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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL EUGENE JAMES, Defendant and Appellant.	C057995 (Super. Ct. No. 06F04888)

APPEAL from a judgment of the Superior Court of Sacramento County, Timothy M. Frawley, Judge. Affirmed.

Laurie Wilmore, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette and Michael P. Farrell, Assistant Attorneys General, David A. Rhodes and Michael Dolida, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I and II of the DISCUSSION.

In this case, we hold that possession of an assault weapon in California remains unlawful and is not protected by the Second Amendment to the federal Constitution as construed by the United States Supreme Court in *District of Columbia v. Heller* (2008) 554 U.S. __ [171 L.Ed.2d 657] (*Heller*).[1]

Defendant Michael Eugene James was convicted by jury of three counts of unlawful possession of an assault weapon (Pen. Code, § 12280, subd. (b)),[2] one count of unlawful possession of a .50 caliber BMG rifle (§ 12280, subd. (c)), 10 counts of unlawful possession of a firearm (§ 12021, subd. (g)(2)), and one count of unlawful possession of a blowgun (§ 12582). The trial court sentenced defendant to two years in state prison and imposed other orders. On appeal, defendant asserts two claims of instructional error and further asserts that his right to bear arms under the Second Amendment to the United States Constitution has been violated.

In the unpublished portion of the opinion, we reject his claims of prejudicial instructional error. In the published portion, we reject his Second Amendment claim. We therefore affirm the judgment.

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[1] The Second Amendment to the Constitution of the United States provides, "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

[2] Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

In May of 2006, Special Agent John Marsh of the California Department of Justice began investigating defendant for possible firearms violations. Special Agent Marsh discovered that a restraining order had been issued against defendant, expressly prohibiting defendant from possessing firearms. The restraining order further directed defendant to "turn in or sell" all firearms in his possession by a certain date. Upon receiving this information, Marsh consulted the Automated Firearms System (AFS) database and discovered that defendant had roughly 20 firearms registered to his name. Marsh then contacted defendant by phone; defendant explained that all of his firearms had been turned in to the Sacramento Police Department. A comparison of the AFS database with the list of weapons turned in to police revealed 10 outstanding firearms.

In an attempt to clear up the discrepancy, Special Agent Marsh again contacted defendant by phone. During this conversation, defendant walked around his house and informed Marsh that he had found two additional firearms. When Marsh arrived at defendant's house to retrieve the newly-discovered guns, he found four firearms (including two assault weapons) stacked on the floor near the front door. Defendant explained that he had found two more while Marsh was en route. The specifics of these firearms are as follows: (1) Bushmaster XM-15 assault weapon; (2) Professional Ordnance Carbon 15 assault pistol; (3) Keltec P-32 handgun; and (4) Dan Wesson Arms .357 revolver. After confiscating the weapons, Marsh explained to

defendant that according to the AFS records there were still a number of firearms that had not been turned in. Defendant refused Marsh's request to search the house for the remaining guns.

Shortly after leaving defendant's house, Special Agent Marsh realized that he left behind a working file and returned to retrieve it. Marsh arrived to find that defendant had found another gun. This firearm, a Kobray PM-11 handgun, was also confiscated.

Notwithstanding the weapons turned in to the Sacramento Police Department, and the five weapons taken by Special Agent Marsh during the two trips to defendant's house, there were still a number of firearms registered to defendant that had not been turned in. Marsh returned two days later with a search warrant. An Armalite AR-50 .50 caliber BMG rifle was found in its original box on a shelf in the garage. An Eagle Arms AR-15 lower receiver, and a DPMS AR-15 lower receiver, were also found in a box in the garage. An Eagle Flight blowgun and darts were found on a shelf in the garage. A 1911 Springfield .45 caliber semiautomatic handgun, and a Remington 12-gauge shotgun, were found next to the front door.

Defendant told Marsh that he did not turn in the .50 caliber BMG because he knew that he did not register it and if he turned it in, then he could get in trouble. Defendant said he thought he had turned all the other guns in.

Defendant was charged with three counts of unlawful possession of an assault weapon (counts 1, 2 & 4), one count of

unlawful possession of a .50 caliber BMG rifle (count 3), 10 counts of unlawful possession of a firearm (counts 5-14), and one count of unlawful possession of a blowgun (count 15). He was tried by a jury. At the conclusion of Agent Marsh's testimony (and before the jury was instructed), the trial court entertained questions from the jurors. The record reflects the following:

"[THE COURT:] There was another question to the effect regarding the laws that apply if Mr. Johnson [*sic*] had honestly forgotten that he was in possession of the confiscated weapons, is that possession still illegal? [¶] That's not necessarily within the province of this witness to answer, but that issue will be addressed in the instructions of law and the arguments that the attorneys make so that will be made clearer for you."

Defendant was convicted on all counts, and sentenced to an aggregate term of two years in state prison (the middle term of two years on counts 1, 2 and 4; sentence on counts 2 and 4 to run concurrently to count 1), such term to run consecutively to two one-year terms in the county jail on counts 3 and 7 (custody credits to be applied to these county jail terms), plus a concurrent term of one year in the county jail on the remaining 10 counts of unlawful possession of a firearm (counts 5-6 & 9-14) and unlawful possession of a blowgun (count 15).

