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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RONNIE LEE BROWN, Defendant and Appellant.	D052967 (Super. Ct. No. SCD209548)

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Affirmed.

A jury convicted Ronnie Lee Brown of one count of selling cocaine base in violation of Health and Safety Code[1] section 11352, subdivision (a) (count 1); but was unable to reach a verdict on count 2, possession of cocaine base for sale (§ 11351.5), and the court declared a mistrial as to that count. After waiving his right to a jury trial regarding enhancement allegations, Brown admitted allegations that he had four prior

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1 All further statutory references are to the Health and Safety Code unless otherwise specified.

drug convictions within the meaning of section 11370.2, subdivision (a), and had served five prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

After striking two of Brown's four prior drug conviction allegations and three of his five prior prison term allegations, the court sentenced Brown to a total prison term of 12 years. The sentence consisted of the middle term of four years as to count 1, plus two consecutive three-year terms for Brown's prior drug convictions, plus two consecutive one-year terms for his prison priors.

Brown appeals, contending (1) CALCRIM No. 220 reduces the prosecution's burden of proof by effectively advising the jury to weigh the evidence in a manner suggestive of the lesser preponderance of the evidence standard; (2) CALCRIM No. 223 shifts the burden of proof by stating that the purpose of direct and circumstantial evidence is to "prove or disprove the elements of a charge"; (3) CALCRIM No. 302 improperly shifted the burden of proof by telling jurors that in the event of a conflict in the evidence, "you must decide what evidence, if any, to believe"; and (4) the foregoing instructions given by the court were prejudicial.

We conclude that Brown forfeited these claims of instructional error. In the exercise of this court's discretion, however, we reach the merits of Brown's contentions and conclude the court did not commit instructional error or violate his right to due process. Accordingly, we affirm the judgment.

FACTUAL BACKGROUND

A. *The People's Case*

In the early evening of October 5, 2007, San Diego Police Department officers assigned to a drug enforcement squad were conducting surveillance along the 600 and 700 blocks of "C" Street in San Diego, which are known for illegal drug activity. One of the officers, Esmeralda Tagaban, working in plain clothes, observed Kevin Powell from a concealed street-level position as he was walking back and forth along the sidewalk approaching various people. She suspected he was attempting to buy narcotics. Powell approached Brown and, after they spoke to one another, Officer Tagaban saw Powell hand Brown a small item, with his palm and fingers down, which was consistent with how money is commonly handled in a drug sale.

After she saw the exchange, Officer Tagaban began observing Brown and Powell through her binoculars. She then saw Brown retrieve a clear plastic baggie, which he held open in his left palm to display it to Powell. Officer Tagaban saw that the baggie contained an off-white substance that, based on her training and experience, she believed was cocaine base. Officer Tagaban then observed Brown reach into the plastic baggie, retrieve an off-white item, and hand it to Powell. Powell took the object from Brown and promptly walked away westbound on "C" Street. Brown also walked away, going southbound.

Believing she had just observed a narcotics transaction, Officer Tagaban made a radio call to uniformed police officers waiting nearby. She gave the officers a description of what she had witnessed and provided descriptions of both Brown and Powell.

Officer Luke Johnson detained Powell about 30 seconds after he received the radio call. Officer Johnson searched Powell and found a piece of rock cocaine in Powell's shirt pocket. The rock weighed 0.15 grams and tested positive for cocaine base.

Officer Maria Delgadillo detained Brown about one minute after Officer Tagaban made the radio call and retrieved from inside Brown's waistband a clear plastic baggie that contained several small pieces of rock cocaine that had a net weight of 0.84 grams. Brown did not have in his possession a pipe or other device to smoke the rock cocaine. However, a search of Brown's black shoulder bag produced three folded-in-half piles of currency totaling $127. Officer Delgadillo found a cell phone plus another $40 in an identification holder inside the bag. The currency was comprised of six $20 bills, one $10 bill, four $5 bills, and 17 $1 bills, for a total of $167.

B. *The Defense*

Prior to his arrest, Brown worked as a temporary worker for Labor Temp Services. He would typically earn between $43 and $50 in net pay per day for his work. On October 4, 2007, the temporary agency wrote Brown a check for $157.85 in net pay for three days of work. Typically, pay checks from the temporary agency are available to be picked up by the workers the day after they are written.

