

Mr. Chair, see the summary below of the recent case of **State v. Lafayette** from February. This case is instructive regarding distinctions between the terms “use, used, or using” and “carry, carried, or carrying” with respect to 13 V.S.A. § 4005 concerning firearms and other deadly weapons.

Best,

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Summary provided from: *State v. Lafayette*, 2024 VT 6, ¶¶ 12-22 (Vt. Feb. 16, 2024)

➤ **Concerning “Carrying a Weapon While Committing a Felony”**

- ❖ 13 V.S.A. § 4005 makes it a crime for a person to carry a dangerous or deadly weapon, openly or concealed, while committing a felony. 13 V.S.A. § 4005 does require a relationship between the carrying of a weapon and the underlying felony but the weapon need not be “used or brandished.” It is enough that the weapon had the potential of facilitating the commission of the underlying felony.
- ❖ In *State v. Carter*, the Supreme Court’s principal decision interpreting § 4005, the Court noted that the purpose of the statute was to impose more severe penalties when the carrying of a weapon “facilitated, or had the potential of facilitating, the commission of a felony.” 156 Vt. 437, 442, 593 A.2d 88, 91 (1991) (quotation omitted).
- ❖ The Supreme Court has held that “§ 4005 requires a relationship between the carrying of a weapon and the underlying felony.” *Id.* at 437, 593 A.2d at 92. In *Carter*, the Supreme Court emphasized that the statute does not require the weapon to be “used or brandished.” *Id.* Rather, “[i]t is enough that the weapon had the potential of facilitating the commission of the underlying felony.” *Id.*
- ❖ In *Carter*, the State presented evidence that the defendant had a loaded gun in his pocket when he assisted a twelve-year-old boy in entering a trailer and stealing a jug of coins. The Court held that this evidence was sufficient to support a conviction under § 4005 even though the defendant did not use or display the weapon while committing the burglary, reasoning, “[t]hat a weapon has the potential of facilitating the felony of burglary is patent.” *Id.*
- ❖ The Vermont Supreme Court has concluded that a defendant carrying a firearm can have the obvious potential to facilitate a felony (e.g., sexual assault, burglary etc.). The Court has held that a jury can reasonably conclude that a defendant was emboldened by his possession of a gun to carry out an assault.
- ❖ 13 V.S.A. § 4005 certainly applies when a defendant displays a firearm, or makes it known that a firearm is readily available, to intimidate a victim. The context of the facts will dictate application. The Court has further held that the fact that a defendant does not actually use the gun and/or does not actually verbalize a threat to harm a victim with the gun does not mean that the weapon does not have significant potential to assist the defendant in committing the related felony. *See Contreras*, 950 F.2d at 242; *Guidry*, 456 F.3d at 509; *see also United States v. Sturtevant*, 62

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F.3d 33, 34 (1st Cir. 1995) (explaining that connection between assault and defendant's carrying of gun “seems to us no less close than the connection between a drug hideout and gun. In each instance, the weapon provides an added sense of security and has a substantial potential for use in the course of the particular crime in question”).

- ❖ A defendant’s argument that a § 4005-carrying-conviction cannot stand because of a lack of evidence that the gun was loaded will be unpersuasive. While evidence that a defendant loaded a gun could be probative, the lack of evidence that a gun is loaded does not defeat a conviction.
- ❖ The statute merely requires proof that the defendant carried a dangerous or deadly weapon—it does not require proof that the weapon was loaded. *See Contreras*, 950 F.2d at 241 (explaining that “[t]he fact that a weapon is ‘unloaded’ or ‘inoperative’ does not insulate the defendant” from conviction under equivalent federal statute prohibiting carrying firearm while committing crime of violence); *see also McLaughlin v. United States*, 476 U.S. 16, 17-18, 106 S.Ct. 1677, 90 L.Ed.2d 15 (1986) (holding that unloaded gun is “dangerous weapon” because “the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue”); *State v. Longley*, 2007 VT 101, ¶ 8, 182 Vt. 452, 939 A.2d 1028 (concluding that firearm need not be loaded or operable to be a “deadly weapon” for purposes of aggravated domestic assault).
- ❖ The Court has held that the term “carrying” does not require the gun to be on the defendant's person at all times during the commission of the felony; constructive possession can be sufficient. *See Muscarello v. United States*, 524 U.S. 125, 126, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998) (concluding under equivalent federal statute that carrying a firearm is not limited to carrying of firearms on the person; it also includes knowing possession and conveyance of firearm in locked glove compartment of car); *Contreras*, 950 F.2d at 241 (affirming conviction for carrying firearm during sexual assault where gun was in reach of defendant during assault); *see also United States v. Critton*, 43 F.3d 1089, 1096 (6th Cir. 1995) (explaining that firearms are “used” or “carried” to commit felony of drug trafficking within definition of equivalent federal statute “so long as it reasonably appears that the weapons were in a defendant's actual or constructive possession and were used to protect the drugs or facilitate the transaction”).
- ❖ In **Lafayette**
 - The record showed that when the defendant came to K.V.’s window, he asked her to hold his gun and showed her the gun.
 - The gun appeared to be the same gun that defendant pulled from his waistband in the Facebook video, suggesting that defendant routinely carried it on his person.
 - Although there was no testimony regarding the location of the gun during and after the sexual act, no weapon was found at or around the residence after defendant departed. The totality of the evidence supports a rational conclusion that defendant retained control of the gun throughout the assault and took it with him when he left.
 - *See, e.g., United States v. Pate*, 932 F.2d 736, 737-38 (8th Cir. 1991) (affirming conviction for carrying firearm in relation to bank robbery where defendant had shotgun in getaway car, because escape was part of robbery).