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In the Supreme Court

of the State of California

People of the State of California,	)	No. S192704
Plaintiff and respondent,	)	
v.	)	
Mildred Delgado,	)	
Defendant and appellant.	)	

SUPREME COURT
FILED

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Deputy

Appellant's Opening Brief on the Merits

Appeal from the Judgment of the Superior Court
County of Los Angeles
The Honorable Ronald Rose, Judge
Nos. BA337662, BA348502

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By appointment of the California Supreme Court

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In the Supreme Court

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People of the State of California,	)	No. S192704
Plaintiff and respondent,	)	
v.	)	
Mildred Delgado,	)	
Defendant and appellant.	)	

Questions Presented

(1) Did the trial court have a duty to instruct sua sponte on an aiding and abetting theory of liability where defendant personally performed some elements of the charged offense and another person performed the remaining elements to be required to complete the crime?

(2) If so, did the Court of Appeal correctly conclude that the trial court's failure to instruct on aiding and abetting was harmless error?

Statement of the Case

A jury convicted Mildred Delgado of kidnapping to commit robbery (Pen. Code, § 209, subd. (b)(1) [count 1]) and robbery (Pen. Code, § 211 [count 2]), and found he used a knife and inflicted great bodily injury in the commission of the crimes. (Pen. Code, §§ 12022, subd. (b)(2)) & 12022.7, subd. (a), respectively; see CT 130-131 [verdicts]& CT 89-9 [information].) The convictions arose out of an incident that occurred on March 2, 2008, involving Melvin Perez. (CT 89-90.) Mr. Delgado was convicted in the same trial of other offenses that occurred on a different occasion. These other convictions are not relevant to the questions on review.

The court sentenced Mr. Delgado to life in prison for kidnapping to commit robbery, with an additional four years for the enhancements. The punishment for robbery was stayed under Penal Code section 654. (3 RT 1505-1507; CT 151-154.)

Mr. Delgado appealed. (CT 150.) In a published decision, the Court of Appeal ruled, with respect to the kidnapping conviction, that the trial court erred by failing to instruct sua sponte on aiding and abetting. (Slip Opinion at p. 8.) However,

the Court found the error harmless and affirmed the convictions and sentence. (*Id.* at p. 10.)

This Court granted review on June 29, 2011.

Statement of the Facts

The Testimony of Melvin Perez

On a Saturday night, after drinking six beers at home, Melvin Perez left his home to go to a bar. (2 RT 626, 662.) It was about 8:00 p.m. (2 RT 626.) Perez briefly stopped at a bar, Salsa LA, then left to go to a second bar, El Charro. He noticed Mildred Delgado walking behind him as he headed to El Charro; they spoke to each other briefly and then parted. (2 RT 630.)

Moments later, Delgado entered El Charro. (2 RT 630.) Perez invited Delgado to join him and bought Delgado a beer. (2 RT 630.) Delgado asked Perez to accompany him to a friend's house where they could do drugs. Perez declined; Delgado left. (2 RT 631.)

Perez stayed at the bar. Shortly after Delgado left, a woman told Perez she noticed Delgado had been staring at Perez's jewelry. (2 RT 633.) The woman called Perez's cousin, who came to the bar and took Perez's jewelry and watch from him. (2 RT

633.)

Perez stayed at El Charro until closing. He finished eight more beers. (2 RT 664, 632.) He was drunk, and he confessed at trial that his memory of what happened that night was incomplete. (2 RT 635, 660, 670.)

When Perez left the bar he saw Delgado outside, standing next to a "big car" driven by a woman whom Perez did not know. (2 RT 635-637.) Perez could not remember what kind of car it was. (2 RT 670.)

Delgado invited Perez to go drinking and offered him a ride. Perez agreed and got into the car. (2 RT 637.) The woman spoke a few words but Perez did not remember what she said. (2 RT 636.) The woman and Delgado sat in the front; Perez got into the back seat. (2 RT 638.)

