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.	)	

Appellant's Reply 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
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Introduction

The question presented is whether aiding and abetting instructions must be given sua sponte where the defendant personally performed some of the elements of the charged offenses and another person performed the remaining elements required to complete the crime. Defendant Mildred Delgado ("Delgado") argues such instructions are necessary because due process requires the State to prove each element of the crime beyond a reasonable doubt. To permit the State to prove an offense by establishing less than all of the elements of the offenses as to a particular defendant would lessen the

prosecution's burden of proof and violate the right to a jury trial and to due process under the State and Federal Constitutions. (*People v. Flood* (1998) 18 Cal.4th 470, 479-80.)

For that reason California courts have long held that aiding and abetting or conspiracy instructions are required whenever the State seeks to hold a defendant liable for the acts of another. (*People v. Washington* (1969) 71 Cal.2d 1170, 1174; see CALCRIM No. 416 [pattern instruction on uncharged conspiracy].) Under the circumstances of this case, where the question of whether the driver of the car was an aider and abettor in the kidnapping was a disputed issue, the error in failing to give aiding and abetting instructions is reversible error.

Respondent raises three main points in opposition:

First, making an argument it did not raise in the Court of Appeal, respondent argues that Delgado personally performed all of the elements of kidnapping. (Respondent's Brief ("RB") at p. 8.) Respondent claims Delgado moved the victim, Melvin Perez ("Perez") into the car by force or fear, and thereafter restrained Perez in the moving vehicle.

Second, respondent claims no aiding and abetting

instructions were required because Delgado and the female driver of the car were both "perpetrators" of the kidnapping. (RB at pp. 12-19.)

Third, respondent asserts if error occurred it was harmless because (1) the prosecution did not rely on an aiding and abetting theory at trial and therefore there was no need to instruct upon it (RB at p. 21), and (2) testimony that the driver was uninvolved in the crime was not credible. (RB at pp. 23-25.)

Respondent's arguments are without merit. At the outset, it is notable that respondent's argument that no instructional error occurred rests on an assumption that Delgado and the driver were partners in crime and acted "pursuant to a pre-conceived plan." (RB at p. 20.) Yet the question whether the driver was a knowing accomplice to the kidnapping and acted to assist it was not a question the jury was asked to decide, and in fact did not decide. The question on appeal is whether the jury should have been required to make that finding. Respondent assumes away the very issue that is to be decided.

In this brief, Delgado uses the terms "aider and abettor," "uncharged conspirator," and "accomplice" interchangeably to

express the concept of derivative liability. (See *People v. Brigham* (1989) 216 Cal.App.3d 1039, 1047-48 [discussing the various terms used to denote a criminal combination].) However, based on the prosecution evidence and argument, conspiracy is the theory that best fits the prosecution case. Thus, the trial court should have instructed sua sponte on an uncharged conspiracy. (See *People v. Williams* (2008) 161 Cal.App.4th 705, 709.)

Argument

I. Perez Entered The Car Voluntarily; There Was No Evidence He Got Into The Car Because Of Force Or Threats.

Respondent argues the trial court did not err in failing to instruct on aiding abetting because (1) Delgado personally "moved" Perez into the vehicle, and (2) Delgado thereafter prevented Perez from getting out of the moving car. (RB at pp. 9-11.) Both arguments are meritless.

Luring a person into a car by false pretenses is not kidnapping. "Asportation by fraud alone does not constitute general kidnapping in California." (*People v. Davis* (1995) 10 Cal.4th 463, 517, n.13.) Simple kidnapping and kidnapping for robbery both require that

the movement of the victim be accomplished by force or fear. (*People v. Jones* (2003) 108 Cal.App.4th 455, 462 [noting that both simple and aggravated kidnapping require movement by force ro fear and without consent]; Pen. Code, §§ 207, 209, subd. (b)(1).) "[A] general act of kidnapping ... can only be accomplished by the use or threat of force." (*People v. Green* (1980) 27 Cal.3d 1, 64, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239.)

Respondent's claim that Delgado "moved" Perez into the car by "grabbing" his shoulder is rebutted by Perez's own testimony. The prosecutor asked Perez, "But you agreed to go inside the car, right?" Perez answered, "Yes." (2 RT 637.) Later, in cross-examination, Perez reiterated that he was not pushed or forced into the car, that he was not threatened before he got in the car, and he did not see a knife before he entered the car. (2 RT 666-67.) In closing argument, the prosecutor conceded Perez was "persuaded" to get into the car; "it wasn't by force," the prosecutor admitted. (3 RT 1248.)

Respondent's contention that Delgado forced Perez into the

car is based on a snippet of testimony taken out of context. Respondent raises an argument now that was not made at trial or on direct appeal. The argument is meritless.