DISCUSSION

I

Defendant contends the trial court prejudicially erred in refusing his request to instruct the jury on the defense of

mistake of fact pursuant to Judicial Council of California Criminal Jury Instructions (2007-2008), (CALCRIM) No. 3406.

In the trial court, defendant argued that he made two mistakes of fact: (1) that he was unaware that he possessed the weapons and (2) that he was unaware that he could not possess an assault weapon. On appeal, he advances only theory number (1). We shall conclude that any error in failing to instruct on mistake of fact was harmless.

"A person who commits an act . . . under a mistake of fact which disproves his or her criminal intent, is excluded from the class of persons who are capable of committing crimes." (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425; § 26 [a person is considered incapable of committing a crime if he or she "committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent"].) (*People v. Meneses* (2008) 165 Cal.App.4th 1648, 1661 (*Meneses*).)

In *People v. Meneses*, *supra*, 165 Cal.App.4th at page 1661, the court provided several examples of the mistake-of-fact defense: "[A] reasonable yet mistaken belief that the victim consented to sex is a defense to forcible rape [citation]; a good faith and reasonable belief that the prosecutrix was at least 18 years old is a defense to statutory rape [citation]; and a defendant's bona fide and reasonable belief that he was divorced is a defense to bigamy [citation]." (*Id*. at p. 1662.)

Consistent with these principles, CALCRIM No. 3406 instructs the jury that if the defendant did not have the

required criminal intent or mental state because he operated under an honest and reasonable mistake of fact, or if the defendant's conduct would have been lawful under the facts as he honestly and reasonably believed them to be, then the defendant is not guilty.

Defendant argues he was entitled to a mistake-of-fact instruction because there was substantial evidence in the record that defendant did not know he possessed the assault weapons and the blow gun.

Defendant first argues:

"All the charges against [defendant] contain a mental intent element which could be negated by mistake of fact. Possession of an assault weapon, as charged in counts one through four, contains a scienter requirement. The prosecution must prove that the defendant knew or should have known that the firearm at issue possessed the characteristics making it an assault weapon. (*In re Jorge M.* (2000) 23 Cal.4th 866, 887.) Possession of a firearm after being the subject of a restraining order, as charged in counts five through fourteen, has two knowledge elements, a defendant must knowingly possess the weapon and know about the restraining order. (CALCRIM No. 2512.) 'With respect to the elements of possession or custody [relating to felon in possession of a firearm], it has been held that knowledge is an element of the offense []. (*People v. Snyder* (1982) 32 Cal.3d 590, 592, citations omitted.)' If possession of a firearm requires knowing scienter, possession of a blow gun would logically have the same requirements.

"The evidence in the record was that [defendant] overlooked the presence of his weapons and with the exception of the BMG rifle, believed he had turned them all in. His mistaken belief was a defense to all of the counts, except count three, because his mistake negated the element of knowledge."

Defendant argues further:

"There was substantial evidence in the record from Agent Marsh's testimony that [defendant] was relying on a mistake of fact defense that he mistaken [*sic*] believed he had turned in all his firearms. To begin with, [defendant] had many guns. He divested himself of 19 weapons. When initially contacted by Agent Marsh, he stated that he did not have any guns because he had turned them all in. When contacted again regarding a specific list of guns, he stated that he would have to look and see. While he was checking, he began a process of locating weapons and then immediately informing Agent Marsh of their existence. He made statements that that [*sic*] he believed he had turned them all in (with the exception of the BMG), and must have overlooked them. [Defendant] represented that he wasn't very organized, had overlooked all the guns recovered on the 16th and 18th and had overlooked the shotgun because it was in a case. According to Agent Marsh, Defendant bought the guns in 2001, had been busy with work and misplaced them and lost track of them. His home was cluttered and his mobility was affected because he was on crutches. While the location of many of the weapons within a room were not specifically noted, most of the

weapons appear to have been found inside boxes and bags, with only the blow gun lying in plain view on a shelf in the garage."

We shall conclude that, assuming for the sake of argument the trial court erred in refusing a mistake-of-fact instruction, any error was harmless. "Error in failing to instruct on the mistake-of-fact defense is subject to the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243." (*People v. Russell, supra,* 144 Cal.App.4th 1415, 1431, citing *People v. Mayer* (2003) 108 Cal.App.4th 403, 413.)

To begin with, the factual basis of defendant's "I forgot" defense is implausible.

Defendant did not testify at trial. Thus, he did not testify that he did not know the guns were in his house. Defendant asserts that, with the exception of the Armalite AR-50 .50 caliber BMG rifle, which defendant admitted had not been turned in because he believed he would get in trouble, he mistakenly believed that he had turned in all of his weapons. The factual basis for his alleged mistake of fact is contained in statements defendant gave (not under oath) to the police. However, as already indicated, during the second phone conversation with Special Agent Marsh, defendant immediately discovered two weapons that had not been turned in. He found two more while Marsh drove to his house, and yet another while Marsh was returning to collect his file. These weapons simply could not have been very hard to find. Defendant's assertion that he believed he had already turned these weapons in, and yet was able to find them in a matter of minutes as he strolled

through his house while on the phone with Special Agent Marsh strains credulity. With respect to the additional weapons discovered when his house was searched, these weapons were not hidden away in a hard-to-find location, such that the jury could reasonably have concluded that defendant forgot about their existence. Indeed, the blowgun and darts were in the open on a shelf in the garage.

