In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JONIS CENTENO,

Defendant and Appellant.

Case No. S209957

Appellate District Division Two, Case No. FVA801798
San Bernardino County Superior Court, Case No. E054600
The Honorable Cara D. Hutson, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

ISSUE PRESENTED

Did the prosecutor commit misconduct during closing argument by misstating the state's burden of proof?

INTRODUCTION

Appellant claims the prosecutor committed misconduct during closing argument by misstating the burden of proof. He has forfeited a claim of prosecutorial misconduct and may only obtain relief if defense counsel was ineffective for failing to object to the complained of remarks. Those remarks, however, were not objectionable. The prosecutor's assertion that a decision could be reached in the face of conflicting and incomplete information, and that reasonable doubt does not include unreasonable possibilities, did not misstate the burden of proof. Even if the statements were technically objectionable, the record does not preclude a rational tactical explanation for the lack of objection. Because counsel was not asked to explain his actions, appellant's judgment must be affirmed. Furthermore, any assumed deficiency was not prejudicial because, in light of the trial court's instructions and state of the evidence, the prosecutor's brief comment on the burden of proof cannot have influenced the jury's verdict.

STATEMENT OF THE CASE

A San Bernardino Superior Court jury found appellant guilty of two counts of committing a lewd act on a child under 14 years of age (counts 1 & 2; Pen. Code § 288, subd. (a)) and one count of child molestation (count 3; Pen. Code § 647.6, subd. (a)(1)). (1 CT 173-175.) The trial court sentenced appellant to a total term of five years in prison. (2 CT 310.)

Appellant made several unsuccessful claims on appeal. Relevant here is his claim that the prosecutor misstated the burden of proof during her rebuttal argument and that his trial counsel was ineffective for failing to

object. The Court of Appeal found that a claim of prosecutorial misconduct had been forfeited. It also found that the complained of statements did not constitute misconduct because they were not a misstatement of law. Consequently, the court rejected appellant's ineffective assistance of counsel claim. (Slip. Op. at p. 13.)

This Court granted appellant's petition for review.

STATEMENT OF FACTS

Prosecution evidence

Appellant lived in his paternal aunt's (Esmirita Centeno) garage, which was partitioned into two sections. (1 RT 122, 149.) Augustin Rosal and his two children, seven-year-old Jane Doe and four-year-old Jese, were renting the other half of the garage. (1 RT 122, 149.) One day, Rosal walked by appellant's room and saw appellant laying on top of his daughter. (2 RT 238.) Appellant quickly jumped off Doe when Rosal walked in. (2 RT 238.) Rosal spoke with Esmirita and they agreed that appellant would stay away from Rosal's children. (2 RT 238-239.)

Shortly thereafter, San Bernardino Sheriff's deputies responded to an anonymous report that appellant had sexually assaulted Doe. (2 RT 235.) After Rosal told them that he had seen appellant laying on top of Doe, the deputies went to Doe's school and spoke with her. (2 RT 238, 240-241.) At a forensic interview, Doe said that appellant had rubbed himself on her on several occasions. (2 CT 375, 377.) Appellant had exposed himself on one such occasion. (2 CT 379, 387.)

Rosal moved his family out of Esmirita's house. (1 RT 123.) He received monetary assistance from the congregation of his church, where appellant's father was a pastor. (1 RT 125-126.) Appellant's father also gave Rosal rides to and from court because Rosal was unable to drive. (1 RT 127-128.)

At trial, Rosal denied having seen anything sexual. (1 RT 129.) He said appellant and his daughter were wrestling over a ball and that he only moved out of the house because he was concerned about his children bothering the other men in the house. (1 RT 129, 138.) Initially reluctant to speak, Doe testified that appellant had twice rubbed himself on her, exposing himself one of the times. (2 RT 196, 212, 217.)

Defense evidence

Appellant's father denied speaking with Rosal about the case or dissuading him from cooperating with the prosecution. (2 RT 361-363.) Called by appellant, Rosal reiterated the fact that he moved out of Esmirita's house because he was upset that his children were going into other people's bedrooms. (2 RT 378.) He further testified that he receives money from the county and is not supported by appellant's father's church. (2 RT 383.)

Esmerita testified that Rosal told her he was moving because his children were going into the rooms of other men. (2 RT 387) He never said anything about appellant touching his daughter. (2 RT 391.)

Elba Robledo was a neighbor and friend of appellant's. (2 RT 397.) When asked, she said she would trust appellant with her five year old daughter. (2 RT 398.) This was because she had seen appellant playing with her daughter and had never seen him do anything inappropriate. (2 RT 398.) Robledo's daughter had never complained of being molested by appellant. (2 RT 399.)

Appellant testified on his own behalf. (2 RT 418.) He denied molesting Doe. (3 RT 476-478.) He said he was doing pushups when Rosal's children came in chasing a ball. (2 RT 424-425.) He and the children played with the ball until Rosal walked by the room, at which time the children left and he resumed doing pushups. (2 RT 425-427.)

ARGUMENT

Appellant claims the prosecutor committed misconduct during closing argument by misstating the burden of proof in five respects. (OBOM 2-3.) Because he failed to object at trial, he has forfeited a claim of prosecutorial misconduct. Appellant's related ineffective assistance of counsel claim also fails because each of his five assertions is without merit.

First, appellant argues the prosecutor's use of a "flawed iconic image" undermined the presumption of innocence as the starting point from which the prosecution was required to prove appellant's guilt because it encouraged the jury to jump to an immediate conclusion and to address the evidence from that starting point. (OBOM 2.) The image, however, was not used in a manner that encouraged the jury to guess at identification. Just the opposite, the prosecutor told the jury that the image represented California and argued that the existence of inaccurate and incomplete information did not preclude a finding of guilt beyond a reasonable doubt.

