IN THE SUPREME COURT OF FLORIDA

CURTIS DALE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,691

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, CURTIS DALE, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Petitioner or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State finds the petitioner's statement of the case and facts to be generally supported by the record; however, the State

notes that the relevant facts are set out in the district court's opinion. Dale v. State, 669 So.2d 1112 (Fla. 1st DCA 1996).

SUMMARY OF ARGUMENT

The First District Court of Appeal affirmed the petitioner's conviction and sentence for armed robbery with a deadly weapon, but asks this Court to answer whether under the circumstances of the instant case, the jury may find that the BB gun was a deadly weapon. The petitioner argues that the State failed to prove that the BB gun was actually used as a deadly weapon. The petitioner was properly convicted and sentenced, and this Court should answer the certified question in the affirmative. Whether a BB gun is a firearm, was not an issue below, and the appropriate inquiry is whether the evidence was sufficient to support the jury's finding that the BB gun of the instant case constituted a deadly weapon. A BB gun constitutes a weapon as contemplated by Florida statutes, and the appellant's use of the BB gun during the commission of the robbery constituted armed robbery in the first degree. This Court should also affirm the petitioner's conviction and sentence because the State presented substantial, competent evidence to support the jury's verdict.

ARGUMENT

ISSUE PRESENTED/CERTIFIED QUESTION

CAN A JURY PERMISSIBLY FIND A BB GUN TO BE A DEADLY WEAPON AND A DEFENDANT GUILTY OF ARMED ROBBERY WHEN THE EVIDENCE SHOWS THAT THE BB GUN WAS FOUND UNLOADED, WITHOUT A C02 CARTRIDGE, AND NO EVIDENCE WAS PRESENTED THAT THE BB GUN WAS LOADED AT THE TIME OF THE OFFENSE, WHERE THE DEFENDANT STATED SIMPLY 'I HAVE A GUN'' DURING THE COMMISSION OF THE ROBBERY?

The First District Court of Appeal affirmed the petitioner's conviction and sentence for armed robbery with a deadly weapon, but asks this Court to answer whether under the circumstances of the instant case, the jury may find that the BB gun was a deadly weapon. The petitioner suggests that this Court should address whether a BB gun is a deadly weapon per se. Such alteration of the question confuses the issue, and would require this Court to respond to hypotheses. Moreover, various district courts have already settled the issue by finding that whether an air or gas operated gun will be classified as a deadly weapon is a question for the jury. Gooch v. State, 652 So.2d 1189, 1191 (Fla. 1st DCA 1995); accord Duba v. State, 446 So.2d 1167, 1169 (Fla. 5th DCA 1984) (holding "whether or not an object [inoperative air pistol] is a deadly weapon is a question of fact to be determined by the jury from the evidence, taking into consideration its size, shape

and material and the manner in which it was used or was capable of being used.") Thus, this Court should only address the certified question.

Deadly weapon.

The appellant concedes the issue of sufficiency of the evidence to convict him of robbery; however, he argues that his crime was impermissibly aggravated because the BB gun failed to meet the definition of a firearm, and that the State failed to prove that the BB gun was actually used as a deadly weapon. The State asserts that the appellant was properly convicted and sentenced. Section 812.13(2)(a) provides:

> If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony in the first degree, punishable by imprisonment for a term not exceeding life imprisonment. . . .

§812.13(2)(a), Fla. Stat. (1993). The petitioner vehemently argues that the BB gun is not a firearm. The State asserts that whether a BB gun is a firearm is not at issue because the information charged the petitioner with committing the robbery while carrying a deadly weapon to wit an [BB gun] air pistol (R 5), and the jury was instructed "that the state was required to prove [Petitioner] Dale used a 'deadly weapon,' which was defined as a weapon **used** or threatened to be used in a way likely to

produce death or great bodily harm." (T 284); Dale, supra at 1113. Hence, a firearm was not an issue below, and the appropriate inquiry is whether the evidence was sufficient to support the jury's finding that the BB gun of the instant case constituted a deadly weapon.

