No.

IN THE SUPREME COURT OF THE UNITED STATES

IGOR PERLOV,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

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November 8, 2021

THE QUESTION PRESENTED

A jury convicted petitioner of unlawful possession of ammunition, which police found in a cardboard box in the trunk of his car. Petitioner testified he did not know it was there. The trial court refused a mistake-of-fact jury instruction that would have told the jury a defendant is not guilty of unlawful possession if he did not have the required mental state because he did not know a fact. The California Court of Appeal ruled that any error was harmless because petitioner's testimony that he was unaware of the ammunition "did not overcome" what the appellate court called the "extremely strong evidence" presented by the testimony of the State's witnesses.

Is it a violation of the Due Process Clause and defendant's Sixth Amendment right to require the State to prove a criminal charge beyond a reasonable doubt *to a jury* when a reviewing court decides his case by weighing the credibility of the witnesses?

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IN THE UNITED STATES SUPREME COURT

IGOR PERLOV,

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Respondent.

PETITION FOR WRIT OF CERTIORARI

Igor Perlov petitions this court for a writ of certiorari to the California Court of Appeal, which affirmed his conviction for being a prohibited person in possession of ammunition.

OPINIONS BELOW

The order of the Court of Appeal affirming the conviction appears at App-1, and is unreported. The order of the Court of Appeal denying a motion for rehearing appears at App-16, and is unreported. The order of the California Supreme Court denying a discretionary review appears at App-17 and is unreported.

JURISDICTION

The judgment of the California Court of Appeal was entered on May 19, 2021. The Court of Appeal denied a timely petition for rehearing on June 7, 2021, and the California Supreme Court denied discretionary review on August 11, 2021. This petition is filed within 90 days of that denial, and is timely pursuant to Rule 13.1 of this Court.

The jurisdiction of this court is invoked pursuant to 28 U.S.C §1257(a), as a petition for a writ of certiorari to review the judgment of the highest court of a State.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

JURY INSTRUCTION INVOLVED

Judicial Counsel of California Criminal Jury Instructions [CALCRIM]

No. 3406. Mistake of Fact

The defendant is not guilty of _____ *<insert crime[s]>* **if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.**

If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ *<insert crime[s]>***.**

If you find that the defendant believed that _____ *<insert alleged mistaken facts>* **[and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for _____** *<insert crime[s]>***.**

If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____ <*insert crime[s]*>, you must find (him/her) not guilty of (that crime/those crimes).

INTRODUCTION

Petitioner was charged with being a prohibited person in possession of ammunition. He had become a prohibited person several weeks before his arrest, after he was reported to have made some telephone calls to the FBI anonymous tip line, and he was committed to a mental health facility for a 72-hour evaluation and treatment, pursuant to California Welfare and Institutions Code § 5150. A commitment like this makes one ineligible to possess arms or ammunition for a period of five years. Calif. Welf. & Instit. Code § 8103, subd. (f)(10). The parties stipulated at trial that he was a prohibited person, and the jury did not hear anything about the underlying circumstances of his commitment.

Several weeks after the commitment police found ammunition in a cardboard box in the trunk of petitioner's car.

Defense counsel described petitioner's theory of defense in his opening statement: "Ladies and gentlemen, that's Igor Perlov. He did not know about the ammunition in his car. He did not knowingly possess that ammunition." 6 RT 644.[1]

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[1] Because the opinion of the California Court of Appeal omits certain matters petitioner considers significant, petitioner will from time to time refer to the Reporter's Transcript (RT) and Clerk's Transcript (CT) that was part of the record on appeal.

Testimony by two police officers tended to show that petitioner was aware that the ammunition was in the trunk. Petitioner, on the other hand, testified his father bought the ammunition a year earlier when his father and he had gone to the shooting range, but petitioner had no recollection of the ammunition being placed in the trunk. He testified he didn't deliberately store ammunition in the trunk of his car; it was brought to his attention after the officers performed the search. 7 RT 775. The trial court refused petitioner's request to give the standard pattern mistake-of-fact instruction, CALCRIM No. 3406.

Petitioner contended on appeal that it was error for the trial court to refuse to give the mistake-of-fact jury instruction, which would have informed the jury that if the defendant believed that he did not own, possess or control ammunition, then he did not have the mental state required for the offense of unlawfully possessing ammunition. In lay person's terms, if he did not know there was ammunition in his trunk, he could not have had the necessary knowledge required for a conviction.