Second, appellant argues the prosecutor's remark that the jury's decision had to be "in the middle" improperly quantified the burden of proof. (OBOM 2.) Appellant takes this phrase out of context. The prosecutor was taking about a range of possibilities that included impossible and unreasonable. There is no reasonable possibility that the jury would have understood the prosecutor's remarks as a quantification of the burden of proof.

Third, appellant claims that "[t]he prosecutor's argument that 'with reasonable doubt, you need to accept the reasonable and reject the unreasonable' and that its decision 'in the middle' between the impossible and the reasonable 'has to be based on reason. It has to be a reasonable account,' suggested the jury could convict if it merely believed it 'reasonable' that [appellant] committed the charged offenses, while still having a reasonable doubt as to guilt." (OBOM 3.) Appellant reads these

remarks out of context and, in so doing, misconstrues them. The prosecutor properly told the jury to limit its consideration to reasonable possibilities. She removed the possibility of any misunderstanding by urging the jury to "look at the entire picture to determine if the case has been proven beyond a reasonable doubt." (3 RT 616.)

Fourth, appellant argues that the prosecutor "confused reasonable doubt with the rules for considering circumstantial evidence" by "[t]elling the jury it had to 'reject the unreasonable and accept the reasonable[.]'" (OBOM 3) This Court has rejected arguments that the phrase, contained in jury instructions discussing circumstantial evidence, implies that a jury should convict so long as the prosecution's theory is reasonable. This is because it is correct for the jury to limit its consideration to reasonable possibilities so long as the jury is properly told how to weigh those possibilities, which it was here.

Finally, appellant argues that the Court of Appeal erred in concluding that the challenged remarks were ineloquent redundancies of correct instructions. (OBOM 3.) As noted above, and as shall be demonstrated, none of the prosecutor's remarks was an objectionable misstatement of law. Even if they were technically objectionable, the record does not preclude a reasonable explanation for the lack of objection. Nor does the record support a finding of prejudice. Accordingly, the judgment must be affirmed.

I. THE CHALLENGED REMARKS

The prosecutor began her rebuttal argument by discussing reasonable doubt. Although he did not object below, appellant now challenges the following remarks, focusing on the emphasized portions:

> All right. [defense counsel] spoke quite a bit about reasonable doubt. Basically, *with reasonable doubt, you need to accept the reasonable and reject the unreasonable*, and your decision cannot be based on sympathy, prejudice, or speculation. It has to be based on the evidence in this case.

Now, [defense counsel] said there is missing evidence so, therefore, there is reasonable doubt. You can't possibly make a decision because there is missing evidence, and the only missing evidence he is referring to is an interview with Jane Doe at the school.

Let me give you a hypothetical. Suppose for me that there is a trial, and in a criminal trial, the issue is what state is this that is on the Elmo. Say you have one witness that comes in and this witness says, hey, I have been to that state, and right next to this state there is a great place where you can go gamble, and have fun, and lose your money. The second witness comes in and says, I have been to this state as well, and there is this great town, it is kind of like on the water, it has got cable cars, a beautiful bridge, and it is call Fran-something, but it is a great little town. You have another witness that comes in and says, I have been to that sate, I went to Los Angeles, I went to Hollywood, I saw the Hollywood sign, I saw the Walk of Fame, I put my hands in Clark Gable's handprints in the cement. You have a fourth witness who comes in and says, I have been to that state.

What you have is you have incomplete information, accurate information, wrong information, San Diego in the north of the state, and missing information, San Bernardino has not even been talked about, *but is there a reasonable doubt that this is California*? No. You can have missing evidence, you can have questions, you can have inaccurate information and still reach a decision beyond a reasonable doubt. *What you are looking at when you are looking at reasonable doubt is you are looking at a world of possibilities.* There is the impossible, which you must reject, the impossible but unreasonable, which you must also reject, and the reasonable possibilities, and *your decision has to be in the middle. It has to be based on reason.* It has to be a reasonable account. And make no mistake about it, we talked about this in jury selection, you need to look at the entire picture, not one piece of evidence, not one witness. You don't want to look at the tree and ignore the forest. You look at the entire picture to determine if the case has been proven beyond a reasonable doubt.

(3 RT 614-616.)

II. APPELLANT FORFEITED HIS PROSECUTORIAL MISCONDUCT CLAIM

As the above quotation of the of the prosecutor's argument shows, appellant failed to object to the statements he now contends constitute misconduct. His clam of prosecutorial misconduct has therefore been forfeited.

"It is settled that, following a jury trial, a claim of [prosecutorial] misconduct is not cognizable on appeal absent a timely objection if an objection and admonition would have cured the harm." (*People v. Scott* (1997) 15 Cal.4th 1188, 1217.) A defendant's failure to object and request an admonition is excused only when 'an objection would have been futile or an admonition ineffective.' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 679.) 726-727.) A trial court does not have "an independent duty to remedy unobjected-to prosecutorial misconduct[.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 298; *People v. Fuiava, supra,* 53 Cal.4th at p. 681; *See also People v. Ervine* (2009) 47 Cal.4th 745, 806-807.)

"The objection requirement is necessary in criminal cases because 'a contrary rule would deprive the People of the opportunity to cure the defect at trial and would "permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal."' [Citation.]" (*People v. Partida* (2005) 37 Cal.4th 428; *See also In re Seaton* (2004) 34 Cal.4th 193, 198-199 ["[D]efense may have reason to expect that the prosecution's evidence will be weaker because of the death of witnesses, fading of memories, or loss of physical evidence in a second trial after an appellate reversal."].)

