SJC-12710

COMMONWEALTH vs. MICHAEL R. KELLY.

Middlesex. October 2, 2019. - January 30, 2020.

Present (Sitting at Barnstable): Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Firearms. Intent. Public Welfare Offense. Constitutional Law, Right to bear arms. Due Process of Law, Public welfare offense. Practice, Criminal, Instructions to jury.

Complaint received and sworn to in the Natick Division of the District Court Department on January 22, 2013.

Complaint received and sworn to in the Framingham Division of the District Court Department on February 20, 2013.

The cases were tried before David W. Cunis, J., and a motion for a required finding was considered by him.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Edward R. Molari for the defendant.

Jamie Michael Charles, Assistant District Attorney, for the Commonwealth.

Keith G. Langer, for Commonwealth Second Amendment, Inc., amicus curiae, submitted a brief.

GAZIANO, J. While showing a firearm to one of his friends as a potential purchaser of the weapon, the defendant accidently discharged it in a bedroom, shooting his friend through the hand. The defendant challenges his convictions of discharging a firearm within 500 feet of a building, in violation of G. L. c. 269, § 12E, and unlawful possession of a firearm, in violation of G. L. c. 269, § 10 (h). In a matter of first impression, the defendant argues that G. L. c. 269, § 12E, includes a mens rea requirement for the element of discharge. The defendant also argues that the trial judge erred in declining to instruct the jury on G. L. c. 140, § 129C (m), which exempts from licensing requirements the "temporary holding, handling or firing of a firearm for examination, trial or instruction in the presence of a holder of a license to carry firearms." We conclude that G. L. c. 269, § 12E, does not require any mens rea as to the element of discharge. Because the evidence in this case did not support a finding that the defendant's possession was temporary and in the presence of a holder of a license to carry, we conclude as well that the judge did not abuse his discretion in declining to instruct on an exemption for temporarily holding a firearm.[1]

[1] We acknowledge the amicus brief submitted by Commonwealth Second Amendment, Inc.

1. Background. We summarize the facts the jury could have found, reserving some details for later discussion. In January of 2013, the defendant was living, at least part of the time, at his father's home in Massachusetts. The defendant also spent part of his time in Maine, where he had a driver's license. The defendant owned a Springfield XD .40 caliber semiautomatic handgun; when in his father's house, the firearm was kept inside a case in a hallway closet. The defendant's father had a license to carry a firearm in Massachusetts, but the defendant did not have a license to carry in Massachusetts or a firearm identification card; he did meet the minimal requirements for possession of a firearm in Maine, where a license to own a firearm is not required.

At some point on January 20, 2013, the defendant took the case, with the firearm in it, out of the hallway closet and brought it into a bedroom. He unlocked and opened the case. Later that day, the victim and several other of the defendant's friends came to the house to watch a football game on television. The defendant hoped to sell the firearm to the victim, who a short time previously had acquired a license to carry a firearm in the Commonwealth. The two men went into the bedroom, where the defendant demonstrated various features of the firearm. He handed the firearm to the victim, who soon handed it back. The defendant and a police lieutenant both

testified that the design of the firearm required the user to depress the trigger to disassemble the weapon. Believing that the chamber was empty, the defendant depressed the trigger in order to disassemble the firearm; this discharged a bullet, which struck the victim in the hand.

The defendant was charged with unlawful possession of a firearm, in violation of G. L. c. 269, § 10 (h); possession of a high capacity feeding device, in violation of G. L. 269, § 10 (m); discharging a firearm within 500 feet of a building, in violation of G. L. c. 269, § 12E; assault and battery by means of a dangerous weapon, in violation of G. L. c. 265, § 15A (b); and two counts of witness intimidation (of the victim and the investigating officer), in violation of G. L. c. 268, § 13B.[2] At trial, the defendant requested the jury be instructed on the statutory licensing exemption set forth in G. L. c. 140, § 129C (m), which permits "[t]he temporary holding, handling or firing of a firearm for examination, trial or instruction in the presence of a holder of a license to carry firearms, or the temporary holding, handling or firing of a rifle or shotgun for examination, trial or instruction in the presence of a holder of a firearm identification card, or where such holding, handling

[2] Prior to trial, the Commonwealth entered a nolle prosequi on the charge of possession of a high capacity feeding device.

or firing is for a lawful purpose." The judge declined to give such an instruction. The defendant's motion for a required finding of not guilty at the close of the Commonwealth's case was denied. A District Court jury convicted the defendant of unlawful possession of a firearm, discharging a firearm within 500 feet of a building, and one count of witness intimidation (the investigating officer). The jury acquitted him of assault and battery by means of a dangerous weapon and the other count of witness intimidation (the victim). The defendant renewed his motion for a required finding of not guilty; the judge again denied the motion.

