

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
CHRIS THOMAS GILBRETH,  
Defendant and Appellant.

A112477

(Solano County  
Super. Ct. No. VCR 176100)

Chris Gilbreth appeals his convictions for voluntary manslaughter and possession of a firearm by a convicted felon. Defendant's principal argument is that his conviction for possession of a firearm by a convicted felon must be reversed because his predicate felony conviction had been reduced to a misdemeanor. We agree with defendant on this point, reverse his conviction for firearm possession, and remand for resentencing. In all other respects we affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

Defendant shot and killed his next-door neighbor, Sheldon Amason, as Amason and his tenant, Ray deVeyra, advanced into defendant's front yard. This was the culmination of a series of incidents that began when Amason moved in next door to the Vallejo home where defendant lived with his pregnant wife and their two-year-old daughter. Defendant's wife testified that Amason threw frequent wild all-night parties, regularly beat his girlfriend, and threatened defendant's family and dogs. On one occasion, Amason waved a machete at defendant's brother-in-law when he was painting a shed in defendant's backyard. Amason's girlfriend's son, Ronnie Faubert, was a

convicted child molester who also lived with Amason. Defendant's wife observed Amason assault Faubert with a weed whacker and a metal pipe. Amason's tenant, Ray deVeyra, also regularly assaulted his girlfriend in view of defendant and his family. Shortly after Amason moved in, defendant bought two handguns to protect himself and his family: a .380 semi-automatic, and a .357 revolver. Defendant and his wife also installed a locking security screen on their front door, and several security cameras.

A few weeks before the shooting, a man threw rocks from Amason's property at defendant's pregnant wife and her friend while they were in defendant's backyard with defendant's daughter. Defendant confronted Amason about the incident, and punched him in the face.

The afternoon of the shooting, Amason got into an argument with another neighbor over whether Amason would move a car that was blocking the neighbor's driveway. Somehow the incident escalated and defendant became involved in the argument. When Amason and deVeyra entered defendant's front yard, defendant drew a handgun and told the two to leave his property. Amason lunged toward defendant, and defendant fatally shot Amason in the chest.

Defendant was charged with murder, with several firearm enhancement allegations, and possession of a handgun by a convicted felon (based on a 1999 conviction for evading an officer). The prosecution argued that Amason may have deserved a good beating, but he did not deserve to die, and that defendant had no right to shoot his intoxicated and unarmed neighbor. Defendant claimed that he was trying to protect his wife and child from his unpredictable and dangerous neighbor, and that he did not intentionally shoot Amason.

The jury convicted defendant of the lesser included offense of voluntary manslaughter, with use of a firearm, and possession of a firearm by a convicted felon. The accounts of Amason's boorish behavior led the trial court at the time of defendant's sentencing to characterize Amason as "the neighbor from hell." Nevertheless, the court considered Amason to be a vulnerable victim due to his intoxicated state at the time of his death, and also determined that the crime involved planning because defendant was

armed with a firearm. The court denied probation and sentenced defendant to a three-year lower term for the manslaughter, a four-year consecutive term for the firearm use enhancement, and a consecutive eight-month term for possession of a firearm by a convicted felon, for a total prison term of seven years, eight months.<sup>1</sup> Defendant timely appealed.

## **DISCUSSION**

### *A. Possession of a Firearm by a Convicted Felon*

Defendant argues the evidence was insufficient to support his conviction for possession of a firearm by a convicted felon, because the prior felony conviction that qualified defendant for that charge was reduced to a misdemeanor upon his successful completion of probation. We agree that reduction of this earlier offense to a misdemeanor precluded using it as the predicate offense to the charge that defendant was a felon in possession of a firearm.

