In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CHARLES HENRY RUDD,

Defendant and Appellant.

Case No. S250108

Fourth Appellate District, Division Three, Case No. G054241
Orange County Superior Court, Case No. 14CF3596
The Honorable David A. Hoffer, Judge

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ISSUES PRESENTED IN THE PETITION

[1.] Does instructing a jury with CALCRIM No. 315, which directs the jury to consider an eyewitness's level of certainty when evaluating an identification, violate a defendant's federal and state due process rights? [2.] Are rules that assign the trial court a stronger gatekeeping role in the admission of eyewitness identification required or advisable?[1]

INTRODUCTION

Defendant-Appellant Charles Rudd claims that he was deprived of due process when the trial court instructed the jury with CALCRIM No. 315, California's pattern instruction on the evaluation of identification evidence. That instruction includes, as one factor among many for the jury to consider, the identifying witness's level of certainty when he or she made the identification. Rudd contends that this single line of the instruction could lead jurors to overvalue the reliability of an eyewitness identification, and that the instruction therefore violates due process.

The argument is incorrect. Like CALJIC No. 2.92, which this Court previously approved, CALCRIM No. 315 refers to witness certainty in neutral terms. It is only one of over a dozen factors that the jury may find relevant in a given case in determining the truthfulness and accuracy of the witness's testimony. The instruction allows the jury to give the certainty factor any weight it deems appropriate, including no weight at all. Further,

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[1] Although Rudd's petition for review included questions about both jury instructions and admissibility (Pet. 5), the arguments in Rudd's opening brief address only the instructional issue. (See OBM 11 [listing only first issue presented].) Because Rudd has not discussed whether there should be "rules that assign the trial court a stronger gatekeeping role in the admission of eyewitness identification," this brief will not do so either. (See *People v. Clark* (2016) 63 Cal.4th 522, 552 [argument forfeited where defendant failed to raise it in the opening brief].)

expert testimony about the limitations and biases of eyewitness identifications may assist the jury in applying the factors, including the certainty factor. This factor thus does not unduly influence the jury's evaluation of the reliability of particular testimony—let alone mandate, or even encourage, a particular conclusion in a particular case. That is especially so when CALCRIM No. 315 is given together with other standard jury instructions on the evaluation of witness and expert testimony, as it was here.

Contrary to Rudd's contentions, there is no scientific consensus that an eyewitness's expression of certainty in an identification is categorically irrelevant to the identification's accuracy. Indeed, Rudd's own expert testified that a witness's expression of confidence can be highly relevant in certain circumstances. The lack of such consensus simply underscores why it would be inadvisable to invent a constitutional rule to address Rudd's concerns.

Avoidance of erroneous convictions is of the utmost importance to the jury's role in the criminal justice system. As with other jury instructions, there may be ways to improve CALCRIM No. 315 so that it would better assist jurors in their task. But such improvements should be proposed to and considered by the Judicial Council, in the process that California's Rules of Court set forth for the optimization of model instructions—not imposed in inflexible and unsupported constitutional terms.

The judgment should be affirmed.

STATEMENT OF FACTS

Charles Rudd and his codefendant, Desirae Lemcke, were charged with and convicted of crimes connected to the July 13, 2014, assault and robbery against Monica Campusano. (1CT 258-261; 2CT 310-317, 3CT 581-587.)

A. The Case Against Rudd

Campusano testified that on July 13, 2014, she went to visit a friend at the Royal Roman Motel in Santa Ana. (2RT 157-158.) On the way to her friend's room, Campusano passed by room 216, where a woman later identified as Lemcke was standing outside the room's open door. (2RT 159-161.) Just inside was a man later identified as Rudd. (2RT 161.)

Lemcke asked to borrow Campusano's phone. (2RT 159-160.) As Campusano handed her phone to Lemcke, Rudd stepped out and punched Campusano in the face. (2RT 161-162, 165.) He pulled her inside the room and hit her several more times. (2RT 162-163.) He kicked her in the head and stomach while she crouched on the ground. (2RT 167.) Campusano lost consciousness (2RT 163, 167), and at some point, her purse was taken from her (2RT 176-177.)

After the attackers left, Campusano went to the motel's office and contacted 911. (2RT 212, 214-215; 6RT 913.) She told the 911 operator that one of her assailants was a black man who was about 30 years old. (4CT 916, 918.) She described the other as a tattooed "American" woman who was also about 30 years old. (4CT 918-919.)

Police Officer Ricardo Velasquez, who met Campusano at the motel, noticed blood coming from her mouth and swelling in her jaw. (4RT 589.) Campusano told Velasquez that her male attacker was a large black man who was "approximately six three to six five, anywhere from 260 to 300 pounds, [and] balding with a goatee." (4RT 590.) She described the woman as "a heavyset white female, maybe around five six, over 200 pounds, [with a] tattoo around the neck area." (*Ibid.*)

Campusano was taken to the hospital, and she had surgery. (4RT 590; 2RT 191.) Afterwards, she had wires in her mouth for several weeks and could not eat solid food. (2RT 195-197.) The attack left the right side of her face looking different from the left. (2RT 197-198.)

Hotel records showed that Lemcke had checked into room 216 on July 8 and checked out on July 13. (3RT 400-401.) A records check revealed that Lemcke matched the description given by Campusano, and revealed the existence of a court order covering Lemcke and Rudd together. (4RT 591-592.) The order's description of Rudd—a black man "approximately six three over 250 pounds"—was consistent with Campusano's description of the male suspect. (4RT 592-593.) Based on that, Velasquez created a photo lineup consisting of six photos, with Rudd's photo in position number 5. (4RT 593; see 3CT 588 [exhibit list].)

That photo lineup was first presented to Campusano at the emergency room on the night of the attack. (4RT 594.) Velasquez read to Campusano a form admonishment used for photo lineups. (4RT 594-595.) Campusano signed the admonishment and looked at the lineup. (4RT 595.) She pointed to Rudd's photograph. (4RT 595-596.) When Velasquez asked her what she specifically recognized about the man in the picture, Campusano said she recognized his nose, mouth, and jaw area. (4RT 596.)

Campusano was interviewed again about the attack on October 15, 2014, by Officer Adrian Silva. (3RT 407.) Campusano told Silva that her male attacker was "six foot one to six foot three," weighed between 230 and 250 pounds, and had a tattoo on his neck that was partially covered by his clothing. (3RT 410, 459-460.) Campusano described the woman as a blond who weighed 250 pounds and was 35 years old. (3RT 410, 454.) Campusano told Silva that she had happened to see her female attacker again the day before the interview. (3RT 410.) During that encounter, Campusano noticed a tattoo on the woman's neck (*ibid.*), and saw the woman accompanied by a black man who was not the person who had attacked her (3RT 454, 476-477).

Silva read to Campusano the Santa Ana Police Department's printed admonishment for photo lineups. (3RT 412-413.) The admonishment

consisted of "five to seven instructions basically telling the victim to look at the photos carefully, to not feel compelled to identify anybody if they're not sure, to remind them that the hairs, mustaches, beards could be easily changed, as well as the lighting on the photo, it could be light or darker, things of that nature, but essentially to instruct the person to not feel compelled to pick someone out but to identify someone if they can from the photo based on their recollection." (3RT 412.) Campusano confirmed that she understood the instructions. (3RT 413.) Silva showed her a photo lineup of women, and Campusano identified Lemcke's photo as depicting the woman from the motel. (3RT 410-411, 413-414; see 3CT 588 [exhibit list].)