The defendant filed a postconviction motion for a required finding of not guilty on the charges of discharging a firearm and witness intimidation. See Mass. R. Crim. P. 25 (b) (2), 378 Mass. 896 (1979). The Commonwealth conceded that, under Commonwealth v. Muckle, 478 Mass. 1001, 1003 (2017), which had been decided while the defendant's appeal was pending, the District Court lacked jurisdiction over the charge of witness intimidation and agreed to dismiss that charge. The defendant argued that G. L. c. 269, § 12E, includes a requirement that the discharge be done knowingly, and that there was insufficient evidence to show knowledge. The judge denied the motion because he concluded that G. L. c. 269, § 12E, does not contain any mens rea requirement for the act of discharge.

The defendant appealed from the denial of the motion for a required finding and from his convictions. We transferred the consolidated appeal from the Appeals Court on our own motion.

2. Discussion. a. Mens rea for discharging a firearm with 500 feet of a building. The defendant argues that G. L. c. 269, § 12E, requires proof that he discharged the firearm knowingly. He maintains that the evidence was insufficient to establish that he knowingly discharged the firearm and that the judge therefore erred in denying his motion for a required finding.

In a claim challenging the sufficiency of the evidence, we review the facts in the light most favorable to the Commonwealth. Commonwealth v. Brown, 479 Mass. 600, 608 (2018), citing Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). The undisputed evidence in this case established that the defendant discharged the weapon, but that he did not do so knowingly or intentionally. Therefore, the question before us is whether G. L. c. 269, § 12E, contains the requirement that the discharge of the firearm be knowing.[3]

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[3] General Laws c. 269, § 12E, provides:

> "Whoever discharges a firearm as defined in [G. L. c. 140, § 121], a rifle or shotgun within [500] feet of a dwelling or other building in use, except with the consent of the owner or legal occupant thereof, shall be punished by a fine of not less than fifty nor more than one hundred

In the mid-Nineteenth Century, legislatures in the United States began imposing strict liability for certain offenses in the areas of public health and safety. See Morissette v. United States, 342 U.S. 246, 256-257 (1952) (collecting cases from Nineteenth and Twentieth Centuries); Commonwealth v. Mixer, 207 Mass. 141, 142-143 (1910) (same). These offenses came to be known as "public welfare offenses." See Morissette, supra at 255. Public welfare statutes "[t]ypically . . . regulate potentially harmful or injurious items." Staples v. United States, 511 U.S. 600, 607 (1994). Rather than criminalizing conduct that already has resulted in harm, these statutes criminalize behavior that "create[s] the danger or probability of it which the law seeks to minimize." Morissette, supra at 255-256.

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dollars or by imprisonment in a jail or house of correction for not more than three months, or both. The provisions of this section shall not apply to (a) the lawful defense of life and property; (b) any law enforcement officer acting in the discharge of his duties; (c) persons using underground or indoor target or test ranges with the consent of the owner or legal occupant thereof; (d) persons using outdoor skeet, trap, target or test ranges with the consent of the owner or legal occupant of the land on which the range is established; (e) persons using shooting galleries, licensed and defined under the provisions of [G. L. c. 140, § 56A]; and (f) the discharge of blank cartridges for theatrical, athletic, ceremonial, firing squad, or other purposes in accordance with [G. L. c. 148, § 39]."

This court repeatedly upheld strict liability statutes in early cases involving the sale of intoxicating liquor, see, e.g., Commonwealth v. Goodman, 97 Mass. 117, 119 (1867); the sale of adulterated food, see, e.g., Commonwealth v. Smith, 103 Mass. 444, 445 (1869); and violations of motor vehicle laws, see, e.g., Commonwealth v. Pentz, 247 Mass. 500, 509 (1924). In more recent years, we have continued to uphold the power of the Legislature to create strict liability, public welfare offenses. See, e.g., Commonwealth v. Tart, 408 Mass. 249, 265 (1990) (landing raw fish for sale without permit).

