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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD HENDERSON,

Defendant and Appellant.

E054489

(Super.Ct.No. FVA1000427)

OPINION

APPEAL from the Superior Court of San Bernardino County. Arthur Harrison, Judge. Affirmed.

Thomas E. Robertson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Melissa Mandel and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Richard Henderson, who had been convicted of a felony, slept over at the home of a friend. The next morning, in the room where defendant had been sleeping, the police found five firearms. The friend denied any knowledge of the firearms.

After a jury trial, defendant was found guilty of possession of a firearm by a felon (Pen. Code, former § 12021, subd. (a)(1); see now Pen. Code, § 29800, subd. (a)(1)). In a bifurcated proceeding, the trial court found one prior prison term enhancement (Pen. Code, § 667.5, subd. (b)) to be true. Defendant was sentenced to a total of three years in prison, along with the usual fines and fees.

Defendant now contends that the trial court erred by refusing his request for an instruction on accident. We will hold that the trial court properly refused the request because, when defense counsel requested an accident instruction, there was no substantial evidence to support one, and later, after the defense had introduced some evidence arguably supporting an accident instruction, defense counsel did not renew his request. Separately and alternatively, we will also hold that the refusal to instruct on accident was harmless.

I

FACTUAL BACKGROUND

On March 9-10, 2010, defendant and his girlfriend, Stacie Kilgo, stayed at the home of defendant's friend, Christopher Readman. Defendant and Kilgo slept in a back bedroom.

The next morning, defendant and Kilgo got into an argument. Kilgo threw a rock through defendant's windshield, then left. A neighbor called the police.

While looking for Kilgo, a police officer saw firearms in the back bedroom. Readman then consented to a search of the back bedroom. In that search, the police found three rifles leaning against the wall, one shotgun on a wall rack, and one handgun in a desk drawer. All but the handgun were "in plain view." The firearms were never fingerprinted or tested for DNA.

According to a police officer, Readman told him that the firearms belonged to defendant. At trial, Readman denied saying this. However, he also testified that he did not have any firearms in his home. Defendant told the police that "the guns were not his[.]"

One of the firearms had been stolen. Otherwise, however, Readman had no apparent reason to lie; for example, he had not been convicted of a felony.

Kilgo, testifying for the defense, denied seeing any firearms in the back bedroom. She explained that Readman "stores a lot of things in that room[,] like fishing poles. . . . There's a lot of things boxed up in there, so it's kind of cluttered . . ." ¹ If she had seen a gun, she "would [have] question[ed] it, . . . like what is that there for." She also testified that defendant did not bring any firearms into the house.

¹ The exhibits included photographs of the firearms taken in the police evidence room, but none taken in situ and no photographs of the bedroom itself.

Kilgo admitted that she had not contacted the police or the prosecution with this information before trial. She had contacted defense counsel for the first time after listening to Readman testify at a hearing on the previous day.

It was stipulated that defendant had been convicted of an unspecified felony.

II

DEFENDANT’S REQUEST FOR AN ACCIDENT INSTRUCTION

A. *Additional Factual and Procedural Background.*

After all prosecution witnesses had testified, but before Kilgo, the only defense witness, testified, the trial court held an instructions conference. At the conference, defense counsel requested CALCRIM No. 3404, which would have provided:

“Defendant is not guilty of [unlawful possession of] a firearm if he [did not] act[] with th[e] intent [required for that crime] but instead acted accidentally[. Y]ou may not find the defendant guilty of [unlawful] possession of a firearm unless you are convinced beyond a reasonable doubt that he acted with that intent.”²

This discussion followed:

“[PROSECUTOR]: There’s no evidence to support the instruction.

² Defense counsel’s oral recitation of his proposed instruction was somewhat garbled. However, when his proposed instruction is read together with the standard wording of CALCRIM No. 3404, what he was asking for is reasonably clear.

“THE COURT: I think you’re right. There has to be substantial evidence to support it. And if there were substantial evidence, I would be required to give it, but I’m not going to at this point.

“[DEFENSE COUNSEL]: I understand because it’s a felon in possession. But since his guns were in plain view, I see it becomes problematic.

“THE COURT: That is the problem.”

The trial court did instruct on the union of act and intent. (CALCRIM No. 250.)

It also instructed that the elements of the charged crime included that:

“1. The defendant owned, received, or possessed a firearm;

“2. The defendant knew that he owned, received, or possessed the firearm”

(CALCRIM No. 2511.)

Finally, it instructed that possession requires “that a person knowingly exercised control over or the right to control a thing” (CALJIC No. 1.24.)

B. *Analysis.*

1. *General principles.*

Unlawful possession of a firearm requires “knowledge of the character of the object possessed” (*People v. Mendoza* (1967) 251 Cal.App.2d 835, 843), plus the intent to possess it (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922).

“A person who commits a prohibited act “through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence” has not committed a crime. [Citation.] Thus, a felon who acquires possession of a firearm

through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent.’ [Citation.]” (*People v. Kim* (2011) 193 Cal.App.4th 836, 846.)

Because the so-called “defense” of accident is actually a claim that the prosecution has failed to prove the intent element of the crime, the trial court has no duty to instruct on it sua sponte. (*People v. Anderson* (2011) 51 Cal.4th 989, 997.) “A trial court’s responsibility to instruct on accident . . . generally extends no further than the obligation to provide, *upon request*, a pinpoint instruction relating the evidence to the mental element required for the charged crime.” (*Ibid.*)

“A trial court must give a pinpoint instruction, even when requested, only if it is supported by substantial evidence. [Citation.]” (*People v. Ward* (2005) 36 Cal.4th 186, 214-215.) “In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether “there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt” [Citations.]’ [Citations.]” (*People v. Mentch* (2008) 45 Cal.4th 274, 288.)

