S19_704

**In The Supreme Court of the**

**State of California**

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| **People of the State of California,** | ) | No. |
| | ) | |
| | ) | Court of Appeal |
| Plaintiff and respondent, | ) | No. B220174 |
| | ) | SUPREME COURT FILED |
| v. | ) | |
| | ) | |
| **Mildred Delgado,** | ) | |
| | ) | MAY - 2 2011 |
| Defendant and appellant. | ) | |
| | ) | Frederick K. Ohlrich Clerk |
| | | Deputy |

PETITION FOR REVIEW

Appeal From The Judgment Of The Superior Court
Of The State Of California, County Of Los Angeles
Nos. BA337662 & BA348502

Honorable Ronald Rose, Judge

Robert Derham, SBN 99600
Attorney at Law
400 Red Hill Avenue
San Anselmo, CA 94960
Tel: 415-485-2945

Attorney for defendant and
appellant

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| Plaintiff and respondent, | ) | Court of Appeal No. B220174 |
| v. | ) | |
| **Mildred Delgado,** | ) | |
| Defendant and appellant. | ) | |

To the Honorable Chief Justice of the California Supreme Court, and to the Associate Justices:

Defendant Mildred Delgado petitions for review from the published opinion of the Court of Appeal, Second Appellate District, Division One, filed on March 29, 2011, affirming the conviction and judgment of the superior court. The written decision of the Court of Appeal is attached to this petition.

Questions Presented

1. Where the evidence shows that the defendant committed some but not all of the elements of a crime, but an accomplice committed an act that completed the crime, is the court required to instruct the jury on aiding and abetting principles?

This question has divided the Court of Appeal. In *People v. Cook* (1998) 61 Cal.App.4th 1364, the court held aiding and abetting instructions were not required "[i]f the defendant performed an element of the offense, . . . even if an accomplice performed other acts that completed the crime." (*Id.* at p. 1371.)

The court below declined to follow the rule articulated in *Cook*. (Slip Opinion at p. 8, reported at 193 Cal.App.4th 1202.) The court reasoned that due process requires the prosecution to prove *all* elements of an offense, and the *Cook* rule lessened the prosecution's burden of proof by permitting conviction upon proof of less than all elements of the charged offense. (*Ibid.*)

The petition for review should be granted to secure uniformity and resolve this important question of law. (Cal. Rules of Court, rule 8.500(b)(1).)

2. Whether there is substantial evidence of bodily injury to support the enhancement under Penal Code section 12022.7 to satisfy due process. (*Jackson v. Virginia* (1979) 443 U.S. 307.)

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Statement of the Case

An amended information filed July 14, 2009, charged

defendant Mildred Delgado kidnaping to commit robbery (§ 209, subd. (b)(1); count 1), two counts of second degree robbery (§ 211; counts 2 & 3), and assault with a deadly weapon (§ 245, subd. (a)(1); count 4). (CT 89.) The information also alleged that Delgado personally inflicted great bodily injury (§ 12022.7, subd. (a); counts 1-4) and used a deadly weapon (§ 12022, subd. (b)(1); counts 1-3). Counts 1 and 2 allegedly occurred on March 1, 2008; counts 3 and 4 allegedly occurred on March 10, 2008. The charges were initially brought in separate cases but were joined for trial on July 14, 2009. (CT 65; 2 RT A-2.)

A jury convicted Mr. Delgado of all counts, and found all enhancements to be true. (CT 130.) On October 28, 2009, the court sentenced Delgado to state prison. On count 1, kidnapping for robbery, the court imposed a life term, with three years for the great bodily injury enhancement (§ 12022.7, subd. (a)) and one year for the weapon enhancement (§ 12022.7, subd. (b)(1)). (3 RT 1506.) On count 3, robbery, the court imposed the upper term of five years (§ 213, subd. (a)(2)), plus three years for the great bodily injury enhancement and one year for the use of a weapon. The court imposed but stayed punishment for robbery in count 2, and for assault with a deadly weapon in count 4. (3 RT 1505,

1507.) (3 RT 1505.) The total prison term imposed amounted to life plus 13 years. (CT 151-154.)

