S250108

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DESIRAE LEMCKE and
CHARLES HENRY RUDD,

Defendants and Appellants.

Supreme Court
No. S250108

Court of Appeal
No. G054241

Sup. Court No. 14CF3596

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
Honorable David H. Hoffer, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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By Appointment of the Court of
Appeal under the Appellate
Defenders, Inc. Independent Program

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APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

This case presents the following issue: Does instructing a jury with CALCRIM NO. 315 that an eyewitness's level of certainty can be considered when evaluating the reliability of the identification violate a defendant's due process rights.

INTRODUCTION

The victim and eyewitness in this case, Monica Capusano, saw her attacker for seconds before he grabbed her, pulled her into a motel room, and punched her in the face. She lost consciousness and fell to the floor after he punched her two or three more times. He and his companion, Desirae Lemcke, took her purse and fled. Based solely on Capusano's eyewitness

identification, Charles Rudd, Lemcke's former boyfriend, was convicted of second degree robbery with intent to inflict great bodily harm.

Many factors cast serious doubt on the accuracy of Capusano's identification of Charles Rudd as the perpetrator. She had a fleeting glance of him before he knocked her unconscious. The identification procedures used by the police were highly questionable. And, Capusano was a less than credible witness, which even the prosecution was forced to admit.

Capusano nonetheless at trial proclaimed her certainty that Charles Rudd was the man who attacked her. She told the jury it was impossible to forget his face and his tattoo, although admitting she saw him for mere seconds, just before he raised his fist and hit her in the face. And, paradoxically, she had forgotten the tattoo. She first mentioned her attacker's tattoo three months later, when the police questioned her a second time. And, although she picked Rudd's tattoo when shown the two photos, the best she could say was the tattoo was "more like" the perpetrator's.

The jury, when evaluating her testimony, was instructed to consider "how certain" Capusano was when she made the identification. As noted, Capusano was emphatically certain. The trial court rejected the defense's request to omit or explain the certainty factor in CALCRIM No. 315. The jury was thus left to rely on their mistaken belief that a certain eyewitness is accurate. The jury had heard expert testimony, but it was too abstract to adequately inform the jury that certainty does not equal accuracy.

The erroneous jury instruction was reversible, prejudicial error that deprived Charles Rudd of his federal and state constitutional rights to due process. Had the jury not been told to consider certainty, it is highly likely that one or more jurors would have paid proper attention to the many reasons to question Capusano's identification and refused to find him guilty. The judgment of conviction must be reversed.

SUMMARY OF ARGUMENT

The jury was improperly instructed with CALCRIM No. 315. The instruction incorrectly ratified the common but mistaken belief that an eyewitness' certainty correlates with accuracy. Had the certainty factor been omitted, or explained adequately, the jury would have been able to intelligently weigh all factors bearing on the reliability of the eyewitness evidence. At least one person on the jury, and likely more, would have found Charles Rudd not guilty. The error was prejudicial and deprived Mr. Rudd of his due process rights. The judgment of conviction must be reversed and the matter remanded for a new trial.

STATEMENT OF THE CASE

An amended information filed on August 24, 2016, alleged that appellant Charles Henry Rudd and co-defendant Desirae Lee Lemke committed the following offenses on or about July 13, 2014: second degree robbery (§ 211/212.5, subd. (c), count 1), aggravated assault by means of force likely to result in great bodily injury (§ 245, subd. (a)(1), count 3), and battery with serious bodily injury (§ 243, subd. (d), count 4). Rudd was also charged with mayhem (§ 203, count 2). The information alleged enhancements for personal infliction of great bodily injury (§ 12022.7, subd. (a)) against Rudd as to counts 1 and 3, and two enhancements for prior prison terms (§ 667.5, subd. (b).) (2 CT 314-316.) The battery charge against Lemcke was dismissed. (1CT 133, 5 RT 656-657.) The charge of mayhem (count 2) against Rudd was set aside (§ 1118.1) on the ground that the alleged injury was not a prolonged disability. (1CT 133, 5RT 667–668.)

A jury found Rudd and Lemcke guilty on the robbery and assault charges, and Rudd guilty on the battery count. The jury found the great bodily injury allegations against Rudd true. (1CT 71-72, 4CT 581-585, 7RT 1103-1106 [Rudd], 1CT 143, 4 CT 585-587, 7RT 1103-1106 [Lemcke].) The court

found the prior prison term allegations against Rudd true. (1CT 42-43, 72, 7RT 1174.)

Rudd was sentenced to a total of six years in prison, the midterm of 3 years on count 1 plus 3 years for the GBI enhancement. The sentences on counts 3 and 4 were stayed. (§ 654). The court also imposed mandatory fees and fines, and reserved jurisdiction over the matter of victim restitution. (§ 1202.43). (1CT 77-78, 4CT 797-798, 7RT 1181-1190.)

A timely notice of appeal was filed on November 9, 2016. (1CT 79, 4CT 794.) The Court of Appeal affirmed the judgment of conviction. This Court granted Rudd's petition for review to decide whether instructing a jury to consider an eyewitness' level of certainty, when evaluating the reliability of the identification, violates a defendant's due process rights.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Capusano is attacked and robbed at the Royal Roman Motel.

On the evening of July 13, 2014, around 7:30 p.m., Monica Capusano (aka Rafael Barriga Capusano[1]) was at the Royal Roman Motel to visit a friend. (2RT 157-158.) It was getting dark. (2RT 207.) While walking along an outdoor walkway, she saw a woman, later identified as co-defendant Desirae Lemcke, standing about three feet from an open motel room door. (3RT 317.) She also saw a man standing inside the room. (2RT 169.) He was "right at the corner in the door where you go inside the room" (3RT 317) and was moving around. (3RT 321-322.)

Lemcke asked Capusano if she could use her phone. (2RT 159-160.) Capusano looked into her purse, which was over her shoulder, for her cell

[1] Capusano is a transgender woman and asked to be addressed as a female and with feminine pronouns in the trial court proceedings. (1RT 238-239.)

phone. (2RT 159, 173.) She handed the phone to Lemcke. (2RT 165.) That encounter took about three seconds. (3RT 319-320.) She admitted she was not paying attention to the man and did not actually see him step forward, but to reach her, he must have. (2RT 160-162, 165-166, 3RT 318, 320-323.) He took her by the front or collar of her shirt, pulled her into the room and punched her in the face around four times. (2RT 160-163, 165-166.)

Capusano was dizzy and "cloudy." (2RT 163, 211-212, 217-218, 3RT 323, 347.) She lost consciousness and her face hurt. (2RT 163, 166-167.) "It was -- it was like -- right at two seconds I was feeling that I was losing consciousness." (2RT 167, 3RT 320, 326-327.) She fell on the floor and covered her face to protect herself. (2RT 166, 173, 209-210, 327-330, 334-338, 4RT 598-599.) She was kicked several times while on the floor. (3RT 341-343.) She felt her purse being pulled from her. (3RT 347-348.)

When the prosecutor asked Capusano, "Were you able to get a good look at his face?" she answered yes. (2RT 167.) She saw him when he was standing behind the woman, and also when he was punching her. She "remembered his face well." (2RT 168, 171.) It was "impossible for [her] not to recognize his face." (2RT 285.)

