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See Dissenting Opinion

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROMAN VALENTINO MUNIZ, Defendant and Appellant.	E049333 (Super.Ct.No. RIF129131) OPINION

APPEAL from the Superior Court of Riverside County. H. Warren Siegel, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.). Affirmed with directions.

Stephen S. Buckley, 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, Barry Carlton, Teresa

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part three.

Torreblanca, and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Roman Valentino Muniz, of vandalism exceeding $400 (Pen. Code, § 594, subd. (b)(1))[1] and assault (§ 240). He was granted probation and appeals, claiming reversal of his convictions is required due to statements the trial court made during voir dire about the requirement of an abiding conviction and due to the admission of evidence of his prior conduct. He also asserts that two of his probation terms are vague and overbroad and he is entitled to more custody credits than he was awarded. We reject his first two contentions and therefore affirm his convictions. We will order the trial court to amend the above-mentioned probation conditions and we reject his contention concerning his custody credits. Therefore, we affirm his sentence, while directing the trial court to amend those two conditions.

FACTS

During the early morning hours of March 19, 2006, defendant, his brother and other companions went to the home of the victims, a mother and her teenage son, Josh, and daughter, Katie, and the windows of the vehicle belonging to Josh, which was parked in front of the home, were smashed. Awakened by the noise, the mother then awoke Josh, who was very intoxicated, and told him to call the police, and went outside and saw defendant and his group coming towards her house with bats and clubs. She went back inside, awoke Katie and told her to stop Josh from going outside through the back door,

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

which he always used. Katie went out the front door and caught Josh as he came out the gate of the fence dividing the back yard from the driveway at the side of the house. Josh had a bat in his hand. Katie caught up with Josh in the driveway and pinned him against a car that was parked near the gate. Defendant approached Josh and asked him where his houseguest was. While Katie continued to pin Josh against the car, defendant took the bat that Josh had been holding in his hand. Defendant waived the bat in the air and yelled at Josh and Katie. Defendant hit the car that Josh had been pinned up against two or three times on its right side. Katie pushed Josh back through the gate and was trying to hold it closed and hold him back from going through the gate onto the driveway again. Defendant stood on the driveway at the left side of the gate, yelling for Josh and his houseguest to come out, swearing and pounding on the gate with the bat. Josh and Katie told defendant that the houseguest was not there. Defendant's brother stood on the right side of the gate, yelling and hitting the gate with the bat, which he had gotten from defendant. Defendant tried to pull the gate open many times and Katie tried to keep it closed, while also restraining Josh. The companions with whom defendant and his brother had arrived stood in the victims' driveway, front lawn or the street in front of their home. At one point, Katie turned to restrain Josh, then turned back to the gate and defendant pushed it so hard that it flew back and struck her in the face, breaking two of her front teeth. Defendant continued to yell and looked around for his companions. As he and his brother retreated down the driveway towards the street, his brother smashed

the windows of the two vehicles that were parked in the driveway and hit the tailgate of one of them with the bat.

ISSUES AND DISCUSSION

1. *Trial Court's Remarks About Abiding Conviction*

At the beginning of voir dire, the trial court elaborated on a number of instructions. As to the reasonable doubt instruction, the trial court said, as is pertinent here, "Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything related to human affairs is open to some possible or imaginary doubt. It is that state of the case, which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition they cannot say they feel an abiding conviction of the truth of the charge. [¶] What does that mean in plain English, abiding conviction? Jurors have to have an abiding conviction of the truth of the charge. It means a long-lasting belief when you come to a verdict you will be comfortable with it the day you do it, two months or a year from now. That's abiding conviction. Everybody understand that?"

During the first break following this statement, defense counsel asked the trial court to reinstruct on proof beyond a reasonable doubt, stating that the trial court's explanation of abiding conviction "waters down the standard of proof that the People are held to in the sense that people have beliefs which often times change, and that that is not a definition of proof beyond a reasonable doubt that is authorized by the instruction." The trial court denied the request, saying to defense counsel, "I read the instruction . . . .

Look at the case definition of abiding. That's exactly what it is. If you [have] something to the contrary, bring it in . . . . I'll look at it." After lunch, the trial court said, " . . . I checked my definition of abiding conviction, and that is the law." The trial court asked defense counsel if he had found anything to the contrary. Defense counsel called to the trial court's attention *People v. Brigham* (1979) 25 Cal.3d 283, 290, 291 (*Brigham*) and *People v. Garcia* (1975) 54 Cal.App.3d 61 (*Garcia*), which he claimed supported his position. In fact, they do not.