In addition, other jury instructions told the jury that they had to find that defendant intentionally and *knowingly* possessed the weapons.

Thus, the jury was instructed on the union of act and intent as follows: "Every crime charged in this case requires proof of the union, or joint operation, of act and wrongful intent. [¶] In order to be guilty of the crime of illegal possession of specified weapons, a person must not only commit the prohibited act, but must do so intentionally or on purpose. The act required is explained in the instructions for each crime. However, it is not required that he intend to break the law." Moreover, the instructions for each crime explained to the jury that the People must prove not only that defendant possessed the specified weapons, but also that "defendant knew that he possessed" these weapons. The jury was also instructed to find defendant not guilty unless the People proved each element, including the element of knowing possession, beyond a reasonable doubt.

Read together, these instructions clearly informed the jury that if there was a reasonable doubt concerning whether

defendant knew that he was in possession of the specified weapons, i.e., a reasonable doubt as to whether defendant operated under a mistake of fact concerning possession of the weapons, they must acquit the defendant. Accordingly, the failure to instruct the jury pursuant to CALCRIM No. 3406 did not remove defendant's defense from the case and was adequately covered by the instructions as given.

The arguments of counsel also clearly informed the jury that, to be convicted, defendant had to know the firearms were there.

In the first part of her closing argument, the prosecutor argued: "In this case you don't have to decide whether or not [defendant] knew he was violating any particular statute by violation of possession of an assault weapon, but I had to prove to you that he possessed these guns, *that he knew he possessed them*.

"He purchased them; obtained them. *He intentionally and on purpose possessed these weapons*.

"The evidence is that he lived in approximately a 1,000-square foot home with a single-car garage. Albeit it may have been cluttered, when you look at all of the exhibits here, *it's not reasonable to believe that he just didn't know he possessed these things.*" (Italics added.)

Referring to the counts charging violation of a restraining order, the prosecutor argued:

"Each one of those weapons fulfills those counts, separate weapons for each count. Did he possess those? And the issue

becomes: *Did he purposefully or intentionally possess these weapons*?" (Italics added.)

Addressing defendant's argument that he forgot he possessed the weapons, the prosecutor addressed the argument on the merits as follows:

"Some of the questions -- and the agent testified that at one point, the defendant said to him, well, I forgot. I just overlooked them. I didn't realize I had them.

"I want to ask you again to apply your common sense about the value. Even if you accept his statement that he made to the agent -- this is just to the 50 BMG -- that he paid $2,000 for that BMG in Count 10, he paid $2,000 and he overlooked it? And a 1,000 square foot home with a single-car garage.

"Now, he turned in 19 weapons after the restraining order, but he kept all of these; and it may have been in a box, but he knew he had it. And how do you know that? First of all, you know that he knew he had all these weapons because when the agent called him and told him, I am investigating a crime in which one of your weapons was used, the first thing the defendant said was I have a restraining order. I don't have any weapons. I am not allowed to have any weapons.

"Do you remember that? And then the agent said, well, I have a list of guns that are registered to you; and they haven't all been turned in. Could you look?

"So the defendant went and looked. If you recall the testimony of the agent, the phone conversation lasted 10 to 15

minutes; and that is the conversation as well as the time it took to look.

"And within 10 to 15 minutes of the conversation and at least somewhat less of that looking for these weapons, he comes back to the phone and says, oh, I found two more.

"Now, how could he find them so quickly if he didn't know he possessed them and where they were? Think about that. He knew where those weapons were but the agent had keyed him in: Look, we know you have registered these weapons. We know you possess these weapons. Now, where are they?

"So he says, okay, I found two and the agent said I will go pick them up. When he gets over there, the defendant says, oh, I found two more.

"Now, the only relevance for that is, you have to find -- to find him not guilty of those four counts, you have to actually believe that he did not remember he had these weapons because *I have to prove that on that date, he possessed them with the general intent, which is that he purposefully and intentionally possessed them.*

"These are weapons that he either purchased or traded or some other mechanism in the past.

"Some of them he had registered; some he had not. They were all worth at least several hundred dollars. It's not reasonable that he did not know that he possessed those." (Italics added.)

In his closing argument, defense counsel argued at length that defendant had simply overlooked or forgotten about the weapons.

In the rebuttal phase of her closing argument, the prosecutor argued:

"[Defense counsel] said he hadn't handled these guns, hadn't handled any weapons and hadn't purchased any for several years.

"Well, what about all the ammunition that was found in the house? What about all of the magazines to some of these weapons found in the bedroom?

"What about the magazines that were found in the master bedroom, the upper and folding stock to the R15 that was found in the living room on the end table?

"The magazines that were found in the front bedroom closet? What about all of those? He is handling weapons. He knows what he has. A gun collector is a person who has many weapons of this sophistication who actually goes out to purchase parts to put together and complete a weapon, do you really think they don't know what they have in their possession?

"That's like saying that you collect anything that's important to you that is large like this and you don't know what it is? You are going to pay thousands of dollars for items and you don't know? Of course you do. That belies common sense."

Thus, both the jury instructions and the arguments of counsel clearly presented to the jury the issue whether defendant had knowingly possessed the weapons. Considering the

whole record, it is not reasonably probable that defendant would have obtained a better result had a mistake-of-fact instruction been given. (*People v. Mayer, supra,* 108 Cal.App.4th at. p. 413.)

