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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOHN WESSLEY GLEASON, Defendant and Appellant.	H042771 (Monterey County Super. Ct. No. SS141935)

Defendant John Wessley Gleason was convicted by jury trial of felony possession of an assault weapon (Pen. Code, § 30510, subd. (a)(11)).[1] The trial court refused to reduce the conviction to a misdemeanor under section 17, subdivision (b) and placed defendant on felony probation. On appeal, defendant contends that prohibiting him from possessing an assault weapon violates his Second Amendment rights, and he asserts that the trial court abused its discretion in refusing to reduce his conviction

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[1] Subsequent statutory references are to the Penal Code.

to a misdemeanor. We reject both of his contentions and affirm the court's order of probation.

I. Facts

In July 2014, defendant and Angelina Sottile had been living together for eight years. They were engaged and were the parents of six-year-old Evelyn. Sottile was unhappy in the relationship due to defendant's drinking. She knew that defendant had several guns, including an "SKS rifle." Defendant had kept guns for many years. He kept the guns in a gun safe in a shed in the backyard of their home.

When Sottile got home from work on the afternoon of July 14, 2014, defendant was home alone. He had been drinking, and he initiated a conversation about their relationship. Sottile told him that she was not happy and no longer found him attractive. Defendant became upset and hurt. Sottile was cooking dinner when defendant's 17-year-old daughter, Tamarie Gleason (Tammy), and Sottile's "ex-girlfriend from high school," Patricia Van Kempen, returned home with Evelyn. The women sat down and had dinner. Defendant did not eat dinner with them. Instead, he continued to drink. After dinner, he resumed the conversation with Sottile about their relationship, and Van Kempen, Tammy, and Evelyn went out to rent a movie. Defendant continued to drink and to be upset. When Van Kempen and the girls returned, defendant went out and bought another bottle of wine for him to drink.

Defendant continued to talk to Sottile about their relationship, and he told her to "leave." Van Kempen and the girls went to Evelyn's room around 8:30 p.m. to avoid exposing the girls to the heated conversation between defendant and Sottile. Sottile told him that she would leave the next day. Defendant was "very upset," and he "went outside." Van Kempen and the girls rejoined Sottile in the living room, and they started to watch the movie. Defendant was "pacing around," and at one point came in, sat down next to Sottile, and "stared at" her. At another point, defendant, who was continuing to drink,

came in and told Sottile that Van Kempen "had to leave."[2] He also asked Tammy to put Evelyn to bed. Defendant again "disappeared out in the back for a while" and then came in and locked both the knob and the deadbolt on the front door, which Sottile thought "was strange because we pretty much never locked our door." Defendant was also going into and out of his and Sottile's bedroom.

Toward the end of the movie, Sottile decided that she would leave that night. When the movie ended, she told the others by text message that she was going to grab her and Evelyn's "stuff . . . and then we'll leave." Sottile went to Evelyn's room and grabbed some things. She then waited for defendant to come out of their room because he had locked himself inside. Eventually she got tired of waiting and, after he walked out of the room and then right back into it, she opened the door.

Defendant was standing facing the bed. The SKS rifle was on the bed with a magazine inserted into it. Sottile looked at defendant and looked at the bed and said "'Are you kidding me?'" Defendant grabbed the gun. Sottile could "hear the metal shuffling," but she could not be sure whether this was sound of the gun being cocked. Sottile turned around, grabbed Evelyn, told Van Kempen and Tammy "'[w]e got to go,'" and ran out the front door. She found defendant's actions so "scary" and frightening that she left her purse, phone, clothing, and other stuff in the house.

When Sottile looked back, the others were not behind her. She put Evelyn temporarily in defendant's unlocked vehicle and told her to stay there. Back in the house, defendant had come out of the bedroom holding the SKS rifle, which had its magazine attached. He did not say anything; he held the gun, cried, and stared at them. Tammy told defendant: "'You have to promise that you're not going to hurt us.'" Defendant replied: "'I can't promise that.'" Tammy "stayed and covered" Van Kempen "while she got her belongings." Tammy "covered" Van Kempen "just in case my dad did decide to do something he might regret because he was upset."

