003) 31 Cal.4th 822, a unanimous California Supreme Court upheld the

introduction of a witness's report to police that he had been robbed of his money and car. Other evidence showed he had not been robbed and had left his car at an airport. The Supreme Court held: "The evidence in question was not hearsay The statements were not admitted to prove that [the witness] was the victim of a robbery; they were offered to prove that [the witness] tried to establish an alibi for himself and thus must have known that defendant was going to commit a crime." (*Id.*, at p. 841.)

Similarly, in *People v. Zack* (1986) 184 Cal.App.3d 409, 417, a defendant's exculpatory statements that he had been in Carmel fishing and stopped at a particular gas station when a murder was committed elsewhere were admitted not to prove the truth of the matters asserted in the statements, but their falsity in light of evidence that the weather was foul and the gas station closed that day. *Zack* ruled that the defendant's statements were not hearsay, and that prior cases had similarly held that such evidence had not been offered "for the truth of the matters asserted, and, in fact, they were offered to show the opposite, i.e., not for a hearsay purpose. (Evid. Code, § 1200.)"

The same rationale applies in the present case. Smith's initial statement to Complin that someone from the station had called and threatened him was not offered for the proof of what was said. That statement itself may well have been false. But it did serve as a baseline, regardless of its truth, against which his later inconsistent version was to be measured. That second statement was certainly not offered to prove the truth of the matter asserted but just the opposite. Regardless of whether the first statement was true or not, the jury could reasonably infer that second one was a highly exaggerated version that Smith offered while under oath for the purpose of getting unemployment benefits he was not entitled to.

The second “problem of proof” that cross-respondent sees is that the impeachment evidence was “merely an oath contest between Complin and Smith.” (RB, at p. 9.) First, cross-respondent points to nothing in the record to suggest that Smith could or would deny Complin’s testimony. No offer of proof to that effect was made by the prosecutor, and it appears cross-respondent is simply speculating that Smith would deny Complin’s testimony. Second, many entire trials, particularly in sexual assault and domestic violence cases, are basically “oath contests,” which is the rationale behind the California Supreme Court’s approval of Evidence Code section 1108 and its admission of prior acts of sexual violence to prove propensity. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911-912; see also *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1028 (upholding Evid. Code, § 1109 under such rationale.)

Jury instructions, common sense and experience indicate that frequently the uncorroborated testimony of a single witness is sufficient to prove a fact beyond a reasonable doubt. (CALJIC No. 2.27 (2004 ed).) Cross-respondent takes a common occurrence in litigation and tries to turn it into justification for excluding highly probative evidence. Cross-respondent fails.

The next supposed problem of proof is that Smith won his unemployment insurance appeal. This is an utter nonfactor. Evidence of the appeal verdict would be inadmissible hearsay. (*People v. Wheeler* (1992) 4 Cal.4th 284, 297-300 [misdemeanor conviction inadmissible to prove the matters determined].)

The fourth supposed problem of proof is that the evidence came from the “losing party” at the unemployment benefits appeal hearing. Cross-respondent supposes that if Complin were impeached with that fact, it would “invite further delay and confusion.” First, Complin was a mere employee of

the gas station, and had no personal stake in whether Smith was paid unemployment benefits or not. But even if the fact that Complin was an adverse witness were deemed admissible, it could be brought out in a single question. How this would cause confusion and delay sufficient to justify the exclusion of highly probative evidence is left unexplained.

It is notable that cross-respondent does not try to support the trial court's actual stated rationale for excluding the evidence: that it was "vaguely relevant, barely relevant, but the probative value as to [sic] a completely collateral matter." (RT 573.) Cross-respondent apparently concedes that the proffered evidence was not just "barely relevant" to a "collateral matter." As demonstrated in cross-appellant's opening brief, the issue of whether Smith was willing under oath to exaggerate a claim of victimization was of central importance to the defense of the case, and was anything but a "collateral matter." (Cross AOB, at pp. 21-24.)

Cross-respondent apparently concedes the substantial probative value to the defense, but relies on the "undue consumption of time" and "proof problems" to justify discretionary exclusion. However, the supposed proof problems are not substantial. Nor can the "undue consumption of time" fairly be used by itself to justify the exclusion of highly probative evidence. "Evidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it." (*People v. Wright* (1985) 39 Cal.3d 576, 585, quoting *People v. McDonald* (1984) 37 Cal.3d 351, 372.) Or, as the California Supreme Court more recently put it in reversing a section 352 ruling against a criminal defendant, "Presentation of evidence at the heart of the defense would not have constituted an 'undue' consumption of time." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070.)

