IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. ISAIAH HENDRIX, Defendant and Appellant.	Supreme Court No. S265668 Court of Appeal No. B298952 Superior Court Nos. 2018037331; 2017025915

Appeal from a Judgment of the
Ventura County Superior Court
Honorable Paul W. Baelly, Commissioner

APPELLANT'S OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

In an order dated January 27, 2021 this Court limited the issues to be briefed and argued to the following: "Did the Court of Appeal err in holding an instructional error on the defense of mistake of fact harmless? In the circumstances of this case, which standard of prejudice applies to an error in instructing on the defense of mistake of fact: that of *People v. Watson* (1956) 46 Cal.2d 818 or that of *Chapman v. California* (1967) 386 U.S. 18?"

INTRODUCTION

Appellant was convicted of residential burglary (1 CT 187) when he "jimmied" open a locked screen door in the backyard of

an Oxnard home. (4 RT 125-128.) When appellant was unable to enter the locked sliding glass door behind the screen door, he simply sat down on a chair in the backyard and waited until the police apprehended him about seven minutes later. (Exh. 1, 4 RT 140, 1 CT 269.) Appellant's defense was that he mistakenly thought he was at his cousin Trevor's house. Both the Court of Appeal and the People acknowledge that the trial court erred when it included the bracketed "reasonable" language in the mistake of fact instruction requiring appellant's mistaken belief that he was at his cousin's house to be both subjectively and objectively reasonable. Because burglary is a specific intent crime, appellant's defense required only an actual mistaken belief. The bracketed language requiring the belief to be reasonable should have been omitted because only general intent crimes require the mistaken belief to be "both actual and reasonable." (*People v. Lawson* (2013) 215 Cal.App.4th 108, 115.) The dispute in this case is whether or not this instructional error was harmless.

The majority opinion in the Court of Appeal applied the *Watson* standard and found that although the trial court erred when it included the bracketed "reasonable" language in the mistake of fact instruction, the error was harmless because it was clear to them that appellant fabricated his account that he thought he was at his cousin's house. (*People v. Hendrix* (2020)

55 Cal.App.5th 1092, 1096-1098.) The dissent, applying the *Chapman* standard, found the error was not harmless after noting appellant's recent mental health history and his inexplicable action of simply waiting in the backyard of a home he had allegedly just tried to burglarize. (*Id.* at pp. 1100-1101 (dis. opn. of Tangeman, J.).)

Appellant agrees with the dissent and emphasizes that the deliberations in this case were so close that at one point the jury was hung. The court's error in such a close case is magnified and increases the likelihood that at least one juror relied on the instruction to incorrectly find that even though appellant actually believed he was at his cousin's home he was still guilty because this belief was objectively unreasonable. Under either the *Watson* or *Chapman* standard, appellant's burglary conviction must be reversed because there is a reasonable chance a juror made this legally invalid finding.

STATEMENTS OF THE CASE AND FACTS

Case No. 2017025915 – The Robbery

On July 22, 2017 appellant entered a Costco store without a membership, telling an employee that his mother was inside and he wanted to find her. (1 CT 211.) The employee then escorted appellant around the store. (1 CT 211.) Appellant grabbed a bottle of tequila and threatened the employee that he would "blast" her if she said anything or kept him from leaving

the store. (1 CT 211.) Appellant then left the store and was apprehended with the bottle of tequila. (1 CT 211.)

For this offense, appellant was charged with a strike, second degree robbery (Pen. Code, §§ 211, 212.5.) (1 Supp. CT 8-13.)[1] The case was continued a number of times (1 Supp. CT 14-21) until October 17, 2017 when a doubt was declared regarding appellant's mental competency. (1 Supp. CT 22-23.) Appellant was evaluated by Dr. Wood who found him incompetent to stand trial based on symptoms of a severe mental illness. (2 Supp. CT 4-6.) Appellant was "nonresponsive at times, stared off for long periods of time, acknowledged hearing voices" and did not understand why he was "in jail, or what is happening during a court proceeding." (2 Supp. CT 6.) On November 9, 2017, the court, based on Dr. Wood's report, found appellant incompetent to stand trial and suspended proceedings (Pen. Code, § 1368). (1 Supp. CT 28-29; 1 Supp. 1 RT 4-5.) On December 8, 2017 appellant was committed to Atascadero State Hospital (1 Supp. CT 43) but he was not admitted until April 3, 2018. (2 Supp. CT 10.) On July 26, 2018 appellant was recommended to be returned to court because his competency had been restored. (2 Supp. CT 9-19.) On August 9, 2018 the court found appellant competent to

[1] The notation "Supp." stands for the supplemental transcripts which were filed on December 3, 2019 after appellant's motion to amend his appeal to include the robbery probation violation was granted.

stand trial and criminal proceedings were reinstated. (1 Supp. CT 52-53; 2 Supp. 1 RT 4.)

