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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 117

SMITH (MARK A.),

Appellant.

20 Eagle Street
Albany, New York
November 20, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Smith.

3 MS. STARE: Yes. May it please the court.
4 Stephanie Stare for Mr. Smith. May I please reserve two
5 minutes for rebuttal?

6 CHIEF JUDGE WILSON: Yes.

7 MS. STARE: Thank you. It is uncontroverted that
8 the object used in Mr. Smith's case was a BB gun. A BB - -
9 -

10 JUDGE SINGAS: Can I ask you just to frame out
11 this issue for us? Are you arguing that because it was a
12 BB gun, you should have gotten the affirmative defense? Or
13 are you arguing because it was a BB gun, there should have
14 been a reduction to the rob 2?

15 MS. STARE: I'm saying a little bit of both.
16 Because it's a BB gun, he was entitled to the affirmative
17 defense because it's not a firearm, but it really should
18 have been charged as a rob 2 to begin with.

19 JUDGE SINGAS: Okay. So if we go with the first
20 option. If it was that you're entitled to the affirmative
21 defense, is it treated like every other affirmative
22 defense, or do you think it - - - you automatically get it
23 if you know that the weapon was a BB gun?

24 MS. STARE: My - - - our position is if you know
25 the weapon is a BB gun, you automatically get it almost as

1 a matter of law. My reading of the statute - - -

2 JUDGE SINGAS: Okay. But is that - - - is that
3 contrary to how we view affirmative defenses, which say you
4 have to give a view of the evidence that supports the
5 defense?

6 MS. STARE: Right. So I think what that comes
7 down to is the affirmative defense language in subdivision
8 4 only refers to firearms. If you look at it it says,
9 "such pistol, revolver", et cetera. It does not say, "such
10 object that was displayed".

11 So it's a condition precedent to that operability
12 analysis that the item was, in fact, a firearm.

13 JUDGE SINGAS: Right. So the People, I think,
14 are saying because the BB gun is not a firearm, then this
15 doesn't apply at all?

16 MS. STARE: I think this was charged wrong. In
17 Mr. Smith's case, it was absolutely charged wrong.

18 JUDGE GARCIA: So you're asking us - - -

19 MS. STARE: They knew it was a BB gun.

20 JUDGE GARCIA: - - - us essentially to make a per
21 se rule that any BB gun is not a firearm capable of - - -
22 whatever language is - - - causing serious bodily injury or
23 death?

24 MS. STARE: Because it's not a firearm. So there
25 are - - - there's subdivision 2 and 3, that if you want to

1 go the path of causing injury.

2 JUDGE GARCIA: Because it seems to me - - - to
3 follow up on what Judge Singas was asking - - - and there's
4 three ways you could do this. You could say, I think, the
5 Fourth Department's rule which is, yes, it is, and you have
6 to show this particular weapon was not a BB gun is a
7 firearm capable; or you could say, I think, what you're
8 kind of saying - - - you could say, maybe, depending on the
9 BB gun; or you could say, no, any BB gun is not. And which
10 of those three are you asking for, yes, maybe, or no?

11 MS. STARE: I am asking that the affirmative
12 defense - - - the burden on the defense to get the
13 affirmative defense is met either by showing it's not a
14 firearm, which a BB gun is not a firearm.

15 JUDGE GARCIA: So BB gun per se not a firearm
16 capable?

17 MS. STARE: Correct.

18 CHIEF JUDGE WILSON: You were about to say, or, I
19 think. You were starting to count on your fingers.

20 MS. STARE: Or if it's an unknown object, then
21 they have to show that it was not a firearm capable of
22 producing - - -

23 JUDGE GARCIA: So - - -

24 MS. STARE: - - - et cetera, et cetera.

25 JUDGE GARCIA: - - - if you show in the course of

1 this trial that it's a - - - that you raise enough evidence
2 to get the affirmative defense of it was a BB gun, then it
3 goes to the jury and all they have to decide is was it a BB
4 gun or not?

5 MS. STARE: Yes. And again, that goes back to
6 how this was charged wrong. So there's a burden on - - -

7 CHIEF JUDGE WILSON: Well, could a BB gun be an
8 "other" weapon, not firearm? Because I think it's not a
9 firearm, right? It doesn't use an explosive.

10 MS. STARE: Correct.

11 CHIEF JUDGE WILSON: Could it be an "other"
12 weapon capable of causing death or serious injury?

13 MS. STARE: That would be properly charged under
14 subdivision 2 or 3.

15 CHIEF JUDGE WILSON: But doesn't 4 or read - - -
16 allow for that or not?

17 MS. STARE: Not in my reading, Your Honor. The -
18 - - because it says "such pistol" doesn't - - - not.
19 Excuse me. I'm going to start all over.

