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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2163**

State of Minnesota,
Respondent,

vs.

Howard James Johnson,
Appellant.

**Filed January 9, 2012
Affirmed; motion to strike denied
Peterson, Judge**

Mille Lacs County District Court
File No. 48-CR-09-2312

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

Janice S. Jude, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney,
Milaca, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Benson Merz Godes,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Harten,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a conviction of possession of a firearm by an ineligible person, appellant argues that the district court erred in determining that the Beretta Gardone rifle that he possessed is not an “antique firearm,” as defined in Minn. Stat. § 624.712, subd. 3 (2008), and, based on this determination, denying his motion to dismiss count one of the complaint for lack of probable cause. Also, appellant moves to strike respondent’s appendix and portions of its brief. We affirm appellant’s conviction and deny his motion to strike.

FACTS

A homeowner called police and asked that appellant Howard James Johnson be removed from her home. Two officers were dispatched to the home and spoke with the homeowner outside. The homeowner told the officers that appellant had been consuming alcohol and had a firearm. The officers saw lights on inside the home and knocked on the door and announced their presence. Appellant did not respond, but the officers could see appellant inside the house carrying a rifle. Appellant turned off the lights and closed the curtains.

An officer contacted appellant by telephone. Appellant denied having any weapons and said that he would not leave the home until he spoke with an attorney. Additional officers arrived, and a standoff occurred that lasted about six hours. The standoff ended after appellant spoke with an attorney and surrendered. Two hours later,

officers executed a search warrant at the home and found a Beretta Gardone rifle, a pellet gun, and a rifle cartridge.

Appellant had been convicted of a felony for making terroristic threats, which made it unlawful for him to possess a firearm. The state charged appellant with two counts of unlawful possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(2) (2008), and one count of terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2008). Appellant moved to dismiss one count of unlawful possession for lack of probable cause, arguing that the Beretta Gardone rifle met the statutory definition of “antique firearm” in Minn. Stat. § 624.712, subd. 3 (2008), and, therefore, under Minn. Stat. § 624.715 (2008), appellant’s possession of the rifle was not prohibited. The district court denied the motion, and the parties agreed to resolve the case by submitting one count of unlawful possession of a firearm to the court on stipulated facts pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980),¹ and dismissing the other charges.

Appellant waived his right to a jury trial, and appellant’s counsel stated the stipulated facts as follows: (1) the Beretta Gardone is a firearm “according to [the district court’s] definition” (2) appellant possessed the Beretta Gardone; (3) appellant was a felon ineligible to possess a firearm at the time he possessed the firearm; and (4) appellant possessed the firearm in Mille Lacs County. Counsel also stated that the court could take

¹ In a “*Lothenbach* proceeding,” a defendant submits to a court trial on stipulated facts without waiving the right to appeal pretrial issues. *State v. Lothenbach*, 296 N.W.2d 854, 858 (Minn. 1980). This procedure is now permitted under Minn. R. Crim. P. 26.01, subd. 4. *State v. Burdick*, 795 N.W.2d 873, 875-76 (Minn. App. 2011).

account of the facts presented at the contested omnibus hearing and that the issue preserved for appeal was the court's "pretrial ruling of the 'antique.'"

The district court noted its pre-trial ruling that the Beretta Gardone rifle is not an "antique firearm" because it was not manufactured before 1899 and is not a replica of a firearm manufactured before 1899. The court concluded that the state proved beyond a reasonable doubt the charge of felon in possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(2), and sentenced appellant to prison. This appeal followed.

Appellant moved to strike the state's appendix and portions of its brief. The state moved to strike portions of appellant's brief. This court denied the state's motion and deferred appellant's motion to this panel.

D E C I S I O N

Appellant does not dispute that he was prohibited from possessing any firearm or that he possessed a Beretta Gardone rifle. But he argues that he did not violate Minn. Stat. § 624.713, subd. 1(2), because the rifle that he possessed fits within the statutory definition of "antique firearm," and the unlawful-possession statute states that section 624.713 "shall not apply to antique firearms which are carried or possessed as curiosities or for their historical significance or value." Minn. Stat. § 624.715 (2008).

When there is an exception to a statutory provision, a criminal defendant has the burden of establishing a prima facie case for this defense, after the state has carried its burden in showing that the statute has been violated. Once the defendant has come forward with sufficient evidence for the defense, the overall presumption of innocence operates to shift the burden back onto the state to prove the contrary beyond a reasonable doubt.

State v. Langaas, 426 N.W.2d 479, 482 (Minn. App. 1988) (citation omitted).