The car traveled for a short time and then stopped. (2 RT 643.) Delgado got into the back seat, but whether he climbed into the backseat directly or got out of the car and entered through the back door is unclear. (2 RT 643, 668). Perez asked what was going on; Delgado told him to "shut up." (2 RT 645.) Perez then tried to get out, but the door was locked. (2 RT 645.) Perez testified, "I

tried to get out, and the one who was driving, she blocked [sic] it from the front to the back. She blocked [sic] the doors." (2 RT 643.) Perez added that he "tried to open the door, but the door was already locked." (2 RT 645.)

Delgado reached into Perez's pockets and asked for Perez's jewelry; Perez said it had been stolen. (2 RT 644.) Delgado drew a knife. (2 RT 645.) The two struggled. (2 RT 645.) The car started moving again and traveled a few blocks before Delgado stabbed Perez and he lost consciousness. (2 RT 647.) Later, Perez realized Delgado had taken his wallet and money. (2 RT 648.)

Perez did not recall getting out of the car; he thought he was pushed. (2 RT 650.) Perez believed he blacked out and regained consciousness near his apartment, which was about a half mile from the bar. (2 RT 649.)

<u>The Testimony of Mildred Delgado</u>

Delgado testified that he lived two blocks from Salsa LA. (2 RT 932.) On the night of the incident, Delgado saw Perez outside El Charro; Delgado had seen Perez before in the neighborhood. (2 RT 933.) Perez offered to buy Delgado a beer. (2 RT 933.)

After drinking a beer, Delgado told Perez he was tired and

wanted to go home. (2 RT 934.) They agreed to meet again later that night. (2 RT 934.) Delgado returned around 1:30 a.m. and saw Perez inside. (2 RT 934.) Perez followed Delgado out of the bar. Outside, Delgado saw Myra, a woman he had met a few times. He believed she ran an informal taxi service. (2 RT 944.) She was there when Delgado got outside, but they did not come to the bar together.(2 RT 942.)

Perez got into Myra's car voluntarily. (2 RT 935.) When Delgado got inside, he saw Perez was still drinking a beer; he told him to keep it down. Perez told Delgado he was "a big scaredy-cat, that [he] was gay." (2 RT 936.) Delgado jumped in the back to calm Perez down, and Perez hit him with the beer bottle. Delgado took out the knife, and Perez hit himself against it in the struggle. (2 RT 938.) Delgado denied robbing Perez.

<u>Mildred Delgado's Pre-trial Statements</u>

Delgado gave a statement to the police 10 days after the incident. (2 RT 907.) According to the detective who took the statement, Delgado gave four different versions of the incident. (2 RT 912.) In his first account, Delgado stated that he was with Perez at the bar but left to get food; he suggested that perhaps his

friends had done something to Perez. By his fourth account, Delgado's account was similar to Perez's. (2 RT 912.) Delgado said his plan was to rob Perez, but he stabbed Perez because Perez punched him in the face. (2 RT 913.) The detective who testified to these pretrial statements did not say whether Delgado mentioned the driver or her role, if any, in the incident.

<u>The Police Found the Car Used in the Incident</u>

The police later located the car. (2 RT 915.) A calendar found inside had "Myra and Mildred" written on it. (2 RT 916.) The car, an Isuzu Trooper, was registered to Myra Gonzales, whose address was a few blocks from the bar. (2 RT 919-920.) A blood stain in the car was swabbed and found to belong to Melvin Perez. (2 RT 925.)

Argument

I. The Trial Court Has A Sua Sponte Duty To Instruct On Aiding And Abetting Or Conspiracy Where A Defendant Commits Some But Not All Of The Elements Of A Crime, And Another Person Commits The Remaining Elements.

