IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHN R FONTENOT, Defendant and Appellant.	No. S247044 Court of Appeal No. B271368 (Los Angeles County Superior Court No. NA093411)

APPELLANT'S REPLY BRIEF ON THE MERITS

Michael Allen
State Bar No. 254082
1240 Rosecrans Ave., Ste. 120
Manhattan Beach CA 90266
Telephone: (415) 283-7579
allenmichael.law@icloud.com

Attorney for Appellant,
John R. Fontenot

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INTRODUCTION

The parties agree regarding the question this court presented: attempted kidnapping is not a lesser included offense of kidnapping. (AOB 10; RB 13.) Both parties agree that *People v. Martinez* (1999) 20 Cal.4th 225, 241 is no longer good law in light of *People v. Bailey* (2012) 54 Cal.4th 740, 753 (*Bailey*). (AOB 18; RB 15.)

The parties, however, still dispute whether the trial court violated Fontenot's rights to constitutional due process when it convicted Fontenot of an uncharged lesser related offense. The most important point of disagreement is whether, under existing decisional law, Penal Code section 1159 provided constitutionally adequate notice that Fontenot was in jeopardy of being convicted of attempt. Although section 1159 appears capable of providing such notice, cases have interpreted that statute to apply only where the attempt is a lesser-included offense. If section 1159 were to provide the notice that the Attorney General claims, a defendant would be entitled to a jury instruction on attempt, and cases have routinely found this not to be the case. In fact, recent cases have cited language from this court's decision in *Bailey* to deny a defendant's right to an attempt instruction.

The parties also disagree whether Fontenot asked the court to find him guilty of attempt, whether Fontenot had an opportunity to correct the notice failure, and whether the error is subject to prejudicial error analysis. Fontenot did not ask the court to find him guilty of attempt, he had not opportunity to correct the error, and the error is not subject to prejudicial error analysis.

The Attorney General does not dispute the appropriate remedy.

ARGUMENT

I. Section 1159, as Interpreted by the Courts at the Time of His Trial, Did Not Put Fontenot on Notice that He Needed to Defend Against a Charge of Attempted Kidnapping.

The Attorney General argues there was no due process violation because section 1159 provided notice to Fontenot that he was on trial not just for kidnapping but attempted kidnapping: "Penal Code section 1159 [puts] defendants on notice of potential liability for the inchoate version of the charged, completed offense." (RB 17.) The Attorney General points out that, by its terms, section 1159 provides that "the judge if a jury trial is waived, may find the defendant guilty ... of an attempt to commit the offense." (RB 17; Pen. Code, § 1159.)

Section 1159 cannot reasonably be interpreted to have provided Fontenot with such notice because case law has interpreted this language to apply only where the attempt is necessarily included in the charged offense. (See e.g. *Bailey, supra,* 54 Cal.4th 740.) In fact, no published decision after *Bailey* has interpreted section 1159 in the manner the Attorney General suggests. The cases follow *Bailey,* holding that the trier of fact cannot find the defendant guilty of an attempt

unless that crime is necessarily included in a charged offense. (*People v. Hamernick* (2016) 1 Cal.App.5th 412, 417; *People v. Mendoza* (2015) 240 Cal.App.4th 72; *People v. Braslaw* (2015) 233 Cal.App.4th 1239.)

Notably, the Attorney General has not cited a single case, before or after *Bailey*, that has interpreted section 1159 to provide constitutionally adequate notice of a defendant's potential jeopardy of being convicted of an uncharged attempt. (RB 17-21; but see *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1454; *People v. Crary* (1968) 265 Cal.App.2d 534, 540.) Instead the Attorney General's response cites *People v. English* (1866) 30 Cal. 214, 217 to support the "deeply rooted" jurisdiction of the court to render a guilty verdict as to attempt. (RB 17.) The Attorney General's citation to *English* case seems misplaced, however, as the case did not involve or discuss attempt. (*English, supra,* 30 Cal. 214.) The defendant was charged with assault with intent to commit murder, and a jury convicted the defendant of assault with a deadly weapon with intent to inflict bodily injury. (*Id.* at pp. 216-217.)

The Attorney General's sole citation to a case actually applying section 1159 contradicts the Attorney General's argument. (RB 18, fn. 2, *People v. Braslaw, supra,* 233 Cal.App.4th at p. 1248.) In *Braslaw,* the appellant argued the trial court had a duty to instruct the jury on the uncharged attempt, citing section 1159 for support. (*Id.* at p. 1247.) The court disagreed, citing *Bailey*:

> While the "disjunctive language" of the statute might suggest both lesser included offenses and attempts should be treated equally when it comes to the obligation to instruct sua sponte (*People v. Bailey* (2012) 54 Cal.4th 740, 752, 143 Cal.Rptr.3d 647, 279 P.3d 1120 (*Bailey*); see *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1454, 89 Cal.Rptr.3d 402 [citing section 1159 as creating an

> obligation to instruct on attempt]), this is not so. Our Supreme Court has made the "qualification that under section 1159, '"[a] defendant may be convicted of an uncharged crime if, but only if, the uncharged crime is necessarily included in the charged crime."'" (*Bailey, supra,* 54 Cal.4th at p. 752, 143 Cal.Rptr.3d 647, 279 P.3d 1120.) A trial court therefore has no sua sponte duty to instruct on attempt unless it is also a lesser included offense. (*Id.* at p. 753, 143 Cal.Rptr.3d 647, 279 P.3d 1120 [no duty to instruct on attempted escape because it had more specific intent requirement than crime of escape].)

(*People v. Braslaw, supra,* 233 Cal.App.4th at p. 1247.)

In *Hamernick,* a more recent case, the Attorney General appeared to concede that section 1159 did not provide the defendant with notice that she might be convicted of the uncharged attempt to commit the charged crime.[1] (*Hamernick, supra,* 1 Cal.App.5th at p. 423.) Similar to Fontenot's case, after the close of evidence the trial court did not believe the prosecution had proved the charged offense, "unlawful possession of a controlled substance, Dilaudid ... ." (*Id.* at pp. 416, 421.) Without any amendment of the charges, the trial court instructed the jury on attempted possession, and the jury found the defendant guilt of this attempt. (*Id.* at pp. 416, 422.) The Attorney General conceded that the trial court erred in substituting the attempt for the charged crime because the attempt was not a lesser included offense. (*Id.* at p. 423.) The Attorney General conceded that attempt was merely a "lesser related" offense, which did not provide sufficient

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[1] *Hamernick* reversed the jury verdict based on the lack of constitutional due process notice and the court error in instructing the jury on the uncharged attempt, but the Attorney General conceded these points without raising section 1159.

notice to satisfy the constitutional due process or a fair trial guarantees. (*Hamernick, supra,* 1 Cal.App.5th at p. 426.)

Thus, section 1159 does not permit the trier of fact to convict a defendant of an uncharged attempt unless "the uncharged crime is necessarily included in the charged crime." (*Bailey, supra,* 54 Cal.4th at p. 752, quoting *People v. Sloan* (2007) 42 Cal.4th 110, 116.) Accordingly, the trial court cannot have a sua sponte duty to instruct on an uncharged attempt unless it is a lesser included offense. (*Bailey, supra,* at p. 753.) *Bailey* thus impliedly overruled two earlier decisions interpreting section 1159 to require a sua sponte instruction on uncharged attempts "where there is evidence that would absolve the defendant from guilt of the charged offense but would support a finding of guilt of attempt to commit the charged offense ... ." (*People v. Hamlin, supra,* 170 Cal.App.4th at p. 1454; *People v. Crary, supra,* 265 Cal.App.2d at p. 540.) In fact, this court has consistently held that section 1159 does not provide notice that a defendant is in jeopardy of being convicted of anything but the charged crime and crimes necessarily included in the charged crime. (*Bailey, supra,* 54 Cal.4th at pp. 752-753; *People v. Sloan* (2007) 42 Cal.4th 110, 116; *People v. Lobhauer* (1981) 29 Cal.3d 364, 368.)

Insofar as the parties agree that attempted kidnapping was not a lesser included offense of kidnapping, this court's statements in *Bailey, supra,* 54 Cal.4th 740 foreclose respondent's argument that section 1159 put Fontenot on notice that he might be convicted of the uncharged attempt. Respondent cites no cases to support its argument, and there are several cases, subsequent to *Bailey,* that interpret section 1159 not to provide the notice that respondent argues. Moreover, the Attorney General did not argue this interpretation of section 1159

either in *Hamernick* or during the court of appeal proceedings in this case. If this argument was not obvious to the Attorney General, it is difficult to imagine why it would have been apparent to Fontenot at his trial.

Fontenot was tried on March 28, 2016. (CT 74-75.) This was almost four years after this court decided *Bailey*. (*Bailey, supra,* 54 Cal. 4th 470, decided Jul. 12, 2012.) His trial also took place after *Braslaw*. (*Braslaw, supra,* 233 Cal.App.4th 1239, filed Jan. 30, 2015, review denied Apr. 15, 2015.) Accordingly, section 1159 did not provide Fontenot with constitutionally adequate notice, and the trial court violated Fontenot's right to due process when it convicted him of the uncharged crime of attempted kidnapping.

II. Fontenot Neither Agreed to Allow the Court to Consider a Verdict on the Uncharged Attempt Nor Had an Opportunity to Correct the Lack of Notice.

The Attorney General argues that Fontenot's due process claim fails because he could not have been surprised by the court's consideration of this charge. The Attorney General asserts that Fontenot could not have been surprised because he asked for this verdict, and even if he did not ask for it, he had the opportunity to object to it and did not. (RB 26.) Finally, the Attorney General believes that Fontenot had a duty to request a continuance to respond to the theory if it surprised him. (RB 26.)

Each of these arguments fails: Fontenot did not ask the trial court to find him guilty of attempted kidnapping; Fontenot had no opportunity to object; and a continuance would have fixed nothing after

both sides had rested, the case had been submitted to the court, and the court had pronounced a verdict.

A. Defense Counsel Did Not Ask for a Verdict on Attempted Kidnapping or Concede that Fontenot was Guilty of Attempted Kidnapping; She Merely Argued that the Prosecution Failed to Prove Kidnapping.

The Attorney General cites *People v. Birks* (1998) 19 Cal.4th 108 in support of forfeiture but leaves out the most relevant passage: "nothing in our holding prevents the defendant from arguing in any case that the evidence does not support conviction of any charge properly before the jury, and that complete acquittal is therefore appropriate." (*Id.* at p. 136, fn. 19.) This is what Fontenot did, and this does not result in forfeiture. (*Ibid.*)

The prosecutor in the trial court argued that it was defense counsel who made the case for attempted kidnapping. (RT 110.) Defense counsel explained, however, that by distinguishing kidnapping from attempted kidnapping, she had not requested a verdict on attempted kidnapping:

> And my reply to that your honor, I want to be very specific. I argued that the People did not meet their burden on kidnapping but they would have met their burden on an attempt. That doesn't mean that I requested the court to find my client guilty of the attempt.
>
> What I said there was there was sufficient evidence to do it. But what the courts have repeatedly said [sic] it's up to the district attorney to charge those cases. It's not up to me to acquiesce and ask for that.
>
> I didn't ask for that. I argued they didn't prove a kidnapping, they proved an attempt. He's not charged with an attempt. Court can't find him guilty of it. It's a separate and distinct crime requiring a different standard of proof.

(RT 110.) The court did not dispute defense counsel's characterization, and denied the defense motion on other grounds. (RT 108, 110.) The trial court's denial was based on the trial court's belief that the court had a *sua sponte* duty to consider a verdict on attempt. (RT 108, citing *People v. Crary, supra,* 265 Cal.App.2d 534.) It was not based on counsel having requested the verdict. (RT 108.)

Defense counsel, moreover, could not herself waive Fontenot's rights to challenge any actual allegation that he was guilty of attempted kidnapping. (*People v. Lopez* (2018) 28 Cal.App.5th 758 [239 Cal.Rptr.3d 465, 472-473]; see also *McCoy v. Louisiana* (2018) __ U.S. __ [138 S.Ct. 1500; 200 L.Ed.2d 821] and *People v. Farwell* (2018) 5 Cal.5th 295, 300.) This would itself be reversible error. (*Ibid.*)

In *Lopez,* counsel's opening and closing arguments conceded the defendant was guilty of felony hit and run. (*Lopez, supra,* 28 Cal.App. 5th [239 Cal.Rptr.3d at p. 470].) Relying on *McCoy* and *Farwell,* the Court of Appeal held that counsel's concessions had been "tantamount to a guilty plea, as it admitted 'all of the elements of a charged crime necessary for a conviction' and 'relieved the prosecution of its burden of proof' on that count." (*Id.* at p. 472.) Because there was not evidence the defendant was aware of the constitutional rights that he was giving up, the Court of Appeal reversed. (*Id.* at pp. 472-473].)

B. Toro is Inapposite Because this was Not a Jury Trial, and There were No Instructions or Verdict Forms to Which Defense Counsel Might Have Objected.

The Attorney General argues that Fontenot forfeited his challenge to the verdict on attempted murder because he did not object, but the Attorney General does not explain precisely when Fontenot

could usefully have objected. Moreover, the Attorney General's leading case is inapposite, addressing as it does a jury trial where counsel could have objected to verdict forms and jury instructions before they went to the trier of fact. (*People v. Toro* (1989) 47 Cal.3d 966, disapproved on other grounds by *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.)

The Attorney General's argument has already been rejected by several courts. (*People v. Parks* (2004) 118 Cal.App.4th 1, 8; *In re Alberto S.* (1991) 226 Cal.App.3d 1459, 1465; *People v. Delahoussaye* (1989) 213 Cal.App.3d 1, 11–13; *People v. Delgado* (1989) 210 Cal.App. 3d 458, 463–464.) "[A] defendant's failure to object to a court's finding him or her guilty of a lesser related offense after the decision is announced does not support a reasonable inference of consent to conviction of the offense." (*In re Alberto S., supra,* at p. 1465.) This notice or warning is necessary to satisfy the due process requirements articulated in *Lohbauer, supra,* 29 Cal.3d at page 368. (*In re Alberto S., supra,* at p. 1465.)

The Attorney General has already argued, as here, that these earlier cases were wrongly decided and that the reviewing court should find that the defendant's failure to object to the conviction at the time it was announced by the court or at a later hearing amounted to consent. (*In re Alberto S., supra,* 226 Cal.App.3d at p. 1465.) "They contend the fact that defendant could have objected after the court announced its decision, but did not, is the equivalent of the defendant acquiescing to the conviction." (*Id.* at pp. 1465–1466.) The court in *Alberto S.* could not agree, and for good reason. (*Id.* at p. 1466.)

The absence of warning, or notice, of the possibility that the defendant might be convicted of a lesser related offense, distinguishes

Parks, Alberto S., Delahoussaye, and *Delgado* from the cases cited there and here by the Attorney General. (*In re Alberto S., supra,* 226 Cal.App.3d. at p. 1465.) For example, in one of the Attorney General's cases, the defendant was charged with attempted murder and assault with a deadly weapon. (*Toro, supra,* 47 Cal.3d at p. 970.) In addition to the charged offenses, the jury was instructed on, and received a jury verdict form for, the offense of battery with serious bodily injury. (*Id.* at p. 971.) The jury found defendant not guilty of the charged offenses but found him guilty of battery with serious bodily injury as a lesser offense to the attempted murder charge. (*Ibid.*) The court of appeal reversed because battery with serious bodily injury was not a lesser included offense and defendant had not requested the instruction. (*Ibid.*) This Court granted review. (*Id.* at p. 972.)

The Court described the issue as whether the defendant should be considered to have consented to have the jury consider a lesser related offense "when the instructions are given by the court sua sponte and no defense objection was raised, *despite ample opportunity,* to either the instructions or the verdict forms by which the nonincluded offense was submitted to the jury." (*Toro, supra,* 47 Cal.3d at p. 974, italics added.) Deciding the issue, the court relied on the general rule that a defendant may not raise the issue of "unfair surprise" for the first time on appeal. (*Id.* at pp. 975-976.) "To prevent speculation on a favorable verdict, a reasonable and fair rule ... is that a failure to promptly object will be regarded as a consent to the new charge and a waiver of any objection based on lack of notice." (*Id.* at p. 976.)

Here, the trial court found Fontenot guilty of attempted kidnapping after the presentation of evidence and the arguments of

counsel on the crime of kidnapping. There was no verdict form and no instruction to which Fontenot might have objected. By the time the court announced that it was finding Fontenot guilty of attempted kidnapping, the verdict was in and it is difficult to see what good defense counsel's objection would have done. In fact, when defense counsel did the next day challenge the adequacy of the notice and the lawfulness of the court finding Fontenot guilty of the uncharged lesser related offense, the court denied the motion, holding that the court had the duty to "instruct sua sponte on an attempt to commit an alleged offense whenever there is evidence that might absolved [sic] the defendant on the charged offense and there is evidence that would justify the attempt." (RT 108.)

Finally, it cannot be said that Fontenot had the opportunity to object but chose not to in order to speculate on a favorable verdict. Defense counsel's argument was plain. The prosecution had not proved a kidnapping. The court agreed with this argument. Counsel was not gaming the system. She was not trying to have it both ways. She just did not believe a kidnapping had been proved. Here, unlike *Toro*, Fontenot may justly complain that he was surprised by the court's consideration of an uncharged lesser related offense.

Nonetheless, the Attorney General characterizes defense counsel's argument as a plea for leniency, and argues that a successful plea for leniency should foreclose any challenge to the result. (RB 29.) Neither the record nor the facts support this. Nowhere does the record show counsel pleading for leniency. (RB 29.) Counsel does not admit the possibility of a conviction for kidnapping and ask for leniency; she argues that the court cannot on these facts find a kidnapping. If the court were to find Fontenot guilty of kidnapping, the result would be

reversed for insufficient evidence. Moreover, the Attorney General does not explain how a conviction for attempted kidnapping might result in any leniency. (RB 29.) The consequences for Fontenot of a conviction for attempted kidnapping was just the same as for kidnapping. Conviction of either crime would qualify as a third strike and result in a sentence of 25 years to life. (CT 77.) To either conviction, the court would add three serious felony priors. (CT 77.)

C. Fontenot Could Not Correct the Lack of Notice by Asking for a Continuance After the Matter Had Already Been Submitted to the Trier of Fact.

The Attorney General argues that Fontenot forfeited his challenge to the attempted kidnapping conviction because he did not object or seek a continuance "even after the trial court made the specific intent finding ... ." (RB 26, citing *People v. Seaton* (2001) 26 Cal.4th 598, 640-641.) Similar to the citation to *Toro* above, *Seaton* is inapposite because it applies to circumstances where the defendant had notice in the trial court and where requesting a continuance would have provided the defense with a legitimate opportunity to correct any deficiencies that might have resulted from not having had notice earlier.

In *Seaton,* the prosecution charged the defendant with felony murder and two felony-murder special circumstances, robbery murder and burglary murder. (*Seaton, supra,* 26 Cal.4th at pp. 626, 640.) At trial, the prosecution presented evidence to support a finding that the defendant had broken into the home and had beat the victim not once but twice. (*Id.* at p. 640.) The second beating provided the jury with an alternative means of finding the defendant guilty of the murder and the robbery and burglary special circumstances. (*Ibid.*) On appeal, the

defendant complained that he had no pre-trial notice that the prosecutor would argue this theory of guilt based on two beatings. (*Seaton, supra,* 26 Cal.4th at p. 640.) He argued that the first mention of this theory was "when jury selection was almost complete." (*Ibid.*) The court found that the defendant could not complain of the error because even if he had a right to pre-trial notice, he had never "objected to the lack of notice at trial, nor did he seek a continuance to prepare sufficiently to respond to the theory. As a result, he has not preserved the right to assert the lack of notice on appeal." (*Id.* at p. 641.) In short, the defendant had a chance to fix it and he did not; thus, he may not complain.

Here by contrast, the court found Fontenot guilty of the uncharged, lesser related offense after all the evidence was in, after the arguments had been made, and after the matter was submitted to the court for decision. Under these circumstances, Fontenot had no opportunity to correct the absence of notice by requesting a continuance, and therefore not duty to do so.

III. The Constitutional Due Process Error is Not Reviewable for Prejudice Because the Court Lacked Jurisdiction to Find Fontenot Guilty of the Uncharged Attempt, and there is No Way to Evaluate What the Outcome Might Have Been Without the Error.

The Attorney General argues that even if Fontenot was denied constitutional due process notice of the uncharged attempt, "The only way the conviction of the uncharged offense would implicate appellant's due process notice rights would be if it deprived appellant of the opportunity to present a defense that might have defeated a finding

of specific intent." (RB 24, citing *People v. Breverman* (1998) 19 Cal.4th 142, 165.) Although not cited by respondent, this court's opinion in *Bailey* appears to have considered whether the evidence was so overwhelming that the petitioner could not have been prejudiced by the error. (*Bailey, supra,* 54 Cal.4th at p. 754.)

Bailey notwithstanding, this is not a case where a reviewing court could evaluate the error for prejudice because the error was jurisdictional and it is impossible to determine what the outcome might have been without the error.

A. The Error Was Jurisdictional: the Court Had No Authority to Find Fontenot Guilty of the Uncharged Attempt.

In *Hamernick,* the court of appeal rejected the Attorney General's argument that lack of notice was harmless. (*People v. Hamernik, supra,* 1 Cal.App.5th at p. 427.) The court "found no case to support the People's argument that since the evidence supported the lesser related offense, any failure to charge the defendant in the Information was harmless," but the court did not decide the case on the presence or absence of harmless error. (*People v. Hamernik, supra,* 1 Cal.App.5th at p. 427.) Instead, the court held that "since the attempted possession charge was not included in the Information, the trial court lacked jurisdiction to convict defendant of the lesser related offense." (*Ibid.*, citing *People v. Parks, supra,* 118 Cal.App.4th 1, 5-6.)

In a court trial, the judge sitting as the trier of fact, must "at the conclusion thereof, announce his findings upon the issues of fact, which shall be in substantially the form prescribed for the general verdict of a jury and shall be entered upon the minutes." (Pen. Code, § 1167; see *Parks, supra,* 118 Cal.App.4th at p. 9.) When the issue

submitted to the court is whether the prosecution has proved a particular crime beyond a reasonable doubt, the court cannot simply substitute a different question or a different charge. (*Parks, supra,* 118 Cal.App.4th at p. 9; see also *In re Alberto S., supra,* 226 Cal.App.3d 1459, 1466.)

> "It is fundamental that 'When a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime. [Citations.] This reasoning rests upon a constitutional basis: "Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." [Citation.]' (*People v. West* (1970) 3 Cal.3d 595, 612 [91 Cal.Rptr. 385, 477 P.2d 409]....)" (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368, 173 Cal.Rptr. 453, 627 P.2d 183.)

(*In re Alberto S., supra,* 226 Cal.App.3d at p. 1464.)

Here, because the attempt was not included in information, reversal is required without consideration of prejudice. (*Hamernick, supra,* 1 Cal.App.5th at p. 427; see AOBM 19.)

B. Even if the Court Had Jurisdiction to Find Fontenot Guilty of the Uncharged Attempt, the Constitutional Due Process Notice Error is Not Reviewable for Prejudice Because it Impossible to Know How the Case Would Have Been Tried Differently if Fontenot Had Known Specific Intent Would Be an Issue.

Insofar as we cannot know how Fontenot would have defended the case differently if he were on notice that he could be convicted of attempted kidnapping, the error was structural and not reviewable for prejudice. (See *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149, fn. 4 ["we rest our conclusion of structural error upon the

difficulty of assessing the effect of the error."]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 282 [structural error where consequences are "necessarily unquantifiable and indeterminate ... ."])

In the context of omitted jury instructions on elements of the crime, this Court has refused to find an exception to the *per se* rule of reversal where the defendant was unaware that the element needed to be proved, insofar as "he might through ignorance fail to present evidence worthy of consideration on that matter." (*People v. Garcia* (1984) 36 Cal.3d 539, 556.) This exception applied only where the parties recognized that the element was an issue and "presented all evidence at their command on that issue ... ." (*Ibid.*)

The Attorney General concedes that "the mental state required for attempted kidnapping, specific intent to kidnap, was never at issue in this case." (RB 24.) This is true: the only issue at Fontenot's trial was whether Fontenot had carried M away a substantial distance.[2] (1RT 91, 93-94, 98.) Fontenot carried her as far as the door and put his hand on the door handle. (1RT 23-24.) The parties were then left to argue whether that movement was sufficiently substantial to support a kidnapping conviction.

Fontenot's intent in opening the door and what he intended to do if he succeeded in opening it and holding on to M were not relevant. If Fontenot had only intended to take M outside to the street, his specific intent may not have supported a conviction for attempted kidnapping. (Cf. *People v. Sheldon* (1989) 48 Cal.3d 935, 952 [moving victim from a garage, to hallway in the house, to the kitchen, and then

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[2] Fontenot testified that he had not seen, touched, approached, or spoken to M that night, but the closing arguments showed this theory was not being contested. (1RT 74-75.)

to the den insufficient]; *People v. Green* (1980) 27 Cal.3d 1, 65, 67 [moving victim 90 feet insufficient]; *People v. Brown* (1974) 11 Cal.3d 784, 788-789 [moving victim 75 feet insufficient]; *People v. Thornton* (1974) 11 Cal.3d 738, 767 [moving victim from front to back of laundromat insufficient]; *People v. Daly* (1992) 8 Cal.App.4th 47, 56 [moving victim 40 feet insufficient]; *People v. John* (1983) 149 Cal. App. 3d 798, 804-810 [moving victim 465 feet asportation insufficient].)

Despite Fontenot's intent being irrelevant at his trial, respondent argues "There was no suggestion that [Fontenot] had any defenses to specific intent at the time of trial, even at the hearing on his new trial motion." (RB 26.) Respondent argues "Appellant cannot credibly claim that he would have defended himself any differently if attempted kidnapping been separately charged." (RB 26.)

Respondent's claims are based on a trial where Fontenot's specific intent was not at issue. Respondent cannot know what other defenses Fontenot might have presented at a trial where his intent had been in issue. Respondent cannot know whether Fontenot would have testified at a trial where his specific intent had been a necessary element. Respondent cannot know what evidence Fontenot may have had that would have been relevant to this question. Respondent cannot know what evidence Fontenot may have had to support a defense that would have been available against attempted kidnapping but not kidnapping. Respondent cannot assume from the absence of evidence at a trial where specific intent was not in issue that the evidence would have been substantially the same at a trial where specific intent was at issue.

Because Fontenot did not know that specific intent was an element to be proved in his trial, we cannot know what evidence he