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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND UGALDE,

Defendant and Appellant.

B234572

(Los Angeles County  
Super. Ct. No. VA118436)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Phillip H. Hickok, Judge. Affirmed with directions.

Ann Krausz, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Lance E. Winters, Assistant Attorney General, and Scott A. Taryle and Pamela  
C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

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Raymond Ugalde appeals from the judgment entered following his conviction by jury for second degree robbery (Pen. Code, § 211) with a finding he committed the offense for the benefit of, at the direction of, or in association with, a criminal street gang (former Pen. Code, § 186.22, subd. (b)(1)). The court sentenced appellant to prison for 13 years. We affirm the judgment with directions.

### ***FACTUAL SUMMARY***

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which as to the robbery is undisputed, established as follows. During the evening of January 28, 2011, Xinran Wang was walking on Belshire near Carson in Hawaiian Gardens. About three or four men in their 20's, including appellant, ran up to Wang and robbed him of his wallet. During the robbery, one of the assailants pointed a gun at Wang, Wang surrendered his wallet to the gunman, and appellant was standing next to the gunman. The group yelled at Wang several times, then fled. Wang lived in Hawaiian Gardens. He was not a gang member.

Wang fled towards his home and called 911. He spoke a little English but, with the help of a Mandarin interpreter, Wang reported the following. Four to five non-Asian high school students approached Wang and, using a gun, robbed him. Each robber was wearing a hoodie, and one robber was wearing a gray hoodie. At the time of the call, Wang was at an address in the 12400 block of 221st. The address was at or near his home. When the operator asked for the cross street, Wang replied, "Carson, Carson they must be around, they live in the neighborhood too I think."<sup>1</sup>

Los Angeles County Sheriff's Deputy Niel Wenland was in a helicopter and responding to the robbery call. He flew to an apartment complex in Hawaiian Gardens. The complex was a hangout for Varrio members.

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<sup>1</sup> The information Wang reported to the operator is reflected in a transcript of the call. The parties stipulated the transcript did not record the call verbatim.

Wenland saw three or four persons at the complex and they matched the suspects' descriptions. The group fled into the laundry room of the complex. Wenland broadcast to other sheriff's units what he had seen and the address of the complex. Less than 30 seconds later, the group fled and initially ran westbound. Los Angeles County Sheriff's Deputy David Machuca detained codefendant Douglas Burgos, one of the men in that group. (Burgos is not a party to this appeal.)

Los Angeles County Sheriff's Sergeant Oscar Butao, responding to the robbery call, went to an apartment complex at 22009 Belshire.<sup>2</sup> Butao saw appellant exit a laundry room at the location and detained him. No other suspects were inside the laundry room. Wang's wallet was in the laundry room and \$20 had been taken from the wallet. Appellant was wearing a dark hooded shirt and dark jeans.

Machuca testified as follows. While Machuca was booking Burgos at the sheriff's station, appellant looked at Burgos and asked, " 'They got you too?' " Appellant knew Burgos. Appellant lived on 224th, and Burgos lived on the west side of Hawaiian Gardens.

Wang identified appellant and Burgos at the preliminary hearing, and testified Burgos was the gunman. Wang also identified appellant at trial. Wang testified at trial that he had been uncertain when he earlier had identified Raymond T. as the gunman from his photograph.

Los Angeles County Sheriff's Detective Lorena Rodriguez, a gang expert assigned to the Lakewood sheriff's station, testified as follows. Hawaiian Gardens was within the area covered by the station. As part of Operation Safe Streets at the station, Rodriguez contacted gang members in the community. Rodriguez also spoke with deputies who worked in Hawaiian Gardens and with citizens. The Varrio Hawaiian Gardens gang (Varrio), a criminal street gang, was the only gang that claimed Hawaiian Gardens as the gang's territory. The area of Belshire and Carson was within Varrio's territory. One of

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<sup>2</sup> Appellant concedes this was the same complex to which Wenland referred.

the primary activities of the gang was the commission of street robberies. The purpose of committing street robberies was to instill fear in the community. When a group of gang members committed a robbery, other members would know the robbers were willing to commit crimes and acts of violence and this increased the gang members' status.