Respondent next contends Delgado forcibly moved Perez by assaulting and robbing him in the moving car. (RB at p. 10.) This argument overlooks a few facts. First, the movement of the car itself restrained Perez. Second, Perez testified he could not get out of the car because the driver (not Delgado) locked his door. (2 RT 645.) Third, driver alone "moved" Perez by driving the car away, and the car was stopped when, according to Perez, Delgado entered the back seat and robbed him. (2 RT 643-45.) Fourth, unless the driver was Delgado's partner in crime, Delgado's restraint of Perez constituted false imprisonment, not kidnapping, because the movement fo the car cannot be attributed to Delgado. For example, if the defendant commits robbery on a moving bus, he may be guilty of robbery and false imprisonment, but not kidnapping unless the bus driver was an accomplice to the crime. If the bus driver was not an accomplice, the movement of the bus cannot be attributed to the defendant, and it cannot be said that the defendant personally moved the

victim by force or fear.

Accordingly, the Court of Appeal was correct in holding that "the record does not reflect that [Delgado] personally moved or caused Perez to move a substantial distance." (Slip Opinion at p. 8.) Respondent's argument to the contrary fails.

II. 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.

The Court of Appeal held Delgado did not personally move Perez and thus could not be found guilty of kidnapping as the perpetrator. (Slip Opinion at p. 8.) Accordingly, the court ruled the trial court had a sua sponte duty to instruct on accomplice liability and erred in failing to do so. (Slip Opinion at p. 8.)

Respondent argues the Court of Appeal's ruling is "problematic." (RB at p. 12.) Respondent claims the Court of Appeal erred because (1) the court failed to consider this Court's ruling in *People v. McCoy* (2001) 25 Cal.4th 1111 and (2) the court should have followed *People v. Cook* (1998) 61 Cal.App.4th 1364 (*Cook I*). (RB at pp. 12-19.)

Although respondent argues that *McCoy* controls this case,

it fails to explain how *McCoy* applies here. In *McCoy*, defendants McCoy and Lakey committed a drive-by shooting. McCoy was the driver and Lakey a passenger. Both fired guns at a group of people standing on sidewalk; two people were shot, one fatally. (*People v. McCoy, supra,* 25 Cal.4th at p. 1115.) The defendants were convicted of murder and attempted murder, but the convictions were reversed on appeal. McCoy's conviction was reversed because the trial court misinstructed the jury on unreasonable self-defense, and Lakey's conviction was reversed on the ground an aider and abettor could not be convicted of a greater crime than the perpetrator. (*Ibid.*)

This Court held that an aider and abettor could, in a homicide case, be guilty of a greater crime than the perpetrator. (25 Cal.4th at p. 1122.) In analyzing the issue, the Court observed that the "dividing line between the actual perpetrator and the aider and abettor is often blurred." (25 Cal.4th at p. 1120.) The Court stated that 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." (*Ibid.*) In *McCoy*, the Court found that McCoy and Lakey "were to some

extent both actual perpetrators and aiders and abettors." (25 Cal.4th at p. 1122.) Although these explanations of perpetrator and accomplice liability are relevant here, *McCoy* neither discussed nor decided the issue raised in this case — whether a court must instruct sua sponte on aiding and abetting when a defendant performs some elements of a crime and another person commits the remaining elements necessary to complete the crime.

Thus, it is hard to fathom respondent's criticism of the Court of Appeal for failing to "account for *McCoy*." (RB at p. 13.) Respondent does not explain how *McCoy* comes into play here. If anything, *McCoy's* observation that 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" solidifies Delgado's argument that instructions on both perpetrator and accomplice liability must be given in such cases. (25 Cal.4th at p. 1120.) Moreover, as *McCoy* noted, the aider and abettor doctrine "makes aiders and abettors liable for their accomplices' actions as well as their own" and "obviates the necessity to decide who

was the aider and abettor and who the direct perpetrator or to what extent each played which role." (*Ibid.*)

Here, the prosecution's theory was that Delgado and the female driver conspired together to kidnap and rob Perez. (3 RT 1276 ["He was working with this other person. The other person was driving."].) As in *McCoy*, the prosecution's case was that both Delgado and the driver were in part perpetrators and in part aiders and abettors. It is for this reason that accomplice instructions were required; if the driver was not part of the conspiracy, then she was an unwitting accomplice, and her actions in driving the vehicle away did not satisfy the asportation element of kidnapping.

