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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DIEGO ORTIZ,

Defendant and Appellant.

A127798

(Contra Costa County  
Super. Ct. No. 050911503)

In 1975, Division One of this District collected the long line of decisions where trial courts had departed from the language of Penal Code 1096 in instructing on the concept of reasonable doubt. It summarized that “[w]ell intentioned efforts to ‘clarify’ and ‘explain’ these criteria have had the result of creating confusion and uncertainty, and have repeatedly been struck down by the courts of review of this state.” (*People v. Garcia* (1975) 54 Cal.App.3d 61, 63.) In 1994, our Supreme Court, adopting a characterization from Division Four of this District, noted that “appellate courts have long cautioned against ‘an impromptu instruction on reasonable doubt’ . . . because varying from the [statutory] standard is a ‘perilous exercise.’ ” (*People v. Freeman* (1994) 8 Cal.4th 450, 503-504, quoting *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 632.) Indeed, as far back as 1956, this court noted that failure to follow the statutory language “ ‘is simply inviting error.’ ” (*People v. Simms* (1956) 144 Cal.App.2d 189, 199.)

Even so, trial courts still stray from this sensible and entrenched principle. In 2004, two Courts of Appeal treated impromptu explanatory remarks during jury selection as instructional error that was prejudicial per se. Presented with the same situation, we conclude that such remarks need not automatically be treated as actual instructions from the court. Depending on the circumstances, what the trial court says may be nothing more than imprudent comments or remarks, and are likely to be treated as such by prospective jurors. The situation we confront here is that a trial court, having made such ill-advised remarks, and upon being advised by an alert prosecutor that it might be flirting with reversible error, promptly reversed course, effectively repudiated its remarks, and told prospective jurors to follow the definition of reasonable doubt “you will be hearing . . . at the close of the trial.” The jury sworn to try the case heard no subsequent reference to the court’s earlier improper amplification and was properly instructed on reasonable doubt. In light of the totality of these circumstances, we conclude that the court’s remarks do not qualify as actual instructional error, still less as structural error that is prejudicial per se. Our ultimate conclusion is that the impact of the court’s remarks were timely cured, and thus there is no basis for reversal.

### **BACKGROUND**

On January 4, 2010, defendant Diego Ortiz was present as the court and counsel began the process of selecting the jury that would subsequently find him guilty as charged of two counts of second degree robbery. The trial court told the prospective jurors: “Your job as jurors will be to listen to the evidence, to decide what the facts are, to apply the law as I instruct you on it, and to determine whether the prosecution has proved the defendant guilty beyond a reasonable doubt. [¶] One sentence with about four important ideas in it, so let me talk about them one at a time.” Concerning the concept of reasonable doubt, the court made the following remarks (with non-substantive editorial changes made by us):

“Let me talk a little bit about the presumption of innocence and what that means.

“The defendant in a criminal case is presumed to be innocent until proven guilty beyond a reasonable doubt.

“Proof beyond a reasonable doubt is defined as proof that leaves you with an abiding conviction that the charge is true.

“The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt.

“This principle puts the burden on the prosecution to prove its case.<sup>1</sup>

“Defendant isn’t required to prove anything to you.

“In computer terms you can say innocence gives the default, that is it’s where you start and where you stay unless and until something moves you off of that default, and in a criminal trial the only thing that would move you off the default would be evidence convincing you beyond a reasonable doubt that the defendant did what he’s accused of.

“When we talk to you we get lots of different opinions about the legal system, the police, so on. People think that the system always works. Some people think it doesn’t work. Some people have opinions in between.

“Let me put it to you this way.

“I suspect everybody in the courtroom if they think about it, would have, would think the same thing about what kind of system we would have if the government when it

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<sup>1</sup> The court was distilling language from Penal Code section 1096, which provides: “A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him or her guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: ‘It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.’ ”

wants to punish someone for a crime weren't required to come in for a fair trial to prove that the person is guilty. That's why we have this principle that says that the government must prove its case.

"In effect you can say is that it is government's trial case that is on trial here.

"Again, this seems a little paradoxical when you think of criminal cases we think of the defendant being on trial; in one sense obviously that's true. But in another sense, this is government, prosecution that has a case to present to you that you will either accept by having a verdict of guilty, or not accept by having a verdict of not guilty.

"The defendant doesn't have a case to prove to you, only the prosecution does.