A little over two weeks after appellant's proceedings were reinstated, on August 27, 2018, appellant accepted a plea bargain and pled guilty to the felony robbery charge after the district attorney offered three years felony probation and 365 days in jail. (1 Supp. CT 56-75; 1 Supp. 3 RT 104-109.) On September 24, 2018 the court sentenced appellant pursuant to the plea bargain and placed him on formal felony probation for 36 months and ordered him to serve 365 days in the Ventura County Jail. Because of time served, he was released that day. (1 Supp. CT 76-80; 1 Supp. 4 RT 154-161.)

A little over one month later, on October 28, 2018 appellant was arrested for the underlying burglary in this case after he was seen attempting to open the rear sliding glass door of a residence. (1 Supp. CT 83.) On October 31, 2018 appellant's probation was revoked and his violation of probation charge was set to trail his new residential burglary case. (1 Supp. CT 81-82, 87.)

Case No. 2018037331 – The Residential Burglary

On October 28, 2018, appellant approached a home occupied by three residents – two parents and their adult son. (4 RT 122, Exh. 1.) The home was continuously monitored by five security cameras. (4 RT 124.) Around 7 a.m. the son woke up to appellant loudly knocking on the front door and ringing the

doorbell. (4 RT 125.) By the time the son made it downstairs to see who was at the front door, no one was there. (4 RT 126.) The son checked the security cameras and saw appellant go through the side gate of the house, try to open a locked side door, and then enter his backyard. (4 RT 125, 133-134, 138.) Appellant "jimmied" open a locked sliding screen door to the back of the house but was unable to open the locked sliding glass door behind it to enter the house.[2] The residents called the police. (4 RT 126.) The police arrived just seven minutes later and found appellant simply sitting on a chair in the backyard. (4 RT 119, 140, 1 CT 269, Exh. 2.) Appellant appeared surprised when the officers arrived. (4 RT 120.) He did not attempt to flee or fight with the officers and was cooperative throughout their encounter. (4 RT 119, 176.) Appellant had no weapons or burglary tools on him – he only had a water bottle. (4 RT 176-177.)

Appellant told the police he thought he was at his cousin Trevor's house. (Exh. 2 [body camera video of Officer Aldrete], 1 CT 265 [transcript of Exh. 2], 4 RT 117 [Exh. 2 received into evidence].) Appellant stated that a friend had told him that

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[2] Assuming appellant intended to commit theft upon entry, this slight crossing of the threshold of the exterior screen door elevated appellant's offense from an attempted burglary to a completed burglary because it equates to the entry of a structure. (1 CT 162; *People v. McEntire* (2016) 247 Cal.App.4th 484, 491-493.)

Trevor had moved and this was his new address. (Exh. 2, 1 CT 265.) But Officer Vines knew Trevor and knew that his house was two to three blocks away on the other side of Pacifica High School. (4 RT 167-169.) Further in recorded jail calls to his mother, appellant asked her to find a witness who would testify on appellant's behalf to say that he had given appellant the wrong address for Trevor's house. (Exh. 7 [jail calls to mom], 1 CT 298, 300 [transcripts of jail calls], 4 RT 175 [Exh. 7 received into evidence].) When appellant persisted, she refused, saying she was not willing to get anyone "caught up or doing any type of drama or lying." (Exh. 7, 1 CT 300.) Lastly, in a recorded jail call to his uncle, appellant never denied or refuted that he was "running around breaking in people's" homes and when his uncle asked him what he was doing, he simply replied, "I don't know." (Exh. 8 [jail call to uncle], 1 CT 302 [transcript of jail call], 4 RT 175 [Exh. 8 received into evidence].)