On appeal petitioner pointed out that without the instruction a jury could easily have interpreted other instructions to permit a verdict of guilt even if the jury thought petitioner was unaware of the ammunition. Another instruction, CALCRIM No. 225, instructed the jury that "[a] mental state may be proved by circumstantial evidence." 2 CT 233. This instruction might have misled the jury to draw unwarranted inferences, for example, if a juror thought the defendant's belief that there was no ammunition in the car was unreasonable, that could be "circumstantial evidence" that he did not

have that belief. That was the case in *People v. Russell*, 144 Cal.App.4th 1415 (2006), where the defendant testified he thought the motorcycle he found had been abandoned. On appeal the State argued the evidence was overwhelming and that the defendant's knowledge was necessarily decided under the instruction that defined the elements of the crime. In reversing the conviction, the Court of Appeal in *Russell* explained that the omitted mistake-of-fact instruction "would have clarified the knowledge element by insuring that the jury understood that a good faith belief, even an unreasonable good faith belief, would negate one of the elements of the offense." *Id*., at 1433.

Perhaps more important, the instruction describing the elements of the offense in our case, CALCRIM No. 2591, said that the defendant must know he possessed ammunition, but it also told the jury that to possess something "[i]t is enough" if a person has "the right to control it." 2 CT 246. A reasonable juror might well have been misled to conclude that if something is in a person's car trunk, that person legally has the "right" to control it even if he doesn't know it is there, and therefore conclude that possession had been established. CALCRIM No. 3406 would have told the jury specifically that if the jury believed that the defendant did not know he had ammunition in the trunk, then he was not guilty of the charge. Without that instruction, his defense was incomplete. And the Constitution guarantees criminal defendants "a meaningful opportunity to present a *complete* defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) [italics added], quoting *California v. Trombetta*, 467 U. S. 479, 485 (1984). This right is abridged by evidence rules

that "infring[e] upon a weighty interest of the accused" and are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " *United States v. Scheffer*, 523 U. S. 303, 308 (1998), quoting *Rock v. Arkansas*, 483 U. S. 44, 58, 56 (1987).

The California Court of Appeal agreed that a trial court must give a mistake-of-fact instruction if there is any substantial evidence to support such a defense, App-9, but the court found any error harmless in light of the strength of the State's case.

The State's case consisted almost entirely of the testimony of two police officers. The appellate court characterized the testimony of Officer Lizarde about petitioner's incriminating statements during a traffic stop as "extremely strong evidence" that was not "overcome" by petitioner's contrary testimony that "he had no recollection of the ammunition being in the trunk, had not seen or discussed the ammunition with Lizarde in Arizona, and had not looked in the trunk after that traffic stop," which the appellate court characterized as "inconsistent" and "evasive." App-12.

Petitioner unsuccessfully sought rehearing and further review because when the appellate court concluded that petitioner's testimony did not overcome the State's "extremely strong" evidence to the contrary, the appellate court necessarily weighed the credibility of the State's witnesses against that of petitioner. Determining the credibility of witnesses is a job for the jury, not a reviewing court.

STATEMENT OF THE CASE

The evidence showed that as of October 2, 2018, petitioner became a person prohibited from possessing guns or ammunition. App-2; 6 RT 713.

On September 26, 2018, while it was still legal for petitioner to possess guns and ammunition, police removed four handguns from a locked box in the interior of his car that were registered to petitioner. They did not search the trunk. App-2.

On December 19, 2018 Arizona police stopped petitioner for speeding on Interstate 10. App-2. Because the highway is a "big corridor for narcotics" they asked to search the car and petitioner consented. 6 RT 647, 672. After searching through a very messy trunk, Officer Lizarde found under some bags of clothes a cardboard box which contained three or four Ziploc bags with what he believes was more than a hundred rounds of ammunition. 6 RT 648, 650, 660, 668. There were no guns. Lizarde did not take notes or write a police report for the incident. 6 RT 655.

The testimony of Officer Lizarde and that of petitioner differed about what happened next. Lizarde testified he asked petitioner what the ammunition was for, and petitioner responded it was ammunition he had collected since he had to turn his guns in to the San Francisco Police, something "for memories." App-3; 6 RT 650, 664.

Petitioner testified he did not see the police recover ammunition from the trunk. 7 RT 778. He thinks an officer said something about ammunition—he doesn't remember what—but he doesn't recall the officer showing him a bag of ammunition. 7 RT

756. Petitioner didn't open the trunk of the car after that. 7 RT 758-759.

San Francisco police learned about the Arizona traffic stop from the FBI, and on December 31, 2018 they searched petitioner's car with petitioner's consent. Officer Manfredi testified he removed the contents of the trunk. There was a lot of clutter, App-3, but eventually he found a bag of ammunition; it took a little time to find it. 6 RT 704-705.

Officer Manfredi interviewed petitioner about the ammunition. The State interpreted petitioner's statements as admissions that he knew the ammunition was there, while petitioner contends he was just positing hypothetical reasons why the ammunition could have been there. Manfredi testified, over objection, that in the interview petitioner was "evasive"[2] and "he tends to lie." App-4; 6 RT 701.

