

## **TRIVIALIZATION OF THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT TO MERE REASONABLENESS: *CENTENO* ERRORS I HAVE SEEN**

**By Chuck Sevilla**

Shortly after *People v. Centeno* (2014) 60 Cal.4th 659, came down, I wrote a Flash on its significance in dealing with prosecutorial arguments meant to diminish the State's burden of proof. (Yes, CALCRIM 103 and 220 instructions defining proof beyond a reasonable doubt – "an abiding conviction in the truth of the charge" – are also ambiguous to the point of minimalizing and misleading, but that's another story.)

*Centeno* is best known for chastising prosecutors who use a "jigsaw" puzzle theory of reasonable doubt whereby a completed puzzle outline of California is displayed, a piece is pulled, and the prosecutor declares, "see, you still know that's California beyond a reasonable doubt." That's an easy issue to spot, regulate and curtail.

The far more pervasive issue is when the prosecutor argues that proof beyond a reasonable doubt is satisfied by a showing of the "reasonableness" of the proof. This is often based on the prosecutor's use of CalCrim 224 and 225 on circumstantial evidence, quoted in full at the end of this paper.

In *Centeno*, the prosecutor's argument that reasonable doubt is what is reasonable was reversible error. In fact, the error was so serious that reversal was required even though defense counsel did not object. The Court unanimously ruled that defense counsel's failure to object constituted prejudicial ineffective assistance of counsel. (60 Cal.4th 676-677.)

The holding is clear: it "is error for the prosecutor to suggest that a 'reasonable' account of the evidence satisfies the prosecutor's burden of proof." (Id. at 672; Italics in original.) This issue is very important. In fact, it's critical because the burden is the standard by which the jury determines the facts. The instruction gives meaning to the presumption of innocence. (See *In re Winship* (1970) 397 U.S. 358, 363 ["It is a prime instrument for reducing the risk of

convictions resting on factual error"].)

If that standard is diminished to a mere "what's reasonable?" defendants are being convicted without proof beyond a reasonable doubt. As *Centeno* held: the prosecutor's remarks "confounded the concept of rejecting unreasonable inference with the standard of proof beyond a reasonable doubt. She [the prosecutor] repeatedly suggested that the jury could find defendant guilty based on a "reasonable" account of the evidence. These remarks clearly diluted the People's burden." (*Id.* at 673-674.)

The Court held that if one juror adopts the diluted definition, the result is an unconstitutional conviction. As *Centeno* states: "there is a reasonable probability that the prosecutor's argument caused one or more jurors to convict defendant based on a lesser standard than proof beyond a reasonable doubt. Accordingly, defendant's convictions cannot stand. (*Id.* at 677; italics added.)

In my own appellate practice in the intervening four years since *Centeno*, I see prosecutors continuing to argue proof beyond a reasonable doubt as the mere reasonable determination of the facts. I'm going to give three examples from three cases I've handled where the issue arises. Sadly, in one of them, counsel did not object and thus risked forfeiting the issue. The examples are provided here to heighten awareness to an important error that may slip by defense counsel in the heat of battle. Recognition can lead to timely objections and corrective measures.

This may shock you, but even with timely objections, the trial court probably will tersely overrule the objection, or sluff it off by overruling it and saying, "the jury will get the instruction on proof beyond a reasonable doubt." That, of course, does not tell the jury what the prosecutor said was fundamentally wrong; rather, it shows judicial acquiescence to the error. Without immediate correction, "[t]here was no reason for the jury to reject the prosecutor's hypothetical. It did not directly contradict the trial court's instruction on proof beyond a reasonable doubt, but instead purported to illustrate that standard." (*Centeno*, supra at 676.)

