No. S265668

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.

Second Appellate District, Division Six, Case No. B298952
Ventura County Superior Court, Case Nos. 2017025915; 2018037331
The Honorable Paul W. Baelly, Judge

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Did the Court of Appeal err in holding an instructional error on the defense of mistake of fact harmless?

2. 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

The parties agree that the mistake-of-fact instruction given at appellant's burglary trial was incorrect. The dispute is what standard of harmlessness applies under the circumstances of this case. Because the instruction, as given here, did not implicate any federal constitutional concern, the state law harmlessness standard under *Watson* applies.

Appellant was arrested in the back yard of a house, where he had jimmied open a screen to a sliding door. He claimed to officers at the scene that he mistakenly thought it was his cousin's house. This was also his principal theory at trial, where he argued that his mistake showed that he had not entered the house with the intent to steal. On that basis, the trial court instructed the jury that if it believed appellant was acting under the mistaken belief that the house belonged to his cousin, and if it determined that the mistake was reasonable, it had to acquit. Although the jury was entitled to consider reasonableness insofar as it bore on whether appellant made a *good faith* mistake, the instruction ran the risk of suggesting that the ultimate question of the specific mental state required for burglary—here, an intent

to steal—was subject to a standard of objective reasonableness. In that narrow regard, it was erroneous.

Mistake-of-fact instructions may operate in different ways depending on the circumstances of the case. Here, appellant's mistake-of-fact theory sought to negate the intent-to-steal element of burglary. The instruction accordingly highlighted appellant's theory that he thought he had entered his cousin's house, telling the jury it had to acquit if it determined that appellant did not possess the required specific mental state for burglary. It is thus best understood as a "pinpoint" instruction, one which relates particular facts to an element of the offense. And well established precedent treats pinpoint instructions as a matter solely of state law and not of federal constitutional law. The instruction did not, as appellant contends, alter or qualify the requirements of burglary in a way that would be analogous to misinstruction on an element of the offense. And there is no dispute that the court's other instructions properly defined every element of burglary, including the element of specific intent. The erroneous inclusion of a reasonableness requirement relating to the assessment of appellant's factual theory is therefore a matter of state law and subject to the miscarriage of justice standard under *Watson*.

Applying the *Watson* standard, appellant cannot satisfy his burden to show a reasonable probability that the jury would have reached a different verdict absent the instructional error. Under the circumstances, it is improbable that the relatively narrow, improper aspect of the instruction made a difference. The

incriminating evidence admitted at trial established overwhelmingly that appellant did not actually think his cousin lived at the house. Not only were his furtive actions at the scene consistent with a burglary, but his claimed mistake was effectively debunked at trial by evidence that he had tried to procure false evidence to support it, that he tacitly admitted trying to burgle the house, and that he had a prior theft conviction. In fact, the evidence was so overwhelming, and the issue of reasonableness so unimportant, that the instructional error was harmless even under the *Chapman* beyond-a-reasonable-doubt standard.

STATEMENT OF THE CASE AND FACTS

Defendant and appellant Isaiah Hendrix was tried for first-degree residential burglary (Pen. Code, § 459)[1] before a jury empaneled in the Ventura County Superior Court. (1CT 125.)

The evidence at trial showed that Artrose Tuano was inside his home at 7:00 a.m. when he heard loud knocking and the sound of his doorbell. (1RT 122-125.) No cars were in his driveway that morning. (1RT 131.) Through his home surveillance video system, Tuano saw appellant go through the side gate into the backyard. (1RT 123, 125.) Appellant unsuccessfully tried to open the side door that led to the garage. (1RT 138.) At the back of the house, appellant jimmied opened the screen to a glass sliding door. He attempted to open the sliding door but could not. (1RT 127-128.)

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

Officers arriving at the house saw appellant sitting on a bench in the backyard; he appeared surprised. (1RT 115, 119, 120.) Appellant said, "I was just by myself. The reason why I came is 'cause this is my cousin's house, so I came to see if he was home, but nobody answered." (1CT 264.) Appellant further stated that a friend had told him his cousin Trevor had moved to this address. (1CT 265.) During the ensuing arrest and search of appellant, officers did not find any burglary tools. (1RT 119-120, 177.)

The jury heard a recording of a telephone conversation appellant had with his mother while he was in jail. In the call, appellant said he needed a witness and he wanted his mother to "have Desmond … just speak up for me or something and say I gave him the wrong address because I thought it was—or something like that, you know, by mistake." (2CT 298.) Appellant then specified, "I don't know what the address is, but it's called Indiana Street that I knocked on the house. I don't know the address." (2CT 298.)

In another recorded call, appellant again asked his mother, "Can you have like the, the friend thing do that for me? The, the, the witness?" After his mother answered ambiguously, he asked whether his mother had it "under control" or if he needed "to make something happen with that?" When his mother seemed puzzled, he asked again, "Do you already have that under control or do I need somebody—do I need to call one of my friends to do it for me?" (1CT 300.) His mother said she was not going to ask someone to lie. Appellant responded by asking for the phone

number of a person named Luis. (1CT 300.) He also asked for a money deposit so he could call Luis. (1CT 300.)

A recording of a telephone conversation appellant had with his uncle "Johnny" was also played for the jury. (2CT 302.) Johnny reprimanded appellant for talking "crazy" when he knew the calls were being recorded. Appellant said, "it's not like they really listen." (2CT 302.) Johnny then complained about appellant "running around breaking in people's house" and asked him, "What the fuck—what were you doing'?" Appellant responded, "I don't know." (2CT 302.) Johnny said, "That stealing shit, you motherfuckers go that—that's that Indian shit up in your motherfuckers. Man, that's just … ." Appellant interjected, "Hey, hey, Uncle Johnny, you're always talking smack, man. You're always talking smack. That's always (unintelligible) my uncle's always be talking smack to me." (2CT 302.)

A police officer who went to high school with appellant's cousin Trevor and remained an acquaintance of his testified that during high school, Trevor lived two or three blocks from Tuano's house and had not moved from that address since high school. (1RT 169.) A school separated Tuano's neighborhood from Trevor's. (1RT 169.)

Other-crimes evidence was also presented for the purpose of showing intent and absence of mistake. On July 22, 2017, appellant, using the excuse that his mother was already inside a Costco store, gained entry into the store, took a bottle of tequila, and left without paying for it. (1RT 183-186; see CT 161.)