Capusano calls 911 and talks to Officer Vasquez at the scene.

When Capusano regained consciousness, she was alone on the floor. Her phone and purse containing $500 in cash were gone. Although dizzy and in pain, she went to the motel lobby and asked the clerk to call 911. (2RT 218.) The clerk declined but Capusano's friend showed up and lent her a phone. While Capusano was in the lobby, she saw the black man and the white woman leaving the motel in a cab. (2RT 212, 214-215, 226.) Nothing in the record suggests she saw their faces then. (4CT 918-926.)

In the 911 call, Capusano described the perpetrator as a black male wearing a white shirt and blue jeans, about 30 years old, between 6'1" and

6'3". (3RT 381, 4CT 918-926.) She did not tell the 911 operator she saw a tattoo on his neck. (2RT 217-218, 221, 3RT 384.)

When Officer Vasquez arrived at the scene, Capusano as stressed and crying. (4RT 590.) She described her attacker as a black male, 35 to 40 years old, 6'3" to 6'5" feet tall, 260 to 300 pounds, with balding hair, and a goatee. (2RT 202-203, 3RT 385, 4RT 590, 5RT 644.)

The photo lineup at the hospital emergency room.

After Capusano was taken by ambulance to the hospital, Officer Vasquez discovered that the motel room was registered to Desirae Lemcke. (4RT 590-591.) A records check disclosed that Lemcke had a "no contact" order against a Charles Rudd. (4RT 591.) The order's description of Rudd roughly fit Capusano's description of her attacker, so Vasquez assembled a six-pack photo lineup that included a photo of Rudd. (4RT 592-593.)

At the hospital emergency room, Capusano was "under anesthesia" but told Vasquez she was able to answer questions. (2RT 180-182, 190-191, 267-269, 273, 3RT 360-361.) Officer Vasquez read her a form admonishment, which she signed. (4RT 595, 5RT 624 Exhibit L.) Capusano picked Charles Rudd from the lineup as the person who had attacked her. (4RT 595-596, 5RT 624, 631-632.) She signed her name by the photo, but misspelled it, writing "Refael" instead of "Rafael." (5RT 634.)

Officer Vasquez asked Capusano what she specifically recognized that made her identify Rudd. (4RT 596.) She said she recognized the nose, mouth, and jaw. (4RT 596.) The photo did not show a tattoo on either side of Rudd's neck. (5RT 651.) Officer Vasquez did not recall her mentioning a tattoo and his report did not state that she had mentioned a tattoo. (3RT 427, 460, 468, 596, 5RT 645.)

The identification process at the hospital was not recorded. It was not a blind administration; Officer Vasquez had prepared the lineup and knew

which photo was Rudd's. (Compare Pen. Code, § 859.7 [eyewitness identification protocols that will go into effect January 2020].)

Three months later, Capusano recalls her attacker had a tattoo.

Three months after the attack, Detective Silva got a phone number for Capusano and called her. (2RT 262-263, 3RT 407.) In her discussions with Detective Silva, Capusano mentioned – for the first time -- that her attacker had a tattoo on his neck. (3RT 471, 473.) She did not recall which side of the neck it was on. (3RT 435.) She could not say "exactly what type of tattoo it was because [she] didn't read and [she] didn't see the type of tattoo it was." (3RT 364-365.) Also, the tattoo was partially blocked by the perpetrator's clothing. (3RT 436, 459-460.)

A week later, Detective Silva interviewed Capusano again. (2RT 263.) He showed her two photos of tattoos. (3RT 415-416, Exhibits 5 and 6.) He told her that one or the two tattoos belonged to Rudd, the man she had previously identified at the hospital as the perpetrator. (3RT 417.) The second tattoo belonged to Marcus Horn, Lemcke's current boyfriend.[2] (3RT 432-433, Exhibit 6.)

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[2] The record does not explain how Marcus Horn, Lemcke's current boyfriend, came to the attention of the police. Detective Silva interviewed him about the same time he was interviewing Capusano. Before trial, the court excluded Detective Silva's interview with Horn on hearsay grounds, but allowed the defense to question Silva about showing Capusano a photo of Horn's neck tattoo and the photo lineup that included Horn. (1RT 45-61, 87-92, 2CT 327-340.)

The record includes a transcript of the interview. (4CT 866-915.) Horn admitted he was at the motel that evening, and that he was with Lemcke, but told Silva they left before the attack occurred. (4CT 904-906.) Since the interview was excluded and Horn did not testify, the jury did not learn of Horn's admission that he was at the motel that night with Lemcke.

Detective Silva admonished Capusano not to feel compelled to identify either tattoo. (3RT 418.) Capusano looked at the two tattoos. She picked Rudd's tattoo, saying it was "more like the one that she remembered on the person that assaulted her." (4RT 419.)

Next, Detective Silva asked Capusano if she remembered identifying a male previously. (3RT 420, Exhibit 7.) She said she had. He showed her a single photo of Rudd (the same photo from the prior lineup) and asked if she "remembered that this was a specific photograph within the lineup that she had already identified." Capusano answered yes. (3RT 420.)

Lastly, Detective Silva showed her a six-pack photo lineup that included a photo of Marcus Horn. Rudd's photo was not included in that lineup. (3RT 420-421.) Officer Silva asked "if she identified anybody from this lineup, either as someone she knew or as possibly someone who had attacked her on that date." She said no. She pointed at the photo of Rudd and "she said for sure it was Mr. Rudd." (3RT 422.)

Capusano's in-court identification of Rudd.

At trial, Capusano was called as the prosecution's first witness. When asked if she saw her attacker in the courtroom, Capusano pointed toward Rudd, who was sitting at the defense counsel table, and said he was man who attacked her. (2RT 171.) The prosecution asked if she could see him, and she said no. From where she was sitting, part of the judge's bench was blocking her view. (2RT 284-285.) She then stood up and said he was wearing a blue shirt and underneath a black shirt. (2RT 171, 284.)

On cross examination, Capusano admitted she identified Rudd in court before she actually saw him. (2RT 284.) Defense counsel then asked Capusano if she knew who to identify because he was the only black person at the defense table. (3RT 286-287.) She answered, "Well, it's logical. He's the one." (3RT 287.)

Expert testimony on memory and perception.

The defense expert testified on memory and perception. He opined that if a fair lineup is done soon after the event, then "accurate identification with strong recognition memory often is made very confidently and very quickly." (5RT 759.) But outside that window of time, "confidence is not related to accuracy in any regard." (5RT 759-760.) A confident witness can be correct. (5RT 774, 783, 787.) But, an eyewitness can also be 100 percent certain of an identification, and yet be proved wrong by DNA evidence. (5RT 723, 758-760, 768-769, 796.)

Capusano's testimony is the only evidence implicating Rudd.

Other than Capusano's identification, there was no other evidence pointing to Rudd as the person who attacked Capusano that night at the Royal Roman Motel. The defense offered the testimony of an investigator who had shown photos of Rudd and Horn to the motel clerk who was at the time of the attack. According to the investigator, the clerk told him Rudd was not the man with Lemcke at the motel, but she could not say if Horn was. (6RT 923-925.) At trial, clerk did not recall what she told the investigator. (6RT 902-904, 907-910, 920.)

