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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2010-2011

CR-09-1806

Bryant Bernard Evans

v.

State of Alabama

**Appeal from Jefferson Circuit Court
(CC-09-396; CC-09-397; CC-09-398; and CC-09-399)**

BURKE, Judge.

Bryant Bernard Evans appeals his four convictions for first-degree robbery, violations of § 13A-8-41, Ala. Code 1975. Evans was sentenced, as a habitual offender, to life imprisonment without parole for each conviction.

On February 6, 2009, the grand jury returned four indictments against Evans, charging him with four counts of first-degree robbery. Each indictment involved a different victim but stemmed from the same set of facts. The four victims were Joshawan Brown, Larry Hunter, Michael Rutledge, and Frank Bowden. The cases were consolidated for trial, which began on May 10, 2010.

At trial, Rutledge testified that he was the owner of A Cut Beyond barbershop. According to Rutledge, one day in August 2008, when he arrived to open the barbershop for the day, a few customers were waiting for him in the parking lot. After Rutledge let those customers inside the barbershop, he "noticed a short fellow walk from the top of the hill down past [the] shop, and maybe two minutes later he turned around and came back from down in the alley and walked back up towards the shop." (R. 109.) Rutledge explained that the man walked through the parking lot, which was right in front of his barbershop. Rutledge did not know that man. Rutledge testified that the man passed by the barbershop, but, a few minutes later, the man returned, and Evans was with him.

CR-09-1806

Rutledge knew Evans because he had sold magazines to Rutledge and had gotten a shave from Rutledge in the past.

After they entered the barbershop, Evans stood in the middle of the shop, and the shorter man stood by the door holding a blue gym bag in his hands. Evans then pulled a gun from his waistband. At that time, Rutledge was cutting Brown's hair. Initially, Evans pointed the gun at Bowden and Hunter, who were in the waiting area of the barbershop, and told them not to move. Evans then pointed the gun at Rutledge, but Brown "rushed" Evans and a "tussle" ensued. (R. 112.) Rutledge then grabbed his gun from a nearby counter and shot twice at Evans. At that time, Rutledge did not know whether either shot hit Evans, but Rutledge found out later that he had hit Evans. As Evans was fleeing the barbershop, he dropped his white baseball cap and his gun. Rutledge testified that Evans left the barbershop and then ran to the right. Rutledge further testified that he did not see the men get into their vehicle because it was parked behind the barbershop. After making sure that everyone in the barbershop was unhurt, Rutledge called emergency 911.

Rutledge testified that the police quickly responded to his call. When the police arrived at the barbershop, Rutledge met them outside. The owner of a nearby business was also standing outside, and he pointed toward an older model Chevrolet automobile that was smoking badly as it drove away and told police: "There they go right there." (R. 116-17.) The police pursued the car and apprehended Evans along with the other man who had entered the barbershop with Evans earlier.

Hunter testified that he was sitting in the waiting area of the barbershop with Bowden when a "taller guy" and a "shorter guy" entered the barbershop. (R. 173.) The shorter guy was holding a blue bag. According to Hunter, "the taller guy came in and lifted up his shirt and brought a gun out, pointed it toward me and [Bowden], the guy that was sitting there, told us nobody move." (R. 173.) The man with the gun then walked toward Rutledge and the man who was getting a haircut and pointed the gun at them. Hunter testified that the man getting his haircut grabbed the arm of the man with the gun and they began "tussling." (R. 174.) Hunter then heard two gunshots. Hunter testified that the taller guy was

CR-09-1806

shot in the back and that, after the taller guy was shot, he dropped his gun and fled. Hunter stated that he "did see the little ragged car going down the street that they were in, little Chevy." (R. 179.) Shortly after the men were apprehended by the police, Hunter was able to identify them by height and size. Hunter also stated that the blue bag was outside the car when he identified the men.

