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*See Concurring and Dissenting Opinion

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. STEVEN BURNICE MOORE, Defendant and Appellant.	E048982 (Super.Ct.No. VCR6558) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Knish, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Rebecca P. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Barry Carlton, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found true a petition filed by the People to extend the commitment of defendant, Steven Moore, who had previously been adjudged not guilty by reason of

insanity (Pen. Code, § 1026.5, subd. (b)(1)). Defendant contends that the trial court's comments about the reasonable doubt standard and its failure to instruct the jury that he had a right not to testify and a negative inference should not be drawn from his failure to testify require reversal of the jury's finding. We disagree and affirm. The facts adduced at the hearing on the petition are not relevant to this appeal.

1. Trial Court's Comments About Reasonable Doubt

a. Facts

At the beginning of voir dire, 18 prospective jurors were seated in the jury box. The remaining prospective jurors were seated in the audience, however, the trial court said to them, "[T]his is not the time to take a little nap because you might find yourself [in the jury box] later and we'll be asking you the same things we're asking [those in the jury box]. So . . . keep track of what we're asking."

Soon thereafter, the trial court said, "I'm going to start off by talking about general legal principles . . . . I talked about the burden of proof.[1] I think of the word 'burden' is like a duty and in a case, in a trial[,] one of the sides always has the main duty to prove what's at issue in the case. And [in] this proceeding, the People . . . are the ones that have the duty, the burden of proving their case. [¶] And there are different standards we use in the law for how much do they have to prove. Do they have to prove it by a little to win or do they have to prove it by a lot to win[?]" The court explained that in a civil case, the burden was with the plaintiff and was by a preponderance of the evidence,

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1 The trial court had read the standard instruction on reasonable doubt.

which it defined as "[t]hey have to prove their case just by a little bit more than the other side . . . 50.1 percent . . . ." The court added, "This [case] is very different. The burden of proof here is beyond a reasonable doubt. That's a much higher standard. . . . [¶] . . . [It] means that the People have to prove their case beyond all of your reasonable doubts that you may have. At the end of [the] case if . . . you're . . . thinking, ' . . . I think [defendant] might be dangerous or the petition might be true, I do have some reasonable doubts, I'm sort of leaning toward the People, but I have some reasonable doubts,' you have to vote not true. Because that means the People didn't prove their case beyond a reasonable doubt. [¶] . . . [¶] . . . [T]he law tells us what the burden of proof is. It is beyond a reasonable doubt. It's what you have to follow in this case." The prospective jurors agreed they would do that. The court continued, "[P]roof beyond a reasonable doubt doesn't mean beyond all doubt. It would be almost impossible to prove something beyond what we call a shadow of a doubt, but beyond all doubt. . . . [T]he People are not required to eliminate every possible doubt in the world. They just have to prove it beyond all reasonable doubts. [¶] . . . [¶] I have a couple of examples that I think might help. [¶] If . . . all of you . . . [could] reach a verdict on what type of flag this is behind my desk, I think all of you could probably reach a verdict beyond a reasonable doubt, but you certainly couldn't reach a decision beyond all doubt." The trial court explained that this was so because the potential jurors were looking at an unfurled flag, that appeared, from the portion they were viewing, to be an American flag, but it was possible that a picture of the court's face was in the portion of the flag the potential jurors could not see, and, therefore, it was not an American flag. The court added, "I think you can look at

where it's placed [i.e.,] it's in the courtroom, it looks like an American flag. I think you could say beyond a reasonable doubt [that it's an American flag], but you couldn't say it beyond all doubt. You could not because you couldn't see the whole thing." The trial court then talked about a puzzle of the face of President Obama that was missing a piece of his forehead, a piece of his chin and an ear. The court said, "You would probably still say beyond a reasonable doubt who it is. But you couldn't say beyond all doubt. . . . [¶] The People don't have to put every piece of the puzzle in place, but they have to put enough so you can say their petition is true beyond all reasonable doubt." The trial court's last example concerned its planning of an event for mid-August at noon, the clear implication being in San Bernardino, where the weather had to be at least 50 degrees. The court said, "I think I can say beyond a reasonable doubt . . . that the temperature is going to be above 50 degrees. . . . [¶] . . . I don't think I could say beyond all doubt. . . . [W]ho knows, . . . there could be some weird storm system or you never know what happens to the climate. You can never say beyond all doubt what the weather is going to be. [¶] [H]opefully, th[e]se examples illustrate the difference between proof beyond a reasonable doubt, which the People do have to prove[,] and proof beyond all doubt, which they don't."

Two court (and five calendar) days later, still during voir dire, one of the prospective jurors[2] said, "[A] strong conviction I have is the way I think the judge described reasonable doubt versus just doubt, some sort of doubt. And I think the way

[2] She was later peremptorily excused by the defense.

that [the trial court] outlined it about . . . the flag." Defense counsel, who was questioning this prospective juror at the time, replied, " . . . I'm going to deal with that in closing argument. I don't agree with any of that. I don't think this is the place for me to deal with that." The prospective juror replied, "There's doubt and reasonable doubt."

Trial began 13 days later. During opening statements, defense counsel told the jury, "What it is your job to do . . . i[s] to decide whether the prosecutor proves beyond a reasonable doubt that [defendant] suffers from a mental disorder defect or disorder and because of the disease[,] defect[, or] disorder he is unable to or has serious difficulty controlling his dangerous behavior and poses a substantial danger of physical harm to others . . . . [¶] . . . [¶] . . . [T]he law here is clear, as the jury instructions state. The question is whether or not the prosecution has proven beyond a reasonable doubt that [defendant] suffers from a mental disease, defect or disorder and whether because of th[at] . . . [,] he poses a substantial danger of physical harm to others and has a serious difficulty controlling his dangerous behavior."

Three days later, after the close of evidence, defense counsel began his argument to the jury by stating that defendant had no burden in this case and did not have to prove anything—that if the prosecutor did not prove his case beyond a reasonable doubt, the jury had to find for defendant. He added, "[T]his is . . . a case of whether [the prosecutor] proves the petition beyond a reasonable doubt. That's the law. We all agreed upon that." Then counsel said, "I was seething when the judge gave his descriptions of reasonable doubt [during voir dire]. He had three different descriptions. . . . I wanted to jump up and scream reasonable doubt is something that is defined in law, it's something for you

[(the jury)] to decide. I'm going to remind you of what [the court] said . . . because it outlines where we're going to go. [¶] . . . [Concerning the puzzle of the President with the missing pieces, a]re you convinced beyond a reasonable doubt that it's really a picture of President Obama? [¶] . . . I saw a lot of heads nod . . . . What if you went to the National Republican senatorial website, pulled up extra things, and another site, you go to get other bits and pieces, do you really think it's going to be a normal thing or mock him? . . . You're not guaranteed those pieces that are missing are going to be part of it. We would think they would, but would we be convinced beyond a reasonable doubt? Maybe, maybe not."

