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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ROGELIO CARLOS-ZARAGOZA,

Defendant and Appellant.

A130066

(Sonoma County
Super. Ct. No. SCR565937)

A jury convicted appellant Rogelio Carlos-Zaragoza of three counts of rape in concert, two counts of false imprisonment and single counts of kidnapping and assault with a deadly weapon. (Pen. Code,¹ §§ 264.1 [now subd. (a)] [Stats, 1994, ch. 1188, § 2, p. 7183]; 236; 209, subd. (b)(1), former § 245, subd. (a)(1) [Stats. 2004, ch. 494, § 1, pp. 4040-4041].) The jury also found true three kidnapping for rape enhancement allegations, leading the trial court to sentence him to 75 years to life in state prison. (Former § 667.61, subd. (a), (c)(3), (d)(2) [Initiative Measure, Prop. 83, § 12, eff. Nov. 8, 2006; Stats. 1998, ch. 936, § 9, pp. 6874-6876].) Carlos-Zaragoza appeals, contending that the trial court committed various instructional errors. We agree that the failure to instruct the jury on reasonable doubt was state law error and that the error was prejudicial. (See CALCRIM No. 220.) Thus, we reverse the conviction and remand the matter to the trial court for further proceedings.

¹ All statutory references are to the Penal Code unless otherwise indicated.

I. FACTS

A. *Jane Doe 1 Incident*

On the night of June 16, 2006, Jane Doe 1 approached two men in a motor vehicle in a Santa Rosa convenience store parking lot and asked them for a ride to Mendocino Avenue. She got into the car driven by a man whom she later identified as appellant Rogelio Carlos-Zaragoza.

When the car went past her destination and headed north onto the freeway, Jane Doe 1 yelled at Carlos-Zaragoza to stop the car. In the back seat with her, his passenger made sexual advances while Jane Doe 1 struggled and begged to be let out of the car, in vain.

Jane Doe 1 was driven off the freeway to a vineyard, where Carlos-Zaragoza and his passenger met up with two other Hispanic males in a second car. The four Spanish-speaking men offered her \$50 for sex. She refused and asked to be taken home. When Carlos-Zaragoza and his passenger drove away with Jane Doe 1, she believed he was doing so. Instead, Carlos-Zaragoza drove to a deserted winery, again followed by the occupants of the second car.

At the winery, all four men touched Jane Doe 1's body and removed her clothing. When she repeatedly tried to run away, the men dragged her back. Each of the four men raped her. After many hours, one of the men drove her back to a location near the convenience store where the evening had begun.

Jane Doe 1 reported the incident to Santa Rosa Police later that day. She told police that she had been pulled into the car against her will and that she had passed out after being dropped off before she contacted authorities. She underwent a sexual assault examination during which DNA evidence was collected. Jane Doe 1 was unable to identify any of her attackers at this time.

B. *Jane Doe 2 Incident*

Six weeks later, on the evening of July 28, 2006, Jane Doe 2 saw two men drive by a Santa Rosa liquor store, stop and look at her. She approached them and asked if they knew where she could get drugs and if she could get a ride from them to Apple

Valley Lane. She got into the back seat of the car with the passenger. The other man—whom she later identified as Carlos-Zaragoza—drove the car. A third man soon joined them. By this point, Jane Doe 2 asked to get out of the car, but was not permitted to do so. Carlos-Zaragoza headed toward the freeway.

Jane Doe 2 was driven north to a vineyard situated near the freeway. Once Carlos-Zaragoza stopped the car, Jane Doe 2 twice tried to flee, without success. Each of the three men raped her twice. Jane Doe 2 was driven back to Apple Valley Lane in Santa Rosa. As the car was leaving, she wrote down its license number.²

The next morning, she reported the incident to Santa Rosa Police. She was unable to positively identify anyone from photographs of possible suspects. The lineup did not contain a photograph of Carlos-Zaragoza, but did include one of his brother Leonel. Jane Doe 2 thought that Leonel might have been involved in the incident. A sexual assault examination was conducted, during which a blood sample and DNA evidence was collected. Several months later, in November 2006, Jane Doe 2 was shown another photographic lineup, this one including Carlos-Zaragoza's photograph. She told police that he looked familiar but she was not positive that he was one of her attackers.

C. Jane Doe 3 Incident

Several years later, on July 24, 2009, Jane Doe 3 was walking in Santa Rosa about midnight. On Dutton Avenue, a dark four-door sedan approached her. As she tried to avoid the car, a man walked toward her holding a knife. He grabbed the screaming Jane Doe 3 and pushed her into the car, assisted by the car's driver who was later identified as Carlos-Zaragoza. He drove the car north onto the freeway. The passenger raped Jane Doe 3 in the back seat of the car after removing a tampon from her vagina.

