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STATE OF CONNECTICUT *v.* TRAVIS WAYNE ARMSTRONG
(AC 44561)

Bright, C. J., and Cradle and Suarez, Js.

Syllabus

Pursuant to statute (§ 53a-134 (a) (4)), a person is guilty of robbery in the first degree when, inter alia, in the course of the commission of the crime of robbery, he threatens the use of what he represents by his words or conduct to be a firearm.

Convicted of the crime of attempt to commit robbery in the first degree, the defendant appealed to this court, claiming, inter alia, that the evidence was insufficient to prove beyond a reasonable doubt that he was guilty of attempted robbery. The defendant walked to the front counter at a fast-food restaurant and demanded $20. While he spoke with the employee, W, at the counter, his right hand was located near his right hip, partially under a hoodie he was wearing, and he moved his hand up and down. The defendant repeated his demand for money, and threw a plastic bag across the counter, which landed on the floor beside W. After W did not make any move to open the cash register, the defendant walked out of the restaurant. During the incident, W observed a cell phone clip on the defendant's belt as well as an object with a black handle near his belt. At trial, the state's theory of the case was that the defendant had threatened what he represented to be a handgun during his encounter with W, which lasted for approximately thirty seconds. *Held* that the state did not satisfy its burden of proving beyond a reasonable doubt that the defendant took a substantial step in the commission of an attempted robbery because the evidence did not support a finding that the defendant threatened the use of what he represented by his words or conduct to be a firearm, one of the necessary elements of attempted robbery in the first degree: the evidence showed that the defendant demanded money to which he was not entitled, but he did not threaten explicitly to physically injure W and did not explicitly threaten to do so by means of the use of a handgun, nor did the defendant explicitly direct W's attention to any object in his possession or indicate that he possessed a handgun, and, considering the totality of the circumstances, the jury could have reasonably interpreted the defendant's statements as a threat to cause W physical harm, but, standing alone, the statements could not have reasonably been interpreted as a threat to use a specific object, namely, a handgun, to cause such harm; moreover, although there is no requirement that a threat to use a firearm be explicitly uttered, consideration of the defendant's accompanying conduct did not lead to a different conclusion, for the evidence of the defendant's conduct during his brief encounter with W did not permit a reasonable inference that his threat to do harm encompassed a threat to do harm with a handgun, as W did not describe an item in the defendant's possession that objectively resembled a handgun, nor did she testify that the defendant had made use of an object in his possession in the same way one would make use of a handgun, such as pointing an object at her in the way in which one would point a handgun at another person; furthermore, it would have been entirely speculative for the jury to premise a finding that the defendant specifically threatened to use a handgun solely on the fact that W observed an object with a black handle near the defendant's belt, as the jury reasonably could have inferred that the defendant engaged in the movements that W described in order to draw W's attention to that area of his body while he was demanding money from her, but it could not have reasonably inferred from this evidence, viewed in isolation or in light of the evidence as a whole, that the defendant intended to convey that he was in possession of a handgun as opposed to any other object or weapon.

Argued November 2, 2022—officially released March 7, 2023

Procedural History

Two part substitute information charging the defendant, in the first part, with the crime of attempt to commit robbery in the first degree, and, in the second part, with being a persistent felony offender and having displayed, threatened the use of, or represented by his words or conduct that he possessed a firearm during the commission of a felony, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, and tried to the jury before *Spellman*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed*; *judgment directed*.

Pamela S. Nagy, supervisory assistant public defender, with whom, on the brief, was *Mark Rademacher*, former assistant public defender, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, *Andrew Slitt*, assistant state's attorney, and *Thadius L. Bochain*, deputy assistant state's attorney, for the appellee (state).

Opinion

SUAREZ, J. The defendant, Travis Wayne Armstrong, appeals from the judgment of conviction, rendered following a jury trial, of attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2)[1] and 53a-134 (a) (4).[2] The trial court, *Spellman*, *J.*, enhanced the defendant's sentence after the defendant was adjudicated a persistent felony offender in violation of General Statutes (Rev. to 2017) § 53a-40 (g),[3] and for his having "displayed, threatened the use of, or represented by his words or conduct that he possessed a firearm" during the commission of a class A, B, or C felony, in violation of General Statutes § 53-202k,[4] as he was charged in two part B informations.[5] The defendant claims that (1) the court violated his right to self-representation, (2) the court committed instructional error with respect to the essential elements of attempted robbery, (3) the court improperly enhanced his sentence pursuant to § 53a-40 (g), and (4) the state failed to prove beyond a reasonable doubt that he was guilty of attempted robbery. We agree with the defendant that the state did not satisfy its burden of proving beyond a reasonable doubt that he took a substantial step in the commission of the offense because the evidence did not support a finding that he displayed or threatened the use of what he represented by his words or conduct to be a firearm. Accordingly, we reverse the judgment of conviction and remand the case to the trial court with direction to render a judgment of acquittal.[6]

