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 REPLY 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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I. Introduction

It is heartening to know the People agree that CALCRIM No. 315's instruction on certainty can be improved to better help jurors understand eyewitness evidence. (Respondent's Answer Brief on the Merits pp. 10, 44.) Preventing misidentifications is critical to the accused and critical as well to prosecutors, police departments, judges, and "society at large." (*People v. Sánchez* (2016) 63 Cal.4th 411, 498 [J. Liu, dissenting].) Public confidence in the criminal justice system is eroded when an innocent person is sent to prison. And when the wrong person is convicted, the real perpetrator remains free to commit more crimes.

Despite sharing this common ground, the People's Answering Brief argues that the certainty factor in the instruction does not violate due

process, because it is neutral, allowing the jury to give eyewitness certainty any weight or no weight. In any event, the People contend, expert testimony and general instructions ensure that the jury does not give undue weight to an eyewitness' certainty.

The first argument sidesteps the point; while the certainty factor may appear superficially neutral, it does not instruct the jury on the factors affecting an eyewitness' certain identification. Without instruction, the jury cannot intelligently evaluate the evidence at all, much less give it the weight due. As for the second argument, expert testimony cannot accomplish what a jury instruction does. Among other things, the defense expert may be viewed skeptically, as a hired gun, while jury instructions are the last word, delivered by an authority figure in a concise and focused way. Finally general jury instructions are a dubious safeguard; telling the jury to "consider all the evidence" does nothing to ensure the jury understands the evidence. And telling the jury to use common sense confirms the common misperception that a certain eyewitness is an accurate one, when scientific research has established that certainty correlates with accuracy only in limited circumstances.

Turning to the scientific research, the People attempt to mischaracterize Rudd's position, contending he argues: (1) an eyewitness' certainty is "categorically irrelevant"; (2) eyewitness certainty never correlates with accuracy; and (3) the trial court is forbidden from instructing on certainty. (ABM 10, 22, 28, 37, 40). Rudd makes none of these claims, and none is valid.[1] Eyewitness certainty is a multifaceted and nuanced subject and cannot be reduced to these unyielding notions.

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[1] The People also state that Rudd failed to discuss and therefore "forfeited" the issue about assigning the trial court a stronger gatekeeping role. (*People v. Reed* (2018) 4 Cal.5th 989, 1019 [Liu, dissenting] ["[I]t is time to consider rules that assign the trial court a stronger gatekeeping role in

To be clear, Rudd argues that under the circumstances of this case – where the eyewitness expressed great certainty, the identification procedures were far from ideal, and the eyewitness evidence was the only evidence implicating Rudd – instructing the jury with CALCRIM No. 315's certainty factor, without scientifically correct guidance, prejudicially deprived him of due process. Because the instruction did not explain the factors affecting certainty, the jury incorrectly equated confidence with accuracy and gave the identification far more credence than deserved. The expert testimony did not prevent this fallout and general instructions actually facilitated it. As a result, Rudd was denied the opportunity to present his sole defense and the prosecution was not held to its burden to prove all the elements of the offense beyond a reasonable doubt.

Because the certain but unreliable eyewitness evidence played a dispositive role in this case, the People cannot prove beyond a reasonable doubt that the instructional error did not contribute to the verdict. Identification of the perpetrator was the only contested issue, and the certainty of the eyewitness was the only inculpatory evidence. It follows that the instructional error infected the entire trial, resulting in a conviction that violated due process. The judgment of conviction must be reversed.

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this context."].) But since this Court granted review on the first issue only – whether instructing a jury with CALCRIM 315 violates due process rights -- Rudd's brief addresses that issue only.

II. The certainty factor as phrased in CALCRIM No. 315 may be superficially neutral, but it fails to educate the jury about the "unique confluence of features" attending eyewitness identification evidence, most notably that certainty correlates with accuracy only in limited circumstances not present here.

