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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. KEVIN DANIEL ARNOLD, Defendant and Appellant.	C050141 (Super. Ct. Nos. 04-3470, 00-0436)

APPEAL from a judgment of the Superior Court of Yolo County, Timothy L. Fall, Judge. Affirmed in part and reversed in part.

Danalynn Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, John G. McLean and R. Todd Marshall, Deputy Attorneys General, for Defendant and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of sections II, III, IV and V of the Discussion.

In this case we interpret Penal Code section 12001, subdivision (c),[1] which provides that, for purposes of possession of a firearm by a convicted felon (§ 12021, subd. (a)(1)), "the term 'firearm' includes the frame or receiver of the weapon." We hold that possession of the "frame or receiver" is sufficient, but not necessary, for a section 12021, subdivision (a)(1), violation. We disagree with a reading of *People v. Gailord* (1993) 13 Cal.App.4th 1643 (*Gailord*) to the extent that such a reading would suggest a defendant *must* possess *both* a barrel *and* a frame or receiver in order to be guilty of illegally possessing a firearm. Because defendant Kevin Daniel Arnold's possession of the barrel was undisputed, and only his possession of the frame or receiver is contested, we conclude his section 12021 conviction is supported by sufficient evidence.

In case No. 04-3470, a jury convicted defendant of theft or unauthorized use of a vehicle (Veh. Code, § 10851, subd. (a)--count 1), possession of a firearm by a convicted felon (§ 12021, subd. (a)(1)--count 3), and receiving stolen property (§ 496, subd. (a)--count 4). It acquitted him of a charge of possession of ammunition by a person prohibited from owning or possessing a firearm. (§ 12316, subd. (b)(1)--count 2.)

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[1] Further undesignated section references are to the Penal Code.

In case No. 00-0436, the trial court found that defendant violated his probation by committing the offenses in case No. 04-3470.

Defendant was sentenced to state prison for three years four months, consisting of two years for receiving stolen property, eight months for possession of a firearm, and eight months for the probation violation. Sentence for vehicle theft was stayed pursuant to section 654.

In the published portion of our opinion, we consider defendant's contention that his possession of a firearm conviction must be reversed for insufficient evidence. In the unpublished portion of the opinion, we consider several contentions of instructional error and a contention that defendant's count 4 (receiving stolen property) conviction must be reversed because the People pleaded it as an alternative to count 1 (vehicle theft). We shall reverse count 4 and remand for resentencing.

FACTS

At the outset of trial, the parties stipulated that defendant had been previously convicted of a felony.

Prosecution Case-in-Chief

In May 2004, Yolo County Sheriff's Detectives Mike Glaser and Lance Faille went to defendant's residence during an investigation of a stolen all-terrain vehicle (ATV). The property was a large rural parcel consisting of a main residence, a trailer, a travel trailer, a laundry room, and a

barn. Detective Faille searched the trailer and found a firearm.

At trial, Detective Glaser identified the firearm as a model 77 Ruger .22-caliber rifle. It was not in the condition that one would expect for a standard weapon. The front stock support arm and the rear stock, which are helpful in holding and aiming the firearm, were missing. There was no bullet in the chamber.

During his testimony, Detective Glaser identified the barrel of the firearm. When the firearm was found, the bolt was inside it, where it belonged. Glaser pointed out for the jury the chamber area and the area of the firearm where the mechanics of the gun were housed. He also showed how a shell could be inserted and the bolt closed afterward. He found that he was unable to move the safety. If operating properly, the safety should slide forward toward the trigger.

The officers had been informed that defendant was using an ATV to drive back and forth from his trailer to the house of his father, Franklin Arnold (Arnold). During the search, Detective Glaser spoke to defendant's girlfriend, Rebecca Youngblood, who confirmed defendant's use of the ATV. The officers proceeded to Arnold's house and discovered the stolen ATV. It had been taken from a farm about a quarter-mile away.

When defendant arrived at Arnold's house, Detective Glaser questioned him about the ATV while Detective Faille spoke with Arnold. Defendant did not want to talk to Glaser. As defendant was seated in the back of a patrol car following his arrest, he

told Arnold he was sorry, "[b]ecause [he] knew [the ATV] was stolen when [he] bought it."

Youngblood acknowledged having told the officers that the rifle they found belonged to defendant. She denied having knowledge of an ATV.