Darryl Myers, a police officer for the Birmingham Police Department, testified that, on August 22, 2008, he responded to a call about a robbery in progress at the A Cut Beyond barbershop. When Officer Myers arrived at the scene, two men who were standing outside the barbershop pointed out to him that the two suspects were driving away in a tan-colored Chevrolet car. Officer Myers pursued the car and stopped it. After the car stopped, the driver got out of the car and started walking away. Officer Myers ordered the driver to stop. Initially, the driver responded that he was going to his aunt's house, but, after Officer Myers drew his weapon and ordered the driver to get down on the ground, the driver complied with Officer Myers's order. At trial, Officer Myers identified Evans as the person who was seated in the

CR-09-1806

passenger's seat of the car when it was stopped. Officer Myers also testified that, when he saw Evans in the car that day, Evans had been shot. Officer Myers checked the vehicle-identification number ("VIN") of the car and the license plate that was on the car, and he discovered that the VIN and the license plate were not registered to the same person.

Evans's medical records showed that he was admitted to UAB Hospital on August 22, 2008, with a single gunshot wound through the left side of his chest. DNA testing showed that the DNA profile of blood found at the barbershop matched Evans's DNA profile.

At the close of the State's evidence, Evans moved for a judgment of acquittal on the ground that the State's evidence was insufficient to support a finding of guilty on any of the first-degree-robbery charges. Specifically, Evans alleged that the State failed to set forth sufficient evidence indicating that Evans intended to deprive any person of his property. (R. 262-64.) The trial court denied that motion. After the motion was denied, the defense rested.

On May 12, 2010, the jury found Evans guilty of four counts of first-degree robbery. On June 21, 2010, Evans filed

CR-09-1806

a pro se motion for a new trial. On June 25, 2010, the trial court sentenced Evans, as a habitual offender, to life imprisonment without the possibility of parole for each conviction. On August 16, 2010, the trial court denied Evans's motion for a new trial. On September 1, 2010, Evans appealed his convictions to this Court.

I.

On appeal, Evans first alleges that the trial court erred in denying his motion for a judgment of acquittal because, he says, the State presented insufficient evidence to support any of his first-degree-robbery convictions. Specifically, Evans appears to argue that the State did not present sufficient evidence indicating that he intended to deprive any of the victims of their property.

Section 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; or

"(2) Causes serious physical injury to another."

Section 13A-8-43(a), Ala. Code 1975, provides:

"A person commits the crime of robbery in the third degree if in the course of committing a theft he:

"(1) Uses force against the person of the owner or any person present with intent to overcome his physical resistance or physical power of resistance; or

"(2) Threatens the imminent use of force against the person of the owner or any person present with intent to compel acquiescence to the taking of or escaping with the property."

Furthermore, "robbery ... is a crime against the person; it does not require that a theft be accomplished for the elements of robbery to be established." Ex parte Verzone, 868 So. 2d 399, 402 (Ala. 2003). "Proof of an actual taking of property is not required to sustain a conviction for robbery." Craig v. State, 893 So. 2d 1250, 1256 (Ala. Crim. App. 2004). "'[T]he former crime of attempted robbery now constitutes robbery.'" Casey v. State, 925 So. 2d 1005, 1006 (Ala. Crim. App. 2005) (quoting Petty v. State, 414 So. 2d 182, 183 (Ala. Crim. App. 1982)).

Concerning the sufficiency of the evidence to sustain a conviction, this Court has held:

"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.'" Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998), quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985). "The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt.'" Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997), quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992). "When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision.'" Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998), quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990). 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.'

Ingram v. State, 878 So. 2d 1208, 1210 (Ala. Crim. App. 2003), quoting Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978).

Furthermore,

"Circumstantial evidence is not inferior evidence, and it will be given the same weight as direct evidence, if it, along with the other evidence, is susceptible of a reasonable inference pointing unequivocally to the defendant's guilt. Ward v. State, 557 So. 2d 848 (Ala. Cr. App. 1990). In reviewing a conviction based in whole or in part on circumstantial evidence, the test to be applied is whether the jury might reasonably find that the

evidence excluded every reasonable hypothesis except that of guilt; not whether such evidence excludes every reasonable hypothesis but guilt, but whether a jury might reasonably so conclude. Cumbo v. State, 368 So. 2d 871 (Ala. Cr. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979).'"

"Ward, 610 So.2d at 1191-92."

Lockhart v. State, 715 So. 2d 895, 899 (Ala. Crim. App. 1997).

