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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	No. G054241
Plaintiff and Respondent,	)	
	)	(Superior Ct. No. 14CF3596)
vs.	)	
	)	
DESIRAE LEE LEMCKE, et al.,	)	
	)	
Defendants and Appellants.	)	

PETITION FOR REVIEW

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three, Case No. G054241

On Appeal from the Superior Court of the County of Orange
The Honorable David H. Hoffer, Case No. 14CF3596

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Representing appellant/petitioner
DESIRAE LEE LEMCKE by
appointment of the Court of
Appeal under the Appellate
Defenders, Inc. independent case
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	)	
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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, THE CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant, DESIRAE LEE LEMCKE, hereby petitions this Honorable Court for review in the above-entitled matter of the unpublished opinion by the Court of Appeal of the State of California, Fourth Appellate District, Division Three, issued on June 21, 2018. A copy of the opinion is attached as an appendix.

* * *

ISSUES PRESENTED FOR REVIEW

1. Must appellant's conviction for aggravated assault be reversed because, due to erroneous instruction with CALCRIM No. 1603, the aggravated assault conviction is possibly based upon finding appellant aided and abetted robbery solely during asportation to a place of temporary safety, an invalid legal theory of retroactive culpability?

2. Assuming instruction error in the form of instructions offering jurors a legally invalid theory of aider-and-abettor liability for aggravated assault, is the error properly deemed harmless beyond a reasonable doubt because the prosecutor's closing argument was confined to a legally valid theory of liability, although it is impossible to discern whether one or more jurors found guilt based upon the legally invalid theory?

NECESSITY FOR REVIEW

Review by the Supreme Court of a decision of the Court of Appeal should be granted "when necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) The issue presented involves an important question of law that will arise in the future whenever the court instructs with both CALCRIM No. 1603 [aiding and abetting robbery] in combination with CALCRIM No. 402 [aider and abettor liability for natural and probable consequences], similar to the error that arose in *People v. Pulido* (1997) 15 Cal.4th 713, 728 [an instruction such as no. 1603 "could well suggest to a jury that a person who aids and abets only in the asportation phase of robbery, after the killing is complete, is nonetheless guilty of first degree murder under the felony-murder rule"].)

Review should be granted because the Court of Appeal held, assuming error, the error was harmless because the prosecutor did not urge the jury to find appellant guilty based upon the legally invalid theory.

Review is necessary to clarify that when the instructions permit jurors to find guilt based on either valid or invalid legal theories, the error is reversible unless it can be discerned that the jury unanimously found guilt based upon the legally valid theory.

STATEMENT OF THE CASE

Desirae Lee Lemcke ("appellant") was found guilty of second-degree robbery (§ 211) and assault by means of force likely to result in great bodily injury (§ 245, subd. (a)(1)). The People also alleged appellant had served a prior prison term (§ 667.5, subd. (b)). (1CT 71–72, 143, 2CT 581–587, 7RT 1103–1107.)[1/] The court found the prior prison term allegations true. (1CT 146, 7RT 1172.) Judgment was pronounced on November 4, 2016. Probation was denied and appellant was sentenced to serve an aggregate term of three years in prison. (1CT 144–149, 7RT 1198–1202.) Timely notice of appeal was filed on November 7, 2016. (4CT 795.)

On appeal, appellant argued CALCRIM No. 1603 in combination with CALCRIM No. 402, opened the possibility for appellant to be found guilty of aggravated assault based on an invalid theory of retroactive culpability. The Court of Appeal filed an unpublished opinion on June 21, 2018, which assumed appellant's claim of instruction error was meritorious, but concluded any error was not prejudicial. (Opinion, pp. 5–9.)

No party filed a petition for rehearing.

STATEMENT OF FACTS

The statement of facts set forth in the Opinion (pp. 3–5) is adopted only for purposes of this petition.

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1. Throughout, "CT" and "RT" refer to the Clerk's and Reporter's Transcripts, respectively, in case no. G054241.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GRANTING REVIEW

Appellant's conviction for indirectly aiding and abetting aggravated assault under the natural and probable consequences theory of liability could be based on various interpretations of the evidence. CALCRIM No. 1603 applied to one of those interpretations, and allowed an improper conviction based on retroactive culpability for the completed assault if the jury concluded appellant joined in the robbery by forming intent to aid and abet only the asportation and getaway to a place of temporary safety. Appellant argued on appeal that, because it is impossible to discern from the instructions and verdicts whether one or more jurors found her guilty of robbery based on intent to aid and abet robbery formed after codefendant Rudd's assault upon the victim, the aggravated assault conviction must be reversed.