The People contend that the certainty factor in CALCRIM No. 315 is neutral because it allows the jury to give the eyewitness evidence any weight or significance it deems appropriate, or none at all. (ABM 9, 26, 33.) On its face, the factor may be phrased neutrally, not inclining toward either view.[2] But facial or superficial neutrality does not assure that the jury is able to interpret and apply the certainty factor in a way that satisfies due process. Asking whether the instruction is neutral may not be the right question in this situation. Rather, the proper inquiry is how a reasonable juror would interpret the instruction and whether the juror would apply the certainty factor in a constitutional manner. (*Boyde v. California* (1990) 494 U.S. 370, 380 [110 S.Ct. 1190, 1198, 108 L.Ed.2d 316, 329] [question is whether the jury applied the challenged instruction "in a way that prevents the consideration of constitutionally relevant evidence."]; *Sandstrom v. Montana* (1979) 442 U.S. 510, 514 [99 S.Ct. 2450, 2454, 61 L.Ed.2d 39, 45] [question is "how a reasonable juror could have interpreted the instruction"].)

Unlike other factors in CALCRIM No. 315, there is much lay people do not know about eyewitness certainty. For example, it is common knowledge that people cannot see in the dark and when their view is obstructed. Instructing a juror to consider the lighting and whether the eyewitness had an unobstructed view requires no further explanation. In contrast, however, most lay people are not aware of the unique features of eyewitness identification evidence. A prime example, lay jurors do not

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[2] Oxford English Dictionary, vol. X, pages 356, (2d ed. 2000).

know that in most cases, certainty cannot be used as a proxy for accuracy. Nor do they know how "certainty" can be manipulated when suggestive or non-pristine[3] procedures are used. (See J. Wixted & G. Wells (2017) *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychol. Sci. in the Pub. Int. 12-21 [When suggestive or "non-pristine" identification procedures are used, research has shown that eyewitness certainty or confidence does not correlate well with accuracy.].)

The list continues. Jurors generally are not aware that an eyewitness' identification, particularly when the eyewitness is very certain, may skew their assessment because the evidence is highly and perhaps unduly persuasive. (*People v. Sánchez* (2016) 63 Cal.4th 411, 497 [J. Liu, concurring], citing G. Wells and A. Bradfield (1998) "*Good You've Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. of Applied Psych. 360, 361 [noting that eyewitness identification evidence is the single most influential factor to jurors, citing several studies].)

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[3] "Pristine" refers to a fair, non-suggestive lineup conducted with a double-blind administrator and pre-lineup instructions. (*Ibid.*) Beginning in 2020, Penal Code section 859.7 will require that photo and live lineups be conducted using pristine identifications procedures which are detailed in the statute. Section 859.7 procedures require that the person conducting the identification procedure use "blind" or "blinded administration" whereby the administrator does not know the identity of the suspect. Nothing should be said to the eyewitness that may influence their identification. If an eyewitness identifies a person in the lineup, the investigator must ask about the eyewitness' confidence in the identification and record what the eyewitness says. The investigator may not disclose any information about the person identified and may not validate or invalidate the eyewitness' identification.

Jurors do not know that common sense in this situation fails them, and that common sense may improperly confirm the misperception that a certain eyewitness is an accurate one, when in many cases, just the opposite is true. (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; *State v. Guilbert* (Conn. 2012) 49 A.3d 705, 731 [factors affecting the reliability of eyewitness identifications are "contrary to common assumptions"]; see also 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 [preexisting beliefs often play a role in the jury deliberation process].)

Further, jurors are likely not aware that evaluating eyewitness evidence is not a straightforward matter of deciding whether the eyewitness is being truthful or not. Most eyewitnesses sincerely believe they are telling the truth, even if they are wrong. A juror's ability to spot a liar will not help him or her evaluate the accuracy or reliability of an eyewitness. (See J. Gould *et al.* (2014) *Predicting Erroneous Convictions*, 99 Iowa L. Rev. 471, 499 ["Although it may seem counterintuitive, a lying witness may actually be easier for police and prosecutors to detect with further investigation than one who is honestly mistaken."].)

Unless these factors and variables are acknowledged and explained to jurors, the bare instruction to consider "how certain the eyewitness was when identifying the perpetrator" will likely not be understood well enough to ensure a fair trial. Certainty, unlike other factors on the list, is not a matter of common knowledge or easily understood, and yet it is powerful evidence. Without guidance, jurors are likely to overvalue the evidence. (*People v. Sanchez, supra,* 63 Cal.4th 411, 495-496 [The instruction naturally "prompts the jury to conclude that an eyewitness identification is more reliable when the witness expresses greater certainty."]; *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. Henderson (*2011) 27 A.3d 872, 889, citing J. Epstein (2007), *The Great Engine that Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 772.)

