

State of New Hampshire
Supreme Court

NO. 2013-0373

2013 TERM

NOVEMBER SESSION

State of New Hampshire

v.

James Dylan Benninghove

RULE 7 APPEAL OF CONVICTION OF THE
MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF JAMES DYLAN BENNINGHOVE

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QUESTIONS PRESENTED

- I. Was the indictment insufficient to charge a felony when it did not allege a felonious *actus reus*?
Preserved: MOTION TO SENTENCE CRIMINAL THREATENING AS MISDEMEANOR (Apr. 16, 2013), *Appx.* at 32; NOTICE OF APPEAL, question I.
- II. Does pointing a gun at the roof of one's own car constitute "use" of a weapon to elevate misdemeanor criminal threatening to a felony?
Preserved: MOTION TO SET ASIDE (Apr. 15, 2013), *Appx.* at 28; MOTION TO SENTENCE CRIMINAL THREATENING AS MISDEMEANOR (Apr. 16, 2013), *Appx.* at 32; Transcript of Trial, *passim*; NOTICE OF APPEAL, question I & II.
- III. Was there insufficient evidence of felony criminal threatening when Mr. Benninghove neither used nor brandished a gun at Mr. Frazier?
Preserved: MOTION TO SET ASIDE (Apr. 15, 2013), *Appx.* at 28; MOTION TO SENTENCE CRIMINAL THREATENING AS MISDEMEANOR (Apr. 16, 2013), *Appx.* at 32; Transcript of Trial, *passim*; NOTICE OF APPEAL, question II.
- IV. Was there insufficient evidence of criminal threatening when Mr. Frazier was never placed in fear?
Preserved: Transcript of Trial, *passim*; NOTICE OF APPEAL, question II.
- V. Should the court have granted Mr. Benninghove's motion to set aside the jury verdict when the version of events the witness told at trial cannot comport with the evidence?
Preserved: MOTION TO SET ASIDE (Apr. 15, 2013), *Appx.* at 28; MOTION TO SENTENCE CRIMINAL THREATENING AS MISDEMEANOR (Apr. 16, 2013), *Appx.* at 32; Transcript of Trial, *passim*; NOTICE OF APPEAL, question II.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. August 2012, Hooksett, New Hampshire

On a sunny August afternoon in 2012, Dylan Benninghove was driving his black BMW to the mechanic for repairs. BENNINGHOVE STATEMENT (Aug. 8, 2012), Exh. 1, *Appx.* at 23; CHARTIER STATEMENT (Aug. 8, 2012), Exh. 4, *Appx.* at 26; *Trn.* at 21. His girlfriend, Audrey Chartier, followed him north on Route 3 in Hooksett, New Hampshire. 911CALL at 0:05-1:53.¹

Mr. Benninghove has a licence to carry a pistol. *Trn.* at 72-73; GUN LICENSE (Dec. 16, 2011), Exh. 5 (admitted for identification only), *Appx.* at 22. He owns a small semi-automatic Sig-Sauer .380 pistol, which he keeps in a holster under the seat of his car. *Trn.* at 84. Mr. Benninghove says he was moving the gun and had it out on his lap because it was underfoot, and he was dropping off the car. BENNINGHOVE STATEMENT (Aug. 8, 2012), Exh. 1, *Appx.* at 23.

II. Brandishing Fingers

Where the road turns to a single lane, *Trn.* at 19-20, 81-82, a full-size tractor-trailer truck driven by Jeffrey Frazier was traveling for a time in the right lane next to Mr. Benninghove, and then merged left behind Mr. Benninghove but in front of and cutting off Ms. Chartier. *Trn.* at 16, 19, 21, 29-30, 80-82. The BMW featured a sunroof, and at the time the truck was beside, and then while it was behind, Mr. Frazier could see inside Mr. Benninghove's car. *Trn.* at 24, 31, 44-45.

Mr. Frazier says Mr. Benninghove repeatedly braked in front of him causing danger; Mr. Benninghove says he braked because Mr. Frazier was shouting at him at stop. *Trn.* at 22; BENNINGHOVE STATEMENT (Aug. 8, 2012), Exh. 1, *Appx.* at 23. In any event, the two exchanged words and gestures.