Rodriguez opined appellant was a Varrio member. Rodriguez based her opinion on reports she had read, conversations with detectives who had contacted appellant, conversations with the detective handling the present case, and appellant's tattoos. Appellant previously had been arrested four times for violating a gang injunction. Varrio members had been served with the injunction, which ordered them not to associate with other Varrio members. Rodriguez opined Raymond T. was a Varrio member and Burgos was a Varrio associate.<sup>3</sup>

In response to a hypothetical question based on evidence in this case, Rodriguez opined the present robbery was committed for the benefit of, and in association with, Varrio. Rodriguez based her opinion on reports she had read and the fact the robbery was committed in Hawaiian Gardens, which Varrio claimed as its territory.

According to Rodriguez, the crime benefited the gang, not financially, but by instilling fear in the community and maintaining a perception in the community that the gang controlled the city. Moreover, the gang members would know from the fact the victim did not speak English that he probably would not report the crime. The gang members did not have to flash gang signs or mention their gang, and the victim did not have to know the robbers were in a gang. Varrio was the only gang in Hawaiian Gardens, and the city was the gang's turf. The fact the gang members were committing

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<sup>3</sup> Appellant had a Varrio tattoo on his stomach. Appellant had on his right arm a tattoo of a palm tree, another Varrio symbol. On his right arm, appellant had a tattoo that Varrio members commonly wore, i.e., a tattoo that referred to southeast, the area in which Hawaiian Gardens was located. Raymond T. had Varrio-related tattoos on his stomach and left hand, a tattoo on his right hand, and a tattoo indicating southeast on his back.

the crime in concert created fear in citizens. Everyone in Hawaiian Gardens knew that Varrio was the only gang in the city.

Moreover, the fact multiple gang members committed the crime was significant to the issue that the crime was committed in association with the gang. If more than two or three gang members committed the robbery, this meant they were committing the crime openly, thereby increasing the gang's status. Appellant presented an alibi defense.

### ***ISSUES***

Appellant claims (1) the trial court reversibly erred by failing to give CALJIC No. 2.90 during the predeliberation instructions, (2) the trial court erroneously denied appellant's motion to bifurcate the gang allegation, (3) cumulative prejudicial error occurred, and (4) insufficient evidence supported the true finding as to the gang allegation. Respondent claims the abstract of judgment must be corrected to reflect the jury convicted appellant of second degree robbery.

### ***DISCUSSION***

1. *The Trial Court's Failure to Give CALJIC No. 2.90 Does Not Require Reversal of the Judgment.*

a. *Pertinent Facts.*

During voir dire of the prospective jurors, the court and parties referred to reasonable doubt. For example, the court indicated the elements of the crime had to be proven beyond a reasonable doubt and the jury had to decide beyond a reasonable doubt if the gang allegation was true. The prosecutor commented there were robbery and gang allegations in the present case and it was his burden to prove "this case" and appellant's guilt beyond a reasonable doubt.

Appellant commented as follows. The standard at trial was beyond a reasonable doubt, the jury had to determine if there was a reasonable doubt appellant was innocent, and if the People did not prove the elements, "then you have reasonable doubt." Appellant did not have to prove his innocence. The People had to prove beyond a reasonable doubt that appellant "did the things in the complaint."

The trial court without objection failed to give CALJIC 2.90 during its predeliberation instructions. The court gave various predeliberation instructions that referred to reasonable doubt, including CALJIC No. 2.61,<sup>4</sup> which we will discuss later.

During opening argument, the prosecutor discussed reasonable doubt and commented that, during jury selection, the court had talked about reasonable doubt. The prosecutor also stated, “It’s my burden of proof to prove this case beyond a reasonable doubt.” The prosecutor indicated he wanted to focus on the meaning of reasonable doubt and stated, “you have to have a reasonable doubt as to [appellant’s] innocence before you can find him not guilty.” The prosecutor also argued perpetrators and accomplices were equally guilty of a crime “if proven beyond a reasonable doubt” and “[t]hat’s what we have in this particular case.” The prosecutor, discussing CALJIC No. 4.50, argued the alibi witnesses’ testimony did not raise a reasonable doubt appellant had been present when the crime was committed.

