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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2013-2014

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Ex parte James Lee Ware

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: James Lee Ware

v.

State of Alabama)

(Tuscaloosa Circuit Court, CC-06-284; Court of Criminal Appeals, CR-08-1177)

MURDOCK, Justice.

In June 2008, James Lee Ware was convicted of first-degree rape, see Ala. Code 1975, § 13A-6-61(a)(1), first-degree burglary, see Ala. Code 1975, § 13A-7-5(a)(1), and first-degree robbery, see Ala. Code 1975, § 13A-8-41(a)(1).

Ware was sentenced as an habitual felony offender to three sentences of life imprisonment, to be served consecutively. Ware appealed his convictions to the Court of Criminal Appeals. The Court of Criminal Appeals affirmed the trial court's judgment. Ware v. State, [Ms. CR-08-1177, March 25, 2011] ___ So. 3d ___ (Ala. Crim. App. 2011).

On appeal to the Court of Criminal Appeals, Ware raised the following issues, among others, (1) whether the trial court violated his Sixth Amendment right to confront the witnesses against him when it admitted a DNA-profile[1] report that was based on the work of laboratory technicians who did not testify at trial and (2) whether the trial court erred in denying his motion for a judgment of acquittal on the robbery and burglary charges because, Ware contends, there was not sufficient evidence to prove beyond a reasonable doubt that he

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[1]"DNA identification" or DNA profiling is

> "[a] method of scientific identification based on a person's unique genetic makeup; specif., the comparison of a person's deoxyribonucleic acid (DNA) —- a patterned chemical structure of genetic information —- with the DNA in a biological specimen (such as blood, tissue, or hair) to determine whether the person is the source of the specimen. DNA evidence is used in criminal cases for purposes such as identifying a victim's remains, linking a suspect to a crime, and exonerating an innocent suspect."

Black's Law Dictionary 551 (9th ed. 2009).

was armed with a deadly weapon or a dangerous instrument. This Court granted certiorari review as to those two issues. We affirm as to the first issue and reverse as to the second.

I. Facts

On the night of June 8, 1993, L.M., a graduate student enrolled at the University of Alabama in Tuscaloosa, was asleep in her bed when she was awakened by a man lying on top of her and covering her eyes with a towel and a plastic bag. L.M. testified that, while she was struggling with her attacker, she "felt, [she] thought, something sharp in [the attacker's] back pocket." L.M. was forcibly raped two times and was left blindfolded, with her feet bound with an electrical extension cord. Money and a ring had been taken from her house. After the attacker left, L.M. called the police. L.M. was taken to the hospital, where a rape-kit analysis was prepared.[2] Other than the rape kit, no physical evidence was obtained from the crime scene that could be used to identify the rapist.

The case remained unsolved for several years. In 2004 the Alabama Department of Forensic Sciences ("the DFS") obtained a grant that enabled "cold-case rapes" to be tested

[2]At the hospital, L.M. was examined and swabs were used to take samples of bodily fluids from L.M.'s vagina and mouth.

for the presence of deoxyribonucleic acid ("DNA"), which, if present, could lead to the identification of the rapist. In 2004, the Tuscaloosa Police Department delivered to the DFS the rape kits from several unsolved rape cases, including L.M.'s. Later in 2004, the DFS delivered those rape kits, including L.M.'s, to Orchid Cellmark Laboratory ("Cellmark") in Germantown, Maryland.

Cellmark laboratory technicians processed the biological material taken from swabs in L.M.'s rape kit, tested the DNA present in that material, and developed a DNA profile of the male whose semen was found on the vaginal swab. The record discloses that as many as six laboratory technicians performed tests on L.M.'s vaginal swabs. Cellmark prepared a three-page DNA-profile report containing a summary description of the tests performed and DNA profiles of L.M. and the as yet unidentified male donor. Cellmark also prepared a "case file" or "case folder" documenting (1) each of the steps in the process, (2) various review checklists, and (3) machine-generated results in the form of graphs and charts.[3] The DNA-

[3]The case file consists of approximately 41 pages that document, step by step, Cellmark's handling of the swabs contained in the rape kit, the tests that were performed on the samples, and the results of the tests, most of which are in the form of machine-generated graphs. The case file also includes reports generated by the DFS documenting the collection of the samples from L.M. and the chain of custody.

profile report was based on the data documented in the case file.

The DNA-profile report and the case file generated by Cellmark were sent to Angelo DellaManna at the DFS. DellaManna compared the DNA profile sent to him by Cellmark to other known DNA profiles contained in the Combined DNA Index System ("CODIS"), which is a nationwide repository for DNA-specimen information. See Ala. Code 1975, § 36-18-21(j). DellaManna testified that the DNA profile received from Cellmark matched Ware's DNA profile in CODIS.[4]

Pursuant to routine procedure at the DFS, once the DNA match was ascertained, the DFS confirmed that the CODIS profile under Ware's name actually was that of Ware. The DFS also took a new DNA sample from Ware's cheek and confirmed that the DNA profile from Ware's cheek sample matched the CODIS sample as well as the semen profile from the vaginal swabs taken from L.M.

Ware objected to the admission of any documents prepared by Cellmark and to any testimony from DellaManna as to what Cellmark did with respect to L.M.'s rape kit. Ware objected

[4]DellaManna also testified that the Cellmark laboratory technicians properly performed all tests on the biological material in accordance with the controls and procedures put in place by the DFS and that there were "no errors in [L.M.'s] case."

that the use of this evidence violated his Sixth Amendment right to confront and to cross-examine the Cellmark laboratory technicians who performed the tests that formed the basis for the DNA-profile report.

The State also presented testimony from Cellmark's molecular geneticist, Jason E. Kokoszka, Ph.D., who supervised and reviewed the testing and analysis of L.M.'s case and who signed Cellmark's DNA-profile report in L.M.'s case. Kokoszka testified that L.M.'s case file was kept in the regular course of business at Cellmark and that he was the custodian of those records.

Kokoszka testified that the case file reflects "all the analyses that occurred in L.M.'s case from start to finish, culminating with the ... review checklists that the person reporting the case and reviewing the case would fill out to show what actually occurred inside the case." Kokoszka further testified that as the reviewer of all the work done in this case, he had reviewed the "identification of the semen upon the sample which occurred prior to the DNA testing," and he had reviewed "all the analyses that were performed to ensure that they were performed in accordance with [Cellmark's standard operating procedures] and also ensured that the conclusions drawn from the data were accurate and appropriate

as well." Kokoszka initialed the review sheets in the case file to reflect that he had reviewed the case, and he stated that his personal review meant that the work was performed "in accordance with the guidelines" that were in place. He stated that "[t]o [his] knowledge there were no errors that occurred during the analysis of the case."

