ADVANCE SHEET HEADNOTE
January 10, 2022

2022 CO 1

No. 20SC22, *Tibbels v. People*—Jury Instructions—Reasonable Doubt.

In this case, the supreme court considers whether statements made by the trial court to a jury venire attempting to explain the concept of reasonable doubt effectively lowered the prosecution's burden of proof. During voir dire of the prospective jurors, the trial court provided a real-life example of the doubt a prospective homebuyer would have upon observing a structurally significant crack in the home's foundation, equating that doubt to a reasonable doubt. The court must now decide the proper test for determining whether comments like this lowered the prosecution's burden of proof and whether the example that the trial court gave here did so.

The court now concludes that the proper test for determining whether a trial court's statements to the jury lowered the prosecution's burden of proof is a functional one. An appellate court must ask whether there is a reasonable likelihood that the jury understood the court's statements, in the context of the

instructions as a whole and the trial record, to allow a conviction based on a standard lower than beyond a reasonable doubt. Applying this test to the specific facts presented, the court concludes that it is reasonably likely that the jury understood the court's statements to allow a conviction on a standard lower than beyond a reasonable doubt, which constitutes structural error.

The court thus reverses the judgment of the division below.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2022 CO 1

Supreme Court Case No 20SC22
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 17CA620

Petitioner/Cross-Respondent:

Ernest Joseph Tibbels,

v.

Respondent/Cross-Petitioner:

The People of the State of Colorado.

Judgment Reversed
en banc
January 10, 2022

Attorneys for Petitioner/Cross-Respondent:
Megan A. Ring, Public Defender
Meredith K. Rose, Deputy Public Defender
Denver, Colorado

Attorneys for Respondent/Cross-Petitioner:
Philip J. Weiser, Attorney General
Jacob R. Lofgren, Assistant Attorney General
Denver, Colorado

JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 This case, a companion case to *Pettigrew v. People*, 2022 CO 2, __ P.3d __, which we also decide today, requires us to consider again whether a trial court's comments to a jury venire attempting to explain the concept of reasonable doubt effectively lowered the prosecution's burden of proof. Although we granted certiorari to consider three questions,[1] these questions really present two issues for our determination. First, we must decide the proper test for determining whether a trial court's comments to prospective jurors lowered the prosecution's burden of proof. Second, we must consider whether the example that the trial court used here to explain the concept of reasonable doubt lowered the prosecution's burden of proof.

---

[1] We granted certiorari to review the following issues:

1. Whether the trial court's example of reasonable doubt lowered the prosecution's burden of proof in violation of the defendant's constitutional rights to due process and a jury trial.
2. Whether other factors occurring in the course of a trial mitigate the harm of an instruction that lowers the prosecution's burden of proof.
3. Whether a trial court's comments during voir dire should be reviewed as "instructions" such that any improper comment could constitute structural error requiring automatic reversal.

¶2 We now conclude that the proper test for determining whether a trial court's statements to the jury lowered the prosecution's burden of proof is a functional one. Specifically, an appellate court must ask whether there is a reasonable likelihood that the jury understood the court's statements, in the context of the instructions as a whole and the trial record, to allow a conviction based on a standard lower than beyond a reasonable doubt. In this way, statements made to the venire during voir dire can, in context, have the effect of instructing the jury on the law to be applied, whether or not such statements can be characterized as formal "instructions," and other facts and circumstances of the trial may well inform the question of how the jury would reasonably have understood such statements.

¶3 Applying the foregoing standard to the specific facts presented here, in which the court equated the concept of reasonable doubt to the doubt that a prospective homebuyer would have upon observing a structurally significant, floor-to-ceiling crack in the home's foundation, we further conclude that it is reasonably likely that the jury understood the court's statements to allow a conviction on a standard lower than beyond a reasonable doubt, which constitutes structural error.

¶4 Accordingly, we reverse the judgment of the division below.

I. Facts and Procedural History

¶5 On March 4, 2016, Ernest Tibbels called 911 while experiencing a mental health crisis. Commerce City police officers responded to the call and, rather than taking Tibbels to a hospital as he had requested, arrested him under the mistaken belief that he was violating the terms of a protection order.

¶6 The officers transported Tibbels to the Adams County Detention Facility, where he resisted the officers' attempts to complete the booking process. Because he was agitated and combative, the officers did not remove his handcuffs or take him through the body scanner, which would have required removing the handcuffs. Instead, they took him to the so-called "booking quiet room," where they could pat him down, remove his handcuffs, and let him sit and cool down.

