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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. ANARBOL VALENCIA, Defendant and Appellant.	B258449 (Los Angeles County Super. Ct. No. PA077220)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed in part, modified in part, and remanded with directions.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.

The Assault Weapon Control Act (Pen. Code, § 30500 et seq.)[1] includes a felony prohibition against *assault weapon activity* (§ 30600, subd. (a) [hereafter § 30600]), and an alternate felony/misdemeanor prohibition against *possession of an assault weapon* (§ 30605, subd. (a) [hereafter § 30605]). The parties agree there is no evidence of assault weapon activity in this case, but instead, the evidence shows defendant possessed four assault weapons. The primary issue in this appeal is whether defendant's convictions for assault weapon activity may be reduced to assault weapon possession as a lesser included offense under the accusatory pleading test as applied in *People v. Smith* (2013) 57 Cal.4th 232, 240 (*Smith*). We conclude the accusatory pleading test applies and reduction to the lesser offense of assault weapon possession is appropriate.

PROCEDURAL BACKGROUND

The jury convicted defendant Anarbol Valencia of the following offenses: count 1—shooting at an inhabited building (§ 246); count 2—shooting at an unoccupied vehicle (§ 247, subd. (b)); count 3—stalking (§ 646.9, subd. (b)); counts 4-5 and 12-13—unlawful assault weapon activity (§ 30600); count 7—possession of a machine gun (§ 31625, subd. (a)); count 9—unlawful firearm activity (§ 29815, subd. (a)); count 10—unlawful possession of ammunition (§ 30305, subd. (a)(1)); and count 11—discharge of a firearm with gross negligence (§ 246.3, subd. (a)).[2] The trial court sentenced defendant to 11 years in state prison, consisting of five years for shooting at an inhabited building in count 1, consecutive terms of two years for unlawful assault weapon activity in counts 4 and 12, and consecutive terms of eight months for possession of a machine gun in count 7, unlawful possession of ammunition in count 10, and discharge of a firearm with gross

[1] All statutory references are to the Penal Code unless otherwise stated.

[2] Counts 6 and 8 were dismissed by the prosecution during trial.

negligence in count 11. Sentencing on the remaining counts was to concurrent terms or punishment was stayed pursuant to section 654.

Defendant raises two issues on appeal. First, he argues there is insufficient evidence to support his convictions on four counts of unlawful assault weapon activity, a point conceded by the Attorney General. Second, defendant contends there is insufficient evidence to support his conviction of discharging a firearm with gross negligence under section 246.3. We agree the convictions of assault weapon activity are not supported by substantial evidence, but conclude the four convictions may be reduced to the lesser offense of possession of an assault weapon. The conviction under section 246.3 is supported by substantial evidence. We therefore modify the judgment as to four counts, affirm as to the others, and remand for resentencing.

FACTS

Prosecution Evidence[3]

Count 11 (Discharge of a Firearm with Gross Negligence)

Defendant and Oscar Lopez[4] had been childhood friends, but defendant perceived a problem with Oscar over the four-year period preceding the charged offenses. On March 22, 2013, Oscar was with his friend, Javier Guerra, in the garage of the Sylmar home Oscar shared with his wife, Christina, and their four children. Oscar ducked behind a car when he saw defendant drive up to the house in his truck. Guerra spoke briefly to defendant and then returned to the house. Defendant drove the truck a short distance past the Lopez residence, put his arm outside the driver's window, and fired up to five shots

[3] We set forth the facts chronologically, rather than in numerical order of the counts alleged.

[4] Because Oscar and Christina Lopez share the same last name, we refer to them by first name for clarity.

into the air. Guerra and Oscar saw the shots being fired; Christina heard the gunfire from inside the house.

Counts 1-3 (Shooting at an Inhabited Dwelling, Shooting at an Unoccupied Vehicle, and Stalking)

On May 10, 2013, Christina obtained a civil harassment restraining order against defendant on behalf of herself, Oscar, and their 13-year-old son. Defendant was ordered to stay at least 100 yards away from the persons protected by the order. He was prohibited from owning or possessing firearms or ammunition.

As Oscar was getting ready for work between 5:30 and 6:00 a.m. on June 10, 2013, he saw defendant's truck in front of the Lopez home. Oscar opened the front door, but stayed out of view. He saw defendant fire seven to nine shots toward the residence. Christina and the children were awakened by the shots. Gunshots struck the garage, a girl's jacket hanging in the garage, and Oscar's truck. The incident was captured by four video cameras installed at the Lopez residence.

Responding officers observed the gunshot damage to the Lopez residence and reviewed the video of the incident. Using information gathered at the scene, including a description of defendant's truck and license number, officers took defendant into custody. A receipt for a rental storage unit was recovered from the truck. A gunshot residue test performed on defendant returned with a positive result.