During the State's examination of Kokoszka, the DNA-profile report and the case file were admitted into evidence over Ware's Confrontation Clause objection. In admitting the report, the trial court stated:

> "I believe that [under] the cases following Crawford [v. Washington, 541 U.S. 36 (2004),] and Crawford [itself], the supervisor of the lab work and that prepared the report, if that person is present to -- present and subject to cross-examination, Crawford is satisfied. The Court is going to overrule the objection."

Other than the DNA evidence, no evidence was presented that would identify the rapist. Ware contends that the DNA match was proven to be erroneous by evidence indicating that he was incarcerated in the Autauga County jail at the time of the rape. The evidence as to Ware's incarceration is in dispute.[5] In 1993, Ware was incarcerated in the Autauga County jail and was serving as a jail cook. There was

[5]No documentary evidence was presented; the jail records were allegedly destroyed by a flood several years ago.

evidence presented indicating that while he was incarcerated Ware was treated as a trusty and was at least occasionally granted unsupervised leave from the jail. There was also evidence indicating that Ware allegedly spent some time at an address four blocks from where L.M. was raped. Thus, the evidence as to Ware's alibi presented a question for the jury.

II. Confrontation Clause of the Sixth Amendment

A. Standard of Review

"Where an issue presents a pure question of law, ... this Court's review is de novo." Ex parte Peraita, 897 So. 2d 1227, 1231 (Ala. 2004). Likewise, a trial court's application of the law to the facts is reviewed de novo. Ex parte Jackson, 886 So. 2d 155, 159 (Ala. 2004). See also Stewart v. State, 990 So. 2d 441, 442 (Ala. Crim. App. 2008) ("Where ... an appellate court reviews a trial court's conclusion of law and its application of law to the facts, it applies a de novo standard of review.").

B. The Court of Criminal Appeals' Decision

Before the Court of Criminal Appeals, Ware contended that the trial court had violated his Sixth Amendment right to confront witnesses against him when it admitted into evidence testimony and reports based on the workproduct of laboratory technicians who did not testify at the trial. Specifically,

Ware contended that the DNA-profile report and related evidence is testimonial in nature under the principles set forth in Crawford v. Washington, 541 U.S. 36 (2004), and Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

The Court of Criminal Appeals concluded that the DNA-profile report was not "testimonial" because, it reasoned, (1) the report was not in the form of an affidavit, (2) the laboratory technicians were not engaged in an accusatory function, (3) the data entries were "routine," (4) Ware was not identified as a suspect at the time the tests were performed, and (5) there was no potential for prosecutorial abuse under the circumstances of this case.

C. United States Supreme Court Precedent

The Sixth Amendment of the United States Constitution provides in part that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...." In Ohio v. Roberts, 448 U.S. 56, 66 (1980), the United States Supreme Court held that the Confrontation Clause does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability.'"[6]

[6]"To meet that test, evidence must either fall within a 'firmly rooted hearsay exception' or bear 'particularized guarantees of trustworthiness.'" Crawford, 541 U.S. at 40

In Crawford, the United States Supreme Court overruled Roberts, rejecting the "reliability" standard and holding that the right to confront witnesses applies to all out-of-court statements that are "testimonial." 541 U.S. at 68. Although the Crawford Court did not arrive at a comprehensive definition of "testimonial," it noted that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure,[7] and particularly its use of ex parte examinations as evidence against the accused." 541 U.S. at 50.

The Crawford Court described the "core" class of statements covered by the Confrontation Clause as follows:

> "Various formulations of this core class of 'testimonial' statements exist: 'ex parte in-court testimony or its functional equivalent —- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'; 'extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'; 'statements that were made under circumstances which would lead an objective witness

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(citing Roberts, 448 U.S. at 66).

[7]The reference to civil-law mode of criminal procedure was a reference by the Crawford Court to the ex parte examinations traditionally used in the French criminal-law system, that is, officials would examine suspects and witnesses before trial and then read the examinations in court in lieu of live testimony. See Crawford, 541 U.S. at 43-44.

> reasonably to believe that the statement would be available for use at a later trial.'"

541 U.S. at 51—52 (internal citations omitted). Crawford held that a statement made by the defendant's wife during police interrogation was testimonial and subject to the Confrontation Clause.

Since Crawford, the Supreme Court has released three decisions addressing the application of the Confrontation Clause to forensic-testing evidence. In Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), the Supreme Court held that a sworn certificate of analysis attesting that certain materials were cocaine was a testimonial statement.[8] The Court in Melendez-Diaz declined to create a forensic-testing exception, and it rejected the argument that the certificate at issue there was not testimonial because it was not "accusatory."

In Bullcoming v. New Mexico, ___ U.S. ___, 131 S. Ct. 2705 (2011), the Supreme Court held that the Confrontation Clause applied to an unsworn forensic-laboratory report

[8]Justice Thomas, who provided one of the five votes for the judgment in Melendez-Diaz, authored a concurring opinion in which he reasoned that the certificate of analysis at issue was an affidavit and thus fell "'within the core class of testimonial statements ....'" Melendez-Diaz, 557 U.S. at 329 (Thomas, J., concurring) (quoting White v. Illinois, 502 U.S. 346, 365 (1992)).

certifying the defendant's blood-alcohol level, where the report was specifically created to serve as evidence in a criminal proceeding and there was an adequate level of formalities in the creation of the report.

In Williams v. Illinois, ___ U.S. ___, 132 S. Ct. 2221 (2012), the United States Supreme Court held, in a plurality opinion,[9] that the Confrontation Clause was not violated where an expert was allowed to offer an opinion based on a DNA-profile report prepared by persons who did not testify and who were not available for cross-examination. Williams involved a bench trial in which a forensic specialist from the Illinois State Police laboratory testified that she had matched a DNA profile prepared by an outside laboratory to a profile of the defendant prepared by the state's lab. The outside lab's DNA report was not admitted into evidence, but the testifying

[9]The plurality opinion, authored by Justice Alito, received four votes; a dissenting opinion authored by Justice Kagan received four votes; Justice Thomas wrote an opinion concurring in the judgment but "shar[ing] the dissent's view of the plurality's flawed analysis." Williams, ___ U.S. at ___, 132 S. Ct. at 2255 (Thomas, J., concurring in the judgment). Justice Breyer concurred in the plurality opinion, but wrote separately to request that the case be reargued to more fully address how the Confrontation Clause applies to crime-laboratory reports and to suggest that the Confrontation Clause does not bar DNA reports from accredited crime laboratories.

analyst was allowed to refer to the DNA profile as having been produced from the semen sample taken from the victim.

