

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID GUNDERSON,

Defendant and Appellant.

A123526

(Humboldt County  
Super. Ct. No. CR081103)

David Ray Gunderson appeals from convictions of possession of a machine gun and a silencer, and misdemeanor violation of a court order. He contends the trial court's instructions relating to the felony offenses failed to properly explain the prosecution's burden of proof and undermined the defense in several particulars; there was insufficient evidence of unlawful possession; and the trial court erred in admitting certain items of evidence and testimony about them. We conclude that the weapons convictions must be reversed due to instructional error.

**STATEMENT OF THE CASE**

Appellant was charged by amended information filed on July 15, 2008, with 24 counts of spousal rape with use of an intoxicant (Pen. Code, § 262, subd. (a)(2)<sup>1</sup>); one count of attempting to prevent or dissuade a victim or witness of a crime (§ 136.1, subd. (b)(1)); one count of possession of a machine gun (§ 12022, subd. (a)); one count of

<sup>1</sup> All further statutory references will be to the Penal Code unless otherwise specified.

possession of a silencer (§ 12520); and one count of forcible rape, with an allegation that appellant personally used a firearm in committing the offense (§§ 261, subd. (a)(2), 12022.5, subd. (a)(1)). Appellant was also charged with three misdemeanor offenses, violation of a court order (§ 166, subd. (a)(4)), possession of a controlled substance without a prescription (Bus. & Prof. Code, § 4060), and disclosure of information without permission (Veh. Code, § 1808.45). Subsequently, at the prosecutor's request, the trial court dismissed the charges of forcible rape, possession of a controlled substance and disclosure of information without permission.

After a jury trial, on September 24, 2008, appellant was found guilty of two felonies, possession of a machine gun and possession of a silencer, and one misdemeanor, violating a court order. The jury also found appellant guilty of the lesser included offense of battery on 11 of the spousal rape counts, but the court later struck these convictions as barred by the statute of limitations.

The trial court sentenced appellant to concurrent terms of two years each on the felony convictions, suspended execution of sentence and placed appellant on four years probation. Appellant was sentenced to 354 days in county jail on the misdemeanor count and received credit amounting to all but a few of those days.

Appellant filed a timely notice of appeal on December 15, 2008.

### **STATEMENT OF FACTS<sup>2</sup>**

Appellant became the Chief of Police for the City of Blue Lake sometime between 1999 and 2002, after serving as the Deputy Chief. His wife, Darcy Seal, was a Blue Lake police officer. Appellant and Seal would be on call seven days a week; calls to the department would be routed directly to their home after hours. According to Seal, appellant worked "all the time," "[f]rom morning to night."

---

<sup>2</sup> As the only issues on appeal concern the weapons convictions, only the facts related to these convictions will be addressed herein.

In February 2008, appellant was arrested on multiple charges of having raped his wife while she was under the influence of a sleeping aid. Following the arrest, Humboldt County District Attorney's Office investigators executed a search warrant at appellant's house and at the Blue Lake Police Department. At the police department, the investigators seized "quite a few weapons" that city manager Wiley Buck asked them to take into safekeeping, providing Buck with a list of the weapons taken. Additional weapons were seized at appellant's home, including a Heckler & Koch MP5 machine gun and a Heckler & Koch Mark 23 pistol with a silencer. These were found in one of two locked safes in appellant's garage which were opened by a locksmith; Seal did not have access to the safes. The safes were "almost entirely" filled with weapons. On February 15, during a warrant search of the police department's evidence storage facility, investigators seized a police department inventory list for weapons that was found in an inner storage room. Neither the MP5 nor the Mark 23 and silencer were listed on the department inventory. Nor were these weapons listed on the general ledger listing city purchases. A certified list from the Automated Firearm System (AFS) showed 16 weapons registered to appellant and two registered to Seal. The MP5 and Mark 23 were not on this list.

California law requires that handguns be registered with AFS; law enforcement agencies are required to register handguns as institutional weapons. All the weapons on the police department's inventory list were registered as institutional weapons with AFS. The Mark 23 was not registered with AFS. State law does not require the agency to register a machine gun or a silencer. Blake Graham, a special agent with the California Department of Justice, Bureau of Firearms, testified, however, that often agencies would register weapons that are not legally required to be registered for liability and tracking purposes. The two weapons at issue had been registered with the federal government by Heckler & Koch.

The evidence regarding acquisition of the MP5 and Mark 23 with silencer consisted of a February 2001 purchase order from Cinema Weaponry for items including an “MP5A3” and “Mk23 Suppressor,” showing Heckler & Koch as the vendor and the Blue Lake Police Department, attention Chief Gunderson, as the “ship to” address, and an October 24, 2001, invoice for items including an MP5 machine gun and a suppressor for a Mark 23—the weapons at issue here—purchased by Cinema Weaponry from Heckler & Koch and shipped to appellant’s attention at the police department.<sup>3</sup> District Attorney’s investigator Steve Dunn testified that the police department never purchased the MP5 and the silencer; rather, the owner of Cinema Weaponry bought these items from Heckler & Koch and Heckler & Koch sent them to the police department.

Unlike the MP5 and Mark 23 with silencer, other weapons the city purchased from Cinema Weaponry in September 2001 (two Benelli shotguns with attaching lights and shell holders) were reflected on the city’s general ledger.

Dwayne Rigge was city manager of Blue Lake from July 1996 to December 2002. He oversaw purchase decisions for the city, including purchases of weapons. Weapons purchased for the police department needed Rigge’s prior authorization. It was “absolutely” a requirement that all weapons owned by the police department be “part of the Blue Lake Police Department weapons inventory” and Rigge would expect that the department’s inventory list would include all weapons belonging to the department. He would also expect that any weapons purchased by the city would be reflected on the city’s general ledger. During his tenure as city manager, appellant never asked for authority to purchase, use or possess fully automatic machine guns as part of his official duties and Rigge never authorized such purchase, use or possession. Nor did appellant

---

<sup>3</sup> The purchase order listed five items, four of which are listed on the October invoice. The fifth item on the purchase order, a Mark 23 magazine, appears on a separate December 15, 2001, invoice from Heckler & Koch, also indicating Cinema Weaponry as the “sold to” address and appellant, at the police department, as the “ship to” address.

ask for authorization to purchase a firearm with a silencer, and Rigge did not authorize use or possession of such a weapon. Appellant never talked to Rigge about the need for the city to possess a fully automatic machine gun or a sidearm with a silencer and Rigge would not have authorized purchase of these weapons. Rigge acknowledged, however, that he was not trained in police tactics or strategies and he “basically” deferred to the police chief to determine these matters for the police department.

Similarly, Wiley Leon Buck, who was the Blue Lake City Manager in 2008, testified that in accordance with procedures for general purchasing, if the police chief wanted to purchase weapons, Buck would expect to be notified in advance and have the transaction go through him. Buck testified that he would expect all weapons belonging to the police department to be reflected on an inventory list. He was not sure whether there was an “actual policy” for this but stated, “[t]here should have been.” He also would expect the police chief to register all his firearms with the appropriate governmental agencies. Buck testified that appellant never asked for, and Buck never gave, authorization to purchase machine guns.