Prior to deliberations, the jury was instructed on the elements of the charged crime of burglary, pursuant to CALCRIM 1700, as follows:

> The Defendant is charged with burglary. To prove that the defendant is guilty of this crime, the People must prove that: One, The defendant entered a structure; and two, When the defendant entered a structure, he intended to commit theft. To decide whether the defendant intended to commit theft, please refer to the separate instructions that I will give you on those crimes.
>
> The burglary was committed if the defendant entered with the intent to commit theft. The defendant does not need to have actually committed theft as long as he entered with the intent to do so. The People do not have to prove that the defendant actually committed theft.
>
> Under the law of burglary, a person enters a building if some part of his or her body penetrates the area inside the building's outer boundary. A building's outer boundary includes the area inside a window screen.

(5RT 229; 1CT 162.)[2]

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[2] The jury was correspondingly instructed on theft, pursuant to CALCRIM 1800, as follows:

> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant took possession of property owned by someone else;
>
> 2. The defendant took the property without the owner's consent;

At the defense's request, the court also instructed on mistake of fact, pursuant to CALCRIM 3406. The instruction as given by the trial court included optional language indicating that the defendant's mistake had to be reasonable:

> 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 the 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.

(5RT 210-212, 231; 1CT 165.)

In closing argument, the prosecutor did not discuss or apply the mistake-of-fact instruction. The prosecutor first addressed

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> 3. When the defendant took the property, he intended to deprive the owner of it permanently;
>
> AND
>
> 4. The defendant moved the property, even a small distance, and kept it for any period of time, however brief.

(1CT 167; see 5RT 258.)

the elements of the crime. (5RT 236-241.) He then focused on the intent element, describing the proof of that element to be appellant's goal-oriented behavior in scouting the house, checking for residents, and attempting access through a number of possible entryways. (5RT 241-243.) The prosecutor argued that appellant's intent that day was to steal, citing evidence that even though appellant knocked on the door and rang the doorbell, he avoided showing his face to the camera and did not announce his presence to the residents of the house. (5RT 244-246.) The prosecutor pointed to appellant's calls with his mother and uncle and characterized them as attempts to procure false testimony and tacit admissions to the crime. (5RT 246-250.) The prosecutor also cited appellant's prior offense committed at Costco to show lack of mistake, intent, and common scheme. (5RT 250-254.)

The prosecutor further argued there was no credible evidence of an alternative intent. (5RT 254.) He argued that appellant's story that he thought he was at his cousin's house was revealed to be a "pack of lies" because appellant had tried to procure false testimony to support the story. (5RT 255.) The prosecutor argued, "There's no evidence of another explanation other than a theft that fits all the evidence in this case." (5RT 255.)

The prosecutor then briefly argued there was penetration of an outer boundary of the house, which satisfied the entry requirement of burglary. (5RT 256.) He concluded by arguing that appellant was guilty of first degree residential burglary in

that he "entered an inhabited residence" and "did it with the intent to steal." (5RT 256.) Summarizing all the evidence again, the prosecutor concluded, "there's only one reasonable interpretation of the evidence … and that's the defendant is guilty of Count 1 … ." (5RT 257.)

Defense counsel, in contrast, argued to the jury that the evidence showed appellant went to the house "with the intent to find his cousin, not to break in." (5RT 259.) He argued that appellant did not act like a burglar, as he remained in the back yard for some time with no burglary tools. (5RT 260.) Counsel also argued that appellant's mistake was reasonable because his cousin lived only two blocks away. (5RT 261.) Counsel concluded, "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. You must." (5RT 263.) He also argued that there was no proof beyond a reasonable doubt of entry because appellant had not breached the building's outer boundary. (5RT 263-264.)

During rebuttal, the prosecutor focused his argument on the burden of proof, the nature of direct and circumstantial evidence, and the jury's obligation to disregard sympathy; he did not discuss the evidence to any significant degree. (5RT 264-270.)

While the jury deliberated, appellant admitted a prior strike conviction for robbery. (1CT 179.) That same afternoon, the jury asked for a transcript of one of the telephone calls. (5RT 281.) The parties agreed to inform the jury that the transcript was not evidence. (5RT 281.) The jury resumed deliberations but an hour

later submitted a note indicating it could not come to a decision. (5RT 282.) Because the jury had been deliberating for only about two and a half hours, the trial court denied the defense's mistrial motion and instructed the jury to continue deliberating. (5RT 283-284.) The morning of the next court day, the jury requested and was granted a readback of the testimony of the officer who responded to the burglary call. (6RT 304.) That same afternoon, the jury returned a guilty verdict of first degree burglary. (7RT 314-315; 1CT 187.)

Appellant was sentenced to nine years in state prison, which consisted of the low term of two years, doubled pursuant to the Three Strikes law (§ 667, subd. (e)(1), 1170.12, subd. (b), (c)(1)), plus five years for the prior serious felony enhancement (§ 667, subd. (a)(1)). (8RT 340-341; 1CT 224-225.)

On appeal, appellant claimed that the trial court erred in including the reasonableness requirement in its instruction on the mistake-of-fact defense. The Court of Appeal agreed, noting that burglary is a specific intent crime and both the instruction's bench note and decisional authority indicate that the reasonableness requirement is reserved for general intent crimes. (Opn. 4-6.)

The Court of Appeal decision was divided, however, on the question of harmlessness. The majority applied the *Watson* harmless error test. (Opn. 6.) It reasoned that, under that test, the error was harmless because appellant's mistake-of-fact defense was implausible in light of the evidence. The majority cited the facts that: (1) a visiting cousin would not make forcible

attempts to enter the house; (2) no logical witnesses testified about giving appellant a mistaken address; (3) appellant solicited his mother to find a witness who would testify consistently with appellant's story; and (4) appellant told his uncle he did not know why he had tried to enter the house. (Opn. 6-7.)

The dissent, in contrast, reasoned that the error amounted to misinstruction on an element, requiring the *Chapman* harmlessness test. (Dis. Opn. 1.) The dissent concluded that the error was prejudicial under *Chapman*, pointing to the following: (1) appellant's mental illness as reflected by a pre-trial incompetency finding; (2) appellant's lack of any burglary tools; and (3) appellant's inexplicable conduct in staying on the property after he could not gain entry. Addressing the jailhouse calls, the dissent stated: "Maybe it shows only how desperate he was to get out of custody." (Dis. Opn. 1-2.)