We first address the question of statutory interpretation: whether G. L. c. 269, § 12E, contains an implied mens rea requirement for the element of discharge. We then turn to a consideration of whether imposing strict liability for the element of discharge would infringe on constitutional protections.

i. Statutory interpretation. "Our primary duty in interpreting a statute is to effectuate the intent of the Legislature in enacting it" (quotation and citation omitted). Commonwealth v. Curran, 478 Mass. 630, 633 (2018). "[W]here the language of a statute is plain and unambiguous, it is conclusive as to the legislative intent" (citation omitted). Commonwealth v. Wassilie, 482 Mass. 562, 573 (2019). When, as here, the language is unclear, we "must interpret the statute so as to

render the legislation effective, consonant with sound reason and common sense." See Commonwealth v. Morgan, 476 Mass. 768, 777 (2017), quoting Seideman v. Newton, 452 Mass. 472, 477 (2008). We examine the "cause of [the statute's] enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Wallace W. v. Commonwealth, 482 Mass. 789, 793 (2019), quoting Adoption of Daisy, 460 Mass. 72, 76–77 (2011).

We generally presume that criminal liability will not be imposed without some level of mens rea. See Commonwealth v. Miller, 385 Mass. 521, 524 (1982), quoting Dennis v. United States, 341 U.S. 494, 500 (1951) ("[the] existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence"). Given this, the absence of explicit language involving mens rea in a statute is not dispositive of a legislative intent to create a strict liability offense. See Brown, 479 Mass. at 606-607.

General Laws c. 269, § 12E, does not contain any language specifying a requisite mens rea. Therefore, we must determine whether, in enacting it, the Legislature intended to create a strict liability, public welfare offense. As discussed, public welfare statutes criminalize conduct that has not necessarily caused harm but is "potentially harmful or injurious" (emphasis added). See Staples, 511 U.S. at 607. See also Morissette, 342

U.S. at 255-256 ("Many violations of [public welfare offenses] result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize"); Commonwealth v. Raymond, 97 Mass. 567, 569 (1867) ("[strict liability] is the general rule where acts which are not mala in se are made mala prohibita from motives of public policy, and not because of their moral turpitude or the criminal intent with which they are committed").

The discharge of a firearm within 500 feet of a building is such conduct. Firearms do not cause harm merely by existing. Cf. Commonwealth v. Young, 453 Mass. 707, 714 (2009) ("unlicensed possession of a firearm itself is a regulatory crime. It is passive and victimless"); Commonwealth v. Alvarado, 423 Mass. 266, 270 (1996) ("carrying a concealed weapon is not, standing alone, an indication that criminal conduct has occurred or is contemplated"). Neither is the discharge of a firearm inherently harmful. Cf. Ezell v. Chicago, 651 F.3d 684, 709 (7th Cir. 2011) (government failed to show that "civilian target practice at a firing range creates such genuine and serious risks to public safety that prohibiting range training throughout the city is justified"). Rather, when firearms are discharged, they create a risk of harm. It is important to note that the statute at issue here only criminalizes discharges within 500 feet of a dwelling or

building in use, not within 500 feet of any building. See G. L. c. 269, § 12E. This indicates that the Legislature intended to reduce the risk of injuries to people who might be nearby, a risk that regrettably came to fruition here. The statute is consistent with a public welfare offense because it punishes risky behavior, not behavior that necessarily has caused a harm.

One important factor to consider in determining whether the Legislature intended to create a strict liability offense, albeit not dispositive, is the potential length of punishment. Early public welfare offenses "almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences." Staples, 511 U.S. at 616, citing Raymond, 97 Mass. at 567 (fine of $200, six months in jail, or both, under St. 1866, c. 253, § 1, for killing calf less than four weeks old for purpose of sale), Commonwealth v. Farren, 9 Allen 489, 490 (1864) (fine for selling adulterated milk), and People v. Snowburger, 113 Mich. 86, 87-88, 90 (1897) (fine of $500 or incarceration in county jail for selling adulterated food). Because our system of criminal law generally presumes that mens rea is required, "imposing severe punishments for offenses that require no mens rea would seem incongruous." See Staples, supra at 616-617.