In the present case, the trial court drastically underrated the probative value of the evidence, while also failing to understand it was being offered for a non hearsay purpose. The resulting exclusion was an abuse of the discretion afforded by Evidence Code section 352.

- B. The exclusion of the evidence, in addition to being an error of state law, also denied cross-appellant his federal constitutional due process right to present a defense.

In his opening brief, cross-appellant argued that the exclusion of evidence in his case violated his federal constitutional right to present a defense. Cross-respondent's only reply is that since the exclusion was permissible under Evidence Code section 352, there was no constitutional violation. Cross-respondent does not argue procedural forfeiture, nor argue that even if the exclusion were error under Evidence Code section 352, there was no violation of the federal constitutional right to present a defense.

Because exclusion was not justified under Evidence Code section 352, and because erroneous exclusion of evidence of significant probative value to the defense is a denial of the right to present a defense, a federal constitutional violation has been demonstrated.

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- C. The exclusion of evidence was prejudicial under either *Chapman* or *Watson*.

Cross-respondent erroneously assumes that *Watson* is the appropriate host of prejudice. (CRB at p. 15.) He then claims that even if the evidence had been admitted, and Smith's testimony about the severity of the assault consequently discounted by the jury, the jury would still have convicted of

felony assault solely on the testimony of Mark Meeuwissen. Meeuwissen testified that he saw cross-appellant punch Smith three or four times, but that Smith had his arms over his head in “rope a dope” fashion. As the trial judge noted, this was a reference to a famous Muhammad Ali fight, the “Rumble in the Jungle” in Zaire against George Foreman. In that fight, Ali protected his head with his hands, taking repeated blows on his arms without any apparent damage, and then ultimately knocked Foreman out. In Smith’s use of the rope a dope, Meeuwissen testified that he never saw Smith go down in response to the blows, never saw him lose consciousness, nor saw any other blows. (RT 306-307.)

Cross-respondent’s claim that the jury would have convicted cross-appellant of assault with force likely to produce great bodily injury based on Meeuwissen’s testimony alone rings hollow in light of how the trial prosecutor argued the issue to the jury. (Cf. *People v. Minifie, supra*, 13 Cal.4th at p. 1071: “The jury argument of the district attorney tips the scale in favor of finding prejudice”) The prosecution emphasized the knock to the ground and head kicking, testified to only by Smith, as the basis the jury should rely upon to establish that the assault was with force likely to produce great bodily injury. (RT 676-679.)

Cross-respondent also ignores the closeness of the issue reflected in the jury’s finding that great bodily injury was not actually inflicted, despite its finding that the assault was by means of force likely to produce great bodily injury.

Certainly, under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24, that the prosecutor must show beyond a reasonable doubt that the error complained of did not affect the verdict, the error was prejudicial. Given the closeness of the issue, the probative value of the excluded evidence, and

the prosecutor's reliance on the uncorroborated testimony of Smith regarding the knock down and head kicking, the error cannot be deemed harmless beyond a reasonable doubt.

Even under the more lenient *Watson* standard, the error was prejudicial and requires reversal of the judgment. Contrary to some views, the "reasonable probability of a more favorable outcome" prejudice test applicable to state law errors does not require a demonstration that a more favorable outcome is "more likely than not." Instead, it means that there is a reasonable chance or more than an abstract possibility of a more favorable outcome upon retrial without the error. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704-715, citing *People v. Watson* (1956) 46 Cal.2d 818, 836, with a "cf." citation to *Strickland v. Washington* (1984) 466 U.S. 668, 693-694, ["reasonable probability" does not mean "more likely than not," but merely probability "sufficient to undermine confidence in the outcome."].)

In an issue of this factual closeness, there can be no confidence that a jury would credit Smith's testimony about the severity of the assault, had they known of his prior willingness to inflate an original complaint under oath in order to gain unemployment benefits. Evidence of such prior conduct, when coupled with Smith's similar use of the alleged severity of cross-appellant's assault to obtain narcotics from Dr. Nakelchuk and to try to obtain spousal support would cause any reasonable juror to doubt Smith's credibility on this point and to demand some corroboration, of which there was none.

Accordingly, whether the error is viewed as one of state law or federal law, or both, it was prejudicial and requires reversal.