DNA evidence from Capusano's shirt was collected and analyzed. Rudd voluntarily gave a DNA sample for comparison. (4RT 482, Exhibit K.) The Orange County analyst found that the sample was "not suitable for database entry or comparison." (5RT 801-803, 6RT 854-855, 857-859.) The analyst detected DNA other than Capusano's, but under that lab's guidelines, he could not safely assume the foreign DNA came from only one person. (5RT 801-803.)

The defense DNA expert disagreed with the prosecution's analyst and considered the DNA samples suitable for comparison. Under guidelines that

permit analysis of "low-level DNA," Rudd would absolutely be excluded as the contributor of the DNA. (5RT 693-696.) Other certified labs, including the California Department of Justice lab, follow guidelines that would have permitted a comparison of the DNA. (6RT 854-855.)

Despite inconsistencies in her testimony, Capusano remains certain she has identified the perpetrator.

There were inconsistencies in Capusano's recall of the events; even the prosecution admitted as much. (8RT 941, 944.) A critical example, Capusano claimed she reported to Officer Vasquez at the scene that the perpetrator had a tattoo on his neck. (3RT 367-369.) That was not Officer Vasquez's recollection and (5RT 645) and his police report did not reflect that Capusano reported a neck tattoo. (3RT 427, 460, 468, 596, 5RT 645.) When asked what she specifically recalled, she said his nose, mouth and jaw. (4RT 596.) The testimony and documentary evidence indicated that the tattoo was first discussed in October when Detective Silva interviewed her. (3RT 361-368, 6RT 875-876.)

Another example, Capusano testified initially that she did not regain consciousness until she was in the ambulance and on the way to the hospital. (1RT 172, 177, 180.) The prosecutor then showed her a photo of her injuries, which was taken while she was at the motel. (2RT 199, 266.) Upon seeing the photo, she remembered that she regained consciousness while she was on the floor of the motel room, explaining "I don't remember exactly because I was knocked out because of the blows." (2RT 199-200, 210-211.)

Despite these and other discrepancies in her testimony, Capusano remained certain throughout the trial that Rudd was the man who attacked her. She saw Rudd when he was standing in the room behind Lemcke, and she also saw him when he grabbed her shirt, pulled her into the room, and punched her in the face. She "remembered his face well." (2RT 168, 171.) Also, "I

remember that I saw a tattoo [on his neck], and that's why I can't forget his face." (2RT 178-179.) "It's impossible for me not to recognize his face." (2RT 285.) "The thing is that I can't forget his face or his tattoo." (3RT 363, 369.)

The Court of Appeal Decision

The Court of Appeal affirmed the judgment of conviction. "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."

ARGUMENT

I. The scientific and academic communities have reached a consensus that an eyewitness' certainty does not correlate with accuracy. The concern expressed in *Wright*, that this theory is a "matter of ongoing scientific debate" is no longer valid.

This Court is aware of the scientific research indicating that an eyewitness' certainty about an identification does not correlate with the accuracy of the identification. "Studies concluding there is, at best, a weak correlation between witness certainty and accuracy are nothing new." (*People v. Sanchez* (2016) 63 Cal.4th 411, 462.) They were cited three decades ago in *People v. McDonald*, when the Court ruled that expert testimony may assist jurors with understanding the frailties of eyewitness identification. (*Ibid.*; see *People v. McDonald* (1984) 37 Cal.3d 351, 369 ["the majority of recent studies have found no statistically significant correlation between confidence and accuracy, and in a number of instances the correlation is negative -- i.e., the more certain the witness, the more likely he is mistaken."].)

What may be new, however, is that scientific researchers have reached a consensus that an eyewitness' certainty does not correlate with accuracy.[3]

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[3] See, e.g., Wells & Quinlivan, (2009) *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test In Light of Eyewitness Science 30 Years Later*, Law and Human Behavior, 33: 1, 11-12 (citing authorities); Leippe, *et al.*, *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions*, 33 Law & Hum. Behav. 194, 194 (2009) (summarizing prior research); Kassin *et al. On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts,* (2001) 56 Am. Psychol. 405, 407-412; Cutler, *Symposium: Reforming Eyewitness Identification: Convicting The Guilty, Protecting The Innocent: A Sample Of Witness, Crime, And Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, (2006) 4 Cardozo Pub. L. Pol'y & Ethics J. 327, 337-338.

Legal scholars, in step with the research, have written extensively about the pitfalls, problems, and possible solutions to prevent mistaken eyewitness identifications.[4] Perhaps more significant, a growing number of state courts, based on this wealth of research, are concluding that changes are warranted.[5] The United States Supreme Court as well has recognized the due process implications of mistaken eyewitness identifications. (*Perry v. New Hampshire* (2012) 565 U.S. 228, 232-233 [132 S.Ct. 716, 721, 181 L.Ed.2d 694, 703].) Indeed, the *Perry* Court specifically noted jury instructions as a safeguard against mistaken identifications. (*Ibid.*)

California's jury instructions have yet to incorporate what the research and legal scholarship has now confirmed, that an eyewitness' certainty does

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[4] See, e.g., Bennett, *Unspringing The Witness Memory And Demeanor Trap: What Every Judge And Juror Needs To Know About Cognitive Psychology And Witness Credibility* (2015) 64 Am. U.L. Rev. 1331, 1369-1370.)Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction* (2010) 7 Ohio St. J. Crim. L. 603, 603; Koosed, *Reforming Eyewitness Identification Law and Practices To Protect the Innocent* (2009) 42 Creighton L.Rev. 595; Schmechel, O'Toole, Easterly, & Loftus, Beyond the Ken? *Testing Jurors' Understanding of Eyewitness Reliability Evidence* (2006) 46 Jurimetrics 177, 180 [noting the "nearly unanimous consensus among researchers about the [eyewitness reliability] field's core findings"].) Garrett, *Convicting The Innocent: Where Criminal Prosecutions Go Wrong.* Cambridge, MA: Harvard University Press (2011); B. Scheck, P. Neufeld, & J. Dwyer, *Actual Innocence: When Justice Goes Wrong And How To Make It Right.* New York, NY: New American Library (2003).

[5] *Commonwealth v. Gomes* (Mass. 2015) 22 N.E.3d 897, 912-914; *State v. Lawson* (Ore. 2012) 291 P.3d 673, 688; *State v. Cabagbag* (Haw. 2012) 277 P.3d 1027, 1038-39; *State v. Guilbert* (Conn. 2012) 49 A.3d 705, 721 [citing state and federal cases and describing a "near perfect scientific consensus"]; *State v. Mitchell* (Kan. 2012) 275 P.3d 905; *State v. Henderson* (N.J. 2011) 27 A.3d 872; *State v. Guzman* (Utah 2006) 133 P. 3d 363; *Brodes v. State* (Ga. 2005) 614 S.E.2d 766, 770 [collecting cases acknowledging the consensus]; *Commonwealth v. Santoli* (Mass. 1997) 680 N.E.2d 1116, 1121; *State v. Long* (Utah 1986) 721 P.2d 483, 491.)

not predict or correlate with accuracy. This Court's concern, stated in *People v. Wright*, was that the theory was "experimental" and a "matter of ongoing scientific debate." (*People v. Wright* (1988) 45 Cal.3d 1126, 1143 & fn. 13.) This is no longer the case. "If there is one thing that the research is virtually unanimous on, it is this: there is no correlation whatsoever between eyewitness certainty and accuracy." (Clements, *Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony* (2007) 40 Ind. L. Rev. 271, 282-283.)