Petitioner testified he did not know he had ammunition in the trunk of his car on the day the police confiscated his guns. App-5. He testified he believed his dad bought the ammunition in question at the shooting range where the two of them had gone a little over a year earlier, while it was still legal for petitioner to possess guns and ammunition. App-5; 7 RT 746-748, 784. He testified he believed the ammunition the [San Francisco] police recovered from his trunk was the same ammunition the police in Arizona saw in his trunk on December 19th, that is, it was "left over" from when he had it in his trunk previously. 7 RT 770-772. Petitioner testified he didn't deliberately store ammunition in the trunk of his car; it was brought

[2] The officer's opinion appears to be the source of the Court of Appeal's characterization of appellant's testimony as "inconsistent" and "evasive." App-12.

to his attention after the officers performed the search, and he as no memory of putting ammunition there. 7 RT 775.

REASONS FOR GRANTING THE PETITION

TO CONCLUDE THAT THE FAILURE TO GIVE THE MISTAKE-OF-FACT JURY INSTRUCTION WAS HARMLESS ERROR, THE CALIFORNIA COURT OF APPEAL WEIGHED THE CREDIBILITY OF THE WITNESSES. ITS DECISION IS IN CONFLICT WITH FEDERAL DECISIONS WHICH SAY CREDIBILITY OF THE WITNESSES IS THE JOB OF THE JURY.

The mistake-of-fact instruction was important to petitioner's presentation of a complete defense.

Another jury instruction, which described the elements of the offense, CALCRIM No. 2591, told the jury, "A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or t*he right to control it*, either personally or through another person." 2 CT 246 [Italics added].

It would not be unreasonable for a juror to conclude that a person has the legal right to control anything contained in his car. And if one were to consider only property law, the juror would be right. The owner of a car has a key to the trunk, and necessarily exercises control over anything inside. The same "right to control" principle would apply in other situations, as well, for example, to a farm owner or a homeowner.

But this instruction is misleading without also giving the mistake-of-fact instruction when it comes to criminal law, because it eliminates an important additional consideration necessary for a conviction, namely that the defendant *knows* that illicit property is

present. A farmer is not guilty of raising marijuana plants found on his back forty if he does not know they are there, and a mother is not guilty of possession of methamphetamine which her son has hidden in the back of his chest of drawers. But this jury instruction says it is "enough" to prove possession if a person has the legal *right* to control the property. That may be so in some contexts, but not in the criminal context. As the Court of Appeal opinion acknowledges, the crime actually requires "knowing possession of the prohibited item." App-9.

Under California law when a defendant raises the defense of mistake of fact, he is "only required to raise a reasonable doubt as to whether he had such a belief." *People v. Mayberry*, 15 Cal.3d 143, 155 (1975). The appellate opinion in our case recognizes that under California law a trial court is required to instruct on mistake of fact, even if the defendant does not request it, if there is substantial evidence to support such a defense. The opinion goes on to say that in deciding whether there is substantial evidence to support the defense, "the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' " App-10 [citation omitted].

Yet after stating that the trial court does not determine the credibility of the defense evidence when it decides whether the jury should hear the instruction, the appellate court itself does that very thing when it determines whether the error was harmless.

The decision of the California Court of Appeal is not just illogical. It conflicts with other decisions of the federal courts of

appeals and with decisions of this court. If a jury *could* believe the defense evidence, the failure to instruct is not harmless.

Telling the jury it is "enough" for a conviction that the defendant has the right to control property misdescribes the elements of the crime. This court has held that an error in an instruction that misdefines the crime is subject to the harmless-error of *Chapman v. California*, 386 U.S. 18 (1967); see also *Neder v. United States*, 527 U.S. 1, 10 (1999). That test does not involve an assessment of the credibility of witnesses.

A number of circuit court decisions have found that when the court declines to instruct on a defense theory, it is reversible error. *See Barker v. Yukins*, 199 F.3d 867, 874-875 (6th Cir. 1999) [failure to instruct on self defense violated Due Process Clause and Sixth Amendment; state reviewing court erred by assessing the credibility of the evidence, which was for the jury to decide]; *Bradley v. Duncan*, 315 F.3d 1091, 1098-1099 (9th Cir. 2002) [failure to instruct on entrapment defense deprived defendant of his due process right to present a "complete defense"]; *Davis v. Strack*, 270 F.3d. 111, 131-132 (2nd Cir. 2001) [state court's refusal to instruct on self defense completely deprived defendant of his defense to a homicide charge, in violation of due process]; *Conde v. Henry*, 198 F.3d 734, 741 (9th Cir. 1999) [failure to instruct on included offense of simple kidnapping prevented defendant from presenting his theory of the defense, which the jury may have accepted; error not harmless under *Chapman* standard]; *United States v. Douglas*, 818 F.2d 1317, 1320-1321 (7th Cir. 1987) ["failure to include an instruction on the defendant's theory of the case [that he was a mere purchaser of

drugs and not a conspirator] . . . would deny the defendant a fair trial. (Citation.)]"; *United States v. Escobar de Bright*, 742 F.2d 1196, 1201 (9th Cir. 1984) [failure to instruct that defendant is not guilty of conspiracy if he only conspired with a government agent deprives defendant of a fair trial].

