

In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

CUITLAHUAC TAHUA RIVERA,

Defendant and Appellant.

CAPITAL CASE

Case No. S153881

Colusa County Superior Court Case No. CR46819
The Honorable S. William Abel, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

	Page
Introduction	5
Argument.....	6
I. The CALJIC No. 8.71 instruction, when considered together with the other instructions, did not render the instructions erroneous	6
II. The trial court’s failure to instruct the jury on the elements of assault is subject to harmless error analysis	7
A. The <i>Merritt</i> decision.....	7
B. The instructional error here is subject to harmless error analysis.....	9
C. The error was harmless beyond a reasonable doubt.....	11
Conclusion.....	13

TABLE OF AUTHORITIES

	Page
CASES	
<i>Chapman v. California</i> (1967) 386 U.S. 18.....	8
<i>Hedgpeth v. Pulido</i> (2008) 555 U.S. 57.....	9
<i>Neder v. United States</i> (1999) 527 U.S. 1.....	8, 9
<i>People v. Colantuono</i> (1994) 7 Cal.4th 206.....	11
<i>People v. Cummings</i> (1993) 4 Cal.4th 1233.....	5, 8, 9
<i>People v. Grunder</i> (2007) 151 Cal.App.4th 412.....	6, 7
<i>People v. Laya</i> (1954) 123 Cal.App.2d 7.....	11
<i>People v. McMakin</i> (1857) 8 Cal. 547.....	11
<i>People v. Merritt</i> (2017) 2 Cal.5th 819.....	<i>passim</i>
<i>People v. Mil</i> (2012) 53 Cal.4th 400.....	9
<i>People v. Moore</i> (2011) 51 Cal.4th 386.....	6
<i>People v. Salazar</i> (2016) 63 Cal.4th 214.....	5, 6, 7

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Penal Code

§ 186.22, subd. (b)(1).....	10
§ 187, subd. (a).....	5
§ 245, subd. (b)	5
§ 246.....	11
§ 12021.5, subd. (b)	11
§ 12022.5, subd. (a)(1).....	10, 11
§ 12022.53, subd. (c).....	12
§ 12022.53, subd. (d)	12

COURT RULES

California Rules of Court

Rule 8.520(d)	5
Rule 8.630(d)	5

OTHER AUTHORITIES

CALJIC

No. 3.30.....	10
No. 8.71.....	5, 6, 7
No. 8.74.....	6, 7
No. 9.02.1.....	10
No. 9.03.....	12
No. 17.10.....	6, 7
No. 17.19.....	10
No. 17.24.2.....	10
No. 17.40.....	6, 7

INTRODUCTION

Appellant Rivera appeals from a judgment of death following various convictions, including a conviction for first degree murder (Pen. Code,¹ § 187, subd. (a)) and two convictions for assault with a semiautomatic firearm (§ 245, subd. (b)). In Appellant's Opening Brief, Rivera argued, among other things, that (1) the giving of the CALJIC No. 8.71 jury instruction constituted prejudicial error requiring his conviction in count I to be reduced to second degree murder (AOB 56-66), and (2) the trial court's failure to instruct the jury on the elements of assault was structural error under *People v. Cummings* (1993) 4 Cal.4th 1233 and requires reversal of his convictions for assault with a semiautomatic firearm (AOB 122-130). Respondent previously argued that these claims should be rejected. (RB 34-43, 65-73.)

After the briefing was completed, this Court issued two decisions applicable to this case. In *People v. Salazar* (2016) 63 Cal.4th 214, this Court held that giving the CALJIC No. 8.71 instruction in combination with several other instructions, many of which were given in this case, did not constitute error. And in *People v. Merritt* (2017) 2 Cal.5th 819, this Court overruled *Cummings* and held that harmless error analysis applies to a failure to instruct on the elements of a charged crime so long as the error does not vitiate all the jury's findings. Respondent submits this supplemental brief in accordance with California Rules of Court, rules 8.520(d) and 8.630(d) to address the application of *Salazar* and *Merritt* to the instant case.

¹ All further statutory references are to the Penal Code unless otherwise specified.

