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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MELANIE ABONGAN,

Defendant and Appellant.

D060934

(Super. Ct. No. SCD234743)

APPEAL from a judgment of the Superior Court of San Diego County, Edward P. Allard III, Judge. Affirmed.

Melanie Abongan was convicted of two offenses (unlawful driving of a vehicle and selling a stolen vehicle) based on her participation in a transaction in which a stolen vehicle was sold to undercover officers. On appeal, she contends the judgment must be reversed because (1) there is insufficient evidence to support the unlawful driving conviction, and (2) her counsel provided ineffective representation by cross-examining a witness in a manner that "opened the door" to expert testimony by a prosecution witness

that had previously been excluded by the trial court. We reject these challenges to the judgment and affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

On October 19, 2010, a man using a stolen identity rented a Chrysler vehicle from Enterprise Rent-A-Car. The Chrysler was not returned, and on November 1, 2010, Enterprise Rent-A-Car reported it stolen.

Detective Rodney Demetrio and Investigator John Clements were working as undercover operatives for the San Diego Regional Auto Theft Task Force (RATT), which conducts long-term undercover operations by infiltrating auto theft operations. On November 17, 2010, the two officers met three individuals (defendant, Adam Morofsky, and James Hodge<sup>1</sup>) at a parking lot and purchased the stolen Chrysler for \$400. The facts of the sale transaction were essentially undisputed; the key disputed issue was whether defendant had knowledge of what was occurring. As we detail below, the evidence showed that Morofsky set up the deal with the undercover officers; defendant drove Morofsky to the parking lot; Hodge drove the stolen Chrysler to the parking lot; and defendant drove Morofsky and Hodge away from the parking lot after the sale was completed. The prosecution's theory of the case was that defendant conspired and aided and abetted Morofsky and Hodge with the sale. The defense theory was that defendant did not know about the deal and was merely giving a ride to a friend as a favor.

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<sup>1</sup> Hodge is also referred to in the record as James "Red" Krebs.

A few weeks before the sale, Detective Demetrio had arranged for the purchase of the Chrysler through phone conversations and text messages with Morofsky, who had previously sold Demetrio a stolen Toyota 4Runner. Detective Demetrio and Morofsky had established the price, location, and time for the sale of the Chrysler.

On the day of the sale, Morofsky sent text messages to Detective Demetrio updating him about the imminent arrival of the Chrysler at the parking lot where they had arranged to meet. Morofsky texted that the man who was supposed to deliver the car (later identified as Hodge) claimed not to realize the sale was " 'right now.' " Morofsky thought Hodge was " 'pussy to drive' " the car (meaning he was afraid because the car was already reported stolen), and Morofsky offered to pick up the car himself and bring it to Detective Demetrio. After a series of texts, Morofsky texted that Hodge was on his way and Morofsky was just a few blocks away.

Shortly thereafter, Morofsky arrived at the parking lot in a Ford Taurus car being driven by a female (later identified as defendant). While they were waiting for the stolen Chrysler to arrive, the officers conversed with defendant and Morofsky. Complaining about the Chrysler driver's failure to arrive, Detective Demetrio said in this situation typically they would not do business anymore because he was not going to "look[] bad in front of [his] connect" and he could not "come up . . . empty handed[,] " which meant he would look bad to his criminal "boss" if he came back empty-handed. At one point during the conversation defendant told Detective Demetrio that she "roll[ed] around with" Morofsky, which meant she "h[u]ng out" with him. While they were still waiting for the Chrysler, defendant left the scene and went inside a nearby fast food restaurant.

While defendant was at the restaurant, the officers continued talking with Morofsky. Morofsky complained about people "lagging," and Investigator Clements asked if "[t]hese people have their shit together . . . for getting it done," which was a reference to the person bringing the stolen car for them to buy. Morofsky told the officers that the person driving the Chrysler was defendant's friend. In response, Investigator Clements commented that it "sucks when you're the middle man" and you "can't control it." Morofsky responded, "I know it's a pain in the ass." When Investigator Clements stated "honestly it makes you look bad[,]" Morofsky said he was "making . . . jack shit" from the deal; he was going to ask "him for . . . \$50 bucks out of it"; and he was "just . . . trying to be nice."

Hodge then drove up in the stolen Chrysler, parked next to the Taurus, and was introduced by Morofsky to the officers. Detective Demetrio gave Hodge \$400 cash for the Chrysler, and Morofsky gave the keys to the Chrysler to Detective Demetrio.

After the cash and keys had been exchanged, defendant arrived back from the restaurant. While defendant was present, Hodge and the officers talked about getting in touch about a Dodge Charger vehicle, and Hodge stated he would let them know as soon as he found out about the Charger vehicle.

When they left the scene, Investigator Clements drove the stolen Chrysler; Detective Demetrio drove an undercover police car; and defendant drove the Taurus with

Morofsky and Hodge as her passengers. During the entire transaction, defendant had been "calm" and "joined in conversations without any nervousness . . . ."2

A few weeks after the sale of the Chrysler, Detective Demetrio sent a text message to Morofsky, and he received a reply that Morofsky was in custody. Detective Demetrio then asked for the phone numbers for either Hodge or defendant so he could ask about the Dodge vehicle, and he was sent defendant's number. When Detective Demetrio called defendant, they talked about Morofsky getting arrested. Thereafter, over a period of about three or four months, Detective Demetrio had phone communications with defendant about every two weeks to check if she had any cars to sell him. Describing the content of these communications, Detective Demetrio testified: "She would just respond that she would check on it and let me know if she comes across anything; she has people that actually get cars for her"; "she could get people that would get her cars for me, and when she comes across something, she'll let me know"; and "[s]he had offered up a Ford Taurus at one point, but mentioned there's something fishy about the owner being missing, and she'll tell me more sometime if we meet in person. I offered to get rid of it for her, but she didn't respond to that." Ultimately, defendant did not supply or sell Demetrio another car.

Both Morofsky and Hodge called defendant while they were in jail. Hodge's recorded phone call (made on April 22, 2011) was played for the jury. During the call,

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<sup>2</sup> The sale transaction in the parking lot was videotaped by a member of the RATT surveillance unit, and the videotape (including the recorded conversations) was played for the jury.

Hodge asked defendant to write him a letter or email and send him pictures because she was all he could think about. Defendant asked Hodge if he had seen Adam (i.e., Morofsky) who was also in jail, but Hodge did not initially remember who Morofsky was.<sup>3</sup>

Although acknowledging there was no evidence that defendant "directly brokered" the deal, Investigator Clements opined that she participated as a broker. Clements explained that his opinion was based on her phone communications with Detective Demetrio after the deal, plus the facts that she drove Morofsky to the deal; Morofsky told the officers the person driving the stolen car was defendant's friend and Morofsky was not getting much out of the deal; and it was apparent defendant knew Morofsky and Hodge.

In closing arguments, the prosecutor stated that Morofsky set up the deal with the buyer, Hodge drove the stolen vehicle, and defendant provided the transportation to and from the scene of the sale transaction. The prosecutor argued the circumstances surrounding the sale established defendant's knowledge of and participation in the deal, including that Morofsky was communicating with the undercover officers in front of her; she was close friends with Morofsky and Hodge whereas Morofsky and Hodge did not previously know each other; she was the "middle man" who brought Morofsky and Hodge together to get the car sold; and after the sale she told Detective Demetrio that she

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<sup>3</sup> When defendant asked Hodge if he had seen "Adam in there[,] " Hodge responded, "Adam who?" When defendant provided a bit of information about Adam, Hodge remembered who he was and said he had not seen him.

knows people who can get her cars. In contrast, defense counsel argued the prosecution was improperly trying to establish that she was "guilty by association" based on who her friends were; the evidence showed she did not arrange, discuss, or transact the deal; and she was merely doing a friend a favor by giving him a ride.