20 Because it says, "such pistol is not a loaded
21 weapon", et cetera, and not "such object that is displayed
22 as a pistol", I read that as it has to be a firearm first
23 before you get to that ability.

24 JUDGE CANNATARO: What do you think in the
25 statutory text the "such" is modifying? What's part of

1 what comes before is "such" related to?

2 MS. STARE: Pistol, revolver, firearm.

3 JUDGE CANNATARO: Well, in the statute it's "what
4 appears to be a pistol, revolver, firearm."

5 MS. STARE: Right. So there's two things I want
6 to point you to. The CJI instruction takes out that "such"
7 language entirely. The jury instruction, if it were given,
8 literally just says "the pistol, revolver," et cetera, "was
9 not a loaded weapon - - -

10 JUDGE RIVERA: We're - - - we're - - -

11 MS. STARE: - - - "from which - - -

12 JUDGE RIVERA: - - - we're focusing on the
13 statute.

14 MS. STARE: Yes.

15 JUDGE RIVERA: It is what the statute says.

16 MS. STARE: Correct. Correct.

17 JUDGE RIVERA: So your interpretation of 4 is
18 that "what appears to be" cannot encompass something that
19 is not any of these items, but merely appears to be?

20 MS. STARE: Correct.

21 JUDGE HALLIGAN: So what - - -

22 CHIEF JUDGE WILSON: But don't - - -

23 JUDGE HALLIGAN: - - - meaning then do the words
24 "appears to be" have?

25 MS. STARE: So that goes to the legislative

1 intent in subdivision 4. It balanced - - - and this court
2 goes through that in - - -

3 JUDGE HALLIGAN: I'm familiar with the history of
4 the provision. But you're saying we should read those
5 words consistent with the legislative history and not just
6 sort of take the words for what they mean, which could, I
7 think, possibly include a BB gun. Yes?

8 MS. STARE: If you - - - it does. It does and it
9 doesn't. So the - - - the language of rob - - - robbery
10 2nd sub 2(b) is identical to robbery 1st sub 4, except for
11 that affirmative defense.

12 JUDGE TROUTMAN: But why wouldn't you look at the
13 specific text? It says, "displays what appears to be".

14 MS. STARE: Uh-huh.

15 JUDGE TROUTMAN: Are you saying we just totally
16 disregard it even though it is - - - that language is
17 clearly there - - - and look towards legislative intent
18 instead?

19 MS. STARE: Look at legislative intent, but also
20 look at this own - - - this court's own - - -

21 JUDGE TROUTMAN: But why? If the language is
22 clearly there, it's - - - what's ambiguous about "what
23 appears to be"?

24 MS. STARE: Because that "what appears to be" is
25 not repeated after the word "such". And this court, in

1 Baskerville and Lopez makes it very clear, and I will quote
2 Baskerville. It's "an affirmative defense that the object
3 displayed was not an operable firearm." This court used
4 the word "firearm".

5 JUDGE CANNATARO: So you're saying because the
6 statute doesn't say "such apparent pistol or revolver",
7 that that renders it ambiguous to the extent that we have
8 to now go back and look at what the legislature intended?

9 MS. STARE: Yes.

10 CHIEF JUDGE WILSON: And you just read - - -

11 JUDGE SINGAS: And you also said - - -

12 CHIEF JUDGE WILSON: - - - you just read "was not
13 an operable firearm", right? But a BB gun is not an
14 operable firearm. And we - - - don't we have firearm - - -
15 don't we have cases where people have their hand in a
16 hoodie or some - - -

17 MS. STARE: Yes.

18 CHIEF JUDGE WILSON: - - - other, and we allow
19 the affirmative defense under 4. No?

20 MS. STARE: So that was the "or" that I said
21 earlier when it's an unknown object. Right? You have
22 those - - -

23 CHIEF JUDGE WILSON: But the unknown object isn't
24 in the statute.

25 MS. STARE: Right. I'm - - -

1 CHIEF JUDGE WILSON: I mean, if you read "such"
2 to restrict it to the firearms, then I - - - it seems to me
3 your interpretation restricts the defense to things that
4 are firearms, actual firearms, not what appears to be.

5 MS. STARE: I'm restricting the defense's burden
6 of proving it's an operability, which is what the court in
7 this case concentrated on - - - the trial court. I'm
8 restricting that to firearms.

9 JUDGE HALLIGAN: Maybe I'm confused, but it
10 sounds to me like you are proposing a narrower, rather than
11 a broader reading of the affirmative defense?

