



acknowledged defendant's objection and that defendant had not used or threatened use of the firearm during the argument. However, the court also noted that the firearm "was within close proximity of the alleged assault" and that defendant had taken the firearm with him when he exited the vehicle. In imposing condition thirteen, the court referenced the significantly increased risk of deadly violence in domestic-violence situations where firearms are accessible. Defendant appeals the imposition of condition thirteen.

The order imposing conditions of release "shall be affirmed if it is supported by the proceedings below." 13 V.S.A. § 7556(b). "[I]n assessing whether the order is supported by the proceedings, we recognize that the [superior] court possesses a high degree of discretion in analyzing the evidence before it . . . [and] reverse only if the court has abused its discretion." State v. Bailey, 2017 VT 18, ¶ 9, 204 Vt. 294. When considering conditions of release to protect the public, the superior court must impose "the least restrictive" conditions "that will reasonably ensure protection of the public." 13 V.S.A. § 7554(a)(2). The statute lists several factors for a court to consider when imposing conditions of release, including "the nature and circumstances of the offense charged" and the defendant's "character and mental condition." Id. § 7554(b)(2).

On appeal, defendant argues that imposing condition thirteen was an abuse of the superior court's discretion and was not the least restrictive means necessary of protecting public safety. He asserts that, despite the firearm's close physical proximity to the altercation, the alleged domestic assault did not involve the firearm and therefore does not justify the imposition of condition thirteen. He questions the court's reliance on social science establishing the connection between firearms and lethal domestic violence, stating, "[o]ne cannot . . . assume that every alleged domestic violence-type situation is more deadly when a firearm is readily accessible." Defendant argues that the other imposed conditions sufficiently protect the public, pointing to the conditions prohibiting him from contacting complainant and the fact that he has no history of violating court orders. Finally, defendant argues that condition thirteen unduly burdens his Second Amendment rights.

The record supports the imposition of condition thirteen. At arraignment, the court considered the circumstances of the alleged domestic assault and the well-established connection between access to firearms and significantly increased risk of lethal domestic violence. Although defendant is not accused of a crime involving the firearm in question, he is accused of having committed an act of domestic violence in close physical proximity to a firearm; based on the description defendant provided to police, the firearm was in arm's length of defendant during the alleged altercation. Further, defendant told police that he took the firearm with him when he left the vehicle after the argument, and he additionally stated that he brings his firearm with him most places. Considering the volatile nature of domestic violence and the speed at which an incident of violence can become lethal when firearms are accessible, the firearm's presence during the alleged domestic assault is sufficiently relevant to create a factual nexus. By defendant's own admission, the firearm is almost always on his person. In the interest of protecting public safety, condition thirteen prevents defendant from escalating any further instances of domestic violence to the level of lethality that access to a firearm can cause.

I now turn to defendant's Second Amendment arguments. In District of Columbia v. Heller, 554 U.S. 570, 595 (2008), the United States Supreme Court held that the Second Amendment protects the right of individuals to keep and bear arms. However, "[l]ike most

rights, the right secured by the Second Amendment is not unlimited.” *Id.* at 626. The Supreme Court emphasized “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* at 635. This distinction of “law-abiding” is critical; the Second Amendment does not preclude the government from reasonably restricting (or, as the Supreme Court put it, “disqualif[ying]”) the right to bear arms for individuals accused or convicted of crimes. *Id.* at 635.

This Court has not considered Second Amendment rights in the context of pre-trial conditions of release, so the standard of review is not established in Vermont. As this Court noted in *State v. Misch*, “*Heller* did not specify what standard should apply to challenges under the Second Amendment.” 2021 VT 10, ¶ 52 (per curiam). We acknowledged that, after *Heller*,

the majority of federal circuit courts have developed a two-step framework for addressing Second Amendment claims. This approach, as the Second Circuit has described, requires courts to first “consider whether the restriction burdens conduct protected by the Second Amendment,” and if it does, “determine and apply the appropriate level of scrutiny,” generally intermediate or strict scrutiny.

*Id.* ¶ 53 (quoting *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 254 & n. 49 (2015)). We also noted that “the Second Circuit has held that ‘heightened scrutiny is appropriate only as to those regulations that substantially burden the Second Amendment.’ ” *Id.* ¶ 54 (quotation omitted).

I need not determine the appropriate level of scrutiny here because defendant fails to establish that his possession of a firearm as an individual accused of domestic violence is protected by the Second Amendment. By the nature of the Supreme Court’s precedent in *Heller*, an individual who is disqualified from firearm ownership because they are accused of not obeying the law does not automatically enjoy the more expansive Second Amendment rights afforded to their law-abiding peers. Defendant, who is here accused of violating the law in close proximity of a firearm, falls outside of the protected category.

However, even if intermediate scrutiny were required, condition thirteen would survive this inquiry. The Second Circuit noted that, “[t]hough ‘intermediate scrutiny’ may have different connotations in different contexts, . . . the key question [in firearm regulation] is whether the statutes at issue are ‘substantially related to the achievement of an important governmental interest.’ ” *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 261. It further acknowledged that there are “substantial, indeed compelling, governmental interests in public safety and crime prevention.” *Id.* (quotation omitted). The only remaining question, therefore, is whether condition thirteen is substantially related to the State’s interest in protecting public safety. I find that it is.

Condition thirteen’s terms are relevant to the underlying allegations and therefore substantially related to the State’s interest in ensuring public safety. The condition aims to ensure public safety in light of the violent nature of the allegations against defendant. Prohibiting defendant from buying, using, and possessing firearms protects the public from an

accused abuser escalating domestic violence to a deadly level. Even if a stricter level of scrutiny were required, there are no less restrictive means available to prevent defendant from accessing and using a firearm in a potential future domestic violence situation, particularly given defendant's assertion that he ordinarily has the firearm with him most of the time.

Additionally, on its face, condition thirteen is not an overbroad, vague, or otherwise unduly burdensome restriction. Prohibitions against firearm possession are imposed as a result of convictions of the very crime defendant is accused of committing. 13 V.S.A. § 4017(a) (“A person shall not possess a firearm if the person has been convicted of a violent crime”); *id.* § 4017(d)(3) (defining violent crime as listed crime in 13 V.S.A. § 5301(7) with limited exceptions); *id.* § 5301(7)(C) (listing domestic assault). Such prohibitions are also imposed in relief from abuse orders. See Benson v. Muscari, 172 Vt. 1, 6 (2001) (upholding relief-from-abuse order prohibiting defendant from possessing firearms). Defendant does not challenge the constitutionality of these statutes, and such a challenge would likely fail considering Heller's rationale and resulting precedent.

The trial court gave due weight and consideration to the underlying facts, including the nature of the allegation and defendant's lack of criminal history, in deciding to impose condition thirteen. The record supports its conclusions about the factual nexus between the firearm and the alleged instance of domestic assault and the increased risks to public safety associated with access to a firearm in a domestic violence situation.

Affirmed.

FOR THE COURT:

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William D. Cohen, Associate Justice