Section 790.001 defines "Weapon" as "any dirk, metallic knuckles, slingshot, billie, tear gas gun, chemical weapon or device, or **other deadly weapon** except a firearm or a common knife." (Emphasis added). In the Interest of W.M., 491 So.2d 1263 (Fla. 4th DCA 1986) the district court provided that "[a] weapon is a 'deadly weapon' if it is used or threatened to be used in a way likely to produce death or great bodily harm. Fla. Std. Jury Instr. (Crim.) P. 88." Id. 1264.

The petitioner properly began his analysis by quoting a reasonable definition of a deadly weapon, but disregarded that definition to seek support for his claim of error in the penumbra of inapplicable facts. The petitioner cited a series of **cases** that stand for the premise that objects designed for ordinary uses are not deadly weapons under §812.13(2)(a), unless there is evidence that they were used as bludgeons or in manners likely to cause death or great bodily harm. Riddley v. State, 441 So.2d 188 (Fla. 5th DCA 1983); Paul v. State, 421 So.2d 696 (Fla. 2d DCA

1982); M.R.R. v. State, 411 So.2d 983 (Fla. 3d DCA 1982); McCray v. State, 358 So.2d 615 (Fla. 1st DCA 1978); Gomez v. State, 496 So.2d 982 (Fla. 3d DCA 1986); Brooks v. State, 605 So.2d 874 (Fla. 1st DCA 1992), quashed on other grounds, 630 So.2d 527 (Fla. 1993); Bates v. State, 561 So.2d 1341 (Fla. 2d DCA 1990).

Indeed, Bates provides:

> A 'deadly weapon has been defined as any instrument that, when used in the ordinary manner contemplated by its design and construction, will or is likely to cause death or great bodily harm." Depasquale v. State, 438 So.2d 159, 160 (Fla. 2d DCA 1983. Moreover, "[a]n object becomes a deadly weapon if its sole modern use is to cause great bodily harm." Robinson v. State, 547 So.2d 321, 323 (Fla. 5th DCA 1989).

Id.

In the instant case, the BB gun is designed to shoot lead shots or pellets that are .18 inches in diameter. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 189 (3d ed. 1981). The instant gun could fire either with or without a C02 cartridge (T 161), and when it is used in the ordinary manner contemplated by its design and construction, it will or is likely to cause great bodily harm or death. See Duba v. State, 446 So.2d 1167 (Fla. 5th DCA 1984) (whether an air pistol is a deadly weapon is a jury question, and whether an object is a deadly weapon depends on the manner in which it was used or capable of being used.) Accord Lynn v.

State, 567 So.2d 1043 (Fla. 5th DCA 1990) (a defendant who threatened to use a gun, which turned out to be an inoperable BB gun, was properly convicted of robbery with a deadly weapon); Gooch v. State, 652 So.2d 1189 (Fla. 1st DCA 1995). Accordingly, "a BB gun constitutes a weapon as contemplated by sections 812.13(2)(a) and 790.001(13)," and "the appellant's use of the BB gun during the commission of the robbery constituted armed robbery in the first degree." DePasquale v. State, 438 So.2d 159, 160 (Fla. 2d DCA 1983); U.S. v. Koonce, 991 F.2d 693, 698 (11th Cir. 1993)(holding that BB gun that looks like a firearm and is perceived by the victim of a robbery to be such, is a dangerous weapon.) (Emphasis added).

Additionally, §790.022, Fla. Stat. (1993), which prohibits the unsupervised use of BB guns, air or gas-operated guns, or electric weapons by a minor under the age of 16 years, clearly indicates the legislative intent to treat the BB gun as a weapon. See also Rodriguez v. Esquijarosa, 391 So.2d 334 (Fla. 3d DCA 1980) (the act of pumping a BB gun for a seven-year-old, who shot and injured another, is an actionable negligent act).