DISCUSSION

Brown challenges CALCRIM Nos. 220, 223, and 302, claiming that these three instructions, taken together, undermined the presumption of innocence and shifted to him the burden of proof. Brown also claims the court's instructional errors were prejudicial because "it is reasonabl[y] possible that, if correctly instructed, jurors would have

maintained a reasonable doubt as to whether [he] sold the rock cocaine to Powell." For reasons we shall explain, Brown's claims are meritless.

A. *Forfeiture*

Before we reach the merits of Brown's constitutional challenges to CALCRIM Nos. 220, 223, and 302, we must first address the People's contention that Brown forfeited these challenges because he did not object to those instructions in the trial court, nor did he request any modifications during the discussion of the jury instructions. Brown acknowledges he did not object to the instructions he now challenges.

The California Supreme Court recently explained that "[t]he longstanding general rule is that the failure to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given." (*People v. Rundle* (2008) 43 Cal.4th 76, 151.)

The court's instructions under CALCRIM Nos. 220, 223, and 302 correctly stated the law governing the definition of reasonable doubt, the definition and use of direct and circumstantial evidence, and a jury's evaluation of conflicting evidence, respectively. We thus conclude that by failing to object in the trial court to the portions of these instructions (discussed, *post*) he now challenges on appeal, Brown forfeited his instructional error claims in this matter.

Notwithstanding Brown's forfeiture of his claims, in the exercise of this court's discretion we shall address the merits of those claims, all of which concern the fundamental constitutional right to due process. (See *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6 ["An appellate court is generally not prohibited from reaching

a question that has not been preserved for review by a party"]; *People v. Brown* (1996) 42 Cal.App.4th 461, 471 [an appellate court may address the merits of a "pure issue of law concerning a fundamental constitutional right" even though it was not preserved in the trial court].)

B. *CALCRIM No. 220*

Brown first contends that CALCRIM No. 220, which defines reasonable doubt and explains the presumption of innocence, reduces the prosecution's burden of proof by effectively advising the jury to weigh the evidence in a manner suggestive of the lesser preponderance of the evidence standard. We reject this contention.

1. *Background*

The court instructed the jury under CALCRIM No. 220 as follows:

> "[T]he fact that criminal charges have been filed against [Brown] is not evidence whatsoever of his guilt. It's not evidence that those charges are true. You cannot be biased against a defendant because he has been arrested, charged with a crime or brought to trial.
>
> "[*Brown*] *in a criminal case is presumed to be innocent until the contrary is proven. This presumption requires that the People prove each and every element of the charges against him beyond a reasonable doubt*. Until and unless that's done, the presumption of innocence prevails.
>
> "When I tell you the People have to prove something, they have to prove it beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt.
>
> "In deciding whether the People have proven their case beyond a reasonable doubt, you must *impartially compare, and consider all the evidence* we have presented to you during the course of the trial.

> Unless that evidence proves the defendant guilty beyond a reasonable doubt, he would be entitled to an acquittal. You'd have to find him not guilty." (Italics added.)

2. *Analysis*

Citing *Coffin v. United States* (1895) 156 U.S. 432, Brown contends the phrase "impartially compare and consider all the evidence" used in the foregoing instructions "undermines the presumption of innocence and supplants it with a mere civil standard of impartiality." Brown asserts that "the phrase 'impartially compare' inescapably implies a weighing of two opposed sets of evidence—the scales of justice cliché." He also complains that "the word 'compare' in its ordinary significance imparted the incorrect idea of weighing two opposed sets of evidence so that if no contrary evidence were presented by the defense, the prosecution would have sustained its burden of proof because it would obviously outweigh the absence of evidence on the other side." This, he maintains, "inevitably results in reducing the standard of proof to below that of beyond a reasonable doubt, because even slight, insubstantial evidence will 'outweigh' no evidence just as credible, convincing evidence will." Brown's contentions are unavailing.

Several California appellate courts, including this one, have rejected similar challenges to the pattern reasonable doubt and presumption of innocence instructions set forth in CALCRIM No. 220. (See, e.g., *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509-1510 (*Westbrooks*); *People v. Rios* (2007) 151 Cal.App. 4th 1154, 1156-1157; see also *People v. Flores* (2007) 153 Cal.App.4th 1088, 1091-1093.) We agree with the reasoning and conclusions in these decisions.

Viewing the instructions as a whole, a reasonable juror would not believe that the "impartially compare and consider all the evidence" phrase in CALCRIM No. 220 lessens the prosecution's burden to prove its case beyond a reasonable doubt or alters the presumption of innocence concept. The instructions plainly and clearly state that a defendant in a criminal case is presumed to be innocent and that this presumption requires that the People prove each element of a crime beyond a reasonable doubt. The instruction then tells the jurors that in deciding whether the People have met this burden, they "must impartially compare and consider all the evidence" received throughout the entire trial and unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and they must find him not guilty.

