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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH R. GRIFFIN,

Defendant and Appellant.

B243252

(Los Angeles County
Super. Ct. No. MA054718)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Hayden A. Zacky, Judge. Affirmed.

Matthew D. Alger, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Connie H. Kan, Deputy Attorneys General, for Plaintiff and Respondent.

Kenneth R. Griffin (Griffin) challenges his conviction for second degree murder. (Pen. Code, § 187, subd. (a).)¹ He contends that the trial court violated his due process right to be convicted only upon proof of guilt beyond a reasonable doubt when, during jury voir dire, it twice stated that the burden of proof did not require the jurors to be 100 percent positive.

We find no error and affirm.

FACTS

The Los Angeles County District Attorney filed an information charging Griffin with murder in violation of section 187, subdivision (a). It alleged that Griffin personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)) during the commission of the crime, and that he had a prison term prior (§ 667.5, subd. (b)). Griffin pleaded not guilty.

During jury voir dire, the trial court quoted CALCRIM No. 103 to 35 prospective jurors as follows: “I will now explain the presumption of innocence and the People’s burden of proof. [¶] . . . [¶] 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 the People must prove something, I mean 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 possible 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 of the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.” Later in the day, the trial court brought in a supplemental panel of prospective jurors, which boosted the number of prospective jurors up to 49. A second time, the trial court defined

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

the People's standard of reasonable doubt by reading CALCRIM No. 103 to the jury pool.

While the trial court was questioning prospective jurors in the jury box, it stated: “[I]n terms of the People’s burden of proof, which is beyond a reasonable doubt[,] . . . [i]t means you must have an abiding conviction of the truth of the charge. It does not mean beyond all possible doubt or beyond a shadow of a doubt or 100 percent positive. [¶] Does anybody have any difficulty accepting that? [¶] If so, raise your hands.” None of the prospective jurors raised a hand.

A supplemental panel of 20 prospective jurors joined the voir dire. A third time, the trial court read CALCRIM No. 103. It then stated: “That’s how the law defines reasonable doubt. And please keep in mind, it’s not beyond all possible doubt or a shadow of a doubt or 100 percent positive. It’s an abiding conviction of the truth of the charge.”

Once the 12 jurors and two alternates were selected and sworn in, the trial court preinstructed them on the law. A fourth time, the trial court read CALCRIM No. 103.

After trial, the trial court instructed on the reasonable doubt standard by reading CALCRIM No. 220. Absent two nonsubstantive sentences, it is identical to CALCRIM No. 103. The trial court also stated that the jury must be convinced that the “People have proved each fact essential” to a guilty verdict “beyond a reasonable doubt.” Moreover, Griffin may “rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt,” and Griffin cannot be convicted “unless the People have proved his guilt beyond a reasonable doubt.” The trial court explained that the “People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime.” A copy of the jury instructions was provided to the jurors.

The jury found Griffin guilty of second degree murder, and found the allegation that he personally used a deadly and dangerous weapon to be true. Then, after a bench trial regarding the prior prison term allegation, the trial court found the allegation to be true.

Griffin was sentenced to 17 years to life in state prison.

This timely appeal followed.

DISCUSSION

We review claims of instructional error under a de novo standard. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569–570.)

This appeal presents a straightforward question. Did the trial court violate Griffin’s right to due process by impermissibly lowering the People’s burden of proof? (*In re Winship* (1970) 397 U.S. 358, 364 [“the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”].) No particular words are required when a trial court instructs a jury on the burden of proof in a criminal trial. (*Victor v. Nebraska* (1994) 511 U.S. 1, 5 (*Victor*).) “Rather, ‘taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury’ [Citation.]” (*Ibid*; *People v. Stone* (2008) 160 Cal.App.4th 323, 331 [a jury instruction cannot be judged based on one or two phrases plucked out of context].) Insofar as an instruction is ambiguous, we must determine whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. (*Ibid*.) If an instruction lowers the People’s burden of proof, it is structural error requiring automatic reversal. (*People v. Aranda* (2012) 55 Cal.4th 342, 365; *Brecht v. Abrahamson* (1993) 507 U.S. 619, 629–630.) We turn to our analysis.