Counts 4-5, 7, 9, 10, and 12-13 (Unlawful Assault Rifle Activity, Possession of a Machine Gun, Unlawful Possession of Firearms while on Probation, and Unlawful Possession of Ammunition)

A search warrant was obtained for the storage unit listed on the receipt in defendant's truck. Defendant was identified as the tenant of the unit by an employee of the storage business and through business records. The search of defendant's storage unit

resulted in discovery of four unregistered assault weapons and a machine gun. A firearms expert testified to the characteristics qualifying four weapons as assault weapons and one as a machine gun, all of which are prohibited weapons under California law. A search of defendant's residence three days after the storage unit search led to discovery of multiple live rounds of ammunition. It was stipulated that defendant had suffered a prior conviction for carrying a concealed firearm (§ 25400, subd. (a)(2)).

Defense Evidence

The search of defendant's truck by police did not result in the recovery of any firearms, ammunition, or other evidence linking him to the commission of the charged shootings. Defendant has collected firearms and ammunition for over 20 years, at one time being licensed by the federal government to buy firearm relics without paperwork or a waiting period. He is the registered owner of several firearms, has owned many guns over the years, and does not shoot at people. His positive gunshot residue test result is attributable to the work he has done in his residence, including storing ammunition, cleaning guns, and gun-smithing. Anyone entering defendant's room would likely have a positive gunshot residue test. Defendant did not have a problem with Oscar, but he believed Oscar had issues with another man who drove a truck similar to defendant's vehicle.

DISCUSSION

The Assault Weapons Activity Charges

The parties agree there is no evidence to support the convictions in counts 4-5 and 12-13 for felony unlawful assault weapon *activity*, in violation of section 30600. They also agree that the evidence shows that defendant was in *possession* of the assault weapons, which is instead punishable as an alternate felony/misdemeanor under section

30605. And the parties further agree that section 30605 is not a necessarily included offense of section 30600 under the statutory elements test.

Defendant contends the four convictions under section 30600 must be reversed not only due to the lack of substantial evidence, but also because the trial court instructed the jury on the elements of possession of an assault weapon rather than the charged offense. The Attorney General argues there was an implied amendment adding the charges of assault weapon possession, an argument we reject. (See *post*, fn. 5.) We requested additional briefing from the parties on the issue of whether assault weapon possession is a lesser included offense of assault weapon activity under the accusatory pleading test to the extent the allegation that defendant did "keep for sale" an assault weapon necessarily includes possession of the weapon.

Background

The section 30600 charges in counts 4-5 and 12-13 of the information were in the conjunctive, tracking the statutory language. The counts each identified a specific assault weapon and alleged that defendant "did manufacture, caused to be manufactured, distribute, transport, import into this State, *keep for sale*, offer and expose for sale, give and lend an assault rifle." (Italics added.)

It went unnoticed throughout the preliminary hearing and the presentation of evidence at trial that defendant had been charged with a code section that did not apply to his conduct. The trial court did note the state of the evidence when formulating the package of jury instructions, realizing that the evidence showed possession of assault weapons, but the information was not amended to allege possession of an assault weapon, nor was the jury provided with verdict forms on the lesser crime. The trial court did, however, instruct the jury with a modified version of CALCRIM No. 2560 ("Possession, etc., of Assault Weapon or .50 BMG Rifle [Pen. Code, §§ 30605, 30600]"), which read in pertinent part as follows: "The defendant is charged in Counts 4, 5, 12 and 13 with unlawfully possessing an assault weapon, specifically a Norinco Mak-90, Kalashinkov

Saiga, Rugar Mini 14 and an Intratec 22 Pistol, respectively, in violation of Penal Code section 30600(a). [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant possessed, gave or lent an assault weapon, specifically a Norinco Mak-90, Kalashinkov Saiga, Rugar Mini 14 and an Intratec 22 Pistol; [¶] 2. The defendant knew that he possessed it; [¶] AND [¶] 3. The defendant knew or reasonably should have known that it had characteristics that made it an assault weapon." The modified instruction combined one factually irrelevant element of section 30600—that defendant "gave or lent an assault weapon"—with the elements of section 30605 that defendant "possessed" an assault weapon.

The jury verdicts stated that defendant was guilty in counts 4-5 and 12-13 "as charged in . . . the information" of "the crime of UNLAWFUL ASSAULT WEAPON/.50 BMG RIFLE ACTIVITY, . . . in violation of Penal Code Section 30600(a), a felony."

Sections 30600 and 30605

Section 30600 provides in relevant part as follows: "(a) Any person who, within this state, manufactures or causes to be manufactured, distributes, transports, or imports into the state, *keeps for sale*, or offers or exposes for sale, or who gives or lends any assault weapon or any .50 BMG rifle, except as provided by this chapter, is guilty of a felony, and upon conviction shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for four, six, or eight years." (Italics added.) Thus, section 30600, subdivision (a), requires proof of one or more of the enumerated activities specified in the statute.