"This requires some mental discipline on the part of jurors because there are a couple of important ways that it differs from how you make your decisions in ordinary life.

"For one thing, you probably don't require proof beyond a reasonable doubt of most of the decisions that you make.

"Perhaps, some of them, like, wanting to get married or something important like that, you might. But for most of things you decide I bet you don't require proof beyond a reasonable doubt before you reach a decision.

"Certainly for those who like myself are parents, I'm guessing that you did not require proof beyond a reasonable doubt that it was a little Timmy or little Susie who broke the lamp before you send them to their room.

"However, in a criminal court, we do require proof beyond a reasonable doubt; basically, we have adopted a system under which if the government wants to punish someone for committing a crime, they cannot do that if there is reasonable doubt about whether the person is guilty.

"Now, only reasonable doubt, not all possible doubt. The basic question you're going to be asked when you go into the jury room is if you have doubts about the prosecution's case, are there reasonable doubts? Or are they just the kind of doubts that

anybody they think about spin out? That's the basic question that will be for you to decide in the jury room.

"The other big difference from ordinary life is that on most things you don't start at 100 on the spectrum of the other possibilities and have to be moved back to the other end, but that is the case here.

"When I was on jury duty one of the lawyers asked what I thought was a clever question.

"Let's have a quick show of hands. How many of you think that the accused here he's probably guilty? How many think he's innocent? How many of you are saying: We haven't heard anything of the evidence yet? How can we possibly choose? It's 50/50, right?

"I have an unfair advantage because I've been to law school. So I knew the correct answer is B; as the defendant sits here before you today, he's innocent. He'll remain innocent unless and until the evidence convinces you beyond a reasonable doubt that he is guilty.

"So let me ask you to approach it this way. If I came to you and I said someone in your life was accused of such and such a crime, your reaction might be, well I will believe that if you prove it to me, but I'm not going to take it at face value. I'll believe it when you prove it to me, not before. Now, actually Mr. Ortiz isn't someone in your life.

"And I'm not asking you to make any assumptions about his character or his personality, but I am asking you in effect to say to Ms. Smith [the prosecutor], Ms. Smith, if you prove that Mr. Ortiz did what he's accused of, I'll believe that, but I won't believe it until you prove it. . . . [¶] . . . [¶]

"Let me explain what it means to say that the burden or proof is on the prosecution and the role of the defense.

"Now, I assume that his attorney will do it as much or as little as they think is in their best interest to convince you not to accept the prosecution's case, but the question

that will be put to you at the end of the trial, can be rephrased as do you or don't you believe the prosecution's case, not the defense's case, the prosecution's case. Because only if you believe the evidence proved the defendant guilty beyond a reasonable doubt can you convict.

"Point is that the defense is not required to do anything. They can sit back and do nothing. Nevertheless, if at the end of the trial the prosecution's case has not convinced beyond a reasonable doubt, you must acquit.

"In other words, the prosecution never wins by default in a criminal trial.

"Let me give you a sports analogy. Suppose the question is whether you can shoot a three-point basket.

"Now, it's obviously harder to shoot that basket if somebody is guarding you, trying to block the shot, take the ball whatever, but even if no one is guarding you, you still have to stand behind that line and put that ball through the hoop before you get the three points.

"Similarly here, regardless of how much or how little Ms. Osborne [defense counsel] does to so to speak guard Ms. Smith, she's got to prove to you beyond a reasonable doubt that Mr. Ortiz did what he's accused of before she gets the three points or guilty verdict.

"Do any of you have . . . One other point I want to make.

"There is a verdict of guilty or a verdict of not guilty. Verdict of guilty we know what that means, that means that the prosecution has convinced you that defendant did it.

"Not guilty that could mean you're 100 percent convinced he didn't do it. He's just being railroaded. Or it could mean, gee I kind of think he did it, but there's some reasonable doubts. From our point of view those both come in as a not guilty verdict because the defendant . . . is presumed innocent unless, and until he's proved guilty beyond a reasonable doubt."

The following day, out of the panel's presence, the prosecutor approached the trial court and expressed concern that "the questioning by the court in regard to reasonable doubt and referencing to marriage or everyday life decisions—there are a number of appellate court decisions on the case. And in reviewing [them], it is reversible error to reference reasonable doubt with use of everyday life decisions. I think it can be corrected with a curative instruction, but I feel that my job is both to protect the record for any conviction that I get as well as to make sure the defendant has a fair trial."