Concerning being able to say without a reasonable doubt that it will be over 50 degrees in August, defense counsel said, "You're convinced beyond a reasonable doubt that August 21st it's going to be really hot in the afternoon? [¶] . . . [A]re you convinced beyond a reasonable doubt it's going to be hot? What if it's raining? What if we have some of our wonderful global issues? . . . [¶] . . . The judge . . . told you some things. There's a reason why I'm bringing this back to you. This is important how you interpret it."

Counsel then told the jury that he came into the courtroom the night before and cut from the unfurled flag behind the bench one of its 50 stars and put it on the table where he sat during trial, which he then pretended to reach for. He said, "Of course, I wouldn't . . . cut the flag. . . . But I know some of [you are] expecting when I reached over I was going to pull that [star] out. The point is [that the flag has] never been unfurled. You haven't seen the rest of it. [¶] When I said that to you, did that create a

doubt? . . . [M]aybe there is a star missing, maybe not. The point is reasonable doubt is harder to define than that. [¶] . . . [¶] What does it mean? . . . [Y]ou've got the instruction. . . . I'm going to read it again. I ask you to follow along. It's so important that you got to know what it says. [¶] . . . 'The People are required to prove the petition beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the petition is true.' [¶] That's pretty strong language. An abiding conviction lasts a long time. You're convinced of this. [¶] 'The evidence does not need to eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] . . . Unless the evidence proves the petition beyond a reasonable doubt, you must find that the petition has not been proved.'"

Defense counsel then went on to give the jury what he called three examples of reasonable doubt. The first was the reasonable doubts he entertained about the future success of his impending marriage, yet he married anyway, despite not being convinced beyond a reasonable doubt that it would be successful before he entered into it. The next was his decision to become a parent, about which he had reasonable doubts as to his future success before making the decision, but he ultimately made the correct one to have a family despite his reasonable doubts. The third was a hypothetical, i.e., if he was faced with the decision to turn off the life support for a loved one who was in a persistent vegetative state. He said that the decision to end the life would be made despite a reasonable doubt that the person is beyond hope—the doubt being due to the possibility that some day, in the future, the person would come out of his or her vegetative state. He added, "If we had [in] our society . . . the concept of reasonable doubt no one would get

off the freeway, society would come to a halt. But in a criminal case we have that standard." He described the standards of proof that he said were less than proof beyond a reasonable doubt, specifically, reasonable suspicion, probable cause, proof by a preponderance and clear and convincing proof. He added, "so [proof beyond a reasonable doubt] is a very high standard." He reiterated that the prosecutor had to prove all the criteria to sustain the petition by this standard. He made six more references to this standard during the rest of his argument.

During closing argument, the prosecutor said, ". . . I thought it was interesting that . . . [defense counsel] had great disagreements with the way that the judge decided to describe the law to you and then went to the jury instructions to show how what the judge had told you wasn't really right. [¶] But what did the judge tell you after he . . . was done with his preliminary statements? What did I tell you when I was making my preliminary statements? That you have to go with the law that the judge instructs you on. . . . [¶] We may . . . make comments about what the law is. And, you know, we're not perfect in that regard. Sometimes we miss some words. Sometimes we miss some things. Sometimes we don't put everything on the chart that should be there. [¶] But, hopefully, essentially if we're doing what we're supposed to we point out the differences. . . . [¶] . . . [¶] [N]o matter what I say, no matter what [defense counsel] has to say, you need to look at the evidence. You need to look at the law, apply the law. What the witnesses have to say, that's your evidence. . . . [¶] . . . [¶] Our burden of proof in this case is beyond a reasonable doubt. And it is the People's burden. That is, the evidence that we're talking about has to be proven beyond a reasonable doubt."

b. Discussion

Defendant here contends that the trial court's remarks during voir dire trivialized the reasonable doubt standard, diluted the concept of reasonable doubt and lowered the People's burden of proof, constituting structural error. We begin by quoting the following, with which we wholeheartedly agree:

"Over a quarter of a century ago, a thoughtful Court of Appeal opinion collected cases from a number of jurisdictions on the fate of 'innovative' and '[w]ell intentioned efforts' by trial courts 'to "clarify" and "explain"' reasonable doubt that instead created 'confusion and uncertainty' and led to reversals on appeal. [Citation.] A few excerpts from those cases are instructive: '[Citation]: " . . . [T]he term 'reasonable doubt' best defines itself. All attempts at definition are likely to prove confusing and dangerous." [Citation.]: "Every attempt to explain [the definition of reasonable doubt] renders an explanation of the explanation necessary." [Citation.]: "It is in a term which needs no definition, and it is erroneous to give instruction resulting in an elaboration of it." [Citation.]: "[G]enerally, the attempted definitions of [reasonable doubt] . . . are simply misleading and confusing, and not proper explanations of their meaning at all." [Citation.]: "As it is difficult, if not impossible, to give a precise and intelligible definition of what a reasonable doubt is, without extending an instruction into almost a treatise upon the subject, . . . the better practice is to follow as nearly as practicable the language of the [statute], which is certainly as intelligible and as easily comprehended as the definition given in this case.'" [Citation.] [¶] To any trial judge who feels the urge to clarify or explain reasonable doubt, we commend the concise history of the reasonable

doubt standard that appears in the latest CALJIC compendium. (California Jury Instruction, Criminal, Appendix B (Jan. 2004 ed.).) Originating in English cases of centuries ago, that history came to fruition only in the past decade with 'the universal approval' by federal and state courts alike of CALJIC No. 2.90, 'conclusively settl[ing]' its 'legal sufficiency and propriety.' [Citation.] We trust that any trial judge who reads that history will heed the two English bards: . . . 'Let it be.' (Lennon & McCartney (Northern Songs 1970) 'Let It Be.')" (*People v. Johnson* (2004) 119 Cal. App.4th 976, 986.)

Our task is to determine de novo whether there is a reasonable likelihood the jury applied the trial court's remarks in an unconstitutional manner. (*Victor v. Nebraska* (1994) 511 U.S. 1, 5 [114 S.Ct. 1239]; *People v. Posey* (2004) 32 Cal.4th 193, 218.) We conclude that there is no such reasonable likelihood.

