Prejudice: Selective vs. Whole-Record Review

Where the court found or presumed trial error, did the court fail to conduct proper "whole-record" review and instead examine the record from an exclusively judgment-favoring perspective, ignoring other evidence or relevant non-evidentiary record factors?

With rare exceptions requiring per se reversal, trial error must be evaluated for its impact on the judgment. (Cal. Const., art. VI, § 13.) Properly performed, this "prejudice" analysis is strikingly different from "'the familiar substantial evidence rule.'" (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 77.) The latter tests the sufficiency of evidence to support the judgment, so a recitation of only those facts, viewed in a judgment-favoring light, is appropriate. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) But even with legally sufficient evidence, if the "possibility" of prejudice from error is "more than … abstract[,]" reversal is necessary under the state standard. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351, citing *People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Giardino* (2000) 82 Cal.App.4th 454, 467 [under *Watson* review, reversal is required where "the evidence supports conflicting conclusions" as to the matter in dispute]; *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050 [*Watson* standard is equivalent to the prejudice prong in evaluating trial counsel's Sixth Amendment effectiveness under *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]]; *Wong v. Belmontes* (2009) 558 U.S. 15 [130 S.Ct. 383, 390, 175 L.Ed.2d 328] [per *Strickland*, "the reviewing court must consider all the evidence — the good and the bad — when evaluating prejudice"].)

Given the inadequacy of a "sufficiency of evidence" approach to *Watson/Strickland* prejudice, that sort of analysis is even further from the mark under the much less forgiving *Chapman* harmless error standard (*People v. Burnham* (1986) 176 Cal.App.3d 1134, 1149; *Fry v. Pliler* (2007) 551 U.S. 112, 116 [127 S.Ct. 2321, 2325, 168 L.Ed.2d 16]; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] [where federal constitutional error occurs in a criminal trial, state has the burden to prove its harmlessness beyond a reasonable doubt].) Expressly or implicitly applying the substantial evidence test to *Chapman* error, therefore, is itself error. (See *People v. Mil* (2012) 53 Cal.4th 400, 417-418 [required standard is the "*opposite*" of the "less demanding" substantial-evidence review employed by the Court of Appeal] (original italics); cf. *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 712, fn. 6 [propriety of reliance on correct standard of review determined not by words used but by "what the Court of Appeal actually did" in purporting to apply it].) Indeed, under *Chapman* itself, even an appellate declaration of "'overwhelming evidence'" in support of the judgment doesn't shield it from reversal. (386 U.S. 18, 23.) For example, given elemental instructional error, only where the judgment-supporting evidence was truly "uncontroverted" — where the defendant "did not, and apparently could not, bring forth facts contesting" it — can the strength of the evidence justify a *Chapman* harmless error finding. (*Neder v. United States* (1999) 527 U.S. 1, 18-19 [119 S.Ct. 1827, 144 L.Ed.2d 35].)

Under any standard of prejudice, then, an appellate court errs by taking a sufficient-evidence approach to error impact review. After all, the closer the factual issues for the trier of fact, the stronger the case for prejudice. (*People v. Garcia* (2005) 36 Cal.4th 777, 804; *People v. Newson* (1951) 37 Cal.2d 34, 46; *People v. Fleming* (1913) 166 Cal. 357, 383.) And a relative-closeness analysis can't fairly proceed from a lopsided summary. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 331 [126 S.Ct. 1727, 164 L.Ed.2d 503] ["by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt"].) Moreover, where the appellate court finds instructional error, prejudice is tested by evaluating the evidence as it favors *the appellant*, not the judgment. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674; *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 298.) Again, this is "'the opposite of the traditional substantial evidence test.'" (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 304.) Similarly, where the error involved witness impeachment erroneously precluded in violation of the Sixth Amendment's confrontation right, the "correct inquiry" requires the reviewing court to "assum[e] that the damaging potential of the cross-examination were fully realized" at trial. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [106 S.Ct. 1431, 89 L.Ed.2d 674].)

Nor is a review for prejudice properly limited to the evidence: all standards require analysis of the *entire relevant record*. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [re *Watson*, "the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict"]; see *Watson* itself, 46 Cal.2d 818, 836 [calling for "an examination of the entire cause, including the evidence"]; *People v. Mil, supra*, 53 Cal.4th 400, 417 [quoting *Neder v. United States, supra*, re *Chapman* review: appellate court's threshold duty is "to 'conduct a thorough examination of the record'"]; *United States v. Hasting* (1983) 461 U.S. 499, 509 [103 S.Ct. 1974, 1980, 76 L.Ed.2d 96] ["Since *Chapman,* the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole"].) Whole-record review encompasses matters beyond the evidence itself, such as:

- Whether the prevailing party exploited the error in closing argument or otherwise. (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876 ["whether respondent's arguments to the jury may have contributed to the instruction's misleading effect" as factor in assessing prejudice]; *Arizona v. Fulminante* (1991) 499 U.S. 279, 297-98, 300 [111 S.Ct. 1246, 113 L.Ed.2d 302] [erroneously admitted evidence "led to the admission of other evidence prejudicial to" appellant]; *Satterwhite v. Texas* (1988) 486 U.S. 249, 260 (1988) [108 S.Ct. 1792, 100 L.Ed.2d 284] [prosecutor "highlighted" erroneous evidence in closing argument].)
- Whether the jury's lengthy deliberations, questions, readback requests, or deadlock announcement suggest difficulty reaching a decision. (*People v. Anderson* (1978) 20 Cal.3d 647, 651 ["jury took several days of deliberation to reach its verdict"]; *People v. Dominguez* (2006) 39 Cal.4th 1141, 1160-1161 [jury question suggests "one or more jurors may have been considering" point at issue]; *People v.*

Thompkins (1987) 195 Cal.App.3d 244, 251-252 [as of deadlock, "necessarily, at least one of the jurors was not persuaded by the strength of the prosecution's evidence"].)

- Whether a split or lesser verdict reveals the jury's "readiness to scrutinize the evidence" and "convict on lesser charges than the prosecution requested." (*People v. Brown* (2016) 245 Cal.App.4th 140, 155-156.)
- Whether a previous jury was unable to reach a verdict in a trial with substantially the same evidence. (*People v. Rivera* (1985) 41 Cal.3d 388, 393, fn. 3, disapproved on another point in *People v. Lessie* (2010) 47 Cal.4th 1152, 1168, fn. 10 [deeming error prejudicial where case was close, Supreme Court found it "noteworthy that a first trial of defendant ended in a hung jury"]; *id.* at 395 (conc. opn. of Grodin, J.); *Krulewitch v. United States* (1949) 336 U.S. 440, 444-445 [69 S.Ct. 716, 93 L.Ed. 790] [four trials, including two mistrials, in same case].)

If a reviewing court finds harmless error without undertaking a proper whole-record review – for example, by simply finding the evidence sufficient to support the judgment – the decision is erroneous. (See, e.g., *People v. Mil, supra*, 53 Cal.4th 400, 417-418; *Sears v. Upton* (2010) 561 U.S. 945, 955 [130 S.Ct. 3259, 3266, 177 L.Ed.2d 1025] [*Strickland* prejudice "inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below"]; *Satterwhite v. Texas, supra*, 486 U.S. 249, 258-259 [disapproving state court *Chapman* analysis: "The question … is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained' [citation]"].)