### *Jury Verdict and Sentence*

The jury found defendant guilty of unlawfully driving of a vehicle (Veh. Code, § 10851) and selling a stolen vehicle (Pen. Code, § 496d). The trial court granted her probation, with a six-month stayed jail sentence pending successful completion of probation.

## DISCUSSION

### I. *Substantial Evidence of Unlawful Driving*

Defendant argues there is insufficient evidence to support her unlawful driving conviction.

When reviewing a challenge to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) If the circumstances reasonably support the trier of fact's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*Ibid.*)

A defendant is culpable as an aider and abettor if the defendant acted with knowledge of the perpetrator's unlawful purpose and with the intent to commit, facilitate

or encourage the offense. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) Aider and abettor status may not be based on mere presence at the scene or knowledge and failure to prevent the crime; however, factors such as presence, companionship, and conduct before and after the crime may be considered in making the aiding and abetting determination. (*Ibid.*) Similarly, a defendant is culpable under conspiracy principles if the defendant and another person agreed to commit a crime, intended to agree, and intended to commit the offense. (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399.) Although mere association cannot establish a conspiracy, a conspiracy may be proven by circumstantial evidence inferred from the conduct, relationship, interests and activities of the alleged conspirators before and during the alleged conspiracy. (*Id.* at pp. 1399-1400.)

The record supports the jury's finding that defendant intentionally assisted with the sale of the stolen Chrysler. Morofsky told the undercover officer that Hodge (the driver of the stolen car) was defendant's friend, and Hodge's call to defendant from jail corroborated this claim. Also, based on Hodge's failure to initially recollect who Morofsky was, the phone call suggested that Morofsky and Hodge were not well-acquainted. Defendant's close relationship with Hodge, and the lesser connection between Hodge and Morofsky, supports an inference that it was defendant who put Morofsky and Hodge in touch with each other to carry out the stolen vehicle sale negotiated by Morofsky. Also, defendant was present when the officers and Hodge discussed getting in touch about another vehicle and there was no suggestion Hodge tried to hide this discussion from defendant; this circumstance supported an inference that she

was trusted to know about the deals and was not just an unaware observer present by happenstance.

Further, a few weeks later when Detective Demetrio called defendant and asked about purchasing another car, defendant talked about having people who could get cars for Demetrio. Given that defendant had provided transportation to and from the scene where a stolen vehicle was actually sold, the jury could reasonably deduce that defendant's reference to the acquisition of other cars referred to stolen cars, not to the legitimate brokerage and sale of vehicles. Considering all these circumstances in their totality, the record supports the jury's finding that defendant was aware of and intentionally assisted the stolen vehicle sale transaction, and thus she was culpable for Hodge's unlawful driving of the car under aiding and abetting or conspiracy principles.

In support of her challenge to her unlawful driving conviction, defendant argues she did not drive, arrive in, or have control over the Chrysler; there was no direct evidence she had discussed the sale with anyone; she was inside a restaurant when the vehicle was sold; she could have thought Hodge was engaged in legitimate car sales; and she never offered the undercover detective a car notwithstanding his repeated phone communications to her. Although these were facts and inferences the jury could consider, they do not defeat the sufficiency of the evidence supporting the jury's guilty verdict.

## II. *Ineffective Assistance of Counsel*

Defendant argues her trial counsel provided ineffective representation because on cross-examination of a prosecution witness he opened the door to expert testimony that

had previously been excluded by the trial court and that was relevant to the key disputed issue of her knowledge.

### *A. Background*

#### *1. Trial Court's Pretrial Ruling Excluding the Expert Testimony*

During pretrial proceedings, the court and parties discussed whether the prosecution could present expert testimony from Investigator Clements about the typical roles of people present during stolen car sales operations. The prosecutor proffered testimony from Clements stating that a seller of a stolen car does not bring people to the scene of the sale who do not know about the illegal deal; rather additional people are brought for safety reasons to serve as "other eyes" in case there are problems during the transaction. Defense counsel objected to the evidence, arguing it did not relate to the particular case and addressed matters that could be resolved by the jury based on common sense and without expert testimony.

To assist the court with its ruling, Investigator Clements testified at an Evidence Code section 402 hearing about his observations concerning the role of additional people brought to a stolen vehicle sale transaction. Clements testified a seller would bring along someone he or she could trust, and additional people might be present because they have a vested interest in the sale, to provide "an extra set of eyes" for surveillance, or to provide a ride so the seller does not have to leave the scene on foot.

The trial court ruled the expert testimony was inadmissible. The court stated the case did not involve a sophisticated criminal organization whose structure needed to be explained to the jury; the reasons delineated by Investigator Clements for the presence of

additional people were all matters of common sense; his testimony in essence said that everyone at the scene has knowledge of the deal; and the question of defendant's knowledge was a matter that could be resolved by the jury without expert testimony.

## *2. Trial Court's Ruling that Defense Counsel Opened the Door to the Expert Testimony*

During trial, the court changed its ruling and allowed the prosecutor to ask Investigator Clements whether it is common for people accompanying the seller of a stolen car to be unaware of what is occurring at the sale transaction. The trial court found defense counsel had opened the door to this testimony during cross-examination of Detective Demetrio.

On cross-examination of Detective Demetrio, defense counsel elicited testimony that different people were with Morofsky during the two sales transactions he had conducted with Demetrio; i.e., the individual with Morofsky during the sale of the 4Runner was not the same person as the individual present during the sale of the Chrysler. Defense counsel also asked if it was common to have multiple people involved when someone is selling a stolen vehicle, and Demetrio answered yes. Defense counsel continued: "And it's very likely that that person [with the seller at the time of the sale] is not aware of what's going on with the deal, is that correct?" Detective Demetrio responded: "It could be. But most of the time, from my experience, people bring other people to deals . . . as lookouts."

On redirect examination (over defense objection), the prosecutor asked Detective Demetrio if it was common to have additional people at a stolen car sale transaction who were unaware of the deal. Demetrio answered it was not common, explaining the

additional person would ask questions, and when he or she saw a car worth 10 or 20 thousand dollars being sold for three or four hundred dollars, the person was "going to be aware there's something shady going on . . . ."

After the conclusion of Detective Demetrio's testimony, the trial court ruled defense counsel had opened the door to permit expert testimony from Investigator Clements about the knowledge of additional people present during stolen car sale transactions because defense counsel had asked this question of Detective Demetrio. Defense counsel objected to the court's ruling, unsuccessfully arguing that he had only questioned Detective Demetrio about the two deals he had conducted with Morofsky, not about deals in general, and, further, additional expert testimony on this point should not be permitted.

### *3. Investigator Clements' Expert Testimony About the Knowledge of People Accompanying the Seller*

After presenting the testimony of Detective Demetrio about the undercover purchase of the stolen Chrysler, the prosecutor called Investigator Clements to the stand and likewise questioned him about what occurred during the Chrysler sale transaction. Based on its ruling that defense counsel had opened the door to expert testimony about the awareness of additional people at stolen car sale transactions, the prosecutor was permitted to also question Investigator Clements as an expert on stolen car sale transactions.

To present this expert information, the prosecutor asked: "[I]n your experience in undercover operations involving stolen cars where you're making purchases, is it

common for additional people [who] arrive with the seller of the stolen car to be unaware of what's occurring in that deal?" Investigator Clements answered: "No. I think it's common to know what's going on." Clements elaborated that a seller would bring a person that he or she could trust because the person would "have something on" the seller and the person could "offer that up" to the police if the person gets in trouble. Further, the additional person could be there to be an extra set of eyes; because the person has a "vested interest" and is going to get paid; or because the person is "brokering" the deal (i.e., bringing the seller and buyer together).

### B. *Analysis*

To show ineffective representation, the defendant must establish that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, absent counsel's deficiency, the result would have been different. (*People v. Weaver* (2001) 26 Cal.4th 876, 925.) There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (*Ibid.*) If the record does not show prejudice from counsel's alleged deficiency, we may reject the claim without determining whether counsel's performance was deficient. (*People v. Sapp* (2003) 31 Cal.4th 240, 263.)

The record reflects that defense counsel did not intend to open the door to expert testimony about the typical roles and knowledge of people who accompany a seller to a stolen car sale transaction; thus, this is not a case involving the elicitation of testimony based on a conscious, strategic decision by defense counsel. Rather, defense counsel wanted to bring out the fact that two different people were present at the two deals

conducted between Morofsky and Detective Demetrio, and thus defendant was not in the position of a trusted coconspirator who repeatedly accompanied Morofsky to these illegal deals. Although defense counsel's question concerning the awareness of additional people was couched in the context of the two deals between Morofsky and Demetrio, the court ruled that it opened the door to expert testimony concerning stolen car deals in general.<sup>4</sup>

Assuming *arguendo* that reasonably competent counsel would have refrained from asking any questions that addressed stolen car sale transactions in general, there was no prejudice from this deficiency. The record as a whole shows the expert opinion about the typical awareness of a stolen car seller's companions was not highly significant information presented to the jury.

The testimony of both Detective Demetrio and Investigator Clements that persons accompanying the seller are typically aware of the deal was very brief. Also, the reasons they presented for their opinion (i.e., a person with the seller would ask questions and it would be apparent what was occurring; the person needed to be trusted by the seller; and the person could be serving as a look-out or have an interest in the deal) did not involve specialized or technical information that the jury might not have been able to figure out without the expert opinion. Contrary to defendant's assertion on appeal, the expert testimony on this point did not "all but seal[] [her] fate" on the charged offenses. Rather, the testimony was relatively innocuous because (as noted by the trial court and defense

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<sup>4</sup> Defendant does not assert the trial court abused its discretion in finding defense counsel had opened the door to expert testimony on this point.

counsel during the pretrial discussions) it involved considerations derived from a common sense evaluation of the circumstances. Indeed, on cross-examination, Detective Demetrio acknowledged that a person's presence during a car sale does not automatically mean the person knows the car is stolen. Reasonably intelligent jurors would likewise know this and understand that—regardless of expert opinion concerning the typical awareness of a seller's companions—their job was to determine whether defendant in fact had knowledge of the illegal transaction or, as claimed by the defense, was merely doing a friend a favor by giving him a ride.

Further, on cross-examination, defense counsel elicited extensive testimony from the officers concerning whether defendant herself (not some hypothetical typical additional person) knew about the deal. For example, Detective Demetrio acknowledged he had no communications with defendant about the Chrysler deal; defendant was in the restaurant when the stolen Chrysler arrived; his conversations about the Chrysler deal were with Morofsky and Hodge; defendant did not give him the keys to the Chrysler; no money was given to defendant; and notwithstanding his repeated phone communications with defendant asking for a car, she never got him one.

Similarly, Investigator Clements acknowledged that defendant did not offer to sell the Chrysler, did not participate in the conversation for the purchase of the Chrysler, could not hear what was occurring while she was in the restaurant, did not provide the keys, was not given any money, and was not present when the money and keys were exchanged.

Additionally, in closing argument the prosecutor only once mentioned the expert testimony on this point, stating: "The detectives tell you, someone who is selling them a stolen car, they're not going to bring people they don't trust." The remainder of the prosecutor's argument focused exclusively on the circumstances surrounding the Chrysler sale transaction and defendant's relationships and conduct to establish her knowledge and participation in the sale.

The record as a whole shows the focus of the trial was whether defendant herself knew about the deal, and the expert testimony about the knowledge of a typical seller's companion was not of great import. Under these circumstances, we are satisfied the jury's verdict was based on an evaluation of defendant's particular knowledge, and there is no reasonable probability it would have reached a different conclusion without the expert testimony.

#### DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.