Defendant draws our attention to a number of cases in which, he asserts, the trial courts made remarks similar to those made here, which were deemed to be constitutional error.

The first is *People v. Johnson* (2004) 115 Cal.App.4th 1169 (*Johnson I*), in which the trial court said during voir dire, "'The burden is proof beyond a reasonable doubt. A doubt that has reason to it, not a ridiculous doubt, not a mere possible doubt. Because we all have a possible doubt whether we will be here tomorrow. That's certainly a possibility. We could be [killed] tonight. . . . [I]t's a possibility. It's not reasonable for us to think that we will [be killed tonight] because we plan our lives around the prospect of being alive. We take vacations; we get on airplanes. We do all these things because

we have a belief beyond a reasonable doubt that we will be here tomorrow or we will be here in [the future] . . . . But we wouldn't plan our live[]s ahead if we had a reasonable doubt that we would, in fact, be alive.'"

The *Johnson I* court cited an earlier decision, *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35 (*Nguyen*), in which the prosecutor had argued to the jury that beyond a reasonable doubt is '"a very reachable standard that you use every day in your lives when you make . . . decisions . . . about whether you want to get married, decisions that take your life at stake when you change lanes as you're driving. If you have reasonable doubt that you're going to get in a car accident, you don't change lanes.'" The *Nguyen* court concluded, "'The . . . argument that people apply a reasonable doubt standard "every day" and that it is the same standard people customarily use in deciding whether to change lanes trivializes the reasonable doubt standard. It is clear the almost reflexive decision to change lanes while driving is quite different from the reasonable doubt standard in a criminal case. 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 marriages end in divorce. [Citations.]' [Citation.]" (*Johnson I*, *supra*, 115 Cal.App.4th at pp. 1171-1172.) The *Johnson I* court then cited *People v. Brannon* (1873) 47 Cal. 96, stating that the judgment of a person in the ordinary affairs of life is governed by the preponderance standard. (*Johnson*, *supra*, at p. 1172.) The *Johnson I* court concluded, "The same applies to making decisions to take vacations and get on airplanes. . . . [¶] We are not prepared to say that people planning vacations or scheduling flights engage in a deliberative process to the depth

required of jurors or that such people finalize their plans only after persuading themselves that they have an abiding conviction of the wisdom of the endeavor. Nor can we say that people make such decisions while aware of the concept of 'beyond a reasonable doubt.' Accordingly, per *Brannon*, the trial court's attempt to explain reasonable doubt had the effect of lowering the prosecutor's burden of proof. [¶] . . . [The] instruction . . . reduced the prosecution's burden to a preponderance of the evidence." (*Ibid.*)

The difference between the comments made in *Johnson I* and those here rests with the *Johnson I* court's emphasis on the fact that planning vacations or scheduling flights, like changing lanes in *Nguyen*, are not characterized by the deep deliberative process required of jurors in criminal cases. Rather, they are often made impulsively, almost reflexively and certainly in the absence of abiding conviction or after a determination that the decision is a correct one beyond reasonable doubt. Here, in contrast, the trial court was merely trying to make the point that there is a difference between reasonable doubt and any *possible* doubt, just as the standard instruction given here on reasonable doubt, with which defendant finds no fault, provided. It stated, "The evidence does not need to eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." Because the trial court here did not invite the jurors to view their duty to decide if the petition had been proven beyond a reasonable doubt using the same impulsive, reflexive, and nondeep deliberative processes as the examples used in *Nguyen* and *Johnson I*, neither of those opinions mandate a conclusion that error occurred here.

The next case defendant cites, *People v. Johnson* (2004) 119 Cal.App.4th 976 (*Johnson II*), is equally unhelpful to his position. In *Johnson II*, "The [trial] court authorized the prospective jurors to find [defendant] guilty even if they were to have 'some doubt' about his guilt and characterized a juror who renders a guilty verdict with 'no doubt' about his guilt as 'brain dead.' . . . [¶] . . . [¶] The [trial] court equated proof beyond a reasonable doubt to everyday decision making in a juror's life . . . ." (*Id.* at pp. 980-981.) In fact, the trial court said, "'Everything you do, you can look at what's reasonable and possible, and . . . every decision you make . . . [is] based on . . . reason . . . . [¶] . . . [T]hat's not a definition of reasonable doubt, but that's what we want you to bring to court with you, the same thing you use every day in making your . . . decision[s]. . . . [F]igure out what happened beyond a reasonable doubt, not beyond all possible doubt. . . . [Y]ou are never going to know what . . . happened beyond all possible doubt . . . .'" (*Id.* at p. 982.) The trial court reiterated that "jurors are . . . simply to make the 'kind of decisions you make every day in your life.' [¶] . . . The thing that you're doing is [making the] kind of decisions you make every day in your life, figuring out what happened, whether the defendant is guilty or not guilty. [¶] 'That's the kind of thing . . . that you decide every day in your life.' [¶] . . . [T]he [trial] court [again] instructed that jurors who find an accused person guilty or not guilty engage in the same decision making process they 'use every day. When you get out of bed, you make those same decisions.'" (*Id.* at pp. 982-983.) Likewise, the prosecutor, during his argument to the jury, "characterized a juror who could return a guilty verdict without 'some doubt' about [defendant's] guilt as 'brain dead' and equated proof beyond a

reasonable doubt to everyday decision making in a juror's life[.]" (*Id*. at p. 983.) The appellate court concluded that the trial court's remarks lowered the prosecution's burden of proof. (*Id*. at p. 985.) As stated before, the trial court here did not equate proof beyond a reasonable doubt with everyday decisions people make. Additionally, this trial court did not say that a juror could find in favor of the petition even though having some doubts about its veracity.