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. On May 17, 2018, the defendant arrived via automobile at a McDonald's fast food restaurant in Willimantic. At that time, shift manager Marzetta Williams was working at the restaurant, as was Janel Burdzy, who was working as a cashier at the restaurant's drive-through window. The defendant walked into the restaurant and went into a restroom. He then walked to the front counter, where he encountered Williams. The defendant stated: "Oh, give me the money. I don't want any problems." The defendant was wearing a gray hoodie. While he spoke with Williams, his right hand was located near his right hip, partially under the hoodie, and he moved his hand up and down. Williams replied that she was unable to open the cash register. The defendant stated, "I don't want any problems. I just need [twenty dollars]. Give me the money." The defendant threw a plastic bag across the counter, which landed on the floor beside Williams. After Williams did not make any move to open the register, the defendant walked out of the restaurant. Williams immediately shouted to Burdzy, who was serving a customer at the drive-through window, that "we just almost got robbed." Burdzy saw the defendant quickly enter the passenger side of an automobile in the restaurant's parking lot, and she recorded the

license plate. Williams then called 911 to report the incident. During the incident, Williams observed a cell phone clip on the defendant's belt as well as an object with a black handle near his belt. Although Williams did not observe a handgun, and she did not inform the police that the defendant was armed, she believed that he possessed a handgun and that he would do "whatever" to get the money that he demanded.

Although the defendant raises four claims in this appeal, we first turn to the merits of his sufficiency of the evidence claim, for he is entitled to a judgment of acquittal if the evidence was insufficient to support his conviction.[7] See, e.g., *State* v. *Bereis*, 117 Conn. App. 360, 364, 978 A.2d 1122 (2009). "In [a defendant's] challenge to the sufficiency of the evidence . . . [w]hether we review the findings of a trial court or the verdict of a jury, our underlying task is the same. . . . We first review the evidence presented at trial, construing it in the light most favorable to sustaining the facts expressly found by the trial court or impliedly found by the jury. We then decide whether, [on] the facts thus established and the inferences reasonably drawn therefrom, the trial court or the jury could reasonably have concluded that the cumulative effect of the evidence established the defendant's guilt beyond a reasonable doubt. . . . [W]e give great deference to the [verdict] of the [jury] because of its function to weigh and interpret the evidence before it and to pass [on] the credibility of witnesses. . . .

"In evaluating evidence that could yield contrary inferences, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier [of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . As we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier [of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Lori T.*, 345 Conn. 44, 72–73, 282 A.3d 1233 (2022).

Having set forth our standard of review, we turn to the elements of the offense of which the defendant was convicted. Section 53a-134 (a) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery . . . or of immediate flight therefrom, he or another participant in the crime . . . (4) displays or threatens

the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . .”[8] Because the defendant was charged with attempt to commit robbery pursuant to § 53a-49 (a) (2), the state bore the burden of proving, “first, that the accused acted with the intent to commit the crime . . . and, second, that the accused intentionally took action that constituted a ‘substantial step’ toward completion of the crime.” *Small* v. *Commissioner of Correction*, 286 Conn. 707, 727, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

In its long form information, the state charged the defendant with attempt to commit robbery in the first degree in that he “did, while in the course of . . . attempting commission of a robbery . . . display or threaten the use of what he represented to be a handgun . . . .” At trial, however, the state’s theory of the case was not that the defendant had displayed a handgun during the attempted commission of the crime, but that he had threatened the use of what he represented to be a handgun during his encounter with Williams, which lasted for approximately thirty seconds. The state also argued that the defendant’s conduct amounted to an attempted robbery because the defendant allegedly took a substantial step toward, but did not actually, obtain any money. Consistent with the evidence and its theory of the case at trial, in this appeal, the state does not argue that the evidence was sufficient to prove beyond a reasonable doubt that the defendant displayed a handgun during the attempted commission of the crime or flight therefrom, but that he had threatened the use of what he represented to be a handgun during the attempted commission of the crime.

The defendant claims that the evidence was insufficient to prove that he threatened the use of what he represented to be a handgun during the attempted commission of the robbery. “In determining whether [a] defendant threatened to use what he represented by words or conduct to be a firearm, [t]he test is not whether the defendant actually had a firearm . . . but whether he displayed or threatened the use of what he represented by his conduct to be a firearm.” (Citation omitted; internal quotation marks omitted.) *State* v. *St. Pierre*, 58 Conn. App. 284, 288, 752 A.2d 86, cert. denied, 254 Conn. 916, 759 A.2d 508 (2000). “[T]he essential element of subsection (a) (4) [of § 53a-134] . . . is the representation by a defendant that he has a firearm. Under this portion of § 53a-134, a defendant need not have an operable firearm; in fact, he need not even have a gun. He need only represent by his words or conduct that he is so armed.” (Emphasis omitted.) *State* v. *Hawthorne*, 175 Conn. 569, 573, 402 A.2d 759 (1978).

The defendant argues that, “[i]n cases where there is sufficient evidence of this element, there is some

action taken by the defendant that suggests he is holding or concealing a gun, such as pointing an object at the victim, or holding a concealed object that appears to be a gun by its shape and size. . . . There is also sufficient evidence when the defendant says something indicating that he has a gun. . . .

"In addition to evidence that the defendant represented that he had a gun, there must be evidence to prove that he threatened to use the gun. . . . There is no requirement that the threat be explicitly stated. . . . However, evidence proving that the defendant represented that he had a firearm does not necessarily prove that he threatened to use it. . . .