Here, the trial court properly instructed the jury pursuant to CALCRIM No. 220.² (*People v. Zepeda* (2008) 167 Cal.App.4th 25, 31–32 [CALCRIM No. 220 approved].)

² CALCRIM No. 220 incorporates the substance of 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

CALCRIM No. 103 is identical but for two nonsubstantive sentences, so it was also properly given. And there was nothing wrong with the trial court's statement that the burden of proof did not require the jury to be 100 percent positive. This statement was made in conjunction with CALCRIM No. 103 and merely reformulated the statements in CALCRIM Nos. 103 and 220 that the "evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." As discussed in *Victor*, the "reasonable doubt standard is . . . probabilistic. 'In a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened.' [Citation.]" (*Victor, supra*, 511 U.S. at p. 14.) Thus, we conclude that the trial court did not misstate the burden of proof. Rather, it defined what the burden of proof required, and then it defined what the burden of proof did not require.

Griffin points out that it is improper for a prosecutor or trial court to demonstrate the meaning of "beyond a reasonable doubt" by equating it to the certainty that an image is recognizable even though it contains missing parts or false information. (*People v. Otero* (2012) 210 Cal.App.4th 865, 869–872 [improper for prosecutor to compare "no [r]easonable [d]oubt" with a PowerPoint diagram that is clearly California even though some of the cities are misplaced]; *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1268 [improper for prosecutor to equate beyond a reasonable doubt with the certainty that an eight piece jigsaw puzzle showed the Statue of Liberty even though it was missing two pieces and only 75 percent of the image was visible].) Relying on this law, Griffin contends that the jurors could have interpreted the trial court's "100 percent positive" statement to allow a finding of guilt based upon a standard that is below that required by due process, i.e., they could have concluded that 70, 75 or 85 percent certainty was sufficient for a conviction.

We disagree.

of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."''

Prior to the trial, the trial court quoted CALCRIM No. 103 on four occasions and thereby informed the prospective jurors that they could not convict unless they had an abiding conviction of guilt after impartially comparing and considering all of the evidence that would be presented. Then, after the trial, the jury was instructed pursuant to CALCRIM No. 220 and received that very same guidance. Moreover, the “100 percent positive” statement did not imply a percentage of certainty necessary for conviction like an incomplete jigsaw puzzle might. The statement merely explained that an imaginary doubt would not bar a finding of guilt as long as the jurors had an abiding conviction as to the truth of the charges. Thus, the trial court never expressly or impliedly quantified the level of certainty required. Rather, it focused on explaining the need for an abiding conviction. And even if the “100 percent positive” statement was ambiguous, there was no reasonable likelihood that the jury misunderstood and misapplied the jury instructions because the statement was made prior to trial and the posttrial instructions were clear.

Next, Griffin contends that the “100 percent positive” statement suggested that the jurors needed to be only substantially persuaded of guilt. But when the statement was coupled with the “abiding conviction” instruction in CALCRIM Nos. 103 and 220—repeated on five occasions—there was no chance for confusion. The “100 percent positive” statement helped define “abiding conviction” as something that was less than absolute certainty because such certainty was impossible. It did not identify or suggest a threshold level of certainty.

In the reply, Griffin argues: “Some people can be convinced and have their consciences satisfied that a defendant is guilty only by being 100 [percent] positive. But they can be 100 percent positive even though they recognize there is a mere possibility the defendant is not guilty. ¶ . . . ¶ [T]he trial court’s comments . . . that beyond a reasonable doubt does not mean being ‘100 percent positive’ likely led the jury to believe that it could properly convict [Griffin] even if it had a possible doubt about his guilt that was more than just imaginary or insubstantial.” Rephrasing the idea a bit, Griffin later averred: “The jurors therefore were likely to conclude from the entirety of the

instructions on the subject that in order to have an abiding conviction and be convinced beyond a reasonable doubt, they did not need to be 100 percent persuaded that [Griffin] [was] guilty as charged.”

Again, we disagree. CALCRIM No. 220 conveys the concept that a juror can have an abiding conviction despite imaginary doubt. The trial court’s “100 percent positive” statement merely established that there was no need for every imaginary doubt to be disproved by the prosecution.

DISPOSITION

The judgment is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.*
FERNS

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.