This court, too, has distinguished between determining whether a jury *could* reach a verdict in favor of the defendant and whether a jury *would* reach such a verdict. For example, Rule 404(b) of the Federal Rules of Evidence generally prohibits introduction of extrinsic acts that might adversely reflect on the defendant's character, unless the evidence bears on a relevant issue, such as motive, opportunity, or knowledge. A reviewing court, in determining whether it was error to admit the evidence, will examine logically whether the evidence "is probative" of a material issue other than character. *Huddleston v. United States*, 485 U.S. 681, 686 (1988). A court makes a similar evaluation when it determines whether evidence is inadmissible because "its probative value is substantially outweighed by the danger of unfair prejudice" under Rule 403. *Id*. at 687. The reviewing court, in both instances, "weighs," in a sense, the probative value of the evidence, but it does not weigh its credibility. Assessing credibility is a job for the jury, and the only question for a reviewing court is whether the jury could reasonably find the fact upon which relevance depends. *Id*. at 689-690. That is the same function the California Court of Appeal says the trial court employs when it decides whether there is substantial evidence to justify giving the instruction. If the evidence would have allowed the jury to make such a finding at the time the

trial court considers whether to give the instruction (as the opinion states), that does not change because the case is on review.

In *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006), this court invalidated a South Carolina rule that prohibited a defendant from introducing evidence of third-party guilt if the prosecution had introduce evidence that, if believed, "strongly supports" a guilty verdict. The court recognized that the rule depended on "the true strength" of the prosecution's case, which cannot be assessed without considering challenges to its reliability. *Id*. at 330. Where the credibility of the prosecution's witnesses is not conceded, "the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact." *Ibid*.

The California Court of Appeal's ruling that "Appellant's inconsistent, evasive testimony plainly did not overcome the extremely strong evidence that he was fully aware of the presence of the ammunition" is in conflict with that holding. What the California court did is hardly different from directing a *nunc pro tunc* verdict for the State, which the law does not permit. *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) [a judge "may not direct a verdict for the State, no matter how overwhelming the evidence"].

CONCLUSION

The Sixth Amendment's guarantee of a trial by jury, together with the Due Process Clause, have been deemed by the United States Supreme Court to be pillars of the Bill of Rights. "Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an

ancient rule that has 'extend[ed] down centuries.' " *United States v. Haymond,* 139 S.Ct. 2369, 2376 (2019).

The Constitution guarantees a criminal defendant the right to present a *complete* defense:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi* [410 U.S. 284, 302 (1973)], or the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 515 U.S. 308 (1974), the Constitution guarantees criminal defendants, "a meaningful opportunity to present a complete defense."

Crane v. Kentucky, supra, 476 U.S. 683, 687. "The right would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." *Tyson v. Trigg*, 50 F.3d 436, 448 (7th Cir. 1995).

Petitioner's *only* defense was that he did not know the ammunition was present. But this defense could not be said to be complete until the jury knew he could not be found guilty just because he had the right to control the contents of his car. The Court of Appeal itself acknowledged that a guilty verdict requires "knowing possession of the prohibited item." App-9, citing *People v. Bay*, 40 Cal.App.5th 126, 132 (2019).

Did the jury draw an invalid inference about guilt because of their interpretation of either of the instructions that *were* given? Would they have reached a verdict more favorable to petitioner if they had received CALCRIM No. 3406?

Maybe yes, maybe no. It is impossible to tell. "Juries provide no reasons, only verdicts." *United States v. Benally,* 546 F.3d 1230,

1233 (10th Cir. 2008). That is why the Sixth Amendment's fundamental right to a trial by jury includes as its most important element "the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' " *Sullivan v. Louisiana*, *supra* 508 U.S. at 277.

The distinction between a reviewing court's analysis of the significance of the evidence and an analysis of the credibility of the evidence is an important issue of federal law, and is essential to ensure a fair trial. The California Court of Appeal has decided an issue in a way opposite of other courts, including this court, which has said that the strength of the prosecution's case can only be assessed by "factual findings that have traditionally been reserved for the trier of fact." *Holmes v. South Carolina*, *supra* 547 U.S. at 330. By assessing the relative credibility of the testimony, the California court substituted its analysis for an analysis our Constitution, together with multiple decisions by this and other courts, say must be performed by a jury.

The court should grant the petition. See Supreme Court Rule 10(b) and(c).

Respectfully submitted,

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Appendix

Order of the California Court of Appeal Affirming the Conviction

May 19, 2021

Filed 5/19/21

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. IGOR PERLOV, Defendant and Appellant.	A158359 (San Francisco County Super. Ct. No. SCN230604)

Appellant Igor Perlov was found guilty following a jury trial of possession of ammunition by a prohibited person. On appeal he contends the trial court erred when it refused his request to instruct the jury on mistake of fact. We shall affirm the judgment.

