ORIGINAL

FILED
SID J. WHITE
APR 30 1996
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CURTIS DALE, :

Petitioner, :

v. CASE NO. 87,691

STATE OF FLORIDA, :

Respondent. :

_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0513253
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF **CITATIONS**
PAGE TWO

STATUTES

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

CURTIS DALE,	:	
Petitioner,	:	
VS.	:	CASE NO. 87,691
STATE OF FLORIDA,	:	
Respondent,	:	

INITIAL RRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

This is an appeal from conviction at jury trial of armed robbery with a deadly weapon. All proceedings were held in Gadsden County before Circuit Judge William L. Gary.

On appeal, the First District Court affirmed but certified a question. Dale v. State, 669 So.2d 1112 (21 Fla.L.Weekly D683 (Fla. 1st DCA 1996).

The one-volume record on appeal will be referred to as "R" and the two volumes of transcripts as "T."

II STATEMENT OF THE CASE

Petitioner, Curtis Dale, was charged by information filed March 7, 1994, in Gadsden County, with armed robbery with a deadly weapon of Ina Bruton in the Flowers Bakery store (R 5).

October 7, petitioner moved in limine to prevent the state from offering evidence that he had escaped from jail as proof of consciousness of guilt (R 19); the motion was denied (T 5-22).

At trial October 13 and 14 before Judge Gary, petitioner's motions for judgment of acquittal were denied (T 23-42,292). The jury found him guilty as charged (R 21).

December 14, the state filed notice of intent to seek enhanced penalty (R 22). The same day, Dale was sentenced to life in prison as an habitual offender, with credit for time served of 300 days, and $255 court costs (R 25-30). His presumptive guidelines sentence was 83.7 to 139.5 months (6.9 to 11.6 years) in prison (R 32). January 5, 1995, the court entered a written habitual offender order (R 32-B).

Notice of appeal was timely filed January 10, 1995 (R 33).

III STATEMENT OF THE FACTS

Petitioner, Curtis Dale, was convicted of robbing the Flowers Bakery store in Quincy, which is apparently just down the block from the police station, on February 16, 1994, just before 11:00 a.m. (T 46-48, 127).

Ina Bruton, the store manager, testified that a black guy came in and got a loaf of bread. When the cash drawer came open, the man said, "Get one of those bags [a plastic Flowers bag] and put all your money in it" (T 52). She kind of like froze. He said, "Hurry. Get the bag and put the money in it." He said, "I got a gun." He pulled his shirt back so she could see a part of something that was **black**, which she assumed was a gun. She asked if he wanted the ones, and he said "I want it all" (T 54-55).

She laid the money - $137 - on the counter; he picked it up, backed away a step or two, and stopped. He asked if she had a phone and where it was. It was in the back room. He said, "Okay, don't you call anybody. You call anybody, I will be back." She said she would not call anybody. He walked to the door and stopped and said again, "I meant what I said. You call anybody, I will be back." Then he went out the door to the right (T 55-56).

When she was sure he was gone, she locked the doors and called the police (T 57-59). She was crying when she called, "I couldn't hardly talk I was so scared." The police arrived before she **got** off the phone. The man was between 5'8" and 6'

tall and weighed 185 to 190 pounds. He was in his late 20's or early 30's (T 59). He wore a white shirt with green, red and blue pinstripes and a baseball hat turned backwards (T 60). The police brought a man to the store (T 65). She asked the police to put the cap on him backwards, so she could "make sure" it was him (T 66). Bruton identified Dale as the robber (T 57).

On cross, Bruton said she thought the cap was dark, but it turned out to be white. She did not notice whether the man had a moustache or any marks or scars on his face (T 75).

Quincy Public Safety Officer Jeffrey Garrett Wiggins took a description of the robber from Bruton: dark complected black male, approximately 6' tall and 180 pounds, wearing a white shirt with dark colored stripes, and a dark baseball cap turned around backwards. He passed the description to all other units, so they could BOLO the area. (T 94-95).