Penal Code section 12021, subdivision (a)(1)<sup>2</sup> provides: “Any person who has been convicted of a felony . . . and who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.” Defendant’s conviction for possession of a firearm by a felon was predicated on his 1999 conviction for evading an officer, a crime that is punishable by imprisonment in state prison or confinement in the county jail. (Veh. Code, § 2800.2, subd. (a).) Defendant’s sentence of 30 days in county jail for this offense was stayed, and he was placed on three years probation. But in June 2001, on the motion of the district attorney, defendant’s conviction for evading an officer was reduced to a misdemeanor under section 17

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<sup>1</sup> The court minutes and abstract of judgment have transposed the terms of imprisonment applicable to the use enhancement and the firearm possession. Because we conclude the case must be remanded for resentencing, the error can be corrected in the proceedings on remand.

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

because defendant successfully completed probation.<sup>3</sup> Section 17 provides, in relevant part: “(a) A felony is a crime which is punishable with death or by imprisonment in the state prison. . . . [¶] (b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] (1) After a judgment imposing a punishment other than imprisonment in the state prison. . . . [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor. . . .”

“[O]nce a court has reduced a wobbler to a misdemeanor pursuant to . . . section 17, the crime is thereafter regarded as a misdemeanor ‘for all purposes.’ This unambiguous language means what it says, and unless the Legislature states otherwise, a person such as [defendant] stands convicted of a misdemeanor, not a felony, for all purposes upon the court so declaring.” (*Gbremicael v. California Com. on Teacher Credentialing* (2004) 118 Cal.App.4th 1477, 1483 (*Gbremicael*)). Accordingly, defendant’s possession of a firearm by a convicted felon must be reversed. (See *People v. Banks* (1959) 53 Cal.2d 370, 383-387, 388 [“defendant would remain classified as one convicted of a felony within the meaning of section 12021 . . . until and unless the [prior] offense was reduced to a misdemeanor by imposition of appropriate sentence”]; *Gbremicael, supra*, at p. 1485 [“as the *Banks* court observed, a person whose felony conviction is reduced to a misdemeanor will no longer be classified as one convicted of a felony within the meaning of . . . section 12021”].)

The People attempt to create an aura of uncertainty around the application of section 17, subdivision (b)(3) by comparing this case to those where defendants unsuccessfully argued their convictions were automatically classified as misdemeanors

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<sup>3</sup> The reduction of defendant’s conviction for evading an officer to a misdemeanor was apparently unknown to counsel and the court in the current case. Defendant and his wife appear to have at all relevant times been under the mistaken belief that he was not allowed to possess weapons.

because they successfully completed probation. (*People v. Banks, supra*, 53 Cal.2d 370; *People v. Livingston* (1970) 4 Cal.App.3d 251; *People v. Esparza* (1967) 253 Cal.App.2d 362.) We find those cases to be inapposite. Defendant’s earlier conviction for evading an officer was reduced upon motion of the prosecution to a misdemeanor “for all purposes.”

We also are not persuaded by the People’s criticism of *Gbremicael, supra*, 118 Cal.App.4th 1477, for its reliance on dicta in our Supreme Court’s decision in *People v. Banks, supra*, 53 Cal.2d 370. We have no reason to disagree with the *Gbremicael* court’s construction of section 17, and we agree that: “as observed in *Banks*, when the Legislature wants to continue treating a felony reduced to a misdemeanor under . . . section 17 as a felony, it expressly says so, and the court will treat the person as such only upon those occasions.” (*Gbremicael, supra*, at p. 1486.) In fact, the Legislature added subsection (b)(3) to section 17 after *Banks* was decided, and included no language to suggest that a defendant whose conviction was reduced under section 17, subdivision (b)(3) was to still be considered a felon for purposes of section 12021. At the time he was charged in this case, defendant had a prior misdemeanor conviction for evading an officer, and that conviction could not be considered a felony to serve as the basis for a charge that defendant had violated section 12021. Defendant’s conviction for being a felon in possession of a firearm is reversed.

