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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. RICKY VALDEZ HUFFMAN, Defendant and Appellant.	B285344 (Los Angeles County Super. Ct. No. YA092067)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Brandlin, Judge. Affirmed.

James R. Bostwick, Jr., 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, Steven D. Matthews, Supervising Deputy Attorney General, Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Ricky Valdez Huffman was convicted of unlawful firearm activity (Pen. Code, § 29825, subd. (a)[1]) and disobeying a court order (§ 166, subd. (a)(4)). On appeal, Huffman contends the trial court prejudicially erred by not instructing the jury on the definitions of attempt and specific intent when it instructed the jury on the elements of section 29825, subdivision (a). We affirm the judgment.

BACKGROUND

A. Factual Background

1. Prosecution Evidence

On January 4, 2014, Huffman called the Torrance Police Department and requested assistance to "keep the peace." Torrance Police Department Officer Jennifer Leach responded to the call. Huffman told Officer Leach that he needed to retrieve personal property from his residence, which he and his ex-girlfriend Jennifer Sepulveda leased. Officer Leach went with Huffman to his residence.

Before arriving at Huffman's location, Officer Leach learned that Sepulveda had obtained a temporary restraining order against Huffman but had not served it on him. Officer Leach obtained a copy of the temporary restraining order and personally served it on Huffman at his residence. Officer Leach knew she was serving the right person because Huffman verbally identified himself and the residence had the same address as the one listed on the restraining order.

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[1] All statutory citations are to the Penal Code unless otherwise indicated.

Under the heading "**No Guns or Other Firearms or Ammunition**," the temporary restraining order stated that Huffman "cannot own, possess, have, buy or try to buy, receive or try to receive, or in any other way get guns, other firearms, or ammunition." (Original emphasis.) The hearing on the application for a permanent restraining order was set for January 23, 2014.

On January 16, 2014, Huffman went to a store that sells firearms, filled out an application to purchase a gun, and paid a $180 deposit for a .40 caliber semiautomatic handgun. He could not take possession of the gun until the end of a ten to fourteen-day waiting period and his successful completion of a state and federal background check. During the waiting period, the store was notified that Huffman was not eligible to purchase a gun.

2. Huffman's Evidence

Huffman testified at trial. He admitted calling the police for help in keeping the peace on January 4, 2014 and going to the store on January 16 to buy a firearm. He denied being served with a restraining order and said that Sepulveda accompanied him to the store to purchase the firearm. He had a firearm permit and a guard card. Huffman needed the gun to earn a higher salary at work.

When Huffman visited the gun store and put a deposit on the gun he selected, he was not aware that he was subject to a restraining order.

The day after Huffman visited the gun store, Sepulveda gave Huffman a paper stating that a restraining order against

him had been dismissed.[2] Huffman was upset to learn that a restraining order had been issued against him. Huffman testified that if he had known he was subject to a restraining order, he "would have never purchased that firearm because [he] would have been in a situation." This was the first time Huffman learned that Sepulveda had obtained a restraining order against him.

About one year after applying to purchase the firearm, Huffman received a letter from the Department of Justice in Sacramento stating that the reason he could not possess the gun was because a temporary restraining order had been issued against him.

Huffman never returned to the gun store to pick up the gun. He was promoted at his job and was paid the salary he would have received if he had obtained a gun. As a result, he no longer needed to buy a gun.

B. Procedural Background

On September 20, 2016, the District Attorney of the County of Los Angeles filed an information charging Huffman with unlawful firearm activity in violation of section 29825, subdivision (a), and disobeying a court order in violation of section 166, subdivision (a)(4).

Trial began on August 10, 2017. The prosecution called Officer Leach and an employee of the gun store as witnesses and

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[2] A January 17, 2014 minute order in the restraining order case (received in evidence as an exhibit in this case) states that the January 23 hearing was advanced to January 17 and called for hearing. At Sepulveda's request, the trial court dismissed the matter and dissolved the temporary restraining order. Huffman did not make an appearance.

successfully moved the temporary restraining order into evidence. Huffman testified for the defense.

