

No. COA07-838

FOURTH
DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA

)
)

v.

) From

Onslow County

) 06 CRS 52279

CHAUNCEY MARSHALL,
Defendant

) 06 CRS 52283

DEFENDANT-APPELLANT'S BRIEF

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No. COA07-838

FOURTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)
)

V.) From

) Onslow County
) 06 CRS 52279
CHAUNCEY MARSHALL,) 06 CRS 52283
Defendant

DEFENDANT-APPELLANT'S BRIEF

QUESTIONS PRESENTED:

- I. Was it error to not dismiss the indictment in **06 CRS 52283** for failure to properly charge the offense of robbery with a dangerous weapon in violation of N.C.G.S. § 14-87 in that the indictment fails to allege that the "implement" was dangerous and "keeping his hand in his coat" doesn't constitute a dangerous weapon or endangering or threatening the life of the victim?
- II. Did the Trial Court commit reversible error in not granting the Defendant's Motions to Dismiss made at the close of the State's evidence and at the close of all the evidence in **06 CRS 52279** because
 - A. The State failed to prove the element that the defendant had possession, use or threatened use of a firearm or other dangerous weapon, implement or means; and
 - B. The State failed to prove the element that defendant obtained the property of Circle K Stores by endangering or threatening the life of Toni Cinotti?

- III. Did the Trial Court commit reversible error in not granting the Defendant's Motions to Dismiss made at the close of the State's evidence and at the close of all the evidence in 06 CRS 52283 because**
- A. The State failed to prove the element that the defendant had possession, use or threatened use of a firearm or other dangerous weapon, implement or means; and**
 - B. The State failed to prove the element that defendant obtained the property of The Pantry, d/b/a Kangaroo Express by endangering or threatening the life of Nancy L. Henneke?**

STATEMENT OF THE CASE

The Defendant was charged by an indictment for robbery with a dangerous weapon of the Kangaroo Express in case number 06 CRS 52283, and by an indictment for robbery with a dangerous weapon of the Circle K store in case number 06 CRS 52279. The date of each offense was March 11, 2006. The case came on for trial at the December 11, 2006 criminal term of Onslow County Superior Court before the Honorable Charles H. Henry, Superior Court Judge. The Defendant pled not guilty to each offense.

On December 13, 2006, the jury convicted the Defendant of each offense. By judgment dated December 13, 2006, the Court consolidated the two counts and sentenced the Defendant to a minimum term of 117 months and a maximum term of 150 months in the North Carolina Department of Correction.

In a related case, 06-CRS-52479, the Defendant pled no contest to

possession of cocaine, a Class I felony, date of offense being March 11, 2006, and by judgment dated December 13, 2006, was sentenced to be imprisoned for a minimum term of 8 months, a maximum term of 10 months in the North Carolina Department of Correction to run concurrently with the robbery with dangerous weapons convictions. The defendant duly appealed assigning error.

By Order of July 11, 2007, the Honorable Kenneth F. Crow, Superior Court Judge, ordered the Onslow County Clerk of Superior Court to transmit the trial exhibits to the North Carolina Court of Appeals pursuant to Rule 9(d)(2) of the North Carolina Rules of Appellate Procedure.

The record on appeal was filed with the North Carolina Court of Appeals on July 11, and docketed on July 18, 2007. An extension order was allowed giving the defendant up to and including September 24, 2007 within which to file this brief.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

The Defendant-Appellant, Chauncey Marshall, respectfully appeals the judgments entered in this case based upon alleged errors committed at the trial of this matter. This appeal is pursuant to N.C.G.S. 15A-1444(a) in that he is a defendant who entered a plea of not guilty to the criminal charges and was found guilty, and is appealing as a matter of right from the final judgment entered.

STATEMENT OF THE FACTS

At about 7:30 a.m. on Saturday, March 11, 2006, Nancy Hineke,

Assistant Manager of Kangaroo Express on 1070 Piney Green Road, observed the defendant enter the store. (Tpp. 28-33). Ms. Hineke said “good morning” to him, but he did not respond. (Tp. 34). Ms. Hineke testified that the defendant came back behind the counter to within 3 or 4 inches of her and demanded the money out of the register and the safe. (Tp 36). Ms. Hineke said “excuse me”. He said “I want the money out of the register”. (Tpp. 34, 36, 37). Ms. Hineke gave him the money out of the register. He had his hand inside of his jacket. Ms. Hineke testified “I believe that he may have had a weapon.” She was scared. Ms. Hineke thought he had a weapon, because of the way that he carried himself and the way his hand and arm was jammed in his in his jacket. (Tpp. 34, 35, 46). He asked for the money from the safe, but she was not able to open it at that time. (Tp. 37). After she gave him the money from the register, he went out the door. Ms. Hineke locked the doors, called dispatch and reported the robbery and dialed 911. The amount of money she gave the defendant was \$63.00. (Tp. 38). Ms. Hineke testified that the defendant was wearing big baggy blue jeans, an oversized white tee shirt, and a black jacket that looked like it was a liner from another jacket that had snaps on it. (Tp. 35). In less than 5 minutes the deputies arrived and Ms. Hineke told them what had happened. (Tpp. 38, 39). The deputies went into the office and viewed the surveillance tape. (Tp. 39). State’s Exhibit 1-7 are pictures of the defendant when he was inside the store. (Tpp. 42-44).

