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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2013

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Ex parte Luther Stancel Pate IV

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Luther Stancel Pate IV

v.

City of Tuscaloosa)

(Tuscaloosa Circuit Court, CC-10-102; Court of Criminal Appeals, CR-10-0843)

MAIN, Justice.

Luther Stancel Pate IV petitioned this Court for a writ of certiorari to review the judgment of the Court of Criminal Appeals, affirming Pate's conviction for menacing. We granted Pate's petition to consider, as questions of first impression, whether lawfully arming oneself is a "physical action" so as

to fulfill an element of Alabama's menacing statute, see § 13A-6-23(a), Ala. Code 1975, and whether the defense-of-premises statute, see § 13A-3-25, Ala. Code 1975, is applicable in this case. The Court of Criminal Appeals, in its unpublished memorandum, held that there was sufficient evidence of the "physical-action" element of menacing to present the question to the fact-finder. The Court of Criminal Appeals also held that Pate's conduct was not excused by the defense-of-premises statute.[1] Pate v. City of Tuscaloosa (No. CR-10-0843, June 22, 2012), __ So. 3d ___ (Ala. Crim. App. 2012)(table). For the reasons discussed below, we reverse and remand.

I. Factual Background and Procedural History

Pate leased a building he owned in Tuscaloosa to the owner of a restaurant called the Santa Fe Cattle Company ("Santa Fe"). The lease for Santa Fe was terminated for

[1]We note that the Court of Criminal Appeals affirmed the trial court's judgment without an opinion. Presiding Judge Windom and Judge Kellum recused themselves. On May 16, 2012, then Chief Justice Charles R. Malone of the Alabama Supreme Court appointed retired Alabama Supreme Court Associate Justice Patricia M. Smith to sit specially on this case pursuant to § 12-13-17, Ala. Code 1975. Judge Welch, Judge Joiner, and Special Judge Smith concurred in affirming the menacing conviction. Judge Burke dissented, without writing.

nonpayment of rent, and its parent company subsequently declared bankruptcy. Santa Fe closed on or around September 27, 2009. Santa Fe had been ordered to vacate the premises by September 29, 2009, but on September 30, 2009, Pate was alerted by one of his associates that Santa Fe employees were trespassing on the property. Pate directed his associate to contact the police.

On September 30, Walter Bryan Hart, Reneta Lawless, and Joseph Thompson, all Santa Fe employees, were at the building leased from Pate. They had been instructed by their supervisors to oversee the removal of leased restaurant equipment that remained inside Pate's building and also to clean the building in preparation for turning it over to Pate. One of Pate's associates, Chris Dobbs, followed by several police officers, arrived at the property while Hart, Lawless, and Thompson were there. After Hart and others discussed their presence in the building with the police, the police determined that it was a civil matter and they were not going to get involved.

Shortly thereafter, Pate arrived at the building and ordered everyone to leave the premises. According to Hart and

Thompson, when the police officers, who were still on the premises, seemed reluctant to get involved, Pate told them that if they were unable to prevent these people from trespassing on his property, he had a shotgun in his truck and he could get rid of the trespassers himself. At some point, the police did ask Hart and the other Santa Fe employees to leave the premises. Everyone initially obliged and left, but Hart reentered the premises for the purpose of, according to his testimony, retrieving his personal laptop computer. Pate, who had walked to the back of the premises to assess the damage to the premises after Hart and the others had initially left, returned to the front area where he saw Hart, once again, inside the premises.

According to Hart, Pate yelled at him and told him to get out of the building or he was going to "stomp [Hart's] a**." Hart said that Pate continued yelling at him as he walked outside. Hart testified that he went straight to his car, got in, and looked up to see Pate standing in front of his car pointing a shotgun at him and telling him to get off his property. Hart indicated that he left as quickly as possible because he was afraid Pate was going to hurt him physically.

Pate's version was that, when he returned to the front of the building and noticed Hart, he sent Dobbs to summon the police, who were still in another part of the building. Pate said that he ordered Hart, once again, to leave his property. Pate testified that Hart began to argue with him and then turned and proceeded toward his vehicle with Pate following behind him. As Hart walked toward his vehicle, Pate said that he went to his truck to retrieve his shotgun. Although Hart testified that Pate aimed the gun at him, Pate denied ever pointing the gun at Hart and stated that he only motioned with a pointing finger for Hart who was in his car, to leave the premises while Pate was holding the gun pointed down toward the ground.