After both sides rested, counsel and the court discussed jury instructions outside the jury's presence. Defense counsel objected to an instruction proposed by the prosecution based on CALCRIM No. 2512, which in its unmodified form asks if the defendant owned, purchased, received, or possessed a firearm. Over defense counsel's objection, the court adopted the prosecution's suggestion to modify CALCRIM No. 2512 by adding language asking if Huffman "attempted" to purchase a firearm. Defense counsel stated, "regarding the language of attempt, . . . there may be an issue as to whether that's – if [Huffman] is charged with attempted possession of a firearm versus the attempt to purchase."

The trial court responded: "So, you can't have an attempted attempt. So, how would you have a 664/29825 if the actual statute contains as a prohibition attempt to purchase?"[3] The court overruled defense counsel's objection.

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[3] Penal Code section 664 provides in part: "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts . . . ."

Penal Code section 29825, subdivision (a) provides: "Every person who purchases or receives, or attempts to purchase or receive, a firearm knowing that the person is prohibited from doing so by a temporary restraining order or injunction issued pursuant to Section 527.6, 527.8, or 527.85 of the Code of Civil Procedure, a protective order as defined in Section 6218 of the Family Code, a protective order issued pursuant to Section 136.2 or 646.91 of this code, or a protective order issued pursuant to Section 15657.03 of the Welfare and Institutions Code, is guilty of

The court then instructed the jury. The instructions included the following:

"Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings."

* * *

"The crime charged in count 1, namely unlawful firearms activity, requires proof of the union or joint operation of act and wrongful intent. For you to find a person guilty of the crime of unlawful firearms activity, that person must not only intentionally commit the prohibited act, but must do so with a specific intent and/or mental state. [¶] The specific intent and/or mental state required are explained in the instruction for that crime."

* * *

"The defendant is charged in count 1 with unlawful firearm activity in violation of Penal Code section 29825(a). To prove that the defendant is guilty of this crime, the People must prove that:

"One, the defendant purchased or attempted to purchase a firearm;

"Two, the defendant knew that he purchased or attempted to purchase a firearm;

"Three, a court had ordered in a temporary restraining order that the defendant not purchase or attempt to purchase a firearm; and,

"Four, that the defendant knew of the court's order."

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a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine."

The court also informed the jury that it was taking judicial notice of the temporary restraining order against Huffman which Sepulveda obtained on January 2, 2014 and dismissed on January 17, 2014.

In closing argument, the prosecution asserted Huffman knew about the temporary restraining order when he tried to buy a gun on January 16, 2014. The prosecution argued the evidence supported inferences that (1) Huffman knew he had falsely denied on the gun purchase application that he was subject to a restraining order and (2) he persuaded Sepulveda to dismiss the temporary restraining order the next day in the hope the temporary restraining order would be dismissed before his application was processed.

Defense counsel acknowledged that Huffman was trying to purchase a gun but asked the jury to find his efforts did not amount to an attempt for purposes of the charged crime: "Did Mr. Huffman know that he purchased or attempted to purchase a firearm? Yes. . . . He told you that yeah, I was trying to get a gun. I filled out the paperwork and I was trying to purchase this gun." "But . . . the reason I asked you to look at each element separately is because it also has to be more than just filling out the application. He has to be really making the steps to purchase the gun. So he pays an invoice, puts down a deposit. But he can't even get that gun . . . until that purchase and until that eligibility is complete." Defense counsel also argued Huffman's actions – calling the police, trying to buy a gun – showed he did not know about the temporary restraining order.

On August 16, 2017, the jury found Huffman guilty on both counts.

The trial court placed Huffman on three years of formal probation, ordered him to attend an anger management program, and imposed various fees and fines. Huffman filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

We review a claim of instructional error de novo. (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 759.) "'In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights. In making this determination, we consider the specific language under challenge and, if necessary, the instructions as a whole. [Citation.]'" (*People v. Lopez* (2011) 199 Cal.App.4th 1297, 1305.)

II. Even assuming the trial court was required to instruct the jury on attempt, any error was harmless.

A. Omission of an attempt instruction did not contribute to the jury's verdict.

Huffman was convicted of violating section 29825, subdivision (a), which provides: **"**Every person who purchases or receives, or attempts to purchase or receive, a firearm knowing that the person is prohibited from doing so by a temporary restraining order . . . is guilty of a public offense . . . ."