Based on Campusano's statement about the male attacker's neck tattoo, Silva also prepared two photos that showed neck tattoos without faces. (3 RT 416-417; see 3CT 588.) One showed Rudd's tattoo; the other showed the tattoo of another man, Marcus Horn. (3CT 588; 3 RT 416-417, 433.) On October 21, 2014, Silva went to Campusano's home to show her the photos. (3RT 417-418.) Silva told her he "wanted to see if the tattoo, the placement or what she remembered of the tattoo, was either similar or in fact the tattoo that I was going to show her," but stressed that she should "not feel compelled to identify somebody from these tattoos." (3RT 418.) Campusano looked at each picture individually, and then looked at them side by side. (*Ibid.*) She identified the tattoo belonging to Rudd as more like the one that she remembered on the person who assaulted her. (3RT 419.) Silva showed Campusano a photo of Rudd and asked her "if she remembered that this was a specific photo within the lineup that she had already identified," which she confirmed was the case. (3 RT 419-420; see 3CT 588.) Silva then showed Campusano another lineup of six photos of black men. This lineup did not include Rudd's photo, but did include a picture of Marcus Horn, whose tattoo had been shown to Campusano. (3

RT 421-422, 433; see 3CT 588.) Silva asked Campusano whether she recognized anyone in the lineup. Campusano said "none of these," pointed back to the previous separate photo of Rudd, and said "for sure it was [him]." (3RT 422.)

At trial, the prosecutor asked Campusano if she saw the man who beat her in court. (2RT 171.) She said yes, and pointed to where Rudd was sitting. (2RT 171.) When asked what Rudd was wearing, Campusano could not see and had to stand up before she described his clothing. (2RT 171, 284.) Campusano said she remembered Rudd's face, the tattoo on his neck, and his look "with anger." (2RT 178-179.)

B. Rudd's Defense

On cross-examination, defense counsel questioned Campusano about her honesty and motivation to lie. Defense counsel focused extensively on whether Campusano (who is transgender) was lying by using the first name Monica, and by spelling her name in varied ways. (See, e.g., 2RT 236-237, 240, 243-245, 247-248, 258-261.) He questioned her at length regarding her prior convictions for prostitution and lewd conduct. (4RT 557-580.) He implied that she had lied to the 911 dispatcher and the officers. (2RT 249-252.) He questioned the extent of her injuries and whether she really had wires in her jaw. (2RT 252-259, 268-273.) Defense counsel also impeached Campusano based on discrepancies between her testimony in court and her application for a U visa,[2] including the fact that her visa

[2] A "U visa," is a temporary nonimmigrant visa created by Congress to provide legal status for noncitizens who assist in the investigation of serious crimes in which they have been victimized. (See 8 U.S.C. § 1101(a)(15)(U); *People v. Morales* (2018) 25 Cal.App.5th 502, 506.)

application said she had been "kidnapped." (4RT 538-539, 550, 552.)[3] Campusano acknowledged that she could have trouble getting her U visa if authorities did not view her as cooperative in the investigation of her attack. (4RT 555-556.) Campusano also acknowledged that she was concerned about her medical bills and that she had sought financial assistance from the government. (2RT 278-283.)

With respect to Campusano's identifications of Rudd, defense counsel in cross-examination suggested that they were of little value, given that, in court, Campusano had identified him without standing up despite her obstructed view from the witness stand. (2RT 284-288; see also *id.* at 285, 288 [Campusano's statements that "[i]t's ... not necessary for me to see him," and "it was logical" that Rudd would be in court].)

Rudd called a psychology professor, Dr. Mitchell Eisen, as an expert witness. (5RT 714-797.) With respect to in-court identifications, Eisen explained that by the time of trial, witnesses have come to believe, and "are prepared to reassert their belief," that the defendant committed the crime. (5RT 758.) Eisen explained that such belief "is the end product after a long process," starting from "the very first viewing," and accumulating through "every identification procedure that follows and every discussion and every piece of information they get regarding that" until they appear in court. (*Ibid.*) The identification in court, therefore, is "not a memory test." (*Ibid.*; see *ibid.* ["Usually you have the defendant sitting at the defense table. It's pretty obvious who we're talking about."]) Instead, it is "an assertion of the person's belief that they've come to believe ... that this is, in fact, the culprit." (*Ibid.*)

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[3] See 1CT 8 [original information, charging defendants with "Attempt-Kidnapping to Commit Robbery"], capitalization altered.

Eisen also discussed the relationship between a witness's expression of confidence in his or her identification and the accuracy of that identification. According to Eisen, "[t]he research has come a long way" on that subject. (5RT 758.) Eisen explained that although some experts may have previously believed that "confidence is not related to accuracy in any regard," in fact, "that's not really true." (5RT 758-759.) Instead, "confidence is useful" if "you have a fair and unbiased lineup," the identification is "done soon enough after the events when the person has a good memory," and the witness reports a "strong recognition." (5RT 759.) However, Eisen continued, "outside that window" confidence is "not related to accuracy in any regard," because the witness's confidence level will be affected by information he or she learned after the crime occurred. (5RT 759-760; see *ibid.* [noting that, as time goes on, a witness may learn that the person previously picked was suspected by police, that there is other evidence implicating him, or that the police believe the identification to be accurate].) Eisen testified that there have been cases where a witness claimed one-hundred percent certainty about an identification, but physical evidence such as DNA proved the identification mistaken. (5RT 768.) Eisen also confirmed that, while a confident eyewitness can be correct in court, a confident eyewitness can also be wrong in court. (5RT 795-796.)

Rudd also called several additional witnesses. Thomas Gleim, a private investigator, testified that he had shown photos of Rudd and of Marcus Horn to Chung Ae Kim, a motel clerk who had been on duty the night of the attack. (6 RT 923-924.) He said that when shown Rudd's photo, Kim said that was not a person she had noticed during Lemcke's stay at the hotel. (6RT 923-925.) When shown Horn's photo in a lineup, Gleim said, Kim indicated that several of the pictures in the lineup looked the same to her, and that she could not identify Horn's photo. (6RT 923-925.) When Kim testified, however, she remembered Campusano's picture

clearly, but was unclear about what she had told the investigator—and what she would have known—about the people whom Lemcke was with. (6RT 902-912, 915-918, 920.) Suzanna Ryan, a forensic DNA consultant, testified that the DNA that police had collected from Campusano's clothing after the attack appeared to come from only two people, one of whom was Campusano. (5RT 687-688.) Based on the "low level data" and assuming that there were only two contributors to the sample, Ryan opined that Rudd was excluded as a contributor. (5RT 695-697.) Ryan acknowledged, however, that a person may not necessarily leave behind DNA when he or she touches an object. (5RT 697.)[4]

C. Jury Instructions

The People proposed that the Court instruct the jury with CALCRIM No. 315. (2CT 341). That instruction reads:

> You have heard eyewitness testimony identifying the defendants. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony.
>
> In evaluating identification testimony, consider the following questions:
>
> - Did the witness know or have contact with the defendants before the event?
>
> - How well could the witness see the perpetrator?

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[4] On rebuttal, the prosecution called its own forensic analyst, Robert Binz, to testify about the DNA evidence. (5RT 799, 801-802.) Binz explained that Campusano was the major contributor of DNA in the sample, and less than 5% of the sample was contributed by any other contributors. (5RT 804.) That prevented any interpretation of the data beyond identifying Campusano's contribution. (5RT 804.) As a result, Binz testified, he could not say how many other people's DNA was in the sample besides Campusano's, and Rudd could not be excluded as a potential contributor. (5RT 801, 804.)