In *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 (*Katzenberger*), the prosecutor made a PowerPoint presentation during closing argument to illustrate the reasonable doubt standard. "The . . . presentation consisted of eight puzzle pieces forming a picture of the Statue of Liberty. The first six pieces came on to the screen sequentially, leaving two additional pieces missing. The prosecutor argued it was possible to know what was depicted 'beyond a reasonable doubt' even without the missing pieces. The prosecutor then added the two missing pieces to show the picture was in fact the Statue of Liberty." (*Id*. at p. 1262.) Defense counsel, after unsuccessfully objecting to the presentation, said during his argument to the jury that the presentation was "'a travesty and . . . not reasonable doubt at all.'" (*Id*. at p. 1265.) The trial court then reread the reasonable doubt instruction "to 'clarify things.'" (*Ibid*.) The appellate court concluded that the presentation "misrepresented the 'beyond a reasonable doubt' standard." (*Id*. at p. 1266.) The *Katzenberger* court cited a New York case in which the jury was shown a jigsaw puzzle of Abraham Lincoln to illustrate the principle that the jury did not need all their questions answered in order to convict. (*Ibid*.) The New York appellate court held that this was error because the average juror could recognize Lincoln

"'long before all of the pieces are in place[, which is o]bviously . . . not the quantum of proof required in a criminal case.'" (*Ibid.*) The *Katzenberger* court held, "The Statue of Liberty is almost immediately recognizable in the prosecution's . . . presentation. Indeed, some jurors might guess that the picture is of the Statue of Liberty when the first or second piece is displayed. . . . [M]ost jurors would recognize the image well before the initial six pieces are in place. The presentation, with the prosecutor's accompanying argument, leaves *the distinct impression that the reasonable doubt standard may be met by a few pieces of evidence. It invites the jury to guess or jump to a conclusion*, a process completely at odds with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt. [¶] . . . [¶] [Additionally, t]he prosecutor's puzzle analogy . . . contains a quantitative component similar to those in [two federal cases that resulted in reversals]. Specifically, the puzzle of the Statue of Liberty is composed of eight pieces. When the sixth piece of the slide show was in place, leaving two missing pieces, the prosecutor told the jury, 'this picture is beyond a reasonable doubt [the Statue of Liberty],' *inappropriately suggesting a specific quantitative measure of reasonable doubt*, i.e., 75%." (*Id.* at pp. 1266-1267, italics added.)

In contrast to the facts in *Katzenberger*, the trial court's analogy here did not convey the distinct impression that the reasonable doubt standard could be met by a few pieces of evidence. The trial court did not tell the prospective jurors how many pieces composed the puzzle of President Obama. Unlike the puzzle in *Katzenberger*, the jurors were not called upon to speculate or guess what it depicted as each piece was put in place. Rather, the trial court described an almost completed puzzle, with just a few

pieces missing. The implication of the puzzle story, as clearly stated by the trial court, was that the People were not obliged to put on every piece of evidence they had—just enough evidence to convince the jury beyond a reasonable doubt of the truth of the petition. This implication was consistent with the instructions the jury was given that neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant and that the evidence does not need to eliminate all possible doubt. Additionally, unlike the puzzle in *Katzenberger*, there was no quantitative aspect to the Obama puzzle here, because the total number of puzzle pieces was not given.

In our view, the flag analogy the trial court here gave was simply an illustration of the difference between a reasonable doubt and *a possible* doubt. As we have stated, the standard reasonable doubt instruction draws the same distinction between the two, providing that the former requires finding the petition not true and the latter does not. The fact that the flag the trial court spoke of was in a courtroom, behind the bench, and appeared, from the portion that could be seen, to be an American flag, served as the basis for the trial court's conclusion that, "I think all of [the prospective jurors] could probably reach a verdict beyond a reasonable doubt, but . . . [not] . . . beyond all doubt . . . [¶] . . . because you couldn't see the whole thing" that it was, indeed, an American flag.

We have already discussed the stated (and actual) implication of the trial court's Obama puzzle.

As to the trial court's August weather example, again, its implication was to distinguish reasonable doubt from any doubt, a perfectly acceptable distinction, fully supported by the standard instruction given.

Contrary to defendant's assertions, these examples did not encourage the jurors to engage in speculation to determine the facts of the case or to trivialize their duty by suggesting that they could determine the truth of the petition in the same manner that they made everyday decisions. In fact, it was *defense counsel* who introduced the idea of reasonable doubt in the types of decisions that were held to be improper in *Nguyen* and *Brannon*, although it would take more time and mental gymnastics than this jury possibly possessed to derive any inference relevant to reasonable doubt from what he said. The only inference this court could derive from counsel's remarks is that counsel made two important decisions in his life, although he had reasonable doubts about their wisdom, and they happened to work out for him. We have no idea what this means in terms of the burden of proof. The implication, in terms of reasonable doubt, of his example of cutting off someone's life support also escapes us, despite many attempts to formulate one. Again, we doubt that the jury put as much time and effort into it as we have.

The People call our attention to *People v. Jasmin* (2008) 167 Cal.App.4th 98. Therein, the prosecutor, during closing argument, told the jurors, "[T]here isn't . . . one of you . . . who, at sometime in your lives, have [not] been called upon to make extremely important decisions[,] . . . not . . . everyday kind of decisions[, but] . . . critical, almost life changing . . . decisions . . . . As reasonable people, we gather the facts before us that bear upon that decision making as fully as we can, knowing that there's always . . . more

we would like to know, [but] . . . the obligation to make the decision does not go away. So we gather the facts as best we can know them, and we apply our reason to them. And if having done that there is one reasonable choice to make, we . . . make that choice. . . . [W]e do not choose to disregard the facts. We do not choose . . . to do the unreasonable thing." (*Id*. at p. 115.) The appellate court in *Jasmin* contrasted the remarks there with those in the cases we have just discussed in which the jury's task was likened to everyday decisionmaking, and it concluded that the former did not reduce the reasonable doubt standard to a mere reasonable decision. (*Id*. at p. 116.)

We disagree with defendant's interpretation of the three examples the trial court gave as trivializing the reasonable doubt standard because, he asserts, none of the jurors would care whether the flag in the courtroom was an American flag, the puzzle is that of President Obama or whether it will be over 50 degrees in August. That is not the point of the examples, which point has already been described. Moreover, we again note that it was *defense counsel*, not the trial court, that drew the jury's attention to those important decisions in life that he asserts in his reply brief are not analogous to the jury's task in a criminal case.

As the People correctly point out, the reasonable doubt standard is a probabilistic one, in that the fact finder cannot acquire unassailably accurate knowledge of what happened, but can acquire a belief in what probably happened. (*Victor v. Nebraska*, *supra*, 511 U.S. at p. 14.) The level of probability is very high, or, near certitude, which is fulfilled by an abiding conviction following a careful examination and comparison of all the evidence. (*Ibid*.; *Jackson v. Virginia* (1979) 443 U.S. 307, 315 [99 S.Ct. 2781].)

Besides concluding that the trial court's remarks themselves did not create a reasonable likelihood that the jury applied the reasonable doubt standard in an unconstitutional manner, we also determine that the circumstances surrounding those remarks leads to the same conclusion. Defense counsel, almost contemporaneously with the trial court's statements, said he would have to say something about them during argument, and he did. He asserted that the trial court was incorrect in its examples and he gave ones he considered to be proper. The prosecutor then told the jurors that they should disregard both the examples given by the court and defense counsel and follow the law as contained in the instructions. The reasonable doubt standard was given to the jury a number of times. Finally, in cases in which oral instructions conflict with written, the latter control. (*People v. Mills* (2010) 48 Cal.4th 158, 201.) Therefore, to the extent some jurors may have interpreted the trial court's examples as suggesting a standard of proof in conflict with that contained in the written instructions which were sent into the jury room, the latter is deemed to have controlled.

