COLORADO COURT OF APPEALS **2012 COA 34**

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Court of Appeals No. 10CA2252
Pueblo County District Court No. 09CR1433
Honorable David W. Crockenberg, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Joddy Leon Carbajal,

Defendant-Appellant.

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JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE MILLER
Román, J., concurs
Richman, J., specially concurs

Announced March 1, 2012

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¶1 In 1876, the new State of Colorado adopted a constitution that included a provision in its bill of rights establishing a right to keep and bear arms in defense of one's home, person, and property:

> *The right of no person to keep and bear arms in defense of his home, person and property*, or in aid of the civil power when thereto legally summoned, *shall be called into question*; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.

Colo. Const. art. II, § 13 (section 13) (emphasis added). This provision has never been amended.

¶2 During the twentieth century, the Colorado General Assembly enacted a statute making possession of a weapon by a previous offender (POWPO) unlawful. § 18-12-108(1), (2)(a), C.R.S. 2011. Although the POWPO statute does not refer to section 13, in *People v. Ford*, 193 Colo. 459, 462, 568 P.2d 26, 28 (1977), the supreme court held that a defendant may raise an affirmative defense to a POWPO charge under section 13 by presenting competent evidence that his or her purpose in possessing weapons was defense of home, person, and property.

¶3 Beginning in 1983, the stock jury instructions utilized by trial courts in Colorado have included an instruction following *Ford*:

> It is an affirmative defense to the crime of [POWPO] that the defendant possessed the weapon for the purpose of defending his *[home] [property] [person]*.

*See* COLJI-Crim. H:51 (2008). In recent years, however, some prosecutors have asked trial courts to alter the stock instruction by adding a requirement that the defendant's purpose in possessing the weapons arises from a reasonable belief in a threat of imminent harm. Other divisions of this court have rejected such efforts in unpublished decisions based on the supreme court's holding in *Ford*. *See People v. Silveira*, (Colo. App. No. 10CA0017, June 2, 2011) (not published pursuant to C.A.R. 35(f)); *People v. Smith*, (Colo. App. No. 09CA1694, Dec. 9, 2010) (not published pursuant to C.A.R. 35(f)). While these unpublished opinions do not establish binding precedent, we agree with their reasoning. We publish this opinion because, as demonstrated by the fact that the same issue has arisen in at least three different judicial districts, the issue is one of continuing public interest. C.A.R. 35(f)(2).

¶4 In this case, defendant, Joddy Leon Carbajal, appeals the judgment of conviction entered on jury verdicts finding him guilty of two POWPO counts. He argues that the trial court committed reversible error when it rejected his tender of the stock jury

instruction regarding his affirmative defense to the POWPO charges and instead utilized a version provided by the prosecution, which added language concerning a reasonable belief of a threat of imminent harm. We agree, reverse the judgment of conviction, and remand for a new trial.

## I. Background

¶5 Police officers obtained a search warrant for defendant's residence based on a tip in an unrelated case. During their search, the officers discovered three handguns in the main bedroom and bathroom area of the house.

¶6 Defendant was charged with three POWPO counts. At trial, defendant presented evidence that he possessed the weapons in order to defend his home, person, and property. He asked the trial court to provide the jury with the stock POWPO affirmative defense instruction. The trial court, however, determined that it would give the affirmative defense instruction proposed by the prosecution, which altered the stock instruction by adding the emphasized language, as follows:

> It is an affirmative defense to the charge of [POWPO] that the defendant possessed a firearm for the purpose of defending himself, home, or property *from what he*

*reasonably believed to be a threat of imminent harm*.

¶7 Defendant objected. The court, relying on language in *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975), analogized this case involving the section 13 affirmative defense to cases involving the affirmative defense of choice of evils under section 18-1-702, C.R.S. 2011. *See id.* at 103, 544 P.2d at 391 (noting that the then current version of the POWPO statute should be read in pari materia with the choice of evils affirmative defense); *see also* COLJI-Crim. H:09 (2008) ("choice of evils" stock instruction; affirmative defense available where conduct is "necessary as an emergency measure to avoid an imminent public or private injury"). The trial court also noted that section 18-1-704, C.R.S. 2011, describing the affirmative defense of self-defense, contains an "imminent" threat requirement.

¶8 In closing arguments, the prosecution argued extensively regarding the lack of an imminent threat to defendant. The jury then convicted defendant of two of the three POWPO charges.

## II. Analysis

¶9 The sole issue before us is whether the trial court erred when it added the phrase "from what he reasonably believed to be a threat of imminent harm" to the stock instruction. We conclude

that it so erred.