During closing argument, appellant’s counsel argued, *inter alia*, “the prosecution has not proved this case against [appellant] beyond a reasonable doubt.” Appellant

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<sup>4</sup> The other given instructions that referred to reasonable doubt were CALJIC Nos. 2.01, 2.91, 4.50, and 17.24.2. CALJIC No. 2.01, pertaining to circumstantial evidence, stated, *inter alia*, “each fact which is essential to complete a set of circumstances necessary to establish the defendant’s guilt must be proved beyond a reasonable doubt.” CALJIC No. 2.91, stated, “The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime with which he is charged. [¶] If, after considering the circumstances of the identification and any other evidence in this case, you have a reasonable doubt whether defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find him not guilty.” CALJIC No. 4.50, entitled “exemptions and defenses” (capitalization omitted), stated, “The defendant in this case has introduced evidence for the purpose of showing that he was not present at the time and place of the commission of the alleged crime for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, you must find him not guilty.” CALJIC No. 17.24.2, an instruction pertaining to the gang allegation, indicated, *inter alia*, the People had the burden of proving that allegation, and if the jury had a reasonable doubt that the allegation was true, the jury was required to find the allegation to be not true.

distinguished and discussed the presumption of innocence, burden of proof, and reasonable doubt standard. As to the last of these, appellant's counsel stated, "And finally, the third most important thing that [the prosecutor] also mentioned is called reasonable doubt. And . . . it's been attempted to be defined many, many times. It's difficult. The judge told you what reasonable doubt is. But reasonable doubt essentially means there's no other explanation reasonably to explain what the prosecution is alleging. There's no other alternative. It has to be the way that the prosecution said. Because all alternatives don't make sense, it's not reasonable."

Appellant also argued he did not have to prove his innocence, the People had to prove he was guilty of robbery beyond a reasonable doubt, Wang was the only eyewitness, and Wang's allegedly inconsistent stories constituted reasonable doubt. Appellant conceded Wang was robbed and appellant argued the issue was identity.

b. *Analysis.*

Appellant claims the trial court reversibly erred by failing to give CALJIC No. 2.90 during the predeliberation instructions. We reject the claim, considering below the People's burden to prove guilt beyond a reasonable doubt (burden), the definition of reasonable doubt, and the presumption of innocence (presumption).

(1) *The Burden.*

Insofar as the burden is concerned, in *People v. Aranda* (2012) 55 Cal.4th 342 (*Aranda*), our Supreme Court concluded federal due process requires a trial court in a criminal case to give a predeliberation burden instruction as to each charged offense. (*Id.* at pp. 349-350, 357-358, 365, 367, 373.) *Aranda* also concluded a trial court's failure to give a standard predeliberation reasonable doubt instruction (i.e., CALJIC No. 2.90 or CALCRIM No. 220) does not constitute federal due process error as long as the predeliberation instructions "otherwise cover" (*id.* at p. 358) the requirement of the burden. (*Id.* at pp. 350, 358, 361).

Phrased differently, *Aranda* teaches that a trial court does not violate its federal due process obligation to give a predeliberation burden instruction as long as the court

gives either (1) a standard predeliberation reasonable doubt instruction or (2) another predeliberation instruction that otherwise covers the requirement of the burden as to each charged offense.

For example, in *Aranda*, a jury convicted the defendant of, inter alia, voluntary manslaughter as a lesser included offense of murder and the trial court failed to give a standard predeliberation reasonable doubt instruction. *Aranda* concluded the failure was not federal due process error because other predeliberation instructions told the jury that, inter alia, the burden had to be satisfied before the jury could convict the defendant of any lesser included offense of murder.

The *Aranda* court did find said failure violated federal due process with regard to the defendant's conviction for active participation in a gang because the other predeliberation instructions did not inform the jury that the burden had to be satisfied as to that offense. However, the court found the violation was subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]. (*Aranda, supra*, 55 Cal.4th at pp. 350, 363, 365-368.)