After reviewing the decisions provided by the prosecutor, the trial court told the prospective jurors:

"Good morning, ladies and gentlemen.

"Yesterday, when I was discussing reasonable doubt, I made the point that in most of your decisions in ordinary life, you probably don't apply a standard of reasonable doubt. I think that's true, and you can tell that there are your own experiences that you don't apply such a high standard to most of the decisions that you make. I said rather offhandedly that perhaps some people do respect to something like getting married.

"Thinking about that—I spent the last week observing over in family court and getting ready for my new assignment. And I have to say that suggests to me that not nearly enough people do apply that kind of standard to getting married. In any event, the lawyers will argue to you about the concept of reasonable doubt. I'm sure the prosecution at the close of the case will be arguing to you if you have any doubts that are not reasonable ones—the defense will be pointing out to you items that they think should create reasonable doubt to you.

"You've heard the definition, you will be hearing it again at the close of the trial. And it is up to you to decide whether or not there is any reasonable doubt in the case."

Before the robbery charges were submitted to the jury, the trial court instructed that "Some words or phrases used during this trial have legal meanings . . . . These words and phrases will be specifically defined in these instructions. Please be sure to listen

carefully and follow the definitions that I give you.” The jury was then instructed with CALCRIM 220 on reasonable doubt.<sup>2</sup> And defendant was found guilty.

## REVIEW

The sole contention advanced by defendant on this timely appeal is that the trial court’s comments “lowered the prosecution’s burden of proof to a preponderance of the evidence,” and thereby “diminished the presumption of innocence and the standard of proof beyond a reasonable doubt.” For defendant, the trial court’s “amplification upon the reasonable doubt standard” qualifies under *Sullivan v. Louisiana* (1993) 508 U.S. 275 as structural error that is reversible per se, allowing no scope for harmless error analysis.

It cannot be avoided that the court’s well-intentioned explanation was ill advised and imprudent. Comparisons of the decisions of everyday life and the beyond a reasonable doubt standard have been faulted since *People v. Brannon* (1873) 47 Cal. 96, 97, because focus upon the former “ ‘trivializes’ ” the latter. (*People v. Johnson* (2004) 115 Cal.App.4th 1169, 1171-1172, quoting *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36; see *People v. Johnson* (2004) 119 Cal.App.4th 976, 985-986.) “ ‘The marriage example is also misleading since the decision to marry is often based on a standard far less than reasonable doubt, as reflected in statistics indicating 33 to 60 percent of all

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<sup>2</sup> “The fact that a criminal charge has been filed against the defendant is not evidence that charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you that the People must prove something, I mean that they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.”

marriages end in divorce.’ ” (*People v. Johnson, supra*, 115 Cal.App.4th 1169, 1171-1172, quoting *People v. Nguyen, supra*, at p. 36.)

By invoking Penal Code section 1259—which allows a convicted defendant to challenge the correctness of an instruction even if no contemporaneous objection was lodged—defendant is implicitly equating the trial court’s comments with an actual instruction of law. That assumption is clearly based on the two *Johnson* decisions, which are the centerpiece of defendant’s argument: *People v. Johnson, supra*, 119 Cal.App.4th 976; *People v. Johnson, supra*, 115 Cal.App.4th 1169. Both of those decisions involved explanations of the reasonable doubt standard that came from the court during jury selection. Both trial courts used language indistinguishable from the “decisions of ordinary life” comparison found here. And in both no one objected or protested the judicial explanations. Although only one of the decisions expressly equated the trial court’s remarks with structural error (*People v. Johnson, supra*, 119 Cal.App.4th 976, 986), both treated the error as prejudicial per se. (*People v. Johnson, supra*, 119 Cal.App.4th 976, 979-986; *People v. Johnson, supra*, 115 Cal.App.4th 1169, 1171-1172.)

The premise of defendant’s contention, and the starting point of both of the *Johnson* opinions, is that during jury selection a trial court’s remarks, comments, or observations attain the status of formal instructions of law, and thus a misstatement amounts to instructional error. Such an assessment had not been addressed by the parties, so we requested supplemental briefing. After careful reflection of their thoughtful responses, we conclude that what happened at defendant’s trial falls outside the ordinary concept of instructional error.