2. Instruction on Defendant's Right Not to Testify and Inference from His Failure to Testify

a. Facts

Before trial began, defendant requested that the trial court instruct the jury as follows:

"A defendant has an absolute . . . right not to testify. He . . . may rely on the state of evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that the defendant did

not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way."

Penal Code section 1026.5, subdivision (b)(7) provides, in pertinent part, "The person [for whom extension of commitment is sought] shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees."

The trial court rejected defendant's proffered instruction, finding that despite the wording of Penal Code section 1026.5, subdivision (b)(7), rights that attached to criminal proceedings, such as the right against double jeopardy and the right of defendant personally to waive jury trial, have already been held by appellate courts to be inapplicable to recommitment proceedings. The trial court observed that the rights guaranteed by that subdivision are only those that are appropriate to such proceedings. The court further found that it was appropriate for the jury to hear from the defendant in order to determine his current mental and intellectual functioning. The court concluded that the jury would assume that defendant would not testify due to his impaired mental state. If anything, the jury would find the People's case deficient for failing to put defendant on the stand. Therefore, in the court's estimation, the proffered instruction was misleading.

During argument to the jury, the prosecutor said, "[The defense] cho[se] not to call any witnesses, which they don't have to do. They don't have a burden, they can rely on the evidence that the People have presented. They didn't refute anything, but we haven't

heard from [defendant]. Why don't we have [defendant] explain to us how he doesn't have problems?"

Following defense counsel's objection and request for a curative instruction, the trial court sustained the objection and instructed the jury not to consider whether defendant testified.

b. Discussion

Defendant contends that the trial court erred by not instructing the jury that he had a *constitutional* right not to testify and that no adverse inference could be drawn from his failure to testify. Preliminarily, defendant made clear below, twice, that he was not requesting that the jury be instructed that he had a *constitutional* right not to testify.

We review defendant's claim whether the trial court erred in refusing his requested instruction de novo. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)

In *People v. Lopez* (2006) 137 Cal.App.4th 1099, 1107-1109 (*Lopez*) [Fourth Dist., Div. Two], this court observed, "Courts of Appeal have held the privilege not to testify does not apply in proceedings under a variety of civil commitment laws . . . . [¶] [T]he Fifth District Court of Appeal . . . [¶] acknowledged that previous decisions had held [Penal Code section 1026.5, subdivision (b)(7)] 'did not make all rights guaranteed for criminal proceedings applicable in [Penal Code] section 1026.5 proceedings.' ([*People v.*] *Haynie* [(2004)] 116 Cal.App.4th [1224,] 1228.) In *People v. Superior Court* (*Williams*) (1991) 233 Cal.App.3d 477, 488, . . . the court held: 'The statutory language merely codifies the application of constitutional protection . . . *mandated by judicial decision*. It does not extend the protection of constitutional provisions which *bear no*

relevant relationship to the proceedings. [Citation.]' . . . [¶] [I]n *People v. Powell* (2004) 114 Cal.App.4th 1153, 1157-1158, . . . the court held [Penal Code] section 1026.5 did not require personal waiver of a jury trial in an [not guilty by reason of insanity (NGI)] recommitment proceeding. Citing *Williams*, the court stated that [Penal Code] section 1026.5 '"merely codifies the application of constitutional protections . . . mandated by judicial decision." [Citation.]' [Citation.] Judicial decisions had not extended to civil committees the right of a criminal defendant to decide personally whether to waive a jury, because in civil commitment cases 'the jury does not impose criminal punishment and has no power to determine the extent to which the person will be deprived of his . . . liberty . . . .' [Citation.] [¶] . . . [¶] The *Haynie* court . . . agree[d] with *Williams* that despite its literal language, [Penal Code] section 1026.5[, subdivision] (b)(7) did not guarantee constitutional protections that did not have a relevant relationship to commitment proceedings. It held, though, that '[t]he right to not be compelled to testify against oneself is clearly and relevantly implicated *when a person is called by the state to testify* . . . even if what is said on the witness stand is not per se incriminating.' [Citation.]" (*Id*. at pp. 1107-1108, italics added.)[3] This court then

[3] Defendant below and here relies on the holding in *People v. Haynie* (2004) 116 Cal.App.4th 1224, and its companion case, *In re Luis C*. (2004) 116 Cal.App.4th 1397, the latter of which we have deliberately not mentioned because it was authored by the same panel as *Haynie*, using the same reasoning. (*Lopez*, *supra*, 137 Cal.App.4th at pp. 1109-1110.)

held,[4] "[T]he interpretation[] of Penal Code section 1026.5[, subdivision] (b)(7) in *Haynie* [is] unsupported. . . . [¶] . . . [¶] . . . [*People v. Henderson* (1981) 117 Cal.App.3d 740] held that *identical language* to that set forth in Penal Code section 1026.5[, subdivision] (b)(7) [for MDSO[5] committees] *did not* extend the privilege [against self-incrimination] to [such] committee[s]. . . . [¶] . . . *Henderson* concluded: '[The section identical to Penal Code section 1026.5, subdivision (b)(7)] codifies the application of constitutional protections to MDSO proceedings mandated by judicial decision [citations]. It does not extend the protection of the constitutional privileges against self-incrimination to testimonial communications which are not incriminatory.' [Citation.] . . . [¶] . . . [¶] . . . [I]n referring to the protections 'mandated by judicial decision,' the *Henderson* court meant to refer to the rights to proof beyond a reasonable doubt and to a unanimous verdict . . . . [¶] . . . [¶] . . . The Supreme Court in [*People v.*] *Burnick* [(1975) 14 Cal.3d 306] . . . concluded that, despite the Legislature's reference in Welfare and Institutions Code section 5303 to 'the procedures required under' the part of the constitution containing the right not to testify, the Legislature did not intend that a

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[4] Contrary to the assertion of defendant below, what is quoted in the text of this opinion is the holding of this court and not dicta because it is the premise upon which this court rejected the argument that, under the equal protection clause, mentally disordered offender (MDO) committees should have the right against self-incrimination that NGI committees do. Similarly, defendant's assertion here that *Lopez* should not govern because it involved an MDO and an equal rights assertion is specious. Of even less legitimacy is defendant's assertion that it is inapplicable because the trial court here concluded that defendant had a right not to testify under Penal Code section 1026.5 and the trial court in *Lopez* concluded otherwise.

