

MEMORANDUM (SAMPLE)

TO: Professor Sorkin  
FROM: Joan Marshall  
DATE: January 15, 2001  
RE: Scott Freehold

QUESTIONS PRESENTED

1. Can a person be convicted of simple robbery or attempted simple robbery under Minnesota law if the person demands money from a store employee but drops it before leaving the store?

2. Can a person be convicted of aggravated robbery or attempted aggravated robbery under Minnesota law if the person, while committing a robbery, points a toy gun at the victim?

SHORT ANSWERS

1. Yes. A person who takes money then drops it can be convicted of simple robbery, since momentary control of the property is sufficient. Attempted simple robbery is a lesser included offense of simple robbery, so the person could be convicted of either crime but not both.

2. No. For a person to be convicted of aggravated robbery, the victim must reasonably believe that the person is armed with a dangerous weapon. If the person intended for the victim to believe that the water gun was dangerous, however, it

is possible that the person could be convicted of attempted aggravated robbery.

#### STATEMENT OF FACTS

Scott Freehold entered Krusty's Toys and Stuff, a toy store in Midland, Minnesota, on March 15, 2000. He was wearing a mask and carrying a two-foot-long bright orange plastic water gun. He approached Delbert Gustafson, the sales clerk, and asked Gustafson to hand over all of the money in the cash register. Although Gustafson noticed a clear liquid dripping from the gun, he complied with Freehold's request, handing Freehold a bag full of money. As Freehold started to leave the store, Gustafson shouted, "Stop that man! It's only a squirt gun!" Freehold dropped the money and the gun and ran. He now wishes to know what crimes he could be convicted of if he were to surrender to the authorities.

#### APPLICABLE STATUTES

Whoever, having knowledge of not being entitled thereto, takes personal property from the person or in the presence of another and uses or threatens the imminent use of force against any person to overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property is guilty of robbery and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both.

Minn. Stat. § 609.24 (2000).

Subdivision 1. First degree. Whoever, while committing a robbery, is armed with a dangerous weapon or any article used or fashioned in a manner to lead

the victim to reasonably believe it to be a dangerous weapon, or inflicts bodily harm upon another, is guilty of aggravated robbery in the first degree and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than \$ 35,000, or both.

Subd. 2. Second degree. Whoever, while committing a robbery, implies, by word or act, possession of a dangerous weapon, is guilty of aggravated robbery in the second degree and may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than \$ 30,000, or both.

Minn. Stat. § 609.245 (2000).

Subdivision 1. Whoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit that crime, and may be punished as provided in subdivision 4.

Subd. 2. An act may be an attempt notwithstanding the circumstances under which it was performed or the means employed to commit the crime intended or the act itself were such that the commission of the crime was not possible, unless such impossibility would have been clearly evident to a person of normal understanding.

Subd. 3. It is a defense to a charge of attempt that the crime was not committed because the accused desisted voluntarily and in good faith and abandoned the intention to commit the crime.

Subd. 4. Whoever attempts to commit a crime may be sentenced as follows:

(1) If the maximum sentence provided for the crime is life imprisonment, to not more than 20 years; or

(2) For any other attempt, to not more than one-half of the maximum imprisonment or fine or both provided for the crime attempted, but such maximum in any case shall not be less than imprisonment for 90 days or a fine of \$100.

Minn. Stat. § 609.17 (2000).

## DISCUSSION

The State of Minnesota may seek to charge Scott Freehold with simple robbery and first or second degree aggravated

robbery. Since simple robbery is a lesser included offense of aggravated robbery, he cannot be convicted of both simple and aggravated robbery. He could also be charged with attempting to commit one of these crimes, although attempt of a crime is a lesser included offense of the crime itself.

### Simple Robbery

The first crime with which Freehold may be charged is simple robbery. The elements of simple robbery are (1) the taking of personal property from another person, (2) knowledge of not being entitled to the property, and (3) the use or threat of imminent use of force. Minn. Stat. § 609.24 (2000).

Freehold did take money from the store clerk, although he dropped the money before he left the store. However, the taking element is satisfied when the perpetrator obtains control over the property, even if only for a few seconds. State v. Solomon, 359 N.W.2d 19, 21 (Minn. 1984). Freehold's actions therefore satisfy the first element of simple robbery despite his abandonment of the money.

Second, Freehold must have known that he was not entitled to the money. Freehold walked into a store wearing a mask and demanded all of the money in the cash register. The knowledge element can be inferred from these facts.

Finally, the State must prove that Freehold used or threatened to use force to accomplish the robbery. An implied threat of force will be inferred when the victim complies with the perpetrator's demands. State v. Taylor, 427 N.W.2d 1, 4

(Minn. App. 1988). Gustafson probably knew the gun was only a toy. However, he did comply with Freehold's demand, perhaps because he feared some other use of force. A threat of force would probably be inferred, satisfying the third element. Freehold could therefore be convicted of simple robbery.