Facial neutrality does not foreclose due process concerns and it does not pay heed to the "unique confluence of features" that affect an eyewitness' certainty and which are not known to lay jurors. (*Perry v. New Hampshire* (2012) 132 S. Ct. 716, 739, 181 L. Ed. 2d 694 730-31 [Sotomayor, J., dissenting].) The United States Supreme Court "has long recognized that eyewitness identifications' unique confluence of features--their unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process--can undermine the fairness of a trial." (*Ibid.*)

III. Misleading and incomplete jury instructions implicate due process concerns, and instructing the jury with CALCRIM No. 315's certainty factor violated Rudd's due process rights to a complete defense and to have every element of the offense proved beyond a reasonable doubt.

The People contend that instructing the jury to consider certainty along with the other factors listed in CALCRIM No. 315 does not in any case violate due process. This contention fails to recognize that due process is flexible, and each case must be considered in context and based on the facts and circumstances of the case. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481 [33 L. Ed. 2d 484, 92 S. Ct. 2593] ["it has been said so often by this Court and others as not to require citation of authority that due

process is flexible and calls for such procedural protections as the particular situation demands"]; *Cafeteria Workers v. McElroy* (1963) 367 U.S. 886, 895, [6 L. Ed. 2d 1230, 81 S. Ct. 1743] ["the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation"].)

That due process may require a jury instruction to inform and guide the jurors, or correct common misperceptions or outdated assumptions, is nothing new or unusual. (See, e.g., *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 355 [127 S.Ct. 1057, 1064, 166 L.Ed.2d 940, 950] [discussing a jury instruction explaining the purpose of punitive damages; "[I]t is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers."]; *Simmons v. South Carolina* (1994) 512 U.S. 154, 164 [114 S. Ct. 2187, 129 L. Ed. 2d 133] ["The trial court's refusal to apprise the jury of information so crucial to its sentencing determination [regarding future dangerousness], particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause."]; *Francis v. Franklin* (1985) 471 U.S. 307, 322 [105 S.Ct. 1965, 1975, 85 L.Ed.2d 344, 358] ["Contradictory instructions as to intent--one of which imparts to the jury an unconstitutional understanding of the allocation of burdens of persuasion--create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner, unless other language in the charge explains the infirm language sufficiently to eliminate this possibility."]; *People v. Ledesma* (2006) 39 Cal.4th 641, 666 [to overcome the common misperception that all life prisoners may

eventually be paroled, jurors may need to be instructed to take literally the words "life without possibility of parole"]; see also *People v. Jones* (1990) 51 Cal.3d 294, 315, 319-320 [CALJIC No. 2.20.1, the precursor to CALCRIM No. 330 provides guidance to the jury in assessing the credibility of children, in light of recent studies that have undermined incorrect but "traditional assumptions" about child witnesses].); *People v. Catley* (2007) 148 Cal.App.4th 500, 507-508 [rationale for upholding CALCRIM No. 330, to correct traditional but no longer valid assumptions about the testimony of children applies to the testimony of witnesses with a developmental disability or cognitive impairment].)

The People cite *People v. Catley, supra,* 148 Cal.App.4th 500, as an example of a jury instruction that meets due process. (ABM 33-34.) Rudd's opening brief cited *Catley* also, as an example of when explanatory instructions are required. But, unlike CALCRIM No. 315, the instruction discussed in *Catley,* CALCRIM No. 331, does provide guidance and helps the jury understanding how to evaluate the testimony of witnesses with cognitive disabilities. (*Id.* at pp. 507-508.) CALCRIM No. 315 does not offer the same with regard to eyewitnesses who profess certainty and hence does not satisfy due process, which CALCRIM No. 330 and 331 do. (*People v. Jones, supra,* 51 Cal.3d at pp. 315, 319-320; *People v. Catley, supra,* 148 Cal.App.4th at 507-508.)

Due process requires that the certainty factor, if used, is accompanied by information reflecting scientific research. A jury instructed to consider "how certain" the eyewitness was, without explanation, will interpret the instruction as equating certainty with accuracy, when science establishes otherwise. Consequently jurors will place more value than merited on the eyewitness' confidence. Therefore, to satisfy due process, an explanatory instruction is required when the certainty factor is included.