Witnesses who heard Jane Doe 3's cries of distress saw a car drive away on Dutton Avenue. A call to the sheriff was made, offering a description of the car and its general direction. By 12:20 a.m., a California Highway Patrol Officer had spotted a speeding Honda Accord. The officer initiated a traffic stop, but the driver of the Honda

² The car was registered to Antonio Carlos of Santa Rosa. By the time police inquired about it, the vehicle had been sold.

failed to yield to his instructions. Inside the car, Jane Doe 3 realized that law enforcement authorities were pursuing the vehicle. The rapist quickly dressed and returned to the front seat. When the car stopped abruptly, the two men fled on foot in opposite directions. Jane Doe 3 reported that she had been kidnapped and raped.

Within an hour, Carlos-Zaragoza was located nearby and arrested. He was brought before Jane Doe 3, who identified him as one of the kidnappers. She selected photographs of Carlos-Zaragoza and his brother Leonel from two photographic lineups. Initially, she identified Carlos-Zaragoza as the person who sexually assaulted her and Leonel as the driver.

Carlos-Zaragoza was interviewed³ by a Sonoma County Sheriff that night. Carlos-Zaragoza told the sheriff that he rode along with his brother Leonel in the Honda to go buy some beer. Leonel got out of the car and spoke to a young woman who wanted some beer. She got into the backseat of their car and Leonel drove on the freeway to get beer at a certain convenience store in Windsor. The police wanted to stop the car, so they pulled off the freeway. Both of them ran from police because they were scared. Carlos-Zaragoza denied that either he or his brother had any sexual contact with the young woman. He denied that his DNA would be found on her. Neither man was in the backseat with her, he told the sheriff. Carlos-Zaragoza insisted that the woman got into the car willingly—she did not scream or struggle.

The authorities soon located Leonel Carlos-Zaragoza. He had a pocket knife in his possession at the time of his arrest. When Jane Doe 3 saw Leonel in person, she identified him as the rapist. Having seen both men, she was certain Leonel was the man who sexually assaulted her and that Carlos-Zaragoza was the driver.

After Leonel's arrest and Jane Doe 3's identification of Carlos-Zaragoza as the driver, Carlos-Zaragoza was confronted with these new facts. He then admitted to the sheriff that he had driven the car. He said that he had been afraid to admit that he had been driving because he did not have a license. Still, Carlos-Zaragoza continued to insist

³ One interview with Carlos-Zaragoza was audiotaped.

that Leonel was in the front passenger seat the entire time that they were in the car with the woman and that neither he nor Leonel had intercourse with her.

Jane Doe 3 had a sexual assault examination, in which DNA evidence and a blood sample were collected. The examination confirmed that she was having her menstrual period at that time.

D. Investigation, Charges, and Pretrial Matters

After their arrest, DNA evidence was also taken from Carlos-Zaragoza, his brother Leonel, and the back seat of the Honda. The evidence in Jane Doe 3's case was sent for testing. On July 28, 2009, Carlos-Zaragoza and his brother Leonel⁴ were charged with the kidnapping, rape, rape in concert, and assault with a deadly weapon of Jane Doe 3. (§§ 209, subd. (b)(1), 261, subd. (a)(2); former §§ 245, subd. (a)(1), 264.1.)

When Carlos-Zaragoza's DNA was run against a state database, the results suggested that he was involved in the 2006 rape of Jane Doe 2. The investigators assigned to the Jane Doe 1 and Jane Doe 2 cases realized that the cases were similar. On October 9, 2009, the police interviewed Carlos-Zaragoza about these two cases.⁵ The police also obtained another DNA sample from Carlos-Zaragoza in order to test the accuracy of the initial DNA results in the Jane Doe 2 case. They also wanted to see if his DNA matched the DNA evidence in Jane Doe 1's case.

On October 15, 2009, Santa Rosa Police interviewed Jane Doe 1 again for the first time since the June 2006 incident. Most of the report she had originally given was accurate, she told police. However, she admitted that some details of her initial report were inaccurate. She had gone willingly into Carlos-Zaragoza's car and after her release, Jane Doe 1 had spent several hours looking—without success—for a heroin fix.

⁴ For ease of understanding, we refer to Rogelio Carlos-Zaragoza by his surname and refer to Leonel Carlos-Zaragoza by his first name. We refer to Leonel only as needed to understand the issues that Carlos-Zaragoza raises on appeal.

⁵ The trial court rejected a motion to suppress this audiotaped statement, but it appears that the statement—which was in Spanish—was not admitted into evidence at trial.