Thompson testified, in pertinent part, that he, Lawless, and Hart left the restaurant as Pate and the officers requested, but after they left Hart told Thompson and Lawless that he was going back inside to get his laptop. Then, according to Thompson, as he and Lawless walked to their vehicle, Hart walked back toward the restaurant and yelled for the officers to get his computer. When Hart walked out of the restaurant the second time, Thompson saw Pate go to his truck

and get a shotgun out of his truck. Thompson testified that Pate held the gun in an upright position and pointed his finger at Lawless and Thompson, motioning for them to leave the property. According to Thompson, as Lawless started the vehicle, Pate directed his attention to Hart. Thompson stated that Pate lowered the gun to his side when the police came out of the building into the parking lot.

According to Officer R.B. Phillips of the Tuscaloosa Police Department, one of the officers who responded to the call made by Pate's employee, Pate was very angry and agitated when he arrived at the restaurant. Officer Phillips stated that Pate was yelling and saying that he wanted everybody out of the building. Officer Phillips testified that Pate indicated that he had a gun in his truck and that if the police could not get everybody out that he would "take care" of it. Officer Phillips testified that he never saw Pate point the shotgun anywhere but toward the ground. Officer Phillips said that he eventually took the shotgun from Pate. Tuscaloosa Police Officer Jeremy Todd testified that Pate stated that if the police could not get Hart and the others out of his building that he would get his gun from his truck

and take care of the situation himself. Officer Todd also stated that when he saw Pate the shotgun was angled toward the ground.[2]

Pate was charged with and convicted in the Tuscaloosa Municipal Court of menacing, a violation of Tuscaloosa City Ordinance § 17-1 and § 13A-6-23, Ala. Code 1975. Pate appealed to the Tuscaloosa Circuit Court for a trial de novo. After a bench trial, Pate was again convicted of menacing. The trial court stated:

> "THE COURT: But I assume that the hunter's position is that you did not--it was not pointed. So there's some dispute regarding whether or not you actually pointed it at Mr. Hart. However, the statute states that if you intentionally place or attempt to place another person in fear of imminent serious physical injury by a physical action that that still amounts to the crime of menacing. By

[2]A video disc containing the videos from four security tapes (three from the security camera at Santa Fe and one from a camera located in the police vehicle) was introduced into evidence at the trial, showing the sequence of events that occurred after Hart reentered the building. The tapes show Hart leaving the building with Pate and Dobbs behind him. Dobbs then goes back inside while Pate walks toward his truck, and Hart enters his vehicle. Pate retrieves his shotgun from his truck, and Hart is backing his vehicle out of his parking space while Pate begins walking toward Hart's parking space. The shotgun is in Pate's right arm pointed at the ground. Hart is shown backing out and driving toward the parking lot exit before Pate even reaches the vicinity of Hart's vehicle. No police officer is shown as being present in the vicinity until after Hart had left the parking lot.

> your testimony, by getting the gun and by your testimony to the effect that he was getting away rapidly because he was scared based upon you getting the gun, that would be physical action which the Court is of the opinion would amount to the crime of menacing.
>
> "And so for that reason, the Court finds you guilty of the crime of menacing."

(Emphasis added.)

The trial court sentenced Pate to 60 days in the municipal jail but suspended the sentence and placed Pate on probation for one year. The trial court also ordered Pate to pay fines and other fees. Pate appealed to the Court of Criminal Appeals. The Court of Criminal Appeals affirmed the conviction, without an opinion. Pate v. City of Tuscaloosa (No. CR-10-0843, June 22, 2012), ___ So. 3d ____ (Ala. Crim. App. 2012) (table). This Court granted certiorari review.