Due process requires that each element of a crime be proven beyond a reasonable doubt. When two people join together to commit a crime, and one person commits some elements of the

crime and the other person commits the rest, the trial court has a sua sponte duty to instruct on accomplice liability to ensure that each element has been proven beyond a reasonable doubt. Without aiding and abetting or conspiracy instructions, a defendant cannot be found criminally responsible for the acts of another person.

This rule is well established. The only decision to reach a contrary conclusion, *People v. Cook* (1998) 61 Cal.App.4th 1364, is an outlier that has never been followed and whose conclusion was rejected by a federal court. Accordingly, the Court of Appeal below correctly ruled that the trial court had a sua sponte duty to instruct on aiding and abetting and erred in failing to do so.

A. Failing to instruct on aiding and abetting when a defendant commits only some of the elements of a crime, and another person commits the missing element, violates due process and the right to a jury trial.

The Constitution requires that all elements of a crime be proven to a jury beyond a reasonable doubt. (U.S. Const., 5th, 6th & 14th Amends; *In re Winship* (1970) 397 U.S. 358, 364 [holding that every fact necessary to constitute the crime must be proven beyond a reasonable doubt]; *United States v. Gaudin* (1995) 515

U.S. 506, 509-510 [holding a defendant in a criminal case has a right to a jury trial on every element of the crime].) The California Constitution requires the same. (*People v. Flood* (1998) 18 Cal.4th 470, 479-80 (holding that instructional error that relieves the prosecution of the burden of proving each element of the offense beyond a reasonable doubt "violates the defendant's rights under both the United States and California Constitutions").)

To safeguard these rights, the trial court must instruct the jury on the elements of the crime. Without instructions, a jury would not know which facts constitute the crime and the record would not show that the jury found each required fact beyond a reasonable doubt. (*People v. Magee* (2003) 107 Cal.App.4th 188, 193.) Accordingly, the trial court has a sua sponte duty to instruct on all of the elements of the offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.)

In this case, defendant was charged with kidnapping for robbery and the jury was instructed on simple kidnapping as a lesser-included offense. (CT 121.) Both crimes require the prosecution to prove the defendant, by force or fear, "moved" the

victim a substantial distance. (§ 207, subd. (a); *People v. Rayford* (1994) 9 Cal.4th 1, 12-14.)

The Court of Appeal found that defendant did not move Perez. (Slip Opinion at p. 8.) The victim, Melvin Perez, testified he entered the car voluntarily, and after a short time, was assaulted and robbed by defendant while the woman (who did not testify) drove the car a few blocks. The Court of Appeal found "the record does not reflect that [defendant] personally moved or caused Perez to move a substantial distance." (Slip Opinion at p. 8.)

Because Delgado did not move the victim, he did not commit one of the elements of kidnapping. He could be convicted of kidnapping only if the actions of the driver, who did move the victim, could be attributed to Delgado. But the jury was not instructed on aiding and abetting, or conspiracy, and thus the jury was not required to find that the driver assisted the crime of kidnapping by driving the car a substantial distance. The Court of Appeal correctly ruled the failure to instruct sua sponte on aiding and abetting was error under the state and federal constitutions. (Slip Opinion at pp. 8-9.)

B. California courts have long held that accomplice liability instructions are required when a defendant commits only some of the elements that constitute the crime.

It is common for two people to join together to commit a crime. One person may commit part of the crime, and the accomplice may take other acts that complete the crime. In such a case, each person is both a perpetrator and an aider and abettor. "When two or more persons commit a crime together, both may act in part as the actual perpetrator and in part as the aider and abettor of the other, who also acts in part as an actual perpetrator." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120.) Courts have long recognized that accomplice instructions are appropriate when two or more people commit a crime together. (See. e.g., *People v. Kaufman* (1907) 152 Cal. 331, 334 (holding that when parties combine to commit a crime, "each is criminally responsible for the acts of his associates or confederates" committed in furtherance of the crime); *People v. Washington* (1969) 71 Cal.2d 1170, 1174 (holding trial court must instruct sua sponte on uncharged conspiracy where prosecution is relying on it to prove defendant's liability as an aider and abettor).