The Court of Appeal noted that CALCRIM No. 1603 is a correct statement of the law, but recognized "it should not be given in all robbery cases where the defendant is charged as an aider and abettor." (Opinion, p. 7.) Assuming error akin to that addressed in context of the felony-murder rule in *People v. Pulido, supra,* 15 Cal.4th at p. 722 ["complicity in a felony murder [does not] extend to one who joins the felonious enterprise after the killing has been completed"], the Court of Appeal decided any instruction error in this case was harmless. The Court of Appeal reasoned that the "*only* act" the prosecutor argued as a basis for appellant's aider-and-abettor liability for robbery transpired prior to the robbery. Based on the prosecutor's argument, the Court of Appeal reasoned the jury was unlikely to find appellant guilty based upon an improper theory of retroactive aider-and-abettor liability. (Opinion, p. 9, italics in original.)

Appellant respectfully requests this court grant review. Appellant was tried on a theory of indirectly aiding and abetting aggravated assault committed by codefendant Rudd. She could be found guilty if the jury concluded that an aggravated assault was a reasonably foreseeable consequence of execution of a robbery. It is a given that an aggravated assault is a reasonably foreseeable consequence of executing a robbery. However, one can be liable for aiding and abetting robbery after-the-fact of aggravated assault, and that could be the finding of one or more jurors in this case.

The prosecutor urged the jury to find appellant intended to assist with robbery at the outset, when she asked to borrow the victims's phone, which provided Rudd with the opportunity to commit the robbery. Rudd viciously beat the victim. Appellant was merely present. Although appellant did nothing to stop Rudd's assault, she also did nothing to assist Rudd in the acquisition of the victim's property by force or fear. What is clear is that appellant fled with Rudd and may have carried the victim's purse in that connection.

The problem is that, under those facts, the jury could reasonably conclude appellant innocently asked to borrow the victim's phone, but nevertheless was guilty of aiding and abetting robbery by forming the intent to assist Rudd with asportation after the assault and taking were committed. Given the evidence of Rudd's ugly ranting about the victim's sexual orientation, Rudd appears to have lashed out at the victim for reason of hatred. This would be inconsistent with the prosecutor's theory that appellant was working with Rudd to purposefully reel the victim in to be robbed.

The trial court apparently recognized that appellant could be found guilty based on act and intent to aid and abet after the taking was

accomplished, as demonstrated by the court's decision to instruct with CALCRIM No. 1603. According to the Bench Notes for CALCRIM No. 1603, "[t]he court has a sua sponte duty to give this instruction when the defendant is charged with aiding and abetting a robbery and an issue exists about when the defendant allegedly formed the intent to aid and abet." (Judicial Council of Cal., Crim. Jury Instns. (2012) Bench Notes to CALCRIM No. 1603, p. 1220, citing *People v. Cooper* (1991) 53 Cal.3d 1158, 1165–1166 [defendant who drove get-away car asserted he did not intend to aid and abet at time of robbery].)

However, it is error to give CALCRIM No. 1603 when a defendant is charged with felony murder because the instruction permits a jury to convict a defendant who formed the intent to aid and abet the robbery after the act causing death. Indeed, another Bench Note to CALCRIM No. 1603 states: "Do not give this instruction if the defendant is charged with felony murder." (Judicial Council of Cal., Crim. Jury Instns. (2012) Bench Notes to CALCRIM No. 1603, p. 1220.)

> [CALCRIM No. 1603] could well suggest to a jury that a person who aids and abets only in the asportation phase of robbery, after the killing is complete, is nonetheless guilty of first degree murder under the felony-murder rule.

(*People v. Pulido, supra,* 15 Cal.4th at p. 728.)