For this offense, appellant was charged with his second strike, first-degree residential burglary (Pen. Code, §§ 459, 460). (1 CT 8-10.) On November 8, 2018 a doubt was once again declared as to appellant's competency to proceed and his criminal proceedings were again suspended pursuant to Penal Code section 1368. (1 CT 19; 1 Supp. 5 RT 204.) He was evaluated by Dr. Emerick who diagnosed appellant with bipolar disorder, found him to be "inappropriately euthymic" and noted that a

court order to medicate him may be required because appellant was currently not taking his medication and "there is a strong likelihood of his decompensating if he is not medicated." (2 Supp. CT 22-23.) However, Dr. Emerick found appellant competent to stand trial (2 Supp. CT 23) because appellant "had learned his lessons thoroughly from the State Hospital curriculum" and "was able to pass all questions about the Court process with flying colors." (2 Supp. CT 21.) Based on Dr. Emerick's report, the court found him competent to stand trial and reinstated the criminal proceedings on December 6, 2018. (1 CT 22, 1 Supp. 6 RT 254.)

Appellant's jury trial was held from April 23 until April 26, 2019. (1 CT 99, 178.) When the jury began their deliberations, at 11:32 a.m., appellant admitted his prior robbery conviction. (1 CT 178-179, 5 RT 276-280.) Later that afternoon, at just past 3 p.m., the jury requested the transcript from the jail phone calls or a read back. (1 CT 174, 179, 5 RT 281.) The court replied "there was no court transcription of the phone calls. The transcript is not evidence." (1 CT 174.) About an hour later, just before 4 p.m., the jury informed the court that they could not come to a decision. (1 CT 175, 179, 5 RT 282.) Appellant requested a mistrial but the court instructed the jury to continue deliberating. (5 RT 282-284.) When the jury returned after the weekend, they continued their deliberations for about two hours

and then asked for a playback of one of the officer's testimony. (1 CT 192, 6 RT 304.) After the court reporter read back the testimony, the jury resumed deliberations and then later that afternoon found appellant guilty of the sole count of first-degree residential burglary and found true the allegation that someone was inside the residence during the commission of the offense. (1 CT 187, 193, 7 RT 314-316.) After discharging the jury, the court found appellant in violation of his probation. (7 RT 320-321.)

Prior to sentencing, appellant moved to strike his prior robbery conviction for sentencing purposes. (1 CT 201-222.) The court read the motion (8 RT 331) but impliedly rejected it when the court sentenced appellant to a total term of ten years in prison. (1 CT 224-228; 8 RT 342.) The ten-year term was composed of the low term for the burglary of two years which was doubled to four years because of appellant's prior strike (8 RT 340); the five-year prior serious felony enhancement (Pen. Code, § 667, subd. (a)(1)) (1 CT 227, 8 RT 340); and one further year, which was 1/3 of the midterm for the probation violation in the robbery case. (1 CT 227, 8 RT 341.)

ARGUMENT

I. The *Chapman* Standard Applies to the Trial Court's Error in Instructing on the Mistake of Fact Defense.

A. The Trial Court Erred by Including the Bracketed Reasonable Mistake Language in the Mistake of Fact Instruction.

Appellant's counsel requested the jury be instructed with CALCRIM No. 3406, Mistake of Fact, under the theory that appellant mistakenly believed that his cousin Trevor lived at the house he attempted to enter. (5 RT 210-211.) The court agreed there was substantial evidence to include the instruction (5 RT 211) but acquiesced to the prosecutor's request that "all the 'reasonably' brackets get included" in the instruction. (5 RT 212.) The court erred by including the bracketed reasonable mistake language.

The court filled in the standard jury instruction on the mistake-of-fact defense, CALCRIM No. 3406, as follows:

"The defendant is not guilty of burglary if he did not have the intent or mental state required to commit the crime because he reasonably did not know a fact or reasonably and mistakenly believed a fact.

If the defendant's conduct would have been lawful under the facts as he reasonably believed them to be, he did not commit burglary.

If you find that the defendant believed that that (sic) defendant's cousin Trevor resided at the home and if you find that belief was reasonable, the defendant did not have the specific intent or mental state required for burglary.

If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for burglary, you must find him not guilty of that crime." (1 CT 165; CALCRIM No. 3406.)

There is no dispute that the trial court erred by including the bracketed reasonable mistake language in the mistake of fact instruction. (*People v. Hendrix*, *supra*, 55 Cal.App.5th 1092, 1096-1097.) "For general intent crimes, the defendant's mistaken belief must be both actual and reasonable, but if the mental state of the crime is a specific intent or knowledge, then the mistaken belief must only be actual." (*People v. Lawson*, *supra*, 215 Cal.App.4th 108, 115.) The bench notes to CALCRIM No. 3406 instruct: "If the defendant is charged with a general intent crime, the trial court must instruct with the bracketed language requiring that defendant's belief be both actual and reasonable. [¶] If the mental state element at issue is either specific criminal intent or knowledge, do not use the bracketed language requiring the belief to be reasonable."