¶7 Approximately one hour later, an officer walked by the quiet room and noticed that Tibbels had torn pieces from his shirt and placed the pieces around his neck. Tibbels threatened to kill himself and anyone else who entered the quiet room and then hit the window of that room with a sharpened metal spike. Officers called for lethal cover, locked down the jail, and repeatedly ordered Tibbels to set the spike down. Although Tibbels did not initially comply, he eventually dropped the spike and complied with requests to lie down with his hands behind his back, at which point officers entered the room, re-handcuffed him, placed him in a restraint chair, and confiscated the three-inch long spike.

¶8 The prosecution subsequently charged Tibbels with first degree introduction of contraband, felony menacing, and first degree possession of contraband, and the case proceeded to trial.

¶9 During voir dire of the prospective jurors, the trial court read a portion of the pattern instruction defining "reasonable doubt." The court, however, then immediately undermined that definition, stating, "Now, you're all sitting there saying what the hell does that mean. It's a lengthy definition, okay. And don't lose heart. I'll give you an example and see if we can put some teeth and make this concrete."

¶10 The trial court then offered the following as an illustration of reasonable doubt:

> All right. So you and your spouse and your children are in a market to by [sic] a house, okay. And you're looking for a ranch, 2,000 square foot, full basement, and you want to be on an acre of land. You know, the school—you want to be in the 27-J School District.
>
> You—so you get yourself a realtor, you and your husband and your kids, you start go looking for a house [sic]. Let's just say in the Brighton area, for example. And you're looking for that ranch and that size property. And you come upon that ranch and it's just like the dream come true, okay. The price is right. Interest rates are still good. It's in the location that you want. The schools are good. The neighborhood is wonderful, it's perfect.
>
> So one Saturday morning you go out to the property with the realtor and your family and you fall in love with it, it's just wonderful. So you're walking around the exterior. You're walking inside, it looks great. And you descend the flight of stairs down to the basement and as you get to the bottom of the basement steps you look around and

> to the far concrete wall you look and you see a crack in the foundation from the floor to the ceiling. And it's not that superficial cracking that concrete will do. And structurally it's significant. Are you going to buy that house?

¶11 A prospective juror answered that she would not buy the house because she would not want a house with a bad foundation.

¶12 The trial court continued:

> Okay. You've got a reason. And it's this crack that is structurally significant. And that's causing you to hesitate, causing you to pause with going forward with a home purchase. This is my example of reasonable doubt.
>
> Now the lawyers usually do a better job, all right. But does that kind of put some—you can kind of touch and feel what reasonable doubt is. It's not—it's not aliens coming down and telling you don't buy the house, okay. It's something that you can kind of touch or feel or an inference that you may be able to draw.

¶13 The trial court returned to this example later during voir dire, telling the prospective jurors that the prosecution's burden is "proof beyond a reasonable doubt. And it's that example that I gave you, what a reasonable doubt is. So that's the burden that the government has to surmount to prove this case beyond a reasonable doubt."

¶14 Defense counsel did not object to the court's example. Nor did the trial court ever withdraw its example or instruct the jury to disregard it.

¶15 At the conclusion of the evidence the court instructed the jury on the applicable law and gave the pattern jury instruction on reasonable doubt. The jury

ultimately found Tibbels guilty of possession of contraband but acquitted him of the other two charges.

¶16 Tibbels appealed, arguing that the trial court's example lowered the prosecution's burden of proof by setting too high a standard for what qualifies as reasonable doubt and that this was structural error requiring reversal. In a split, published opinion, a division of the court of appeals affirmed Tibbels's conviction. *People v. Tibbels*, 2019 COA 175, 490 P.3d 517.

¶17 As pertinent here, the majority concluded that the trial court's reasonable doubt illustration did not unconstitutionally lower the prosecution's burden of proof. *Id.* at ¶ 35, 490 P.3d at 525. The majority reached this conclusion for five reasons: (1) the trial court had characterized its illustration as an "example" and said that the attorneys would do a better job of explaining reasonable doubt; (2) the illustration was given only during the jury selection portion of the trial; (3) the court told the prospective jurors that, at the conclusion of the evidence, it would tell the jurors the rules of law that they were to use in reaching their verdict and would provide copies of those rules to the jury, and the court never provided its illustration in writing; (4) before giving its illustration and again at the close of the evidence, the court properly instructed the jury on the meaning of reasonable doubt; and (5) the jury never indicated any confusion about reasonable doubt, and

the majority therefore presumed that the jury understood and followed the trial court's instructions. *Id.* at ¶¶ 35–39, 490 P.3d at 525.