Because the statute applies when a defendant "attempts to purchase or receive" a firearm while subject to a restraining

order, Huffman argues the trial court was required to instruct the jury on the elements of attempt. (See § 21a ["An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission"].) Specifically, Huffman contends the court should have instructed the jury to decide whether his actions went beyond mere preparation. (See *People v. Reed* (1996) 53 Cal.App.4th 389, 398 ["Mere acts in preparation for a crime do not constitute an attempt"].) The omission of an attempt instruction, Huffman argues, violated his constitutional rights.

The People disagree, arguing the trial court was not required to instruct the jury on attempt because, "in the context of [Huffman's] crime, 'attempt' did not have any particular legal meaning." Instead, the People argue, the court properly instructed the jury that words and phrases not specifically defined in the instructions were to be applied using their ordinary, everyday meanings.

Even assuming the trial court was required to instruct the jury on the definition of attempt with respect to section 29825, subdivision (a), any error was harmless beyond a reasonable doubt. (See *People v. Lynch* (2010) 50 Cal.4th 693, 763 (*Lynch*), overruled on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610.) As noted, the section 29825, subdivision (a) allegation required the jury to find that Huffman "purchase[d] or receive[d], or attempt[ed] to purchase or receive, a firearm knowing that [he was] prohibited from doing so by a temporary restraining order . . . ." (§ 29825, subd. (a).) In *People v. Cain* (1995) 10 Cal.4th 1 (*Cain*), the trial court did not instruct on the definition of attempt, and the jury found the defendant not guilty of rape, but found true an attempted rape-murder special-

circumstance allegation. (*Id*. at p. 44.) The Supreme Court concluded that the CALJIC instruction on attempt[4] "merely restates the common meaning of "attempt, which is to try or endeavor to do or perform the act." (*Id*. at p. 44, internal quotation marks omitted.) The court concluded the omission of the attempt instruction did not contribute to the verdict and "the jury necessarily made the requisite findings necessary to hold defendant liable for this special circumstance." (*Ibid*.; see *Lynch*, *supra*, 50 Cal.4th at p. 763.)

Here, as in *Cain*, Huffman could not "try" to purchase or receive a firearm while subject to a restraining order without intending to do so and doing an act toward the purchase or receipt of a firearm while subject to a restraining order. Thus, in finding Huffman attempted to purchase or receive a firearm while subject to a restraining order, "'the jury . . . necessarily considered and found to be true" the elements of the CALCRIM No. 460 instruction on attempt which Huffman cites.[5] (*Cain*, *supra*, 10 Cal.4th at p. 44.) Accordingly, we conclude that omission of the attempt instruction did not contribute to the jury's verdict. (See *ibid*.)

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[4] CALJIC No. 6.00 provided that "[a]n attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (*Cain*, *supra*, 10 Cal.4th at p. 44.)

[5] CALCRIM 460 requires the People to prove that (1) "The defendant took a direct but ineffective step toward committing _____<*insert target offense*>" and (2) "The defendant intended to commit _____<*insert target offense*>."

B. No reasonable jury could find that Huffman's actions were anything other than an attempt to purchase a firearm.

1. Attempt versus preparation.

Huffman argues a properly instructed jury would have acquitted him "because his actions were insufficient for an attempt."

The Supreme Court recently discussed the law of attempt in *People v. Garton* (2018) 4 Cal.5th 485 (*Garton*). In order to decide if the trial court had jurisdiction over a charge that the defendant conspired to commit murder in Oregon, the court was required to determine whether the defendant's acts within California's borders independently constituted an attempt to commit murder. (*Id*. at p. 510.) Because there was clear evidence of the defendant's intent to murder the victim, the court reviewed the defendant's actions in California under the "slight acts" rule: "'Although a definitive test has proved elusive, we have long recognized that "[w]henever the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt." [Citations.]'" (*Ibid*.)

In *Garton*, the defendant planned the murder of his victim extensively. (*Garton*, *supra*, 4 Cal.5th at p. 511.) By the morning of February 6, 1998, he had loaded his car with weapons and equipment and driven from his home toward the state line with accomplices, intending to murder his victim in the Portland area the next day. (*Ibid*.)

