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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JAMES DALE ENGELSTAD et al., Defendants and Appellants.	B280958 (Los Angeles County Super. Ct. No. MA069528)

APPEAL from judgments of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed in part, reversed in part, and remanded.

Renee Rich, under appointment by the Court of Appeal, for Defendant and Appellant James Dale Engelstad.

Carolyn D. Phillips, under appointment by the Court of Appeal, for Defendant and Appellant Tracy Scott Evans.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant

Attorney General, Blythe J. Leszkay and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Codefendants James Dale Engelstad and Tracy Scott Evans were arrested by law enforcement members of a marijuana task force investigating a large scale marijuana-grow operation. A jury convicted both men of illegal drug and firearm offenses.

Engelstad raises sentencing and record correction issues on appeal. We modify Engelstad's sentence to strike a three-year enhancement under Health and Safety Code section 11370.2, subdivision (c). We also direct that the sentencing minute order and abstract of judgment be corrected to omit references to fines the trial court did not impose. We otherwise affirm the judgment as to Engelstad.

Evans raises four issues on appeal: (1) there was insufficient evidence to support his convictions for being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)); (2) there was insufficient evidence to support his conviction for methamphetamine possession while armed (Health & Saf. Code, § 11370.1, subd. (a)); (3) the jury instruction on methamphetamine possession while armed misstated the law; and (4) his trial attorney was ineffective for failing to object to the instruction. We find substantial evidence supported Evans's felon in possession conviction. We reverse for instructional error with respect to the possession while armed charge. As a result, we need not reach defendant's second and fourth arguments.

II. DISCUSSION

A. *Engelstad's Appeal*

Engelstad raises only sentencing and record correction issues on appeal. As a result, we need not discuss the underlying facts at length. Law enforcement officers had a warrant to search rural desert property associated with Engelstad. They found a large amount of marijuana growing in a ravine. They followed the irrigation lines to Engelstad's trailer. As they approached, Engelstad ran, disposing of a gun in the process. When detained, Engelstad was wearing an empty holster attached to his belt and had methamphetamine in his pocket. Officers also found marijuana in his trailer. The jury convicted Engelstad of methamphetamine possession for sale, marijuana possession for sale, marijuana cultivation, possession while armed with a loaded, operable firearm, and firearm possession by a felon. (Health & Saf. Code, §§ 11378, 11359, 11358, 11370.1, subd. (a); Pen. Code, § 29800, subd. (a)(1).) The jury further found Engelstad was personally armed with a firearm. (Pen. Code, § 12022, subd. (c).) The trial court found Engelstad had served seven prior separate prison terms. (Pen. Code, § 667.5, subd. (b).) The court sentenced Engelstad to 18 years in prison.

Engelstad's sentence includes a three-year enhancement under Health and Safety Code former section 11370.2, subdivision (c). The enhancement was imposed because Engelstad had a prior conviction under Health and Safety Code section 11379.6, subdivision (a). That conviction no longer qualifies a defendant for an enhancement under Health and Safety Code section 11370.2, subdivision (c), as amended by

Senate Bill No. 180 effective January 1, 2018. (Stats. 2017, ch. 677, § 1.) Because defendant's conviction is not yet final, the amendment applies to him and the enhancement must be stricken. (*People v. Millan* (2018) 20 Cal.App.5th 450, 454-456; *People v. Zabala* (2018) 19 Cal.App.5th 335, 344.) The Attorney General concedes this point.

The sentencing minute order and abstract of judgment both reflect a $5,400 restitution fine and a parole revocation restitution fine in the same amount. (Pen. Code, §§ 1202.4, subd. (b), 1202.45, subd. (a).) The trial court did not orally impose those fines. As a result, the minute order and abstract of judgment must be amended to omit reference to the fines. (*People v. Jones* (2012) 54 Cal.4th 1, 89.) The Attorney General concedes this point as well and correctly notes the trial court's failure to impose the fines cannot be corrected on appeal. (*People v. Tillman* (2000) 22 Cal.4th 300, 301-303.)