Ms. Hineke testified that State's Exhibit # 3 shows the defendant coming in behind the counter with his right hand inside his jacket. (Tpp. 44-46). "It was shoved inside of his jacket like he may have had a weapon" (Tp. 46). Ms. Hineke testified that State's Exhibit #'s 6 and 7 show that when she and the defendant were facing each other inches apart behind the counter, his right hand was empty. State's Exhibits #'s 6 & 7 show that the defendant's right hand was empty. When Ms. Hineke gave money from the register to the defendant, he took it from her with his right hand. (Tpp. 52-54). The encounter with the robber from time he came around to the register until the time she handed him the money was two minutes. (Tp. 54). Ms. Hineke picked out number 4 from the photo line-up as the person who robbed her. (Tp. 50, 51, State's Exhibit 8).

Onslow County Crime Scene Investigator Bill Meredith testified that State's Exhibit # 9 was a VHS video tape from the Kangaroo Express. (Tpp. 55-56, 70-71).¹ State's Exhibits #s 1 through 7 are still photos produced from the VHS video tape. (Tpp. 71 and 80).

Richard Sutherland, Jr., an Onslow County Deputy Sheriff testified that he reviewed video footage which showed that a black male entered store and exited 2½ minutes later. (Tpp. 74, 77), and that the defendant's right arm was located inside of his coat, held at approximately 90 degree angle to his body and his hand pointed forward in the coat. (Tp. 78).

At 8:19 a.m. on Saturday, March 11, 2006, Tony Cinotti, manager of Circle K on Pine Valley Road, saw the defendant come in the door and in a

¹The video of the Kangaroo Express robbery in 06 CRS 52289 was forwarded to the Court of Appeals by the Onslow County Clerk of Court.

couple of seconds he was coming behind the counter. (Tpp. 86-87, 110).

He was wearing a black puffy jacket. (Tp. 88).

As soon as Ms. Cinotti saw him coming behind the counter, she started screaming "I'm being robbed, I'm being robbed." (Tp. 88). He had his hand in his coat. She "knew there was a gun . . .". He said "give it up, give it all up. I want all of it". She was still screaming. She said she was terrified. He grabbed for her cell phone with his left hand, and she jerked it back and threw it. He shoved her with his body, with his arms. (Tpp. 88, 89, 94-96). He yelled "open the drawer, open the drawer." She said "I'm trying." She got it open. He said "I want it all. I even want what is under the drawer." (Tpp. 91, 94, 113, 114). She said "that is all. There's nothing under the drawer." (Tpp. 91, 114). She opened the register and gave him the money and he took it and stuffed it in his jacket and left. His right hand stayed in his jacket the whole time. (Tp. 114).

Ms. Cinotti testified that when he grabbed for the cell phone, she glimpsed "a texture, I guess a handle. It was black. It all happened so quickly, but I was convinced it was a gun." (Tpp. 95, 96). However, she didn't see a barrel or trigger or hammer. There was something textured inside of his coat and he had his hand on it. (Tpp. 95, 96, 117). He never took his hand out of the jacket, but she saw what was like a grip, it was like a black handle. She has not seen many guns, but she has seen them with like texture. He was very intimidating, very scary. She felt that if she didn't do what he said that he would hurt her. It was a matter of seconds. (Tp. 88, 89).

As the defendant was going out the door, a customer, Mr. Smith, was coming in the door. Ms. Cinotti started screaming to Mr. Smith "he just robbed me, he just robbed me", and at that time she also picked up the phone and dialed 911. Smith saw defendant's car and got partial tag number. (Tpp. 91, 97, 98, 120-122). In his testimony, Mr. Smith gave no indication that he saw defendant in possession of a handgun or firearm. (Tpp. 120-124). Ms. Cinotti gave this information to the dispatcher. (Tpp. 91, 98). The car was a small burgundy car. The car was a late model maroon Japanese or Korean import. The police arrived within a minute and a half or two minutes. (Tp. 123). The registered owner of the car was Nichole Bliss. (Tpp. 128, 139).