- What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation?
- How closely was the witness paying attention?
- Was the witness under stress when he or she made the observation?
- Did the witness give a description and how does that description compare to the defendants?
- How much time passed between the event and the time when the witness identified the defendants?
- Was the witness asked to pick the perpetrator out of a group?
- Did the witness ever fail to identify the defendants?
- Did the witness ever change his or her mind about the identification?
- How certain was the witness when he or she made an identification?
- Are the witness and the defendants of different races?
- Was the witness able to identify other participants in the crime?
- Was the witness able to identify the defendants in a photographic or physical lineup?
- Were there any other circumstances affecting the witness's ability to make an accurate identification?

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

(3CT 521-524.)

Rudd's attorney objected to the inclusion of witness confidence as a factor in CALCRIM No. 315, arguing that that line of the instruction should be deleted "because there is absolutely no authority supporting any type of correlation between witness competence and witness accuracy." (6RT 889, citing *People v. Sánchez* (2016) 63 Cal.4th 411, 494-499 (*Sánchez*), conc. opn. of Liu, J.)

The trial court denied the objection. The court noted that the defense's expert witness, Dr. Eisen, had testified about two features of eyewitness confidence. Eisen "testified that confidence, when it comes to the initial recognition, based on a valid and non-suggestive photo spread, is a factor that ought to be considered." (6RT 892; see also 6RT 891.) Eisen also testified, however, that an identifying witness's feeling of confidence can be "built up later on through additional information provided to the ... person making the identification." (6RT 891-892.) The court reasoned that CALCRIM No. 315's inclusion of eyewitness certainty as a factor for consideration was "consistent with [that] testimony"—noting that Rudd's counsel could argue, based the expert testimony, that Campusano's confidence could have changed over time. (*Id.* at 892.) The instructions to the jury therefore included CALCRIM No. 315 with the confidence factor intact. (3CT 521-524.)

The court also delivered various other instructions that bore on the identification evidence. For instance, CALCRIM No. 200—a general instruction on the duties of the judge and jury—instructed the jury that it is "up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial." (3CT 496.) It also told the jury to "[p]ay careful attention to all of these instructions and consider them together." (3CT 497.) CALCRIM No. 220, in turn, instructed the jury to "impartially compare and consider all the evidence that was received throughout the entire trial," and stated that "[u]nless the

evidence proves the defendants guilty beyond a reasonable doubt, they are entitled to an acquittal and you must find them not guilty." (3CT 505.) CALCRIM No. 301 informed the jury that "[t]he testimony of only one witness can prove any fact," but that "[b]efore you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." (3CT 519.) And CALCRIM No. 226—a general instruction about how to evaluate testimony—informed the jury:

> 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. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.
>
> In evaluating a witness's testimony, you may consider anything that tends to prove or disprove the truth or accuracy of that testimony.

(3CT 513.) It then listed 11 factors, and warned that "[p]eople sometimes honestly forget things or make mistakes about what they remember" and that "two people may witness the same event yet see or hear it differently." (3CT 513-515.)

D. Verdict and Sentence

During the trial, the court granted Rudd's motion under section 1118.1 to dismiss a mayhem charge (Pen. Code § 203; count 2) that was alleged only against him, and granted the People's motion to dismiss a battery with serious bodily injury charge (Pen. Code § 243, subd. (d); count 4) against Lemcke. (1CT 133; 5RT 656-657, 668; 2CT 311.)[5] On all

[5] Subsequent statutory references are to the Penal Code, unless otherwise designated.

remaining charges and allegations, the jury delivered convictions and true findings. (3CT 581-588.) Rudd and Lemcke were each convicted of second degree robbery (§§ 211, 212.5, subd. (c); count 1) and aggravated assault (§ 245, subd. (a)(1); count 3), and Rudd was convicted of battery with serious bodily injury (§ 243, subd. (d); count 4). With respect to the robbery and aggravated assault charges, the jury also found true the allegation that Rudd personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)). In subsequent proceedings, the trial court found true the allegations that Rudd had served two prior prison terms (§ 667.5, subd. (b)) and that Lemcke had served one prior prison term (§ 667.5, subd. (b)). (1CT 76, 146.)

The court sentenced Rudd to six years in prison—three years for the robbery plus a consecutive three years for the great bodily injury finding. (1CT 76.) It imposed and stayed two-year sentences for the aggravated assault and battery charges under section 654. (1CT 77.) The court sentenced Lemcke to three years in prison for the robbery, with a two-year sentence for aggravated assault likewise imposed and stayed under section 654. (1CT 148.)

E. The Appeal

The Court of Appeal affirmed. (Slip opn. at 13.) Rudd's sole claim was that his due process rights were violated by CALCRIM No. 315's instruction for the jury to consider a witness's level of certainty in evaluating that witness's identification evidence. (*Id.* at 10.) The court noted that Justice Liu's concurring opinion in *Sánchez* had raised questions about whether the inclusion of witness certainty as a factor for juries to consider remained proper in light of intervening scientific research and case law. (*Id.* at 13, citing *Sánchez, supra,* 63 Cal.4th at p. 498, conc. opn. of Liu, J.). However the court considered Rudd's claim controlled by this

Court's decisions in *People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232 (*Johnson*), and *Sánchez, supra,* which approved of a similar instruction, CALJIC No. 2.92. (*Ibid.*)

This Court granted Rudd's petition for review.

STANDARD OF REVIEW

A jury instruction's propriety is reviewed "independently" or de novo, because "[t]he underlying 'question is one of law, involving ... the determination of ... applicable legal principles ....' [Citation.]" (*People v. Alvarez* (1996) 14 Cal.4th 155, 217, second ellipses in original.)

ARGUMENT

I. INCLUDING THE EYEWITNESS'S LEVEL OF CERTAINTY IN A LIST OF FACTORS FOR JURORS TO CONSIDER IN EVALUATING AN IDENTIFICATION DOES NOT VIOLATE DUE PROCESS

Rudd contends that the Due Process Clause forbids a court from instructing a jury to consider an eyewitness's level of certainty, alongside the other factors listed in CALCRIM No. 315, in evaluating whether the witness's identification is truthful and accurate. (OBM 22-45.)

That argument is incorrect. CALCRIM No. 315's reference to witness certainty does not tell jurors how much weight, if any, to give that factor or what conclusions to draw from it, and jurors do not consider that single factor alone, viewed in isolation. Further, juries apply the instruction on eyewitness identification together with other instructions requiring them to consider all evidence in the case, informing them of their power to accept or reject witness testimony, and (in this case, like many others) requiring them to consider pertinent expert testimony about identifications. The factor Rudd complains about—a single line in a three-page instruction—does not lower the prosecution's burden of proof or deny defendants a meaningful opportunity to present a complete defense. Instead, the jury

instructions as a whole and the overall context of the case gave ample opportunity for Rudd's counsel to present evidence and argument for why the jury should doubt the identification—demonstrating not only that there was no error, but also that any error would be harmless on the record of this case.

A. Like the Instructions Approved in *Wright* and *Johnson*, CALCRIM No. 315 Includes Witness Certainty Among Numerous Neutrally Described Factors

This Court has rejected constitutional challenges to CALCRIM No. 315's unofficial but highly similar predecessor, and the reasoning of those cases applies equally here.