Appellant often obtained equipment through “DRMO,” a program under which surplus military equipment can be released to public agencies such as police departments for civilian use, providing rural or underfunded police departments to save money. While Rigge was city manager, he did not personally manage DRMO transactions but was apprised of everything that was acquired through the program because an inventory was kept of these items. Rigge testified, “We did receive great quantities of items” through DRMO and, based on the inventory, “we would determine whether we actually wanted to keep it or if . . . there was another public agency that was interested in it.” DRMO items cannot be given to private citizens. Rigge never authorized a nongovernmental agency to purchase weapons for the Blue Lake Police Department and never would have authorized a nongovernmental agency to purchase anything for the city. Any gift to the city would have had to come before the city council for formal acceptance.

Buck was aware that appellant frequently traded surplus items and in so doing saved the city “quite a bit of money.” The police department’s inventory listed a number of Sig Sauer handguns; Buck testified that when he became city manager, they wanted the police officers to all have the same weapon rather than each owning his or her own, and the Sig Sauers were “given to us,” with the city paying shipping. The inventory also listed a number of automatic weapons, ten Heckler & Koch .45 UMP submachine guns acquired in June 2007 and ten 9-millimeter Colt submachine guns acquired in May 2005.<sup>4</sup> Buck testified that appellant advised him the police department could get machine guns for training purposes and to use as “bargaining units” for trades and loans with other departments. Buck did not personally see a need for automatic weapons “for the size of the town,” but “it was looked as more of a bargaining unit and training for the officers.” Shown two letters from appellant to Heckler & Koch, a May 2007 request for 10 UMP machine guns and an October 2007 request for 9-millimeter caliber machine guns, both indicating the weapons were not intended for retransfer or resale, Buck testified that he was not aware that if the weapons were obtained, the city would not be able to retransfer or resell them.<sup>5</sup>

Buck knew that appellant carried a machine gun in his car but he did not know how that particular machine gun was acquired and believed that the machine gun and silencer at issue here were obtained prior to his becoming city manager. Buck “would

---

<sup>4</sup> The record is unclear regarding these automatic weapons, which are *not* the ones involved in appellant’s convictions. While the ten “H&K cal UMP” weapons listed as having been acquired in June 2007 appear to correspond to the ten .45 such weapons requested in appellant’s May 2007 letter (exhibit No. 45), the ten Colt submachine guns listed on the inventory as having been acquired in May 2005 clearly do *not* correspond to the October 2007 letter requesting ten 9-millimeter H & K machine guns.

<sup>5</sup> Prior to requesting the machine guns from Heckler & Koch, appellant had unsuccessfully attempted to obtain a grant from the Indian Gaming Committee for machine guns in connection with law enforcement duties at a casino with which the police department had had a contract, although the casino was not within the city boundaries. The city no longer had the casino contract.

hope” the weapon appellant had would be lawfully possessed and registered with the appropriate agencies. He would not allow the chief or other police officers to possess a non-registered weapon as part of their official duties or to so possess a weapon that was not reflected on the police department weapons inventory list. Asked whether he would ever authorize Cinema Weaponry to purchase weapons for the city without his prior authorization, Buck said, “[n]ever came up, to my knowledge; but, no. That would be kind of odd and not standard, for another agency to buy weapons for us to have.”

Buck was not aware that the police department possessed a weapon with a silencer and he was never asked whether members of the police department could possess or use a silencer as part of their duties or advised that there was a need for a silencer. He testified that he did not see the need for the police to have a silencer but “I’d have to defer to law enforcement for that information.” He also “deferred to [appellant’s] knowledge of crime in the town” with regard to the machine gun.

When Buck was city manager, the city was authorized for one police chief, one sergeant, two officers and an office clerk. They also tried to have as many reserve officers as possible, and reserve officers would have city personnel files.

The police department’s Policies and Procedures Manual did not include policies or procedures for training or use of fully automatic machine guns. Rigge testified that the manual was updated regularly while he was city manager and, had he authorized the use, possession or purchase of machine guns or weapons with silencers, he would have expected the manual to include policies and procedures on possession and use of these weapons. Dunn, based on his 13 and a half years as a peace officer in Humboldt County, would have expected the department’s rules for use or possession of firearms to be reflected in the manual. Dunn also testified that a police chief makes decisions on strategy and tactics for the department.

Investigators found no records indicating any member of the police department had been trained on the MP5 or Mark 23 with silencer.

Dave Morey, lieutenant for the Humboldt County Sheriff's Department, was the administrative supervisor for the part of the county including Blue Lake and, at the time of trial, in charge of law enforcement in Blue Lake. Morey had never felt the need to purchase weapons with silencers or to arm Blue Lake officers with fully automatic machine guns; some of the officers had weapons that could be made fully automatic, but they had been rendered "non-fully automatic."

Michael Hislop, chief investigator with the Humboldt County District Attorney's Office, testified that his investigation revealed a My Space account opened by appellant. In response to a search warrant, My Space sent Hislop a print-out of the "front page" of appellant's My Space page, which said "live, laugh and love, weapon system sales and services" and had photographs of weapons and explosives. Appellant was not licensed to sell weapons. The My Space account was represented to be from both appellant and his brother. Dunn did not investigate whether the brother was a licensed arms dealer.

Dunn testified that a letter to the federal department that assists agencies in acquiring firearms at little or no cost, in which appellant requested firearms and related equipment, stated there were 10 compensated law enforcement officers in the Blue Lake Police Department. City records indicated the police department did not have 10 sworn peace officers at the time of this letter or at any time reflected on the inventory list, and Rigge testified the department did not have ten compensated officers at one time. Buck testified that when he was city manager, the city was authorized for one police chief, one sergeant, two officers and an office clerk. They also tried to have as many reserve officers as possible, and reserve officers would have city personnel files.

### **Defense**

Joseph Gerace was an officer with the Blue Lake Police Department from October 2006 until June 2008. On one occasion, Gerace went to the shooting range at the police academy with his wife, appellant, Darcy Seal, Ruby Seal and two younger boys. The adults and one of the boys fired an MP5 machine gun. Neither Gerace's wife nor

appellant's son worked for the police department. Gerace shot the machine gun once. He thought this was the beginning of training on the gun, but he did not receive any further training. He did not recall the police department's manual having any policies or procedures on training or use of machine guns or firearms with silencers. Gerace testified that the "premise" behind the Blue Lake Police Department was a "family environment" and appellant was "a real stickler" for safety when they were at the range.

Gerace testified that appellant never represented himself as being involved in weapons sales and services. He did not know why the police department had over thirty automatic machine guns, did not know of a reason any of the officers would need a machine gun and was never told he or another officer might need a fully automatic machine gun to respond to the casino or to the school.

Benedict Tisa testified for the defense as an expert in training law enforcement. He explained that DRMO is a program run by the Department of Defense which allows surplus property to be turned over to state agencies, one of the easiest and least expensive ways for agencies to obtain equipment for law enforcement purposes. Tisa testified that "trades of firearms with weapon dealers involving multiple law enforcement agencies" are common. The weapons obtained from Heckler & Koch, however, did not come through DRMO: The weapons came directly from the manufacturer and the documents showed an "outright acquisition."