II. Analysis

Although this Court recognizes that this case involves the interplay of Alabama's menacing statute, § 13A-6-23(a), Ala. Code 1975, and a property owner's right to defend his premises from a trespasser under § 13A-3-25, Ala. Code 1975, we need not reach both of these issues to resolve this matter. Because of our construction of the menacing statute, we

pretermit consideration of the defense-of-premises issue. Pate argued below, as he does on certiorari review, that the trial court should have granted his motion for a judgment of acquittal because, he argues, merely arming himself, without any accompanying action, is not a "physical action" that could form the basis of a charge of menacing.

Menacing is defined in § 13A-6-23(a), Ala. Code 1975: "A person commits the crime of menacing if, by physical action, he intentionally places or attempts to place another person in fear of imminent serious physical injury." (Emphasis added.) The Commentary to § 13A-6-23 states that menacing encompasses the situation where "'physical injury' is neither inflicted nor intended." There is no statutory definition for the term "physical action." In this case, the trial court found that getting the gun was sufficient "physical action" to constitute the offense of menacing.

In examining the menacing statute, we must apply the following principles of statutory construction:

> "'"[I]t is well established that criminal statutes should not be 'extended by construction.'"' Ex parte Mutrie, 658 So. 2d 347, 349 (Ala. 1993) (quoting Ex parte Evers, 434 So. 2d 813, 817 (Ala. 1983), quoting in turn Locklear v. State, 50 Ala. App. 679, 282 So. 2d 116 (1973)).

> "'A basic rule of review in criminal cases is that criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e., defendants. Schenher v. State, 38 Ala. App. 573, 90 So. 2d 234, cert. denied, 265 Ala. 700, 90 So. 2d 238 (1956).
>
> "'Penal statutes are to reach no further in meaning than their words. Fuller v. State, 257 Ala. 502, 60 So. 2d 202 (1952).
>
> "'One who commits an act which does not come within the words of a criminal statute, according to the general and popular understanding of those words, when they are not used technically, is not to be punished thereunder, merely because the act may contravene the policy of the statute. Fuller v. State, supra, citing [Young v. State], 58 Ala. 358 (1877).
>
> "'No person is to be made subject to penal statutes by implication and all doubts concerning their interpretation are to predominate in favor of the accused. Fuller v. State, supra.'

"Clements v. State, 370 So. 2d 723, 725 (Ala. 1979) (quoted in whole or in part in Ex parte Murry, 455 So. 2d 72, 76 (Ala. 1984), and in Ex parte Walls, 711 So. 2d 490, 494 (Ala. 1997)) (emphasis added).

> "'"Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to apply to cases not covered by the words used ...." United States v. Resnick, 299 U.S. 207, 209, 57 S.Ct. 126, 127, 81 L.Ed. 127 (1936). See also, Ex parte Evers, 434 So. 2d 813, 816

> (Ala. 1983); Fuller v. State, 257 Ala. 502, 60 So. 2d 202, 205 (1952).'
>
> "Ex parte Jackson, 614 So. 2d 405, 406 (Ala. 1993) (emphasis added). '[T]he fundamental rule [is] that criminal statutes are construed strictly against the State. See Ex parte Jackson, 614 So. 2d 405 (Ala. 1993).' Ex parte Hyde, 778 So. 2d 237, 239 n. 2 (Ala. 2000) (emphasis added). The 'rule of lenity requires that "ambiguous criminal statute[s] ... be construed in favor of the accused."' Castillo v. United States, 530 U.S. 120, 131, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000) (paraphrasing Staples v. United States, 511 U.S. 600, 619 n. 17, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994))."

Ex parte Bertram, 884 So. 2d 889, 891-92 (Ala. 2003).

> "'Moreover, "one 'is not to be subjected to a penalty unless the words of the statute plainly impose it,' Keppel v. Tiffin Savings Bank, 197 U.S. 356, 362, 25 S.Ct. 443, 49 L.Ed. 790 [(1905)]. '[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-222, 73 S.Ct. 227, 229-230, 97 L.Ed. 260 [(1952)]." United States v. Campos-Serrano, 404 U.S. 293, 297, 92 S.Ct. 471, 474, 30 L.Ed.2d 457 (1971).'
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> "[United States v.] Bridges, 493 F.2d [918] at 923 [(5th Cir. 1974)].
>
> "'Words used in the statute must be given their natural, plain, ordinary, and commonly understood meaning.' Alabama Farm Bureau Mut. Casualty Ins. Co. v. City of Hartselle, 460 So. 2d 1219, 1223

> (Ala. 1984). The general rule of construction for the provisions of the Alabama Criminal Code is found in Ala. Code 1975, § 13A-1-6: 'All provisions of this title shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law, including the purposes stated in section 13A-1-3.' Among the purposes stated in § 13A-1-[3] is that found in subsection (2): 'To give fair warning of the nature of the conduct proscribed.'"