Circle K had a surveillance system with eight cameras, motion activated. (Tp. 99). State's Exhibit # 16 shows when the defendant was behind the counter demanding money. (Tp. 103-104, 110). State's Exhibit 17 shows when he first came behind counter and his right hand is inside the jacket (Tpp. 103-105). This is when the defendant was telling her "give it up, give it all up" (Tp. 111).

In her statement to Officer Campbell, Ms. Cinotti said " He had his right hand in his coat as if he had a weapon." Officer Campbell's report and Ms. Cinotti's statement never mentioned a black butt of a gun. (Tpp. 116, 117). Ms. Cinotti testified that the robbery lasted a minute. (Tp. 119).

Anthony Campbell, Lieutenant Jacksonville Police Department, heard the dispatch about armed robbery at 8:20 a.m., March 11, 2006, and proceeded to Circle K on Pine Valley Road. (Tpp. 132-137). He spoke with Mr. Smith about the incident. Mr. Smith told him that he had obtained the tag number TZN and described the vehicle as a wine or burgundy, Japanese-type vehicle. He described the suspect as a black male, approximately 5'7" tall, 200 lbs., very large. (Tp. 136, 137).

Ms. Cinotti is Lt. Campbell's aunt. (Tp. 135). Lt. Campbell testified that Ms. Cinotti did not mention anything about seeing a black textured item. "She told me that when the suspect entered the store that he kept his right hand inside of his jacket and that she believed that he was carrying a gun." Lt. Campbell did not recall anything about a black textured handgun. (Tpp. 140, 141).

Lt. Campbell reviewed the store surveillance system and described his observations: “You could . . . see the suspect enter the store. He walked to the left side of the counter and walked around to the back of the counter because the cutout is exactly on the right side of the counter. He walked directly behind the counter and just pushed her right towards the back of the front counter and still keeping his right hand in his jacket.” He pushed Ms. Cinotti with his shoulder and body. He grabbed the money from the register and quickly walked out the door. (Tpp. 141-143).

Lt. Campbell talked with Ms. Bliss and asked her who was driving her vehicle. She told him Chauncey Marshall was the person that was driving her vehicle. She said that she had allowed Mr. Marshall to use her vehicle and he didn’t return the vehicle as promised. (Tp. 145). Lt. Campbell showed Ms Bliss photographs printed from the store surveillance system of Mr. Marshall behind the counter. She identified the person in the photograph as Mr. Marshall. (Tp. 146-148, State’s Exhibit 19).

Nichole Bliss testified that she owned a 2005 Suzuki Firenza, maroon or wine color, with a license tag number TZM4600. (Tp. 154). On Friday night, March 10, 2006, Ms. Bliss let the defendant borrow her car. He said he was going to clubs. When she woke up Saturday morning her car was not back. She found out something was wrong when she was contacted by her supervisor who said that the police were looking for her pertaining to her vehicle. Tony Campbell told her that her car was questionable in a robbery. He asked her who drove her vehicle and showed her a photograph.

The photograph was the defendant Chauncey Marshall. Ms. Bliss made an in-court identification of the defendant Chauncey Marshall. (Tpp. 155-157). State's Exhibit #'s 16 , 17 and 19 are photographs of Chauncey Marshall. (Tpp. 157, 158). Lieutenant Campbell played a video tape of the robbery in progress, a computer generated video. The person doing the robbery was Chauncey Marshall (Tpp. 158, 159).

Capt. Donnie Worrell, Supervisor of the Investigation Division of the Onslow County Sheriff's Department, testified that at 8:00 p.m., March 11, 2006, he went to work his security job at the Triangle Motel. Detective Fransden had told him that they had a positive ID made on the robbery suspect. Before Capt. Worrell went to the Triangle Motel, he got a photo of the robbery suspect. (Tpp 160, 162, 164). State's Exhibit # 20 is a photograph of the defendant. (Tp. 165, 166). While he was at the Triangle Motor Inn, he saw the defendant in the parking lot. Capt. Worrell observed two black males walk out the side door of the Orleans house. (Tpp. 166, 167). Capt. Worrell identified and arrested the defendant. A short time later Detective Condry transported Marshall to the Jacksonville Police Department. (Tpp. 167, 168). The defendant was wearing a black colored jacket. The inside of the jacket was almost like an international orange or hunter orange. (Tp. 169). After being advised of his rights, the defendant made a written statement. (Tpp. 176-178).