PROCEDURAL BACKGROUND

On January 22, 2019, appellant was charged with possession of ammunition by a prohibited person. (Pen. Code, § 30305, subd. (a)(1).)[1]

At the conclusion of a jury trial, the jury found appellant guilty as charged.

On August 30, 2019, the trial court suspended imposition of sentence and placed appellant on probation for five years.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Also, on August 30, 2019, appellant filed a notice of appeal.

FACTUAL BACKGROUND

Prosecution Case

At trial, the court read the following stipulation to the jury: "On October 2nd, 2018, the defendant became prohibited from owning or possessing firearms or ammunition for a period of five years, pursuant to the California Welfare and Institutions Code."[2]

On September 26, 2018, San Francisco Police Officer Carlos Manfredi made contact with appellant in the parking lot of a CVS pharmacy in San Francisco. Appellant was sitting next to his car, a Nissan. After talking with appellant about firearms located inside the car, Manfredi recovered four handguns of different calibers, including .40 caliber and 9-millimeter, that were inside a lockbox on the backseat. All of the guns were legally registered to appellant. Manfredi did not ask about or find any ammunition in the car and he did not search the car's trunk.

On December 19, 2018, Police Officer Rafael Lizarde, formerly with the Quartzsite, Arizona Police Department, was on patrol on Interstate 10 in Quartzsite when he pulled over appellant, who was driving his Nissan car, for speeding. Appellant consented to a search of the car, including the trunk. As Lizarde searched the trunk, which was full of clothes and other items, he

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[2] The jury was not informed of the reason for this prohibition, which was imposed after appellant's confinement in September 2018, under Welfare and Institutions Code section 5150. However, preliminary hearing testimony reflects that the confinement resulted from appellant leaving five voice mail messages for the FBI stating that he was hearing voices and experiencing homicidal ideation. Specifically, he said he was being programmed to carry out a mass shooting. It was subsequently determined that there were five firearms registered in appellant's name, which led to the events testified about at trial.

found an open-lidded, brown cardboard box containing three or four Ziploc bags, which in turn contained over a hundred rounds of ammunition of different calibers, including .40 caliber. The box was in the back of the trunk, covered by clothes. Lizarde found no guns during the search.

Lizarde took the box of ammunition out of the trunk and placed it on the curb where appellant, who was sitting on the curb, could see it. He asked appellant what the ammunition was for if he had no gun. Appellant responded that it was ammunition he had collected since he had to turn in his guns to the San Francisco Police Department and that he kept the ammunition for "memories" of when he had weapons. Their conversation about the ammunition lasted about 10 minutes.

Lizarde issued appellant a citation. Because he was unaware that appellant was prohibited from possessing ammunition, he returned the box containing the bags of ammunition to the trunk. He placed the box "right on top of everything else," where it was readily visible and anyone opening the trunk "would automatically see it." Appellant was standing next to the car, near the trunk, when Lizarde returned the ammunition to the trunk. Lizarde did not confiscate the ammunition or inform appellant of any confiscation. During their encounter, appellant was trembling and seemed nervous. The traffic stop was memorable for Lizarde because much of what appellant said was inconsistent or did not make any sense, which is unusual in traffic stops.

Twelve days later, on December 31, 2018, Officer Manfredi, who had confiscated appellant's firearms in September, contacted appellant inside his home in San Francisco. Appellant consented to a search of his Nissan car, and gave Manfredi the keys to the car, which was parked a block away. Manfredi searched the Nissan's trunk and saw "a lot of clutter" before finding

a plastic bag on the left side of the trunk that contained 222 rounds of .40 caliber ammunition. The bag also contained a box of 50 rounds of .380 caliber ammunition; the box was of the kind that comes from the manufacturer. Neither the plastic bag nor the packaged ammunition was inside a cardboard box.

After finding the ammunition, Manfredi arrested appellant and also interviewed him about three hours later. During the interview, appellant admitted that he had the ammunition before his weapons were confiscated in September 2018. The videotaped interview and earlier-recorded footage from Manfredi's body camera were played for the jury at trial. A clip from the body camera footage showed that when Manfredi asked appellant what he was doing with the ammunition, appellant said it was "leftover," and when Manfredi said appellant was not allowed to have any ammunition, appellant said he did not know that. In clips from the subsequent interview, appellant was shown saying that when he was stopped by police in Arizona, the officers searching his car found the same ammunition. When the prosecutor asked about appellant's demeanor during the interview as a whole, Manfredi responded that he was evasive and tended to lie.