Carroll v. State, 599 So. 2d 1253, 1265 (Ala. Crim. App. 1992). In determining the proper application of a statute, this Court has a duty to "'ascertain and effectuate legislative intent expressed in the statute, which may be gleaned from the language used, the reason and necessity for the act, and the purpose sought to be obtained.'" Hunt v. State, 642 So. 2d 999, 1028 (Ala. Crim. App. 1993), aff'd, 642 So. 2d 1060 (Ala. 1994) (quoting Ex parte Holladay, 466 So. 2d 956, 960 (Ala. 1985)); see also Rutledge v. State, 745 So. 2d 912 (Ala. Crim. App. 1999).

Consistent with the foregoing and applying the principles of statutory construction, we conclude that Pate's getting the gun, without more, was not sufficient to establish the physical-action element of menacing. Therefore, we conclude that the Court of Criminal Appeals erred in determining that there was sufficient evidence of the physical-action element

of menacing. In light of our resolution of the first ground on which we granted certiorari review -- whether getting the gun constituted "physical action" under the facts of this case -- we pretermit discussion of the second ground on which we granted certiorari review -- whether the defense-of-premises statute is applicable in this case.

III. Conclusion

For the foregoing reasons, we reverse the judgment of the Court of Criminal Appeals and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Stuart and Bolin, JJ., concur.

Wise, J., concurs specially.

Parker, J., concurs in the result.

Murdock and Shaw, JJ., dissent.

WISE, Justice (concurring specially).

I concur with the majority's conclusion that Luther Stancel Pate's action of getting a shotgun from his vehicle, without more, did not constitute a "physical action" that would support a conviction for menacing. In footnote 6 of his dissent, Justice Murdock points out that in Hiler v. State, 44 So. 3d 535 (Ala. Crim. App.), rev'd on other grounds, 44 So. 3d 543 (Ala. 2009), a case I authored while serving as the presiding judge on the Alabama Court of Criminal Appeals, the Court of Criminal Appeals found "that there was sufficient evidence to sustain a charge of menacing in light of the context in which the defendant's physical actions occurred; part of the context considered relevant by the Court of Criminal Appeals was the defendant's oral representation that the device was a bomb." ___ So. 3d at ___ n. 6. I write simply to explain why I believe Hiler is factually distinguishable from the present case.

In Hiler, Hiler had been staying at the residence of his ex-wife, Michelle Noble, and her then husband, Greg Noble. The evidence indicated that, on the day of the incident, Hiler and Michelle had argued and that law-enforcement officers had

been called to the residence. Deputy Mike Hill of the Franklin County Sheriff's Department testified that he went to the Noble residence; that, when he arrived, Hiler was sitting on a chair at an outbuilding that was approximately 100 meters from the house; that he went to the residence and talked to the Nobles; and that Michelle told Deputy Hill that Hiler had been under the influence of some type of drug that morning and that she wanted Hiler removed from the residence.

Deputy Hill then went back to his patrol vehicle and drove to the outbuilding. When he pulled up, Hiler went inside the outbuilding and later came back out with a device. Hiler then held up the device and showed it to Deputy Hill. Deputy Hill testified that, based on his training, it appeared to him that Hiler was holding some type of explosive device. Also, when he asked Hiler what the device was, Hiler told him it was a bomb. After Deputy Hill left and went back to the residence to telephone his supervisor and dispatch, Hiler began walking toward the Nobles' residence with the explosive device in his hand. Hiler initially refused to stop when Deputy Hill ordered him to do so, but he then went back to the

outbuilding after Deputy Hill drew and pointed his weapon at Hiler.

After other officers arrived at the scene, they attempted to talk to Hiler. At one point, Hiler came out of the outbuilding with the device attached to his waist. He also indicated that he had a mercury switch on the device. Subsequently, Hiler agreed to put the device down after another officer, Jerry Holcomb, agreed to put his gun in his vehicle. After Hiler laid the device down, Officer Holcomb attempted to use a stun gun on Hiler but was not able to do so, and Hiler ran toward the device.

On appeal, Hiler argued that the trial court should have granted his motion for a judgment of acquittal on the menacing charge because, he argued, he did not make any threats of bodily harm or take any physical action toward Deputy Hill, who was the alleged victim of the offense. In addressing this argument, the Court of Criminal Appeals stated:

> "Based on the evidence presented, the jury could have reasonably concluded that Hiler took physical action when he showed the device to Hill and told him it was a bomb and when he ran toward the device after Holcomb unsuccessfully attempted to use a stun gun on him. See Oliver v. City of Opelika, 950 So. 2d 1229 (Ala. Crim. App. 2006) (holding that there

> was sufficient evidence of physical action where the defendant pointed a gun at an officer)."

44 So. 3d at 542.

The present case does not involve a situation where law-enforcement officers were present based on a homeowner's request to remove Pate from their property. Rather, in this case, Pate was on his own property. Additionally, there was evidence indicating that the employees of the Santa Fe restaurant were trespassers on Pate's property and that they were removing equipment owned by Pate from the property, even though the time for Santa Fe to vacate the premises had passed. Further, there was evidence indicating that Walter Bryan Hart and the other Santa Fe employees had initially agreed to leave the premises at the request of law-enforcement officers but that Hart later reentered the premises. Pate did not actually retrieve the shotgun from his vehicle until after he came back to the front of the building and saw Hart inside the premises again. Pate then went to his vehicle, retrieved the shotgun, and walked toward Hart's vehicle. This is vastly different from the physical actions involved in Hiler. Here, it appears that the trial court based its decision solely on the fact that Pate obtained a weapon. However, in Hiler, it

was the combination of Hiler's showing the device to Deputy Hill, telling him it was a bomb, strapping the device to his waist, indicating the device had a mercury switch, and then running toward the device, which he had laid down, after the officer unsuccessfully tried to subdue him with a stun gun, that constituted the physical action in Hiler. Thus, I believe that this case is factually distinguishable from Hiler.

MURDOCK, Justice (dissenting).

I am reminded that this is but a mere misdemeanor case. Our duty is made no less by this fact. Over the years, some of our most important constitutional rights have been addressed by the United States Supreme Court in misdemeanor cases. Although no fundamental constitutional right is addressed in the present case, important and fundamental principles of Alabama law are at stake. These include the viability of the ore tenus rule and the continued viability of the crime of menacing. And then there is the question of the ability of law enforcement to act confidently and without hesitation, and with all the tools that should be available to them, to secure the scene of any dispute to which they have been summoned, whether civil or criminal, and whether or not on private property.[3]

The statute at issue reads simply as follows:

> "A person commits the crime of menacing if, by physical action, he intentionally places or attempts to place another person in fear of imminent serious physical injury."

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[3]It has been urged upon this Court that the Second Amendment rights should be addressed in this case. No issue regarding the Second Amendment was preserved in the trial court, however.

Ala. Code 1975, § 13A-6-23(a). I see only two elements prescribed by this statute: (1) "physical action" and (2) a mind-set of using that physical action to "intentionally place[] or attempt[] to place" another in fear of imminent serious physical injury. If the defendant in this case was entitled to a judgment of acquittal, it must be because there was not sufficient evidence in the record to allow the fact-finder to reasonably find the existence of one of these two elements.

As I read the defendant's brief to this Court and the main opinion, it appears to me that both address only the "physical-action" element. Yet, clearly, there was physical action. The mere winking of an eye constitutes physical action. Even the "mere" act of "getting the gun" in this case entailed walking out of a building to a truck in a parking lot, opening the door of that truck, retrieving from inside that truck a shotgun, and exercising physical control over that shotgun.