2. *The timing of the request for the instruction.*

In arguing that there was substantial evidence to support an accident instruction, defendant relies on Kilgo’s testimony that the back bedroom was cluttered and that she did not see any of the firearms. The problem with this is that defense counsel requested the instruction, and the trial court denied the request, *before Kilgo testified*.

“[W]e examine the record before the trial court at the time of its ruling. [Citation.]” (*People v. Mendoza* (2000) 24 Cal.4th 130, 161 [pretrial motion for severance].) “Appellate courts rarely accept . . . evidence that is developed after the challenged ruling is made. [Citation.] This is so in part because an appellate court reviews the correctness of a record that was before the trial court at the time it made its ruling. [Citation.]” (*In re Robert A.* (2007) 147 Cal.App.4th 982, 990; see also *In re Zeth S.* (2003) 31 Cal.4th 396, 405.)

The evidence admitted before the instructions conference showed that defendant slept in the back bedroom and that the firearms in the back bedroom were “in plain view.” The shotgun “was on [a] rack that was hanging on the wall.” Officers had spotted the firearms while going through the house looking for Kilgo.

Moreover, at that point, there was *no* evidence that the firearms were *not* in plain view. Defendant told the police that he did not own the guns, but there was no evidence that he denied being in possession of them. Consistent with this state of the evidence, defense counsel conceded that his request for an accident instruction was “problematic” because the “guns were in plain view”

If defense counsel felt that Kilgo’s testimony supported an accident instruction, he had two options. First, at the instructions conference, he could have made an offer of proof. It appears that he did not do so because Kilgo had given him a somewhat different account than her later testimony. According to Kilgo, she contacted defense counsel for the first time after listening to Readman testify at a hearing on August 24, 2011. In the

afternoon of August 24, 2011, the prosecutor stated, “. . . I was just notified that [defense counsel] may be calling Stacie Kilgo.” Defense counsel agreed, then added, “She . . . stated that [Readman] testified accurately that they did stay the night in the room. And when she arrived with Mr. Henderson and *when they slept in the room, the guns were there* and he didn’t bring the guns.” (Italics added.) Thus, Kilgo apparently did not tell defense counsel that she did not see the firearms. If anything, she told him (or at least implied) that she *did* see them.

Second, after Kilgo testified, but before the trial court instructed the jury, defense counsel could have requested an accident instruction. However, he did not do so. As already noted, even if there was evidence of accident, the trial court was not required to instruct on accident sua sponte.

We therefore conclude that the trial court did not err by failing to give defendant’s requested accident instruction.

3. *Harmless error.*

Separately and alternatively, even assuming the trial court erred by failing or refusing to give an accident instruction, the error was not prejudicial.

As already mentioned, accident is not a genuine affirmative defense; rather, it disproves a mental element of the crime. Here, the jury was instructed on this element; defendant does not argue otherwise. An accident instruction would merely have pinpointed the defense theory that this element was missing.

This is not a case in which there was a failure to instruct on an element of the crime. Hence, the federal constitutional harmless error standard does not apply. (See *People v. Cornwell* (2005) 37 Cal.4th 50, 89, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Rather, the “[e]rroneous failure to give a pinpoint instruction is reviewed for prejudice under the [state-law] *Watson*^[3] harmless error standard. [Citations.]” (*People v. Larsen* (2012) 205 Cal.App.4th 810, 830-831.) This standard “inquires whether there is a ‘reasonable probability’ that a result more favorable to the defendant would have occurred absent the error. [Citation.]” (*People v. Aranda* (2012) 55 Cal.4th 342, 354.)

Here, in closing argument, the prosecutor conceded that one element of the crime was that “defendant knew that . . . he possessed the firearm.” In arguing that the prosecution had proved the necessary knowledge, he noted that Kilgo’s testimony that she had not seen the firearms was to the contrary, but he argued that it was not credible.

In light of the instructions that were given, as well as the arguments of counsel, the jury would have been well aware that, if it had a reasonable doubt that defendant knew the firearms were there, it should acquit. Evidently it simply did not believe Kilgo. We see no reasonable probability that, if the trial court had also given defendant’s requested accident instruction, defendant would have enjoyed a more favorable outcome.

³ *People v. Watson* (1956) 46 Cal.2d 818, 836.

Defendant relies on *People v. Gonzales* (1999) 74 Cal.App.4th 382, disapproved on other grounds in *People v. Anderson, supra*, 51 Cal.4th at p. 998, fn. 3, which held that the failure to give an accident instruction was prejudicial under the circumstances in that case. (*Gonzales*, at p. 391.) There, however, during deliberations, the jurors sent out a question requesting clarification of the meaning of “willful intent.” (*Id.* at p. 388.) The court reread several of the pertinent instructions, but the jurors indicated that they were still “troubled.” (*Ibid.*) Thereafter, the jurors indicated that they were deadlocked. One stated that there was still a problem with the meaning of “willful intent.” (*Id.* at p. 389.) The jurors eventually reached a verdict without any further instructions on this point. (*Id.* at pp. 384, 389.)

Needless to say, nothing similar happened in this case. The jury did send out several questions, including one that, while somewhat vague, apparently related to the difference between actual and constructive possession.⁴ However, the jury did not seem

⁴ The jury’s question asked:

“Can we get clarification on

“A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person’

“also

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

“also

[footnote continued on next page]

to have any problem with the mental element of unlawful possession. Significantly, defense counsel did not ask the court to respond to the jury’s question by instructing on accident. Thus, like us, he evidently did not view its question as related to this issue.

We therefore conclude that the asserted error was harmless.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.

[footnote continued from previous page]

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

With the concurrence of both counsel, the trial court responded, in part, “Both statements are correct, and are designed to convey the same meaning.”