

Appellate Defenders, Inc.  
MCLE Seminar  
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# **When the Law is the Problem**

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## **Jury Instructions On Appeal**

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**finding errors and establishing prejudice**

# The trial court's responsibility

"[I]t is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it...." (*Bollenbach v. U.S.* (1946) 326 U.S. 607, 613-614.)

As coordinator of the trial and guardian of due process, a trial judge has a duty to ensure proper instructions are presented to the jury.

The trial court has a duty "to see to it that the jury are adequately informed on the law governing all elements of the case submitted to them to an extent necessary to enable them to perform their function in conformity with the applicable law." (*People v. Sanchez* (1950) 35 Cal.2d 522, 528.)

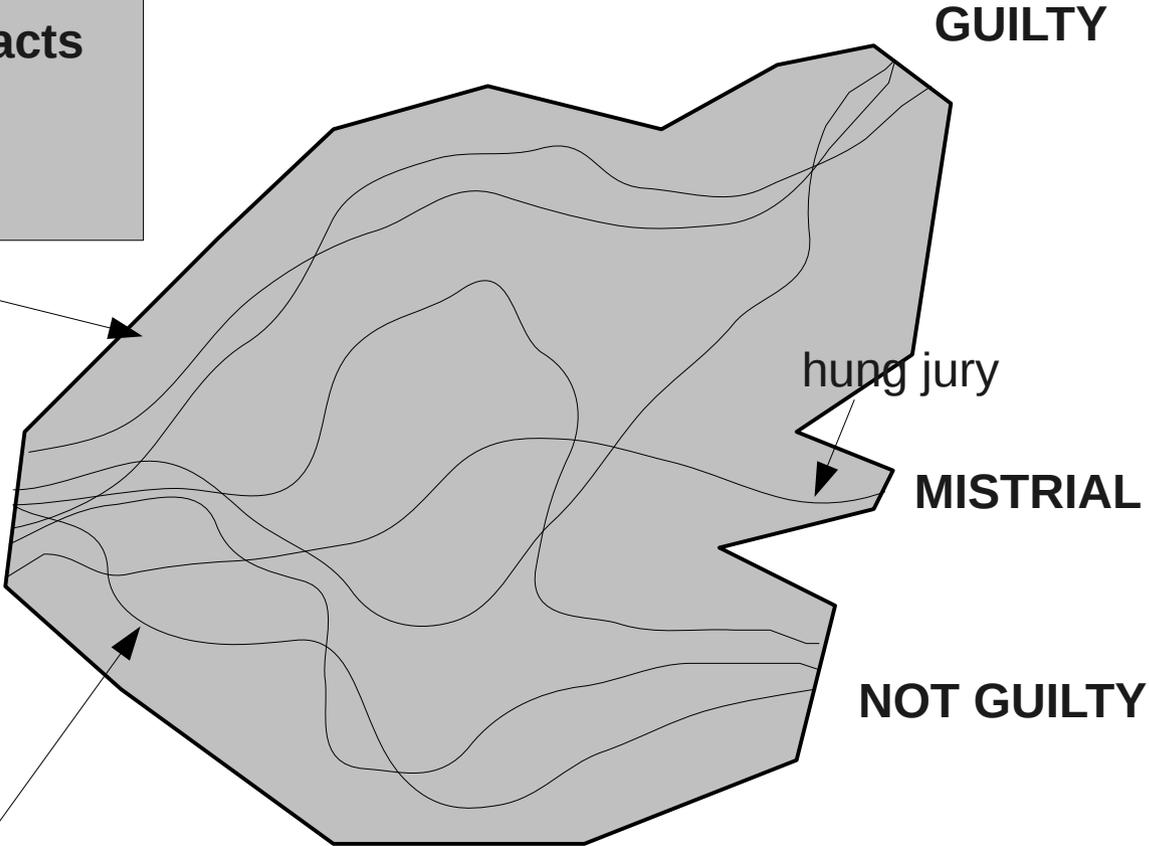
"[F]rom our appellate perspective, of the many and varied contentions of trial court error we are asked to review, nothing results in more cases of reversible error than mistakes in jury instructions." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 252.)

# Instructions as legal paths through the evidence

- were all appropriate paths made available?
- were any inappropriate path made available?
- were the paths made available properly laid out?

the world of possible facts as established by the evidence

JURY AT TRIAL'S START



the paths through the evidence made available by the instructions

# Instructions are for telling jurors...

## **"HOW TO" – THE BASICS**

trial framework

judge/juror duties

REASONABLE DOUBT

evidence analysis

- witness testimony
- direct/circumstantial evidence
- intent
- limited use

forms of culpability (a&a, n&pc, cons)

deliberations

- unanimity

## **WHAT MUST BE PROVED**

the crime(s) & enhancements

elements, incl. intent

special findings (incl. "degree")

LIOs

defenses

# Instructions required sua sponte (on court's own motion)

## – Trial framework

- reasonable doubt & presumption of innocence
- witness testimony
- direct/circumstantial evidence
- general/specific intent
- and more...