Brigham criticized former CALJIC No. 22, which defined the "moral certainty" which was, at the time, contained in CALJIC No. 2.90 as "that degree of proof which produces conviction." (*Brigham*, *supra*, 25 Cal.3d at p. 290.) *Brigham* concluded that this definition "speaks only of 'conviction.' The lasting, permanent nature of the conviction connoted by 'abiding' is missing and the juror is not informed as to how strongly and how deeply his conviction must be held. Thus, [it] may allow a juror to conclude that he or she could return a guilty verdict based on a strong and convincing belief which is something short of having been 'reasonably persuaded to a near certainty.' [Citation.]" (*Id*. at pp. 290-291.)

Amongst the list of objectionable embellishments to the standard reasonable doubt instruction in *Garcia*, *supra*, 54 Cal. App.3d 61, 63-65, none addressed the abiding nature of the conviction jurors must have.

We determine whether the trial court's definition was correct de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "[T]he proper inquiry is not whether [it] 'could have'

been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) We conclude that there is no such reasonable likelihood.

Defendant here points out that courts have held that the juror's conviction must be settled and fixed and lasting and permanent. However, he does not say in what way the definition this trial court gave did not convey this information.

He also points out that there is really no need to elaborate on the word abiding. However, he, again, does not say how the definition the trial court gave created a reasonable likelihood that the jury did not understand what the law required about the nature of their conviction.

Defendant then attacks the trial court's definition on a basis not objected to below. He focuses on the trial court's use of the word "comfortable" in "abiding conviction . . . [means] a long-lasting belief when you come to a verdict you will be comfortable with" and asserts that it "requir[ed] only that the jur[ors] feel 'comfortable' about their verdicts rather than possessing a deeply felt and abiding conviction." However, at this point, the trial court was not addressing the deeply held nature of the conviction, but the duration of it. Therefore, there is no reasonable likelihood that the jurors interpreted the trial court's use of the word "comfortable" to mean that they did not have to have an abiding conviction. The trial court had just told them they did and this requirement was reiterated during instructions at the end of trial.

Given the foregoing, the trial court's repetition of the standard reasonable doubt instruction, without additional elaboration as to "abiding conviction" at the end of trial, we conclude there is no reasonable likelihood the jury misapplied the instruction.

That said, we agree with the following and apply it to "abiding conviction": "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.)

2. *Impeachment of Defendant with Evidence of His Prior Misdemeanor Vandalism*

Defendant moved to exclude admission of evidence, for the purpose of impeachment, that he had committed misdemeanor vandalism in 2002.[2] He asserted below that he could find no authority that misdemeanor vandalism involved moral turpitude. He also requested exclusion under Evidence Code section 352, arguing that the evidence had limited probative value because the crime was a misdemeanor and because the similarity between it and one of the currently charged offenses presented a high risk of prejudice. The trial court found that it was not too remote in time and, because it was similar to one of the charged offenses, it was "more cogent." The court also concluded that, under *People v. Campbell* (1994) 23 Cal.App.4th 1488 (*Campbell*), misdemeanor vandalism involved moral turpitude because it required maliciousness.

[2] During examination by his attorney, defendant testified that "in 2002 [he] sprayed graffiti on an overpass on some walls near some railroad tracks[.]" On cross-examination, he admitted that he vandalized property. He never testified that he was convicted of anything in connection with this.

In *Campbell*, the appellate court reasoned that felony vandalism's requirement of maliciousness meant that it involved moral turpitude because the requirement "'import[s] a wish to vex, annoy, or injure another person, or an intent to do a wrongful act . . . .' [¶] ' . . . [T]here must be a wanton and willful (or "reckless") disregard of the plain dangers of harm, without justification, excuse or mitigation.' [Citation.] Such a state of mind betokens that 'general readiness to do evil' which constitutes moral turpitude. (See *People v. Castro* [(1985)] 38 Cal.3d [301,] 314.)" (*Id.* at p. 1493.)[3] In 2002, when defendant committed his prior offense, misdemeanor vandalism also required maliciousness. (Former § 594, subds. (a) & (b)(2)(A).)

