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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ANDRE MERRITT,** **Defendant and Appellant,**	Case No. S

Fourth Appellate District, Division Two, Case No. E062540
San Bernardino County Superior Court, Case No. FVI1300082
The Honorable Debra Harris, Judge

PETITION FOR REVIEW

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Pursuant to rule 8.500 of the California Rules of Court, the People of the State of California respectfully request that this court grant review of the November 20, 2015, decision of the Court of Appeal, Fourth District, Division Two, in this matter to settle an important question of law. (Cal. Rules of Court, rule 8.500, subd. (b)(1).) The Court of Appeal reversed appellant Andre Merritt's two robbery convictions because the trial court failed to instruct the jury on multiple elements of the charged offense, and the court held such error was reversible per se. A copy of the Court of Appeal's slip opinion is attached to this Petition. The Court of Appeal denied the People's Petition for Rehearing on December 16, 2015.

ISSUE PRESENTED

Is the failure to instruct the jury on the elements of a charged offense subject to harmless error review under *Neder v. United States* (1999) 527 U.S. 1?

STATEMENT OF THE CASE

A San Bernardino County jury convicted appellant of two counts of second degree robbery (Pen. Code, § 211) and found true that he personally used a firearm in the commission of the offenses (§ 12022.53, subd. (b)).[1] The trial court sentenced appellant to prison for 19 years and four months. The trial court failed to instruct the jury with CALCRIM No. 1600, the standard instruction on the elements of robbery.

On appeal, appellant claimed, in relevant part, that the trial court erred in failing to instruct the jury on the elements of robbery, and such error was reversible per se under *People v. Cummings* (1993) 4 Cal.4th 1233 (*Cummings*). The People conceded that the court erred in failing to instruct on some elements of robbery, but argued that the error was subject to

[1] All further statutory references are to the Penal Code unless otherwise indicated.

harmless error review pursuant to *People v. Mil* (2012) 53 Cal.4th 400 (*Mil*), which relied on *Neder v. United States* (1999) 527 U.S. 1 (*Neder*). The People argued that any error was harmless beyond a reasonable doubt because (1) the court's other instructions required that the jury find multiple elements of robbery beyond a reasonable doubt; (2) appellant conceded all of the elements of robbery except identity; (3) counsel for both sides listed all of the elements of robbery for the jury during argument; and (4) overwhelming evidence proved appellant was the person who committed the robberies.

The Court of Appeal reversed appellant's two robbery convictions on the ground that the failure to instruct on substantially all of the elements of the charged offenses was reversible per se under *People v. Cummings, supra,* 4 Cal.4th 1233. (Slip opn. at p. 9.) The court did not address *People v. Mil, supra,* 53 Cal.4th 400, cited by the People, which holds that failure to instruct on multiple elements of the charged offense is subject to harmless error review.

The People filed a petition for rehearing, which the court denied without comment.

REASONS FOR GRANTING REVIEW

I. REVIEW IS NECESSARY TO RESOLVE WHETHER THE RULE UNDER *PEOPLE V. CUMMINGS*, THAT ERROR IN FAILING TO INSTRUCT ON SUBSTANTIALLY ALL OF THE ELEMENTS OF A CHARGED OFFENSE IS REVERSIBLE PER SE, IS STILL GOOD LAW IN LIGHT OF *NEDER V. U.S.*

This case involves an important issue of law, namely whether certain constitutional instructional errors should be considered structural and therefore reversible per se or should be subject to harmless error review governing most constitutional errors. The Court of Appeal here, in reversing two robbery convictions for failure to give CALCRIM 1600 setting forth the elements for robbery, opted for finding structural error. It

did so based solely on this court's decision in *People v. Cummings, supra,* 4 Cal.4th 1233. But post-*Cummings*, the United States Supreme Court in *Neder* clarified the law concerning whether harmless error analysis applied to instructional errors of constitutional dimension and held that it did. And, in *Mil* and *People v. Aranda* (2012) 55 Cal.4th 342 (*Aranda*), this court followed *Neder* and reached the same conclusion. However, this court did not expressly disapprove *Cummings* on this point and lower courts have been struggling to reconcile the decisions ever since.