ARGUMENT

I. THE CALJIC NO. 8.71 INSTRUCTION, WHEN CONSIDERED TOGETHER WITH THE OTHER INSTRUCTIONS, DID NOT RENDER THE INSTRUCTIONS ERRONEOUS

As set forth in Respondent’s Brief, the trial court instructed the jury regarding its determination of the degree of murder (48 CT 13820 [CALJIC No. 8.71], 13821 [CALJIC No. 8.74]), and the duty of individual jurors to decide the case for themselves (48 CT 13842 [CALJIC No. 17.40]). (RB 35-36.) Based on this Court’s decision in *Salazar*, which rejected a claim similar to Rivera’s, the instructions were not erroneous.

In *People v. Salazar, supra*, 63 Cal.4th 214, this Court addressed a challenge to the same CALJIC No. 8.71 instruction that was given in this case. (*Id.* at p. 246.) Acknowledging its prior statement in *People v. Moore* (2011) 51 Cal.4th 386 that the same version of the CALJIC No. 8.71 instruction was potentially confusing and it was “better practice” not to use it, this Court clarified that it had not held the instruction was erroneous. (*People v. Salazar, supra*, 63 Cal.4th at p. 246.) *Salazar* went on to hold that the instructions as a whole, which included instructions under CALJIC Nos. 8.71, 8.74, 17.10, and 17.40, were not erroneous. (*Id.* at pp. 247-248.)

Salazar rejected Rivera’s “tortured” interpretation of the CALJIC No. 8.71 instruction, which assumes the jury would disregard the instructions given under CALJIC Nos. 8.74 and 17.40. (*People v. Salazar, supra*, 63 Cal.4th at p. 247-248.) “No logical reading of the instructions leads to a compelled verdict of first degree murder.” (*Id.* at p. 247.) In fact, if anything, the instructions skewed deliberations in Rivera’s favor. (*Ibid.*)

The lack of a CALJIC No. 17.10 instruction in this case does not compel a different result. As *People v. Grunder* (2007) 151 Cal.App.4th 412 explained, such an instruction is “mere icing on the cake” and does not address the unanimity language in CALJIC No. 8.71 any more directly than

the CALJIC No. 17.40 instruction. (*Id.* at p. 425.) CALJIC No. 8.74 similarly addresses the unanimity principle by requiring unanimity as to the degree of murder. CALJIC No. 17.10 merely reminds the jury it must reach a unanimous verdict on the greater crime before it can accept a guilty verdict on a lesser crime. Although *Salazar* referred to the CALJIC No. 17.10 instruction that was given in that case, its presence in the instructions was not uniquely crucial to this Court's holding. (*People v. Salazar, supra*, 63 Cal.4th at pp. 247-248.) No logical reading of the instructions here could lead to a compelled verdict of first degree murder, even without a CALJIC No. 17.10 instruction.

Therefore, the CALJIC No. 8.71 instruction did not render the instructions as a whole erroneous. For these reasons, and for the reasons previously set forth in pages 34 through 43 of Respondent's Brief, appellant's claim should be rejected.

II. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE ELEMENTS OF ASSAULT IS SUBJECT TO HARMLESS ERROR ANALYSIS

As set forth in Respondent's Brief, the trial court failed to instruct the jury on the elements of assault in relation to the assault with a semiautomatic firearm charges in counts V and VI. (RB 66-67.) The jury was instructed on the element that the assault was committed with a semiautomatic firearm. (48 CT 13828.) The jury was also instructed that the offenses in counts V and VI required general criminal intent. (48 CT 13812.) Based on this Court's decision in *Merritt*, the error here is subject to harmless error analysis, and any error was harmless.

A. The *Merritt* Decision

In *People v. Merritt, supra*, 2 Cal.5th 819, this Court addressed the trial court's failure to give the standard jury instruction on the elements of the charged crime of robbery. (*Id.* at p. 821.) The instructions had,

however, instructed the jury that 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.” (*Id.* at p. 823.) The jury was also instructed on a firearm use allegation, which required the jury to find that the defendant either displayed the weapon in a menacing manner, hit someone with the weapon, or fired the weapon. (*Ibid.*)

The issues in *Merritt* were whether the error in failing to instruct on the elements of robbery was amenable to harmless error analysis and, if so, whether the error was harmless. (*People v. Merritt, supra*, 2 Cal.5th at p. 825.) The court acknowledged that in *People v. Cummings, supra*, 4 Cal.4th 1233, it had held on similar facts that harmless error analysis does not apply 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.” (*People v. Merritt, supra*, 2 Cal.5th at p. 825, quoting *People v. Cummings, supra*, 4 Cal.4th at p. 1315.) However, *Merritt* explained that subsequent United States Supreme Court precedent had made the *Cummings* holding obsolete. (*People v. Merritt, supra*, 2 Cal.5th at pp. 822, 825-831.)