1. In *People v. Wright* (1988) 45 Cal.3d 1126 (*Wright*), this Court considered a defendant's claim that he was deprived of a fair trial when the trial court declined to give the defendant's requested instructions on eyewitness identification. (*Id.* at pp. 1131-1132.) The Court held that the trial court was correct to reject proposed instructions that were "argumentative." (*Id.* at pp. 1134-1135; see *id.* at p. 1135 ["'An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.'"], quoting *People v. McNamara* (1892) 94 Cal. 509, 513.) In contrast, the Court held, it was error to deprive the defendant of an instruction "list[ing] certain factors, supported by the evidence in the case, that are relevant to the jury's evaluation." (*Id.* at pp. 1138-1139.) Elaborating on this distinction, the Court reasoned that "a proper instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence." (*Id.* at p. 1141.) However, the Court continued, "[t]he instruction should *not* take a position as to the *impact* of each of the

psychological factors listed." (*Ibid.*; see *ibid.* [explaining that it would "improperly invade the domain of the jury, and confuse the roles of expert witnesses and the judge," for an instruction to "'explain[]' the influence of the various psychological factors" or "endorse, and require the jury to follow, a particular psychological theory relating to the reliability of eyewitness identifications"].) The Court reasoned that any "explanation of the *effects* of [factors listed in the instruction] is best left to argument by counsel, cross-examination of the eyewitnesses, and expert testimony where appropriate." (*Id.* at p. 1143.)

Wright therefore held that "CALJIC No. 2.92 or a comparable instruction should be given when requested in a case in which identification is a crucial issue and there is no substantial corroborative evidence. [Citation.]" (45 Cal.3d at p. 1144.) That instruction was appropriate, the Court explained, because "rather than drawing factual inferences favorable to defendant from specific items of testimony, it 'merely intone[s] considerations any jury must make in evaluating an eyewitness identification.' [Citation.]" (*Ibid.*) CALJIC No. 2.92 began by informing the jury that

> Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to any of the following[.]

(*Wright, supra*, 45 Cal.3d at pp. 1165-1166.) It then listed 13 factors, the eleventh of which was "[t]he extent to which the witness is either certain or uncertain of the identification." (*Ibid.*)

This Court considered a specific challenge to CALJIC No. 2.92's certainty factor in *People v. Johnson* (1992) 3 Cal.4th 1183. (See *id.* at p. 1231 [considering whether "the trial court erred in instructing the jury that

the extent to which the witness was either certain or uncertain of the identification was a factor to consider in assessing eyewitness testimony"].) The defendant's expert witness had testified "that a witness's confidence in an identification does not positively correlate with its accuracy" (*ibid.*)—an argument that matches what Rudd claims here (OBM 22) but goes beyond what Rudd's expert testified to at trial (see p. 16, *supra*). The defendant argued that the witness certainty line in CALJIC No. 2.92 was improper because it was not supported by any evidence and because it "impl[ied] the jury could not rely on [the expert's] evidence." (*Johnson, supra,* 3 Cal.4th at p. 1231.) This Court rejected both challenges, explaining that the instructions as a whole—including not only the identification instruction but also a separate instruction on expert testimony—properly left the jury free to accept or reject the expert's view, and therefore "to infer that [the witness's] positive identification was not necessarily an accurate one." (*Id.* at pp. 1231-1232.)

Finally, this Court considered CALJIC No. 2.92's certainty factor in *People v. Sánchez* (2016) 63 Cal.4th 411. There, the defendant alleged that scientific studies supported "at best, a weak correlation between witness certainty and accuracy." (*Id.* at p. 461.) The Court noted that *Wright* had "specifically approved CALJIC No. 2.92, including its certainty factor," and that *Johnson* had "reiterated the propriety of including this factor." (*Id.* at 462.) Because Sánchez's case included "uncertain as well as certain identifications," and because the instruction would not have had a prejudicial effect on Sánchez's case, the Court determined that "[a]ny reexamination of our previous holdings ... should await a case involving only certain identifications." (*Id.* at p. 462.) In its discussion of prejudice, however, the Court characterized CALJIC 2.92 as citing the certainty factor "in a neutral manner," that told "the jury only that it could consider" certainty without "suggest[ing] that certainty equals accuracy." (*Ibid.*)

2. *Wright*'s, *Johnson*'s, and *Sánchez*'s reasoning about CALJIC No. 2.92 is equally applicable to CALCRIM No. 315. CALCRIM No. 315 tells the jury to "consider" "[h]ow certain was the witness when he or she made an identification." That is "neutral" language. (*Wright*, 45 Cal.3d at p. 1141; *Sánchez*, 63 Cal.4th at p. 462.) It does not "suggest that certainty equals accuracy" (*Sánchez*, 63 Cal.4th at p. 462) or encourage the jury to value witness certainty above any other factor that is listed in the instruction or that the jury thinks of on its own (see 3CT 524 [instructing jury to consider "any other circumstances affecting the witness's ability to make an accurate identification"]). Nor does it "endorse" or "require the jury to follow" any "particular psychological theory relating to the reliability of eyewitness identifications." (*Wright*, 45 Cal.3d at p. 1141.) Instead, the instruction leaves to the jury the task of drawing conclusions about what should be inferred from a witness's certainty or uncertainty and how that should be weighed in connection with the numerous other factors included in the instruction.

As Rudd observes (OBM 28), CALCRIM No. 315 instructs jurors to "consider" its listed factors, rather than stating that the jury "may" or "can" consider them. But that does not detract from the instruction's neutrality. The instruction also told jurors to "consider" various other factors that—in this case and others—could lead the jury to discount the significance of a witness's asserted certainty, such as the passage of time between the incident and identification, whether the witness was under stress, and whether the witness and defendant were of different races. In any event, the jury was already under a duty to consider any admitted evidence pertaining to an identifying witness's certainty, because of the court's statutorily required instruction (which Rudd does not contest) to "impartially compare and consider all the evidence that was received throughout the entire trial." (3CT 505 [CALCRIM No. 220]; see § 1096

[stating that determinations of reasonable doubt require "consideration of all the evidence"]; *Victor v. Nebraska* (1994) 511 U.S. 1, 16 [discussing similar instruction].)

3. Rudd's due process argument is further weakened when CALCRIM 315 is viewed in context of the jury instructions as a whole. "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. [Citation.]" (*Cupp v. Naughten* (1973) 414 U.S. 141, 146-147; *People v. Mills* (2012) 55 Cal.4th 663, 677; see 3CT 497 [CALCRIM No. 200 instruction to "[p]ay careful attention to all of these instructions and consider them together"].)

CALCRIM No. 226 informed the jury that it "alone, must judge the credibility or believability of the witnesses," and that it could choose to "believe all, part, or none of any witness's testimony." (3CT 513.) Jurors were told to "[c]onsider the testimony of each witness," but to decide for themselves "how much of it you believe." (*Ibid.*) In "deciding whether testimony is true and accurate," that instruction continued, jurors should use "common sense and experience" and "consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony." (*Ibid.*) The instruction made clear that a witness could be wrong notwithstanding her certainty, through its admonitions that "[p]eople sometimes honestly forget things or make mistakes about what they remember," and that "two people may witness the same event yet see or hear it differently." (3CT 514.) In conjunction, CALCRIM No. 226 and CALCRIM No. 315 effectively informed the jury that an eyewitness who is certain about her identification may nonetheless have made a mistake—and that the jurors alone have the responsibility to decide whether that has happened. (See *People v. Sattiewhite* (2014) 59 Cal.4th 446, 475 [jurors are presumed to be "capable of understanding and correlating all jury instructions which are given."], internal quotation marks omitted.)