*Aranda* stated, "We believe, . . . that when, as here, the court has not misdefined the reasonable doubt standard<sup>5</sup> in a manner that improperly lowers the prosecution's burden of proof, but nonetheless has failed to satisfy its federal constitutional obligation to instruct on the requirement that the prosecution prove the defendant's guilt of *each* charged offense beyond a reasonable doubt, the effect of the instructional omission, like most errors of constitutional dimension, is amenable to harmless error review. Under these circumstances, other components of the trial, such as the instructions relating to other charged crimes, the verdicts on those counts, and other potentially relevant circumstances (such as the content of the attorneys' closing argument or the nature and extent of a trial court's remarks during jury selection with regard to the reasonable doubt requirement), may support a determination that the theoretical gap left by the court's

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<sup>5</sup> The standard is misdefined when the trial court defines the standard by referring to "grave uncertainty" and "substantial doubt." (*Aranda, supra*, 55 Cal.4th at p. 364.)



failure during predeliberation instructions to link the reasonable doubt standard of proof to a certain charged offense had in reality been filled by these other components of trial. In such cases, a reviewing court could determine that there is no reasonable possibility that the jury did not *actually apply* the beyond a reasonable doubt standard in finding the defendant guilty of the offense in question.” (*Id.* at p. 365, second italics added.)

*Aranda* noted, however, that a review of the strength of the prosecution’s case has no place in *Chapman* analysis in this setting. (*Aranda, supra*, 55 Cal.4th at pp. 367-368.) *Aranda* observed, “if a reviewing court were to rely on its view of the overwhelming weight of the prosecution’s evidence to declare there was no reasonable possibility that the jury based its verdict on a standard of proof less than beyond a reasonable doubt, the court would be in the position of expressing its own idea ‘of what a reasonable jury would have done. And when [a court] does that, “the wrong entity judge[s] the defendant guilty.” [Citation.]’ [Citation.] No matter how overwhelming a court may view the strength of the evidence of the defendant’s guilt, that factor is not a proper consideration on which to conclude that the erroneous omission of the standard reasonable doubt instruction was harmless under *Chapman*.” (*Id.* at p. 368.)

*Aranda* later observed, “If it can be said beyond a reasonable doubt that the jury must have found the defendant’s guilt beyond a reasonable doubt, the error is harmless. If the reviewing court cannot draw this conclusion, reversal is required.” (*Aranda, supra*, 55 Cal.4th at p. 368.)

As stated, in *Aranda*, a jury convicted the defendant of, inter alia, active participation in a gang, and *Aranda* concluded the trial court committed federal due process error by failing to give a predeliberation burden instruction as discussed. Based on the facts in *Aranda*, including a predeliberation burden instruction on the voluntary manslaughter charge, our Supreme Court concluded the error was harmless under the *Chapman* standard. (*Aranda, supra*, 55 Cal.4th at pp. 369-374.)<sup>6</sup>

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<sup>6</sup> *Aranda* concluded state law too requires a trial court in a criminal case to give a predeliberation burden instruction. (*Aranda, supra*, 55 Cal.4th at pp. 350, 352-354.) The

(2) *The Definition of Reasonable Doubt.*

The federal Constitution does not require a trial court to define reasonable doubt. (*Aranda, supra*, 55 Cal.4th at p. 374.) However, state law does. (*Id.* at pp. 350, 374.) *Aranda* teaches a trial court does not violate this state law obligation as long as the trial court gives either (1) a standard predeliberation reasonable doubt instruction or (2) “other instructions” (*id.* at p. 350) that define reasonable doubt. *Aranda* concluded a trial court’s state law error in failing to define reasonable doubt as discussed is subject to harmless error analysis under *Watson*. (*Aranda, supra*, 55 Cal.4th at pp. 350, 354, 375.)