As this court recently explained in *Westbrooks*, the "impartially compare and consider" phrase "merely instructs the jury that it must consider only the evidence presented at trial in determining whether the People have met their burden of proof. In other words, this instruction informs the jury that the People may not meet their burden of proof based on evidence other than that offered at trial." (*Westbrooks*, *supra*, 151 Cal.App.4th at p. 1509.) Nothing in the instruction suggests that a jury must find in the prosecution's favor if the defendant does not produce any evidence, nor is there anything in the instruction that suggests the concepts of "compare" and "consider" mean that the jury is not bound to presume a defendant's innocence or that the jury should not apply the beyond-a-reasonable-doubt standard of proof.

CALCRIM No. 220 correctly defines the concepts of reasonable doubt and the presumption of innocence. Taken as a whole, the instructions correctly communicated these concepts to the jury.

Brown's reliance on *Coffin v. United States*, *supra*, 156 U.S. 432 is misplaced. In *Coffin*, the United States Supreme Court found the trial court had properly instructed on reasonable doubt but erred by refusing to specifically instruct on the presumption of innocence. (*Id*. at pp. 452-461.) In this case, as already discussed, the court instructed the jury on the presumption of Brown's innocence.

C. *CALCRIM No. 223*

Brown next contends that CALCRIM No. 223, which defines direct and circumstantial evidence, shifts the burden of proof by stating that the purpose of direct and circumstantial evidence is to "prove or disprove the elements of a charge." We reject this contention.

1. *Background*

The jury received CALCRIM No. 223, which defines and illustrates the concepts of direct and circumstantial evidence and guides the jury in the use and evaluation of such evidence:

> "Facts may be proved by direct or circumstantial evidence or by a combination of both. *Direct evidence* can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. *Circumstantial evidence* also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question. For example, if a witness testifies that he saw

> someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside.
>
> "Both direct and circumstantial evidence are acceptable types of evidence to *prove or disprove the elements of a charge*, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence." (Last italics added.)

2. *Analysis*

Brown claims that CALCRIM No. 223, by instructing the jury that the purpose of evidence is to "prove or disprove the elements of a charge," improperly suggested that the defense was required to "do more than raise a reasonable doubt to merit an acquittal, i.e., it suggest[ed] the defense must disprove an element of the charged offense." Thus, he maintains, CALCRIM No. 223 violated the due process clause of the Fourteenth Amendment to the federal Constitution by "shift[ing] to the defendant the burden of disproving guilt." Brown also asserts the corresponding CALJIC instruction, CALJIC No. 2.00, by stating that "direct and circumstantial evidence are acceptable as a means of

proof," does not suffer from this defect because it omits any suggestion a defendant must disprove the charged offense.[2]

"When we review challenges to a jury instruction as being incorrect or incomplete, we evaluate the instructions given as a whole, not in isolation." (*Rundle, supra,* 43 Cal.4th at p. 149.)

Here, Brown's constitutional challenge to CALCRIM Nos. 223 violates this fundamental rule. Brown first improperly isolates the phrase "prove or disprove the elements of a charge," which appears in the following complete sentence contained in that instruction:

> "Both direct and circumstantial evidence are acceptable types of evidence to *prove or disprove the elements of a charge*, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other." (Italics added.)

Then, taking the word "disprove" out of context, Brown complains that this word incorrectly suggests to the jury that the defense must disprove an element of the charged offense, thereby shifting the burden of proof to the defendant to disprove his guilt.

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2 CALJIC No. 2.00 states: "Evidence consists of the testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact. [¶] Evidence is either direct or circumstantial. Direct evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact. [¶] Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn. [¶] An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. [¶] [It is not necessary that facts be proved by direct evidence. They also may be proved by circumstantial evidence or by a combination of direct and circumstantial evidence. Both *direct and circumstantial evidence are acceptable as a means of proof.* Neither is entitled to any greater weight than the other.]" (Italics added.)