Tisa opined that acquisition of the pistol and silencer at issue in this case would be justifiable and prudent for the Blue Lake Police Department, giving the police chief the ability to deploy the weapon in "high-risk" conditions like a hostage situation. Tisa explained that the pistol with suppressor could help both the accuracy of the shooter and the functioning of nearby officers by suppressing the noise from the weapon that would otherwise disrupt and disorient the officers. The weapon with suppressor could also be of benefit in a situation where an officer was "compromised" and had to use deadly force without alerting other suspects. Tisa had seen this type of weapon possessed and used by

other law enforcement agencies in such situations. Tisa opined that the MP5 machine gun was a “well thought-out acquisition” that provided enhanced operational capability to patrol officers. He testified that this weapon is considered one of the “more usable and efficient weapons” and is commonly used in California, assigned both to patrol personnel and special weapons teams. Tisa opined that it would be better for these weapons to be kept with appellant rather than at the station, so they would be immediately available to take to a crime scene. It would be “due diligence” for appellant to keep them locked in a safe.

Tisa would expect a weapon owned by a department to appear on that department’s inventory list. He would not expect all such weapons to be registered with the California Department of Justice (DOJ) because police departments are not necessarily required to have a DOJ permit for institutional weapons. Typically weapons bought directly by a police department are registered by the vendor. Tisa was aware that the handgun with silencer and the MP5 were not registered with DOJ and believed these weapons were not required to be registered because they were institutional weapons sold directly to the police department. He acknowledged that if an officer owned a weapon as part of his or her official duties, he would expect the weapon to be lawfully registered with the DOJ and reflected on the department’s inventory list, and the officer to have received training and recertification on the weapon.

Tisa acknowledged that the expression “if it isn’t in writing it doesn’t exist” applied to training records. He had not seen documentation of appellant having received training on the use of a submachine gun but had seen comments from the former chief indicating appellant received training around 2001, prior to or concurrent with the acquisition of the submachine gun. Training involves initial training followed by reoccurring training at intervals determined by a given agency, although person experienced in use of a particular weapon would be able to handle it even without maintaining current training. California requires law enforcement officers to recertify

firearm training annually. Tisa was not aware of appellant receiving training after 2001. Tisa testified that it was “very common” for agencies to have a “family day” at a shooting range at which family members might discharge weapons under controlled circumstances.

Wayne Shaw testified that in July 2004 he installed two shotgun mounts and one overhead MP5 machine gun mount in a Suburban at the request of the Blue Lake Police Department.

## **DISCUSSION**

### **I.**

Except as authorized by statute, California law prohibits “any person, firm or corporation” from possessing a machine gun (former § 12220 [now § 32625]<sup>6</sup>) or a silencer (former § 12520 [now § 33410]). This proscription, however, does not apply to the “possession of machineguns by regular, salaried, full-time peace officer members of a police department . . . when on duty and if the use is within the scope of their duties.”<sup>7</sup> (Former § 12201 [now § 32610].) Similarly, the prohibition does not apply to

---

<sup>6</sup> The weapons statute relevant to appellant’s convictions were reorganized by the Legislature in 2010, operative January 1, 2012. (Stats. 2010, ch. 711 (SB 1080).) The reorganization was expressly intended not to entail substantive change. (§§ 16005, 16010, 16015, 16020, 16025.) For convenience and clarity, this opinion will refer to the statutes in effect at the time of appellant’s prosecution and trial.

<sup>7</sup> Former section 12201 provides in full: “Nothing in this chapter shall affect or apply to any of the following:

“(a) The sale to, purchase by, or possession of machineguns by police departments, sheriffs’ offices, marshals’ offices, district attorneys’ offices, the California Highway Patrol, the Department of Justice, the Department of Corrections for use by the department’s Special Emergency Response Teams and Law Enforcement Liaison/Investigations Unit, or the military or naval forces of this state or of the United States for use in the discharge of their official duties, provided, however, that any sale to these entities be transacted by a person who is permitted pursuant to Section 12230 and licensed pursuant to Section 12250.

“(b) The possession of machineguns by regular, salaried, full-time peace officer members of a police department, sheriff’s office, marshal’s office, district attorney’s

the “possession of silencers by regular, salaried, full-time peace officers who are employed by an agency listed in Section 830.1 . . . when on duty and when the use of silencers is authorized by the agency and is within the course and scope of their duties.”<sup>8</sup> (Former § 12501 [now § 33415].)

Appellant contends the trial court erred in failing to instruct the jury on the burden of proof applicable to the exceptions to liability under former sections 12201 and 12501. He argues that in order to prove him guilty of unlawful possession, the prosecution was required to prove beyond a reasonable doubt that the exceptions did not apply. Instead, appellant urges, the jury instructions suggested that appellant had to prove the exceptions did apply.

The jury instructions stated that in order to prove appellant guilty of unlawful possession of a submachine gun, “the People must prove that: [¶] 1. The defendant possessed a submachine gun in the State of California. [¶] 2. The defendant knew that he possessed a submachine gun in the State of California.” After defining “submachine-

---

office, the California Highway Patrol, the Department of Justice, or the Department of Corrections for use by the department’s Special Emergency Response Teams and Law Enforcement Liaison/Investigations Unit when on duty and if the use is within the scope of their duties.”

<sup>8</sup> Former section 12501 provides in full: “Section 12520 shall not apply to, or affect, any of the following:

“(a) The sale to, purchase by, or possession of silencers by agencies listed in Section 830.1, or the military or naval forces of this state or of the United States for use in the discharge of their official duties.

“(b) The possession of silencers by regular, salaried, full-time peace officers who are employed by an agency listed in Section 830.1, or by the military or naval forces of this state or of the United States when on duty and when the use of silencers is authorized by the agency and is within the course and scope of their duties.

“(c) The manufacture, possession, transportation, or sale or other transfer of silencers to an entity described in subdivision (a) by dealers or manufacturers registered under Chapter 53 (commencing with Section 5801) of Title 26 of the United States Code, and the regulations issued pursuant thereto.”

gun,” the instructions went on to state, “Penal Code section 12201 authorizes ‘[t]he possession of [sub]machine[-]guns by regular, salaried, full-time peace officer members of a police department, sheriff’s office [or specified other offices] when on duty and if the use is within the scope of their duties.’ ”

Similarly, the instructions told the jury that to prove appellant guilty of unlawful possession of a firearm silencer, “the People must prove that: [¶] 1. The defendant possessed a silencer in the State of California. [¶] 2. The defendant knew that he possessed the silencer in the State of California.” The instructions defined “silencer” and continued, “Penal Code section 12501 authorizes ‘[t]he possession of silencers by regular, salaried, full-time peace officers when on duty and when the use of silencers is authorized by the agency and is within the course and scope of their duties.’ ”

Appellant’s defense was that he possessed the MP5 and silencer while on duty and within the scope of his duties, and that as Chief of Police he was authorized to make decisions about what weapons members of his department should possess and use. Appellant urges that because the trial court did not tell the jurors that the prosecution was required to prove beyond a reasonable doubt that appellant’s possession was unlawful, the jurors would have understood that the defense had to establish the applicability of the exceptions to liability.

“A trial court must instruct the jury on the allocation and weight of the burden of proof (Evid. Code, § 502; *People v. Simon* [(1995)] 9 Cal.4th [493,] 501 [citing Evid. Code, § 502]; *People v. Figueroa* [(1986)] 41 Cal.3d [714,] 721 [same]), and, of course, must do so correctly. It must give such an instruction even in the absence of a request (see *People v. Simon, supra*, 9 Cal.4th at p. 501), inasmuch as the allocation and weight of the burden of proof are issues that ‘are closely and openly connected with the facts before the court, and . . . are necessary for the jury’s understanding of the case’ (*People v. St. Martin* (1970) 1 Cal.3d 524, 531).” (*People v. Mower* (2002) 28 Cal.4th 457, 483-484.)