Therefore, we have interpreted statutes that contain no specific mens rea requirement, but that provide a harsh penalty,

to contain an implicit requirement of a particular mens rea. See Commonwealth v. Collier, 427 Mass. 385, 388 (1998) (two and one-half year maximum sentence for violating protective order); Commonwealth v. Jackson, 369 Mass. 904, 907, 916 (1976) (five-year maximum penalty and one-year mandatory minimum for carrying firearm without license); Commonwealth v. Boone, 356 Mass. 85, 87 (1969), citing G. L. c. 269, § 10, as amended through St. 1957, c. 688, § 23 (then five-year maximum sentence for carrying firearm in vehicle without license); Commonwealth v. Buckley, 354 Mass. 508, 511-512 (1968) (five-year maximum sentence for being present where narcotic drug was held).[4]

The United States Supreme Court similarly has inferred a mens rea requirement where statutes contain severe penalties. See United States v. X-Citement Video, Inc., 513 U.S. 64, 72, 78 (1994) (X-Citement) (ten-year maximum for violation of act protecting children against sexual exploitation); Staples, 511 U.S. at 615 (ten-year maximum period of incarceration for possessing unregistered machine gun); Liparota v. United States, 471 U.S. 419, 420 n.1, 433 (1985) (five-year maximum penalty for unlawfully acquiring or possessing food stamps). See also

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[4] On occasion, we have held that crimes with very harsh penalties may be strict liability offenses, but only where there is "clear legislative language indicating that mens rea was not required for conviction." Commonwealth v. Alvarez, 413 Mass. 224, 228-229 (1992), citing Commonwealth v. Buckley, 354 Mass. 508, 511-512 (1968).

United States v. United States Gypsum Co., 438 U.S. 422, 442 n.18 (1978) (noting that new maximum penalty of three years and $100,000, which was not applicable to defendants in that case, weighed towards implying mens rea requirement in antitrust violations of Sherman Act).

On the other hand, in Tart, 408 Mass. at 265, we declined to imply a mens rea requirement in part because "[t]he maximum penalties . . . , imprisonment for thirty days and a $50 fine, [were] relatively small" (quotation omitted). Similarly, in Commonwealth v. Minicost Car Rental, Inc., 354 Mass. 746, 748 (1968), we held that violation of a parking regulation was a strict liability offense because "the penalty of a fine not exceeding $20 is very definitely minor."

Here, G. L. c. 269, § 12E, provides a maximum penalty of one hundred dollars, three months' incarceration, or both. Incarceration for any length of time is a serious consequence that we do not wish to trivialize. Nonetheless, given our existing jurisprudence, imprisonment for three months falls squarely within the category of "fines or short jail sentences" that are characteristic of public welfare offenses. See Staples, 511 U.S. at 616. The length of punishment here thus

does not compel us to impose a mens rea requirement that is not present in the plain language of the statute.[5]

Another relevant factor is the ability of a defendant to take actions to avoid violating the statute. In Dean v. United States, 556 U.S. 568, 570 (2009), the Court examined a statute that criminalized discharge of a firearm during the commission of certain crimes. The Court held that no mens rea for the discharge was necessary, because "[t]hose criminals wishing to avoid the penalty for an inadvertent discharge can lock or unload the firearm, handle it with care during the underlying violent or drug trafficking crime, leave the gun at home, or -- best yet -- avoid committing the felony in the first place." Id. at 576. Similarly, in X-Citement, 513 U.S. at 76 n.5, the Court noted that imposing strict liability on pornography producers regarding the age of the performers was logical because "producers are more conveniently able to ascertain the age of performers."

[5] Another factor that has appeared occasionally in our common law is whether the offense is a felony or a misdemeanor. "Close adherence to the early cases . . . might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense." Staples v. United States, 511 U.S. 600, 618 (1994). But the offense here, discharging a firearm within 500 feet of a building, is a misdemeanor. Commonwealth v. Edwards, 71 Mass. App. Ct. 716, 721 (2008). Therefore, this factor does not weigh in favor of implying a mens rea requirement.

