

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1656**

State of Minnesota,
Appellant,

vs.

Andrew Vernard Glover,
Respondent.

**Filed May 4, 2020
Reversed and remanded
Rodenberg, Judge**

Hennepin County District Court
File No. 27-CR-19-16529

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for appellant)

Mary F. Moriarty, Fourth District Public Defender, Paul J. Maravigli, Assistant Public Defender, Minneapolis, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Smith, Tracy M., Judge; and Klaphake, Judge.*

S Y L L A B U S

A device is a firearm within the meaning of Minn. Stat. § 624.713, subd. 1(2) (2018), if that device (1) propels a projectile by the combustion of gunpowder or other explosive, and (2) is used or intended to be used as a weapon.

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

OPINION

RODENBERG, Judge

In this pretrial appeal by the state from an order granting respondent Andrew Glover’s motion to dismiss one count of the complaint charging him with possession of a firearm by an unauthorized person, the state argues that the district court’s order has a critical impact on the state’s case and that the district court erred by concluding that the flare launcher respondent possessed is not a firearm under Minnesota law because it was not “designed to injure or kill.” Because a “firearm” is a device that propels a projectile by the combustion of gunpowder or other explosive and which is used or intended to be used as a weapon, the district court legally erred in determining that the flare launcher cannot be a “firearm.” Whether respondent intended to use the flare launcher as a weapon presents a triable question of fact, and we therefore reverse and remand.

FACTS

On July 9, 2019, an employee of the Bloomington Kohl’s store reported a theft of electronics. The employee told police that two suspects entered the store, walked into a room marked “Employees Only,” and pried open a locker containing expensive electronics. Several electronic items were taken from the locker. Police located respondent in the store and apprehended him. Police discovered a loaded flare launcher¹ in respondent’s pocket.

¹ The parties refer to the device recovered from respondent as a “flare gun” or “signal launcher.” It is elsewhere referred to in the record as an “emergency signaling device” and as a “signaling device.” The specific device is manufactured by Orion Inc., and United States patent number 6,415,538 identifies the specific Orion-manufactured device as a “flare launcher.” For the purpose of this opinion, we refer to the device as a flare launcher. The device launches an “aerial distress flare,” as identified in United States patent number 5,025,729. For the purpose of this opinion, we refer to this projectile as a flare.

The Kohl's employee identified respondent as one of the individuals he observed trying to pry open the locker. Respondent has multiple prior felony convictions and is prohibited from possessing a firearm under Minn. Stat. § 624.713, subd. 1(2).

The state charged respondent with being an ineligible person in possession of a firearm, third-degree burglary, and possessing burglary or theft tools. Respondent moved to dismiss the unlawful-possession-of-a-firearm charge for lack of probable cause, arguing that the flare launcher is not a firearm within the meaning of Minn. Stat. § 624.713, subd. 1(2). The state opposed the motion.

At a pretrial suppression hearing, the state presented testimony from a deputy sheriff who is a firearms examiner. The deputy testified that he understands a firearm to be “an assembly of a barrel and the action from which a projectile is propelled by means of combustion.” He further testified that the particular flare launcher recovered from respondent is operated by inserting a flare into the chamber in the rear part of the flare launcher's barrel, cocking the hammer, and pulling the trigger. Pulling the trigger drives the hammer forward by spring pressure, causing the firing pin to strike the primer that ignites the gunpowder² and provides the heat needed to create the explosion and propel the projectile. The deputy testified that a pistol and a flare launcher are similar in that they are both hand-held devices that propel a projectile by means of combustion. He acknowledged

² The deputy testified that this flare launcher ignites “black powder,” which is a type of gunpowder that is not smokeless. Black powder is defined as “[a]n explosive mixture of saltpeter, charcoal, and sulfur, formerly used in firearms,” whereas gunpowder is defined as “[a]ny of various explosive powders used to propel projectiles from guns, especially a black mixture of potassium nitrate, charcoal, and sulfur.” *The American Heritage Dictionary of the English Language* 191, 784 (5th ed. 2018). In this opinion, we use the term “gunpowder.”

that flare launchers are routinely found in boat shops and marinas, and that the primary use of a flare launcher is to signal an emergency.

The district court dismissed the ineligible-person-in-possession-of-a-firearm charge for want of probable cause, concluding that a flare launcher is not a firearm because it is not designed to be used as a weapon. The state thereafter requested that the district court stay its order, asserting that the order had a critical impact on the state's case. The district court stayed the order and continued respondent's trial on the remaining counts.

This pretrial appeal by the state followed.