The petitioner's argument is inconsistent and without merit; he cites the principle enunciated in the applicable cases, but attempts to distinguish them or declares them to be erroneous

where the courts ruled against his position. For example, he relies on DePasquale (IB 10, 13), but respectfully declares that the case is illogical and wrongly decided. (IB 20). He finds the First DCA's determination that Lynn v. State, 567 So.2d 1043 (Fla. 5th DCA 1990) is on point to be awry, and attempted to distinguish it on the fact that the defendant in Lynn was more explicit with his threat (ie. "Hurry up or he would 'blow [the cashier's] . . . brains out.'") Id. 1044; (IB 18). Contrary to the petitioner's assertion, the facts in Lynn are similar to those of the instant case, if not identical. See also Duba, supra.

In Lynn, the defendant was robbing a Red Lobster restaurant; as the cashier was responding to his instructions, he "lifted his shirt to reveal a handgun wedged in his trousers and told the cashier to hurry up or he would 'blow [the cashier's] . . . brains out.'" Id. 1044. Shortly thereafter, the police recovered a non-operational [BB gun] air pellet pistol because it did not have a C02 cartridge, the barrel was jammed, and a witness testified that the gun never worked. Id. 1044-5. The district court found that for purposes of classification as a deadly weapon, a pellet pistol discharges pellets through use of air pressure, and is 'capable of causing death or injury." Id. 1044.

The district court also found that whether the pistol was operational at the time of the crime was properly submitted to the jury because an expert was able to dislodge the jammed pellet and make it work. Id. 1045. The district court affirmed the jury's determination that the pellet gun was a deadly weapon. Id.

The petitioner argues that even if a BB gun could qualify as deadly weapon, the instant BB gun was not a deadly weapon because it was not loaded, or used as a "bludgeon." He concluded that his use of the BB gun was similar to the use of "a shoe or a grapefruit." (IB 22). This conclusion or analogy is perplexing when the petitioner defines a deadly weapon as an instrument that will or is likely to cause death or great bodily harm, when used in the ordinary manner contemplated by its construction or design. (IB 13). The State will not address the use contemplated for a grapefruit, but will assert that a BB gun is designed or constructed to fire a lead pellet of .18 inches in diameter at a target[1], contemplating damaging or destroying the target. Moreover, the legislature's banning of unsupervised "[u]se of BB guns, air or gas-operated guns, or electric weapons or devices by minor[s] under 16," is a clear indication that the legislature

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[1]Whether a living or non-living thing.

views the BB gun as likely to cause great bodily harm or death. §790.22, Fla. Stat. (1993).

In Bentley v. State, 501 So.2d 600 (Fla. 1987), the supreme court stated:

> [W]e hold that the display of an unloaded firearm, without proof of readily available ammunition, invokes the three-year minimum mandatory sentence. In *Watson* v. *State*, 437 So.2d 702 (Fla. 4th DCA 1983), *approved in part, disapproved in part,* 453 So.2d 810 (Fla. 1984), the court found that the legislature did not intend to require a finding that a handgun be operational in order to uphold conviction of robbery with a firearm because of concerns about the perception of the victim. (Citation omitted).

Id. 602. Accord Bass v. State, 232 So.2d 25 (Fla. 1st DCA 1970) reasoning that

> [W]hen one is confronted by another with a gun and does not know it to be unloaded, the natural reaction is to assume that the gun can be fired and can inflict great bodily harm. . . . [W]hether the weapon is to be classified as "deadly" is a factual question to be resolved by the jury.

Id. 27. See also Jackson v. State, 662 So.2d 1369 (Fla. 1st DCA 1995) ("one may be convicted of armed robbery with a deadly weapon if he or she is carrying the weapon at the time of the robbery, regardless of whether the weapon is used.")