¹All documents cited herein are included in the appendix, which appears at the end of this brief. The recording of the 911 call has been transmitted to this Court.

According to Mr. Frazier at trial, Mr. Benninghove leaned out the driver's-side window, twisted around, and gestured with his right hand. *Trn.* 23, 31-32, 35. Nonetheless, Mr. Frazier immediately called 911 and narrated the entire event, and with his first words told the operator, "I've got a guy in front of me that's threatening me with a frickin pistol." 911CALL at 0:08. When the operator tried to calm him, Mr. Frazier said, "I don't take too kindly to someone pointing a gun out the window." 911CALL at 0:48.

At trial Mr. Frazier admitted his narration to the 911 operator was a lie. *Trn.* at 33, 38, 48. Mr. Frazier admitted that Mr. Benninghove never pointed a gun out the window but rather only used hand gestures out the window. *Trn.* at 35. Mr. Frazier admitted that when he called 911 Mr. Benninghove had not shown or pointed anything more than his fingers. *Trn.* at 35. And Mr. Frazier admitted that at the time of the call, he had not seen any gun. *Trn.* at 32, 35.

In his statement given to the police that day, Mr. Frazier wrote that Mr. Benninghove was "giving me the middle finger then puts his hand out window like he is pointing something at me so I called 911." FRAZIER STATEMENT (Aug. 8, 2012), Exh. 2, *Appx.* at 25. He testified that "it was the seeing of the hand" that prompted his call to 911. *Trn.* at 32. He testified that contrary to what he said twice in his 911 narration, Mr. Benninghove never pointed a gun out the window. *Trn.* at 33, 35.

In his statement Mr. Frazier wrote that after he called 911, he saw Mr. Benninghove "messing around in the back seat or behind the seat." FRAZIER STATEMENT (Aug. 8, 2012), Exh. 2, *Appx.* at 25; *Trn.* at 46. At trial Mr. Frazier said after pointing fingers out the window, Mr. Benninghove "starts reaching around behind the seat." *Trn.* at 23.

Mr. Frazier testified that he saw a gun and saw Mr. Benninghove point the gun "straight up and down," at the roof of the BMW. *Trn.* at 34, 40, 43, 46. Mr. Frazier, describing the gun

in some detail, said he then saw Mr. Benninghove cock the pistol, chamber a round, and pull the hammer back. *Trn.* at 26, 38; FRAZIER STATEMENT (Aug. 8, 2012), Exh. 2, *Appx.* at 25. In his 911 narration which spanned the entire incident, and despite several moments of silence when the 911 operator was trying to determine his location, Mr. Frazier said nothing about pointing the gun at the roof nor cocking the pistol. 911CALL, *passim*.

III. Arrest

The incident soon ended when Mr. Frazier saw a state trooper at a weigh-station he knew he was approaching. *Trn.* at 27; 911CALL at 2:40. The trooper testified he was sitting in his cruiser at the weigh-station when he saw Mr. Frazier:

at a rather quick fashion, coming up to a quick stop, jumping out of the truck, half in the truck, half out of the truck, with his cellphone up to his ear, screaming that he was just involved in a ... road rage incident with another vehicle described as a black BMW and pointing to the vehicle that was directly in front of him that had just gone past me moments before, saying that he had just threatened him with a gun.

Trn. at 53. The officer testified: "I raced up behind the suspect vehicle, activated my emergency lights. And the vehicle at that point pulled over to the far right-hand side of the road." *Trn.* at 55. The officer said he stopped Mr. Benninghove almost immediately – within a minute in time and a quarter-mile in distance. *Trn.* at 67, 72, 74.

IV. Gun Was Never Cocked

The officer said that (except for Mr. Benninghove's dog) there was nobody else in the car. Mr. Benninghove had his hands on the wheel, and the officer found the gun in its holster under the driver's seat. *Trn.* at 56-57, 74.