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[2] Sottile saw defendant consume three bottles of wine that day over an eight-hour period.

Tammy thought defendant might shoot Van Kempen.[3] After Van Kempen gathered her belongings, Tammy and Van Kempen "came running out" of the house just as Sottile was approaching the front door. Sottile told Tammy that she had forgotten her purse, and Tammy went back in and grabbed it. Sottile grabbed Evelyn, and they ran across the street to Van Kempen's car. As they were getting into the car, Sottile saw defendant pacing near the garage with the SKS rifle "carried on his side" at his hip with the barrel pointed "in our general direction." Sottile and Van Kempen "told the girls to put their heads down" as they drove away.

Sottile contacted the police the next day. The police obtained a search warrant for defendant's home. They searched the master bedroom and found the keys to the gun safe, "unspent 7.62 caliber ammunition," a holster with a 30-round nine-millimeter magazine, defendant's driver's license, and a purchase order for the SKS rifle. Defendant had purchased the SKS rifle in 2001 for $300. The police then searched the gun safe in the shed in the backyard and found the SKS rifle and a fully loaded, detachable, 30-round "banana" magazine containing 7.62 caliber ammunition. Defendant's SKS rifle was a centerfire gun with "a folding stock" and "a pistol grip."

II. Procedural Background

Defendant was charged by information with felony possession of an SKS assault weapon, three counts of felony assault with a firearm (§ 245, subd. (a)(2)), one count of misdemeanor exhibition of a deadly weapon (§ 417, subd. (a)(1)), and two counts of child endangerment (§ 273a, subd. (b)).

At the jury trial, the prosecution presented an expert witness on firearms. He testified: "The SKS is basically a semiautomatic weapon. The original version of the SKS, it's magazine fed. It has a fixed ten round magazine. It has a fixed stock, and it has a bayonet that swivels in and out from underneath. It's a lot longer in

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[3] Tammy originally told the police that defendant had pointed the gun at them, but she recanted that statement a month later.

length, overall length, compared to an AK." Defendant's SKS rifle differed from the original version because it had "a folding stock," "a pistol grip," and a detachable "banana magazine" that could hold up to 30 rounds. An SKS rifle is an assault weapon if it has a folding stock, a pistol grip or a detachable magazine, and defendant's SKS rifle had all three features. Defendant's SKS rifle was test-fired and found to be fully functional and to operate as a semiautomatic.

Defendant testified that he owned two .22 rifles in addition to the SKS rifle at the time of the incident. He also had various accessories including "ammunition, scopes, scope mounts, all kinds of different accessories." Defendant testified: "I don't hunt. I just shoot." He kept the guns locked in the shed's gun safe except when he brought them into the house to clean them. The guns would "[g]enerally not" be loaded when he brought them into the house. Defendant testified that he brought the SKS rifle into the house four or five days before the incident to clean it up so that he could sell it. He did not return the SKS rifle to the gun safe because it took him several days to clean it. Instead, he kept it in his bedroom. Defendant maintained that the SKS rifle was never loaded while it was in the house, though the magazine was also in his bedroom so that it too could be cleaned.

Defendant admitted that he had drunk much of a bottle of wine before Sottile arrived home from work on July 14, 2014, and that he later went out and bought another bottle of wine. His conversation with Sottile made him very depressed but not angry. He paced around and cried. Defendant testified that he went into his bedroom, saw the SKS rifle, and, for less than a minute, considered killing himself. Having rejected that idea due to his concern for his children, "I decided I would put the gun away." He picked up the gun, checked that the chamber was empty, and turned toward the door to take the gun back to the shed. It was at that moment that Sottile walked into the bedroom. Defendant insisted that the magazine attached to the SKS rifle was empty at that time. He also testified: "[I]t would not be unusual to see me in the house with a gun with a magazine in it."