By November 2009, Carlos-Zaragoza faced a second complaint alleging the rape in concert and false imprisonment of Jane Doe 2. (§ 236; former § 264.1.) In January 2010, two informations were filed against Carlos-Zaragoza. The first charged him with the kidnapping, assault by means of force likely to cause great bodily injury, rape, and rape in concert of Jane Doe 3.⁶ (§§ 209, subd. (b)(1), 261, subd. (a)(2); former §§ 245, subd. (a)(1), 264.1.) The second information alleged the rape in concert and false imprisonment of Jane Doe 2. (§ 236; former § 264.1.) Both informations included special allegations that the victims were kidnapped for purposes of rape.⁷ (Former § 667.61, subds. (a)-(e).)

In February 2010, Santa Rosa Police received DNA test results confirming Carlos-Zaragoza's involvement in the Jane Doe 1 and Jane Doe 2 sexual assaults. Later that month, a third complaint was filed against him in the Jane Doe 1 case. (§ 236; former § 264.1.) In April 2010, an information was filed alleging that Carlos-Zaragoza had committed rape in concert, and false imprisonment against Jane Doe 1, with a kidnapping for rape enhancement. (§ 236; former §§ 264.1, 667.61, subds. (a), (d).)

In May 2010, the trial court consolidated all three cases into a single information. A second consolidated information was filed in July 2010, charging Carlos-Zaragoza with three counts of rape in concert, two counts of false imprisonment, and single counts of kidnapping, rape, and assault by means of force likely to cause great bodily injury.⁸ (§§ 209, subd. (b)(1), 236, 261, subd. (a)(2); former §§ 245, subd. (a)(1), 264.1.) The

⁶ The prosecution reasoned that Leonel was the perpetrator and that Carlos-Zaragoza was liable on an aiding and abetting theory.

⁷ A person convicted of rape or rape in concert who kidnapped the victim and moved her—thus substantially increasing the risk of harm to her over and above the harm inherent in the sexual assault—must be sentenced to a prison term of 25 years to life. (§ 667.61, subds. (a), (c)(1), (d)(2).)

⁸ Leonel was also charged with several 2009 offenses in this information. His case was severed from that of Carlos-Zaragoza in July 2010 and Carlos-Zaragoza's case was tried first.

four rape charges each included a kidnapping for rape enhancement allegation.⁹ (Former § 667.61, subds. (a)-(e).) Carlos-Zaragoza pled not guilty to all charges and denied the enhancement allegations.

E. *Trial*

Carlos-Zaragoza's trial was conducted in July and August 2010. DNA evidence linked Carlos-Zaragoza to the 2006 sexual assaults on Jane Doe 1 and Jane Doe 2. DNA testing excluded his brother Leonel as a possible contributor in the two 2006 cases. Jane Doe 3's DNA evidence was found on Leonel's body shortly after the sexual assault, providing evidence that he committed the July 2009 sexual assault.

Jane Doe 1, Jane Doe 2, and Jane Doe 3 each testified at trial and each identified Carlos-Zaragoza in court as a perpetrator. The jury was shown a photograph of the Honda from which Carlos-Zaragoza fled after the Jane Doe 3 assault. A bloody tampon was found in the back seat. Jane Doe 3 identified the knife found on Leonel at the time of his arrest as looking like the one he used to abduct her.

Carlos-Zaragoza attacked the credibility of each of the three complaining witnesses alleging they lacked credibility based on discrepancies between the reports given and the evidence, drug or alcohol use, and memory problems. As to Jane Doe 1 and Jane Doe 2, counsel argued that there was reasonable doubt about whether they consented to intercourse. He also argued that Leonel acted on his own when he sexually assaulted Jane Doe 3.

Over Carlos-Zaragoza's objection, the prosecution was allowed to argue that the jury could use evidence of the earlier charged sexual offenses to draw an inference that

⁹ The information alleged that Carlos-Zaragoza kidnapped each victim and that his movement of each victim substantially increased the risk of harm to her, over and above that risk necessarily inherent in the underlying rape or rape in concert. If an enhancement was found to be true, Carlos-Zaragoza would face an indeterminate sentence of 25 years to life in state prison. (Former § 667.61, subds. (a), (c)(1), (3), (d)(2) [Initiative Measure, Prop. 83, § 12, eff. Nov. 8, 2006; Stats.1998, ch. 936, § 9, pp. 6874-6876].) For our purposes, the current version of this provision is substantially the same as that in effect in 2006 and 2009 at the time of the three charged offenses. (See § 667.61 [Stats.2011, ch. 361, § 5].)

