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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **SEAN KING,** **Defendant and Appellant.**	**A104219** **(San Francisco County Super. Ct. No. 186344)**

Sean King appeals his conviction by jury verdict of possession of a short-barreled rifle. (Pen. Code, § 12020, subd. (a)(1).[1]) He contends the court erred in failing to instruct on the mens rea element of the offense.

BACKGROUND

Because appellant does not dispute that he knew the rifle at issue was in his garage, a detailed factual recitation of his offenses is unnecessary. The police searched appellant's house after he was identified in a photo lineup as an assailant in a sexual assault. Appellant lives in the house with his mother and brother.

The police found a loaded rifle, 24 and 1/8 inches in overall length, in a workbench drawer in the garage area. They were unable to retrieve any fingerprints from the rifle. Possession of a rifle less than 26 inches in overall length, colloquially referred to as a sawed-off rifle, is illegal. (§ 12020, subds. (a)(1), (c)(2)(B).)

[1] Appellant was also convicted of three drug-related offenses, but he does not challenge these convictions.

Testifying on his own behalf, appellant acknowledged knowing the rifle was in the drawer because he had seen it while cleaning in the area. He denied ownership, and thought it belonged to his brother or a friend of his brother. He "had no idea" of the rifle's length or that possession of a rifle of its length was illegal.

DISCUSSION

At issue in this appeal is whether the trial court erred in failing to instruct that appellant could not be convicted of possession of the short-barreled rifle found in the workbench drawer absent proof that he knew the rifle's illegal characteristics.

I. *Mens Rea Requirement of Section 12020*

Section 12020, subdivision (a)(1), makes punishable as a misdemeanor or felony the possession of a "menagerie of unusual, sophisticated weapons, some with mysterious and evil-sounding names . . . ." (*People v. Taylor* (2001) 93 Cal.App.4th 933, 938.) "[A]ny short-barreled rifle" is among these enumerated weapons. For purposes of this offense, a short-barreled rifle is defined as, inter alia, "[a] rifle with an overall length of less than 26 inches." (§ 12020, subd.(c)(2)(B).) The statute does not specify a requisite mental state.

Pertinent to this offense, the jury was instructed with CALJIC No. 12.40. This instruction did not include any reference to a requisite mental state.[2]

All further section references are to the Penal Code.

[2] The jury was instructed, in relevant part:

"Every person who possesses a rifle with an overall length of less than 26 inches is guilty of [section 12020, subdivision (a)].

"[¶]

"There are two kinds of possession: actual possession and constructive possession.

"'Actual possession' requires that a person knowingly exercise direct physical control over a thing.

"'Constructive possession' does not require actual possession, but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons.

"One person may have possession alone, or two or more persons together may share actual or constructive possession.

"In order to prove this crime . . . each of the following elements must be proved:

"[T]he requirement that, for a criminal conviction, the prosecution prove some form of guilty intent, knowledge, or criminal negligence is of such long standing and so fundamental to our criminal law that penal statutes will often be construed to contain such an element [of scienter] despite their failure expressly to state it. 'Generally, "'[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'. . . ." [Citation.] In other words, there must be a union of act and wrongful intent, or criminal negligence. [Citations.] "So basic is this requirement that it is an invariable element of every crime unless excluded expressly or by necessary implication." [Citation.]' [Citation.]" (*In re Jorge M.* (2000) 23 Cal.4th 866, 872; see also *People v. Simon* (1995) 9 Cal.4th 493, 521-522.)

It is also well-recognized that the Legislature does not intend any proof of scienter or wrongful intent to be a requisite element of certain penal statutes, often classified as public welfare offenses. (*In re Jorge M., supra,* 23 Cal.4th at p. 872.) These kinds of offenses are generally based on the violation of a statute that is purely regulatory in nature and involves widespread injury to the public. (*Ibid*.) These penal statutes are enacted to protect public health and safety, e.g., traffic regulations, food and drug regulations. They impose light penalties; and they carry no moral obloquy or damage to reputation. (*Ibid*.) Their primary purpose is regulation, not punishment or correction. (*Ibid*.) Because they impose criminal sanctions without a finding of wrongful intent, they are frequently referred to as strict liability offenses. (See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332.)

The issue in *In re Jorge M*. was whether possession of an unregistered assault weapon, a violation of section 12280, subdivision (b) of the Assault Weapons Control Act (§§ 12275-12290), is a strict liability offense or requires proof that the defendant knows the characteristics of the weapon that bring it within the Act. (*In re Jorge M*., *supra*, 23 Cal.4th at p. 871.) The Act contains no reference to the defendant's knowledge. (*Id*. at p. 872.)