IV. The infirmities in CALCRIM No. 315's certainty factor are not cured by expert testimony, argument of counsel, or general instructions. A focused and informative jury instruction is the best, and perhaps only, means of educating the jury about the vagaries of eyewitness identification evidence.

Despite agreeing that the instruction could be improved to better assist jurors, the People suggest that expert testimony, argument of counsel, and general instructions can educate the jury adequately; therefore, the certainty factor is fine as is. But none of these succeeds as well as an informative jury instruction, given the nature of the adversarial process.

A. Jurors view defense counsel as an advocate for the accused, not an authority providing balanced information.

The People contend that argument of counsel is adequate to give the jury all the education and information it needs to properly discharge its duties. (ABM 10, 28-29, 42.) Not so. "Arguments of counsel generally carry less weight with a jury than do instructions from the court." (*Boyde v. California, supra*, 494 U.S. at p. 384; accord *Carter v. Kentucky* (1981) 450 U.S. 288, 304 [101 S.Ct. 1112, 67 L.Ed.2d 241].) An attorney's argument is just that – argument, made by an advocate – and naturally is viewed as one-sided. The "jury understands defense counsel's duty of advocacy and frequently listens to defense counsel with skepticism." (*United States v. LaPage* (9th Cir. 2001) 231 F.3d 488, 492.)

Moreover, the prosecutor's argument may appear more authoritative than defense counsel's. "The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige." (*People v. Talle* (1952) 111 Cal.App.2d 650, 677, cited with approval in *People v. Thomas* (1992) 2 Cal.4th 489, 529.) "Defense counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates

for the defense." (*Ibid.*) Argument of counsel, and in particular defense counsel's argument, cannot effectively educate the jury.

B. Expert testimony cannot perform the functions of an informative and well-crafted jury instruction.

Just as defense counsel's argument is viewed as one-sided and partisan, so is testimony from the defense's expert witness. (*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.) Jurors tend to be skeptical of experts in general, but are more skeptical of the defendant's expert, who may be viewed as a hired gun with a financial motive for testifying. (R. Wise *et al.* (2009) *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case,* 42 Conn. L. Rev. 435, 453-454, citing Charles Patrick Ewing, *Trials of a Forensic Psychologist: A Casebook* 18 (2008) ("[I]n criminal trials jurors often regard prosecution witnesses as objective professionals doing a public service, while they see defense experts as hired guns who would say anything for the right amount of money.").

An expert's trial testimony about eyewitness confidence is limited in other ways that prevent it from effectively educating the jury. Eyewitness confidence is a complex topic. Expert testimony trying to explain confidence 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.) Further, the concepts and vocabulary are new to most jurors and difficult to grasp, even under optimal conditions. (G. 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."].)

The defense expert is not only a paid advocate for the defense, but he or she is trying to convey complex information in an adversarial setting, using an unfamiliar question and answer format. The expert's ability to educate the jury, under these conditions, is limited, and the expert cannot accomplish what a well-crafted and informative jury instruction can.

C. A focused and informative jury instruction is the best, and perhaps only, means of educating the jury about the vagaries of eyewitness identification evidence.

"Jury charges offer a number of advantages: they are focused and concise, authoritative (in that juries hear them from the trial judge, not a witness called by one side), and cost-free; they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury's role or opining on an eyewitness' credibility." (*State v. Henderson* (2011) 27 A.3d 872, 925.)

Jury instructions stand apart from argument and expert testimony, in a number of ways. Instructions are delivered by the trial court judge, a neutral authority figure. "The influence of the trial judge on the jury is necessarily and properly of great weight." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612 [66 S.Ct. 402, 405, 90 L.Ed. 350, 354] [internal citation omitted].) "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." (*Ibid.*)

Further, the judge has the last word literally as well. He or she is the last person to address the jury, while expert testimony and closing argument occurred sometimes days before the jury deliberates. Not an insignificant

consideration, jurors have a copy of the instructions in the jury room and can refer to them throughout deliberations. (CALCRIM No. 200; RT 931.) In contrast, they do not have the advantage of a transcript of the expert's testimony or the attorneys' closing arguments to refresh their recollections. Finally and importantly, jury instructions are concise and focused, certainly in contrast to argument and expert testimony, and they are not cluttered with objections and cross examination.