Engelstad argues the record erroneously reflects the trial court imposed concurrent sentences on counts 2 through 5. The trial court did not say whether the sentences were concurrent or consecutive. The sentences therefore are concurrent. (Pen. Code, § 669, subd. (b); *People v. Black* (2007) 41 Cal.4th 799, 822.)

B. *Evans's Appeal*

While marijuana task force members were executing a search warrant for two nearby locations (including Engelstad's trailer), they encountered a trailer occupied by Evans. It was in a valley below Engelstad's trailer, which was on top of a hill. The second residence listed in the warrant was also on top of the hill but south of Engelstad's home. There were 7 to 10 vehicles in the

vicinity of Evans's trailer. Officers observed two weapons in plain sight. A semiautomatic handgun was in a tray resting on the engine block under the open hood of a blue car. The "closest bumper" of the vehicle was 10 to 20 feet from the trailer. A shotgun was in the open trunk of a white car, which was "maybe" 20 to 25 feet from the motor home. The two cars were 15 feet apart. The trailer and the two vehicles were "relatively close," within a 40-foot circumference.[1] Both weapons were loaded and operable.

The officers "cleared the area," announced their presence, and called out for any occupants of the trailer to come out. A woman came out first, followed by defendant. Defendant told an officer that he had a small baggie of methamphetamine inside the trailer. Officers recovered methamphetamine on a nightstand inside the trailer. Evans told officers he was a mechanic and was working on the cars for a friend. Neither weapon-containing vehicle was registered to Evans. He denied any knowledge of the guns. The weapons were not tested for fingerprints or DNA. No items associated with the weapons were found in the trailer.

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[1] There was some arguably inconsistent evidence about the distance between the trailer and the closest weapon-containing vehicle. Deputy Mark Madrid testified the blue car's closest bumper was 10 to 20 feet from the trailer. Deputy Angela Riggs testified the location of the white car (which Deputy Madrid had identified as the location of the blue car) was "maybe" 20-25 feet from the trailer.

The jury convicted Evans of methamphetamine possession,[2] methamphetamine possession while armed with a loaded, operable firearm, and two counts of firearm possession by a felon. (Health & Saf. Code, §§ 11370.1, subd. (a), 11377; Pen. Code, § 29800, subd. (a)(1).) The trial court sentenced Evans to eight years in state prison.

1. Sufficiency of the evidence: felon in possession

Evans challenges the sufficiency of the evidence to support his firearm possession by a felon conviction. "'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (*Jackson v. Virginia* (1979) 443 U.S. 307.) In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) 'This standard applies whether direct or

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[2] Evans admitted to deputies that he possessed the methamphetamine. At trial, defense counsel conceded in argument to the jury that Evans was guilty of this offense.

circumstantial evidence is involved.' (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)" (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

Penal Code section 29800, subdivision (a)(1) provides: "Any person who has been convicted of, . . . a felony . . . and who owns, purchases, receives, or has in *possession* or under *custody or control* any firearm is guilty of a felony." (Italics added.) The parties stipulated that Evans had a prior felony conviction.

A conviction for being a felon in possession may rest on physical or constructive possession of the weapon. "Although the crime of possession of a firearm by a felon may involve the act of personally carrying or being in actual *physical* possession of a firearm, . . . such an act is not an essential element of a violation of [Penal Code section 29800, subdivision (a)(1)] because a conviction of this offense also may be based on a defendant's *constructive* possession of a firearm. [Citations.] 'To establish constructive possession, the prosecution must prove a defendant knowingly exercised a right to control the prohibited item, either directly or through another person.' [Citation.] [¶] Thus, . . . possession of a firearm does not necessarily require that the possessor be armed with it. For example, a convicted felon may be found to be a felon in possession of a firearm if he or she knowingly kept a firearm in a locked offsite storage unit even though he or she had no ready access to the firearm . . . ." (*People v. White* (2014) 223 Cal.App.4th 512, 524 [Penal Code former section 12021, subdivision (a)(1), now Penal Code section 29800, subdivision (a)(1)].)[3] "The elements of unlawful possession may

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[3] The trial court instructed the jury on constructive possession pursuant to CALJIC No. 12.44: "'Constructive possession' does not require actual possession, but does require

be established by circumstantial evidence and any reasonable inferences drawn from such evidence. [Citations.]" (*People v. Williams* (1971) 5 Cal.3d 211, 215 [drug possession].)

