

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

<hr/>)	Case No. S012279
THE PEOPLE OF THE STATE)	(San Diego Superior
OF CALIFORNIA,)	Court No. 73093/75195)
)	
Plaintiff and Respondent,)	
)	
DAVID ALLEN LUCAS,)	
)	
Defendant and Appellant.)	
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AUTOMATIC APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

HONORABLE LAURA PALMER HAMMES, JUDGE, PRESIDING
HONORABLE FRANKLIN B. ORFIELD, MOTIONS JUDGE
HONORABLE WILLIAM H. KENNEDY, MOTIONS JUDGE

APPELLANT'S PRE-ARGUMENT SUPPLEMENTAL BRIEF

California Rules of Court, Rules 8.520(d) and 8.630(d)

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Pursuant to the California Rules of Court, Rules 8.520(d) and 8.630(d), appellant David Lucas submits the following supplemental briefing to address new authorities which were not available when appellant's reply brief was filed. These new authorities relate to appellant's opening brief argument 2.8.3 (AOB, pp. 514-524) and 2.8.1 (AOB, pp, 485-507).¹

I.

THE THIRD PARTY GUILT INSTRUCTION ERRONEOUSLY INCLUDED A DEFENSE BURDEN TO RAISE A REASONABLE DOUBT AND OMITTED THE PROSECUTION'S BURDEN TO DISPROVE THE THIRD PARTY'S GUILT BEYOND A REASONABLE DOUBT.

A. Procedural Overview.

In the Jacobs case, the defense relied on a theory of third party guilt based on Johnny Massingale's confession and other evidence of Massingale's guilt. Accordingly, the defense requested the following third party guilt instruction based on CALJIC No. 5.15, the extant instruction on self defense:

Evidence has been produced in this trial for the purpose of showing that a person other than the defendant committed the crime(s) charged.

The burden is on the prosecution to prove beyond a reasonable doubt that it was the defendant and not another person who committed the charged offenses.

If after consideration of all of the circumstances of the case, you have a reasonable doubt whether the defendant or some other person committed the crime(s) charged, you must give the defendant the benefit of that doubt and find him not guilty. (CT 14733.)

¹ The issues are addressed in respondent's brief at pages 207-228 and in appellant's reply brief at pages 86-90.

However, the judge vehemently disagreed with the defense contention that the prosecution had the burden of disproving the third party's guilt:

Mr. Feldman: Judge, if you're going to look to instructions to fashion, we ask you to look to [CALJIC No.] 5.15.

...
Mr. Feldman: And while I recognize 5.15 addresses justifiable homicide, it squarely places the burden of rebutting an affirmative defense on the prosecution so, in other words, the burden would be on the prosecution to prove beyond a reasonable doubt that Johnny Massingale did not commit the offense charged.

"If you have a reasonable doubt that Johnny Massingale committed the homicide, you must find the defendant not guilty," and to any other third party suspect, based on the language of 5.15.

Mr. Clarke: Then that- -

The Court: **My look of shock and horror may be registered for the record.**

...
Mr. Feldman: 5.15 and 2.91 place the burden of proof where it belongs; on the prosecution to disprove- -

The Court: No.

Mr. Feldman: The affirmative defense.

The Court: Okay.

I am not going to go any further on that. **They do not have to prove beyond a**

reasonable doubt that Johnny Massingale did not commit the Jacobs homicide. (RT11419-20 [emphasis added].)²

In light of her rulings the judge modified the defense requested instruction to read as follows:

The defendant has presented evidence in this trial for the purpose of showing that a person or persons other than the defendant may have committed a crime or crimes charged.

If after a consideration of the entire case, such third party evidence, alone or together with other evidence, raises a reasonable doubt whether the defendant committed a crime or crimes charged, you must give the defendant the benefit of that doubt and find him not guilty. (CT 14313.)

B. Judge Hammes Erred By (1) Refusing Lucas's Instruction That The Prosecution Had To Disprove The Third Party Evidence And (2) Instructing That The Third Party Evidence Had To "Raise[] a Reasonable Doubt."