A. Law

¶10 The trial court has the duty to instruct the jury properly on all matters of law. *People v. Garcia*, 28 P.3d 340, 343 (Colo. 2001). When a defendant objects to an erroneous instruction, the harmless error standard applies, and reversal is required unless the error does not affect the substantial rights of the defendant. *Id.* at 344; *see also* Crim. P. 52(a). "An error is harmless only when a reviewing court can say with fair assurance that, in light of the entire record, the error did not substantially influence the verdict or impair the fairness of the trial." *Lybarger v. People*, 807 P.2d 570, 581 (Colo. 1991).

¶11 By virtue of section 13, a defendant presenting competent evidence that his or her purpose in possessing weapons was defense of home, person, and property raises an affirmative defense to a POWPO charge. *Ford*, 193 Colo. at 462, 568 P.2d at 28; *People v. DeWitt*, ___ P.3d ___, ___, 2011 WL 4089974, *4 (Colo. App. No. 10CA1271, Sept. 15, 2011). As long as the defendant presents some credible evidence, or a "scintilla" of evidence, in support of the affirmative defense, the jury decides whether the defendant

possessed a weapon for a constitutionally protected purpose. *See* § 18-1-407(1), C.R.S. 2011 (to raise an affirmative defense, a defendant must present credible evidence of the defense); *Ford*, 193 Colo. at 462, 568 P.2d at 28; DeWitt, ___ P.3d at ___, 2011 WL 4089974, *4. If the defendant presents such evidence, the prosecution then has the burden of disproving the affirmative defense beyond a reasonable doubt. *See* § 18-1-407(2), C.R.S. 2011; *People v. Pickering*, ___ P.3d ___, ___, 2011 WL 4014400, *2 (Colo. No. 10SC446, Sept. 12, 2011).

B. The Instruction

¶12 As noted above, the trial court modified the stock instruction and imported the "imminent threat" language from the statutory affirmative defenses of choice of evils and self-defense. *See* §§ 18-1-702 (choice of evils), 18-1-704 (use of physical force in self-defense or defense of others). However, the affirmative defenses of choice of evils and self-defense do not apply to this case because they address use of force or other conduct. Although the POWPO statute prohibits possession, use, or carrying of a weapon by a previous offender, the sole basis for the POWPO charges here was defendant's conceded possession of the weapons found during the

search of his residence.

¶13 Defendant did not assert either of the statutory affirmative defenses. The affirmative defense he raised is based on Colorado's constitutional right to keep arms. "A [POWPO] defendant . . . who presents competent evidence showing that his purpose in possessing weapons was the defense of his home, person, and property *thereby raises an affirmative defense." Ford*, 193 Colo. at 462, 568 P.2d at 28 (emphasis added). The jury decides the defendant's purpose for possessing a weapon. *Id.*

¶14 Contrary to the People's arguments on appeal, we do not find, in either *Blue* or *Ford*, any requirement that the affirmative defense to POWPO be based on an imminent threat. If the supreme court intended such a requirement, it could have stated one.

¶15 The People argue that, without an "imminent threat" requirement, the POWPO statute would be unenforceable, in effect a "dead letter" allowing previous offenders to carry firearms. We are unconvinced for three reasons.

¶16 First, the verdict form asked only whether defendant possessed a weapon. There was no contention at trial that he used or carried the guns in his home.

¶17 Second, while a defendant need only present some credible evidence that his or her purpose in possessing weapons was for the defense of person, home, and property, the prosecution is not limited in the arguments it can make to disprove the affirmative defense. The arguments the prosecution made in this case could have been made under the stock jury instruction, as the jury ultimately chooses whether to believe a defendant's assertion of purpose. *Compare DeWitt*, ___ P.3d at ___, 2011 WL 4089974, *6 (the defendant was entitled to the stock jury instruction where he presented some credible evidence of a constitutionally protected purpose for weapon possession), *with People v. Barger*, 732 P.2d 1225, 1226 (Colo. App. 1986) (the defendant was not entitled to affirmative defense instruction where he presented no evidence that public possession of weapon in a bar was based on any threat to his person, home, or property).

¶18 Third, the supreme court's decision in Ford has been on the books for over thirty-four years. Our supreme court is the final arbiter of our state constitution, and we are bound by its precedent. *See Curious Theatre Co. v. Colorado Dep't of Pub. Health & Env't*, 220 P.3d 544, 551 (Colo. 2009) (supreme court is final arbiter of the

meaning of the Colorado Constitution); *White v. Anderson*, 155 Colo. 291, 308, 394 P.2d 333, 341 (1964) (same). As an intermediate court of appeals, we must therefore adhere to *Ford's* description of section 13 as preserving the right of even previous offenders to keep arms where the defendant's "purpose in possessing weapons was the defense of his home, person, and property." *Ford*, 193 Colo. at 462, 568 P.2d at 28.[1]

¶19 Therefore, we conclude the trial court erred in modifying the stock instruction to include a "threat of imminent harm" requirement.