He walked into the living room and "realized that they were running because they were scared I was going to do something with this gun . . . ." He put the gun back in his bedroom and went back out to the living room, where he encountered Tammy. Defendant thought she said: "'Do you promise you're not going to hurt yourself?'" That was why he responded "that I couldn't guarantee her that." He went out to try to talk to the women, but they drove away. Defendant denied that he had pointed the SKS rifle at anyone that night. After the women left, he put the SKS rifle back into the gun safe.

The jury was instructed: "An SKS rifle with detachable magazine is an assault weapon. [¶] An assault rifle also includes any semiautomatic, center-fire rifle that has the capacity to accept a detachable magazine and either has a pistol grip that protrudes conspicuously beneath the action of the weapon or has a folding stock." The jury returned a guilty verdict on the possession count, but it acquitted defendant of the assault counts and the child endangerment counts. The jury deadlocked on the exhibition count.

The court declared a mistrial on the exhibition count, and it granted the prosecution's motion to dismiss that count. When defendant spoke to the probation officer, he "denied having an issue with alcohol." He said he was a "light to moderate" drinker. Defendant was 54 years old and had a couple of prior misdemeanor convictions and no felony convictions. The probation department recommended felony probation with a 240-day jail term, and the prosecution agreed with this recommendation.

Defendant asked the court to reduce his conviction to a misdemeanor under section 17, subdivision (b). His trial counsel argued that misdemeanor treatment was appropriate because defendant (1) never denied possessing the gun, which he "knew was an illegal weapon," (2) "was willing to enter a plea of guilty to possession of the firearm," (3) cooperated with the investigation, (4) had "a very minimum prior criminal history" and no history of violence, and (5) had "voluntarily [sought] counseling" and "discontinue[d] his alcohol use." She also asserted that defendant was "in

poor health" and "not a danger to society." The prosecution opposed a reduction.

The court was not persuaded by defendant's trial counsel's argument. "[H]e's always been willing to accept responsibility for that [possession] charge, but never as a felony. Never. Not before the trial and not after the trial and just really dead set against it as a felony." Defendant's trial counsel contested the court's assertion and stated that defendant had been willing to plead to the possession offense as a felony "17(b) open," but the prosecutor had not been willing to accept such a plea. The court responded: "I didn't get that impression at the trial."[4]

The court refused to reduce the conviction to a misdemeanor due to the nature of defendant's conduct. In the court's view, "the circumstances of the possession and the characteristics of the individual possessing it, leads really to only one conclusion, and that's felony conduct." "You have someone who denies really being motivated, at least in some ways, being motivated against the women in the house at the time but who denies being angry, denies being emotional, denies that they are in his sight . . . and yet can't help but express that anger . . . ." The court characterized defendant's description of the events to the probation officer as "the words of someone who is thinking bad thoughts about someone. That's someone who is scary. Holding an assault rifle . . . ." "I think we've read about people like you who get despondent, who have an affinity for guns, who won't plead if it's a felony . . . and the reason that you won't plead to it as a felony is because you want to have guns in the future. I think. I think that was the reason for it." Nevertheless, in light of defendant's trial counsel's argument that defendant had been willing to plead to a felony, the court did not rely on its belief that defendant had been unwilling to plead to felony conduct. "[I]t's still a question about whether or not conduct is felonious. I think the Court's analysis still

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[4] During a hearing in the midst of trial on defendant's request for substitution of counsel, outside the jury's and the prosecutor's presence, defendant's trial counsel told the court that defendant had been unwilling to accept any plea bargain that would bar him from possessing firearms.

stands. It is. It was very scary and . . . it's the kind of thing you don't want to read about in the future, I suppose."

The court suspended imposition of sentence and placed defendant on probation conditioned on a 180-day jail term. Defendant timely filed a notice of appeal.