In *People v. Hill* (1998) 17 Cal.4th 800 [overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13], the court cited "unusual circumstances" in excusing the defendant's failure to object to prosecutorial misconduct. (*Id.* at 821.) In that case, which involved

numerous instances of misconduct, defense counsel was faced with the dilemma of either allowing the prosecutor to prejudice his client through improper argument or prejudice his client himself by objecting and "provoking the trial court's wrath, which took the form of comments before the jury suggesting [he] was an obstructionist[.]" (*Ibid.*)

Here, in contrast to *Hill*, there were no "unusual circumstances" at play. In fact, the record establishes that counsel was willing and able to object; he did so to a later portion of the prosecutor's rebuttal. (3 RT 618.) And, as the Court of Appeal noted, the trial court's response – listening to the basis for the objection and explaining its reason for overruling the objection – shows that the court was willing to entertain objection during closing argument. Thus, the lack of objection here is not the product of a hostile courtroom and appellant's forfeiture of the issue should not be excused.

Nor can it be said that an admonition would have failed to cure the purported harm. In *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, and *People v. Otero* (2012) 210 Cal.App.4th 865, the two cases appellant primarily relies upon, the misconduct at issue was cured by admonition. Assuming the same type of misconduct occurred here, there is no reason to believe that it would not have also been cured by an admonition. Appellant's claim of prosecutorial misconduct, therefore, has been forfeited. Ineffective assistance of counsel is his only avenue for relief.

Appellant apparently agrees as he does not argue the claim was preserved, instead maintaining that his trial counsel was ineffective. (OBOM 58.) As to this assertion, appellant is mistaken.

III. APPELLANT HAS NOT ESTABLISHED THAT DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT OR THAT ANY PREJUDICE RESULTED FROM THIS ALLEGED DEFICIENCY

As stated, appellant makes five claims of error. Two of his claims involve the prosecutor's use of a demonstrative aid. Two of his claims involve the prosecutor's discussion of reasonable versus unreasonable possibilities. And fifth claim is a general assertion that the Court of Appeal incorrectly characterized the prosecutor's argument. None of these assertions is sufficient to carry appellant's burden of establishing ineffective assistance of counsel. As shall be demonstrated, none of the prosecutor's remarks was objectionable. Even if they were, appellant cannot establish deficient performance and prejudice. The record does not preclude a reasonable explanation for the lack of objection. Nor does it support a finding that appellant would have received a more favorable outcome had defense counsel objected to the complained of remarks.

In order to prevail on a claim of ineffective assistance of counsel, appellant must establish both that counsel's performance was deficient and that the deficiency prejudiced him. (*Strickland v. Washington* (1984) 466 U.S. 688 [104 S.Ct. 2052, 80 L.Ed.2d 67]; *People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) Deficient performance is defined as " 'errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment.' [Citation.]" (*Harrington v. Richter* (2011) 562 U.S. __ [131 S.Ct. 770, 787, 178 L.Ed.2d 624].) Prejudice means that it is reasonably probable appellant would have received a more favorable outcome had the deficient act or omission not occurred. (*Id.* at p. 787-788.)

"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation] and there is a 'strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance.' [Citation.]" (*People v. Lucas, supra*, 12 Cal.4th at pp. 436-437.)

A. The prosecutor did not misstate the burden of proof when she used a demonstrative aid to analogize the state of evidence at the conclusion of trial

Appellant claims the prosecutor undermined the burden of proof by using a demonstrative aid depicting a "flawed iconic image." (OBOM 2, 26.) He argues the error was compounded by the prosecutor's remark to the jury that its decision had to be "in the middle." (OBOM 2, 26.) This he says, added an element of quantification to the image. These claims are unmeritorious because the prosecutor told the jury what the image depicted and thus the jury was not encouraged to guess at anything. The complained of "in the middle" remark was not made in reference to the image and therefore cannot have added an element of quantification to it. As the Court of Appeal found, that remark, when viewed in the appropriate context, was a correct assertion that the prosecutor had to prove guilt beyond a reasonable doubt, not beyond an unreasonable doubt.

"[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation]." (*People v. Marshall* (1996) 13 Cal.4th 799, 831.) A prosecutor's remarks to the jury are inappropriate when there is a "'reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.'" (*People v. Brown* (2003) 31 Cal.4th 518, 553.) But a reviewing court does not lightly infer "'that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*Id.* at 554.)

Penal Code section 1096 provides a definition of reasonable doubt that a court may use in instructing the jury. "It is not a mere possible doubt;

because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (Pen. Code § 1096.)

Aside from the statutory definition, this Court has generally discouraged prosecutors from expounding upon reasonable doubt. (*People v. Medina* (1995) 11 Cal.4h 694, 745.) It has not, however, deemed all such attempts misconduct. In *People v. Anderson* (1990) 52 Cal.3d 453, for example, "[t]he prosecutor used a baseball analogy in describing the state's burden of proof[.]" Specifically, the prosecutor argued "just as a tie 'goes to the runner' in baseball, an 'evidentiary tie' in a criminal case benefits the defendant." (*Id* at p. 472.) *Anderson* claimed the statement could be construed to mean that a "defendant would prevail only if the evidence were closely balanced ('tied'), but would lose, despite reasonable doubt, if the prosecution's case slightly outweighed the defense." (*Ibid.*) This Court viewed the analogy in context and found no misconduct because the prosecutor was making the legally accurate observation "that conflicting testimony and inference must be resolved in defendant's favor." (*Ibid.*)