Some courts, as in this case, have applied *Cummings* and found instructional error concerning the elements of the charged offense structural and therefore reversible per se while other courts have applied *Neder* and *Mil* to find the same type of error subject to harmless error review. Application of the rule in *Cummings* leads to arbitrary results, as demonstrated below, while application of the rule in *Neder* and *Mil* preserves judgments obtained from fundamentally fair trials where error is proven harmless beyond a reasonable doubt. Review is necessary to resolve whether the holding in *Cummings* is still good law in light of such new authority. Alternatively, the People request that this court remand this case to the Court of Appeal with directions to address the rule promulgated in *People v. Mil,* and to conduct a harmless error analysis. The People relied on *Mil* in the respondent's brief and Petition for Rehearing, however the Court of Appeal reversed appellant's convictions and denied the petition without addressing *Mil.*

A tension exists within California law and between California law and United States Supreme Court law concerning whether harmless error review applies to instructional errors of constitutional dimension, such as the failure to instruct on substantially all of the elements of a charged crime. At the time this court decided *Cummings*, state and federal courts lacked guidance from the United States Supreme Court concerning whether

harmless error analysis could apply to instructional error concerning omitted elements of charged offenses or whether such error was reversible per se. Accordingly, various courts approached the issue differently. (*Cummings*, *supra,* 4 Cal.4th 1233 at pp. 1312-1314 [discussing state and federal cases addressing whether such instructional errors were structural].) In *Cummings*, this court held that harmless error review is inapplicable to an instructional error that withdraws from the jury's consideration substantially all of the elements of an offense, unless, through other instructions, the jury found the facts necessary to support a conclusion that the omitted elements were proven. (*Id.* at p. 1315.)

The United States Supreme Court subsequently resolved the conflict between the courts in *Neder v. U.S.*, *supra*, 527 U.S. 1. The court held that an instructional error is subject to harmless error review even when the record does not establish that the jury found the facts necessary to show that an omitted element was proven. (*Neder*, at p. 14.) The court explained that an instructional error omitting an element of the offense is not structural error because it is possible to determine from the record whether the error is harmless. (*Id.* at p. 12.) Unlike in *Sullivan v. Louisiana* (1993) 508 U.S. 275, in which the court held that giving a defective reasonable doubt instruction is structural error because it "vitiates all the jury's findings," omitting the elements of an offense does not necessarily "vitiate all the jury's findings" because the consequences of the error may be determined and quantified. (*Ibid.*) "Put another way," structural errors "deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair" and "a jury instruction that omits an element of the offense—differs markedly from the constitutional violations [the Supreme Court has] found to defy harmless-error review." (*Id.* at pp. 8-9.)

In *Neder*, the United States Supreme Court rejected the rule that Neder proposed, which was the same rule adopted in *Cummings*, that an instructional error that omits an element of the crime is only subject to harmless error review when the jury is required to find other facts that satisfy the omitted element. (*Neder*, *supra*, 527 U.S. at p. 14.) The court found the rule fundamentally flawed because it "imports into the initial structural-error determination (i.e., whether an error is structural) a case-by-case approach that is more consistent with our traditional harmless-error inquiry (i.e., whether an error is harmless). Under our cases, a constitutional error is either structural or it is not." (*Ibid.*) Thus, the High Court found the instructional error in failing to instruct on an element of the offense was subject to traditional harmless error review.

Subsequent decisions of this court such as *Mil* followed suit and applied harmless error analysis to instructional errors of constitutional dimension. (*Mil*, *supra*, 53 Cal.4th at p. 410 [failure to instruct on two elements of the alleged felony-murder special circumstance was not structural error but subject to harmless error review]; *Aranda*, *supra*, 55 Cal.4th at p. 363 [failure to instruct that the People must prove guilt beyond a reasonable doubt not structural error but subject to harmless error review].) This court recognized "An error is structural, and thus subject to automatic reversal, only in a very limited class of cases, such as the complete denial of counsel, a biased decisionmaker, racial discrimination in jury selection, denial of self-representation at trial, denial of a public trial," and denial of any instruction of the burden of proof. (*Mil,* at p. 410, internal quotations omitted, citing *Neder*, *supra*, 527 U.S. at p. 8; also *Aranda*, at p. 363 ["[M]ost errors implicating a federal constitutional right, including most instructional errors, are amenable to harmless error analysis and that only a 'very limited class of cases' are subject to per se reversal."].) Structural errors "deprive defendants of basic protection

without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair." (*Mil,* at p. 410, internal quotations omitted, citing *Neder*, *supra*, 527 U.S. at pp. 8-9.)