Statutory construction is a question of law, which we review de novo. *State v. Stewart*, 624 N.W.2d 585, 588 (Minn. 2001). The goal of statutory interpretation and construction “is to ascertain and effectuate the intention of the legislature,” and each statute “shall be construed, if possible, to give effect to all its provisions.” Minn. Stat. § 645.16 (2010). We construe the words of a statute according to their common and approved usage. Minn. Stat. § 645.08(1) (2010). When the legislature’s intent is clearly discernible from a statute’s plain and unambiguous language, the court interprets the language according to its plain meaning without resorting to other principles of statutory construction. *State v. Kelbel*, 648 N.W.2d 690, 701 (Minn. 2002).

As used in the unlawful-possession statute:

“Antique firearm” means any firearm, including any pistol, with a matchlock, flintlock, percussion cap, or similar type of ignition system, manufactured before 1899 and any replica of any firearm described herein if such replica is not designed or redesigned, made or remade, or intended to fire conventional rimfire or conventional centerfire ammunition, or uses conventional rimfire or conventional centerfire ammunition which is not readily available in the ordinary channels of commercial trade.

Minn. Stat. § 624.712, subd. 3 (2008).

This definition applies to two categories of firearms. The first category includes firearms with specific types of ignition systems that were manufactured before 1899, and the second category includes replicas of firearms in the first category. The second category is further defined to exclude a replica if, instead of using the ignition system used in the original firearm, the replica uses conventional rimfire or conventional

centerfire ammunition. But a replica that uses conventional rimfire or conventional centerfire ammunition remains within the definition of “antique firearm” if the ammunition that it uses is not readily available in the ordinary channels of commercial trade.

The firearms expert appellant called to testify at the omnibus hearing testified that the Beretta Gardone rifle that appellant possessed has a percussion cap ignition system. The expert also testified that this type of rifle was first manufactured in 1891 and was issued to the Italian army until 1943. The expert testified that the weapon that appellant possessed was manufactured in 1943² and that it is not a replica of a firearm manufactured before 1899. The district court determined that the exemption for antique firearms does not apply to the Beretta Gardone rifle that appellant possessed because the rifle was not manufactured before 1899 and it is not a replica of a firearm manufactured before 1899.

Appellant argues that his 1933 Beretta Gardone is a “replica.” *The American Heritage College Dictionary* 1180 (4th ed. 2007) defines replica as, “[a] copy or reproduction.” A copy is defined as, “[a]n imitation or reproduction of an original.” *Id.* at 316. Appellant contends that his 1933 Beretta Gardone is a replica because it is a copy of a firearm manufactured in 1891. But the evidence that appellant offered established only that the Beretta Gardone rifle that he possessed was made by an Italian company in Italy in 1933 and that company began making Beretta Gardone rifles in 1891.

² Appellant stipulated to owning a Beretta Gardone manufactured in 1933. The expert’s inconsistent statement does not affect our analysis of the issue on appeal.

Appellant's expert testified that the firearm is not a replica, although he did not say why it is not a replica. And there is no evidence in the record that demonstrates that appellant's rifle was manufactured as a copy of a Beretta Gardone rifle manufactured before 1899, i.e., an imitation or reproduction of an original. The fact that the 1933 rifle is the same as rifles manufactured before 1899 does not, by itself, demonstrate that the 1933 rifle is an imitation or reproduction of the rifles manufactured before 1899. If a company manufactures a rifle model according to the same specifications for several years, the rifles it makes in later years are not imitations or reproductions of the first rifle made; they are just additional rifles made according to the same specifications as the first rifle. Appellant, therefore, failed to sustain his burden of establishing a prima facie case that his 1933 Beretta Gardone is an antique firearm.

Because appellant failed to sustain his burden of establishing a prima facie case that his 1933 Beretta Gardone is an "antique firearm," the district court properly found that the exemption in Minn. Stat. § 624.715 did not apply to appellant. The district court did not err in concluding that the state proved beyond a reasonable doubt that appellant possessed a firearm in violation of Minn. Stat. § 624.713, subd. 1(2).

Motion to Strike

Appellant has moved to strike a portion of the state's appendix that reproduces various Internet materials and the parts of the state's brief that refer to the Internet materials, arguing that the materials are not part of the record. The state did not offer the Internet materials at the omnibus hearing or include them in the stipulated facts presented to the district court, and it has not moved to supplement the record. In response to

appellant's motion, the state argues that this court should take judicial notice of some of the Internet materials based on appellant's factual concessions in the record. The state argues that other materials establish facts as a matter of convenience to this court and, in the interests of judicial economy, should not be stricken.

The record on appeal consists of "papers filed in the [district] court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. Generally, an appellate court may not base its decision on materials outside the record on appeal and may not consider matters not produced and received into evidence in the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

The state relies on the Internet materials provided in its appendix to support part of its argument on appeal. Because the state failed to make these materials part of the record, we have not considered the materials in reaching our decision. Accordingly, we deny appellant's motion to strike as moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying motion to strike as moot because appellate court did not rely on challenged material in deciding issues on appeal).

Affirmed; motion to strike denied.