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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO PAZ, Defendant and Appellant.	2d Crim. No. B232882 (Super. Ct. No. 2010042142) (Ventura County)

A jury found Francisco Paz guilty of two counts of attempted first degree residential burglary. (Pen. Code, §§ 459, 664.)[1] Paz admitted the special allegations that he had a prior serious or violent felony conviction under the Three Strikes law (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)), a prior serious felony conviction under section 667, subdivision (a)(1), and had served two prior prison terms (§ 667.5, subd. (b)).

The judgment is modified to reflect 146 days of presentence credit for time actually served. In all other respects, we affirm.

FACTS

On November 26, 2010, the day after Thanksgiving, Delfia Zermeno was napping inside her house. At about 1:12 p.m., she heard someone trying to open her front door. She looked out the window, but did not see anyone. Then she heard trash cans

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

being moved and her neighbor's dogs barking. She opened her front door and saw a man in a white T-shirt walking down the street. She asked if he wanted anything. She did not remember whether he answered.

At about the same time, Zermeno's neighbor, John Macik, was at his home eating lunch. His dogs started barking. He looked out the window and saw the face of a man who was frantically running in circles in Zermeno's yard. The man disappeared from view. Soon after the man disappeared, Macik heard trash cans being banged around, first in Zermeno's yard, and then in his own.

Macik went to the sliding glass door that leads to his yard. As he approached the door from the inside, he saw a man outside wearing a white T-shirt and shorts. The man did not appear to see Macik. Macik watched as the man forced open the locked screen door and tried to open the glass door. Macik told his wife to call 911. Eventually the man realized the house was occupied. He put his hands near his face and disappeared down the side yard.

The police responded to the 911 call and found Paz walking about three houses away from Zermeno's and Macik's houses. He matched the description of a Hispanic man wearing a white T-shirt and shorts. Macik identified Paz as the man he saw at his door.

After Paz's arrest, he waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436), and agreed to talk to Police Officer Dan Potter. He told Potter he was in the neighborhood looking for the home of his in-laws.

Later Paz's telephone calls were audiotaped by jail staff. Paz told an unidentified woman that he made a mistake talking to Potter. He said he told Potter he was trying to open the door to the unidentified woman's house. He said his defense would be that he did not have the intent to commit burglary. He said his defense is that he had "meth psychosis," after which he chuckled.

DISCUSSION

I.

Paz contends the trial court erred in excluding the testimony of his grandmother.

The trial court held a hearing pursuant to Evidence Code section 402. Paz's grandmother testified at the hearing. She said that on the day Paz was arrested, she was at home at 8:00 a.m. when she heard noises in Paz's bedroom. She went to the bedroom, but Paz told her he was fine. She did not think he looked normal. She went back to her own bedroom. Paz came in and asked her if she heard voices. She replied, "[T]here [are] no voices around here. There is nobody, just us." Paz said, "No, there is, grandma. I think somebody is trying to get in." She hugged him and tried to assure him there was nobody but the two of them in the room. Paz insisted, "There is somebody after us . . . ." Paz left the bedroom, stating, "I'll be back, but I have to go find out what's going on." Paz's grandmother did not see him again until after he was arrested.

The trial court found there is not a "sufficient nexus" between Paz's state of mind at 8:00 a.m. and his state of mind at 1:00 p.m., when the offenses were committed. The court also ruled the testimony inadmissible under Evidence Code section 352. The court found the testimony would tend to mislead the jury.

Evidence is relevant if it has any tendency in reason to prove or disprove a disputed fact that is of consequence to the action. (Evid. Code, § 210.) The trial court has broad discretion to decide the relevancy of evidence. (*People v. Lewis* (2001) 25 Cal.4th 610, 641.)

We agree with the trial court. Evidence that Paz heard voices at 8:00 a.m. has no bearing on whether he had the intent to commit burglaries at 1:00 p.m. Not only is the time differential substantial, but it is not clear how evidence Paz was hearing voices has a tendency to disprove his intent to commit burglary. Nothing in Paz's grandmother's testimony indicated the voices caused him to attempt to break into Zermeno's and Macik's

homes. If it might have some relevance, it is so minimal that it was properly excluded by the exercise of the trial court's discretion under Evidence Code section 352.

II.

Paz contends the prosecutor committed misconduct by diluting the reasonable doubt standard during closing argument.