Conversely, this Court found misconduct where a prosecutor's argument implied that the defendant had to establish a possibility of innocence. (*People v. Hill, supra*, 17 Cal.4th at p. 831.) In *Hill*, the prosecutor, while discussing reasonable doubt, argued, " 'it must be reasonable. It's not all possible doubt. Actually, very simply, it means, you know, you have to have a reason for this doubt. *There has to be some evidence on which to base a doubt.*' " (*Hill*, 17 Cal.4th at 831, emphasis in original.) This Court found the argument "could reasonably be interpreted as suggesting to the jury [that the prosecution] did not have the burden of

proving every element of the crimes charged beyond a reasonable doubt." (*Ibid.*)

Court of Appeal decisions are in accord with the principle that a prosecutor's analogy must assert a legally accurate principle. In *People v. Nguyen* (1995) 40 Cal.App.4th 28, for example, the court found it was improper for the prosecutor to argue that the reasonable doubt standard could be equated to common life decisions, such as getting married or changing lanes. It found the "almost reflexive" decision to change lanes is "quite different from the reasonable doubt standard in a criminal case." (*Id.* at p. 36.) It pointed out that, considering the divorce rate, "the decision to marry is often based on a standard far less than reasonable doubt." (*Ibid.*) It noted that as far back as 1873, this Court held that "'The judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence.'" (*Ibid.*, quoting *People v. Brannon, supra,* 47 Cal. at p. 97.) *Nguyen* found the error harmless, however, as the trial court properly instructed the jury, and, in addition, the defendant did not object to the argument, and thus deprived the court of the opportunity to correct the matter at trial. (*People v. Nguyen, supra,* 40 Cal.App.4th at pp. 36-37.)

Conversely, the court found no error in *People v. Jasmin* (2008) 167 Cal.App.4th 98, a case where the prosecutor argued that what was required of the jurors was to approach their decision as they would an "extremely important" decision in their own lives. "As reasonable people, we gather the facts before us that bear upon that decision making as fully as we can, knowing that there's always, in real life -- and the courtroom is no different than any other aspect of real life. . . . There's always more we would like to know, we want to know. [¶] That being said, the need, the obligation to make a decision does not go away. So we gather the facts as best we can know them, and we apply our reason to them. And if having done that there

is but one reasonable choice to make, we, as reasonable people, make that choice." (*Id.* at p. 115.) The Court of Appeal noted that this argument "did not reduce reasonable doubt to a mere reasonable decision" and was thus different from the lane-changing or getting-married examples criticized in *Nguyen*.

With respect to demonstrative aids, the court in *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, found that a prosecutor impermissibly used an eight-piece jigsaw puzzle depicting the Statue of Liberty while discussing reasonable doubt. When the automated presentation put the sixth piece of the puzzle in place, the prosecutor argued that no reasonable doubt existed as to what the completed puzzle would depict. The Court of Appeal found this improper because using a puzzle "invites the jury to guess or jump to a conclusion." (*Id* at p. 1267.) This was particularly problematic with the use of an iconic image, which most people would recognize early in the process of completing the puzzle. Moreover, the court took issue with the fact that the prosecutor identified the moment when six of eight pieces (75%) were in place as the moment when reasonable doubt no longer existed. This, the court found, impermissibly quantified the burden of proof. (*Id.* at p. 1267-1268.)

The puzzle analogy was the fundamental flaw with the prosecutor's argument in *Katzenberger*. By revealing information piece by piece, the prosecutor was attempting to identify the moment a viewer had an abiding conviction in the outcome. In this context, the use of an "iconic image," invoked a lower degree of certainty than that required to find a criminal defendant guilty because most people would feel comfortable identifying the image long before the puzzle is complete. Thus, the task the prosecutor was referencing, identifying a familiar object, was akin to the everyday decisions criticized in *Nguyen*.

Katzenberger's quantification analysis also stems from the fact that the prosecutor framed his argument in terms of a puzzle. This is because a puzzle can be completed. And by showing the jury the image of an incomplete puzzle, the jury was able to determine how near complete the prosecutor was implicitly arguing his case needed to be.

It should also be noted that the puzzle example in *Katzenberger* discussed obtaining an abiding conviction prior to the placement of all the puzzle pieces and was thus not analogous to a criminal trial, where the jury must consider all the evidence presented.

In this case, unlike *Katzenberger*, the prosecutor was not asking the jury to guess at what the image represented. Her point was not about the least amount of information necessary for an abiding conviction. Thus, she did not ask "can you identify this?" or, "at what point can you identify this?" Just the opposite, the prosecutor conceded that the image was of California. (3 RT 615.) Her point was that the existence of information that did not support a conclusion that the state was California did not amount to reasonable doubt. Thus, she argued, "What you have is you have incomplete information, accurate information, wrong information, San Diego in the north of the state, and missing information, San Bernardino has not even been talked about, but is there a reasonable doubt that this is California?" (3 RT 615.) Just as in *Jasmin*, the prosecutor here was making the legally permissible argument that a decision based upon the evidence presented could be made, even if there was more the jury may like to know, and even if there was some inaccurate evidence. Because the prosecutor was asserting a legally accurate principle, counsel was not deficient for failing to object.

In arguing the contrary, appellant claims the image was objectionable because it "conveyed to the jury that it need not fully consider the missing and incorrect information[.]" (OBOM 44.) As the Court of Appeal

recognized, however, the prosecutor's argument that incomplete and inaccurate information does not render a decision impossible was consistent with the jury instructions given. (CALCRIM No. 226, Witnesses ["you may believe all, part, or none of any witness's testimony" (3 RT 561)]; and CALCRIM No. 302, Evaluating Conflicting Evidence ["if you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe" (3 RT 564)].) Together, these instructions tell the jury that it may resolve conflicts in testimony by rejecting testimony if appropriate. And unlike a jigsaw puzzle with missing pieces, the map at issue did not invite the jury to the guess at what was missing. The only time the prosecutor referenced missing information was when she said additional information almost certainly exists but that it was not required to make a decision. (3 RT 615 ["San Bernardino has not even been talked about"].) Unlike *Katzenberger*, the jury was not given an incomplete image and urged to "fill in" the missing pieces.