¶18 The majority nonetheless "strongly discourage[d]" trial courts from using "everyday illustrations" to explain the concept of reasonable doubt, *id.* at ¶ 40, 490 P.3d at 525, because such illustrations "run the risk of confusing jurors, lowering the prosecution's burden of proof, and diminishing the presumption of innocence," *id.* at ¶ 23, 490 P.3d at 523. Indeed, the majority noted that divisions of the court of appeals had repeatedly discouraged trial courts from using such illustrations to explain reasonable doubt, the presumption of innocence, and other legal concepts. *Id.* at ¶ 33, 490 P.3d at 525.

¶19 Judge Pawar dissented. In her view, it was reasonably likely that the trial court's illustration had set too high a bar for what constitutes reasonable doubt and suffices for an acquittal, thereby lowering the prosecution's burden of proof and constituting structural error. *Id.* at ¶¶ 56, 58, 490 P.3d at 527–28 (Pawar, J., dissenting). Judge Pawar reached this conclusion for several reasons: (1) the trial court never told the jury to disregard, ignore, or otherwise not apply its example; (2) the court's illustration did not contradict the abstract explanations of reasonable doubt contained in the court's final instructions but rather more specifically and precisely defined those explanations, informing the jury how to apply the abstract concepts in a real-life situation; and (3) the fact that the court's

example "was not technically a formal instruction" was unimportant because "it was an uncontradicted explanation of reasonable doubt from the judge, the one person in the courtroom whose words everyone, including the jury, must heed." *Id.* at ¶¶ 60–64, 490 P.3d at 528–29.

¶20 Tibbels then petitioned for certiorari, and the People filed a cross-petition. We granted both petitions.

II. Analysis

¶21 We begin by addressing the applicable standard of review. After next reviewing the legal principles governing the necessity of instructing the jury on the concept of reasonable doubt, we articulate the test to be applied to determine whether a trial court's statements to the jury regarding the applicable law lowered the prosecution's burden of proof. We then proceed to apply this standard to the facts now before us.

A. Standard of Review

¶22 We review de novo the question of whether a trial court accurately instructed the jury on the law. *Johnson v. People*, 2019 CO 17, ¶ 8, 436 P.3d 529, 531. Instructions that lower the prosecution's burden of proof below the reasonable doubt standard constitute structural error and require automatic reversal. *Id.*; *accord Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993).

B. Applicable Law

¶23 The Due Process Clause of the United States Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *accord Vega v. People*, 893 P.2d 107, 111 (Colo. 1995). The Supreme Court has thus made clear that the reasonable doubt standard is "indispensable" in criminal prosecutions. *See Winship*, 397 U.S. at 364.

¶24 Intrinsically related to this standard is the presumption of innocence afforded criminal defendants. *See Delo v. Lashley*, 507 U.S. 272, 278 (1993) (per curiam) (observing that the presumption of innocence "operates at the guilt phase of a trial to remind the jury that the State has the burden of establishing every element of the offense beyond a reasonable doubt"). As the Supreme Court has stated, "The [reasonable doubt] standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Winship*, 397 U.S. at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

¶25 In light of the foregoing, the court must properly instruct the jury on—and, as the fact finder, the jury must apply—the reasonable doubt standard. *Johnson*, ¶ 13, 436 P.3d at 533. In this regard, trial courts retain some flexibility in defining

for the jury what constitutes a reasonable doubt. *Id.* at ¶ 10, 436 P.3d at 532; *see also Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("[S]o long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof.") (citation omitted). Nonetheless, both this court and the Supreme Court have repeatedly cautioned that attempts by trial courts to define "reasonable doubt" in ways beyond the long-established pattern instructions do not often clarify the term, *see, e.g.*, *Holland v. United States*, 348 U.S. 121, 140 (1954); *Johnson*, ¶¶ 13, 19, 436 P.3d at 532, 534, and that trial courts must guard against defining "reasonable doubt" in a way that allows the jury to convict on a lesser showing than due process requires, *see Victor*, 511 U.S. at 22; *Johnson*, ¶ 13, 436 P.3d at 532. The trial courts' decisions not to heed this admonition in both this case and in *Pettigrew*, ¶¶ 15–16, which we also decide today, have again placed before us the question of whether a trial court's efforts to define "reasonable doubt" violated a defendant's due process rights.