Although defendant’s attack is directed against the court’s remarks contrasting the standard of proof beyond a reasonable doubt with “ordinary life” decisions, the court’s remarks should not be divorced from their context. It was for this reason that the court’s comments on both concepts of the presumption of innocence and the proof beyond a

reasonable doubt were set out in their entirety. It will be at once appreciated that the two concepts are cognates. The trial court's comments made it absolutely clear that only credible evidence establishing defendant's guilt beyond a reasonable doubt would overcome the presumption of innocence. Defendant does not claim that this portion of the court's remarks were either inappropriate or inaccurate. Moreover, it will also be appreciated the court's "ordinary life" remarks constituted only a small portion of the comments addressed to the potential jurors, while the main thrust and real point of the trial court's remarks was to drive home the importance of the presumption of innocence and how it operated.

The chronology of the remarks is also pertinent. The court's unfortunate foray into unsolicited explanation on reasonable doubt occurred early in the process of choosing a jury: the court had discussed scheduling and decided hardship challenges, but prospective jurors had not been questioned by counsel preparatory to for-cause and peremptory challenges. According to the applicable Standards of Judicial Administration, the court was only "addressing" some concepts of a criminal trial using informal language. (See Cal. Stds. Jud. Admin., § 4.30(b).) The court's comments were obviously framed in conversational language, with no overt indication that actual instruction was intended. They were not preceded by an oracular announcement similar to the "I will now instruct you on the law that applies to this case. . . . [¶] . . . [¶] Pay careful attention to these instructions" language from CALCRIM No. 200 that the eventually empanelled jury heard at the end of the trial. (Cf. *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1217-1218 [prospective jurors explicitly told " 'I'm going to read to you now an instruction' " on reasonable doubt, that they were about to be instructed " 'on the law that applies to this case,' " and that they must " 'apply the law that I state to you' "].) Thus, as we have noted elsewhere, the remarks were made " 'not to actual jurors, but to prospective jurors who at the time did not know whether they would ultimately serve in the case. As a result, the members of the panel could well have . . .

failed to give the [remarks] the same focused attention they would have had they been impaneled and sworn.’ ” (*People v. Crawford* (1997) 58 Cal.App.4th 815, 823, quoting *People v. Elguera, supra*, at p. 1222.) Conversely, “[i]nstruction at the conclusion of trial, rather than before, tends to ensure emphasis and prevent confusion.” (*People v. Elguera, supra*, at p. 1223.)

The distinction between what is intended as informal and what is meant to be official can be hard to discern. The court’s utterances here prove the point. Still, the Attorney General’s position, that only those comments by a trial court “which is reasonably likely to understand as a statement of the law should be evaluated as a jury instruction”—a statement with which defendant largely agrees—appears sound. Our Supreme Court has consistently recognized that not everything said by a court to prospective jurors amounts to instructions, particularly if the comments were made offhandedly, and were intended to convey general information. (*People v. Avila* (2009) 46 Cal.4th 680, 715-716; *People v. Romero* (2008) 44 Cal.4th 386, 423; *People v. Dunkle* (2005) 36 Cal.4th 861, 929; *People v. Livaditis* (1992) 2 Cal.4th 759, 781.) The court has not treated as error trial court comments that “were not intended to be, and were not, a substitute for full instructions at the end of trial” and where “the court informed the jurors that it would instruct them . . . after the evidence portion of the trial.” Comments “[do] no harm as the jurors are aware . . . that the complete instructions which they had to follow would be given at the end of the trial.” (*People v. Edwards* (1991) 54 Cal.3d 787, 840-841.)<sup>3</sup>

This approach speaks to our situation with unusual force. The court’s remarks occurred when prospective jurors were just beginning to concentrate on the task to which they might be called. Those who heard the court’s remarks knew they were only at a

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<sup>3</sup> This is also the way alleged prosecutorial misconduct during voir dire is analyzed. (See *People v. Seaton* (2001) 26 Cal.4th 598, 636; *People v. Medina* (1995) 11 Cal.4th 694, 741; *People v. Ghent* (1987) 43 Cal.3d 739, 770.)

preliminary stage of the trial. The court's unfortunate exegesis on reasonable doubt was promptly withdrawn and repudiated as made "offhandedly." The prospective jurors were directed to "the definition" they had already "heard." (By "definition" we believe the court was referring to its formulation of Penal Code section 1096 that "Proof beyond a reasonable doubt is defined as proof that leaves you with an abiding conviction that the charge is true." (See text accompanying fn. 1, *ante.*))<sup>4</sup> Then, the court told those who would be selected to serve as jurors that they "will be hearing it again at the close of the trial" following the arguments of counsel. In these circumstances, we conclude the court's explanatory remarks "were not intended to be, and were not a substitute for full instructions at the end of the trial." (*People v. Edwards, supra*, 54 Cal.3d 787, 840.)