Billy Walker and his nephew, John Shipp, approached one of the officers at the store, asked what had happened and what the robber was wearing (T 110-11). Walker told Investigator Corder that Dale had come to Walker's house between 11 and 12 that morning, changed clothes and left his clothes there. Curtis also looked in the phone book, but did not use the phone (T 121, T 231 et seq.). Walker knows Curtis personally, Walker lives about one-tenth of a mile from the Flowers Store (T 157). Walker did not see a gun or money (T 106-07, 124).

Officers took possession of the clothes at Walker's house

(T **112**). Walker later found a gun under the bathroom sink and called the police to tell them. He also found a Flowers **bag** in the bathroom (T **113**).

No fingerprints of value were found (T **130,143,192-97**). Ridgeway Stone, an evidence technician, took possession of the air pistol found at Walker's house (T **137**). The CO, cartridge was missing when he found it, as it is today (T 138).

Quincy Investigator Jim Corder stopped at the store for just a minute to get basic information from the clerk and then got back out and started looking around the area (T 152). He saw Dale on the street entering a housing project on foot. He was wearing black shorts, a white T-shirt and a black bandanna, which was not the clothing described by Bruton (T 155).

Corder identified the BB gun. It has no CO, cartridge and no BBs, but according to Corder, it looks like a real Beretta .9 mm handgun. The prosecutor asked about it having two names, Beretta and Daisy, the latter is a BB gun brand name. Bruton could not identify the gun (T **162**). When they arrested Dale 20 to 25 minutes later, he had changed clothes again. They did not find any money on him (T **167-68**). Dale is 6' tall and weighs **180** pounds (T **170**).

Four witnesses testified concerning Dale's two escapes from jail. On May 11, 1994, Dale was transferred from the Gadsden County Jail to the Liberty County Jail. On June 28, he escaped from Liberty County, He was apprehended on 1-10 in Washington County on June 29. He was returned to the Gadsden

County Jail and escaped on the night of August 26. He was found in Leon County underneath a bed in a residence early the next morning, the 27th, and arrested (T 217-18, 223-29).

IV SUMMARY OF ARGUMENT

Petitioner, Curtis Dale, was convicted of armed robbery with a deadly weapon. The "weapon" in his possession was an unloaded BB gun. It is well-settled that a BB gun does not meet the statutory definition of a firearm. While in its ordinary usage, a BB gun is not a deadly weapon, it can become one, depending on the manner in which it is used. A non-firearm, indeed many household objects, can be classified as deadly weapons if they are used in a manner likely to cause death or great bodily harm.

As there was, however, no evidence Dale used the BB gun in a manner likely to cause death or great bodily harm, the proof was legally insufficient to sustain conviction of armed robbery. While it is true that the question of whether an object is a deadly weapon is ordinarily for the jury, this principle presumes that the requisite predicate has been laid. The predicate for the creation of a jury question is the introduction of substantial competent evidence from which the jury could find that Dale had used the BB gun as a deadly weapon. Absent such evidence, as here, the trial court erred in denying the motion for judgment of acquittal on the deadly weapon element, and the district court erred in affirming the conviction,

V 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 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 COMMISSION OF THE ROBBERY?

The issue in this case could be framed more simply as whether a BB gun - either loaded or unloaded - is a deadly weapon per se.

If it is a deadly weapon per se, then proof that petitioner Dale had a BB gun, without regard to how it was used or whether it was loaded, creates a jury question as to whether he committed armed robbery with a deadly weapon. If a BB gun is not a deadly weapon per se, then the state must prove it was actually used in a manner likely to cause death or great bodily harm.

Petitioner contends a BB gun - either loaded or unloaded - is not a deadly weapon per se, and the state failed to prove he used it in a manner likely to cause death or great bodily harm, thus the evidence was insufficient as a matter of law to sustain his conviction of armed robbery with a deadly weapon. Petitioner further believes the opinion of the First District Court of Appeal below went awry because it treated the BB gun as a deadly weapon per se, when it is not.

The robber pulled back his shirt and showed the store

clerk, Ina Bruton, a black object in his waistband, which she believed to be a gun. He did not take the gun out, did not point it at her, did not threaten to shoot her. At trial, the state introduced an object it recovered along with the clothes which petitioner Curtis Dale had changed from at Billy Walker's house. The state believed this object to have been the "gun" shown to Bruton, although she could not identify it. It was an unloaded air-powered BB gun.