On March 11, 2006 at approximately 8:40 a.m. W.L. Condry, Detective with the Jacksonville Police Department, was advised that a

robbery had occurred at the Circle K on Pine Valley Road. (Tpp. 182-184). Detective Condry responded to that location, arriving at approximately 9:15 a.m. and made contact with Lt. Campbell who briefed him on what had occurred. They moved to the interior of the business where he made contact with the Manager, Ms. Toni Cinotti, who also briefed him on what had occurred. Ms. Cinotti escorted Detective Condry to the office and they viewed the video. (Tpp. 184, 185).

Detective Condry viewed the video and verified that it did capture the robbery itself. The Circle K video surveillance system is multi-camera, with a total of 8 cameras on premises. (Tp. 187).

Detective Condry described the videos, State's Exhibit # 33, as they were played in court. (Tpp. 196-213). Exhibit # 33 is the CD with the videos, four different camera angles. (Tp. 196)². One video shows the front door from the cash register area; one looks from the front door to the cash register area; and, two are different angles looking at the cash registers from the back of the cash registers. (Tp. 197). The play time on the videos does not correspond to real time. (198).

The video of the front doors to the business show the defendant entering and exiting. (Exhibit 33, video "all.Front Door.avi", 00.54-01:15). The Defendant enters at 54 seconds run time. The defendant is out of view for approximately 20 seconds run time before he exits as Mr. Smith approaches the door. (Tpp. 200-201, Exhibit 33, video "all-Front Door.avi",

²The video of the Circle K robbery in 06 CRS 52279 was forwarded to the Court of Appeals by the Onslow County Clerk of Court.

00.54-01:15). Review of the video shows that as the defendant entered the store, he used his empty right hand to open the door and as he exited the store, he used his empty right hand to push open the door. (Exhibit 33, video "all-Front Door.avi", 00.54-01:15).

In the view of register number one from behind the counter, the suspect comes into view at 3 minutes and 33 seconds. He enters from the left, passing in front of the camera, disappears from view for a second, and emerges from bottom right-hand side and the robbery occurs. Detective Condry testified: "As you are watching, if you will observe the counter area to her left now, that's where you'll be able to see this orange lining as he puts his right hand under his jacket, you'll see the orange lining there." (Tpp. 202-204, Exhibit 33, video "all-Pos Register # 1.avi", 03.33-04:08). Detective Condry continued describing the video. As he comes directly behind the counter, you can see his left hand with the pointer finger sticking out. The right arm is concealed underneath the jacket. He never takes that right arm from underneath his jacket. He uses his left arm for all the encounters with the victim. His right arm is concealed, but held tight to his body. (Tpp. 204-206, Exhibit 33, video "all-Pos Register # 1.avi", 03.33-04:08).

The register number two position shows the counter area from a different angle. (Tp. 206-207, Exhibit 33, video "all-Pos Register # 2.avi", 00.38-01:10). The defendant comes in from the left to right at 38 seconds, disappears for just a moment and re-enters behind the counter. As the

suspect comes in, you can see the bottom of the coat as he puts his hands in his coat. "As he's putting his right hand under his jacket you can see the orange right there at the bottom left hand corner of the jacket and it will fly up." The left hand is exposed from the jacket itself. His right hand is held tight against the body so you can't see it. You can again see the bulge in the jacket here.

(Tpp. 207-209, Exhibit 33, video "all-Pos Register # 2.avi", 00.38-01:10).

The fourth video is the area of the sale. The defendant is seen at 3 minutes, 38 seconds. (Tpp. 209-210, Exhibit 33, video "all-Rear of Sale.avi", 03.38-04:12).

The four videos comprising State's Exhibit # 33 do not show that the defendant had a handgun or a firearm. (Exhibit 33). In fact, Exhibit #33 shows that the defendant used his empty right hand in opening the door both on entry and exit. (Exhibit 33, video "all.Front Door.avi", 00.54-01:15).

Detective Condry described the defendant's coat as a nylon type jacket, fluffy, thick type jacket, dark in color with extremely orange lining. (Tpp. 201, 202).

With a positive identification from Ms. Bliss, Detective Condry obtained an arrest warrant for the arrest of Chauncey Marshall. Around 10:00 p.m., he went to the Triangle Motor Inn. (Tpp. 217, 218). There were several law enforcement officers on the scene with two black male suspects in custody with a vehicle that matched the suspect vehicle description. Captain Worrell and Sheriff Brown advised him of what had occurred. The defendant was one of the suspects at the scene. (Tp. 218, 219).

Detective Condry transported the defendant to the Jacksonville Police Department to the booking room. After being advised of his rights (Tpp. 225-227), the defendant gave Detective Condry a statement. In his statement, the defendant admitted committing the robberies. (Tpp. 229-231). The defendant stated that he did not actually have a weapon during the robberies and that he only pretended to be armed. (Tp. 231, 236).