Thus, the time has come to revise California's jury instructions "to more closely align with research into the limitations of eyewitness evidence." (*Sánchez, supra*, 63 Cal.4th at pp. 495-498 (conc. opn. of Liu, J.), cited in *People v. Reed* (2018) 4 Cal.5th 989, 1029 [dissenting opn of Liu, J.].)

A. There are dangers unique to eyewitness evidence, and juries must be adequately educated so they can weigh the evidence intelligently.

The dangers of mistaken identifications are well documented. [6] The Innocence Project has found that mistaken eyewitness identifications have contributed to approximately 70 percent of the more than 350 wrongful convictions in the United States overturned by post-conviction DNA evidence. The California Legislature has noted these dangers at the state level: "Eyewitness misidentification is the leading contributor to wrongful convictions proven with DNA evidence nationally. In California, eyewitness

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[6] The Innocence Project, Facts on Post-Conviction DNA Exonerations (www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (as visited February 2019); Wells *et al.*, *Eyewitness Evidence: Improving Its Probative Value*, (2006) 7 Psychol. Sci. Pub. Int. 45, 48 ("As of this writing, there have been more than 180 definitive DNA exonerations: the proportion that involves eyewitness identifications continues to run about 75% or more.").

misidentification played a role in 12 out of 13 DNA-based exonerations in the state." (Pen. Code, § 859.7, subd. (b).)

And yet, despite its frailty, jurors find eyewitness testimony uniquely persuasive. "[T]here is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'" (*People v. Sanchez* (2016) 63 Cal.4th 411, 497 [J. Liu concurring] [citations omitted]; see *State v. Lawson* (Ore. 2012) 291 P.3d 673, 704-705 ["Jurors consistently tend to overvalue the effect of the certainty variable in determining the accuracy of eyewitness identifications."]; *State v. Guilbert* (Conn. 2012) 49 A.3d 705, 731 ["Many of the factors affecting the reliability of eyewitness identifications are either unknown to the average juror or contrary to common assumptions . . . ."]; Benton *et al.*, *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, (2006) 20 Applied Cognitive Psychol. 115, 120.)

This common misperception, when left uncorrected, hobbles a jury's ability to assess eyewitness identification evidence. When identification is a pivotal issue at trial, it becomes critical that the jury is properly informed about the factors affecting an eyewitness' claim that the defendant is "the one." (*Brodes v. State* (Ga. 2005) 614 S.E.2d 766, 771, citing *State v. Robinson* (N.J. 2000) 754 A.2d 1153.) Jurors must be informed not only of the factors that bear on the eyewitness evidence, but more to the point, how those factors impact an eyewitness' reliability.

B. Jury instructions are a necessary complement to other means of guarding against mistaken identifications.

A number of safeguards help prevent mistaken identifications: jury instructions, expert witness testimony, cross examination of the eyewitness, argument of counsel, and evidentiary and exclusionary rules. (*Perry v. New*

Hampshire (2012) 565 U.S. 228, 232-233 [132 S.Ct. 716, 721, 181 L.Ed.2d 694, 703].) Importantly, jury instructions offer distinct advantages: they are unbiased and authoritative, for example. Given the limitations of expert testimony and cross examination in particular, jury instructions must be viewed as a complement, rather than as an alternative, for guarding against mistaken identifications. Expert testimony and cross examination may be necessary but are not sufficient.

As this Court recognized in *McDonald*, expert testimony is an important and potentially effective means of educating a jury how to weigh eyewitness identification evidence. (*People v. McDonald* (1984) 37 Cal. 3d 351, 364-65.) Expert testimony, however, may be viewed as one-sided and partisan. It is also expensive and time consuming. (*United States v. Jones* (1st Cir. 2012) 689 F.3d 12, 19; see, e.g., Note: *The Province Of The Jurist: Judicial Resistance To Expert Testimony On Eyewitnesses As Institutional Rivalry*, (2013) 126 Harv. L. Rev. 2381, 2391-2392.) Or, as occurred in this case, the expert may not provide the information needed, in terms that are direct and accessible, leaving the jury no better informed and possibly confused. (See Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, (2011) 39 Am. J. Crim. L. 97, 132 ["The utility of expert testimony is also limited by the extent to which jurors will incorporate the specialized knowledge they hear during trial into their decision-making."].)

Even more so, cross-examination does not adequately apprise the jury of the factors it should consider. Even if it does alert jurors to the factors, it is generally considered ineffective to educate the jury about the importance of the factors. (See *State v. Guibert, supra,* 49 A.3d at pp. 725-726 [emphasis in original]; *State v. Cabagbag, supra,* 277 P.3d at p. 1038]; Bennett, *Unspringing The Witness Memory And Demeanor Trap: What Every Judge And Juror Needs To Know About Cognitive Psychology And Witness*

Credibility (2015) 64 Am. U.L. Rev. 1331.) Further, although cross-examination is a "powerful tool for exposing lies, it is not particularly effective when used against eyewitnesses who believe they are telling the truth." (McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions* (2005) 42 Am. Crim. L. Rev. 1271, 1277; see also Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, And The Limits Of Cross-Examination* (2007) 36 Stetson L. Rev. 727, 771-772, cited in *State v. Henderson, supra,* 27 A.3d at p. 889.)

Jury instructions offer advantages that expert testimony does not. They are focused and concise. (*Henderson, supra,* 27 A.3d at p. 925; *State v. Cabagbag, supra,* 277 P.3d at p. 1038].) In contrast, expert testimony, and cross examination of the expert, may provide information in a diffuse fashion. The jury may disregard the expert as a hired gun for one side or the other, rather than a source of information. But jury instructions not biased for one side or the other, if properly drafted. Also important, the judge, a neutral arbiter, delivers the jury instructions. The instructions are described as statements of law, not argument or opinion. It also bears noting that expert testimony is time-consuming and expensive, while jury instructions are relatively cheap and easily incorporated in a trial. (See, e.g., Simmonsen, *Teach Your Juror Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony* (2011) 70 Md. L. Rev. 1044, 1078-1079 [cash-strapped public defenders may not have funds for experts].) In view of these advantages, jury instructions should be considered a useful if not necessary complement to expert testimony and cross examination, not an alternative.

II. CALCRIM No. 315 as written is not neutral but at best incomplete and at worst argumentative.

The *Sanchez* majority stated that CALJIC No. 2.92, the predecessor to CALCRIM No. 315, "cites the certainty factor in a neutral manner, telling the jury only that it could consider it. It did not suggest that certainty equals accuracy." (*People v. Sanchez* (2016) 63 Cal.4th 411.) Appellant Rudd respectfully disagrees. CALCRIM No. 315 is not permissive and it is not neutral. At best, it is incomplete and misleading by omission. At worst, it is argumentative, highlighting one piece of evidence – witness certainty – and allowing the jury to rely on the traditional assumption that an eyewitness' certainty means he or she is accurate.