But even this "getting the gun" was not "without more." First, there was "more" purely physical action by the defendant. Second, as discussed in subsequent paragraphs,

there was "more" in the form of the defendant's demeanor and verbal threats that provided the context for the fact-finder to assess the import of the defendant's physical actions.

As to the additional physical action, following the retrieval of his shotgun, the defendant did not simply stand stationary beside his truck, bearing the retrieved weapon. Instead, with the weapon in hand, he physically advanced toward a victim he had threatened only moments earlier. If I have understood correctly the issue here to be whether there was evidence to satisfy the "physical-action" element of the menacing statute, then I find myself on the other side of "the looking glass" -- confused.[4]

Perhaps, however, I misunderstand the issue before us. Perhaps it is not the physical-action element of the menacing statute, but the other element -- the intent vel non of the defendant to place another in fear of imminent serious physical injury -- that we attempt here to address. The problem with this supposition, however, is that this too is a

[4]Lewis Carroll, Through the Looking-Glass, and What Alice Found There (Macmillan and Co.; London 1872).

factual issue -- a factual issue as to which the trial court made a finding based on ore tenus evidence.[5]

The Court of Criminal Appeals wrote a 23-page unpublished memorandum parsing all the substantial evidence received in this case. The Court of Criminal Appeals quoted and discussed at length the application of well established ore tenus principles to the trial court's findings based on this evidence. The evidence not received by the trial court ore tenus was in the form of security recordings that contain a partial, but undisputable, audio record of the events. The following synopsis of the evidence (amply supported by the evidence of record) was offered by the Court of Criminal Appeals below:

> "Here, evidence that Pate was irate and that he walked toward [Walter Bryan] Hart with a shotgun after having implied that he would shoot the trespassers and having stated that he would assault

[5]The analysis of the main opinion consists mostly of a long quote concerning principles of statutory construction. Following this quote the main opinion simply states that, in light of these principles, the defendant's actions in this case cannot be considered menacing. There is no discussion of the quoted principles and specifically how they mandate such a conclusion. Moreover, I see no function in this case for the principles of statutory construction quoted in the main opinion. In light of what appears to me to be simple and straightforward language employed in the statute to define "menacing," I find these principles inapposite.

> Hart was sufficient to support a finding by the fact-finder that Pate's conduct was intentional and intended to place or attempt to place Hart in fear of imminent serious physical injury."

(Emphasis added.)

At one point, the trial court did criticize the defendant's action in "getting the gun." Surely, however, the use of the three words "getting the gun" was merely a shorthand description by the trial court of what the defendant did in this case. Given all the evidence before it, part of which was ore tenus testimony to which the trial court could and did assign credibility and weight, and the balance of which was indisputable audio and video recordings of the defendant's actions and words, it cannot reasonably be assumed that the trial court found the defendant guilty of menacing based merely on the physical act of "getting the gun" removed entirely from his subsequent action of advancing toward the victim with that gun and from any of the conflict, anger, and threats that provide context and import for the defendant's actions.

Moreover, if in fact we are ignoring this context for the defendant's actions, then we are ignoring common sense and life experience. Further still, we ignore standards of

appellate review that require us under circumstances such as this to assume the trial court knows and applied the law to the evidence before it. E.g., Ex parte Slaton, 680 So. 2d 909, (Ala. 1996). Part of that law is that the general demeanor of a defendant and verbal threats made by a defendant can and do provide context within which to evaluate and determine the import of a defendant's purely physical actions.[6]

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[6]In Henry v. State, 714 So. 2d 1002, 1006 (Ala. Crim. App. 1998), the Court of Criminal Appeals held that the evidence was sufficient to prove "menacing" where the defendant banged on the roof of his car and held a gun without pointing it at the victims in light of the context in which this action occurred, including specifically the fact that the defendant verbally threatened to harm the victims if they behaved in a certain manner. In Hiler v. State, 44 So. 3d 535, 542 (Ala. Crim. App. 2009) rev'd on other grounds, 44 So. 3d 543 (Ala. 2009), then Presiding Judge Wise wrote for the Court of Criminal Appeals that there was sufficient evidence to sustain a charge of menacing in light of the context in which the defendant's physical actions occurred; part of the context considered relevant by the Court of Criminal Appeals was the defendant's oral representation that the device was a bomb. Compare Mihas v. United States, 618 A.2d 197, 200 (D.C. 1992)(making clear that verbalized threats provide important context for assessing the import of physical actions):