The court nonetheless concluded "[the defendant's] actions within California were not sufficient to satisfy the act element of an attempted murder." (*Garton*, *supra*, 4 Cal.5th at p. 511.) The court reasoned that the defendant's actions in California did not

occur in close proximity to the victim or to the anticipated site of the murder in the Portland area. (*Id.* at p. 512.) While in California, the defendant could not enter the murder scene, hide in a position that would give him a clear shot, or even go to the general vicinity of the planned murder scene. (*Ibid.*)

The court noted it had "previously found sufficient evidence of attempted murder when a defendant was far away from his victim but had no further actions to take to complete the crimes." (*Garton*, *supra*, 4 Cal.5th at p. 512, citing *People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 9, 14 ["[a]lthough Decker did not himself point a gun at his sister" he "had effectively done all that he needed to do to ensure that [the victims] be executed"].) The court explained: "'The purpose of requiring an overt act is that until such act occurs, one is uncertain whether the intended design will be carried out. When, by reason of the defendant's conduct, the situation is "without any equivocality," and it appears the design will be carried out if not interrupted, the defendant's conduct satisfies the test for an overt act. [Citations.]'" (*Garton*, *supra*, 4 Cal.5th at p. 512, quoting *Decker*, *supra*, 41 Cal.4th at pp. 13-14.)

The defendant in *Garton* had done some but not all of the things he needed to do to murder his intended victim. (*Garton*, *supra*, 4 Cal.5th at p. 513.) He had gathered weapons and other equipment, scouted possible crime scenes, prepared his accomplices, and started driving toward Oregon. (*Ibid.*) But he had not arrived near the anticipated crime scene, sent his accomplices to murder the victim without further assistance, or taken other action sufficient to accomplish the victim's murder from afar. (*Ibid.*)

Moreover, the defendant's actions in California on February 6, 1998 "were temporally separated by one night from his actions in Oregon on the morning of February 7, 1998. This significant temporal gap between when [the defendant] and his coconspirators embarked for Oregon and their arrival at the location where they planned to kill [the victim] shows that, at the moment defendant and his coconspirators entered into Oregon, the plot to kill [the victim] was not 'in such progress that it [would] be consummated unless interrupted by circumstances independent of the will of the attempter . . . .'" (*Garton*, *supra*, 4 Cal.5th at pp. 513-514.)

The court acknowledged that "[a] defendant need not take the penultimate action toward a crime to be guilty of attempt. For example, a defendant need not point a gun at an intended victim to be guilty of attempted murder; when a defendant has clearly shown murderous intent, arriving near an intended victim's home or work with a weapon and then waiting for the victim can be attempted murder. [Citation.] Nor must a defendant be within sight of a victim; when a defendant has clearly shown murderous intent, unequivocally directing an accomplice to commit a murder can constitute attempted murder. [Citation.] But our case law does not suggest that a defendant with clearly shown intent need only make preparations or start moving toward the intended victim to be guilty of attempted murder. [Citations.]" (*Id*. at p. 514.) The court held the defendant's activities in California did not satisfy the overt act element of attempted murder, even considering the clear evidence of his intent to murder the victim. (*Id*. at p. 515.)

Garton, *supra*, 4 Cal.5th 485 suggests that when there is a "significant temporal gap" between the defendant's actions

initiating a plot and the defendant's actions completing the crime, a jury can find the defendant's initiating actions were preparation only and did not amount to an attempt to carry out the crime – even when the defendant clearly intended to commit the crime.

2. Even if the jury had been instructed on attempt, it could not have found Huffman took only preparatory steps in purchasing a firearm.

Huffman argues a properly instructed jury could have concluded his conduct in filling out an application to purchase a gun and paying a deposit was merely "preparation" and did not amount to an "attempt" for purposes of section 29825. Huffman argues: "'A 'sale' consists of the passing of title from the seller to the buyer for a price [citation].' [Citation.] It is axiomatic that one does not purchase goods unless and until the sale is completed. . . . [¶] . . . [T]he purchase of a firearm in California is a multi-step process. A prospective purchaser must complete a federal background check form. [Citation.] Submission of the form initiates a ten-day waiting period. [Citation.] If the store is not notified during the waiting period that the purchaser is ineligible, then the sale can proceed. [Citation.]" According to Huffman, he took only "preliminary steps" in this process.