C. Test for Instructional Error on Reasonable Doubt

¶26 To decide the test that we should apply to determine whether a trial court's instructions to the jury lowered the prosecution's burden of proof, we are guided by Supreme Court case law regarding the standard for assessing allegedly defective jury instructions.

¶27 In *Boyde v. California*, 494 U.S. 370, 372 (1990), the Court considered whether two jury instructions used in the penalty phase of a capital murder trial were consistent with the Eighth Amendment. The defendant claimed that the instructions did not allow the jury to consider mitigating evidence of his background and character and therefore prevented the jury from making the requisite individualized assessment as to whether the imposition of the death penalty was appropriate. *Id.* at 375–76.

¶28 The Court began its analysis by recognizing the "well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Id.* at 378 (quoting *Cupp v. Naughten*, 414 U.S. 141, 146–47 (1973)). Noting that the legal standard for reviewing allegedly defective jury instructions had been "less than clear," *id.*, the Court determined that the proper inquiry in such a case is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," *id.* at 380. The Court opined that such a standard "better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical 'reasonable' juror could or might have interpreted the instruction." *Id.* The Court further explained:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might.

> Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id. at 380–81.

¶29 Applying the foregoing standard to the case before it, the Court concluded that there was no reasonable likelihood that the jurors had interpreted the instructions at issue to prevent consideration of mitigating evidence. *Id.* at 381.

¶30 The Supreme Court returned to the question of the proper standard for interpreting allegedly faulty jury instructions in *Estelle v. McGuire*, 502 U.S. 62 (1991), a case in which the defendant had been convicted of murdering his infant daughter. Specifically, in examining the propriety of a prior bad acts instruction, which the defendant claimed amounted to a propensity instruction that violated his right to due process, the Court reiterated that a challenged instruction may not be assessed in isolation "but must be considered in the context of the instructions as a whole and the trial record." *Id.* at 71–72. The Court thus again applied the "reasonable likelihood" standard, stating, "[I]n reviewing an ambiguous instruction such as the one at issue here, we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Id.* at 72 (quoting *Boyde*, 494 U.S. at 380).

¶31 In accordance with that standard, the Court perceived no reasonable likelihood that the jury would have concluded that the instruction, read in the

context of the other instructions, authorized the use of propensity evidence to establish the defendant's guilt. *Id.* at 74–75.

¶32 Lastly, in *Victor*, 511 U.S. at 5–10, 14–19, the Court applied the foregoing line of reasoning in the context of trial courts' attempts to define "reasonable doubt." *Victor* involved two separate murder convictions in which the defendants challenged the trial courts' instructions on reasonable doubt. *Id.* at 7–10, 18–19.

¶33 In the first case, the trial court defined "reasonable doubt" as "not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt." *Id.* at 7. The court continued, "It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." *Id.* The defendant objected to the phrases "moral evidence" and "moral certainty," arguing that modern jurors would have understood those phrases to mean a standard of proof lower than beyond a reasonable doubt. *Id.* at 10, 14.

¶34 In the second case, the court instructed the jury on reasonable doubt using the same concept of "moral certainty" and further advised the jury, among other things, that "[a] reasonable doubt is an actual and substantial doubt" arising from the evidence or lack thereof. *Id.* at 18. The defendant challenged this instruction

on the ground that equating a reasonable doubt with a substantial doubt overstated the degree of doubt required for a conviction. *Id.* at 19.

¶35 The Court began its analysis by noting that as long as a trial court instructs the jury that the defendant's guilt must be proved beyond a reasonable doubt, the Constitution does not require that any particular words be used in advising the jury of the prosecution's burden of proof. *Id.* at 5. Instead, the instructions, taken as a whole, must correctly convey the concept of reasonable doubt to the jury. *Id.* Thus, the question in the cases before the Court was "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* [i.e., reasonable doubt] standard." *Id.* at 6. Applying that standard, the Court determined that, although the instructions in the two cases were concerning and "somewhat problematic," when considered in the context of the instructions as a whole and the trial record, there was no reasonable likelihood that the jurors would have understood the challenged instructions to allow conviction on a standard of proof lower than the reasonable doubt standard. *Id.* at 13, 16–17, 19, 21–23.