“As a matter of constitutional due process, the defendant need only raise a reasonable doubt regarding a defense that negates an element of the crime, and in this situation the burden of persuasion is on the People to show the nonexistence of the defense beyond a reasonable doubt.” (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 570; *People v. Mower*, *supra*, 28 Cal.4th at pp. 479-480.) Respondent acknowledges that the prosecution had the burden of proving the inapplicability of the statutory exceptions beyond a reasonable doubt, but maintains the trial court properly instructed the jury on this point.<sup>9</sup>

As can be seen above, the instructions on the offense of “unlawful possession of a submachine gun” informed the jury that the “People must prove” two things: that “the defendant possessed a submachine gun in the State of California” and that “the defendant knew that he possessed a submachine gun in the State of California.” The instructions then stated that the governing statute “authorizes possession of submachine guns” in specified circumstances, but did not indicate which party was required to prove to whether these circumstances applied in this case, or by what standard of proof. This left the jurors with no guidance on how to determine whether the exception to liability applied.

In analogous situations, standard jury instructions make the prosecution’s burden clear. For example, Health and Safety Code section 11357 makes unlawful the possession of marijuana except as authorized by law; the Compassionate Use Act (Health & Saf. Code, § 11362.5) makes Health and Safety Code section 11357 inapplicable to a patient, or the patient’s primary caregiver, “who possesses . . . marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.” CALCRIM No. 2375, concerning possession of more than 28.5 grams of

---

<sup>9</sup> Because of the trial court’s sua sponte duty to instruct in this context, we cannot accept respondent’s contention that appellant waived the claim by failing to request clarification of the instructions in the trial court.

marijuana in violation of Health and Safety Code section 11357, subdivision (c), sets forth the elements of the offense, then states that possession of marijuana is lawful if authorized by the Compassionate Use Act, that the defense must produce evidence tending to show that his or her possession was authorized, and that “[t]he People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess . . . marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.”

Illustrating the same point, section 278.5 sets forth the punishment for a person who maliciously deprives a lawful custodian of a right to custody, while section 278.7 makes section 278.5 inapplicable to a person with a right to custody in certain circumstances. CALCRIM No. 1252, concerning the defense under section 278.7, directs that the defendant “did not maliciously deprive a []lawful custodian of a right to custody” in specified circumstances, then states, “[t]he People have the burden of proving beyond a reasonable doubt that the defendant maliciously deprived a []lawful custodian of a right to custody . . . . If the People have not met this burden, you must find the defendant not guilty . . . .”

“In assessing a claim of instruction error or ambiguity, we consider the instructions as a whole to determine whether there is a reasonable likelihood the jury was misled.” (*People v. Tate* (2010) 49 Cal.4th 635, 696; *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4.) Respondent, asserting the jury was properly instructed, emphasizes that the trial court repeatedly mentioned the prosecution’s burden of proof beyond a reasonable doubt in its instructions. Specifically, the jury was instructed, “A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.” The jury was told that it could rely upon circumstantial evidence to find a fact necessary to find appellant guilty only if the prosecution “proved each fact essential to that conclusion

beyond a reasonable doubt” and that “[y]ou may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt.” The instructions expressly repeated the prosecution’s burden of proof beyond a reasonable doubt with respect to the rape charges and again in the context of the jury’s findings on greater and lesser offenses.

None of these references address the problem appellant has raised. The jury was told generally that the prosecution was required to prove appellant guilty beyond a reasonable doubt, and this admonition was specifically repeated in the instructions concerning the rape charges. When it came to the instructions defining the offenses at issue, however, the only things the jury was told the prosecution had to “prove” were that appellant “possessed” the machine gun (or silencer) and “knew” he did so. “ ‘A specific instruction which is defective in respect to the burden of proof is not remedied by correct general statements of law elsewhere given in the charge unless the general statement clearly indicates that its consideration must be imported into the defective instruction.’ ” (*United States v. Sanchez-Lima* (9th Cir. 1998) 161 F.3d 545, 549, quoting *De Groot v. United States* (9th Cir. 1935) 78 F.2d 244, 253.) The critical facts upon which appellant’s guilt depended—the applicability of the exceptions to liability under sections 12201 and 12501—simply were *not* tied to the prosecution’s burden of proof. The instructions were confusing because they informed the jury that the prosecution was required to “prove” appellant “possessed” the items in question but failed to direct the jury that the prosecution was required to prove appellant possessed them “unlawfully.”<sup>10</sup>

---

<sup>10</sup> In arguing that the wording of the instructions suggested to the jury that appellant was required to “formally establish” that he had been authorized to possess the weapons in question, rather than that the prosecution had to disprove the exceptions to liability, appellant draws an analogy to *People v Figueroa*, *supra*, 41 Cal.3d at page 721. *Figueroa* was a prosecution for unlawful sale of securities. The defense was that the securities in question came within a statutory exemption. *Figueroa* found reversible error in the trial court’s failure to instruct the jury that the defense was only required to raise a reasonable doubt as to the applicability of the statutory exemption. (*Id.* at p. 721.) The court then noted that the error was compounded by the instruction’s statement that “ ‘[i]t is unlawful for any person to offer or sell in this state any security unless such sale has

Respondent also urges any potential juror confusion was alleviated by the parties' closing arguments. A reviewing court "must consider the arguments of counsel in assessing the probable impact of the instruction on the jury." (*People v. Young* (2005) 34 Cal.4th 1149, 1202.) Respondent cites a portion of the prosecutor's argument in which he stated, "There is no dispute that [appellant] could have had those weapons as part of his official duties," then analyzed the evidence to show he did not. According to respondent, in arguing that the evidence showed appellant's possession of the machine gun and silencer were unlawful, the prosecutor accepted the burden of proving the statutory exception inapplicable. The prosecutor never expressly referred to the burden of proof in this context, however, and his argument that the evidence showed appellant did not possess the weapons within the terms of the exception would have been appropriate regardless of which party had the burden of proof on the issue.

Respondent's suggestion that defense counsel's closing argument was "made in the context of the prosecution's burden to prove that appellant had not lawfully possessed the submachine gun and silencer" similarly fails to acknowledge that the argument made no direct reference to the prosecution's burden of proof. Defense counsel did close his argument, as respondent quotes, with the statement that he was "confident that when you hold the District Attorney to his burden of proof in this case . . . the only reasonable conclusion you can reach is that, in fact, my client should be acquitted of all the charges that have been brought before you in this proceeding." This general statement did nothing to clarify the ambiguity created by the instructions on the weapons charges,

---

been qualified or *unless such security has been exempted with the California Corporations Commissioner.*' " (*Id.* at p. 722.) The italicized language, the court stated, gave "the erroneous impression that the Figueroas had to apply for and receive a formal exemption from the Corporations Commissioner." (*Ibid.*) We are not convinced the language of the instruction in this case similarly suggests the defendant was required to take a particular action to trigger application of the exception to liability. This point is not significant, however, as the critical issue is the instruction's failure to make the applicable burden of proof clear.

which specifically referred to the prosecution having to “prove” possession but did *not* expressly refer to its burden of proving *unlawful* possession.