ISSUES

- I. Does the district court's pretrial order have a critical impact on the state's case?
- II. Is a flare launcher a "firearm" as contemplated by Minn. Stat. § 624.713, subd. 1(2)?

ANALYSIS

I. The district court's order dismissing the unlawful-possession-of-a-firearm charge has a critical impact on the state's case.

The state may appeal as of right to this court from a dismissal order "based on questions of law." Minn. R. Crim. P. 28.04, subd. 1(1). "When the state appeals from a pretrial order dismissing a criminal charge, this court will reverse only if the state clearly and unequivocally demonstrates that the district court erred and that the error, unless reversed, will have a critical impact on the outcome of the prosecution." *State v. Gradishar*, 765 N.W.2d 901, 902 (Minn. App. 2009) (quotation omitted). The critical-

impact test is satisfied when the district court's order "bars further prosecution of a defendant." *Id.*

The state argues that the district court's order has a critical impact on the state's case. Respondent does not concede critical impact, and contends that the prosecutor's having filed an amended complaint after the dismissal, again charging respondent with unlawful possession of a firearm, confirms that the district court's decision to dismiss the charge did not critically impact the state's ability to prosecute.³

The state did amend the complaint after the appealed-from order. But the amendment to the complaint added an enhancement to another count, and did not amend the ineligible-possession count, which had been dismissed. The state concedes that it cannot prosecute the dismissed charge under either version of the complaint unless the district court's pretrial order is reversed.

Additionally, the timing of the filings reveals that the appeal of count one was not affected by the amended complaint. The amended complaint was filed after the state filed its notice of appeal. The district court therefore had no jurisdiction over count one at the time the amended complaint was filed. *See State v. Barnes*, 81 N.W.2d 864, 866 (Minn. 1957) (stating that "the jurisdiction of a [district] court is suspended . . . as to those matters necessarily involved in the appeal," but not those that are "independent of, or which are

³ On January 14, 2020, a special term panel of this court denied respondent's motion to dismiss this appeal as having been taken from a non-appealable order. The special term panel held that "whether a signal launcher is a firearm under Minnesota law is a question of law because it involves statutory interpretation." Our resolution of the appeal is limited to the statutory-interpretation issue. Applying Minnesota Supreme Court caselaw to the statutory-interpretation question leaves for resolution at trial a factual question, as discussed below.

supplemental to, the appeal or collateral to the proceeding in which the appealed order or judgment was rendered”). When the state filed the amended complaint, count one was “necessarily involved in the appeal.”

Because the district court dismissed count one, we conclude that the district court’s order has a critical impact on the state’s case.

II. Whether a flare launcher is a firearm under Minn. Stat. § 624.713, subd. 1(2), is a question of fact for trial.

The state argues that a flare launcher is a “firearm” within the meaning of Minn. Stat. § 624.713, subd. 1(2), because it is a device that propels a projectile by the combustion of gunpowder or other explosive. Respondent argues that, in addition to propelling a projectile by the combustion of gunpowder or other explosive, a “firearm” must also be designed to be used as a weapon. And because a flare launcher is not designed to be a weapon, respondent maintains that it is not a “firearm.”

The statute under which respondent was charged prohibits “a person who has been convicted of . . . a crime of violence” from possessing “ammunition or a pistol⁴ or semiautomatic military-style assault weapon or . . . any other firearm.” Minn. Stat. § 624.713, subd. 1(2).

The complaint alleges that respondent is within the category of ineligible persons because he was previously convicted of a crime of violence. Respondent does not dispute

⁴ We note that under Minn. Stat. § 624.712, subd. 2 (2018), the definition of a “pistol” expressly excludes “a ‘BB gun,’ a scuba gun, a stud gun or nail gun used in the construction industry or children’s pop guns or toys.” Minn. Stat. § 624.712, subd. 2, does not exclude flare launchers from the definition of a “pistol.” But we do not address whether a flare launcher falls within the statutory definition of a “pistol” because the state makes no argument that it is a pistol.

that he is an ineligible person. Therefore, the issue on appeal is whether a flare launcher can be considered a firearm under the statute. This “presents a question of statutory interpretation, which [appellate courts] review de novo.” *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017). The objective of statutory interpretation is “to ascertain and effectuate the Legislature’s intent.” *State v. Bowen*, 921 N.W.2d 763, 765 (Minn. 2019).