Carlos-Zaragoza had a propensity to commit sex offenses, and that this inference of such a propensity was evidence that supported the later-committed sexual offenses. Over defense objection, the trial court instructed the jury that if it found that one of the charged sexual offenses had been proven by a preponderance of the evidence, it could draw from that an inference that Carlos-Zaragoza had a propensity to commit sexual offenses. (See Evid. Code, § 1108; CALCRIM No. 1191 [modified].) Before deliberations began, the trial court did not instruct the jury with CALCRIM No. 220, on the presumption of innocence, the prosecution’s burden of proving every element of the charged crimes beyond a reasonable doubt, and the definition of the term “reasonable doubt.”

The jury acquitted Carlos-Zaragoza of the rape of Jane Doe 3, but convicted him of the remaining seven charges—one count of rape in concert against each of the three victims, two counts of false imprisonment and single counts of kidnapping and assault with force likely to cause great bodily injury. (§§ 209, subd. (b)(1), 236; former §§ 245, subd. (a)(1), 264.1.) The jury also found three kidnapping for rape allegations to be true. (§ 667.61, subs. (a)-(e).) Carlos-Zaragoza was sentenced to an indeterminate term of 75 years to life—three consecutive terms of 25 years to life for each rape in concert. Sentences on the other four convictions were imposed but stayed to prevent multiple punishment. (§ 654.)

II. REASONABLE DOUBT

Carlos-Zaragoza raises several instructional issues on appeal. We need only address one of them—his contention that the trial court violated state law by failing to define the term “reasonable doubt” during its predeliberation instructions. This instructional omission constitutes prejudicial error because the instruction on the use of propensity evidence allowed the jurors to find Carlos-Zaragoza guilty based on a mere preponderance of evidence, rather than proof beyond a reasonable doubt.

During the pendency of this appeal,¹⁰ the California Supreme Court issued a decision making it clear that state law requires that the trial court define the term

¹⁰ At our request, the parties submitted letter briefs discussing the implications of this decision after the normal briefing period had ended.

“reasonable doubt” for the jurors. (*People v. Aranda* (2012) 55 Cal.4th 342, 374-375 (*Aranda*); see §§ 1096, 1096a.) Standard jury instructions—CALCRIM No. No. 220 and CALJIC No. 2.90—define this most basic and vital concept. For example, the pertinent aspect of CALCRIM No. 220 states: “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 possible doubt, because everything in life is open to some possible or imaginary doubt.” (See CALCRIM No. 220.) However, the trial court did not give CALCRIM No. 220 to Carlos-Zaragoza’s jury,¹¹ nor did it define reasonable doubt in any other predeliberation¹² jury instruction it gave.

The failure to define “reasonable doubt” does not violate federal constitutional standards, but it does violate state law.¹³ (*Victor v. Nebraska* (1994) 511 U.S. 1, 5; *Aranda, supra*, 55 Cal.4th at pp. 350, 354, 374-375; see also §§ 1096-1096a; Evid. Code, § 502.) This error is subject to harmless error review. (*Aranda, supra*, 55 Cal.4th at p. 375; *People v. Mayo* (2006) 140 Cal.App.4th 535, 550–551; see *People v. Watson* (1956) 46 Cal.2d 818, 837.) The erroneous omission of a definition of reasonable doubt is harmless error if nothing in the record suggests that the jury was confused about the

¹¹ We do not know if this instruction was inadvertently or intentionally omitted. The record on appeal does not include a transcript of the discussions of proposed jury instructions among the trial court and counsel, but cites only brief recitations of defense objections made during those discussions.

¹² The jury questionnaire included a definition of reasonable doubt in one of its questions and it appears that this topic was discussed during voir dire. Even if the trial court itself defines reasonable doubt during voir dire, it still has an obligation to define this term during its predeliberation instructions. While the omission is error, the fact that the definition of reasonable doubt was discussed during voir dire may weigh into a harmless error analysis. (See *Aranda, supra*, 55 Cal.4th at p. 376.)

¹³ The Attorney General appears to concede state law error, arguing that this error was harmless.

meaning of this concept.¹⁴ (*Aranda, supra*, 55 Cal.4th at p. 375.)

A key factor of this analysis is whether the jury was invited to apply a standard of proof less than that of reasonable doubt. (See *Aranda, supra*, 55 Cal.4th at p. 375.) In the case before us, the jury was instructed that it could use charged sexual offenses as evidence to allow an inference that Carlos-Zaragoza had a propensity to commit such offenses when it determined his guilt or innocence of other charged sexual offenses, if the preliminary offense was proven by a preponderance of evidence.¹⁵ (See CALCRIM No. 1191; see also Evid. Code, § 1108.)