Further facts will be developed during the argument portion of this brief.

ARGUMENT

- I. THE INDICTMENT IN 06 CRS 52283 FAILS TO PROPERLY CHARGE THE OFFENSE OF ROBBERY WITH A DANGEROUS WEAPON IN VIOLATION OF N.C.G.S. § 14-87 IN THAT THE INDICTMENT FAILS TO ALLEGE THAT THE "IMPLEMENT" WAS DANGEROUS AND "KEEPING HIS HAND IN HIS COAT" DOESN'T CONSTITUTE A DANGEROUS WEAPON OR ENDANGERING OR THREATENING THE LIFE OF THE VICTIM, AND IT WAS ERROR TO NOT DISMISS THIS INDICTMENT.

Assignment of Error No. 1 (Rp. 9, 41; Tpp. 254, 255).

The standard of review for insufficiency of an indictment is *de novo*. State v. Sturdivant, 304 N.C. 293, 283 S.E. 2d 719 (1981).

The trial court lacks subject matter jurisdiction over an indictment insufficient on its face. N.C.G.S. § 15A-1446(d); State v. Wallace, 351 N.C. 481, 528 S.E. 2d 326, *cert. denied*, 531 U.S. 1018, 148 L.Ed.2d 498 (2000). A challenge to an indictment's sufficiency can be made at any time, even if not raised during trial. *Id.*

The indictment in 06 CRS 52283 charges the defendant as follows:

INDICTMENT III - ROBBERY WITH A DANGEROUS WEAPON 06
CRS 52283

The jurors for the State upon their oath present that on or about the date of offense shown and in Onslow County the defendant unlawfully, willfully and feloniously did steal, take, and carry way and attempt to steal, take and carry away another's personal property, U.S. money of the value of \$78.00 from the person and presence of Nancy L. Henneke, said property belonging to The Pantry, Inc. D/B/A The Kangaroo Express #896 located at 1079 Piney Green Road, Jacksonville, North Carolina. The defendant committed this act by means of an assault consisting of having in possession and threatening the use of an implement, to wit, keeping his hand in his coat demanding money, whereby the life of Nancy L. Henneke was endangered and threatened.

N.C.G.S. § 14-87. Section 14-87(a) provides:

(a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

The elements of the crime of robbery with a dangerous weapon are: (1) the unlawful taking or attempted taking of personal property from another, (2) the possession, use or threatened use of "firearms or other dangerous weapon, implement or means", and (3) danger or threat to the life of the victim. N.C.G.S. § 14-87(a); State v. Joyner, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978).

Although the language “robbery with a dangerous weapon” appears in the caption of the indictment in 06 CRS 52283, there is no allegation in the text of the indictment alleging robbery with a “dangerous weapon, implement or means”. Therefore, the indictment fails to allege the element of “possession, or with the use or threatened use of any firearms or other dangerous weapon, implement or means” as required by N.C.G.S. § 14-87(a). As a result, the indictment is insufficient on its face.

The indictment’s allegation of an implement of “keeping his hand in his coat” doesn’t constitute a dangerous weapon and is, therefore, insufficient to allege robbery with a dangerous weapon. A defendant's hands cannot be dangerous weapons under N.C. Gen. Stat. § 14-87(a). State v. Hinton, 361 N.C. 207, 211, 639 S.E. 2d 437, 440 (2007). In Hinton, Raleigh Police Officer Newton was in an altercation with defendant Hinton while questioning Hinton about a domestic dispute. Defendant Hinton and Officer Newton had a physical altercation which ended with Officer Newton unconscious and Hinton taking Officer Newton's handgun from its holster. Hinton struck a supine Officer Newton with his fists four times. Hinton testified that Officer Newton grabbed him by the bicep, placed a hand on his throat, pinned him against the wall, began to choke him, rammed his head against the wall, and that he saw Officer Newton reaching for his handgun. Hinton also testified he feared Officer Newton would shoot him unless he took the handgun from Officer Newton. After taking the handgun, Hinton held it up in the air and began to move to the