## – The elements the prosecutor must prove based on the allegations

- acts & intents

## – Case-specific principles of law:

"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. 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." (*People v. Breverman* (1998) 19 Cal.4th 142, 154, internal quotation marks and citations omitted).

# Fact-based sua sponte instructions

- A sua sponte duty arises for a particular instruction only if there is substantial evidence from which a jury composed of reasonable persons could find the facts underlying the instruction true. (*People v. Breverman* (1998) 19 Cal.4th 142, 162; *People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8 [evidence sufficient to deserve consideration from the jury, that a reasonable juror could find persuasive].)
- The determination whether sufficient evidence supports an instruction must be made without reference to the credibility of that evidence. (*People v. Salas* (2006) 37 Cal.4th 967, 982; *People v. Marshall* (1996) 13 Cal.4th 799, 847.)
- Doubt as to the sufficiency of the evidence to require a particular instruction should be resolved in the defendant's favor. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.)
- The court need not give instructions based solely on conjecture and speculation. (*People v. Day* (1981) 117 Cal.App.3d 932, 936.)
- "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

# Sua sponte instructions on lesser offenses

required by Penal Code § 1159

- **lesser included offenses**

- greater crime B cannot be committed without also committing lesser crime A

(*People v. Breverman* (1998) 19 Cal.4th 142, 161.)

- **attempted crime**

- evidence that the alleged crime was not completed

(*People v. Crary* (1968) 265 Cal.App.2d 534, 540 [where there is evidence that would absolve the defendant from guilt of the charged offense but would support a finding of guilt of attempt to commit the charged offense, an instruction on attempt is mandatory].)

- *not* an LIO for general intent crimes because the intent to attempt is a specific intent

# Sua sponte instructions on lesser included offenses

- When does rule apply?
  - statutory elements test
  - accusatory pleadings test  
(*People v. Bailey* (2012) 54 Cal.4th 740, 748;  
*People v. Clark* (1990) 50 Cal.3d 583, 636.)
- Lesser degrees of crimes
- Every supportable "lesser" theory
  - based on reasonable interpretations of evidence  
(*People v. Hill* (1993) 12 Cal.App.4th 798, 804.)
- Even if inconsistent with the defense
  - [although D can try to "invite error"]  
(See *People v. Breverman* (1998) 19 Cal.4th 142, 148-149.)
- Exception: lesser is time-barred [*D's choice*]  
(See *Cowan v. Superior Court* (1996) 14 Cal.4th 367.)

# Sua sponte instructions on a particular defense

- Required *if*
  - the defendant is relying on a defense that is supported by substantial evidence  
(*People v. Wilson* (2005) 36 Cal.4th 309, 331.)
  - OR
  - there is substantial evidence supportive of the defense  
AND  
the defense is not inconsistent with the defendant's theory of the case.  
(*People v. Seden* (1974) 10 Cal.3d 703, 716.)

# Sua sponte - unanimity

- More than one act shown by the evidence could constitute the crime charged and reasonable jurors could disagree as to which act the defendant committed
- Jurors have to unanimously agree on ONE of the particular acts to find defendant guilty.
- Prosecution "election" of one act obviates need for instruction.
  - Court must instruct on election unless prosecutor informs jurors.
- Exceptions:
  - alternative legal theories of culpability (*Schad v. Arizona* (1991) 501 U.S. 624.)
  - continuous course of conduct (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309.)
    - acts are so closely connected they form part of one and the same event
    - statute contemplates a continuing series of actions over a period of time
  - overt acts of a conspiracy (*People v. Russo* (2001) 25 Cal.4th 1124, 1133-1136.)

# Instructions that must be requested

- **Cautionary and limiting instructions**

Generally must be requested, but "[t]he circumstances in a given case determine whether the failure to give cautionary instructions sua sponte constitutes reversible error." (*People v. Blankenship* (1970) 7 Cal.App.3d 305, 312.)

- **Clarifying or amplifying instructions**

"Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Hart* (1999) 20 Cal.4th 546, 622.)