12 MS. STARE: I - - - it's a narrower applicability
13 to what the defense has to prove. In my view of it, if - -
14 -

15 JUDGE HALLIGAN: I'm not sure I follow that.
16 Maybe you could explain that.

17 MS. STARE: That's fine. If it's not a firearm -
18 - - and a BB gun is not a firearm - - - I think that in and
19 of itself shows that if the DA decided to charge it under
20 this subsection, the affirmative defense has to read.

21 JUDGE HALLIGAN: That's a distinct argument, I
22 think. Right? I mean, I took you, in your brief, to be
23 arguing that the affirmative defense should have been
24 given. Not that there couldn't be a charge brought under
25 subsection 4? Those, I think, are different arguments.

1 And now I think I hear you saying that you can't charge
2 under subsection 4 for a BB gun. Maybe I'm mistaken.

3 MS. STARE: I think going forward, the
4 appropriate thing to do is not to charge under sub 4.

5 JUDGE HALLIGAN: But I don't think you raised
6 that argument to us, and I thought you focused on the
7 affirmative defense?

8 MS. STARE: I did in the brief. Yeah.

9 JUDGE SINGAS: Can I - - - can I just have - - -

10 CHIEF JUDGE WILSON: Of course. Yeah.

11 JUDGE SINGAS: - - - one more question?

12 So you - - - you started an answer regarding the
13 same language in the rob 1 and the rob 2. Exact same
14 language, right?

15 MS. STARE: Uh-huh.

16 JUDGE SINGAS: So what do you think the
17 significance of that is?

18 MS. STARE: So the legislative intent needed to
19 balance the prosecution's difficulty with proving an
20 unknown object, an object that they never recover, against
21 the defendant's ability to show that it wasn't an operable
22 firearm. So a lot of the cases are - - - you know, finger
23 in the pocket that we talked about or a metal bar wrapped
24 up, that's - - - a gun is never recovered. Or there's
25 cases where there's a BB gun but also a second unknown

1 weapon.

2 JUDGE SINGAS: Well, can I ask you another
3 question? And I don't know if you know the answer to it;
4 I'll ask the People as well. In terms of operability in -
5 - - in your jurisdiction or in your department, do BB guns
6 get tested by ballistics for operability?

7 MS. STARE: They do not, as far as I'm - - - as
8 far as I know.

9 JUDGE SINGAS: Okay.

10 CHIEF JUDGE WILSON: Thank you.

11 MS. WALENDZIAK: Good afternoon. May it please
12 the court. Amy Walendziak, on behalf of the People.

13 It's our position that in this case, Defendant
14 didn't meet his burden of proving the entitlement to the
15 court charging the jury on the affirmative defense to
16 robbery in the first degree.

17 JUDGE SINGAS: Okay. And what kind of evidence
18 would he have to put forward? Do you know of ballistics
19 tests for operability of BB guns?

20 MS. WALENDZIAK: I personally don't. I've never
21 spent any time in the Special Investigations Bureau,
22 candidly. So I really can't speak to that.

23 But I do think - - - I have to imagine that there
24 is somebody that could have test-fired this particular
25 weapon that was recovered from the defendant's apartment

1 and said whether or not it fired anything, or worked, or
2 discharged a shot.

3 CHIEF JUDGE WILSON: Well, is it your position
4 that every type of loaded, operable BB gun is capable of
5 producing death or serious injury?

6 MS. WALENDZIAK: I think it could.

7 CHIEF JUDGE WILSON: Necessarily as a matter of
8 law? Because it seems, otherwise, there may be a
9 difference between the Fourth Department's position and
10 some of the other Appellate Division departments, in that
11 you may be able to prove that even though this is an
12 operable, loaded BB gun, it's - - - this particular BB gun
13 is not capable of producing death or serious injury. And
14 it seems to me the trial court and the Appellate Division
15 read the defense as restricted to operability and loaded,
16 and not simply that it's a BB gun, but it's a small BB gun.

17 MS. WALENDZIAK: If I am understanding your
18 question correctly, Your Honor, and please correct me if
19 I'm not. My understanding - - - or how I read the Fourth
20 Department's decision and how I read the statute as well -
21 - - and I think getting back to this, when the affirmative
22 defense and also the statutory burdens - - - this
23 particular subdivision of robbery in the first degree was
24 meant by the legislature to address an issue of evidence
25 when the weapon is not immediately recovered after the

1 robbery.

2 So I believe it was this court's decision in
3 Baskerville. There was a toothbrush - - -

4 CHIEF JUDGE WILSON: I'm sorry? "Immediately
5 recovered" or just recovered?

6 MS. WALENDZIAK: Recovered at all.

7 CHIEF JUDGE WILSON: Okay.

8 MS. WALENDZIAK: But I would note in a lot of the
9 decisions where this applies, I think there's a bit closer
10 temporal proximity to the apprehension of the defendant.
11 So in Baskerville, I believe it was a subway platform
12 robbery. If I'm misremembering the case name, I apologize.
13 But the defendant was followed by the police, and then he
14 was apprehended. And when they searched him incident to
15 arrest, the only object he had was a toothbrush.