After *Cummings*, the United States Supreme Court held in *Neder v. United States* (1999) 527 U.S. 1, 4 that the harmless error rule of *Chapman v. California* (1967) 386 U.S. 18 applies to a failure to instruct the jury on an element of the charged crime. The high court explained that a jury instruction that omits an element of the offense “differs markedly from the constitutional violations we have found to defy harmless-error review” (*Neder v. United States, supra*, 527 U.S. at p. 8), and that the error did not “vitiating all the jury’s findings.” (*Id.* at p. 11, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281.) *Neder*’s holding, that “harmless-error analysis applies to instructional errors so long as the error at issue

does not categorically “vitiat[e] all the jury’s findings,” was later reaffirmed in *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 61. And this Court applied *Neder* to an instructional error that omitted two elements from the jury’s consideration in *People v. Mil* (2012) 53 Cal.4th 400, 410-414.

Finding that the rules in *Neder* and *Mil* were generally applicable, *Merritt* held that an error for failure to instruct on elements of the charged offense “is amenable to harmless error analysis” “so long as the error does not vitiate all of the jury’s findings.” (*People v. Merritt, supra*, 2 Cal.5th 819.) Thus, *Merritt* overruled the “artificial” rule established in *Cummings*. (*Id.* at pp. 829, 831.) The *Merritt* court explained that the failure to instruct on the elements of robbery in that case did not vitiate the jury’s findings that the defendant acted with the required mental state, that he personally used a firearm during the commission of the offense, and that he was the perpetrator, such that harmless error analysis would apply. (*Id.* at p. 829.) *Merritt* went on to hold that the instructional error was harmless in light of the parties’ closing arguments, the defendant’s concession that a robbery had been committed, the jury’s other findings, and the overwhelming evidence of robbery. (*Id.* at pp. 831-832.)

B. The Instructional Error Here Is Subject to Harmless Error Analysis

Merritt is applicable to this case. So long as the error did not vitiate all the jury’s findings, the error is subject to harmless error analysis. (*People v. Merritt, supra*, 2 Cal.5th at p. 819.) To the extent Rivera relies on the rule articulated in *Cummings*, his argument is no longer valid and must be rejected.

The failure to instruct the jury on the elements of assault did not vitiate all of the jury’s findings as to the convictions for assault with a semiautomatic firearm. Although the error here vitiated the jury’s findings

that Rivera committed assault, many of the jury's findings regarding the assault with a semiautomatic firearm convictions were not vitiated.

The jury was instructed that it must find the assault was committed with a semiautomatic firearm. (48 CT 13828 [CALJIC No. 9.02.1].) The jury was also instructed that the offense of assault with a semiautomatic firearm required a general criminal intent and that a person acts with general criminal intent if he "intentionally does that which the law declares to be a crime. (48 CT 13812 [CALJIC No. 3.30].) By virtue of the jury's guilty verdicts in counts V and VI, the jury necessarily found these facts true. (47 CT 13599, 13601.) The jury also found that Rivera was the perpetrator of the assaults in a case where the only contested issue as to the assault with a semiautomatic firearm counts was Rivera's identity as the perpetrator, just like in *People v. Merritt*, *supra*, 2 Cal.5th at page 829. (See 11 RT 2325-2329, 2334-2335 [Rivera's closing argument].) The failure to instruct on the elements of assault did not vitiate these findings.