C. Harmless Error

¶20 Upon review of the trial transcripts, we conclude that the modified affirmative defense instruction impacted defendant's substantial rights and, therefore, was not harmless error.

¶21 The prosecution cross-examined defendant to show that he had not received any recent threats and that his claimed need to protect himself, his home, and his property was not reasonable. In

[1] We are not persuaded by the federal and out-of-state authorities cited by the People. Those cases pertain to statutory or common law affirmative defenses based on self-defense, justification, and duress, not to a defense based on a constitutional provision like Colorado's section 13.

both closing and rebuttal argument, the prosecution extensively argued that no immediate threat had been shown.

¶22 Because the modified jury instruction allowed the prosecution to defeat the affirmative defense by showing that defendant did not reasonably believe in a "threat of imminent harm," the burden of proof regarding defendant's purpose in possessing weapons was impermissibly lowered. This error was not harmless. *See People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005) (where the prosecution's burden of disproving an affirmative defense is improperly lowered, the error cannot be deemed harmless).

D. Second Amendment

¶23 In *District of Columbia v. Heller*, 554 U.S. 570, 630, 635 (2008), the United States Supreme Court held that the Second Amendment to the United States Constitution protects a personal right to keep and bear arms for self-defense and "defense of hearth and home." *See also McDonald v. City of Chicago*, ___ U.S. ___, ___, 130 S.Ct. 3020, 3044 (2010) (extending the Second Amendment's reach to the states). The Court concluded that "nothing in our opinion should be taken to cast doubt on the longstanding prohibitions of the possession of firearms by felons." *Heller*, 554 U.S. at 626.

Numerous federal courts have followed Heller in upholding the constitutionality of the federal counterpart to POWPO, 18 U.S.C. § 922(g)(1). *See, e.g., United States v. Torres-Rosario*, 658 F.3d 110, 113 n.1 (1st Cir. 2011) (collecting cases); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009).[2]

¶24 Neither party has asserted the possible relevance of *Heller's* holdings and analysis to the present case, and we decline to speculate whether our supreme court would modify its holding in *Ford* in light of *Heller*.

## III. Conclusion

¶25 The judgment of conviction is reversed, and the case is remanded for a new trial consistent with this opinion.

JUDGE ROMÁN concurs.

JUDGE RICHMAN specially concurs.

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[2] Judge Tymkovich stated in his concurring opinion in *McCane* that the language in *Heller* regarding the constitutionality of felon in possession statutes was dictum, but also observed that "Supreme Court dicta bind[] us 'almost as firmly as . . . the Court's outright holdings.'" 573 F.3d at 1047 (quoting *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1243 (10th Cir. 2008)). Other courts have concluded that the language was not dictum. *See, e.g., United States v. Barton*, 633 F.3d 168, 171 (3d Cir. 2011) (collecting cases).

JUDGE RICHMAN specially concurring.

¶26 I concur with the majority's determination that defendant is entitled to a new trial because the instruction given on his asserted constitutional affirmative defense varied from the stock instruction, which has apparently been used by our trial courts for many years, and because use of the modified instruction cannot be dismissed as harmless error under the circumstances presented here.

¶27 However, I write separately to acknowledge the People's argument that the stock instruction is problematic and omits an important element that should be part of the affirmative defense. In this regard, I conclude that at least one of the modifications made by the trial court in this case merits consideration by either the supreme court, in formulating a new stock instruction, or the General Assembly, in expressly specifying a statutory affirmative defense to the POWPO offense.

¶28 By modifying the stock instruction, the trial court, in my view, added two separate elements to the affirmative defense, although these were mixed in the language added by the court. The first requirement was that the defendant's purpose in having the weapons was to defend himself from what he "reasonably believed"

to be a threat of harm. The second requirement was that the threat of harm be "imminent."

¶29 On the one hand, I disagree with the People's argument that "imminent harm" should be required to establish the affirmative defense, for several reasons. First, the affirmative defense in this case is based on the state constitutional right to "keep and bear arms in defense of . . . home, person and property." I do not perceive that the amendment addresses the use of a weapon only when a citizen is confronted with imminent harm, but rather it permits the "keeping" of arms in defense of home, person, and property. If possession were permitted only at a time of emergency created by imminent harm, the affirmative defense would not acknowledge the full scope of the limited right provided in the constitution.