As drafted, CALCRIM No. 1191 instructs on the proper use of *uncharged* crimes as propensity evidence, if those uncharged offenses are proven by a preponderance of the evidence. (See CALCRIM No. 1191.) In Carlos-Zaragoza’s case, the trial court modified the instruction to allow the jury to consider *charged* offenses if proven by the same preponderance of the evidence standard of proof. The modified instruction stated “that the defendant committed the crimes that were charged in this case” if “the People have proved by a preponderance of the evidence that the defendant in fact committed the offense.” It went on to say that “[p]roof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.” The instruction also stated that “[i]f you decide that the defendant committed the offenses, you may, but are not required to, conclude . . . that the defendant was likely to commit and did commit the offenses, as charged here.” But then the instruction concluded by saying that “[i]t is not sufficient by itself to prove that the defendant is

¹⁴ When making this analysis, we may not consider the strength of the evidence adduced at trial. The prejudice issue is not about the strength of the evidence, but the possibility that the jury might have applied the wrong burden of proof. (See *Aranda, supra*, 55 Cal.4th at pp. 367-368.) Thus, we cannot rely on the testimony of the three prosecution witnesses or the strong DNA evidence clearly linking Carlos-Zaragoza to the key charged crimes.

¹⁵ In so doing, it defined proof by a preponderance of evidence as evidence that “more likely than not” was true.

guilty of the charged sex offenses. The People must still prove each charge and allegation beyond a reasonable doubt.”

This modified instruction was confusing and could have been interpreted to suggest to the jury that it could find that Carlos-Zaragoza committed a charged offense by a preponderance of the evidence, rather than by proof beyond a reasonable doubt. At best, the instruction contained mixed messages. While it concluded with an admonition that the People were required to prove each charge and allegation beyond a reasonable doubt, the rest of the instruction told the jury that it could conclude that the defendant committed some of the charged offenses by a preponderance of the evidence.

Courts should be wary of any set of instructions that excludes the standard reasonable doubt instruction but includes an instruction referring to a different standard of proof. (See *Aranda, supra*, 55 Cal.4th at p. 369 [“Significantly, none of the court’s instructions at trial referred to a lesser standard of proof such as preponderance of the evidence . . . ”].) The set of instructions given in Carlos-Zaragoza’s case are even more troubling because the modified version of CALCRIM No. 1191 suggested that the jury could find that the defendant committed the offenses charged in this case by a mere preponderance of the evidence.

The California Supreme Court has allowed use of a modified version of CALCRIM No. 1191 to instruct the jury that even charged offenses can be used to demonstrate the defendant’s propensity to have committed other charged offenses in the same case. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1164-1167.) In *Villatoro*, however, the modified instruction did not refer to the preponderance of the evidence standard as it did here. (*Id.* at p. 1167-1168.) And, unlike the jury in the case at bar, the jury in *Villatoro* was given a standard reasonable doubt instruction. (*Id.* at p. 1168.) The presence of these factors allowed the *Villatoro* court to conclude that the modified version of CALCRIM 1191 did not impermissibly lower the prosecution’s burden of proof beyond a reasonable doubt. (*Ibid.*) The absence of these factors in Carlos-Zaragoza’s case reinforces our view that the propensity evidence instruction given in his case was erroneous.

The juxtaposition of the trial court’s failure to instruct on the definition of reasonable doubt and its instruction allowing the use of charged offenses found by a preponderance of the evidence as propensity evidence created a possibility of juror confusion about the burden of proof to apply to at least one of the charged sexual offenses. This, in turn, raises serious concerns about the burden of proof to which the jury actually held the prosecution. The propensity evidence instruction raises a reasonable probability that the outcome would have been more favorable to Carlos-Zaragoza if the trial court had instructed on the definition of reasonable doubt. Thus, this state law error flowing from the failure to instruct on reasonable doubt was prejudicial. (See *Aranda, supra*, 55 Cal.4th at pp. 375-376.)¹⁶

The judgment is reversed and the matter is remanded to the trial court for further proceedings.

REARDON, P. J.

We concur:

RIVERA, J.

HUMES, J.

¹⁶ In light of this conclusion, we need not address the other instructional issues posed by Carlos-Zaragoza’s appeal. (CALCRIM Nos. 220. 1191.) On retrial, the jury should be given a definition of reasonable doubt and if given a propensity instruction at it, it should be given one that avoids confusing the applicable standards of proof and that explains how the charges can be used as propensity evidence with more precision. In this regard, the recent *Aranda* and *Villatoro* decisions—both decided after the 2010 trial of Carlos-Zaragoza—will offer instructional guidance.