#### B. Resentencing

Our decision that defendant’s conviction for being a felon in possession of a firearm must be reversed requires us to consider whether his case needs to be remanded for resentencing. Defendant says it must, because his status as a once convicted felon was a significant factor in the court’s sentencing decision. Although it is a close question, we agree that remand for resentencing is necessary.

Much of the argument at defendant’s sentencing hearing concerned his eligibility for probation. Section 1203, subdivision (e)(2), prohibits probation for “[a]ny person who used . . . a deadly weapon upon a human being in connection with the perpetration of

the crime of which he or she has been convicted,” except “in unusual cases where the interests of justice would best be served.” (See also Cal. Rules of Court, rule 4.413(c).)

The trial court considered this to be an unusual case. The People argue that it did not do so within the meaning of section 1203, and the court’s discretion should not be disturbed. We disagree. True enough, the court said it did not consider the case to be unusual in a strictly legal sense, but the court considered the case “unusual in a common sense sort of interpretation.” The defendant was under considerable provocation from the victim who the trial court described as “the neighbor from hell.” In fact, the words the court used when it denied the defendant probation indicate that it did consider this to be an unusual case.

Probation was denied in “the interest of justice.” Defendant used a firearm. The court could not have considered possible probation for the defendant unless it concluded the case was an unusual one under section 1203. We cannot agree with the People’s characterization of the record that the trial court determined this was not an unusual case within the meaning of section 1203.

What we cannot tell from the record is the extent to which defendant’s status as a once convicted felon influenced the court’s sentencing choices. Certainly the court considered factors in aggravation. The crime reflected some planning because defendant purchased and retained firearms in anticipation that he might need to protect his family from this victim, and the victim was considered vulnerable because he was intoxicated and unarmed when he was shot. But overall, the court determined factors in aggravation and factors in mitigation were in equipoise. In their sentencing memorandum, the People placed significance upon defendant’s prior criminal history. Whether the court did also, or how much, we cannot determine from this record. But the court remarked at the hearing that defendant’s decision to arm himself was “unlawful . . . because his status prohibited him from possessing a firearm.”

The People argue that the trial court did not abuse its discretion when it rejected probation. But whether the trial court acted within its discretion, or could have imposed a prison sentence on defendant irrespective of a prior felony, is not the issue in cases like

this one. To avoid remand, we would have to be certain about the sentencing choice the court would make if it was aware of defendant's true legal status. We do not apply a harmless error analysis in cases like this. "[W]hen as in this case the sentencing court bases its determination to deny probation in significant part upon an erroneous impression of the defendant's *legal* status, fundamental fairness requires that the defendant be afforded a new hearing and 'an informed, intelligent and just decision' on the basis of the facts. [Citation.]" (*People v. Ruiz* (1975) 14 Cal.3d 163, 168.)

The trial court appears to have been unaware of defendant's correct legal status at the time of sentencing. It sentenced him as a felon in possession of a weapon when defendant was not eligible for the charge. On remand, the court may make the same decision and sentence defendant to state prison.<sup>4</sup> But, because defendant's status as a prior convicted felon may have weighed in significant part upon the trial court's exercise of discretion, we remand for resentencing.

### C. *Jury Instructions on Involuntary Manslaughter*

Defendant argues his conviction for voluntary manslaughter must be reversed due to the trial court's failure to instruct the jury sua sponte on involuntary manslaughter under a criminal negligence theory.<sup>5</sup> We disagree.

The jury convicted defendant of voluntary manslaughter in spite of defendant's claim that he acted in self-defense, and was not guilty of murder or manslaughter. (See *People v. Blakeley* (2000) 23 Cal.4th 82, 85.) An unintentional killing which results from an unreasonable but good faith belief in the need to act in self-defense constitutes voluntary manslaughter. This imperfect self-defense supports a voluntary manslaughter conviction "when one kills unlawfully, and with *conscious disregard for life*, but lacks

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<sup>4</sup> Of course, on remand the trial court could not impose a longer sentence than originally imposed. (See *People v. Craig* (1998) 66 Cal.App.4th 1444, 1447-1448.)