The plurality opinion concluded that the analyst's testimony was not barred by the Confrontation Clause for two independent reasons, neither of which received the concurrence of a majority of the Court. First, the plurality concluded that the expert's testimony was not admitted for the truth of the matter asserted but was admitted only to provide a basis for the testifying expert's opinions.[10] Second, the plurality concluded that the DNA-profile report was not testimonial because its primary purpose was not to accuse the defendant or to create evidence for use at trial, but "for the purpose of finding a rapist who was on the loose." Williams, ___ U.S. at ___, 132 S.Ct. at 2228. The Williams plurality also noted the inherent reliability of DNA-testing protocols and the difficulties in requiring the prosecution to produce the analysts who actually did the testing.[11]

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[10]Justice Thomas, in his opinion concurring in the judgment in Williams, disagreed that there was any legitimate nonhearsay purpose for the analyst's testimony, noting that "[t]here is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth." Williams, ___ U.S. at ___, 132 S.Ct. at 2257 (Thomas, J., concurring in the judgment).

[11]The latter propositions are in tension with Crawford's rejection of the "reliability" standard in Confrontation

Justice Thomas concurred in the judgment in Williams based on his conclusion that the DNA-profile report "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." Williams, ___ U.S. at ___, 132 S. Ct. at 2255 (Thomas, J., concurring in the judgment). Justice Thomas, however, "shar[ed] the dissent's view of the plurality's flawed analysis." Id.

In light of the fractured nature of the decision in Williams, it is not clear how the United States Supreme Court will treat forensic reports under the Confrontation Clause. Justice Kagan concluded her dissenting opinion in Williams as follows:

> "[The] clear rule [of Confrontation Clause precedent] is clear no longer. ... What comes out of four Justices' desire to limit Melendez-Diaz and Bullcoming in whatever way possible, combined with one Justice's one-justice view of those holdings, is —- to be frank —- who knows what. Those decisions apparently no longer mean all that they say. Yet no one can tell in what way or to what extent they are altered because no proposed limitation commands the support of a majority."

___ U.S. at ___, 132 S.Ct. at 2277 (Kagan, J., dissenting). See also United States v. Pablo, 696 F.3d 1280, 1293 (10th

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Clause cases and with Melendez-Diaz's rejection of a forensic-testing exception. Nonetheless, the Williams plurality did not overrule or expressly reject any portion of the holdings of Crawford, Melendez-Diaz, or Bullcoming.

Cir. 2012) (noting that, in light of the divided opinions in Williams, admission of forensic reports over a Confrontation Clause objection "is a nuanced legal issue without clearly established bright line parameters").[12]

D. Analysis

In light of the foregoing, a case can be made for both sides of the issue whether the DNA-profile report in this case is "testimonial" under the "holdings" of Melendez-Diaz, Bullcoming, and Williams. The issue is a challenging one. We need not resolve it, however, because we agree with the trial court that, in this case, the Confrontation Clause was satisfied by the testimony of Kokoszka, a Cellmark employee who supervised and reviewed the DNA testing and who signed the DNA-profile report.

[12]In Marks v. United States, 430 U.S. 188, 193 (1977), the Supreme Court stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by the Members who concurred in the judgment on the narrowest grounds.'" In Johnson v. Board of Regents of University of Georgia, 263 F.3d 1234, 1248 n.12 (11th Cir. 2001), the United States Court of Appeals for the Eleventh Circuit concluded that the "Supreme Court has not compelled us to find a 'holding' on each issue in each of its decisions. On the contrary, the Court has indicated that there may be situations where even the Marks inquiry does not yield any rule to be treated as binding in future cases." (Citing Nichols v. United States, 511 U.S. 738, 745-46 (1994).) Given the 4-1-4 split and the nature of the view of the Confrontation Clause expressed by Justice Thomas, Williams may be such a case.

The United States Supreme Court has not squarely addressed whether the Confrontation Clause requires in-court testimony from all the analysts who have participated in a set of forensic tests, but Bullcoming and Williams suggest that the answer is "no." In Bullcoming, the Supreme Court held:

> "[S]urrogate testimony [through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification] does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist."

___ U.S. at ___, 131 S. Ct. at 2710.

Justice Sotomayor noted in her special writing in Bullcoming concurring in part that the analyst who testified was not "a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." ___ U.S. at ___, 131 S.Ct. at 2722 (Sotomayor, J., concurring in part). She also stated that "it would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results." Id.

Likewise, the dissenting opinion in Williams suggested that the dissenters' approach to the Confrontation Clause

would not require testimony from every person who had participated in the analytical process. The dissent stated:

> "But none of our cases -- including this one -- has presented the question of how many analysts must testify about a given report. (That may suggest that in most cases a lead analyst is readily identifiable.) The problem in the cases ... is that no analyst came forward to testify."

Williams, ___ U.S. at ___ n. 4, 132 S.Ct. 2273 n. 4 (Kagan, J., dissenting).

We conclude that Kokoszka's testimony in this case satisfied the purpose of the Confrontation Clause. Kokoszka signed the DNA-profile report and initialed each page of Cellmark's "case file" that was also admitted into evidence. Kokoszka testified that he was one of the individuals taking responsibility for the work that resulted in the report and that he had reviewed each of the analyses undertaken to determine that they were done according to standard operating procedures and that the conclusions drawn were accurate and appropriate. Kokoszka's testimony at trial provided Ware with an opportunity to cross-examine Kokoszka about any potential errors or defects in the testing and analysis, including errors committed by other analysts who had worked on the case. The trial court found that Kokoszka's testimony satisfied the requirements of the Confrontation Clause. We agree.

Based on the foregoing, we affirm the decision of the Court of Criminal Appeals to the extent that it affirmed Ware's conviction for first-degree rape and the life sentence imposed on that conviction.

III. Sufficiency of the Evidence

A. Standard of Review

> "'Appellate courts are limited in reviewing a trial court's denial of a motion for judgment of acquittal grounded on insufficiency.' 'The standard of review in determining sufficiency of evidence is whether evidence existed at the time [the defendant's] motion for acquittal was made, from which the jury could by fair inference find the [defendant] guilty.' In determining the sufficiency of the evidence, we view the evidence in the light most favorable to the State."

Ex parte Burton, 783 So. 2d 887, 890–91 (Ala. 2000) (citations omitted). In order to find a defendant guilty, the jury must find that the State proved each and every element of the offense charged beyond a reasonable doubt. See, e.g., Ex parte Brown, 74 So. 3d 1039, 1052 (Ala. 2011); Goodwin v. State, 728 So. 2d 662, 671 (Ala. Crim. App. 1998) ("'It is fundamental that in a criminal prosecution the burden is on the state to prove beyond a reasonable doubt each and every element of the offense charged.'" (quoting Hall v. State, 607 So. 2d 369, 373 (Ala. Crim. App. 1992))).

B. Analysis

This Court granted certiorari review as to Ware's assertion that the Court of Criminal Appeals' judgment on his burglary and robbery convictions conflicted with Thornton v. State, 883 So. 2d 733, 736-37 (Ala. Crim. App. 2003), which noted that "'"there must be substantial evidence tending to prove all the elements of the charge."'" (Quoting Ex parte Mitchell, 723 So. 2d 14, 15 (Ala. 1998), quoting in turn H. Maddox, Alabama Rules of Criminal Procedure § 20.1, at 734 (2d ed. 1994).)[13] Actual possession or use of a "deadly weapon" or a "dangerous instrument," as those terms are defined in the relevant statutes, is an element of both the robbery and burglary offenses of which Ware was convicted.

[13]Elaborating on the "substantial evidence" requirement, the court in Thornton quoted with approval from this Court's opinion in Ex parte Mitchell, 723 So. 2d 14 (Ala. 1998):

> "'Rule 20.1(a), Ala. R. Crim. P., requires that a motion for a judgment of acquittal be granted as to any offense "for which the evidence is insufficient to support a finding of guilty beyond a reasonable doubt." One commentator explains: "There must be substantial evidence tending to prove all the elements of the charge, and the burden is on the State to prove beyond a reasonable doubt that the crime has been committed and that the defendant was the person who committed it." H. Maddox, Alabama Rules of Criminal Procedure § 20.1, at 734 (2d ed. 1994).'"

Thornton, 883 So. 2d at 736-37 (quoting Mitchell, 723 So. 2d at 15).

Ware contends that L.M.'s testimony —- that she "thought" she felt "something sharp" in Ware's back pocket —- did not amount to substantial evidence sufficient to prove beyond a reasonable doubt that Ware actually was armed with a "deadly weapon" or a "dangerous instrument" as those terms are statutorily defined.[14]

As to the robbery conviction, Ware was charged and convicted of robbery in the first degree under the following provisions of § 13A-8-41:

> "(a) A person commits the crime of robbery in the first degree if he violates Section 13A-8-43 and he:
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> "(1) Is armed with a deadly weapon or dangerous instrument ...."

To aid the State in proving the element of being armed with a deadly weapon or dangerous instrument, the statute provides that certain conduct by the defendant constitutes prima facie

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[14]Justice Shaw seeks to re-frame the question before us, asserting at the outset of his special writing that "[t]he main opinion holds that a rational juror could not conclude that a sharp object in the pocket of the pants of a man committing burglary, robbery, and rape was a deadly weapon." ___ So. 3d at ___ (Shaw, J., concurring in part and dissenting in part). We do not so hold; the question before us is not whether a rational juror could have concluded that a sharp object is a deadly weapon. Instead, as stated, the question we must, and do, decide is whether there was sufficient evidence introduced in this case that the object in the pocket of this man was a "deadly weapon" or "dangerous instrument," as those terms specifically are defined in § 13A-1-2(7) and (5), Ala. Code 1975, respectively.

evidence that the defendant was so armed. Subsection (b) provides:

> "(b) Possession then and there of an article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or dangerous instrument, or any verbal or other representation by the defendant that he is then and there so armed, is prima facie evidence under subsection (a) of this section that he was so armed."

(Emphasis added.)

The Code of Alabama defines "deadly weapon" as a "firearm or anything manifestly designed, made, or adapted for the purposes of inflicting death or serious physical injury." § 13A-1-2(7), Ala. Code 1975 (emphasis added).[15] A "dangerous

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[15]As Justice Shaw notes, § 13A-1-2(7) also provides that the term "deadly weapon" includes certain types of knives, including a "switch-blade knife" and a "gravity knife." ___ So. 3d at ___. There is no evidence indicating that, if there was a sharp object in Ware's back pocket, it was one of those particular types of knives.

Justice Shaw also observes that "any sharp object can be 'manifestly designed, made, or adapted for the purposes of inflicting death or serious physical injury.'" ___ So. 3d at ___ (last emphasis in original). This is true, but this is not the test. If it were, then it would be sufficient that an assailant have on his or her person a set of car keys, an ink pen, a pencil, or a even a cellular telephone or a pair of eye-glasses that could be broken so as to create a sharp edge or object. Indeed, almost any article of clothing worn by any defendant in any robbery or assault could be adapted for use in strangling a victim. It is critical to keep in mind, therefore, that the legislature had in mind not what "can be '... adapted for the purposes of inflicting death or serious physical injury,'" which would mean that almost any robbery would be an "armed" robbery, but what is "designed, made or

instrument" is defined as "any instrument, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is highly capable of causing death or serious physical injury." § 13A-1-2(5), Ala. Code 1975 (emphasis added).

Subsection (b) addresses two types of conduct by the defendant that constitute prima facie evidence of being armed: (1) possession of an "article used or fashioned in a manner to lead a person reasonably to believe it to be a deadly weapon or dangerous instrument" or (2) a representation by the defendant that he is so armed.

Ware's indictment alleged that Ware had in his possession a "knife or other sharp object" at the time the offenses were committed.[16] No knife or other sharp object was found at the scene or introduced into evidence, and there was no evidence indicating that L.M. actually saw a knife or similar object. Nor was there any evidence indicating that Ware made any

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adapted" for such purpose, and "manifestly" so. This is consistent with the legislature's providing a list of examples in § 13A-1-2(7) that reads as follows: "a pistol, rifle, or shotgun; or a switch-blade knife, gravity knife, stiletto, sword, or dagger; or any billy, black-jack, bludgeon, or metal knuckles."

[16]There was no allegation in the indictment, and no evidence introduced at trial, that Ware made any representation to L.M. that he had in his possession a knife or other deadly weapon or dangerous instrument.

"verbal or other representation" to L.M. that he was so armed. The only evidence as to whether Ware was armed was L.M.'s testimony that, as she was flailing her arms, she "thought" she felt "something sharp" in Ware's back pocket. Thus, in the present case, the State sought to meet the requirement for establishing a prima facie case under § 13A-8-41(b) by proving that Ware possessed an article that was "used or fashioned in a manner to lead a person reasonably to believe it to be a deadly weapon or dangerous instrument."