Defendant points to a question from a juror asking what should happen if defendant honestly forgot that he possessed the weapons. However, the question was asked at the conclusion of the testimony of Agent Marsh, before the jury was instructed and before the closing arguments of counsel. The question was not reiterated. Presumably, the jury instructions and counsels' arguments clarified the matter for the jury.

Defendant relies on *People v. Russell, supra,* 144 Cal.App.4th 1415, a case decided by the Court of Appeal for the Sixth Appellate District, which reversed a conviction for receiving a stolen vehicle (§ 496d) because the trial court failed to give a mistake-of-fact instruction. *Russell* is distinguishable. Nothing in the *Russell* opinion indicates that the jury was instructed on the issue of knowledge as the jury was instructed in this case, nor were the arguments of counsel set out in *Russell*. (See *Russell, supra,* 144 Cal.App.4th at pp. 1432-1433.)

As we have said, when we consider the whole record in this case--the state of the evidence, the jury instructions, and the arguments of counsel--we are confident that if the trial court erred in failing to give a mistake-of-fact instruction, the error was harmless. (*People v. Mayer, supra,* 108 Cal.App.4th at p. 413.)

II

Defendant next contends the trial court prejudicially erred in failing to instruct sua sponte on the defense of momentary possession for surrender to law enforcement pursuant to CALCRIM No. 2512. Again, we disagree.

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]" (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149.) Accordingly, the trial court has an obligation to instruct the jury, sua sponte, with a specific defense if the defendant is relying on the defense, or if there is substantial evidence supporting the defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Salas* (2006) 37 Cal.4th 967, 982 (*Salas*); *Breverman, supra,* 19 Cal.4th at p. 157.) However, there is no obligation to instruct a jury with a defense if the evidence supporting the defense is minimal or insubstantial. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145; *People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1058-1059.)

In this case, the trial court instructed the jury as to the elements of possession of a firearm by a person prohibited by court order pursuant to CALCRIM No. 2512, but did not include

the bracketed portion of the instruction defining the defense of momentary possession.[3] Nor was there any need for the trial court to include the bracketed portion as the defense of momentary possession was in no way implicated by the facts of this case. The defense of momentary possession "applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191, 1193 [defendant not entitled to momentary possession instruction where defendant was in possession of methamphetamine for a period of time between 40 minutes and four hours, during which defendant took no steps to dispose of the substance]; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [felon defendant not entitled to momentary possession instruction where defendant possessed a firearm between two and four days because, "as a matter of law, defendant's possession of the firearm cannot be characterized as momentary"]; *People v. Booker* (1978) 77 Cal.App.3d 223, 225 [felon defendant not entitled to momentary possession instruction where he took his sister's revolver to

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[3] The bracketed portion defining the defense of momentary possession instructs in relevant part: "If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that: [¶] 1. (He/She) possessed the firearm only for a momentary or transitory period; [¶] 2. (He/She) possessed the firearm in order to (abandon[,]/[or] dispose of[,]/[or] destroy) it; [¶] AND [¶] 3. (He/She) did not intend to prevent law enforcement officials from seizing the firearm." (CALCRIM No. 2512.)

the pawnshop to sell it because the four-block walk to the pawnshop was not a momentary possession].)

Defendant asserts that he was entitled to the instruction on momentary possession with respect to the five weapons he turned over during Special Agent Marsh's first two visits to his house, as well as the two weapons found by the front door when Marsh returned two days later with a search warrant. However, the restraining order prohibiting defendant from possessing firearms became effective in December of 2005, roughly five months prior to defendant's interactions with Special Agent Marsh. Notwithstanding defendant's apparent willingness to turn over the weapons when repeatedly prodded by law enforcement, we fail to see how five months of unlawful possession can be considered "momentary" within the meaning of the defense.

III

Defendant's final contention on appeal is that section 12280, subdivisions (b) and (c), prohibiting possession of an assault weapon or .50 caliber BMG rifle, violated his right to bear arms under the Second Amendment to the United States Constitution. Defendant relies on language in *Heller, supra,* 554 U.S. ___ [171 L.Ed.2d 637], "indicating that the Second Amendment is a pre-existing right of the individual and that military type weapons were the type originally sought to be

protected."[4] Defendant's reading of *Heller* does not withstand scrutiny.

A

Section 12280 was enacted by the Legislature as part of the Roberti-Roos Assault Weapons Control Act of 1989. (Stats. 1989, ch. 19, § 3, p. 67.) Subdivision (b) provides in relevant part: "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 in the state prison." Section 12276, also enacted as part of the Assault Weapons Control Act, defines "assault weapon" by providing a list of proscribed weapons.[5]

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[4] While defendant acknowledges that the Second Amendment has not been held to apply to the states through the Fourteenth Amendment (see *U. S. v. Cruikshank* (1875) 92 U.S. 542, 553 [23 L.Ed. 588], cited with approval in *Heller*, *supra*, 128 S.Ct. at pp. 2812-2813; *U. S. v. Fincher* (8th Cir. 2008) 538 F.3d 868, 873, fn. 2 ["We note that the Supreme Court did not address the question whether the Second Amendment is incorporated through the Fourteenth Amendment and thus applicable to the states"]), he "anticipates" that the Second Amendment will be incorporated, and raises the issue in order "to exhaust state remedies and preserve his right to federal review." Since we hold that defendant's right to bear arms was not infringed by section 12280, subdivisions (b) and (c), we do not address the incorporation issue.