ARGUMENT

I. THE ERRONEOUS MISTAKE-OF-FACT INSTRUCTION IN THIS CASE IS SUBJECT TO THE *WATSON* STANDARD OF HARMLESS-ERROR REVIEW

Appellant claims that the erroneous mistake-of-fact instruction should be subject to the *Chapman*, and not the *Watson*, harmlessness standard because it was tantamount to misinstructing on an element of the offense. (OBM 14-21.) But while the instruction related to a particular element of burglary, it focused on the factual assessment of appellant's claimed mistake. It is therefore best understood as a pinpoint instruction, which does not implicate any federal constitutional issue and is therefore reviewed for harmlessness under *Watson*.

There is no dispute that the court separately and correctly instructed the jury on the elements of burglary and theft. The erroneous instruction informed the jurors, in essence, how to evaluate certain evidence that related to the specific intent-to-steal element, but it did not purport to alter or qualify the definition of burglary. The error was therefore one of state law alone.

A. The mistake-of-fact instruction was incorrect

The Court of Appeal below properly concluded that there was instructional error, since the jury was told that the mistake-of-fact defense required appellant's mistaken belief to be reasonable. (Opn. 3-5; see *People v. Watt* (2014) 229 Cal.App.4th 1215, 1218; *People v. Lawsen* (2013) 215 Cal.App.4th 108, 114-115; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425-1426; *People v. Reyes* (1997) 52 Cal.App.4th 975, 984, 984 fn. 6; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 11.) Indeed, the Bench Notes to CALCRIM 3406 specify: "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."

The Court of Appeal in *Watt* explained the reason for this rule:

> A mistake of fact must be in good faith. In determining if a mistake of fact has negated a specific mental state, the jury may consider reasonableness in deciding if the belief was in good faith—a highly unreasonable belief can support an inference of bad faith, so while objective

> reasonableness is not a requirement of the defense of mistake, subjective reasonableness can be a relevant consideration on the subject of good faith.

(*Watt*, *supra*, 229 Cal.App.4th at p. 1218, citations omitted; see also *People v. Navarro*, *supra*, 99 Cal.App.3d Supp. at p. 11 ["It is true that if the jury thought the defendant's belief to be unreasonable, it might infer that he did not in good faith hold such belief. If, however, it concluded that defendant in good faith believed that he had the right to take the beams, even though such belief was unreasonable as measured by the objective standard of a hypothetical reasonable man, defendant was entitled to an acquittal since the specific intent required to be proved as an element of the offense had not been established"].) In other words, in a case involving specific intent (or knowledge), the instructional language about the reasonableness of the defendant's mistake might improperly convey that the defendant must harbor an objectively reasonable mental state, even though subjective reasonableness remains relevant to the question of the asserted mistake's good faith.

Burglary requires a specific intent to commit a felony—in this case, theft. (See RT 229; 1CT 162 [CALCRIM 1700]; *People v. Hill* (1967) 67 Cal.2d 105, 11.) There were therefore two related but analytically distinct questions implicated by the mistake-of-fact theory in this case: whether appellant actually made a mistake in good faith, as to which the jury could consider reasonableness; and whether appellant in fact harbored an intent to steal, which was not subject to any reasonableness requirement. Insofar as the instruction might have conveyed to

the jury that appellant's claimed mental state had to be objectively reasonable, the instruction was erroneous.

B. The erroneous instruction did not implicate the federal Constitution and therefore did not require the *Chapman* harmlessness standard

Appellant correctly observes that, for purposes of harmless error review, the relevant question is whether the incorrect mistake-of-fact instruction implicated his federal constitutional rights. (OBM 18.) He claims that the erroneous instruction requires harmlessness review under *Chapman* because it violated his "federal constitutional rights to a fair and impartial trial." (OBM 18-19.) More specifically, he argues that the mistake of fact principle "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." (OBM 20.) He reasons that, because the prosecution was required to prove the intent element beyond a reasonable doubt, the erroneous instruction "implicates the identical constitutional concerns as an instructional error on an element of an offense," as it "relieved the prosecutor of proving a requisite element of the offense." (OBM 22-23.) As will be explained below, the mistake-of-fact instruction as given in this case did not implicate the federal constitution and is therefore reviewed for harmlessness under *Watson*.

1. Instructional error is generally a matter of state law and implicates the federal Constitution only in limited circumstances

The standard of harmlessness that applies to an instructional error depends on the nature of the error. If it is one of federal constitutional dimension, then, under *Chapman*, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*People v. Aledamat* (2019) 8 Cal.5th 1, 9.) Otherwise, our state Constitution requires a reviewing court to assess a faulty instruction's effect on the verdict under the reasonable-probability test of *Watson*. (Cal. Const., art. VI, § 13; *People v. Flood* (1998) 18 Cal.4th 470, 487-490; *People v. Breverman* (1998) 19 Cal.4th 142, 176.)[3]

As a general proposition, instructional error is a matter of state law; only the violation of some federal constitutional protection will call for application of the *Chapman* standard. For example, an erroneous instruction will offend the federal Constitution if it "'so infected the entire trial that the resulting conviction violates due process.'" (*Estelle v. McGuire* (1991) 502 U.S. 62, 71-72, quoting *Cupp v. Naughten* (1973) 414 U.S. 141, 147.) The failure to instruct on an element of a charged offense

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[3] In the rare circumstance where an erroneous instruction defies assessment for harmlessness, it may require automatic reversal as "structural error." (See, e.g., *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280 [faulty burden of proof instruction vitiated all jury findings with "consequences that are necessarily unquantifiable and indeterminate"]; see also *People v. Blackburn* (2015) 61 Cal.4th 1113, 1132-1136.)

also implicates the federal constitution, since it violates the right to a jury trial. (*Neder v. United States* (1999) 527 U.S. 1, 15-16; *People v. Merrit* (2017) 2 Cal.5th 819, 832; see also *In re Winship* (1970) 397 U.S. 358, 364 [federal due process guarantees the right to a jury determination beyond a reasonable doubt of every fact necessary to constitute the charged crime].) And similarly, misinstruction on an element of a charged offense that relieves the prosecution of its burden of proving each element to a jury beyond a reasonable doubt violates the federal Constitution. (*Roy v. California* (1996) 519 U.S. 2, 5; *Flood*, *supra*, 18 Cal.4th at pp. 479-480.)