In light of this reasoning, we respectfully disagree with the predicate of the analysis of the two *Johnson* opinions, namely, that improper or incorrect judicial remarks made to prospective jurors automatically qualify as instructional error.

There is an additional ground for distinguishing the *Johnson* decisions: in neither of them does it appear that the trial court recognized that its remarks were improper and took corrective action. But here, thanks to the prosecutor's commendable intercession, the trial court not only accepted that its remarks contrasting the reasonable doubt standard and everyday decisions were inappropriate, it immediately told the prospective jurors that they had "heard the definition" and would be "hearing it again at the close of the trial." The point is important because if the inappropriate "decisions in ordinary life" comparison had come from the prosecutor, it would be deemed cured by an admonition from the court. (See *People v. Nguyen, supra*, 40 Cal.App.4th 28, 36.) If we assume that jurors would follow an admonition to disregard a prosecutor's comments (*People v. Burgener* (2003) 29 Cal.4th 833, 873), there is no obvious reason to think jurors would be incapable of doing the same to the court's comments. (See *People v. Daugherty* (1953)

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<sup>4</sup> This we agree would qualify as an instruction and was intended as such.

40 Cal.2d 876, 890-891; *People v. Kagan* (1968) 264 Cal.App.2d 648, 664; *Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1043; *Fletcher v. State* (Tex.Ct.Crim.App. 1997) 960 S.W.2d 694, 701 [“an instruction by the judge to disregard any comment made by him is sufficient to cure any error”]; *Cooper v. State* (Ind. 1977) 359 N.E.2d 532, 534-535 [“The trial judge’s original statement was clearly erroneous . . . but he promptly and thoroughly admonished the jury . . . which is presumptively cured”].)

Moreover, as already noted, it was not until the evidentiary phase of the trial had ended that the jury was formally told to “Pay careful attention to these instructions” because they constituted “the law that applies to this case.” Unlike the conversational tone of the court’s pretrial remarks, its more formal utterance (“I will now instruct on the law that applies to this case. . . . [¶] . . . [¶] Pay careful attention to these instructions”) at the end of the trial would find the court’s influence at its zenith. (See *Bollenbach v. United States* (1946) 326 U.S. 607, 612 [“Particularly in a criminal trial, the judge’s last word is apt to be the decisive word”]; *People v. Elguera, supra*, 8 Cal.App.4th 1214, 1223 [“Instruction at the conclusion of trial . . . tends to ensure emphasis and prevent confusion.”].) The correct, and actual, instruction given by the court “therefore must reasonably be deemed to have been uppermost in the minds of the jury during their deliberations.” (*People v. Garcia, supra*, 54 Cal.App.3d 61, 70.) Nothing in the record suggests that the jury was uncertain about the concept of reasonable doubt.<sup>5</sup>

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<sup>5</sup> Such as occurred in *Stoltie v. State of California* (C.D.Cal. 2007) 501 F.Supp.2d 1252, 1253-1254, where the jury repeatedly asked for additional guidance after its deliberations commenced. *Stoltie* is notable because it was during the trial court’s final response to a jury question about reasonable doubt that it strayed into error by using an analogy similar to the “ordinary life” comparison that has caused so much difficulty. (*Id.* at p. 1255.) In that setting it would be very hard—if not impossible—to treat the court’s responses as anything other than instructional error. As we have emphasized, the situation here is fundamentally different, and our analysis is therefore understood as confined to the precise context presented.

In light of the totality of the circumstances, we conclude there was no reasonable likelihood that the jury understood the court's remarks in an unconstitutional fashion by lowering the prosecution's burden of proving defendant's guilt beyond a reasonable doubt. (See *Victor v. Nebraska* (1994) 511 U.S. 1, 16, 22-23.) There is consequently no need to consider whether the trial court qualify as structural error.

**DISPOSITION**

The judgment of conviction is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Haerle, J.