This court in *Pulido* "address[ed] a question regarding the scope of complicity in robbery-murder. If one person, acting alone, kills in the perpetration of a robbery, and another person thereafter aids and abets the robber in the asportation and securing of the property taken, is the second person guilty of first degree murder under section 189?" This court concluded "the answer is no," because, "[a]lthough the second person is an accomplice to robbery [citation], such participation in the robbery does not

subject the accomplice to murder liability under section 189, because the killer and accomplice were not 'jointly engaged at the time of such killing' in a robbery." (*People v. Pulido, supra,* 15 Cal.4th at p. 716.) In other words, the killer "was not acting, at the time of the killing, in furtherance of a 'common' design to rob [citation]." (*Ibid.*)

Appellant acknowledged on appeal that, "[a]n aider and abettor's liability for murder under the natural and probable consequences doctrine operates independently of the felony-murder rule." (*People v. Chiu* (2014) 59 Cal.4th 155, 166, citing *People v. Culuko* (2000) 78 Cal.App.4th 307, 322.) Nevertheless, as argued, the rationale underlying the rule from *Pulido* and its progeny logically applies equally to the circumstances presented in this case. Although not a homicide, this case does involve an aggravated assault that fortuitously did not result in the victim's death. Hypothetically, had the victim not survived Rudd's aggravated assault with great bodily injury, the *Pulido* problem with CALCRIM No. 1603 would undoubtedly exist. It exists nonetheless even though the victim survived the attack because—as instructed—the jury was allowed to find (1) appellant formed the intent to aid and abet robbery asportation only, after the fact of the aggravated assault, but (2) aggravated assault is a reasonably-foreseeable consequence of executing a robbery, so (3) appellant is culpable for the aggravated assault too.

This court agreed with *Pulido,* that retroactive aider and abettor liability was an invalid theory under California law, but upheld the conviction on the ground that defendant Pulido was not prejudiced by the error. (*People v. Pulido, supra,* 15 Cal.4th at p. 727.) Eventually, the case reached the United States Supreme Court and, in *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 60 [129 S.Ct. 530, 172 L.Ed.2d 388], it was observed that error in instructing a California state court jury on alternative theories of

liability, one of which is invalid, constitutes federal constitutional error that requires reversal unless harmless beyond a reasonable doubt. (*Ibid.*, see also *Neder v. United States* (1999) 527 U.S. 1, 15–19 [119 S.Ct. 1827, 144 L.Ed.2d 35].)

This sort of error requires reversal of the aggravated assault conviction because there is no way to assume that appellant was found guilty of aggravated assault on a valid theory of directly aiding and abetting aggravated assault, or a valid theory of aiding and abetting robbery before the assault was committed, as opposed to the *invalid theory* of aiding and abetting the robbery after the assault was complete. The Court of Appeal concluded the error was harmless based on the prosecutor's argument to the jury, i.e., the prosecutor's theory of aiding and abetting robbery at the outset prior to the assault. Defense counsel did not, for obvious reason, argue that appellant was guilty of robbery for aiding and abetting only the post-assault asportation. However, under long established precedent, when, as in this case, the record does not demonstrate which theory the jury relied upon, the error cannot be deemed harmless beyond a reasonable doubt. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131; *People v. Green* (1980) 27 Cal.3d 1, 69.)

Under the combination of instructions given, the jury's guilty verdicts *cannot* necessarily demonstrate that the jury believed that appellant intended to aid and abet robbery when she borrowed the victim's phone. The verdict in appellant's case indicates a conviction of aggravated assault and robbery, but does not specify whether the jury relied on aiding and abetting before the assault or only in the post-assault asportation of the victim's purse. One or more jurors may have been persuaded to agree on a guilty verdict based upon the invalid legal theory.

Review should be granted because the Court of Appeal found the error harmless by reasoning the prosecutor's closing argument theory controlled and dictated the jury's factual findings. However, the jury's verdicts do not indicate that the jury unanimously adhered strictly to the prosecutor's closing argument as a basis for the jury's factual findings. Thus, there is no way to determine which theory the jury relied upon to reach a verdict. Even if one juror used the improper retroactive culpability theory to find appellant guilty of assault, the conviction is unconstitutional and must be reversed.

CONCLUSION

Review is necessary because, regardless of the prosecutor's stated theory in closing argument, there is no way to discern which theory jurors used to return the verdict. Review should be granted and appellant's aggravated assault conviction should be reversed.

Respectfully submitted,

Dated: July 23, 2018

___/s/ *Sylvia W. Beckham*____

Representing appellant/petitioner
DESIRAE LEE LEMCKE by
appointment of the Court of
Appeal under the Appellate
Defenders, Inc. independent case
system

CERTIFICATE OF LENGTH

I, Sylvia W. Beckham, counsel for Desirae L. Lemcke, certify the Petition for Review, was produced using 13-point Times New Roman type including footnotes, and the word processing program, WordPerfect, used to generate this brief indicates the word count for this document is 2,271 words.