16 CHIEF JUDGE WILSON: Right.

17 MS. WALENDZIAK: And there was no firearm that
18 was recovered in his path of flight. So we know in that
19 case, the toothbrush was what was used. Here, there was
20 almost two months, I believe, between the robbery and the
21 search warrant - - -

22 CHIEF JUDGE WILSON: But the People's theory is
23 this was the BB gun. No?

24 MS. WALENDZIAK: It's very likely that it was.
25 But none of the victims were able to identify it as the

1 weapon that was - - -

2 JUDGE RIVERA: I thought that was the argument at
3 closing?

4 MS. WALENDZIAK: I would note that - - -

5 JUDGE RIVERA: Did I misunderstand the record?

6 MS. WALENDZIAK: No. I do know that the
7 prosecutor argued that it's very likely that this was the
8 BB gun, but I would note that her summation isn't evidence.
9 It would be about an inference to be drawn from there.

10 I don't think we would have - - - we were able to
11 prove the weapon that was used because none of the victims
12 were able to identify it. And there was that gap in time,
13 like I said, between - - -

14 JUDGE TROUTMAN: If a defendant is entitled to
15 the charge, how does that come about?

16 MS. WALENDZIAK: So - - -

17 JUDGE TROUTMAN: Whose - - -

18 MS. WALENDZIAK: - - - with this - - -

19 JUDGE TROUTMAN: - - - how does the burden
20 process work?

21 MS. WALENDZIAK: So in this particular case,
22 because we charged it under subdivision - - - division 4,
23 the People had to prove that the defendant displayed what
24 appeared to be a pistol, revolver, rifle, shotgun, or other
25 firearm in this particular case. And we did that here

1 because all of the victims testified that when the robber
2 came into the hair salon, he displayed something that
3 appeared to be - - -

4 JUDGE TROUTMAN: Did you have to prove
5 operability?

6 MS. WALENDZIAK: No, we didn't, Your Honor.
7 Because again, the legislature, in enacting subdivision 4
8 in the robbery in the first-degree statute - - - I believe
9 this court talked about in several of its cases, I think
10 Lopez and Gilliard - - - they were intending to - - - to
11 solve the problem that the People often find themselves in
12 when no weapon is recovered.

13 We can't exactly prove the - - - whether it was
14 loaded or operable at the time of the robbery if we never
15 recover it.

16 CHIEF JUDGE WILSON: So if I understand you
17 correctly, you read subdivision 4, the affirmative defense
18 there, as applying to things that are not firearms but
19 appear to be firearms?

20 MS. WALENDZIAK: Yes. And I believe in Gilliard
21 and Lopez, this court, in describing that, they - - -
22 because the affirmative defense only applies when
23 subdivision 4 is charged, this court seemed to interpret
24 the "such" referring back to that first phrase, the "what
25 appears to be a pistol, revolver or other firearm" - - -

1 JUDGE SINGAS: I don't think so. And Gilliard we
2 said, "such object", and if it's an object, you get the
3 affirmative defense.

4 MS. WALENDZIAK: Well, this court - - - so
5 there's the first part of subdivision 4 that says, "A
6 defendant commits robbery in the first degree when you
7 display what appears to be". And then there's the
8 affirmative defense that comes in when such pistol,
9 revolver, or other firearm is not actually a loaded weapon
10 capable of discharging a shot.

11 And as I read this court's - - -

12 CHIEF JUDGE WILSON: So you think you don't get
13 the defense for a finger in the pocket?

14 MS. WALENDZIAK: You would if there's evidence
15 that it's a finger in the pocket, and not a loaded weapon
16 from which a shot can be discharged that's capable of
17 causing death or serious physical injury.

18 JUDGE RIVERA: Regardless if it appears, because
19 of the way it's masked, to be a - - - let's take one of
20 them - - - a pistol?

21 MS. WALENDZIAK: So if it appear - - - so I kind
22 of view it as a we have to meet our burden on the first
23 part of the statute, and then it's the defendant's burden
24 on the second part. So we have to show that he initially -
25 - -

1 JUDGE TROUTMAN: So does that play into whether
2 there's a reasonable view of the evidence to support charge
3 - - - that charge being given?

4 MS. WALENDZIAK: I think so if I'm understanding
5 your question correctly, Judge Troutman.

6 JUDGE TROUTMAN: In order to get the charge, are
7 you saying there must be a reasonable view of the evidence
8 to support that in the case of a finger, it was a finger?

