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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD A. ALARCON et al., Defendants and Appellants.	B260234 (Los Angeles County Super. Ct. No. BA397216)

APPEAL from a judgment of the Superior Court of Los Angeles County. George G. Lomeli, Judge. Reversed and remanded.

Richard P. Lasting and Amy E. Jacks for Defendants and Appellants.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Richard A. Alarcon (Alarcon) and Flora M. Alarcon (Mrs. Alarcon)[1] were convicted of fraudulent voting and perjury by declaration, crimes that required the jury to determine whether defendants' legal domicile was the residence listed on their respective voter registration forms and other documents they signed under penalty of perjury. Defendants contend the trial court erred by instructing the jury with a mandatory rebuttable presumption regarding legal domicile. That instruction, defendants claim, relieved the prosecution of its burden of proving all of the elements of the crimes beyond a reasonable doubt and violated their due process rights. Defendants further contend the erroneous instruction was not harmless. We agree and reverse the judgment and remand to the trial court for further proceedings.

BACKGROUND

Information

An information charged Alarcon with nine counts of perjury by declaration, in violation of Penal Code section 118, subdivision (a), and seven counts of fraudulent voting, in violation of Elections Code section 18560. The same information charged Mrs. Alarcon with three counts of perjury by declaration and three counts of fraudulent voting.

The information alleged that Alarcon committed perjury by declaration by listing 14451 Nordhoff Street, Panorama City (the Nordhoff home) as the "address where you live" on his voter registration form on November 9, 2006, and April 2, 2007 (counts 1 and 7); by listing the Nordhoff home as his "residence address" on his declaration to solicit and receive campaign contributions on November 20, 2006, and October 8, 2008 (counts 2 and 13); by listing the Nordhoff home as his "residence address" on his declaration to become a candidate for the city council on December 11, 2006, and November 6, 2008 (counts 4 and 17); and by listing the Nordhoff home as the "address

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[1] Because defendants share the same surname, we refer to Richard Alarcon by his surname and Flora Alarcon as Mrs. Alarcon in order to avoid confusion. The two are referred to collectively as defendants.

where you live" on an application for a California driver's license in January 2007 and on April 2, 2007 (counts 5 and 7). The information further alleged that Alarcon fraudulently voted in elections held on March 6, 2007, May 15, 2007, February 8, 2008, June 3, 2008, November 5, 2008, March 3, 2009, and May 19, 2009 (counts 6, 9, 10, 12, 14, 19, 21).

As to Mrs. Alarcon, the information alleged that she committed perjury by declaration by listing the Nordhoff home as the "address where you live" on a driver's license application form on April 7, 2008, and on June 18, 2009 (counts 11 and 24); by listing the Nordhoff home as the "address where you live" on a provisional ballot on November 4, 2008 (count 15); and that she fraudulently voted in elections held on November 4, 2008, March 3, 2009, and May 19, 2009 (counts 16, 20, and 22).[2]

Summary of the relevant evidence

In the 1990's, Alarcon served two terms on the Los Angeles City Council, where he represented the Seventh District. The law at the time imposed a two-term, eight-year limit for city council members.

Alarcon was elected to the State Senate in 1998. He served two terms as a state senator before being elected to the State Assembly in November 2006. Also in November 2006, Los Angeles voters passed Measure R, which increased the term limit for members of the city council from eight to twelve years. After the passage of Measure R, Alarcon expressed a desire to seek reelection to the city council.

The Alarcons were married in August 2007. Mrs. Alarcon owned two residential properties. One was the Nordhoff home which was located in District Seven. The other was located outside District Seven on Sheldon Street in Sun Valley (the Sheldon home). Defendants' marriage certificate listed Alarcon's address as the Nordhoff home and Mrs. Alarcon's address as the Sheldon home.

Wendy Gruel, a member of the Los Angeles City Council from 2002 to 2009, testified that Alarcon telephoned her in 2007 to ask her to consider moving the

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[2] The information did not include a count 3 or a count 18.

boundaries of District Seven to include the Sheldon home. Gruel ultimately told Alarcon that she was not comfortable moving the boundaries.

A special election was set for March 6, 2007, to fill a vacant seat on the city council for District Seven. To be eligible to run for the vacant city council seat, a candidate must have established residency in District Seven by November 9, 2006. Alarcon completed and signed a voter registration form on November 9, 2006, listing the Nordhoff home as the "address where you live." Also in November 2006, Alarcon signed a declaration of intent to solicit and receive contributions for the city council seat in District Seven, stating under penalty of perjury that his residence was the Nordhoff home. He filed a declaration of candidacy for the vacant District Seven seat on December 11, 2006, stating, under penalty of perjury, that the Nordhoff home was his "residence address." Alarcon voted in the March 2007 special election and was elected to the city council as the District Seven representative.