As defendant here acknowledges, in *People v. Lepolo* (1997) 55 Cal.App.4th 85, 90, this court cited as authority the holding in *Campbell* "that vandalism involved moral turpitude." We here note that we did not, in *Lepolo*, cite *Campbell* as authority that only *felony* vandalism involved moral turpitude. We disagree with defendant's contention that *Campbell* is authority only for the proposition that *felony* vandalism involves moral

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[3] Disregard of this last sentence in *Campbell* has resulted in confusion, even in this court, as to whether misdemeanor vandalism is a crime of moral turpitude. However, we here conclude that *Campbell* was correctly decided.

Defendant's contention, advanced at oral argument, that it is not because maliciousness in the context of disturbing the peace can be committed with only the intent to vex or annoy, is misplaced. As *Campbell* points out, the prohibition on vandalism, as originally enacted, was a catch-all precursor to what is now Title 14 of the Penal Code, dealing with malicious injury to property. *Campbell* went on to hold that malice *in the context of such a statute*, requires wanton or willful disregard of the plain dangers of harm *and it is that*, which *Campbell* concluded, constitutes moral turpitude. The prohibition on maliciously disturbing the peace is not part of Title 14 and has no application to malicious injury of property. Therefore, it does not have the requirement of wanton and willful disregard of the plain dangers of harm.

turpitude and is not authority that *misdemeanor* vandalism does. The reasoning of *Campbell* applies equally to both forms of the offense because it is dependent on the presence of maliciousness, which is common to both.

Defendant also asserts that "under the 'least adjudicated elements test,' the connection between a prior *conviction* for misdemeanor vandalism and a person's credibility for truthfulness is extremely tenuous at best." Not only do we not understand defendant's point, but it is irrelevant, as it was not the fact that defendant was *convicted* of misdemeanor vandalism, but the fact that he *committed* misdemeanor vandalism for which admission was sought. (See *People v. Chatman* (2006) 38 Cal.4th 344, 373; *People v. Wheeler* (1992) 4 Cal.4th 284, 295-297, 300; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1522.) The least adjudicated elements test is appropriate in the context of admission of evidence that a defendant had suffered a prior (felony) *conviction*, but not, as here, where the *conduct* underlying the misdemeanor conviction is all that is relevant. Moreover, even if the test is applicable here, one of the least adjudicated elements of misdemeanor vandalism is, like that of felony vandalism, maliciousness. Therefore, under the least adjudicated elements test, misdemeanor vandalism is a crime involving moral turpitude because it shares the element of maliciousness which *Campbell* held is the basis for concluding that felony vandalism involves moral turpitude.

Defendant concedes that his spraying the graffiti on the overpass "had nothing in common with his alleged aiding and abetting the smashing of the [vehicles'] windows[.]"

Thus, he abandons the argument he made below that his prior and current conduct were so similar that evidence of the former would unduly prejudice him in this trial.

He also asserts that admission of the evidence "allow[ed] the jury to consider [him] a vandal and surmise—*once a vandal*[,] *always a vandal*." However, the jury was instructed that it could use evidence that any witness had committed a crime or other misconduct *only* in evaluating that witness's credibility. We must presume that the jury followed this instruction and did not make the inference defendant suggests.

Defendant presents no persuasive argument that the trial court abused its discretion in permitting him to be impeached with his prior vandalism. (*People v. Kipp* (2001) 26 Cal.4th 1100.)

Moreover, even if we concluded that misdemeanor vandalism is not a crime involving moral turpitude, we would not reverse, as it is not reasonably probable that admission of the evidence of defendant's prior vandalism adversely affected the outcome of the trial. (*People v. Harris* (2005) 37 Cal.4th 310, 336.) It was mentioned very briefly, first, by defense counsel and second, by the prosecutor, during their examinations of defendant. *The prosecutor did not even mention it during his argument to the jury*, relying, instead, on the conflicts between the stories of defendant and his own witness and those portions of each story that made no sense. We note that both defense witnesses—defendant's friend and companion during the crimes and defendant, managed to get before the jury their assertion that Josh was a drug dealer. While Josh's state of inebriation that night did not permit him to be much of an effective witness for the

prosecution,[4] his mother and his sister were, without doubt, the star witnesses for the prosecution and Josh's familial ties to them permitted the negative implication of the accusation that he was a drug dealer to reflect unfavorably upon them, as well. Additionally, certain important aspects of defendant's account of the events that night contradicted those of his friend and companion.[5] Finally, portions of his story were downright unbelievable, e.g., his claim that his unarmed group of five pursued Josh's armed group of eight to the victim's home. Also unbelievable was defendant's claim that after 15-year-old Katie was hit in the mouth with the gate, which chipped and/or broke two of her front teeth, she made no noise, did not cry and did not react, other than putting her head down, and immediately thereafter put herself between defendant and her 19-year-old brother, pinning the latter against the trunk of a car. Also unbelievable was defendant's assertion that when he got back to his friend's car, just before he took off in it, he threw Katie's bat into the trunk so the people behind him on foot who had emerged