Respondent asserts that the prosecutor emphasized his burden when he reminded the jury at the outset of his final argument that he had the last word because “the burden of proof is on the prosecution.” But this statement was immediately followed by discussion of the rape charges. The prosecutor did discuss reasonable doubt after turning to the weapons charges: After describing certain evidence as demonstrating appellant did not possess the weapons as part of his official duties, the prosecutor asked the jurors to “use a little bit of reason” and gave the definition of reasonable doubt. He went on to argue: “If within reason if something happened to [appellant], he was out of town or he died or if he left, what does Blue Lake have that says those guns are there?” The prosecutor urged that the “paper trail” showed Heckler & Koch sent the weapons to a law enforcement agency but “the city manager said they were never authorized,” they were not registered or reflected on the police department’s inventory list and “[t]here was nothing in the City of Blue Lake that would say those guns were theirs.” The prosecutor’s remarks thus suggested that if there was reason to believe the city would not be able to claim ownership of the weapons if “something happened” to appellant, the jury should find appellant did not possess them within the scope of his official duties. In other words, rather than clarifying that the prosecution had to prove beyond a reasonable doubt that appellant did not possess the machine gun and silencer within his official capacity as specified in the exception to liability, the prosecutor suggested that the jury should find appellant guilty if there was reason to believe he did not so possess the weapons—a significantly lighter burden for the prosecution to meet.

We conclude the trial court erred in failing to instruct the jury on the burden of proof applicable to the exceptions to liability for unlawful possession of a machine gun and a silencer. The remaining question is whether the error requires reversal of appellant’s convictions. Respondent argues the evidence against appellant was

“overwhelming” and proved beyond a reasonable doubt that appellant did not possess the machine gun and silencer lawfully.

There was a great deal of circumstantial evidence that appellant possessed the MP5 and the silencer outside the scope of his official duties. Unlike the weapons found at the police station, the MP5 and silencer were found in a locked safe at appellant’s home to which appellant’s wife did not have access. The machine gun and silencer were not listed on the police department’s weapons inventory, which both city managers and even the defense expert testified they would have expected to include any weapon belonging to the department. Nor were the machine gun and handgun with silencer registered with the state. While state law does not require the police department to register a machine gun or a silencer, the handgun to which the silencer was attached was required to be registered, and there was evidence that agencies would often register weapons that were not required to be registered for liability and tracking purposes. All of the weapons on the police department’s inventory list were registered with the state,<sup>11</sup> and all of the weapons found at appellant’s home except the MP5 and Mark 23 with silencer were registered with the state to appellant or his wife. In this respect, the MP5 and silencer were treated differently from both the weapons appellant personally owned and the weapons belonging to the police department.

The evidence also showed that the machine gun and silencer were obtained in a different manner than some other weapons owned by the police department, supporting an inference that they were not obtained for official use. Both Buck, who was the city manager in 2008, and Rigge, the city manager at the time the weapons were acquired,

---

<sup>11</sup> Appellant argues that the evidence is not clear on this point, citing testimony at the preliminary hearing suggesting there may have been more weapons at the police department than appeared on the inventory and a portion of Tisa’s testimony in which he said that he had not been asked to look into whether all the police department weapons were registered. Dunn affirmatively testified, however, that all of the weapons on the department’s inventory were registered with the state as institutional weapons.

testified that weapons purchased by the city for the police department should be purchased with the city manager's approval and reflected on the city's expanded general ledger. Documentation of such a purchase—a September 2001 purchase of different weapons, reflected in the city's general ledger—was in evidence. By contrast, the city did not purchase the weapons at issue; the paperwork for these items showed that they were ordered by the owner of Cinema Weaponry and shipped to appellant at the police department, and they were not reflected on the city's ledger. Although there was considerable testimony about the DRMO program through which surplus weapons could be obtained without purchase, the documentation of the acquisition of the MP5 and Mark 23 with silencer indicated they were not obtained through this program.

Additionally, although investigators looked, they found no records of training on the machine gun or silencer, and Darcy Seal testified that none of the officers trained on them. The Department's Policies and Procedures Manual contained no policies or procedures regarding training, use or possession of fully automatic machine guns, although there was such information regarding silencers. Defense expert Tisa testified that he would not expect a police department's policies and procedures manual on use of force to specifically discuss use of machine guns or silencers but rather to deal with use of weapons generally, but even he would expect the manual to include requirements for training on particular weapons. He would also expect an officer who owned a weapon as part of his or her official duties to receive training and recertification on that weapon. The only evidence that any Blue Lake police officer "trained" on the MP5 was Gerace's testimony that he believed the one shot he fired at the shooting range, on an occasion when he, his wife, Darcy Seal, Ruby Seal and appellant's son also fired the weapon, was the beginning of training on the weapon.

The Blue Lake Police Department was very small. Both city managers testified that appellant never asked for, and they never gave, approval for appellant to purchase machine guns or silencers for official use. Rigge testified that he would not have

approved such purchases; Buck testified that he did not see the need for such weapons for Blue Lake but that he would have deferred to law enforcement's assessment. Morey testified that while in charge of law enforcement in Blue Lake, he had never felt the need to purchase silencers or arm officers with fully automatic weapons. Darcy Seal was not aware of any purpose for which the city police department would need a weapon with a silencer.

But the evidence was not as strong as respondent suggests. The significance of the weapons being found at appellant's home rather than at the police station was potentially weakened by the fact that appellant was on duty 24 hours a day, seven days a week, with calls to the police department routed to his home after hours. Tisa testified that it would be better for the weapons at issue to be with appellant, rather than kept at the police station, so they would be immediately available to take to a crime scene, and that for safety reasons keeping them in a locked safe would be "due diligence." The strength of the inference that the MP5 and silencer were not police department weapons because they did not appear on the inventory was undermined by the absence of evidence that all other weapons owned by the department were listed. Contrary to respondent's assertion, the evidence did not establish that *every* weapon belonging to the department appeared on the inventory. No witness so testified. Exhibit No. 12, which listed the weapons seized in the search of the police department, was received over objection but never admitted into evidence, and therefore cannot be compared with the inventory. At least some weapons acquired by the department do not appear on the inventory: The two Benelli shotguns purchased by the city for the department in September 2001, at a cost of \$747.20 each, do not appear. The inventory does list two Benelli shotguns, but with an acquisition date of March 2004 and a cost of \$1,000 each, suggesting these may not be the two weapons purchased in 2001. Indeed, the inventory, dated July 2007, lists no item acquired prior to 2004, and no evidence was presented whether this was because items acquired earlier were no longer in the department's possession or were never included in an inventory.

Much of the other evidence was also open to interpretation. While it was clear the weapons at issue were not purchased by the city according to the procedures the city managers described, it was also clear that not all the department's weapons were acquired by purchase: Buck testified that the department's Sig Sauers were "given to us," with the city paying only shipping, and several witnesses described the process by which weapons and other equipment could be obtained through the DRMO program. Accordingly, while the fact that the weapons at issue were not purchased through city procedures could support an inference that appellant obtained them for personal purposes but could also indicate no more than that these weapons, like others in the department's arsenal, were obtained by means other than purchase. The inference that the MP5 and silencer must not belong to the police department because they were not registered with the state while the weapons on the police department's inventory were so registered was undermined by the fact that law enforcement agencies are not legally required to register machine guns and silencers with the state.