Carolyn Jackson, a former Department of Transportation liaison to the Los Angeles City Council, met with Alarcon on May 18, 2007. Jackson congratulated Alarcon on his recent election to the city council, and Alarcon said, "You know, I wasn't even living in the district when I got elected." He added, "[B]ut I am now."

Pauline Amond was a land use consultant hired by Mrs. Alarcon to obtain the approvals necessary to build a nine-unit condominium building on the property where the Nordhoff home was located. Amond testified that on November 18, 2007, she submitted a master land use permit application to rezone the property to allow the condominium units to be built.

Various neighbors testified as to whether the Nordhoff home appeared to be occupied during the relevant time periods. Stephen Folden, who lived across the street from the Nordhoff home, testified that the home appeared empty from 2006 until the end of 2009. He never saw people or cars there, the lights were never on, and the yard was overgrown. At some point, either in October 2009 or January 2010, Folden began to see children at the Nordhoff home on a regular basis. Folden's wife Pamela observed very

little activity at the Nordhoff home between 2007 and 2010. She testified that defendants "moved in" to the Nordhoff home in 2010.

Carlos Lopez, who lived next door to the Nordhoff home from 1996 to 2007, testified that he saw a dog at the home in 2007, but he could not remember how often that was the case. Asa Zapasov, who operated a day care center next door to the Nordhoff home from 2006 to 2011, told an investigator for the District Attorney's office in April 2009 that it did not appear that anyone lived in the home. Angel Hernandez lived across the street from the Nordhoff home. He testified that between 2006 and 2009, the house appeared to be vacant.

Maria Solis, who moved into a house across the street from the Sheldon home in 2006, told an investigator that Alarcon lived at the Sheldon home with his wife and daughter. At trial, she testified that she would see Alarcon outside the Sheldon home and that on two or three occasions in 2008 when she took her own daughter to school she noticed that Alarcon brought a girl to the same school.

Gabriela Bibian, the assistant principal of Byrd Middle School in Sun Valley, testified that defendants' daughter, Victoria, attended the school in 2006 through 2009. School records listed Victoria's address as the Sheldon home. School records listed a different address for Alarcon.

Wayne Wohler, a Department of Water and Power (DWP) employee, testified as to water and electricity consumption at the Nordhoff home. According to Wohler, average daily water usage at the Nordhoff home between September 12, 2006, and September 12, 2007, equaled or exceeded the daily average for a family of four; however, zero billable units of water were consumed at the Nordhoff home in 2008 and during several periods in 2009. Wohler also compared the relative amounts of electricity consumed at the Nordhoff and Sheldon homes between the fall of 2006 and the end of the summer of 2007. During that time period, average daily electricity consumption at the Nordhoff home was 30 percent greater than that consumed at the Sheldon home.

Porfirio Salazar, a DWP meter reader, testified that he went to the Nordhoff house every other month for the past 15 years. According to Salazar, an aggressive dog was

present at the Nordhoff home before May of 2007, but the dog was absent from May 2007 until 2011. Salazar stated that the home appeared to be vacant in 2007, but that at some point the home was being renovated, landscaped, and painted, as if people were about to move in.

Nancy Hodges-Jimenez, who worked in various staff positions for Alarcon from 1989 to 2013, testified that she went to the Nordhoff home occasionally in 2007 to deliver work or mail for Alarcon.

Mrs. Alarcon's brother, Miguel Angel Montes de Oca, testified that from September 2007 through April 2009 he renovated the Nordhoff home. He installed new wood floors and bathroom tile, patched and painted the walls throughout the home, and installed new kitchen and bathroom lighting and plumbing fixtures. The renovation work was done to prepare the home so that defendants could move there.

Jose Manuel Rodriguez, an employee of Julian's Porcelain & Fiberglass, testified that he repaired and refinished a porcelain bathtub at the Nordhoff home on November 5 or 6 of 2007. To perform the work, Rodriguez had to enter the home, which was "vacant" with "absolutely nothing inside."