[4] However, Josh did testify that his houseguest left the family home before the incident, which contradicted the claim of defendant and his friend that the houseguest was present during the crimes.

[5] For example, defendant claimed he and his companions were calmly on their way to the home of a friend who lived down the street from the victim's home to pay a social visit, but encountered there a rowdy group which included Josh and the houseguest. His friend/companion testified that the group containing Josh and his houseguest went to his friend's home to rescue the friend from a rowdy group, which included Josh and his houseguest, that was outside the home, demanding that the friend come out so they could beat him up. Defendant testified that when Josh came out of his backyard, he was accompanied by another male. His friend/companion made no such claim. Defendant testified that when he took the bat from Josh as Katie had the latter pinned up against the trunk of the car, the mother ran in between her children and defendant and told the latter not to hit her son. Defendant's friend/companion did not testify that this occurred.

from the victim's backyard could not get ahold of it and beat him with it. Defendant was also unable to explain how an ornament on the top of the fence between the victim's backyard and driveway became damaged, as he claimed neither he nor his brother had hit it. Defendant claimed that the windows of Josh's vehicle were not broken out when he and his companions arrived at the victim's home, but this could not possibly have been the case. Finally, defendant did not state how his brother came to possess whatever he used to break out the windows in the car and truck parked in the victim's driveway, since defendant had the bat in his possession at the time and he testified that none of the people with him had weapons.

3. *Sentencing*

a. Probation Conditions

Two of the terms of defendant's probation are that he not possess, use or have in his control any non-prescribed controlled substances or drug paraphernalia and that he not own, possess, have under his control or immediate access to any firearm, deadly weapon, weapon-related paraphernalia or incendiary device. The parties agree that without the requirement that defendant knowingly do what has been prohibited, these conditions are unconstitutionally vague and overbroad. However, the People assert that modification of them to insert the knowledge requirement is unnecessary because it is implied. However, to avoid any confusion, we will make it express.

b. Section 4019 Credits

Defendant was granted probation and awarded section 4019 custody credits at a time when a defendant earned two days of credit for every four days of actual presentence custody. (Former § 4019, amended Jan. 25, 2010.) Section 4019 was amended after defendant was sentenced to allow four days credit for every four days of actual presentence custody. (*Ibid.*) Defendant here contends that the new version of section 4019 should be retroactively applied to him and his credits increased accordingly. We recognize that the retroactivity of the change to section 4019 is currently pending before the California Supreme Court.[6] We conclude that section 4019 should not be applied to defendant retroactively.

In *In re Estrada* (1965) 63 Cal.2d 740, 746 (*Estrada*), the California Supreme Court observed, "[Penal Code section 3] . . . embodies the general rule of construction . . . that when there is nothing to indicate a contrary intent in a statute[,] it will be presumed that the Legislature intended the statute to operate prospectively and not retroactively. . . . [H]owever, . . . [w]here the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. [The rule of

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[6] See *People v. Otubuah* (2010) 184 Cal.App.4th 422, review granted July 21, 2010, S184314; *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808; *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963; *People v. Landon* (2010) 183 Cal.App.4th 1096, review granted June 23, 2010, S182808, and *People v. House* (2010) 183 Cal.App.4th 1049, review granted June 23, 2010, S182813.)

construction] is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent."

Estrada went on to hold, "In the instant case there are . . . other factors that indicate the Legislature must have intended that the amendatory statute should operate in all cases not reduced to final judgment at the time of its passage." (*Estrada*, *supra*, 63 Cal.2d at p 746.) "There is one consideration of paramount importance. It leads inevitably to the conclusion that the Legislature must have intended, and by necessary implication provided, that the amendatory statute should prevail. When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment *for the commission of the prohibited act.* . . . [¶] . . . A legislative mitigation of the penalty *for a particular crime* represents a legislative judgment that the lesser penalty . . . is sufficient to meet the legitimate ends of the criminal law . . . . [¶] . . . [¶] . . . [Thus,] where the new statute mitigates the punishment . . . [i]f there is no saving clause [the defendant] can and should be punished under the new law." (*Id.* at pp. 744-745, 747, italics added.)