In prior briefing on this issue Lucas relied, *inter alia*, on CALCRIM's articulation of the burden of proof with respect to affirmative defenses to demonstrate that the third party guilt instruction given in the present case suffered from two crucial deficiencies. (See ARB p. 389.) That is, unlike the CALCRIM format for such instructions, Judge Hammes's instruction (1)

² The judge reiterated her viewr comments while refusing another third party guilt instruction:

Page 113 [CT1494] is denied. This is a requirement that **the People prove beyond a reasonable doubt that Johnny Massingale did not participate in or commit the Jacobs homicides. I think that's an incorrect statement of the law.** (RT 11453:25-28 [emphasis added].)

failed to allocate to the prosecution the burden of disproving the third party defense beyond a reasonable doubt and (2) shifted the burden to Lucas to establish that the third party evidence raised a reasonable doubt as to his guilt.

Subsequent case law demonstrates that Lucas's reliance on CALCRIM was well founded. CALCRIM's articulation of the burden of proof has been consistently approved as a correct statement of the law.

For example, in *People v. Fiu* (2008) 165 Cal.App. 4th 360, 383-86, the Court addressed the burden of proof with respect to the defense of withdrawal to an aiding and abetting charge. The appellant in *Fiu* relied on the language of CALCRIM No. 401 in support of his position that the jury should have been instructed that "the prosecution bore the burden of disproving that he withdrew." (*Ibid.* at p. 385.) As the Court of Appeal recognized:

Unlike its counterpart, CALJIC No. 3.03, CALCRIM No. 401 does specifically allocate the burden of proof on the issue of withdrawal in a case involving aider and abettor liability. (*Ibid.*)

The Court of Appeal agreed that the CALJIC instruction's failure to specifically allocate the burden of proof was error:

We believe that the trial court has a duty to instruct specifically on the allocation of the burden of proof on the defense of withdrawal; failing to do so sua sponte was error. The proper burden would be explained by the trial court indicating that if the jury has a reasonable doubt whether or not the defendant effectively withdrew, they should acquit. (*Id.* at p. 386.)

As in *Fiu*, the trial court in *People v. Mentch* (2008) 45 Cal. 4th 274, [hereinafter "*Mentch*"] utilized the standard CALJIC instruction to instruct on an affirmative defense – in this case the compassionate use of marijuana defense. The CALJIC instruction used in *Mentch* (CALJIC No.12.24.1) placed the burden on the defendant to "raise a reasonable doubt" as to his guilt. On the other hand, the CALCRIM instruction on the compassionate use defense

requires the prosecution to disprove the affirmative defense beyond a reasonable doubt. (CALCRIM No. 2370.) Recognizing the difference between the CALJIC and CALCRIM formats, this Court asked the parties to submit briefing on the nature of the defense burden to "raise a reasonable doubt" and whether the jurors should be instructed on that burden. (*People v. Mentch, supra*, 45 Cal. 4th 274 292, fn. 12.) However, the majority opinion did not address the issue because there was insufficient evidence to warrant any instruction on the compassionate use defense. Nevertheless, Justice Chin's concurring opinion (joined by Justice Corrigan), while agreeing with the majority holding, expressed concern that the burden of proof had not been correctly articulated by the standard instruction. Noting the parties agreed the jury should not be instructed that the defense must "raise a reasonable doubt," Justice Chin observed: "If the parties' answer to our question is correct, CALJIC No. 12.24.1 misinstructs the jury." (*Mentch, supra*, 45 Cal. 4th at p. 293 (conc. opn. of Chin, J.)) Thus, even though the majority opinion did not decide the question, Lucas's claim in the present case is supported by the agreement of the parties in *Mentch* that instructing the jury that the defense must raise a reasonable doubt is error which "may run risks that are best avoided." (*Ibid.* at p.294.)

Similarly, *People v. Mathson* (2012) 210 Cal. App. 4th 1297, 1322, explained why the CALCRIM format helps to assure that the jurors understand that the defendant has no burden with respect to the defense theory of unconsciousness:

The two sentences of the third paragraph in CALCRIM No. 3425 referenced above are preceded by: "The People must prove beyond a reasonable doubt that the defendant was legally conscious when he acted." This emphasis was not in any of the CALJIC instructions, and it positively reinforces both the

58 Cal. 4th at 793-94, Liu, J., conc. and dis. opn.). Obviously therefore, in a closely balanced case “the allocation of the burden of [proof] ... can be outcome determinative ... [Citations.]” (*People v. Jackson, supra*, 58 Cal. 4th at p. 793, quoting *Gamache*, 562 U.S. at p. —, 131 S.Ct. at p. 593 (statement of Sotomayor, J; see also *People v. Thomas, supra*, 218 Cal.App. 4th at 646 [judgement reversed because reviewing court could not be certain the error was harmless]; *Foxworth v. St. Amand* (1st Cir. 2009) 570 F.3d 414, 436[If the habeas court is uncertain whether the state has met its burden to show an error was harmless “the petitioner must win.” (internal citations and punctuation omitted)]; *Farr v. County of Nevada* (2010) 187 Cal.App. 4th 669, 682 [“Equal probability ... does not satisfy a burden of proof.[citation]”].)