Defendant's stepmother, Martha Vaughn, was present on the day he was arrested. She recalled that he had been riding an ATV daily around their property for months. He told her that he had borrowed the ATV from neighbors.

The general manager of the farm testified that defendant had not been given permission to use the ATV.

Defense

Arnold testified that he had frequently seen defendant riding the ATV. Arnold recounted his version of the conversation with defendant while he was seated in the patrol car. According to Arnold, defendant said, "'They think I know the four-wheeler was stolen.'" On cross-examination, Arnold testified that he responded, "'I thought you told me that the Windsors had let you borrow it,'" and that defendant replied, "No," even though he had previously told Arnold that he had borrowed the ATV. On redirect examination, Arnold testified that defendant did not respond to his question about borrowing the ATV.

Arnold testified that the Ruger .22-caliber rifle was a gun he had owned in 1990. It was kept in a barn that burned. Arnold found the remains of the gun when he cleaned up the debris from the fire.

Prosecution Rebuttal

Vaughn testified that, immediately after the patrol car took defendant away, Arnold told her that defendant *knew* the ATV was stolen and that he bought it from the person who had stolen it.

Detective Faille confirmed that he had heard defendant tell his father that he *knew* the ATV was stolen when he bought it. Faille also testified that he had heard Youngblood admit that she had received bruises to her knees as a result of a fall off of the ATV.

Defense Surrebuttal

Arnold denied having told Vaughn that defendant knew the ATV was stolen.

DISCUSSION

I

Defendant contends his count 3 conviction must be reversed because there was insufficient evidence that he possessed a firearm. Specifically, he claims there was insufficient evidence "that the item in [his] possession contained a receiver." In the alternative, he claims count 3 must be reversed because the jury was given insufficient instruction as to what constitutes a firearm. Neither claim has merit.

"'To determine sufficiency of the evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume

in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 387 (*Carpenter*), quoting *People v. Johnson* (1993) 6 Cal.4th 1, 38; see *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560].)

Count 3 alleged a violation of the Dangerous Weapons Control Law. (§ 12000 et seq.) Section 12021, subdivision (a)(1), provides in relevant part: "Any person who has been convicted of a felony . . . 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."

Section 12001 defines the term "firearm." Subdivision (b) provides: "As used in this title, 'firearm' means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion."

Section 12001, subdivision (c), adds: "As used in Sections *12021*, 12021.1, 12070, 12071, 12072, 12073, 12078, 12101, and 12801 of this code, and Sections 8100, 8101, and 8103 of the Welfare and Institutions Code, the term 'firearm' *includes* the frame or receiver of the weapon." (Italics added.) "A *receiver* is 'the metal frame in which the action of a firearm is fitted and to which the breech end of the barrel is attached.' [Citation.]" (*Harrott v. County of Kings* (2001) 25 Cal.4th

1138, 1147, fn. 6 (*Harrott*), italics in original.) An "action" is "an operating mechanism" or "the manner in which a mechanism . . . operates." (Merriam-Webster's 10th Collegiate Dictionary (2001) p. 11.)

"'Includes' is 'ordinarily a term of enlargement rather than limitation.' [Citation.] The 'statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions.' [Citation.]" (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774; see *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 216-217; *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 717.)

Under this principle of statutory construction, subdivision (c) of section 12001 *enlarges*, rather than limits, the definition of "firearm" in subdivision (b). This means that, for purposes of section 12021, possession of a "frame or receiver" is *sufficient* to constitute possession of a "firearm," *regardless* of whether a "device" with a "barrel" is also possessed.

Conversely, subdivision (c)'s definition of a firearm as "including" a "frame or receiver" does not place upon the word "firearm" a meaning "limited to" devices that include frames or receivers. (*Flanagan v. Flanagan, supra,* 27 Cal.4th at p. 774.) Thus, section 12001, subdivision (c), does *not* mean that for purposes of section 12021, the "device" described in subdivision (b) *must* include a "frame or receiver" as well as a barrel.

Although possession of a receiver is sufficient, it is not necessary to a conviction.

