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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RONNIE EUGENE BACON, Defendant and Appellant.	B277404 (Los Angeles County Super. Ct. No. MA066825)

APPEAL from a judgment of the Superior Court of Los Angeles County, Andrew E. Cooper, Judge. Modified and, as so modified, affirmed.

Leonard J. Klaif, 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, Assistant Attorney General, Susan Sullivan Pithey and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Ronnie Eugene Bacon of possession of a firearm and ammunition by a felon, possession of a controlled substance while armed with a firearm, and possession of a controlled substance. Bacon contends the trial court erred by failing to instruct the jury on simple possession of a controlled substance as a lesser included offense of possession while armed. The parties agree that the abstract of judgment must be corrected to reflect that the trial court stayed sentence, pursuant to Penal Code section 654,[1] on Bacon's conviction for possession of a controlled substance. We order the abstract of judgment modified as the parties request, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

On July 31, 2015, at approximately 4:30 p.m., Los Angeles County Sheriff's Deputies Uriel Cruz and Joshua Raniag received a 911 call reporting that a woman had been assaulted. The call was traced to a rural, isolated area near 90th Street West and Avenue J in the City of Lancaster. Approximately 15 minutes after receiving the call, the deputies arrived at a residence in the area, which consisted of a house and a detached garage. Multiple sheds, several recreational vehicles, and a small mobile home park were also located on the property. The property was usually occupied by squatters.

When the deputies arrived, appellant Bacon and two young women were walking from the main residence to the garage. One of the women approached the deputies and denied making the

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[1] All further undesignated statutory references are to the Penal Code.

911 call. Bacon and the other woman, Whitney Caruso, entered the garage.

The garage had been converted into a furnished residence, comprised of a separate living room, bedroom, kitchen, and bathroom. Bacon and Caruso were in the living room when deputies arrived at the front door. Deputy Cruz asked Bacon whether the property was his and whether anyone had called 911. Cruz asked for permission to enter to determine whether anyone inside needed assistance. Bacon stated that he owned or was in charge of the property, and gave the deputies permission to enter and look around.

Upon entering the living room, Cruz observed, in plain view, a digital scale, a plastic bag containing a crystalline substance that he believed to be methamphetamine, and a methamphetamine pipe, all on a coffee table. The glass pipe appeared to have been used. The deputies detained Bacon and Caruso, as well as other persons found on the property, and obtained a search warrant. Other deputies arrived to assist.

During the subsequent search pursuant to the warrant, Sergeant Steven Owen discovered an operable, sawed-off shotgun inside a closet in the garage bedroom. The closet was approximately six or seven feet by four feet; the closet door was open and unlocked. Inside the closet was a blue duffle bag, sitting on top of other items, beneath a "little pile" of clothing. Inside the duffle was the shotgun, loosely wrapped in orange plastic. The shotgun was loaded with 20-gauge rounds in each barrel. Twelve additional loose rounds were inside the duffle. The closet contained men's clothing. Right outside the closet, Owen found mail addressed to Bacon. Owen found the shotgun

within "[a] couple minutes maybe, maybe a little less" after he began searching the closet.

Bacon told the deputies that he had been staying in the converted garage for approximately two years. Caruso had been staying with him for two months, and they both slept in the converted garage's bedroom. Bacon denied that the shotgun, ammunition, methamphetamine, scales, and pipe belonged to him. He stated that he did not know how they had gotten in the residence. He admitted using methamphetamine on a daily basis.

The crystalline substance was tested and determined to be a substance containing methamphetamine, with a net weight of 6.1301 grams.

Bacon stipulated that he had suffered a prior felony conviction. He presented no evidence.

2. *Procedure*

Trial was by jury. Bacon was convicted of possession of a firearm by a felon (§ 29800, subd. (a)(1)), possession of ammunition by a felon (§ 30305, subd. (a)(1)), possession of a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a)); and misdemeanor possession of a controlled substance, a lesser included offense of possession of a controlled substance for sale. (Health & Saf. Code, § 11377, subd. (a).) Bacon admitted serving a prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced him to a term of five years. It imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, and a criminal conviction assessment.

Bacon appeals.

DISCUSSION

1. *Lesser included offense instruction*

Bacon was charged in count 3 with possession of a controlled substance, methamphetamine, while armed with a loaded firearm, in violation of Health and Safety Code section 11370.1, subdivision (a). Defense counsel did not request, and the trial court did not give, an instruction on simple possession on count 3, and the jury convicted Bacon as charged. Bacon contends the trial court prejudicially erred by failing to sua sponte instruct on simple possession of methamphetamine. We disagree.