Conversely, if a statute is likely to criminalize behavior by those who cannot easily avoid violating the statute, strict liability is impermissible. See X-Citement, 513 U.S. at 76 n.5, 78. In Smith v. California, 361 U.S. 147, 148 (1959), the Supreme Court examined a statute that criminalized the sale of books containing any "obscene or indecent writing." The Court reasoned that, without a mens rea requirement, "[e]very bookseller would be placed under an obligation to make himself [or herself] aware of the contents of every book in his [or her] shop. It would be altogether unreasonable to demand so near an approach to omniscience." Id. at 153.

With the statute at issue here, by contrast, firearm owners can take simple steps to ensure compliance. Firearm owners generally have control over whether they discharge their weapons. Additionally, many firearms have features designed to reduce accidental discharges. See G. L. c. 140, § 131K ("Any firearm . . . without a safety device designed to prevent the discharge of such weapon by unauthorized users . . . including, but not limited to, mechanical locks or devices designed to recognize and authorize, or otherwise allow the firearm to be discharged only by its owner or authorized user, . . . provided, that such device is commercially available, shall be defective and the sale of such a weapon shall constitute a breach of warranty . . ."). See, e.g., Pena v. Lindley, 898 F.3d 969, 973

(9th Cir. 2018) ("Two [California statutes] require that a handgun have a chamber load indicator and a magazine detachment mechanism, both of which are designed to limit accidental firearm discharges"); United States v. Richardson, 51 Fed. Appx. 90, 92 (4th Cir. 2002), cert. denied, 537 U.S. 1240 (2003) ("weapon had three safety features to prevent an unintended firing"); Pacific Mut. Life Ins. Co. of Cal. v. Brooks, 14 F.2d 307, 308 (8th Cir. 1926) (noting "many safety features of the gun which would tend to prevent [discharge] from occurring accidentally").

Here, the undisputed evidence was that the Springfield XD .40 firearm required the user to depress the trigger in order to disassemble the weapon. At trial, the defendant described the weapon as having a "terrible design." A police lieutenant testified that the firearm was risky to disassemble because it required pulling the trigger in order to do so. He also testified that this model of firearm was not approved for civilian use in Massachusetts.

Despite the dangers associated with this particular type of firearm, the defendant stored it in Massachusetts, and he demonstrated its features to the victim inside his father's house. The defendant testified that he handed the firearm to the victim and was not paying attention to the victim for part of the time while the victim was holding the firearm. When the

victim handed it back, the defendant became aware that it "wasn't fed properly," but he nonetheless depressed the trigger in order to disassemble the weapon. There were many precautions that the defendant could have taken to avoid the subsequent accidental discharge.[6]

In light of all the above, we conclude that the Legislature intended to create a strict liability, public welfare offense.[7]

ii. Second Amendment. Where fairly possible, a statute must be construed "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score" (citation omitted). Commonwealth v. Fremont Inv. & Loan, 459 Mass. 209, 214 (2011). Therefore, "where [rights under the

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[6] Among other things, the defendant easily could have learned that this particular firearm was not approved for ownership in Massachusetts by examining the publicly posted list of approved firearms. See Executive Office of Public Safety and Security, Approved Firearms Roster (Sept. 2019), https://www.mass.gov/doc/approved-firearms-roster-6/download [https://perma.cc/H7C6-ASF5]. See also G. L. c. 140, § 123 (prescribing testing requirements that firearm models must undergo before being approved for sale); G. L. c. 140, § 131 3/4 (delegating duty to Secretary of Public Safety to promulgate list of approved firearms); 501 Code Mass. Regs. §§ 7.00 (2016) (regulating promulgation of approved firearms roster).

[7] As the defendant points out, in Alvarez, 413 Mass. at 230, a case involving G. L. c. 94C, § 34J, which then established a mandatory minimum term of imprisonment of two years for certain drug offenses committed within 1,000 feet of a school, we mentioned G. L. c. 269, § 12E, in language that suggested we considered it to have a mens rea requirement for the element of discharge. To the extent the dicta in Alvarez, supra, made that suggestion, we now conclude otherwise, for the reasons discussed supra.

First Amendment to the United States Constitution] are at issue, we presume 'that some form of scienter is to be implied in a criminal statute even if not expressed.'" Commonwealth v. Jones, 471 Mass. 138, 143 (2015), quoting X-Citement, 513 U.S. at 69. The defendant argues that we should apply this principle of statutory interpretation here because the Second Amendment to the United States Constitution is implicated. The regulated activity, however, falls outside the scope of the Second Amendment.