Turning to the instant case, although the issue of a firearm is not applicable, this Court's reasoning in Bentley, supra,

remains compelling. The Court adopted the Fourth DCA's finding that "the legislature did not intend to require a finding that a handgun be operational in order to uphold conviction of robbery with a firearm because of concerns about the perception of the victim." Id. 602. Indeed, in the instant case, the victim was not fully acquiescing to the petitioner's orders, until he said "I got a gun" while pulling 'his shirt back so she could see a part of something that was black, which she assumed was a gun." Had the petitioner say that he had a "shoe" or a "grapefruit," the victim's perception would be irrelevant, but here, the petitioner successfully completed the robbery using the threat of the gun that he was carrying. Whether loaded or unloaded, the petitioner used the BB gun to threaten or imply serious bodily harm or deadly force.

Moreover, the fact that the BB gun was found unloaded, does not necessarily mean that it was unloaded when it was used in the robbery. The State presented evidence that the gun was operational and could be fired even without a C02 cartridge, that the petitioner said he had a gun, and displayed to the victim what appeared to be a gun. Therefore, whether the BB gun was a deadly weapon under these circumstances, was a question of fact properly submitted to the jury, which found the Petitioner guilty

of robbery with a deadly weapon. See Lynn, supra. Hence, the trial court did not err in denying the Petitioner's motion for judgment of acquittal on that issue.

Although both the trial court and the district court found that the evidence was sufficient to support the jury's verdict, the certified question appears to leave this Court as the **final** arbiter of that issue. The State begins by noting that the record on appeal does not indicate that the petitioner filed **a** motion to arrest judgment or for a new trial.

> When a motion for a new trial is untimely the case **stands** as though no motion for a new trial had been made at all[2]. It is therefore obviously not error for the trial judge to deny a motion which in legal contemplation was never made.

Hogwood v. State, 175 So.2d **817, 818** (Fla. 3d DCA 1965) (footnote renumbered).

However, if this Court's addresses the issue whether the evidence was sufficient for the jury to permissibly find the petitioner guilty **on** the issue of carrying a deadly weapon during the robbery, the standard of review is provided in Tibbs v. State, **397** So.2d 1120 (1981), affirmed **457 U.S. 963, 102** S.Ct., **72** L.Ed.2d 652 (1982).

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[2]McLendo v. State, *90* Fla. 272, **105 So. 406 (1925).**

> As a general principle, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or a trier of fact. Rather the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

Id. 1123 (citations omitted). See also Worden v. State, 603 So.2d 581 (Fla. 2d DCA 1992) ("[o]nce the jury has made its determination it will not be reversed on appeal if there is competent, substantial evidence to support it.") See Lynn, supra at 1045 (evidence that the defendant indicated that he had a gun, move his shirt to show a gun wedged in his pants, which turned out to be a jammed BB gun without a cartridge that an expert rendered operational, was competent, substantial evidence to support a jury finding that the gun was a deadly weapon.)

Turning to the instant case, the petitioner concedes the issue of his conviction for robbery. On the issue of a deadly weapon, this Court should also affirm his conviction because the State presented substantial, competent evidence to support the jury's verdict. The State presented evidence that the petitioner displayed what appeared to be a gun, while stating that he had a gun, and making implied threats that he would return if the

victim called the police. In addition, the State presented evidence that the petitioner's clothes, the empty store bag in which the money was placed, an operational BB gun without a cartridge or pellets that could be spring loaded to fire, were found at the location where the petitioner changed his clothes. The totality of the evidence[3] is certainly sufficient to support the jury's conclusion that the petitioner carried a deadly weapon while committing the robbery. Moreover, the jury was instructed "that the state was required to prove [Petitioner] Dale used a 'deadly weapon,' which was defined as a weapon used or threatened to be used in a way likely to produce death or great bodily harm." (T 284); pale, supra at 1113. Absent proof to the contrary, the jury is presumed to have followed the trial court's instruction. U.S. v. Simon, 964 F.2d 1082 (11th Cir. 1992).