A trial court must instruct the jury on all general principles of law relevant to the issues raised by the evidence, including lesser included offenses, whether or not the defendant makes a formal request. Instruction on a lesser included offense is required when there is evidence the defendant is guilty of the lesser offense but not of the greater. (*People v. Banks* (2014) 59 Cal.4th 1113, 1159-1160, disapproved on another ground by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; *People v. Whalen* (2013) 56 Cal.4th 1, 68.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Banks*, at p. 1160; *People v. Booker* (2011) 51 Cal.4th 141, 181.)

" 'For purposes of determining a trial court's instructional duties,' " our Supreme Court has said " 'that "a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser

offense, such that the greater cannot be committed without also committing the lesser." ' [Citation.] When applying the accusatory pleading test, '[t]he trial court need only examine the accusatory pleading.' [Citation.] '[S]o long as the prosecution has chosen to allege a way of committing the greater offense that necessarily subsumes a lesser offense, and so long as there is substantial evidence that the defendant committed the lesser offense without also committing the greater, the trial court must instruct on the lesser included offense.' [Citation.]" (*People v. Banks*, *supra*, 59 Cal.4th at p. 1160, italics omitted; *People v. James* (2014) 230 Cal.App.4th 1256, 1260.)

Health and Safety Code section 11370.1, subdivision (a) provides, in pertinent part, that a person who possesses "any amount of a substance containing . . . methamphetamine . . . while armed with a loaded, operable firearm is guilty of a felony . . . ." The statute defines " 'armed with' " as "having available for immediate offensive or defensive use." (*Ibid.*)

Bacon acknowledges that simple possession of methamphetamine is not a lesser included offense of possession while armed under the elements test. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 644-645 [applying the "elements" test, possession of methamphetamine under Health & Saf. Code, § 11377, subd. (a) is not a lesser included offense of possession of a controlled substance while armed under Health & Saf. Code, § 11370.1, subd. (a), because a violation of § 11370.1 may be based on possession of substances that are not included in § 11377, subd. (a)]; *People v. Sosa* (2012) 210 Cal.App.4th 946, 949 [it is possible to violate Health & Saf. Code, § 11370.1, subd. (a) without violating Health & Saf. Code, § 11350, subd. (a), because the lists of controlled substances in the two statutes

differ].)

However, Bacon is correct that simple possession was a lesser included offense under the accusatory pleading test. The information here specified the particular substance in question. It alleged, as to Count 3: "On or about July 31, 2015, in the County of Los Angeles, the crime of possession of a controlled substance with firearm, in violation of Health and Safety Code section 11370.1(a), a [f]elony, was committed by Ronnie Eugene Bacon, who did unlawfully possess methamphetamine while armed with a loaded, operable firearm, to wit: handgun." (Full capitalization omitted.) Thus, based on the language of the pleading, if Bacon committed the offense of possession of methamphetamine while armed, he necessarily committed the lesser offense of possession of methamphetamine.

We need not determine whether the trial court erred by failing to instruct on the lesser included offense, however, because assuming arguendo omission of the instruction was error, it was harmless. The failure to instruct on a lesser included offense requires reversal only if an examination of the entire record establishes a reasonable probability that the error affected the outcome. (*People v. Wyatt* (2012) 55 Cal.4th 694, 698; *People v. Beltran* (2013) 56 Cal.4th 935, 955.) No such probability exists here.

To prove possession of a controlled substance while armed with a firearm, the People were required to show, in addition to Bacon's possession of the methamphetamine, that while possessing the contraband he (1) had a loaded, operable firearm available for immediate offensive or defensive use; and (2) he knew that he had the firearm available for immediate offensive or defensive use. (Health & Saf. Code, § 11370.1, subd. (a);

People v. Mena (2005) 133 Cal.App.4th 702, 706; CALCRIM No. 2303.) In order to be "armed" within the meaning of Health and Safety Code section 11370.1, subdivision (a), "a defendant need not physically carry the firearm on his or her person." (*People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 989-990 (*Martinez*).) Knowledge that the gun is loaded and operable is not an element of the offense. (*People v. Heath* (2005) 134 Cal.App.4th 490, 492.)

The jury convicted Bacon of possession of a firearm by a felon and possession of a controlled substance. Therefore, based on the instructions given, it concluded Bacon knowingly possessed both the firearm and a usable quantity of methamphetamine, with knowledge of the methamphetamine's character as a controlled substance. There was no dispute that the shotgun was loaded and operable.