9 MS. WALENDZIAK: Yes, I am, Judge Troutmann.

10 And here there was no reasonable view of the
11 evidence that the object that the - - - excuse me - - -
12 that the defendant displayed during the robbery was not a
13 loaded weapon from which a shot could be discharged. There
14 was no testimony or evidence about - - -

15 CHIEF JUDGE WILSON: Yeah. But that - - - but
16 that isn't a requirement, is it?

17 MS. WALENDZIAK: It is. The object that was
18 displayed during the - - -

19 CHIEF JUDGE WILSON: It has to also be what the -
20 - - the item also has to be capable of producing death or
21 other serious physical injury. Right?

22 MS. WALENDZIAK: Yes. And so I suppose applying
23 the statute to this case, we met our burden on proving what
24 we had to in that first part of the statute, because all of
25 the victims testified that he displayed what they perceived

1 to be a real gun.

2 CHIEF JUDGE WILSON: Right.

3 MS. WALENDZIAK: And then in order to get the
4 affirmative defense, Defendant could have taken the stand
5 and said that this particular - - - you know, this weapon
6 that I had, it was not capable of causing death or serious
7 physical injury; it was unloaded; it was inoperable.

8 CHIEF JUDGE WILSON: Right. But the court seemed
9 to limit the defendant to showing it was either inoperable
10 or not loaded. Not that it was a loaded, operable BB gun,
11 but a BB gun not capable of producing death and thought it
12 was constrained by a Fourth opinion - - - Fourth Department
13 opinion, whose name is a little difficult to pronounce but
14 starts with an A.

15 MS. WALENDZIAK: Yeah. The Akinlawon?

16 CHIEF JUDGE WILSON: Yeah.

17 MS. WALENDZIAK: I think I'm pronouncing correct
18 - - - or close enough?

19 CHIEF JUDGE WILSON: Yeah.

20 MS. WALENDZIAK: Yes. So as I read the
21 Akinlawon, the - - - that's kind of what I'm getting at, is
22 that the - - -

23 CHIEF JUDGE WILSON: But that's out of step with
24 some other Appellate Division decisions?

25 MS. WALENDZIAK: It's in step, I believe, with

1 the Third Department and the First Department. I believe
2 the First Department in Padua follows a similar analysis.
3 And the Third Department, I believe it was - - - I cited to
4 both cases in my brief. I prefer - - -

5 JUDGE SINGAS: Yeah. But why isn't the Second
6 Department correct to say that, you know what, this is not
7 a firearm, and the legislature made a conscious decision to
8 have two subsections, one a B violent, one a C violent,
9 that say the exact same thing. Why doesn't it make sense
10 the way the Second Department views it? That if it's a BB
11 gun, it's not a firearm, and then you get knocked down to
12 the C violent and then everything "displays what appears to
13 be" comes into effect? Why is that?

14 MS. WALENDZIAK: Well, I think it's because of
15 the language that is used in the affirmative defense. The
16 - - -

17 JUDGE SINGAS: The language is exactly the same.

18 MS. WALENDZIAK: Well, again, the - - - I don't
19 think it is in the affirmative defense. With the
20 affirmative defense, again, the defendant had to show that
21 it was - - - the object displayed was not a loaded weapon
22 from which that shot could be discharged. The legislature
23 certainly could have said that it's an affirmative defense
24 when the object displayed was not a firearm.

25 They didn't say "firearm". They said, "A loaded

1 weapon from which a shot capable of causing death or
 2 serious physical injury could be discharged." And I note,
 3 too, when the legislature talks about firearms in Article
 4 268 of the Penal Law, there's always this reference to
 5 expelling a projectile by way of explosive. I believe it's
 6 Section 265.00, subdivision 15.

7 When they talk about a loaded firearm, they
 8 mentioned one that is loaded with ammunition. And again,
 9 that dischargement by way of an explosive. There are
 10 certain terms associated with firearms that just weren't
 11 used in this affirmative defense. Again, it was limited to
 12 a loaded weapon that discharges a shot capable of causing
 13 death or other serious physical injury.

14 JUDGE RIVERA: Are there operable BB guns that
 15 are not capable of producing death or other serious
 16 physical injury?