[5] Section 12276 provides in full:

"As used in this chapter, 'assault weapon' shall mean the following designated semiautomatic firearms:
"(a) All of the following specified rifles:
"(1) All AK series including, but not limited to, the models identified as follows:
"(A) Made in China AK, AKM, AKS, AK47, AK47S, 56, 56S, 84S,

and 86S.
“(B) Norinco 56, 56S, 84S, and 86S.
“(C) Poly Technologies AKS and AK47.
“(D) MAADI AK47 and ARM.
“(2) UZI and Galil.
“(3) Beretta AR-70.
“(4) CETME Sporter.
“(5) Colt AR-15 series.
“(6) Daewoo K-1, K-2, Max 1, Max 2, AR 100, and AR 110C.
“(7) Fabrique Nationale FAL, LAR, FNC, 308 Match, and Sporter.
“(8) MAS 223.
“(9) HK-91, HK-93, HK-94, and HK-PSG-1.
“(10) The following MAC types:
“(A) RPB Industries Inc. sM10 and sM11.
“(B) SWD Incorporated M11.
“(11) SKS with detachable magazine.
“(12) SIG AMT, PE-57, SG 550, and SG 551.
“(13) Springfield Armory BM59 and SAR-48.
“(14) Sterling MK-6.
“(15) Steyer AUG.
“(16) Valmet M62S, M71S, and M78S.
“(17) Armalite AR-180.
“(18) Bushmaster Assault Rifle.
“(19) Calico M-900.
“(20) J&R ENG M-68.
“(21) Weaver Arms Nighthawk.
“(b) All of the following specified pistols:
“(1) UZI.
“(2) Encom MP-9 and MP-45.
“(3) The following MAC types:
“(A) RPB Industries Inc. sM10 and sM11.
“(B) SWD Incorporated M-11.
“(C) Advance Armament Inc. M-11.
“(D) Military Armament Corp. Ingram M-11.
“(4) Intratec TEC-9.
“(5) Sites Spectre.
“(6) Sterling MK-7.
“(7) Calico M-950.
“(8) Bushmaster Pistol.
“(c) All of the following specified shotguns:
“(1) Franchi SPAS 12 and LAW 12.
“(2) Striker 12.
“(3) The Streetsweeper type S/S Inc. SS/12.
“(d) Any firearm declared by the court pursuant to Section

Section 12276.1 was enacted by the Legislature in 2000 and further defines "assault weapon" by the characteristics which render these weapons more dangerous than ordinary weapons typically possessed by law-abiding citizens for lawful purposes.[6]

12276.5 to be an assault weapon that is specified as an assault weapon in a list promulgated pursuant to Section 12276.5.

"(e) The term 'series' includes all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer.

"(f) This section is declaratory of existing law, as amended, and a clarification of the law and the Legislature's intent which bans the weapons enumerated in this section, the weapons included in the list promulgated by the Attorney General pursuant to Section 12276.5, and any other models which are only variations of those weapons with minor differences, regardless of the manufacturer. The Legislature has defined assault weapons as the types, series, and models listed in this section because it was the most effective way to identify and restrict a specific class of semiautomatic weapons."

[6] Section 12276.1, subdivision (a) provides:

"Notwithstanding Section 12276, 'assault weapon' shall also mean any of the following:

"(1) A semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine and any one of the following:

"(A) A pistol grip that protrudes conspicuously beneath the action of the weapon.

"(B) A thumbhole stock.

"(C) A folding or telescoping stock.

"(D) A grenade launcher or flare launcher.

"(E) A flash suppressor.

"(F) A forward pistol grip.

"(2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds.

"(3) A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.

"(4) A semiautomatic pistol that has the capacity to accept a detachable magazine and any one of the following:

"(A) A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer.

Section 12280, subdivision (c), was enacted as part of the .50 Caliber BMG Regulation Act of 2004 (Stats. 2004, ch. 494, § 8, pp. 7-8), and provides in relevant part: "Any person who, within this state, possesses any .50 BMG rifle, except as provided in this chapter, shall be punished by a fine of one thousand dollars ($1,000), imprisonment in a county jail for a period not to exceed one year, or by both that fine and imprisonment."

In section 12275.5, the Legislature codified its findings, declarations, and legislative intent behind the Assault Weapons Control Act of 1989 and the .50 Caliber BMG Regulation Act of 2004: "(a) The Legislature hereby finds and declares that *the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state. The Legislature has restricted the assault weapons specified in Section 12276 based upon finding that each firearm has such a*

"(B) A second handgrip.

"(C) A shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning his or her hand, except a slide that encloses the barrel.

"(D) The capacity to accept a detachable magazine at some location outside of the pistol grip.

"(5) A semiautomatic pistol with a fixed magazine that has the capacity to accept more than 10 rounds.

"(6) A semiautomatic shotgun that has both of the following:

"(A) A folding or telescoping stock.

"(B) A pistol grip that protrudes conspicuously beneath the action of the weapon, thumbhole stock, or vertical handgrip.

"(7) A semiautomatic shotgun that has the ability to accept a detachable magazine.