At trial, Detective Glaser identified the barrel of the burned and possibly melted firearm. Defendant concedes that the weapon "consisted of the bare metal part or the barrel of the weapon." He claims "there is insufficient evidence that [he] possessed the firing mechanism or action portion of the receiver," but no such evidence was necessary.[2]

Gailord, on which the Attorney General relies, does not require a different result. In *Gailord*, the defendants faced enhancements pursuant to sections 12022 and 12022.5, not prosecution under section 12021. (*Gailord, supra,* 13 Cal.App.4th at pp. 1644-1645.) Because neither section 12022 nor 12022.5 is listed in section 12001, subdivision (c), its provisions did not apply. (*Id*. at p. 1650.) The evidence in *Gailord* "was conflicting" as to whether one of the defendants "possessed and used only" a receiver or "the receiver together

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[2] As we have noted, the receiver is *the metal frame in which the action is fitted.* (*Harrott, supra,* 25 Cal.4th at p. 1147, fn. 6.) Thus the action is *fitted into* the receiver or frame; it is not a "portion of" the frame, as defendant's argument suggests.

At trial, Detective Glaser identified the barrel, trigger guard, trigger, slide, bolt and firing pin, and showed where the bolt slides "along the rim" of a portion of the rifle. That portion is the receiver. Thus, Detective Glaser's testimony may be understood as suggesting that defendant's rifle had a frame or receiver within the meaning of section 12001, subdivision (c). However, we decline to rest our holding solely upon that basis.

with" the barrel." (*Id*. at p. 1650.) Because only the section 12001, subdivision (b), definition, and not the subdivision (c) definition, applied, the narrow legal issue was whether the defendant possessed *the barrel* (*id.* at p. 1651); that he possessed the receiver was uncontested.

However, because possession of the receiver was *factually* undisputed, *Gailord* accepted the defendants' argument and agreed that "the jury instructions read to the jurors in this case did not adequately apprise the jury of the necessity of determining whether [a defendant] possessed the barrel assembly *in addition to* the receiver so as to comply with" section 12001, subdivision (b). (*Gailord, supra*, 13 Cal.App.4th at p. 1650, italics added.) Read in context, the phrase "in addition to" does not mean, as the Attorney General here suggests, that "a defendant needs to possess both a barrel and a receiver or frame in order to be guilty of illegally possessing a firearm."

The present case is the factual and legal opposite of *Gailord*: defendant's offense *is* listed in subdivision (c), but his possession of the *receiver* is disputed; whereas his possession of the *barrel,* as required by subdivision (b), is undisputed. Nothing in *Gailord* suggests the evidence in this case was insufficient.

Defendant contends the fire modified the rifle in such a way that there is no substantial evidence it fell within the intended definition of a "firearm." We disagree.

Our Supreme Court has noted an evident legislative intent to "prohibit possession by an ex-felon of an inoperable . . .

firearm, that is, one which although designed to be used as a weapon is presently incapable of being fired." (*People v. Nelums* (1982) 31 Cal.3d 355, 358.) Defendant claims the rifle fell outside this rule because it "did not give the appearance of having shooting capability given its description as nothing more than the barrel of a former rifle, melted and distorted, missing the front and rear stocks and firing mechanism."[3] However, the record suggests that a simple expedient, such as covering the burned portion with an article of clothing or other object from which the barrel would protrude, could obscure the fire damage and allow a victim to perceive the object as a working rifle. We reject defendant's contention that the "purposes behind prohibiting the possession of an inoperable firearm" do not apply to his rifle. The evidence was sufficient to support the count 3 conviction. (*Carpenter, supra,* 15 Cal.4th at p. 387.)

Defendant contends in the alternative that count 3 must be reversed because the trial court breached its duty to further instruct the jury sua sponte on the definition of "firearm." He claims CALJIC No. 12.48, which defines "firearm," was insufficient because it allowed the jury to find his "possession of the barrel and bolt sufficient without specifically finding that *in addition* to these items [he] *also* possessed the receiver

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[3] We have rejected defendant's contention that the firing mechanism was missing. The trigger, slide, bolt and firing pin all were present. (See fn. 2, *ante.*)

portion of the weapon containing the crucial firing mechanism."[4] (Italics in original.) We disagree.

For the reasons we have stated, the jury was not required to find that defendant "possessed the receiver portion of the weapon." Nor was his trial counsel ineffective for having failed to request further instruction on section 12001, subdivision (c). As we have explained, possession of a frame or receiver is *sufficient* (albeit not necessary) for purposes of section 12021, subdivision (a)(1). On these facts, an instruction on "frame or receiver" would simply have offered the jury an alternate route to a conviction.

II

Defendant contends count 3 must be reversed because the trial court erroneously refused his requests for two pinpoint instructions. We conclude both instructions were properly refused.