However, this court never disapproved *Cummings,* and in *Mil,* in dicta, it indicated that it was still viable by distinguishing *Cummings* on the basis of the number of omitted elements. (*Mil*, *supra*, 53 Cal.4th at pp. 413-414 ["In this case [. . .] the instructions omitted only two elements from the charge."].) In *Mil,* two of the three elements of the charged felony-murder special circumstance allegation were omitted, whereas in *Cummings*, four of the five elements of the charged robbery offense were missing from the jury instructions. (*Ibid.*) But the United States Supreme Court's holding in *Neder* did not turn on the number of elements omitted but the nature of the error; it examined whether the error was structural or not without looking at whether other properly given instructions covered the missing element. And the holding in *Mil* relied primarily on *Neder.* (*Id.* at pp. 409-412.)

Contrary to *Neder, Cummings* requires an examination of the other instructions, essentially a limited harmless error review, to determine whether the instructional error is reversible per se. This process of first looking to overlapping instructions to determine whether an instructional error is reversible per se is improper because, as the Supreme Court explained in *Neder*, "a constitutional error is either reversible per se, or it is not." (*Neder*, *supra*, 527 U.S. at p. 14.) An instructional error that removes substantially all of the elements from jury consideration should be subject to traditional harmless error review under *Neder*'s reasoning. Also, the "all or substantially all" language in *Cummings* is a vague and unworkable standard that has led to and will continue to lead to arbitrary and conflicting results, as demonstrated below.

Because of this tension between *Neder, Mil* and *Aranda* on the one hand, and *Cummings* on the other, California courts of appeal are struggling with which standard applies and when. For example, post-*Neder*, the court in *People v. Magee* (2003) 107 Cal.App.4th 188, 195 (*Magee*) had to decide whether the failure to instruct on the elements of robbery in an accessory to robbery prosecution was reversible per se or subject to harmless error review. (*Magee*, at p. 191.) After recognizing the tension, the *Magee* court elected to follow the *Neder* line of cases and apply harmless error review. (*Id.* at pp. 193-194.) But it had to distinguish *Cummings* on the weak ground that the defendant in *Cummings* was convicted of robbery, while Magee was convicted of being an accessory to robbery. (*Id.* at p. 195.) In doing so, the court agreed with *Neder's* rejection of the limited harmless error review to determine whether an error was structural or not, stating, "[w]e reject the assertion that a mathematical computation should be used to determine when reversal is required." (*Ibid.*)

After *Magee* was decided, another court of appeal examined *Neder* and *Magee* and observed, "[i]t is not clear whether the failure to instruct on all elements of an offense is structural error or error that may be harmless beyond a reasonable doubt." (*People v. Lohner* (Cal. Ct. App., Feb. 17, 2005, A100573) 2005 WL 387970, at *23.)[2] It then refused to determine

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[2] The People request judicial notice by separate cover of the following unpublished cases. This Court may take judicial notice of unpublished opinions to show "a pattern of behavior or address an institutional problem." (*People v. Hill* (1998) 17 Cal. 4th 800, 847-848 [unpublished opinion of court of appeal was in category of "Records of ... any court of this state," under Evidence Code section 452, subd. (d); Supreme Court could take judicial notice in evaluating prosecutor's history of misconduct, and doing so did not cite or rely on the opinion in violation of rule generally prohibiting citation of unpublished opinions].)

whether the error was reversible per se or not, stating that either way, the error would not be harmless. (*Ibid.*) Additionally, two courts of appeal expressly refused to follow *Cummings* in light of *Neder* and applied harmless error review. (*People v. Belmontes* (Cal. Ct. App., July 30, 2004, E033510) 2004 WL 1701158, at *4 [all elements of charged offense omitted]; *People v. O'Neal* (Cal. Ct. App., Apr. 17, 2007, A112206) 2007 WL 1129366, at *6 [all elements of the charged offense omitted].) One court wrote that *Cummings* "has been eclipsed by more recent authority. Both the United States and California Supreme Courts have clearly stated that the failure to instruct a jury on the statutory elements of an offense is a trial error subject to harmless error analysis." (*People v. O'Neal* (Cal. Ct. App., Apr. 17, 2007, A112206) 2007 WL 1129366, at *6.)