17 MS. WALENDZIAK: I believe so. I referenced the
 18 court to some articles about BB guns in my brief. So the
 19 one that was recovered from the defendant's apartment in
 20 this case was a CO2 air pistol. So it discharges the BBs
 21 through the use of these cartridges that contain compressed
 22 gas. And these ones are readily capable of causing death.
 23 I know - - -

24 JUDGE RIVERA: But there is some - - -

25 MS. WALENDZIAK: - - - there are some - - -

1 JUDGE RIVERA: - - - type of BB gun that would
2 not?

3 MS. WALENDZIAK: Yes. I think the easiest one to
4 kind of envision is there used to be, like, the plastic
5 ones that had the orange tip on the end, and that orange
6 tip was how you could easily recognize that it was a BB
7 gun. My understanding is most of those expelled their BBs
8 through the use of a spring-loaded contraption, kind of
9 like the one in A Christmas Story with Ralphie's - - -

10 JUDGE RIVERA: Okay.

11 MS. WALENDZIAK: - - - BB gun for Christmas. And
12 - - -

13 JUDGE CANNATARO: But even that one could put
14 your eye out.

15 CHIEF JUDGE WILSON: No. That's a - - - no. I'm
16 sorry, that's a pump-action compressed air. It's not a
17 spring-loaded.

18 MS. WALENDZIAK: My - - - if I erred on the - - -

19 CHIEF JUDGE WILSON: I know that musical pretty
20 well.

21 JUDGE RIVERA: But - - - so but why isn't - - -

22 CHIEF JUDGE WILSON: It's a red rider.

23 JUDGE RIVERA: I'm sorry. Why isn't that capable
24 of producing death or other serious physical injury if you
25 - - -

1 MS. WALENDZIAK: Well, I guess - - -

2 JUDGE RIVERA: - - - shoot toward someone's
3 eyeball?

4 MS. WALENDZIAK: I think there are a lot of them
5 that is - - -

6 JUDGE RIVERA: No, no. I'm talking about the one
7 that you - - -

8 MS. WALENDZIAK: The ones that are?

9 JUDGE RIVERA: - - - started out saying, well,
10 there's this one that wouldn't fit this category.

11 MS. WALENDZIAK: I think there's ones that are
12 much more similar to a toy, really. And again, like, I
13 think any of them probably could if - - - you know, say, a
14 four-year old took - - -

15 CHIEF JUDGE WILSON: Don't we read something into
16 "readily capable"?

17 MS. WALENDZIAK: And I think there are a lot of
18 BB guns that are readily capable. Like I said, there are
19 the CO2 air pistols that are commonly being produced today,
20 and those are the ones that are primarily in the
21 marketplace. And those ones, again, do readily cause
22 death. There was a - - -

23 JUDGE CANNATARO: But you seem to be
24 acknowledging that not all - - -

25 MS. WALENDZIAK: No. And again, I - - -

1 JUDGE CANNATARO: - - - and readily capable of
2 causing serious injury or death?

3 MS. WALENDZIAK: No. And I think that again goes
4 into the affirmative defense. It's on the defendant to
5 prove - - -

6 JUDGE TROUTMAN: So if there was a reasonable
7 view of the evidence because of that which was presented,
8 that it wasn't capable of causing the injury or death, then
9 they would be entitled to it?

10 MS. WALENDZIAK: Yes, I agree. But if there is -
11 - -

12 JUDGE TROUTMAN: But your argument is, they don't
13 automatically get it just because it's a BB gun?

14 MS. WALENDZIAK: No they don't. They have to put
15 in the work of showing that - - - as the statute says, that
16 it was unloaded, inoperable, or not capable of causing
17 death. Again, I would draw the court's attention, there
18 was a case - - -

19 JUDGE RIVERA: Because - - - because it fits the
20 first sentence, it appears to be one of those things - - -

21 MS. WALENDZIAK: So if it appears - - -

22 JUDGE RIVERA: - - - not because it is?

23 MS. WALENDZIAK: Yes. That is what we have - - -
24 that is what the People have to prove in order to establish
25 robbery in the first degree under this subdivision. And

1 then it's the defendant's burden to prove the affirmative
2 defense by a preponderance of the evidence. And if he
3 doesn't do the work to show the entitlement to the
4 affirmative defense, it's not charged to the jury.

5 JUDGE RIVERA: So if you use something, let's - -
6 - let's take a screwdriver for one moment, but it appeared
7 in the way it was masked - - -

8 MS. WALENDZIAK: Yes.

9 JUDGE RIVERA: - - - to be one of the listed
10 types of firearms. A screwdriver used appropriately, or
11 perhaps aggressively, might cause serious physical injury.
12 No?

13 MS. WALENDZIAK: But it's not a loaded weapon
14 that discharges a shot. So in that - - -

15 JUDGE CANNATARO: It's not capable of making a
16 shot, right?

17 MS. WALENDZIAK: No, it's not. It's a
18 screwdriver. It doesn't discharge a shot.

19 JUDGE RIVERA: So it would fail on one of the
20 other little - - -

21 MS. WALENDZIAK: Yes. And the affirmative
22 defense would apply for the screwdriver because, again,
23 it's not a loaded weapon.

