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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0668**

State of Minnesota,
Respondent,

vs.

John Michael Glaser,
Appellant.

**Filed February 25, 2013
Affirmed
Peterson, Judge**

Itasca County District Court
File No. 31-CR-11-804

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Muhar, Itasca County Attorney, Todd S. Webb, Chief Assistant County Attorney, Grand Rapids, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Charles F. Clippert, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Cleary, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

On appeal from a conviction of felon in possession of a firearm in violation of Minn. Stat. § 609.165, subd. 1b(a) (2010), appellant argues that (1) the statute's lifetime

ban on firearm possession, as applied to him, violates the Second Amendment to the United States Constitution; and (2) the district court erred by instructing the jury that a pellet or BB gun is a firearm. We affirm.

FACTS

In 2003, appellant John Glaser was convicted of fifth-degree controlled substance crime for possession of methamphetamine in violation of Minn. Stat. § 152.025, subd. 2 (2000), which is a felony offense. In December 2010, appellant injured a friend when he accidentally discharged a pellet gun. Appellant brought his friend to a hospital for treatment and admitted to a responding police officer that he owned the pellet gun. Respondent State of Minnesota charged appellant with possession of a firearm by an illegible person in violation of Minn. Stat. § 609.165, subd. 1b(a) (2010).

Appellant moved to dismiss the charge, arguing that, as applied to him, the statute's lifetime ban on possession of a firearm violates the Second Amendment to the United States Constitution. The district court denied his motion. At trial, the court instructed the jury that, for purposes of the crime charged, a pellet or BB gun is a "firearm." The jury found appellant guilty. This appeal follows.

D E C I S I O N

Constitutional Challenge to Minn. Stat. § 609.165, subd. 1b(a)

"The constitutionality of a statute presents a question of law, which we review de novo." *State v. Crawley*, 819 N.W.2d 94, 101 (Minn. 2012). "Minnesota statutes are presumed to be constitutional, and our power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *State v.*

Bussmann, 741 N.W.2d 79, 82 (Minn. 2007) (quotation omitted). “A party challenging a statute on constitutional grounds must demonstrate, beyond a reasonable doubt, that the statute violates a provision of the constitution.” *State v. Grossman*, 636 N.W.2d 545, 548 (Minn. 2001).

The Second Amendment states, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570, 595, 128 S. Ct. 2783, 2799 (2008), the United States Supreme Court held “that the Second Amendment conferred an individual right to keep and bear arms.” The United States Supreme Court later held that this right applies to the states. *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3050 (2010). But the Supreme Court also explained that “the right secured by the Second Amendment is not unlimited”:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626-27, 128 S. Ct. at 2816-17. The Supreme Court identified these regulations as examples of presumptively lawful restrictions on the right to keep and bear arms. *Id.* 554 U.S. at 627 n.26, 128 S. Ct. at 2817 n.26.

Neither *Heller* nor *McDonald* identified the level of scrutiny that applies when a court considers whether a law regulating gun possession violates a citizen’s Second Amendment right to bear arms. *State v. Williams*, 794 N.W.2d 867, 875 n.6 (Minn.

2011). In *State v. Craig*, 807 N.W.2d 453, 461-62 (Minn. App. 2011), *review granted* (Minn. Feb. 14, 2012), this court held “that an alleged violation of an individual’s right to possess a firearm as recognized in *Heller* and *McDonald*, . . . warrants the application of an intermediate level of scrutiny.” A statute survives intermediate scrutiny when it is “substantially related to an important governmental objective.” *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 1914 (1988). “Protecting the public from offenders who use guns is certainly an important governmental objective, if not a compelling state interest.” *Craig*, 807 N.W.2d at 462.

Appellant argues that, as applied to him, the firearm prohibition in section 609.165, subdivision 1b(a), is overly broad because it applies a blanket prohibition notwithstanding that “he is not a truly violent offender.” We disagree. Section 609.165, subdivision 1b(a), prohibits any person “convicted of a crime of violence, as defined in section 624.712, subdivision 5,” from possessing “a firearm.” In defining “crime of violence,” the legislature explicitly included all felony convictions for offenses under chapter 152. Minn. Stat. § 624.712, subd. 5 (2010). The legislature did not distinguish among felony-level crimes in chapter 152, and its definition of “crime of violence” unambiguously includes appellant’s underlying crime of felony fifth-degree possession of a controlled substance. *Id.*

In *Craig*, this court considered whether Minn. Stat. § 624.713, subd. 1(2) (2010), which also imposes on a person convicted of a “crime of violence” a lifetime ban from possessing a firearm, violated the Second Amendment to the United States Constitution. 807 N.W.2d at 460-64. This court concluded that prohibiting individuals “convicted of

felony drug offenses from possessing firearms is substantially related to the government’s interest in protecting public safety” and held that the statute did not violate the Second Amendment. *Id.* at 463-64.