A. The instruction is phrased in the imperative, not the permissive.

Certainty is not merely a factor the jurors are told they "could" or may or can consider, if they wish. The instruction is phrased as an imperative. Jurors are directed, when evaluating the reliability of an eyewitness identification, to consider certainty. Similarly CALJIC No. 2.92, which tells the jury "you should consider," is not permissive but rather imperative. (See *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443 ["It is a well-settled principle of statutory construction that the word 'may' is ordinarily construed as permissive, whereas 'shall' is ordinarily construed as mandatory, particularly when both terms are used in the same statute."].)

B. In this context, and without explanation, the instruction is argumentative.

In the context of eyewitness identification, the instruction is not neutral. It fails to account for the "unique confluence of features" presented by eyewitness identifications, "their unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the

adversarial process" which can "undermine the fairness of a trial." (*Perry v. New Hampshire, supra,* 565 U.S. 228, 245 (Sotomayor, J., dissenting) Rather, as it stands, the instruction is argumentative. It directs the jury's attention to specific evidence – Capusano's proclaimed certainty that Rudd was the perpetrator -- and implies the conclusion to be drawn, namely, that a certain eyewitness is accurate. (See *People v. Lewis* (2001) 26 Cal.4th 334, 380 [citations omitted].)

A jury instruction should "not take a position as to the impact of the factors, nor should it imply that any particular conclusions be drawn from specific items of evidence." (*People v. Carter* (1993) 19 Cal.App.4th 1236, 1253 [italics added], citing *People v. Wright* (1988) 45 Cal.3d 1126, 1141.) But CALCRIM No. 315 currently does just that. It implies that a certain witness is an accurate one, because it fails to put the jury in the full picture. The jury does not know what research scientists, legal scholars and the judiciary now know about the unreliability of eyewitness evidence. Thus, telling the jury to consider "certainty," without more, necessarily implies and leads them to conclude that a certain witness is an accurate one. As the *Sanchez* concurrence noted, the instruction "naturally prompts the jury to conclude that an eyewitness identification is more reliable when the witness expresses greater certainty." (*People v. Sánchez, supra,* 63 Cal.4th at p. 495 [Liu, J. concurring], citing *State v. Mitchell, supra,* 275 P.3d at p. 913].)

C. At a minimum, the instruction is incomplete and misleading by omission.

The instruction is not only argumentative, but is also incomplete and misleading by omission. A jury, unless adequately informed, defaults to the common misperception that a witness's certainty correlates with his or her accuracy. The instruction does not provide information that puts the jury in

the picture. They need adequate information. Without it, they confuse certainty with accuracy.

III. Educating and informing the jury to correct traditional but incorrect assumptions about a class of witness is a proper function for a jury instruction.

In *Wright* this Court expressed concern that "explaining" the certainty factor would constitute endorsing a point of view or outcome. (*People v. Wright* (1988) 45 Cal.3d 1126, 1142-1143.) Given that the lack of correlation is no longer merely am experimental theory or point of view -- but rather is widely accepted by scientists, scholars and other courts -- this concern is no longer warranted.

Regardless, jury instructions are often used to explain concepts to juries that are not commonly understood or where "common sense" has ceased to make sense. Jury instructions, alongside expert testimony, explain how to view evidence, in those cases where the jury may come to the evidence with preconceived but incorrect ideas. (See *People v. Mateo* (2016) 243 Cal.App.4th 1063, 1074 [because of the potential for misuse of "child sexual abuse accommodation syndrome" or CSAAS evidence, and the potential for great prejudice to the defendant in the event such evidence is misused, a jury instruction limiting the use of the evidence may be appropriate]; *People v. Bowker* (1988) 203 Cal.App.3d 385, 394.) Without doubt, preexisting beliefs often play a role in the jury deliberation process. (Gordon, *Through the Eyes of Jurors: The Use of Schemas in the Application of "Plain-Language" Jury Instructions* (2013) 64 Hastings L.J. 643, 669-670.) Therefore, explanatory instructions have been used where "traditional assumptions" about a class of witness "may previously have biased the factfinding process." (*People v. Catley* (2007) 148 Cal.App.4th 500, 508, citing cases.)

There are other examples of explanatory instructions in California. For example, recent studies have undermined traditional notions about the unreliability of child witnesses, their untruthfulness, susceptibility to leading questions, or inability to recall prior events accurately. (*People v. Catley, supra,* 148 Cal.App.4th at pp. 507-508; *People v. Jones* (1990) 51 Cal.3d 294, 315; see also *People* v. *Luna* (1988) 204 Cal. App.3d 726, 748-749 [observing "revolutionary change" with respect to credibility extended to victims of sexual assaults].) Jury instructions are used to advise jurors how to evaluate the credibility of child witnesses and thereby correct the common belief that child witnesses are unreliable. CALCRIM No. 330 states: "While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he or she is a child."

Another example, CALCRIM No. 331, informs the jury how to evaluate the testimony of witness with a developmental disability or cognitive impairment. The jury is told that the disability does not mean the person is any more or less credible than another witness, and the jury should not discount or distrust the testimony, solely because of the disability.

One final example is the common misperception that life prisoners may eventually be paroled. Jurors may need to be instructed to take literally the words "life without possibility of parole." (*People v. Ledesma* (2006) 39 Cal.4th 641, 666.) Otherwise, jurors may incorrectly assume that a life sentence is not for life and make decisions based on that incorrect belief. (*Ibid.*)

Similarly, it is appropriate and necessary to explain the certainty factor in CALCRIM No. 315, if it is used. The information does not endorse a point of view or direct an outcome; much to the contrary, an explanation is vital because "traditional assumptions" about witness certainty have biased the

jury's factfinding process and credibility assessment. (See *People v. Catley, supra,* 148 Cal.App.4th 500, 508.)

IV. Instructions from other jurisdictions serve as examples of informative and yet neutral instructions.

Other states have revised their jury instructions in an effort to remedy the misperception about certainty. These instructions do no more than inform juries that an eyewitness' certainty may or may not indicate accuracy. They do not attempt to promote one view or another, but merely alert the jury to both possibilities, ensuring that the instruction is not understood as equating certainty with accuracy. The jury is not swayed toward either outcome or told how much weight to give any one factor affecting the reliability of the eyewitness evidence.

New Jersey's jury instructions may be the most comprehensive:

> "You heard testimony that (insert name of witness) expressed his/her level of certainty that the person he/she selected is in fact the person who committed the crime. As I explained earlier, a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification. Although some research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.
>
> Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification. (See New Jersey

Model Criminal Jury Charges, Identification: In-Court and Out-Of-Court Identifications.)

Other states' jury instructions are briefer but still alert jurors to the possibility that certainty does correlate with accuracy. In Utah, juries are instructed that a witness's level of confidence is a factor that may be considered but also warns that an eyewitness may be mistaken. Further, a witness level of confidence is one of many factors that jurors may consider. "However, a witness who is confident that (he) (she) correctly identified the perpetrator may be mistaken." Further, the jury is advices, "You don't have to believe that the identification witness was lying or not sincere to find the defendant not guilty. It is enough that you conclude that the witness was mistaken in (his) (her) belief or impression. . . ." (Model Utah Jury Instructions, CR 404 Eyewitnesses Identification.)