(TAKEN FROM *PEOPLE v. MANUEL ALEX TRUJILLO*, H026000
PETITION FOR REVIEW)

III. EXCLUSION OF EVIDENCE THAT THE ALLEGED VICTIM HAD PREVIOUSLY LIED UNDER OATH TO

EXAGGERATE A CLAIM OF VICTIMIZATION WAS AN ABUSE OF DISCRETION AND A VIOLATION OF THE DUE PROCESS RIGHT TO PRESENT A DEFENSE.

1. Whether Smith Could Have Been Prosecuted For Perjury on the Basis of the Excluded Evidence is Irrelevant to Whether the Evidence of His Lying Under Oath Should Have Been Admitted to Impeach His Credibility.

This court's opinion began its analysis of the exclusion of evidence issue by saying that the excluded evidence did not show that Smith was ever investigated, arrested, or convicted of perjury, and that Smith could not have been convicted on the basis of witness Complin's excluded testimony. (Opn, at pp. 11-12.) These points are irrelevant to a correct analysis of whether the trial court abused its discretion in excluding the evidence. Defendant need not meet the criminal burden of proof to convict Smith of lying under oath at the unemployment insurance appeal hearing in order to present evidence tending to prove that to the jury. The correct test is whether a reasonable juror could conclude that Smith had lied under oath at the benefit appeals hearing, and that such prior lying under oath negatively affected the credibility of Smith's testimony before the jury. Proof that a witness has previously lied under oath is highly probative as to the witness's credibility. Particularly where, as here, an alleged victim of crime is claiming a degree of injury uncorroborated by any other evidence, and a degree of injury absolutely essential to establish a

felony rather than misdemeanor offense occurred, evidence that he had previously lied under oath about a similarly uncorroborated claim of victimization is absolutely essential to a fair determination of credibility.

It has been said many times that “No witness including a defendant who elects to testify is entitled to a false aura of veracity.” (*People v. Beagle* (1972) 6 Cal.3d 441, 453.) The trial court’s ruling excluding highly probative impeachment evidence provided such a false aura for Smith.

2. The Opinion’s Claim That The Excluded Evidence Violated the Hearsay Rule was Erroneous Under Controlling Authority Not Acknowledged in the Opinion.

Respondent and cross-appellant explained in his reply brief that admission of out of court statements to prove their falsity, rather than their truth, does not violate the hearsay rule because Evidence Code section 1200 defines hearsay as “evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Reply brief, at p. 3) The reply brief also cited recent and controlling California Supreme Court authority, *People v. Crew* (2003) 31 Cal.4th 822, 841, which recognized that out of court statements admitted to prove their falsity are not hearsay.

The court’s opinion never acknowledges respondent and cross/appellant’s argument that the statements were not hearsay within the

Evidence Code definition. It does not give any consideration to the controlling California Supreme Court authority cited in the reply brief. It therefore came to an erroneous conclusion.

3. This Court's Conclusion That the Exclusion of Evidence Was Not an Abuse of Discretion and a Violation of his Due Process Rights Was Error.

As discussed above, much of this court's analysis of this issue consisted of confusion of the requirements of a perjury prosecution with standards for admission of impeachment evidence, and on its erroneous holding that the evidence was offered to prove the truth of the matter stated, and therefore hearsay.

But perhaps the greatest error is the failure to apprehend the great probative value of this evidence on the issue of Smith's credibility. This court views the excluded evidence in the following fashion: "Threats to Smith by unknown and irrelevant third parties and complaints of threats by him were decidedly collateral to the instant matter which was concerned with the issue whether defendant robbed and assaulted Smith with the intent to inflict great bodily injury." (Opn, at p.13.)

However, the similarity of Smith's actions in making false statements of victimization in the unemployment benefits case and his actions in this case made the evidence highly relevant to the credibility of Smith's claim of an

assault so vicious that it was committed with force likely to produce great bodily injury.

Any reasonable trier of fact presented with evidence of Smith's willingness in a similar situation to exaggerate the degree of his victimization under oath for personal benefit would decline to buy Smith's story of a vicious head kicking assault. This part of Smith's story was totally uncorroborated, and seemed at odds with the one other percipient witness who saw some of the encounter from the window of the Ministry.

The fact finding accuracy of the trial under review was markedly impaired by the trial court's exclusion of the highly probative and otherwise admissible evidence impeaching Smith's credibility. This court's opinion erroneously ratifies this serious error.