Burglary is a specific intent crime. It requires the act of unlawful entry accompanied by the specific intent to commit theft

or any felony. (Pen. Code, § 459; *People v. Wallace* (2008) 44 Cal.4th 1032, 1077.) Due to this specific intent, for appellant to establish a mistake of fact defense, he needed only to show that he subjectively believed his cousin Trevor resided at the home – he did not need to show that this belief was also objectively reasonable. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1426-1427, disapproved of on another ground by *People v. Covarrubias* (2016) 1 Cal.5th 838, 874, fn. 14 [a trial court does not have a *sua sponte* duty to instruct on the mistake of fact defense because it serves only to negate an element of the crime.])

Appellant's mistaken belief that his cousin Trevor resided at the residence did not need to be objectively reasonable because the mistaken belief itself, regardless of its reasonableness, negates the requisite specific intent to commit theft – if appellant thought he was entering his cousin Trevor's house, he was not entering with the intent to steal. (*See id.* at pp. 1425-1427.) The jury's job regarding the mistake of fact defense was thus solely to determine whether or not appellant actually believed that his cousin Trevor resided at the home. They were not required to determine whether this belief was also reasonable. The trial court erred by including the bracketed reasonable mistake language. (*Ibid.*)

B. The Trial Court's Instructional Error Should be Reviewed Under the *Chapman* Standard.

While it is clear that the trial court erred by instructing the jury that appellant's mistaken belief must have been reasonable, the Court of Appeal disagreed regarding what standard of prejudice applies to this error. If the instructional error violated appellant's federal rights under the United States Constitution, then the *Chapman* "harmless beyond a reasonable doubt" test should have been used. However, if the instructional error only implicated appellant's rights under California law, then the *Watson* "reasonable probability" test applies. (*People v. Breverman* (1998) 19 Cal.4th 142, 184-185 (dis. opn. of Mosk, J.).) Here, the *Chapman* test applies because the instructional error relieved the prosecutor from proving each element of the crime beyond a reasonable doubt violating appellant's rights under both the Due Process Clause and the Sixth Amendment of the United States Constitution.

The case of *People v. Watt* (2014) 229 Cal.App.4th 1215, 1217-1219 is similar to the present case because in both cases the trial court instructed on the mistake of fact defense, but its instruction was incorrect because it required the mistaken belief to be reasonable. The court in *Watt* noted that it could not find one case that used the *Chapman* test when analyzing the failure to instruct on an affirmative defense or erring in the instruction given and gathered cases which all used the *Watson* test instead.

(*Id*. at pp. 1219-1220.) But the *Watt* court then found the instructional error was harmless under **both** the *Chapman* and *Watson* tests. (*Id*. at p. 1220.)

In this case, the majority opinion relied on Article VI, section 13 of the California Constitution and the cases *People v. Zamani* (2010) 183 Cal.App.4th 854, 866 and *People v. Russell*, *supra,* 144 Cal.App.4th 1415, 1431 to find that the *Watson* "reasonable probability" test applies. (*People v. Hendrix*, *supra*, 55 Cal.App.5th 1092, 1097.) The recent case of *People v. Molano* (2019) 7 Cal.5th 620, 670 appears to support this conclusion. ["Error in failing to instruct on the mistake-of-fact defense is subject to the harmless error test set forth in *People v. Watson*."] But *Zamani*, *Russell*, and *Molano* all involved cases in which the trial court failed to instruct on the mistake-of-fact defense. Further in both *Russell* and *Molano* the defense never even requested the mistake of fact defense. (*People v. Russell*, *supra,* 144 Cal.App.4th 1415, 1431; *People v. Molano*, *supra*, 7 Cal.5th 620, 672.) Here, appellant not only requested the defense but used it as his sole theory of defense. The question here is thus not whether the trial court should have instructed the jury on the mistake of fact defense; the question is whether its error in how it instructed the jury impacted appellant's federal rights. The answer is the instructional error violated appellant's federal

rights to a fair and impartial trial and the *Chapman* test therefore applies.