The jury made additional findings related to the offenses of assault with a semiautomatic firearm as well. The jury expressly found, as the jury did in *People v. Merritt*, *supra*, 2 Cal.5th at page 829, that in committing assault with a semiautomatic firearm in counts V and VI, Rivera personally used a firearm in violation of section 12022.5, subdivision (a)(1), which required a finding that Rivera "intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it" as to each victim. (47 CT 13599, 13601; 48 CT 13836 [CALJIC No. 17.19].) The jury also found that the assaults with a semiautomatic firearm were committed for the benefit of, in association with, or at the direction of a criminal street gang with the specific intent to promote, further, or assist criminal conduct by gang members in violation of section 186.22, subdivision (b)(1). (47 CT 13599, 13601; 48 CT 13837 [CALJIC 17.24.2].) The jury further found that Rivera carried a firearm

with a detachable magazine in violation of section 12021.5, subdivision (b), when he committed the assaults with a semiautomatic firearm. (47 CT 13599, 13601; 48 CT 13835 [special instruction].) The jury was properly instructed as to these enhancements. Thus, these findings, too, were not vitiated by the failure to instruct on the elements of assault.

C. The Error Was Harmless beyond a Reasonable Doubt

The failure to give instructions on the elements of assault was harmless because “it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error.” (*People v. Merritt, supra*, 2 Cal.5th at p. 831.) The jury found the existence of the facts necessary to establish that Rivera assaulted Aaron McIntire and Kimberly Bianchi in counts V and VI. The evidence that Rivera committed the assaults was also overwhelming.

In finding Rivera personally used a firearm in violation of section 12022.5, subdivision (a)(1), in connection with counts V and VI, the jury necessarily found beyond a reasonable doubt that Rivera willfully and unlawfully committed an act which by its nature would probably and directly result in the application of physical force to McIntire and Bianchi and that he had the present ability to apply physical force to both victims. (48 CT 13836; *People v. McMakin* (1857) 8 Cal. 547, 548 [act of pointing a loaded gun at another person in a threatening manner sufficient to sustain a conviction for assault with a firearm]; *People v. Laya* (1954) 123 Cal.App.2d 7, 16 [“The mere pointing of a gun at a victim constitutes an assault with a deadly weapon whether or not it is fired at all”]; see *People v. Colantuono* (1994) 7 Cal.4th 206, 219 [an act, under circumstances that denote intent existing at the time, with present ability of using actual violence against the person of another, is an assault].) The jury also found Rivera guilty of shooting at an occupied vehicle (§ 246) as to both victims in counts III and IV, so it necessarily found that Rivera discharged a

firearm at an occupied vehicle and that the discharge was willful and malicious. (47 CT 13595, 13597; 48 CT 13829 [CALJIC No. 9.03].) The jury further found that Rivera intentionally and personally discharged a firearm and caused great bodily injury to McIntire in the commission of count III under section 12022.53, subdivision (d), and intentionally and personally discharged a firearm in the commission of count IV against Bianchi under section 12022.53, subdivision (c). (47 CT 13595, 13597.) Additionally, the jury necessarily found that a battery was committed against McIntire, who was shot in the ankle, when it found the section 12022.53, subdivision (d), enhancement true. In doing so, the jury necessarily resolved that Rivera attempted to commit a battery, encompassing the facts necessary to find that Rivera had committed an assault.

Moreover, the evidence proving Rivera's assaults with a semiautomatic firearm was overwhelming. That the shooting of McIntire and Bianchi occurred was undisputed; Rivera only contested that the government failed to prove it was he who committed it. (11 RT 2325-2329.) Both victims, however, repeatedly either identified Rivera as the shooter, identified his vehicle, or identified someone resembling Rivera as the shooter. (9 RT 1645-1646, 1661-1662, 1665-1670, 1680, 1684-1686, 1698-1709, 1711-1712, 1750, 1757-1761.) The gun used in the shooting was the same gun Rivera used to murder Officer Gray just four days later. (9 RT 1797.) The jury clearly rejected Rivera's argument and found that Rivera was the shooter based on the overwhelming evidence against him. (47 CT 13595, 13597, 13599, 13601.) There is no reason to believe that the jury verdict would have been any different had it been instructed on the elements of assault.

For these reasons, and for the reasons previously set forth in pages 70 through 73 of Respondent's Brief, any error was harmless beyond a reasonable doubt. Therefore, reversal of counts V and VI is not required.

CONCLUSION

Accordingly, this Court should affirm the judgment as to counts I, V, and VI.

Dated: February 11, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** uses a 13 point Times New Roman font and contains 2,579 words.

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STATE OF CALIFORNIA
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