[5] MDSO refers to the now defunct category of mentally disordered sex offenders.

potential . . . committee [under 5300 et seq] have the right not to testify. Rather, the Legislature meant only to afford the committee the rights guaranteed by due process, i.e., the rights to proof beyond a reasonable doubt and a unanimous jury. [¶] . . . [I]t is reasonable also to conclude the Legislature acted with the same intent in enacting [Penal Code] section 1026.5[, subdivision] (b)(7). That is, in granting a . . . NGI committee 'the rights guaranteed under the federal and state Constitutions for criminal proceedings,' the Legislature intended to grant the rights guaranteed by due process, such as proof beyond a reasonable doubt and a unanimous verdict, but not other rights that are granted criminal defendants alone, such as the privilege not to testify. [¶] . . . [¶] . . . [I]n enacting Penal Code section 1026.5 . . . [t]he Legislature wanted to establish a commitment procedure for NGI's that would overcome the equal protection problems . . . when [the California Supreme Court] compared the treatment of NGI's and MDSO's. Therefore, it included in the NGI commitment law the identical language it had included in the MDSO law . . . the person subject to commitment 'shall be entitled to the rights guaranteed under the Federal and State Constitutions for criminal proceedings.' [¶] . . . [I]n including the identical language in Penal Code section 1026.5[, subdivision] (b)(7), the Legislature acted with the same intent. [¶] . . . [¶] . . . [T]wo years after *Williams* was decided, the Legislature amended [Penal Code] section 1026.5 without modifying its language to overrule *Williams* or to state explicitly that an NGI committee has the criminal defendant's privilege not to testify. . . . '"'[I]t must be presumed that the Legislature is aware of the judicial construction and approves of it.' [Citations.]"' [Citation.] [¶] . . . [¶] . . . [T]he Supreme Court in *Cramer v. Tyars* [(1979)] 23 Cal.3d 131, . . . [held] that the right not to

testify did not apply in commitment hearings of mentally retarded persons. *Cramer* analyzed the applicability of the right not to testify not by examining whether the committee's testimony was necessary to prove the prosecution's case, but by examining the essential nature of the proceeding. Thus, the court stated: '[t]he commitment may not reasonably be deemed punishment either in its design or purpose. It is not analogous to criminal proceedings.' (*Id*. at p. 137.) [¶] *Cramer* further stated that 'the historic purpose of the privilege against being called as a witness has been to assure that the *criminal* justice system remains accusatorial, not inquisitorial. [Citations.] The extension of the privilege to an area outside the criminal justice system, in our view, would contravene both the language and purpose of the privilege.' ([*Id*. at pp.] 137-138.) [¶] . . . [¶] Civil commitment, by definition, does not involve the 'system of criminal justice.' . . . [¶] For these reasons, we conclude the Legislature in enacting Penal Code section 1026.5[, subdivision] (b)(7) . . . did not intend to require that persons subject to commitment under th[at] provision[] [had] the right not to testify." (*Id*. at pp. 1110-1116.)

Defendant offers no sound reason for our departure from the holding in *Lopez*.

Therefore, we conclude that the trial court did not err in refusing to give the proffered instruction.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

RAMIREZ
P.J.

I concur:

HOLLENHORST
J.

[*People v. Steven Burnice Moore*, E048982]

MILLER, J., concurring and dissenting.

I respectfully concur in part and dissent in part. I concur with the majority's opinion concerning defendant's contention that the trial court erred by not instructing the jury that defendant had a constitutional right to not testify. My dissent concerns defendant's assertion that the trial court erred in its three examples of the reasonable doubt standard. I write separately to explain the reasons for my dissent. I would reverse the judgment.

DISCUSSION

Defendant contends that the trial court erred by improperly illustrating the reasonable doubt standard of proof, because the trial court effectively lowered the prosecution's burden of proof by encouraging jurors to speculate about the possible evidence. I agree.

"The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law [citation] . . . ." (*People v. Posey* (2004) 32 Cal.4th 193, 218.) I am reviewing the trial court's examples, or illustrations, of the reasonable doubt instruction; therefore, I apply the independent standard of review.

"The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. [Citation.] Indeed, so long as the court instructs the jury on the necessity that the [the prosecution's petition] be proved beyond a reasonable doubt, [citation], the Constitution does not require that any particular form of words be

used in advising the jury of the government's burden of proof. [Citation.] Rather, 'taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury.' [Citation.]" (*Victor v. Nebraska* (1994) 511 U.S. 1, 5.) "[T]he proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." (*Id.* at p. 6.)

A. JIGSAW PUZZLE

I begin my analysis with the trial court's "jigsaw puzzle" example. The majority has provided a summary of *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1264 (*Katzenberger*); however, in order to aid the reader, I provide a summary here. In *Katzenberger*, during closing arguments the prosecutor used a PowerPoint program to illustrate the reasonable doubt instruction to the jury. The program began with a blue computer screen, and then six different puzzle pieces appeared sequentially. The picture was easily recognizable as the Statue of Liberty. After the sixth puzzle piece was in place, the final picture showed two missing puzzle pieces, i.e., the picture would have been complete with a total of eight puzzle pieces. The missing pieces included (1) the statue's face, and (2) the upper left corner of the image. (*Ibid.*)

The prosecutor argued to the jury, "'[W]e know [what] this picture is [of] beyond a reasonable doubt without looking at all the pieces of that picture. We know that that's a picture of the Statue of Liberty, we don't need all the pieces of . . . it. And ladies and gentlemen, if we fill in the other two pieces . . . we see that it is, in fact, the [S]tatue of

[L]iberty. And I will tell you in this case, your standard is to judge this case beyond a reasonable doubt.'" (*Katzenberger*, *supra*, 178 Cal.App.4th at p. 1265.)

The appellate court found the prosecutor's jigsaw puzzle example to be problematic because it left "the distinct impression that the reasonable doubt standard may be met by [only] a few pieces of evidence. It invites the jury to guess or jump to a conclusion, a process completely at odds with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt." (*Katzenberger*, *supra,* 178 Cal.App.4th at p. 1267.) The appellate court further concluded that the jigsaw puzzle illustration, which was missing two of eight puzzle pieces, "inappropriately suggest[ed] a specific quantitative measure of reasonable doubt, i.e., 75 percent." (*Id.* at pp. 1267-1268.) The appellate court held that the prosecutor's illustration of the reasonable doubt instruction constituted misconduct. (*Id.* at p. 1268, fn. 3.)