The officer testified that to make the gun fire, a round would have to be in the chamber, which would require that it be cocked, *Trn.* at 60, 69; and that had it been cocked, there would

have been a round in the chamber. *Trn.* at 72. The officer pulled the slide back to check the chamber, *Trn.* at 58, and found it empty. *Trn.* at 69, 72. He took the magazine out, *Trn.* at 58, 70, and found it full. *Trn.* at 58, 68, 69, 70, 72. Thus, he testified, when he found it holstered under Mr. Benninghove's seat, it was not ready to fire. *Trn.* at 69. The officer acknowledged that manually emptying the chamber would make the ejected rounds fly around the cockpit of the car, but testified that he found no other rounds during his search of the car, meaning none had been previously ejected. *Trn.* at 71, 72. The officer also acknowledged that the gun cannot be cocked while holstered. *Trn.* at 75.

The officer acknowledged that the gun had not been cocked during the incident because for him to have located it holstered under the seat, Mr. Benninghove would have had to find the ejected rounds, remove the magazine, put the previously-ejected rounds in the magazine, replace the magazine in the well, put the gun back in the holster, and place it under the seat – and that there was not enough time for all that between the alleged incident and when he was pulled over. *Trn.* at 71-72, 75.

V. No Fear

Mr. Frazier several times characterized his own emotions during the incident. He was concerned that “somebody could have seriously got hurt,” *Trn.* at 24, was “worried” and “getting a little nervous,” *Trn.* at 24, 25, admitted he was not calm and “was getting upset myself,” *Trn.* at 24, 36, several times said he was “angry,” *Trn.* at 35, 36, 42, testified he was “mad,” *Trn.* at 28, “And I was furious.” *Trn.* at 25.

When Mr. Frazier testified about the incident, the prosecutor (without objection from defense counsel) could not get him to express fear even when the prosecutor tried to put the words in his mouth with directly leading questions:

- Q. So you start the call, and what happens next?
- A. Next, he starts reaching around behind the seat. And I don't know. And I'm telling the 911 officer what he's doing. Then next thing I know, I see him go like this, and I see a gun in his hand. And then he goes like this and cocks it. To me, it looked like a semiautomatic.
- Q. Now you're, I'm guessing, pretty high up, right, in the truck?
- A. Yeah, I'm only sitting probably seven feet in the air.
- ...
- Q. How was your ability to see through that window and see what he's doing?
- A. I can look down right in the back of the window and see the dashboard of a vehicle, easy.
- Q. So what did you think when you saw that?
- A. Then I started getting a little nervous, and –
- Q. Well, what were you getting nervous about?
- A. There's a guy with a gun, and he's all upset.
- Q. And these are some – I don't mean to make them sound like silly questions, but I have to ask so we're clear about everything. What were you *afraid* that he might do to you?
- A. I didn't know at that point.
- Q. What was the – I mean, what kinds of things were you worried that he could try?
- A. Well, he already stuck his hand out, making it like he was going to shoot at me. Now I see a gun, so I'm – I didn't know. I was -- I was getting upset myself.
- Q. Uh-huh.
- A. Because somebody could have seriously got hurt. Whether it'd of him or me, somebody could have seriously got hurt. And the 911 officer is the one that calmed me down and basically told me what to do.
- Q. Did you worry that you might get shot at?
- A. Yeah, that always crosses your mind.

Trn. at 23-25 (formatting altered, minor emanations omitted, emphasis added). Mr. Frazier was

asked directly how he felt during the incident:

Q. So when it's all happening, how would you describe your mood, your state of mind?

A. I would say angry. I don't know if excitement –

Q. Sure.

A. The – all the excitement and everything that was going on, if that's the right thing to say.

Q. No, that's fine.

Trn. at 42.

Mr. Frazier kept following the BMW closely even after the gun was allegedly brandished, refusing to pull over or slow down, and keeping the car just 30 feet ahead. *Trn.* at 36. And when during the call Mr. Frazier indicated he would follow the BMW more closely in an attempt to get the licence plate number and the 911 operator told him to “[t]ry to keep yourself safe,” he replied, “I don't take too kindly to someone pointing a gun out the window,” 911CALL at 0:48, and then got close enough to successfully read the plate to the operator.

