IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **TIEN DUC NGUYEN,** Defendant and Appellant.	Case No. G046081

Orange County Superior Court, Case No. 10WF0918
The Honorable Daphne Sykes Scott, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On April 7, 2011, an Orange County Superior Court jury found appellant guilty of attempted manufacture of an assault weapon (Pen. Code, §§ 664, subd. (a), and 12280, subd. (a)(1); Count 1) and attempted possession of an assault weapon (Pen. Code, §§ 664, subd. (a), and 12280, subd. (b); Count 2). (CT 31 [minute order], 188-189 [verdict forms].) Appellant pled guilty to possession of a firearm by a felon (Pen. Code, §12021, subd. (a)(1); Count 3) and possession of ammunition by a person prohibited from possessing ammunition (Pen. Code, §12316, subd. (b)(1); Count 4). Appellant also admitted that he had one strike prior conviction (Pen. Code, §§ 667, subds. (d), and (e)(1), and 1170.12 subds. (b) and (c)(1)). (CT 16 [minute order].)

On November 14, 2011, appellant was sentenced to six years in prison. (CT 37 [minute order], 295 [abstract of judgment].)

Appellant filed a notice of appeal on November 29, 2011. (CT 293.)

STATEMENT OF FACTS

On March 17, 2010, Buena Park Police Officer Brian Chapman, who was assigned to the Auto Theft Task Force, and several other officers went to an auto repair business located at 13040 Hoover Street in Orange County as part of an ongoing investigation. (1 RT 101-102.) Officer Chapman contacted appellant, who was the owner, at the shop. Chapman asked appellant if he had any weapons on the premises. (1 RT 102-103.) Appellant admitted that he had a rifle he used for hunting and showed Officer Chapman pictures on his cell phone of dead pigs appellant claimed he had shot and killed. (1 RT 103.) Officer Chapman asked appellant where he kept the rifle and appellant led him to a storage area located above the store office. Inside the storage room, appellant had a .50 caliber DTC rifle ("DTC rifle"), which Officer Chapman described as a fully assembled,

"very large, large-caliber, bolt-action-type rifle." (1 RT 103, 105.) The rifle did not contain a manufacturer's name stamp, serial number or other identification marks.

Officer Chapman testified that rifles are not typically used for pig hunting and referring to appellant's DTC rifle, Officer Chapman stated, "even calling it an elephant gun would be an understatement." (1 RT 109.) The DTC rifle did not have a manufacture name or serial number, typically required when registering a weapon. (1 RT 110, 113.) Officer Chapman asked appellant about the lack of a serial number or manufacturer's name on the rifle. Appellant replied that he had purchased the lower portion of the rifle, which usually contains the manufacturer's name and serial number, off the internet. (1 RT 113.) Appellant explained that the lower portion of the rifle was not completed and was not considered a completed receiver when he purchased it off the internet. Appellant then completed the receiver by drilling it to the upper portion of the rifle, which he had also purchased off the internet. Appellant admitted that the rifle was capable of being fired. (1 RT 113-114.) Officer Chapman "dry-fired" it and found it to be in good working order. (1 RT 114-115.)

Officer Chapman asked appellant if he possessed any ammunition. Appellant showed him a box containing 50 rounds of .50 caliber DTC ammunition. Appellant received the ammunition through the mail. (1 RT 116.) Officer Chapman asked appellant if he had any other ammunition and appellant showed him 120 rounds of .50 caliber Beowulf ammunition. (1 RT 116-117.) Appellant said he purchased the Beowolf ammunition for his pig hunts and it was left over from one of his hunts. (1 RT 117.) The Beowolf ammunition did not fit the DTC rifle. (1 RT 117.) Appellant said that the Beowolf ammunition fit a different type of rifle that he had rented to go pig hunting. (1 RT 117-118.)

Officer Chapman asked appellant if he had any other weapons in the shop and appellant said he was making an AK-47 weapon (hereafter "AK-47"). (1 RT 119, 121.) Officer Chapman asked appellant to show him the AK-47 and appellant took him to another part of the shop where Officer Chapman saw a large box containing parts for an AK-47. (1 RT 119-120.) Appellant showed Officer Chapman a website on the computer called AK-Builder.com. (1 RT 121.) The receiver in the kit did not have a manufacturer's name or serial number on it and appellant explained that he had purchased the lower receiver, which Officer Chapman described as a piece of metal with holes in it which was bent into the correct shape to hold the internal parts of the AK-47. Appellant admitted that he had personally altered the receiver and bent it into the proper shape to assemble the AK-47. (1 RT 122.) Appellant admitted that he knew making and having his own AK-47 rifle was wrong. (1 RT 123.)