But the possibility of a jury misapplying state law, at least in a noncapital case, does not give rise to federal constitutional error. (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342; see also *Beck v. Alabama* (1980) 447 U.S. 625, 638, fn. 14 [declining to decide whether the Due Process Clause requires a lesser-included-offense instruction in a noncapital case]; *Windham v. Merkle* (9th Cir. 1998) 163 F.3d 1092, 1106 [no federal question presented by state court's failure to give lesser-included-offense instruction in non-capital case].) Even when an instruction is inadvisable, or plainly wrong, this does not, without more, implicate the federal Constitution. (See, e.g., *People v. Lemcke* (2021) 11 Cal.5th 644, 278 Cal.Rptr.3d 849, 868 [instruction on eyewitness certainty did not violate due process, even though it "has the potential to mislead jurors"].) Indeed, this Court has underscored that the category of instructional errors violating the federal Constitution is narrow. In holding that the failure to instruct on a lesser

included offense is a matter of state law alone, the Court stated: "In light of the United States Supreme Court's careful disclaimers, and its tendency to interpret related federal rules, both constitutional and nonconstitutional, in a narrow way, we decline to do what the high court has expressly not done—to hold that such an instructional rule is required in noncapital cases by the federal Constitution." (*Breverman*, *supra*, 19 Cal.4th at p. 169.)

2. Harmlessness review of an erroneous affirmative defense instruction is not at issue in this case

A mistake-of-fact defense can be characterized in different ways depending on the context. In some situations, it amounts to an affirmative defense. (See, e.g., *People v. Brooks* (2017) 3 Cal.5th 1, 73; *In re Jennings* (2004) 34 Cal.4th 254, 280.) Generally, an affirmative defense is "one which does not negate any element of the crime, but is a new matter which excuses or justifies conduct which would otherwise lead to criminal responsibility." (*People v. Bolden* (1990) 217 Cal.App.3d 1591, 1601; see also *People v. Frye* (1992) 7 Cal.App.4th 1148, 1158; *People v. Spry* (1997) 58 Cal.App.4th 1345, 1369.) It is a defendant's burden to produce evidence supporting an affirmative defense; typically, this is because "its existence is 'peculiarly' within his personal knowledge and proof of its nonexistence by the prosecution would be relatively difficult or inconvenient." (*People v. Salas* (2006) 37 Cal.4th 967, 981.) "For example, necessity is a defense which admits, for the sake of argument, the elements of the charged offense, but offers a justification to avoid

criminal culpability. As such, it is an affirmative defense which the defendant must prove by a preponderance of the evidence." (*Bolden*, *supra*, 7 Cal.App.4th at p. 1601.)

This Court addressed mistake of fact as an affirmative defense in *Jennings*. There, the defendant was charged, under Business and Professions Code section 25658, subdivision (c), with furnishing alcohol to a person under 21 who, after drinking, proximately caused serious injury in a car crash. (*Jennings*, *supra*, 34 Cal.4th at pp. 259-260.) Analyzing the statutory provision, this Court held that it "does not require a showing the offender had knowledge of the imbiber's age or other criminal intent." (*Id.* at pp. 260-276.) The Court further held, however, that the defendant was entitled to rely on an affirmative defense of mistake of fact, as to which he would bear the burden of proving that he mistakenly believed the person to whom he furnished the alcohol was over 21. (*Id.* at pp. 276-281.)

The *Brooks* decision is similar. There, the defendant strangled a woman and then drove her to a different location where he burned the car while she was inside it. (*Brooks*, *supra*, 3 Cal.5th at pp.16-23.) Forensic evidence showed that the victim died from smoke inhalation and thermal injuries. (*Id.* at p. 21.) The defendant was convicted of murder in the course of a kidnaping (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17)(B)). (*Id.* at p. 16.) On appeal, the defendant claimed that the trial court had an obligation to instruct the jury on mistake of fact, based on his belief that the victim was already dead when he drove off with her in the car. (*Id.* at pp. 71-72.) This Court

treated that theory as an affirmative defense for purposes of the court's sua sponte duty to instruct, reasoning that consent may serve as a defense to kidnapping and consent in turn requires a live victim. (*Id.* at pp. 73-74, discussing *People v. Mayberry* (1975) 15 Cal.3d 143, 154-155 [mistaken belief in consent may serve as a defense to rape].)[4]

Whether and to what extent an affirmative defense instruction is required as a matter of federal constitutional law, and, concomitantly, whether an error relating to an affirmative defense instruction is assessed for harmlessness under *Chapman*, is unsettled. (See *Salas*, *supra*, 37 Cal.4th at p. 984; see also *Gilmore*, *supra*, 508 U.S. at pp. 343-344.) But appellant does not argue that resolution of that question is required here. Instead, he acknowledges that the alleged mistake of fact in this case sought to negate an element of the charged burglary. (OBM 19.) Because appellant's defense did not involve an excuse or justification separate from the elements of the offense, on which he bore any burden, respondent agrees that this case does not call for the Court to resolve any question about harmlessness review of a faulty affirmative defense instruction.[5]

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[4] The Court in *Brooks* nonetheless concluded that the trial court did not err in failing to instruct on mistake of fact because the record did not contain substantial evidence to support the instruction. (*Brooks*, *supra*, 3 Cal.5th at pp. 74-75.)

[5] Though acknowledging that the alleged mistake of fact here sought to disprove an element of burglary, appellant's opening brief also states that a defendant bears the burden of "providing" substantial evidence on the question, "which in one

3. The mistake-of-fact instruction here operated as a pinpoint instruction that does not implicate the federal harmlessness standard

Mistake of fact has been characterized more commonly not as an affirmative defense but as a defense that serves to disprove an element of the charged crime. Thus, in *Jennings*, the Court observed that, as a general matter, "a mistake of fact defense is not available unless the mistake disproves an element of the offense." (*Jennings*, *supra*, 34 Cal.4th at p. 277.) The Court explained that Penal Code section 26 provides the foundation for the mistake-of-fact defense. That section states: "All persons are capable of committing crimes except … Persons who committed the act or made the omission charged under an ignorance or

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sense makes this an affirmative defense." (OBM 20, citing *People v. Howard* (1996) 47 Cal.App.4th 1526, 1533, and *Frye*, *supra*, 7 Cal.App.4th at pp. 1158-1159.) In the context of an affirmative defense as described above—one which raises an excuse or justification separate from the elements of the offense—"the burden of proving an exonerating fact may be imposed on a defendant." (*Salas*, *supra*, 37 Cal.4th at pp. 981-982; see also *Frye*, *supra*, 7 Cal.App.4th at pp. 1158-1159 [addressing "excuse or justification"].) But as used in this case, the mistake-of-fact instruction only needed to be supported by substantial evidence in the record. (*People v. Nelson* (2016) 1 Cal.5th 513, 542.) However that substantial evidence requirement might be described, the sense in which the instruction did *not* constitute an affirmative defense—that it bore on an element of burglary—is the one that is relevant here. Taking appellant's argument as a whole, respondent does not understand appellant's brief to suggest that this case implicates the unresolved issue identified in *Salas*.

mistake of fact, which disproves any criminal element." (Pen. Code, § 26.)