¶30 Second, if the defense required a showing of imminent harm, the defense would overlap, and perhaps duplicate, much of the affirmative defense of self-defense. *See* § 18-1-704(1), C.R.S. 2011 (requiring proof that the defendant has a reasonable belief that he is subject to the "use or imminent use of unlawful physical force"). The affirmative defense at issue here is separate from self-defense.

¶31 Third, in a case such as this, the defense can be asserted even when the defendant has not engaged in any active conduct to use or employ the weapon alleged to be unlawfully possessed. Unlike self-defense, where the defendant has by definition engaged in the use of "physical force," most often the use of a weapon, the POWPO defendant has not necessarily employed the weapon. Indeed, the facts of this case reflect no actual use of the weapon by defendant.

¶32 On the other hand, I agree with the People's argument that application of the affirmative defense in a POWPO case should include a showing that the defendant's possession of the weapon is based on "a reasonable belief of a threat of harm." The absence of a requirement of a "reasonable belief" in the stock instruction permits the affirmative defense to be asserted whenever a POWPO defendant claims that his "purpose" in possessing the weapon was for defense, no matter how unreasonable or unjustified that claim may be. It may well be that even under the current stock instruction, juries implicitly assess the "reasonableness" of the defendant's assertion that he possessed the weapon for the purpose of defense of the home, property, and person. But without the express inclusion of that element in the affirmative defense instruction, there is no way

to ensure that the defense is limited to cases where the asserted purpose of possessing the weapon is reasonable.

¶33 In support of creating a modified stock instruction on the affirmative defense in a POWPO case that incorporates the requirement of a reasonable belief from a threat of harm, I note that other parallel statutory affirmative defenses contain a requirement of reasonable conduct by the defendant. *See, e.g.*, § 18-1-703(1)(a)-(c), C.R.S. 2011 (use of physical force – special relationships: allowing use of physical force when it is "reasonably necessary and appropriate" or when one "reasonably believes" the use of force is necessary); § 18-1-704(1), C.R.S. 2011 (self defense: allowing use of physical force when one believes it is "reasonably necessary"); § 18-1-704.5, C.R.S. 2011 (use of deadly force against intruder: allowing use of force when the occupant has a "reasonable belief" that intruder is committing or intends to commit a crime and might use physical force); § 18-1-705, C.R.S. 2011 (use of physical force in defense of premises: allowing use of physical force when "reasonably necessary" to prevent or terminate what one "reasonably believes" to be the commission or attempted commission of a crime).

¶34 In addition, although the "choice of evils" affirmative defense does not employ the term "reasonable" to measure the defendant's conduct, it requires that the situation faced by the defendant be of "sufficient gravity" according to "ordinary standards of intelligence and morality" and that the "desirability and urgency of avoiding the injury" facing the defendant clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute that is violated. § 18-1-702(1), C.R.S. 2011.

¶35 I also note that including a requirement of a reasonable belief in a threat of harm in the affirmative defense in a POWPO case would not conflict with the constitutional right to keep and bear arms in defense of the home, person, and property embodied in section 13. In *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975) the Supreme Court upheld the facial constitutionality of the POWPO statute. In *People v. Ford*, 193 Colo. 459, 462, 568 P.2d 26, 28 (1977), the supreme court emphasized that the state may validly use its police power to restrict or regulate the right to possess arms where the purpose of such possession is not a constitutionally protected one. And in *Robertson v. City & County of Denver*, 874 P.2d 325, 331 (Colo. 1994), the court held that section 13 does not

confer a ”fundamental right” to possess weapons, but rather that the question in each case is whether the law at issue constitutes a reasonable exercise of the state’s police power.

¶36 If enforcement of the POWPO statute is a reasonable exercise of the state’s police power to restrict the right of a citizen to keep and bear arms for one’s defense, it seems only logical that a POWPO defendant asserting the right should be required to show that his or her possession of the arms is based on a reasonable belief that such a defense is necessary. Therefore, I would uphold a modified stock instruction in a POWPO case which includes a requirement that the defendant possessed the weapon for the purpose of defending himself, his home, and his property from what he “reasonably believed to be a threat of harm.”

¶37 As the majority states, the affirmative defense in a POWPO case is not a creature of statute, but rather emanates from section 13 and the ruling in *Ford*, 193 Colo. at 462, 568 P.2d at 28 (“A defendant charged under section 18-12-108 who presents competent evidence showing that his purpose in possessing weapons was the defense of his home, person, and property thereby raises an affirmative defense.”). Accordingly, I conclude that the

judiciary could modify the stock instruction to require a showing of "a reasonable belief of a threat of harm" or the General Assembly could codify the affirmative defense and include the requirement of a reasonable belief, as it has done with other statutory affirmative defenses, consistent with the constitutional rights of defendants.