In *People v. Hunter* (1977) 68 Cal.App.3d 389 (*Hunter*), the appellate court retroactively applied an amendment to section 2900.5 that, for the first time, allowed 4019 conduct credits to probationers serving local time as a condition of probation. The court reasoned, "The amendment . . . must be construed as one lessening punishment, as that term is used in *Estrada.* True, *Estrada* deals with a statute which lessens the

maximum sentence for a particular crime while the amendment to section 2900.5 concerns credit against a . . . sentence imposed as a condition of probation. But in the circumstances which we here consider, the distinction is without legal significance." (*Id.* at p. 393.) *Hunter* provided no explanation as to how the distinction lacked legal significance.

Hence, the following year in *People v. Doganiere* (1978) 86 Cal.App.3d 237, 240 (*Doganiere*), this court, also on the basis of *Estrada*, upheld the retroactivity of an amendment to section 2900.5 that provided that section 4019 conduct credits a probationer who had served local time as a condition of probation earned would be credited towards his prison sentence after probation was revoked.

Hunter's conclusion that the distinction between the shorter sentence for a particular crime in *Estrada* and the conduct credits in the case before it was "without legal significance" a position accepted sub silentio, in *Doganiere*, has never been adopted by the California Supreme Court. As *Estrada* itself stated, unless legislation contains express retroactive language or clear and unavoidable implication negatives the presumption of non-retroactivity, prospective application is mandated under section 3 of the Penal Code. The amendment to section 4019 contains no such express language. Additionally, there is no clear and unavoidable implication, as there was in *Estrada*, that negatives the presumption of non-retroactivity.

The amendment to section 4019 at issue here was introduced and enacted to "address the fiscal emergency declared by the Governor . . . " (Stats. 2008-2010, ch. 28,

§ 62 (Sen. Bill No. 18)) by reducing the prison population. That particular method of fiscal frugality has since been abandoned and, as of September 28, 2010, all defendants who commit crimes on or after that date will be awarded credits using the same formula that existed when defendant committed these crimes. (§ 4019.) The amendment at issue does not create a clear and unavoidable implication that the Legislature determined that the prison terms for all defendants whose cases were not final when the amendment was enacted, but whose crimes had been committed before September 28, 2010, were too lengthy for the crimes they committed. Deriving such an implication would lead to an absurd result. For defendants charged with serious crimes, who sit in jail for many months (and sometime, years) awaiting long and complicated trials, granting them credits under the amendment at issue would imply that the Legislature has determined that the punishment for those severe crimes was too great. On the other hand, defendants charged with much less serious crimes, waiting a much more abbreviated pre-trial period, would not benefit as significantly from the amendment at issue and thus the implication would be that the legislature did not conclude that the sentences for their less serious crimes deserved drastically reduced punishment.

Estrada, we believe, is much more specific in its holding than *Hunter* concluded it was. *Estrada* addressed only punishment *for a particular offense*. The implication that the Legislature's reduction of a sentence for a particular offense signals its conclusion that the term for that offense was too great; the same implication does not arise when the Legislature increases custody credits, strictly for financial reasons, as here.

Therefore, we conclude that defendant is not entitled to additional custody credits.

DISPOSITION

The trial court is directed to amend the Minutes of the Sentencing Hearing to insert, as to condition seven, the word "knowingly" between the words "Not" and "possess" and, as to condition twenty, the word "knowingly" between the words "Not" and "own." In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

I concur:

CODRINGTON
J.

[*People v. Roman Valentino Muniz*, E049333]

MILLER, J., dissenting.

I respectfully dissent. I would reverse the judgment, due to the trial court's errors in elaborating on the reasonable doubt instruction.

A. FACTS

I briefly set forth the relevant facts, in order to provide the reader with a quick reference to the trial court's statements. The standard reasonable doubt instruction provides, in part, "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true." (CALCRIM No. 220.)