Defendant's first requested instruction would have told the jury: "To find the defendant guilty of the crime of [section] 12021(a)(1) of the Penal Code, the People must prove beyond a reasonable doubt that the defendant knew that by his

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[4] The jury was instructed with CALJIC No. 12.48, as follows: "The word 'firearm' means any device designed to be used as a weapon from which is expelled through a barrel, a projectile by the force of any explosion or other form of combustion whether operable or not. The word 'firearm' also includes the frame or receiver of any such weapon. The receiver is the metal frame in which the action of a firearm is fitted and to which the breech end of the barrel is attached."

possession of the item charged in count 3 as a 'firearm,' he was engaging in conduct forbidden by law."

Defendant's second requested instruction would have told the jury: "If you find that the item charged in Count 3 as 'a firearm' is a firearm, the People must still prove beyond a reasonable doubt that the defendant knew that the item charged in Count 3 as a 'firearm' was a proscribed weapon."

These requested instructions would have directly contradicted CALJIC No. 3.30, which, with respect to count 3, instructed the jury: "General criminal intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, that person is acting with general criminal intent *even though he may not know his act or conduct is unlawful*." (Italics added.)

Under CALJIC No. 3.30, defendant manifestly did *not* need to know that the firearm was a "proscribed weapon," or that his possession of that weapon was "forbidden by law," in order to possess it with general criminal intent. Defendant does not contend CALJIC No. 3.30 was improperly given, and any such contention is forfeited. (See *People v. Hardy* (1992) 2 Cal.4th 86, 150; *People v. Wharton* (1991) 53 Cal.3d 522, 563.)

In re Jorge M. (2000) 23 Cal.4th 866, on which defendant relies, is distinguishable. *Jorge M.* held that a provision of the Assault Weapons Control Act required knowledge of, or negligence with regard to, the *facts* making possession of certain assault weapons criminal. (*Id*. at p. 887; § 12280, subd. (b).) Specifically, *In re Jorge M.* concluded, "the People

bear the burden of proving the defendant *knew or reasonably should have known* the firearm possessed the characteristics bringing it within" the statute. (*Ibid.,* italics in original.) By "characteristics," the court meant whether the possessed firearm "was an 'SKS with detachable magazine' (§ 12276, subd. (a)(11))." (*Id*. at p. 888.)

Jorge M. did not hold that the minor must know, or reasonably should know, that an "'SKS with detachable magazine'" is a "proscribed weapon," or that possession of an "SKS with detachable magazine" is "forbidden by law." Thus, the case is not authority for the requested instructions.

"[A] court is generally not required to correct improper instructions[.]" (*People v. Tapia* (1994) 25 Cal.App.4th 984, 1027, fn. 18.) Contrary to defendant's suggestion, this is not a case of a court refusing to correct an otherwise proper instruction because of its use of an improper word. Rather, it is a case of a court refusing instructions that would have erected the prohibited defense of ignorance of law. There was no error.

III

Defendant contends it was prejudicial error for the trial court not to give a mistake of fact instruction on count 3. (E.g., CALJIC No. 4.35.)[5] Alternatively, he posits his trial

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[5] CALJIC No. 4.35 provides: "An act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus a person is not guilty of a crime if [he] [she] commits an act or

counsel was ineffective for having failed to request such an instruction. Neither claim has merit.

Defendant claims he was "relying" on a mistake of fact defense with respect to count 3. However, the "two special instructions" proposed by defense counsel involved mistake (or ignorance) of law, not mistake of fact. (See Discussion section *II*, *ante*.) Defendant is presumed to know that it is unlawful for him to possess a firearm after a felony conviction. (*People v. Snyder* (1982) 32 Cal.3d 590, 593.) The issue whether defendant's object qualified as a firearm under section 12001 was a legal question, such that any mistake by defendant was a mistake of law.

Defendant argues he was "operating under a reasonable but mistaken belief that, given the melted condition of the so-called 'firearm,' its missing parts, and obvious inoperability," the object did not contain the "requisite characteristics of a 'firearm.'" However, even in its melted condition, this firearm contained a "barrel" through which objects could be expelled by force of combustion. (§ 12001, subd. (b).) Any belief that the melting, or absence, of parts associated with the "receiver" deprived this object of the "requisite characteristics of a 'firearm'" was a mistake of law, not fact. (§ 12001, subd. (c); see Discussion section *I*, *ante*.) The trial court had no duty to give a mistake of fact instruction, and defendant's trial

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omits to act under an actual [and reasonable] belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful."

counsel was not ineffective for having failed to request one. (See *People v. Stratton* (1988) 205 Cal.App.3d 87, 97.)