"(8) Any shotgun with a revolving cylinder."

high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings. It is the intent of the Legislature in enacting this chapter to place restrictions on the use of assault weapons and to establish a registration and permit procedure for their lawful sale and possession. It is not, however, the intent of the Legislature by this chapter to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities. [¶] (b) The Legislature hereby finds and declares that *the proliferation and use of .50 BMG rifles, as defined in Section 12278, poses a clear and present terrorist threat to the health, safety, and security of all residents of, and visitors to, this state, based upon findings that those firearms have such a high capacity for long distance and highly destructive firepower that they pose an unacceptable risk to the death and serious injury of human beings, destruction or serious damage of vital public and private buildings, civilian, police and military vehicles, power generation and transmission facilities, petrochemical production and storage facilities, and transportation infrastructure*. It is the intent of the Legislature in enacting this chapter to place restrictions on the use of these rifles and to establish a registration and permit procedure for their lawful sale and possession." (Italics added.)

In *Kasler v. Lockyer* (2000) 23 Cal.4th 472 (*Kasler*), our Supreme Court reviewed the historical context of the Assault Weapons Control Act and provided a detailed analysis of its legislative history. As the court explained, the Legislature was motivated by "[t]he crisis created by the proliferation and use of assault weapons." (*Id*. at p. 482.) The "crisis" was summed up by Speaker of the Assembly Willie L. Brown, speaking to the Assembly, meeting as a Committee of the Whole: "'The shooting incident in Stockton, the drive-by shootings that have been going on in Southern California at an alarming rate, the number of police officers who have been the victims of semi-automatic weapons, and the "stats" that now show the alarming group of arrests that are taking place, and when items are confiscated, on many, many occasions those items have turned out to be semi-automatic weapons. A combination of all those things, plus the volume of editorials, the volume of public comment out there about the question, requires us to address the issues.' [Citation.]" (*Ibid*., citing 1 Assem. J. (1989-1990 Reg. Sess.) pp. 436-437.)

The court then placed Speaker Brown's comments in context: "The 'shooting incident in Stockton' to which Speaker Brown alluded had occurred at the Cleveland Elementary School in Stockton, California, the month before the meeting of the Committee of the Whole. While 300 pupils, mostly kindergartners through third graders, were enjoying their lunchtime recess, Patrick Purdy, who had placed plugs in his ears to dull the sounds of what he was about to do, drove up to the rear of the

school and stepped out of his car carrying a Chinese-made semiautomatic AK-47. 'Impassively, Purdy squeezed the trigger of his rifle, then reloaded, raking the yard with at least 106 bullets. As children screamed in pain and fear, Purdy placed a 9-mm pistol to his head and killed himself. When the four-minute assault was over, five children, ages 6 to 9, were dead. One teacher and 29 pupils were wounded.' [Citation.]" (*Kasler*, *supra*, 23 Cal.4th at p. 483.)

The court also reviewed the horrific facts of a shooting incident at a San Ysidro McDonald's restaurant that occurred five years earlier in which James Huberty killed 21 people and wounded 15 others with assault weapons fire: "Stepping into the restaurant with a 9-millimeter Browning automatic pistol in his belt and a 12-gauge shotgun and a 9-millimeter UZI semiautomatic rifle slung over his shoulders, Huberty called out, '"Everybody on the floor." About 45 patrons were present. As they scrambled to comply, Huberty marched around the restaurant calmly spraying gunfire. . . . Maria Diaz ran out the side door in panic when the shooting started, then remembered that her two-year-old son was still inside. She crept back to a window and saw him sitting obediently in a booth. She motioned him toward the door, nudged it open, and the boy toddled to safety.' [Citation.] Not everyone was so fortunate. After SWAT sharpshooters finally killed Huberty, 'police and hospital workers moved in on the gruesome scene. A mother and father lay sprawled across their baby, apparently in an attempt to shield it. All three were dead.' [Citation.] The carnage was clearly

far worse than it would have been had Huberty not been armed with semiautomatic weapons. He fired hundreds of rounds. 'The gunfire was so heavy that police at first assumed that more than one gunman was inside. A fire truck took six shots before reversing direction and backing off. One fire fighter was grazed by a bullet that tore through the truck and then landed softly on his head.' [Citation.]" (*Kasler*, *supra*, 23 Cal.4th at p. 483.)

That the unusually dangerous nature of assault weapons was the motivation behind the Assault Weapons Control Act was underscored by Attorney General John Van de Kamp, who testified before the Committee of the Whole: "Increasingly, 'the weapons of choice for this madness,' he noted, were 'semi-automatic military assault rifles.' In Los Angeles, he said, it had 'become fashionable among hard-core members of the Crips Gang to spray a stream of bullets in hopes of taking down one rival gang member, but infants and grandmothers may be killed as well. They say that the young killers even have a phrase for it. They say, "I spray the babies to [the] eighties."' [Citation.]" (*Kasler*, *supra*, 23 Cal.4th at p. 484, citing 1 Assem. J. (1989-1990 Reg. Sess.) p. 438.) A vivid illustration of the Attorney General's observation was provided by Lieutenant Bruce Hagerty of the Los Angeles Police Department: "'Probably the most graphic example, for me, was on Good Friday of last year, where a rival gang entered a neighborhood in South Central Los Angeles and sprayed a crowd of forty to fifty people with an AR-15, and that's an American assault rifle, shooting 14 people, killing a

19 year old boy, hitting a five year old little girl, and a 65 year old man, and all ages in between. I was the field commander of that situation, and I'm here to tell you that that was, in every sense of the word, a war scene. . . . There were bodies everywhere and people were terrified, and the only reason that this gang did that was to terrorize the neighborhood because they wanted to take it over and be able to sell drugs in that neighborhood, and the military assault rifle is the vehicle that they used. [¶] . . . I'm here to tell you that there's only one reason that they use these weapons, and that is to kill people. They are weapons of war.' [Citation.]" (*Kasler*, *supra*, 23 Cal.4th at p. 485, citing 1 Assem. J. (1989-1990 Reg. Sess.) p. 450.)