Dated: July 23, 2018 ___/s/ *Sylvia W. Beckham*____

PROOF OF SERVICE BY MAIL
(Cal. Rules of Court, rules 1.21 & 8.50.)

People v. Desirae Lee Lemcke, et al., Case No. G054241

I, Sylvia W. Beckham, declare: I am over the age of 18 years and not a party to the case; I am employed in the County of Santa Barbara, California, where the mailing occurs; and my business address is 1072 Casitas Pass Road, PMB 314, Carpinteria, California, 93013-2109.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service, and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

On July 23, 2018, I caused to be served the *Petition for Review* by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Central Justice Center
Attn: Judge Hoffer
700 Civic Center Drive West, 1st Fl.
Santa Ana, CA 92701

Alternate Public Defender
Attn: Thomas Nocella
600 W. Santa Ana Blvd., Ste. 600
Santa Ana, CA 92701

Desirae Lemcke (appellant)
(*lost contact—holding copy in file*)

I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

PROOF OF SERVICE BY ELECTRONIC SERVICE
(Cal. Rules of Court, rules 2.251(i)(1)(A)–(D) &8.71(f)(1)(A)–(D).)

Furthermore, I, Sylvia W. Beckham, declare I electronically served from my electronic service address of beckham_law@cox.net the above-referenced document on July 23, 2018, before 5:00 PM, to the following entities:

APPELLATE DEFENDERS, INC., eservice-court@adi-sandiego.com

ATTORNEY GENERAL (San Diego office), SDAG.Docketing@doj.ca.gov

JEANINE G. STRONG (Counsel for Charles Henry Rudd), Strong145629@gmail.com

DISTRICT ATTORNEY (Orange County), Appellate@da.ocgov.com

COURT OF APPEAL (Fourth District, Division Three), via True Filing EFS

I declare under the penalty of perjury under the laws of the State of California the foregoing is true and correct.
Executed on July 23, 2018 __/s/ *Sylvia W. Beckham*___

APPENDIX: Opinion filed June 21, 2018

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DESIRAE LEE LEMCKE and CHARLES HENRY RUDD, Defendants and Appellants.	G054241 (Super. Ct. No. 14CF3596) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant Desirae Lee Lemcke.

Jeanine G. Strong, under appointment by the Court of Appeal, for Defendant and Appellant Charles Henry Rudd.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendants Desirae Lee Lemcke and Charles Rudd of robbery (Pen. Code, §§ 211, 212.5, subd. (c); count 1)[1] and aggravated assault (§ 245, subd. (a)(1); count 3). It further found Rudd guilty of battery with serious bodily injury (§ 243, subd. (d); count 4), and that he personally inflicted great bodily injury (§ 12022.7, subd. (a)) in the course of the robbery and the aggravated assault. The court found Rudd served two prior terms in state prison (§ 667.5, subd. (b)) and Lemcke served one prior term in state prison. The court sentenced Rudd to six years in prison, consisting of a three-year midterm on the robbery and a consecutive three-year term for inflicting great bodily injury. Lemcke was sentenced to three years on the robbery conviction. As to both defendants, the court stayed execution of sentence on the remaining counts pursuant to section 654.

On appeal, Lemcke contends her conviction for aggravated assault must be reversed due to instructional error that permitted her to be convicted on an invalid theory. Rudd contends an instruction erroneously let the jury consider a witness's level of certainty of his identification. We affirm the judgments.

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

FACTS

The Robbery and Assault

Monica Campusano was at the Royal Roman Motel in Santa Ana, California, on July 13, 2014, at 7:30 p.m. to visit a girlfriend. Campusano was dressed in her work uniform and had her purse, containing $500 or $550, over her right shoulder. Campusano walked by room 216 on her way to visit her friend. A young woman, later identified as Lemcke, was standing just outside of room 216. Lemcke was with a man Campusano later identified as Rudd, who was standing in the doorway of room 216. Lemcke asked if Campusano had a cell phone she could use. Campusano said she did and as she was about to hand it to Lemcke, Rudd hit Campusano in the face and pulled her into the room.

Rudd punched Campusano about four times in the head. When she was on the floor, Rudd kicked her in her stomach and head. Campusano told Rudd to take her bag and not to do anything to her. Rudd called her a "fucking faggot."[2] She lost consciousness inside the room. Before she passed out, Campusano got a good look at Rudd's face. He had a tattoo on the right side of his neck. The last thing she remembered before regaining consciousness was being on the floor inside room 216, beaten up and bleeding.