Officer Chapman asked appellant if he had any other weapons. Appellant admitted that he also had a shotgun registered to his wife, but appellant had lent it to another person. (1 RT 123.) Officer Chapman asked appellant for permission to search his home and appellant consented. (1 RT 124.) Later that afternoon, Officer Chapman and the other officers searched appellant's home. They did not find any more weapons but did find the box and receipt for the DPC rifle receiver. They also discovered a moderate size gun safe inside a hall closet. The door to the safe was wide open and there was nothing inside. (1 RT 124-125.) During the search of appellant's shop, Officer Chapman noticed appellant in the back alley of his shop using his cell phone several times. (1 RT 123.)

Officer Chapman later looked at the website appellant had shown him called AK-Builder.com and saw that the site sold an AK-47 "flat receiver dye set," used to bend the flat receiver into the proper shape to assemble an AK-47. (1 RT 130.) In a taped interview with appellant the following day,

Officer Chapman asked appellant if he had used the dye set to bend the receiver and appellant admitted he had. (1 RT 131.)

Officer Chapman compared the AK-47 parts in the box found in appellant's shop with the diagram of the parts of a working AK-47. The parts in the box were the same parts described in the diagram of a working AK-47, with some slight variations; appellant's AK-47 had a folding stock verses a fixed stock and no forward pistol grip. (1 RT 139-141.) Appellant told Officer Chapman that the box contained all of the parts for an AK-47 with the exception of the receiver, which he had bought separately. (1 RT 161.) Officer Chapman testified that a lot of the work that was required for the assembly of the AK-47 had been completed. (1 RT 162.) He testified that the receiver was "mostly complete" and the only thing that needed to be done to make it complete was to drill one more hole into the receiver in order to place pins into it to hold the internal parts. (1 RT 152.)

Orange County Sheriff Sergeant Greg Schuch, a firearms expert, testified that he compared the parts of appellant's AK-47 to a fully functioning AK-47 type rifle. (2 RT 167.) Sergeant Schuch testified that appellant possessed all of the parts necessary to complete an AK-47 weapon and when all of the parts were assembled together they would function as a semiautomatic, centerfire rifle which had the capacity to accept a detachable magazine, a forward pistol grip which protruded conspicuously beneath the action of the weapon, and a folding stock. (2 RT 213-216.) Sergeant Schuch testified that the .50 Beuwolf ammunition found in appellant's shop was a considerably large and powerful round of ammunition. (2 RT 180.)

Defense

Michael Penhall, a gunsmith and gun store owner, testified that the receiver in the box of AK-47 parts found in appellant's shop did not appear ready to be installed. (2 RT 267-269, 273.) Penhall opined that it would

take a fair amount of work to make the receiver "functional." (2 RT 276.) Penhall testified that the rails still needed to be welded onto the receiver to complete the assembly of the receiver. (2 RT 292-294.) Also, in order to complete the receiver, the gas block needed to be installed to the barrel, the trigger and hammer pin holes needed to be drilled, and the trigger guard needed to be installed. (2 RT 294-296, 298.) Penhall testified that the parts in their current state did not constitute a rifle in any form and it would take about eight hours to complete the assembly. (2 RT 294, 307.) Penhall also testified that the magazine would be fixed if a magazine lock was attached to the rifle. (2 RT 301.)

On cross examination, Penhall testified that all of the parts needed to build a semiautomatic, centerfire weapon, were in the box found in appellant's shop and that weapon would have the capacity to accept a detachable magazine, including a pistol grip that would protrude conspicuously beneath the action of the weapon. The weapon would also have a folding stock, and a forward pistol grip. (2 RT 310-311.)

ARGUMENT

I. THE PRIMARY THEORY OF CONVICTION WAS NOT LEGALLY ERRONEOUS

Appellant contends that the primary theory of conviction for attempted manufacture and possession of an assault weapon (Counts 1 and 2) was legally erroneous because the legislature crafted the AWCA to prohibit only fully assembled assault weapons. (AOB 7-13.) Contrary to appellant's claim, the trial court properly allowed the prosecution to proceed on an attempted manufacture and possession of an assault weapon theory.

A. Relevant Background

The felony complaint in this case charged appellant with manufacture and possession of an assault weapon in violation of Penal Code section 12280, subdivision (a)(1) and (b)[1], among other charges and allegations not relevant here. (CT 44.)

Following the preliminary hearing, the trial court found appellant committed the lesser included offense of *attempted* manufacture of an assault weapon and *attempted* possession of an assault weapon. (CT 119-120.)

The prosecution subsequently filed an information charging appellant with attempted manufacture and attempted possession of an assault weapon in violation of Penal Code sections 664, subdivision (a) and 12280, subdivisions (a)(1) and (b). Appellant later pled guilty to and admitted the additional charges of being a felon in unlawful possession of firearms and ammunition. (CT 123.)

B. The Assault Weapons Control Act (AWCA)

In 1989, the Legislature enacted the AWCA. (Pen.Code, § 12275 et seq.) Relevant here, Penal Code section 12280, subdivision (a) prohibits the manufacture, distribution, transportation, importation, offer for sale, gift, or loan of any assault weapon. The crime is a felony. Penal Code section 12280, subdivision (b) prohibits the possession of any assault weapon. The crime is a "wobbler." A "semiautomatic, centerfire rifle that

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[1] In 2010, Penal Code section 12280, and other AWCA statutes prohibiting manufacture and possession of assault weapons, were repealed by Stats.2010, c. 711 (S.B.1080), § 6, operative Jan. 1, 2012, and continued as renumbered penal code sections. However, to avoid confusion and to maintain consistency with the penal code sections set out in appellant's opening brief, respondent's opposition to appellant's claims will refer to the pertinent pre-2012 penal code sections for assault weapons and the .50 caliber DTC rifle.

has the capacity to accept a detachable magazine and . . . [ ] [a] pistol grip that protrudes conspicuously beneath the action of the weapon" is listed as a prohibited assault weapon. (Pen. Code, §12276.1, subd. (a)(1).)

C. The Trial Court's Theory Of Conviction Was Proper

Appellant claims that the trial court erred in allowing the prosecution to proceed in this case on the theory he attempted to manufacture and attempted to possess an assault weapon. According to appellant, attempted manufacture and attempted possession of an assault weapon is not supported by the language or legislative history of Penal Code section 12276.1. Appellant argues that "the ability to fire as a semiautomatic is an essential feature of any generically-defined 'assault weapon' under section 12276.1, subdivision (a)(1)" and "properly construed, the statute only applies to rifles that are actually operable as semiautomatic firearms." (AOB 10.) According to appellant, "the word 'semiautomatic' describes how the weapon actually functions" and "means that the weapon must fire a bullet, extract the fired cartridge, and chamber a fresh cartridge with each pull of the trigger, allowing the shooter to fire multiple shots without reloading manually." (AOB 10-11.) Thus, concludes appellant, "a rifle that cannot fire semiautomatically is not an 'assault weapon' under section 12276.1," and such is the case here as appellant's rifle was not fully completed nor fully functional. (AOB 11.)

Appellant's argument should be rejected for several reasons. First, appellant was prosecuted under the attempt theory set forth in Penal Code section 664. Penal Code section 664, provides in pertinent part: "Every person who attempts to commit *any* crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts." (Italics added.) Penal Code section 664 provides for criminal conviction of crimes that come close but are not completed and appellant has failed to show why a person

who has an almost fully functional, fully completed assault weapon could not be prosecuted for attempted manufacture and possession of that weapon under Penal Code section 664. Furthermore, nothing in the language of the AWCA exempts it from being subject to section 664.

Moreover, other cases have upheld convictions for attempted manufacture of prohibited items. For example attempting to manufacture a controlled substance is a punishable crime. (*People v. Luna* (2009) 170 Cal.App.4th 535 [sufficient evidence defendant attempting to manufacture a controlled substance].) With respect to manufacture of controlled substances, it has been held that the Legislature "intended to criminalize all acts which are part of the manufacturing process, whether or not those acts directly result in completion of the final product." (*People v. Heath* (1998) 66 Cal.App.4th 697, 705.) The same logic should be true for cases involving an attempted manufacture or possession of an assault weapon, whether or not the acts directly resulted in the assembly of a fully operational weapon.

First, there is no explicit language in the statute which requires that the weapon be fully operable or fully assembled. Penal Code, section 12276.1, subdivision (a)(1), prohibits "semiautomatic, centerfire rifle[s] that ha[ve] the capacity to accept a detachable magazine and . . . [ ] [a] pistol grip that protrudes conspicuously beneath the action of the weapon." Nothing in the statute requires that the rifle be fully operational. Also, nothing in the statute implies that possession of the parts of a listed assault weapon is permissible.