At trial, Evans denied knowing the weapons were in the cars and his trial attorney so argued to the jury. The jury rejected that claim. On appeal, Evans asserts the evidence was insufficient in that: there was no evidence he owned either weapon; there were no fingerprints or DNA evidence connecting him with the firearms; there was no ammunition or gun paraphernalia in his trailer; the weapons were in vehicles parked 20 to 25 feet away from the trailer; Evans did not own the cars; and the vehicles were "accessible to any[one] walking down the roads running past the motor[ ]home, or to those who camped or lived in the vicinity."

We conclude there was substantial evidence Evans possessed the weapons within the meaning of Penal Code section 29800, subdivision (a)(1).[4] Evans occupied a trailer in a rural and isolated desert area. The trailer was surrounded by cars. Evans did not own the vehicles. But Evans was a mechanic who had been working on the cars for a friend. The weapons were in

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that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons."

[4] The jury instructions on this count as well as the possession while armed count refer only to a handgun and not to a shotgun, but the parties did not limit their arguments to the handgun alone. Their arguments also encompassed the shotgun. The information charged defendant in a single count with possessing both firearms; and the verdict form listed both the handgun and the shotgun.

plain view. The handgun was under the open engine compartment hood of a vehicle the closest bumper of which was 10 to 20 feet from Evans's trailer. It was in a tray that also contained tools. The shotgun was in the open trunk of a car that was "maybe" 20 to 25 feet from the motor home. The two cars were 15 feet apart and both were within a 40-foot circumference of the trailer. Given the proximity of the weapons to Evans's trailer, the isolated location of the trailer, defendant's admission he had been working on the cars, and the location of the weapons in plain view, the jury could reasonably conclude defendant knowingly exercised control over or had a right to control the guns. Whether the loaded, operable weapons might instead have been left behind by a passerby, as defendant suggests, was for the jury to decide.

2. Jury Instruction

a. jury instruction failed to include "immediate"

Health and Safety Code section 11370.1, subdivision (a) defines "armed with" to mean "having available for *immediate* offensive or defensive use." (Italics added.) The jury instruction given in this case omitted the word "immediate" from the definition of "armed with." (Cf. *People v. Singh* (2004) 119 Cal.App.4th 905, 913 [that defendant had to *knowingly* have firearm available was an element of the offense].) The jury was instructed pursuant to CALJIC No. 12.52: "'Armed with' means knowingly to carry a firearm or have it available for offensive or defensive use." No other instruction described "armed" as

available for *immediate* use.[5] Although Evans did not object to the instruction, we can consider the error if it affects his substantial rights. (Pen. Code, § 1259; *People v. Zamudio* (2008) 43 Cal.4th 327, 353.)

b. jury instruction error was not harmless

A jury instruction that misstates an element of an offense is not structural error requiring automatic reversal. (*Pope v. Illinois* (1987) 481 U.S. 497, 502-503; *People v. Harris* (1994) 9 Cal.4th 407, 416-417 (*Harris*).) Instead, we determine whether the instructional error was prejudicial. (*Harris, supra*, at p. 416.) We apply the *Chapman* standard of review.[6] (*Harris, supra*, at pp. 416-417.) Such error is harmless "if it can be said beyond a reasonable doubt that the jury's verdict in this case was not affected by the erroneous instruction." (*Pope v. Illinois, supra*, 481 U.S. at p. 502.)