front of the building. As other police officers arrived, Hinton placed the gun on the ground, got on his knees, and put his hands on his head. Hinton's assault resulted in substantial injuries to Officer Newton, including a concussion, a torn right iris which has resulted in permanent damage, a fractured right eye socket, a shattered nose, and the loss of his senses of taste and smell. State v. Hinton, 361 N.C. at 208-209, 639 S.E. 2d at 438-439. Concluding that "a defendant must use an external weapon to be convicted under N.C.G.S. § 14-87", the Court held that "a defendant's hands, in and of themselves, cannot be dangerous weapons for purposes of robbery with a dangerous weapon under N.C.G.S. § 14-87." State v. Hinton, 361 N.C. at 212, 639 S.E. 2d at 441; see also State v. Duff, 171 N.C.App. 662, 615 S.E.2d 373, rev. den. 359 N.C. 854, 619 S.E.2d 853 (2005) (An individual's bare hands, fists, and feet are not considered "dangerous weapons" for the purposes of Statute criminalizing robbery with firearms or other dangerous weapons). Nor does the allegation of "keeping his hand in his coat" sufficiently allege a danger of threat to the life of the victim. Therefore, the indictment in the present case fails to allege two essential elements of robbery with a dangerous weapon.

As the trial court lacked subject matter jurisdiction over the indictment charging robbery with a dangerous weapon in 06 CRS 52283, the judgment and conviction for robbery with a dangerous weapon must be vacated. State v. Scott, 150 N.C. App. 442, 564 S.E. 2d 285 (2002), rev. den 356 N.C. 443, 573 S.E.2d 508 (2002).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT GRANTING THE DEFENDANT'S MOTIONS TO DISMISS MADE AT THE CLOSE OF THE STATE'S EVIDENCE AND AT THE CLOSE OF ALL THE EVIDENCE IN 06 CRS 52279 BECAUSE

Assignment of Error No. 2 (Rp. 41; Tpp 254, 255, 288, 295).

The standard of review for a motion to dismiss in a criminal trial is "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." State v. Powell, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). In reviewing challenges to the sufficiency of the evidence, the appellate court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. State v. Barnes, 334 N.C. 67, 430 S.E.2d 914 (1993).

A. THE STATE FAILED TO PROVE THE ELEMENT THAT THE DEFENDANT HAD POSSESSION, USE OR THREATENED USE OF A FIREARM OR OTHER DANGEROUS WEAPON, IMPLEMENT OR MEANS.

The indictment in 06 CRS 52279 charges the defendant as follows:

INDICTMENT I - ROBBERY WITH A DANGEROUS WEAPON 06
CRS 52279

The jurors for the State upon their oath present that on or about the date of offense shown and in Onslow County the defendant willfully and feloniously did steal, take, and carry away and attempt to steal, take and carry away another's personal property, U.S. money of the value of \$100.00, from the person and presence of Toni Cinotti, said property belonging to Circle K Stores, Inc., D/B/A Circle K Store located at 199 Pine Valley Road, Jacksonville, North Carolina. The defendant committed this act by means of an assault consisting of having in possession and threatening the use of a dangerous weapon, to wit, a handgun, whereby the life of Toni Cinotti was endangered and threatened.

In the Circle K robbery, the State's evidence showed that as the defendant entered and exited the store, he used his empty right hand to open the door. Once in the store, he placed his right hand in his coat. (Tpp. 196-213, State's Exhibit 33). The store clerk, Ms. Cinotti, thought that he had a gun. She thought she saw a grip or black handle. (Tp. 88, 89). However, she didn't see a barrel or trigger or hammer. (Tpp. 95, 96). None of the 4 videos of State's Exhibit 33 actually show the defendant with a gun or firearm in his right hand or on his person. In her statement given to Lt. Campbell, Ms. Ciotti never mentioned seeing a black butt of a gun. (Tpp. 116, 117). Lt. Campbell testified that Ms. Cinotti did not mention anything about seeing a black textured item. "She told me that when the suspect entered the store that he kept his right hand inside of his jacket and that she believed that he was carrying a gun." Lt. Campbell did not recall anything about a black textured handgun. (Tpp. 140, 141). There is no testimony from Mr. Smith that he saw a gun as Mr. Smith encountered the defendant as the defendant exited the store. Mr. Smith testified that the man coming out the door was very polite and said "good morning, sir". (Tpp. 120-124). No gun was found on the defendant at the time of his arrest. No gun was introduced into evidence at trial. See Exhibit Log (Rp. 13, 14). In his statement to Detective Condry, the defendant stated that he did not actually have a weapon during the robberies and that he only pretended to be armed. (Tpp. 231, 236).

Since a defendant's hands cannot be dangerous weapons under N.C.

Gen. Stat. § 14-87(a), State v. Hinton, 361 N.C. at 211, 639 S.E. 2d at 440, the State has failed to prove the element that the defendant had possession, use or threatened use of a firearm or other dangerous weapon, implement or means .

B. THE STATE FAILED TO PROVE THE ELEMENT THAT DEFENDANT OBTAINED THE PROPERTY OF CIRCLE K STORES BY ENDANGERING OR THREATENING THE LIFE OF TONI CINOTTI.