The only element remaining to prove the Health and Safety Code section 11370.1 charge was that Bacon, while possessing the controlled substance, had the firearm available for immediate offensive or defensive use. There was ample evidence supporting such a finding. For example, in *Martinez*, the defendant had a firearm available for immediate use within the meaning of Health and Safety Code section 11370.1 when he was found in the kitchen with heroin; a sawed-off shotgun and marijuana were found either in the kitchen or in a bedroom; and another sawed-off shotgun and a rifle were found in a closet. (*Martinez*, *supra*, 225 Cal.App.4th at pp. 985, 989.) Similarly, in *People v. Molina* (1994) 25 Cal.App.4th 1038, the evidence was sufficient to hold the defendant to answer on a Health and Safety Code section 11370.1 charge. The defendant was in the driver's seat of his truck. A pocket sewn into the front seat's cover contained a

toiletry bag, which contained baggies of drugs. A loaded gun was in a duffle bag full of clothing located behind the back seat, which the arresting officer believed to be accessible from the driver's seat. (*Id.* at pp. 1041-1042, 1043-1044.) And in the analogous context of a section 12022 firearm enhancement,[2] *People v. Bland* (1995) 10 Cal.4th 991 concluded the defendant was armed with a firearm in the commission of a felony when an assault weapon was under his bed in his bedroom and cocaine was found in his bedroom closet. (*Id.* at p. 995.) *Bland* explained that when a firearm is found in close proximity to the illegal drugs in a place frequented by the defendant, the jury may reasonably infer that the firearm was available for the defendant to put to immediate use. (*Id.* at pp. 1002-1003.)

Similarly, here there was strong evidence the firearm was immediately available to Bacon for offensive or defensive use. Bacon was in the living room of the converted garage, along with the methamphetamine. The shotgun was in the closet in the residence's bedroom. The closet was open and unlocked. The duffle bag itself was not locked. Sergeant Owen, who found the

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[2] Health and Safety Code section 11370.1, as originally enacted, required that the defendant have "immediate personal possession" of the firearm. (Stats. 1989, ch. 1041, § 1.) Section 11370.1 was amended in 1991 "to replace the phrase 'while in the immediate personal possession of' with 'while armed with' a loaded, operable firearm" (*People v. Peňa* (1999) 74 Cal.App.4th 1078, 1083) and to add the current definition of "armed with" as "available for immediate offensive or defensive use." (Stats. 1991, ch. 469, § 1.) "This definition is consistent with the well-established construction of 'armed' given to firearm enhancements such as section 12022." (*Martinez*, *supra*, 225 Cal.App.4th at pp. 989-990.)

shotgun, testified that he discovered it within "[a] couple minutes maybe, maybe a little less" after he started looking inside the closet. The orange plastic was only loosely wrapped around the gun, and Owen simply pulled it off. Thus, Bacon had ready access to the shotgun. To retrieve it, all Bacon needed to do was walk into the bedroom and pull it from the duffle bag in the closet, which could have been accomplished within moments. In contrast, there was a dearth of evidence suggesting the firearm was *not* immediately available to Bacon. Bacon does not explain what evidence would have supported a finding he was not armed within the meaning of Health and Safety Code section 11370.1, except to point out the gun was in the duffle bag in a closet, wrapped in plastic. These facts, however, provide little support for a finding the shotgun was unavailable for his immediate use.

Moreover, the defense theory was that the People had failed to prove Bacon possessed or had knowledge of the shotgun, which was not in plain sight and could have belonged to one of the other persons who frequented the property. The defense did not otherwise argue to the jury that the firearm was not immediately available for Bacon's use. Given the evidence and the defense argument, there is no reasonable probability the jury would have rendered a more favorable verdict had the trial court given the challenged instruction.

2. *Correction of the abstract of judgment*

The trial court sentenced Bacon to a term of five years, configured as follows. On count 3, possession of a controlled substance with a firearm, the court imposed the upper term of four years, plus an additional year for the section 667.5, subdivision (b) prior prison term enhancement. It stayed sentence on counts 1 and 2 pursuant to section 654. The court

initially stated it was imposing a consecutive one-year sentence on count 6, possession of a controlled substance, but then corrected itself and ordered sentence on count 6 stayed pursuant to section 654.

The abstract of judgment does not reflect any term, imposed or stayed, on count 6. "When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties." (*People v. Jones* (2012) 54 Cal.4th 1, 89; see *People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3.) We therefore order this clerical error corrected.

DISPOSITION

The clerk of the superior court is directed to modify the abstract of judgment to reflect a one-year sentence on count 6, stayed pursuant to Penal Code section 654, and to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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DHANIDINA, J.*

WE CONCUR:

EDMON, P. J.

LAVIN, 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.