When Campusano recovered consciousness, she went to the motel office. She couldn't remember whether someone helped her walk to the office or whether she went on her own. She was dizzy and saw the defendants leaving in a taxi. Campusano called 911 and reported that she had just been robbed by "a black guy with a lady." She said they took her phone and her purse, "with [her] money and everything." Campusano said the man was the one who hit her.

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[2] Campusano is a male transgender person.

Officer Ricardo Velasquez responded to the motel and met with Campusano. She was crying, bleeding from her mouth, and her lower jaw was swollen. She described the male assailant as being a big African-American male, approximately six foot three inches to six foot five inches tall, 260 to 300 pounds, balding, with a goatee. She described the female as Caucasian, heavyset—over 200 pounds, perhaps five foot six inches tall, with a tattoo around the neck area.

Campusano underwent surgery. Wires inserted into her jaw remained for five or six weeks. During that time she could only consume liquids. As a result of the incident, her jaw was not the same, it looked different, and it made a noise when she talked or chewed. It continued to hurt at the time of the trial.

After arranging an ambulance for Campusano, Velasquez spoke with the owner of the motel. Records showed Lemcke had been registered in room 216 on that date. The officer ran a record check on Lemcke and found she matched the description of the female given by Campusano. He also found a court record involving Lemcke and Rudd, wherein Rudd was listed as six foot three inches tall and 250 pounds.

Velasquez created a photographic lineup containing a photograph of Rudd in the number five position. He took the lineup to the hospital where Campusano was in a bed and read her an admonishment about the photographic lineup. Campusano selected Rudd's photograph as the assailant.

In October 2014, Campusano was shown another photographic lineup. This one contained a photograph of Lemcke in position number two. Campusano selected Lemcke's photograph as the woman involved. Days later, she was shown two photographs of neck tattoos on African-American males. The photographs did not show the subjects' faces. Campusano identified Rudd's tattoo.

Also in October 2014, Campusano informed a detective she recently was at a Walmart store in Garden Grove, California, where she saw Lemcke with an African-

American male. She followed them for some period of time and concluded the male was not the one who robbed her.

The defense presented the testimony of an expert who testified to psychological factors that may affect the validity of an eyewitness identification. (See *People v. McDonald* (1984) 37 Cal.3d 351, 361-369, overruled on a different point in *People v. Mendoza* (2000) 23 Cal.4th 896 [admissibility of expert testimony regarding psychological factors affecting eyewitness identification].)

DISCUSSION

I

Lemcke's Appeal

Lemcke contends instructional error requires reversal of her aggravated assault conviction. She argues the court's instruction to the jury on aiding and abetting with respect to the robbery allowed the jury to convict her of the aggravated assault under circumstances where the assault was *not* the natural and probable consequence of the robbery.

Lemcke was prosecuted for robbery on the theory that she aided and abetted Rudd when she asked Campusano to borrow her cellphone, giving Rudd the opportunity to pull Campusano into Lemcke's motel room and rob her. Under the prosecution's theory of the case, Lemcke shared Rudd's intent to steal. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

Lemcke was charged with aggravated assault based on the natural and probable consequences theory of aiding and abetting. "Once the necessary mental state is established, the aider and abettor is guilty not only of the intended, or target, offense, but also of any other crime the direct perpetrator actually commits that is a natural and probable consequence of the target offense." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) Therefore, if Lemcke aided and abetted Rudd in committing a robbery, she

would be guilty for any natural and probable offense Rudd committed during robbery. (See *People v. Fagalilo* (1981) 123 Cal.App.3d 524, 532 [jury could reasonably find aggravated assault was natural and probable consequence of robbery].)

The court instructed the jury with CALCRIM No. 1603: "To be guilty of robbery as an aider and abettor, the defendant must have formed the intent to aid and abet the commission of the robbery before *or while a perpetrator carried away the property to a place of temporary safety*. [¶] A perpetrator has reached a place of temporary safety with the property if he or she has successfully escaped from the scene, is no longer being pursued, and has unchallenged possession of the property."[3] (Italics added.) According to Lemcke, the italicized portion of the instruction would permit the jury to convict her of aggravated assault as a natural and probable consequence of the robbery, even if the jury found the act that triggered aiding and abetting liability occurred after Rudd had already committed the assault against Campusano. We review de novo whether the trial court's

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[3] The court also instructed the jury pursuant to CALCRIM No. 402 as follows: "The defendants are charged in count one with second degree robbery and in count three with aggravated assault."