- **Pinpoint instructions**

Pinpoint instructions "relate particular facts to a legal issue in the case or "pinpoint" the crux of a defendant's case, such as mistaken identification or alibi. They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

# Pinpoint Instructions

- "Upon request, a trial court must give jury instructions 'that "pinpoint[] the theory of the defense," but it can refuse instructions that highlight "'specific evidence as such.'"" (*People v. Earp* (1999) 20 Cal.4th 826, 896.)
  - "A defendant is entitled to an instruction relating particular facts to any legal issue." (*People v. Sears* (1970) 2 Cal.3d 180, 190 [examples].)
  - "'None of the cases cited in *Sears* says, and *Sears* itself does not say, that upon request the judge must direct the attention of the jury to specific testimony and tell the jury it may look to that testimony for the purpose of forming a reasonable doubt on an issue.'" (*People v. Castellano* (1978) 79 Cal. App.3d 844, 858.)
- Pinpoints NOT entitled
  - Argumentative – instruction may not invite the jury to draw inferences favorable to the defendant from specific evidence on a disputed question of fact (*People v. Wright* (1988) 45 Cal.3d 1126, 1135-1136.)
  - Duplicative (*People v. Bolden* (2002) 29 Cal.4th 515, 558-559.)
  - Confusing (*People v. Garceau* (1993) 6 Cal.4th 140, 192-193.)
- Although the court may refuse to give a requested pinpoint instruction that is argumentative or that contains irrelevant factors, the court has a duty to modify an otherwise proper instruction to eliminate the faults and to tailor it to the facts of the case. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110.)

# Answers to jury questions

The trial court has a duty to help the jury understand the legal principles the jury is asked to apply. (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) Under **Penal Code section 1138** the court must attempt "to clear up any instructional confusion expressed by the jury." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.)

But "[t]his does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." (*Beardslee*, p. 97; *People v. Moore* (1996) 44 Cal. App.4th 1323, 1331.)

In exercising that discretion, the trial court "must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*Beardslee*, p. 97; *Moore*, p. 1331.)

Also note that the court must (1) allow counsel to participate in developing an answer, and (2) present the answers to the jury in open court, unless waived. (*People v. Dagnino* (1978) 80 Cal.App.3d 981; *People v. Avila* (2006) 38 Cal.4th 491, 613-614.)

# Standard of review on appeal

## **The propriety of instructions is a question of law → de novo review**

- Issues related to the giving or failure to give an instruction entail the resolution of mixed questions of law and fact which are predominantly legal and are examined without deference. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) Accordingly, "assertions of instructional error are reviewed de novo." (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838).
- The standard of de novo or independent review applies to instructions on lesser included offenses. (*People v. Waidla* (2000) 22 Cal.4th 690, 733, accord, *People v. Manriquez* (2005) 37 Cal.4th 547, 584)
- "The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law...." (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

# Avoiding forfeiture: § 1259

Under Penal Code section 1259, the appellate court can review the jury instructions even though no objection was made below.

It is said that the failure to object to an instruction in the trial court waives any claim of error unless the claimed error affected the substantial rights of the defendant, i.e., resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error. (Pen. Code, § 1259; *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978; accord, *People v. Rivera* (1984) 162 Cal.App.3d 141, 146.) **Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim** – at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was. Accordingly, it seems far better to state straight-forwardly, as we now do, that an appellate court may ascertain whether the defendant's substantial rights will be affected by the asserted instructional error and, if so, may consider the merits and reverse the conviction if error indeed occurred, even though the defendant failed to object in the trial court.

(*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

# Issue spotting

Did the instructions properly set forth the applicable burdens of proof, especially the most fundamental one, proof of guilt beyond a reasonable doubt?

Were any instructions misleading or confusing? Were technical terms defined?

Were all applicable sua sponte instructions given?

Was there evidence to support the giving of each instruction?

Were special instructions required? Examples might be cautionary instructions, limiting instructions, and instructions relating to accomplices (Pen. Code, § 1111; *People v. Davis* (2005) 36 Cal.4th 510, 547), expert witnesses, and corpus delicti requirements (e.g., *People v. Alvarez* (2002) 27 Cal.4th 1161, 1180).

Were appropriate instructions on lesser included offenses given? (*People v. Cunningham* (2001) 25 Cal.4th 926, 1007-1008; *People v. Waidla* (2000) 22 Cal.4th 690, 733-734; see *People v. Breverman* (1998) 19 Cal.4th 142, 154-163.)

Did the instructions adequately put forth the defense theory of the case?

Did the instructions fully and accurately state the basic elements of the offenses?

Were instructions given over defense objection? Were defense instructions refused?