The defendant contends that, in light of Hinton, the defendant's hands are not capable of threatening or endangering life, and therefore, cannot be a firearm or other dangerous weapon within meaning of armed robbery statute, regardless of what instrument appears to be. State v. Allen, 317 N.C. 119, 125, 126, 343 S.E.2d 893, 897, 898 (1986). In Allen, the Court held that: (1) the jury was required to determine what, in fact, the instrument used by defendant during robbery was, where there was evidence that instrument appeared to be firearm capable of endangering or threatening life of victim, but there was also evidence that instrument was either cap pistol or inoperative firearm incapable of threatening or endangering life of victim; (2) the cap pistol which looks like real firearm is not dangerous weapon within meaning of armed robbery statute; and (3) there was reasonable possibility that had trial court not erroneously instructed jury different result would have been reached at trial. In Allen, the Court summarized the rulings in this area: "In an armed robbery case the jury may conclude that the weapon is what it appears to the victim to be in the absence of any evidence to the contrary. If, however, there is any

evidence that the weapon was, in fact, not what it appeared to the victim to be, the jury must determine what, in fact, the instrument was. Finally, if other evidence shows conclusively that the weapon was not what it appeared to be, then the jury should not be permitted to find that it was what it appeared to be.” State v. Allen, 317 N.C. at 125, 343 S.E. 2d at 897. The Court concluded: “No matter what an instrument appears to be, if in fact it is a cap pistol, or a toy pistol, or some other instrument incapable of threatening or endangering life, it cannot be a firearm or other dangerous weapon within the meaning of the armed robbery statute.” State v. Allen, 317 N.C. at 126, 343 S.E. 2d at 898.

The state's evidence in Allen tended to show as follows: A black male wearing a ski mask entered the Quick Snack store in Williamston shortly before 11 p.m. on 10 September 1983, pointed what appeared to be a small caliber pistol at the clerk and demanded the money in the cash register. The clerk saw the gun's barrel and gave the man the money. As the masked man left the store still holding what appeared to be a small revolver, he saw a store customer and told him, “Get back or I'll shoot.” The customer also saw the revolver's barrel. The state offered defendant's statement to law enforcement indicating defendant had used a “cap pistol” to rob the store and had no intention of hurting the clerk. The gun taken from defendant was the lower half of a .22 caliber pistol. The barrel and cylinder appeared to have been broken off at the lower trigger hammer. The defendant had told a deputy sheriff on the night of his arrest that the barrel of the cap

pistol he used had come off and he had reattached it with a rubber band. Consequently, the cap pistol would not fire. State v. Allen, 317 N.C. at 120-121, 343 S.E. 2d at 894-895.

In State v. Fleming, 148 N.C. App. 16, 26, 557 S.E. 2d 560, 566 (2001), the Court held that failure of trial court to include a definition of dangerous weapon in its jury instruction for offense of robbery with a dangerous weapon, and lack of sufficient evidence to find that BB gun used by defendant during commission of robbery was a dangerous weapon, required vacation of defendant's conviction for robbery with a dangerous weapon, and resentencing of defendant on the lesser included offense of common law robbery. The Court stated that a dangerous weapon, for purposes of N.C.G.S. § 14-87 setting forth offense of robbery with a dangerous weapon, is generally defined as any article, instrument or substance which is likely to produce death or great bodily injury. State v. Fleming, 148 N.C. App. at 26, 557 S.E. 2d at 563. In Fleming, the Court stated that "Actual possession and use or threatened use of firearms or other dangerous weapon is necessary to constitute the offense of robbery with firearms or other dangerous weapon", quoting State v. Faulkner, 5 N.C. App. 113, 119, 168 S.E. 2d 9, 13 (1969). State v. Fleming, 148 N.C. App. at 20, 557 S.E. 2d at 563; see also, State v. Alston, 305 N.C. 647, 651, 290 S.E.2D 614, 616 (1982) (a BB gun could not be a firearm or other dangerous weapon within the meaning of N.C. G.s. § 14-87 because it was incapable of endangering or threatening the life of a person).

In Fleming, the evidence was sufficient to find that weapon used by defendant in committing robbery was a BB gun; defendant showed store employee that he had a gun in the waistband of his pants during commission of robbery, defendant was apprehended by police approximately five minutes after employee had seen gun that was tucked into defendant's waistband, and police retrieved a BB gun from defendant's waistband during pat-down search. State v. Fleming, 148 N.C. App. at 21-22, 557 S.E. 2d at 564. In Fleming, the store employee testified as follows:

He opened his jacket-when he asked for the money to start with I didn't respond immediately . . . he opened his coat and all I could see was the butt, that appeared to me to look like a butt of a gun sticking in his waistband, and then he shut his coat back up. . . . I couldn't tell you if it was that gun. I didn't see the whole gun that day. . . . I was just-it just scared me to death. I could tell it was a gun.