Moreover, *McCoy* rejects the distinction between aiders and abettors and perpetrators drawn by the court in *People v. Cook, supra,* 61 Cal.App.4th 1364 (*Cook I*). In attempting to draw a line that distinguished between perpetrators and aiders and abettors, *Cook I* relied upon the common law distinction between a principal in the first degree and a principal in the second degree. According to *Cook I*, a perpetrator is the equivalent of a principal in the first degree, that is, one who engages in criminal

conduct by performing at least one of the elements of the charged offense. An aider and abettor, however, is the equivalent of a principal in the second degree, that is, one who does not engage in the criminal conduct, but aids the commission of the crime in other ways. An example would be the get-away driver who waits in the car outside the bank while his partner robs it. (*People v. Cook, supra,* 61 Cal.App.4th at p. 1370.)

Respondent relies on *Cook I* to argue that "where co-perpetrators operate together to commit every element of a kidnapping for robbery, they can be, but are not necessarily only, aiders and abettors. They are direct perpetrators." (RB at 17.) There two flaws in this argument.

First, as *McCoy* noted, persons who commit a crime together may be *both* aiders and abettors and perpetrators. (*McCoy, supra,* 25 Cal.4th at p. 1120.) *McCoy* rejected the distinction between perpetrators and aiders and abettors drawn by *Cook I.* It stands to reason that if two persons engage in criminal conduct, and they personally commits some elements of a crime, and aid and abet other elements, the jury must be instructed on both forms of liability in order to find that each

element of the crime has been committed.

Second, respondent assumes that because the driver drove the car away, she was a perpetrator of the kidnapping. Although respondent acknowledges a defendant cannot be guilty of a crime without proof of criminal intent (RB at p. 17), respondent ignores the fact there has been no finding here that the driver intended to kidnap Perez or to aid in his kidnapping. The driver was not charged with any crime, and the jury was not instructed on any theory of liability as to the driver. The record does not show the jury found the driver was a knowing accomplice.

To illustrate its argument, respondent asserts that "a perpetrator who places a victim on an airplane is guilty of kidnapping without resorting to instructing the jury at trial . . . that it must also decide whether the pilot of the airplane was an aider and abettor." (RB at p. 18.) But this is only correct if the perpetrator "placed" the victim on the plane by force or fear. However, if the victim boarded the plane voluntarily, there is no kidnapping unless the jury finds the perpetrator and pilot were part of a conspiracy (charged or uncharged) to kidnap the victim. If the rule were otherwise, then any criminal restraint (such as

robbery) that occurs on a moving object (e.g., an elevator, a moving sidewalk, a bus) becomes kidnapping simply because the victim is moving at the time the restraint occurs.

As noted at the outset of this brief, *People v. Williams, supra,* 161 Cal.App.4th 705 correctly holds the trial court must instruct sua sponte on an uncharged conspiracy in cases such as the one at bar. Respondent attempts to distinguish *Williams* on the ground that there the prosecutor introduced evidence of a conspiracy and requested the instructions. (RB at p. 15, n.4.) With all due respect, respondent misses the point.

In *Williams*, a drug dealing case, the defendant took the buyer's money and another person, who was not charged, delivered the drugs to the buyer. The prosecutor asked for conspiracy instructions because "there isn't one person who committed the crime." (161 Cal.App.4th at p. 709.) The Court of Appeal agreed the instructions were proper, holding that "[w]here 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." (*Ibid.*)

Respondent sidesteps a discussion of *Williams* by arguing that in this case "appellant was a direct participant in the crimes" and the prosecution "did not rely on an aiding and abetting theory or conspiracy theory." (RB at p. 15, n.4.) The argument is simply wrong.

First, the defendant in *Williams* was also a "direct participant" in the crime; he took the money from the buyer.

Second, the prosecution in this case presented evidence of a conspiracy and relied on it in closing when he argued to the jury that Delgado "was working with this other person. The other person was driving." (3 RT 127.) Respondent relies on the same evidence and theory on appeal and repeatedly describes the kidnapping and robbery as the objectives of an uncharged conspiracy:

- "The prosecution's evidence showed a coordinated, concerted action by appellant and his crime partner." (RB at p. 12.)

- "The plan is a joint plan, shared by both perpetrators." (RB at p. 18.)

- "[T]he evidence presented at trial established that

appellant grabbed the victim and ushered him into a waiting car driven by a cohort and pursuant to a preconceived plan." (RB at 20.)

Despite respondent's claim the prosecutor "did not rely on . . . a conspiracy theory," it is apparent the State relied, and continues to rely, on the theory that Delgado and the driver were co-conspirators. This Court is not required to accept respondent's claim that this case was not tried on a conspiracy theory. (*People v. Duran* (1947) 57 Cal.App.2d 363, 371 ["We cannot agree that the case was not tried on the theory of conspiracy. The word 'conspiracy' was not used in the course of the trial, but there was ample evidence to show that all the defendants on trial and two other persons were acting together" for a common purpose.].)