Appellant also argues the image was flawed because it "encouraged the jurors to begin their deliberations from a staring point of guilt rather than innocence." (OBOM 45.) In support of this assertion, he contrasts *State v. Jackson* (2013) 305 P.3d 685. In that case, the prosecutor discussed the presumption of innocence during voir dire. The prosecutor said that a trial is like a painting in that the prosecution starts with a blank canvas and that, through testimony, beings painting a picture. (*Id.* at p. 691.) The prosecutor then referenced a painting of George Washington, the bottom portion of which was never completed. The prosecutor concluded by asking a potential juror, "when the Judge says that we have to prove our case beyond a reasonable doubt, you realized that not every little corner of the painting has to have paint on it[?]" (*Id.*) The Kansas Court of Appeals declined to label this misconduct because the argument "stressed that the defendant was presumed innocent, it was the State's burden to put paint on

that 'blank canvas' of innocence, and it was the jury's responsibility to decide whether the picture presented by the State was identifiable beyond a reasonable doubt." (*Id.* at p. 693.)

Thus, *Jackson* does not support appellant's claim of error. The "blank canvas of innocence" was at the beginning of trial. The prosecutor's case-in-chief applied the paint. And by the time the jury began its deliberations, the prosecutor argued, an identifiable picture had been painted. This is similar to the point the prosecutor was making here. She told the jury that the image represented the product of several witnesses' testimony and that, through that testimony, sufficient evidence had been presented to make a decision. As the Kansas court found, this was a fair point.

Appellant further argues, without explanation, that the image was not an accurate analogy. (OBOM 46.) He cites *People v. Otero* (2012) 210 Cal.App.4th 865 (*Otero*) for this proposition. *Otero*, however, was wrongly decided and this Court should not adopt its poor reasoning.

In *Otero*, the prosecutor used an image depicting the outlines of California and Nevada. San Francisco was correctly labeled. Sacramento, however, was only identified with a star and the letters "Sac." San Diego was placed in the northern part of California, and Los Angeles in the southern part. There was a dollar sign in southern Nevada and the word "ocean" was written to the left of California. (*Otero, supra*, 210 Cal.App.4th at 869.) Below the image were the words, "'Even with incomplete and incorrect information, no reasonable doubt that this is California.'" (*Id.* at p. 869.) Displaying the image, the prosecutor argued,

> "I'm thinking of a state an it's shaped like this. And there's an ocean to the left of it, and I know that there's another state that abuts this state where there's gambling. Okay. And the state that I'm thinking about, right in the center of the state is a city called San Francisco, and in the southern portion of the state is a city called Los Angeles. And I think the capital is Sac-something.

> And up at the northern part of the state there's a city called San Diego. I'm just trying to figure out what state this might be.
>
> Is there any doubt in your mind, ladies and gentlemen, that that state is California? Okay, Yes, there's inaccurate information. I know San Diego is not at the northern part of California, and I know Los Angles isn't at the southern. Okay. But my point to you in this –"

(*Id.* at p. 870.)

Relying on *Katzenberger*, the *Otero* court found the argument before it improper. The court explained that, "[a]lthough the prosecutor in this matter did not use a jigsaw puzzle and it could be argued she did not introduce a quantitative measure of proof beyond a reasonable doubt, the PowerPoint slide used an immediately recognizable icon." (*Otero, supra*, 210 Cal.App.4th at 872.) Because the state could have been identified as California by its shape alone, the *Otero* court held that the prosecutor's argument " 'leaves the distinct impression that the reasonable doubt standard may be met by a few pieces of evidence. It [also] invites the jury to jump to a conclusion[.]' " (*Ibid.*)

The court also found that the image impermissibly quantified the burden of proof because it contained eight "pieces of information," only one of which was necessary to answer the, "what state is this" question. This quantification error, the court said, was even more egregious than the error in *Katzenberger* because the image before it contained inaccurate information. (*Otero, supra*, 210 Cal.App.4th at 873.)

The problem with the *Otero* court's analysis is that it began with condemning the use of an identifiable image and then sought to explain how the image did not properly convey the principle of reasonable doubt. Its reliance on *Katzenberger* was misplaced because in that case, the prosecutor's argument which was couched in terms of a puzzle, invited the jury to guess at a conclusion prior to the placement of all the pieces. The

puzzle metaphor in *Katzenberger* was exacerbated by the use of an image that most people would recognize well before all the pieces were in place. Conversely, in *Otero*, the image was explicitly labeled as California. The jury did not need to guess at what the image was depicting. Instead, with that question removed, the jury was required to listen to the prosecutor's argument in order to discern the point being made. That point, that a decision beyond a reasonable doubt could be made in the face of conflicting information, was legally accurate and did not misstate the burden of proof.

While appellant does not argue that the image here quantified the burden of proof (instead arguing that the prosecutor's "in the middle" remark added an element of quantification), it should be noted that the *Otero* court's quantification analysis ran counter to the standard of review. (*Brown, supra*, 31 Cal.4th at 554 [court does not lightly infer most damaging interpretation].) It is unreasonable to believe that a juror would have counted the "pieces of information" and calculated that reasonable doubt means only 12.5 percent of the information needs to support a finding.of guilt. (*Otero, supra*, 210 Cal.App.4th at 873.) Similarly erroneous was the *Otero* court's characterization of the image before it as "more egregious" than the *Katzenberger* jigsaw puzzle because the map contained inaccurate information. The inaccurate information was included in an effort to approximate the state of the evidence at the conclusion of trial. A criminal trial always contains the very real possibility that a witness may convey inaccurate information. This fact is addressed by CALCRIM No. 226, Witnesses, which instructs the jury that it may reject such testimony. Accordingly, inclusion of inaccurate information actually made the image a better analogy than one in which all information points to a single conclusion.