Based on the authorities cited herein, it is clear that an operational BB gun is a dangerous weapon that may not be used in a robbery, and the facts surrounding its use supported the jury's verdict. Therefore, this Court should answer the certified question in the affirmative. Whether the gun was not a firearm,

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[3]In contrast the petitioner's argument would tend to suggest that the pertinent facts should be analyzed in isolation from one another.

is not determinative of whether a reasonable jury could find that it was a deadly weapon. The determinative factor is the manner in which the gun was used. In the instant case, it was used to impliedly threaten great bodily harm or death, which the gun was capable of doing.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the affirmative, the decision of the First District Court of Appeal reported at 669 So. 2d 1112 should be approved, and the judgment and sentence entered in the trial court should be affirmed.

Respectfully submitted,

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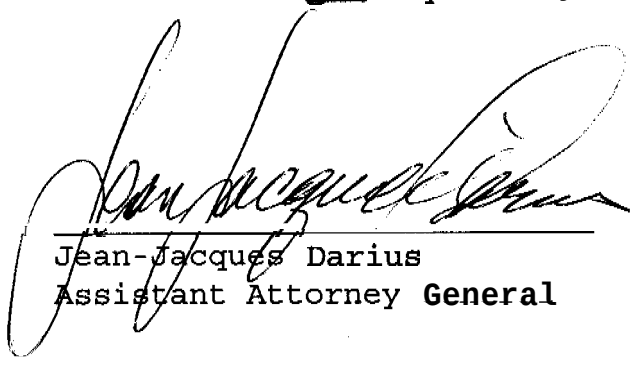
COUNSEL FOR RESPONDENT
[AGO# 96-110858]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Kathleen Stover, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 28th day of May, 1996.



Jean-Jacques Darius
Assistant Attorney General

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Appendix

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CURTIS DALE.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING *AND* DISPOSITION THEREOF IF FILED.

CASE NO.: 95-135

Opinion filed March 19, 1996.

An appeal from the Circuit Court for Gadsden County. William Gary, Judge.

Nancy A. Daniels, Public Defender; Kathleen Stover, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Douglas Gurnic, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Curtis Dale appeals his conviction for armed robbery with a deadly weapon in violation of section 812.13(2)(a), Florida Statutes (1993), arguing that under the facts of the instant case

the evidence was legally insufficient to establish that Dale's use of a BB gun met the statutory definition of a deadly weapon. Because the issue of whether the BB gun used here was a deadly weapon was properly treated as a jury question, we affirm and certify a question of great public importance.

Below, Flowers Bakery employee Ina Bruton, the victim, testified that Dale demanded money from her saying "I got a gun," while at the same time, he pulled his shirt back so she could see a part of something that was black, which she assumed was a gun. Later, Dale's clothes, a BB gun, and a Flowers bag were recovered at the same site. Although the gun was found without BBs or a CO_2 cartridge, the state introduced testimony that the BB gun was operational and could be spring-loaded with BBs.[1] The trial court charged the jury that the state was required to prove Dale used a "deadly weapon," which was defined as a weapon used or threatened to be used in a way likely to produce death or great bodily harm. The jury returned a verdict finding Dale guilty as charged.

In Gooch v. State, 652 So. 2d 1189, 1191 (Fla. 1st DCA), rev. denied, 659 So. 2d 1086 (1995), this court ruled that

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[1]This evidence distinguishes the instant case from Brooks v. State, 605 So. 2d 874 (Fla. 1st DCA 1992), quashed on other grounds, 630 So. 2d 527 (Fla. 1993), wherein the state did not prove that the starter pistol had a capability to injure. In Brooks, the appellant's conviction for armed robbery was reduced to simple robbery since the starter pistol was not otherwise used in a manner which would or could cause death or serious bodily harm (e.g., it was not used as a bludgeon).

"whether . . . an air or gas operated gun is a deadly weapon depends on the manner in which it is used, and whether it will be classified as a deadly weapon is a question for the jury." The trial court here correctly presented this issue to the jury. Gooch, supra; Lynn v. State, 567 So. 2d 1043 (Fla. 5th DCA 1990).