Second, appellant's narrow reading of the statute is not supported by the public policy reasons for enacting the AWCA. "The law's origins as a legislative response to a serious public safety problem, reflected in this history and in the statutory findings and statement of purpose (§ 12275.5), tend to place the AWCA, including section 12280(b), in the category of

public welfare offenses, of which the primary goal is regulation for the public welfare or safety rather than punishment of individual offenders." (*In re Jorge M.* (2000) 23 Cal.4th 866, 874.) Allowing a person to possess all the parts needed to make an AK-47 with a detachable magazine, especially when the rifle is but a few parts from being assembled to be fully functioning, would be contrary to the Legislature's policy of regulating public welfare and safety. The danger implict in appellant's logic is that these weapons will be possessed and manufactured by individuals to an almost fully functioning condition to evade it technically being a completed assault weapon subject to the criminal sanctions of AWCA.

Appellant also argues that the legislature's failure to expressly include "parts of a semiautomatic rifle" subject to the AWCA show it intended to criminalize only possession and manufacture of fully operational and fully complete semiautomatic rifles. In so arguing, appellant refers to other firearm statutes which provide that the definition of "firearm" includes the "frame" and "receiver" of the weapon. (AOB 11-12.) Thus, concludes appellant, the legislature's failure to include similar language that assault weapons include the frame or receiver or any other parts, infers that the legislature did not intend to include only parts of an assault weapon. (AOB 12.)

However, as appellant points out, the other firearm statutes to which he refers were enacted to abrogate *People v. Jackson* (1968) 266 Cal.App.2d 341, 347, which held that a violation of Penal Code section 12021 required proof that the weapon was fully operational. (AOB 12, citing *People v. Nelums* (1982) 31 Cal.3d 355, 357 [section 12001, subdivision (c) effected a legislative abrogation of Jackson's requirement that the weapon be fully operational].) Similarly so, an assault weapon should not have to be in fully operational form in order to be a prohibited weapon under the AWCA. Assault weapons are even more deadly than a

standard firearm. If it has been held that a firearm need not be fully operational, it should be the same too with an assault weapon.

Appellant also refers to firearm statutes that explicitly refer to weapons "designed to be used" and "which may readily be converted to" a firearm. (AOB 12, citing sections 1200, subd. (a)(1), (b) & 1460, subd. (b)(2)(D).) Appellant argues that as no similar language is used in the assault weapon statute, the legislature did not intend to ban assault weapons that were only "designed to be used" or which could easily be converted to semiautomatics. Appellant's argument is unavailing. It is nonsensical that the legislature would ban possession and use of less potent firearms even though they were not fully completed and fully operational, yet not ban parts of a much more dangerous type of weapon – the assault weapons in issue in this case. As state above, the AWCA was enacted in response to the extreme safety concerns of citizens owning such high powered weapons. Possession of all the parts to assemble one of these weapons and maintained in a condition needing only to be attached to one another, is contrary to public policy.

In sum, appellant has failed to show that the statute's language or the legislative history permits a person to possess all the parts necessary to assemble an operational assault weapon in a condition requiring only attachment of those parts to one another. This court should reject appellant's argument and uphold his convictions for attempted manufacture and possession of an assault weapon.

II. NO DUE PROCESS VIOLATION BY THE TRIAL COURT'S PRIMARY THEORY OF CONVICTION BECAUSE THERE WAS SUFFICIENT EVIDENCE OF SCIENTER

Appellant contends that as a matter of law his federal right to due process was violated because insufficient evidence was presented that he intended to manufacture or possess a firearm he knew or reasonably should

have known could be assembled into an assault weapon. Specifically, appellant argues that because the only evidence presented to support his convictions was his mere possession of the box of AK-47 parts and which "could have been built into any number of legal configurations," he cannot be convicted of attempted manufacture or possession of an assault weapon under Penal Code sections 664 and 12280, subdivisions (a)(1) and (b). (AOB 13-15.) To the contrary, given the evidence in this case support the jury's reasonable conclusion that appellant was attempting to possess and manufacture an assault weapon; he had all the parts necessary to assemble the AK-47, he assembled those parts and was only a few steps from completing the assault weapon, and admitted to the investigating detective that he knew making and having the AK-47 rifle was wrong.