Section 30605 provides in relevant part as follows: "(a) Any person who, within this state, *possesses* any assault weapon, except as provided in this chapter, shall be punished by imprisonment in a county jail for a period not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170." (Italics added.) In addition to proof of possession of an assault weapon, "the People bear the burden of proving the defendant *knew or reasonably should have known* the firearm possessed the

characteristics" of an assault weapon. (*In re Jorge M.* (2000) 23 Cal.4th 866, 887 (*Jorge M.*).)

Because there is no evidence defendant engaged in assault weapon activity as defined in section 30600, the convictions in counts 4-5 and 12-13 cannot stand under federal or state law. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) We next address whether possession of an assault weapon is a lesser included offense of the "keep for sale" portion of section 30600 under the accusatory pleading test.

The Accusatory Pleading Test and the Authority to Reduce to a Lesser Offense

"For purposes of determining a trial court's instructional duties, we have 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. [Citations.]' [Citations.]" (*Smith*, *supra*, 57 Cal.4th at p. 240.) Where the charging document alleges an offense that may be violated in different ways, *and the pleading uses the statutory language in the conjunctive*, "the defendant may be convicted of the greater offense on any theory alleged (see *People v. McClennegen* (1925) 195 Cal. 445, 452), including a theory that necessarily subsumes a lesser offense." (*Id.* at p. 244.) Thus, if an accusatory pleading alleges multiple ways of violating a statute, the jury may convict of the charged crime, but if not, "the jury may return a verdict on the lesser offense . . . so long as there is substantial evidence" to support the lesser charge. (*Id.* at p. 245.)

"We have 'long recognized that under Penal Code sections 1181, subdivision 6, and 1260, an appellate court that finds that insufficient evidence supports the conviction for a greater offense may, in lieu of granting a new trial, modify the judgment of conviction to reflect a conviction for a lesser included offense.' (*People v. Navarro*

(2007) 40 Cal.4th 668, 671 fn. omitted; see *id.* at p. 678.)" (*People v. Bailey* (2012) 54 Cal.4th 740, 748, fn. omitted.)

Analysis Under the Accusatory Pleading Test

As noted, the information alleged the section 30600 violations in the conjunctive language of the statute. Under these circumstances, *Smith*, *supra*, 57 Cal.4th at page 245, requires that we look to the various ways in which section 30600 may be violated to determine if section 30605 is an included offense under the accusatory pleading test. Our focus is upon the portion of the information alleging that defendant "did . . . keep for sale" an assault rifle. If "keep for sale" necessarily includes the element of possession, then possession of an assault weapon is a lesser included offense under the accusatory pleading test.

Cases addressing the interpretation of "keep for sale" recognize that "[t]he word 'keep' denotes possession . . . ." (*Ford v. State* (Neb. 1907) 112 N.W. 606, 607 [examining pleading under statutory language prohibiting "any person to keep for sale" intoxicating liquors].) "To 'keep' is to have in possession. *Balfe v. People* (Colo.) 66 Colo. 94, 179 P. 137. The possession may be by the accused in person or through an agent. *Hoskins v. Commonwealth*, 171 Ky. 204, 188 S.W. 348." (*Young v. Commonwealth* (Ky. 1922) 239 S.W. 1042, 1043 [interpreting statute making it unlawful to "'keep for sale'" intoxicating liquor]; see *Elder v. Camp* (Ga. 1942) 18 S.E.2d 622, 624 [possession of a slot machine is prima facie evidence of the keeping of a slot machine]; *State v. Hudson* (N.C.Ct.App. 2010) 696 S.E.2d 577, 584 ["The term '"keep" therefore denotes not just possession, but possession that occurs over a duration of time'"].

Dictionary definitions are in accord. Black's Law Dictionary defines "keep" as "a term meaning to hold, to maintain, to support, to retain in possession and to take care of." (Black's Law Online Dict. (2016) <http://thelawdictionary.org/keep/> [as of Feb. 25, 2016]). The Merriam-Webster dictionary first defines "keep" as "to continue having or

holding (something): to not return, lose, sell, give away, or throw away (something)." (Merriam-Webster Online Dict. (2015) <http://www.merriam-webster.com/dictionary/keep> [as of Feb. 25, 2016]). The Oxford Dictionaries define "keep" as "[h]ave or retain possession of." (Oxford Online Dict. (2016) <http://www.oxforddictionaries.com/definition/english/keep> [as of Feb. 25, 2016].)