The dissent was correct that *Chapman's* "harmless beyond a reasonable doubt" test applies to this case because the error equated to a misinstruction on an element of the burglary offense. (*People v. Hendrix*, *supra*, 55 Cal.App.5th 1092, 1100 (dis. opn. of Tangeman, J.), citing *People v. Hudson* (2006) 38 Cal.4th 1002, 1013.) Jury instructions that relieve "the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense"[3] must be analyzed under *Chapman* because such instructions "violate the defendant's due process rights under the federal Constitution" and implicate a defendant's Sixth Amendment rights to an impartial jury trial. (*People v. Flood* (1998) 18 Cal.4th 470, 491, 503, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) "Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." (*Carella v. California* (1989) 491 U.S. 263, 265.)

"The mistake-of-fact defense operates to negate the requisite criminal intent or mens rea element of the crime."

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[3] The "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.)

(*People v. Lawson*, *supra*, 215 Cal.App.4th 108, 111.) Appellant's mistake of fact defense was used to disprove that appellant had the specific intent to commit theft when he opened the screen door, which was required to convict him of burglary. (Pen. Code, §§ 26, par. 3, 459; 1 CT 162, 165.) If appellant was trying to enter his cousin Trevor's house, he was not intending to steal from the home.

The defendant bears the burden of providing substantial evidence that he had a bona fide mistaken belief in order to request the mistake of fact defense instruction, which in one sense makes this an affirmative defense. (*People v. Howard* (1996) 47 Cal.App.4th 1526, 1533 (disapproved of on another ground in *People v. Fuhrman* (1997) 16 Cal.4th 930, 947 fn. 11.) In California, this burden is considered "minimal" – "[a]ll that is required is that there be some evidence supportive of excuse or justification or that the defendant in some manner inform the court that he is relying upon such a defense." (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1158-1159.) Once that burden is met and the mistake of fact instruction is given, the burden then reverts back to the People to disprove the mistake of fact beyond a reasonable doubt. (*Id.* at p. 1159; *People v. Howard, supra,* 47 Cal.App.4th 1526, 1533; accord *People v. Mayberry* (1975) 15 Cal.3d 143, 157.)

In *People v. Thomas* (2013) 218 Cal.App.4th 630, 643-644, the Court of Appeal held that the failure to instruct on provocation when it is properly presented in a murder trial requires harmless error analysis under *Chapman*. Once "provocation is properly presented in a murder case, then, proving the element of malice requires the People to prove the absence of provocation beyond a reasonable doubt." (*Id.* at p. 644.) The failure to instruct on provocation thus relieves the prosecution of proving each element beyond a reasonable doubt and implicates a defendant's federal due process rights "requiring analysis for prejudice under Chapman." (*Ibid.*) The same reasoning applies here.

The trial court correctly ruled that the jury should have been instructed with the mistake of fact defense because appellant's immediate claim to the police that he thought he was at his cousin Trevor's house provided substantial evidence for the jury to determine whether or not this was true. (2 RT 210-211.) Because the mistake of fact defense was properly raised, the prosecutor was then required to prove beyond a reasonable doubt that appellant did not believe he was at his cousin's house. (*People v. Howard, supra,* 47 Cal.App.4th 1526, 1533.) But, as instructed, the prosecutor was relieved of this burden. Instead, the prosecutor could obtain a conviction by proving that even if appellant actually believed he was at his cousin Trevor's house,

he was still guilty because this belief was unreasonable. (1 CT 165.)

Because the prosecutor has the burden to prove beyond a reasonable doubt that a defendant did not have a mistaken belief (once this defense is properly presented to the jury), the instructional error on mistake of fact in this case implicates the identical constitutional concerns as an instructional error on an element of an offense. Here, the mistake of fact instruction relieved the prosecutor of proving each and every element of the charged offense beyond a reasonable doubt. Appellant's subjective belief that he thought he was at his cousin's house provided a reasonable doubt that he specifically intended to commit theft which is required for burglary. (*People v. Russell*, *supra*, 144 Cal.App.4th 1415, 1426-1427; 1 CT 165.) Therefore, the prosecutor was required to prove that this account was a fabrication and that appellant did not actually believe that he was at his cousin Trevor's house. However, as erroneously instructed, for the jury to find that the mistake of fact defense applied, this jury also had to find that appellant's mistaken belief was objectively reasonable. This "amounted to misinstruction on an element of the offense." (*People v. Wilkins* (2013) 56 Cal.4th 333, 348.) A juror could have incorrectly convicted appellant of burglary by finding that even though he subjectively believed that he was at his cousin's house, this belief was objectively

unreasonable. The erroneous mistake of fact instruction resulted in misinstructing the jury and relieved the prosecutor of proving a requisite element of the offense beyond a reasonable doubt - that appellant was lying when he said he thought he was at his cousin's house. The federal *Chapman* standard therefore applies and appellant's conviction must be reversed unless the mistake of fact instructional error was "harmless beyond a reasonable doubt." (*Id.* at pp. 348, 350; *People v. Thomas*, *supra*, 218 Cal.App.4th 630, 644.)