In District of Columbia v. Heller, 554 U.S. 570, 628-629 (2008), the United States Supreme Court struck down parts of the District of Columbia's statutory scheme for handgun possession because "banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family would fail constitutional muster" (quotations and citation omitted). See McDonald v. Chicago, 561 U.S. 742, 791 (2010) (incorporating Second Amendment against States). "Since Heller, '[c]ourts have consistently recognized that Heller established that the possession of operative firearms for use in defense of the home constitutes the 'core' of the Second Amendment.'" Commonwealth v. McGowan, 464 Mass. 232, 235 (2013), quoting Hightower v. Boston, 693 F.3d 61, 72 (1st Cir. 2012). See Gould v. Morgan, 907 F.3d 659, 671 (1st Cir. 2018), citing Kachalsky v. Westchester, 701 F.3d 81, 93 (2d Cir. 2012), cert. denied sub

nom. Kachalsky v. Cacace, 569 U.S. 918 (2013); Drake v. Filko, 724 F.3d 426, 436 (3d Cir. 2013), cert. denied sub nom. Drake v. Jerejian, 572 U.S. 1100 (2014); Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir.), cert. denied, 571 U.S. 952 (2013); National Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 206 (5th Cir. 2012), cert. denied, 571 U.S. 1196 (2014); Tyler v. Hillsdale County Sheriff's Dep't, 837 F.3d 678, 685 (6th Cir. 2016) (en banc); United States v. Reese, 627 F.3d 792, 800 (10th Cir. 2010), cert. denied, 563 U.S. 990 (2011); and United States v. Focia, 869 F.3d 1269, 1285 (11th Cir. 2017), cert. denied, 139 S. Ct. 846 (2019).

Here, however, the conduct at issue clearly falls outside the core Second Amendment right; by its terms, G. L. c. 269, § 12E, does not punish the discharge of a firearm within a home where it is discharged in the "lawful defense of life and property." Additionally, the statute does not prohibit discharge when the owner of the building in question has given permission. Id. Here, however, the defendant's father testified that he had not given the defendant permission to discharge the firearm in his home. The statute also does not apply to "any law enforcement officer acting in the discharge of his [or her] duties." Id. Neither does the statute prohibit the discharge of a firearm at a licensed shooting gallery. Id.

Cf. Ezell, 651 F.3d at 690 (ban on shooting ranges violated Second Amendment). Therefore, we need not infer a mens rea requirement on this ground. Cf. McGowan, 464 Mass. at 233 (statute that "allows the owner of a firearm to carry or otherwise keep the firearm under the owner's immediate control within the home . . . falls outside the scope of the right to bear arms protected by the Second Amendment").[8]

Rather, G. L. c. 269, § 12E, falls squarely within the category of firearm regulations not proscribed by the Second Amendment. "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." McGowan, 464 Mass. at 237, quoting Heller, 554 U.S. at 626. The Second Amendment "does not imperil every law regulating firearms." McDonald, 561 U.S. at 786.

In Heller, 554 U.S. at 632-633, the Supreme Court explicitly distinguished between laws that infringe on the right to bear arms for self-defense, which implicate the Second

[8] Even under a broader reading of the Second Amendment that includes a right to bear arms for purposes of self-defense outside the home, see Young v. Hawaii, 896 F.3d 1044, 1070 (9th Cir. 2018), reh'g en banc granted, 915 F.3d 681 (9th Cir. 2019); Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012), our reasoning is not disturbed, as G. L. c. 269, § 12E, does not restrict the discharge of a firearm in lawful self-defense.

Amendment, and laws similar to the one at issue here, which do not. The Court analyzed "founding-era laws" that prohibited the discharge of firearms "in certain places (including houses) on New Year's Eve and the first two days of January" in New York, the discharge of firearms "in streets and taverns" in Rhode Island, and the discharge of firearms within Boston. See id. The Court stated that it was unlikely that these laws would have been enforced against a person who acted in self-defense. Id. at 633. The Court also noted that all these laws "punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties." Id. Based on this analysis, the Court determined that these founding-era statutes were consistent with its holding that the Second Amendment protects the right to keep and bear arms in the home for the purposes of self-defense. See id. at 635-636.