In the present case the third party guilt instruction allocated the burden of persuasion to the defendant. Thus, this instruction precluded any juror who was uncertain whether or not the third party evidence "raised a reasonable doubt" as to Lucas's guilt from voting to acquit based on the third party evidence. On the other hand, that same uncertain juror would have been required to vote to acquit if the jurors had been correctly instructed that the prosecution must prove beyond a reasonable doubt that the third party suspect did not commit the crime.

Nor did the instructions as a whole cure the error. The defective instruction was the only one that specifically related the third party guilt evidence to the burden of proof. Therefore, it must be assumed that the jurors followed the specific instruction and not other general instructions in assessing the third party guilt evidence. (See generally, *People v. Fuiava* (2012) 53 Cal. 4th 622, 669.) As one federal court recently held, the general burden of proof instruction cannot cure an error in another more specific instruction unless the general instruction actually explains the deficient instruction:

The state's contention that the jury instructions as a whole cured the *Sandstrom* error is not persuasive either. The state claims that instructions to the jury about the presumption of innocence and that the state was required to prove every element of the offense—venue included—beyond a reasonable doubt amounts to sufficient clarification for the jury.[Footnote omitted] But instructions like these are exactly the type of general instructions *Francis* [*Francis v. Franklin* (1985) 471 U.S. 307, 322, 105 S.Ct. 1965, 85 L.Ed.2d 344] found inadequate: "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity.' [Citation.]"(*Owens v. McLaughlin* (11th Cir. 2013) 733 F.3d 320, 327-28; see also *People v. Gay* (2008) 42 Cal.4th 1195, 1225.)³

By relieving the prosecution of its burden to prove Lucas guilty beyond a reasonable doubt the error violated Lucas's state (art. I, sections 7, 15 and 16) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury and undermined the fundamental judicial framework of the trial and the Jacobs convictions should be reversed without an assessment of prejudice. (See *People v. Mil* (2012) 53 Cal.4th 400, 410.)

However, even if not structural, the error was prejudicial under any harmless error standard because the evidence in the Jacobs case likely left at least some of the jurors uncertain or undecided about the third party guilt evidence. On the one hand there was no conclusive evidence of Lucas's guilt and, on the other hand, the evidence against Johnny Massingale was so strong that the prosecutor charged him with the murders, and a magistrate held him to answer after a full preliminary examination. Under these circumstances, the Jacobs convictions should be reversed under any standard of prejudice.

³Moreover, because the Massingale evidence involved a confession to the police, the jurors could reasonably have thought that a special rule applied to that evidence.

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II.

DENIAL OF FAIR OPPORTUNITY TO CONFRONT MASSINGALE

The Sixth Amendment right of confrontation “seeks to ensure that the defendant is able to conduct a personal examination and cross-examination of the witness, in which [the defendant] has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.” [Internal citations and punctuation omitted.] (*People v. Herrera* (2010) 49 Cal.4th 613, 620–621.) “Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.” [Internal citations and punctuation omitted.] (*People v. Williams* (2013) 58 Cal.4th 197, 263-64.)

III.

CONCLUSION

For the foregoing reasons, as well as those set forth in the prior briefing, the judgment should be reversed.

Dated: May 3, 2014

THOMAS LUNDY
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DAVID ALLEN LUCAS

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.630(b)(2), I certify that the attached Appellant's Reply Brief uses 13 point Times New Roman font and contains 2,787 words in *WordPerfect* computerized format.

Dated: May 3, 2014

Thomas Lundy

Attorney for Appellant

Allen David Lucas

PROOF OF SERVICE

I DECLARE THAT:

I am a resident of Sonoma County and employed in the County of Sonoma, State of California.

I am over the age of eighteen and not a party to the within action. My business address is: 2777 Yulupa Avenue #179, Santa Rosa, California 95405. On May 3, 2014, I served the within: **APPELLANT'S PRE-ARGUMENT SUPPLEMENTAL BRIEF** on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon, fully prepaid, in the United States mail, at Santa Rosa, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and executed on May 3, 2014, at Santa Rosa, California.

Tom Lundy