II. The Court of Appeal Erred When It Found the Trial Court's Instructional Error Was Harmless.

A. The Instructional Error Was Not Harmless Under *Chapman.*

"Under the *Chapman* harmless error standard, the burden is on the People, not the defendant, to demonstrate that the violation of the defendant's federal constitutional right was harmless beyond a reasonable doubt." (*People v. Cutting* (2019) 42 Cal.App.5th 344, 349.) A reviewing court making this harmless error inquiry "asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." (*Neder v. United States* (1999) 527 U.S. 1, 19.) If the answer to that question is "yes," the error is not harmless. (*Ibid.*) In this case the record contains evidence that could rationally lead a juror to find that appellant actually

believed he was at his cousin Trevor's house. So, the error cannot be held harmless.

One of the first things appellant told the officers on scene was that he was there looking for his cousin. (1 CT 264; Exh. 2.) Further, the facts that appellant never attempted to flee the scene but simply waited outside in the backyard drinking his bottle of water after he was unable to enter the sliding glass door (4 RT 119; Exhs. 1 and 2); that he had no burglary tools or weapons on him (4 RT 177); and that his cousin lived in the area, only two to three blocks away (4 RT 169), lead to the reasonable conclusion that appellant was looking for his cousin and not trying to break into the house. Appellant's history of mental illness and the fact that he had recently been released from Atascadero State Hospital also support his claim of confusion and mistaken belief that he was at his cousin's house. (1 Supp. CT 52-53; 2 Supp. CT 9-19; *People v. Hendrix*, *supra*, 55 Cal.App.5th 1092, 1100-1101 (dis. opn. of Tangeman, J.))

Thus, one reasonable interpretation of this evidence is that appellant actually believed that he was at his cousin's house, but when no one answered the locked front door at 7 a.m. he then went to try and get in through the other doors of the house to wait either for his cousin to wake up or for him to get home. When he discovered that all the doors were locked, he simply sat in the backyard and waited. After being arrested and having to

wait in jail, appellant then attempted to find someone to support his defense.

Clearly, the majority did not believe this view of the evidence when it found "that the story appellant told the police was a fabrication." (*People v. Hendrix*, *supra*, 55 Cal. App. 5th 1092, 1098.) But determining how credible appellant was and whether or not he fabricated his story were decisions for the jury to make. These are "truth-finding task[s] assigned solely to juries in criminal cases." (*Carella v. California*, *supra*, 491 U.S. 263, 265.) By making findings of fact and credibility determinations the majority usurped the jury's role of determining whether appellant subjectively believed he was at his cousin's house and became "in effect a second jury to determine whether the defendant is guilty." (*Neder v. United States, supra,* 527 U.S. 1, 19.) Because the record contains evidence that rationally supports a finding that appellant actually believed he was at his cousin Trevor's house, the instructional error in this case was not harmless and appellant's burglary conviction must be reversed.

B. The Instructional Error Was Not Harmless Under *Watson*.

Even under the less stringent *Watson* standard, prejudicial error requiring reversal is shown if "it is reasonably probable that a result more favorable to the appealing party would have been

reached in the absence of the error." (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.) "[A] 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*People v. Wilkins*, *supra*, 56 Cal.4th 333, 351, italics in original.)

"In applying the Watson standard, we may look to the other instructions given, as well as whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability that the error affected the result. [Citations.]" (*People v. Watt*, *supra*, 229 Cal.App.4th 1215, 1220.) But weighing the evidence like this is very tricky because doing so risks invading the jury's role as the truth finder. "Because virtually all forms of harmless error review risk infringing on 'the jury's factfinding role and affect the jury's deliberative process in ways that are, strictly speaking, not readily calculable,' courts performing harmless error review are walking a tightrope—where they must weigh how an error affected the proceedings without displacing the jury as finder of fact." (*People v. Aledamat* (2019) 8 Cal.5th 1, 17 (dis. opn. of Cuéllar, J.), citing *Neder v. United States*, *supra*, 527 U.S. 1, 18.) "The risk of an appellate court usurping the jury's role becomes especially great when harmless error analysis focuses not on whether error might have affected the jury's decisionmaking, but

on whether there was overwhelming evidence to support the result." (*People v. Jackson* (2014) 58 Cal.4th 724, 790 (dis. opn. of Liu, J.).)