In contrast to *Otero*'s strained application of *Katzenberger* stands *State v. Crawford*, (2011) 46 Kan. App.2d 401, where the Kansas Court of

Appeals applied the reasoning of *Katzenberger* in a manner consistent with its original meaning. In that case, the prosecutor used an incomplete jigsaw puzzle analogy during voir dire. In so doing, the prosecutor asked a potential juror: "so even though there's some pieces missing, you're able to say that looks like a lighthouse and an ocean?" (*Id.* at p. 411.) After considering *Katzenberger*, the court found the prosecutor's argument to be improper because the statement "implied to the jury that it could find Crawford guilty even if some evidence was missing if it 'looked like' he committed the crimes." (*Id.* at p. 414.) This outcome is consistent with *Katzenberger* and *Nguyen* in that the prosecutor impermissibly urged the jury to make a decision based upon a level of certainty lower than beyond a reasonable doubt. As stated, this principle is inapplicable in this case because the prosecutor was not so arguing. Her point was that incomplete and inaccurate information did not render a decision impossible.

In short, the *Otero* court erred in evaluating the demonstrative aid without consideration of the context in which it was used. This error is even more apparent in light of the numerous out-of-state opinions appellant cites in support of his position. (OBOM 34-43.)While the nature of the visual aid used in those cases varies, the cases are consistent in the principle that use of an image, "iconic" or otherwise, is not per se impermissible.

As the Washington State Court of Appeals has observed with respect to its jurisprudence, "We have viewed the State's use of a jigsaw puzzle analogy on a case-by-case basis, considering the context of the argument as a whole." (*State v. Fuller* (2012) 169 Wash.App. 797, 825.) As an example of impermissible argument, the *Fuller* court cited an earlier Washington state case where the prosecutor trivialized "the abiding belief necessary," by arguing "You add a *third* piece of the puzzle, and at this point *even being able to see only half*, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma." (*Id.* at 826, [original italics,

internal quotation marks omitted], quoting *State v. Johnson*, 158 Wash.App. 677.)

At issue in *Fuller* was another jigsaw puzzle depicting Tacoma. (*Fuller, supra*, 169 Wash.App. at 823-824.) The prosecutor displayed a few pieces and said, "From that we might think it looks like Tacoma, but we don't know – ." (*Id.* at 824.) Progressing with the presentation, the prosecutor said, "Now, we have more pieces, more evidence that suggests this is Tacoma. But we may not yet have enough pieces, enough evidence to know beyond a reasonable doubt that it's Tacoma." (*Ibid.*) Finally, the prosecutor added more pieces saying, "Now, we have more pieces. We have more evidence and we can see beyond a reasonable doubt that this is a picture of Tacoma. We can see the freeway. We can see Mount Rainer and we can see the Tacoma Dome." (*Ibid.*) The prosecutor concluded his analogy by saying,

> A trial is very much like a jigsaw puzzle. It's not like a mystery novel or [the *Crime scene Investigation* television serious (CSI)] or a movie. You're not going to have every loose end tied up and every question answer[ed]. What matters is this: Do you have enough evidence to believe beyond a reasonable doubt that the defendant is guilty?

(*Ibid.*) The *Fuller* court found this argument permissible because "The specific puzzle analogy the State employed here..., discussed identifying a puzzle with certainty before it was complete without purporting to quantify the degree of certainty required or equating identifying the image with making a mundane choice." (*Fuller, supra*, 169 Wash.App. at 828.)

This outcome is consistent with *Katzenberger*, *Jasmin*, and *Nguyen*. A prosecutor may urge the jury to make a decision based upon the entirety of the evidence, even if there is more the jury would like to know, so long as the prosecutor does not imply a level of certainty lower than beyond a reasonable doubt. That is exactly what the prosecutor did in this case.

Finally, appellant argues that the prosecutor improperly quantified the burden of proof by arguing that the jury's decision had to be "in the middle." (OBOM 46.) This assertion is not supported by the record. First, it should be repeated that appellant does not argue that the image itself quantified the burden of proof. Second, the prosecutor was not referencing the image when she made the complained of "in the middle" comment. And third, she was not saying that the jury's decision had to be in the middle of guilt and innocence. Instead, as the Court of Appeal found, the remark was an explanation "that reasonable doubt involves reflecting on the spectrum of possibilities that are supported by the evidence—from those that are impossible, to those that are unreasonable, and then to those that are reasonable and possible." (Slip. Op. at 8.) By telling the jury that its "decision has to be in the middle. It has to be based on reason. It has to be a reasonable account" (3 RT 615), "the prosecutor argued the jury needed to reject the impossible, the unreasonable, and the mere possibilities in favor of a reasonable factual scenario that was supported by the evidence." (Slip. Op. at p 8-9).

In conclusion, the prosecutor did not invite the jury to guess at what the image depicted. The prosecutor's argument that inaccurate and incomplete information does not render a decision impossible was an accurate statement of the legal principles articulated in CALCRIMs No. 226 and 302. And the prosecutor never quantified the burden of proof. Thus, the challenged remarks were not a misstatement of law. Nor did they trivialize or undermine the burden of proof. Accordingly, an objection on those grounds would have been futile and counsel cannot have been ineffective for not making such an objection. (*People v. Price* (1991) 1 Cal.4th 324, 387.)