"In the present case, the record is devoid of any evidence that the defendant represented that he had a gun, and that he threatened to use a gun." (Citations omitted; internal quotation marks omitted.)

The state focuses on the evidence that the defendant moved his right hand, which was concealed near his right hip, up and down during his encounter with Williams. The state also relies on the fact that Williams observed a "black handle" near the defendant's belt and that Williams believed that the defendant had a firearm. The state argues that, "[c]onsidering [the evidence of the defendant's] words and conduct, the jury reasonably could have concluded that the defendant wanted Williams to believe that he had a gun and that he threatened the use of it during his attempt to rob her." The state further argues that "[t]he defendant's claim boils down to an improper attempt to have this court substitute its judgment for that of the jury."

Next, we turn our attention to the relevant evidence. During the state's direct examination of Williams, the only eyewitness to the pertinent events at issue, the following colloquy between the prosecutor and Williams occurred:

"Q. [A]round 6:50 in the morning or so, just a little bit before 7 [a.m.], did anything unusual happen?

"A. Yeah.

"Q. What . . . was it?

"A. A car pulled up . . . in the parking lot, a guy came out, he went into the restroom, and then he came back out, he came to the front counter. He was jiggin' something on his right side.

"Q. You said he was doing what?

"A. Like, jiggin' around on his right side. He had somethin' on his side of his belt. And he was jiggin' around and he said, Oh, give me the money. I don't want any problems.

"Q. And he said that to who?

"A. He said it to me. I was at the register in the front.

I thought he was gonna place an order.

"Q. And you said he was—I just want to make sure I use the right word that you used, you said he was jigging . . .

"A. I said jigging, yes."

At this point during the state's direct examination of Williams, the prosecutor, with the court's permission, asked Williams to demonstrate the movement she described in colloquial terms as " 'jiggin' " or "jigging." While demonstrating the movement, Williams explained that the perpetrator, who she subsequently identified as the defendant, had his hand "slightly under the hoodie" he was wearing, but "you could still kinda see his hand." Following Williams' demonstration, the prosecutor asked the court if the record could reflect "that the witness took her right hand and put it on the side of her hip and moved it up and down." The court agreed.

Williams then testified that she told the perpetrator that she was unable to open the cash register, and that he replied, "I don't want any problems. I just need [twenty dollars]. Give me the money." Williams testified that after she reiterated that she could not open the cash register, the perpetrator threw a plastic bag in her direction, which landed on the floor. She testified that the perpetrator then walked out of the restaurant and got into an automobile.

The following colloquy between the prosecutor and Williams then occurred:

"Q. What . . . were you thinking when he was doing that with his hand? . . .

"A. I . . . kinda figured it was a gun. That's what I thought, like, maybe he had a gun. Like—that's what it seemed like to me.

"Q. So . . . what did you think . . . was happening?

"A. That he was tryin' to rob me, that he wanted money, and he was gonna do whatever to get it.

"Q. And . . . you said at first you didn't open the register. . . . [W]ere you able to open the register at any point?

"A. I didn't open it at all.

"Q. Why not?

"A. I wasn't gonna make any sudden movements or anything in case it was a gun."

During defense counsel's cross-examination of Williams, Williams agreed that, when she called 911, she did not "mention anything about . . . a gun in that phone call . . . ." Later, during cross-examination, the following colloquy between defense counsel and Williams occurred:

"Q. And you said . . . [that the perpetrator] wiggled his waist, so at some point in time, you were looking down at his belt. Is that correct?

"A. Yes.

"Q. And it's safe to say you were trying to figure out if he actually had a gun or not?

"A. Yes.

"Q. And you did not actually see a gun?

"A. No, I did not.

"Q. Did you tell . . . in that 911 call, did you tell the police that somebody had a gun?

"A. No, I didn't."

During defense counsel's cross-examination of Williams, she was asked about the first of two written statements that she provided to the police in the immediate aftermath of the incident.[9] Williams testified that, in her first statement, she stated that the perpetrator had a clip on his belt, but she did not state that he had moved the clip. The following colloquy between defense counsel and Williams then occurred:

"Q. I'm jumping back to the clip again . . . you had mentioned that the person had a cell phone clip on his belt. . . .

"A. Yes. . . .

"Q. Is that what he was putting his hands on?

"A. I—not at the time, no. He was jigging. Like . . . his hand was, like, slightly under his hoodie when he was jiggin' the side.

"Q. And you couldn't see a gun there. Is that correct?

"A. Correct.

"Q. But you could . . . see a clip on the belt there?

"A. I couldn't see anything but his hand. . . .

"Q. Did the police ask you if . . . the person had a gun?

"A. Yes, they did.

"Q. Did they . . . ask you more than once?

"A. Yes, they did.

"Q. Did they ask you when they . . . first arrived at the McDonald's? Did they ask you if the person had a gun?

"A. Yes.

"Q. And when they first arrived at the McDonald's, what did you tell them?

"A. I told them I didn't know if it was a gun or not, but he was jigging the side of his belt.

"Q. You never told the police this was . . . an armed robbery. Is that correct?

"A. I did not."