The *Centeno* Example. Before I start with my three examples, here's the egregious example from *Centeno* where the prosecutor argued and committed reversible error:

"your decision has to be in the middle. It has to be based on reason. It has to be a reasonable account.... [Y]ou need to look at the entire picture, not one piece of evidence, not one witness ... to determine if the case has been proven beyond a reasonable doubt.' [The prosecutor] then asked the jury to consider the following: 'Is it reasonable to believe that a shy, scared child who can't even name the body parts made up an embarrassing, humiliating sexual abuse, came and testified to this in a room full of strangers or the defendant abused Jane Doe. That is what is reasonable, that he abused her. [¶] Is it reasonable to believe that Jane Doe is lying to set-up the defendant for no reason or is the defendant guilty?'... 'Is it reasonable to believe that there is an innocent explanation for a grown man laying on a seven year old? No, that is not reasonable. Is it reasonable to believe that there is an innocent explanation for the defendant taking his penis out of his pants when he's on top of a seven-year-old child? No, that is not reasonable. Is it reasonable to believe that the defendant is being set-up in what is really a very unsophisticated conspiracy led by an officer who has never met the defendant or he['s] good for it? That is what is reasonable. He's good for it.'" (*Centeno*, 60 Cal.4th at pp. 671-672; italics added.)

Example 1. The prosecutor argued near the end of closing argument:  
Proof beyond a reasonable doubt...I don't have to eliminate all possible doubt. The question is that you're asking yourself shouldn't be is it possible that this happened a different way? It's is it reasonable.  
[Defense Counsel]: Objection. Misstates the instruction  
COURT: Overruled. The jurors have the instruction.  
[Prosecutor] ...Is it reasonable that when he touched them on the vagina when he sat next to them on the sofa that that's not what he did? No.  
[Defense Counsel]: Objection. That misstates the burden of proof. It flips it.  
COURT: Overruled.  
[Prosecutor] The girls say it happened that way. He said it happened that way. That's what happened beyond a reasonable doubt.

Here, the prosecutor argued she didn't have to eliminate all possible doubt, but rather her version was "reasonable." Not only was the prosecutor wrong, but the trial court compounded the error by not giving a corrective instruction. When defense counsel objects to a prosecutor's closing argument -- and the trial court overrules the objection in the jury's presence -- the trial court has effectively told jurors that the prosecutor is entirely correct. (See *Hall v. United States* (1883) 150

U.S. 76, 81-82 [by overruling defense counsel's objection to prosecutor's argument in the presence of the jury, the trial judge "gave the jury to understand that they might properly and lawfully be influenced by it".] In this situation, where the prosecutor's argument is incorrect "[i]t [is], in fact, as if the court had charged the jury" in accord with the prosecutor's misstatement. (*Graves v. United States* (1893) 150 U.S. 118, 121; accord *People v. Hill* (1992) 3 Cal.4th 959, 1009 [by overruling defense counsel's objection to prosecutor's argument in the presence of the jury the trial court "put the court's imprimatur on the argument and thus tended to mislead the jury"]; *People v. Woods* (2006) 146 Cal.App.4th 106, 113-114, 118 [by overruling defense objection to prosecutor's argument in the jury's presence the trial judge "effectively informed the jury that the law, facts, inferences and reasoning processes [that the prosecutor] urged upon them were valid and acceptable".].)

(The appellate court did not reach the issue as the case was reversed for violation of Miranda requirements. *People v. Saldana* (2018) 19 Cal.App.5th 432.)

Example 2. This example shows the trial-long problem from voir dire to opening statement to final argument. The prosecutor's effort to minimize her burden was repeated each time she addressed the jurors:

A. Voir Dire. [Prosecutor] "Because a lot of what the law is based off of is what's reasonable and what's logical, what makes sense. Does that kind of jive with what your thinking is?" Further, "beyond a reasonable doubt is an abiding conviction that charge is true...do you have any distinctions, personally, between the words reasonable and possible?" "If I tell at one point I could dunk...yeah, I'm not even five-four...that's possible. But is it reasonable?...all sorts of things are possible in this world...but not necessarily the, it is reasonable that it makes sense?"

B. Opening statement. The prosecutor told the jury: "Assess what makes sense, what is logical, what's reasonable, and then come to your conclusion."

C. Final argument, "Beyond a reasonable doubt...it is what is reasonable, logical." Then in rebuttal argument, it got worse: "this has been an ongoing issue...it only becomes one reasonable interpretation of the evidence ...because if I had to try and dissuade you of every single plausible story that person maybe

could come up with, it would be impossible."

There were no defense objections to any of the above prosecutorial errors. The case is pending. This problem should have been addressed when it first surfaced and raises the question whether counsel should file a trial brief to include a *Centeno* description of the law. That way, the judge and prosecutor are both sensitized to the issue and counsel will be ready to pounce when if the prosecutor resorts to violating *Centeno*.