Thus, for many reasons, expert testimony and argument of counsel cannot rectify an incomplete or misleading jury instruction. A focused and informative jury instruction is the best, and perhaps only, means of educating the jury about the vagaries of eyewitness identification evidence.

D. General instructions do not correct the common misperceptions about eyewitness certainty and may confuse the jury with conflicting information.

The People contend that the gaps in CALCRIM No. 315 are filled by the general instructions the jury receives. (ABM 10, 19, 27, 30, 33-34.) The People cite: CALCRIM No. 200 (You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions. . . . Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.); CALCRIM No. 220 (In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial.); CALCRIM No. 226 (You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience.)

These general instructions do little to help the jury properly interpret and apply the certainty factor. Some, in fact, affirmatively misdirect the jury. The instructions repeatedly tell the jury to use common sense (CALCRIM Nos. 105, 200, 226) when common sense is not helpful and in fact detrimental when it comes to assessing the reliability of an eyewitness. The general instructions reinforce rather than correct the jury's misperception that a confident eyewitness is an accurate one. (Cf. *Barclay v. Florida* (1983) 463 U.S. 939, 941 [103 S.Ct. 3418, 77 L.Ed.2d 1134] ["It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum, as if he had no experiences"].)

Moreover, telling the jury to follow the instructions, even if they disagree with them, does nothing to ensure that the jury understands the instruction in the first place. (CALCRIM No. 200.) By the same token, telling the jury to *consider* all the evidence does nothing to help them *understand* the evidence. (CALCRIM No. 220.)

The instructions also tell juries to evaluate the "credibility and truthfulness" of the witnesses. But most eyewitnesses sincerely believe they are telling the truth and will appear credible. (*State v. Henderson, supra,* 27 A.3d 872, 889], citing J. Epstein (2007) *The Great Engine that Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 772.)

V. Describing certainty as "only one of many factors" for the jury to consider is not accurate in Rudd's case, because the jury's verdict turned on the eyewitness evidence.

The People characterize certainty as only one of many factors, a single line in a three-page instruction. (ABM at 9, 22, 30, 34.) The People apparently believe that the jury's failure to understand eyewitness confidence is insignificant. In fact, the People state, jurors may find that the certainty factor is not pertinent at all in a given case. (ABM 33.)

This argument gives Rudd no solace. Although certainty occupies only one line is CALCRIM No. 315, Capusano's certainty that Rudd was the man who assaulted her was the most important and dispositive factor in the case. Identity was the only contested element of the offense and Capusano's certainty was the only evidence offered to prove identity. There is virtually no chance the jurors considered her testimony "not pertinent." Given the circumstances of this case, the certainty factor cannot fairly be described as merely one of many factors.

VI. The instructional error infected the entire trial and deprived Rudd of his due process rights. The People cannot prove beyond a reasonable doubt that the instructional error did not contribute to the verdict.

The People agree that the instructional error is reviewed under the *Chapman* standard for federal constitutional error. (ABM at 41.) *Chapman* imposes a heavy burden on the People and requires that they prove, beyond a reasonable doubt, that the instructional error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 70-71 [112 S. Ct. 475, 116 L. Ed. 2d 385] [question is whether the alleged instructional error "by itself so infected the entire trial that the resulting conviction violates due process"].) "Under Chapman, it is not the

defendant's burden to show that the error did have adverse effects; it is the state's burden to show that the error did not have adverse effects." (*People v. Jackson* (2014) 58 Cal.4th 724, 792-793, J. Liu.) The reviewing court be "convinced the error was harmless to the maximal level of certainty within the realm of reason, a level that admits no reasonable doubt." (Jackson at p. 792.)

To determine whether an error is harmless, the reviewing court considers the record de novo. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 295 [111 S.Ct. 1246, 1257, 113 L.Ed.2d 302, 322].) The court also considers "the trial record as a whole." (*Rose v. Clark* (1986) 478 U.S. 570, 583 ["The question is whether, on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt."]) Whole-record review requires consideration of matters that favor the defense or undercut the prosecution's case, not only the evidence and inferences most favorable to the prosecution. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 330-331 [126 S.Ct. 1727, 1729, 164 L.Ed.2d 503, 503].)