For example, a person who fires a gun believing it to be unloaded is entitled to rely on a mistake-of-fact defense in a murder case because he or she would lack the criminal intent required for murder. (*Jennings*, *supra*, 34 Cal.4th at p. 277, discussing *People v. Goodman* (1970) 8 Cal.App.3d 705, 709.) But the defense will not be available if the claimed mistake is irrelevant to the intent required for the offense. For example, a burglary defendant's claimed mistake about the residential or commercial nature of a building does not support a mistake-of-fact defense because the prosecution is not required to prove that the defendant knew what type of building it was. (*Jennings*, *supra*, 34 Cal.4th at p. 277, discussing *People v. Parker* (1985) 175 Cal.App.3d 818, 821-823.)[6]

When this more common type of mistake of fact, pertaining to an element of the charged offense, is conveyed to the jury, the instruction is properly understood as a "pinpoint." (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 873-874 [citing approvingly authority describing mistake of fact instruction as pinpoint].)

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[6] As already noted, *Jennings* involved a situation in which the alleged mistake of fact did not negate an element of the charged offense. In addressing that situation, the Court identified "public welfare offenses" as a category in which a mistake of fact might nonetheless be relevant to a more general requirement that the prosecution make "some showing of knowledge or criminal intent" to support the conviction. (*Jennings*, *supra*, 34 Cal.4th at pp. 277-280.) But burglary is not such an offense because it requires proof of a specific criminal intent as one of its elements. (*Id.* at p. 277.)

Pinpoint instructions "relate particular facts to an element of the charged offense and highlight or explain a theory of the defense." (*Nelson, supra,* 1 Cal.5th at p. 542.) Such an instruction need not be given on the court's own motion but only on request by the defendant, if supported by substantial evidence. (*Ibid.*; see also *Covarrubias*, *supra*, 1 Cal.5th at pp. 873-874.)

Here, it is apparent that the instruction in question, given on appellant's request, was a pinpoint. Appellant's argument was that, because he thought the house belonged to his cousin, he did not intend to "break in"—and, by implication, he did not intend to enter to commit theft but only to find his cousin. (See 5RT 259, 263.) The instruction specifically highlighted the facts relied on by appellant that related to the intent element of burglary, saying: "If you find that the defendant believed that 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." (4RT 210-212; 1CT 165.) Because the instruction related particular facts to an element of the charged offense in order to highlight appellant's defense theory, it was plainly—at least as given in this case—a pinpoint instruction. (See *Covarrubias, supra,* 1 Cal.5th at pp. 873-874; *Nelson*, *supra,* 1 Cal.5th at p. 542.)

Indeed, appellant's claimed mistake about the ownership of the house was not in itself directly determinative of any legal issue in the case. One may, after all, burgle the home of a relative. (See *People v. Pendleton* (1979) 25 Cal.3d 371, 382 [burglary occurs when defendant enters home which he did not

have unconditional possessory right to enter].) The mistake-of-fact instruction was only pertinent to the case because appellant made the further claim that his mistaken belief showed he did not possess the requisite intent for burglary. In that sense, his defense was no different from any other lack-of-intent claim, such as that he had entered the house to retrieve a lost pet. Considered in that light, it is even more clear that the instruction served as a pinpoint in tying a particular factual theory to the mental state element of burglary.

Under this Court's precedent, an erroneous pinpoint instruction is evaluated under *Watson*. In *People v. Pearson* (2012) 53 Cal.4th 306, the jury was informed by way of a pinpoint instruction that voluntary intoxication could serve as a defense to several of the specific-intent charges in that case, but erroneously omitted reference of its application to the specific-intent charge of torture. (*Id.* at p. 325.) This Court reiterated the principle that while "a trial court has no sua sponte duty to give a 'pinpoint' instruction on the relevance of evidence of voluntary intoxication, 'when it does choose to instruct, it must do so correctly.'" (*Ibid.*, quoting *People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) Evaluating harmlessness, this Court stated that it would "apply the 'reasonable probability' test of prejudice to the court's failure to give a legally correct pinpoint instruction." (*Ibid.*) The Court also rejected the appellant's due process argument, stating in a footnote, "The failure to give a fully inclusive pinpoint instruction on voluntary intoxication did not, contrary to defendant's contention, deprive him of his federal fair trial right or

unconstitutionally lessen the prosecution's burden of proof." (*Id.* at p. 325, fn. 9.)

This Court's decision in *People v. Molano* (2019) 7 Cal.5th 620 is also instructive. In *Molano*, the defendant claimed that the trial court should have instructed his jury on a variation of the "*Mayberry* defense," that a reasonable, good faith belief in consent disproves specific intent to rape. He claimed that a good faith but *unreasonable* mistake of fact as to consent would preclude liability for rape felony murder and the rape-murder special circumstance. (*Id.* at p. 666-667, discussing *Mayberry, supra*, 15 Cal.3d 143.) Similar to this case, the elements of rape there were correctly defined. And similar to the problem appellant identifies in the instructions here, the overall effect of the instructions in *Molano*, without the defendant's proposed mistake-of-fact instruction, was to leave the jury with an existing rape-defining instruction (CALCRIM 1000) that required acquittal if there was a *reasonable* and good faith belief that the victim had consented. (*Molano, supra*, 7 Cal.5th at pp. 666-667.)

Without deciding whether the proposed instruction conveyed the correct law, the Court proceeded to harmless error analysis, observing that "'[e]rror in failing to instruct on the mistake-of-fact defense is subject to the harmless error test set forth in *People v. Watson* … .'" (*Molano, supra*, 7 Cal.5th at pp. 669-670.) The Court determined that there was no reasonable probability of a different outcome in light of "the strength of the prosecution's case and the lack of evidence or argument supporting defendant's belatedly advanced theory of mistake of fact." (*Id.* at pp. 670-

672.) Like in *Pearson*, the Court in *Molano* also rejected the defendant's argument that the instructional error violated due process. It explained that "[b]ecause defendant was allowed to present the defense he chose, followed by jury instructions he agreed to, he was not denied due process by being deprived of the opportunity to present a complete defense." (*Id.* at p. 672.)

The error in *Molano* resulted from a failure to instruct rather than from erroneous language in a given instruction. Nonetheless, the instructions in *Molano* ran a risk, similar to the instruction in this case, of requiring the jury to determine that a subjective mental state was objectively reasonable where it did not have to do so. Indeed, the alleged error in *Molano* was arguably even more pronounced than the one in this case since the challenged reasonableness language and the elements of the charged offense were contained in a single instruction.