General Laws c. 269, § 12E, is quite similar to the founding-era statutes discussed in Heller, 554 U.S. at 632-633. The statute prohibits discharge in certain locations, and it sanctions that discharge with a relatively minor punishment. Because the founding-era statutes are consistent with the Second Amendment right, G. L. c. 269, § 12E, the Massachusetts statute prohibiting discharge within 500 feet of a dwelling, is as well. See Powell v. Tompkins, 783 F.3d 332, 346 (1st Cir. 2015), cert.

denied, 136 S. Ct. 1448 (2016), citing Heller, supra at 626–627, and McDonald, 561 U.S. at 786 ("Nowhere in its dual decisions did the Supreme Court impugn legislative designs that comprise so-called general prohibition or public welfare regulations aimed at addressing perceived inherent dangers and risks surrounding the public possession of loaded, operable firearms"); Ezell, 651 F.3d at 702–703 ("if the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment -- 1791 or 1868 -- then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review"). In light of the above, we need not imply a mens rea requirement based on the Second Amendment.

iii. Due process. Although not raised by the defendant, we briefly address the question of due process. "Strict criminal liability is not necessarily a denial of due process of law . . . ." Miller, 385 Mass. at 525. Nonetheless, some strict liability statutes may run afoul of due process. See Buckley, 354 Mass. at 510-511, citing Lambert v. California, 355 U.S. 225, 228-230 (1957).

In Lambert, 355 U.S. at 226, the United States Supreme Court considered a statute that required all residents of Los

Angeles who previously had been convicted of felonies to register with the chief of police within five days of moving into the city. The Court held that the strict liability registration requirement violated due process because "[v]iolation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test," and because the defendant did not have "an opportunity . . . to avoid the consequences of the law." See id. at 229. See also United States Gypsum Co., 438 U.S. at 438 (holding strict liability for Sherman Act violations unconstitutional because act "does not, in clear and categorical terms, precisely identify the conduct which it proscribes").

The statute in this case is readily distinguishable. First, violation of the statute requires an action, namely, the discharging of a firearm. Cf. Lambert, 355 U.S. at 229 ("Violation . . . is unaccompanied by any activity whatever . . ."). Additionally, as discussed, there are many ways for individuals to avoid accidental firearm discharges, thereby "avoid[ing] the consequences of the law." Cf. id. Lastly, the statute precisely "identif[ies] the conduct which it proscribes." Cf. United States Gypsum Co., 438 U.S. at 438.

In Staples, 511 U.S. at 610-611, the Supreme Court held that imposing strict liability for possession of a machine gun was unconstitutional. The Court observed that, due to the "long

tradition of widespread lawful gun ownership by private individuals in this country," gun owners were not "on notice that they stand 'in responsible relation to a public danger'" (citation omitted). Id. Here, however, the regulated conduct is discharge, which implicates dangers not present in the simple possession of a firearm. Additionally, as discussed, other States throughout the United States have a long history of regulating the locations in which firearms may be discharged for purposes other than self-defense or defense of another. Therefore, the reasoning in Staples, supra, does not apply.

Having determined that the element of discharge in G. L. c. 269, § 12E, does not contain a mens rea requirement, and thus that the denial of the defendant's motion for a required finding was not erroneous, we turn to the charge of possession in violation of G. L. c. 269, § 10 (h).

b. Instruction on statutory exemption. The defendant argues that the trial judge erred in declining to instruct the jury on the statutory exemption of G. L. c. 140, § 129C (m). That exemption is relevant to the defendant's conviction under G. L. c. 269, § 10 (h), which provides, in relevant part, "Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of [G. L. c. 140, § 129C,] shall be punished . . . ." Under G. L. c. 140, § 129C, "[n]o person, other than . . . an exempt person . . .

shall own or possess any firearm . . . unless he [or she] has been issued a firearm identification card" pursuant to § 129B. Permissible exemptions include the "temporary holding, handling or firing of a firearm for examination, trial or instruction in the presence of a holder of a license to carry firearms." G. L. c. 140, § 129C (m).