The *Kasler* court concluded its review of the legislative history by noting that when Governor Deukmejian signed the Assault Weapons Control Act into law on May 24, 1989, the Governor explained: "'"It's well known that some drug dealers and violent gang members are using assault-type weapons. . . . In the face of such firepower, our state's courageous law enforcement officers need all the help that we can give them as they seek to preserve our public safety."'" (*Kasler*, *supra*, 23 Cal.4th at pp. 486-487.) Accordingly, in enacting the Assault Weapons Control Act, the Legislature sought to address "the grave threat to public safety posed by the possession and use of assault weapons by criminals . . . ." (*Id*. at p. 487.)

A review of the legislative history of the .50 Caliber BMG Regulation Act of 2004 reveals that the Legislature was not only

concerned by the threat to public safety posed by the prospect of .50 caliber BMG rifles being used by criminals, but also by the threat to national security posed by the prospect of these weapons falling into the hands of terrorist organizations.

As expressed by the author of the bill: "[.50 caliber BMG] sniper rifles and .50 [caliber] BMG ammunition are armaments designed for military applications involving the destruction of infrastructure and anti-personnel purposes. The military uses these weapons to destroy concrete structures, including bunkers, light armored vehicles, and stationary tactical targets such as fuel storage facilities, aircraft, communications structures and energy transfer stations. . . . [¶] [.50 caliber BMG] weapons and their ammunition have increasingly been manufactured and marketed to civilians over the past several years. There is increasing evidence of these weapons falling into the hands of political extremists and terrorists, and more recently drug and street gangs. The manufacturers of these weapons have been reducing the weight, enhancing portability and lowering the price to own these weapons, so there is currently an expanding proliferation of these war weapons. [¶] The facts indicate that [.50 caliber BMG] sniper weapons and .50 [caliber] BMG ammunition present a clear and present public health and safety danger to California and the nation." (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 50 (2003-2004 Reg. Sess.) as amended June 2, 2003, pp. 13-14; see also Assem. Com. on Public Safety, Analysis of Assem. Bill No. 50 (2003-2004 Reg. Sess.) Apr. 29, 2003, p. 7 ["According to the author, '[t]he fifty-

caliber sniper rifle is one of the United States military's highest-powered rifles, capable of ripping through armored limousines. It is said to be able to punch holes through military personnel carriers at a distance of 2,000 yards, the length of 20 football fields. It is deadly accurate at up to one mile and effective at more than four miles. . . .'"].)

The Assembly Committee on Public Safety analysis of the bill contains the following: "The term '.50 BMG' stands for Browning machine gun (one of the earliest firearms to use the ammunition) and is a technical designation for the round used in the weapon. . . . Manufacturers of the rifles claim that the rifle is accurate up to 2,000 yards and effective up to 7,500 yards. . . . The .50 caliber ammunition . . . [is] capable of piercing through body armor. [¶] . . . [¶] . . . [¶] The Violence Policy Center has issued two reports on the .50 caliber sniper rifle. [Citations.] Both reports stated that the unregulated sale of military sniper rifles to civilians creates a danger to national security as the rifles have the ability to shoot down aircraft. [¶] The second report also states that at least 25 Barrett .50 caliber sniper rifles were sold to the Al Qaeda network. [Citations.]" (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 50 (2003-2004 Reg. Sess.) Apr. 29, 2003, pp. 7-9.)

The bill was supported by the Los Angeles County Sheriff's Department, which argued in support of the legislation: "This weapon, which is readily available on the civilian market, can pierce armored vehicles and concrete structures from one mile

away with pinpoint accuracy. In the hands of terrorists, .50 BMG sniper rifles pose a grave threat to airplanes, refineries or other potential targets." (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 50 (2003-2004 Reg. Sess.) Apr. 29, 2003, p. 10.)

In sum, the Legislature enacted the Assault Weapons Control Act of 1989 and the .50 Caliber BMG Regulation Act of 2004 in order to address the proliferation and use of unusually dangerous weapons: assault weapons, with an incredibly "high rate of fire and capacity for firepower," which can be used to indiscriminately "kill and injure human beings" (§ 12275.5, subd. (a)); and .50 caliber BMG rifles, which "have such a high capacity for long distance and highly destructive firepower that they pose an unacceptable risk to the death and serious injury of human beings, destruction or serious damage of vital public and private buildings, civilian, police and military vehicles, power generation and transmission facilities, petrochemical production and storage facilities, and transportation infrastructure" (§ 12275.5, subd. (b)).

It is against this backdrop that we must analyze *District of Columbia v. Heller*, *supra*, 554 U. S. ___ [171 L.Ed.2d 637], and determine whether section 12280, subdivisions (b) and (c), violate the right to bear arms guaranteed by the Second Amendment to the United States Constitution.