When the sufficiency of the evidence to support a criminal conviction is challenged on appeal, the appellate court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Bolden* (2002) 29 Cal.4th 515, 553; *People v. Osband* (1996) 13 Cal.4th 622, 690; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318 [99 S.Ct. 2781, 61 L.Ed.2d 560].) The court presumes in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Osband, supra*, 13 Cal.4th at p. 690; *People v. Wader* (1993) 5 Cal.4th 610, 640.) The reviewing court cannot reweigh the evidence or evaluate the credibility of the witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) To warrant rejection by the appellate court

> of the testimony that has been believed by the trier of fact, the testimony must be inherently improbable. [Citation.] There must exist either a physical impossibility that it is true, or its falsity must be apparent without resorting to inferences or

> deductions. [Citations.] Conflicts and even testimony that is subject to justifiable suspicion do not justify the reversal of a judgment. [Citation.]

(*People v. Meals* (1975) 48 Cal.App.3d 215, 221-222; see also *People v. Green* (1985) 166 Cal.App.3d 514, 517.)

The reviewing court "must begin with the presumption that the evidence . . . was sufficient, and the defendant bears the burden of convincing [the court] otherwise." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

Appellant claims that there was no evidence he intended to build an assault weapon he knew or should have known had the necessary characteristics of being an assault weapon. He argues that his convictions "cannot rest on appellant's possession of the parts alone" and the "parts could have been built into any number of legal configurations." (AOB 14-15.) Appellant cites only evidence favorable to him and his defense in making this appellate claim. His argument ignores the standard of appellate review for claims of insufficient evidence and invites this Court to reweigh the evidence. (*People v. Ochoa, supra*, 6 Cal.4th at p. 1206.)

> [I]t is black letter law that '[c]onflicts and even testimony which is subject to justifiable suspicion do not justify reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' [Citation.]

(*People v. Curl* (2009) 46 Cal.4th 339, 342, fn. 3.)

When a jury resolves the credibility issues against the defendant, the reviewing court is "bound by that resolution." (*Ibid.*) Therefore, any conflict in the testimony does not render the evidence insufficient.

Appellant's argument also impermissibly invites this Court to rely only on evidence, and inferences, favorable to his argument. (*People v. Sanghera, supra*, 139 Cal.App.4th at pp. 1573-1574.). That invitation must

be rejected. As stated above, "[i]t is not enough for the defense on appeal simply to assert that there was insufficient evidence, or to point to the defense version of the facts and maintain that the jury should have accepted it." (*People v. Sanghera, supra,* 139 Cal.App.4th at pp. 1573-1574.) That is exactly what appellant erroneously does here.

The correct standard of review is whether the evidence supported the jury's conviction of second degree murder and finding of malice aforethought when viewing the evidence in the light most favorable to the judgment. (*People v. Kraft, supra,* 23 Cal.4th at p. 1053; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) A review of the whole record shows substantial evidence supports appellant's convictions for attempting to manufacture and possess an assault weapon.

As stated above, Penal Code section 12280, subdivisions (a) and (b) prohibit the manufacture and possession of assault weapons. The prosecutor did not have to prove that appellant had actual knowledge of the characteristics of the weapon that made it an assault weapon. (*In re Jorge M.* (2000) 23 Cal.4th 866, 869-870, 887.) Rather, proof that appellant knew or reasonably should have known that possession of an assault weapon is unlawful is sufficient. (*Ibid.*) "[B]ecause of the general principle that all persons are obligated to learn of and comply with the law," it ordinarily is reasonable to conclude that, absent "exceptional cases in which the salient characteristics of the firearm are extraordinarily obscure, or the defendant's possession of the gun was so fleeting or attenuated as not to afford an opportunity for examination," a person who knowingly possesses a semiautomatic firearm reasonably would investigate and determine whether the gun's characteristics make it an assault weapon. (*Id.* at p. 885; see also *In re Daniel G.* (2004) 120 Cal.App .4th 824, 832.)

"[A] person who has had substantial and unhindered possession of a semiautomatic firearm reasonably would be expected to know whether or

not it is of a make or model listed in section 12276 or has the clearly discernable features described in section 12276.1." (*In re Jorge M., supra,* 23 Cal.4th at p. 888.)