A good example of the rule is found in *People v. Williams* (2008) 161 Cal.App.4th 705. There, two people joined together to sell cocaine. The defendant Williams took the buyer's money and another person, who was not charged, delivered the cocaine to the buyer. (161 Cal.App.4th at pp. 708-09.) The prosecutor requested aiding and abetting instructions, then conspiracy instructions, because "there isn't one person who committed the crime." (*Id.* at p. 709.) The Court of Appeal agreed the instructions were necessary and proper: "Where the prosecutor did not charge conspiracy as an offense, but introduced evidence of a conspiracy to prove liability, the court had a sua sponte duty to give uncharged conspiracy instructions." (*Id.*) As *Williams* noted, this rule is longstanding, and a standard jury instruction has been formulated to address the situation. (*Id.* at p. 709, citing *People v. Pike* (1962) 58 Cal.2d 70, 88 & CALCRIM No. 416.)

The facts here are analogous to *Williams*. Under one view of the evidence, one person (defendant) detained the victim against his will with the intent to rob him while the other person (the driver) moved the victim a substantial distance in furtherance of the crime. As in *Williams*, one person could not

have committed the crime; it took two acting together to complete the crime of kidnapping. And, as in *Williams,* instructions on aiding and abetting or conspiracy were required to ensure that each element of the crime was proven beyond a reasonable doubt.

C. *People v. Cook* was wrongly decided, has never been followed, and was rightfully rejected by a federal court.

As demonstrated by *People v. Williams, supra,* accomplice instructions are required when a defendant commits some but not all of the elements of the charged crime, and the defendant's liability for the completed crime rests upon the actions of another person. The only case to depart from this principle has been *People v. Cook* (1998) 61 Cal.App.4th 1364, a decision that has never been followed and was rejected by a federal court in the habeas corpus action that followed the appeal.

In *Cook*, the defendant confronted the victim with a knife. The victim dropped his bag of beer, and defendant's friend picked up the beer and walked away while defendant stabbed the victim. (*Cook, supra,* 61 Cal.App.4th at p. 1366.) On appeal, defendant argued the friend took the property from the victim, and aiding and abetting instructions were required to find defendant guilty

of robbery. (*Id.* at p. 1368.)

The Court of Appeal rejected the argument. It held "if the defendant performed an element of the offense, the jury need not be instructed on aiding and abetting, even if an accomplice performed other acts that completed this crime." (*Cook, supra,* 61 Cal.App.4th at p. 1371.)

No case has followed this ruling. And, in the habeas corpus action that followed the decision, a federal court found the Court of Appeal's holding "clearly unconstitutional." (*Cook v. Lamarque* (E.D. Cal. 2002) 237 F.Supp.2d 985, 996.) The federal court held:

> Due process requires that all elements of the offense be proven against the defendant. However, the *Cook* rule allows the prosecution to prove an offense by establishing only one element as to a particular defendant, effectively removing the necessity of proving all required elements and thereby lessening the burden of proof. Pursuant to the *Cook* rule, if a crime is completed, then the prosecution need only prove that a defendant committed one element in order for the defendant to be found guilty of the entire crime, so long as another actor committed the remaining elements.

(*Cook, supra,* 239 F.Supp. at p. 996.)

In sum, the Court of Appeal below correctly ruled that aiding and abetting instructions must be given sua sponte

whenever a defendant commits some parts of the crime, and his liability for the offense depends on the completion of the crime by another person. Given that this procedure is already universally followed, the rule adds no burden to the trial court judge or to the government. But a contrary rule, one that allows a conviction based on the commission of a single element of the crime, would raise serious constitutional issues and lead to injustice.

