Some Tips for Arguing *Watson* Prejudice More Persuasively
by
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When arguing state error, counsel generally must confront the standard of prejudice set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836: an error is deemed harmless unless, "after an examination of the entire cause, including the evidence,"[1] it appears "reasonably probable" the defendant would have obtained a more favorable outcome had the error not occurred. The burden is on the defendant to show such a reasonable probability.

Watson is the most difficult test for the appellant among the standard prejudice tests[2] and so needs to be argued with special care. But all too often, after demonstrating that error occurred, appellate counsel will simply follow up with a conclusory statement such as, "It is reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred," citing *Watson*. Such a facile treatment is not likely to satisfy the applicable burden and persuade the court to order relief. The end result will almost inevitably be still another "harmless error" affirmance.

It need not be that way. To improve the chances of success, counsel should (1) more completely describe what the test "reasonably probable" is and is not, (2) concretely show how it is met in the particular case by pointing to facts from which the court can find prejudice, and (3) optimally define what the "more favorable result" might have been.

Tip (1): In your prejudice analysis, emphasize the *College Hospital* formulation of *Watson* – a reasonable "chance" the error was prejudicial (less than "more likely than not" but more than an "abstract possibility")

First, it is not necessary simply to quote the bare "reasonably probable" test from *Watson* and then struggle to meet it. Counsel can call attention to and use clarifications of the test from later Supreme Court cases, which may improve the chances of success.

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[1]California Constitution, article VI, section 13.

[2]The others are *Chapman v. California* (1967) 386 U.S. 18 (for most federal constitutional error, the beneficiary of error must demonstrate beyond a reasonable doubt it was not prejudicial) and reversible per se. There are also some specialized "boutique" standards for certain kinds of errors. See Appellate Defenders, Inc., California Appellate Practice Manual ("Manual"), § 4.50 et seq., http://www.adi-sandiego.com/manual.html.

In *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, the court held that, under *Watson*, "'probability' . . . does not mean more likely than not, but merely *a reasonable chance*, more than an *abstract possibility*." (*Id*. at p. 715, italics original, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 837, and *Strickland v. Washington* (1984) 466 U.S. 688, 693-694, 697, 698; see also *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050-1051; *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 918; *People v. Dennis* (1998) 17 Cal.4th 468, 523; see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-802.)

Watson itself rejects the more likely than not standard: "an equal balance of reasonable probabilities necessarily means . . . 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*Watson*, 46 Cal.2d at p. 837.)

The *College Hospital* formulation in theory means the same thing as the bare "reasonably probable" test, but it is at least atmospherically more favorable to the appellant and may actually have the practical effect of forestalling the court's inadvertent use of a more stringent standard than is appropriate. The reason is that the "bare" test uses the ambiguous term "probable," which can mean "possible" but most often calls to mind "more likely than not."[3] Unless its attention is drawn to the *College Hospital* clarification of the *Watson* test, the court may reflexively use a preponderance (more likely than not) standard.[4] Pointing out that the Supreme Court has specifically held the

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[3]"Probability" sometimes is used to mean, simply, statistical odds – of whatever magnitude ("the probability of winning the lottery is 1 in 5 million"). But more often it is understood as "more likely than not" ("better call off the picnic – with such dark clouds overhead, rain seems a probability today"). (See *People v. Savedra* (1993) 15 Cal.App.4th 738, 744 ["likely" most often means "more probable than not"].)

The ambiguity of "probable" or "likely" is illustrated by such cases as *People v. Superior Court* (*Ghilotti*)*, supra*, 27 Cal.4th 888, 916-919 (lengthy analysis of term "likely" in interpreting SVP law and Welf. & Inst. Code, § 6601 language, "likely to engage in acts of sexual violence") and *People v. Savedra*, *supra*, 15 Cal.App.4th 738, 744-745 (under Pen. Code, § 4574 "likely" means "having potential," not "more likely than not"). (See also *In re Y.R.* (2007) 152 Cal.App.4th 99, 108, disapproved on other grounds by *In re S.B.* (2009) 46 Cal.4th 529, 537, fn. 5; *In re Willon* (1996) 47 Cal.App.4th 1080, 1097-1099.)

[4]E.g., *Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 897 ("[w]e . . . conclude that it is more probable than not that the erroneous instruction produced a result less favorable to plaintiff Kim than would otherwise have occurred," citing

true burden is less than that – "[a] reasonable chance, not an abstract possibility" – reminds the court to apply a less formidable, more readily attainable standard. Counsel therefore should explicitly analyze prejudice in those terms.