The prosecutor told the jury: "Reasonable doubt is something--If you have a reasonable doubt, you have something you can hold on to. You can say, 'I have a doubt based on this reason.' It's not, 'Well, there's a cloud way out there in the horizon. It's a beautiful day here in Ventura, but there is a cloud there in Thousand Oaks, one single puff of cloud. I was going to go to Malibu to the beach today, Honey, what do you think?' 'I don't know. There's a cloud. It looks like it could rain.' Could rain. One cloud. That's not reasonable doubt, ladies and gentlemen."

The prosecutor also told the jury: "[Reasonable doubt] is really a doubt with a reason that you can attach to it. It is a reason you can articulate to your fellow jurors."

The prosecutor has broad discretion in arguing the legal and factual merits of the case. (*People v. Kazenberger* (2009) 178 Cal.App.4th 1260, 1266.) But it is improper for the prosecutor to misstate the law. (*Ibid.*) In particular, it is improper for the prosecution to attempt to absolve itself from the standard of proof beyond a reasonable doubt. (*Ibid.*)

Paz relies on *People v. Ngyuen* (1995) 40 Cal.App.4th 28. There the prosecutor argued: "'The standard is reasonable doubt. That is the standard in every single criminal case. And the jails and prisons are full, ladies and gentlemen. [¶] It's a very reachable standard that you use every day in your lives when you make important decisions, decisions about whether you want to get married, decisions that take your life at stake when you change lanes as you're driving. If you have reasonable doubt that you're going to get in a car accident, you don't change lanes.'" (*Id.* at p. 35.)

The Court of Appeal "strongly disapprove[d]" of arguments suggesting the reasonable doubt standard is used in daily life. (*People v. Ngyuen, supra*, 40 Cal.App.4th at p. 36.) The court quoted *People v. Brannon* (1873) 47 Cal. 96, 97: "'The judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence. Juries are permitted and instructed to apply the same rule to the determination of civil actions involving rights of property only. But in the decision of a criminal case involving life or liberty, something further is required. . . . There must be in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, derived from a comparison and consideration of the evidence.'" (*Ngyuen*, at p. 36.)

Whenever a prosecutor argues reasonable doubt by analogy to decisions made in daily life, he enters into dangerous territory. That is because no decision a juror makes in daily life is analogous to deciding the defendant's guilt beyond a reasonable doubt. It is certainly not analogous to deciding whether it might rain.

Nor is there a requirement that a juror be able to articulate the reason for the doubt to his fellow jurors. A juror who is unconvinced by the evidence is required to find the defendant not guilty even if he cannot articulate why he is unconvinced.

In any event, any prosecutorial misconduct is harmless. The prosecutor's comments are not so egregious or misleading as to amount to federal constitutional error. Instead the standard stated in *People v. Watson* (1956) 46 Cal.2d 818, 836, applies. (See *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 723, disapproved on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 28.) We must reverse only if it is reasonably probable Paz would have obtained a more favorable result in the absence of the error.

Here the jury was properly instructed on the definition of reasonable doubt. The jury was also instructed that if an attorney's comments on the law conflict with the court's instructions, the jury must follow the instructions. We presume the jury understood and followed all of the trial court's instructions. (*People v. Wilson* (2008) 44 Cal.4th 758, 803.) Thus the instructions alone show the error is harmless.

Moreover, the evidence against Paz was overwhelming. The evidence was uncontradicted that Paz was trying to break into Zermeno's and Macik's homes. But Paz argues there is little evidence of his intent. There is little direct evidence, but the circumstantial evidence is compelling. The intent to commit theft can be inferred from the forcible and unlawful entry alone. (*People v. Fitch* (1946) 73 Cal.App.2d 825, 827.) No other reasonable explanation appears from the evidence.

III.

Paz contends the trial court miscalculated his presentence credit by one day. Paz argues the court gave him 145 days of actual credit, but it should have given him 146 days.

Paz was arrested on November 26, 2010, and was sentenced on April 20, 2011. It appears Paz is correct. He should have received 146 days of presentence credit for time actually served.

The judgment is modified to reflect 146 days of time actually served presentence. In all other respects, we affirm.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

David W. Long, Judge

Superior Court County of Ventura

Robert L. Hernandez, under appointment by the Court of Appeal, for Defendant and Appellant.

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