Based on these authorities and dictionary definitions, and despite defendant's contrary arguments, we conclude that the phrase "keep for sale" in the information charging violations of section 30600 put defendant on notice that the prosecution involved an element of possession of the assault weapons, as defined in section 30605. The trial court instructed the jury on the elements of possession of an assault weapon in CALCRIM No. 2560. The jury verdicts in counts 4-5 and 12-13 found defendant guilty as charged in the information, which included the allegation defendant "did keep for sale" an assault weapon. While the jury verdicts finding defendant guilty of violating section 30600 cannot stand due to insufficiency of the evidence, we may reduce the charges to violations of section 30605 and "'modify the judgment of conviction to reflect a conviction for a lesser included offense.'" (*People v. Bailey*, *supra*, 54 Cal.4th at p. 748.)

Defendant resists this conclusion with an argument that section 30605 has a judicially imposed scienter element not contained in the language of section 30600. Defendant forthrightly acknowledges that the language of section 30605 lacks an express requirement of scienter, but that our Supreme Court has interpreted the statute to require proof that a defendant know or reasonably should know that the firearm possessed has the characteristics of an assault weapon. (*Jorge M.*, *supra*, 23 Cal.4th at p. 887 [interpreting the predecessor version of section 30605].) Defendant points out that no case has addressed whether section 30600 also has a scienter element, and argues it is possible the Legislature may have intended to make it a strict liability offense. We have no doubt that our Supreme Court would impose a scienter requirement on section 30600. Both statutes are part of the Assault Weapons Control Act, and it would be anomalous to require a mens rea for the less serious offense but not for the offense carrying greater punishment. Without reiterating the exhaustive analysis by the *Jorge M.* court, we comfortably

conclude that section 30600's prohibition against assault weapon activity requires a mens rea element that the defendant know or have reason to know that his or her offending conduct involves an assault weapon. This conclusion is consistent with the language of CALCRIM No. 2560.

Based on the foregoing, the convictions is counts 4-5 and 12-13 are reduced to possession of an assault weapon, in violation of section 30605.[5]

Sufficiency of the Evidence of Grossly Negligent Discharge of a Firearm

Defendant argues the evidence is insufficient to support the conviction in count 11 of discharging a firearm in a grossly negligent manner. Defendant reasons that he did not act in a grossly negligent fashion because he purposely shot away from persons or buildings and the persons present in the Lopez home were not in harm's way and suffered no injury or near injury. The contention is without merit.

"'We review the entire record in the light most favorable to the judgment, and affirm the convictions as long as a rational trier of fact could have found guilt based on the evidence and inferences drawn therefrom. [Citations.]' (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1044.)" (*People v. Medina* (2007) 41 Cal.4th 685, 699.)

Section 246.3, subdivision (a), provides as follows: "Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense and shall be punished by imprisonment in a county jail not exceeding one year, or by

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[5] We reject the Attorney General's argument that defendant gave implied consent to amend the charge to a violation of section 30605 under the reasoning of *People v. Toro* (1989) 47 Cal.3d 966 (*Toro*), disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558). None of the attributes of consent to an implied amendment, as discussed in *Toro* and the other authorities cited by the Attorney General, are present in this case. This case differs significantly from the situation in *Toro*, where the jury received instructions and a verdict form on the lesser related offense. Defendant's jury was never given the option to return a verdict on anything but the charged offenses.

imprisonment pursuant to subdivision (h) of Section 1170." Our colleagues in Division Four have held that "[i]t is beyond dispute" that firing a gun into the air in a commercial area is sufficient to establish gross negligence. (*People v. Alonzo* (1993) 13 Cal.App.4th 535, 540 (*Alonzo*).) Gross negligence requires that the act is a departure from the conduct of an ordinarily prudent or careful person under the same circumstances that is incompatible with a proper regard for human life—in other words, a disregard of human life or an indifference to consequences. (*Ibid*., citing *People v. Penny* (1955) 44 Cal.2d 861, 879.)

Defendant's conduct, if anything, is more serious than that in *Alonzo*. We have reviewed the exhibits in this case. The singular photographs in People's Exhibits Nos. 3 and 4, as well as the multiple photographs contained on the disc admitted as People's Exhibit No. 8, reflect that the Lopez residence is surrounded by other single family residences. Defendant's conduct placed the entire neighborhood at risk. As *Alonzo* recognizes, defendant's conduct "also presented the very real possibility that it would generate responsive gunfire," whether from the Lopez family, another person in the neighborhood, or responding police officers. (*Alonzo*, *supra*, 13 Cal.App.4th at p. 540.) We reject defendant's challenge to the sufficiency of the evidence in count 11.

DISPOSITION

The convictions in counts 4-5 and 12-13 are reduced to violations of Penal Code section 30605, subdivision (a). The cause is remanded to the trial court for resentencing. In all other respects the judgment is affirmed.

KRIEGLER, Acting P. J.

We concur:

BAKER, J.

KUMAR, J.*

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