State v. Fleming, 148 N.C. App. at 21, 557 S.E. 2d at 563. The Fleming Court found “it is clear the weapon in question was, in fact, a BB gun” and concluded that “[i]f all the evidence shows the instrument could not have been a firearm or other dangerous weapon capable of threatening or endangering the life of the victim, the armed robbery charge should not be submitted to the jury”. State v. Fleming, 148 N.C. App. at 21-22, 557 S.E. 2d at 564.

In defendant Marshall’s case, the conclusive evidence shows that he did not have a firearm and that he only used his right hand to pretend that he had a gun. There is no evidence that his hand had the capability to inflict death or great bodily injury. As a matter of law, the North Carolina Supreme Court in Hinton, has concluded that a defendant’s hands are not capable of

threatening or endangering life, and therefore, cannot be a firearm or other dangerous weapon within meaning of armed robbery statute. Accordingly, the State failed to prove all the elements of the charge of robbery with a dangerous weapon.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT GRANTING THE DEFENDANT'S MOTIONS TO DISMISS MADE AT THE CLOSE OF THE STATE'S EVIDENCE AND AT THE CLOSE OF ALL THE EVIDENCE IN 06 CRS 52283 BECAUSE

Assignment of Error No. 3 (Rp. 41; Tpp. 254, 255, 288, 295).

The Defendant-Appellant incorporates the standard of review for motions to dismiss from Argument II.

A. THE STATE FAILED TO PROVE THE ELEMENT THAT THE DEFENDANT HAD POSSESSION, USE OR THREATENED USE OF A FIREARM OR OTHER DANGEROUS WEAPON, IMPLEMENT OR MEANS.

In the Kangaroo Express robbery, the State's evidence showed that at times the defendant had his right hand inside of his jacket. (Tpp. 44-47, 52-54). Ms. Hineke thought he had a weapon, because of the way that he carried himself and the way his hand and arm was jammed in his in his jacket. (Tpp. 34, 35, 46). When Ms. Hineke gave money from the register to the defendant, he took it from her with his right hand. (Tp. 54). Ms. Hineke testified that State's Exhibit #'s 6 and 7 show that when she and the defendant were facing each other inches apart behind the counter, his right hand was empty. When Ms. Hineke gave money from the register to the

defendant, he took it from her with his right hand. (Tpp. 52-54).

Since a defendant's hands cannot be dangerous weapons under N.C.G.S. § 14-87(a), State v. Hinton, 361 N.C. at 211, 639 S.E. 2d at 440, the State has failed to prove the element that the defendant had possession, use or threatened use of a firearm or other dangerous weapon, implement or means.

B. THE STATE FAILED TO PROVE THE ELEMENT THAT DEFENDANT OBTAINED THE PROPERTY OF THE PANTRY, D/B/A KANGAROO EXPRESS BY ENDANGERING OR THREATENING THE LIFE OF NANCY L. HENNEKE.

The defendant contends that, in light of Hinton, the defendant's hands are not capable of threatening or endangering life, and therefore, cannot be a firearm or other dangerous weapon within meaning of armed robbery statute, regardless of what instrument appears to be. State v. Allen, 317 N.C. 119, 343 S.E.2d 893 (1986). In defendant Marshall's case, the evidence shows that he used his right hand to pretend that he had a gun. There is no evidence that his hand had the capability to inflict death or great bodily injury. As a matter of law, the North Carolina Supreme Court in Hinton, has concluded that a defendant's hands are not capable of threatening or endangering life, and therefore, cannot be a firearm or other dangerous weapon within meaning of armed robbery statute. Accordingly, the State failed to prove all the elements of the charge of robbery with a dangerous weapon.

CONCLUSION

For the foregoing reasons, the Defendant-Appellant Chauncey Marshall respectfully requests that his convictions be reversed, or in the alternative, that he be awarded a new trial or new sentencing hearing.

This the ____ day of September, 2007.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **DEFENDANT-APPELLANT'S BRIEF** was served upon counsel of record by depositing the same in a postpaid wrapper in an official depository under the exclusive care and custody of the United States Postal Service, New Bern, North Carolina, and addressed to:

Lars F. Nance
Special Deputy Attorney General
North Carolina Department of Justice
Service to State Agencies Section
P.O. Box 629
Raleigh, NC 27602-0629

This the ____ day of _____, 2007.

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