We conclude it is not clear beyond a reasonable doubt that a rational juror would have found Evans guilty absent the instructional error. The facts lend themselves to a finding Evans had the weapons available for use. He was in a remote area, living in a trailer, surrounded by cars, two of which contained loaded, operable weapons. The weapons were in close proximity to the trailer. But it is entirely less clear the weapons were

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5 The CALCRIM counterpart to CALJIC No. 12.52 includes but does not define the word "immediate." (CALCRIM No. 2303 (rev. Feb. 2014).)

6 *Chapman v. California* (1967) 386 U.S. 18, 24.

available for Evans's *immediate* use. As Evans asserts, "immediate" means "nearby and quickly and directly available" (quoting *People v. Pena* (1999) 74 Cal.App.4th 1078, 1084 [Health & Saf. Code, § 11550, subd. (e)].) Law enforcement officers found the guns outside the trailer while Evans was inside the trailer (as were the drugs). The officers were able to secure the weapons without, it appears, Evans even realizing the task force members were on his property. A properly instructed juror could reasonably conclude Evans did not have quick and direct access to the weapons.

Additionally, in determining whether the error was harmless, we examine counsel's argument. (Cf. *People v. Young* (2005) 34 Cal.4th 1149, 1202 [when a jury instruction is ambiguous, the reviewing court "must consider the arguments of counsel in assessing the probable impact of the instruction on the jury"].) Evans's attorney argued there was an important distinction between having a gun in the same room as the drugs and being able to grab it, and having the guns outside the trailer. Counsel told the jury the relevant question was whether the gun was "close by" in relation to the methamphetamine: if the methamphetamine was in the bedroom and the gun was in the bedroom closet, the weapon would be available—it could be "readily grab[bed]" and used to defend the drugs; here, however, the methamphetamine was in Evans's bedroom, but the guns were "outside in trunks, in cars some distance away," so that when the deputies arrived, defendant was blocked off from the weapons; hence Evans was not armed. A properly instructed jury may well have found this argument persuasive and concluded defendant was not guilty of the possession while armed offense.

The result we reach is consistent with the legislative intent in amending Health and Safety Code section 11370.1 in 1991. Prior to the amendment, the statute prohibited the possession of narcotics "while in the *immediate personal possession* of a loaded, operable firearm." (Stats. 1990, ch. 41, § 1, italics added.) A deputy district attorney raised a concern that the language was too limiting: "Due to the wording of this clause the only way a defendant can be guilty of this offense is if the firearm is on their person, under their control, or in the passenger compartment of a motor vehicle." (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 154, Feb. 7, 1991.) The Legislature sought to expand the reach of the language. It omitted the word personal but retained the word immediate. Retention of the word immediate supports a conclusion the Legislature intended to broaden the reach of the statute, but only so far. As the author explained in a letter to the governor, "[This amendment] will allow for the prosecution of dangerous criminals when they have immediate access to a firearm rather than only when it is on their person." (Sept. 10, 1991 letter from Assemblywoman Carol Bentley to Governor Pete Wilson.)

Because it is not clear beyond a reasonable doubt that a rational juror would have found Evans guilty if correctly instructed, the possession while armed conviction must be reversed.

III. DISPOSITION

The judgment as to defendant James Dale Engelstad is modified to strike the three-year enhancement under Health and Safety Code section 11370.2, subdivision (c). On remand, the

abstract of judgment must be amended to so reflect. Also on remand, the trial court is to correct the sentencing minute order and the abstract of judgment to omit reference to a restitution fine under Penal Code section 1202.4, subdivision (b) and a parole revocation restitution fine under Penal Code section 1202.45, subdivision (a). The court shall issue an amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

The judgment as to defendant Tracy Scott Evans is reversed with respect to his conviction for methamphetamine possession while armed with a loaded, operable firearm. (Health & Saf. Code, § 11370.1.) The judgment is affirmed in all other respects.

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KIM, J.*

We concur:

BAKER, Acting P.J.

MOOR, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.