Similarly, the Maine jury instructions caution that "there may not be a correlation between the reliability of an eye witness identification and the amount of certainty expressed by the witness in making that identification." (1 Maine Jury Instruction Manual § 6-22A.) The Kansas jury instruction on eyewitness identification does not even include certainty or confidence as a factor, although it does include a catch-all that the jury "may consider any other circumstances that may have affected the accuracy of the eyewitness identification." The instruction also elaborates on the burden of proof in this context. "The law places the burden upon the State to identify the defendant. The law does not require the defendant to prove (he) (she) has been wrongly identified." (Pattern Instructions Kansas Crim. 4th 51.110 Eyewitness Identification.)

Another variation is the Hawaii instruction, which cites numerous factors that the jurors "may" consider. The certainty factor is described as considering the "extent to which the witness is either certain or uncertain of the identification and whether the witness's assertions concerning certainty or

uncertainty are well-founded." (Hawaii Standard Criminal Jury Instructions 3.19 Eyewitness Testimony.)

Finally some states are investigating the question as New Jersey did. In *Commonwealth v. Walker*, the Massachusetts Supreme Court requested a study committee on the issue. "Because eyewitness identification is the greatest source of wrongful convictions but also an invaluable law enforcement tool in obtaining accurate convictions, and because the research regarding eyewitness identification procedures is complex and evolving, we shall convene a study committee to consider how we can best deter unnecessarily suggestive procedures and whether existing model jury instructions provide adequate guidance to juries in evaluating eyewitness testimony." (*Commonwealth v. Walker* (Mass. 2011) 953 N.E.2d 195, 208, fn. 16].)

V. Instructing the jury with CALCRIM No. 315 violated Rudd's federal and state rights to due process by lowering the prosecution's burden of proof and preventing him from presenting a complete defense.

The government must prove beyond a reasonable doubt every element of a charged offense. (*In re Winship* (1970) 397 U.S. 358, 362-363 [25 L. Ed. 2d 368, 90 S. Ct. 1068]; *Victor v. Nebraska.* (1994) 511 U.S. 1, 6 [114 S.Ct. 1239, 1243, 127 L.Ed.2d 583, 591].) An instructional error that relieves the prosecution of the burden of proving each essential element of the charged offense beyond a reasonable doubt violates the defendant's due process rights under both the United States and California Constitutions. (*Neder v. United States* (1999) 527 U.S. 1, 4 [144 L.Ed.2d 35, 119 S.Ct. 1827]; *People v. Mil* (2012) 53 Cal.4th 400, 409-410.)

In this case, the prosecution was required to prove, beyond a reasonable doubt, that Rudd was the person who attacked Capusano. (*People v. Alvarez*

(2002) 27 Cal.4th 1161, 1164-1165 ["To convict an accused of a criminal offense, the prosecution must prove that (1) a crime actually occurred, and (2) the accused was the perpetrator."]; *People v. Medina* (1995) 11 Cal.4th 694, 764 [a "defendant's identity" is an "element of the charged offense"]; see also Evid. Code, § 520 ["The party claiming that a person is guilty of a crime or wrongdoing has the burden of proof on that issue."].) The certainty instruction, however, lowered the prosecution's burden of proof in this case because the jury was unduly encouraged to believe Capusano's identification of Rudd, despite the factors weighing against it.

The instruction resulted in a second type of error. A criminal defendant must be afforded a meaningful opportunity to present a complete defense. (*Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, 904, citing *California v. Trombetta* (1984) 467 U.S. 479, 485 [104 S.Ct. 2528, 2532, 81 L.Ed.2d 413, 419].) A state court's jury instructions violate due process if they deny a defendant a "meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636; see also *Estelle* v. *McGuire* (1991) 502 U.S. 62, 72 [116 L. Ed. 2d 385, 112 S. Ct. 475].)

Rudd's sole defense in this case was mistaken identity. The certainty instruction, however, prevented the jury from fully considering all the reasons why the identification was flawed and instead allowed the jury to put undue weight on Capusano's "certain" identification of him. He was preventing from fully and fairly arguing he was not the perpetrator, which was the only disputed issue in the case and his sole defense. The jury was not properly allowed to consider that the certain eyewitness testimony was wrong. This was a denial of due process.

VI. Under either *Chapman* or *Watson*, it was reversible, prejudicial error to instruct the jury to consider how certain the witness was.

As the instructional error implicated appellant's federal constitutional right to due process of law, it must be judged under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Accordingly, the conviction must be reversed unless the state can demonstrate that the error is harmless beyond a reasonable doubt. The state cannot meet that burden in this case.

As noted, the eyewitness testimony was the only evidence tying Rudd to the crime. On the other side of the scale, many factors weighed against the accuracy of Capusano's identification. The error undoubtedly contributed to the verdict, because it was the sole basis for finding liability. (See *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 495 [error may be harmless if the evidence is so overwhelming that the jury could have had no reasonable doubt].) Had the jury not been unduly influenced to consider certainty, it could have properly balance that one factor against the numerous factors weighing against reliability. At least one, and most likely more, jurors would have refused to convict.

The error requires reversal even under the state prejudice standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. Under *Watson*, the error "requires reversal of a conviction if, taking into account the entire record, it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred." (*People v. Ledesma, supra,* 39 Cal.4th at p. 716.) A "probability" under *Watson* does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*Cassin v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-802.)

Similarly, had the jury known it was not required to accept Capusano's certainty as reliable evidence, the jurors would have been free to consider all

the reliability factors. There is more than a reasonable chance that Rudd would have obtained a more favorable outcome.

VII. The prosecution cannot prove that the error did not contribute to the verdict; the "certain" but unreliable identification prevented the jury from properly evaluating the eyewitness evidence. The error was prejudicial.

Instructing the jury to consider Capusano's certainty was prejudicial, reversible error. Capusano's testimony was the only evidence against Rudd. If the jury had not been told to accept the testimony uncritically, they would have been able to consider all the reasons not to believe Capusano. This is not a case where the other evidence is overwhelming. (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 495.) Thus it was not harmless under *Chapman*; the error undoubtedly contributed to the verdict. Nor can it be considered harmless under *Watson*. Had the jury not equated certainty with accuracy, Rudd was have obtained a more favorable outcome. Given the reasons to doubt Capusano's identification, coupled with the lack of any other evidence that could establish Rudd's guilt, it is highly likely that one juror, if not several or all, would have refused to find guilt.

A. Several compelling factors cast doubt on the reliability of the eyewitness evidence.

A number of factors bear on the reliability of an eyewitness' identification: ability to perceive, stress level, whether the witness' attention was focused on a weapon, and cross-racial identification. (*People v. Reed, supra,* 4 Cal.5th at p. 1030, citing *Henderson, supra,* 27 A.3d at pp. 921-922 [discussing the factors that affect the reliability of eyewitness identifications]; *Lawson, supra,* 291 P.3d at pp. 688-689 [same].)

In this case, although Capusano saw the perpetrator for mere seconds,

she described essentially two discreet opportunities to view him. This testimony is viewed most favorably to the prosecution. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 [appellate court reviews the evidence in the "light most favorable to the prosecution and presume[s] in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence"].)