Time did not resolve the confusion in the courts of appeal. Even after this court decided *Mil* in 2012, some courts of appeal have held that failing to instruct the jury on the elements of the offense is error that is reversible per se under *Cummings*. (This case, *People v. Merritt* (Cal. Ct. App., Nov. 20, 2015, E062540) 2015 WL 7444789, at *4; *People v. Uy* (Cal. Ct. App., Nov. 14, 2014, C063037) 2014 WL 6065995, at *27 [two of the three elements of charged offenses omitted].) In one case, the jury was not instructed on *one* central element of the charged offense, and the court held the error was reversible per se under *Cummings*. (*People v. Griesa* (Cal. Ct. App., June 21, 2012, C066058) 2012 WL 2354396, at *7 [one of the three elements of charged offense omitted].) Other cases, however, have held that failing to instruct on all the elements of the charged crime is error subject to harmless error review under *Mil*. (*People v. Sims* (Cal. Ct. App., Nov. 20, 2014, B238001) 2014 WL 6634668, at *11 [all elements of two charged offenses omitted]; *People v. White* (Cal. Ct. App., June 8, 2012, B230371) 2012 WL 2054896, at *10 [one of two elements of charged offense omitted].) One court recently struggled to determine what

constituted "substantially all" of the elements omitted. It ultimately held that the omission of a special allegation composed of three elements functionally only omitted one element, thus *Mil*, not *Cummings*, applied. (*People v. Barrie* (Cal. Ct. App., Dec. 7, 2015, F067893) 2015 WL 8053618, at *3.) This court should review this case to resolve the conflict between the rule in *Cummings* and the rule in *Mil* and *Neder* line of cases, and to settle the important question of whether the failure to instruct on the elements of the charged offense is subject to harmless error review as with most errors of constitutional dimension or falls into the very limited category of errors deemed structural and therefore reversible per se.

This case is a good vehicle to resolve this issue, because appellant received a fundamentally fair trial and the facts of this case perfectly illustrate why such instructional errors should be subject to harmless error review; the error in failing to give the robbery instruction was particularly harmless here. As *Neder* pointed out, an instructional error cannot be structural where the record shows the defendant received a fundamentally fair trial. (*Neder*, *supra*, 527 U.S. at pp. 8-9.)

The trial in this case was fundamentally fair. There is no dispute that appellant was tried before an impartial judge with the full panoply of constitutional rights—counsel, confrontation rights and presentation of evidence. (See *Mil, supra*, 53 Cal.4th at p. 410.) The jury was properly instructed on reasonable doubt. Also, any error was harmless beyond a reasonable doubt, which demonstrates that this type of error is amenable to harmless error review. Here, appellant was charged with two counts of second degree robbery and at trial, with representation by counsel, he conceded all the elements of robbery except identity. Overwhelming evidence supported all elements of robbery. During argument, both the prosecutor and the defense counsel enumerated the elements of robbery as set forth in the standard CALCRIM No. 1600, that is (1) the defendant (2)

took (3) another person's property (4) from the victim's person or immediate presence (5) against the victim's will (6) accomplished by means of force or fear (7) with the specific intent to permanently deprive the victim of the property.[3] Although the trial court failed to instruct the jury with CALCRIM No. 1600 either orally or in writing, it did instruct the jury on the requisite intent to rob (CALCRIM No. 251) and on the elements of the personal gun use enhancement (CALCRIM No. 3146). Elements 1 (identity), 2 (taking), 3 (another person's property), and 7 (intent) were covered by CALCRIM No. 251, which required the jury to find beyond a reasonable doubt that appellant had the specific intent to permanently deprive the owner of the property when it was taken. CALCRIM No. 3146 overlapped with elements 1 (identity), and 6 (the use of force or fear). The jury necessarily found that appellant used force or fear to commit the robberies because it found true that appellant personally used a firearm during the commission of the offenses. To find that appellant used a firearm during the commission of the robberies, the jury had to find beyond a reasonable doubt that appellant displayed the weapon in a menacing manner, hit someone with the weapon, or fired the weapon. Thus, the jury found beyond a reasonable doubt that appellant used force or fear to commit the robberies because it found he used a firearm in a way that would constitute force (hitting someone with the weapon) or fear (displaying the weapon in a menacing way or firing the weapon). These instructions cover five out of seven elements of robbery. Nevertheless, the Court of Appeal clearly felt constrained by *Cummings* to find the omission of CALCRIM No. 1600 structural error and therefore reversible per se.