L.M. did not testify that she saw or felt "a knife," only that while she "was flailing [her] arms around ... [she] felt, [she] thought, something sharp in [Ware's] back pocket." L.M. did not testify as to what, exactly, she thought the "something sharp" in Ware's pocket was, nor did she provide any details regarding what she felt (size, approximate shape, etc.). This testimony, even when viewed in the light most favorable to the State, is not substantial evidence that would support a finding beyond a reasonable doubt of the "deadly weapon" element of the offense of first-degree robbery, especially when one considers that § 13A-1-2(7) defines a deadly weapon as that which is "manifestly designed, made, or adapted" for the purpose of "inflicting death or serious physical injury." Likewise, this testimony, even when viewed

in the light most favorable to the State, is not substantial evidence in support of a finding beyond a reasonable doubt that Ware was armed with a "dangerous instrument," considering the definition of this latter term as limiting it to instruments that, under the circumstances in which they are "used, attempted to be used, or threatened to be used," are "highly capable of causing death or serious physical injury." See § 13A-1-2(5).[17]

As for the State's attempt to rely upon the provisions of § 13A-8-41(b), proof beyond a reasonable doubt of the requirements prescribed by that subsection requires not merely

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[17]Justice Shaw cites Ex parte Williams, 780 So. 2d 673 (Ala. 2000), for the proposition that, because a can of beans or peas in that case was considered a "dangerous weapon," we likewise must consider the "sharp object" L.M. thought she felt in Ware's back pocket to have been a "deadly weapon" or "dangerous instrument." ___ So. 3d at ___ n. 21. Ex parte Williams, however, is distinguishable in relation to the requirements imposed by the relevant statutes. The Court explained in Ex parte Williams that "[the victim] said the man ... grabbed some canned 'beans or peas from a shelf' and began hitting her with the can or cans." 780 So. 2d at 674 (emphasis added). More specifically, the Court accepted the treatment of the can as a dangerous instrument "used as the robbery victim says the robber in this case used a can (or cans) of peas or beans." Id. at 674 (emphasis added). In contrast, in the present case, there was no evidence indicating that Ware ever removed from his pocket whatever it was that L.M. "thought" she felt there and, specifically, no evidence indicating that it was ever "used" or "manifestly ... adapted for the purpose of inflicting death or serious physical injury." See §§ 13A-8-41(b) and 13A-1-2(5) and (7).

that the victim subjectively believed that the defendant possessed a "deadly weapon" or "dangerous instrument," but that he or she also "reasonably ... believed" this to be true. The only evidence in this case of either a "subjective belief" or a "reasonable belief" that Ware possessed a "deadly weapon" or a "dangerous instrument," as those terms are defined, is L.M.'s limited testimony that, as she was flailing about, she happened to feel, "she thought," "something sharp" in Ware's back pocket. Such testimony is simply too limited, vague, and equivocal to support a finding beyond a reasonable doubt of the "deadly weapon" or "dangerous instrument" element necessary for a conviction for first-degree armed robbery.[18]

We conclude that the State did not present sufficient evidence to support a finding beyond a reasonable doubt of the "armed" element of first-degree robbery. Accordingly, the trial court should have granted Ware's motion for an acquittal on the first-degree-robbery charge because one of the elements of that offense was not proven.

[18]Common experience suggests that there are numerous objects that might feel "sharp" when felt through the pocket of another person's pants. Although many such items might be adapted for use as a weapon under certain circumstances, most of those items would not constitute "deadly weapons" or "dangerous instrumentalities" as those terms are defined in the statute.

As to the first-degree-burglary conviction, the version of § 13A-7-5 in effect at the time of the offense in 1993 included as an element of the offense that the defendant be armed with a deadly weapon or use or threaten the use of a dangerous instrument. Specifically, the applicable version of § 13A-7-5 provided, in pertinent part:

> "(a) A person commits the crime of burglary in the first degree if he knowingly and unlawfully enters or remains unlawfully in a dwelling with intent to commit a crime therein, and, if, in effecting entry or while in dwelling or in immediate flight therefrom, he or another participant in the crime:
>
> "(1) Is armed with explosives or a deadly weapon; or
>
> "....
>
> "(3) Uses or threatens the immediate use of a dangerous instrument."

(Emphasis added.) Significantly, § 13A-7-5 contained no analog to the provision in § 13A-8-41(b) regarding conduct that constitutes prima facie evidence that the defendant was armed.

To convict Ware of first-degree burglary under the above-quoted provision, the State was required to prove that he was armed with a deadly weapon or that he used or threatened the immediate use of a dangerous instrument. As noted, there was

no evidence indicating that Ware made any threat or used a knife or similar object.

In this case, the sufficiency-of-the-evidence issue turns on whether Ware was armed with a "knife or other sharp object" constituting a deadly weapon. As discussed in connection with the robbery conviction, the fact that L.M. felt, "she thought," "something sharp" in Ware's pants pocket is not sufficient to prove beyond a reasonable doubt that Ware was armed with a deadly weapon. Only through conjecture or speculation could one say that an unidentified "sharp" object was a knife or similar deadly weapon.

We conclude that the State did not present sufficient evidence to support a finding beyond a reasonable doubt of the "armed" element of first-degree burglary under the version of § 13A-7-5 in effect at the time of the offense. Accordingly, the trial court should have granted Ware's motion for an acquittal on the first-degree-burglary charge because one of the elements of that offense was not proven.[19]

[19]As to both the robbery and the burglary convictions, the State does not suggest in its brief to this Court what the "something sharp" that L.M. thought she felt was. The State does, however, contend that the towel and plastic bag used in the rape were also "dangerous instrumentalities." Id. That contention fails because Ware's indictment alleged that he was armed with a knife or sharp object. Further, the record does not reflect that Ware used those objects for any purpose other than covering L.M.'s eyes.

Although the trial court erred in denying Ware's motion for a judgment of acquittal on the first-degree-robbery and first-degree-burglary offenses, it appears that the State presented substantial evidence to support a conviction for a lesser-included offense to each of the robbery and burglary charges (third-degree robbery under § 13A-8-43, Ala. Code 1975, and second-degree burglary under § 13A-7-6(b), Ala. Code 1975). We therefore find it appropriate to remand the cause for the trial court to enter judgment as to those lesser-included offenses and to impose appropriate sentences. See Ex parte Edwards, 452 So. 2d 508, 510 (Ala. 1984) ("'State and federal appellate courts have long exercised the power to reverse a conviction while at the same time ordering the entry of judgment on a lesser-included offense.'" (quoting Dickenson v. Israel, 482 F. Supp. 1223, 1225 (E.D. Wis. 1980))). See also McMillan v. State, 58 So. 3d 849, 853 (Ala. Crim. App. 2010) (reversing conviction for first-degree domestic violence because of insufficient evidence that deadly weapon was involved and remanding case with instructions to enter conviction on the lesser-included offense of second-degree domestic violence).