Rudd's jury was required to consider the potential unreliability of witness certainty by another instruction as well. Rudd—like many other defendants—presented expert testimony on the subject of eyewitness identification and recollection.[6] CALCRIM No. 332 instructed Rudd's jury that it "must consider" Dr. Eisen's opinions and decide their "meaning and importance." (2CT 442, quoting CALCRIM 332; see also *ibid.* ["consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion"].) Eisen's testimony did not align with Rudd's current claims about a complete lack of correlation between an eyewitness's certainty and the accuracy of identification. (Compare OBM 22-23, with pp. 37-38, *infra*.) But the expert left no doubt that a witness can feel certain about his or her identification yet be completely wrong—and he explained in detail how certain circumstances make expressions of certainty less valuable. (5RT 758-762; see *id.* at pp. 759, 761 [stating that, except in particular circumstances, "confidence is not related to accuracy," because it could be influenced by "feedback" and "hindsight bias"]; *id.* at pp. 730-732 [explaining that although a person's memory of an event in fact becomes less accurate as time passes, the person may nonetheless feel more certain of the memory]; *id.* at pp. 747, 750 [describing how witnesses become more "committed" to a particular choice

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[6] See generally *People v. McDonald* (1984) 37 Cal.3d 351, 377 ["When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony."], overruled on other grounds, *People v. Mendoza* (2000) 23 Cal.4th 896, 914.

if they are told that they had previously identified the person]; *id.* at p. 796 [agreeing that there are cases where the witness was "a hundred percent certain ... but the evidence proved that they were actually mistaken"].)

Even if there were ambiguity in CALCRIM No. 315 itself, there is no "'reasonable likelihood that the jury misunderstood and misapplied the instruction'" (*People v. Young* (2005) 34 Cal.4th 1149, 1202, citations omitted), in light of the additional jury instructions, the expert's testimony, and the arguments of counsel. (See p. 42, *infra* [discussing closing arguments].) The instructions as a whole appropriately respected the jury's right to evaluate and weigh the evidence when deciding the ultimate issue of the attacker's identity and did not violate due process.

B. The Instruction Did Not Lower the Prosecution's Burden of Proof, Prevent Rudd from Presenting a Complete Defense, or Mislead the Jury

"[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." (*People v. Mills*, *supra*, 55 Cal.4th at p. 677.) Rather, to support a due process claim "it must be established not merely that the instruction is undesirable, erroneous, or even universally condemned, but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643, internal quotation marks omitted, citing *Cupp*, *supra*, 414 U.S. at p. 146.) Rudd identifies no specific due process right that was violated by the instruction he challenges.[7]

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[7] Although Rudd argues that that the instruction violated his rights under both the federal and state Constitutions (OBM 34), he does not assert that the analysis under the two due process clauses should differ. And there (continued...)

1. The instruction did not "lower[] the prosecution's burden of proof" with respect to identity. (OBM 34.) It did not, for instance, require the jury to conclude that Rudd was the attacker if Campusano was certain of her identification, or require Rudd to disprove his identity as the attacker in light of Campusano's statements. (*Cf. Francis v. Franklin* (1985) 471 U.S. 307, 314 [describing the due process problem with a mandatory presumption that "relieves the State of the burden of persuasion on an element of the offense"].) Nor did it tell jurors that the witness's certainty was a "sole and sufficient basis" on which to determine identity. (*County Court of Ulster County v. Allen* (1979) 442 U.S. 140, 167.) Instead, CALCRIM No. 315 instructed Rudd's jurors to consider *all* evidence that could bear on the reliability of the identification, and listed witness certainty as merely one potential factor among many. And the instruction concluded by reinforcing the principle that "[t]he People have the burden of proving beyond a reasonable doubt that it was the defendants who committed the crimes," and that "[i]f the People have not met this burden, you must find the defendants not guilty." (3CT 524.)

(...continued)
is no substantial difference relevant to this case. (See generally *People v. Flood* (1998) 18 Cal.4th 470, 481 ["under the due process guarantees of both the California and United States Constitutions, the prosecution has the burden of proving beyond a reasonable doubt each essential element of the crime"]; *People v. Lucas* (1995) 12 Cal.4th 415, 456 ["The state and federal constitutions guarantee the defendant a meaningful opportunity to present a defense."]; *American Liberty Bail Bonds, Inc. v. Garamendi* (2006) 141 Cal.App.4th 1044, 1057, fn. 11 ["The due process clauses under the federal and state constitutions are considered to be co-extensive and to have the same scope and purpose."]; but see pp. 35-36, *infra* [discussing state-constitutional due process holding in *People v. Ramos* (1984) 37 Cal.3d 136].)

The United States Supreme Court has rejected a due process challenge where allegations of an instruction's non-neutrality were far more substantial than is the case here. In *Cupp*, the trial court instructed a jury: "'Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption.'" (*Cupp*, *supra*, 414 U.S. at p. 142.) Many courts had disapproved of such instructions under their supervisory powers. (*Id.* at pp. 145-146.) When considering the instruction's constitutionality, however, the Supreme Court rejected the defendant's argument that the presumption impermissibly "shifted the State's burden to prove guilt beyond a reasonable doubt and forced [him] instead to prove his innocence." (*Id.* at p. 143.) "[I]n the context of the overall charge" (*id.* at p. 147), the Court reasoned, the instruction left the jury "free to exercise its collective judgment to reject what it did not find trustworthy or plausible" (*id.* at p. 149; see *ibid.* [noting instructions on the State's duty to prove guilt beyond a reasonable doubt and the presumption of innocence]; *ibid.* [noting instructions to consider the witness's manner, the nature of the testimony, and anything else relating to the witness's possible motivation to speak falsely]. Notwithstanding the far-from-ideal language in the instruction at issue, *Cupp* held that due process was not violated.

Similarly, in *People v. Jackson* (1996) 13 Cal.4th 1164, this Court upheld four instructions about defendants' consciousness of guilt. (See *id.* at pp. 1222-1223 & fns. 12-13 [quoting CALJIC Nos. 2.03, 2.04, and 2.06 instructions that the jury may "consider" the defendant's "willfully false or deliberately misleading statements," attempts to "persuade a witness to testify falsely or ... fabricate evidence," and attempts to "suppress evidence against himself" as circumstances "tending" to "prove" or "show" a

"consciousness of guilt"]; *id.* at p. 1222 & fn. 12 [quoting CALJIC No. 2.52 instruction that the jury may consider flight immediately after the commission of a crime in light of other facts to decide the question of the defendant's guilt or innocence].) *Jackson* rejected the defendant's contention that the instructions at issue impermissibly reduced the prosecution's burden of proof. Instead, the Court reasoned, "each of the four instructions made clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior." (*Id.* at p. 1224.) Moreover, the Court explained, the instructions had a "cautionary" effect that could potentially "benefit[] the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*Ibid.*)

Finally, the Court of Appeal in *People v. Catley* (2007) 148 Cal.App.4th 500, 506-508 (*Catley*), considered a due process challenge to California's statutory instruction on the credibility of witnesses with cognitive impairment. In accordance with Penal Code section 1127g and CALCRIM No. 331, the trial court had instructed: "'In evaluating the testimony of a person with a cognitive impairment, consider all of the factors surrounding that person's testimony, including his or her level of cognitive development. [¶] Even though a person with a cognitive, or mental impairment ... may perform differently as a witness because of his or her level of cognitive development, that does not mean he or she is any more or less credible than another witness. [¶] You should not discount or distrust the testimony of a person with a cognitive ... impairment solely because he or she has such a[n] impairment.'" (*Id.* at p. 506, brackets and ellipses in original.) The defendant argued that the instruction effectively

lessened the prosecution's burden of proof. (*Ibid.*) The court observed that section 1127f requires a similar instruction where a child testifies, and that multiple cases had rejected the claim that the child-witness instruction unduly inflates such children's testimony. (*Id.* at p. 507 [discussing cases].) Based on those precedents, the court concluded that the instruction on mentally impaired witnesses was constitutional as well: It merely "informs the jury it should not decide whether an individual with a developmental disability or cognitive impairment is a credible witness based solely on the disability or impairment," while "advis[ing] the jury the level of the witness's development disability or cognitive impairment is one factor it must consider." (*Id.* at p. 508.)