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[3] This Court in *Cummings* did not include "identity" as an element of robbery, which is why it stated that there were six elements of robbery.

The rule promulgated by *Cummings* should be overruled because it requires the automatic reversal of fundamentally fair trials in which an instructional error can be proven harmless beyond a reasonable doubt. "'The harmless-error doctrine recognizes the principal that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence [citation], and promote public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, The Riddle of Harmless Error 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it").'" (*Rose v. Clark* (1986) 478 U.S. 570, 577.) To reverse the judgment here would, to paraphrase the words of former Chief Justice Traynor as quoted in *Rose,* bestir the public to ridicule such a decision. The constitutional error in this case had no effect on the outcome of the trial, and it did not violate appellant's fundamental rights.

This case exemplifies the arbitrariness of the "substantially all" standard for determining whether an instructional error is structural error, and it exemplifies the rational basis of adopting a bright-line harmless error analysis applicable to most constitutional violations. The harmless error standard protects the interests of the defendant, the victims, and the People in a fair trial and in the finality of judgment. (See *People v. Avila* (1995) 35 Cal.App.4th 642, 668.) Review in this case is therefore necessary to resolve whether the rule that omission of "substantially all" elements of a charged offense is structural error promulgated by *Cummings* is still viable.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this court grant review of the present case. Alternatively, the People request this court remand this case to the Court of Appeal with direction to address the rule promulgated in *People v. Mil*, *supra*, 53 Cal.4th 400 and to conduct a harmless error analysis.

Dated: December 31, 2015

Respectfully submitted,

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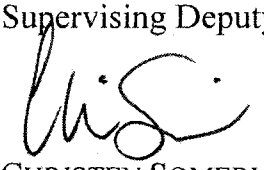

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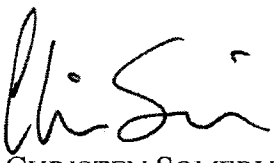
CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3,447 words.

Dated: December 31, 2015

KAMALA D. HARRIS
Attorney General of California



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ATTACHMENT

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANDRE MERRITT, Defendant and Appellant.	E062540 (Super.Ct.No. FVI1300082) OPINION

APPEAL from the Superior Court of San Bernardino County. Debra Harris, Judge. Reversed.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Christen Somerville, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Andre Merritt guilty of two counts of robbery. (Pen. Code, § 211.)[1] The jury found true the allegations that defendant personally used a firearm during both robberies. (§ 12022.53, subd. (b).) The trial court sentenced defendant to prison for a term of 19 years 4 months. Defendant raises two issues on appeal. First, defendant contends the trial court erred by failing to instruct the jury on the crime of robbery—the whole instruction was omitted. (CALCRIM No. 1600.) Second, defendant asserts that, because he relied upon an alibi defense, the trial court erred by instructing the jury that the prosecutor need not prove the crime occurred on a specific date. (CALCRIM No. 207.) We reverse the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. DEFENDANT'S OFFENSES

1. *STORAGE FACILITY*

On December 19, 2012, at approximately 5:00 p.m., Kristen Wickum was working at the front counter of Storage Direct, in Victorville. Defendant approached the front counter. Defendant pulled out a gun and demanded "all the money." Wickum gave defendant the money "[i]n the drawer" and the petty cash box. All together, defendant took approximately $338. After defendant left, Wickum called for her manager, who was in a back room with the door closed. Wickum and the manager contacted law enforcement.

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[1] All subsequent statutory references will be to the Penal Code, unless otherwise indicated.

Defendant's face was not covered during the robbery. Wickum described the assailant as a black male; approximately 20 years old; 5 feet 11 inches tall; wearing a blue hooded sweatshirt, gray shorts, white socks, and Chuck Taylor shoes. Wickum recalled the handgun being a black semiautomatic. When shown a six-pack photographic lineup, Wickum "almost immediately" identified defendant.

2. *CONVENIENCE STORE*

On December 19, 2012, at approximately 6:22 p.m., Christian Lopez was working at La Mexicana, a convenience store in Victorville. Defendant pointed a gun at Lopez and said, "Give me the money . . . [¶] . . . [¶] Muthafucker." Lopez gave defendant the money from the cash register and from a separate "stash." Defendant took approximately $700.