There is no question whether the air pistol is **a** firearm. **It** is not. It does not meet the statutory definition of firearm, because it does not expel a projectile by means of an explosive, § 790.001, Fla.Stat. The question here is whether the unloaded air pistol/BB gun meets the legal definition of a deadly weapon. Petitioner contends it does not, because it was not used or threatened to be used in a manner likely to cause death or great bodily harm.

It seems clear in Florida law that a firearm is a deadly weapon per se, regardless of whether it is operational or loaded, That means it is no defense to a charge of armed robbery or aggravated assault that the firearm was not loaded, **or** not operational. See Watson v. State, 437 So.2d 702 (Fla. 4th DCA 1983), approved in part, 453 So.2d 810 (Fla. **1984);** M.R.R. v. State, 411 So.2d 983, 984 (Fla. 3d DCA 1982); Warren v. State, 332 So.2d 361 (Fla. 3d DCA 1976); Baas v. State, 232 So.2d 25 (Fla. 1st DCA 1970).

This is true because the statute defines **a** firearm as a

thing which is not only presently operable to expel a projectile by means of an explosive, but also a thing which is readily convertible to do so. § 790.001(6), Fla.Stat. An unloaded, but otherwise operable firearm, is readily convertible to expel a projectile. Even an inoperable firearm may nevertheless be readily convertible. The definitional section of chapter 790 was added in 1969, thus predating all of the cases cited above, except that the date of the offense in Bass (but not of the decision) predated the statute. Ch. 69-306, Laws of Florida.

It is also well-settled that an air-powered BB gun does not meet the statutory definition of firearm. See, e.g., Depasquale v. State, 438 So.2d 159 (Fla. 2d DCA 1983). Where the thing does not meet the statutory definition of firearm, the next question is whether it meets the definition of weapon. A weapon is defined as:

> any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife. (emphasis added).

§ 790.001(13), Fla.Stat. (1993). The only item on this list which a BB gun might be is "other deadly weapon."

A "deadly weapon" has been defined thus:

> Where the instrument used is not a firearm as statutorily defined, Florida courts also apply an objective test and look to the nature and actual use of the instrument and not to the subjective fear of the victim or intent of the perpetrator in determining whether the instrument is a deadly weapon for purposes of the aggravated assault statute.

M.R.R., supra, 411 So.2d at 984. The Second District Court put it this way:

> A deadly weapon is defined as one likely to produce death or great bodily injury. An unloaded gun has been deemed to be a deadly weapon as a matter of fact, and as a matter of law. However, if the instrument used is not a gun, Florida courts apply an objective test and look only to the nature and actual use of the instrument, even where fear on the part of the victim is an element of the crime. (emphasis added; cites omitted)

Heston v. State, 484 So.2d 84, 86 (Fla. 2d DCA 1986); see also Goswick v. State, 143 So.2d 817, 820 (Fla. 1962).

The law is clear that a toy gun or a fake gun is not a firearm within the meaning of the robbery statute, even if it is threatened to be used to shoot the victim. See Paul v. State, 421 So.2d 696 (Fla. 2d DCA 1982) (toy gun). Thus, in McCray v. State, 358 So.2d 615 (Fla. 1st DCA 1978), where the robber pointed a cigarette lighter shaped like a gun at the victim as if it were a firearm, this court held the fake gun not to be a weapon.

Since it does not meet the statutory definition of firearm, nor the legal definition of a deadly weapon, a starter pistol, not readily convertible to expel a projectile, is treated the same as a fake gun. Thus, in Brooks v. State, 605 So.2d 874 (Fla. 1st DCA 1992), quashed on other grounds, 630 So.2d 527 (Fla. 1993), the First District held that, since the starter pistol was used only as a fake gun, and not as a bludgeon, it was not a weapon at all. Thus, the court reduced

Brooks' armed robbery conviction to simple robbery. See also Ridley v. State, 441 So.2d 188 (Fla. 5th DCA **1983).** A toy or fake gun could be found to be a weapon, but only if it were used **as** a weapon, that is, as a bludgeon. For example, Gomez v. **State**, 496 So.2d 982 (Fla. 3d DCA 1986), involved a toy gun, but the robbery with a non-deadly weapon conviction was sustained, because the robber had used the toy gun to strike the victim.

In M.R.R., the defendant used a starter gun, which was not designed to fire a projectile. The court held it was the state's burden to prove either that it could expel a projectile, or could be readily converted to do so, citing M.M. v. State, 391 So.2d 366 (Fla. 1st DCA 1976), review denied, **411** So.2d **384** (Fla. **1984).** The state failed to introduce any evidence on this issue. The court held:

> Because the state failed to prove that the "fake gun" in this case was a deadly weapon either because it was a firearm as statutorily defined and thus was a deadly weapon per ***se***, or because it was in fact used as a deadly weapon, the finding that the instrument was a deadly weapon cannot stand.

411 So.2d at 985.

Petitioner contends that Bates v. State, 561 So.2d 1341 (Fla. 2d DCA 1990), is factually similar to and legally dispositive of his own case. Bates approached a convenience store clerk with an object covered by a rag, said he had a ".22" [sic] and demanded she give him money. The clerk did not see the object, the state did not find a gun, and following his

arrest, Bates admitted the object under the rag was a nutdriver. The district court reduced his conviction from armed robbery to simple robbery, because the nutdriver was not a deadly weapon. That is, it was not used in a manner likely to cause death or great bodily harm.

Bates quoted the definition in Depasquale:

> 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." (emphases added)

561 So.2d at 1341, quoting Depasquale, 438 So.2d at 160. The court continued:

> [a]n object becomes a deadly weapon if its sole modern use is to cause great bodily harm.

Bates, quoting Robinson v. State, 547 So.2d 321, 323 (Fla. 5th DCA 1989).

The court held that Bates had neither used nor threatened to use the nutdriver in a violent way. "He merely stated that it was a gun he was holding." The court said a nutdriver, when used for its designed purpose, would not cause death or great bodily harm. The court also said, however, that this result was dependent on the manner in which Bates used the nutdriver. Had he threatened to use it as a bludgeon, that could have resulted in death or great bodily harm, and he could have been convicted of first-degree robbery therefor. The district court opinion below did not cite or distinguish Bates.

Similarly to Bates, in Robinson, the district court held

that a single-edge razor blade found in the defendant's pocket was not a concealed weapon, because it was not being used in a manner likely to cause death or great bodily harm. 547 So.2d at 323.

The cases just cited all involve known objects, which did not meet the statutory definition of firearm or the legal definition of a deadly weapon. Another group of cases involves unidentified objects, which may **or** may not be firearms. The resolution of these cases depends on what evidence was introduced to prove whether they were real firearms. In general, the rule appears to be that an object which appears to be or could be a firearm, coupled with a threat to use the object as a firearm, constitutes prima facie evidence that it is a firearm. Any claim that the apparent firearm was not in fact a firearm is treated essentially as an affirmative defense.

For example, in T.T. v. State, 459 So.2d 471 (Fla. 1st DCA 1984), the robber held an object that appeared to be a gun, threatened **to** shoot and to blow out the victims' brains. This court upheld the armed robbery convictions, but distinguished McCray (cigarette lighter shaped like gun) based on the additional evidence of the defendant's threats. That additional evidence, the First District held, meant there was more than a merely subjective belief of the victim that the object was **a** firearm.

Although the T.T. opinion did not put it this way, its reasoning appears to be that the gun-like appearance of the

object was circumstantial evidence that it was a firearm, but such circumstantial evidence was consistent with the possibility the gun was a fake. The defendant's threats to **blow** out the victims' brain, however, was inconsistent with the possibility the gun was **fake**, since a fake gun cannot do this. Thus, assuming no direct evidence proves the object to be a gun or not, gun-like appearance, coupled with a threat that is inconsistent with the gun being fake, is sufficient evidence that the object was a firearm. This appears to be an accurate statement of the law.

In Franklin v. State, 476 So.2d **1346** (Fla. 1st **DCA** 1985), the victim testified the robber displayed what appeared to be a .22 pistol. The defendants claimed it was a "blank gun." The First District distinguished McCray (cigarette lighter gun) and M.M., supra (starter pistol) as follows:

> However, in neither case did the perpetrators threaten to use their ersatz gun against the victim in a **way** likely to inflict great bodily harm.
>
> This case is more like T.T. [supra], wherein two separate threats to shoot robbery victims with "an object which appeared to be a gun" were held to be sufficient circumstantial evidence *to* conclude that the defendant had used a firearm. . . Here, the appellants threatened to shoot the cashier twice in the store and a third death threat was made after the sexual batteries. Given these circumstances, the jury could have reasonably concluded that the object used **by** appellants was a firearm.

476 So.2d at 1348.

It is not self-evident, however, that a robber's claim to

have a gun should constitute evidence a gun was carried absent actual evidence of a gun. As the First District observed in Butler:

> Robbers commonly merely imply the possession of a weapon in order to bolster their threat. [However, t]hat implication cannot amount to proof of the possession.

Butler v. State, 602 So.2d **1303, 1305** (Fla. 1st DCA 1992), quoting Ryder v. State, 464 So.2d 1324, 1325 (Fla. 5th **DCA** 1985). It is not clear that verbally pretending to have a gun should count as evidence of an actual gun when non-verbal pretending does not. There is no need to reach the issue in this case, however, as there is no evidence that Dale made any verbal claim or threat implying the gun he held was real. He said only, "I got a gun."

Where there is no proof the gun was real and no threats to use the possibly fake gun to shoot the victim, the First District refused to uphold an armed robbery conviction. Butler, supra. In Butler, the robber entered a dry cleaning shop with a pair of pants folded over his hand. The pants revealed the outline of a long hard object that appeared to be the barrel of a gun. Butler pointed the object at the victims. The victims assumed Butler was carrying a gun, but conceded the object could have been something else of similar shape, such as a pipe. The robber never said he was carrying a gun and never threatened to shoot. The district court held the evidence was insufficient to establish that whatever Butler was **carrying** actually was a gun.

Moreover, whether the object is a firearm is judged by an objective standard, not the subjective perception of the victim. For example, in 1.0. v. State, 412 So.2d 42 (Fla. 3d DCA 1982), the assault victim was a rifle expert. He testified that the gun carried by the defendant was not a toy. The defendant testified he had carried a replica of a real gun. Acting as fact finder, the trial court found the evidence insufficient to prove the gun was real, but ruled the victim's reasonable perception of the gun as real was adequate to prove aggravated assault. The district court disagreed, holding evidence of the victim's perception to be insufficient if it does not show the defendant actually had a real firearm.

The implication of T.T. and Franklin is that gun-like appearance alone is **not** enough to prove an object is a firearm. Otherwise, neither case would have had to rely on the defendant's threats to shoot. Moreover, where the facts are similar, but there were no threats to shoot, the First District has deemed the evidence legally insufficient to sustain conviction of armed robbery. Butler.

While the trial court believed that Lynn v. State, 567 So.2d 1043 (Fla. 5th **DCA** 1990), was on point with the instant case, it is distinguishable because of threats made in that case which have no counterpart here. In Lynn, the robber lifted his shirt to reveal a handgun wedged in **his** trousers as he robbed a Red Lobster Restaurant. When Lynn crashed his car as he was attempting to flee, the police found an air pellet

pistol in the car. It was not operable, because the CO_2 cartridge was missing and pellets were jammed in the barrel.

Unlike the instant case, however, Lynn told the cashier to hurry up or he would "blow [the cashier's] brains out." 567 So.2d at 1044. A witness testified that the pistol had never been operable while owned by her husband (Lynn was not the owner), and a forensics expert testified he was able to make it operable after unjamming the barrel and obtaining a special CO, cartridge from the manufacturer. Despite the witnesses' testimony on operability, the court ruled that whether the air pistol was a deadly weapon was a jury question because Lynn's threat to blow out brains implied operability, Lynn testified he borrowed a car to purchase pellets, but did not remember the robbery, and on the morning of the robbery, Lynn and a defense witness went shopping for a cartridge for the gun so the witness' children could use the gun for target practice. Id. at 1045. The district court held:

> It was not unreasonable for the jury to infer that the pistol was loaded and operational at the time of the robbery in light of Lynn's threat to use the pistol in a manner that implied it was operational and his inability to recall the robbery and thereby attempt to resolve the issue of operability.

Id.

There was no such evidence here: Dale did not threaten to shoot the victim; there was no evidence of when, if ever, the BB gun had been operational; nor evidence that Dale had obtained BBs or a CO, cartridge for it; and he claimed no lapse

of memory.

A BB gun is not a deadly weapon **per** se, as is a firearm. Therefore, it could have been classified as a deadly weapon only if it **had** been used as a deadly weapon here. It was not. The robber did not even take the gun out of his pants; he did not point it at the victim; he did not threaten to shoot her, or anything similar. He did threaten to come back, if she called anyone, but this threat was in no way linked to the "gun," and it was an amorphous threat to do something in the future. It was qualitatively far different from the immediacy of "give me the money **or** I'll **blow** your brains out."

Petitioner further contends that a BB gun does not meet the legal definition of a deadly weapon, thus it does not meet the statutory definition of a weapon, thus he could not validly **be** convicted of robbery with a weapon, Moreover, even if a loaded BB gun did meet the legal definition of a deadly weapon, an unloaded BB gun does not, there was no proof the BB gun was loaded at the time of the robbery, and the fact it could be "readily converted" to operational status is irrelevant, because the concept of ready convertibility applies only to firearms, and a BB gun is not a firearm.

Although not expressed as a per se holding, in Depasquale, supra, the Second District held a BB gun was a deadly weapon per *se.* That is, a BB gun is a deadly weapon merely by virtue of the fact that it expels shot by air or gas. Petitioner contends this per se conclusion is true as a matter of law

where a firearm is concerned, but it is not self-evident, and instead, requires proof, where a BB gun is concerned.

The court also said the BB gun's capability of causing death or great bodily harm was 'heightened if a BB gun is used in the manner as the one used by [DePasquale]." 438 So.2d at 160. The opinion, however, gives no facts except that DePasquale "used" the BB gun in robbing a restaurant. The First District has apparently followed Depasquale. See Gooch v. State, 652 So.2d 1189 (Fla. 1st DCA), review denied, 659 So.2d 1086 (Fla. 1995). with all due respect, Depasquale was wrongly decided, and it is not even logical **or** semantical on its face.

Depasquale goes wrong because, while it cites an acceptable definition of deadly weapon as an instrument that "when used in the ordinary manner contemplated **by** its design and construction, will or is likely to cause death or sreat bodily harm," it misapplies the definition. The court ruled that, because a BB **gun** has the capability of inflicting great bodily harm, it is deadly weapon. **438** So.2d at 160. **Well**, "capable of" and "likely to" cause death or great bodily harm when used in the "ordinary manner" of its designed use are not the same thing, and the true standard was misapplied to BB guns.

Used in the ordinary manner for which they were designed, BB guns will not and are not "likely to" cause death or great bodily harm, It is true a BB gun is "capable" of causing great bodily harm, that is, under the right circumstances, a BB gun could blind someone, for example, but the circumstances under

which a BB gun is capable of producing death are unlikely or non-existent. There are no circumstances in which a BB gun is "likely to" cause either death or great bodily injury, and the state wholly failed to prove to the contrary.

Perhaps a preliminary question is what is a BB gun designed for, and what is the ordinary manner of its use? Petitioner contends a BB gun is designed as something of a beginner's gun. It is designed to accustom youth to something more substantial than a toy, but far less dangerous than a firearm. Because BBs are small and no explosive is used, a BB gun fires with relatively low force and cannot travel any substantial distance. The typical consequences of the misuse (not merely the use) of a BB gun **are** illustrated in Leister v. **Jab-**

—, — 629 So.2d 981 (Fla. 5th DCA 1993), in which one child shot another with a BB gun during horseplay. The jury awarded nothing for pain and suffering, and the trial court denied a motion for new trial, saying:

> It is clear from their verdict that the jury viewed the BB gun accident in this case to be a minor incident blown out of proportion by plaintiffs and their counsel. The physical pain involved was a momentary sting.

629 So.2d at 982, The district court affirmed. By comparison, while firearms can be used for relatively innocuous activities, such as target shooting, they are designed to and in the ordinary manner of their use will kill or seriously wound any person or animal that is shot.

In Forchion v. State, 214 So.2d 751, 752 (Fla. 3d DCA

1968), the district court said of the stick thrown by the defendant:

> Whether or not an object is a deadly weapon is not to be determined upon its capability of producing death but rather on its likelihood to produce death or great bodily injury. (emphasis added)

This is a correct statement of the law, and it shows how Depasquale went wrong.

Because a BB gun is theoretically capable of being used as a deadly weapon, it can be found to be so, but only where the state proves it was actually used in a manner likely to cause death or great bodily harm. Similarly, given the right circumstances, a shoe or a grapefruit could be deadly weapons. Davis v. State, 565 So.2d 826 (Fla. 5th DCA 1990); Wilton v. State, 455 So.2d 1142 (Fla. 2d DCA 1984). These cases do not prove that shoes and grapefruit are deadly weapons per se any more than the BB gun here was a deadly weapon per se. *See* also Arroyo V. State, 564 So.2d 1153 (Fla. 4th DCA 1990) (open pocket knife not dangerous weapon under burglary statute because not used in manner likely to produce death or great bodily harm); E.J. v. State, 554 So.2d 578 (Fla. 3d DCA 1989) (evidence insufficient to prove skateboard was used as deadly weapon); Smith v. Nussman, 156 So.2d 680, 682 (Fla. 3d DCA 1963) (slingshot not deadly weapon, [but later added to statutory definition of "weapon"]). They could be classified as deadly weapons only if they were used in a manner likely to cause death or great bodily harm, The BB gun here was not used

in such a manner.

Moreover, even assuming arguendo that a loaded BB gun could be found to a deadly weapon, an unloaded BB gun cannot. An object is legally a firearm, even if it is presently inoperable, as long as it is readily convertible to use as a firearm. This application comes from the definitional statute, and no analogous provision applies to other weapons. In other words, even if an unloaded firearm remains a firearm, there is no statutory or legal basis for holding that an unloaded non-firearm remains a deadly weapon. Rather, its actual present inability to be used as a deadly weapon is not overcome by a statutory presumption to the contrary. Cf. Heston, supra (crossbow with no arrows is not a deadly weapon). In Streetman v. State, 455 So.2d 1080 (Fla. 2d DCA 1984), the district court held that using a fake bomb did not constitute robbery with a weapon, because it construed "weapon" to mean only those objects which have an actual capability to injure, which the fake bomb did not. Petitioner contends an unloaded BB gun has no actual capability to injure, either.

Many cases say that whether an object is a deadly weapon is a question for the jury, and the First District held this case, too, presented a jury question. This is true, however, only if the state has introduced evidence consistent with finding the object was used as a deadly weapon. The state did not prove that the BB gun here was so used. It was only shown to the victim and never removed from the robber's waistband.

One way of looking at this issue is to determine what is the jury question supposedly created by the evidence. The only question validly for the jury is whether the BB gun was used in a manner likely to cause death or great bodily harm. Whether a BB gun is capable under any circumstances of causing death or great bodily harm could be viewed as preliminary to the question of whether it was so used in the instant case. The state offered no evidence, however, to prove a BB gun is capable in theory of causing death or great bodily harm, much less that it was so used in the instant case. For example, no witness testified as to how or under what circumstances, if ever, a BB gun was capable of inflicting death or great bodily harm. The matter is not self-evident, and the burden is on the state of proving the deadliness of any object other than a deadly weapon per se, such as a firearm. The state failed to do so here.

The First District opinion notes that a police officer testified the BB gun was operational and could be spring-loaded with BBs. Dale, 21 Fla.L.Weekly at D683. In a footnote, the court said this evidence distinguished the instant case from Brooks, "wherein the state did not prove that the starter pistol had a capability to injure." Dale, at n.2. The district court also noted that the state failed to prove in Brooks that the starter pistol was used in a manner which would or could cause death or great bodily harm, that is, it was not used as a bludgeon.

The trouble with this analysis is at least twofold.

First, it equates proof that the BB gun was operational and/or could be spring-loaded with the legal conclusion that it is a deadly weapon per se. As a factual matter, this conclusion is not self-evident; as a legal question, only a firearm is a deadly weapon per se. Whether, as a question of fact, a loaded BB gun is a deadly weapon, ever, or in a particular case was used as **a** deadly weapon, is an open question which requires proof **by** the state. The state and the district court both treated the BB gun the same as if it were a firearm, The limited proof the district court would require in order to create a jury question was only whether the BB gun was operational or could be loaded. This is the standard for a deadly weapon per se; it is not the appropriate standard for an object which the state must prove to be deadly.

There was no such proof here. That is, the district court erred in ruling that evidence the BB gun was operational and could be spring-loaded either 1) created a jury question, or 2) distinguished the instant case from Brooks. To the contrary, petitioner contends his situation is the same as Brooks. In Brooks, the state failed to prove the starter pistol was capable of causing death or great bodily harm; the state's case here suffers from the same infirmity.

Moreover, counsel for petitioner believes this **is** the point on which many of the district court cases have gone awry. They assume the question whether a BB gun is a deadly weapon is for the jury to decide, even in the absence of any evidence

that the BB gun was actually used in a manner likely to cause death or great bodily harm. Thus, the courts concluded a jury question existed, when in reality, the state produced no evidence which created a jury question.

Second, assuming arguendo that a loaded BB gun is a deadly weapon per se, the district court opinion also assumes erroneously that no legal distinction exists between an unloaded, that is, not presently operational, BB gun and a loaded BB gun. This is legally insupportable. As argued earlier, the only reason why a firearm is treated the same whether it is loaded or not is because a statute defines an object which **is** 'readily convertible" to expel a projectile as a firearm, equally as an object that is presently capable of expelling a projectile. No equivalent statute exists for non-firearms, such as the BB gun. Thus without present capability - i.e., without proof it was loaded at the time of the robbery - a BB gun does not qualify as **a** deadly weapon.

The district court attached some significance to the fact the robber said "I got **a** gun." It is not clear, however, what the court thinks the significance is. The state argued **below** it was an implicit threat to use the gun. Petitioner contends that he could hardly have done or said less and still let the victim know he had the gun. The robber in Bates said he had **a** ".22," that is, a gun, but the Second District held that was not sufficient to prove the unknown object was a gun.

Further, Florida courts have held in a different context

that a "gun" is not the same as a "firearm." E.g., Neskovski v. State, 568 So.2d 468, 469 (Fla. 5th DCA 1990). As the concurring opinion points out in Neskovski, the mandatory minimum applies only if the "gun" in question meets the statutory definition of a firearm, and many "guns" do not. The concurrence cited as examples water guns, grease guns, and antique guns, the last being specifically excluded from the statutory definition. Petitioner would add that BB guns are also "guns" but not "firearms." This is true even though the terms "gun" and "firearm" are often used interchangeably, as they often are in court opinions, and as he has done in this brief.

The state failed to prove the BB gun was used in a manner likely to cause death or great bodily harm. The evidence on this issue is undisputed, and it was legally insufficient to prove Dale used the unloaded BB gun as a deadly weapon, therefore, this court should order his conviction to be reduced to simple robbery, as the district courts did in Brooks, Bates, Ridley, and M.R.R., supra.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse the district court decision, and reverse and remand to reduce his conviction to simple robbery and for resentencing.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
Fla. Bar No. 0513253
Assistant Public Defender
Leon County Courthouse
301 S. Monroe, Suite 401
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Curtis Dale, inmate no. 783245, Gulf Correctional Institution, P.O. Drawer 130, Wewahitchka, Florida 32465-0130, this 30 day of April, 1996.

KATHLEEN STOVER

IN THE SUPREME COURT OF FLORIDA

CURTIS DALE,	:	
	:	
Petitioner,	:	
	:	
vs.	:	**CASE NO. 87,691**
THE STATE OF FLORIDA,		
	:	
Respondent,	:	
	:	

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CURTIS DALE.,

Appe1lant,

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

---

[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.