(3) *The Presumption.*

*Aranda* concluded the mere failure to instruct on the presumption is not federal constitutional error. (*Aranda, supra*, 55 Cal.4th at p. 356, fn. 9.) Instead, “[T]he constitutional inquiry for failure to instruct on this principle is to evaluate the omission ‘in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial.’ (*Ibid.*)” (*Id.* at p. 356.) *Aranda* also concluded there is no need to engage in the above inquiry, and a trial court has not failed to instruct on the “principle” (*id.* at p. 356)

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applicable state law consists of statutes (Evid. Code, § 502; Pen. Code, § 1096) and case law holding a trial court must instruct on those principles closely and openly connected with the facts before the court and necessary for the jury’s understanding of the case. (*Aranda, supra*, 55 Cal.4th at p. 354.) *Aranda* teaches a trial court does not violate its state law obligation as long as the trial court gives either (1) a standard predeliberation reasonable doubt instruction or (2) other instructions that cover the “substance” (*id.* at p. 354) of such an instruction. (*Ibid.*) For example, in *Aranda*, other instructions “covered the . . . principle[] embodied in the standard reasonable doubt instruction, that is, . . . the prosecution’s burden of proving guilt beyond a reasonable doubt . . . .” (*Id.* at p. 374.) A trial court’s state law error in failing to give a predeliberation burden instruction is subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*Aranda, supra*, 55 Cal.4th at p. 354.)

of the presumption, when the trial court, through another instruction, has “expressed the substance” (*id.* at p. 356) of the presumption.<sup>7</sup>

(4) *Application of the Law to This Case.*

(a) *No Federal Due Process Error Occurred Regarding the Burden.*

In the present case the trial court used CALJIC instructions when giving the predeliberation instructions but did not give CALJIC No. 2.90; therefore, the court did not give a standard predeliberation reasonable doubt instruction. However, the court gave CALJIC No. 2.61. That instruction stated, “In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant’s part will make up for a failure of proof by the People so as to support a finding against him on any essential element.”

We note as to the first sentence in CALJIC No. 2.61 that a defendant seeking acquittal and deciding whether to testify could *not* choose to rely on any failure by the People to prove beyond a reasonable doubt every essential element of the charge unless the People had the *burden* to prove beyond a reasonable doubt every essential element of that charge. This is so because, absent such a burden, the defendant, when deciding whether to testify, might conclude there was no burden, the burden of proof was on the defendant, or the standard of proof was less than beyond a reasonable doubt. Absent the burden on the People, a failure of proof by the People would produce no consequence on

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<sup>7</sup> The state law analysis applicable to the presumption is essentially the same as the previously discussed state law analysis applicable to the burden (see fn. 6, *ante*). State law requires a trial court in a criminal case to give a predeliberation presumption instruction. (*Aranda, supra*, 55 Cal.4th at pp. 350, 352-355.) A trial court does not violate its state law obligation to give such an instruction as long as the court gives either a standard predeliberation reasonable doubt instruction or other instructions that cover the “substance” (*id.* at p. 354) of such an instruction. (*Ibid.*) For example, in *Aranda*, other instructions “covered the . . . principle[] embodied in the standard reasonable doubt instruction, that is, the presumption of innocence . . . .” (*Id.* at p. 374.) A trial court’s state law error in failing to instruct on the presumption is subject to harmless error analysis under *Watson*. (*Aranda*, at p. 354.)

which the defendant could rely when deciding whether to testify. The first sentence of CALJIC No. 2.61 presupposes the People have the burden to prove beyond a reasonable doubt every essential element of the charge(s) against the defendant in order to convict the defendant.

We note as to the second sentence in CALJIC No. 2.61 that a lack of proof on the defendant's part *would* make up for a failure of proof by the People so as to support a finding against the defendant on any essential element if the defendant had the burden to prove the defendant's innocence as to the essential elements. The second sentence presupposes the People have the burden of proof as to the essential elements.

We believe the jury in this case understood that CALJIC No. 2.61 clearly implied the People had the burden to prove beyond a reasonable doubt every essential element of the charge against appellant in order to convict him. That is, we conclude CALJIC No. 2.61 covered the requirement of the burden (*Aranda, supra*, 55 Cal.4th at pp. 350, 358, 360-361); therefore, the court committed no federal due process error by failing to give CALJIC No. 2.90.