Defendant's face was not covered during the robbery. Lopez described the assailant as "a black male in his 20s, about [six] foot with a thin, bulky build, wearing a black shirt, khaki shorts, and he was armed with a silver handgun." When shown a photographic lineup, Lopez identified defendant "Right away." The robbery was recorded by the store's surveillance system. The video recording was played for the jury.

3. *SEARCH*

On January 4, 2013, a San Bernardino County Sheriff's Department detective and deputies searched defendant's residence in Victorville. In defendant's bedroom, the law enforcement officers found ammunition. In a girl's bedroom, where defendant stored some of his clothes, the officers found cargo-style men's shorts, two hooded black sweatshirts, and Converse or Chuck Taylor-type shoes.

4. *DEFENSE*

Defendant presented an alibi defense. On the night of December 18, 2012, defendant's mother picked defendant up at the jail in Adelanto. Waiting at her home to celebrate defendant's release, were defendant's brother, defendant's cousin, and two other men. When defendant arrived at the house, the men smoked marijuana and played videogames. The celebration lasted "two or three days." Defendant was at the house, using the computer, on December 19 from 4:30 to 6:30 p.m. Defendant did not leave the house for approximately four days after being released from jail.

5. *REBUTTAL*

The prosecutor presented a rebuttal witness. San Bernardino County Sheriff's Detective Solorio was present when defendant was interviewed following the execution of the search warrant. During the interview, defendant said he was at home "earlier in the day" on December 19, but then walked to a friend's residence at the Rodeo Apartments. Defendant said he spent the night of December 19 at the Rodeo Apartments.

B. JURY INSTRUCTIONS

Defendant was charged with two counts of robbery. (§ 211.) The trial court did not instruct the jury on the offense of robbery. (CALCRIM No. 1600.) The elements listed in the robbery jury instruction, which were omitted, were: (1) defendant took property that was not his own; (2) the property was in the possession of another person; (3) the property was taken from the other person or his/her immediate presence; (4) the property was taken against that person's will; (5) the defendant used force or fear to take the property or to prevent the person from resisting; and (6) when the defendant used force or fear to take the property, he intended to permanently deprive the owner of the property. The instruction went on to provide further information about the offense. (CALCRIM No. 1600.)

The trial court instructed the jury on the specific intent requirement for robbery. The instruction informed the jury, "The specific intent and mental state required for the crime of Robbery is the specific intent to permanently deprive the owner of the property when it is taken." (CALCRIM No. 251.) The trial court also instructed the jury on the firearm enhancement (§ 12022.53, subd. (b)), which requires proof the defendant (1) displayed the weapon in a menacing manner; (2) hit someone with the weapon; or (3) fired the weapon. (CALCRIM No. 3146.)

During the prosecutor's closing argument, he said, "The instructions are that the defendant took property that was not his own. That the property was in the possession of another person. Property was taken from the other person or immediate presence. Property was taken against that person's will. The defendant used force or fear to take

the property or prevent the person from resisting. And, finally, when the defendant used force or fear to take the property intended to deprive the owner of it permanently. You'll see the instruction in the instructions also that the employee owns the property of the business. So you have all this."

During defense counsel's closing argument, he said, "Now, [the prosecutor] already went through the elements of robbery. Number 1, the defendant took property that was not his own. Two, the property was in the possession of another person. Three, the property was taken from the other person or her immediate presence. The property was taken against that person's will and the defendant used force or fear to take the property or to prevent the person from resisting. And when the defendant used force or fear to take the property he intended to deprive the owner of it permanently. That's [legalese] for, he intended to steal it."

Defense counsel continued, explaining his argument, "Now, there is no question here, as [the prosecutor] said, no question these people were robbed, okay. Our only contention is with Element Number 1 that it was not the defendant. Not the defendant."

DISCUSSION

A. ROBBERY INSTRUCTION

Defendant contends the trial court erred by not instructing the jury on the offense of robbery, and that the error is reversible per se. (CALCRIM No. 1600.) The People concede the trial court erred, but assert the error was harmless. The People assert the error is harmless because (1) the jury was instructed on the specific intent requirement for robbery; (2) the jury was instructed on the use of a firearm, which relates to the force

and fear element of robbery; (3) defendant only disputed identity—he did not dispute that the robberies occurred; and (4) both trial attorneys recited the elements of robbery in their closing arguments.