The first time she saw him, he was standing in the motel room behind Lemcke. But, she admitted she had no reason to notice him. She was paying attention to Lemcke, who asked to borrow her phone, and then looking down into her purse for her phone.

The second time she saw him was as he grabbed her and pulled her into the room, just before he punched her in the face. But, she was frightened and under stress. (4RT 590.) She was likely focused on the perpetrator's fist and not his face. (See, e.g., *Henderson, supra*, 27 A.3d at pp. 911-912.) After the first punch, she was in pain, which likely hindered her perception. And, once she was unconscious, on the floor, and covering her face, she had no ability to perceive. Further, although not explored at the trial, the cross-racial identification may also have been a factor. Capusano is Hispanic and Rudd is African American. Research has shown that it is more difficult to identify a person of a different race than one's own. (See, e.g., *Henderson, supra*, 27 A.3d at pp. 929.) All these factors called her reliability into question.

It also bears mention that Capusano was an unreliable witness on other matters. For example, Capusano testified initially that she did not regain consciousness until she was in the ambulance. (1RT 172, 177, 180.) The prosecutor then showed her a photo of her injuries, which the police had taken while she was still at the motel. (2RT 199, 266.) Upon seeing the photo, Capusano remembered that she regained consciousness while on the floor of the motel room. (2RT 199-200, 210-211.) She explained the error by saying,

"I don't remember exactly because I was knocked out because of the blows." (2RT 199-200.)

Further, she described "feeling" rather than seeing the perpetrator. "And when I put my left hand into my bag in order to pull out the telephone, it was when I was going to pull my telephone out with my hand that I *felt* the blow." (3RT 319 [emphasis added].) She "*felt* that the man -- the man, he hit me on this side of my face, and he pulled me from here, from my shoulder, and he took me into the room." (2RT 160.)

B. Suggestive identification procedures likely tainted the reliability of the identification.

The identifications procedures used by both Officer Vasquez and Detective Silva in this case may have been suggestive, giving the jury more reason to doubt Capusano's identification of Rudd. "As a discrete evidentiary class, eyewitness identifications subjected to suggestive police procedures are particularly susceptible to concerns of unfair prejudice." (*State v. Lawson, supra,* 291 P.3d at p. 695].) As Justice Sotomayor wrote, "Our cases thus establish a clear rule: The admission at trial of out-of-court eyewitness identifications derived from impermissibly suggestive circumstances that pose a very substantial likelihood of misidentification violates due process." (*Perry v. New Hampshire, supra,* 565 U.S. at pp. 249-250.) Indeed, in this case the jury apparently had concerns about the identification procedures and their impact on the identification. While deliberating, they asked for a read back of the testimony of both Vasquez's and Silva's testimony, specifically the testimony about Capusano's identifications of Rudd. (3 CT 571.)

1. Officer Vasquez

Putting aside her three-second view of the perpetrator, Capusano was "under anesthesia" as she put it, when she picked the photo of Rudd out of the photo lineup and undoubtedly impaired. She nonetheless told Officer

Vasquez she was able to look at the photo lineup. But suggesting impairment, she misspelled her own name when she signed the photo lineup. (2RT 180-182, 190-191, 267-269, 273, 3RT 360-361, 5RT 634.) Further, even assuming the filler photos all looked similar to Rudd, the fact remains that if Rudd was not the perpetrator, then even a properly complied lineup based on his photo is no safeguard.

Moreover, the new safeguards that go into effect next year were not used. (Pen. Code, § 859.7.) There was not a blind administration. The identification process was not recorded, either by audio or video recording. The level of Capusano's certainty was not noted. It is unknown whether Capusano received any confirming feedback, if the police made suggestive comments or used body language or other inadvertent cues that influenced Capusano to pick Rudd, the police's suspect. (*State v. Henderson, supra,* 27 A.3d at p. 899 ["Even seemingly innocuous words and subtle cues—pauses, gestures, hesitations, or smiles—can influence a witness' behavior."]; McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions* (2005) 42 Am. Crim. L. Rev. 1271, 1277-1278, and citations therein.)

2. Detective Silva

Several aspects of the identification procedures employed by Detective Silva also appear suggestive. Silva showed Capusano a single photo of Rudd and asked if he was the one. (3RT 420.) By its very nature, a single photo poses a danger of suggestiveness and is generally discouraged. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412-413; *People v. Medina* (1995) 11 Cal.4th 694, 753.) "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. . . . This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of

a single such individual recurs or is in some way emphasized." (See *Simmons v. United States* (1968) 390 U.S. 377, 383-384 [88 S.Ct. 967, 971, 19 L.Ed.2d 1247, 1253].)

Further, the record does not disclose the circumstances under which Capusano recalled the tattoo on the perpetrator's neck, for example, whether her recall was independent of the identification procedures Silva employed, or whether her discussions with Silva inadvertently primed her to recall a tattoo. (Garrett, *Eyewitnesses and Exclusion* (2012) 65 Vand. L. Rev. 451, 453 [eyewitness confidence is highly malleable and may be the product of police suggestion].)

In any event, when Silva showed Capusano two photos of tattoos, simultaneously, she had a 50% chance of picking the right tattoo merely by chance. (See McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions* (2005) 42 Am. Crim. L. Rev. 1271, 1279 [recommending sequential, rather than simultaneous, identification procedure to guard against "relative judgment process"].) Also a questionable tactic, Detective Silva told her one of the tattoos belonged to the person she had previously identified. This information almost guaranteed she would pick one of the two photos rather than neither. (3RT 417.) Even then, she was able to say only that the tattoo looked "more like" the one on the perpetrator. (3RT 419.)

Finally, the in-court identification was likely tainted by the prior suggestive identification procedures. Capusano identified him without looking at him. Rudd was the only African American man seated at counsel table and thus the only choice. As Capusano said, "Well, it's logical. He's the one." (3RT 287.) Despite these reasons to question the in-court identification, it was likely powerful evidence that, from the start of the trial, biased the jury to believe the eyewitness evidence.

C. Expert testimony did not, in this case, adequately inform the jury that an eyewitness, however certain, may not be accurate. Nor did the expert testimony adequately inform the jury about the factors that affect reliability.

Expert testimony is a useful tool for educating the jury but, as this case illustrates, expert testimony alone is not a sufficient means of alerting the jury to the frailties of eyewitness evidence. Here, the expert testified several times that a certain witness may be correct, and described those circumstances. He also testified that a certain witness may not be correct. His testimony covered a broad range of topics on memory and perception, but largely in unexplained jargon: how the "retrieval process" works, that "human memory is considered reconstructive by definition" (5RT 719-720), and "consolidation of memories" make it "very common to have elongated sense of time in retrospect." (5RT 727.) The expert testimony was essentially too abstract to give the jury much guidance in evaluating the eyewitness evidence. (Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, (2011) 39 Am. J. Crim. L. 97, 132.)

In short, the testimony did little to educate the jury about the impact of the many factors affecting reliability. Even under the best of circumstances, and this was not the best of circumstances, there is a concern jurors will not follow the expert testimony. As happened in this case, the expert may "overwhelm[] jurors with technical information, leading them to ignore the expert testimony completely and undercutting the reason for introducing it in the first place." (Simmonsen, *Teach Your Juror Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony* (2011) 70 Md. L. Rev. 1044, 1079.)

