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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAVIER SANTANA, Defendant and Appellant.	G028240 (Super. Ct. No. 00CF0936) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dennis S. Choate, Judge. Reversed.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Melissa A. Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

THE COURT:*

* Before Bedsworth, Acting P. J., O'Leary, J., and Aronson, J.

Javier Santana and his brother were involved in a shooting at an apartment complex in Santa Ana. He was a passenger in the truck when his brother pointed a firearm out the window and fired at the victims. Although Santana was charged with four counts, one was dismissed and he was found not guilty on two others. The jury only convicted him of the crime of accessory after the fact. (Pen. Code, § 32.)

Santana contends, and the Attorney General concedes, that the judgment must be reversed because the trial court did not instruct the jury on the elements of the crime.

The proper instruction is CALJIC No. 6.40. It is clear from the reporter's transcript that the prosecutor intended to request this instruction, and that the court intended to give it. However, the prosecutor did not include this instruction in its list of proposed jury instructions, and the court did not give it. The Attorney General recognizes that while a failure to instruct on an element of a charged offense is not reversible error per se, the failure to instruct at all on the offense is a structural defect in the trial which requires automatic reversal. (See *People v. Epps* (2001) 25 Cal.4th 19, 29.) Given that reversal on this ground is dispositive of the appeal, we do not address the other issues raised by the appellant.

The judgment is reversed.