IV. Conclusion

Based on the foregoing, we affirm Ware's conviction and sentence as to the first-degree-rape charge. As to the first-degree-burglary and first-degree-robbery charges, we reverse the decision of the Court of Criminal Appeals and remand the case for that court to direct the trial court to vacate those convictions, to enter a judgment convicting Ware of the applicable lesser-included offense as to each of the robbery and burglary offenses, and to impose appropriate sentences.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Parker, J., concurs.

Main, J., and Lyons, Special Justice,* concur in part and concur in the result in part.

Moore, C.J., and Stuart, Bolin, Shaw, and Bryan, JJ., concur in part and dissent in part.

Wise, J., recuses herself.

*Retired Associate Justice Champ Lyons, Jr., was appointed to serve as a Special Justice in regard to this appeal.

LYONS, Special Justice (concurring in part and concurring in the result in part).

I concur in the main opinion insofar as it affirms the judgment of the Court of Criminal Appeals as to James Lee Ware's conviction and sentence for rape.

I concur in the result in the main opinion insofar as it reverses the judgment of the Court of Criminal Appeals as to Ware's convictions and sentences for first-degree robbery and first-degree burglary. The main opinion and Justice Shaw's special writing, dissenting from that portion of the main opinion, focus on the sufficiency of the evidence as to the state of mind of the victim, L.M., concerning the sharp object she felt in a back pocket of Ware's pants. I do not consider that issue relevant.

In Part III of his petition for the writ of certiorari, Ware refers to the Court of Criminal Appeals' applying an irrelevant statute and notes that there was no evidence indicating that he threatened L.M. with, fashioned, or used an object during the commission of the offense and no evidence indicating that he made any overt act with respect to an object. Ware's brief argues that the record is devoid of any evidence of threatening. Ware's contentions are accurate.

With respect to first-degree robbery, § 13A-8-41(a), Ala. Code 1975, provides:

> "A person commits the crime of robbery in the first degree if he violates Section 13A-8-43 and he:
>
> "(1) Is armed with a deadly weapon or dangerous instrument ...."

Section 13A-8-41(b), Ala. Code 1975, provides:

> "(b) Possession then and there of an article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or dangerous instrument, or any verbal or other representation by the defendant that he is then and there so armed, is prima facie evidence under subsection (a) of this section that he was so armed."

If Ware had been apprehended at the scene and found to have had a knife on his person, the requisite element for first-degree robbery would be satisfied without any inquiry into the reasonable belief of the victim. Of course, that was not the case here. The Court of Criminal Appeals relied upon § 13A-8-41(b) as the basis for an alternative means of proof of a deadly weapon or dangerous instrument, thereby making the victim's belief relevant. The record reflects that the State did not rely on § 13A-8-41(b) at trial.

The main opinion's rationale for reversing the judgment of the Court of Criminal Appeals on Ware's robbery and burglary convictions is the insufficiency of L.M.'s testimony that she thought she felt something sharp as proof of a reasonable belief of the presence of a deadly weapon or dangerous instrument under § 13A-8-41(b). In effect,

according to the main opinion, L.M.'s belief as to the presence of such an object is simply not reasonable.

Justice Shaw's special writing, relying on the alternative means of proof of the existence of a deadly weapon or dangerous instrument in § 13A-8-41(b), observes:

> "[T]he State can also meet its burden of showing that a defendant was armed with a deadly weapon or dangerous instrument by presenting evidence that the perpetrator was in possession 'of an article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or dangerous instrument ....' § 13A-8-41(b), Ala. Code 1975."

___ So. 3d at ___ (second emphasis added). Justice Shaw then bolsters the reasonableness of L.M.'s conclusion as to the presence of such an article by relying on cases holding that the victim need not actually see the object -- the deadly weapon or dangerous instrument -- to conclude that one is present. I am not persuaded that these cases apply here. This is so because "used or fashioned" as that phrase appears in § 13A-8-41(b) requires some conduct on Ware's part. It is undisputed that L.M.'s encounter with the sharp object was initiated by her hand coming in contact with Ware's back pocket while he was raping her.

Justice Shaw includes a quote from Lucas v. State, 45 So. 3d 380 (Ala. Crim. App. 2009), that references cases in which the victim had a reasonable belief concerning the object

or article found to be a deadly weapon or dangerous instrument, but in all of those cases the defendant was an actor with respect to the object or article that had frightened the victim and was not passive with respect to such object or article, as is the case here. See Dinkins v. State, 584 So. 2d 932 (Ala. Crim. App. 1991), in which the defendant pointed something at the victim that looked like a gun; Breedlove v. State, 482 So. 2d 1277 (Ala. Crim. App. 1985), in which the defendant stuck an object in the victim's side; and James v. State, 549 So. 2d 562 (Ala. Crim. App. 1989), in which the defendant had his hand in his pocket and gestured as if he had a pistol. In Lucas, the defendant pointed a gun at the victim that turned out to be a plastic toy. The quote from Lucas includes a quote from Rice v. State, 620 So. 2d 140 (Ala. Crim. App. 1993), in which the victim saw a small brown handle protruding from the defendant's pocket and the defendant said "don't make me pull this gun out." 620 So. 2d at 141. The quote from Rice included in Lucas and quoted in Justice Shaw's special writing includes the following telling statement from Breedlove, quoting with approval a Wisconsin case: "It [the statute] focuses on the 'reaction of the victim to the threats of the robber.' State v. Hopson, 122 Wis. 2d 395, 362 N.W.2d 166, 169 (1984)." 482 So. 2d at 1281

(emphasis added). In a footnote, Justice Shaw also relies upon Ex parte Williams, 780 So. 2d 673 (Ala. 2000), in which the defendant grabbed a can of beans and used it to hit the defendant. As noted, there is no evidence here of a threat by Ware involving the sharp object.