Even if the trial court committed federal due process error by failing to instruct on the burden as it related to the robbery, it does not follow that we must reverse the judgment. At the outset, we note the record fails to demonstrate the trial court misdefined reasonable doubt in a manner that lowered the People's burden of proof; therefore, *Chapman* analysis applies. (*Aranda, supra*, 55 Cal.4th at pp. 363, 365.)<sup>8</sup>

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<sup>8</sup> Appellant, in his pre-*Aranda* opening brief, cited *People v. Phillips* (1997) 59 Cal.App.4th 952 (*Phillips*), and *People v. Crawford* (1997) 58 Cal.App.4th 815 (*Crawford*), for the proposition a trial court's failure to give a standard predeliberation reasonable doubt instruction is structural error requiring automatic reversal. However, unlike the present case, in neither of those cases were there other instructions connecting the burden to the charged offense. (*Aranda, supra*, 55 Cal.4th at p. 359.) Moreover, *Aranda* disapproved of *Phillips* and *Crawford* to the extent they held the omission of CALJIC No. 2.90 in violation of the federal Constitution is structural error requiring automatic reversal. (*Aranda*, at p. 367, fn. 12.)

During jury selection, the court and parties discussed the People's burden to prove beyond a reasonable doubt that appellant was guilty of robbery. Appellant never complained the court failed to give CALJIC No. 2.90. Even if CALJIC No. 2.61 did not satisfy federal due process requirements, we believe CALJIC No. 2.61 supports a conclusion any federal due process error was harmless.

Moreover, CALJIC No. 2.91 instructed the jury to the effect the People had to prove the issue of identity beyond a reasonable doubt. CALJIC No. 4.50 instructed that if the jury had a reasonable doubt that appellant was present when the crime was committed, the jury had to acquit him. CALJIC No. 2.01 related circumstantial evidence to proof of guilt beyond a reasonable doubt, and CALJIC No. 17.24.2 related the gang allegation to the People's burden of proof, reasonable doubt, and a not true finding.

During jury argument, the prosecutor commented without dispute that the court talked about reasonable doubt during jury selection. Counsel for both parties acknowledged the People had a burden to prove appellant's guilt beyond a reasonable doubt. Nothing in (1) the comments of the court and parties during jury selection, (2) the predeliberation instructions, or (3) the parties' jury arguments suggested that, as to the robbery charge, there was no burden of proof, the burden was not on the People, or the standard of proof was anything other than beyond a reasonable doubt.

Given the entire record, we conclude it is not reasonably possible that the jury did not actually apply the beyond a reasonable doubt standard in finding appellant guilty of robbery, i.e., we conclude beyond a reasonable doubt that the jury's verdict on the robbery charge must have been based on a finding of guilt beyond a reasonable doubt. The alleged instructional error was harmless beyond a reasonable doubt. (*Aranda, supra*, 55 Cal.4th at pp. 368-370, 373-374.)<sup>9</sup>

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<sup>9</sup> In light of our analysis that any federal due process error regarding the burden was harmless beyond a reasonable doubt, any analogous state law error was harmless under the *Watson* standard (see fn. 6, *ante*). There is also no need to address the issue of the impact, if any, on appellant's claim of the fact appellant conceded during jury argument

(b) *No Federal Due Process Error or Reversible State Law Error Occurred Regarding the Issue of the Definition of Reasonable Doubt.*

The trial court did not violate the federal Constitution by failing to define reasonable doubt. (*Aranda, supra*, 55 Cal.4th at p. 374.) Assuming the trial court violated state law by failing to provide a definition, the prosecutor commented without dispute that the court talked about reasonable doubt during jury selection. Nothing in the record suggests the jury might have been confused about the meaning of reasonable doubt. (See *Aranda*, at p. 375.) The jury did not request clarification of the meaning of that phrase. (See *ibid.*) Appellant’s argument to the jury concerning the meaning of reasonable doubt was not confusing.

Nothing in the predeliberation instructions or the parties’ jury arguments invited the jury to apply no standard of proof, or a standard less than beyond a reasonable doubt, to the robbery charge. (See *Aranda, supra*, 55 Cal.4th at p. 375.) Our previous conclusion no prejudicial federal due process instructional error occurred regarding the burden militates towards a conclusion that no prejudicial state law instructional error occurred as to the definition of reasonable doubt. Any state law error by the trial court in failing to define reasonable doubt was not prejudicial under the *Watson* standard. (See *Aranda, supra*, 55 Cal.4th at pp. 375-376.)