II. The Court Of Appeal Erred In Holding The Failure To Instruct On Aiding And Abetting Was Harmless Error.

Although the Court of Appeal was correct that error occurred, its finding that the error was harmless is incorrect. Under established precedent of this Court and the United States Supreme Court, the failure to instruct on an element of the crime cannot be harmless error where at trial the defendant contested the omitted element and produced evidence sufficient to support a contrary finding. (*Neder v. United States* (1999) 527 U.S. 1, 19; *People v. Flood, supra,* 18 Cal.4th 470, 507.) The Court of Appeal either did not apply this rule at all or misapplied it, because the court took no notice of the record evidence that shows defense counsel contested the asportation element and produced evidence

from which the jury could infer that the driver was not an accomplice to the crime.

The error was not harmless and the kidnapping-for-robbery conviction must be reversed.

A. The error violates the federal constitution and therefore the State must show the error was harmless beyond a reasonable doubt.

The failure to instruct upon an element of the offense is federal constitutional error. (*People v. Flood, supra,* 18 Cal.4th 470, 491.) It is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18. (*Flood, supra,* 18 Cal.4th at p. 503; *Neder v. United States, supra,* 527 U.S. at pp. 8-9.) Under *Chapman*, "the beneficiary of a constitutional error" must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra,* 386 U.S. at p.24.)

Here, the failure to instruct on aiding and abetting lessened the State's burden of proof, making it the beneficiary of the error. As such, the State must now prove the error was harmless beyond a reasonable doubt. The record permits no such a finding.

B. The failure to instruct on an element of the crime is not harmless where, as here, the defendant contested the omitted element and presented evidence sufficient to support a contrary finding.

A trial court's failure to instruct on an element of the offense requires reversal where the defendant "contested the omitted element and raised evidence sufficient to support a contrary finding." (*Neder v. United States, supra,* 527 U.S. at p. 19.) In *Neder*, defendant was charged with filing a false income tax return by failing to report over $5 million in income. To prove its case, the government was required to prove defendant filed an income tax return which he did not believe to be true and correct as to every "material" element. The trial court failed to instruct the jury on the materiality element. (*Neder, supra,* 527 U.S. at p. 16.)

The Supreme Court first found that failure to instruct on an element was not a structural defect requiring automatic reversal but could be reviewed for harmless error under *Chapman*. (*Neder, supra,* 527 U.S. at p. 15.) The Court then found the error harmless beyond a reasonable doubt because the materiality of $5 million of income was both obvious and

uncontested. The Court noted defendant "did not, and apparently could not, bring forth facts contesting the omitted element," but instead argued that unreported loan proceeds were not income and he reasonably relied on the advice of counsel in not reporting it. (*Neder, supra*, 527 U.S. at pp. 16-17, 19.) Significantly, however, the Court acknowledged that to safeguard the jury trial guarantee reviewing courts "should not" find the failure to instruct on an element to be harmless in cases "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." (*Neder, supra,* 527 U.S. at p. 19.)

Both this Court and the court of appeal have followed the *Neder* rule. In *People v. French* (2008) 43 Cal.4th 36, the Court held the failure to submit a sentencing factor to a jury may be found harmless "if the evidence supporting that factor is overwhelming and uncontested, and there is no 'evidence that could rationally lead to a contrary finding.'" (*French, supra,* 43 Cal.4th at p. 53, quoting *United States v. Neder, supra,* 527 U.S. at p. 19; see also *People v. Epps* (2001) 25 Cal.4th 19, 29 [holding that error in failure to observe statutory right to a jury trial on a

prior conviction allegation was harmless where defendant did not contest the prior conviction]; *People v. Jackson* (2003) 109 Cal.App.4th 1625, 1635 [holding that a trial court's failure to instruct on an element of the crime required reversal where defendant contested the omitted element and raised evidence sufficient to support a contrary finding, citing *Neder*].)[1]

Indeed, this Court foreshadowed the *Neder* rule in *People v. Flood, supra*, 18 Cal.4th 470, a decision issued a year before *Neder*. In *Flood*, the omitted element was whether the victim was a "peace officer." The Court held the failure to ins truct on the peace officer element was harmless error under *Chapman* because the question was an "uncontested, peripheral element of the offense, which effectively was conceded by defendant." (*People v. Flood, supra*, 18 Cal.4th at p. 507.)