To meet their burden, the People assert that "vastly more important" factors than eyewitness identification evidence provided a basis for the verdict and prove that the instructional error did not contribute to the verdict. (ABM 42.) To support this position, the People offer the following:

> Campusano's first identification of Rudd was the same night as the assault. (See p. 12, *supra.*) It was based on a six-photo lineup and accompanied by an admonishment that she should not feel compelled to identify anyone. (See pp. 12-13, *supra.*) In a later procedure, Campusano identified Rudd again and specifically identified his neck tattoo. (See pp. 13-14, *supra.*) Campusano also correctly identified Lemcke from a photo lineup. (See p. 13, *supra.*) That last identification was corroborated by hotel records, and Lemcke's connection with Rudd was corroborated by a court order. (See p. 12, *supra.*).

This recitation of "vastly more important" evidence omits critical details. Looking at the whole record, and including the omitted details, it is apparent that the evidence on which the jury actually based its verdict – Capusano's identification – is unreliable, seriously challenged, and of little probative value. (*Yates v. Evatt* (1991) 500 U.S. 391, 404, [114 L. Ed. 2d 432, 111 S. Ct. 1884] [harmless-error review examines the basis on which "the jury actually rested its verdict."]) The People cannot show that the instructional error did not contribute to the verdict.

A. When Capusano picked Rudd out of a photo lineup, she was at the hospital under anesthesia, and the identification procedure did not follow best practices.

Capusano did pick Rudd out of a photo lineup within hours after the assault. But she did so under questionable circumstances. She was at the hospital at the time, being prepped for surgery, and was "under anesthesia." (2RT 180-182, 190-191, 267-269, 273, 3RT 360-361.) She misspelled her own name when she wrote it on the photo lineup, which indicates impairment. (RT .) And critically, pristine or best practices procedures were not followed. It was not a blind administration. Officer Velasquez, the same officer who questioned Capusano at the scene, put together the photo array. He then questioned her at the hospital and personally showed her the photo lineup. The identification procedure was not recorded, so there is no assurance that Officer Velasquez did not unknowingly provide confirming feedback or influence her choice through body language or other inadvertent cues.

Further, Capusano's level of certainty was not recorded, but the record amply reflects that she had reason for doubt. The entire encounter took place in seconds. She first glanced the perpetrator standing behind Lemcke; she admitted she was not focused on him. She claimed she saw him when he grabbed her and began punching her in the face, before she

passed out, but at the time she may have been focused on his fist. Also, he was moving, making an identification more difficult. She admitted she did not actually see him step forward, but since he reached out and grabbed her, she believed he must have stepped out of the room. (2RT 160-163,165-167, 211-212, 217-218, 3RT 318-323, 326-327, 347.)

In sum, her ability to observe her attacker was seriously compromised; she admittedly had a fleeting opportunity to observe him and the assault took place in seconds. There are many reasons to doubt the reliability of the prosecution's evidence. (*Holmes v. South Carolina, supra,* 547 U.S. at pp. 330-331.)

B. The "later" identification of Rudd and his tattoo was three months later. The identification procedures used were suggestive and it was the first time Capusano mentioned a tattoo.

The "later procedure" the People refer to was *three months* later, when Detective Silva contacted Capusano to follow up. Capusano had not reported a tattoo on the perpetrator's neck during the initial investigation, but three months later, in her conversations with Silva, she apparently recalled a tattoo. Silva's conversations with Capusano were not recorded, and therefore the record does not indicate whether her recall was independent and spontaneous, or whether her discussions with Silva prompted her to recall a tattoo. Nor does the record indicate why she did not contact the police during the intervening three months to report that she later recalled a tattoo.

The identification procedures were far from pristine in other ways. Before showing her the photos of the tattoos, Detective Silva told her one of the tattoos belonged to the person she had previously identified. This almost guaranteed that she would pick one of the two photos rather than neither. (3RT 417.) Officer Silva then showed her one single photo of Rudd and asked if he was the one. It was not surprising that she said yes.

(3RT 420.) (See *Manson v. Brathwaite* (1977) 432 U.S. 98, 134 [97 S.Ct. 2243, 2263, 53 L.Ed.2d 140, 166] [showing a person one photo or one person is a "grave error, of course, because it dramatically suggests to the witness that the person shown must be the culprit. Why else would the police choose the person? And it is deeply ingrained in human nature to agree with the expressed opinions of others -- particularly others who should be more knowledgeable -- when making a difficult decision."].)