One example of a court's applying the *College Hospital* language to reverse is *People v. Ross* (2007) 155 Cal.App.4th 1033:

> We find the likelihood that defendant would have achieved a more favorable result in the absence of the errors to be more than "merely a reasonable chance," and considerably more than an "abstract possibility." We begin with the fact that the jury in the first trial was unable to reach a verdict, and that its last communication before deadlocking was a question about self-defense . . . .

(*Id.* at pp. 1054-1055; see also *People v. Racy* (2007) 148 Cal.App.4th 1327, 1335.)

> Tip (2): Analyze the effect of the error concretely, in light of the specific facts of the case

Second, as noted at the start of this article, a simple conclusory statement that the evidence was "prejudicial" has little or no chance of meeting the *Watson* burden of persuasion. Counsel must meld the facts of the case and the standard as properly clarified.

In *People v. Ross*, *supra*, the court considered a deadlocked jury and a jury's question in concluding there was prejudice. As discussed in more detail with illustrative cases in the Manual,[5] §§ 4.60-4.64 (see also §§ 5.39-5.41), these are but two of a number of particular factors counsel can use to make a showing of prejudice. Prejudice depends on the nature of the error, its relationship to the facts as presented at trial, the theories of the defense and prosecution, any evidence of its actual effect on the jury, and the overall evidentiary picture. We mention a few of the highlights of the Manual discussion here.

Some kinds of error by their nature carry more weight than others – for example, statements by the court, argument by the prosecutor, instructions, inherently "strong"

Watson) and *People v. Howard* (1987) 90 Cal.App.3d 41, 48, fn. 4 ("*Watson* standard . . . has at least been applied in a manner closely approximating the 'more likely than not' test" [citations]).

[5] http://www.adi-sandiego.com/manual.html.

evidence (such as a confession), and inherently provocative evidence (such as gang affiliation or prior bad acts). (Manual, § 4.61.) The prejudice analysis should stress this point when it arises.

Another factor a prejudice argument should look for is the prominence of the error. (Manual, § 4.62.) Was the error central to the contested issues in the case? Was it given special emphasis (e.g., repeated references by the prosecutor)? Was the jury focused on areas related to it (as evidenced by questions or comments or requests for rereading of testimony)?

A critical factor in using the *Watson* test is often the closeness of the case. (Manual, § 4.63.) Errors occurring in a case where the prosecution's case was fairly weak, or where the defense was strong, are more likely to be prejudicial than those in a lopsided "slam dunk" conviction. In assessing closeness, one can look at the evidence and at the jury's deliberations (length, questions, requests for rereading of testimony, suggestion of deadlock, etc.).

The apparent causal connection between the error and the result can sometimes be demonstrated. (Manual, § 4.64.) One example might be a verdict rendered shortly after error in re-instructing the jury. Another might be comparative results: acquittal on counts not affected by the error or a deadlock in a prior proceeding without the error.

Tip (3): Be flexible in arguing what might be "a more favorable result"

Finally, counsel should not take for granted what might be "a more favorable result." To gain a reversal and retrial, or some more limited relief, one does not necessarily have to show there would have been a full acquittal without the error. It can be sufficient only to show that without the error there is a reasonable chance the result would have more favorable in *some* way than the conviction actually sustained.

A more favorable result, for example, could be a hung jury. (See *Cone v. Bell* (2009) __ U.S. __ [129 S.Ct. 1769, 1773] [issue is whether there is a "reasonable probability that the withheld evidence would have altered at least one juror's assessment"]). It could be conviction of only a lesser offense. (E.g., *People v. Hayes* (2006) 142 Cal.App.4th 175, 183; cf. *People v. Breverman* (1998) 19 Cal.4th 142, 178-179.) It could be conviction on fewer counts. (E.g., *People v. Overman* (2005) 126 Cal.App.4th 1344, 1351.) Counsel should keep these more easily demonstrable possibilities in mind in framing a prejudice argument under *Watson* (or other test, for that matter).

In conclusion, the *Watson* test is not so formidable as it may seem if the test is framed properly to begin with, prejudice is argued concretely in light of the facts of the case, and the possible "more favorable result" is cast in a way to minimize the burden the appellant must carry. The *Watson* test may be the toughest to meet, but it need not be an insuperable obstacle to success on appeal.