Example 3. Here, the prosecutor told the jury proof beyond a reasonable doubt guilt is the only reasonable conclusion.

DA What does that mean in English? It means that based on all the evidence that you've received, guilt is the only reasonable interpretation. That's what it means.

Counsel: Your Honor, that misstates the law.

COURT: Ladies and gentlemen, I have instructed you on the law. If the attorney's statements differ, you are to follow my instructions.

By saying reasonable doubt is when guilt is the only reasonable interpretation is problematic by focusing the jury on the reasonable interpretation of the evidence as sufficient to convict. Compare *People v. Ellison* (2011) 196 Cal.App.4th 1342 (arguing that the BRD standard requires the jury to find the defendant's innocence was reasonable is misconduct). Reasonable doubt is not a balancing of what is a reasonable interpretation of the evidence or even the only reasonable interpretation. It requires more: it necessitates proof beyond any reasonable doubt, that is, a level of proof of facts showing guilt to a near certainty. "The standard of proof is a measure of the jury's level of confidence. It is not sufficient that the jury simply believe that a conclusion is reasonable. It must be convinced that all necessary facts have been proven beyond a reasonable doubt." (*Centeno*, 60 Cal.4th 672.)

Remedies:

1. File a shortened version of the above in your trial brief to head off the error. Objecting during trial is usually too late as the court invariably will blow off the objection with the response that "the jury will receive instructions." But as *Centeno* states, the "reasonableness" example of the burden of proof is not

necessarily inconsistent, at least to a lay jury. (*Centeno*, supra at 676.)

2. Nevertheless, you must object when it happens. State that it misstates the law and ask for a corrective instruction. Use *People v. Bolton* (1979) 23 Cal.3d 208, 215, fn. 5 to coax a correction: "But when the defense counsel requests cautionary instructions, the trial judge certainly must give them if he agrees misconduct has occurred."

3. The wording of the curative instruction must counter the prosecutor's misleading the jury. The instruction should read: "Ladies and gentlemen, the prosecutor has erroneously stated what proof beyond a reasonable doubt means and I am instructing you to disregard his/her definition and abide by the court's. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. Abiding conviction means convincing you to a near certainty of the truth of the charge."

4. If the prosecutor makes the offending argument in initial final argument, object, seek the curative instruction and deal with it in your argument by arguing the jury cannot return a verdict without being "nearly certain" in the proof of guilt. If it happens in rebuttal, ask for surrebuttal to make the same point.

Finally, there are many other ways prosecutor's trivialize the burden of proof. E.g., see *People v. Cowan* (2017) 8 Cal.App.5th 1152 (DA told the jury that the presumption of innocence applies only until the charges are read to the jury at the outset of the case and that that the decision of guilt or innocence was just an ordinary decision of the kind that folks make a hundred times a day); *People v. Johnson* (2004) 119 Cal.App.4th 976, 983 ("In argument to the jury, the prosecutor took his cue from the court's reasonable doubt instructions, characterized a juror who could return a guilty verdict without 'some doubt' about Johnson's guilt as 'brain dead,' and equated proof beyond a reasonable doubt to everyday decision making in a juror's life"); *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36 ("people apply a reasonable doubt standard 'every day' and that it is the same standard people customarily use in deciding whether to change lanes.")

The trivialization issues arise in many contexts and require familiarization in order to be prepared to deal with them by prompt objections and corrective

instructions.

### **CALCRIMS**

#### **CalCrim 224. Circumstantial Evidence: Sufficiency of Evidence**

Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

#### **CalCrim 225. Circumstantial Evidence: Intent or Mental State**

The People must prove not only that the defendant did the act[s] charged, but also that (he/she) acted with a particular (intent/ [and/or] mental state). The instruction for (the/each) crime [and allegation] explains the (intent/ [and/or] mental state) required.

A[n] (intent/ [and/or] mental state) may be proved by circumstantial evidence. Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to conclude that the defendant had the required (intent/ [and/or] mental state), you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required (intent/ [and/or] mental state). If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required (intent/ [and/or] mental state) and another reasonable conclusion supports

a finding that the defendant did not, you must conclude that the required (intent/ [and/or] mental state) was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.