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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. ANTHONY BRAVO, Defendant and Appellant.	B279784 (Los Angeles County Super. Ct. No. KA071282)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

California Appellate Project, Jonathan B. Steiner, Executive Director, Kevin E. Lerman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Anthony Bravo was convicted by a jury in 2006 of assault weapon possession (Pen. Code,[1] former § 12280, subd. (b), count 1), firearm possession by a felon (former § 12021.1, count 2), and ammunition possession by a felon (§ 12316, subd. (b)(1), count 4). The trial court found defendant had prior convictions, including two strikes, and had served prior separate prison terms. (§§ 667, subds. (b)-(i), 667.5, subd. (b), 1170.12, subd. (a)-(d).) Defendant was sentenced to three 25-years-to-life terms with the sentences on counts 2 and 4 stayed (§ 654). This court affirmed the judgment. (*People v. Bravo* (Oct. 11, 2007, B190558) [nonpub. opn.].)

Defendant filed a petition for recall of sentence pursuant to section 1170.126. The trial court denied the petition. The court found, by a preponderance of the evidence, that defendant was statutorily ineligible because he was armed with a firearm during the commission of the offense. (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii); 1170.126, subd. (e)(2).) We affirm the denial order.

BACKGROUND

We set forth the facts in our unpublished opinion affirming defendant's conviction. We will repeat these facts, supplementing them as pertinent to this appeal.

On June 21, 2005, about 1:00 p.m., Downey Police Department Detective David Zimmerman, Detective Michael

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[1] Further statutory references are to the Penal Code.

Nurre, and several other officers went to a house in the 3700 block of Paddy Lane in Baldwin Park to serve a search warrant for marijuana. There was no response to Detective Zimmerman's knock, verbal identification, and request for entry, so the officers forced the door of the house open.

Officers found a man named Soto in the living room. Officers heard the sound of someone running and a door slamming. Officers in the backyard saw appellant standing at an upstairs window from which the screen had been removed.

Officers ordered appellant to come out of the room, which turned out to be the master bedroom. He gave various reasons for not coming out, such as using the bathroom and getting dressed. After about 45 minutes, appellant came out. He was arrested.

Officers searched the house, including the master bedroom. They found a safe with a combination lock under the window where appellant had been standing. They pried the safe open and found a TEC-9 machine pistol, a J&R M-68 assault rifle, and a .45 caliber handgun. The .45 had been reported as stolen to the Glendale Police Department. The other two weapons were not registered and were not legal for civilians to own. Also in the safe were several loaded and unloaded ammunition magazines, a box of .45-caliber ammunition, a box of .9 millimeter ammunition, a Taser, a file containing papers, and $55,000 in currency.

The master bedroom contained only male clothing. The clothing would have fit appellant at the time of his arrest. Police found utility bills and registration documents in appellant's name in a drawer in the bathroom which connected to the master bedroom. Two other bedrooms in the house contained female clothing and personal items. During the search, a woman named

Blanca Vasquez arrived at the house and stated that she lived there. Vasquez was later identified as appellant's girlfriend.

At trial, appellant offered the testimony of his brother, Jonathan Ortiz, that Ortiz had been living in the house on Paddy Lane for three to four months. He paid about $300 in rent to Vasquez. Vasquez's two teenage daughters also lived in the house.

According to Ortiz, appellant shared the master bedroom with Vasquez. When the two quarreled, appellant went to stay with his mother. Appellant essentially divided his time between the two residences.

Ortiz testified that the weapons found in the safe were his, and he was holding them as a favor for a friend named Jerry, whose last name he did not know. Ortiz asked Vasquez for permission to store the guns in the safe for a few days, and she agreed. He did not tell appellant that he had stored the weapons in the safe. Ortiz did not believe that appellant knew about the guns because he was not home at the time Ortiz put them in the safe. Ortiz first told police that he was responsible for the guns in November or December, several months after appellant's arrest.

Officer Nurre testified at trial that he thought the safe was a combination safe, but he was not sure. Ortiz testified that the safe had a numerical combination that he believed Vasquez knew: "Q . . . How would you open up this safe? Did it have a pad with numbers on it or did it have a dial on it? [¶] A As I recall, it had numbers, like, a touch tone phone. [¶] Q And it was [Blanca Vasquez] that hit the numbers to open up the safe? [¶] . . . [¶] A Yes, I believe. I did not see. [¶] Q So you don't know who opened the safe? [¶] A Well, I asked [Vasquez], and

she said, 'Yes.' And so I went . . . to the car to get . . . the guns so that's what I'm saying I did not see her press the numbers or the combination. [¶] Q So you didn't see her open the safe? [¶] A No, I did not."

DISCUSSION

A. *There was Substantial Evidence Defendant was Armed*

Defendant challenges the trial court's finding he was armed during the offense. Our review is for substantial evidence. (*People v. Newman* (2016) 2 Cal.App.5th 718, 727.) Substantial evidence in the record supports the trial court's ineligibility finding.

"Armed with a firearm" in this context means having a firearm available for use, offensively or defensively. (*People v. Bland* (1995) 10 Cal.4th 991, 997.) "'[I]t is the availability—the ready access—of the weapon that constitutes arming.' [Citation.]" (*People v. Bland, supra,* 10 Cal.4th at p. 997.) Moreover, "[A] defendant is armed with a weapon even though it is not carried on his person, when he is aware it is hidden in a place readily accessible to him. [Citations.]" (*People v. White* (2016) 243 Cal.App.4th 1354, 1362.)