In the instant case, the trial court gave the jury an almost identical example of the reasonable doubt standard. The trial court did not have a PowerPoint presentation, but it described the reasonable doubt standard of proof via an analogy of a jigsaw puzzle with three missing sections. I find the *Katzenberger* analysis persuasive and adopt it herein, in particular, the portion of the analysis concerning the invitation for the jury to jump to a conclusion. In the instant case, the trial court's example invited the jury to jump to a conclusion, by seemingly saying that, if the prosecution failed to present a complete case, then a verdict could be reached by assuming what the evidence might have been, or mentally filling in any gaps in the evidence. Consequently, I conclude that the trial

court erred by analogizing the reasonable doubt standard of proof with an incomplete jigsaw puzzle.

The People contend that the trial court's "jigsaw puzzle" example is distinguishable from the example given in *Katzenberger* because the trial court did not tell the prospective jurors "how many parts could be missing." I agree, the trial court did not explain if it was a six-piece puzzle or a 500-piece puzzle; however, the trial court did tell the prospective jurors that the jigsaw puzzle image was missing the president's forehead, chin, and one ear. Consequently, the quantifying issue is not as pronounced in the instant case, as it was in *Katzenberger,* because the jury could not easily compute reasonable doubt as a particular percentage, e.g., 75 percent; however, the jury could still interpret the example as an invitation to guess or jump to a conclusion. Accordingly, I do not find the People's argument persuasive.

Next, the People contend that the "jigsaw puzzle" example was proper because "proof beyond a reasonable doubt does not require the presentation of all possible evidence." I disagree with the People's argument. The jury was told, "The People don't have to put every piece of the puzzle in place, but they have to put enough so you can say their petition is true beyond all reasonable doubt." When the foregoing statement is combined with the trial court's "jigsaw puzzle" example, it gives the impression that the prosecution does not have to present evidence regarding all of the elements—that some major pieces can be missing, and the jurors can fill in the holes by assuming what the evidence may have been. Contrary to the People's position, it does not seem likely the jury understood the example to mean that the prosecution is not

required to present all possible evidence. Accordingly, I find the People's argument unpersuasive.

The majority opinion concludes that the implication of the jigsaw puzzle example "was that the People were not obliged to put on every piece of evidence they had—just enough evidence to convince the jury beyond a reasonable doubt of the truth of the petition." As set forth *ante*, I disagree that such an implication was made by the trial court's jigsaw puzzle example. The trial court said to the venire, "[I]t's a picture of our president's face and, well you're *missing* a piece of the forehead. And one of the ears is *missing*, you *don't have that piece*. And there's a piece *missing* from the chin. You could probably say beyond a reasonable doubt who it is. But you couldn't say it beyond all doubt. You don't have all the pieces, how could you say beyond all doubt who that is?"

The trial court described multiple missing pieces of the puzzle. Due to there being so many missing pieces, I believe the implication made by the trial court's jigsaw puzzle example is that there can be large holes in the prosecution's case, for example there may not be proof pertaining to a particular element, but if there is some proof present, then it would still be possible to find the petition true beyond a reasonable doubt. Accordingly, I conclude the jigsaw puzzle example inaccurately portrayed the standard of proof, and the inaccuracies favored the prosecution.

B. WEATHER PREDICTION EXAMPLE

I now turn to the trial court's example concerning planning an event in August. The majority opinion includes a description of *People v. Johnson* (2004) 115

Cal.App.4th 1169 (*Johnson I*); however, in order to assist the reader, I provide a summary of *Johnson I* here. In *Johnson I,* during voir dire, the trial court made the following comments to the prospective jurors: "'The burden is proof beyond a reasonable doubt. A doubt that has reason to it, not a ridiculous doubt, not a mere possible doubt. Because we all have a possible doubt whether we will be here tomorrow. That's certainly a possibility. We could be run over tonight. God, that would be a horrible thing, but it's a possibility. It's not reasonable for us to think that we will because we plan our lives around the prospect of being alive. We take vacations; we get on airplanes. We do all these things because we have a belief beyond a reasonable doubt that we will be here tomorrow or we will be here in June, in my case, to go to Hawaii on a vacation. But we wouldn't plan our live[]s ahead if we had a reasonable doubt that we would, in fact, be alive.'" (*Id.* at p. 1171.)

The appellate court found the trial court's example problematic because it could not say that when people plan events, such as vacations, they engage in a deliberative process to the depth required of jurors applying the reasonable doubt standard. (*Johnson I*, *supra*, 115 Cal.App.4th at p. 1172.) The appellate court, citing other appellate opinions, wrote that people's decisions regarding their ordinary affairs are controlled by a preponderance of the evidence, and that the reasonable doubt standard is trivialized by comparing it to ordinary decisions. (*Id.* at pp. 1171-1172.) The appellate court concluded that the trial court erred, and reversed the judgment. (*Id.* at p. 1172.)

In this case, the trial court said to the prospective jurors, "if I had to plan an event that required [a date in] the middle of August at noon and the temperature has to be at

least 50 degrees. I think I can say beyond a reasonable doubt [that] I can plan that event for the middle of August at noon and that the temperature is going to be above 50 degrees. I've been here a long time in California, I've never seen the temperature be less than 50 degrees in the middle of August at noon."

The trial court's comments are problematic because they do not illustrate the deliberative process that one must engage in when making a decision beyond a reasonable doubt. Further, many people would not consider a weather prediction to be a decision that is made beyond a reasonable doubt, and therefore, the example trivializes the standard of proof. (*Johnson I, supra*, 115 Cal.App.4th at pp. 1171-1172.) Consequently, I conclude that the trial court erred by comparing the reasonable doubt standard of proof to a weather prediction.

The People cite the weather history for San Bernardino, spanning the years 1904 to 2004. The People assert that the lowest August temperature in San Bernardino was 65 degrees in 1941, and therefore, a temperature above 50 degrees is a certainty in August. The People argue that analogizing the reasonable doubt standard of proof to an indisputable weather prediction does not diminish the standard of proof. The problem I find with the trial court's example is that it trivializes the reasonable doubt standard of proof; it gives the impression that the standard of proof can be satisfied by casual experience, rather than a deliberative process of weighing the evidence presented. The fact that the trial court's weather prediction is likely correct does not help the jury to appreciate that a finding beyond a reasonable doubt can only be reached "after the entire comparison and consideration of all the evidence." (Pen. Code, § 1096.)