The evidence that neither the city managers nor Lieutenant Morey of the County Sheriff's Department saw a need for the police department to own a machine gun or silencer suggests appellant acted inappropriately in obtaining these items, but there was evidence that appellant was the city official with authority to determine the police department's needs and Tisa described the situations in which the weapons would be useful to the police department. That the city managers did not authorize purchase of the weapons suggests appellant went behind their backs in obtaining these items, but there was no evidence that appellant was required to obtain approval from the city manager before acquiring weapons for the department, at least through means other than direct city purchase. Respondent states that appellant did not notify his administrative superior, Lieutenant Morey of the County Sheriff's Department, that the weapons were obtained as police department property, suggesting that this was because Morey would not have approved the acquisition. Morey testified that at the time of trial he was in charge of law

enforcement in Blue Lake, and that he never felt the need to purchase weapons with silencers for law enforcement in the city or to arm officers there with fully automatic weapons. By the time of trial, however, the Blue Lake police department had been disbanded and the county was providing law enforcement services. There was no evidence that while appellant was police chief he had any duty to notify Morey about weapons obtained for the department. Appellant did not hide his possession of the MP5: He had a mount for it in his vehicle, and Buck saw it there. Shaw testified that he installed the mount at the request of the police department and identified the bill for this work.

That appellant kept the weapons at home, where only he had access to them, could demonstrate that he possessed them for personal purposes or could be the consequence of his full time duty as police chief. That Buck was aware appellant possessed the machine gun suggested appellant was not hiding it, but there was no evidence he knew that appellant kept it at home or that it was not listed on the police department's inventory or registered with the state.

Undoubtedly, the evidence raised serious questions about appellant's possession of the MP5 and silencer. But the issue for the jury was whether the evidence proved *beyond a reasonable doubt* that appellant's possession was unlawful. Had the jury been properly instructed, we could confidently say the evidence was sufficient to support its verdict. But the evidence did not compel that result so surely that we can say the jury would necessarily have found appellant guilty if it understood the prosecution was required to prove beyond a reasonable doubt that the exception did not apply. This is all the more true because, as we will discuss below, the jury instructions created a possibility of confusion as to whose approval or authorization was legally required for the acquisition and possession of the weapons. The convictions for unlawful possession of a machine gun and unlawful possession of a silencer must be reversed.

## II.

The other significant problem with the jury instructions in this case arises from the trial court's failure to define the term "agency" as used in former section 12501. Relying on the principle that a trial court is required to define technical terms a jury would not understand, appellant argues the instructions did not correctly inform the jury that the only agency required to authorize appellant's possession of a silencer was the police department, of which appellant was chief. Although the definitional issue arises from the language of former section 12501, concerning possession of the silencer, appellant contends the problem affects his conviction under former section 12201 as well because the instruction affected the jury's determination whether appellant's possession of both the silencer and the machine gun were within the scope of his official duties.

As described above, the jury was instructed that "Penal Code section 12501 authorizes the possession of silencers by regular, salaried, full-time peace officers when on duty and when the use of silencers is authorized by *the agency* and is within the course and scope of their duties." (Italics added.) Section 12501, as relevant here, provides that section 12520's prohibition against possession of silencers "shall not apply to, or affect . . . [t]he possession of silencers by regular, salaried, full-time peace officers who are employed by *an agency listed in Section 830.1* . . . when on duty and when the use of silencers is authorized by *the agency* and is within the course and scope of their duties." (§ 12501, subd. (b); italics added.) Section 830.1 defines persons who are "peace officers" and the extent of their authority; the agencies and categories of officers mentioned in the statute are county sheriffs, city police departments, consolidated municipal public safety agencies performing police functions, superior court marshals, county marshals, certain port wardens and port police officers, district attorneys offices, and the Department of Justice.<sup>12</sup> Appellant's argument is that by referring only to "the

---

<sup>12</sup> Section 830.1 provides: "(a) Any sheriff, undersheriff, or deputy sheriff, employed in that capacity, of a county, any chief of police of a city or chief, director, or

---

chief executive officer of a consolidated municipal public safety agency that performs police functions, any police officer, employed in that capacity and appointed by the chief of police or chief, director, or chief executive of a public safety agency, of a city, any chief of police, or police officer of a district, including police officers of the San Diego Unified Port District Harbor Police, authorized by statute to maintain a police department, any marshal or deputy marshal of a superior court or county, any port warden or port police officer of the Harbor Department of the City of Los Angeles, or any inspector or investigator employed in that capacity in the office of a district attorney, is a peace officer. The authority of these peace officers extends to any place in the state, as follows:

(1) As to any public offense committed or which there is probable cause to believe has been committed within the political subdivision that employs the peace officer or in which the peace officer serves.

(2) Where the peace officer has the prior consent of the chief of police or chief, director, or chief executive officer of a consolidated municipal public safety agency, or person authorized by him or her to give consent, if the place is within a city, or of the sheriff, or person authorized by him or her to give consent, if the place is within a county.

(3) As to any public offense committed or which there is probable cause to believe has been committed in the peace officer's presence, and with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of the offense.

(b) The Attorney General and special agents and investigators of the Department of Justice are peace officers, and those assistant chiefs, deputy chiefs, chiefs, deputy directors, and division directors designated as peace officers by the Attorney General are peace officers. The authority of these peace officers extends to any place in the state where a public offense has been committed or where there is probable cause to believe one has been committed.

(c) Any deputy sheriff of the County of Los Angeles, and any deputy sheriff of the Counties of Butte, Calaveras, Colusa, Glenn, Humboldt, Imperial, Inyo, Kern, Kings, Lake, Lassen, Mariposa, Mendocino, Plumas, Riverside, San Benito, San Diego, San Luis Obispo, Santa Barbara, Santa Clara, Shasta, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Tulare, and Tuolumne who is employed to perform duties exclusively or initially relating to custodial assignments with responsibilities for maintaining the operations of county custodial facilities, including the custody, care, supervision, security, movement, and transportation of inmates, is a peace officer whose authority extends to any place in the state only while engaged in the performance of the duties of his or her respective employment and for the purpose of carrying out the primary function of employment relating to his or her custodial assignments, or when performing other law enforcement duties directed by his or her employing agency during a local state of emergency.”

agency,” without limiting that term to the agencies described in section 830.1, the instruction allowed the jury to assume appellant’s possession of a silencer had to be authorized by another agency such as the city manager’s office or city council.

“ ‘The rules governing a trial court’s obligation to give jury instructions without request by either party are well established. “Even in the absence of a request, a trial court must instruct on general principles of law that are . . . necessary to the jury’s understanding of the case.” [Citations.] That obligation comes into play when a statutory term “does not have a plain, unambiguous meaning,” has a “particular and restricted meaning” [citation], or has a technical meaning peculiar to the law or an area of law [citation].’ (*People v. Roberge* (2003) 29 Cal.4th 979, 988.) ‘A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning.’ (*People v. Estrada* (1995) 11 Cal.4th 568, 574; accord, *People v. Roberge, supra*, 29 Cal.4th at p. 988.)” (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012.) In *Hudson*, for example, the trial court was required to instruct on the specific meaning of “distinctively marked” in statutes defining offenses involving fleeing from a pursuing officer’s motor vehicle; in *Roberge*, instruction was required on the meaning of “likely” under the Sexually Violent Predators Act. (*People v. Hudson, supra*, 38 Cal.4th at pp. 1012-1013; *People v. Roberge, supra*, 29 Cal.4th at p. 988-989.)