The expert in this case did testify that an eyewitness can be 100% certain of an identification, and yet be proved wrong by DNA evidence. (5RT 723, 758-760, 768-769, 796; see also 5RT 763-767 [discussion outside jury presence about question].) While this may have informed the jury that certain

eyewitness evidence is not infallible, it likely did not add to the jury's understanding about the factors that affect reliability. Also, the testimony was beside the point, because the DNA evidence did not in fact prove Capusano wrong. (5RT 693-696, 6RT 801-803, 854-855, 857-859.) On balance, the expert testimony did not provide much of a safeguard against mistaken identification, making the lack of a jury instruction all that more prejudicial.

D. Cross examination did not expose the weaknesses in the eyewitness evidence in this case.

In general, cross-examination does not effectively expose the weaknesses in eyewitness evidence because the eyewitness truly believes he or she is telling the truth, and thus the jury's ability to "spot a liar" is of no help. (Hutchins, *You Can't Handle the Truth! Trial Juries and Credibility* (2014) 44 Seton Hall L. Rev. 505, 541.)

In this case, the cross examination was beset by other problems as well as the usual ones. Capusano, a native Spanish speaker, had little formal education and could not read documents that were in English; those documents, as well as the questions and answers, had to be translated, consuming more time than anticipated. Eventually the trial court curtailed defense counsel's cross examination and attempts to impeach Capusano with prior inconsistent statements. (3RT 388-396, 6RT 831-835.) The trial court ruled essentially that impeaching Capusano on all her inconsistent statements would be unduly time-consuming, and the parties could simply rely on that evidence taken from the police reports and the police officers' testimony. (3RT 388-396.)

The circumstances that undermined effective cross exam may have been unique to this case, but they nonetheless existed, making the failure to instruct the jury about mistaken identification even more prejudicial than it might have been.

E. Taken in the context of the whole trial, the jury instruction cannot be considered harmless.

A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1320-1321.) The issue is whether, in the context of the instructions as a whole and the trial record, there is a reasonable likelihood that the jury was misled to defendant's prejudice. (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 475; see also *People v. Castaneda, supra,* 51 Cal.4th at pp. 1320-1321 [jurors presumed to be "intelligent persons and capable of understanding and correlating all jury instructions which are given."].) Looking at the instructions as a whole in this case, and the trial record, the jury was misled to Rudd's prejudice.

The critical question in this case was whether the single witness, Capusano, accurately identified Rudd as the perpetrator. The jury was instructed that a "single witness can prove any fact and inconsistencies or conflicts don't mean a person is lying." (CALCRIM No. 220; 6RT 939-942.) In other words, the jury could convict based on nothing more than Capusano's uncorroborated but certain identification, despite the many credibility and reliability issues. Indeed, in closing, the prosecution urged the jury to disregard Capusano's inconsistencies and to believe her testimony that Rudd was the perpetrator. (7RT 939-941.)

This instruction, in combination with the certainty factor, was particularly prejudicial. The jury, operating under the erroneous belief that Capusano's certainty indicated accuracy, was told that Capusano's testimony alone – her certainty it was Rudd -- was enough to convict; her other inconsistent or incredible testimony could be ignored. Further, the jury was instructed to follow the law stated in the jury instructions, and, if arguments made by counsel conflicted with the jury instructions, the jury was told to follow the court's instructions. (CALCRIM No. 200.) This effectively

negated defense counsel's argument to the jury that Capusano was unreliable, despite her certainty.

The jury was given other instructions that permitted them to credit Capusano's testimony despite its many inconsistencies. CALCRIM No. 226 told jurors not to automatically reject testimony just because of inconsistencies or conflicts, but consider whether the conflicts are important or not. The jurors were also told they could believe the part of the testimony they wished, and ignore the rest, even if they believed the witness lied about some things. (CALCRIM No. 226.) In light of these other instructions, it cannot be said that the instructions as a whole did not prevent the prejudicial impact of CALCRIM No. 315. Rather, other instructions amplified the prejudicial impact, by telling the jurors they could believe less than credible eyewitness evidence and even if it was the only incriminating evidence.

Given these problematic aspects of the case, *People v. Ward* is of little use here. (*People v. Ward* (2005) 36 Cal.4th 186.) *Ward* is factually distinguishable and does not support a finding of no prejudice. In *Ward,* this Court determined that the certainty instruction in CALJIC No. 2.92, even if erroneous, was not prejudicial. (*Id.* at p. 214.) For one reason, the defendant's expert testified effectively that an eyewitness' level of certainty and the accuracy the identification did not correlate. Also in *Ward,* several eyewitnesses identified the defendant, and defense counsel strongly attacked the accuracy of the eyewitnesses on cross examination. (*Ibid.*)

Not so in this case. Capusano was the only eyewitness, the expert testimony was not effective nor was defense counsel's cross examination effective under the circumstances. The instructional error was prejudicial, under either the *Chapman* or *Watson* standard.

CONCLUSION

Instructing the jury to consider the how certain the eyewitness was when identifying the perpetrator resulted in reversible prejudicial error in this case. Had the certainty factor been omitted, or explained adequately, at least one person on the jury, likely more, would have not have accepted Capusano's certainty uncritically. The jurors would have given proper weight to the numerous indicating the identification fatally unreliable. The judgment of conviction must be reversed and the matter remanded for a new trial.

Dated: March 27, 2019

Respectfully submitted,

_____

Jeanine G. Strong, Counsel for Appellant
Charles Henry Rudd

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Dated: March 27, 2019

Respectfully submitted,

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CERTIFICATION OF WORD COUNT (Rule 8.360(b)(1))

I certify this brief contains 11,149 words, excluding the table of contents, and table of authorities. The word count feature used was that available on Word. (Cal. Rule of Court, rule 8.360(b)(1).)

Dated: March 27, 2019

Respectfully Submitted,

Jeanine Strong

Jeanine G. Strong

Proof of Service
People v. Rudd
Supreme Court Case No. S250108
Court of Appeal No.: G054241
Orange County Superior Court No.: No. 14CF3596

I, the undersigned, declare that I am over 18 years of age, employed in the County of Monterey, and not a party to the instant action. My business address is listed above. My electronic service address is Jeanie@StrongAppellateLaw.com. I served the attached brief as follows.

APPELLANT'S OPENING BRIEF ON THE MERITS

USPS: By placing copies of the document in a sealed envelope, with the correct postage, and depositing them in the United States Postal Service, to each of the following persons at the following addresses on March 27, 2019:

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ORANGE COUNTY SUPERIOR COURT
Attn: Hon. David Hoffer
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ELECTRONIC SERVICE: By sending from my electronic service address of Jeanie@StrongAppellateLaw.com, on March 26, 2019 at 5:30 p.m., the above named document to each of the following persons at the following authorized email service addresses:

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I additionally declare that I electronically submitted a copy of this document to the Court of Appeal on its website at http://www.courts.ca.gov/4dca-esub.htm, in compliance with the court's Terms of Use.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 27, 2019 Jeanine G. Strong