During the state's redirect examination of Williams, the prosecutor asked her about the second statement that she had provided to the police concerning the incident. Williams testified that, in her second statement, she stated that the perpetrator "was grabbin' at his belt and it . . . could have been a gun, that I seen somethin' black and it could have been a gun." Williams agreed with the prosecutor that, in her statement, she used the term "black handle." Williams then identified the defendant, who was present in the courtroom, as the perpetrator.

Beyond Williams' testimony, the other evidence concerning the defendant's conduct inside of the restaurant was presented by the state in the form of a surveillance video as well as still photographs that were generated from the video. The video and photographs depict the defendant, who was wearing dark colored pants and a gray hoodie, entering the restaurant, going into a restroom, and interacting with Williams at the front counter. Consistent with Williams' testimony, the video and the photographs reflect that the defendant had his right hand positioned near the front, right side of his waist. The defendant's right hand appears to be partially or completely concealed in either the right pocket of his pants or under his hoodie. The video also depicts the defendant throwing a plastic bag across the front counter with his left hand during his interaction with Williams.

Having carefully reviewed the evidence, we conclude that it did not support a finding beyond a reasonable doubt that the defendant had threatened by his words or conduct that he would use a handgun. We recognize that we must interpret the defendant's words and conduct in light of their circumstances, his conduct in the attempted commission of a larceny, and in the light most favorable to sustaining the jury's verdict. With respect to what the defendant explicitly stated to Williams, he demanded money to which he was not entitled, but he did not threaten explicitly to physically injure Williams, and certainly did not explicitly threaten to do so by means of the use of a handgun. Nor did the defendant explicitly direct Williams' attention to any object in his possession or indicate that he possessed a handgun. The jury, however, reasonably could have inferred that the defendant's words amounted to an implicit threat. The defendant twice told Williams that he did not "want any problems" while demanding that she give him money to which he was not legally entitled. Considering the totality of the circumstances, we conclude that the jury reasonably may have interpreted these statements as a threat to cause Williams physical

harm, but, standing alone, they may not reasonably be interpreted as a threat to use a specific object, namely, a handgun, to cause such harm.

We recognize that there is no requirement that a threat to use a firearm "be explicitly uttered." *State* v. *Torrence*, 37 Conn. App. 482, 486, 657 A.2d 654 (1995). Our consideration of the defendant's accompanying conduct, however, does not lead to a different conclusion, for the evidence of the defendant's conduct during his brief encounter with Williams did not suggest that his threat to do harm encompassed a threat to do harm with a handgun. Williams unambiguously testified that she did not observe a handgun in the defendant's possession. Williams, describing the defendant's hand movements, testified that she "kinda figured it was a gun" and that "maybe [the defendant] had a gun." Next, she testified that she did not make any sudden movements "in case it was a gun." She agreed with defense counsel that she was trying to figure out if the defendant had a handgun, but she did not actually see one. Ultimately, when she was questioned about her second statement, Williams testified that she saw a black object and "it . . . could have been a gun . . . ." Williams' testimony revealed that the basis for her opinion was the fact that the defendant was moving his right hand near his right hip, and that she had observed an item with a black handle near his belt.

What Williams thought or believed though is not the dispositive question. It was not sufficient for the state to prove beyond a reasonable doubt that Williams subjectively came to such a conclusion.[10] See, e.g., *State* v. *Torrence*, supra, 37 Conn. App. 487 (victim's opinion with respect to whether object in defendant's possession was handgun "had no relevance to the issue" of whether defendant threatened to use handgun). As this court observed in *State* v. *Aleksiewicz*, 20 Conn. App. 643, 648, 569 A.2d 567 (1990), the state's burden of proof under § 53a-134 (a) (4) is not to demonstrate that a perpetrator used an item in such a manner that a reasonable person believed that he possessed a handgun. Instead, "the Connecticut statute's objective requirement [is] that the perpetrator *represented* that he had or would use a gun." (Emphasis in original.) Id. Consequently, to satisfy its burden of proof, the state had to persuade the jury, beyond a reasonable doubt, that the defendant threatened, through his words or actions, the use of a handgun during the attempted robbery. Important in our analysis is the fact that Williams did not describe an item in the defendant's possession that objectively resembled a handgun, nor did she testify that the defendant had made use of an object in his possession in the same way one would make use of a handgun. For example, Williams did not testify that the defendant pointed an object at her in the way in which one would point a handgun at another person. Instead, at different points in her testimony, Williams testified

that the defendant "had somethin' on the side of his belt," that she observed a "clip on his belt," and that she observed a "black handle." This evidence did not permit a reasonable inference that the defendant had represented to Williams, through his actions, that whatever object he might have possessed was a handgun.