### Aggravated Robbery

A person who commits simple robbery can be convicted of first degree aggravated robbery instead if the person (1) is armed with a dangerous weapon, (2) is armed with any article which the victim reasonably believes is a dangerous weapon, or (3) inflicts bodily harm upon the victim. Minn. Stat. § 609.245(1) (2000). If the person merely implies possession of a dangerous weapon during a robbery, the person can be convicted of second degree aggravated robbery. Minn. Stat. § 609.245(2).

Freehold could be convicted of aggravated robbery in the first degree if his victim reasonably believed that the water gun was a dangerous weapon. Only the second part of the test is relevant, since the gun was not in fact a dangerous weapon and it did not inflict bodily harm. The prosecution thus must prove that Gustafson believed the water gun was a dangerous weapon, and that this belief was reasonable. It is unlikely that the prosecution could prove either of these elements.

Gustafson noticed a clear liquid dripping from the water gun, and he referred to it as a squirt gun a moment after giving Freehold the money. Since the gun was made of bright orange plastic, it is unlikely that he ever believed that it was a

dangerous weapon. While he might testify that he feared the gun was filled with acid instead of water, his exclamation at the time of the robbery would tend to undermine this claim.

Furthermore, even if Gustafson did believe that the water gun was a dangerous weapon, it is unlikely that a jury would find this belief reasonable. The gun's appearance would probably preclude any reasonable person from believing that it was dangerous. Courts in other jurisdictions have found toy guns sufficient under similar statutes, but only where the toys were much more realistic. E.g., United States v. Martinez-Jiminez, 864 F.2d 664, 667 (9th Cir. 1989) (holding a dark-colored toy revolver about eight inches long to be sufficient); State v. Childers, 830 P.2d 50, 53 (Kan. App. 1991) (holding a black plastic water pistol resembling a "Luger" handgun to be sufficient). Therefore, it is unlikely that Freehold could be convicted of first degree aggravated robbery.

The definition of second degree aggravated robbery appears to contemplate a situation in which the defendant creates an impression that he or she is armed with a dangerous weapon. Freehold did nothing to imply that he was armed with anything more than a toy gun. He therefore cannot be convicted of second degree aggravated robbery either.

#### Attempt

A person commits attempt to commit a crime if the person (1) intends to commit the crime and (2) takes a substantial step toward doing so, beyond mere preparation. Minn. Stat. §

609.17(1) (2000). Freehold intended to commit at least simple robbery, and in fact completed the crime, which goes beyond the substantial step required for attempt. He cannot be convicted of both simple robbery and attempted simple robbery, however, since attempt is a lesser included offense of the crime attempted. Minn. Stat. § 609.04 (2000).

It is possible that the prosecution would seek to convict Freehold of both simple robbery and attempted aggravated robbery, since it is unlikely he could be convicted of aggravated robbery, as discussed above. In order to convict him of attempted aggravated robbery, the prosecution would need to prove that Freehold intended to commit aggravated robbery, and that his acts constituted a substantial step toward that crime.

Freehold's intent to commit aggravated robbery (in either the first or second degree) might be inferred from the fact that he entered a store armed with a water gun, even though the clerk did not believe that the gun was dangerous. While he may argue that he simply carried the gun to startle the clerk, a jury is likely to infer otherwise. Similarly, his acts could be considered a substantial step toward committing aggravated robbery despite the fact that Freehold failed to make the clerk believe the gun was dangerous, and thus failed to complete the substantive crime of aggravated robbery.

Freehold can argue that no one could reasonably believe that the water gun was a dangerous weapon. The attempt statute provides that an act may not qualify as an attempt if the completion of the crime is impossible and that impossibility

would be "clearly evident to a person of normal understanding." Minn. Stat. § 609.17(2). If a jury agrees that it would have been impossible for Freehold to make anyone think the water gun was dangerous, then it would probably acquit him of attempted aggravated robbery.

#### CONCLUSION

Scott Freehold may be charged with simple robbery, aggravated robbery, and the attempt to commit each of these crimes. He probably would be convicted of simple robbery or attempted robbery, but not aggravated robbery or attempted aggravated robbery.

A person commits robbery by taking personal property from another person knowing he or she is not entitled to it, if the person uses or threatens force. Freehold's momentary control of the money is sufficient, and an implied threat can be inferred from the store clerk's compliance with his demand for the money. Freehold thus could be convicted of simple robbery.

For first degree aggravated robbery, the victim must reasonably believe that the perpetrator is armed with a dangerous weapon. The store clerk probably did not believe that Freehold's water gun was dangerous; even if he did, it is unlikely that a jury would consider this belief reasonable. For second degree aggravated robbery, the defendant must imply the he or she possesses a dangerous weapon, something that Freehold did not do. Therefore, Freehold probably would not be convicted of aggravated robbery.

Attempted simple robbery is an included offense of simple robbery, so Freehold cannot be convicted of both crimes, although he could be convicted of either of them. If he intended for the store clerk to believe that his water gun was a dangerous weapon, however, he could be convicted of attempted aggravated robbery. His strongest defense would be that the completed crime of aggravated robbery was impossible because no one could reasonably believe that a two-foot-long water gun made of bright orange plastic could be a dangerous weapon.