"To find a defendant guilty based on the natural and probable consequences doctrine, you must first decide whether a defendant is guilty of second degree robbery. If you find the defendant is guilty of this crime, you must then decide whether he or she is guilty of aggravated assault."

"Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time."

"To prove that a defendant is guilty of aggravated assault, the People must prove that: [¶] 1. The defendant is guilty of second degree robbery; [¶] 2. During the commission of the second degree robbery a coparticipant in that second degree robbery committed the crime of aggravated assault;" and "3. Under all the circumstances, a reasonable person in the defendant's position would have known that the commission of aggravated assault was a natural and probable consequence of the commission of the second degree robbery."

"A *coparticipant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander."

instructions were "'complete and correctly state the law.'" (*People v. Bell* (2009) 179 Cal.App.4th 428, 435.)

CALCRIM No. 1603 is a correct statement of the law. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1161, 1165.) Lemcke did not object to the instruction. A trial court cannot be expected to alter a correct and approved instruction absent a request from counsel. (*People v. Kelly* (1992) 1 Cal.4th 495, 535.) "'Failure to object to instructional error forfeits the issue for appeal unless the error affects the defendant's substantial rights.'" (*People v. Battle* (2011) 198 Cal.App.4th 50, 64.)

"It is said that the failure to object to an instruction in the trial court waives any claim of error unless the claimed error affected the substantial rights of the defendant, i.e., resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error. [Citations.] Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was. Accordingly, it seems far better to state straightforwardly, as we now do, that an appellate court may ascertain whether the defendant's substantial rights will be affected by the asserted instructional error and, if so, may consider the merits and reverse the conviction if error indeed occurred, even though the defendant failed to object in the trial court." (*People v. Anderson* (1994) 26 Cal.App.4th 1241, 1249.)

As noted above, CALCRIM No. 1603 is a correct statement of the law. But that does not mean it should be given in all robbery cases where the defendant is charged as an aider and abettor. The bench notes to the instruction state it is not to be given when the defendant is charged with felony-murder as an aider and abettor. (Judicial Council of Cal. Crim. Jury Instns. (2018) Bench Notes to Cal. Crim. No. 1603.) This note appears to be based on an issue raised in *People v. Pulido* (1997) 15 Cal.4th 713 (*Pulido*). There, the issue was whether a defendant could be liable for a felony-murder committed before

he aided and abetted the killer in the commission of a robbery. (*Id*. at p. 716.) The *Pulido* court answered the question in the negative, because in such a case the "killer and accomplice were not 'jointly engaged *at the time of such killing*' in a robbery [citation]." (*Ibid.*, italics added.) An accomplice's liability for felony-murder is based on a homicide "committed in furtherance of a 'common purpose' [citation] or 'common design' [citation] of robbery" and does not extend to "a killing that preceded any agreement or intent to participate in the robbery, because the killer was not then acting in pursuit of any such common design or purpose." (*Id*. at p. 722.)

The *Pulido* court, however, held the failure to instruct the jury that an aider and abettor cannot be convicted of a felony-murder committed by another if the defendant only aided and abetted the robbery after the murder occurred did not require reversal, because the issue was decided adversely to the defendant under other, proper instructions. (*Pulido*, *supra*, 15 Cal.4th at p. 716.) The jury in *Pulido* had been instructed it could not find the defendant guilty of the robbery-murder unless he was engaged in the robbery "*at the time of the killing*." In addition, the jury had also been instructed to determine whether the murder occurred "'*while the defendant was engaged or was an accomplice in*' robbery . . . ." (*Pulido*, *supra*, 15 Cal.4th at p. 727.)

The *Pulido* court noted the standard instructions are generally correct, but when "substantial evidence would permit the jury to find the defendant began aiding and abetting an enumerated felony only after the killing occurred, they may require modification, or qualification with a special instruction. Unmodified, CALJIC No. 8.27 appears to tell the jury that an aider and abettor in an enumerated felony, without any temporal or causal qualification, is liable for first degree murder in a killing committed by anyone else engaged in the felony. In combination with the *Cooper* instruction concerning the duration of a robbery [citation], CALJIC No. 8.27 could well suggest to a jury that a person who aids and abets only in the asportation phase of robbery, after the killing is complete, is nonetheless guilty of first degree murder under the felony-murder

rule. As we have seen, that implication would be incorrect." (*Pulido*, *supra*, 15 Cal.4th at p. 728.)