Early in the voir dire process, the trial court instructed the jury on the reasonable doubt standard of proof. When instructing the jury, the trial court explained that proof beyond a reasonable doubt "leaves the minds of the jurors in that condition they *cannot* say they feel an abiding conviction of the truth of the charge." (Italics added.) The trial court then reversed course, informing the jury, "Jurors *have to have* an abiding conviction of the truth of the charge." (Italics added.) The trial court explained that "abiding conviction" means "a long-lasting belief when you come to a verdict you will be comfortable with it the day you do it, two months or a year from now."

During a break, outside the presence of the venire, defense counsel requested that the trial court reinstruct the prospective jurors on the topic of proof beyond a reasonable doubt, because defense counsel was concerned that the trial court's prior explanation "water[ed] down the standard of proof." Both the trial court and defense counsel researched the issue during the lunch break. The trial court said, "Over the lunch hour I

checked my definition of abiding conviction, and that is the law." Defense counsel cited *People v. Brigham* (1979) 25 Cal.3d 283, to support his argument. The trial court concluded that it provided "a correct definition," and therefore did not reinstruct the venire.

It appears from the record that only one panel of prospective jurors was summoned, and therefore, the jury that was sworn to hear the case was selected from the pool of jurors that were present when the court gave its explanation of the reasonable doubt standard of proof. After the close of evidence, the trial court instructed the jury with the standard reasonable doubt instruction. The court said, "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true."

B. DISCUSSION

Defendant contends that the trial court erred by inaccurately explaining the reasonable doubt standard of proof, because the trial court effectively lowered the prosecution's burden. 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 explanation 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. [Citation.]" (*Id.* at p. 6.)

The word "abiding," in "abiding conviction," has been defined by our Supreme Court as meaning that the conviction is of a "lasting, permanent nature." (*People v. Brigham*, *supra*, 25 Cal.3d at p. 290.) The words "abiding conviction" are meant to convey to a juror "how strongly and how deeply his conviction must be held." (*Id.* at pp. 290-291.)

In the instant case, the trial court instructed the jury that an "abiding conviction" means "when you come to a verdict you will be comfortable with it the day you do it, two months or a year from now." First, in regard to duration, the trial court incorrectly instructed the jury that "abiding" means a day, two months, *or* a year. The trial court's explanation of "abiding" meaning something that could last only one day or two months is contrary to our Supreme Court's definition of a feeling that has a "lasting, permanent nature." Thus, I believe the trial court erred when it instructed the jury that "abiding" means a temporary, single day or two month, duration.

Second, as to depth of feeling, the trial court instructed the jury that it need only be "comfortable" with its verdict. The trial court's comment devalues the rule that the truth of the charge must be "deeply felt" by the jurors. (*People v. Light* (1996) 44 Cal.App.4th 879, 885.) Mere "comfort" does not convey how strongly the jurors must feel about their findings of fact. Accordingly, I believe the trial court erred when it instructed the jury that it need only be "comfortable."

Third, the trial court compounded the foregoing issues when it initially instructed the jury that it did *not* need to have an "abiding conviction" regarding the truth of the charges. The trial court quickly reversed course; however, the trial court's comments about not needing an abiding conviction added to the confusion and misinformation regarding the standard of proof. At the close of evidence, the trial court gave the standard reasonable doubt instruction. However, the trial court never cured its error regarding the meaning of "abiding conviction." The trial court never informed the jury that "abiding" means a duration of more than a day or two months—it means a lasting and permanent duration. The trial court also did not cure the misinformation regarding the term "conviction"—explaining that the term refers to a conclusion that is deeply felt, as opposed to something that is "comfortable." Given the misinformation that was given to the jurors by the trial court, and never fully cured, I believe there is a reasonable likelihood that the jury applied the reasonable doubt standard in an unconstitutional manner.

When a trial court's error consists of mischaracterizing the burden of proof, the error is structural; therefore, the error "compels reversal per se." (*People v. Johnson*

(2004) 119 Cal.App.4th 976, 986; *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1172; *People v. Brannon* (1873) 47 Cal. 96, 97.) I note that the Supreme Court is currently considering the issue of whether a harmless error analysis may be performed when a trial court errs by failing to give the standard reasonable doubt instruction (*People v. Aranda*, review granted Jan. 26, 2011, S188204); however, since that matter has not yet been decided, I follow the current legal precedent, which provides the error is reversible per se.

C. CONCLUSION

Accordingly, due to the trial court's errors related to the reasonable doubt instruction, I would reverse the judgment.

CERTIFIED FOR PUBLICATION

/s/ MILLER
J.