(c) *No Federal Due Process or State Law Error Occurred Regarding the Presumption.*

In the present case, the predeliberation instructions included CALJIC No. 1.03. That instruction stated, inter alia, “You must decide all questions of fact in this case *from the evidence received in this trial and not from any other source.*” (Italics added.)

In *Aranda*, the trial court gave CALJIC No. 1.00, which instructed the jury that “they must determine defendant’s guilt *based on the evidence received at trial, and not to consider the fact of his arrest or that he is being brought to trial.*” (*Aranda, supra*,

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that Wang was robbed, other than to note that, insofar as the jury is concerned, the court instructed them that statements by attorneys were not evidence.

55 Cal.4th at p. 356, *italics added*.) *Aranda* relied on this language in CALJIC No. 1.00 to conclude no federal due process instructional error occurred regarding the presumption.

We believe the language in CALJIC No. 1.03 is sufficiently similar to that in CALJIC No. 1.00, and expressed the substance of the presumption with the result the trial court's failure to include the standard reasonable doubt instruction's admonition on the presumption did not constitute federal constitutional error. (Cf. *Aranda, supra*, 55 Cal.4th at p. 356.) Moreover, even if the trial court failed to instruct on the principle of the presumption, we conclude no federal constitutional error occurred in light of the totality of the circumstances. (See *Aranda, supra*, 55 Cal.4th at p. 356, fn. 9.)

Similarly, no state law instructional error occurred regarding the presumption because CALJIC No. 1.03 covered the principle of the presumption. (Cf. *Aranda, supra*, 55 Cal.4th at p. 374.) Even if such state law error occurred, appellant told the prospective jurors that he did not have to prove his innocence. During jury argument, appellant discussed the presumption and argued he did not have to prove his innocence. The burden, when satisfied, rebuts the presumption, and we have already concluded any federal due process instructional error as to the burden was harmless under the *Chapman* standard. We conclude any state law error as to the presumption was harmless under the *Watson* standard. (See *Aranda, supra*, 55 Cal.4th at p. 354.)

## *2. The Trial Court Properly Denied Appellant's Bifurcation Motion.*

Prior to trial, appellant moved to bifurcate the trial on the gang allegation. The prosecutor opposed the motion, summarizing the facts of the robbery and arguing as follows. The gang evidence was important to show appellant's motive and intent. Appellant was an admitted Varrio member and Burgos was a gang associate. The gang expert would testify one of the primary activities of the gang was committing robberies. Appellant and Burgos might have been accomplices; therefore, the People would have to prove they shared the intent of the perpetrators.

Appellant argued gang evidence pertaining to the gang allegation would be highly prejudicial to the robbery charge, and there would be insufficient evidence to prove the gang allegation. The court indicated the fact, if true, that appellant was a Varrio member was relevant to the issues of modus operandi, intent, intent to permanently deprive Wang of his wallet, and willingness to apply force or fear to accomplish criminal activity. The court concluded that, under Evidence Code section 352, “relevance outweighs whatever kind of prejudice might be involved to your client.” During the predeliberation instructions, the court gave a limiting instruction concerning gang evidence.<sup>10</sup>

Appellant claims the trial court erroneously denied his motion to bifurcate. We disagree. The trial court impliedly denied appellant’s motion and appellant does not suggest that, prior to that denial, he took any action to narrow the issues the People had to prove as a consequence of his earlier not guilty plea. There is no dispute the proffered gang evidence was admissible to prove the gang allegation. That evidence was also admissible to prove such issues as motive, intent (including intent to permanently deprive Wang of his wallet), and identity as to the robbery charge. (Cf. *People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518-1519; *People v. Plasencia* (1985) 168 Cal.App.3d 546, 552-553.) Because the proffered evidence was cross-admissible as to the robbery charge and as against any Evidence

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<sup>10</sup> The instruction was CALJIC No. 17.24.3, which stated, “Evidence has been introduced for the purpose of showing criminal street gang activities, and of criminal acts by gang members, other than the crime for which defendant is on trial. [¶] Except as you will be otherwise instructed, this evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show that the crime or crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. [¶] For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose.”