The term “firearm” is not defined in Minn. Stat. § 624.713 (2018) or elsewhere in the chapter. As such, caselaw is instructive in determining what constitutes a “firearm.” The supreme court held in *State v. Seifert* that the definition of a “firearm” is not “restricted in meaning to guns using gunpowder,” but that the definition should be broadly construed to include devices that use compressed air as a propellant. 256 N.W.2d 87, 88 (Minn. 1977). Relying on the *Seifert* holding, this court in *State v. Fleming* considered whether a person could be convicted of violating Minn. Stat. § 624.713 for possessing a BB gun. 724 N.W.2d at 538 (Minn. App. 2006). This court analyzed the issue and noted that the supreme court had previously given a broad interpretation to the term “firearm.” *Id.* at 539-40. We also noted that the legislature did not codify a different definition of “firearm” when amending Minn. Stat. § 624.713 in 1994, after *Seifert* was decided, and we therefore determined that the legislature was aware of and adopted the definition found in the caselaw. *Id.* at 539-40. We concluded that the term “firearm” under Minn. Stat. § 624.713 is not restricted to devices using gunpowder and includes a BB gun. *Id.* at 541.

In *State v. Haywood*, the supreme court again considered the meaning of “firearm.” 886 N.W.2d 485, 486 (Minn. 2016). In *Haywood*, the defendant was convicted of being

an ineligible person in possession of a firearm in violation of Minn. Stat. § 609.165, subd. 1(b) (2014),⁵ for possessing a BB gun. *Id.* On appeal, the defendant argued that a BB gun is not and cannot be a “firearm.” *Id.* The district court and this court had determined that a BB gun is a firearm under Minn. Stat. § 609.165, relying on *Seifert* and *Fleming*, *id.* at 487-88, but the supreme court reversed. The supreme court noted that the term “firearm” is not defined in section 609.165 or elsewhere in chapter 609, and turned to the plain meaning of the word. *Id.* at 490-91 The supreme court considered numerous lay-dictionary definitions of the term, noting that the term “firearm” is typically used to identify a weapon that propels a projectile by the combustion of gunpowder or other explosive. *Id.* at 490. It held that the plain meaning of “firearm” is a “weapon[] that use[s] explosive force.” *Id.* Applying that definition, the supreme court reversed and vacated Haywood’s conviction because the BB gun he possessed propelled shots by compressed air. *Id.*

Haywood held only that the term “firearm” does not include air-guns. It did not hold that any and all devices that propel a projectile by the combustion of gunpowder or other explosive are firearms. Instead, it held that a “firearm” is a “*weapon*[] that use[s] explosive force.” *Id.* (emphasis added). We therefore reject the state’s argument that the term “firearm” includes *any* device that propels a projectile by the combustion of gunpowder or other explosive. There are a number of devices that propel something by

⁵ Although *Haywood* interpreted section 609.165, and respondent here was charged under section 624.713, the analysis in *Haywood* is relevant to the issue here, because both that case and this one concern the definition of the term “firearm.” *See State v. Lue Yang*, 887 N.W.2d 40, 43 (Minn. App. 2016) (stating that, while “*Haywood* does not control this case in the strictest sense,” the *Haywood* analysis of the term “firearm” applies to cases arising under section 624.713).

explosive force that would not generally be regarded as “firearms,” including nail guns that use a .22 caliber blank to propel a nail and fireworks that employ a launching tube (and perhaps even a bottle from which a bottle rocket is launched). These items, and others like them, propel projectiles by combustion of gunpowder or other explosive material but are generally not employed as a “weapon.” In order to be considered a firearm, the device must, under *Haywood*, also be a “weapon.”

Here, the district court concluded that a flare launcher “is a device from which is expelled a projectile by the force of an explosion or combustion.” The record supports this determination. The deputy testified that the flare launcher uses a primer, which is a small metal cup that contains an explosive mixture. The device has a projectile which holds a layer of gunpowder pressed into the face of a magnesium-based compound. When fired, the firing pin strikes the primer to ignite the layer of gunpowder, which upsets the explosive magnesium compound. The magnesium compound then creates white hot gas, and the explosion upsets the propellant, which expands and pushes the cartridge down the barrel to create the flare. Therefore, the district court correctly determined that a flare launcher meets *Haywood’s* “explosive force” requirement, because the flare launcher propels a projectile by the combustion of gunpowder or other explosive.

We next consider whether the flare launcher is a weapon within the meaning of the *Haywood* definition of “firearm.” Although the district court concluded that the signal launcher uses explosive force, it determined that the device is not a firearm because it is not a “‘weapon’ or some variation of ‘a device used or designed as a weapon.’”

In *State v. Moss*, the supreme court determined that dangerous weapons include: “(1) firearms . . . ; (2) devices designed as weapons and capable of producing death or great bodily harm; and (3) devices which, in the manner used or intended to be used, are calculated or likely to produce death or great bodily harm.” 269 N.W.2d 732, 735 (Minn. 1978).

The supreme court has held that “fists, when used to strike, and feet, when used to stomp another person, may or may not be dangerous weapons depending on the circumstances of the case.” *State v. Born*, 159 N.W.2d 283, 284-85 (Minn. 1968); *see also State v. Jurgens*, 424 N.W.2d 546, 553-54 (Minn. App. 1988) (holding that hands and feet may be used as dangerous weapons), *review denied* (Minn. July 6, 1988).

Neither kitchen knives nor scissors are designed to be weapons. However, caselaw supports that sharp items such as knives and scissors can be considered dangerous weapons. *See Moss*, 269 N.W.2d at 736 (determining that a scissors is a dangerous weapon because, “although defendant did not use the scissors during the robbery[,] he had them on his person and intended to use them if their use became necessary”); *State v. Patton*, 414 N.W.2d 572, 574 (Minn. App. 1987) (holding that a knife was a dangerous weapon when it was displayed within two feet of the victim).

In other cases that consider whether an item is a dangerous weapon, we have held that a beer bottle thrown at and hitting a victim’s head, *State v. Cepeda*, 588 N.W.2d 747, 749 (Minn. App. 1999), a pool cue swung like a baseball bat, *State v. Upton*, 306 N.W.2d 117, 117-18 (Minn. 1981), and a board three feet long, two inches wide, and three quarters of an inch thick, *State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983), were all dangerous

weapons. None of these ordinary objects are designed as weapons. But if a person employs such an object with the intent to harm another, then courts may treat the object as a dangerous weapon. *See State v. Coauette*, 601 N.W.2d 443, 448 (Minn. App. 1999), *review denied* (Minn. Dec. 14, 1999).

We conclude that a flare launcher, although not designed as a weapon, is no different than the likes of scissors, pool cues, or baseball bats, and may be a weapon depending on how it is used. The manufacturer of this flare launcher describes the device as an “emergency signaling device,” and not as a firearm. And flare launchers are commonly sold by boat shops and marinas. Patent number 5,025,729 for this flare is titled “Aerial Distress Flare,” and the device is described as “[a]n emergency signaling device comprising an elongate shell to be fired into the air.” The patent further provides that the intended purpose of the flare is to render assistance to “personnel in emergency situations,” and to help “determin[e] the location of a person requiring aid.” Similarly, patent number 6,415,538 B1, titled “Breech Locking Safety Bracket for Flare Launchers,” states that flare launchers “are well known as signaling devices, for example, to warn of distress in emergency, to signal one’s location, to provide a specific, e.g., color[-]coded, message and the like.”

But despite the fact that the device allegedly possessed by respondent is designedly an emergency-alert mechanism, the device is susceptible of being used as a weapon. The deputy testified that flare launchers may shoot a flare up to 500 feet, the flare can burn for up to seven seconds at 1,800 to 2,000 degrees Fahrenheit, and the entire projectile is eventually consumed. The warning label printed on the flare launcher recovered from

respondent reads, “Warning: Not a Toy. Keep Out of Reach of Children. Launches Burning Flares At High Velocity. Never Point at a Person. Never Store or Carry Launcher Loaded.” This record evidence is sufficient to support a conclusion that a flare launcher is susceptible of being used as a weapon.

The complaint alleges that respondent was discovered with a loaded flare launcher in his pocket while he was stealing electronics from a Kohl’s store. It does not allege either that respondent fired the flare launcher or that he pointed it at store employees or responding officers. But the complaint does allege that respondent was carrying the device loaded with a flare, contrary to the printed warning. Based on this record, and interpreting the statute in conformity with Minnesota Supreme Court precedent, a fact issue remains concerning whether respondent intended to use the flare launcher as a weapon. Whether the flare launcher was used or intended to be used as a dangerous weapon is a question of fact for resolution at trial. *See State v. Davis*, 540 N.W.2d 88, 90 (Minn. App. 1995) (stating that “[w]hether a defendant’s hands or feet were used as dangerous weapons is a question of fact” to be determined by a jury), *review denied* (Minn. Jan. 31, 1996). If respondent used or intended to use the flare launcher as a weapon, then it may be considered a firearm. The district court’s dismissal of the ineligible-person-in-possession-of-a-firearm count for want of probable cause was based on legal error under supreme court precedent. It cannot be said on this record that the device was not a weapon. That fact question remains for resolution at trial.

DECISION

We reverse the district court's order dismissing count one and remand for further proceedings consistent with this opinion.

Reversed and remanded.