But in arguing his application to purchase a gun and deposit were only preparatory steps in the process of purchasing a gun, Huffman necessarily assumes he could have taken additional steps to purchase the firearm, such as returning to the gun store and paying the balance of the purchase price.

The assumption is unfounded. The uncontradicted evidence shows that once Huffman submitted an application to

purchase a firearm while he was subject to a restraining order, he was precluded from advancing any further in the purchase process. Huffman could not proceed with his purchase because, due to the restraining order, he could not clear the background check. In applying to purchase a firearm and paying a deposit while subject to a restraining order, Huffman took the last steps he could take to advance his goal.[6]

Because a defendant who applies to purchase a gun while subject to a restraining order cannot take further action to purchase the gun (such as paying the balance of the purchase price), the attempt language of section 29825 would never apply if more than an application to purchase a firearm was required. Thus, if attempt liability under section 29825 required evidence that a defendant subject to a restraining order took further action to purchase a firearm after submitting an application, the attempt provision of section 29825 would effectively be nullified. We do not believe the Legislature intended this result. (See *Tuolumne Jobs & Small Business Alliance v. Superior Court*

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[6] Huffman argues the jury, if properly instructed, could have concluded he intended to complete the firearm purchase only if the restraining order was dissolved. Huffman provided no testimony to support this theory; indeed, at trial he denied he knew about the restraining order when he submitted his application. Moreover, even if Huffman believed when he attempted to purchase the gun that he might have an opportunity to complete the firearm purchase once the restraining order was dissolved, Huffman has not challenged the jury's finding that he knew about the restraining order when he applied to purchase a firearm. Based on this finding, Huffman could not proceed any further with the firearm purchase because the restraining order prevented him from passing the background check.

(2014) 59 Cal.4th 1029, 1039 ["'An interpretation that renders statutory language a nullity is obviously to be avoided"'].)

Here, a jury instructed with CALCRIM 460 would have understood that Huffman – having applied to purchase a firearm while subject to a restraining order – could take no additional steps to purchase a firearm. As a result, the jury could not have found Huffman's application was merely preparation for future actions still needed to complete the purchase. Instead, because Huffman had taken all the actions within his power to purchase a firearm, no reasonable jury could have found Huffman's actions were anything other than an attempt to purchase a firearm.

Accordingly, we conclude beyond a reasonable doubt that any instructional error was harmless because "there is no rational basis upon which the instructional error could have affected the jury's verdict." (*People v. Flood* (1998) 18 Cal.4th 470, 505.)

III. Specific intent.

Huffman asserts the trial court erred by failing to instruct the jury on specific intent. The People argue the trial court gave a specific intent instruction.

The trial court instructed the jury: "For you to find a person guilty of the crime of unlawful firearms activity, that person must not only intentionally commit the prohibited act, but must do so with a specific intent and/or mental state. [¶] The specific intent and/or mental state required are explained in the instruction for that crime."

The court subsequently instructed the jury: "The defendant is charged in count 1 with unlawful firearm activity in violation

of Penal Code section 29825(a). To prove that the defendant is guilty of this crime, the People must prove that:

"One, the defendant purchased or attempted to purchase a firearm;

"Two, the defendant knew that he purchased or attempted to purchase a firearm;

"Three, a court had ordered in a temporary restraining order that the defendant not purchase or attempt to purchase a firearm; and,

"Four, that the defendant knew of the court's order."

The first instruction quoted above promised the court would provide a specific intent instruction "in the instruction for [unlawful firearms activity]." The unlawful firearms activity instruction, however, did not contain an instruction on specific intent.

Nonetheless, the jury was adequately instructed on specific intent. Specific intent is "the intent to engage in the conduct and/or bring about the consequences proscribed by the attempted crime . . . ." (*People v. Toledo* (2001) 26 Cal.4th 221, 230.) In arguing the court had a duty to instruct the jury on specific intent, Huffman points to CALCRIM No. 460, which states that the defendant "'intended to commit [the target offense].'" The trial court so instructed the jury: "For you to find a person guilty of the crime of unlawful firearms activity, that person must not only *intentionally commit the prohibited act*, but must do so with a specific intent and/or mental state." (Emphasis added.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JASKOL, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

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