Code section 352 objection, the trial court did not err by denying appellant's bifurcation motion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1051.)

Second, even if gang evidence proffered to prove a gang allegation is in a given case inadmissible to prove an underlying crime, factors favoring joinder may still exist, since a unitary trial on allegations pertaining to a substantive crime and a gang enhancement ordinarily avoids the increased expenditure of funds and judicial resources which might result if bifurcation occurred. (*Hernandez, supra*, 33 Cal.4th at pp. 1050-1051.) For this additional reason, the trial court did not abuse its discretion by denying appellant's bifurcation motion. (Cf. *id.* at pp. 1048-1051.)

Finally, the trial court gave CALJIC 17.24.3. That instruction effectively told the jury that they were not to consider the gang evidence in connection with the robbery, they were to consider the gang evidence only in connection with the gang allegation, and the jury was not to consider the gang evidence as propensity evidence. We presume the jury followed those instructions. (Cf. *People v. Sanchez* (2001) 26 Cal.4th 834, 852). Any error by the trial court in denying appellant's bifurcation motion was not prejudicial. (Cf. *Watson, supra*, 46 Cal.2d at p. 836.)<sup>11</sup>

### 3. *Sufficient Evidence Supported the True Finding as to the Gang Allegation.*

Appellant claims there is insufficient evidence supporting the true finding as to the gang allegation. We reject the claim. There is no dispute Varrio was a criminal street gang for purposes of Penal Code section 186.22, subdivision (b)(1). There was substantial evidence as follows. Three or four young men robbed Wang at gunpoint. They included appellant and were wearing similar clothing. Not only did the group rob Wang in concert but appellant and Raymond T. were Varrio members, and Burgos was a Varrio associate. Appellant knew Burgos.

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<sup>11</sup> We reject appellant's claim that prejudicial cumulative error occurred.

The group yelled at Wang during the robbery, and later fled. When Wang subsequently asked for his credit card, the group ran back towards Wang and successfully instilled fear in him. Wang thought the group lived in the neighborhood. Appellant, Raymond T., and Burgos retreated to an apartment complex on a nearby street. The complex was a Varrio hangout. The group reasonably could have expected assistance from any other Varrio members present, and the familiar environs of the hangout would have facilitated escape or the destruction of evidence.

Shortly after the robbery, a deputy in a helicopter flew to the complex. Appellant, Raymond T., and Burgos fled into its laundry room and later fled out of it. Appellant later exited a laundry room, apparently the same one, and Wang's wallet, less \$20, was found inside the laundry room.

The robbery occurred in Hawaiian Gardens which, according to Rodriguez, was territory claimed only by Varrio, the city's only gang. One of the gang's primary activities was the commission of street robberies. Rodriguez opined when a group of gang members committed a robbery, it enhanced the members' status. Appellant had various gang tattoos. Rodriguez opined to the effect the robbery was committed to benefit the gang because the robbery instilled fear in the community of Hawaiian Gardens. She also opined the robbery was committed in association with Varrio, and the fact multiple gang members openly committed the robbery provided evidence they did so in association with the gang and to increase its status. Appellant, who had been served with a gang injunction, knew he was not supposed to associate with Varrio members.

We conclude there was sufficient evidence to support the true finding as to the gang enhancement. (Cf. *People v. Abillar* (2010) 51 Cal.4th 47, 59-63; *People v. Leon* (2008) 161 Cal.App.4th 149, 163; *People v. Romero* (2006) 140 Cal.App.4th 15, 19-20; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198-1199.) None of the cases cited by appellant compels a contrary conclusion.

4. *The Abstract of Judgment Must Be Corrected.*

The abstract of judgment reflects the jury convicted appellant of second degree burglary. Respondent claims the abstract of judgment must be corrected to reflect the jury convicted appellant of second degree robbery. We agree and we will direct the trial court to correct the abstract of judgment accordingly. (Cf. *People v. Humiston* (1993) 20 Cal.App.4th 460, 466, fn. 3.)

***DISPOSITION***

The judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting that in the present case the jury convicted appellant of second degree robbery and not second degree burglary.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH J.