The decision in *People v. Jackson* (1989) 49 Cal.3d 1170 is also on point. There, the trial court erred in its instruction on intoxication by referring to an already-abolished diminished capacity theory and hinging evaluation of the specific intent element on whether the "defendant was capable of forming such specific intent" rather than "whether defendant formed" the specific intent. (*Id.* at 1196.) Although not directly labeled as such by this Court in *Jackson*, the instruction there concerned a theory aimed at negating the intent element, and was thus functionally a pinpoint instruction. (See *Pearson*, *supra*, 53 Cal.4th at p. 325 [describing voluntary intoxication instruction as a pinpoint].) This Court determined that the instructional error

was harmless under *Watson*, noting, "the jury was otherwise instructed that the prosecution had the burden of proving all the elements of the crime and that the jury was required to find beyond a reasonable doubt that defendant possessed the necessary mental states required in the crime of murder." (*Jackson*, *supra*, 49 Cal.3d at pp. 1195-1996.)

Here, the jury was instructed that the prosecution had to prove all the elements of the crime, which included the requirement of a specific intent to steal. (1CT 143, 149, 162.) There is no dispute that those instructions were correct. The mistake-of-fact instruction, which related the facts of the case relied on by appellant to an element of the crime, was a pinpoint instruction that is reviewed for harmlessness under *Watson*, just as in the foregoing cases.

4. The instructional error here was unlike the errors in other cases addressing misinstruction on an element

Appellant argues, however, that the error in this case amounted to misinstruction on an element of the offense, citing *People v. Wilkins* (2013) 56 Cal.4th 333, 348. (OBM 22.) The dissenting opinion below employed similar reasoning, citing *People v. Hudson* (2006) 38 Cal.4th 1002, 1013. That view is incorrect. The erroneous instruction on a pinpoint theory of the defense in this case was separate from the correct element-defining instruction. It instead concerned how the jury was to evaluate particular facts relied upon by the defense, a matter that does not implicate any federal constitutional concern and is

therefore evaluated for harmlessness under *Watson*. The element-misinstruction cases are different.

A pinpoint instruction, by definition, "relates" certain facts of the case to an element of the charged offense (*Nelson*, *supra*, 1 Cal.5th at p. 542), and therefore will bear on the jury's evaluation of whether that element has been satisfied. But that does not mean that an erroneous pinpoint instruction necessarily amounts to misinstruction on an element. There is no dispute in this case that the jury was fully and correctly instructed that burglary required an intent to commit theft (5RT 229; 1CT 162) and the instruction on theft, in turn, fully and correctly informed the jury that it needed to find an intent to permanently deprive the owner of his property (1CT 167).

The erroneous mistake-of-fact instruction told the jury that it had to acquit appellant if it accepted "that the defendant believed that that defendant's cousin Trevor resided at the home and if [it found] that belief was reasonable." (4RT 210-212; 1CT 165.) As a matter of facial logic, however, this was incorrect in a way that benefitted appellant. The jury did *not* have to acquit on that basis because appellant could have nonetheless burgled his own cousin's home. (See *ante*, fn. 7.) The jury had to acquit only if it believed appellant did not have the intent to steal when he entered the house. And the instructions in that regard were correct. (1CT 162 [CALCRIM 1700, requiring that defendant "intended to commit threft"]; 1CT 167 [CALCRIM 1800, defining theft to require intent to "deprive the owner of [property] permanently"].) Moreover, the jury was entitled to consider

reasonableness in assessing his claimed mistake for good faith, so the instruction was correct in allowing it to do so. (*Watt, supra,* 229 Cal.App.4th at p. 1218.) Taken as a whole, the jury charge did not prohibit the jury from acquitting appellant by simply applying the offense-defining instructions and concluding that he did not intend to steal, regardless of whose house it was.

To the extent there was error, it was in the instruction's *implicit* suggestion that appellant's claim that he did not intend to steal had to be objectively reasonable. (See Argument I. A., *ante*.) In this regard, the instruction focused on the jury's assessment of the facts concerning appellant's defense theory; it did not purport to inform the jury on the legal requirements of the intent-to-steal element. Inasmuch as the instruction told the jury to assess appellant's factual theory for reasonableness, it was analogous to other similar instructions on the evaluation of evidence, which typically implicate state law only and are assessed for prejudice under *Watson*. (See, e.g., *People v. Diaz* (2015) 60 Cal.4th 1176, 1195-1197 [failure to give instruction that jury should view certain evidence with caution]; *People v. Lucas* (2014) 60 Cal.4th 153, 289 [failure to instruct jury to view immunity agreement as potential source of bias]; *People v. Jones* (2012) 54 Cal.4th 1, 53 [failure to specify which prior crimes were admitted for limited purpose of showing intent]; *People v. Gonzalez and Soliz* (2011) 52 Cal.4th 254, 304 [uncorroborated accomplice testimony]; *People v. Lewis* (2001) 26 Cal.4th 334, 371 [failure to instruct the jury to view witness' testimony with

distrust]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1099-1100 [failure to give limiting instruction about impeaching priors].)

All such erroneous instructions could be said, in some sense, to lower the prosecution's burden of proving the charged crime by improperly telling the jury to give certain evidence more or less weight. But where the jury is otherwise correctly instructed on the elements of the charged offenses, instructions about assessing the evidence are not typically seen as implicating any federal constitution principle. As this Court has stated, "Mere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution." (*People v. Carpenter* (1997) 15 Cal.4th 312, 393, abrogated on other grounds by *Diaz*, *supra*, 60 Cal.4th at pp. 1185-1186.)

The decisions in *Wilkins* and *Hudson* are distinguishable. In *Wilkins*, the defendant was convicted of felony murder after a stove he stole in a burglary fell out of his truck and killed someone 62 miles away from the burglarized house. (*Wilkins*, *supra*, 56 Cal.4th at p. 337.) This Court held that the trial court erred in not instructing the jury on the escape rule, which in a single-defendant case demarcates the point when the underlying felony is completed, after which any death that occurs will fall outside the scope of the felony-murder rule. (*Id.* at p. 342-345.) The Court in *Wilkins* concluded that the failure to give an instruction on the escape rule was not a mere failure to give a pinpoint instruction. It reasoned that, without the missing instruction, the existing instruction on the continuous

transaction theory, providing that "the duration of felony-murder liability … may extend beyond the termination of the felony itself, provided that the felony and the act resulting in death constitute one continuous transaction," allowed the jury to improperly find the defendant guilty for a death that occurred after he had reached a place of temporary safety. (*Id.* at pp. 349-350.)