Through this linguistic isolation technique, which (as we have noted) the Supreme Court disapproved in *Rundle, supra,* 43 Cal.4th at page 149, Brown has distorted the meaning of the phrase "prove or disprove the elements of a charge" in CALCRIM No. 223. A full, contextual reading of the sentence in which that phrase appears reveals that CALCRIM No. 223 plainly instructs the jury that neither direct evidence nor circumstantial evidence is necessarily more reliable than the other, and both types of evidence are acceptable in proving or disproving the elements of a criminal charge that are "necessary to a conviction." Because a defendant may, if she chooses, present direct or circumstantial evidence in an attempt to obtain an acquittal by disproving an essential element of a charged offense, the foregoing language in CALCRIM No. 223 properly informs the jury that both types of evidence are "acceptable to . . . disprove the elements of a charge," and neither is "necessarily more reliable than the other." This language is legally correct, and in no way suggests, as Brown contends, that the defense *must* disprove an element of the charged offense, such that the burden of proof shifts to the defendant to disprove his guilt.

Furthermore, as our high state court recently explained, "[a] defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant." (*People v. Cross* (2008) 45 Cal.4th 58, 67-68.) Here, Brown has not, and cannot, meet his burden of demonstrating a reasonable likelihood the jury understood the phrase "prove or disprove the elements of a charge" in CALCRIM No. 223 in the manner he asserts. As already discussed, the court instructed the jury under CALCRIM No. 220

that Brown was presumed innocent, the prosecution had the burden of proving his guilt beyond a reasonable doubt, and the jury was required to find him not guilty unless the evidence proved him guilty beyond a reasonable doubt.

D. *CALCRIM No. 302*

Brown next contends that CALCRIM No. 302, which instructs the jury on how to evaluate conflicts in the evidence, improperly shifted the burden of proof and undermined the presumption of innocence by telling jurors that in the event of a conflict in the evidence, "you must decide what evidence, if any, to believe."

1. *Background*

The jurors received CALCRIM No. 302, which instructed them as follows regarding the evaluation of conflicting evidence:

> "If you determine there is a conflict in the evidence, you must *decide what evidence, if any, to believe*. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point." (Italics added.)

2. *Analysis*

Brown complains that the directive of CALCRIM No. 302 requiring jurors to decide what evidence to "believe" does not distinguish between inculpatory and exculpatory evidence. He maintains that this directive, as applied to exculpatory evidence, is "fundamentally incorrect because it imposes on the defendant the burden of pointing to exculpatory evidence which the jury must 'believe.'" Thus, Brown asserts,

"[t]he instruction imposes on jurors a false dilemma, i.e., the choice between believing inculpatory evidence and believing exculpatory evidence. Tasking jurors with deciding whether they 'believe' exculpatory evidence . . . undermines the presumption of innocence." Brown also asserts the corresponding CALJIC instruction, CALJIC No. 2.22, does not suffer from this defect because it makes no reference to "believing" evidence on either side of a conflict, and instead states that jurors must assess the "convincing force of the evidence."[3]

In challenging CALCRIM No. 302, Brown again violates the rule in *Rundle* by isolating the phrase "decide what evidence, if any, to believe," which appears in the following complete sentence contained in that instruction:

> "If you determine there is a conflict in the evidence, you must *decide what evidence, if any, to believe*." (Italics added.)

Then, by taking the word "believe" out of context, Brown complains that CALCRIM No. 302, "[a]s applied to exculpatory evidence, . . . imposes on the defendant the burden of pointing to exculpatory evidence which the jury must 'believe,'" thereby undermining the presumption of innocence.

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[3] CALJIC No. 2.22 states: "You are not required to decide any issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which you find more convincing. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses [who have testified on the opposing sides]. The final test is not in the [relative] number of witnesses, but in the *convincing force of the evidence*." (Italics added.)

Using the same linguistic isolation technique he used in challenging CALCRIM No. 223, Brown has distorted the meaning of the phrase "decide what evidence, if any, to believe" in CALCRIM No. 302. A full, contextual reading of CALCRIM No. 302 shows that this instruction plainly and correctly instructs the jurors that when they are presented with conflicting evidence, they must decide what evidence, "if any," to believe. The phrase "if any" indicates the jury is *not* required to believe exculpatory evidence presented by the defendant in order to find reasonable doubt. Also, Brown has misconstrued the phrase "must decide" to mean "must . . . believe." Furthermore, CALCRIM No. 302, like CALCRIM No. 223, must be read in light of the court's instructions (discussed, *ante*) that Brown is presumed innocent, the prosecution has the burden of proving his guilt beyond a reasonable doubt, and the jury is required to find him not guilty unless the evidence proved him guilty beyond a reasonable doubt.

In sum, we conclude the court did not commit instructional error or violate Brown's right to due process.[4] Accordingly, we affirm the judgment.

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[4] In light of our foregoing conclusions, we need not address Brown's remaining contention that the court's claimed instructional errors were prejudicial.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.