> "[I]ntent-to-frighten assault ... requires proof of 'threatening conduct intended either to injure or frighten the victim.' Robinson [v. United States], 506 A.2d [572] at 574 [(D.C. 1986)]. ... We are satisfied that the record here clearly supports the trial court's conclusion that Mihas had engaged in

In addition to the foregoing, the trial court itself made clear that it was not finding the defendant guilty based merely on the physical act of retrieving his shotgun:

> "[T]he Court is convinced that your physical action, coupled with the testimony regarding what was said inside about having the weapon, indicates that you did intentionally place Mr. Hart in fear."

(Emphasis added.

The Court of Criminal Appeals followed the ore tenus rule in affirming the judgment of the trial court. I find no basis in this case for us not to do the same.

> this type of assault, and that the findings of fact provided an adequate basis for that conclusion. The actions of Mihas included initiating the conversation between the two with the hostile question 'What are you looking at?' followed by the appellation 'Jocko' or 'punk,' and further followed by Mihas' instruction to Rinehart that he should 'get out of here.' These utterances were combined with Mihas' approach from ten to twelve feet away to within four or five feet of Rinehart, while holding a knife pointed in the direction of Rinehart belt high, and pointed downward at a 45 degree angle."

See also Matter of Monay W., 822 N.Y.S.2d 613, 33 A.D.3d 809, 810 [(2006)] (indicating that verbalized threats provide relevant context for assessing the import of physical acts by explaining that evidence that the defendant waved a knife in the air while standing four feet away from the complainant and asking if she wanted to fight establishes that the defendant intentionally placed another person in fear of imminent injury by physical menace).

Finally, I note that, although the main opinion states that it pretermits consideration of the issue, it contends that this case does involve the issue of "a property owner's right to defend his premises from a trespasser under § 13A-3-25, Ala. Code 1975." ___ So. 3d at ___. I disagree that this issue is even "presented." Section 13A-3-25 states that "[a] person in lawful possession or control of premises ... may use physical force upon another person when and to the extent that he reasonably believes it necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of a criminal trespass by the other person ...." (Emphasis added.) First, this statute is inapposite because no "physical force" was used "upon another person," only the threat of such force.

Second, the defendant could not have "reasonably believe[d]" that the assertion of physical force by him against the victim, Walter Bryan Hart, was necessary to defend his premises. The police were in control of the scene. In contrast to the defendant, at no point can Hart be heard to threaten the defendant or anyone else, and there was no testimony that he ever did, even before the police arrived.

To the contrary, Hart can be heard on the security tape being polite and compliant. Hart plainly did not pose a physical threat to the defendant or to the defendant's property at the point that the defendant retrieved his weapon and advanced toward Hart with it. Further, for the sake of their safety and others present, the police needed to maintain control of that scene. In this regard, the Court of Criminal Appeals aptly quoted with approval the following excerpt from the trial court's order denying the defendant's postjudgment motion for judgment of acquittal:

> "4. Here, the police presence, the minor threat of physical confrontation and the trespasser's retreat from the building toward his car lead this Court to find that the Defendant's injection of a firearm into the conflict was an unreasonable use of non-deadly physical force."

See generally District of Columbia v. Heller, 554 U.S. 570 (2008) (discussing the fact that the right to keep and bear arms does not extend to all circumstances, including the commission of a crime or the use of unjustified force).

Conclusion

Given the holding of the main opinion, it is unclear to me and, I suspect, to law enforcement and the bench and the bar as well, as to what now constitutes an offense under

§ 13A-6-23(a). At the least, it is now unclear who, as between the fact-finder and the appellate court, is to decide whether the actions (and related threats) of a defendant are sufficient to support a factual finding of an intent to place someone in fear of imminent injury.

I therefore respectfully dissent.

SHAW, Justice (dissenting).

I respectfully dissent. I originally concurred to grant the petition for the writ of certiorari; after reviewing the record and the materials on appeal, I would quash the writ.