24 And if the court has no further questions, I
25 would ask it to affirm the conviction in this matter.

1 Thank you.

2 CHIEF JUDGE WILSON: Thank you.

3 MS. STARE: So in refer - - -

4 JUDGE RIVERA: So are there BB guns that are not
5 able to produce death or other serious physical injury?

6 MS. STARE: I think most BB guns are not capable
7 of causing death or serious injury.

8 JUDGE RIVERA: Was the one involved here, the
9 type that was not readily capable of doing that?

10 MS. STARE: In our opinion, yes.

11 JUDGE RIVERA: Because?

12 MS. STARE: Well, it was never fired. It was
13 never test fired. It was never - - -

14 JUDGE TROUTMAN: What evidence was offered to
15 show it wasn't capable of causing death or serious physical
16 injury?

17 MS. STARE: I don't know that there was evidence
18 presented on that.

19 JUDGE RIVERA: Is that your burden to show that?

20 MS. STARE: Our reading of it is that the burden
21 of getting to operability is you first have to show that
22 it's a firearm. So we never should have gotten there. And
23 this court, during my opposing counsel's argument,
24 Akinlawon is not in step with the other departments.
25 Akinlawon - - - prior to Akinlawon even the Fourth

1 Department agreed that a BB gun is not a firearm.

2 JUDGE GARCIA: So you want us to say this is not
3 a firearm. So it's a failure of proof on the main case,
4 not an affirmative defense issue?

5 MS. STARE: I - - - there are cases where they
6 charge it as the rob 1 subdivision 4, but the affirmative
7 defense is given because it's a BB gun and not a firearm.
8 And - - -

9 JUDGE CANNATARO: And that's the wrong way to do
10 it? You're saying it should never be charged as rob 1?

11 MS. STARE: Yes. In a perfect world, I think
12 this shouldn't have even got past grand jury review.

13 JUDGE RIVERA: Because we should excise, "what
14 appears" from subsection 4?

15 MS. STARE: No - - - in a perfect world, a dumbed
16 down, rewritten - - -

17 JUDGE RIVERA: No. The statute - - -

18 MS. STARE: Right.

19 JUDGE RIVERA: - - - forget the perfect world.
20 The statute - - -

21 JUDGE GARCIA: Which may be that - - -

22 JUDGE SINGAS: It's definitely not perfect.

23 JUDGE RIVERA: - - - just the statute.

24 MS. STARE: A different version of the statute,
25 in my opinion, should read, "displays - - -



1 JUDGE RIVERA: Okay. But this - - - okay.

2 MS. STARE: Of this statute?

3 JUDGE RIVERA: - - - but this particular - - -

4 MS. STARE: Yes.

5 JUDGE RIVERA: - - - the one - - -

6 MS. STARE: Yes.

7 JUDGE RIVERA: - - - that he's convicted of - - -

8 MS. STARE: Yes.

9 JUDGE RIVERA: - - - let's go with that.

10 MS. STARE: Displays what appears to be a firearm
11 instead of that list.

12 JUDGE RIVERA: You would have us excise those two
13 words?

14 MS. STARE: The "such as"?

15 JUDGE GARCIA: No. "What appears."

16 JUDGE RIVERA: "What appears."

17 MS. STARE: No, I - - - I - - -

18 JUDGE RIVERA: Actually "what appears to be",
19 excuse me.

20 MS. STARE: I would like - - -

21 JUDGE RIVERA: - - - it's more than two.

22 MS. STARE: - - - the list of things to be - - -
23 to be substituted firearm. So displays what appears to be
24 a firearm, except that it is an affirmative defense that
25 the object either wasn't a firearm or was an inoperable and

1 unloaded firearm. That's like the - - - my dumbed-down
2 rewriting of what the statute should say.

3 JUDGE RIVERA: Yeah. I don't really understand
4 it because it's "what appears to be", right?

5 JUDGE CANNATARO: Going back to the text. I'm
6 sorry. Did you want to respond to that?

7 MS. STARE: I was going to - - - I was going to -
8 - -

9 JUDGE RIVERA: I mean, those words suggest that
10 it need not be, in fact, any of the listed weapons. Right?

11 MS. STARE: Right. But the linchpin in this case
12 is that we know what the object was. So that's what makes
13 it different from all the other lines of case of - - - of
14 where it applies, where it doesn't apply.

15 JUDGE RIVERA: Well, then just - - - then a
16 follow-up. Then you disagree with counsel who said it - -
17 - we don't know that this was the BB gun because it was two
18 months later?

19 MS. STARE: We absolutely know that this was the
20 BB gun. It was uncontested by the DA. It was uncontested
21 in the charge conference. They never argued in the charge
22 conference it wasn't the BB gun. The judge never said it
23 wasn't the BB gun.