This case is far different. The question whether the driver was a knowing accomplice to kidnapping was contested and evidence was presented to show she was not an accomplice.

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[1] Other jurisdictions follow the same articulation of the *Neder* rule. (*United States v. Thongsy* (9th Cir. 2009) 577 F,3d 1036, ; *State v. Velasco* (Conn. 2000) 751 A.2d 800, 814.)

1. Defendant contested the issue.

In his closing argument, defendant's attorney argued the asportation element of kidnapping had not been proven because defendant was not driving the car and there was no evidence that the driver was acting under his direction. Counsel stated: "Well, Mr. Delgado did not move the car because we know he wasn't driving the car. Another person was driving the car. There's no evidence presented in this case that Mr. Delgado instructed or ordered the female driver to take off or drive the car." (3 RT 1269.)

The prosecutor responded that defense counsel's argument that defendant could not be convicted of kidnapping because he was not driving the car was erroneous. Referring to the instructions on kidnapping, the prosecutor told the jury, "that's not what it says." (3 RT 1277.) The prosecutor added, "Even if you look at that jury instruction at a technical level, that's not what it says there." (3 RT 1277.) The prosecutor urged the jury to use "common sense," and pointed to the evidence that the driver continued to drive while the robbery occurred. (3 RT 1277.)

Thus, unlike *Neder* and *Flood*, in this case the issue was

not peripheral or uncontested. Defense counsel argued defendant could not be guilty of kidnapping because he was not the driver and did not personally move Perez. The prosecutor replied that argument violated "common sense" and was at odds with the kidnapping instruction.

2. Defendant raised evidence sufficient to support a finding that the driver was not a knowing accomplice to kidnapping.

Defendant's trial testimony provided evidence the driver did not aid and abet a kidnapping. Defendant testified he had drinks with Melvin Perez at a bar, left Perez for a few hours, and returned by himself at 1:30 a.m. to find Perez still in the bar and by then quite drunk. (2 RT 934-935.) They left the bar together. Outside, defendant saw a woman whom he had seen two or three times. (2 RT 944.) He knew her only as "Myra" and he believed she ran a taxi service. (2 RT 944.) Delgado saw Myra in her car when he and Perez walked out of the bar but he had not come to the bar with her: "I don't know if she dropped off a customer or to pick somebody up, but since I'd seen her two, three times, I saw her and we said hi to each other." (2 RT 935.) Delgado testified he and Perez got into the car, Perez gave Myra his address, and

Myra began driving to take Perez home. (2 RT 936.)

Thus, Delgado's testimony was sufficient evidence for the jury to find that Myra was not part of a plan to kidnap and rob Melvin Perez, and did not knowingly aid those crimes. It is true Delgado also testified he did not rob Perez, but was himself assaulted by Perez and only then struck Perez in self-defense. It can be seen form the verdict the jury rejected this part of Delgado's testimony.

However, a jury is free to believe "all, part, or none" of any witness's testimony and was so instructed here. (CALCRIM No. 226; CT 114.) A rational juror could find there was no conspiracy to rob Perez, but that defendant acted alone, without the driver's knowledge or assistance. To be sure, there is evidence to support a contrary finding, but the possibility the driver was an unknowing accomplice is not so irrational or unbelievable as to warrant taking this issue away from the jury's consideration.

3. The Court of Appeal's harmless error analysis is flawed because (1) it does not apply *Neder* and (2) it does not consider the evidence showing the driver was not an accomplice.

