IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BO LUCAS JOHNSON,
Appellant.

No. 2 CA-CR 2016-0303
Filed July 28, 2017

Appeal from the Superior Court in Pima County
No. CR20161809001
The Honorable Richard D. Nichols, Judge

AFFIRMED IN PART; APPEAL DISMISSED IN PART

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Appellee

Kimminau Law Firm, PC, Tucson
By Chris J. Kimminau
Counsel for Appellant

OPINION

Judge Espinosa authored the opinion of the Court, in which Presiding Judge Staring and Judge Kelly[1] concurred.

E S P I N O S A, Judge:

¶1 Bo Johnson was convicted in Green Valley Justice Court of threatening or intimidating in violation of A.R.S. § 13-1202(A)(1) and misconduct involving weapons in violation of A.R.S. § 13-3102(A)(12). Johnson appealed his convictions to the Pima County Superior Court, which affirmed them, and he now appeals to this court, challenging the validity of the weapons misconduct statute, and asking us to take jurisdiction to reverse his threatening or intimidating conviction. For the following reasons, we affirm his weapons misconduct conviction and dismiss the appeal of his threatening or intimidating conviction.

Factual and Procedural Background[2]

¶2 In September 2014, Johnson and D.M. became involved in a verbal conflict while on the road in separate cars. The following day, the two encountered one another in a school parking lot. D.M. walked over to Johnson's truck and Johnson, who was handling a

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]The record indicates an evidentiary hearing formed the basis for trial testimony below. Although the transcript of that hearing has not been submitted to this court, the parties' briefs agree on most of the facts underlying Johnson's claims, and we have accordingly relied on those briefs and adopted those facts that support Johnson's convictions. *See State v. Lefevre*, 193 Ariz. 385, n.1, 972 P.2d 1021, 1022 n.1 (App. 1998) (appellate court relates facts in light supporting verdicts).

gun, said words to the effect of "driving like that will get you shot." D.M. reported both the gun and the statement to a police officer assigned to the school. The officer then spoke with Johnson and examined the gun, which had bullets in its magazine although none in its firing chamber.

¶3 Johnson was charged with two counts of threatening or intimidating and one count of misconduct involving weapons. One of the threatening or intimidating counts was subsequently dismissed, and Johnson was convicted of the two remaining charges, placed on probation, and ordered to complete four sessions of anger management and pay a fine. The Pima County Superior Court affirmed his convictions in June 2016.

¶4 Johnson filed a motion for rehearing on his weapons misconduct conviction, arguing that § 13-3102, which contains an exception for an unloaded firearm, is unconstitutionally vague because it lacks a definition of "loaded," which could be construed as limited to a gun having a bullet in its firing chamber. The superior court denied the motion and again affirmed Johnson's convictions, noting that the common understanding of "loaded" is "containing ammunition." Johnson appealed to this court, arguing the superior court erred in affirming both convictions and in particular that 13-3102(A)(12) and 13-3102(I)(1) are unconstitutionally vague.

¶5 Our jurisdiction over appeals from a justice court ruling already appealed to superior court is limited to actions involving the relevant statute's "validity." A.R.S. § 22-375(A). Accordingly, we have appellate jurisdiction to hear Johnson's challenge to the constitutional validity of § 13-3102 but not his argument that the superior court erred in affirming his threatening or intimidating conviction.

Guns on School Property

¶6 As noted above, we consider only Johnson's argument that 13-3102(A)(12) and 13-3102(I)(1) are unconstitutionally vague when read together. Section 13-3102(A)(12) provides that misconduct involving weapons occurs when a person knowingly "[p]ossess[es] a deadly weapon on school grounds." Section 13-3102(I)(1), however,

provides an exception to (A)(12) when the weapon is a "[f]irearm that is not loaded and that is carried within a means of transportation under the control of an adult." Johnson essentially argues that the Arizona statute is unconstitutionally vague because some other states have defined "loaded" more narrowly than simply "containing ammunition."

¶7 In support, Johnson cites Utah's definition of "loaded" as "when there is an unexpended cartridge, shell, or projectile in the firing position" or "when an unexpended cartridge, shell, or projectile is in a position whereby the manual operation of any mechanism once would cause [it] to be fired." Utah Code § 76-10-502(1)-(2). In contrast, however, California has defined "loaded" in one context as "whenever both the firearm and the unexpended ammunition capable of being discharged from the firearm are in the immediate possession of the same person" and otherwise as "when there is an unexpended cartridge or shell . . . in, or attached in any manner to, the firearm, including . . . in the . . . magazine, or clip." Cal. Penal Code § 16840(a)-(b)(1).

¶8 We review a statute's constitutionality de novo but "presume that the statute is constitutional and must construe it, if possible, to give it a constitutional meaning." *State v. McMahon*, 201 Ariz. 548, ¶ 5, 38 P.3d 1213, 1215 (App. 2002). Johnson has "the heavy burden of overcoming that presumption."[3] *Id.* "A statute is unconstitutionally vague if it does not give persons of ordinary intelligence a reasonable opportunity to learn what it prohibits and

[3]Johnson argues the state must demonstrate that § 13-3102 is "precisely tailored to serve a compelling governmental interest" because it affects "the preexisting rights protected by the Second Amendment." But he does not identify any authority suggesting the standard for vagueness varies based on whether the relevant statute implicates a fundamental right, nor are we aware of any outside First Amendment law, *cf. State v. Ochoa*, 189 Ariz. 454, 460, 943 P.2d 814, 820 (App. 1997). To the extent Johnson suggests § 13-3102 unconstitutionally infringes his Second Amendment rights, we do not address that argument because it was not raised below. *See State v. Takacs*, 169 Ariz. 392, 399, 819 P.2d 978, 985 (App. 1991).

does not provide explicit instructions for those who will apply it." *Id.* ¶ 7. Statutes need not, however, "be drafted with absolute precision" but rather need only "convey a definite warning of the proscribed conduct." *Id.* ¶ 8.

¶9 Furthermore, "[a] statute is not unconstitutionally vague solely because it fails to explicitly define one of its terms or because the provision is susceptible to more than one interpretation." *State v. Lefevre*, 193 Ariz. 385, ¶ 18, 972 P.2d 1021, 1026 (App. 1998). In such a situation, we will give the statute an appropriate construction upon considering legislative intent and policy, the common-law understanding of the statute's terms, technical meanings, and prior judicial decisions. *State v. Takacs*, 169 Ariz. 392, 395, 819 P.2d 978, 981 (App. 1991). We may also look to dictionary definitions, both legal and otherwise, to determine a word's meaning. *See, e.g.*, *id.* at 397-98, 819 P.2d at 983-84; *McMahon*, 201 Ariz. 548, ¶ 9, 38 P.3d at 1216.

¶10 Section 13-3102(A)(12) clearly prohibits "[p]ossessing a deadly weapon on school grounds." That section provides people of ordinary intelligence with sufficient notice and a definite warning that deadly weapons, which A.R.S. § 13-3101(A)(1) expressly defines to include firearms, are not permitted on school property. Johnson nevertheless argues 13-3102(A)(12) is unconstitutionally vague when combined with 13-3102(I)(1)'s narrow exception. But "[a] statute that 'gives fair notice of conduct to be avoided is not void for vagueness simply because it may be difficult to determine how far one can go before the statute is violated.'" *Lefevre*, 193 Ariz. 385, ¶ 19, 972 P.2d at 1026, *quoting State v. Phillips*, 178 Ariz. 368, 370, 873 P.2d 706, 708 (App. 1994).

¶11 The vagueness Johnson attributes to § 13-3102 appears to depend on importing conflicting definitions of "loaded" into the statute rather than simply reading it. The superior court concluded that the word "loaded" means "containing ammunition," and we agree. Numerous sources concur, including those on which Johnson relies. *See State v. Dor*, 75 A.3d 1125, 1127 (N.H. 2013) (stating "loaded" gun includes one "containing a cylinder, magazine, or clip with a cartridge that can be discharged through the normal operation of the firearm") (emphasis omitted); *State v. Ricks*, 314 P.3d 1033, ¶ 14, n.4 (Utah Ct. App. 2013) (recognizing Utah's statutory definition of

"loaded" is narrower than the "commonly understood" meaning of the word); *State v. Sims*, 2007-Ohio-6821, ¶ 31, 2007 WL 4442684 (Ohio Ct. App. Dec. 20, 2007) (defining "loaded" using the same terms of capability as the statutory definition of "firearm," which applies to unloaded and inoperable firearms, Ohio Rev. Code § 2923.11(B)(1)).[4]

¶12 Although legislatures are free to define the words they use in statutes differently from common understanding, we will not conclude a statute that is clear on its face is vague merely because other states may have enacted narrower, or broader, statutory definitions. *Cf. Takacs*, 169 Ariz. at 397, 819 P.2d at 983 ("Words and phrases in a statute are to be given their ordinary meaning unless it appears from the context of the statute or from that of the act of which the statute is a part that a different meaning is intended."). The Arizona Legislature having chosen not to give "loaded" a technical meaning, the commonsense "containing ammunition" is the term's most logical interpretation. Because this meaning would be apparent to a person of ordinary intelligence, we conclude the phrase "not loaded" is not unconstitutionally vague. *See id.*

Threatening or Intimidating

¶13 Johnson acknowledges that § 22-375 does not confer appellate jurisdiction for this court to consider whether the superior court committed legal error in affirming his threatening or intimidating conviction but requests that we treat this portion of his appeal as a petition for special action under *Ruesga v. Kindred Nursing Centers, L.L.C.*, 215 Ariz. 589, ¶ 16, 161 P.3d 1253, 1258 (App. 2007). But Johnson has identified no compelling reason for us to do so and no clear error by the trial court. *See Washington v. Superior Court*, 180 Ariz. 91, 93, 881 P.2d 1196, 1198 (App. 1994) (appellate court looks to factors such as clear error and significant issue of statewide importance in accepting special action jurisdiction). Accordingly, we

[4]Rule 111(d), Ariz. R. Sup. Ct., permits citation to decisions of other jurisdictions if permitted in the originating jurisdiction. Rule 3.4, Ohio Sup. Ct. R. Rep. Op., permits the citation of "[a]ll opinions of the courts of appeals issued after May 1, 2002," including unpublished ones.

decline to consider the appeal of his threatening or intimidating conviction as a special action and otherwise lack jurisdiction to address it.

Disposition

¶14 For the foregoing reasons, Johnson's weapons misconduct conviction is affirmed and the appeal of his threatening or intimidating conviction is dismissed.