Appellant acknowledges the governmental interest identified in *Craig*, but argues that as applied to him, the firearm prohibition is not substantially related to the governmental goal of protecting public safety. He asserts that, unlike the defendant’s underlying conviction in *Craig*, appellant’s underlying conviction did not involve possession of a firearm. *See id.* at 462 (stating that defendant’s underlying felony drug conviction involved possession of a firearm). But, like the firearm ban in section 624.713 at issue in *Craig*, the legislature defined “crime of violence” for purposes of the firearm ban in section 609.165 to include felony convictions for offenses under chapter 152, without regard to whether a defendant possessed a firearm when committing the offense. Minn. Stat. §§ 609.165, subd. 1b(a), 624.712, subds. 1, 5, .713, subd. 1(2) (2010). To protect the governmental interest in public safety, the firearm ban need only be “substantially related” to that goal. Also, by including only felony-level drug convictions in the definition of “crime of violence,” the legislature limited the prohibition to individuals convicted of more-serious drug offenses. *See Craig*, 807 N.W.2d at 462-63 (noting this limitation in concluding that prohibition need not be applied on a case-by-case basis); *see also United States v. Bustos-Torres*, 396 F.3d 935, 943 (8th Cir. 2005) (recognizing that “weapons and violence are frequently associated with drug transactions”). Because we conclude that, as applied to appellant, the firearm prohibition

of section 609.165 is not overly broad, the statute, as applied to appellant, does not violate the Second Amendment.

Jury Instruction that a Pellet or BB Gun is a “Firearm”

Appellant argues that the district court erred by instructing the jury that, for purposes of Minn. Stat. § 609.165, subd. 1b(a), a pellet or BB gun is a “firearm.” We disagree.

District courts have “significant discretion” to craft jury instructions. *State v. Peou*, 579 N.W.2d 471, 476 (Minn. 1998). “When we review jury instructions for error, we review the instructions in their entirety to determine whether they fairly and adequately explained the law of the case. An instruction is [erroneous] if it materially misstates the law.” *State v. Kuhnau*, 622 N.W.2d 552, 555-56 (Minn. 2001) (citation omitted). “A defendant who claims that the district court erred bears the burden of showing the error and any resulting prejudice.” *Id.* at 556.

Questions of statutory interpretation are reviewed de novo. *State v. Grigsby*, 818 N.W.2d 511, 515 (Minn. 2012). When interpreting a statute, we must “ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (2010). “When the words of a law in their application to an existing situation are clear and unambiguous, we apply the plain meaning of the statute. A statute is ambiguous if its language is subject to more than one reasonable interpretation.” *State v. Caldwell*, 803 N.W.2d 373, 382 (Minn. 2011) (citation omitted). Courts “will not supply words that the Legislature either purposely omitted or inadvertently left out.” *Id.*

Section 609.165, subdivision 1b(a), prohibits a person “convicted of a crime of violence” from possessing “a firearm.” The statute does not define “firearm.” In *State v. Seifert*, 256 N.W.2d 87, 88 (Minn. 1977), the defendant was charged with using a dangerous weapon while committing a robbery under Minn. Stat. § 609.02, subd. 6 (1974). The statute defined “dangerous weapon” as including “any firearm,” but did not define “firearm.” *Id.* The supreme court adopted a definition of “firearm” provided in the game-and-fish laws, which defined “firearm” as “any gun from which shot or a projectile is discharged by means of an explosive, gas, or compressed air.” *Id.* (quoting Minn. Stat. § 97.40, subd. 34 (1974) (now codified as amended at Minn. Stat. § 97A.015, subd. 19 (2010))).

In *State v. Newman*, 538 N.W.2d 476, 478 (Minn. App. 1995), *review denied* (Minn. Nov. 30, 1995), this court held that a BB gun is a “firearm” for purposes of the felony drive-by-shooting statute, Minn. Stat. § 609.66, subd. 1e(a) (Supp. 1993). This court recognized that “[s]ection 609.66 now contains a cross-reference to the game and fish laws in Minn. Stat. ch. 97A,” and applied the game-and-fish law’s definition: “a gun that discharges shot or a projectile by means of an explosive, a gas, or compressed air.” *Newman*, 538 N.W.2d at 477-78 (quotation omitted).

Most recently, in *State v. Fleming*, 724 N.W.2d 537, 540 (Minn. App. 2006), this court held that, for purposes of conviction of possession of a firearm by an ineligible person under Minn. Stat. § 624.713, subd. 1 (2004), “firearm” includes a BB gun. This court stated that a “gas-cartridge BB gun falls within the definition of ‘firearm’ applied in *Seifert*, which includes any gun from which a shot may be discharged by gas or

compressed air.” *Fleming*, 724 N.W.2d at 540 (quotation omitted). This court stated that, because the legislature amended the challenged statute in 1994, after *Seifert*, and chose not to define “firearm” for purposes of the section at issue, “the legislature presumptively adopted the Minnesota Supreme Court’s definition.” *Id.*

Similarly, the legislature amended section 609.165 in 1996, after both *Seifert* and *Newman* were decided, without defining “firearm.” 1996 Minn. Laws ch. 408, art. 4, § 7, at 655. Accordingly, we presume that for purposes of the term “firearm” as used in section 609.165, the legislature adopted the definition of “firearm” in *Seifert*. See *Pecinovsky v. AMCO Ins. Co.*, 613 N.W.2d 804, 809 (Minn. App. 2000) (“Courts presume that the legislature acts with full knowledge of previous statutes and existing caselaw.”).