Applying those standards to the present case, there was sufficient evidence that appellant intended to build a rifle he knew was a prohibited assault weapon. Not only did appellant have substantial and unhindered possession of al the parts needed to assemble a fully functioning AK-47, but he also had the ATC rifle, a semi automatic rifle, which appellant admitted he assembled himself. (1 RT 113-114.) Appellant admitted using guns to go hunting, showed the officers pictures of pigs he had shot and killed, had "rented" a gun to go hunting, and had loaned out a shot gun registered to his wife. (1 RT 103, 117-118, 123.) Appellant also had large caliber ammunition for two different types of firearms. (1 RT 116-117.) Appellant showed Officer Chapman a website appellant had been looking at a website called AK-Builder.com and admitted that he had begun bending the receiver for the AK-47 rifle. (1 RT 121-122.) Moreover, appellant admitted to Officer Chapman that he knew making and having his own AK-47 rifle was wrong. (1 RT 123.) The evidence shows that appellant was no novice to weapons. He was very experienced and knowledgeable about weapons, especially high powered rifles and the evidence here clearly supported the jury's finding that appellant knew the AK-47 rifle he was assembling had would be prohibited assault weapon. Thus, viewing the evidence in the light most favorable to the judgment, the record discloses substantial evidence supporting appellant's convictions and appellant was not denied due process.

III. THE STATUTE IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED TO APPELLANT

Appellant claims that the trial court's primary theory of conviction violated due process because the statute is unconstitutionally vague as

applied to his situation because "[n]either the statute nor any prior judicial decision gave constitutionally adequate notice that the AWCA applies to a possession of the parts of an AK-47 assault weapon that can be, with the requisite knowledge, skill, and work, configured into both legal firearms [sic] as well as an 'assault weapon.'" (AOB 15-17.) Appellant has not shown that the statute is unconstitutionally vague as applied to him.

Initially, when a determination in a particular criminal case is fact specific, the issue must be raised in the trial court. When the issue is not urged or argued in the trial court, as here, this Court may not consider it for the first time on appeal. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.) Appellant never raised this claim at trial. Therefore, it should not be considered on appeal.

However, even assuming appellant has preserved his right to raise this claim here, it should be rejected. To withstand a vagueness challenge, a penal statute must satisfy two basic requirements. First, the statute must provide adequate notice to those who must observe it. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 332; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1106; see U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 15.) Ordinary people of common intelligence should be able to understand what is prohibited by the statute and what may be done without violating its provisions. (*Tobe v. City of Santa Ana, supra*, 9 Cal.4th at pp. 1106-1107.) Second, the statute must provide sufficiently definite guidelines. A vague law impermissibly delegates policy matters to the police, judges and juries for resolution on a subjective basis, with the attendant risk of arbitrary and discriminatory enforcement. (*People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381, 390; *People v. Ellison* (1998) 68 Cal.App.4th 203, 207.)

In determining the sufficiency of the notice, this Court examines a statute in the light of the conduct with which the defendant is charged. If

the defendant can reasonably understand by the terms of the statute, either standing alone or as construed, that his conduct was criminal and prohibited, the statute is not vague. (*United States v. Lanier* (1997) 520 U.S. 259, 267; *People v. Powers* (2004) 117 Cal.App.4th 291, 298.) Thus the terms of the statute can be construed by reference to other legitimate sources such as statutes, legislative history and judicial decisions. (*People ex rel. Gallo v. Acuna, supra*, 14 Cal.4th at pp. 1116-1117.)

It is settled that a statute should be construed "in the light of the objective sought to be achieved by it as well as of the evil sought to be averted." (*In re Huddleson* (1964) 229 Cal.App.2d 618, 624.)

All presumptions and intendments favor the validity of a statute. Mere doubt does not afford sufficient reason for a judicial declaration of invalidity. If the validity of the measure is fairly debatable, it must be sustained. (*Centex Real Estate Corp. v. City of Vallejo* (1993) 19 Cal.App.4th 1358, 1362.) Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780.) A statute cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 143.)

Appellant claims that section 12276.1, subdivision (a)(1), is unconstitutional as applied to him because "neither the AWCA nor any prior judicial decision fairly disclosed to appellant that it was unlawful for him to possess or modify firearm parts of [sic] in a disassembled state that may be assembled into an 'assault weapon.'" (AOB 17.) Appellant's argument is unavailing.

First, appellant was convicted under an attempt theory, and under Section 664, any person who attempts to commit a crime if he had the specific intent to commit the crime, and took a direct but ineffectual act

toward its commission, is guilty of attempt. (Pen.Code, § 21a; *People v. Toledo* (2001) 26 Cal.4th 221, 229.) There is nothing vague about section 664.

Moreover, appellant admitted that he bought all the parts for the AK-47 rifle off the internet and that he had searched a computer website called AK-Builder.com on how to assemble the rifle. He admitted that he had bought a die set off the website in order to bend the receiver into the proper shape to assemble the rifle. Appellant admitted that he knew that making and possessing an AK-7 was wrong. (1 RT 123.) Thus, appellant was fully aware of the laws prohibiting his possession and manufacture of an assault weapon, and aware that his possession of the parts of the almost fully assembled AK-47 rifle violated those laws. Thus, appellant's own conduct demonstrated that the statute was not unconstitutionally vague as applied in his case.