Here, there was substantial evidence defendant resided in the master bedroom and did not share it with Vasquez. The master bedroom contained only men's clothing in a size that would have fit defendant. A drawer in a connecting bathroom contained utility bills and registration documents in defendant's name. The two other bedrooms in the house contained female clothing and personal items.

If the safe was in a bedroom defendant exclusively occupied, it can be inferred that defendant knew the safe's combination. As well, even if Ortiz's testimony that Vasquez knew the combination is credited, it would be reasonable for the trial court to conclude defendant, in whose bedroom the safe was found, *also* knew the combination.

There further was substantial evidence that the firearms were available for defendant's use during the offenses of conviction, and indeed at the time that the officers were present. After police officers entered the house, defendant went straight to the master bedroom where the weapons were stored. From outside the house, officers saw defendant standing at a window. The safe was under that window. The safe contained a machine pistol, an assault rifle and a .45-caliber handgun together with ammunition. Defendant remained in the master bedroom for about 45 minutes after officers had ordered him out.

Assuming he knew the safe's combination, Defendant could have resorted to the weapons at any time during the 45 minutes he remained in the master bedroom resisting the police officers' commands that he exit.

We note that, on these facts, the conclusion that defendant was armed while officers were present follows naturally from the jury verdict. Under this verdict, it is difficult to see facts that might demonstrate mere constructive possession of firearms by defendant rather than actual possession. In convicting appellant of possession of the firearms and ammunition that were in the safe, the jury necessarily rejected Ortiz's testimony that defendant did not know of the weapons. The jury verdict means that defendant knowingly possessed the firearms found in the bedroom safe; defendant was in that bedroom for about 45

minutes. From that verdict, a conclusion that he was *not* armed at that time would mean that although he knowingly possessed those firearms, they were stored in a safe to which he did not know the combination. This is an unlikely conclusion, and the contrary inference that he knew the combination is a far more reasonable one.

In all, the trial court could reasonably infer defendant, who resided in the master bedroom, and who ran there when officers entered his house, knew the guns were present and had ready access to them by using the combination to the safe. This was substantial evidence defendant was armed during the commission of the offense.

Defendant cites *People v. Balbuena* (1992) 11 Cal.App.4th 1136, a drug possession case, as factually similar to this case.[2] *Balbuena* is inapposite. There, officers entered a home 30 seconds to a minute after knocking and announcing their presence. They found the defendant lying on the floor. They also found a suitcase containing an unloaded pistol. No ammunition was found in the home. The court noted: "About 10 or 12 feet, and an extended sofabed, separated defendant from the suitcase[]." (*Id.* at p. 1138.) The court held there was insufficient evidence the defendant was personally armed with a firearm as required by former section 12022, subdivision (c). (*Id.* at p. 1139.) "Armed" meant on the defendant's person or available for offensive or defensive use. (*Ibid.*) The court reasoned: "The gun

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[2] *Balbuena* was disapproved in *People v. Bland, supra*, 10 Cal.4th at page 1001, footnote 4, to the extent it suggested a defendant found guilty of felonious drug possession and who had an assault weapon available for use in furtherance of that crime would not be armed during the commission of the offense.

was not within defendant's reach, nor had it been placed in a position of especially ready access, nor was it loaded and ready for use, nor was there anything to connect the gun to the commission of the [drug possession] offenses." (*Ibid.*) Here, in contrast, defendant was in the master bedroom for about 45 minutes after police officers entered his home and ordered him out. The weapons were within defendant's immediate reach and readily available for use, assuming defendant knew the safe's combination.

B. *The Trial Court's Fact-Finding was not Limited to Facts Encompassed by the Judgment*

Defendant asserts the trial court's fact-finding eligibility determination was limited under *People v. Guerrero* (1988) 44 Cal.3d 343, 355, to facts found by the jury. In a case decided after defendant filed his opening brief, however, our Supreme Court held to the contrary. In *People v. Estrada* (2017) 3 Cal.5th 661, 669-673, the court concluded that a trial court ruling on section 1170.126 eligibility may consider facts beyond those encompassed by the judgment.

Defendant argues *Guerrero* survives *Estrada* to the extent it forbids relitigation of the facts. Defendant asserts, "no evidence directly place[d] the gun near [defendant's] person." He urges this court to "conclude [the armed finding] was unfounded because it was not resolved by the record of conviction and was not based on acts contemporaneous to the constructive possession conviction." We disagree with defendant. Under *Estrada,* the trial court properly considered facts in the record and concluded

defendant had ready access to the weapons. The pivotal facts were introduced in evidence at defendant's trial.

C. *Preponderance of the Evidence was the Correct Standard of Proof*

Preponderance of the evidence generally is the standard of proof under California law. (Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"].) Defendant cites *People v. Arevalo* (2016) 244 Cal.App.4th 836 for the proposition that the trial court was required to apply a beyond a reasonable doubt standard of proof. No published case has agreed with *Arevalo*. There is extensive authority to the contrary stating that the appropriate standard is preponderance of the evidence. (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1039-1040; *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1301-1305 [§ 1170.126 dangerousness finding]; see *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048 [no jury trial and finding beyond a reasonable doubt required].) This question as to the applicable standard of proof for an ineligibility finding is before the Supreme Court in *People v. Frierson* (2016) 1 Cal.App.5th 788, 793-794, review granted Oct. 20, 2016, S236728. We agree, pending resolution of this issue by our Supreme Court, that preponderance of the evidence is the applicable standard. The trial court did not err in applying that standard.

DISPOSITION

The order is affirmed.

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RAPHAEL, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, 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.