In this case, when analyzing whether the error was harmless, the majority opinion focused on the evidence supporting a burglary conviction rather than on whether the erroneous mistake of fact instruction affected the jury's decisionmaking. (*People v. Hendrix*, *supra*, 55 Cal.App.5th 1092, 1097-1098.) The majority first characterized appellant's attempts at entry as "multiple forcible attempts to enter the house and a garage" and found that no one who subjectively believed that his cousin lived at the house would also think he was allowed to forcibly enter the home. (*Id*. at p. 1098.) But the record supports a benign interpretation of this evidence as well; instead of forcibly attempting to enter the residence, appellant was merely checking the doors to see if they were unlocked so that he could enter and wait for his cousin to return home.

Next the majority finds that appellant's jail calls demonstrate that appellant never actually believed he was at his cousin's house because the calls prove he was trying to procure false testimony saying someone gave him the wrong address and that appellant never contradicted his uncle when he was accused of breaking into people's homes. (*Ibid*.) The majority opines that they "do not believe that a friend told him cousin Trevor had

moved to the victim's house. It seems much more likely, consistent with the prosecutor's theory, that appellant made up this excuse to avoid arrest." (*Id*. at p. 1098, fn. 3.) They conclude "that the story appellant told the police was a fabrication." (*Id*. at p. 1098.)

But the calculus to determine prejudice is different than that used to determine whether the evidence was sufficient to convict. To determine prejudice, the reviewing court asks whether there is a reasonable probability that appellant would have received a better outcome if the error had not been made. (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.) Contrary to the majority's contentions, the evidence in this case is not so overwhelming that it leads **only** to the conclusion that appellant fabricated his mistake of fact defense. The majority made no mention of the substantial evidence in support of appellant's mistake of fact defense. (See Section I. A., above.) Likewise, no response was made to the dissent's claim that the "majority substitutes its own judgment, based on a cold record, about appellant's credibility and true intentions." (*People v. Hendrix*, *supra*, 55 Cal.App.5th 1092, 1101 (dis. opn. of Tangeman, J.)) If the majority had focused on whether the instructional error affected the jury's decisionmaking process (*People v. Jackson*, *supra*, 58 Cal.4th 724, 790 (dis. opn. of Liu, J.)), it would have found that appellant was prejudiced by the error.

In this case that means that if there is a reasonable chance that just one juror convicted appellant based on the theory that appellant actually had the mistaken belief that he was at his cousin Trevor's house, but that this belief was unreasonable, then his burglary conviction must be overturned. There is such a "*reasonable chance*" in this case, "more than an *abstract possibility,*" because this was obviously a close case for the jury and the evidence supports such a view. (*People v. Wilkins*, *supra*, 56 Cal.4th 333, 351, italics in original.)

The majority completely omits the facts indicating how close this case was for the jury. This case was so close that at one point the jury informed the court that they were deadlocked and could not make a unanimous decision – at least one juror was unwilling to convict at that point. (1 CT 175; 5 RT 282.) The prejudicial impact of a court's error is heightened in close, deadlocked cases. (*People v. Diaz* (2014) 227 Cal.App.4th 362, 384-385.) The jury's requests for the transcripts of the jail calls (1 CT 174, 5 RT 281) and for Officer Aldrete's testimony (1 CT 192, 6 RT 304) are also "indications the deliberations were close." (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295.) The only issue in this case was whether appellant opened the screen door with the intent to steal from the home or with the intent to enter his cousin's house. Thus, it is clear that the impasse in the deliberations must have revolved around that issue.

Jurors are presumed to understand and follow the court's instructions. (*People v. Homick* (2012) 55 Cal.4th 816, 867.) In this case, the jury was erroneously instructed that appellant's mistaken belief that his cousin Trevor resided at the home must be reasonable. (1 CT 165.) Further, comments from the "prosecutor, as the People's official representative, carry with the jury." (*People v. Thomas* (1992) 2 Cal.4th 489, 529.) Here, the prosecutor repeatedly argued that **appellant's mistaken belief was unreasonable** because his cousin's house was in a different neighborhood on the other side of a nearby high school. (5 RT 246, 255.) Appellant's counsel further emphasized the error in the instruction when he argued: "If you find that the defendant believed that his cousin Trevor resided at the home **and if you find that belief is reasonable**, you must find him not guilty." (5 RT 263.) These arguments combined with the erroneous instruction conveyed to the jury that even if appellant actually believed he was at his cousin's house but that this belief was unreasonable then he still must be found guilty. But this theory of conviction is legally incorrect – appellant's mistaken belief that he was at his cousin Trevor's house did not need to be objectively reasonable. An acquittal was required if appellant actually believed he was at his cousin's house, no matter how reasonable this belief was. (*People v. Russell*, *supra*, 144 Cal.App.4th 1415, 1425-1427.)