<sup>5</sup> Defendant speculates that such an instruction was not given because of the misapprehension of his status as a convicted felon who could not legally possess a firearm.

malice because of [the] provocation or imperfect self-defense.” (*People v. Rios* (2000) 23 Cal.4th 450, 461, fn. 7.)

The jury was instructed on the lesser included offense of involuntary manslaughter, but under a misdemeanor manslaughter theory based on brandishing a firearm, rather than a criminal negligence theory.<sup>6</sup> Defendant now argues that the involuntary manslaughter instructions based upon misdemeanor manslaughter were improper because his conduct did not meet the statutory requirement that a weapon be brandished in a “rude, angry, or threatening manner.” (§ 417, subd. (a)(2).) But defendant testified that he pointed his loaded gun straight at the victim with the intent to threaten the victim and drive him off his property.<sup>7</sup> The evidence thus supported the

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<sup>6</sup> The jury was instructed on involuntary manslaughter as follows: “Every person who unlawfully kills a human being without malice aforethought and without the intent to kill and without conscious disregard for human life is guilty of the crime of involuntary manslaughter. . . . [¶] There is no malice aforethought if the killing occurred in the actual but unreasonable belief in the necessity to defend one’s self or another person against imminent peril to life or great bodily injury. [¶] A killing in conscious disregard for human life occurs when a killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for human life. [¶] A killing is unlawful within the meaning of this instruction if it occurred during the commission of an unlawful act not amounting to a felony which is dangerous to human life under the circumstances of its commission. [¶] A violation of California Penal Code Section 417, commonly referred to as brandishing a firearm, is an unlawful act that does not amount to a felony. [¶] . . . [¶] . . . This is the definition of that 417 Penal Code brandishing. It’s a misdemeanor. Every person who, except in self-defense, in the presence of another person, draws or exhibits a firearm, whether it’s loaded or unloaded, in a rude, angry or threatening manner or who in any manner unlawfully uses the same in any fight or quarrel is guilty of a violation of 417 of the Penal Code, brandishing a firearm. That’s a misdemeanor. [¶] In order to prove this crime, each of the following elements must be proved: [¶] One, a person in the presence of another person drew or exhibited a firearm, whether it was loaded or unloaded; [¶] Two, that person did so in a rude, angry or threatening manner; and, [¶] Three, the person was not acting in lawful self-defense.”

<sup>7</sup> Defendant admitted the last thing he said before he shot Amason was, “Get the fuck off my property.”



court's instruction on involuntary manslaughter and the jury had reason to conclude that defendant displayed the gun in a threatening manner. The instruction on involuntary manslaughter was appropriate as given. But the jury did not convict defendant of involuntary manslaughter. It convicted him on the greater charge of voluntary manslaughter. Even if the jury should have been instructed on involuntary manslaughter under the criminal negligence theory, defendant has not shown that a more favorable result was reasonably probable on the record before us. (See *People v. Blakeley, supra*, 23 Cal.4th at pp. 93-94; *People v. Lee* (1999) 20 Cal.4th 47, 61-62.)

**DISPOSITION**

The conviction for possession of a firearm by a convicted felon is reversed. b Defendant's sentence is vacated, and the case is remanded for resentencing. The judgment is otherwise affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Horner, J.\*

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

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ORDER CERTIFYING OPINION  
FOR PARTIAL PUBLICATION

THE COURT:

The opinion in the above-entitled matter filed on September 19, 2007, was not certified for publication in the Official Reports. For good cause, the request for partial publication is granted.

Pursuant to California Rules of Court, rules 8.1105 and 8.1110, the opinion in the above-entitled matter is certified for publication with the exception of parts B and C of the Discussion.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Pollak, J., Acting P.J.

Trial Court: San Francisco County Superior Court

Trial Judge: Honorable Allan Carter

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