At trial Mr. Frazier eventually said the word “scared,” *Trn.* at 36, but his actions and the tone of his voice on the 911 tape corroborates anger or vengeance, not fear. 911CALL, *passim*.

STATEMENT OF THE CASE

Mr. Benninghove was charged with a class B felony of criminal threatening. The indictment alleges:

[O]n or about the 8th day of August, 2012 at Hooksett, New Hampshire, James Benninghove placed or attempted to place Jeffrey Frazier in fear of imminent bodily injury with a handgun, which is a deadly weapon, by brandishing the firearm at him while driving a car in front of the truck Frazier was driving. James Benninghove committed the above acts purposely.

INDICTMENT (Sept. 20, 2012), *Appx.* at 27 (paragraphing and minor punctuation altered).

After a jury trial in the Merrimack County Superior Court (*Richard B. McNamara, J.*), Mr. Benninghove was found guilty, and filed a motion to set aside the verdict as against the weight of the evidence. MOTION TO SET ASIDE (Apr. 15, 2013), *Appx.* at 28. He also requested that despite the felony notation the court should regard the crime as at most a misdemeanor because Mr. Benninghove did not “use” the gun. MOTION TO SENTENCE CRIMINAL THREATENING AS MISDEMEANOR (Apr. 16, 2013), *Appx.* at 32.

The mittimus indicates conviction of a felony. MITTIMUS (May 8, 2013), *Appx.* at 36. Mr. Benninghove was nonetheless sentenced to 12 months committed to the House of Corrections, with 9 months suspended for a period of 5 years – with the committed portion to be served on consecutive weekends. He was also sentenced to 2 years probation, required to “undergo anger management counseling to the satisfaction of probation,” and to refrain from contact with Mr. Frazier. HOUSE OF CORRECTIONS SENTENCE (May 8, 2013), *Appx.* at 37. Execution of the sentence was stayed pending disposition of this appeal.

SUMMARY OF ARGUMENT

Mr. Benninghove first defines the difference between using and brandishing a weapon. He then points out that “use” in the statute connotes a greater physical act than “brandishing” in the indictment, and argues that the indictment is therefore insufficient to allege a felony. He also notes that whatever he did with his gun, he did not “use” it and therefore cannot be guilty of a felony, and also did not “brandish” it and therefore cannot be guilty of any crime. He further notes that despite efforts by the State to have the witness say he was scared, no fear was ever felt, and that therefore Mr. Benninghove cannot be guilty of any crime. Finally, Mr. Benninghove argues that the several stories told by the witness were so internally unreliable that the court, sitting as a thirteenth juror, should have ordered a new trial.

ARGUMENT

I. “Brandishing” is Less Than “Using”

New Hampshire’s criminal threatening statute provides that “[a] person is guilty of criminal threatening when ... [b]y physical conduct, the person purposely places or attempts to place another in fear of imminent bodily injury or physical contact.” RSA 631:4, I(a). “Criminal threatening is a class B felony if the person ... [u]ses a deadly weapon ... in the violation of the provisions of subparagraph I(a)... All other criminal threatening is a misdemeanor.” RSA 631:4, II(a)(2) & II(b).²

Thus to be guilty of a felony, the defendant must “use” a weapon.

A. Using a Gun Means Discharging, or Pointing with Violence Apparently Imminent

This Court has numerous times construed the word “use” in the context of weaponry. All the cases involve actual discharge of the gun, or pointing it at a person while making a specific threat with discharge and injury appearing imminent. *State v. Fichera*, 160 N.H. 660 (2010) (victim shot in the chest constituted use); *State v. McCabe*, 145 N.H. 686 (2001) (defendant murdered victim with the gun constituted use); *State v. Houtenbrink*, 130 N.H. 385 (1988) (defendant shot the victim constituted use). In *State v. Kousounadis*, 159 N.H. 413, 417 (2009), for instance, the defendant drove to former wife’s place of work, parked near her car, and awaited the end of her workday. When she approached, the defendant offered a conversation which she refused. He then opened the door of his car, took out a shotgun, and showed it to her. While she was running away she heard a gunshot, and later police found the spent shell casing in the vicinity, a hole in the wall of the wife’s workplace, and a shotgun slug inside. This Court held that was “use” of the weapon for purpose of felony criminal threatening.