In the present case, only one agency listed in section 830.1 was relevant: The Blue Lake Police Department. Accordingly, appellant’s possession of the silencer would not have been unlawful if it was “when on duty” and “the use of silencers [was] authorized by” the Blue Lake Police Department and was “within the course and scope of [his] duties.” (Former § 12501, subd. (b).) The evidence at trial, however, also addressed another agency—the city manager’s office—as considerable attention was devoted to questions about whether the city manager approved the acquisition of the weapons at issue. By referring to “agency” without further definition, rather than limiting the instruction to the police department, the court left the jury with no guidance

on which “agency” the instruction referred to. Respondent urges that the term “agency” itself was used according to its common meaning, but, at least in the circumstances of this case, that common meaning was much broader than the restricted meaning applicable in this legal proceeding.

Respondent further urges that even if the court should have defined the term, there was no prejudice because it was never suggested that appellant needed approval from any other agency. According to respondent, the prosecution never disputed that appellant had the requisite agency authority to possess the machine gun or silencer and discussed approval of the city manager only in the context of arguing that appellant did not follow normal channels in acquiring the machine gun and silencer so that there would be no official record making these items department property.

The record is not clear on this point. Respondent cites the prosecutor’s statement in closing argument that “[t]here is no dispute” that appellant could have possessed the machine gun and silencer lawfully if he did so as part of his official duties. The prosecutor stated, “The instructions on the weapons . . . tell you that an officer or a department may have machine guns or a silencer as part of their official duties. That’s the law. [¶] There is no dispute that [appellant] could have had those weapons as part of his official duties. The question is whether he did. So, let’s analyze that.” But nothing in these remarks addresses the point at issue here: Who is required to authorize such possession?

Appellant characterizes the prosecution’s theory of the case as being that because the city manager did not expressly authorize possession or purchase of the MP5 or silencer, appellant’s possession was not authorized by an “agency” and the statutory exceptions did not apply. Appellant cites precisely the same pages of the prosecutor’s argument as respondent relies upon in arguing the issue of city manager approval was discussed by the prosecutor only to show appellant was attempting to avoid a “paper trail” showing the weapons to be city property.

After arguing that appellant kept the weapons where he alone had access to them, that they were not on the department's inventory and were not registered, that the officers were not trained to use these weapons and that the department's manual did not cover these weapons, respondent noted Tisa's testimony that the weapons were appropriate for the department and asked, "If they're so necessary, why didn't [appellant] ever ask his city managers for permission to get them? [¶] We have direct evidence that he never asked the city managers, never told them there was a tactical reason for the purchase of these sort of weapons." The prosecutor noted that appellant asked Buck about obtaining other submachine guns, ostensibly for trade purposes, and argued, "That's why Wiley Buck authorized those guns, but the guns that were purchased in 2001, the guns in issue, never mentioned." The argument continued, "Those guns that are so necessary, . . . no request was made for the purchase of them, they weren't purchased by Blue Lake Police Department." He then showed the jury the documentation of the process Rigge described for weapons being purchased for the police department: "before weapons are purchased by the Blue Lake Police Department, the chief of police would talk to him, get permission to do so, explain the reason why it's authorized, then it's paid for." The Benelli shotguns, the prosecutor argued, were reflected on the inventory list and registered with the state; the guns at issue were not registered, "They're unauthorized. They aren't even asked to be authorized. And they don't show up anywhere." Asking who the guns would belong to if appellant were to die, the prosecutor asked, "Did Blue Lake pay for them? Are they on their inventory list? Were they ever authorized? Has anyone trained on them? Doesn't everything indicate that those guns don't belong to Blue Lake?"

Later, the prosecutor argued that if appellant had informed the city managers that the department needed an MP5 to respond to a possible situation at the casino, the managers would have deferred to appellant: "They would have said, it's fair to believe, even though they didn't think it was reasonable, 'Fair enough. You're the chief. You

know what the needs are. Get one.’ [¶] That never happened. That never happened. Later on in 2007 we know that Wiley Buck later on authorized the accumulation of quite a large amount of machine guns for trade. Okay. . . . [¶] What happens is you have a chief of police. There is a process. He is not a law unto himself. There is a city manager that he needs to respond to. If he wants to get weapons, just like the shotguns, he needs to ask permission. If he gets permission, it’s authorized, and it’s purchased by the City. [¶] You have an October purchase. You have a September purchase. One is the one that’s authorized. You have all the documentation from the City and from the vendor, and you have the authorization of the city managers. Those guns are also on the Blue Lake Police Department inventory list. They’re also registered as institutional weapons with the California Department of Justice. The guns bought a month later: No, no, no, no, no.”

The prosecutor’s questioning of the city managers and argument to the jury clearly suggested that appellant needed the approval of the city manager to lawfully obtain the weapons in question. Given this context, jurors could easily have formed the impression that the “agency” required to authorize use of silencers was not the police department itself but the city manager’s office. The potential confusion could have been avoided easily, since the only “agency” relevant under former section 12501 was the Blue Lake Police Department. In these circumstances, using the general term “agency” was insufficient to ensure the jury’s understanding of the issues.

### **III.**

Appellant raises a third instructional issue that we do not find persuasive. According to appellant, if a full time, salaried peace officer possesses a machine gun or silencer while on duty and with agency authorization, even with intent to possess the weapon as personal property, mere possession cannot violate former sections 12201 or 12501. Rather, appellant argues, there must be evidence the peace officer *used* the

machine gun or silencer outside the scope of his or her duties, and the jury should have been so instructed.

Appellant relies upon caselaw defining “use” to mean “ ‘to carry out a purpose or action by means of,’ to ‘make instrumental to an end or process,’ and to ‘apply to advantage.’ ” (*People v. Chambers* (1972) 7 Cal.3d 666, 672, quoting Webster’s New Internat. Dict. (3d ed. 1961).) The cases he relies upon concerned the section 12022.5 enhancement for use of a firearm, which requires a more significant penalty than that required for a defendant who is merely armed during commission of an offense. (*People v. Chambers, supra*, 7 Cal.3d at p. 672; *People v. Granado* (1996) 49 Cal.App.4th 317, 325, 329; *Alvarado v. Superior Court* (2007) 146 Cal.App.4th 993, 1003-1004; *People v. Hays* (1983) 147 Cal.App.3d 534, 544-547.)<sup>13</sup> *Chambers* explained, “By employing the term ‘uses’ instead of ‘while armed’ the Legislature requires something more than merely being armed. (*People v. Washington* (1971) 17 Cal.App.3d 470, 474.) One who is armed with a concealed weapon may have the potential to harm or threaten harm to the victim and those who might attempt to interrupt the commission of the crime or effect an arrest. (See *People v. Pheaster* (1963) 215 Cal.App.2d 754.) Although the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of a firearm in aiding the commission of one of the specified felonies. ‘Use’ means, among other things, ‘to carry out a purpose or action by means of,’ to ‘make instrumental to an end or process,’ and to ‘apply to advantage.’ (Webster’s New

---

<sup>13</sup> Appellant also cites *People v. Piper* (1986) 42 Cal.3d 471, 475-476. *Piper* held that section 1192.7, subdivision (c)(8), which defines “ ‘serious felony’ to mean ‘any other felony in which the defendant inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant uses a firearm’ ” requires personal use of the firearm. The court noted that if the legislature had intended the statute to apply more broadly, it likely would have defined “serious felony” as including “any felony ‘in which a firearm is used’ rather than ‘in which the defendant uses a firearm.’ ” This distinction is not directly relevant to the question before us.