On October 28, 2009, the Los Angeles Police Department responded to a burglary call at the Nordhoff home. Alarcon met the responding officer and authorized a forced entry into the home, where officers arrested Lawrence Payton. Payton had changed the locks to all of the doors in the home, and told the officers "This is my house. What are you doing? Get out of here." Remnants of books and clothes were among the ashes in the fireplace, and Payton had possession of Alarcon's senate wallet and other memorabilia. Officers again arrested Payton inside the Nordhoff home on March 11, 2010.

Jury instructions

At the conclusion of the evidence, the trial court instructed the jury on the elements of the crime of fraudulent voting. That instruction stated in relevant part as follows:

"In order to prove this crime each of the following elements must be proved:

"1. The defendant voted in an election;

"2. At the time that the defendant voted, he was not entitled to vote in that election;

"3. At the time that the defendant voted in the election he knew that he was not entitled to vote in that election;

"4. The defendant had the specific intent to defraud."

The trial court instructed the jury that to be entitled to vote in an election, a person must have completed and signed under penalty of perjury a voter registration form stating the person's name and place of residence. The court advised the jury that "residence" for voting purposes means "domicile," and that "[t]he 'domicile' of a person is that place in which his or her habitation is fixed, wherein the person has the intention of remaining, and to which, whenever he is absent, the person has the intention of returning" and that at any given time, "a person may have only one domicile." The trial court further instructed the jury that "[t]he 'residence' of a person is that place in which the person's habitation is fixed for some period of time, but wherein he or she does not have the intention of remaining" and that "[a]t a given time, a person may have more than one residence."

The trial court gave the jury the following special instruction, No. EC 2026, with regard to the domicile of a member of the legislature:

"The domicile of a Member of the State Legislature shall be conclusively presumed to be at the residence address indicated on that person's currently filed affidavit of registration pursuant to Elections Code Section 2026.

"This section means that a member of the legislature is conclusively presumed to have the intent to remain in or return to the residence which they list on their sworn statement of voter registration. Thus, California Election Code 2026 permits incumbent legislators to elect their domicile by filing a sworn voter registration form.

"The defendant was not a member of the legislature for any elections that occurred in the year 2008."

The trial court also gave the jury special instruction No. EC 2032, regarding multiple residences. That instruction quoted verbatim the language of Elections Code section 2032:

"Except as otherwise provided in this article, if a person has more than one residence and that person has not physically resided at any one of the residences within the preceding year, there shall be a rebuttable presumption that those residences in which he or she has not so resided within the immediate preceding year are merely residences as defined in subdivision (c) of Section 359 and not his or her domicile."

The court instructed the jury on presumptions as follows:

"A presumption is an assumption of facts that the law requires to be made from another fact or group of facts found or otherwise established in the actions. A presumption is not evidence.

"A presumption is either conclusive or rebuttable.

"A conclusive presumption is one which proof of certain acts makes the existence of the assumed fact beyond dispute. The presumption cannot be rebutted or contradicted by the evidence to the contrary.

"A rebuttable presumption is one that can be disproved by evidence to the contrary."

Jury verdicts

The jury found Alarcon guilty of one count of perjury by declaration on November 6, 2008 (count 17) and three counts of fraudulent voting on November 5, 2008, March 3, 2009, and May 19, 2009 (counts 14, 19, and 21) and not guilty of the remaining charges. The jury found Mrs. Alarcon guilty of one count of perjury by declaration on November 4, 2008 (count 15), and two counts of fraudulent voting on March 3, 2009 and May 19, 2009 (counts 20 and 22) and acquitted her of the remaining charges.

DISCUSSION

Defendants' sole contention on appeal is that the trial court erred in instructing the jury pursuant to No. EC 2032 that there was a mandatory presumption that defendants were not legally domiciled in any residence in which they had not physically resided during the preceding year. They argue that that instruction deprived them of their due process rights because it relieved the prosecution of its burden of proving all of the elements of the crimes beyond a reasonable doubt.

I. Standard of review

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citations.]' [Citation.]" (*People v. Smith* (2013) 57 Cal.4th 232, 239.)

On appeal, "[w]e conduct independent review of issues pertaining to instructions. [Citation.]" (*People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411; see *People v. Waidla* (2000) 22 Cal.4th 690, 737.) When reviewing the effect of challenged instructions, we look at the instructions given as a whole, "'viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner.' [Citation.]" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1217.) Instructional errors that raise an improper presumption on an element of an offense are subject to a harmless error standard of review, that is, whether the error was harmless beyond a reasonable doubt. (*Carella v. California* (1989) 491 U.S. 263, 266-267, overruled on another ground in *Hedgpeth v. Pulido* (2008) 555 U.S. 57; *People v. Flood* (1998) 18 Cal.4th 470, 499.)

II. Mandatory and permissible rebuttable presumptions

"Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime -- that is, an 'ultimate' or 'elemental' fact -- from the existence of one or more

'evidentiary' or 'basic' facts. [Citations.] The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. [Citations.]" (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 156 (*Ulster County*).)

In determining whether a particular presumption passes constitutional muster, the United States Supreme Court in *Ulster County* distinguished between "the entirely permissive inference or presumption, which allows -- but does not require -- the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant" (*Ulster County*, *supra*, 442 U.S. at p. 157), and "[a] mandatory presumption . . . [that] tells the trier of fact that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. [Citation.]" (*Ibid.*) Because a permissive presumption "leaves the trier of fact free to credit or reject the inference, it does not shift the burden of proof, and affects application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." (*Ibid.*)

A mandatory presumption, the court in *Ulster County* concluded, is "far more troublesome" because it requires the jury to assume an ultimate elemental fact upon proof of a designated basic fact, thereby affecting "not only the strength of the 'no reasonable doubt' burden but also the placement of that burden." (*Ulster County*, *supra*, 442 U.S. at p. 157.) For that reason, the court concluded that the validity of a mandatory presumption must be determined "on its face," not "as applied." (*Id.* at pp. 157-158.) The court further concluded that "since the prosecution bears the burden of establishing guilt, it may not rest its case on a [mandatory rebuttable] presumption unless the fact

proved is sufficient to support the inference of guilt beyond a reasonable doubt." (*Id.* at p. 167.)

In *Ulster County*, the U.S. Supreme Court found that the jury instructions given -- a statute providing that the presence of a firearm in an automobile is "presumptive evidence" of illegal possession of the firearm by all persons in the vehicle -- gave rise only to a permissive inference, and not a mandatory presumption. The Supreme Court noted that the trial court's instructions had made it clear to the jury that the presumption "gave rise to a permissive inference available only in certain circumstances, rather than a mandatory conclusion of possession, and that it could be ignored by the jury even if there was no affirmative proof offered by defendants in rebuttal."[3] (*Ulster County, supra*, 442 U.S. at pp. 161-162, fn. omitted.)

The principles set forth in *Ulster County* were applied by the California Supreme Court in *People v. Roder* (1983) 33 Cal.3d 491 in construing the mandatory rebuttable presumption contained in Penal Code section 496. Pursuant to that statute, the trial court in *Roder* instructed the jury that if they found that the defendant was a dealer in secondhand merchandise who bought or received stolen property under circumstances that should have caused the defendant to make a reasonable inquiry of the seller's legal right to sell that merchandise, they should presume the defendant did so knowing the merchandise was stolen, unless, based on all the evidence, there was a reasonable doubt that the defendant knew the property was stolen. (*Id.* at pp. 495-496.) The California Supreme Court concluded that the instruction given was "a classic example" of a mandatory rebuttable presumption because it informed the jury that "'they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come

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3 The trial court in *Ulster County* instructed the jury that the presumption regarding possession of an illegal firearm "'is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.' [Citation.]" (*Ulster County, supra*, 442 U.S. at p. 162, fn. 19.) The trial court further instructed the jury that "'[t]he presumption or presumptions . . . relative to the drugs or weapons in this case need not be rebutted by affirmative proof or affirmative evidence but may be rebutted by any evidence or lack of evidence in the case.' [Citation.]" (*Ibid.*)

forward with some evidence to rebut the presumed connection between the two facts.' [Citation.]" (*Id.* at p. 501, quoting *Ulster County, supra*, 442 U.S. at p. 157.)

III. No. EC 2032 is a mandatory rebuttable presumption

The jury instruction at issue here, No. EC 2032, is a mandatory rebuttable presumption. It plainly states that "if a person has more than one residence and that person has not physically resided at any one of the residences within the preceding year, there shall be a rebuttable presumption that those residences in which he or she has not so resided within the immediate preceding year are merely residences . . . and not his or her domicile." The instruction informs the jurors that upon proof of the basic fact -- the defendant has not physically resided in a residence within the preceding year -- they must find that the residence was not the defendant's domicile, unless the defendant presents evidence to the contrary. Unlike the jury instructions given in *Ulster County*, the instructions given by the trial court in the instant case did not inform the jurors that the presumption in No. EC 2032 gave rise to a permissive inference rather than a mandatory conclusion regarding defendants' domicile, nor did they advise the jury that they were free to disregard the presumption even if defendants presented no affirmative evidence in rebuttal. No. EC 2032 accordingly was an impermissible mandatory presumption.