". . . [a] person possessed any rifle with an overall length of less than 26 inches."

After considering seven factors that courts commonly take into account when determining whether a penal statute should be construed as a public welfare offense for which the Legislature intended guilt without proof of any scienter, *In re Jorge M*. concluded that the Assault Weapons Control Act is *not* a strict liability offense. (*In re Jorge M.*, *supra*, 23 Cal.4th at pp. 873, 869, 887.) The Act's "text, history and surrounding statutory context provide no compelling evidence of legislative intent to exclude all scienter from the offense defined in section 12280(b). [Factor One.] Section 20's generally applicable presumption that a penal law requires criminal intent or negligence [factor two], the severity of the felony punishment imposed for violation of section 12280(b), and the significant possibility innocent possessors would become subject to that weighty sanction were the [Act] construed as dispensing entirely with mens rea [factor three], convince us section 12280(b) was not intended to be a strict liability offense." (*Id*. at p. 887.)

However, given the gravity of the public safety threat addressed by the Assault Weapons Control Act, the need for effective law enforcement, and the potential difficulty of routinely proving the defendant's actual knowledge, *In re Jorge M*. held that the Act does not require actual knowledge of the assault weapon's illegal characteristics. Instead, the guilt of the person charged with possessing the weapon can be established by proof that he knew or reasonably should have known that the firearm in question possessed the characteristics that make it an illegal assault weapon. (*In re Jorge M*., *supra*, 23 Cal.4th, *supra*, at pp. 869-870, 887.)

People v. Taylor, supra, 93 Cal.App.4th at pages 939-942 later applied the same analysis to the statute at issue here, section 12020, subdivision (a)(1). The particular enumerated weapon in the possession of the *Taylor* defendant was a "cane sword," defined as a "cane, swagger stick, stick, staff, rod, pole, umbrella, or similar device, having concealed within it a blade that may be used as a sword or stiletto." (§ 12020, subd. (c)(15).) *Taylor* concluded that actual knowledge that the cane conceals a sword is an element of the crime. (*Id*. at p. 941.) It reversed the conviction because the trial court

neither instructed the jury on the knowledge element, nor did the People make any effort to demonstrate that the instructional error was harmless. (*Id*. at p. 942.)

Taylor drew support from *People v. Rubalcava, supra*, 23 Cal.4th 322, decided one month before *In re Jorge M*. The *Rubalcava* defendant was convicted of carrying a concealed dirk or dagger, which, at the time of his arrest, was a violation of section 12020, subdivision (a), as was possession of, inter alia, a cane sword and a short-barreled rifle.[3] Although the Supreme Court held that carrying a concealed dirk or dagger is not a specific intent crime, it emphasized that its holding did "not eliminate the mens rea requirement" of the offense. (*Id*. at p. 331.) Rather, section 12020, subdivision (a)'s prohibition against carrying a concealed dirk or dagger still requires knowledge that the instrument has the statutory characteristics that make it a dirk or dagger: "a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict bodily injury or death." (*Id*. at p. 332; § 12020, subd. (c)(24.)) As *In re Jorge M., supra*, 23 Cal.4th at page 876, footnote 6, subsequently observed, *Rubalcava's* conclusion about the mens rea requirement of section 12020, subdivision (a), is contrary to the conclusions of earlier Court of Appeal opinions which held that knowledge of the contraband character of the objects illegal to possess under section 12020, subdivision (a) was not an element of the offense. (E.g., *People v. Lanham* (1991) 230 Cal.App.3d 1396, 1401-1405 [exploding bullet]; *People v. Valencia* (1989) 214 Cal.App.3d 1410, 1412-1416 [sawed-off shotgun]; *People v. Azevedo* (1984) 161 Cal.App.3d 235, 239-241 [same].)

In light of the holdings of *In re Jorge M., Rubalcalva*, and *Taylor*, we conclude that a violation of section 12020, subdivision (a)(1), based on possession of a short-barreled rifle likewise includes a scienter element. Thus, in the prosecution of a violation of this statute, the People bear the burden of proving the defendant knew or reasonably should have known the firearm possessed the characteristics of a short-barreled rifle, and the jury must be so instructed. The failure to so instruct the jury in this case was error.

Respondent argues that *In re Jorge M*. and *Rubalcava* are distinguishable because they concerned the statutory criminalization of traditionally lawful conduct, that is, statutes that placed restrictions on the possession of objects that have had legitimate uses. By contrast, respondent argues, possession of a short-barreled, or "sawed-off," rifle, has never been lawful. Respondent further argues that a short-barreled rifle, and all the other weapons enumerated in section 12020, subdivision (a)(1), have no legitimate civilian use, and the only reason for their possession is their easily concealable character.