Defense Case

George Sir Duke, who was in a long term relationship with appellant's mother, testified that he lived with appellant and appellant's mother in San Francisco. On September 26, 2018, after police took appellant's guns, appellant's mother gave Sir Duke a big plastic bag containing ammunition of various calibers, which included loose bullets and several packets of ammunition, which he hid in the closet in his bedroom to keep it away from appellant. Appellant's mother had taken the bag from appellant's bedroom. Sir Duke was aware that appellant was not allowed to have ammunition in

his possession, and he never told appellant he had the ammunition. When police came to their house on December 31, Sir Duke gave an officer the bag of ammunition. At trial, defense counsel showed Sir Duke the bag of bullets found in appellant's trunk on December 31, 2018, and Sir Duke testified that it was not the same bag of bullets he hid in his bedroom.

Appellant testified in his own defense. He kept lots of belongings in the trunk of his car, which was almost full. On September 26, 2018, the day his guns were confiscated, he did not know he had ammunition in the trunk of his car. When shown the bag of ammunition later found in the trunk, appellant said he had seen it before but was not sure where it came from. He believed it could have been ammunition his father bought while they were at a shooting range together about a year before trial. Appellant did not recall if he had put the ammunition in his car.

Appellant further testified that approximately two weeks after his guns were confiscated, he was at the hospital, and one of the doctors told him he was not allowed to have guns and ammunition, though he was not paying too much attention. When he got home, he noticed that his room was much cleaner. Before the police encounter at CVS, he had put a bag of ammunition in his room, but he was not sure if it was gone when he returned from the hospital.

Regarding the traffic stop in Arizona, appellant testified that he gave the police officers who pulled over him and his passenger, permission to search his car. Appellant stood right behind the trunk while two officers searched and was standing there when one of the officers opened the trunk. Appellant was talking to his friend and the other officer, but occasionally looked over while the trunk was being searched. The officer took

approximately five items out of the trunk and put them on the pavement right beside the trunk, but the only item appellant noticed was a bag of salt.

Appellant did not recall an officer showing him a bag of ammunition. He thought the officer "said something about ammunition," but did not remember exactly what it was the officer said. Appellant "might have" also said something to the officer about ammunition.[3] Appellant was not sure what happened to the items the officer took out of the trunk, but he thought "some of them were put back." The entire traffic stop took no more than 10 minutes. Appellant had not opened the trunk of his car for a long time before the traffic stop, and had not opened it since.

Defense counsel played a clip from appellant's videotaped interview with Officer Manfredi at trial. Counsel then asked appellant why he told Manfredi during the interview that the bag of ammunition Sir Duke gave to police belonged to Sir Duke, and appellant testified that he had assumed the ammunition was Sir Duke's. Appellant thought police had taken the bag of ammunition that was in his own room at the same time they confiscated his firearms. Counsel asked appellant why, when Manfredi asked during the interview about the ammunition found in the trunk of his car in Arizona, appellant said, "those were the ones you [Manfredi] took, the ones you saw today, the same ones." Appellant responded, "Because I haven't opened my trunk since then, so I assumed that they were the same ones, because I never put anything extra in my trunk." In addition, when Manfredi said the Arizona police had searched appellant's car and found the ammunition in the trunk, appellant remembered telling Manfredi that "they just left it alone." Appellant testified that he made that comment because, although he did not

[3] On cross-examination, appellant testified that he told the officer that he "used to be a firearm owner."

see the Arizona police return the ammunition to his car, "they would have either arrested me for it or confiscated it, and I wouldn't be here dealing with this case right now."

When appellant told Manfredi during the interview that he "totally forgot about it," he meant that "I probably forgot about it. At some point I might have put that ammunition in the trunk, but I just don't have it on the top of my head." Finally, when counsel asked if he lied during the police interview, appellant responded: "I tried not to lie, but, you know, it's difficult to gather up all the memories and come up with a valid explanation why that ammunition was there. That's what I tried to do. I tried to explain why that ammunition was in the trunk of my car."

On cross-examination, appellant testified that he owned the Nissan and he was the only person with access to it. He acknowledged telling Manfredi that the ammunition found in his trunk on December 31, 2018, was "leftover" and that it was the same ammunition the officer in Arizona had previously found. When the prosecutor asked at trial if it was the same ammunition, appellant responded, "I believe so." Appellant also acknowledged that the ammunition Manfredi found in the trunk of his car on December 31, was in his trunk on September 26, when his guns were confiscated. He did not remember if he had put the ammunition in the trunk himself. He never told Manfredi that he thought the Arizona police had taken his ammunition.

Appellant also acknowledged that he had a bag of ammunition in his room, but did not remember seeing it after September 26, when his guns were confiscated. He typically stored ammunition in plastic bags and kept bullets inside the cases they came in.

DISCUSSION

Appellant contends the trial court erred when it refused his request to instruct the jury on mistake of fact because the instruction was supported by substantial evidence.