24 And just very briefly, I know my red light's been
25 on for a while.

1 The Akinlawon case that the trial court relied on
2 they were going to grant the affirmative defense based on
3 this court's decision in Howard, and then they read
4 Akinlawon.

5 Akinlawon is sort of a detour. It relies upon
6 Third Department cases, Richard and Perez, under the
7 framework of analyzing if a BB gun is either a deadly
8 weapon under assault 2 for the Richard case, or a dangerous
9 instrument under rob 1 sub 3 for the Perez case.

10 So in relying on that, they conflated the
11 requirement of showing operability and unloadedness with
12 whether or not it was a firearm. And prior to Akinlawon,
13 the Fourth Department agrees a BB gun is not a firearm.
14 After Akinlawon, they just point to Akinlawon. I think
15 that's what resulted in this erroneous requirement of
16 showing that a BB gun is unloaded or inoperable in these
17 types of situations.

18 JUDGE CANNATARO: Counsel, before you say - - - I
19 just want to like, go back to one linguistic thing that I
20 noticed in subsection 4. You know, you have that offense,
21 part of the language which talks about what appears to be a
22 pistol, revolver, rifle, shotgun, machine gun, which are
23 all firearms. And that is firearm - - - but then when you
24 go back down to the affirmative defense, we don't see the
25 word "firearm" and we don't see a repetition of pistol,



1 revolver, rifle, shotgun, et cetera. What we see is
2 "weapon".

3 And that seems to me to pose an additional
4 challenge to your interpretation of what this affirmative
5 defense means.

6 MS. STARE: I don't - - -

7 JUDGE CANNATARO: I could try to explain it to
8 you, but I think you probably understand what I'm getting
9 at.

10 MS. STARE: Absolutely. I don't disagree with
11 you. I got lost in the weeds in this so often that I can't
12 even tell you.

13 I think it's a poorly written statute. I think
14 that part of the affirmative defense obviously parrots the
15 language of - - - more in line with dangerous instrument
16 than firearm or anything else. So it - - -

17 JUDGE CANNATARO: But isn't weapon big enough to
18 allow for a BB gun? That's really the - - - that's the rub
19 for me.

20 MS. STARE: And I can see that interpretation.
21 But I think because it's tied to the language of
22 operability and serious physical injury and death, that's
23 what.

24 JUDGE RIVERA: Isn't the more natural reading
25 that the - - - these categories are a subset of weapon, and

1 we're only talking about these categories?

2 MS. STARE: I'm sorry; I don't understand the
3 question.

4 JUDGE RIVERA: Well, it - - - if it was just
5 about a loaded weapon, they wouldn't have repeated "such
6 pistol, revolver, rifle, shotgun, machine gun, or other
7 firearm". These are - - - right? Types of weapons?
8 That's all that means?

9 MS. STARE: They're types of firearms.

10 JUDGE RIVERA: No. No. "Was not a loaded
11 weapon", that's the rest of the - - - well, that's the next
12 part of the sentence. I shouldn't say the rest.

13 MS. STARE: Right. And again, I - - -

14 JUDGE RIVERA: The natural reading of that is
15 weapon is the broader category. These are subclasses of
16 that broad category. Firearm is a broader category too,
17 don't get me wrong. But it's - - -

18 MS. STARE: Right.

19 JUDGE RIVERA: Right? It's subsumed within the
20 broader category of loaded weapon?

21 MS. STARE: I could see that interpretation, but
22 I think it's - - -

23 JUDGE RIVERA: Well, why shouldn't we see that
24 interpretation?

25 MS. STARE: Because it's very clear that this

1 subsection and this own - - - this court in Baskerville
2 says it's an operable firearm. You use the words "operable
3 firearm" in relation to the affirmative defense, not just a
4 loaded weapon, not a - - - you know, Ralphie's shotgun from
5 Christmas morning, or you know, that kind of thing.

6 JUDGE SINGAS: But you're saying it's not a
7 firearm, but yet you're entitled to the affirmative
8 defense?

9 JUDGE GARCIA: It's a rifle, not a shotgun.

10 MS. STARE: It's a rifle. Terribly sorry.

11 JUDGE RIVERA: Concede that, Counsel. Just
12 concede it.

13 MS. STARE: I say that he's entitled to it
14 because it's - - - it's not a firearm. So he - - - just
15 showing it's not a firearm has satisfied the fact that it's
16 not an operable pistol, revolver, et cetera.

17 JUDGE RIVERA: Okay.

18 CHIEF JUDGE WILSON: Thank you.

19 (Court is adjourned)
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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Smith (Mark A.), No. 117 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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