Despite respondent's footnote argument, this case is on all fours with *Williams*. Here, as in *Williams*, two persons allegedly agreed to commit a crime. Here, as in *Williams*, each person committed some but not all of the elements of the crime, but together they committed all the elements of the complete crime. Thus, '[w]here 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." (*People v. Williams, supra,* 161 Cal.App.4th at p. 709, citing *People v. Pike* (1962) 58 Cal.2d 70, 88; see CALCRIM No. 416 (Summer 2011 ed.).)

Under respondent's argument, and as articulated by *Cook I*, no conspiracy instructions were required in *Williams* because the defendant committed an element of the crime (accepting the money), and thus there was no need to show that the second person, who provided the drugs to the buyer, was an accomplice to the enterprise. Such a result would violate due process for obvious reasons; there would be no finding that all of the elements of a sale of drugs had been proven.

Accordingly, the Court of Appeal below was correct: the trial court erred in failing to instruct sua sponte on aiding and abetting or conspiracy, which were general principles of law closely and openly connected with the facts presented at trial, and necessary to the jury's understanding of the case. (Slip Opinion at p. 8.)

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III. The Failure To Instruct On Accomplice Liability Was Prejudicial; Whether The Driver Moved The Car With Criminal Intent Was Contested At Trial And Delgado Presented Sufficient Evidence That The Driver Was Uninvolved In The Crime.

The failure to instruct on accomplice liability, be it aiding and abetting or conspiracy, resulted in the absence of a jury finding on the asportation element of kidnapping. In other words, the jury did not find beyond a reasonable doubt that Delgado or an accomplice moved Perez by force or fear, as required to complete the crime of kidnapping. This is analogous to failing to instruct on an element of the crime.

The failure to instruct on an element of the crime is subject to harmless error analysis but, in order to preserve the Sixth and Fourteenth Amendment rights to a jury trial, such review is limited; the error "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* (1999) 527 U.S. 1, 19; *People v. French* (2008) 43 Cal.4th 36, 53 [following *Neder*].)

Here, Delgado contested the asportation element at trial. (3 RT 1269.) Respondent concedes as much. (RB at p. 23.)

Delgado also presented evidence the driver was not part of a plan to kidnap and rob Perez. (2 RT 934-36,944.) Respondent does not deny that such evidence was presented but, without benefit of seeing or hearing the witness testify, opines that the testimony was not "credible" and therefore should not be accepted by this Court. (RB at pp.24-25.) Respondent claims the evidence of asportation was "overwhelming" and no "rational juror" would have found that Delgado acted alone, "without the driver's knowledge and assistance." (RB at pp. 24-25.)

In essence, respondent asks this Court to ignore *Neder's* admonition that a court should not find harmless error where the defendant contested the omitted element and presented evidence to support a contrary finding. Instead, respondent argues the Court should itself weigh the evidence and the credibility of the witnesses and find the error harmless. (RB at p. 24.)

But "it is not a proper appellate function to reassess the credibility of witnesses." (*People v. Jones* (1990) 51 Cal.3d 294, 314.) Unlike a jury, a reviewing court can only judge the witnesses's testimony from a cold record, without seeing or hearing the testimony and is therefore in a poor position to

assess the credibility of witnesses. If the right to a jury trial means anything, it means at the very least that credibility issues must be decided by the jury, not by an appellate court. Where the right to a jury trial on an issue is denied altogether, "the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." (*Rose v. Clark* (1986) 478 U.S. 570, 578.)

Respondent also contends there was no prejudice in failing to instruct on accomplice liability because the prosecution did not rely on such a theory at trial. (RB at p. 21.) In fact, as noted above, the prosecutor did rely on the existence of an uncharged conspiracy to prove that the movement of the car (and Perez inside) was part of a joint criminal enterprise between Delgado and the driver. (3 RT 1276.)

Thus, the failure to give accomplice liability instructions sua sponte was prejudicial error. The kidnapping-for-robbery conviction must be reversed.

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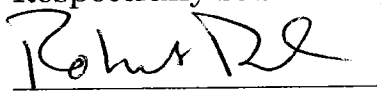
Conclusion

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

Date: April 5, 2012

Respectfully submitted,



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Word Count Certificate

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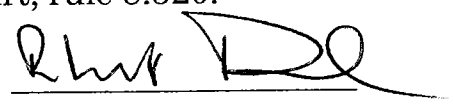

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CERTIFICATE OF SERVICE

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 April 5, 2012, I served the **Reply 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:

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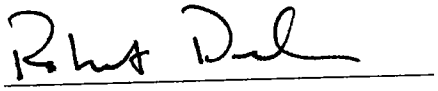
I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct. Executed on April 5, 2012, in San Anselmo, California.



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