We disagree. When a statute has been judicially construed, that construction becomes part of the statute. (*Oliver v. County of Los Angeles* (1998) 66 Cal.App.4th 1397, 1406-1407.) Both *Rubalcava,* 23 Cal.4th 322 and *Taylor, supra,* 93 Cal.App.4th 933 have construed section 12020, subdivision (a), as manifesting a legislative intent to include a scienter requirement. Their construction of the section is not inapplicable to the instant case because they concerned weapons (concealed dirk or dagger, cane sword) different from the one at issue here (short-barreled rifle). All three weapons are designated, along with many others, in a single subdivision: section 12020, subdivision (a). Sections of statutes are to be construed together and harmonized if possible. (*Mannheim v. Superior Court* (1970) 3 Cal.3d 678, 687.) Courts are also to consider the consequences of a particular construction, preferring a practical construction. (*California Correctional Peace Officers Assn. v. State Personnel Bd*. (1995) 10 Cal.4th 1133, 1147.) Placing numerous specified weapons in a single subdivision of a section reflects a legislative intent that they be deemed a single category of weapon to be treated identically. To construe section 12020, subdivision (a), as imposing a scienter requirement for possession of some of its enumerated weapons but not for possession of others would be an impractical and discordant construction that would make enforcement of the section confusing and unwieldy.

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3 Subdivision (a) of section 12020 has since been further subdivided into four subsections, including "(1):" possessing any of approximately 26 specified objects, and "(4):" carrying a concealed dirk or dagger on one's person. (Stats. 1999, ch. 129.)

Furthermore, a fundamental rule of statutory construction is that statutes should be construed to avoid anomalies. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) It would be anomalous to conclude that, in order to violate section 12020, subdivision (a), the Legislature intended a person must know the object he conceals is "capable of ready use as a stabbing weapon" or the cane he possesses conceals "a blade that may be used as a sword or stiletto" (§ 12020, subds. (a)(1) & (4), (c)(15) & (24)), but it did not intend that a person need not know that the rifle he possesses is less than 26 inches in total length. (§ 12020, subd. (c)(2)(B).)

II. *Prejudice*

Failure to instruct on an element of a crime is federal constitutional error that requires reversal of the conviction, unless it can be shown beyond a reasonable doubt that the error did not contribute to the jury's verdict. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) In this case, we cannot conclude that failing to instruct the jury on the scienter element of possession of a short-barreled rifle was an error harmless beyond a reasonable doubt.

The rifle at issue was 24 and 1/8 inches long, less than two inches shorter than the permitted length of 26 inches. It was thus not obviously visibly different in length from rifles which may be possessed lawfully. (Compare *People v. Schaefer* (2004) 118 Cal.App.4th 893, 898, 904: sawed-off rifle 11 inches shorter than permitted length.)

Although the prosecutor referred, without objection, to the rifle as being "sawed-off," the police inspector who supervised the search of appellant's house was not asked to describe any characteristics about the rifle, other than its length, that would indicate it had been sawed or cut. Appellant was never asked whether he had noticed that the end of the rifle's barrel appeared to have been sawed or cut off or about his familiarity with firearms.[4] There was no evidence of a cache of other firearms in the house or that appellant was a firearms aficionado. (Compare *Schaefer, supra,* 118 Cal.App.4th at pp.

[4] The rifle was admitted into evidence, but there is no description of it in the record other than its having a wooden stock and its length.

898, 904: numerous firearms in defendant's bedroom, testimony that defendant liked guns.)

The rifle was found in a common area of appellant's house to which the other occupants of the house--his mother and brother--had access. It was not an area used exclusively or primarily by appellant. (Compare *In re Jorge M., supra*, 23 Cal.4th at p. 888 and *Schaeffer, supra*, 118 Cal.App.4th at p. 898: illegal weapons found next to defendant's bed or in his bedroom.)

Appellant's uncontradicted testimony that he did not "own" the rifle, and that it "was possibly my brother's or his friend" implies that, although he knew of the rifle's existence in the house, his possession was simply constructive. This fact can viably raise a doubt that the defendant knew or reasonably should have known the rifle's illegal characteristics. (*In re Jorge M., supra,* 23 Cal.4th at p. 888.)

Given this state of the evidence, a jury could have found that appellant did not know the contraband characteristics of the rifle in the garage workshop drawer.

CONCLUSION

Appellant's conviction of possession of a short-barreled rifle (§ 12020, subd. (a)(1)) is reversed. In all other respects the judgment is affirmed.

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Jones, P.J.

We concur:

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Stevens, J.

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Simons, J.