IV

Defendant contends, and the People concede, that the trial court erred by failing to instruct the jury that it could not convict him of both *taking* the ATV in count 1 and *receiving* the stolen ATV in count 4. We accept the People's concession.

The information alleged count 4 "[a]s an alternative to the crime charged in count 1." In his opening summation, the prosecutor acknowledged that count 4 was charged "as an alternative." Thus, the jury should have been instructed, pursuant to CALJIC No. 17.03, that "if you find the defendant guilty of" count 1, "you must find [him] not guilty of" count 4.

Omission of CALJIC No. 17.03 was prejudicial because it would have barred the jury, which convicted defendant of count 1, from also convicting him of count 4. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Defendant's conviction on count 4 must be reversed.

The Attorney General claims the error is harmless beyond a reasonable doubt because the evidence, which showed months of posttheft driving of the ATV, would have sustained convictions on both counts pursuant to *People v. Garza* (2005) 35 Cal.4th 866, 881. This argument overlooks the basic fact that the People *elected* not to obtain convictions on both counts. "'"Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken

by surprise by evidence offered at his trial." [Citation.]'" (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368.) Because defendant was never *advised* that he could be convicted of *both* count 1 and count 4, due process precludes us from affirming both convictions.

Because count 4 was designated the principal term, the matter must be remanded to the trial court for resentencing on the remaining counts.

V

Defendant contends that counts 1 and 3 must be reversed because circumstantial evidence was used to establish his criminal intent and the trial court failed to instruct the jury sua sponte with CALJIC No. 2.01. We find no prejudicial error.

The jury was instructed that, in order to convict defendant on count 1, it had to find that he "had the specific intent to deprive the owner either permanently or temporarily of title to or possession of the vehicle." (CALJIC No. 14.36.) CALJIC No. 2.01 would have told the jury that, if the evidence regarding that specific intent "permits two reasonable interpretations, one of which points to" its existence "and the other to its absence, you must adopt that interpretation which points to its absence." Contrary to defendant's argument, the evidence did not permit a *reasonable inference* that defendant *did not intend* to temporarily deprive the owner of possession of the ATV.

The jury heard two versions of defendant's statement in the patrol car. According to the officer, defendant told his father

he was sorry "[b]ecause [he] knew [the ATV] was stolen when [he] bought it." According to the father, defendant said, "'They think I know the four-wheeler was stolen.'" By convicting defendant on count 1, the jury impliedly resolved this conflict in the direct evidence in favor of the officer. Thus, the jury impliedly found that defendant bought the ATV *while knowing it had been stolen*.

Defendant could not *reasonably* have believed that he was entitled to possess a stolen ATV for any period of time. Because he purchased and kept it, and did not seek to return it to its owner a quarter-mile away, the only reasonable inference (and rational conclusion) is that he specifically intended to deprive the owner of possession during that temporary period. It is not reasonably probable that defendant could have fared better had CALJIC No. 2.01 been given. (*Watson, supra,* 46 Cal.2d at p. 836.) The *Watson* standard of prejudice is appropriate because the omission of CALJIC No. 2.01 did not lessen the People's burden of proof. (See *People v. Flood* (1998) 18 Cal.4th 470, 502-504.)

The jury was instructed that, in order to convict defendant on count 3, it must be proved he "had knowledge of the presence of the firearm." (CALJIC No. 12.44.) The evidence showed without conflict that defendant knew the item was present. As to that issue, omission of CALJIC No. 2.01 was harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

Finally, as we have explained, the question whether defendant's firearm "had the requisite characteristics of a

firearm" was one of law, not fact. (§ 12001; see Discussion section *III*, *ante*.) The instructions properly did not require the jury to determine whether defendant "had knowledge that the item he possessed had the requisite characteristics of a firearm," or in other words, whether defendant knew the law. Omission of CALJIC No. 2.01 could not have been prejudicial as to that issue. (*Watson, supra,* 46 Cal.2d at p. 836.)

DISPOSITION

Defendant's conviction on count 4 is reversed. His remaining convictions are affirmed. The matter is remanded for resentencing consistent with this opinion. **(*CERTIFIED FOR PARTIAL PUBLICATION*.)**

DAVIS, J.

We concur:

SCOTLAND, P.J.

HULL, J.