Like the instructions in *Cupp*, *Jackson*, and *Catley*, CALCRIM No. 315 leaves the weight and significance of the certainty factor to the jury's discretion. It addresses a factor that jurors may or may not find pertinent in a given case—and it does so in language far more neutral than the instruction in *Cupp* (which invited jurors to "presume[]" a witness's truthfulness) or that in *Jackson* (which characterized a defendant's deceit as "tending" to show his awareness of guilt). Moreover, by including witness certainty among a long list of other factors, the instruction as a whole makes clear that witness certainty alone is not determinative—the jury may not simply take the word of such a witness as true but must instead consider *all* factors that could bear on the veracity of her testimony. (Cf. *Jackson*, *supra*, 13 Cal.4th at p. 1224 [approving of an instruction that "admonish[ed] the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory"].)

2. The instructions likewise did not preclude Rudd from "present[ing] a complete defense." (OBM 35; see, e.g., *California v. Trombetta* (1984) 467 U.S. 479, 485.) The instruction allowed the jury to credit Rudd's contentions—made through cross-examination and Rudd's expert

witness—that the accuser had identified the wrong person. Indeed, the instruction gave the jury the tools to reach that conclusion, by acknowledging (especially in conjunction with CALCRIM No. 226, CALCRIM No. 332, and Eisen's testimony) that the accuracy of an eyewitness's identification may be undercut by a multitude of factors. (Cf. *Cupp, supra*, 414 U.S. at p. 149 [rejecting due process challenge to instruction that acknowledged various ways a witness could be discredited].) As the closing arguments demonstrated, the instructions placed no obstacles in the way of Rudd's argument that witness certainty does not indicate accuracy. (See 6RT 992 [counsel's argument that "[a] lot of people think the more confident you are in the eyewitness identification, the more accurate it can be, but nothing could be farther from the truth"]; 7RT 1017 ["research is abundant showing that people can make 100 percent positive eyewitness identification and yet be 100 percent wrong"]; 7RT 1017-1018 ["Just remember Dr. Eisen's testimony, Confidence does not equal reliability. Confidence does not equal accuracy."]; 6RT 994 ["a lot of innocent people are wrongfully convicted on eyewitness identification"]; 7RT 1019 ["the fact that this witness is able to come in here and make 100 percent positive identification is really ... meaningless"].)

3. Rudd asserts, in cursory fashion, that CALCRIM No. 315 is "incomplete and misleading by omission," because it does not provide "adequate information," and therefore causes jurors to "default[] to the common misperception that a witness's certainty correlates with his or her accuracy." (OBM 29-30.) But CALCRIM No. 315 lists witness certainty as only one factor among many, presenting the jury with multiple bases on which to reject the identification of a witness notwithstanding that witness's expression of certainty. And Rudd's "default" argument is particularly inapplicable to Rudd's case, since his jury was instructed to consider his

expert witness's explanation noting a more complex relationship between witness certainty and accuracy. (See p. 16, *supra*.)

The argument is also apparently without precedent in California law. The closest analogue to Rudd's "misleading by omission" theory would appear to be *People v. Ramos* (1984) 37 Cal.3d 136. But that case's reasoning and circumstances provide little support for Rudd's argument. *Ramos* considered a statute requiring that juries in capital cases, deciding between a death sentence and life-without-parole, be instructed that "'a sentence of confinement to state prison for a term of life without the possibility of parole may in [the] future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.'" (*Id.* at p. 150.) Although the U.S. Supreme Court had upheld that instruction under the federal due process clause, this Court concluded that state constitutional standards were violated for two reasons. First, the Court reasoned, the instruction was "seriously misleading" because it "would reasonably be understood by the average juror to mean, by negative implication, that while a sentence of life without possibility of parole may be commuted, a sentence of death may not." (*Id.* at p. 153.) Second, the instruction invited jurors to "consider matters that are ... totally speculative and that should not, in any event, influence the jury's determination"—namely, the possibility of gubernatorial clemency. (*Id.* at p. 155.)

Ramos provides no support for invalidating the quite different instruction in this case. Whether an eyewitness's identification is truthful and accurate is properly determined by the jury, and CALCRIM No. 315, unlike the instruction in *Ramos*, does not invite jurors to speculate as to improper considerations. Moreover, the instruction in *Ramos* was likely not only to mislead jurors but to do so in a particularly pernicious way with no parallel here. Jurors are instructed to accept the judge's explanations of

law, and the availability of executive clemency is something that jurors would rightly view as a legal issue. The *Ramos* instruction invited jurors to conclude that the judge had implicitly stated a position on an issue of law that jurors were powerless to second-guess. CALCRIM No. 315, in contrast, tells jurors that they alone may determine whether an identification was accurate. Witness certainty is listed only near the end of a long list of factors bearing on that inquiry, and jurors are told—through CALCRIM No. 315's final catch-all factor and other instructions—to consider all relevant evidence. (See pp. 18, 26, *supra*.) And CALCRIM No. 220 empowers jurors to employ their own judgment in determining whether to believe or disbelieve such testimony. Unlike the instruction in *Ramos*, CALCRIM No. 315—especially in conjunction with other instructions—implies no erroneous principle of law to which the jury must defer.[8]

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[8] Rudd does not argue that the instruction violated his more general right to "a fundamentally fair decision-making process." (*Ramos*, *supra*, 37 Cal.3d at p. 153.) "[T]he category of infractions that violate 'fundamental fairness'" has been defined "very narrowly." (*Dowling v. United States* (1990) 493 U.S. 342, 352.) Here, the instructions told the jury to consider a witness's certainty among a multitude of other factors, told the jury to also consider expert testimony casting doubt on the importance of the certainty factor, and reiterated that the prosecution had the burden to prove identity beyond a reasonable doubt. Defense counsel then discussed the instructions and expert testimony in tandem, using the latter to argue that the certainty factor was of little use in the case. (See p. 42, *infra*.) In such circumstances, Rudd cannot be said to have suffered from a fundamentally unfair process. (Cf. *People v. Riggs* (2008) 44 Cal.4th 248, 310-311 [instruction on defendant's failure to comply with discovery obligations did not make the defendant's trial fundamentally unfair, where the instruction was "a proper statement of the applicable law, from which the parties could argue inferences that might (or might not) be drawn from the evidence presented at trial"].)