Concerning intent, this Court has held:

"[I]ntent is a question for the jury. 'Intent, ... being a state or condition of the mind, is rarely, if ever, susceptible of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence.' Pumphrey v. State, 156 Ala. 103, 47 So. 156, 157 (1908)."

McCord v. State, 501 So. 2d 520, 528-29 (Ala. Crim. App. 1986).

In the present case, considering, as we must, all the evidence in a light most favorable to the State, we hold that a rational finder of fact could have found Evans guilty beyond a reasonable doubt of all four counts of first-degree robbery. The evidence presented by the State indicated that Rutledge saw the shorter man walk past the barbershop twice in the space of approximately two minutes and then return to the barbershop with Evans a few minutes later. Based on that

evidence, the jury could have reasonably inferred that Evans and his accomplice were surveying the scene immediately before they entered the shop. The State's evidence further indicated that the shorter man was carrying a blue gym bag that could be used to carry away property; that, after entering the shop, Evans produced a gun, threatening everyone in the shop; that, after an altercation, Evans and the shorter man fled in a car that had been parked out of sight; and that the VIN and license plate on the car were not registered to the same person. Based on those facts, contrary to Evans's allegation, the jury could have reasonably inferred that Evans intended to compel the acquiescence of everyone in the barbershop to the taking or escaping with property.

The dissent takes issue with our conclusion that the jury could have reasonably inferred that Evans and his accomplice were surveying the scene immediately before they entered the shop. Again, Rutledge testified that he saw the shorter man walk past the barbershop twice in the space of approximately two minutes and then return to the barbershop with an armed Evans a few minutes later. Based on the circumstances as a whole, it seems highly probable that the men were surveying

CR-09-1806

the scene. It is unlikely that the shorter man just happened to be strolling back and forth in front of the barbershop for pleasure a few minutes before he entered the barbershop with an armed man. In any event, it is the duty of the jury, not this Court, to determine factually whether the men were surveying the scene. We hold that the jury certainly could have reasonably inferred that the men were surveying the scene.

Next, while agreeing that the gym bag that was carried by the shorter man could be used to carry away property, the dissent points out that the gym bag could also be used to carry gym clothes, groceries, burglary tools, or a vast variety of other items. We agree. However, again, it was the duty of the jury to decide, in the context of all the evidence presented, whether the purpose of the gym bag was to carry away property or to carry something else. The jury certainly could have inferred that the purpose of the gym bag was to carry away property. It is not unreasonable or mere guesswork to conclude that when a man carrying a gym bag enters a store with an armed accomplice, the man is intending to use that gym bag to carry away property.

The dissent also takes issue with our statement that Evans and the other man fled in a car that had been parked "out of sight." Rutledge, who was in the barbershop when Evans fled, testified that the car was parked behind the building and out of his sight. Rutledge also testified that the parking lot was in front of the barbershop and within his sight. Considering that Evans and his accomplice chose not to park their car in the parking lot in front of the barbershop before entering the barbershop wielding a gun, the jury could have reasonably inferred that Evans and his accomplice had purposefully attempted to hide the car from the sight of the people in the barbershop, whom Evans and his accomplice intended to accost.

We conclude that the State presented evidence from which the jury could have reasonably inferred that Evans intended to compel the acquiescence of everyone in the barbershop to the taking or escaping with property. Therefore, we hold that the State presented sufficient evidence to support Evans's four convictions for first-degree robbery; thus, the trial court did not err in denying Evans's motion for judgment of acquittal.

II.

Lastly, Evans alleges that his convictions in the two cases that named Brown and Bowden as the victims should be reversed. Specifically, Evans alleges that, in those two cases, he was "denied his fundamental right to cross-examine adverse witnesses against him as is guaranteed by the Sixth Amendment of the U.S. Constitution" because Brown and Bowden signed affidavits in support of a warrant for Evans's arrest, but neither Brown nor Bowden testified at trial. (Evans's brief, at 31-32.)

Evans's allegation is completely without merit. The affidavits signed by Brown and Bowden in support of an arrest warrant were not presented to the jury at trial. The Confrontation Clause of the Sixth Amendment to the United States Constitution gives the accused in a criminal prosecution only the right "to be confronted with the witnesses against him." While the Confrontation Clause applies to in-court testimony and some out-of-court statements introduced at trial, Crawford v. Washington, 541 U.S. 36 (2004), it does not apply to out-of-court statements that are not introduced at trial. Therefore, Evans's allegation does

CR-09-1806

not present a valid ground for the reversal of his convictions.