Wilkins thus involved an incomplete instruction on the requirements of an element of the charged offense, which, left unsupplemented, inevitably would lead a jury to an erroneous determination. That is not true here, where the elements were fully and correctly instructed upon and the erroneous language in the separate mistake-of-fact instruction did not purport to define the mental state element of burglary or offer the exclusive way of negating that element. Indeed, the *Wilkins* court's characterization of the error as one of misinstruction on an element was based on whether a jury, believing the defense's factual account, would have "no reason to conclude that he or she must find the defendant not guilty of" the charged crime. (*Wilkins*, *supra*, 56 Cal.4th at pp. 349-350.) In other words, it monopolized the route by which the jury could determine the element at issue. The jury was not so constrained here.

The erroneous instruction in *Hudson* was likewise different in nature from the one in this case. There, as to the charge of evading an officer, the trial court modified the element-defining instruction itself and advised the jury that the technical requirement that the police car be "distinctively marked" could be

satisfied by the car's "red light and siren." (*Hudson*, *supra*, 38 Cal.4th at p. 1007.) Such a charge is contrary to the statutory requirement that the pursuing car bear more distinguishing physical features than a red light and a siren. (*Id.* at p. 1013.) This Court therefore held that the incorrect definition of the statutory requirement amounted to a "misinstruction on an element of the offense," requiring *Chapman* analysis. (*Id.* at pp. 1013-1034.)

The problem in *Hudson* was that the erroneous offense-defining instruction "allowed the jury to determine that the pursuing police car was distinctively marked based only on its red light and siren," thus omitting an element of the offense. (*Hudson*, *supra*, 38 Cal.4th at pp. 1013-1014.) This error arose from the fact that the element there, that the car be "distinctively marked," carries a particular legal meaning that differs from its nonlegal meaning. (*Id.* at pp. 1012-1013.) Because the erroneous language monopolized the method by which the jury could determine the particular element, the instruction amounted to misdefinition of an element. Again, however, the jury in this case was not misled about the intent element of burglary or constrained in its application.

Unlike the instructions in *Wilkins* and *Hudson*, the mistake-of-fact pinpoint instruction here focused on the evaluation of particular evidence in the case without qualifying or modifying the separate and correct instruction on the legal elements of burglary. Even if the instruction incorrectly suggested to the jury how it should weigh the evidence in relation to the intent element

of burglary, that sort of defect implicates state law only. Like in *Pearson*, *Molano*, and *Jackson*, the incorrect instruction telling the jury how to assess certain facts that were relevant to an element of the charged offense is assessed for prejudice under *Watson*.[7]

II. IN ANY EVENT, THE INSTRUCTIONAL ERROR WAS HARMLESS UNDER EITHER *WATSON* OR *CHAPMAN*

Regardless of which harmlessness standard applies, though, the erroneous instruction was not prejudicial in this case.

Under *Watson*, a conviction may be reversed "only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred." (*Breverman, supra*, 19 Cal.4th at p. 178.)

> Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, 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 the error of which the defendant complains affected the result.

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[7] Appellant does not make a separate claim that the erroneous instruction violated due process. Such a claim would be unavailing, since appellant was able to fully mount his defense and argue for acquittal under the correct burglary-defining instructions, including on the basis that he lacked an intent to steal. (See *Molano*, *supra*, 7 Cal.5th at p. 672; *Pearson*, *supra*, 53 Cal.4th at p. 325, fn. 9; see also *Carpenter*, *supra*, 15 Cal.4th at p. 393.)

(*Id.* at p. 177, italics in original.)

Under *Chapman*, reversal is required "unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, [the reviewing court] determines the error was harmless beyond a reasonable doubt." (*Aledamat*, *supra*, 8 Cal.5th at p. 13.) In deciding whether a trial court's misinstruction on an element of an offense is prejudicial, this Court has articulated the *Chapman* test as asking whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Hudson*, *supra*, 38 Cal.4th at p. 1013.) "To say that an error did not contribute to the verdict is … to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*People v. Harris* (1994) 9 Cal.4th 407, 426.) In this analysis, if the relevant factual issue could "reasonably have been decided either way" by a "reasonable fact finder," then the error was not harmless beyond a reasonable doubt. (See *Wilkins*, *supra*, 56 Cal.4th at p. 350.)

As a necessary starting point, the nature of the instructional error at issue here was quite narrow and unlikely to have made much practical difference, if any, to the jury's deliberations. Appellant's claimed mistake of fact was that he was at his cousin's house. The jury was told that it had to acquit if it determined this mistake was reasonable. But in fact, the jury only had to acquit if it found that appellant did not actually possess an intent to steal—a different question. (See *ante*, Argument I. B. 4.) As to that relevant legal question, the jury

was not directly told that it had to determine that appellant's mental state was objectively reasonable. The error was only that the instruction might have suggested as much.

As noted, a jury is entitled to assess whether a claimed mistake of fact was made in good faith, and in doing so it may consider the reasonableness of the mistake. (*Watt*, *supra*, 229 Cal.App.4th at p. 1218; *Navarro*, *supra*, 99 Cal.App.3d Supp. at p. 11.) Thus, the jury in analyzing the evidence here could properly consider the reasonableness of appellant's story insofar as it bore on whether he made the mistake in good faith; it was simply not permitted to apply a standard of objective reasonableness to the ultimate question whether appellant harbored an intent to steal. (See *Watt*, *supra*, 229 Cal.App.4th at p. 1218; *Navarro*, *supra*, 99 Cal.App.3d Supp. at p. 11.) Since, under the circumstances in this case, the focus of appellant's mistake-of-fact defense was on appellant's claimed mistake about ownership of the house, the jury would most naturally, and properly, have considered reasonableness in relation to that particular mistake. It is unlikely that it would have made the further impermissible inference from the instruction that the required mental state of intent to commit theft had to be evaluated from the standpoint of a reasonable person. Neither the instructional language nor the arguments of counsel particularly pointed the jury in that direction. Indeed, defense counsel focused particularly on the instructional language that benefitted appellant, telling the jury that it had to acquit if it accepted his mistake about ownership of the house as reasonable. (5RT 263.) Neither counsel suggested

that the specific intent requirement of burglary was subject to an objective reasonableness standard.

With that in mind, the evidence before the jury was such that the instructional error was harmless even under the beyond-a-reasonable doubt standard.