B. The prosecutor did not misstate the burden of proof when she told the jury that its decision had to be reasonable

Appellant also challenges a portion of the prosecutor's rebuttal where she discussed reasonable versus unreasonable possibilities. He asserts the prosecutor's argument invited the jury to convict so long as the prosecutor's theory was reasonable. (OBOM 50-51.) He further asserts that the argument confused the reasonable doubt standard with the rules for considering circumstantial evidence. (OBOM 52.) When viewed in context, however, it is not reasonably likely the prosecutor's argument was understood as anything other than telling the jury that reasonable doubt did not include unreasonable possibilities.

The prosecutor began her rebuttal by saying:

> All right. [defense counsel] spoke quite a bit about reasonable doubt. Basically, *with reasonable doubt, you need to accept the reasonable and reject the unreasonable*, and your decision cannot be based on sympathy, prejudice, or speculation. It has to be based on the evidence in this case.

(3 RT 614.) After discussing the map, the prosecutor continued:

> *What you are looking at when you are looking at reasonable doubt is you are looking at a world of possibilities.* There is the impossible, which you must reject, the impossible but unreasonable, which you must also reject, and the reasonable possibilities, and *your decision has to be in the middle. It has to be based on reason.* It has to be a reasonable account. And make no mistake about it, we talked about this in jury selection, you need to look at the entire picture, not one piece of evidence, not one witness. You don't want to look at the tree and ignore the forest. You look at the entire picture to determine if the case has been proven beyond a reasonable doubt

(3 RT 615-616.)

The challenged remarks are similar to those considered in *People v. Romero* (2008) 44 Cal.4th 386. In *Romero*, "the prosecutor explained that

the reasonable doubt standard asks jurors to 'decide what is reasonable to believe versus unreasonable to believe' and to 'accept the reasonable and reject the unreasonable.'" (*Id.* at p. 416.) This Court held "Nothing in the prosecutor's explanation lessened the prosecution's burden of proof. The prosecution must prove the case beyond a reasonable doubt, not beyond an unreasonable doubt." (*Id.* at 416.)

For the same reason, the challenged remarks did not misstate the burden of proof. As the Court of Appeal found, the crux of this portion of the prosecutor's argument was that "the jury needed to reject the impossible, the unreasonable, and the mere possibilities in favor of a reasonable factual scenario that was supported by the evidence." (Slip. Op. at p. 9.) This did not lower the burden of proof because it "was not a misstatement of law, as much as a poorly worded redundancy of the reasonable doubt instructions." (Slip. Op. at p. 9.) Accordingly, an objection to the argument would have been overruled and counsel cannot have been deficient for not objecting. (*People v. Price, supra*, 1 Cal.4th at 387.)

Appellant claims the remarks can be understood as asserting that the jury should convict so long as the prosecution's theory is reasonable. (OBOM 50-51.) He also claims the prosecutor's urge to "accept the reasonable and reject the unreasonable" conflated the reasonable doubt standard with the rules for considering circumstantial evidence. (OBOM 52.) These claims argue the same point. Accordingly, they fail for the same reason.

The jury instructions regarding circumstantial evidence require a jury to "accept only reasonable conclusions and reject any that are unreasonable." (CALCRIM No. 224; *See also*, CALJIC No. 2.01.) On several occasions, this Court has rejected challenges to those instructions on the basis that "it directed the jurors to accept an interpretation of the

evidence supporting guilt as long as such an interpretation appeared reasonable and consistent." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1346; *see also*, *People v. Koontz* (2002) 27 Cal.4th 1041, 1084-1085; *People v. Mendoza* (2000) 24 Cal.4th 130, 181.) As the Court has explained, the "'instructions properly direct the jury to accept an interpretation of the evidence favorable to the prosecution and unfavorable to the defense only if no other "reasonable" interpretation can be drawn.'" (*People v. Koontz, supra*, 27 Cal.4th at 1084-1085 [quoting *People v. Kipp* (1998) 18 Cal.4th 349, 375].) In other words, only reasonable possibilities are in play. Thus, it was correct for the prosecutor to urge the jury to constrain its consideration to reasonable possibilities so long as she also properly told the jury how to evaluate those possibilities, which she did by telling the jury to "look at the entire picture to determine if the case has been proven beyond a reasonable doubt." (3 RT 615.)

In sum, the prosecutor's remarks conveyed the legally accurate principle that reasonable doubt does not include unreasonable possibilities. There is not a reasonable likelihood that her statements were misconstrued. Counsel was therefore not ineffective for failing to object to the remarks.

C. Even assuming the argument was objectionable, the record does not preclude a reasonable explanation for the lack of objection

> On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation.

(*People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1009; accord, *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

This is not a case were a finding of ineffective assistance of counsel on direct appeal is appropriate. Counsel was not asked for an explanation of

his actions. And the record does not affirmatively establish a lack of tactical purpose. Nor does it preclude a satisfactory explanation for counsel's actions. Just the oppose, two possible reasons for counsel's lack of objection are readily apparent. First, the prosecutor's ethereal discussion of reasonable doubt was nonresponsive to defense counsel's closing argument. Second, the prosecutor's metaphor could arguably be understood as implying a higher level of proof than that satisfied by the evidence presented. Because trial counsel may well have had reasonable tactical ground for not objecting, counsel's performance cannot be deemed deficient.