Additionally, other firearm possession statutes prohibit possession or use of even a non-operation firearm or parts of a firearm is prohibited. (See *People v. Nelums* (1982) 31 Cal.3d 355, 359 ["nothing in the language of section 12022 requires that the People demonstrate the weapon's operability"].) Here, appellant had previously been convicted of carrying a concealed weapon. Additionally, in *People v. Nelums, supra,* 31 Cal.3d at p. 357, the Court held that section 12001, subdivision (c) effected a legislative abrogation of the requirement that a weapon be fully operational. Appellant should have been aware that carrying or possessing even an inoperable weapon, i.e. parts that are still in the assembly stage, is unlawful. "'California law attributes to all citizens constructive knowledge of the content of state statutes . . . .'" (*Kasler v. Lockyer* (2000) 23 Cal .4th 472, 501.)

In sum, appellant is an experienced firearm builder and has had extensive experience with firearms, as evidenced by his possession of them

and his prior convictions for being in possession of a concealed firearm. Between appellant's experience and his admission that he knew his making and possession of the AK-47 was wrong, the statute as applied to appellant was not unconstitutionally vague. As such, this Court should reject appellant's constitutional challenge to his conviction.

IV. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE REGARDING THE .50 DTC RIFLE AND THE .50 DTC AND BEOWOLF AMMUNITION

Appellant claims the trial court abused its discretion when it admitted testimony and evidence regarding the .50 DTC rifle, .50 DTC ammunition, and Beowolf ammunition. (AOB 17-25.) Appellant's claim should be rejected because that evidence was probative on the ultimate issue in this case, namely whether appellant intended to manufacture an assault weapon and knew the almost fully assembled AK-47 possessed the characteristics of an illegal assault weapon. Admission of the DTC weapon and ammunition evidence did not result in undue prejudice, confusion of the issues, or misleading the jury. In addition, appellant has failed to show that admission of the evidence was prejudicial.

Before trial, defense counsel moved to preclude admission of the DTC rifle and ammunition as being irrelevant to the charges and more prejudicial than probative. (1 RT 18-20.) The trial court denied motion. It reasoned that this evidence tended to show that appellant should have known the nature of the assault weapon. (1 RT 18-19, 22.) The trial court's ruling was not an abuse of discretion.

Evidence Code section 1101, subdivision (a), prohibits admission of evidence of uncharged prior bad acts where the evidence is offered to prove the propensity of the defendant to have committed the charged act. Subdivision (b) of Evidence Code section 1101 provides that this rule does not prohibit admission of such evidence when the evidence is relevant to

establish some fact other than the person's character or disposition. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.)

Specifically, Evidence Code section 1101, subdivision (b) provides "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." Thus, prior bad acts are admissible if relevant to prove a material fact, such as motive, intent, plan, knowledge, identity, or absence of mistake or accident. (Evid.Code, § 1101, subd. (b).)

If evidence is offered under Evidence Code section 1101, subdivision (b), the trial court must weigh "whether the probative value of the evidence of defendant's uncharged offenses is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' (Evid.Code, § 352.)" (*People v. Balcom* (1994) 7 Cal.4th 414, 426-427.) The trial court exercises broad discretion in determining relevance. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) This Court reviews rulings on the admissibility of evidence to determine whether there was an abuse of discretion. (*People v. Memro* (1995) 11 Cal.4th 786, 864.)

Prior acts of misconduct are admissible when relevant to prove an element of the charged crime (*Ewoldt, supra*, 7 Cal.4th 380, 402), such as the defendant's intent (*People v. Robbins* (1988) 45 Cal.3d 867, 879, superseded by statute on another ground as noted in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13). To prove a violation of Penal Code sections 664 and 12280, as alleged in Count 1, the People were required to prove appellant knew or reasonably should have known the weapon he was attempting to manufacture and possess had the characteristics of an assault

weapon. (See CALCRIM No. 2560; *In re Jorge M., supra,* 23 Cal.4th at p. 887 ["People bear the burden of proving the defendant knew or reasonably should have known the firearm possessed the characteristics that bring it within the AWCA"].)