¶36 As the foregoing makes clear, in a wide array of settings—including in the context of deciding whether instructions on the meaning of reasonable doubt unconstitutionally lowered the prosecution's burden of proof—the Supreme Court has employed a functional test, asking whether there is a reasonable

likelihood that the jury understood a contested instruction, in the context of the instructions as a whole and the trial record, to allow a conviction based on a standard lower than beyond a reasonable doubt. And we have applied this standard as well. Thus, in *Johnson*, ¶ 14, 436 P.3d at 533, we stated, "When reviewing an ambiguous jury instruction . . . , we ask whether there is a reasonable likelihood that the jury applied the contested instruction in an unconstitutional manner," noting further that we do not consider instructions in isolation, but rather in the context of the instructions as a whole.

¶37 The question thus becomes whether the same standard should apply to statements regarding the law that a trial court makes either during the jury selection process or otherwise outside the context of the court's formal instructions to the jury. Although we did not need to address this issue in *Johnson*, in which the trial court also made the challenged statements during voir dire, the issue is squarely presented here because the People contend that the court's illustration was neither a definition of "reasonable doubt" nor an instruction of law and therefore did not implicate the above-described principles and structural error analysis.

¶38 For several reasons, we reject the People's apparent premise that only formal instructions of law implicate the above-described principles.

¶39 First, such a view ignores the facts that the court advises the jury of applicable principles of law throughout a trial (including during the jury selection process) and jurors listen carefully to the court's explanation of the law that they must apply in deciding the case. Accordingly, although it is certainly true that not every statement that a trial judge makes in the course of a trial amounts to a statement of the law that the jury must apply, we cannot exclude the possibility that, when considered in context, certain statements by the court, whether made in the context of formal jury instructions or not, may well rise to such a level—or at least impact the formal instructions that the court provides.

¶40 Second, we do not expect jurors to make fine distinctions between statements of applicable law that the court makes in one context as opposed to another. Rather, as the Supreme Court said in *Boyde*, 494 U.S. at 381, we anticipate that jurors will rely on their "commonsense understanding of the instructions in the light of all that has taken place at the trial" and that this understanding will "prevail over technical hairsplitting." *See also United States v. Hernandez*, 176 F.3d 719, 733–34 (3d Cir. 1999) (rejecting arguments that a trial court's comments during voir dire regarding the meaning of "reasonable doubt" would not likely have influenced the jury's decision because such comments came early in the trial and were merely comments and not formal instructions, reasoning, (1) "We will not assume that jurors, contrary to their oath, ignored part of the judge's initial

instruction simply because it came early in the trial"; and (2) the record did not show that the jurors would have drawn the "fine distinction" between a judge's comments on the law and more formal instructions, and the jury was never instructed to ignore the substantive portion of the court's initial instructions in determining the meaning of reasonable doubt).

¶41 Thus, whether it is reasonably likely that a jury would have understood a trial court's statements regarding the applicable law so as to lower the prosecution's burden of proof depends on the nature of the statements, the context in which they were made, any other explanations or instructions that the court may have provided, and, of course, the court's final jury charge.

¶42 Third, we believe that a functional test, rather than one that, as a matter of law, excludes from consideration all statements by a trial judge other than those contained in formal jury instructions, will allow reviewing courts to consider the trial judge's statements in context, with a realistic eye as to how jurors would likely have understood those statements.

¶43 Accordingly, we now conclude that in considering whether a court's statements to a jury regarding the meaning of "reasonable doubt" (whether in formal instructions or not) unconstitutionally lowered the prosecution's burden of proof, an appellate court must ask whether there is a reasonable likelihood that the jury understood the court's statements, in the context of the instructions as a

whole and the trial record, to allow a conviction based on a standard lower than beyond a reasonable doubt.

¶44 Having thus articulated the governing standard, we proceed to apply that standard in the case now before us.

D. Application

¶45 Although we have found no case directly on point, a number of cases decided by sister courts are instructive.

¶46 *Stoltie v. California*, 501 F. Supp. 2d 1252 (C.D. Cal. 2007), *aff'd sub nom. Stoltie v. Tilton*, 538 F.3d 1296 (9th Cir. 2008) (per curiam), was a federal habeas corpus proceeding following a defendant's conviction in state court. In that case, the jury had repeatedly expressed confusion during its deliberations regarding the meaning of "reasonable doubt." *Id.* at 1253–55. In response, the court gave the following example regarding Blythe, a town on the Colorado River in the California Sonoran Desert, to illustrate reasonable doubt:

> If I were to tell you that I am going to Blythe . . . I'm gonna go there in the middle of July and I am taking my skis with me because it snows every July, you might say, I doubt it. And that would be a reasonable doubt, wouldn't it?
>
> But if I told you I am going to Blythe and I am taking my swimming suit and water skiis [sic] to go skiing in the Colorado River in the middle of July, but I am afraid it might be too cold, you'd think, I doubt it, but maybe that's not so unreasonable. Reason and logic apply.

Id. at 1255 (footnotes omitted).

¶47 A federal habeas court ultimately concluded that this illustration, when considered in the context of the overall jury charge, "raised the degree of doubt required for acquittal from a reasonable doubt to an extreme doubt." *Id*. at 1264. Specifically, the court observed that this analogy improperly "suggested that the jury should acquit only if the prosecution's theory was as utterly improbable as a person going skiing in the desert in July." *Id*. Accordingly, the court concluded, "Because this instruction equated an extreme doubt with a reasonable doubt, it created a reasonable likelihood that the jury would apply an unconstitutional standard of proof, believing [the defendant] could only be acquitted if the prosecution's theory was essentially impossible." *Id.*

¶48 Similarly, in *Wansing v. Hargett*, 341 F.3d 1207, 1209 (10th Cir. 2003), during voir dire, a prospective juror asked the court for more guidance regarding the meaning of "reasonable doubt." The trial judge then recalled a trial in which he had been involved as a lawyer and in which the prosecutor had told the jury that reasonable doubt was the kind of serious doubt that causes one to act or not act in serious matters like calling off a wedding at the last minute after walking down the aisle. *Id.* The defendant was convicted and appealed, and the appellate court reversed, concluding that the trial court's remarks had "made it reasonably likely that the jury would overestimate the amount of latitude it had in defining the reasonable doubt standard." *Id.* at 1215. Specifically, the court determined that

the trial court's instruction had improperly suggested that the reasonable doubt standard "comprises as broad a range of burdens of proof as that suggested by the wedding analogy." *Id.*

¶49 Applying similar reasoning here, we believe that it is reasonably likely that the jury applied the trial court's crack-in-the-foundation illustration in a manner that allowed for conviction based on a standard lower than proof beyond a reasonable doubt. We reach this conclusion for several reasons.

¶50 First, the trial court began its discussion of reasonable doubt by undermining the pattern instruction on that concept and giving its own example to explain the principle. Specifically, as noted above, after reading the pattern reasonable doubt instruction to the prospective jurors, the court immediately said that they must be "sitting there saying what the hell does that mean." The court then advised the prospective jurors not to "lose heart" because the court would provide an example to make the definition "concrete," and the court proceeded to provide its nonlegal, crack-in-the-foundation illustration. In our view, the trial court's focus on this nonlegal, real-world example made the illustration highly significant and ensured that the jury would give it undue weight. This is particularly true given that (1) the court gave the example immediately after undermining the pattern instruction on reasonable doubt; (2) the court came back to its illustration later in voir dire, expressly equating reasonable doubt with "that

example that I gave you"; and (3) as in *Hernandez*, 176 F.3d at 733, the court never instructed the jury to disregard its example.

¶51 Second, the crack-in-the-foundation illustration established a higher degree of doubt than is required for an acquittal. Specifically, as noted above, the court equated the concept of reasonable doubt with this scenario, but we would expect that everyone would likely hesitate to buy a house with a structurally significant, floor-to-ceiling crack in the foundation. Accordingly, the court's example suggested that a reasonable doubt was one that was so obvious that it would give every reasonable person pause and cause them to hesitate to act. As was the case with the wedding analogy in *Wansing*, 341 F.3d at 1215, such an example overstated the degree of doubt and uncertainty required for an acquittal. Indeed, in our view, like the skiing example in *Stoltie*, 501 F. Supp. 2d at 1264, the court's instruction here suggested to the jurors that they could acquit Tibbels only if the evidence established an extreme doubt—i.e., one akin to going forward with a home purchase notwithstanding a floor-to-ceiling crack in the home's foundation. This, in turn, unconstitutionally lowered the prosecution's burden of proof.