Assuming we could apply § 13A-8-41(b) even though it was not relied upon by the State at trial, the absence of any conduct by Ware with respect to the article beyond merely having it on his person precludes application of § 13A-8-41(b), i.e., the article was not "used or fashioned" in any manner. I agree with Ware's contention that the Court of Criminal Appeals applied an irrelevant statute. I therefore concur in the result as to the main opinion's reversal of the conviction for first-degree robbery. If the subjective belief of the victim reigns supreme, regardless of lack of activity of the defendant with respect to the article causing fear that the article is susceptible to being used or fashioned as a deadly weapon or dangerous instrument, then § 13A-8-41(b) would be available where the victim concluded that various articles on the defendant's person, such as a belt or a heavy belt buckle or shoes or boots or a ballpoint pen or shirt sleeves or a pant leg, might be so used or fashioned. The scope of § 13A-8-41(b) is then cabined only by the imagination

of the victim, a result not consistent with the text of § 13A-8-41(b).

Because of the inapplicability of § 13A-8-41(b) to the robbery conviction, I do not reach the question whether it could be applied in a prosecution for first-degree burglary, as is urged by Justice Shaw. I therefore also concur in the result as to the main opinion's reversal of the Court of Criminal Appeals' affirmance of Ware's conviction for first-degree burglary.

Main, J., concurs.

MOORE, Chief Justice (concurring in part and dissenting in part).

I concur as to the reversal of the Court of Criminal Appeals' judgment affirming James Lee Ware's burglary and robbery convictions because the State failed to prove that Ware was armed with a deadly weapon or that he used or threatened the immediate use of a dangerous instrument in committing the offenses with which he was charged.

I dissent as to the affirmance of the Court of Criminal Appeals' judgment affirming Ware's conviction and sentence for the rape charge. I believe the Confrontation Clause of the Sixth Amendment to the United States Constitution was not satisfied by the testimony of Jason Kokoszka, Ph.D., the molecular geneticist for Orchid Cellmark Laboratory ("Cellmark"). Kokoszka supervised and reviewed the DNA testing and signed the DNA-profile reports prepared by Cellmark. He also kept L.M.'s case file as Cellmark's custodian of records.

The Confrontation Clause guarantees that, "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Amend. VI, U.S. Constitution (emphasis added). As many as six Cellmark technicians performed DNA tests on L.M.'s vaginal swabs. The technicians who performed the DNA tests and prepared the DNA-profile reports were "the witnesses against [Ware]." The

Confrontation Clause protects the accused's right to confront the witnesses against him, not the witnesses' supervisor or reviewer, or the custodian of records. Other than the DNA evidence, no witnesses or evidence was presented that would identify the rapist in this case. Under these facts, Ware has been denied his Sixth Amendment right to cross-examine the witnesses against him. I respectfully dissent as to that part of the main opinion that in effect affirms Ware's conviction for rape.

BOLIN, Justice (concurring in part and dissenting in part).

I concur as to Part II of the main opinion, which affirms the decision of the Court of Criminal Appeals upholding James Lee Ware's conviction for first-degree rape in light of a Confrontation Clause challenge. I dissent as to Part III, which reverses the Court of Criminal Appeals' judgment on Ware's burglary and robbery convictions, and I join Justice Shaw's well reasoned dissent concerning the sufficiency of the evidence as to those two charges.

SHAW, Justice (concurring in part and dissenting in part).

I concur in affirming the decision of the Court of Criminal Appeals affirming James Lee Ware's first-degree-rape conviction.

As to that part of the main opinion that reverses the decision of the Court of Criminal Appeals affirming the first-degree-robbery and first-degree-burglary convictions, however, I dissent. The main opinion holds that a rational juror could not conclude that a sharp object in the pocket of the pants of a man committing burglary, robbery, and rape was a deadly weapon. I disagree.

The issue here concerns the sufficiency of the evidence. Specifically, Ware claims that the evidence was insufficient to show that he was armed with a deadly weapon and therefore insufficient to support his convictions for first-degree robbery and first-degree burglary.

> "'"In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution. Faircloth v. State, 471 So. 2d 485 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985)." Powe v. State, 597 So. 2d 721, 724 (Ala. 1991). It is not the function of this Court to decide whether the evidence is believable beyond a reasonable doubt, Pennington v. State, 421 So. 2d 1361 (Ala. Crim. App. 1982); rather, the function of this Court is to determine whether there is legal evidence from which a rational finder of

> fact could have, by fair inference, found the defendant guilty beyond a reasonable doubt. Davis v. State, 598 So. 2d 1054 (Ala. Crim. App. 1992). Thus, "[t]he role of appellate courts is not to say what the facts are. [Their role] is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury." Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978) (emphasis original).'"

Ex parte Tiller 796 So. 2d 310, 312 (Ala. 2001) (quoting Ex parte Woodall, 730 So. 2d 652, 658 (Ala. 1998)).

Accepting as true all the evidence introduced by the State, according the State all legitimate inferences from the evidence, and considering all the evidence in a light most favorable to the State, the testimony at trial shows the following: L.M. awoke sometime during the night with Ware on top of her, holding a plastic bag over her face. The jury heard the following testimony from L.M.:

> "I was disoriented at first and very confused about what was going on. And I realized that I was awake and there was someone on top of me. And he immediately started trying to push my legs apart and pulling my -- I had shorts on -- and pulling my shorts off and my underwear and trying to -- trying to enter me sexually. And I started crying and begging -- begging him to stop and to not hurt me. I was flailing my arms and I felt, I thought, something sharp in his back pocket, so I started begging him not to kill me.
>
> "And then he told me to put it in and I was screaming and crying, no, no. And he tried to go down and force himself on me orally, and I tried to keep my legs pushed together and I was begging him more. And then at some point he did enter me on top of me ....

"....

> "He told me to get up and he moved me over to my dresser. And tried to put me on top of -- sit me on top of my dresser and tried to physically enter me that way but was unable to reach me. And then he moved me off the dresser and laid me on top of my bed face down and then he entered me vaginally that way."

(Emphasis added.) Ware tied up L.M. and blindfolded her while he raped her, and he retied her legs when he was done. L.M. testified:

> "He told me -- or he turned me over on my back and retied my legs and told me not to move and be quiet and then he left the bedroom. I heard him leave the bedroom and I was trying to hear what was going on. I heard him move around in my house. I wasn't sure where he was and I was panicking because I was afraid he was going to come back and hurt me, kill me."

Ware stole various items from L.M.'s home, including jewelry and her underwear.

To be convicted of first-degree robbery, the defendant must be "armed with a deadly weapon or dangerous instrument ...." Ala. Code 1975, § 13A-8-41(a)(1). A "deadly weapon" includes, but is not limited to, "a pistol, rifle, or shotgun; or a switch-blade knife, gravity knife, stiletto, sword, or dagger; or any billy, black-jack, bludgeon, or metal knuckles." Ala. Code 1975, § 13A-1-2(7). The Code section does not limit the definition to items that are weapons per se but includes items fashioned to be used as a weapon: "anything

manifestly designed, made, or adapted for the purposes of inflicting death or serious physical injury." Id. A sharp object might not be a knife, but any sharp object can be "manifestly designed, made, or adapted for the purposes of inflicting death or serious physical injury." (Emphasis added.)