The People argue that instruction No. EC 2032 -- read together with the other instructions, specifically, special instruction No. EC 18560 -- did not amount to a mandatory rebuttable presumption. No. EC 18560 required the jury to find the following facts before finding defendants guilty of fraudulent voting: (1) defendants were not entitled to vote at the election, (2) defendants "knew" they were not entitled to vote, and (3) defendants "had the specific intent to defraud." Knowledge and specific intent, the People argue, are the key elements of fraudulent voting, and entitlement to vote is "effectively subsumed within" those elements. The jury could not convict defendants of fraudulent voting solely upon finding that defendants did not live at the Nordhoff home for a year; they would have to find that the prosecution proved the additional elements of knowledge and intent to defraud beyond a reasonable doubt. Because No. EC 2032 "pertained only to the issue of whether appellants were actually entitled to vote, not to the

elements of knowledge and specific intent," the presumption regarding domicile was "superfluous."

That the jury was required to find the additional elements of guilty knowledge and intent to defraud before convicting defendants of fraudulent voting does not alter the fact that the mandatory presumption of instruction No. EC 2032 shifted the burden of proof regarding an element of the crime. The jury could not convict defendants of fraudulent voting without also finding that defendants were not entitled to vote in the election -- a finding that in turn hinged on the separate finding that the Nordhoff home was not defendants' legal domicile.

The presumption in instruction No. EC 2032 was a mandatory rebuttable presumption that relieved the prosecution of its burden of proving every element of the crime of fraudulent voting beyond a reasonable doubt. Giving such an instruction was error that impinged upon defendants' due process rights. (*Ulster County, supra*, 442 U.S. at p. 157; *Roder, supra*, 33 Cal.3d at p. 501.)

IV. The error was not harmless

The verdicts rendered indicate that the jury harbored reasonable doubts concerning defendants' domicile in 2008. The jury acquitted Alarcon of all charges arising in 2006 and 2007, consistent with the conclusive presumption applicable to state legislators as set forth in special instruction No. EC 2026,[4] and with evidence that Alarcon may have occupied the Nordhoff home in 2007.

There was abundant evidence that the Nordhoff home was vacant and under construction in 2008. In addition, the jurors were instructed that the conclusive presumption applicable to state legislators did not apply to any elections that occurred in 2008. The jurors nevertheless acquitted Alarcon of fraudulent voting and perjury charges on February 8, 2008, June 3, 2008, and October 8, 2008, but convicted him of fraudulent

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[4] The conclusive presumption of instruction No. EC 2026 required the jury to conclude that the Nordhoff home was Alarcon's domicile because he was a member of the State Assembly until he resigned from that office to take his seat as the District Seven representative on the city council following his election in March 2007.

voting on November 5, 2008, and perjury by declaration on November 6, 2008. The jury similarly acquitted Mrs. Alarcon of perjury by declaration on April 7, 2008, but found her guilty of the same charge on November 4, 2008.[5] The jury thus determined that defendants were entitled to claim the Nordhoff home as their domicile as of October 8, 2008, but were not entitled to do so less than one month later, on November 4, 2008.

The jury's time-specific determination regarding defendants' domicile is consistent with the mandatory presumption in special instruction No. EC 2032. That instruction required the jury to determine whether defendants had physically resided at the Nordhoff home within the preceding year. Once the jurors found that defendants had not done so, the mandatory presumption of No. EC 2032 required them to find that that home was not defendants' legal domicile.

The distinction drawn by the jury between the October 2008 and the November 2008 charges is supported by evidence that defendants had not "physically resided" at the Nordhoff home within the preceding year. There was evidence that renovation of the Nordhoff home began in the fall of 2007. There was also specific evidence that the Nordhoff home was vacant on November 5, 2007, when a worker entered the home to refinish a bathtub. Mrs. Alarcon's conviction for perjury on November 4, 2008, and Alarcon's conviction for fraudulent voting on November 5, 2008, are one year to the date after that work occurred, a strong indication that the mandatory presumption of instruction No. EC 2032 was the basis for the jury's determination regarding domicile. Given these circumstances, we cannot conclude that the instructional error was harmless beyond a reasonable doubt.

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[5] As discussed, the jury also convicted the Alarcons of fraudulent voting on March 3, and May 19, 2009, but acquitted them both of perjury by declaration on June 18, 2009.

DISPOSITION

The judgment is reversed and the matter is remanded to the superior court for further proceedings.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT