

MAR 13 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHN RICHARD VARNER,

Defendant - Appellant.

No. 10-50071

D.C. No. 5:07-cr-00028-VAP-2

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Submitted March 7, 2013**
Pasadena, California

Before: THOMAS and HURWITZ, Circuit Judges, and BEISTLINE, Chief
District Judge.***

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Ralph R. Beistline, Chief District Judge for the U.S. District Court for the District of Alaska, sitting by designation.

Defendant-Appellant John Varner was convicted on four counts of conspiracy and tax fraud. Varner appeals his conviction, arguing that the trial court erred in failing to give the jury an accomplice instruction sua sponte and that counsel's failure to request the instruction constituted ineffective assistance.

A district court's failure to give a jury instruction sua sponte is reviewed for plain error. *United States v. Guthrie*, 931 F.2d 564, 567 (9th Cir. 1991). Because we have held that "where an accomplice instruction is not requested, it is not plain error not to give one sua sponte," *United States v. Gere*, 662 F.2d 1291, 1295 (9th Cir. 1981), Varner's first argument fails.

Nor was counsel's failure to request the instruction ineffective assistance. On the record before us, we conclude that defense counsel's conduct "falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

The judgment is AFFIRMED.