Furthermore, this issue is barred from appellate review because Evans did not present this specific issue to the trial court.

"'Review on appeal is restricted to questions and issues properly and timely raised at trial.' Newsome v. State, 570 So. 2d 703, 717 (Ala. Crim. App. 1989). 'An issue raised for the first time on appeal is not subject to appellate review because it has not been properly preserved and presented.' Pate v. State, 601 So. 2d 210, 213 (Ala. Crim. App. 1992)."

Ex parte Coulliette, 857 So. 2d 793, 794 (Ala. 2003). "Even constitutional issues must first be raised before the trial court or they are waived." Stanley v. State, 723 So. 2d 821, 822 (Ala. Crim. App. 1998). Therefore, because this issue was not properly raised at trial, the issue is waived.

Moreover, this claim is not properly before this Court for review because Evans has failed to comply with Rule 28(a)(10), Ala. R. App. P., which requires that an argument in an appellate brief contain "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." This

CR-09-1806

Court has stated: "'It is not the job of the appellate courts to do a party's legal research. Nor is it the function of the appellate courts to "make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument.'" Hodges v. State, 926 So. 2d 1060, 1074 (Ala. Crim. App. 2005), quoting Pileri Indus., Inc. v. Consolidated Indus., Inc., 740 So. 2d 1108, 1110 (Ala. Civ. App. 1999). Furthermore, "[r]ecitation of allegations without citation to any legal authority and without adequate recitation of the facts relied upon has been deemed a waiver of the arguments listed." Skinner v. State, 843 So. 2d 820, 827 (Ala. Crim. App. 2002). In his brief to this Court, Evans does not cite any legal authority to support his claim. Therefore, Evans's bare allegation does not satisfy the requirements of Rule 28(a)(10), Ala. R. App. P.; thus, the issue is waived.

Based on the foregoing, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, Kellum, and Joiner, JJ., concur. Welch, P.J., dissents with opinion.

CR-09-1806

WELCH, Presiding Judge, dissenting.

Bryant Evans was convicted of four counts of first-degree robbery. The majority affirms the convictions; I respectfully dissent because the State did not present a prima facie case of first-degree robbery for any of the four counts.

The majority has accurately summarized the evidence presented by the State. The proprietor of the barbershop where the incident occurred, Michael Rutledge, testified that he knew Evans because Evans had sold him magazines on several occasions and because Evans had been a barbershop customer in the past. On the morning of this incident, Rutledge saw a man who was shorter than Evans walk past his shop, turn around, and pass by the shop again. A short while later, a male customer, Joshawan Brown, was sitting in one of the barber's chairs and Rutledge was cutting Brown's hair. Two other men were sitting in the waiting area of the small shop. Evans entered the shop accompanied by the shorter man, who was carrying a blue gym bag. The shorter man stayed near the door. Evans pulled a gun from his waistband, pointed it in the direction of the two waiting customers, and told the men not to move. Evans then walked toward Rutledge and Brown, and

CR-09-1806

he pointed the gun above Brown's head, at Rutledge. When Evans got closer to the men, Brown tussled with Evans and grabbed the gun. As the two tussled, Rutledge panicked, ran toward the bathroom to get away, and then grabbed his gun from a nearby counter. Rutledge fired two shots at Evans as he and the other man were leaving the barbershop; one shot struck Evans, injuring him. Evans dropped his gun inside the shop; the gun was recovered by the police. Neither Evans nor the man with the bag demanded anything from the four men in the barbershop; the evidence established that Evans said only "Don't move," when he first walked into the shop. One of the customers in the waiting area testified that Evans had entered the shop with another man who was carrying a bag, that Evans pointed the gun and told the waiting customers not to move, and that he then tussled with the customer in the barber's chair. Evans lost control of the gun and he was shot as he and the other man attempted to leave the shop, the witness said.