The defendant requested an instruction concerning the exemption in G. L. c. 140, § 129C (m), and objected when the judge denied the request. Therefore, we review for prejudicial error. See Commonwealth v. Okoro, 471 Mass. 51, 67 (2015). The defendant thus is entitled to relief if (1) there was error and (2) the error was prejudicial. See Commonwealth v. Cruz, 445 Mass. 589, 591 (2005). An error is prejudicial unless "we can say with confidence that it did not influence the jury, or had but very slight effect" (quotation and citation omitted). Commonwealth v. Harris, 481 Mass. 767, 777 (2019).

The asserted error here was the decision not to give an instruction on a statutory exemption. We treat the existence of a statutory exemption as equivalent to an affirmative defense. See Commonwealth v. Anderson, 445 Mass. 195, 214 (2005). Therefore, the decision not to instruct is error if the evidence, viewed in the light most favorable to the defendant, provided support for the affirmative defense. See Commonwealth v. Acevedo, 446 Mass. 435, 442-443 (2006). Here, there was no

error; the undisputed evidence showed that the defendant's possession of the firearm was neither temporary nor exclusively in the presence of a holder of a license to carry.

The defendant and the Commonwealth both compare the circumstances here to those in Commonwealth v. Bachman, 41 Mass. App. Ct. 757, 758, 760 (1996). The defendant in that case met a man, who had a firearm identification card, in the home of the defendant's mother. Id. at 758, 761. The defendant showed the man multiple handguns and rifles, fired one of the rifles, and gave the man one of the handguns. Id. at 758. The defendant was charged with and convicted of unlawful possession of rifles and firearms. Id. at 757.

The Appeals Court explained that G. L. c. 140, § 129C (m), contains two provisions. See Bachman, 41 Mass. App. Ct. at 761-762. First, the statute exempts the temporary possession of a firearm in the presence of a holder of a license to carry for the purpose of examination, trial, or instruction. See id. Second, the statute exempts the temporary possession of a rifle in the presence of a holder of a firearm identification card for the purpose of examination, trial, or instruction. See id. The court concluded that the exemption did not apply to the firearm charges because the man shown the weapons only possessed a firearm identification card, not a license to carry. Id. at 760-761. The defendant relies on this distinction in his

argument that both his father and the victim here had licenses to carry. This argument disregards the Appeal Court's reasoning, which is directly applicable here, concerning the rifle charges. The Appeals Court noted that the defendant owned the weapons and retained all but one of them. See id. at 761. Therefore, the court concluded that the defendant's possession was not temporary, making the exemption inapplicable. See id. at 762.

The facts here are similar. The defendant testified that he had owned the firearm in question for at least three months prior to the incident. During the period immediately preceding the incident, the firearm was located in the Massachusetts home of the defendant's father, where the defendant lived at least part of the time. Although the defendant's father and the victim each had licenses to carry, the defendant did not. The defendant's father testified that the defendant was able to access the firearm at any time, even when his father was not present, so long as the firearm remained in the house. The defendant testified similarly, but differed in his statement that, while he could access the firearm when his father was not present, he first had to obtain permission to do so, as he had on the day in question. The defendant testified that on January 20, 2013, he removed the weapon, in its case, from the closet, carried it to the bedroom, and then unlocked the case and took

out the weapon. There was no testimony that anyone with a license to carry a firearm was present.

Viewing this testimony in the light most favorable to the defendant does not assist his case. The defendant's possession of the firearm was not temporary, as he had owned it for several months prior to the incident. Additionally, when the defendant moved the firearm from the closet to the bedroom, he possessed it while not in the presence of a holder of a license to carry. See Commonwealth v. Gouse, 461 Mass. 787, 796 (2012) (evidence that defendant carried bag containing firearm was sufficient to establish possession). The defendant argues, as he testified, that he had permission from his father, the holder of a license to carry, to remove the firearm from the locked box and display it to the victim. General Laws c. 140, § 129C (m), however, requires the physical presence of a holder of a license to carry. No reasonable view of the evidence would support the conclusion that the defendant's possession was temporary and solely in the presence of a holder of a license to carry. Accordingly, the judge did not err in declining to give the requested instruction on the exemption for temporary possession.

3. Conclusion. The defendant's convictions and the order denying his postconviction motion for a required finding of not guilty are affirmed.

So ordered.