C. The Studies and Out-of-State Decisions Cited by Rudd Do Not Support His Due Process Challenge

Rudd also attempts to support his due process argument by citing scientific studies and decisions from other jurisdictions. Those arguments fall short.

1. Rudd asserts that the "scientific communit[y]" has "reached a consensus that an eyewitness's certainty does not correlate with accuracy." (OBM 22; see *id.* at 24 [discussing a "'virtually unanimous'" consensus that "'there is no correlation whatsoever between eyewitness certainty and accuracy'"], citation omitted; *id.* at 23-24 [arguing that California's jury instructions should reflect "what the research and legal scholarship has now confirmed, that an eyewitness' certainty does not predict or correlate with accuracy"].)

It is doubtful, to begin with, that empirical research that was not presented in the trial court, and not subject to judicial factfinding processes, could render the trial court's decision to give an instruction unconstitutional.[9] That is particularly so since Rudd's current contention contradicts the expert evidence that he did present to the trial court. Dr. Eisen acknowledged that "a few years ago," a researcher specializing in eyewitness identifications "might say something like confidence is not related to accuracy in any regard." (5RT 758-759.) But, Eisen continued, that prior understanding is "not really true." (5RT 759; *see ibid.* [stating

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[9] See *People v. Lewis* (2009) 46 Cal.4th 1255, 1316-1317 [holding that CALJIC No. 8.88's definition of mitigation adequately explained the concept, notwithstanding empirical research "not part of the record and not subject to cross examination, suggesting that substantial numbers of persons, given the standard instruction, misunderstand mitigation"], quoting *People v. Boyer* (2006) 38 Cal.4th 412, 486, and citing *People v. Welch* (1999) 20 Cal.4th 701, 773.

that research has now identified that, under particular circumstances, "confidence is useful"].)

Indeed, articles that Rudd cites to this Court (OBM 22, fn. 3) acknowledge the potential usefulness of certainty evidence. (See Leippe et al., *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions* (2009) 33 Law & Hum. Behav. 194, 194 ["There is evidence that confidence is diagnostic of accuracy under some circumstances and can therefore contribute to valid decisions in the prosecution of a criminal case."]; Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later* (2009) 33 Law & Hum. Behav. 1, 18 ["Given no feedback at all, a witness' expression of certainty at the moment of the identification is in fact correlated (albeit imperfectly) with the accuracy of the identification."].)

Additional research confirms that view. For instance, Rudd cites a 2009 article by Gary Wells as evidence of a purported consensus that eyewitness certainty has no relation to accuracy. (OBM 22, fn. 3.) According to that author's recent work, however, "eyewitness identification researchers have discovered that when eyewitnesses are tested using appropriate identification procedures, the confidence they express can be, and usually is, a highly reliable indicator of accuracy." (Wixted & Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis* (2017) 18 Psychol. Science in the Pub. Int. 10, 11; see *ibid.* ["a blanket disregard for eyewitness confidence not only is at odds with what has been learned in recent years but also can contribute both to the wrongful conviction of innocent suspects and to the unwarranted removal from suspicion of a guilty suspect"]; see also, e.g., Wixted, Mickes, Dunn, Clark & Wells, *Estimating the Reliability of*

Eyewitness Identifications from Police Lineups (2016) 113 PNAS 304, 304 [concluding, based on field study, that "confidence in an eyewitness identification from a fair lineup is a highly reliable indicator of accuracy"].)

Like Rudd's trial expert, Wells has concluded that, under appropriate circumstances, "witness confidence bears a strong relationship to accuracy." (Wixted & Wells, *supra,* at p. 12) Such circumstances include (1) having only one suspect per lineup; (2) ensuring the suspect does not stand out in the lineup; (3) telling the witness that the offender might not be in the lineup; (4) using double-blind testing; and (5) collecting a confidence statement at the time of the identification. (*Id.* at pp. 15-17.) The Legislature has recently required police agencies to ensure similar features in California lineups—including the elicitation of contemporaneous statements of confidence. (See § 859.7, subd. (a)(10)(A) [effective January 1, 2020].) As a result, most California identification procedures will soon include exactly the kind of confidence evidence that Rudd's own authorities find highly relevant—making it hard to justify a constitutional prohibition on mentioning witness confidence as a potential factor for the jury's consideration. Indeed, caution is especially appropriate in light of the Legislature's conclusion that collecting statements about witness confidence "can greatly improve the accuracy of identifications." (Stats. 2018, ch. 977, § 1, subd. (d).)

2. Rudd observes that "a growing number of state courts … are concluding that changes are warranted" to lessen the risk of wrongful convictions based on inaccurate identifications. (OBM 23, fn. 5) But the decisions Rudd cites address a wide range of approaches to improving identifications; they do not support his theory that instructions such as California's violate due process.

Several of Rudd's cited cases do not rest on due process at all. (*See Commonwealth v. Gomes* (Mass. 2015) 22 N.E.3d 897; *State v. Mitchell*

(Kan. 2012) 275 P.3d 905; *Brodes v. State* (Ga. 2005) 614 S.E.2d 766, 771; *Commonwealth v. Santoli* (Mass. 1997) 680 N.E.2d 1116, 1121.) Their disapproval of certainty instructions appears to rest instead on judicial supervisory powers—a source of authority that Rudd does not invoke here.

Of the cases that do discuss due process, some do so only with respect to whether judges should allow certain kinds of identification evidence to be admitted—not how juries should be instructed as to evidence that has been admitted. (See *State v. Lawson* (Ore. 2012) 291 P.3d 673, 677; *State v. Guzman* (Utah 2006) 133 P.3d 363, 364.) But to the extent that admissibility issues are related to the instructional issue here, the relationship only weakens Rudd's constitutional claim. When police have used an identification procedure that is unduly suggestive, precedents from this Court and the United States Supreme Court require the resulting identification to be excluded from trial unless it is nevertheless "reliable" —that is, unless, under the "totality of circumstances," there is no "substantial likelihood of misidentification." (*Perry v. New Hampshire* (2012) 565 U.S. 228, 239-240, internal quotation marks omitted.) Among the factors that due process under federal and California law requires judges to consider is "the level of certainty demonstrated by the witness at the confrontation." (*Neil v. Biggers* (1972) 409 U.S. 188, 199; *People v. Clark* (2016) 63 Cal. 4th 522, 558 [similar].) Rudd does not challenge these precedents. Nor does he explain how due process would both require judges to consider witness certainty in determining an identification's reliability, and forbid courts from informing jurors of their ability to consider the same factor.