III. Discussion

A. Second Amendment

Defendant contends that section 30605 is unconstitutional under the Second Amendment because it does not exclude from its prohibition the possession of an assault weapon for self-defense in one's home. He makes a facial challenge to the constitutionality of the statute.

An SKS rifle "with detachable magazine" is statutorily defined as an assault weapon. (§ 30510, subd. (a)(11).) "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 pursuant to subdivision (h) of Section 1170." (§ 30605, subd. (a).)

"Like most rights, the right secured by the Second Amendment is not unlimited." (*District of Columbia v. Heller* (2008) 554 U.S. 570, 626.) "[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." (*Id.* at p. 625.) "[T]he sorts of weapons protected were those 'in common use at the time[,]'" which does not include "'dangerous and unusual weapons.'" (*Id.* at p. 627.)

Defendant claims that assault weapons are "in common use and possessed by law-abiding citizens for lawful purposes." He relies heavily on a former opinion of the Fourth Circuit Court of Appeals. (*Kolbe v. Hogan* (4th Cir. 2016) 813 F.3d 160, rehearing en banc granted.) That opinion was superseded by a subsequent opinion reaching the opposite conclusion. (*Kolbe v. Hogan* (4th Cir. 2017) 849 F.3d 114 (*Kolbe II*).) In *Kolbe II*, the Fourth Circuit held that "assault weapons and large-capacity magazines" are "'like' 'M-16 rifles,' i.e., 'weapons

that are most useful in military service,' and thus outside the ambit of the Second Amendment." (*Kolbe II*, at p. 136.) The Fourth Circuit explained that the features that make a weapon an assault weapon, such as a folding stock, a pistol grip, or a large-capacity magazine, "'serve specific combat-functional ends'" that take such weapons outside the protection of the Second Amendment. (*Kolbe II*, at p. 137.)

Defendant's reliance on *Heller v. District of Columbia* (D.C. Cir. 2011) 670 F.3d 1244 (*Heller II*) is misplaced because *Heller II* did not resolve the issue of whether assault weapons are within the ambit of the Second Amendment. The *Heller II* court avoided this issue because it concluded that, even if the Second Amendment applied, the prohibitions survived intermediate scrutiny. (*Heller II*, at p. 1261.) The same is true with regard to defendant's reliance on *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo* (2d Cir. 2015) 804 F.3d 242. Defendant cites *Fyock v. Sunnyvale* (9th Cir. 2015) 779 F.3d 991, but *Fyock* did not concern assault weapons. It dealt with a prohibition on magazines that could be used with handguns. (*Fyock*, at pp. 997-998.) Defendant also cites *Friedman v. City of Highland Park* (7th Cir. 2015) 784 F.3d 406 (*Friedman*), but it provides no support for his contention. In *Friedman*, the Seventh Circuit rejected a constitutional challenge to a locality's ban on assault weapons. (*Id.* at pp. 410-412.)

Defendant's challenge to the constitutionality of section 30605 is not novel. The Third District Court of Appeal rejected such a challenge in *People v. James* (2009) 174 Cal.App.4th 662 (*James*). In *James*, the defendant challenged section 30605's predecessor, former section 12280. He claimed that the Second Amendment's protection extended to "'military type weapons.'" (*James*, at p. 667.) The Third District concluded that the types of weapons prohibited by former section 12280 (now section 30605) were not protected under the Second Amendment because they were "weapons of war" and therefore were "not the types of weapons that are typically possessed by law-abiding citizens for lawful purposes such as sport hunting or self-defense." (*James*, at pp. 674-676.)