This Court does not "decide whether the evidence is believable beyond a reasonable doubt," Ex parte Woodall, 730 So. 2d 652, 658 (Ala. 1998) (citing Pennington v. State, 421 So. 2d 1361 (Ala. Crim. App. 1982)); instead, it looks here to see whether there was sufficient evidence from which the jury could conclude -- viewing all the evidence -- that the sharp object in Ware's pocket was a deadly weapon.

I believe that the jury could legitimately infer from the evidence that a sharp object -- when found in the possession of a man committing the acts described above -- is a deadly weapon. Ware broke into L.M.'s house at night while she was asleep, covered her eyes, tied her up, and raped her, even while she struggled against him and begged for her life. L.M. told the jury that the sharp object caused her to believe that Ware was going to hurt or kill her ("so I started begging him not to kill me"). The jury in this case might have concluded that a sharp object in the pocket of a random person on the

street might be one of "numerous objects" that are not deadly weapons. But we are not reviewing such a hypothetical scenario -- we are reviewing the evidence in the context presented in this case. A rational juror could conclude beyond a reasonable doubt that a sharp object was a deadly weapon when it was found in the possession of a man intent on rape, robbery, and burglary -- a man who broke into a home at night, who blindfolded and tied his victim, and who ignored her struggling and pleading and raped her. A juror could readily, easily, and beyond a reasonable doubt believe that a sharp object -- when in the possession of a man who planned and executed these acts -- was a deadly weapon. It would certainly not be irrational for a juror to so conclude.

The main opinion, however, appears to take the position that the sharp object could have been one of "numerous objects" that were not weapons. ___ So. 3d at ___ n. 18. But to "accord the State all legitimate inferences" from the evidence requires me to accept the jury's legitimate inference that the sharp object was a weapon and forbids me from accepting the alternate inference that it was not. Therefore, I believe the evidence was sufficient under § 13A-8-41(a).

Under the first-degree-robbery Code section, the State can also meet its burden of showing that a defendant was armed

with a deadly weapon or dangerous instrument by presenting evidence that the perpetrator was in possession "of an article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or dangerous instrument ...." § 13A-8-41(b), Ala. Code 1975. That evidence is "prima facie evidence under subsection (a) of this section that he was so armed." Id. This argument was raised by the State on appeal to the Court of Criminal Appeals and was relied on by that court. Ware, in his application for rehearing to that court, did not challenge the use of this Code section to affirm his conviction.[20] Because § 13A-8-41(b) is addressed by the main opinion, I will address it as an alternate means of affirming the Court of Criminal Appeals' judgment.

When it comes to determining whether one could "reasonably believe" under § 13A-8-41(b) that an article is a deadly weapon, the appellate courts look to the victim's subjective perception:

> "In determining whether there is sufficient evidence to support a conviction for robbery in the first degree, we look to the victim's perceptions:

[20]Instead, Ware argued that the evidence was insufficient to prove the existence of a deadly weapon under that Code section.

> "'In a prosecution for first degree robbery, the robbery victim does not actually have to see a weapon to establish the element of force; his or her reasonable belief that the robber is armed is sufficient. Dinkins v. State, 584 So. 2d 932 (Ala. Crim. App. 1991); Breedlove v. State, 482 So. 2d 1277 (Ala. Crim. App. 1985). The test to determine whether a person reasonably believes that an object is a deadly weapon is a "subjective" one. James v. State, 549 So. 2d 562 (Ala. Crim. App. 1989). "It focuses on the 'reaction of the victim to the threats of the robber.' State v. Hopson, 122 Wis. 2d 395, 362 N.W.2d 166, 169 (1984)." 482 So. 2d at 1281.'"

Lucas v. State, 45 So. 3d 380, 384 (Ala. Crim. App. 2009) (quoting Rice v. State, 620 So. 2d 140, 141–42 (Ala. Crim. App. 1993)). The fact that no weapon is seen is no barrier to proving that the defendant was armed as described in § 13A-8-41(b): "[U]nder Alabama law, the mere fact that the victim did not actually see a weapon would not defeat a conviction for first degree robbery." Breedlove v. State, 482 So. 2d 1277, 1281 (Ala. Crim. App. 1985).

Accepting as true all the evidence introduced by the State, according the State all legitimate inferences from the evidence, and considering all the evidence in a light most favorable to the State, I must conclude that there is sufficient evidence to show that the victim here reasonably believed the sharp object in Ware's pants pocket was a deadly

weapon or dangerous instrument.[21] Specifically, L.M. not only felt a sharp object in Ware's pocket but feeling the object also actually caused her to fear and beg for her life ("so I started begging him not to kill me"). L.M. feared for her life because she felt the sharp object in Ware's pocket. I can reach no conclusion other than that L.M. subjectively perceived that the sharp object in Ware's pocket was a weapon he could use to kill her. I reach this conclusion because that is a "legitimate inference" from her testimony: she felt a sharp object in Ware's pocket, "so" she believed Ware might kill her. Certainly, her testimony is sufficient evidence from which the jury could have concluded the same beyond a reasonable doubt.

Because the State presented sufficient evidence that, under § 13A-8-41(a), Ware was armed with a deadly weapon, and additionally, that L.M. reasonably believed that Ware was

[21]Given that this Court has previously accepted without a technical analysis that a can of beans or peas is a deadly weapon or dangerous instrument for purposes of proving first-degree robbery, I see no question whether a sharp object is considered as such. Ex parte Williams, 780 So. 2d 673, 674 (Ala. 2000) ("In its unpublished memorandum, the Court of Criminal Appeals stated that a can of vegetables, used as the robbery victim says the robber in this case used a can (or cans) of peas or beans, can constitute a 'dangerous weapon,' within the meaning of that term as it is used in § 13A-8-41. We agree. We think it unnecessary to further address Williams's argument that he was not armed with a 'deadly weapon or dangerous instrument.'").

armed with a deadly weapon under § 13A-8-41(b), I would affirm the first-degree-robbery conviction. Further, because the jury found that Ware was armed with a deadly weapon under § 13A-8-41 (either part (a) or (b)), such a finding is sufficient to show that Ware was armed with a deadly weapon for purposes of first-degree burglary under Ala. Code 1975, § 13A-7-5, as that Code section existed at the time of the offense in 1993.

Stuart, Bolin, and Bryan, JJ., concur.