Appellant's claimed mistake was critically undermined by other evidence in the case. He asked his mother in a recorded phone call from jail to help him manufacture witness testimony consistent with his story, and he did not deny it when his mother accused him of trying to solicit lies. (SCT 300 [appellant's mother: "I ain't getting nobody caught up or doing any type of drama or lying"; appellant, in response: "Well, can you give me Luis's phone number?"].) Indeed, the witness that appellant initially asked his mother to contact was Desmond. (SCT 298.) But when his mother refused, appellant simply decided to ask a different friend, Luis, to say he was the person who gave him the wrong address. (SCT 300.) Further, when appellant's uncle asked in another telephone conversation why appellant tried breaking into Tuano's house, he did not reply that he thought it was Trevor's house. He simply said he did not know. (SCT 302.) This evidence strongly showed that appellant's story that he believed he was trying to get into his cousin's house was fabricated. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 101-103 [proper to instruct jury that attempt to procure false evidence may be considered consciousness of guilt]; see also CALCRIM 371; CALJIC 2.04.) In addition, appellant had a prior

theft conviction that was admitted to show intent and absence of mistake. (CT 161.)

Appellant points out that he was sitting in the back yard when apprehended, there was no evidence he possessed burglary tools, and he did not attempt to flee. (OBM 24.) Absent the evidence discussed above, it is true that appellant's behavior in some respects could be seen as consistent with the mistake-of-fact theory. But in light of the fabrication attempts, appellant's tacit admission to burglary, and his prior theft conviction, the evidentiary picture is quite different.

The prosecutor noted that surveillance video showed that appellant walked back and forth in front of the residence waiting for pedestrians (including a jogger) to leave the area. (5RT 242.) It was only after they left that appellant approached the residence. (5RT 242.) It is apparent that his knocking and ringing at the front door under those circumstances was an effort to ascertain whether the house was occupied. (See 5RT 242 ["That behavior gives him an opportunity to know if someone is in the house, for someone to come to the door, at which point he can make whatever statements to them he would like and he can abandon efforts of burglary because it's much harder to break into a house to steal something if there's someone there to stop you"].)

Similarly, appellant's remaining in the back yard after unsuccessfully attempting to gain entry was consistent, in light of the rest of the evidence, with his contemplating other methods of entry. (5RT 238 ["I think the evidence in this case is that the

defendant had satisfied himself that there weren't" people inside the house]; 5RT 254 ["He sits and waits and considers his next steps outside the house"].) And his lack of flight when officers arrived is simply inconclusive. (See *People v. Green* (1980) 27 Cal.3d 1, 37, 39 [a defendant's lack of flight may be explained by any number of plausible reasons, thus an instruction on that point would invite speculation]; see also *People v. Staten* (2000) 24 Cal.4th 434, 459; *People v. Williams* (1997) 55 Cal.App.4th 648, 652.)

Appellant also highlights that he told officers at the scene that he was trying to visit his cousin, and that his cousin in fact lived nearby. (OBM 24.) But the explanation itself was in considerable tension with appellant's actual behavior. He told police that a friend had informed him that his cousin Trevor had moved and had given appellant the location of the burglary as Trevor's new address. If appellant knew his cousin well enough to try to enter his locked house, however, it would be odd, at the least, that he did not know he had moved and did not have his new address.

The speculation of the dissent below, that appellant's solicitation of perjury may have been a desperate attempt to get out of custody, is beside the point, as it merely suggests appellant had a particular motive to exonerate himself, whether or not the means of exoneration were honest. (Dis. Opn. 2.) The relevant point is that recorded calls show that his mistake story was *not* an honest one. Indeed, even the dissent appears to accept that appellant asked his mother "to lie for him." (Dis. Opn. 2.)

Similarly, the dissent's observation that appellant had "a history of mental illness" (Dis. Opn. 1), is of little relevance. No evidence of that history was before the jury and it therefore could not have influenced the jury's verdict. Moreover, the existence of any mental issue has little bearing on the truth or falsity of appellant's asserted mistake of fact. His behavior was consistent with burglary, for the reasons already elaborated. And in fact, a mental problem could very well explain such things as why appellant would have tried to break into the house in the first place and why he sat in the back yard without fleeing. So the point may in fact cut against appellant.

Nor can much weight be attributed to the fact that the jury had at one point declared a deadlock. (See OBM 29.) The record showed that the jury reported that deadlock only two and half hours into deliberations. (5RT 283-284.) It returned a verdict not long after being instructed to continue deliberating, and after receiving a readback of the arresting officer's testimony. (5RT 283-284; 6RT 304; 7RT 314-315; 1CT 187.) It is speculative to make any inference one way or another from these facts. The reason for the initial declaration of a deadlock is far from clear, and the jury did not ask any question specifically bearing on the mistake-of-fact instruction.

On the record in this case, and considering the particular error at issue, there can be no reasonable doubt that the incorrect mistake-of-fact instruction did not contribute to the verdict. Giving the instruction its most natural reading, it is overwhelmingly likely that the jury found that appellant's

asserted mistake—that he believed he was at his cousin's house—was not reasonable and in good faith, which was a permissible conclusion. Given that, there is no reasonable doubt that the verdict would have been the same whether or not the jury understood, incorrectly, that the intent-to-steal requirement itself was subject to an objective reasonableness standard.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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July 21, 2021

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13-point Century Schoolbook font and contains **10,000** words.

ROB BONTA
Attorney General of California

JOHN YANG
Deputy Attorney General
Attorneys for Plaintiff and Respondent

July 21, 2021

LA2021600360

DECLARATION OF SERVICE

Case Name: **People v. Hendrix**

No.: **S265668**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 21, 2021, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

The Honorable Paul W. Baelly
Ventura County Superior Court
Hall of Justice
800 S. Victoria Avenue
Department 27
Ventura, CA 93006

On **July 21, 2021**, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.:

Adrian Dresel-Velasquez, Esq
Counsel for appellant Isaiah Hendrix
Served Via TrueFiling

Rafael Orellana
Deputy District Attorney
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CAP - LA
California Appellate Project (LA)**Served Via TrueFiling**

On July 21, 2021, I placed one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be served electronically on the California Court of Appeal by using the Court's Electronic Service Document Submission system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 21, 2021, at Los Angeles, California.

S. Hubbard	***/s/ S. Hubbard***
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. HENDRIX**
Case Number: **S265668**
Lower Court Case Number: **B298952**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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Date

/s/Shoshana Hubbard
Signature

Yang, John (192938)
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