We assume, as we must, that the jury found that the defendant possessed, near his belt, an object with a black handle. Life experience, however, teaches that an item with a black handle is not necessarily a handgun, for many objects, including other types of weapons, have a black handle. Certainly, in light of the overwhelming evidence of the defendant's intent to commit larceny, it was reasonable for both the jury, and Williams, to suspect that the defendant might be in possession of a weapon of some type. Yet, it would have been entirely speculative for the jury to premise a finding that the defendant specifically threatened to use a handgun solely on the fact that Williams observed an object with a black handle near the defendant's belt. "In finding guilt beyond a reasonable doubt, a jury may not resort to speculation and conjecture but it is clearly within the province of the jury to draw reasonable, logical inferences from the facts proven." *State* v. *Morrill*, 193 Conn. 602, 608, 478 A.2d 994 (1984). Indeed, "[t]he line between permissible inference and impermissible speculation is not always easy to discern. . . . [P]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis, but it must suffice to produce in the mind of the trier a reasonable belief in the probability of the existence of the material fact." (Citation omitted; internal quotation marks omitted.) *State* v. *Rhodes*, 335 Conn. 226, 238, 249 A.3d 683 (2020). Here, the jury reasonably could have inferred that the defendant engaged in the movement described as "jigging" in order to draw Williams' attention to this area of his body while he was demanding money from her, perhaps to suggest that he was in possession of an item with which he could inflict physical injury, but the jury could not reasonably infer from this evidence, viewed in isolation or in light of the evidence as a whole, that the defendant intended to convey that he was in possession of a handgun as opposed to any other object or weapon.[11] As set forth previously in our discussion of the relevant evidence, Williams testified that she did not observe a handgun, but that she had observed an object with a black handle near the defendant's belt.[12]

The state urges us to conclude that the present case is factually similar to the events at issue in *State* v. *Arena*, 33 Conn. App. 468, 636 A.2d 398 (1994), aff'd, 235 Conn. 67, 663 A.2d 972 (1995), and that *Arena* undermines the defendant's claim. The defendant in *Arena* was convicted of robbery in the first degree in violation of § 53a-134 (a) (4), and, on appeal to this court, he claimed "that there was no evidence that he displayed

or represented by his words or conduct that he had a firearm." Id., 470, 475. In *Arena*, the jury reasonably could have found that the defendant walked into a convenience store and ordered Dhanwantie Ramdayal, an employee, who was behind the counter, to " '[p]ut all the money in a bag.' " Id., 471. "As the defendant said that, he placed an opaque plastic shopping bag on the counter. His hand was at the top of the bag and he gripped an object inside the bag. He pointed the object in the bag at Ramdayal. Ramdayal testified that she thought it looked like a gun and that it was round and about fifteen or sixteen inches long.

"As the defendant was asking for the money, [a second employee] [Alexander] Smolkin walked toward the phone. The defendant then said to Smolkin, 'Don't call the police' and 'Don't play cool.' Smolkin turned and saw the object in the bag in the defendant's hand. Smolkin could see the shape of the object and thought it looked like a long barrelled weapon. Smolkin further testified that, in trying to make light of the situation during the robbery, he joked, 'Is that a real gun?' and 'Is it a real robbery?'

"Ramdayal was nervous and had difficulty opening the cash register. The defendant told her to open the register fast and 'hurry up' and 'nothing will happen.' When she opened the register, she withdrew the cash from the drawer. . . . She extended her hand with the money in it and the defendant snatched the money out of her hand. The defendant turned and left the store quickly, and Ramdayal called the police." Id., 471.

In *Arena*, this court rejected the defendant's sufficiency of the evidence claim. Id., 477. The court explained that the state bore the burden of establishing beyond a reasonable doubt that the defendant had displayed or threatened the use of what he represented by his words or conduct to be a firearm. Id., 476. It then explained, "[a]t trial, the state presented evidence demonstrating that the defendant's conduct implied that he was carrying a firearm. Both witnesses testified that in his right hand he was holding a bag they thought concealed a gun. The defendant suggested that the bag's only purpose was to hold the money. . . . We acknowledge that this is not a situation where the defendant said he had a gun or represented that he would shoot if his demands were not met. The evidence presented at trial, however, did include the defendant's statement to one of the witnesses 'hurry up' and 'nothing will happen.' Implicit in that statement is a threat of harm. . . .

"Considering that statement by the defendant and the way the defendant held the object in the bag, the jury could have reasonably inferred that the defendant either carried a firearm or wanted the store clerks to think he had a firearm. . . . We conclude that the facts in this case do not require the jury to resort to specula-

tion or conjecture to infer that the defendant acted as though he carried a firearm." (Citation omitted.) Id., 476–77.

Arena is consistent with our conclusion in the present case. Unlike in *Arena*, in the present case the record is devoid of evidence that the defendant possessed an object that was similar in appearance to a handgun or that he brandished a concealed object in the same way that one would use a handgun. Williams did not testify that she observed an object in the defendant's possession that shared distinctive physical characteristics with a handgun. Her reference to an object with a "black handle" is not an adequate evidentiary basis on which to find that the defendant, by his words and conduct, threatened the use of a handgun. Nor did Williams describe the defendant as having used a concealed object in the manner in which one would use a handgun, such as by grasping it or pointing it in the direction of a victim. Such testimony would have provided the basis for a reasonable inference that the defendant threatened the use of a handgun. In *Arena*, Ramdayal described an object that looked like a gun, which the defendant then gripped and pointed in Ramdayal's direction. Here, Williams, without linking her subjective belief to an object's appearance or the way in which the defendant made use of an object, expressed a subjective belief, namely, that she suspected that the defendant had a gun.