Evans and the second man were apprehended near the scene when a police officer followed their vehicle and executed a stop. Officers determined that the vehicle identification

CR-09-1806

number ("VIN") did not match the license tag on the vehicle. The blue bag Rutledge and the customer testified about was not found inside the vehicle or at the scene. Nothing was taken from the barbershop, its owner, or the customers.

Evans argues on appeal that the trial court erred when it denied the motion for a judgment of acquittal he made at the conclusion of the State's case. Evans argued in the trial court, as he does on appeal, that the State failed to present any evidence of robbery. In rejecting Evans's argument on this issue, the majority has set out the relevant caselaw. My disagreement here is with the majority's application of the law to the facts as adduced from the evidence actually presented at the trial.

The test in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the State, a rational factfinder could have found the defendant guilty beyond a reasonable doubt. Ex parte Stewart, 900 So. 2d 475, 476-77 (Ala. 2004) (quoting Webster v. State, 900 So. 2d 460, 463 (Ala. Crim. App. 2004)). The role of the appellate courts is to determine whether the

CR-09-1806

evidence is legally sufficient, that is, whether a jury could, by fair inference, find the defendant guilty. Id.

Section 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; or

"(2) Causes serious physical injury to another."

Section 13A-8-43(a), Ala. Code 1975, provides:

"A person commits the crime of robbery in the third degree if in the course of committing a theft he:

"(1) Uses force against the person of the owner or any person present with intent to overcome his physical resistance or physical power of resistance; or

"(2) Threatens the imminent use of force against the person of the owner or any person present with intent to compel acquiescence to the taking of or escaping with the property."

After quoting the relevant principles, the majority restates its summary of the evidence and, employs what appears to be conjecture and surmise to conclude that the State presented a prima facie case:

"[W]e hold that a rational finder of fact could have found Evans guilty beyond a reasonable doubt of all four counts of first-degree robbery. The evidence presented by the State indicated that Rutledge saw

the shorter man walk past the barbershop twice in the space of approximately ten minutes and then return to the barbershop with Evans a few minutes later. Based on that evidence, the jury could have reasonably inferred that Evans and his accomplice were surveying the scene immediately before they entered the shop. The State's evidence further indicated that the shorter man was carrying a blue gym bag that could be used to carry away property; that, after entering the shop, Evans produced a gun, threatening everyone in the shop; that, after an altercation, Evans and the shorter man fled in a car that had been parked out of sight; and that the VIN and license plate on the car were not registered to the same person. Based on those facts, contrary to Evans's allegation, the jury could have reasonably inferred that Evans intended to compel the acquiescence of everyone in the barbershop to the taking or escaping with property."

___ So. 3d at ___ (emphasis added).

Without any testimony from the witnesses, the majority has concluded that the jury was free to conclude that the shorter man were "surveying the scene." The testimony indicates only that the shorter man walked past the shop and turned around and that he entered the shop with Evans a few minutes later. There is no testimony that the men walked together initially, or that the shorter man was "surveying" anything -- only that he walked past the shop and returned minutes later. The majority has added this post hoc interpretation of the man's walk past the shop. So, too, did

the majority add that the blue gym bag "could be used to carry away property." The majority is correct, of course, that a gym bag could be used to carry away property, but it is equally true that the blue gym bag here could have been used to carry gym clothes or burglary tools or groceries -- a vast variety of items, limited only by the carrying capacity of the bag, could have been carried in that bag. Furthermore, the majority states that the car Evans left in had been parked "out of sight." That statement, too, overstates the facts actually established by the evidence or that could reasonably be inferred therefrom. Rutledge testified that he did not see the men get into the car after he shot Evans because the car was "parked on the back of the building." (R. 115.) The car was not in Rutledge's sight, but contrary to the inference drawn by the majority, there was no evidence suggesting that Evans had hidden the vehicle.

"This Court is well aware that where 'circumstantial evidence points to the guilt of the accused, it will support a conviction as strongly as direct evidence.' Newsome v. State, 570 So. 2d 703, 710 (Ala. Cr. App. 1989). Accord, Jones v. State, 514 So. 2d 1060, 1067 (Ala. Cr. App.), cert. denied, 514 So. 2d 1068 (Ala. 1987). However, 'no rule is more fundamental or better settled than

that convictions cannot be predicated upon surmise, speculation, and suspicion to establish the accused's criminal agency in the offense charged.' Benefield v. State, 286 Ala. 722, 724, 246 So. 2d 483, 485 (1971), quoted in Crafts v. State, 439 So. 2d 1323, 1325 (Ala. Cr. App. 1983)."