The majority finds the weather prediction example to be acceptable because "the trial court was merely trying to make the point that there is a difference between reasonable doubt and any possible doubt." I agree that the trial court was trying to explain the reasonable doubt standard; however, I do not find the example to be acceptable. The majority goes on to write, "[T]he trial court here did not invite the jurors to view their duty to decide if the petition had been proven beyond a reasonable doubt using the same impulsive, reflexive, and nondeep deliberative processes as the examples used in *Nguyen* and *Johnson I*." I disagree. The trial court invited the jury to think about the reasonable doubt standard in terms of a weather prediction. The trial court said to the venire, "I've been here a long time in California, I've never seen the temperature be less than 50 degrees in the middle of August at noon." In my opinion, the trial court's quick and one-sided explanation of how it made a weather prediction does not illustrate the deliberative process that one must engage in when making a decision beyond a reasonable doubt.

C. "FLAG" EXAMPLE

Next, I examine the trial court's "flag" example. The trial court told the prospective jurors that they could probably reach a verdict beyond a reasonable doubt that the flag in the courtroom was an American flag; however, the jurors could not reach a verdict beyond all doubt, because if the flag were unfurled it might have a picture of the trial judge's face on it.

The trial court's comment that the flag does not need to be unfurled for the prospective jurors to know beyond a reasonable doubt that it is an American flag is

similar to the "jigsaw puzzle" example with the missing pieces. The "flag" example, like the "jigsaw puzzle" example, could be interpreted as an invitation to reach a conclusion beyond a reasonable doubt before thoroughly considering all of the evidence, because the jury can jump to the conclusion that the flag is American, without looking at the whole flag.

The "flag" example is also similar to the "weather prediction" example because it trivializes the reasonable doubt standard by analogizing it to an ordinary observation. In other words, a prospective juror's ability to recognize the American flag does not equate with the deliberative process involved in reaching a decision beyond a reasonable doubt. Consequently, I conclude that the trial court erred.

The People contend that American flags are typically found in courtrooms, and there was a "near certitude" that the flag was American; therefore, the People assert that the flag example illustrated that the petition would need to be found true on proof amounting to a near certitude. The People's position is not persuasive because the ability to recognize the American flag is fairly common, and does not tend to require a deliberative contemplation or weighing of evidence. The People's position is also not persuasive because the trial court did not explain that the prospective jurors must be nearly certain that the flag is American, before concluding that it is an American flag.

Appellate courts have repeatedly found errors in trial courts juxtaposing the reasonable doubt standard of proof with ordinary observations or decisions. (*People v. Brannon* (1873) 47 Cal. 96, 97; *People v. Garcia* (1975) 54 Cal.App.3d 61, *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36; *People v. Johnson* (2004) 119 Cal.App.4th 976,

985 (*Johnson II*).) The reason for the appellate courts' findings of error is that by comparing the reasonable doubt standard of proof with ordinary decisions, which tend to be made by a preponderance of the evidence, the trial courts lower the prosecutors' burden of proof. (*Johnson II*, at p. 985.) The same reasoning is applicable in the instant example—most people would apply the preponderance of the evidence standard to a decision regarding whether a flag is American, not a reasonable doubt standard. In sum, I find the People's argument unpersuasive.

The majority concludes that the flag example "was simply an illustration of the difference between a reasonable doubt and a possible doubt," which parallels the jury instruction. I do not agree that the flag example was an accurate illustration of the reasonable doubt standard. My reasons for this conclusion are given *ante*, so I do not repeat them here.

D. LIKELIHOOD THE JURY MISAPPLIED THE STANDARD

The issue that must be answered is whether there is a reasonable likelihood that the jury applied the evidentiary standard in an unconstitutional manner. (*Victor v. Nebraska* (1994) 511 U.S. 1, 5.) As set forth *ante*, all three of the trial court's examples were problematic in that they altered the burden of proof in favor of the prosecution. Further, it appears from the record that the prospective jurors spent time thinking about the trial court's examples, as evidenced by the following comment made by a prospective juror: "I guess a strong conviction I have is the way I think the judge described reasonable doubt versus just doubt, some sort of doubt. And I think the way that he outlined it about, you know, the flag." Due to (1) the multiple incorrect

examples; (2) the fact that the examples came from the trial court, as opposed to an attorney; and (3) the foregoing comment from the prospective juror reflecting that the jurors likely spent time thinking about the trial court's examples, I believe it is reasonably likely that the jury applied the evidentiary standard in an unconstitutional manner. There was simply too much misinformation about the evidentiary standard given by the court for me to come to a contrary conclusion. (See *Johnson I*, *supra*, 115 Cal.App.4th at p. 1172 [reversal due to one problematic example]; *Johnson II*, *supra*, 119 Cal.App.4th at pp. 986-987 [reversal due to a lengthy amplification of the reasonable doubt instruction].)

E. SUMMARY

As the majority notes in the beginning of its discussion section, trial courts have often been admonished for elaborating on the statutory description of the reasonable doubt standard. (*People v. Garcia*, *supra*, 54 Cal.App.3d at pp. 65-66.) Appellate courts have warned that "'the term "reasonable doubt" best defines itself,'" and that "'[e]very attempt to explain [the definition of reasonable doubt] renders an explanation of the explanation necessary.'" (*Id.* at p. 66.) I believe this case is a classic example of one explanation of the reasonable doubt standard requiring a second explanation of the standard, which ultimately leads to a third explanation of the standard; yet none of the explanations accurately convey the meaning of reasonable doubt. The majority's opinion sends a mixed message, by initially endorsing the foregoing rule that it is best to let the term reasonable doubt define itself, but ultimately approving of the trial court's reasonable doubt examples. For example, the majority concludes that the weather

prediction example is "perfectly acceptable." It is unclear to me how a trial court should proceed given the majority's opinion: should a trial court give the "perfectly acceptable" weather prediction example, or focus on the statutory definition of reasonable doubt? I find this mixed message troublesome, and hope to convey only one message with my dissent: The better practice when instructing a jury on the concept of reasonable doubt "is to follow as nearly as practicable the language of the [statute]." (*Johnson II*, *supra*, 119 Cal.App.4th at p. 986.)

F. STRUCTURAL ERROR

When a trial court's error consists of mischaracterizing the burden of proof, the error is structural; therefore, the error compels reversal per se. (*Johnson II*, *supra*, 119 Cal.App.4th at p. 986; *Johnson I*, *supra*, 115 Cal.App.4th at p. 1172; *People v. Brannon*, *supra*, 47 Cal. at p. 97.) In the instant case, the trial court's three examples mischaracterized the burden of proof, and therefore, I believe the judgment must be reversed, because the errors are structural.

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/s/ MILLER
J.