I. *Trial Court Background*

Defense counsel requested that the court instruct the jury with CALCRIM No. 3406,[4] regarding mistake of fact, and the prosecutor objected. The court questioned whether there was substantial evidence to support the instruction: "The argument from the defense seems to be that the defendant thought, when he was stopped in Arizona by the police, that if he had anything illegal in the car and he had any contraband in the trunk, that the police would have confiscated or taken it. [¶] So the fact that they did not was a mistake of fact. [Appellant] testified that he was never confronted with the fact that there was ammunition back there. The police came and testified that they did confront him, but [appellant] said he did not become aware that there was ammunition when he was stopped in Arizona. [¶] So it seems to me that it's kind of hard for the defense to say, well, because he thought they

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[4] CALCRIM No. 3406 provides: "The defendant is not guilty of <*insert crime[s]*> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.

"If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit <*insert crime[s]*>.

"If you find that the defendant believed that <*insert alleged mistaken facts*> [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for <*insert crime[s]*>.

"If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for <*insert crime[s]*>, you must find (him/her) not guilty of (that crime/those crimes)."

had taken it, he didn't realize he had it later, because he [also testified that he] never thought that he had it in the first place."

The court agreed with the prosecutor that the instruction would be confusing for the jury, given the contradictions in appellant's testimony, and also observed that "[m]uch of this instruction is already covered by common sense. In other words, if [appellant] didn't think the ammunition was in the trunk, then he certainly didn't have any knowledge of it, and that would be a defense, and he would not be guilty."

The court took the matter under submission, and subsequently stated that it viewed CALCRIM No. 3406 as "essentially . . . an accident instruction," "and that "[i]n this case the defense is saying that because [appellant] may have believed that the police in Arizona would have taken the ammunition if they had found any, that the fact the ammunition was there was an accident, or something along those lines, and I don't see that that is substantial evidence sufficient to give the instruction."

II. *Legal Analysis*

The offense of possession of a firearm or ammunition by a prohibited person (§ 30305, subd. (a)(1)) is a general intent crime that requires "knowing possession of the prohibited item." (*People v. Bay* (2019) 40 Cal.App.5th 126, 132.) Section 26 describes persons who are incapable of committing a crime, which includes those who "committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." (§ 26, ¶ Three.) "Section 26 thus describes a range of circumstances or 'defenses' "—including mistake of fact—"which, the Legislature has recognized, operate to negate the mental state element of crimes and show there is no union of act and criminal intent or mental state." (*People v. Lawson* (2013) 215 Cal.App.4th 108, 114.) A lack of knowledge on appellant's

part that there was ammunition in the trunk of his car would thus negate the mental state required for conviction under section 30305, subdivision (a)(1). (See *Bay*, at p. 132; see also § 26, ¶ Three.)

A trial court is required to instruct the jury on mistake of fact even without a request if there is substantial evidence in the record to support such a defense. (*People v. Martinez* (2010) 47 Cal.4th 911, 953.) "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' " (*People v. Salas* (2006) 37 Cal.4th 967, 982.)

Here, appellant argues that there was substantial evidence showing that he was unaware that there was ammunition in the trunk of his car on December 31, 2018, and that the court therefore erred when it refused his request to instruct the jury with CALCRIM No. 3406. According to appellant, the court based its denial of his request on the improper conflation of mistake of fact with accident, which caused it to believe that a lack of knowledge was not sufficient; instead, as the court put it, "there needs to be some act" showing that "by some accident . . . ammunition ended up in the trunk of [appellant's] car."

We agree with appellant that the trial court's attempt to analogize the requirements for a mistake of fact instruction with the distinct factual requirements for an instruction on accident was questionable. Nonetheless, even assuming there *was* in fact substantial evidence in the record that appellant did not know there was ammunition in the trunk of his car (but see *People v. Williams* (1992) 4 Cal.4th 354, 361 [trial court must give a requested instruction only when defense is supported by evidence sufficient to " 'deserve consideration by the jury,' " not " 'whenever *any* evidence is

presented, no matter how weak' "]), we conclude any error in refusing appellant's request to instruct the jury with CALCRIM No. 3406 was harmless.

In applying the state standard of error (*People v. Watson* (1956) 46 Cal.2d 818, 836),[5] "we may look to the other instructions given, as well as whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability that the error affected the result. [Citations.]" (*People v. Watt* (2014) 229 Cal.App.4th 1215, 1220 (*Watt*).)

First, the evidence of appellant's guilt presented at trial was overwhelming. Officer Lizarde testified that during the December 19, 2018 traffic stop in Arizona, he took the cardboard box containing the ammunition he had found in the trunk of appellant's car and placed it on the curb where appellant could see it. He then asked appellant what the ammunition was for if he did not have a gun, and appellant responded that he kept the