Finally, Capusano's level of confidence when she identified the tattoo was not high. Although she picked one of the two photos, she was able to say only that the tattoo looked "more like" the perpetrator's. (3RT 419.) 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, she said the tattoo was partially blocked by her attacker's clothing. (3RT 436, 459-460.)

C. Capusano's identification of Lemcke three months after the assault and the previous connection between Rudd and Lemcke do not put Rudd at the motel that night.

The third of the more important factors the People cite is that Capusano identified Lemcke correctly, and Lemcke had a prior relationship with Rudd. This is a tenuous link and does not put Rudd at the motel on the night of the assault. Further, Capusano did not identify Lemcke until October, three months after the event. (3RT 410-411, 413-414.) Initially Lemcke came to Officer Velasquez's attention because she had rented the motel room, and a search of Lemcke's records revealed she knew Charles Rudd, as she had a court order involving him. (4RT 591.) Based on that information, Officer Velasquez put together a photo lineup that included a photo of Rudd. But the prior connection between Rudd and Lemcke had little to put Rudd at the motel that night.

This is not a case where the other evidence was so overwhelming that the jury would have reached the same verdict regardless of the error. (*People v. Houston* (2012) 54 Cal.4th 1186, 1223; *People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1535.) The dispositive nature of the eyewitness evidence makes it nearly certain that the instructional error, which led the jury to uncritically accept the questionable identification, infected the entire trial. The error deprived Rudd of his right to present a complete defense and have every element of the offense proved beyond a reasonable doubt.

VII. Referring the issue to the Judicial Council does not remedy the due process violation that Rudd suffered. This Court has the authority to pass judgment on jury instructions, while the Judicial Council's role is simply to collect information and make suggestions.

The People suggest that this Court turn the matter over to the Judicial Council. Doing so, however, does not resolve this case or provide Rudd with a remedy. Whether or not the Judicial Council is involved in future revisions to CALCRIM No. 315, Mr. Rudd's case is currently before the Court and he is requesting relief for the due process violation he has suffered as a result of the instructional error.

The Judicial Council has an advisory role but does not appear to enjoy the authority to declare instructions unconstitutional or decide whether or how to amend CALCRIM No. 315 so that it conforms with Due Process. While the Judicial Council "makes every effort to ensure that [the jury instructions] accurately state existing law," the fact remains that the "articulation and interpretation of California law, however, remains within the purview of the Legislature and the courts of review." (Cal. Rules of Court, Rule 2.1050(b).) An advisory committee of the Judicial Council and its advisory committees "establishes and maintains a process for

obtaining public comment on the jury instructions and assists the council in making informed decisions about jury instructions." (Cal. Rules of Court, rule 10.13; see also Appendix D, Judicial Council Governance Policies, Governance Process [advisory committees under California Rules of Court, rule 10.34(a), identify issues and concerns affecting court administration, recommend solutions and propose changes to "rules, standards, forms, and jury instructions."

In any event, this Court does have supervisory authority to act and should act to address Rudd's due process violation. In other cases, the Court has exercised its inherent supervisory power to revise jury instructions. (See, e.g., *People v. Engelman* (2002) 28 Cal.4th 436, 449 [forbidding use of juror misconduct instruction because it created a risk "to the proper function of jury deliberations that is unnecessary and inadvisable"]; *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1319-1320 ["The statutory definition of 'abandoned' in Family Code section 7822, subdivision (a), must be added to the instruction. An instruction on intent to abandon is also necessary."]; *People v. Lara* (1996) 44 Cal.App.4th 102, 110 [a supplementary instruction was imperative to explain to the jury a term that did not have a commonly understood definition in the context of the case].) Nothing would seem to prevent this Court from passing judgment and remedying the instruction error in Mr. Rudd's case.

CONCLUSION

Appellant Charles Henry Rudd respectfully requests that the Court determine that the instructional error made in this case deprived him of his rights to due process and therefore the judgment of conviction must be reversed.

Dated: August 2, 2019

Respectfully submitted,

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

I certify this brief contains 7520 words, including 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: August 2, 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 strong145629@gmail.com. I served the attached brief as follows.

APPELLANT'S REPLY 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 August 2, 2019:

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Attn: Hon. David Hoffer
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ELECTRONIC SERVICE: By sending from my electronic service address of strong145629@gmail.com, on August 2, 2019 at 1:30 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 August 2, 2019 Jeanine G. Strong