In another relevant decision of this court on which the defendant relies; *State* v. *St. Pierre*, supra, 58 Conn. App. 284; a defendant was convicted of robbery in the first degree in violation of § 53a-134 (a) (4). Id., 285. In his direct appeal to this court, the defendant claimed that the trial court improperly had concluded that the evidence was sufficient to prove beyond a reasonable doubt that he had threatened the use of what he represented by words or conduct to be a firearm. Id. This court set forth the facts the jury reasonably could have found: "At approximately 1:30 a.m. on April 12, 1996, the defendant, wearing a hooded gray sweatshirt with the hood tied tightly around his face, dark pants, a dark jacket and black footwear, entered a convenience store in Watertown. The defendant approached the clerk behind the counter, Christopher Brown, and stated, 'This is a holdup.' Brown replied, 'Are you serious?' The defendant answered, 'Yes, I am,' and then gestured by raising his hand inside his jacket from beneath the counter to counter level while at all times keeping his hand and wrist covered by his jacket. On the basis of the comments and gestures of the defendant, Brown presumed that the defendant had a weapon. Brown opened the cash register and gave the defendant the money that was inside. The defendant took the money while keeping the one hand in his jacket and then left." Id., 286.

In analyzing the sufficiency of the evidence claim, this court in *St. Pierre* stated: "In the present case, Brown testified that after the defendant made the demand for money, the defendant raised his right arm, which was covered by a jacket, onto the counter while stating that he was serious. Brown then performed a demonstration for the jury as to what movements the defendant had made. When Brown was asked whether he knew what kind of weapon the defendant had, Brown replied, 'No, I have no idea what the weapon could have been,' but asserted that he thought that the defendant was armed. Officer Tim Gavallas of the Watertown [P]olice [D]epartment, who had gone to the convenience store after Brown reported the robbery, testified that Brown told him that the defendant made movements suggesting he had a gun. Gavallas also discussed what he saw when he viewed the store surveillance videotape and testified that he saw the defendant put his hand under his shirt and 'motion like he had a gun.' " Id., 287–88.

This court concluded "that the defendant's words and upward motion of his arm in his jacket, under the circumstances as they existed, may properly have been considered factors consistent with the representation and threatened use of a firearm. . . . Accordingly, we conclude that the court properly denied the defendant's motion for judgment of acquittal as to the offense of robbery in the first degree because the jury reasonably could have concluded that the cumulative effect of the evidence established the defendant's guilt beyond a reasonable doubt." (Citation omitted; internal quotation marks omitted.) Id., 289.

As in *Arena*, in *St. Pierre*, this court had before it evidence of words and conduct that were objectively consistent with the defendant's having threatened the use of a handgun. Specifically, there was evidence that the defendant raised his concealed right hand to counter level while stating that he was serious about holding up the convenience store. Id., 288–89. Both the eyewitness to the crime and an investigating police officer testified that the defendant's movements were consistent with his possession of a handgun. Id., 287–88. As we have stated previously, evidence of similar movements that are objectively distinctive to the possession of a handgun was lacking in the present case. Here, Williams described the fact that the defendant had his right hand near his right hip, and that he was moving his hand up and down. Assuming, as the state reasonably argues, that handguns are commonly carried in one's waistband, we nevertheless observe that the type of motion described by Williams, viewed in light of the unique circumstances of the present case, lacks the distinctive characteristics that reflect a representation that the defendant possessed a handgun—such as pointing an object at a victim—and, thus, distinguishes the present

case from *St. Pierre*.

The facts of *State* v. *Bell*, 93 Conn. App. 650, 891 A.2d 9, cert. denied, 277 Conn. 933, 896 A.2d 101 (2006), a case that is cited by both parties, are somewhat similar to the facts in *St. Pierre*. In *Bell*, a defendant was convicted of robbery in the first degree in violation of § 53a-134 (a) (4). Id., 652. On direct appeal to this court, the defendant argued that the evidence was not sufficient to support the conviction because it did not support a finding beyond a reasonable doubt that he displayed or represented by his words or conduct that he had a firearm. Id., 668.

In *Bell*, with respect to the incident giving rise to the conviction at issue, this court set forth the following facts that the jury reasonably could have found: "On April 14, 2001, Tricia Smith, the assistant manager of a Friendly's restaurant in Glastonbury, arrived at the store alone at about 6 a.m. to open the restaurant. As she unlocked the front door, the defendant, unmasked, came up behind her and forced his way into the restaurant. He told her that he would not hurt her if she did what he told her to do. Smith was fixated on something the defendant was holding in his hand under his jacket that 'looked like a gun.' The defendant ordered her to take him to the safe. By the time Smith had reached the safe, the defendant had put a bandana over the lower portion of his face. After Smith opened the safe, the defendant told her to get into the walk-in refrigerator. Smith waited a few minutes in the refrigerator until she thought the defendant had left the restaurant. She then ran to a nearby gasoline station for help." Id., 653.