As this Court has recognized, decisions to object are inherently tactical and a failure to do so will rarely establish ineffective assistance of counsel. (*People v. Maury* (2003) 30 Cal.4th 342, 419.) In *People v. Kaurish* (1990) 52 Cal.3d 648, for example, defense counsel did not object when the prosecutor inappropriately referenced the defendant's past misconduct during closing argument. This Court declined to find ineffective assistance because "defense counsel could have reasonably concluded that such evidence was tangential to the case and that the objections would serve only to accentuate defendant's negative qualities in the minds of the jurors." (*Id.* at p. 677-678; see also *People v. Stewart* (2004) 33 Cal.4th 425, 509 [counsel not ineffective for failing to object to asserted prosecutorial misconduct because "an objection (and possibly an admonition as well) likely would have served to highlight matter that might be unfavorable to defendant."].)

Here, counsel may have concluded that the prosecutor's abstract discussion of reasonable doubt was tangential to the issue before the jury. Defense counsel spent closing argument discussing specific evidentiary issues that he asserted were fatal to the prosecution's case. He spoke at length about the anonymous police report, the fact that Doe's first interview

had not been memorialized in any way, and the inconsistencies of Doe's testimony. (3 RT 599-601.) In light of these concrete examples, counsel may have welcomed the prosecutor's lack of direct response. The longer she spent discussing the concept of reasonable doubt, the less time she was rebutting the defense's specific allegations. An objection would have risked re-focusing the prosecutor's attention. Indeed, this explanation is supported by the record. It was not until the prosecutor turned to addressing defense counsel's argument that counsel made an objection. (3 RT 618.) This shows that defense counsel was paying attention and was willing to make objections to what he believed was inappropriate and damaging to his client.

Counsel's decision not to object may have also been the product of a belief that the prosecutor's argument implied a higher burden of proof not met by the evidence presented. As stated, the prosecutor's example explained that inconsistencies and inaccuracies did not render a decision impossible. The prosecutor's example, however, presupposed the presentation of strong evidence to establish a single conclusion. Against the hypothetical witness testimony regarding Nevada, San Francisco, and Los Angeles, the misplacement of San Diego and the incomplete naming of San Francisco ("Fran-something") were relatively insignificant. Thus, the analogy could have been understood as implying that reasonable doubt means overwhelming evidence with relatively minor aberrations.

Unlike the example, the question faced by the jury here was predominantly one of conflicting evidence. This was not a case where the jury was asked to evaluate witnesses recollections in order to determined if the defendant was the perpetrator of a crime that everyone agreed had been committed. This was a case where the percipient witnesses disagreed on whether a crime had even been committed. While Doe maintained that she had been molested (2 RT 196, 212, 217), her father recanted his statement

(1 RT 129), and appellant, testifying on his own behalf, proffered an innocuous version of events (2 RT 424-425). Thus, unlike the California example, this was not a case where only a few pieces of evidence failed to "add up." Instead, the jury was presented with diametrically opposed versions of events and had to weigh witness credibility in order to make a decision. This was a much more difficult task than reconciling testimony that largely leads to the same conclusion, as was the prosecutor's example. Because the state of the evidence was not such that it overwhelmingly pointed to specific conclusion, defense counsel may have determined that the argument inured to his client's benefit by implying that the prosecution was required to present such evidence. Accordingly, the record does not preclude a tactical explanation for the lack of objection and this Court cannot make a finding of ineffective assistance of counsel.

D. No conceivable prejudice ensued from counsel's failure to object

When a trial court properly instructs on the burden of proof, a prosecutor's misstatement of the principle is not automatically reversible. (*People v. Booker* (2011) 51 Cal.4th 141, 184, fn. 24.) The jury is presumed to follow the court's instruction absent evidence to the contrary. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.) Where, as here, counsel did not object to the complained of remarks, appellant must establish a reasonable probability that such an objection would have produced of a more favorable outcome. (*People v. Osband* (1996) 13 Cal.4th 622, 700.)

In this case, prior to closing argument, the court told the jury that, should counsel's argument conflict with the its instructions, the court's instructions controlled. (3 RT 555.) It then properly instructed the jury on the burden of proof. (3 RT 557.) The jury is presumed to have followed these instructions, and the record provides no reason to believe otherwise.

Moreover, it cannot be said that appellant would have received a more favorable outcome had counsel objected. As stated, counsel spent closing argument discussing specific evidentiary issues that he asserted were fatal to the prosecution's case. He spoke at length about the anonymous police report, the fact that Doe's first interview had not been memorialized in any way, and the inconsistencies of Doe's testimony. The prosecutor's abstract discussion of reasonable doubt did little to address these specific allegations. Had counsel objected during this time, it is likely the prosecutor would have moved on to directly rebutting counsel's argument and thus, appellant would not have been in a better position.

Additionally, the nature of the case and the state of the evidence presented makes it unlikely that the prosecutor's argument factored into the jury's deliberation. In order to come to its conclusion, the jury had to carefully weigh conflicting testimony, make credibility determinations and address the issues highlighted by defense counsel in his argument. This was a case involving two directly competing theories. It was not analogous to the prosecutor's example, which presupposed strong evidence to support a single conclusion. There was not a clear version of events against which the inconsistencies cited by defense counsel could be dismissed as slight.

CONCLUSION

Based on the above, respondent respectfully requests this Court affirm the judgment in full.

Dated: December 5, 2013

Respectfully submitted,

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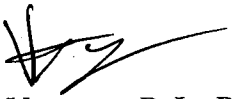

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 8,776 words.

Dated: December 5, 2013

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Attorney General of California

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Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Centeno**
Case No.: **S209957**

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 that same day in the ordinary course of business.

On December 5, 2013, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on December 5, 2013 to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com and Jean Ballantine, Esq. to email: ballantine093675@gmail.com.

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 December 5, 2013, at San Diego, California.

B. Romero
Declarant

B Romero
Signature

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