Internat. Dict. (3d ed. 1961).) The obvious legislative intent to deter the use of firearms in the commission of the specified felonies requires that ‘uses’ be broadly construed.” (*People v. Chambers, supra*, 7 Cal.3d at p. 672.) Simply put, these cases explain that “a gun is ‘used’ when there is evidence of gun-related *conduct* coupled with the intent the gun-related action *facilitate* the crime.” (*Alvarado v. Superior Court, supra*, 146 Cal.App.4th at p. 1005; *People v. Granado, supra*, 49 Cal.App.4th at p. 329.)

The sense in which the term “use” is employed in former sections 12201 and 12501 is very different. Sections 12201 and 12501 concern the circumstances under which possession of a machine gun or silencer are lawful or unlawful. The language of these statutes makes clear that the focus is on *possession* of the items at issue, with the term “use” employed to define the circumstances that make possession of the item lawful.

Section 12201, part of a chapter entitled “Machine Guns,” sets forth two “exemptions” from the provisions of the chapter, stating, “[n]othing in this chapter shall affect or apply to . . . [t]he sale to, purchase by, or possession of machineguns by police departments” and other specified agencies “for use in the discharge of their official duties,” or “[t]he possession of machineguns by regular, salaried, full-time peace officer members of a police department” and other specified agencies “when on duty and if the use is within the scope of their duties.” The other provisions in the chapter define the term “machinegun” (former § 12200 [now § 16880]<sup>14</sup>, make unlawful the possession or knowing transportation of a machine gun except as authorized by the chapter (former § 12220 [now § 32625]), declare it a public nuisance to possess a machine gun in violation of the chapter (former § 12251 [now § 32750]) and set forth rules governing permits and licenses to sell machine guns (former §§ 12230 [now § 32650], 12231 [now

---

<sup>14</sup> Under the Deadly Weapons Recodification Act of 2010, the definition now appears in a statute defining terms for the Act as a whole rather than in the separate chapter concerning machine guns.

§ 32655], 12232 [now § 32660], 12233 [now § 32665], 12234 [now § 32670], 12250 [now §§ 32700, 32705, 32710, 32715, 32720]).

Similarly, section 12501 sets forth “exemptions” to the provisions of a chapter entitled “Firearm Devices,” which defines the term silencer (former § 12500 [now § 17210]<sup>15</sup>) and makes possession of silencers unlawful (former § 12520 [now §33410]). Section 12501 provides that “Section 12520 shall not apply to, or affect, any of the following . . . [t]he sale to, purchase by, or possession of silencers by agencies listed in Section 830.1” or state or federal military forces “for use in the discharge of their official duties,” “[t]he possession of silencers by regular, salaried, full-time peace officers” who are employed by the above listed agencies “when on duty and when the use of silencers is authorized by the agency and is within the course and scope of their duties” or “[t]he manufacture, possession, transportation, or sale or other transfer of silencers” to the listed agencies by federally registered dealers or manufacturers.

These statutes do not distinguish a peace officer’s “use” of a machine gun or silencer from simple “possession.” They are not concerned with how the weapon is actively used but with who may legally possess the weapon, and in what circumstances. The statutes are expressly about “possession.” They employ the term “use” in referring to the parameters of the officer’s job, providing that possession which would otherwise be unlawful is lawful in the specified circumstances; these circumstances include that the officer be on duty and the use of the weapon be within the scope of the officer’s duties. Nothing in the statutes suggests that possession outside the specified circumstances is lawful unless the officer actually puts the weapon to use in a specific situation. If this were the proper construction, a peace officer whose duties do *not* include using a machine gun or silencer could nevertheless possess the item as long as the officer did not

---

<sup>15</sup> Under the new codification, this definition is also contained in the general definitions statute rather than in the separate chapter pertaining to silencers.

put it to use. This would be contrary to the general proscription of former sections 12220 and 12520.

Relying upon *People v. Backus* (1979) 23 Cal.3d 360 (*Backus*), appellant argues that a police officer otherwise subject to immunity for acts within the scope of his or her duties can lose that immunity only upon evidence of a specific act the officer committed outside the scope of duty. In *Backus*, the trial court found police officers charged with conspiracy to furnish heroin immune from prosecution under Health and Safety Code section 11367, which provides immunity from prosecution for violations of the Uniform Controlled Substances Act for “duly authorized peace officers, while investigating violations of [the Uniform Controlled Substances Act] in performance of their official duties.” The evidence showed, among other things, that the officers supplied addicts who were providing information to the officers with heroin obtained in arrests. (*Backus*, at pp. 370-379, 383-384.) Furnishing narcotics is a violation of the Uniform Controlled Substances Act. (*Id.* at p. 382; Health & Saf. Code, § 11352.) The Supreme Court found that although such violations come within the purview of the Health and Safety Code section 11367 immunity, the officers were not immune because they failed to “comply with the statutory provisions governing disposition of the heroin they seized and purchased” and therefore “acted outside the scope of their duties as peace officers.” (*Backus*, at p. 385.)

The prosecution in *Backus* necessarily had to show the officers engaged in specific acts outside the scope of their duties because the specific acts charged—such as furnishing heroin to a particular addict under specific circumstances—would have been immunized if committed within the scope of their duties. As explained above, here the alleged violation is not that appellant made use of the machine gun or silencer on a particular occasion in a way that exceeded the scope of his duties but that his possessing the weapons at all, in the circumstances of this case, exceeded the scope of his duties.

Appellant’s reliance on cases involving offenses such as resisting or committing an assault or battery against an officer engaged in the performance of his or her duties (e.g., §§ 69, 148, 243, subd. (b), 245, subd. (c)) is similarly unavailing. “[A] defendant cannot be convicted of an offense against a peace officer ‘*engaged in . . . the performance of . . . [his or her] duties*’ ’ unless the officer was acting lawfully at the time the offense against the officer was committed. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217, original italics; see also *People v. Simons* (1996) 42 Cal.App.4th 1100, 1109.) ‘The rule flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in “duties,” for purposes of an offense defined in such terms, if the officer’s conduct is unlawful. . . . [¶] . . . [T]he lawfulness of the victim’s conduct forms part of the corpus delicti of the offense.’ (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1217.)” (*In re Manuel G.* (1997) 16 Cal.4th 805, 815.) For example, a defendant cannot be convicted of resisting arrest if the arrest is found to be unlawful because probable cause was lacking or the arresting officer acted with excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 44-45.) In such cases, the prosecution must prove that the arresting officer acted lawfully on a specific occasion. Again, the situation in the present case is different: The issue is not whether appellant acted unlawfully by specific conduct on a certain occasion but whether his on-going possession of the weapons in question was lawful.

### **DISPOSITION**

The erroneous instructions concerning the prosecutor’s burden of proof and the meaning of “agency” in connection with the weapons charges requires reversal of appellant’s convictions for unlawful possession of a machine gun and unlawful possession of a silencer are reversed.<sup>16</sup> The remaining misdemeanor conviction for

---

<sup>16</sup> In view of this conclusion, we find it unnecessary to reach appellant’s claims of error in admitting certain evidence at trial and of ineffective assistance of counsel.

disobeying a court order was not a subject of this appeal and is unaffected by our decision.

The convictions for unlawful possession of a machine gun and unlawful possession of a silencer are reversed.<sup>17</sup>

---

Kline, P.J.

We concur:

---

Haerle, J.

---

Lambden, J.

---

<sup>17</sup> By separate order filed concurrently with this opinion, appellant's petition for writ of habeas corpus (A132260) is denied as moot.