The same is true of CALCRIM No. 1603. In the present case, a jury could understand the unmodified instruction to permit Lemcke's conviction for aggravated assault (the nontarget crime), even if her act of aiding and abetting Rudd's commission of the robbery occurred *after* he assaulted Campusano. Lemcke was not, however, prejudiced by the giving of these instructions. Here, the *only* act on Lemcke's part that was argued to give rise to aider and abettor liability for robbery, was asking Campusano for her cellphone. That act occurred before the robbery. There was no argument urging Lemke did some act after the aggravated assault that somehow aided and abetted Rudd in the commission of the robbery he had already committed, but which would continue until he reached a place of temporary safety. (See *People v. Wilkins* (2013) 56 Cal.4th 333, 345 [robbery continues until perpetrator reaches place of temporary safety].) Lemcke argued she was not guilty of aiding and abetting the robbery because she did not know Rudd intended to commit a robbery when she asked to borrow Campusano's cellphone.

Under these circumstances, we conclude that even if the trial court erred in instructing the jury that a robbery continues until the perpetrator reaches a place of temporary safety, the error did not cause any of the jurors to find Lemcke guilty of aggravated assault as a natural and probable consequence of a robbery Lemcke did not aid and abet until after the robbery and aggravated assault had been committed. Thus, instructing the jury pursuant to CALCRIM No. 1603, in conjunction with CALCRIM No. 402, did not prejudice Lemcke under federal or state standards. (*Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

II

Rudd's Appeal

Rudd contends his state and federal due process rights were violated when the court instructed the jury with CALCRIM No. 315. That instruction directs the jury to consider an eyewitness's level of certainty when evaluating an identification. On cross-examination Campusano stated, "But I do remember his face well. It's impossible for me not to recognize his face."[4] The defense presented the testimony of an eyewitness expert who testified about factors that may affect the accuracy of an identification.

As instructed, CALCRIM No. 315 provides:

"You have heard eyewitness testimony identifying the defendants. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony."

"In evaluating identification testimony, consider the following questions: [¶] Did the witness know or have contact with the defendants before the event? [¶] How well could the witness see the perpetrator?" "What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation? [¶] How closely was the witness paying attention? [¶] Was the witness under stress when he or she made the observation? [¶] Did the witness give a description and how does that description compare to the defendants? [¶] How much time passed between the event and the time when the witness identified the defendant? [¶] Was the witness asked to pick the perpetrator out of a group? [¶] Did the witness ever fail to identify the defendants? [¶] Did the witness ever change his or her mind about the identification? [¶] *How certain was the witness when he or she made an identification*? [¶] Are the witness and the defendants of different races? [¶] Was

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[4] Campusano's statement could have been objected to and stricken as it was not in response to a question. (Evid. Code, § 766 [unresponsive answers "shall be stricken on motion of any party"].)

the witness able to identify other participants in the crime? [¶] Was the witness able to identify the defendant in a photographic or physical lineup? [¶] Were there any other circumstances affecting the witness's ability to make an accurate identification?" (Italics added.)

"The People have the burden of proving beyond a reasonable doubt that it was the defendants who committed the crimes. If the People have not met this burden, you must find the defendants not guilty."

Discussing proposed instructions, the court asked Rudd's attorney if he had "any objections, insertions, or deletions" to the proposed jury instructions. Defense counsel responded: "On CALCRIM [No.] 315, that portion of the factor talking about how certain was the witness when he or she made the identification, I'm relying on Justice Liu's concurring opinion in [*People v. Sánchez* (2016) 63 Cal.4th 411], wherein he discusses the rule of deleting that because there is absolutely no authority supporting any type of correlation between witness competence and witness accuracy." Thus defense counsel preserved the issue for appeal.

We review de novo whether an instruction correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) We do not, however, write on a clean slate here, as we are bound by holdings of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

"The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification . . . ." (*United States v. Wade* (1967) 388 U.S. 218, 228.) The United States Supreme Court also noted a "high incidence of miscarriage of justice from mistaken identification." (*Ibid.*) Certainly, if a witness states he or she is not certain of the identification he or she made, the jury should be able to consider that fact in determining the accuracy of the identification of the defendant as the culprit. (See *People v. Sánchez*, *supra*, 63 Cal.4th at pp. 461-462 (*Sánchez*).) But that does not mean the jury should conclude an accurate identification

has been made because the witness was certain about his or her identification, for as studies have shown, the witness's certainty does not make the identification any more likely to be accurate. (*Sánchez*, at p. 495 (conc. opn. of Liu, J.).)

In *People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232 (*Johnson*), our Supreme Court considered a challenge to CALJIC No. 2.92, the precursor to CALCRIM No. 315. CALJIC No. 2.92 advised jurors that on the issue of eyewitness identification they could consider "[t]he extent to which the witness was either certain or uncertain of the identification." (*Johnson*, *supra*, 3 Cal.4th at p. 1231, fn. 12.) The defendant in *Johnson* contended the portion of CALJIC No. 2.92 permitting a jury to consider the certainty of a witness's identification was not supported by the evidence because, in that case, an expert "testified without contradiction that a witness's confidence in an identification does not positively correlate with its accuracy." (*Johnson*, *supra*, 3 Cal.4th at p. 1231.) In the alternative, the defendant in *Johnson* argued the instruction was improper because it, in effect, contradicted the expert's testimony. (*Ibid*.) Our Supreme Court found that as the jury had been instructed to consider the testimony of any expert, "if the jury was persuaded by [the expert's] testimony, the instructions allowed it to infer that [a witness's] positive identification was not necessarily an accurate one." (*Id*. at p. 1232.)

Years later, in *Sánchez*, *supra*, 63 Cal.4th 411, our Supreme Court considered the issue Rudd raises herein. In *Sánchez*, the jury was instructed pursuant to CALJIC No. 2.92 to consider how certain a witness was in making an identification, just as the jury had been instructed in *Johnson*. (*Sánchez*, *supra*, 63 Cal.4th at p. 461; see *Johnson*, *supra*, 3 Cal.4th at p. 1231, fn. 12.) The court acknowledged "[s]tudies concluding there is, at best, a weak correlation between witness certainty and accuracy are nothing new." (*Sánchez*, *supra*, 63 Cal.4th at p. 462.) The Supreme Court held, however, the defendant forfeited the issue by not objecting in the trial court (*id.* at p. 461), the trial court did not err in giving the instruction, and the defendant suffered no

prejudice from the giving of the instruction (*id*. at p. 462). The court observed it was not clear whether defense counsel would have wanted the "certainty" portion deleted from CALJIC No. 2.92 because there were a number of uncertain identifications, and the "[d]efendant would surely want the jury to consider how uncertain an identification was . . . ." (*Sánchez*, at p. 462.)

Justice Liu concurred in finding the issue had been forfeited and that any error was harmless. Justice Liu did not, however, join in the majority's approval of CALJIC No. 2.92 and its directing the jury to consider the certainty of a witness's identification. (*Sánchez*, *supra*, 63 Cal.4th at p. 495 (conc. opn. of Liu, J.).) He wrote separately on "California's standard instruction on how juries should evaluate eyewitness identification evidence, a topic on which scientific research has shed important light in recent decades." (*Id*. at p. 488 (conc. opn. of Liu, J.).)

Justice Liu noted research has shown certainty of an identification "'is not a good indicator of identification accuracy.'" (*Sánchez*, *supra*, 63 Cal.4th 496 (conc. opn. of Liu, J.).) He concluded the propriety of that portion of the jury instruction directing the jury to consider the certainty of the eyewitness should be reconsidered. "In light of developments in scientific research and recent case law, there is a substantial question whether it is proper for trial courts to instruct that witness certainty is a factor bearing on the accuracy of an identification that juries should consider." (*Id*. at p. 498 (conc. opn. of Liu, J.).) Justice Liu concluded that the propriety of an eyewitness instruction requiring the jury to consider the certainty of the witness's identification "deserves our careful attention" and should be reexamined soon. (*Ibid*.)

We are bound by our high court's decisions holding that an instruction concerning the certainty of an eyewitness's identification is proper. In the majority opinion in *Sánchez*, the court stated, "Any reexamination of our previous holdings in light of developments in other jurisdictions should await a case involving only certain

identifications." (*Sánchez*, *supra*, 63 Cal.4th at p. 462.) This case may be such a case. Defense counsel brought the "certainty" portion of CALCRIM No. 315 to the trial court's attention. Rudd's connection to the charged offenses was not supported by any physical evidence, there were no uncertain identifications, and the case against Rudd consisted entirely of Capusano's eyewitness testimony. However, because we are bound by the decisions in *Sánchez* and *Johnson*, we reject Rudd's contention that the trial court erred in instructing the jury it should consider the certainty of eyewitness identifications.

DISPOSITION

The judgments are affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.