"Atwell v. State, 594 So. 2d 202, 213 (Ala. Cr. App. 1991), cert. denied, 594 So. 2d 214 (Ala. 1992).

"'"'"While a jury is under a duty to draw whatever permissible inferences it may from the evidence, including circumstantial evidence, mere speculation, conjecture, or surmise that the accused is guilty of the offense charged does not authorize a conviction. [Citations omitted.] A defendant should not be convicted on mere suspicion or out of fear that he might have committed the crime. Harnage v. State, 49 Ala. App. 563, 274 So. 2d 333 (1972). While reasonable inferences from the evidence may furnish a basis for proof beyond a reasonable doubt, Royals v. State, 36 Ala. App. 11, 56 So. 2d 363, cert. denied, 256 Ala. 390, 56 So. 2d 368 (1951), mere possibility, suspicion, or guesswork, no matter how strong, will not overturn the presumption of innocence. [Citations omitted.]

"'"'"An inference is merely a permissible deduction from the

proven facts which the jury may accept or reject or give such probative value to as it wishes. [Citations omitted.] It is a logical and reasonable deduction from the evidence and is not supposition or conjecture. Guesswork is not a substitute. [Citations omitted.] A supposition is a conjecture based on the possibility or probability that a thing could have or may have occurred without proof that it did occur. [Citation omitted.] The possibility that a thing may occur is not alone evidence, even circumstantially, that the thing did occur."'"

"'Patterson v. State, 538 So. 2d 37, 42 (Ala. Cr. App. 1987), conviction rev'd, 538 So. 2d 43 (Ala. 1988), quoting Ex parte Williams, 468 So. 2d 99, 101-02 (Ala. 1985).'"

"'Mullins v. City of Dothan, 724 So. 2d 83, 86 (Ala. Cr. App. 1998)."

Boyington v. State, 748 So. 2d 897, 901 (Ala. Crim. App. 1999) (emphasis added), quoted in part in J.M.A. v. State, [Ms. 09-1540, May 27, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011).

The evidence presented in this case does not justify an inference that Evans had the intent to rob the four men in the barbershop. The evidence was equally indicative of

personal animus toward one of the men, particularly Rutledge, toward whom Evans was walking and at whom Evans appeared to be pointing the weapon. The statement, "Don't move," directed to the two men in the waiting area did not reveal an intent to rob any more than it revealed an intent to threaten, kidnap, or harm any or all the men inside the barbershop. In fact, Rutledge said only that he panicked and ran, and the witness who had been in the waiting area testified that he was frightened that Evans might shoot him, but there was no inference from their testimony that they believed Evans intended to rob anyone. I respectfully disagree with the inferences made by the majority in its summary of the limited testimony from the eyewitnesses. Although those inferences are intended to establish the missing element of "intent to compel acquiescence to the taking of or escaping with the property," an inference is defined as "a permissible deduction from proven facts," and I do not believe the majority's inferences are supported by the evidence or proven facts. I have carefully examined the evidence the State presented, and I do not find it sufficient to support an affirmance of any of the four convictions of

first-degree robbery. Whatever Evans's intent might have been, the State failed to establish that he had the intent to steal, and the State failed to present evidence from which a jury could reasonably infer that first-degree robberies were committed.

Because I believe that these convictions were predicated on a combination of surmise, conjecture, speculation, and suspicion, rather than on evidence and reasonable inference, I would hold that the trial court erred to reversal when it denied Evans's motion for a judgment of acquittal. However, because the State's evidence supported the charge of menacing, I would remand the case to the trial court for it to adjudge Evans guilty of four counts of the lesser-included offense of menacing, § 13A-6-23, Ala. Code 1975, on which the jury was also charged, (R. 323), and to sentence him accordingly. See Martinez v. State, 989 So. 2d 1143 (Ala. Crim. App. 2006) (appellate courts have authority to reverse a conviction and order entry of judgment on a lesser-included offense).

For the foregoing reasons, I respectfully dissent.