The least degree of similarity between the charged crime and the prior crime is required to establish relevance on the issue of intent. (*Ewoldt, supra,* 7 Cal.4th at p. 402.) "For this purpose, the uncharged crimes need only be 'sufficiently similar [to the charged offenses] to support the inference that the defendant '"probably harbor[ed] the same intent in each instance.' [Citations.]" '[Citation.]" (*People v. Kipp, supra,* 18 Cal.4th at p. 371.) '"[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.]" (*People v. Robbins, supra,* 45 Cal.3d 867, 880.)

Here, appellant pled not guilty to attempting to manufacture or possess an assault weapon. (CT 7.) Yet, appellant told Officer Chapman that he had assembled the DTC rifle and was in the process of assembling the AK-47. Appellant also showed Officer Chapman a website called AK-Builder.com, in which appellant admitted he had used the dye receiver kit to weld the AK-47 rifle. Evidence that appellant had assembled and possessed the DTC rifle and possessed the .50 caliber and Beowulf ammunition strongly supported the reasonable inference that appellant had the experience and knowledge about assembling firearms to successfully assemble the AK-47 type weapon and should and must have known the weapon he was building had the characteristics of an illegal AK-47 type weapon.

Also, appellant's intent to assemble a completed AK-47 rather than to merely possess a random collection of parts of that weapon is shown by the fact that he has already assembled a semiautomatic rifle. It shows he had the knowledge, ability, and intent to manufacture another high powered weapon. Additionally, evidence that appellant possessed .50 caliber ammunition that would not work in the DTC rifle and therefore was used in another illegal weapon, supports the fact that appellant was familiar with the nuances of the various types of high powered weapons and various types of ammunition used by those weapons. This evidence was probative of appellant's extensive knowledge, ability, and intent to create what was almost a fully assembled AK-47 type weapon.

Additionally, appellant's excuse for possessing the DTC rifle, that he used it to go pig hunting, was improbable. Officer Chapman testified that the type of high powered weapon like the DTC rifle would not be used for pig hunting because - - - - -?. Appellant's attempt at an innocent excuse for possessing the large caliber gun and other ammunition even though he knew it was impractical for the type of hunting he claimed to use it, shows his consciousness of guilt. Thus, the evidence was probative of appellant's intent to manufacture an assault weapon and his knowledge that the assault weapon possessed the characteristics of an illegal weapon.

Moreover, appellant has failed to show that admission of the evidence created substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. Evidence of the DTC rifle and the ammunition was highly probative of a material issue in this case (appellant's extensive firearms knowledge and intent to manufacture). There is also little risk that evidence he had already manufactured weapon or ammunition would so incense the jury that it could not come to a just verdict on whether appellant was manufacturing and possessing an illegal assault weapon. The DTC rifle was as dangerous and offensive as the almost completely assembled

AK-47. "A trial is a search for the truth." (*People v. Harris* (1998) 60 Cal.App.4th 727, 733.) "Painting a person faithfully is not, of itself unfair." (*Id.* at p. 737.)

Even assuming the trial court erred by admitting evidence of the DTC rifle and ammunition, any error was harmless because it is not reasonably probable that the jury would have reached a more favorable result to defendant had the challenged evidence been excluded. (*People v. Carter* (2005) 36 Cal.4th 1114, 1152; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Here, the evidence that appellant intended to manufacture the AK-47 into an illegal assault weapon and that he knew that it possessed the characteristics of an assault weapon, was overwhelming. Appellant had all the parts and had almost a fully assembled illegal AK-47 type rifle. (1 RT 162.) Officer Chapman testified that the only thing that needed to be done to complete the assembly of the AK-47 was to drill one more hole into the receiver to place the pins into it to hold the internal parts. (1 RT 152.) Most importantly, appellant admitted that he knew making and having his own AK-47 rifle was wrong. (1 RT 123.)

Appellant argues that the admission of the evidence violated his due process rights. (AOB 24.) Even though appellant never objected on due process grounds in the lower court, he can still argue on appeal that "(1) the trial court erred in overruling the trial objection, and (2) the error was so serious as to violate due process." (*People v. Partida* (2005) 37 Cal.4th 428, 436, fn. omitted.) "But the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair. [Citations.]" (*Id.* at p. 439.) As already discussed, the evidence was admissible as bearing on defendant's intent and knowledge, and there was no evidence that admission of the prior bad acts evidence created substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. Accordingly, even assuming that the trial

court erred in admitting this evidence, the error did not result in a fundamentally unfair trial.

In sum, the trial court did not err by admitting the DTC rifle and ammunition, and regardless, any error was harmless.

CONCLUSION

Accordingly, respondent respectfully requests the judgments be affirmed.

Dated: July 10, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 7,871 words.

Dated: July 10, 2012

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