We are aware, however, of some confusion in the case law. Compare, Depasquale v. State, 438 So. 2d 159 (Fla. 2d DCA 1983); and Bass v. State, 232 So. 2d 25 (Fla. 1st DCA 1970) with Duba v. State, 446 So. 2d 1167 (Fla. 5th DCA 1984) and M.R.R. v. State, 411 So. 2d 983 (Fla. 3d DCA 1982). Accordingly, we affirm, but certify the following question to our supreme court as a matter of great public importance.

> CAN A JURY PERMISSIBLY FIND A BB GUN TO BE A DEADLY WEAPON AND A DEFENDANT GUILTY OF ARMED ROBBERY WHEN THE EVIDENCE SHOWS THAT THE BB GUN WAS FOUND UNLOADED, WITHOUT A CO_2 CARTRIDGE, AND NO EVIDENCE WAS PRESENTED THAT THE BB GUN WAS LOADED AT THE TIME OF THE OFFENSE, WHERE THE DEFENDANT STATED SIMPLY "I HAVE! A GUN" DURING THE COMMISSION OF THE ROBBERY?

AFFIRMED, question certified.

JOANOS, BENTON AND VAN NORTWICK, JJ., CONCUR.

557 So.2d 102 (Fla. 3d DCA 1990). Second, the trial court erred in determining and distributing an $18,000 debt (Geneva Bank note) to Former Husband. The existence of this debt is not supported by the evidence, as Former Husband testified at trial that the note had been paid by funds from a certificate of deposit. On remand, the trial court shall address these issues and. redistribute the marital property, if necessary.

[5] We also reverse and remand the award of rehabilitative alimony because the trial court failed to make any findings justifying the award. *Collinsworth, supra.* If, on remand, the trial court finds that rehabilitative alimony is still appropriate, it may revisit the amount and length of payments. If the trial court finds that rehabilitative alimony is not appropriate, it may reconsider an award of permanent periodic alimony.

[6] Finally, the award of attorney's fees is reversed because the trial court failed to determine that Former Husband had the ability to pay the amount ordered. On remand, the trial court shall reconsider the financial resources of both parties and revisit this matter.

Any remaining issues raised, but not addressed herein, are affirmed.

AFFIRMED in part, REVERSED and REMANDED in part.

BOOTH, JOANOS and VAN NORTWXCK, JJ., concur.

WEST KEY NUMBER SYSTEM

Curtis DALE, Appellant,

v.

STATE **of** Florida, Appellee.

No. 95–135.

District Court of **Appeal** of Florida, First District.

March 19, 1996.

Defendant was convicted in the Circuit Court, Gadsden County, William *Gary,* J., for armed robbery with a deadly weapon. Defendant appealed. The District Court of Appeal held that whether operational BB gun was a deadly weapon was properly treated as a jury question.

Affirmed; question certified.

Robbery ⇐26

Issue of whether operational BB gun was deadly weapon, for purposes of statute providing for punishment when robbery is committed with deadly weapon, **was** jury question. West's F.S.A. 4 812.13(2)(a).

An appeal from the Circuit Court for Gadsden County; William Gary, Judge.

Nancy **A.** Daniels, Public Defender; Kathleen Stover, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Douglas Gurnic, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Curtis Dale appeals his conviction for armed robbery with **a** deadly weapon in violation of section 812.13(2)(a), Florida Statutes (1993), arguing that under the facts of the instant case the evidence was legally insufficient to establish that Dale's use of **a** BB gun met the statutory definition of a deadly weapon. Because the issue of whether the BB gun used here **was** a deadly weapon **was** properly treated as a jury question, we **affirm** and certify a question of great public importance.

Below, Flowers **Bakery** employee Ina Bruton, the victim, testified that Dale demanded money from her saying "I got a gun," while at the **same** time, he pulled his shirt **back so** she could **see** a part of something that **was black,** which she assumed was **a** gun. Later, Dale's clothes, a BB gun, and a Flowers bag were recovered at **the** same site. Although the gun **was** found without BBs or **a** CO_2 cartridge, the state introduced testimony that the BB gun **was** operational and could

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be spring-loaded with BBs.[1] The trial court charged the jury that the state was required to prove Dale used a "deadly weapon," which was defined as a weapon used or threatened to be used in a way likely to produce death or great bodily harm. The jury returned a verdict finding Dale guilty as charged.

In *Gooch v. State*, 652 So.2d 1189, 1191 (Fla. 1st DCA), *rev. denied*, 659 So.2d 1086 (Fla.1995), this court ruled that "whether ... an air or gas operated gun is a deadly weapon depends on the manner in which it is used, and whether it will be classified as a deadly weapon is a question for the jury." The trial court here correctly presented this issue to the jury. *Gooch, supra; Lynn v. State*, 567 So.2d 1043 (Fla. 5th DCA 1990).

We are aware, however, of some confusion in the case law. *Compare, Depasquale v. State*, 438 So.2d 159 (Fla. 2d DCA 1983) *and Bass v. State*, 232 So.2d 25 (Fla. 1st DCA 1970) *with Duba v. State*, 446 So.2d 1167 (Fla. 5th DCA 1984) *and M.R.R. v. State*, 411 So.2d 983 (Fla. 3d DCA 1982). Accordingly, we affirm, but certify the following question to our supreme court as a matter of great public importance.

CAN A JURY PERMISSIBLY FIND A BB GUN TO BE A DEADLY WEAPON AND A DEFENDANT GUILTY OF ARMED ROBBERY WHEN THE EVIDENCE SHOWS THAT THE BB GUN WAS FOUND UNLOADED, WITHOUT A CO_2 CARTRIDGE, AND NO EVIDENCE WAS PRESENTED THAT THE BB GUN WAS LOADED AT THE TIME OF THE OFFENSE, WHERE THE DEFENDANT STATED SIMPLY "I HAVE A GUN" DURING THE COMMISSION OF THE ROBBERY?

AFFIRMED, question certified.

JOANOS, BENTON and VAN NORTWICK, JJ., concur.

1. This evidence distinguishes the instant case from *Brooks v. State*, 605 So.2d 874 (Fla. 1st DCA 1992), *quashed on other grounds*, 630 So.2d 527 (Fla.1993), wherein the state did not prove that the starter pistol had a capability to injure. In *Brooks*, the appellant's conviction for armed robbery was reduced to simple robbery since the starter pistol was not otherwise used in a manner which would or could cause death or serious bodily harm (e.g., it was not used as a bludgeon).

Justice Anthony NEAL, Appellant,

v.

STATE of Florida, Appellee.

Nos. 94–4298, 95–2911.

District Court of Appeal of Florida, First District.

March 19, 1996.

Defendant was sentenced in the Circuit Court, Bay County, Clinton E. Foster, J., and costs were imposed. Defendant appealed. The District Court of Appeal held that: (1) consecutive sentences exceeded maximum permitted guideline sentence; (2) costs attributable to law library and Gulf Coast Criminal Justice Assessment should have been assessed on per-case basis; and (3) imposition of public defender's lien without informing defendant of right to contest its amount was erroneous.

Affirmed in part, reversed in part, and remanded with directions.

1. Criminal Law ⇐1210(4)

Consecutive sentences were erroneous, where they together added up to five and one-half years, and maximum permitted guideline sentence for offenses of which defendant had been convicted was four and one-half years.

2. Costs ⇐292, 314

Although costs attributable to law library and Gulf Coast Criminal Justice Assessment could be imposed on defendant, they should have been assessed on per-case basis only. Laws 1969, ch. 69–835, § 7; Laws 1989, ch. 89–521, § 7.

3. Costs ⇐314, 325

Imposition of public defender's lien without informing defendant of right to contest its amount was improper.