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[5] Appellant asserts that the federal constitutional standard of error (*Chapman v. California* (1967) 386 U.S 18, 24) is applicable here because the trial court's refusal to instruct on mistake of fact impinged on his constitutional right to present a complete defense. First, as we shall explain in the text, *post*, the jury was instructed of the need for appellant to knowingly possess the ammunition and defense counsel's argument centered on his lack of knowledge. Hence, the failure to instruct with CALCRIM No. 3406 did not preclude appellant from presenting a complete defense. Second, our Supreme Court has confirmed that, in general, any " '[e]rror in failing to instruct on the mistake-of-fact defense is subject to the harmless error test set forth in *People v. Watson*[*, supra,*] 46 Cal.2d [at p. 836].' " (*People v. Molano* (2019) 7 Cal.5th 620, 670; accord, *People v. Givan* (2015) 233 Cal.App.4th 335, 349; *People v. Hanna* (2013) 218 Cal.App.4th 455, 462.) Finally, even *if* the more stringent *Chapman* standard were applicable, we would find the error harmless beyond a reasonable doubt. (*Chapman*, at p. 24.)

ammunition for "memories" of when he had weapons. Their conversation about the ammunition lasted some 10 minutes. Moreover, even though Lizarde then placed the box, which had an open lid, "right on top of everything else" inside the trunk where it was "readily visible" to anyone opening the trunk, when Manfredi looked inside the trunk 12 days later, the ammunition was no longer in the cardboard box and no longer on top of the rest of the clutter in the trunk.

In addition, as Manfredi's body camera footage reflects, when he asked appellant what he was doing with the ammunition found in the trunk, appellant said it was "leftover." During the videotaped interview, appellant told Manfredi that he had the ammunition before his weapons were confiscated in September 2018. Appellant also told Manfredi that this was the same ammunition officers found during the Arizona search. When counsel asked at trial why he told Manfredi this, appellant testified, "Because I haven't opened my trunk since then, so I assumed that they were the same ones, because I never put anything extra in my trunk." Appellant also acknowledged at trial that the ammunition Manfredi found in the trunk of his car on December 31, was in his trunk on September 26, when his guns were confiscated, and that he told Manfredi the ammunition was "leftover."

While appellant additionally testified that he had no recollection of the ammunition being in the trunk, had not seen or discussed the ammunition with Lizarde in Arizona, and had not looked in the trunk after that traffic stop, this testimony was contradicted by the abundance of evidence discussed above, including his own recorded statements and testimony. Appellant's inconsistent, evasive testimony plainly did not overcome the extremely strong evidence that he was fully aware of the presence of the ammunition. (See *Watt*, *supra,* 229 Cal.App.4th at p. 1220; see also *People v. Boyer* (2006)

38 Cal.4th 412, 470 [even if court erred by failing to instruct on complete defense of unconsciousness, any error "was harmless by any applicable standard" in light of "very strong evidence" suggesting appellant was conscious during the alleged offense and the weak evidence of unconsciousness].)

In addition, the court gave CALCRIM No. 2591, which set forth the elements of the offense of unlawfully possessing ammunition and informed the jury that to convict appellant of violating of section 30305, subdivision (a), the prosecution "must prove," inter alia, that he "knew he owned/possessed/had under his custody or control ammunition . . . ."

Second, during closing argument, defense counsel focused on the knowledge element, first summarizing the question facing the jury: "So why are we having a trial? What's the disagreement? On December 31st, 2018, did he know about the ammo in his car? Was that done on purpose; right? That's the issue. More accurately, did the state prove those things beyond a reasonable doubt?" Counsel then proceeded to argue at length that, despite evidence to the contrary, the jury should find that appellant did *not* knowingly possess the ammunition, and therefore acquit him of the charge of possession of ammunition by a prohibited person. Thus, when the jury found appellant guilty of the charged offense, it necessarily found that he had the requisite mental state, i.e., knowledge. (See *Watt*, *supra*, 229 Cal.App.4th at p. 1220 [to extent modified version of CALCRIM No. 3406 erroneously told jury that defendant's lack of knowledge must be objectively reasonable, any such error was harmless where other instructions informed jury that it could find defendant guilty only if it concluded beyond a reasonable doubt that defendant *knew* items in his possession had been stolen].)

For all of these reasons, we conclude the court's error, if any, in refusing to instruct the jury with CALCRIM No. 3406 was harmless under any standard.

DISPOSITION

The judgment is affirmed.

_____
Kline, P.J.

We concur:

_____
Stewart, J.

_____
Miller, J.

People v. Perlov (A158359)

Appendix

Order
of the Court of Appeal
Denying Rehearing

June 7, 2021

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 2

THE PEOPLE,
Plaintiff and Respondent,
v.
IGOR PERLOV,
Defendant and Appellant.

A158359
San Francisco County Super. Ct. No. SCN230604

BY THE COURT:

The petition for rehearing is denied.

Date: 06/07/2021 **Kline, P. J.** P.J.

PRESIDING JUSTICE

Appendix

Docket for Order of the California Supreme Court Denying Review

August 11, 2021

Supreme Court

Disposition

PEOPLE v. PERLOV
Division SF
Case Number S269755

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

Case Citation: **none**

Date	Description
08/11/2021	Petition for review denied

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