The Fourth District Court of Appeal also rejected a challenge to former section 12280 in *People v. Zondorak*

(2013) 220 Cal.App.4th 829 (*Zondorak*). It agreed with the Third District that assault weapons are not protected by the Second Amendment because they are military weapons. (*Zondorak*, at p. 836.) Like defendant, the defendant in *Zondorak* argued that the assault weapons prohibition violated the Second Amendment because it "carves out no exceptions for possession of those weapons within the homes of otherwise law-abiding citizens for self-defense." (*Id.* at p. 837.) The Fourth District rejected this argument because "when a weapon falls outside the class of weapons entitled to Second Amendment protections, neither the place in which it is stored nor the purposes for which it might be used imbues the weapon with Second Amendment protections." (*Ibid.*)

We agree with the Third District's analysis in *James* and the Fourth District's analysis in *Zondorak*. The assault weapons prohibited by section 30605 have unusual and dangerous features that make them "weapons of war," and they therefore do not fall within the protection of the Second Amendment. The location of their storage and the purpose for their possession plays no role in this determination. Accordingly, we reject defendant's Second Amendment facial challenge to section 30605.

B. Section 17, subdivision (b)

Defendant claims that the trial court abused its discretion in refusing to reduce his conviction to a misdemeanor because it (1) failed to "give due consideration" to his individual circumstances, (2) relied on "a personally-held bias" "against persons who own guns," and (3) relied on its "incorrect assumption that appellant was adamantly opposed to pleading to a felony so as not to be prohibited from possessing guns."

Section 17, subdivision (b) provides that "[w]hen a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, 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 or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170." A ruling

under section 17, subdivision (b) must be based solely on "individualized consideration of the offense, the offender, and the public interest . . . ." (*People* v. *Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978 (*Alvarez*).) The court may consider "'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.'" (*Ibid.*) An appeal challenging a trial court's exercise of its discretion under section 17, subdivision (b) can succeed only if it establishes that the trial court's decision was "'irrational or arbitrary.'" (*Alvarez*, at p. 977.) "'In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*Id.* at pp. 977-978.)

The trial court's explanation of its rationale for refusing to reduce defendant's conviction to a misdemeanor plainly displayed that the court had considered defendant's individual characteristics and the nature of the offense. The court explained that "the circumstances of the possession and the characteristics of the individual possessing it, leads really to only one conclusion, and that's felony conduct." "You have someone who denies really being motivated, at least in some ways, being motivated against the women in the house at the time but who denies being angry, denies being emotional, denies that they are in his sight . . . and yet can't help but express that anger . . . ." Defendant's explanation to the probation officer was, in the court's view, "the words of someone who is thinking bad thoughts about someone. That's someone who is scary. Holding an assault rifle . . . ." The court found defendant's conduct and his attitude toward his conduct very troubling with regard to defendant's potential future access to guns. "I think we've read about people like you who get despondent, who have an affinity for guns . . . ." We reject defendant's claim that the court failed to consider his individual circumstances.

Nor do we find any merit in defendant's claim that the court was biased against those who own guns. The court's careful explanation of its reasoning displayed no such bias. Instead, the court's reasoning was closely

tethered to defendant's individual characteristics and the circumstances of his offense. The evidence at trial demonstrated that defendant was angry and upset on the evening of the incident and exhibited no concern for the two women and two children who were exposed to him carrying around an assault weapon with a large capacity magazine inserted into it. We consider the court's characterization of defendant's conduct as "scary" to be an understatement. The court's concern about defendant's future access to guns was not an outgrowth of any "bias" but simply a reasonable concern based on defendant's individual characteristics and his conduct.

We also conclude that the court's possible misimpression that defendant was opposed to pleading guilty to a felony did not play a role in its decision not to reduce the conviction to a misdemeanor. After defendant's trial counsel insisted that defendant had been willing to plead to a felony, the court put aside its impression and noted that the determinative question was "whether or not conduct is felonious." The court remained convinced that defendant's conduct was "very scary" and therefore merited felony punishment. Since the court's view of the nature of defendant's conduct was not based on the court's impression regarding defendant's willingness to plead guilty to a felony, the court's impression had no impact on its decision not to reduce the conviction to a misdemeanor.

IV. Disposition

The order is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.

Court of Appeal, Sixth Appellate District - No. H042771

S246497

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOHN WESSLEY GLEASON, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice