

047

IN THE SUPREME COURT OF FLORIDA

DEXTER MITCHELL,

Petitioner,

vs.

Case No. 91,107

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

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**FILED**

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STATEMENT OF THE CASE

Dexter Mitchell was tried for fourteen crimes charged after an incident involving his wife, her boyfriend, and other unrelated persons in a chiropractor's office and a nearby trailer park. (R4-9). Mr. Mitchell was charged and convicted of robbery with a deadly weapon and attempted robbery with a deadly weapon, as well as aggravated assault with a deadly weapon, and armed trespass. (R4-9). This appeal concerns the sufficiency of the evidence concerning these felonies. Mr. Mitchell was also charged and convicted of aggravated battery for beating his wife on the head with a BB pistol and for other crimes which resulted in acquittals or misdemeanor convictions.'

In four of the six charged aggravated assault with a deadly weapons counts, the jury returned verdicts of guilty of the lesser included misdemeanor offense of assault. (R43, 44, 45, 48). Two of the six charged aggravated assault counts resulted in convictions as charged. (R46, 47). Those two counts concerned the victims **Corey Giles** and Steve Christensen. (R7-8).

The robbery convictions concerned actions which occurred at the home of the wife **Roselena** Mitchell while in the company of her boyfriend, Harold Williams. (R5-6). The armed trespass and aggravated assault charges concerned people at whom Mr. Mitchell

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'The jury found Mr. Mitchell not guilty of burglary of a dwelling with an assault therein, Count Two, and the trial court granted judgments of acquittal for Count Three, aggravated stalking, and for Count Fourteen, impersonating an officer. (R20, 39) .

pointed a BB pistol while pursuing his wife through a chiropractor's office. (R6-9).

At the close of the State's case, the defense moved for judgments of acquittal for the robbery, armed trespass and aggravated assault charges, on the grounds that the state had failed to prove that the BB gun was a deadly or dangerous weapon. (T204-214). These motions for judgment of acquittal were denied. (T207, 208-209, 214).

In ruling on whether the BB pistol was a deadly weapon, the trial court noted, "Well, we didn't hear any testimony from anybody as to what -- what injury, if any that pellet gun could cause if used at point blank range or otherwise. And to be honest with you, I'm not sure, you know. I mean, if you pointed directly at somebody's temple from four inches away if it would kill them. I don't know." (T206). The defense also stated, "I don't even know if it was operable or capable of being operated." (T206). In deciding that the BB pistol was a deadly weapon for the purposes of the aggravated assault charged, the trial court stated, "The defendant might have known it was empty, but if the victim didn't know it was empty, I think you could still be found guilty of aggravated assault with a firearm. . . . It's threatened to be used in a way likely to cause death or great bodily harm and in the victim's mind, it doesn't matter if the gun is loaded or not." (T213). After these arguments were made, the state failed to present additional evidence about the BB pistol. (T289).

Mr. Mitchell was sentenced within the guidelines for the seven

felony convictions to thirteen years for the aggravated battery and robbery charges, and to five years for the armed trespass and aggravated assault charges. (R52-74, 75-77). These convictions and sentences were appealed to the Second District Court of Appeal. (R87).

The Second District Court of Appeal affirmed the felony convictions, stating, "With some hesitation, we conclude that the evidence also establishes trespass with a dangerous weapon, robbery with a deadly weapon, and aggravated assault with a deadly weapon. When a defendant's words or actions imply that a device is dangerous or deadly, and the device is normally dangerous or deadly when used in its ordinary and usual manner, but at the time of the offense it is not dangerous or deadly due to a condition that cannot be observed by the victim, we conclude that a jury may find the device to be a dangerous or deadly weapon." App. at 2. The district court stated the following concerning the evidence about the BB pistol:

The evidence concerning the BB gun is somewhat atypical. The gun was identified for introduction into evidence by Mr. Mitchell's wife. She testified that the pistol appeared to be the weapon used to threaten her and to beat her over the head. A police officer testified that the police collected the gun as evidence at the mobile home park and stored it in an evidence locker. No one testified that the gun was loaded and operable at the scene. No technician fired the weapon or testified to its power.

Because this court thought it possible that the gun, when introduced into evidence, might still have had BBs in its reservoir, we requested the actual pistol be included in our record. Even on careful examination, it looks

like a black, .22 caliber semi-automatic pistol. It is a Huntington Marksman Repeater BB Pistol, which is powered by a spring, rather than a CO2 cartridge. It has a reservoir to hold BBs. Upon physical examination, there is no evidence that it is loaded. It was taped by the police to render it inoperable, but no officer testified about taping the gun. If it was unloaded by the police when they taped it, that fact is not established in the record. We recognize the possibility that Mr. Mitchell may have emptied the BB gun before he threw it out of the mobile home. However, the record contains no evidence of BBs located in the mobile home or on his person. There is no evidence that he ever fired the gun during this extended criminal episode.

(App. at 4-5).

The district court certified the following question to this court:

IF THE STATE FAILS TO PROVE THAT A BB PISTOL IS LOADED AND OPERABLE AT THE TIME OF THE OFFENSE, CAN IT BE CLASSIFIED AS A DANGEROUS OR DEADLY WEAPON WHEN THE DEFENDANT'S ACTIONS CAUSE THE VICTIM TO REASONABLY BELIEVE THAT THE BB PISTOL IS LOADED AND OPERABLE?

App. at 2.



STATEMENT OF THE FACTS

On October 16, 1994, Dexter Mitchell went to the separate home of his estranged wife, Rose, where he saw her boyfriend, Harold Williams carrying beer bottles into the house. (T37). Both men went into the wife's house. (T38). Once inside, Mr. Williams approached Mr. Mitchell, and Mr. Mitchell withdrew a BB pistol from under his jacket. (T40, 238). Mr. Williams believed the BB gun to be real and Mrs. Mitchell was threatened by the pistol. (T10-11, 26 40, 43)"

After Mrs. Mitchell ran into the bedroom and shut the door, Mr. Mitchell kicked the door down and ordered her and Mr. Williams to lie face down on the bedroom floor. (T10, 42). Mr. Mitchell said, he was going to shoot his wife and Mr. Williams. (T11, 41). He then started telling Mrs. Mitchell that he loved her and wanted her to come to Georgia with him to see his family. (T13, 42). He then demanded money from his wife and the boyfriend for this trip. (T11-12, 44). Mrs. Mitchell, who had money, got some money out of her purse and gave it to him. (T12).

While Mr. Mitchell and Mr. Williams were talking, Mrs. Mitchell ran out of the house. (T13). Mr. Mitchell chased her to a nearby chiropractor's office, where the remainder of the crimes occurred. (T15). While chasing her, Mr. Mitchell yelled, "Stop or I'll shoot." ((T13). While running through the office, Mrs. Mitchell cried for someone to call the police because she was being chased by someone with a gun. (T15).

Corey **Giles**, a chiropractic assistant, was standing smoking a

cigarette on the office front porch when she heard the Mitchells approach. (T74). She saw a woman going into the front office door and a man following her holding a gun in one hand and a telephone receiver in the other. (T74). After the woman went into the office, Mr. Mitchell stood there and said, "Where is she?" When Ms. Giles did not answer, he pointed the gun at her face and said, "Where the f\_\_\_\_\_ is she?" Ms. Giles said, "**In** there," and Mr. Mitchell entered the office with the BB pistol. (T75). Ms. Giles' testimony resulted in an aggravated assault conviction. **(R46)**.

Inside the office reception area, Mr. Mitchell waived the gun around, yelling, "Where is she? Where is she? Where the hell is she?" (T69, 70, 109). Two employees, whose testimony resulted in misdemeanor assault convictions, April Lawrence and Mary Gerhart, testified that Mr. Mitchell specifically pointed the BB pistol at them. (T69, 70, 109; R43, 48). Ms. Lawrence and Ms. Gerhart then jumped behind the reception desk. **(T70)**.

**Mr.** Mitchell then ran down a hallway where Gina Palmari, another chiropractic assistant, saw him waiving the pistol around and pointed it directly at her. (T56). Mr. Mitchell said, "Where is she? I'm going to kill her." (T57). Ms. Palmari went back into her room and shut the door. **(T57)**. Her testimony also resulted in a misdemeanor assault conviction. (R44).

Stephen Christensen, an office patient and off-duty corrections officer, was in **a** treatment room, when he heard a loud commotion in the hallway. (T82, 84). He stepped into the hallway where he saw the Mitchells struggling and asked, "What's going on

here?" (T83). Mr. Mitchell then pointed the gun at him and said, "Get back or I'll shoot." (T83). Mr. Christensen ducked behind a wall and ran out of the office to call 911. (T83). Mr. Christensen's testimony resulted in an aggravated assault conviction against Mr. Mitchell. (R47).

One of the chiropractors, Dr. Robert Laronga, was with a patient when he heard loud noises in the front office. (T98). Looking out of his office he saw Mr. Mitchell beating Mrs. Mitchell over the head with the pistol. (T98, 99). Mr. Mitchell pointed the gun at Dr. Laronga, but said nothing to him. Dr. Laronga's testimony resulted in a misdemeanor assault conviction against Mr. Mitchell. (R45).

Another chiropractor, Dr. Thomas Paulantonio, heard the screaming and beating while in his office. Looking out of his door, he saw Mr. Mitchell run by with a gun. (T116). When the beating ceased, he found Mrs. Mitchell lying on the floor bleeding. (T117).

By this time Mr. Mitchell had left the office and eventually fled to a nearby trailer park. (T126, 167). There he came upon Dora Russell, who was in her trailer home answering a telephone call from a neighbor warning her about a man running through the trailer park with a gun. (T126). Mr. Mitchell told Mrs. Russell and her husband that he was a policeman and hung up the telephone. (T128). He then handed the gun to Mrs. Russell, who then gave it to her husband. (T129, 254). Mr. Mitchell, afraid Mr. Russell would notice that the gun was not real, took it back, (T129, 254).

The Russells then ran out of their home, and shortly thereafter Mr. Mitchell surrendered himself and the BB gun to the police. (T153).

### SUMMARY OF THE ARGUMENT

Florida courts use an objective test in determining whether an object is a deadly or dangerous weapon under the robbery, trespass, and aggravated assault laws. The objective test requires that the trial court look to the nature and actual use of the instrument and not to the subjective fear of the victim or the intent of the accused. The district court erred in applying a subjective test, which considered only the fear of the victims, in determining that the unloaded BB pistol used in these crimes was a deadly weapon. Under the objective test, the unloaded pistol was not capable of causing any injury unless used to bludgeon another. In this case the state presented no evidence of what injury, if any, the BB pistol could cause. The state also did not present any evidence that the unloaded BB pistol **was** operable. Therefore, the unloaded BB pistol used in these crimes should not have been deemed a deadly or dangerous weapon. Accordingly, the crimes should have been reduced by the trial court and by the district court to simple robbery, simple attempted robbery, simple assault and simple trespass. Reversal and the appropriate reduction of the charges and resentencing are required.

## ARGUMENT

### ISSUE

IF THE STATE FAILS TO PROVE THAT A BB PISTOL IS LOADED AND OPERABLE AND CAPABLE OF SERIOUS BODILY INJURY AT THE TIME OF AN OFFENSE, CAN IT BE CLASSIFIED AS A DANGEROUS OR DEADLY WEAPON WHEN THE DEFENDANT'S ACTIONS CAUSE THE VICTIM TO REASONABLY BELIEVE THAT THE BB PISTOL IS LOADED AND OPERABLE?

The Third District Court of Appeal has stated, "Where the instrument used is not a firearm, Florida courts 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 purpose of the aggravated assault statute." 1.0. v. State, 412 So.2d 42, 43 (Fla. 3d DCA 1982). Other district courts, including the Second District, have used this objective standard in determining whether an object is a weapon or a deadly weapon for the purposes of the aggravated assault statute and the robbery statute. Blanco v. State, 679 So.2d 792 (Fla. 3d DCA 1996) (armed robbery convictions reduced to simple robbery where defendant used soda bottle to simulate firearm in holding up supermarket cashier); Brooks v. State, 605 So.2d 874, 875 (Fla. 1st DCA 1992) (starter pistol which could not have been rendered operable was not a "weapon" under the robbery statute because it did not have the capability to injure); Gust v. State, 558 So.2d 450, 452-453 (Fla. 1st DCA 1990) (counsel was ineffective if his client told him he

used a key chain in a robbery but attorney still advised **him** to plead to the charge of robbery with a weapon, since key chain not a weapon unless used in a manner to inflict serious bodily harm); Heston v. State, 484 **So.2d** 84, 86 (Fla. 2d DCA 1986) (**crossbow** without arrows could not be deadly weapon under aggravated assault statute, as could not have inflicted injury upon another); Streetman v. State, 455 **So.2d** 1080, 1082 (Fla. 2d DCA 1984) (**plastic-like** substance identified as a bomb but which had no explosive capabilities as rigged was not a weapon under §790.001(13) and robbery with weapon charge reduced to simple robbery); Ridley v. State, 441 **So.2d** 188, 189 (Fla. 5th DCA 1983) (**starter** pistol which was incapable of firing a projectile was not a firearm and robbery with a firearm charge reduced to simple robbery); Harpham v. State, 435 **So.2d** 375 (Fla. 5th DCA 1983) (**starter** pistol designed to detonate small gun powder explosives, but which could not expel a projectile without cylinder and barrel being drilled, was not a firearm and not a weapon, requiring that armed robbery convictions be reduced to simple robbery); M.M. v. State, 391 **So.2d** 366 (Fla. 1st DCA 1980) (**state** failed to prove that starter gun which could not fire a projectile because of warped barrel but which looked like a regular gun was a deadly weapon for the purposes of aggravated assault with a deadly weapon charge); McCray v. State, 358 **So.2d** 615 (Fla. 1st DCA 1978) (**conviction** for robbery with a weapon reduced to simple robbery where object used was a cigarette lighter shaped like a gun and state did not prove that use or threatened use was likely to

produce death or great bodily harm). In this case in which the state failed to prove that the BB pistol was capable of inflicting serious bodily harm, the trial court and the district court erred in not reducing the charges to simple robbery, simple trespass and simple assault. Reversal is therefore required.

The district court certified the following question to this court:

IF THE STATE FAILS TO PROVE THAT A BB PISTOL IS LOADED AND OPERABLE AT THE TIME OF THE OFFENSE, CAN IT BE CLASSIFIED AS A DANGEROUS OR DEADLY WEAPON WHEN THE DEFENDANT'S ACTIONS CAUSE THE VICTIM TO REASONABLY BELIEVE THAT THE BB PISTOL IS LOADED AND OPERABLE?

App. at 2. This question ignores the state's additional failure to prove whether the BB pistol was capable of causing serious bodily injury. The state not only presented no evidence that the object was loaded or operational, but presented no evidence about the object's capabilities at all. As the trial court noted during the arguments on the motion for judgment of acquittal, "Well, we didn't hear any testimony from anybody as to what -- what injury, if any that pellet gun could cause if used at point blank range or otherwise. And to be honest with you, I'm not sure, you know. I mean, if you pointed directly at somebody's temple from four inches away if it would kill them. I don't know." (T206). The defense further added, "I don't even know if it was operable or capable of being operated." (T206). Nevertheless, after these shortcomings in the state's proof were noted, the state produced no additional evidence regarding the capabilities of the BB pistol. (T289). Because evidence of the object's operational capabilities were not



presented to the jury and because no evidence was given concerning the object being loaded or operational, the state failed to prove the object was a dangerous or deadly weapon. Blanco; Brooks; Gust; Heston; Streetman; Ridley; Harpham; M.M.; McCray.

The district court stated the following concerning the evidence about the BB pistol:

The evidence concerning the BB gun is somewhat atypical. The gun was identified for introduction into evidence by Mr. Mitchell's wife. She testified that the pistol appeared to be the weapon used to threaten her and to beat her over the head. A police officer testified that the police collected the gun as evidence at the mobile home park and stored it in an evidence locker. No one testified that the gun was loaded and operable at the scene. No technician fired the weapon or testified to its power.

Because this court thought it possible that the gun, when introduced into evidence, might still have had **BBs** in its reservoir, we requested the actual pistol be included in our record. Even on careful examination, it looks like a black, **.22** caliber semi-automatic pistol. It is a Huntington Marksman Repeater BB Pistol, which is powered by a spring, rather than a CO2 cartridge. It has a reservoir to hold **BBs**. upon physical examination, there is no evidence that it is loaded. It was taped by the police to render it inoperable, but no officer testified about taping the gun. If it was unloaded by the police when they taped it, that fact is not established in the record. We recognize the possibility that **Mr.** Mitchell may have emptied the BB gun before he threw it out of the mobile home. However, the record contains no evidence of **BBs** located in the mobile home or on his person. There is no evidence that he ever fired the gun during this extended criminal episode.

(App. at 4-5). In essence the appellate court conducted its own investigation into the operational capabilities of the BB pistol.

Such evidence still does not show the capabilities of the object for inflicting harm; nor were any of the appellate's court's findings about the pistol ever presented by the state to the trial court. Accordingly, such facts not in the trial record should not properly be used in determining whether the state met its burden at the trial level of proving that the BB pistol was a deadly or dangerous weapon. Weaver v. State, 543 So.2d 443, 444 (Fla. 3d DCA 1989).

Under the facts presented in this case, the BB pistol can only be deemed a deadly or dangerous weapon if considered from the victim's subjective viewpoint. As the district court stated, in finding the evidence here sufficient to support the convictions, "We cannot deny that our reasoning assesses the likelihood of injury from a reasonable victim's perspective and not from the perspective of the defendant, who knows his weapon is unloaded or inoperable. We simply conclude that, under these circumstances, this limited reliance upon a victim's perspective is a correct application of the law." App. at 17. The appellate court thus failed to apply the objective test which looks to the nature and actual use of the instrument.

These charges at issue here concern the armed trespass, aggravated assault with a deadly weapon and robbery with a weapon statutes. As the district court properly noted, the armed trespass statute, §810.08(2), Florida Statutes (1993), provides that if a trespass occurs by an accused armed with a "dangerous weapon," the accused may be convicted of a third degree felony, "Dangerous

weapon" is defined only in the applicable jury instruction, which reads, "A 'dangerous weapon' is any weapon that, taking into account the manner in which it is used, is likely to produce death or great bodily harm." Fla. Std. Jury Instr. (Crim.) 142. Under this definition, the BB pistol was not proved to be likely to produce death or great bodily harm, since there was no proof of the object's injurious capabilities or of whether it was loaded or operational. The district court then erred in finding that under this definition, the victim's reasonable perspective determined that the object was a dangerous weapon.

The remaining counts concern the charges of robbery with a deadly weapon, a pellet pistol, and aggravated assault with a deadly weapon, a pellet pistol. (R5-8). These crimes, robbery codified in §812.13(2)(a), and aggravated assault codified in §784.021(1)(a), both require the use of a deadly weapon. Deadly weapon is not statutorily defined for either crime, but the jury instructions for each crime define deadly weapon in the identical fashion as "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) 156.

In Blanco v. State, 679 So.2d 792 (Fla. 3d DCA 1996), the Third District determined that a soda bottle used to simulate a firearm could not be considered a deadly weapon in that armed robbery case in which the supermarket cashier gave up money in fear of being shot. In applying the objective test, the Blanco court stated,

"Where the instrument is not a firearm as statutorily defined [or a specifically delineated weapon], Florida courts 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 . . . . The question is whether the [instrument] was of a nature or used in a manner that it could have resulted in death or great bodily harm. . . . The state must prove that the instrument used as a weapon was likely to cause great bodily harm because of the way it was used during the crime."

Id. at 793-94, quoting Williams v. State, 651 **So.2d** 1242-43 (Fla. 2d DCA 1995)(**citations** omitted). This objective test was also set forth by the Third District in the aggravated assault case of 1.0. v. State, 412 **So.2d** 42 (Fla. 3d DCA 1982). In 1.0. the victim had twenty-six years of military service and an "expert" rifle rating, and testified that the weapon pointed at him was not a toy gun, but a real shotgun. The accused testified that he used a toy replica which had been examined by a police officer in the neighborhood earlier that same day. The trial court then found 1.0. guilty of aggravated assault based on the victim's reasonable but subjective belief victim that he had been threatened with a real firearm. The district court reversed because, since the instrument used was not a firearm, the evidence did not support a finding that the instrument used was a deadly weapon. Id. at 43.

Such is precisely the situation here, where an object which is not a firearm was used, a pellet pistol, and the evidence does not establish that the object was used as a deadly weapon. Under Blanco, 1.0. and the objective test, reversal and reduction of the charges is required.

The district court below argued that the victim's perspective should determine whether the pistol was a deadly weapon, in part, because there are cases which have held that where a defendant threatens to shoot a victim with a firearm that is never recovered or a gun only circumstantially linked to the offense, there exists sufficient evidence to support the determination that the object is a firearm, as well as a deadly weapon. App. at 7, 14-15. See Council v. State, 691 So.2d 1192 (Fla. 4th DCA 1997); Meyer v. State, 498 So.2d 554 (Fla. 4th DCA 1986); T.T. v. State, 459 So.2d 471 (Fla. 1st DCA 1984); Bradley v. State, 413 So.2d 1248 (Fla. 1st DCA 1982). These cases, however, do not compel disregarding the objective test for an instrument which is recovered and for which proof concerning its operability and capabilities are then possible. For in such cases, like this one, the state is held to the same standard of proving that the recovered object, in this case a BB pistol, is capable of inflicting great bodily harm.

The policy reason for requiring the application of the objective standard is so that the "dangerous weapon" and "deadly weapon" definitions are given an evenhanded construction. If the actual likelihood of an actual object to produce harm determines whether the instrument is a dangerous or deadly weapon, then the facts about the object itself determine the status of this instrument, regardless of what the accused or the victim thought the object might be capable of doing. Thus juries presented with similar facts will not then be deciding different results.

If the victim's perspective is the standard, then whether an

object is a deadly or dangerous weapon will be determined solely on the victim's testimony of what he or she thought the object could have done to him or her. Thus juries presented with the same type of threat by the same weapon would return varying verdicts.

The need for implementing the objective test is made keenly apparent here where the jury decided that certain victims at whom Mr. Mitchell pointed the same BB pistol were faced with simple assault, but yet decided that others had faced aggravated assault.

Gina Palmmini, who thought the gun was real, had the gun pointed at her directly from three feet away while Mr. Mitchell loudly said, "Where is she? I'm going to kill her." (T56-57). April Lawrence was standing behind the front desk when Mr. Mitchell ran into the chiropractor's office and pointed the gun at her from a distance of four feet. (T70). Rosemary Gerhardt was standing with April Lawrence when Mr. Mitchell pointed the pistol at her from four to eight feet, making her afraid she might be shot and killed. (T70, 109). Dr. Robert LaRonga poked his head out of his consultation room and saw Mr. Mitchell hitting Mrs. Mitchell with the pistol. (T98). Mr. Mitchell then pointed the pistol directly at Dr. LaRonga from about thirty feet. (T98-99). The testimony of these victims resulted in simple assault convictions as to counts 7, 8, 9, and 12. (R43, 44, 45, 48).

Corey Giles testified that she was standing out on the front porch smoking a cigarette when she saw the back of Mrs. Mitchell go in the office door and saw Mr. Mitchell following her with a pistol and a telephone. (T74). He stood on the porch and said, "Where is

she? Where the f--- is she? and pointed the gun near her face. (T74-75). When she pointed to the office and said, "In there," Mr. Mitchell left her and went inside. (T74). Stephen Christensen, an off-duty corrections officer, was being treated as a patient in the office when he heard loud noises and went out in the hallway. (T82-84). There he saw Mrs. Mitchell cry out for help, and Mr. Christensen said, "What's going on here?" Mr. Mitchell stepped away from Mrs. Mitchell and pointed the pistol at Mr. Christensen and said, "Get back or I'll shoot." (T83). Mr. Christensen ducked behind a wall and took off running. (T83). The testimony of both Ms. Giles and Mr. Christensen resulted in aggravated assault convictions. (R46, 47). This is so even though the only difference between Ms. Gile's testimony and that of the simple assault victims was the distance she stood from the pistol. In Mr. Christensen's case the only defining difference was not the distance between the two men, which was not established, but the words Mr. Mitchell said to Mr. Christensen, "Get back or I'll shoot." (T83).

Thus, in this case, victims assaulted with the same weapon were not deemed to have had the same crime committed against them. Had, however, the objective test been used here, the same crime of simple assault would have been deemed committed when similar use of the same weapon occurred against different people.

The objective test requires that the trial court, at the close of the state's evidence, assess the likelihood of whether the actual object could inflict serious bodily harm. Blanco; Brooks; Gust; Heston; Streetman; Ridley; Harpham; M.M.; McCray. Under this

analysis, since the BB pistol has not been deemed by the legislature to be a weapon or a firearm, §§790.001(6) and (13), the trial court must look to the state's actual proof concerning the object. There being no proof adduced in this case concerning the object being loaded or about its operational capabilities, the objective test requires that the pistol in this case not be deemed a weapon. Id.

This very lack of proof distinguishes this case from the other cases, relied upon by the district court, in which whether a pellet pistol was a deadly weapon was determined to be a factual question for the jury. In most of those cases there existed evidence concerning the operability and capabilities of the type of pistol used. See Dale v. State, 669 So.2d 1112 (Fla. 1st DCA 1996), review granted, 678 So.2d 337 (Fla. 1996) (affirmed Gooch in case in which evidence of the BB pistol's operability was presented); Gooch v. State, 652 So.2d 1189 (Fla. 1st DCA), review denied, 659 So.2d 1086 (Fla. 1995) (where evidence showed that air-powered pump BB gun was unloaded but operable, whether instrument was a weapon was a jury question); Lynn v. State, 567 So.2d 1043 (Fla. 5th DCA 1990) (where some evidence of operability at the time of the offense was presented, but the recovered pellet gun's barrel was jammed and had a missing CO2 cartridge, whether a pellet gun used in an armed robbery was a deadly weapon was a jury question); Duba v. State, 446 So.2d 1167 (Fla. 5th DCA 1984) (where trial court precluded defense from arguing to the jury that the gun was inoperable and evidence of the capabilities and inoperability of the instrument



were proved, reversal was required).

Depasquale v. State, 438 So.2d 159 (Fla. 2d DCA 1983), on which the district court also relied, concluded that in that armed robbery case the BB pistol used was "an air or gas operated gun designed to expel lead or other metallic shot." Id. at 160. This conclusion was presumably based on evidence in that record which does not exist in this case. As the district court below noted about Depasquale, that opinion does not specify whether it found BB pistol to be deadly weapons as a matter of law or as a factual matter in that particular case.

The district court, in determining that the pellet pistol is a deadly weapon, relied on the robbery and aggravated assault jury instruction language which states that a weapon is deadly if "threatened" to be used in a way "likely" to produce death or great bodily harm, In ruling that the evidence in this case was sufficient to prove the BB pistol was used as a deadly weapon, the district court placed great weight on the words used by Mr. Mitchell when he pointed the object at the various victims. At various times he threatened to shoot with the weapon and to kill the wife or boyfriend. In so deciding, the district court relied upon Shelby v. State, 541 So.2d 1219 (Fla. 2d DCA 1989), in which the district court held that a claim of a gun in an armed sexual battery case provided sufficient evidence to support the conviction. As the district court below noted, however, Shelby is distinguishable, since the sexual battery statute proscribes "threatening" with a deadly weapon during the sexual battery.

Shelby is also distinguishable because in that case there was no weapon recovered about which concrete evidence could be presented. Id. at 1220. Thus Shelby is like the other cases in which a weapon was verbally described by the accused but never recovered. This is not the circumstance presented here, in which evidence about the BB pistol could have been presented but was not.

The district court also relies upon Butler v. State, 602 So.2d 1303 (Fla. 1st DCA 1992), in which a defendant used an object covered with pants draped over his arm to rob several dry cleaners. The victims believed the object to be a gun, although Butler never claimed it to be such. Again, however, no evidence was presented that a gun or other weapon was found when Mr. Butler was arrested. Id. at 1304. The district court reversed the armed robbery conviction because of insufficient proof that the accused used a deadly weapon in the committing the crime. Butler is consistent with the other cases in which no weapon is recovered and the weapon then must be proved by circumstantial evidence. The case at bar, however, is not such a circumstantial evidence case, since the object was recovered and evidence of its operability and capabilities could have been presented.

Under the circumstances in this case in which a concrete instrument is recovered, the objective test should be applied. Applying the objective test to the proof in this case requires a finding that the BB pistol was not a deadly or dangerous weapon. Accordingly, the charges should be reduced to simple robbery, simple assault and simple trespass. Reversal and resentencing are

required.

CONCLUSION

Petitioner respectfully requests that based on the arguments` and authorities presented herein that the convictions be reversed and this case remanded.

APPENDIX

1. Decision of the Second District Court of Appeal on July 11, 1997.

-NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

DEXTER MITCHELL, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Appellee. )

Case No. 95-02169

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Opinion filed July 11, 1997.

Appeal from the Circuit Court for Pinellas  
County; Brandt C. Downey, Jr., Judge.

James Marion **Moorman**, Public Defender,  
**Bartow**, and Kathleen **Calcutt**, Assistant  
Public Defender, Cleatwater, for Appellant.

**Robert A. Butterworth**, Attorney General  
Tallahassee, and Wendy **Buffington**,  
Assistant Attorney General, Tampa, for  
Appellee.

ALTENBERND, Judge.

Dexter Mitchell appeals numerous convictions and sentences arising from  
an unusual sequence of events that occurred on October 26, 1994. During this

rampage, he carried a BB pistol. He struck his estranged wife on the head with the pistol and threatened to shoot several other people. The state failed to introduce testimony that the BB pistol was operable or loaded at any time during this episode. The gun was empty when introduced into evidence and there is no testimony that a law enforcement officer ever emptied **BBs** from its reservoir. We conclude the evidence was sufficient to prove a prima facie case of aggravated battery with a deadly weapon. With some hesitation, we conclude that the evidence also establishes trespass with a dangerous weapon, robbery with a deadly weapon, and aggravated assault with a deadly weapon. When a defendant's words or actions imply that a device is dangerous or deadly, and the device is normally dangerous or deadly when used in its ordinary and usual manner, but at the time of the offense it is not dangerous or deadly due to a condition that cannot be observed by the victim, we conclude that a jury may find the device to be a dangerous or deadly weapon. Accordingly, we **affirm** the trial court in all respects.

We certify to the Supreme Court of Florida the following question of great public importance:

**IF THE STATE FAILS TO PROVE THAT A **BB**  
PISTOL IS LOADED AND OPERABLE AT THE  
= **TIME** OF AN OFFENSE, CAN IT BE CLASSIFIED  
, AS A DANGEROUS OR DEADLY WEAPON WHEN  
THE DEFENDANTS ACTIONS CAUSE THE VICTIM  
TO REASONABLY BELIEVE THAT THE BB  
PISTOL IS LOADED AND OPERABLE?**

## I. THE EVENTS

On October 26, 1994, while armed with a **BB** pistol that appeared to be a firearm, Mr. Mitchell went to the home of his estranged wife. Another man was at the house. Mr. Mitchell entered the house without permission. He pulled the **BB** pistol from his jacket and threatened to kill both his wife and her friend. He took money from his wife and attempted to take money from the man.

Mr. Mitchell's wife escaped and ran down the street. Mr. Mitchell chased her, BB pistol in hand, threatening to shoot her. She entered a chiropractor's **office** for protection. He followed her into the **office**. Inside the office, he threatened several people with the gun, and struck his wife on the head repeatedly with the butt of the gun. She sustained lacerations that required medical treatment.

Mr. Mitchell then fled to a mobile home park and entered the home of an elderly couple without their permission. He claimed he was a police **officer** and actually allowed them to handle the BB pistol, The evidence does not suggest that he threatened the couple with the gun. Instead, the record reveals that during the course of the trespass, he pointed the gun at himself and announced he was going to kill himself. The couple fled **the** mobile home as the police were arriving. After a short standoff, **Mr.** Mitchell threw his BB pistol from the mobile home and surrendered.

## II. THE CONVICTIONS AND SENTENCES

The state charged Mr. Mitchell with fourteen offenses. At the conclusion of his trial, the jury convicted him of eleven offenses. For the events at the home of his



wife, he was convicted of robbery of his wife with a deadly weapon and attempted robbery of her friend with a deadly weapon. For the events at the chiropractic office, he was convicted of trespass with a dangerous weapon, aggravated battery upon his wife with a deadly weapon, two counts of aggravated assault with a deadly weapon, and four counts of simple assault. For the events at the mobile home, he was convicted of trespass with a dangerous weapon. In total, the jury convicted Mr. Mitchell of four misdemeanors and seven felonies. The trial court imposed concurrent sentences, the longest of which is thirteen years' incarceration. We affirm the four simple assault convictions without discussion. We discuss only the issues relating to the BB pistol.

### III. THE EVIDENCE CONCERNING THE BB PISTOL

The evidence concerning the BB gun is somewhat atypical. The gun was identified for introduction into evidence by Mr. Mitchell's wife. She testified that the pistol appeared to be the weapon used to threaten her and to beat her over the head. A police officer testified that the police collected the gun as evidence at the mobile home park and stored it in an evidence locker. No one testified that the gun was loaded and operable at the scene. No technician **fired** the weapon or testified to its power.

Because this court thought it possible that the gun, when introduced into evidence, might still have had **BBs** in its reservoir, we requested the actual pistol be included in our record. Even on careful examination, it looks like a black, **.22** caliber semi-automatic pistol. It is a Huntington Marksman Repeater BB Pistol, which is

powered by a spring, rather than a CO<sup>2</sup> cartridge' It has a reservoir to hold BBs. Upon physical examination, there is no evidence that it is loaded. It was taped by the police to render it inoperable, but no officer testified about taping the gun. If it was unloaded by the police when they taped it, that fact is not established in the record. We recognize the possibility that Mr. Mitchell may have emptied the BB gun before he threw it out of the mobile home. However, the record contains no evidence of BBs located in the mobile home or on his person. There is no evidence that he ever fired the gun during this extended criminal episode.

Various witnesses testified that they thought the BB gun was a real firearm. Mr. Mitchell carried and used the weapon as if it were loaded. During his own testimony after his motion for judgment of acquittal had been denied, Mr. Mitchell called the BB pistol a "weapon" or "gun." He never testified that the gun was empty or inoperable. He explained that he had been in the military and handled this weapon as he had been trained to use firearms in the military.

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\* 1 The Marksman Repeater BB pistol has been the subject of several reported opinions since 1980. In Virginia, it is a firearm. Holloman v. Commonwealth, 269 S.E.2d 356 (Va. 1980). In Georgia, it is not a firearm. Fields v. State, 453 S.E.2d 794 (Ga. App. 1995). In New Jersey, it is a weapon. State v. Evans, 438 A.2d 340 (N.J. Super. Ct. App. Div. 1981). In Texas, it is a deadly weapon. Francis v. State, 748 S.W.2d 276 (Tex. App. 1988). In a case with many similarities to Mr. Mitchell's case, an Ohio appellate court held that a Marksman Repeater BB gun was not a firearm, but could be a deadly weapon. State v. Mills, 595 N.E.2d 1045 (Ohio Ct. App. 1991). Accurate photographs and alleged specifications for this weapon are available on the Internet. See The Edge Company, Marksman Pistol with Dartboard Set (last updated May 13, 1997) <<http://www.edgco.com/mr-1300.html>>.

#### IV. AGGRAVATED BATTERY WITH A DEADLY WEAPON

Mr. Mitchell was charged with aggravated battery for striking his wife with the pistol and causing two gashes on both sides of her head. Section 784.045(1)(a), Florida Statutes (1993), allows the state to charge aggravated battery either for use of a “deadly weapon” or for intentionally causing a “permanent disability.” The state included both theories in the information and in the jury instructions. The evidence established that Mr. Mitchell used the pistol as a bludgeon and created gashes on his wife’s head. Even if the pistol had been a toy gun, his intentional use of this metal object to attack his wife supported a conviction for aggravated battery. Gomez v. State, 496 So, 2d 982 (Fla. 1986). Accordingly, we **affirm** this conviction.

#### V. THE BB GUN IS NOT A FIREARM

Part of the difficulty in this and similar cases stems **from** the statutory definition of a “firearm.” Section 790.001(6), Florida Statutes (1993), defines a “firearm” as

any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; and destructive device; or any machine gun. The term “firearm” does not include an antique firearm unless the antique firearm is used in the commission of a crime.

This definition excludes **BB** guns because they do not use the “action of an explosive.” On the other hand, the definition includes the frame of a firearm and does not require

that the firearm be loaded or operable during the criminal episode. Bentley v. State, 501 So. 2d 600 (Fla. 1987). See, e.g., State v. Altman, 432 So. 2d 159 (Fla. 3d DCA 1983) (.22 derringer without cylinder is firearm).

Because the definition of "firearm" does not involve proof that the gun is loaded or operable, a defendant's use of a firearm during a crime can be established even if the gun is not recovered and introduced into evidence. Circumstantial evidence can be sufficient to establish the use of a firearm. Bradley v. State, 413 So. 2d 1248 (Fla. 1st DCA 1982); T.T. v. State, 459 So. 2d 471 (Fla. 1st DCA 1984); Meyer v. State, 498 So. 2d 554 (Fla. 4th DCA 1986); Council v. State, 691 So. 2d 1192 (Fla. 4th DCA 1997).

In this case, numerous witnesses testified that Mr. Mitchell committed crimes while carrying what they thought was a firearm. If Mr. Mitchell had discarded his gun between the events at the chiropractor's **office** and his arrest at the mobile home park, such evidence may have been sufficient to support convictions involving firearms. Because the traditional definitions of dangerous and deadly weapons do not expressly include inoperable parts of those weapons, Mr. Mitchell's decision to retain his empty **BB** gun makes this case far more **difficult** for the state to prove.

## VI. ARMED TRESPASS

The state charged Mr. Mitchell with two counts of armed trespass pursuant to section **810.08(2)(c)**, Florida Statutes (1993). A trespasser who is armed with a "firearm or other dangerous weapon" is guilty of a third-degree felony. "Dangerous

weapon” is not defined in chapter 810 or in chapter 790. The standard jury instruction, which was given in this case, defines a “dangerous weapon” as “any weapon that, taking into account the way it is used, is likely to produce death or great bodily harm.”<sup>2</sup> Fla. Std. Jury Instr. (Crim.) 142. The concept of a “dangerous weapon,” as so defined, has existed in Florida’s criminal law for well over a century. See, e.g., § 782.03, Fla. Stat. (1993) (excusable homicide statute, initially enacted in 1868); Wood v. State, 31 Fla. 221, 12 So. 539 (1893).

If the jury must “take into account” the fact that the state failed to prove that the BB gun was loaded or operable when Mr. Mitchell pointed and aimed it in his wife’s home and in the mobile home, then the precise way it was used was not likely to produce death or great bodily harm. Despite his threats and the fear he surely created in the minds of his victims, the empty BB gun was no more deadly than a toy gun or water pistol. Thus, these convictions cannot stand unless the jury was allowed to rely upon the defendant’s actions suggesting that the gun was loaded and upon the victims’ reasonable belief that the BB gun was loaded. We will defer analysis of that issue until the other offenses have been examined.

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<sup>2</sup> The information in this case alleged that the weapon was a “deadly **weapon**”—the term appropriate for robbery or assault, but not for trespass or burglary. This technical error was not raised in the trial court.

## VII. ROBBERY WITH A DEADLY WEAPON

The counts of robbery and attempted robbery in this case arise from Mr. Mitchell's actions at the home of his wife. Simple robbery is the taking of property from a person through the use of force and is a felony of the second degree. § 812.13(1), (2)(c), Fla. Stat. (1993). If the robber carries a "weapon," the offense becomes a first-degree felony. § 812.13(2)(b), Fla. Stat. (1993). If the robber carries a "firearm or other deadly weapon," the offense increases to a first-degree felony punishable by life in prison. § 812.13 (2)(a), Fla. Stat. (1993). The robbery statute does not define these various types of weapons.

It is common to rely upon chapter 790 for definitions of various weapons and firearms. Unfortunately, the definition of "weapon" in section 790.001(13) states:

"Weapon" means 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**.)<sup>3</sup> Because the definition of "weapon" in chapter 790 includes an enumerated list of devices and "other deadly weapons," it cannot help us distinguish between a "weapon" and a "deadly **weapon**."<sup>4</sup>

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<sup>3</sup> This list of weapons has evolved from its first appearance at the turn of the century in the Laws of Florida as a list of prohibited concealed weapons. The original catch-all phrase was "other weapon." Ch. 4929, Laws of Fla. (1901). When the legislature revised chapter 790 in 1969, it added the requirement that the "other weapon" be a "deadly" weapon. Ch. 69-306, § 1 at 1104, Laws of Fla.

<sup>4</sup> Arguably, because a BB gun is not an enumerated weapon in section 790.001(13), it can only be a "weapon" if it is also a "deadly weapon."

The standard jury instruction, which was given in this case, defines a “deadly weapon” as a 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.) 156.<sup>5</sup> The definition of “deadly weapon” differs from the definition of “dangerous weapon” in that a weapon may be deadly based on the threat of its use in a way likely to cause great bodily harm. In this case, if the threat employed in the robbery is viewed from Mr. Mitchell’s perspective, there is no proof that he thought his empty BB gun was likely to produce great bodily harm. Viewed from the victims’ perspective, it was reasonable and prudent for them to assume that the gun could produce great bodily harm.

Because this definition of “deadly weapon” contains the concept of a “threat,” it could be classified as a broader category of weapons than “dangerous weapons.” Early case law, however, suggests that the term “dangerous weapon” is “milder” than “deadly weapon,” but “otherwise of the same meaning.” Clemons v. State, 48 Fla. 9, 37 So. 647 (1904).<sup>6</sup> We see no basis to require a different analysis in determining whether the BB pistol in this case was a “dangerous” or “deadly” weapon.

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<sup>5</sup> “Deadly weapon,” like “dangerous weapon” is a longstanding term in Florida law. See Davis v. State, 25 Fla. 272, 5 So. 803 (1889); Pittman v. State, 25 Fla. 648, 6 So. 437 (1889).

<sup>6</sup> The theory that “deadly weapons” are a subset of a larger group of “dangerous weapons” is also supported by other earlier cases. See People v. Seawright, 237 P. 796 (Cal. App. 1925); Jeffery F. Ghent, Annotation, Pact That Gun Was Unloaded as Affecting Criminal Responsibility, 68 A.L.R. 4th 507, 517 (1989). A general reading of more recent cases containing both terms **causes this** court to believe that the terms are now used interchangeably in most jurisdictions.

## VIII. ASSAULT WITH A DEADLY WEAPON

The assaults in this case arise from Mr. Mitchell's conduct at the **chiro-practic** office. Assault becomes aggravated assault if the threat of violence is performed 'with a deadly weapon without intent to kill.' § 764.021 (l)(a), Fla. Stat. (1993). Thus, the type of weapon required is identical to the weapon required for robbery with a deadly weapon. Mr. Mitchell actually **used** the BE3 gun as a bludgeon on his wife in that office, but he never threatened to hit the assault victims; he threatened to shoot them. Again, if we assess the likelihood of harm from his perspective, there is no evidence to support a conviction for aggravated assault. From the victims' perspective, however, there is ample evidence. It is perhaps noteworthy that his use of an empty BB gun substantially increased the risk that someone in the **office** would use a real firearm or other weapon in self-defense and cause great bodily harm to an innocent bystander

## IX. **BB** GUNS AS WEAPONS

Case law considering the status of BB guns tends to make the deadliness or dangerousness of a BB gun a factual question for the jury. In Depasquale v. State, 438 So. 2d 159 (Fla. 2d DCA 1983), this court held that a BB gun was a deadly weapon when used in a robbery. We relied on a common definition of deadly weapon: "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." *Id.* at 160 (quoting 56 Am. Jur. Weapons and Firearm § 2 at 991 (19)). The opinion does not disclose whether the **BB** gun in that case was loaded or operable, but a BB gun is typically



loaded when used in "the ordinary manner." It is not entirely clear whether Depasquale held that all BB guns are deadly as a matter of law or whether deadliness was a factual question. See also Emshwiler v. State, 443 So. 2d 488 (Fla. 2d DCA 1984).

In Duba v. State, 446 So. 2d 1167 (Fla. 5th DCA 1984), the Fifth District expressly held that whether an air pistol was a deadly weapon for purposes of aggravated assault was an issue for the jury. In that case the trial court had prohibited defense counsel from arguing that an inoperable pellet gun was not a deadly weapon. The Fifth District held this jury question was dependent on all factors, including whether, at the time of the offense, the gun was capable of expelling a projectile. See also State v. Jeffers, 490 So. 2d 968 (Fla. 5th DCA 1986) (applying Duba rationale in aggravated battery case).

In Lynn v. State, 567 So. 2d 1043 (Fla. 5th DCA 1990), the defendant committed a robbery while armed with a handgun. The defendant threatened to "blow" the cashier's "brains out." The police recovered a pellet gun ~~from the~~ defendant's car after it crashed during a chase. The gun was inoperable because pellets were jammed in the barrel and a CO<sup>2</sup> cartridge was missing. The court held that the deadliness of the weapon was a jury question, but noted that the evidence supported the possibility that the gun was operable at the time of the offense.

In Gooch v. State, 652 So. 2d 1189 (Fla. 1st DCA), review denied, 659 So. 2d 1086 (Fla. 1995), the First District considered a jury instruction issue in an armed robbery case where the defendant was apprehended shortly after a robbery, and an unloaded air-powered pump BB gun was found in his car. The court recognized that

the deadliness of the weapon was a factual question to be decided by the jury. Most recently, in Dale v. State, 669 So. 2d 1112 (Fla. 1 st DCA 1996), the First District reaffirmed Gooch and certified a question to the supreme court, which has granted review. Dale v. State, 678 So. 2d 337 (Fla. 1996). In Dale, there was evidence that the BB gun was operational.

The case law on this issue is similar to the case law holding that whether a pocketknife is a weapon is a factual question for the jury. In State v. Ortiz, 504 So. 2d 39 (Fla. 2d DCA 1987), where there was no factual dispute about the characteristics of the knife, this court held that a jury could decide whether a four-inch pocketknife was or was not a concealed weapon. Until this court held that the “common pocketknife” exception in section 790.001(13) was unconstitutionally vague, L.B. v. State, 681 So. 2d 1179 (Fla. 2d DCA 1996), the Ortiz rule of law allowed for differing jury outcomes in cases involving identical knives. in identical pockets or purses. Similarly, if the issue whether an unloaded BB gun is a “deadly weapon” is a factual question, then different juries could arrive at disparate verdicts-under identical or similar facts. An additional concern is, given that society has a choice, the law might prefer a person determined to commit a robbery do so with an empty BB gun rather than with a loaded gun.

#### X. OTHER DEADLY WEAPONS CASES

Whether an unloaded BB gun is a dangerous or deadly weapon is an issue that should not be decided without considering cases that address other weapons. The case law reflects competing, if not conflicting, approaches for replica

weapons, toy guns, and items that were used by defendants as if they were deadly weapons.

In Bates v. State, 561 So. 2d 1341 (Fla. 2d DCA 1990), the defendant used a “nut driver” in a robbery. He concealed most of this device so that it looked like a .22 caliber pistol and told the victim that he had a gun. This court held that, as a matter of law, no deadly weapon was used in the robbery because the defendant never threatened to use the nut driver as a bludgeon and he could not use it as a gun. See also Schram v. State, 614 So. 2d 646 (Fla. 2d DCA 1993) (bulge in pocket that may have been knife insufficient to establish deadly weapon).

Likewise, 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 a starter pistol could not be a deadly weapon, as used in a robbery, because the state failed to “prove that the starter pistol had a capability to injure.” The pistol was used like a gun but “would or could [not] cause death or inflict serious bodily harm.” Id. at 875.

These cases are consistent with I.Q. v. State, 412 So. 2d 42 (Fla. 3d DCA 1982), which held that a toy shotgun was not a deadly weapon, even though the victim of an aggravated assault had extensive weapons training and believed the toy gun was real. That case announced an objective test, which examined the nature and actual use of an instrument, to determine whether it was a deadly weapon.

I.Q. was distinguished in I.I. In I.I., the robber held an object that appeared to be a gun and verbally threatened to shoot his victims. Apparently, no gun

was recovered, **and** the defendant argued that he was being convicted solely on the victims' subjective fears that he used a firearm. The First District held that the defendant's threats during his flight were **sufficient** evidence to prove that he used a firearm in the robbery. 459 So. 2d at 472. Under the I.I. standard, if Mr. Mitchell had successfully discarded his BB pistol prior to his arrest, the evidence in this case, including his verbal threats, not only would have supported a determination that he used a "deadly weapon" but also would have supported a conviction for using a "firearm."

In Shelby v. State, 541 So. 2d 1219 (Fla. 2d DCA 1989), this court reviewed a sexual battery case in which the defendant "threatened to use a deadly weapon." The defendant claimed to have a gun, but never displayed any weapon. This court held that the defendant's claim was sufficient to support the conviction. Judge Campbell's opinion cogently observes: "We do not believe that the legislature intended to require a sexual battery victim, who is verbally threatened with a gun or other deadly weapon, to demand satisfactory proof from the perpetrator of the actual existence of the weapon." Id. at 1221. See also Gibbs v. State, 623 So. 2d 551 (Fla. 4th DCA 1993). These cases, however, may be distinguishable from this **case because** section 794.011(3), Florida Statutes (1995), proscribes "threatening" with a deadly **weapon while** committing a sexual battery.

In at least two other cases, circumstantial evidence has **been** used to prove that a weapon or deadly weapon was used during an offense. See, e.g., Fletcher v. State, 472 So. 2d 537 (Fla. 5th DCA 1985) (cold, hard object held to throat could be

razor blade, as robber claimed); Smith v. State, 645 So. 2d 124 (Fla. 1 st DCA 1994) (some sharp object against neck is deadly weapon).

Judge Webster has made a valiant effort to reconcile many of these cases in Butler v. State, 602 So. 2d 1303 (Fla. 1 st DCA 1992). Butler involved a robbery in which the defendant used a concealed object. The victims believed the object was a gun, even though the defendant never expressly stated that it was. The opinion contains a good discussion on the insufficiency of a victim's subjective belief that a weapon was used during a crime to support a weapon's charge. The First District concluded the evidence in Butler was insufficient to prove the use of a deadly weapon. Butler distinguishes T.T. and other cases on the basis that those cases involved additional testimony that the defendant verbally threatened to shoot the victim.

## XI. CONCLUSION

We are not convinced that the preceding cases can be fully reconciled. Likewise, we suspect that these issues could be better addressed if the legislature revised the statutes to contain an adequate, modern list of weapons, while **distinguish-**ing "weapons" from "deadly weapons" and retaining "dangerous weapon" only if the legislature **intends** that term to have a meaning significantly different from "deadly weapon."

There is clear proof that Mr. Mitchell used a **BB** pistol during all of these offenses. With both words and actions, he implied that the gun was loaded and operable. Nothing visible to any victim in this case would lead any rational person to conclude that the BB gun was not a loaded and operable, deadly or dangerous

weapon. In light of the reasoning in Depasquale, and influenced by the treatment of verbal threats in both Shelby and Butler, we conclude that this evidence is sufficient to support these convictions. We cannot deny that our reasoning assesses the likelihood of injury from a reasonable victim's perspective and not from the perspective of the defendant, who knows his weapon is unloaded or inoperable. We simply conclude that, under these circumstances, this limited reliance upon a victim's perspective is a correct application of the law.

Affirmed.

PATTERSON, A.C.J., and **LAZZARA**, J., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Wendy Buffington,  
Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on  
this 27 day of August, 1997.

Respectfully submitted,



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