– from ADI's California Criminal Appellate Practice Manual – Jury instructions. [§4.143]

# Trial error argument structure

## **(1) There was an error**

standard of review

de novo/matter of law

abuse of discretion

&

## **(2) The error was prejudicial**

standard of prejudice

Per se prejudicial

*Chapman* constitutional test

*Watson* state law error test

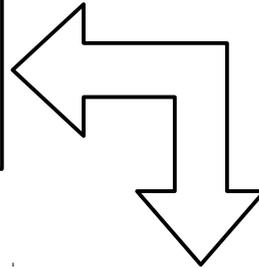
# Instructional error ??

"In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights. In making this determination we consider the specific language under challenge and, if necessary, the instructions as a whole." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.)

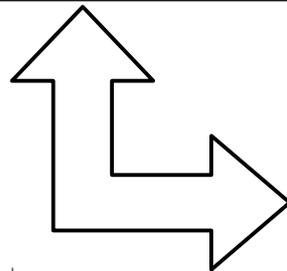
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# Instructional error argument

There was an error  
in the instructions.



How the error could have theoretically affected  
a juror's analysis of crucial issues.



The error was prejudicial.

There is a reasonable  
chance the error DID affect  
a juror's analysis (or govt  
cannot prove otherwise).

# ESTABLISHING PREJUDICE

**(1) show how the error could have theoretically made a difference**

[how the error altered the universe of possible paths through the evidence]

AND

**(2)**

**(a) establish a reasonable possibility that the error *did* make that difference (*Watson*)**

OR

**(b) show that the government cannot prove the error *did not* make that difference (*Chapman*)**

OR

**(c) reversal per se [rare]**

(See *Sullivan v. Louisiana* (1993) 508 U.S. 275 [error in reasonable doubt instruction].)

# ESTABLISHING PREJUDICE

How the error theoretically could have made a difference in a juror's analysis of the evidence and/or reasonable doubt...

Is it arguable that the error

- lessened the burden of proof
  - made the prosecutor's case easier to prove
  
- undermined the defense
  - removed a path to reasonable doubt
  - lessened the impact of defense-favorable evidence
  
- bolstered or undermined a witness's credibility
  
- misled the jury?

# ESTABLISHING PREJUDICE

## ***Chapman* test for harmless instructional error**

(applicable to errors implicating constitutional rights)

"whether it appears beyond a reasonable doubt that the error did not contribute to the jury's verdict" (*People v. Mil* (2012) 53 Cal.4th 400, 417.)

## ***Watson* test for prejudicial instructional errors**

(applicable to non-constitutional errors)

"whether there is a reasonable likelihood that the jury misconstrued or misapplied the [instruction]" (*People v. Clair* (1992) 2 Cal.4th 629; see *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [prejudice established if "a reasonable chance, more than an abstract possibility" error affected the outcome].)

# Per se prejudicial error

## **(1) Omission of substantially all of the elements of a crime**

"[T]he omission of one or more elements of a charged offense or special circumstance allegation is amenable to review for harmless error under the state and federal Constitutions, at least as long as the omission 'neither wholly withdrew from jury consideration substantially all of the elements . . . , nor so vitiated all of the jury's findings as to effectively deny defendant[] a jury trial altogether.'" (*People v. Mil* (2012) 53 Cal.4th 400, 415, quoting *People v. Wims* (1995) 10 Cal.4th 293, 312.)

## **(2) Directed verdict by the judge**

"[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence. . . . [directing a verdict] unquestionably qualifies as 'structural error.'" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277.)

# More Particular Prejudice Tests

## court applications of *Watson* to particular instructional errors

### **(1) Contextually-misleading or inapplicable instructions**

If the instruction is misleading, the reviewing court must then determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Clair* (1992) 2 Cal.4th 629, 663.)

### **(2) Errors in accomplice instructions**

"A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record." (*People v. Lewis* (2001) 26 Cal.4th 334, 370.)

### **(3) Errors in cautionary instruction re: defendant admission**

"Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1268.)

# Resources

- CJER Mandatory Criminal Jury Instructions Handbook
- ADI California Criminal Appellate Practice Manual, §§ 4.22-4.27, 4.143 (spotting issues in jury instructions) [www.adi-sandiego.com > Panel ABCs > Appellate Practice Manual]
- George Schraer & Charles Sevilla, "Jury Instructions from A to B" (Oct. 27, 2012). [capcentral.org > criminal > articles]
- CALJIC Appendices
  - A: Criminal Law – Sua Sponte Instructions
  - B: Reasonable Doubt – The California Experience
  - C: Lesser Offenses to the Offense Charged
  - D: The Birth, Life, and Death of Lesser Related Offenses
- CALCRIM Checklist/Worksheet [capcentral.org > criminal > jury instructions]