We apply the de novo standard when reviewing an alleged instructional error. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) "The trial court must instruct even without request on the general principles of law relevant to and governing the case. [Citation.] That obligation includes instructions on all of the elements of a charged offense." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311 (*Cummings*).) Because the trial court did not instruct on the charged offense, we conclude the trial court erred.

We now examine whether the error is reversible per se or subject to harmless error review. In *Cummings*, the defendant was convicted of robbery, attempted robbery, and conspiracy to commit robbery, but the trial court failed to instruct the jury on the offense of robbery. (*Cummings*, *supra*, 4 Cal.4th at pp. 1256, 1311.) However, the trial court did instruct the jury that the crime of attempted robbery requires the specific intent to permanently deprive the owner of his/her property. (*Id.* at pp. 1311-1312.) The defendant argued that the trial court's failure to instruct on four of the five elements of robbery was reversible per se. (*Id.* at p. 1312.) The People argued the error was harmless because (1) the evidence established the robberies were committed at gunpoint; (2) the jury was instructed on the intent to permanently deprive; and (3) the defendant only disputed identity—he did not dispute that the robberies occurred. (*Ibid.*)

The Supreme Court discussed cases that permit a harmless error analysis to be performed when one element or a portion of an element was omitted from a jury

instruction. (*Cummings*, *supra*, 4 Cal.4th at pp. 1313-1314.) The Supreme Court then wrote, "These decisions make a clear distinction between instructional error that entirely precludes jury consideration of an element of an offense and that which affects only an aspect of an element. Moreover, none suggests that a harmless error analysis may be applied to instructional error which withdraws from jury consideration substantially all of the elements of an offense and did not require by other instructions that the jury find the existence of the facts necessary to a conclusion that the omitted element had been proved." (*Id.* at p. 1315.) The Supreme Court then concluded the defendant's convictions "must be reversed," "regardless of the merits of the People's argument that [the defendant] did not dispute the existence of the predicate facts and that the evidence overwhelmingly established all of the elements of robbery, attempted robbery, and conspiracy to commit robbery." (*Ibid.*)

Thus, *Cummings* establishes that a harmless error analysis may not be applied to an instructional error that withdraws from the jury's consideration substantially all of the elements of an offense, unless, through other instructions, the jury found the facts necessary to support a conclusion that the omitted elements were proven. (*Cummings*, *supra*, 4 Cal.4th at p. 1315.)

Cummings is directly on-point with the instant case. In both cases, (1) the complete robbery instruction was omitted; (2) the juries were instructed that the specific intent requirement for robbery meant establishing the defendant acted with the intent to permanently deprive; (3) the evidence established the robberies were committed at gunpoint; and (4) the defendants only disputed identity—they did not dispute that the

robberies occurred. In the instant case, the jury was also informed of the elements of robbery via the trial attorneys' closing arguments.

Similar to *Cummings*, the instant case did not include instructions that overlapped with all or most of the elements of robbery. For example, a finding that defendant had the specific intent to permanently deprive does not compel a conclusion that the jury found the facts necessary to establish the property was taken from the victims or the victims' immediate presence. (See *Cummings*, *supra*, 4 Cal.4th at p. 1313 ["A finding that property was taken with the intent to permanently deprive the owner does not compel a conclusion that the jury has found the facts necessary to establish the remaining elements of the offense"].) Because the instant case is so closely on-point with *Cummings*, we conclude, as our Supreme Court did in *Cummings*, that the error is reversible per se. (*Id.* at p. 1315.)

B. DATE INSTRUCTION

Defendant contends, because he was relying on an alibi defense, the trial court erred by instructing the jury that the prosecutor was not required to establish the crimes occurred on a specific date. (CALCRIM No. 207.) Defendant urges this court to decide the issue, even if the convictions are reversed for the failure to instruct on robbery, in order to provide guidance to the trial court upon retrial.

The issue has been rendered moot by our conclusion that defendant's robbery convictions must be reversed. (See *People v. Travis* (2006) 139 Cal.App.4th 1271, 1280 [issue is moot when no effective relief can be granted].) We decline the invitation

to provide guidance on the issue. (See *People v. McMillan* (1980) 110 Cal.App.3d 682, 687 [declining to provide additional guidance to the trial court].)

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

KING
J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Merritt**
No.:

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 31, 2015, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 31, 2015, at San Diego, California.

Laura Ruiz
Declarant

Signature

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