¶52 Third, the trial court's illustration arguably suggested to the jurors that Tibbels had some obligation to present evidence to create a reasonable doubt in the jurors' minds. Specifically, after providing the crack-in-the-foundation example, the court commented, "You've got a reason. And it's this crack that is

structurally significant. . . . This is my example of reasonable doubt." This example, however, appears to have turned the presumption of innocence on its head, improperly suggesting to the prospective jurors that they were to start with a presumption of guilt and then look for evidence to create in their minds a reasonable doubt, i.e., "a reason" to acquit. For this reason as well, the example that the court gave violated Tibbels's constitutional rights.

¶53 For all of these reasons, we conclude that, considering the trial court's statements in the context of the instructions and the record as a whole, it is reasonably likely that the jury understood the court's statements to allow a conviction based on a standard lower than beyond a reasonable doubt and that such an instructional error was structural, thereby requiring reversal.

¶54 In so concluding, we are not persuaded by the People's reliance on our prior opinions in *Johnson*, ¶ 15, 436 P.3d at 533, and *Deleon v. People*, 2019 CO 85, 449 P.3d 1135.

¶55 In *Johnson*, ¶ 15, 436 P.3d at 533, we perceived no reversible error in a trial court's statements during voir dire regarding the meaning of "reasonable doubt" because we concluded that the challenged instruction was too nonsensical to be understood by the jury and that the jury would therefore have relied on the correct reasonable doubt instruction that the court gave. Here, in contrast, the crack-in-the-foundation example was a clear, real-world scenario that we believe

the jurors would readily have understood and relied on, particularly given that the court gave the example immediately after undermining the pattern reasonable doubt instruction.

¶56 In *Deleon*, ¶ 1, 449 P.3d at 1136, the question before us was whether the trial court had reversibly erred in not instructing the jury regarding the defendant's right to remain silent (and the impropriety of the jurors' drawing any adverse inference against the defendant from his decision not to testify), notwithstanding the fact that the court had commented on this topic during voir dire. We concluded that the trial court had, in fact, reversibly erred. *Id.* In so concluding, we relied on the facts that (1) the court's comments during voir dire were made in the context of determining whether the potential jurors could act impartially and apply the law (and not in the context of instructing the jurors regarding the law); (2) prior to the parties' opening statements, the court told the jurors that the law that they were to follow "will be" presented to them and that the court's instructions should be the only basis for their verdict; and (3) when the court read its final instructions to the jurors, it told them that the instructions comprised the law the jurors were to follow, and the court gave no instruction on the defendant's right to remain silent. *Id.* at ¶¶ 15, 26–27, 449 P.3d at 1137–38, 1140.

¶57 Notwithstanding the People's suggestion to the contrary, we did not say in *Deleon* that a trial court's statements in voir dire can never rise to the level of an

instruction on the applicable law (or, conversely, that they always do). Rather, just as we do here, we considered the court's statements in the context of the instructions as a whole and the entire record to determine whether the trial court had properly instructed the jury on the law to be applied. In *Deleon*, we concluded that the trial court had not done so, and we reach an analogous conclusion here. To be sure, the instructional issues in *Deleon* and the present case arose in very different settings. Nonetheless, the analytical framework that we employed in *Deleon* to assess the claimed error is consistent with the framework that we apply here.

¶58 Finally, as to the People's reliance on the division's opinion in *People v. Avila*, 2019 COA 145, ¶¶ 40–48, 457 P.3d 771, 779–81, to defend the trial court's statements here, although that case is arguably distinguishable on its facts, to the extent that its holding is inconsistent with the conclusion that we reach today, we overrule that opinion.

III. Conclusion

¶59 For the forgoing reasons, we adopt a functional test for deciding whether a trial court's statements to the jury regarding the law to be applied lowered the prosecution's burden of proof. Specifically, we ask whether there is a reasonable likelihood that the jury understood the court's statements, in the context of the instructions as a whole and the trial record, to allow a conviction based on a

standard lower than beyond a reasonable doubt. Applying that test to the specific facts presented here, in which the court equated the concept of reasonable doubt to the doubt that a prospective homebuyer would have upon observing a structurally significant, floor-to-ceiling crack in a home's foundation, we conclude that it is reasonably likely that the jury understood the court's statements to allow a conviction on a standard lower than beyond a reasonable doubt.

¶60 Because this constitutes structural error, we reverse the judgment of the division below.