B

In *Heller*, *supra*, 554 U. S. ___ [171 L.Ed.2d 637], the United States Supreme Court held that "the [District of

Columbia's] ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." (*Id*. at p. 683.) In so holding, the Court explained that the Second Amendment codified a pre-existing right of the individual "to possess and carry weapons in case of confrontation." (*Id*. at p. 657 ["The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed'"].) However, the Court was careful to point out that, like the First Amendment's right to freedom of speech, the Second Amendment's right to bear arms is not unlimited: "Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*." (*Id*. at p. 659.)

Nor does the Second Amendment's protection extend to any type of weapon. As the *Heller* Court explained, its previous decision in *U. S. v. Miller* (1939) 307 U.S. 174 [83 L.Ed. 1206] (*Miller*) held that the Second Amendment did not protect an individual's right to transport an unregistered short-barreled shotgun in interstate commerce. (*Heller*, *supra*, 554 U. S. ___ [71 L.Ed.2d at p. 675].) The reason, the Court explained, was that "the *type of weapon at issue* was not eligible for Second Amendment protection: 'In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation

or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.'" (*Ibid.*, citing *Miller*, *supra*, 83 L.Ed. at p. 1209.)

The *Heller* Court then elaborated on the types of weapons protected by the Second Amendment: "Read in isolation, *Miller's* phrase 'part of ordinary military equipment' could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939. We think that *Miller's* 'ordinary military equipment' language must be read in tandem with what comes after: '[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.' [Citation.] The traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense. 'In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.' [Citation.] Indeed, that is precisely the way in which the Second Amendment's operative clause ['the right of the people to keep and bear Arms, shall not be infringed'] furthers the purpose announced in its preface ['[a] well regulated militia, being necessary to the security of a free State']. We therefore read *Miller* to say only that the Second Amendment does not

protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." (*Heller*, *supra*, 171 L.Ed.2d at p. 677.)

The *Heller* Court continued: "It may be objected that if weapons that are most useful in military service - M-16 rifles and the like - may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right." (*Heller*, *supra*, 171 L.Ed.2d at p. 679.)

Accordingly, "the right secured by the Second Amendment is not . . . a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." (*Heller*, *supra*, 171 L.Ed.2d at p. 678.) Rather, it is the right to possess and carry weapons typically possessed by law-abiding citizens for lawful purposes such as self-defense. (*Id*. at p. 679.) It protects the right to possess a handgun in one's home because handguns are a "class of 'arms' that is overwhelmingly chosen by

American society" for the lawful purpose of self-defense. (*Ibid*.)

As the court's discussion makes clear, the Second Amendment right does not protect possession of a military M-16 rifle. (*Heller, supra,* 554 U. S. ___ [171 L.Ed.2d at p. 579].) Likewise, it does not protect the right to possess assault weapons or .50 caliber BMG rifles. As we have already indicated, in enacting the Assault Weapons Control Act of 1989 and the .50 Caliber BMG Regulation Act of 2004, the Legislature was specifically concerned with the unusual and dangerous nature of these weapons. An assault weapon "has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." (§ 12275.5, subd. (a).) The .50 caliber BMG rifle has the capacity to destroy or seriously damage "vital public and private buildings, civilian, police and military vehicles, power generation and transmission facilities, petrochemical production and storage facilities, and transportation infrastructure." (§ 12275.5, subd. (b).) These are not the types of weapons that are typically possessed by law-abiding citizens for lawful purposes such as sport hunting or self-defense; rather, these are weapons of war.

Our conclusion that *Heller* does not extend Second Amendment protection to assault weapons and .50 caliber BMG rifles is supported by post-*Heller* federal precedent. In *U. S. v. Fincher* (8th Cir. 2008) 538 F.3d 868 (*Fincher*), the Eighth Circuit Court

of Appeals held that Fincher's possession of a machine gun was "not protected by the Second Amendment" because "[m]achine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use." (*Fincher*, *supra*, 538 F.3d at p. 874; *U. S. v. Gilbert* (9th Cir. 2008) 286 Fed.Appx. 383, 386, 2008 WL 2740453 ["Under *Heller*, individuals still do not have the right to possess machineguns or short-barreled rifles"]; *Hamblen v. United States* (M.D.Tenn. 2008) 2008 WL 5136586 [also holding that *Heller* did not extend Second Amendment protection to machine guns].) While the fully-automatic nature of a machine gun renders such a weapon arguably more dangerous and unusual than a semiautomatic assault weapon, that observation does not negate the fact that assault weapons, like machine guns, are not in common use by law-abiding citizens for lawful purposes and likewise fall within the category of dangerous and unusual weapons that the government can prohibit for individual use. Moreover, the .50 caliber BMG rifle has the capacity to take down an aircraft, a fact which arguably makes such a weapon more dangerous and unusual than the average machine gun. In any event, assault weapons and .50 caliber BMG rifles are at least as dangerous and unusual as the short-barreled shotgun at issue in *United States v. Miller*, *supra*, 83 L.Ed. 1206.

We conclude that section 12280, subdivisions (b) and (c), does not prohibit conduct protected by the Second Amendment to

the United States Constitution as defined in *Heller*, *supra*, 554 U.S. ___ [171 L.Ed.2d 637].

DISPOSITION

The judgment is affirmed.

SIMS, J.

We concur:

SCOTLAND, P. J.

BUTZ, J.