Also, in *Fleming*, this court observed that

the state could have charged *Fleming* under section 609.165, which prohibits a person who has been convicted of a crime of violence from possessing a “firearm”. . . . Minn. Stat. § 609.165, subd. 1b(a) (2004). A conviction under section 609.165 bars a conviction for the same incident under section 624.713. *Id.*, subd. 1b(b) (2004). This proscription suggests that the two statutes are intended to be coextensive. See Minn. Stat. § 645.16(5) (stating that intention of legislature may be discerned from other laws on same or similar subjects).

Fleming, 724 N.W. 2d at 540 n.1. The two statutes’ prohibitions on firearm possession and penalties are equivalent. *Cf.* Minn. Stat. §§ 609.165, subd. 1b(a) (prohibiting person convicted of crime of violence from possessing firearm and stating such possession is a felony punishable by not more than 15 years in prison or payment of fine not more than

\$30,000, or both), 624.713, subds. 1(2), 2(b) (prohibiting possession of firearm by person convicted of crime of violence and providing possession is felony punishable by not more than 15 years in prison or payment of fine not more than \$30,000, or both) (2010). Thus, the term “firearm” in these statutes should be given the same meaning. *See Doe v. Minn. State Bd. of Med. Exam’rs*, 435 N.W.2d 45, 49 (Minn. 1989) (“Because both statutes have the same purpose, they are in pari materia and should be construed together.”).

Appellant argues that, because some criminal statutes define “firearm” as requiring an explosive or combustive as a propellant and others treat BB guns differently from firearms, this court should not apply the broad definition of “firearm” adopted in *Seifert*. But the criminal statutes that appellant identifies define “firearm” only for purposes of those sections. *See* Minn. Stat. §§ 609.666, subd. 1(a) (defining “firearm” for the crime of negligent storage of firearms), .669, subd. 2(2) (defining “firearm” for the gross-misdemeanor crime of civil disorder) (2010). And although other criminal statutes identify or define BB guns separately from firearms, this does not demonstrate legislative intent that a BB gun is not a “firearm” for purposes of the firearm prohibition. *Cf.* Minn. Stat. §§ 609.66, subd. 1d(e)(1)-(2) (separately defining “BB gun” and “dangerous weapon,” and giving “dangerous weapon” meaning given in section 609.02, subdivision 6, which includes “firearms,” for purpose of crime of possessing a dangerous weapon on school property); .713, subd. 3(b) (defining “BB gun” and “replica firearm” for that subdivision only, which identifies elements of terroristic threats) (2010); *see also Newman*, 538 N.W.2d at 477-78 & n.1 (applying *Seifert*’s definition of “firearm” to

section 609.66, subdivision 1e(a), despite differing definition of “firearm” in later-enacted civil-disorder criminal statute).

Appellant argues that the application of the game-and-fish law’s definition of “firearm” in *Seifert* was dictum. But this court addressed, and rejected, this argument in *Fleming*. 724 N.W.2d at 540. Appellant also attempts to distinguish *Fleming* by arguing that, because Fleming’s underlying felony convictions for second-degree assault involved possession of a dangerous weapon, the public-policy goal for concluding that a BB gun is a “firearm” present in *Fleming* is lacking here, where appellant’s underlying felony conviction did not involve a dangerous weapon. *Id.* at 538; *see* Minn. Stat. § 609.222 (2010) (second-degree assault). But the *Fleming* court did not apply *Seifert*’s definition of “firearm” based on public policy. *Id.* at 539-40. The court presumed that the legislature acts with full knowledge of existing caselaw and concluded that, because the legislature amended the statute after *Seifert* without providing a definition of “firearm,” *Seifert*’s definition of “firearm” was the applicable definition. *Id.* at 540.

Appellant also attempts to distinguish *Newman* on the basis that the court defined “firearm” for purposes of the drive-by-shooting statute, which involves a crime against a person. 538 N.W.2d at 477. Appellant argues that, because his underlying conviction did not involve a crime against a person, the public-policy basis for determining a BB gun is a “firearm” present in *Newman* is not present here. But *Newman*’s holding was based on the legislature’s presumptive adoption of the definition of “firearm” in *Seifert*, not on whether the crime was against a person. *Id.* at 478.

We conclude that the district court did not err in instructing the jury that a pellet or BB gun is a “firearm” for purposes of the crime charged.

Affirmed.