The court below found the failure to instruct on aiding and

abetting was error, but the error was harmless beyond a reasonable doubt. (Slip Opinion at pp. 9-10.) The court either failed to apply or misapplied *Neder v. United States, supra,* which is established precedent of the United States Supreme on this precise issue.

First, as noted above, *Neder* holds the failure to instruct on an element of the crime "should not" be found harmless "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding . . .." (*Neder v. United States, supra,* 527 U.S. at p. 19.) The court below did not apply this test. The court did not consider that the omitted question – whether the driver aided and abetted kidnapping – was raised and contested at trial. Nor did the court consider that Delgado's testimony raised evidence sufficient to support a finding that the driver was not an aider and abettor.

Second, the court did not "conduct a thorough examination of the record." (*Neder v. United States, supra,* 527 U.S. at p. 19.) The court found "beyond a reasonable doubt" a "rational jury would have found Delgado guilty of kidnapping had aiding and abetting instructions been given." (Slip Opinion at p. 10.) Yet the

court's summary of the facts to support this conclusion omits Delgado's testimony that Myra was a taxi driver, that he did not come to the bar with her, that he met her outside just as he and Perez were leaving. (2 RT 935, 944.) If believed, Delgado's testimony supports a finding that Myra was not a knowing accomplice.

Moreover, the Court of Appeal drew inferences to support its harmless-error ruling that are unsupported by the record. In its summary of the facts, the Court stated that Perez could not get out of the car because "the driver had child-locked the doors." (Slip Opinion at p. 4.) And again, in finding the error harmless, the Court claimed "[t]he woman locked the rear doors to keep Perez inside, without being instructed by Delgado to do so, using a child-lock mechanism typically available only to the driver." (Slip Opinion at pp. 9-10.) Yet nowhere in the record is there any mention of a child door-lock mechanism.

Nor is there any evidence that Perez saw or heard the driver lock the doors. In fact, he testified he did not hear the doors lock. (2 RT 668.) He might have assumed, as the Court of Appeal did, that the driver locked the doors, but it is common

knowledge that some automobiles lock the doors automatically after the car has traveled a certain distance.

It is entirely possible Perez's conclusion that the driver locked the doors was based on assumption and not observation. A rational juror could have questioned Perez's conclusion, especially because Perez was admittedly quite drunk after drinking 14 beers and unable to remember exactly what happened that night.

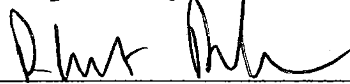
Accordingly, the Court of Appeal erred in finding the error harmless. The kidnapping-for-robbery conviction must be reversed.

Conclusion

For the reasons stated above, the kidnapping conviction must be reversed.

Date: October 11, 2011

Respectfully submitted,



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Word Count Certificate

I declare under penalty of perjury that this brief on the merits contains 4892 words, within the 14,000 word limit set forth in California Rules of Court, rule 8.520(c)(1).

Robert Derham

CERTIFICATE OF SERVICE

I, Robert Derham, am over 18 years of age. My business address is 769 Center Boulevard #175, Fairfax, CA 94930. I am not a party to this action. On October 12, 2011, I served the **Opening Brief on the Merits** upon the parties and persons listed below by depositing a true copy in a United States mailbox in San Anselmo, CA, in a sealed envelope, postage prepaid, and addressed as follows:

Office of the Attorney General
300 South Spring Street
North Tower – Fifth Floor
Los Angeles, CA 90013

California Appellate Project
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Los Angeles, CA 90071

Mr. Mildred Delgado
AB7774
Centinela State Prison
PO Box 901
Imperial, CA 92251

Superior Court
210 West Temple Street
Los Angeles, CA 90012

Office of the District Attorney
210 West Temple Street
Los Angeles, CA 90012

Court of Appeal
300 S Spring Street
Los Angeles, CA 90012

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct. Executed on October 12, 2011, in Marin County, California.

Robert Derham