Rudd's remaining cases likewise fail to advance his claim. One case, *State v. Guilbert* (Conn. 2012) 49 A.3d 705, focused on questions about defendants' entitlement to present expert evidence on identification issues—a subject quite different from whether a particular instruction

violates due process. *State v. Long* (Utah 1986) 721 P.2d 483, 492, in turn, held that the due process clause of Utah's constitution requires some cautionary instruction on eyewitness identification, but did not hold that reference to eyewitness certainty had to be omitted from such an instruction. And *State v. Cabagbag* (Haw. 2012) 277 P.3d 1027 proposed an instruction whose statement of the certainty factor resembles that in the California instruction at issue here. (See *id.* at 1039 [proposing, apparently under the court's supervisory power, that jurors be instructed to consider factors including "[t]he extent to which the witness is either certain or uncertain of the identification"].)[10]

II. ANY ERROR WOULD BE HARMLESS BEYOND A REASONABLE DOUBT

Even if the instruction had violated due process, it would not have prejudiced Rudd. "'[I]nstructional errors—whether misdescriptions, omissions, or presumptions—as a general matter fall within the broad category of trial errors subject to *Chapman* [*v. California* (1967) 386 U.S. 18, 24] review on direct appeal.' [Citations.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 211-212; cf. *Calderon v. Coleman* (1998) 525 U.S. 141, 146-147 [the "reasonable likelihood" test under *Boyde v. California* (1990)

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[10] Rudd also cites *State v. Henderson* (N.J. 2011) 27 A.3d 872, which revised New Jersey's approach to the admissibility of identification testimony and included elaborate requirements for jury instructions on a variety of issues, including witness certainty. To the extent that Rudd argues not merely that the certainty factor should have been removed from his instruction, but also that a more detailed instruction should have been given (OBM 25-27, 29-34), that argument is not properly before this Court. Rudd did not make such a request at trial. (6RT 889-892; *see People v. Ward* (2005) 36 Cal.4th 186, 213 ["defendant never requested the additions he now asserts should have been given; and we find no basis for imposing a sua sponte duty to modify CALJIC 2.92 as now asserted"].) Nor did he raise the argument in the Court of Appeal or in his petition for review. (See Rule 8.516(b)(1), Cal. R. Ct.)

494 U.S. 370 (see p. 29, *supra*) determines whether there was constitutional error "in the first instance"; harmlessness requires a separate inquiry].) "Accordingly, '[reviewing courts] consider whether it appears beyond a reasonable doubt that the error did not contribute to the jury's verdict.'" (*People v. Huggins*, 38 Cal.4th at p. 212, citing *People v. Flood* (1998) 18 Cal.4th 470, 504.) "'To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" (*People v. Flood*, 18 Cal.4th at p. 494, citing *Yates v. Evatt* (1991) 500 U.S. 391, 403.)

Here, the defense's expert testimony (see p. 16, *supra*) informed the jury that witness certainty does not necessarily imply accuracy. Defense counsel emphasized that testimony in his closing argument. (See, e.g., 6RT 992-993 [stating that Eisen "who has been studying eyewitness identification for the last 30 years," testified that "100 percent positive in-court identification" can be "100 percent wrong"]; 6 RT 992 ["A lot of people think the more confident you are in the eyewitness identification, the more accurate it can be, but nothing could be farther from the truth. Just listen to Dr. Eisen's testimony."].) Indeed, even the prosecutor, though not discussing that particular aspect of Eisen's testimony, agreed that Eisen's testimony could help jurors to "understand" Campusano's recollection. (7RT 1045.)

Other circumstances—quite separate from expressions of certainty—played a vastly more important role in convincing the jury that Rudd was Campusano's attacker. 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.*).

In any event, the defense's theory of the case was not focused on the sort of inadvertent misidentification that Rudd's brief portrays as a danger of the certainty factor. Instead, Rudd's theme was that Campusano had simply lied "not only to the police officers, but also to the judge, and also in front of you" (*i.e.*, the jury). (6RT 962.) In discussing the identification, Rudd's attorney contrasted the "honest" mistakes of other people with what he portrayed as purposeful deceit by Campusano. (6RT 964; see generally 6RT 965-988.)[11] He said that her prior convictions for prostitution showed her to be not credible since she had engaged in "conduct that's disgusting, repulsive, filthy, foul, abominable, [and] loathsome." (6RT 973.) He suggested that Campusano in fact was at the motel to commit prostitution, and was harmed when "an angry customer" learned Campusano was transgender. (6RT 975-978.) He questioned Campusano at length about the motivation to lie that could stem from her interest in securing a U visa and about her need for government assistance to pay her medical bills. (2RT 279-283; 4RT 555-577.) He questioned her description about the extent of her injuries. (2RT 256-257, 268-269.) Rudd's theory, in other words, was not that Campusano was a well-meaning witness who was wrongly certain of an erroneous identification; instead, it was that Campusano lied about practically every aspect of her testimony. That accusation of "deceit and deception" (6RT 974), which was amply covered

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[11] Lemcke's attorney attempted to raise reasonable doubt about whether Campusano had seen any woman to begin with (7RT 1027-1028), and, in the alternative, whether that woman knew of and intended to participate in the male assailant's attack (7RT 1034-1039).

by CALCRIM No. 226's general instructions on evaluating witness testimony, was completely unaffected by the certainty instruction.[12] In short, the certainty factor in CALCRIM No. 315 was "'unimportant in relation to everything else the jury considered on the issue in question,'" and any error was not prejudicial. (*People v. Flood*, 18 Cal.4th at p. 494, citation omitted.)

III. POTENTIAL IMPROVEMENTS TO CALCRIM NO. 315 SHOULD BE ADDRESSED TO THE JUDICIAL COUNSEL

Of course, the fact that CALCRIM 315 is constitutional and, in any event, could not have caused any prejudice in this case does not necessarily mean that a better instruction could not be devised. (See, e.g., *Sánchez, supra,* 63 Cal.4th at pp. 494-499, conc. opn. of Liu, J. [criticizing instruction].) "The vagaries of eyewitness identification are well-known." (*United States v. Wade* (1967) 388 U.S. 218, 228.) Instructions on eyewitness identification are one of many safeguards—including "the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, ... and the requirement that guilt be proved beyond a reasonable doubt"—that serve the paramount goal of preventing erroneous convictions. (*Perry v. New Hampshire*, *supra*, 565 U.S. at p. 233.) It is right and proper to periodically examine procedures relating to eyewitness identification, to see whether they can be improved. (See, e.g., § 859.7 [requiring police agency policies to improve identification procedures].)

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[12] Rudd maintains other aspects of cross-examination, including Campusano's language barrier and "little formal education," and the judge's limits on cross-examination, contributed to the prejudice in this case. (OBM 43.) In fact, the defense's cross-examination of Campusano was thorough, with the trial court characterizing Rudd's counsel as "[leaving] no stone unturned in terms of her veracity. (4RT 563.)

In the absence of a constitutional violation, however, the appropriate way forward is through the procedure prescribed by the Rules of Court: making suggestions to the committee that advises the Judicial Council as to instructional "improve[ments]," and circulating proposed changes for "public comment." (Cal. Rules of Court, rule 2.1050(d).) The Judicial Council's advisory committee is composed of, and able to seek comment from, those with diverse experience with this State's criminal trials. With the advice of that committee, the Judicial Council would be well positioned to consider the views of practitioners and judges, to survey the scientific evidence, and ultimately to determine whether particular changes to the instruction would better achieve the model instructions' goal of "improve[ing] the quality of jury decision making." (Rule 2.1050(a).) In such an inquiry, the supervisory-power decisions of other States' courts, the pattern instructions in other jurisdictions, and the full range of scientific evidence could be highly relevant, notwithstanding the absence of a constitutional violation. (See, e.g., *People v. Saddler* (1979) 24 Cal.3d 671, 685, conc. opn. of Bird, C.J. [concluding that, although CALJIC instruction on testifying defendant's failure to explain certain facts did not violate due process, "it would be eminently prudent for the ... members of the CALJIC Committee to consider" a change].) That is the forum to which Rudd's concerns should be addressed.

CONCLUSION

The judgment should be affirmed.

Dated: July 1, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Answer Brief on the Merits uses a 13 point Times New Roman font and contains 11,235 words.

Dated: July 1, 2019

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rudd**
Case No.: **S250108**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 1, 2019, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 1, 2019, at San Francisco, California.

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Declarant

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Signature

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