On October 28, 2009, Mr. Delgado filed a timely notice of appeal. (CT 150.)

## Statement of Facts

Defendant adopts the statement of the facts as set forth in the opinion of the Court of Appeal.

## Reasons for Granting Review

### I. Review Should Be Granted Because There Is A Split Of Authority In The Court of Appeal On Whether Aiding And Abetting Instructions Are Required When Defendant Commits Less Than All Of The Elements Of A Crime And An Accomplice Commits Other Acts That Complete The Crime.

Where the evidence shows that the defendant committed some but not all of the elements of a crime, and an accomplice committed an act that completed the crime, is the court required to instruct the jury on aiding and abetting principles? This question has divided the Court of Appeal. In *People v. Cook* (1998) 61 Cal.App.4th 1364, defendant confronted the victim, who dropped his bag with beer in it, whereupon defendant's friend picked up the beer and walked away while defendant stabbed the victim. On appeal, defendant argued that where an element of the crime is committed by an accomplice, the jury must be

instructed on aiding and abetting. The Court of Appeal rejected the argument, holding that aiding and abetting instructions are *not* required "[i]f the defendant performed an element of the offense, . . . even if an accomplice performed other acts that completed the crime." (*Id.* at p. 1371.)

The court below reached the opposite conclusion. Here, defendant Delgado was convicted of kidnapping for robbery, an element of which is asportation. (§ 207, subd. (a).) However, the undisputed evidence showed that Delgado did not move the victim; the movement was caused by unidentified, uncharged accomplice who drove the vehicle. The court below held the trial court erred in failing to instruct sua sponte on aiding and abetting.

In reaching its conclusion, the court noted that due process requires the prosecution to prove all elements of an offense, and the *Cook* rule lessens the prosecution's burden of proof by permitting conviction upon proof of less than all elements of the charged offense. (Slip Opinion at p. 8.) The court observed that the federal district court had reached the same conclusion in the habeas action that followed the *Cook* appeal. (*Cook v. Lamarque* (E.D.Cal.2002) 239 F.Supp.2d 985, 996.)

Although the court below found the trial court erred in failing to instruct on aiding and abetting, it found the error harmless under *Chapman v. California* (1967) 386 U.S. 18. (Slip Opinion at 9.) The court held there was evidence of a preconceived plan between defendant and the driver of the car. (Slip Opinion at 9.)

In fact, there is no evidence the woman driver was aware of Delgado's intent and acted to assist him. The driver said nothing during the course of the events. (2 RT 676.) Delgado did not give her any instructions during the incident, and there was no evidence, direct or circumstantial, of a preexisting agreement between the two of them to rob Perez. The woman did not testify. There was no evidence of her relationship to Delgado. In closing, the defense argued the asportation element of kidnapping was not proven because there was no evidence that the driver was instructed to drive the car away after Delgado robbed Perez in the backseat. (3 RT 1269.)

Accordingly, review should be granted and the conviction reversed.

II. The Section 12022.7 Enhancement As To Counts 1 And 2 Must Be Reversed Because The Slight Cuts Suffered By Perez Do Not Amount To Great Bodily Injury.

The evidence is insufficient to sustain the finding of great

bodily injury. Perez was cut on his left eyebrow and sustained a small puncture wound in his left armpit. (2 RT 647-53.) The prosecutor admitted in closing that he was concerned that the jury might find that Perez had not suffered great bodily injury: "My concern is that when you compare [Ramirez's] injuries to Melvin Perez, you may say, well, you know what, he didn't suffer great bodily injury. But don't forget that he – a knife was used." (3 RT 1260.)

The use of a knife is not the issue; the issue is whether the knife caused *great* bodily injury. Based on the evidence presented at trial, no rational trier of fact could have found that Perez's injuries constituted "great bodily injury."