In this case the majority opinion usurped the jury's role by focusing on the evidence that supported a guilty conviction. Instead, they should have focused on whether the instructional "error might have affected the jury's decisionmaking." (*People v. Jackson* (2014) 58 Cal.4th 724, 790 (dis. opn. of Liu, J.).) Given that at least one juror at one point was not persuaded that appellant opened the screen door with the intent to steal from the home, and because the prejudicial impact of a court's error is heightened in close, deadlocked cases (*People v. Diaz, supra,* 227 Cal.App.4th 362, 384-385), there is a reasonable chance, and not just an abstract possibility (*People v. Wilkins*, *supra*, 56 Cal.4th 333, 351), that at least one juror relied on the erroneous instruction and found that even though appellant subjectively believed he was at his cousin Trevor's house he was still guilty because this mistaken belief was objectively unreasonable. Because there is a reasonable probability that at least one juror would have acquitted appellant if the court had not erred when giving the mistake of fact instruction, appellant's burglary conviction must be reversed. (*People v. Watson*, *supra*, 46 Cal.2d 818, 836; *People v. Wilkins*, *supra*, 56 Cal.4th 333, 351.)

CONCLUSION

The proper test to determine whether the erroneous mistake of fact instruction prejudiced appellant is the "harmless beyond a reasonable doubt" standard of *Chapman*. Under

Chapman, appellant was prejudiced because the record contains evidence that rationally leads to a finding that appellant actually mistakenly thought he was at his cousin Trevor's house. (*Neder v. United States, supra,* 527 U.S. 1, 19.) But even under *Watson*, the Court of Appeal erred when it found the error harmless because the majority usurped the jury's factfinding role when it found that appellant fabricated his mistaken belief that he was at his cousin's house. If the majority had correctly focused on how the instructional error affected the jury's decisionmaking process it would have found the instructional error was prejudicial. Under *Watson,* appellant's burglary conviction must still be overturned because there is a reasonable chance and not just an abstract possibility that due to the mistake of fact instructional error at least one juror incorrectly convicted appellant by finding that he actually believed his cousin resided at the home but that this mistaken belief was unreasonable. (*People v. Wilkins*, *supra*, 56 Cal.4th 333, 351.)

CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to rule 8.520(c)(1) of the California Rules of Court, I hereby certify that this brief contains 7299 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By _____
Adrian Dresel-Velasquez
Dated: April 20, 2021

PROOF OF SERVICE

ATTORNEY'S CERTIFICATE OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Re: People v. Hendrix; California Supreme Court Case No. S265668

I, Adrian Dresel-Velasquez, certify:

I am an active member of the State Bar of California and am not a party to this cause. My business address is P.O. Box 3443, Santa Barbara, CA, 93130. On April 20, 2021, I caused the attached Appellant's Opening Brief on the Merits to be electronically served by transmitting a true copy via this Court's TrueFiling system to:

Office of the Attorney General, docketinglaawt@doj.ca.gov;

John Yang, John.Yang@doj.ca.gov (Attorneys for Respondent).

The electronic filing of this brief constitutes service on the clerk/executive officer of the Court of Appeal. (Cal. Rules of Court, rule 8.500(f)(1).)

On April 20, 2021, I also served the attached Appellant's opening brief on the merits by transmitting a true PDF copy via electronic mail to:

California Appellate Project at capdocs@lacap.com.

Ventura County District Attorney's Office at appellateda@ventura.org.

Damon Jenkins, Damon.Jenkins@ventura.org (Appellant's trial counsel).

On April 20, 2021, I further deposited in a Post Office regularly maintained by the United States Postal Service at 3345 State St., Santa Barbara, CA, 93105, a copy of the attached Appellant's opening brief on the merits in a sealed envelope with postage fully prepaid, addressed to each of the following:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 20, 2021, at Santa Barbara, California.

By: _____
Adrian Dresel-Velasquez
DECLARANT
SBN 272556

STATE OF CALIFORNIA
Supreme Court of California

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