In *Bell*, this court rejected the claim of evidentiary insufficiency, reasoning as follows: "At trial, the state presented evidence demonstrating that the defendant acted in such a way as to imply that he was carrying a firearm. Smith . . . testified that when the defendant approached her inside the restaurant, he told her that she 'wouldn't get hurt' if she did what he told her to do. Smith testified further that the defendant was holding something under his jacket and was pointing it in her direction. She testified that the object 'looked like a gun.' Considering the defendant's statement implying that Smith could get hurt, along with the way the defendant held the object under his jacket, in the light most favorable to sustaining the verdict, the jury reasonably could have inferred that the defendant had wanted Smith to think that he had a firearm." Id., 670–71.

For the reasons previously discussed in this opinion, the evidence in the present case is distinguishable from the evidence in *Bell*. Absent in the present case was evidence that the defendant acted in such a way so as to imply that he was carrying a firearm, as opposed to any other type of object or weapon. Notably, unlike in *Bell*, in the present case, there was no evidence that the defendant pointed an object while making either an

explicit or an implicit threat to physically harm another person. The defendant in the present case twice stated that he did not want "any problems," which, under the circumstances could be interpreted as a threat to physically harm Williams, but not necessarily with a handgun. Moreover, unlike the conduct at issue in *Bell*, when examined in light of the unique factual circumstances of the present case, the position of the defendant's right hand and the movement described by Williams were not necessarily consistent with the threatened use of a handgun. Furthermore, Williams did not testify that she had observed an object in the defendant's possession that a reasonable person would infer to be a handgun as opposed to another type of weapon capable of causing physical harm. Thus, the analysis and outcome of *Bell* is consistent with our resolution of the present claim.

Finally, we turn to *State* v. *Aleksiewicz*, supra, 20 Conn. App. 643, a decision on which the defendant relies but which the state argues is too factually distinct from the present case to be instructive. In *Aleksiewicz*, a defendant was convicted of robbery in the first degree in violation of § 53a-134 (a) (4). Id., 645. On appeal to this court, the defendant claimed that the evidence was insufficient to support a conviction because, during the commission of the crime, he had not threatened the use of what he represented by his words or conduct to be a firearm. Id.

The court set forth the facts that the jury reasonably could have found, as follows: "On July 16, 1986, at approximately 9 p.m., Thomas Norton and his brother Donald Norton drove to the Connecticut National Bank on Main Street in New Britain. Thomas withdrew $400 from the bank's automatic teller machine. The defendant approached the window on the driver's side of the car and said, 'Give me that money or you're dead.' The defendant then grabbed some of the cash from Thomas' hands, and Thomas, frightened, handed the remaining cash in his lap to the defendant. The defendant then ran toward the front of the bank building. Donald initially pursued him on foot, but when the defendant jumped into a car and fled, the brothers pursued him in their car for twenty to thirty minutes, until they lost him in traffic.

"In reporting the details of the robbery at the police station shortly thereafter, Thomas stated that the defendant was holding his hand inside a 't-shirt' when he demanded the money. At trial, Thomas testified that the defendant had held his hand flat against his abdomen in a 'coat like or jacket.' " Id., 645–46.

In *Aleksiewicz*, the defendant argued on appeal "that the state failed to prove that the defendant, during the commission of the crime, threatened the use of what he represented to be a firearm to the exclusion of any other type of weapon or no weapon at all." Id., 648. In

accepting that claim, this court reasoned that "[t]he only evidence in the present case that the defendant threatened the use of what he represented by word or conduct to be a firearm was the testimony of one of the victims that the assailant held one hand flat against his body, inside his shirt, vest or jacket, and that he said, 'Give me that money or you're dead.' This testimony does not definitely establish the firearm element of this crime because no gun was shown and no specific indication was given, by either the defendant's words or actions, that he had in his possession or would use specifically a gun to accomplish his threat. The question is whether the jury could have found, logically and beyond a reasonable doubt, from the facts presented and inferences drawn from those facts, that the defendant represented by his conduct and words that he had or would use a gun." (Emphasis omitted.) Id., 647.

In *Aleksiewicz*, this court noted that the trial court had precluded Thomas Norton from testifying as to a belief that the defendant had a firearm during the robbery. Id., 649. The court based its evidentiary ruling on a lack of foundation in the evidence for such an opinion. Id., 650. This court then stated: "The [trial] court's assessment of the evidence was that even the victim could not have concluded reasonably that the assailant had a gun in his possession. It is difficult to see how the jury, on the same evidence, could have concluded beyond a reasonable doubt that the assailant either displayed or threatened the use of a gun. We conclude, on the basis of our review of the evidence, in the light most favorable to upholding the conviction, that insufficient evidence was presented on a necessary element of the crime of robbery in the first degree." (Emphasis omitted.) Id.

The state argues that the defendant's reliance on *Aleksiewicz* is misplaced, for, in the present case, Williams testified that she believed that the defendant was in possession of a handgun during the attempted robbery. The state also argues that, in the present case, there was evidence to support that belief, in that Williams testified that the defendant was moving his right hand near his waistband, which is "a common place to conceal a gun," and that he was in possession of an object with a black handle. These factual differences are not significant in light of our conclusion, set forth previously in this opinion, that the defendant's words or conduct did not logically support Williams' belief that the defendant had a handgun as opposed to another object capable of causing physical harm. The rationale in *Aleksiewicz* applies with equal force to the present case. As in *Aleksiewicz*, the state did not present evidence to support a finding beyond a reasonable doubt that the defendant gave the impression, by his words or conduct, that he had in his possession or would use a specific weapon, namely, a *handgun*, during his commission of the offense.