Proof that a victim's bodily injury is "great" — that is, significant or substantial within the meaning of section 12022.7 — is commonly established by evidence of the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the injury. (See, e.g., *People v. Escobar, supra,* 3 Cal.4th at p. 744 [evidence supported finding of great bodily injury where "extensive bruises and abrasions over the victim's legs, knees and elbows, injury to her neck and soreness in her vaginal area of such severity that it significantly impaired

her ability to walk"]; *People v. Le* (2006) 137 Cal.App.4th 54, 59-60, [great bodily injury where soft-tissue gunshot wound prevented the victim from walking unaided for seven weeks]; *People v. Harvey* (1992) 7 Cal.App.4th 823, 827-828[great bodily injury where second degree burns required treatment for "at least a month"].)

Conversely, the Court of Appeal has found no substantial evidence of great bodily injury where the victim suffered only a "minor laceration." (*People v. Martinez* (1985) 171 Cal.App.3d 727, 735.) There, the victim was stabbed in the back. Because the victim was wearing two shirts and a heavy coat, the knife wound was not as serious as it could have been, and caused what was described at trial as a "minor, laceration-type injury in the middle of [the victim's] back." (*Ibid.*)

Whether a victim has suffered great bodily injury is a question of fact for the jury and the reviewing court defers to that finding under the substantial evidence rule. (*People v. Escobar, supra,* 3 Cal.4th at p. 744.) Deference, however, is not abdication. The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In*

*re Winship* (1970) 397 U.S. 358, 364.) If no rational trier of fact could have found all the essential elements of the charged crime, beyond a reasonable doubt, the judgment violates due process and cannot stand. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

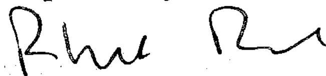
Here, the cut on Perez's eyebrow was hard to see and left a mark that Perez himself described as "very slight." (2 RT 652.) Similarly, the mark under his armpit was hardly visible. (2 RT 653.) Aside from these two minor cuts, Perez sustained only a "a little bit" of swelling. As in *People v. Martinez, supra,* 171 Cal.App.3d 727, the potential for serious injury was present, but the actual injury suffered was not. No rational trier of fact could find a "very slight" wound that caused no damage to be a "great" bodily injury. The enhancement finding must be reversed.

Conclusion

For the reasons stated above, the petition for review should be granted and the conviction reversed.

Dated: April 28, 2011

Respectfully submitted,

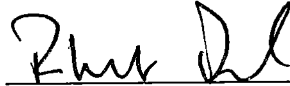


Robert Derham

Attorney for defendant and appellant Mildred Delgado

## Word Count Certificate

I certify this petition for review is contains 2411 words, less than the maximum number allowed by rule 8.504(d)(1) of the California Rules of Court.



Robert Derham

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MILDRED DELGADO,<br><br>Defendant and Appellant. | B220174<br><br>(Los Angeles County<br>Super. Ct. No. BA337662, BA348502) |

COURT OF APPEAL - SECOND DIST.
FILED
MAR 29 2011
JOSEPH A. LANE Clerk
Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald Rose, Judge. Affirmed.

Robert Derham, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant Mildred Delgado, convicted of, among other things, kidnapping to commit robbery, contends the trial court erred by failing to instruct the jury on principles of aiding and abetting and false imprisonment. He also maintains the evidence is insufficient to support the jury's finding that he inflicted great bodily injury. We affirm.

## PROCEDURAL BACKGROUND

An amended information charged Delgado with kidnapping to commit robbery (Pen. Code, § 209, subd. (b)(1);[1] count 1); second degree robbery (§ 211; counts 2 and 3); and assault with a deadly weapon (§ 245, subd. (a)(1); count 4). The information also alleged Delgado personally inflicted great bodily injury (§ 12022.7, subd. (a); counts 1–4), and used a deadly weapon (§ 12022, subd. (b)(1); counts 1–3). Counts 1 and 2 involved events that took place on March 2, 2008, and are the only counts at issue on appeal. Counts 3 and 4 involved an incident on March 10, 2008. The charges, initially levied in separate cases, were consolidated for trial.

Following a jury trial, Delgado was convicted on all counts, and the enhancements were found true. Delgado was sentenced to a total prison term of life, plus 13 years composed of the following: As to count 1, a life term was imposed, plus three years for the great bodily injury enhancement, and one year for the weapon enhancement. (§§ 12022, subd. (b)(1), 12022.7, subd. (a).) As to count 3, Delgado received the upper term of five years, plus three years for the great bodily injury enhancement and one year for the use of a weapon. (§§ 211, 12022, subd. (b)(1), 12022.7, subd. (a).) Sentences as to counts 2 and 4 were imposed, but stayed. Delgado was also ordered to pay various fines and fees, and awarded custody credits.

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[1] Statutory references are to the Penal Code.

## FACTUAL BACKGROUND[2]

*The prosecution's case*

*1. Perez robbery*

On March 1, 2008, Melvin Perez drank several beers at home before leaving to visit two bars for more drinks. Perez stopped first at Salsa L.A., on Beverly Boulevard, but didn't like it there, and decided to head over to El Charo, on Vermont Avenue.

On his way to El Charo, Perez was approached by Delgado, who insisted he knew Perez. Perez said he did not know Delgado, but the two engaged in friendly banter as they walked along, and Perez bought Delgado a beer when they reached the bar. Delgado offered Perez drugs and invited him to accompany him to a friend's house, whom Delgado said owed him money. Perez declined both offers. Delgado left the bar. Perez stayed and continued drinking until the bar closed.

That evening Perez wore a ring, watch, chains and a bracelet. Friends of Perez at the bar saw Delgado staring at Perez's jewelry. One friend phoned Perez's cousin who came to the bar and offered Perez a ride home. Perez refused the offer, but permitted his cousin to take the watch and jewelry for safekeeping.

By the time El Charo closed at 2:00 a.m., Perez had consumed eight beers in addition to the six he drank before he left home. As he left the bar, Perez saw Delgado outside. He was standing next to a SUV. A woman Perez did not recognize was behind the wheel. Delgado and the woman asked Perez to go drinking with them, or if he needed a ride. Perez declined. Delgado then opened up the rear passenger door, grabbed Perez by the shoulder and said, "come on, let's go in." Perez resisted at first, but then agreed to get in the car because he was drunk. He sat in the rear; Delgado and the woman sat in the front seats.

The woman drove the car for a short time, and then stopped. Perez asked Delgado what was going on; Delgado told him to "shut up." Delgado climbed into the back seat.

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[2] We view the evidence in accordance with the usual rules on appeal. (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

Perez tried to get out, but the driver had child-locked the doors. Delgado asked Perez about his jewelry and where it was, and searched Perez's pockets. Perez said the jewelry had been stolen.

Delgado drew a knife. He and Perez struggled in the back seat, as the woman drove along Kenmore, past Third Street and about two blocks from where the car had stopped initially. Delgado took Perez's wallet, which contained $100-$150, and stabbed Perez in the eyebrow and chest. Perez lost consciousness.

The next thing Perez remembered, he was near his apartment, about one-half mile from the El Charo bar. He did not recall getting out of the car, and felt as if he was pushed. He walked to his apartment building, where his neighbors summoned the police, who in turn called the paramedics. Perez was admitted to the hospital, where he spent about eight hours. Perez sustained a cut on his left eyebrow, and a puncture wound in the area of his ribs under his left armpit. His wounds did not require stitches or surgery.

*2. Ramirez robbery*

On the evening of March 9, 2008, Mauro Ramirez drank several beers at his house, and then walked a short distance to the bar, Salsa L.A., and drank about five more. He left Salsa L.A. at about 1:00 a.m. to walk home. A man attacked Ramirez from behind outside his apartment building. Ramirez sustained numerous stab and slash wounds in his chest, side, stomach and the back of his hands. Stitches and staples were required to close the wounds, and Ramirez remained hospitalized for about 24 hours.

Ramirez's wallet (which contained about $20) and cell phone were stolen during the attack. Ramirez had seen Delgado several times in the neighborhood near Salsa L.A. Ramirez was unable at trial to identify Delgado as his attacker.

*3. Delgado's arrest and the police investigation*

On March 11, 2008, Perez was headed into a restaurant for lunch when he spotted Delgado near Salsa L.A. Perez called the police, but Delgado left before they arrived. Perez and a friend followed Delgado. Perez confronted Delgado, saying, "You're the guy who robbed me, huh?" Delgado responded, "yeah, so what?" and the two men began to

fight. The police arrived, Perez identified Delgado as the man who had robbed him the week before, and Delgado was arrested.

The police found a knife with bloodstains in Delgado's pocket. As Delgado was being booked into jail, an officer noticed dried blood stains on his pants and shoes. Tests revealed the blood on the knife, clothing and shoes came from Ramirez. The police investigation led to an impounded Isuzu Trooper, registered to Myra Gonzalez at an address about three blocks from Salsa L.A. A 2007 calendar in the car's console contained the notation "Myra and Mildred." (Delgado's first name is Mildred.) Testing on blood stains found on a rear door panel revealed a match with Perez's blood.

A robbery detective interviewed Delgado on the date of his arrest.[3] Delgado gave the detective several versions of what transpired between himself and Perez the night Perez was robbed. By the end of the interview, Delgado's account of the events was similar to Perez's. Delgado said his "initial plan" had been just to rob Perez, take his wallet and get rid of him. He stabbed Perez after Perez punched him in the face. Delgado admitted pushing Perez out of the car while an acquaintance drove. Delgado also admitted the knife in his possession at the time of his arrest was the one he used to rob Perez, but said the blood on his clothes and shoes must have come from stepping in a puddle of blood on the street.

*Defense case*

Delgado testified on his own behalf. He testified he lived about two blocks from Salsa L.A. On the evening of March 1, 2008, Delgado saw Perez, whom he recognized from the neighborhood, and spoke to him. Perez bought Delgado some beer at El Charo, after which Delgado headed home. Perez stayed at the bar. Perez and Delgado agreed Delgado would come back later, and they would go to Perez's house to drink. Delgado returned to El Charo at about 1:30 a.m. Perez, who was very drunk, followed him out of the bar. Outside, Delgado saw a woman he knew named "Myra" who provided taxi

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[3] The interview was recorded and transcribed, but the recording was not played for the jury.

service, dropping off a customer. Perez got into the car. Delgado got a phone call and then got into the car after Perez. Perez gave the woman his address. The woman and Delgado were going to drop Perez off at his house.

Inside the car, Delgado saw Perez drinking a bottle of beer and told him to drink it quickly and toss out the container. Perez told Delgado he was "a big scaredy-cat, [and] that [he] was gay." Delgado jumped into the back seat to calm Perez down. Perez hit Delgado with the beer bottle. Delgado hit Perez in the nose. Delgado took out his knife because Perez was attacking him with the bottle, but he did not stab or try to stab Perez. Perez ran into Delgado's knife, and wounded his own rib area. Perez also hit himself on the door frame during his struggle with Delgado, which resulted in the injury to his face and forehead. Delgado never intended to rob Perez. Delgado testified he had been drunk when he was interviewed by the detective.

Delgado vaguely recalled having first told the detective he had left the bar to get something to eat, and that while he was gone his friends must have done something to Perez. He did not recall having said that he and Perez got into a black car, or that Perez became angry and got out of the car. Delgado remembered telling the detective he had planned to go to Perez's house to drink, that Perez insulted him and the two of them "had problems." Delgado did not recall telling the detective he asked Perez for money to buy beer, or that Perez believed he was being robbed and had punched him in the mouth.

Delgado denied having attacked Ramirez. He said he must have stepped in a puddle of blood while on an early morning walk with his dog in the area near Ramirez's apartment, while it was still dark. He did not discover blood on his clothes and shoes until later.

*Rebuttal*

The detective spent about one and a half-hours with Delgado after he was taken into custody. He did not smell alcohol on Delgado's breath, and Delgado did not appear to be intoxicated during the interview.

## DISCUSSION

Delgado maintains (1) the trial court erred by failing to instruct on principles of aiding and abetting, and (2) there is insufficient evidence to support the jury's finding of great bodily injury. Neither contention has merit.

*1. Instructional error*

*a. Failure to instruct on aiding and abetting was harmless error*

Delgado insists the trial court erred by failing, sua sponte, to instruct on principles of aiding and abetting. Because he did not drive the car in which Perez was transported, Delgado maintains he was convicted of kidnapping without proof he either moved the victim or made him move a substantial distance by use of force or fear. (§§ 207, subd. (a), 209, subd. (a); *People v. Rayford* (1994) 9 Cal.4th 1, 12–14.) An aider and abettor is one who, by act or advice, aids, promotes or encourages the commission of a crime with knowledge of the criminal purpose of the perpetrator and with the intent to commit, encourage or facilitate the commission of the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 561 (*Beeman*).)

Relying on *People v. Coo*k (1998) 61 Cal.App.4th 1364 (*Cook*), the Attorney General insists aiding and abetting instructions were not required. In *Cook*, the court held that, "one who engages in conduct that is an element of the charged crime is a perpetrator, not an aider and abettor, of the completed crime. . . . 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 the crime." (*Id.* at p. 1371.)

As Delgado points out, in a habeas proceeding brought by the same defendant, a federal district court criticized the rule expressed in *Cook* as "clearly unconstitutional," because it allows the prosecution to prove an offense by establishing a single element as to a particular defendant, "effectively removing the necessity of proving all required elements and thereby lessening the burden of proof. (*Cook v. Lamarque* (E.D.Cal. 2002) 239 F.Supp.2d 985, 986, 996.) 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." (*Ibid.*)

We decline to follow the rule articulated in *Cook.* Due process requires all the elements of an offense be proved against a defendant. But *Cook* permits the prosecution to prove an offense by establishing one element as to a particular defendant, thereby lessening the prosecution's burden of proof. (*Cook v. Lamarque*, *supra*, 239 F.Supp.2d at p. 996.) "Under established law, instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*People v. Flood* (1998) 18 Cal.4th 470, 479–480 (*Flood*).) Accordingly, the court must instruct sua sponte on general principles of law that are both closely and openly connected with the facts presented at trial, and necessary to the jury's understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*); *People v. Brown* (2003) 31 Cal.4th 518, 559.) The court's duty to instruct sua sponte arises if "'there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.' [Citation.]" (*Breverman*, at p. 157.)

With respect to asportation, the elements of aggravated and simple kidnapping do not differ. The prosecution was required to prove: (1) the victim was unlawfully moved by use of force or fear, (2) the movement was without his consent, and (3) the movement was for a substantial distance. (*People v. Jones* (2003) 108 Cal.App.4th 455, 462; §§ 207, 209, subd. (b)(1).) The jury was so instructed here.

While there is evidence Delgado orchestrated the kidnapping of Perez, the record does not reflect that he personally moved or caused Perez to move a substantial distance. Consequently, Delgado could not be found guilty of kidnapping as the perpetrator. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 89 [for conviction of an offense to be supported by sufficient evidence, there must be "substantial evidence of the existence of every element of the offense charged"].) But under the facts here, Delgado could still be guilty as an aider and abettor if he by act or advice, aids, promotes or encourages the commission of a crime with knowledge of the criminal purpose of the perpetrator and

with the intent to commit, encourage or facilitate the commission of the offense. (*Beeman*, *supra*, 35 Cal.3d at p. 561.) Substantial evidence supports this theory. Delgado and his female associate waited for Perez outside the bar at closing time. Delgado grabbed Perez by the shoulder, ushering him into the waiting car driven by the woman who echoed Delgado's invitation to Perez to join them drinking or to accept their offer of a ride. The woman then proceeded to drive a block or so, stopped to allow Delgado to climb into the back seat with Perez, and immediately locked the doors to prevent Perez from escaping. She then drove on silently while Delgado robbed and stabbed Perez, and drove off with Delgado after he pushed Perez from the vehicle. In light of this evidence, and the lack of evidence Delgado actually transported Perez a substantial distance, the trial court was required to instruct sua sponte on aiding and abetting. Its failure to do so was error.

Failure to instruct upon an element of the offense is subject to harmless error analysis under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*). (*People v. Sakarias* (2000) 22 Cal.4th 596, 624–625; *Neder v. United States* (1999) 527 U.S. 1, 8–9 [119 S.Ct. 1827, 144 L.Ed.2d 35].) Accordingly, the error was harmless if it appears beyond a reasonable doubt that it did not contribute to the jury's verdict. (*Chapman*, *supra*, 386 U.S. at p. 24; *People v. Cox* (2000) 23 Cal.4th 665, 677, fn. 6.) An error under the California Constitution is subject to review under the standard of *People v. Watson* (1956) 46 Cal.2d 818. (*Flood*, *supra*, 18 Cal.4th at p. 490.)

Here, reviewed under the more stringent *Chapman* standard, the error was harmless. The jury was instructed on the elements of an aggravated kidnapping and as to the reasonable doubt standard. The evidence established Delgado waited for Perez and insisted he get into a waiting car driven by Delgado's acquaintance, according to a preconceived plan. According to that plan, the jury could readily infer the driver both planned to transport Perez and to ensure he remained in the car while Delgado robbed and stabbed him. The 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. She then continued silently to drive on while Delgado attacked and robbed Perez; the driver voiced no concern or shock and did not come to Perez's aid. These facts are strong indicators she was not only aware of Delgado's intention to rob Perez, but shared the same intention and facilitated the robbery cooperating with Delgado to execute a preconceived plan that included asportation of the victim. On this record it is clear beyond a reasonable doubt a rational jury would have found Delgado guilty of kidnapping had aiding and abetting instructions been given.

*b. No instructional error as to false imprisonment*

The crime of false imprisonment requires proof of (1) nonconsensual, (2) intentional and unlawful restraining or confining of a person, (3) for an appreciable amount of time, no matter how short, (4) accomplished by violence or menace. (*Scofield v. Critical Air Medicine, Inc.* (1996) 45 Cal.App.4th 990, 1000–1001.) False imprisonment is a lesser included offense of kidnapping. (*People v. Magana* (1991) 230 Cal.App.3d 1117, 1120–1121.) Both offenses require a nonconsensual detention or confinement of the victim. But, unlike kidnapping, false imprisonment does not include the element of asportation. Delgado asserts his kidnapping conviction must be reversed because the trial court erred in failing to instruct the jury sua sponte on the lesser included offense of false imprisonment.

""""[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present."' [Citations.] Conversely, even on request, the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215; see also *Breverman, supra*, 19 Cal.4th at p. 154.) "[A] trial court need not instruct [on lesser] offenses unless the evidence would justify a conviction of such offenses." (*People v. Turner* (1983) 145 Cal.App.3d 658, 679, disapproved on other grounds in *People v. Majors* (1998) 18 Cal.4th 385, 411.) The court need not instruct regarding lesser included offenses if the evidence is such that the defendant, if guilty of any offense, is guilty of the greater offense. (*People v. Kelly* (1990) 51 Cal.3d 931, 959; *People v.*

*Ordonez* (1991) 226 Cal.App.3d 1207, 1233 [Instruction on a lesser included offense of false imprisonment is not necessary where the evidence does not support a conclusion that the lesser rather than the greater offense of kidnapping was committed.].)

The only element of kidnapping not required for false imprisonment is asportation. As discussed above, substantial evidence established that the requirements for asportation were met here and the crime of kidnapping was complete. On this record, there is no evidence from which the jury could conclude that appellant merely restrained Perez (false imprisonment) without also finding that his actions constituted kidnapping. The evidence showed that Delgado and the driver acted in concert to move Perez a substantial distance to rob him.

We note also that the trial court did raise the issue of whether an instruction on false imprisonment was warranted in this case. Both Delgado's counsel and the prosecutor readily agreed no instruction regarding false imprisonment was in order on these facts; the trial court agreed and none was given.

2. *Great bodily injury*

Delgado maintains that, on this evidentiary record, "no rational trier of fact could have found that Perez's injuries constituted 'great bodily injury,'" i.e., a "significant or substantial physical injury." (§ 12022.7, subd. (f); *People v. Cross* (2008) 45 Cal.4th 58, 63.)

"'It is well settled that the determination of great bodily injury is essentially a question of fact, not of law. "'Whether the harm resulting to the victim . . . constitutes great bodily injury is a question of fact for the jury. [Citation.] If there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding.'"' [Citation.]" (*People v. Mendias* (1993) 17 Cal.App.4th 195, 205.)

The term great bodily injury has long been accepted as commonly understandable to jurors. It is not a technical term requiring further elaboration. (*People v. La Fargue* (1983) 147 Cal.App.3d 878, 886–887.) "It is well settled that the determination of great bodily injury is essentially a question of fact, not of law. "'"Whether the harm resulting

to the victim . . . constitutes great bodily injury is a question of fact for the jury. [Citation.] If there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding.'" [Citations.]" (*People v. Escobar* (1992) 3 Cal.4th 740, 750, fn. omitted.)

"Abrasions, lacerations, and bruising can constitute great bodily injury. [Citation.]" (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1042.) Injuries that are "trivial, insignificant or moderate" and result in "transitory and short-lived bodily distress" do not rise to the level of "significant or substantial" injuries constituting great bodily injury. (*People v. Caudillo* (1978) 21 Cal.3d 562, 588, overruled on another ground in *People v. Martinez* (1999) 20 Cal.4th 225, 229.) "'A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description. Clearly, it is the trier of fact that must in most situations make the determination.' [Citations.]" (*Escobar, supra*, 3 Cal.4th at p. 752.)

Delgado's argument that the wounds Perez sustained to his eyebrow and under his arm are only "minor cuts" insufficient to establish great bodily injury is an unwarranted minimization of the nature and severity of the injuries he inflicted. Perez did not sustain paper cuts. Rather, he testified he was punched and stabbed repeatedly, and sustained painful lacerations in his eyebrow and ribcage areas that bled causing him briefly to lose consciousness, and causing permanent scars in both places (which were displayed to the jury). When Perez's neighbors saw the immediate aftermath of the assault, they were so alarmed they summoned the police, who in turn called paramedics. Perez required overnight treatment in the hospital. There was no testimony regarding the duration of his injuries or the extent of any impairment. To be sure, there was no corroborating testimony by police officers or medical personnel describing the injuries or any residual effects. However, there was also no challenge raised to Perez's testimony regarding the nature or extent of the injuries he sustained. Perez's unchallenged testimony, coupled with the evidence viewed by the jury was sufficient to support the jury's conclusion that he sustained significant and substantial injury.

Loss of consciousness has been described as sufficient to indicate great bodily injury. (*People v. Kent* (1979) 96 Cal.App.3d 130, 136.) Also, multiple contusions, swelling and discolorations on a child's body were enough to satisfy the definition of great bodily injury. (*People v. Jaramillo* (1979) 98 Cal.App.3d 830, 836–837.) Here, the prosecutor could have done a better job of eliciting a description of the injury, for example, length and depth of the knife wounds and whether there were any residual effects of the injuries. Still, as in *Jaramillo*, "while the issue might be close it appears that there were sufficient facts upon which the court could base its finding of great bodily injury and such a finding therefore will not be disturbed on appeal." (*Id.* at p. 836.) The victim's testimony and the physical evidence were sufficient to allow a jury to conclude that great bodily injury was inflicted within the meaning of section 12022.7.

**DISPOSITION**

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.

CERTIFICATE OF SERVICE

I, Robert Derham, am over 18 years of age. My business address is 400 Red Hill Ave., San Anselmo, CA 94960. I am not a party to this action. On April 29, 2011, I served the **Petition for Review** 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
520 S. Grand Avenue
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 that the foregoing is true and correct. Executed on April 29, 2011, in San Anselmo, California.

Robert Derham