Having concluded that the defendant is entitled to a judgment of acquittal with respect to the charge of attempted robbery in the first degree, we observe that, at trial, the state did not request that the court instruct the jury with respect to lesser included offenses, and such an instruction was not delivered to the jury. The defendant argues that, under the rationale in *State* v. *LaFleur*, 307 Conn. 115, 151–54, 51 A.3d 1048 (2012), it would be unfair to him to remand the case to the trial court with instruction to modify his conviction and impose a conviction for attempted robbery in the third degree. The state has made it clear to this court that it does not advocate for such a course of action on remand if this court overturns the conviction for attempted robbery in the first degree. We agree that, under these circumstances, a remand to modify the judgment to reflect a conviction for a lesser included offense would not be appropriate.

The judgment is reversed and the case is remanded with direction to render a judgment of acquittal.

In this opinion the other judges concurred.

[1] General Statutes § 53a-49 (a) provides in relevant part: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

[2] General Statutes § 53a-134 (a) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm, except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a weapon from which a shot could be discharged. . . ."

[3] General Statutes (Rev. to 2017) § 53a-40 (g) provides: "A persistent felony offender is a person who (1) stands convicted of a felony other than a class D felony, and (2) has been, at separate times prior to the commission of the present felony, twice convicted of a felony other than a class D felony."

All references in this opinion to § 53a-40 are to the 2017 revision of the statute.

[4] General Statutes § 53-202k provides: "Any person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm, as defined in section 53a-3, except an assault weapon, as defined in section 53-202a, shall be imprisoned for a term of five years, which shall not be suspended or reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony."

[5] After returning its verdict with respect to the underlying charge, the jury found that the state had proven beyond a reasonable doubt the factual bases for the application of the sentence enhancement statutes. Thereafter, the court imposed a total effective sentence of seventeen years of imprisonment.

[6] In light of our conclusion that the state failed to present sufficient evidence to convict the defendant of attempted robbery, we need not address the defendant's other claims on appeal.

[7] Sufficiency of the evidence claims are reviewable on appeal, even if they are unpreserved, because they implicate a defendant's federal constitutional right not to be convicted of a crime upon insufficient proof. See *State* v. *Ward*, 76 Conn. App. 779, 795 n.8, 821 A.2d 822, cert. denied, 264 Conn. 918, 826 A.2d 1160 (2003). Nonetheless, we observe that the defendant raised the present claim before the trial court in a motion for a judgment of acquittal at the close of the state's case-in-chief. Following the jury's verdict, the

defendant filed a motion for a judgment of acquittal and a new trial. During argument on that motion, defense counsel indicated that the defendant wanted the court to "reconsider" the arguments made in support of the prior motion for a judgment of acquittal. The court denied both motions.

[8] General Statutes § 53a-133 defines the crime of robbery as follows: "A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny."

General Statutes § 53a-119 provides in relevant part: "A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. . . ."

[9] Neither statement was admitted as evidence.

[10] The state does not appear to dispute this principle. The state, responding to the defendant's claim of instructional error in this appeal, which we need not and do not consider on its merits, argued that the court did not improperly instruct the jury that it was sufficient for the jury to return a verdict of guilty solely upon a finding that Williams believed that the defendant possessed a handgun. In its brief to this court, the state further argued that "a robbery in the first degree conviction must be based on evidence objectively proving that the defendant, considering his words and conduct, displayed or threatened the use of a firearm. Put simply, the [jury] charge [in the present case] adequately focused the jury's attention on whether the defendant represented through words or conduct that he was armed with a firearm."

[11] For the reasons discussed in this opinion, we conclude that the movement described by Williams, when carefully examined in the light of all the evidence presented in this case, does not suggest the threatened use of a handgun. We do not, however, suggest that, under different factual circumstances, the movement described by Williams could not be consistent with the threatened use of a handgun. As stated previously in this opinion, we consider the totality of the circumstances, which necessarily encompasses all the evidence of a defendant's words and conduct, in our evaluation of whether the evidence permitted a finding beyond a reasonable doubt that a defendant threatened the use of a handgun.

[12] The state argues that "the jury reasonably could have concluded that video surveillance capturing the incident depicted the defendant, throughout his interaction with Williams, holding his right hand near the front, right side of his waistband and slightly under his hoodie, near a 'black' item with a 'black handle' that was in the same location, and kept his hand in that position while, from the other side of a counter, he threw a plastic bag at Williams with his opposite hand for her to fill with money from the register." Having reviewed the video and photographs, we are not persuaded that the quality of the images is such that they shed light on what, if anything, the defendant was carrying, let alone if he was in possession of a black object with a black handle, as the state argues. Moreover, the video does not appear to capture images continuously and, thus, the playback quality is not smooth enough to depict the hand movement described by Williams in her testimony. We note that, at trial, Michael Haggerty, a police officer who was the lead investigator for the incident, testified that, although he had viewed the video to determine whether the perpetrator had a gun, he did not observe any type of weapon in the video.