²The statute is reprinted in the appendix, at page 39.

If it is pointed at or toward a person, the gun need not be discharged to be “used.” In *State v. Bird*, 161 N.H. 31 (2010), a lost traveler approached the defendant’s home, clearly marked “no trespassing.” The defendant “came down from his porch, continuing to yell profanities while waving a gun at her,” and “pointed the gun towards her.” *Bird*, 161 N.H. at 33-34 (2010) (quotation omitted). In *State v. Germain*, ___ N.H. ___, Slip Op. 2012-0145, 2013 WL 5912500 (decided Nov. 5, 2013), the defendant pointed a gun at a person’s head and then hit him in the face with the weapon in his hand. In *State v. Gingras*, 162 N.H. 633 (2011), the defendant was driving along when another driver’s actions caused him to swerve, and profanities were exchanged. The defendant got out of his car, approached the other driver on foot, and jumped onto the hood of the other car causing damage. The other driver, now angry, got out of his car, and the defendant withdrew into his own. The defendant then got his handgun from the glovebox, pointed it at the other driver’s chest and threatened to shoot him if he did not back away. This court held that “there could be no serious dispute that the defendant used his gun.” *Gingras*, 162 N.H. at 633. *Gingras* is similar to the facts here, with the important exception that Mr. Benninghove did not point his gun at Mr. Frazier.

Similarly, ordinary objects may be “used” as weapons when they are turned toward a person and cause or come close to causing injury. See e.g., *State v. Euliano*, 161 N.H. 601 (2011) (defendant drove car onto sidewalk and struck people); *State v. Hull*, 149 N.H. 706 (2003) (defendant drove truck so that his mirror caused injury to officer’s shoulder); *In re Justin D.*, 144 N.H. 450 (1999) (roll of coins used as weapon when swung at person’s head); *State v. Kiluk*, 120 N.H. 1 (1980) (dinner fork used as weapon when used to stab someone in the eye); *State v. Piper*, 117 N.H. 64 (1977) (belt buckle used as weapon when blade attached and swung at person).

Thus using a weapon means actually making it do its violence, or imminently threatening its violence to the victim.

B. Brandishing a Gun Means Pompously Advising that Violence is Generally Available

“Brandish,” however, means something short of “use.” The federal sentencing guidelines impose a lengthier sentence when a gun was “used” rather than merely “brandished.” U.S.S.G. § 2B3.1. In *United States v. LaFortune*, 192 F.3d 157 (1st Cir. 1999), the defendant robbed a bank.

Pointing the silver gun at tellers and customers, the armed robber ... shoved or pushed one customer to the floor, telling her to “get down” and “don't talk.” The customer saw the silver flash of (what she perceived as) a gun in his hand. A bank employee heard the armed robber yell for everyone to get down and “saw him wave the small handgun at people in the bank.” Another bank employee reported that the armed robber pointed the handgun directly at her and told her to get down. After the armed robber yelled at the robber behind the teller counter to hurry up, the two ran from the bank, removing their ski masks as they fled.

LaFortune, 192 F.3d at 158. The First Circuit explained the difference between brandishing and using:

LaFortune's conduct amounted to more than brandishing, the general pointing or waving the weapon about in a threatening manner. As we view it, a person may “brandish” a weapon to “advise” those concerned that he possesses the general ability to do violence, and that violence is imminently and immediately available. A general, or even pompous, showing of weapons, involving what one would consider an arrogant demonstration of their presence, constitutes the generalized warning that these weapons may be, in the future, used and not merely brandished. Altering this general display of weaponry by specifically leveling a cocked firearm at the head or body of a bank teller or customer, ordering them to move or be quiet according to one's direction, is a cessation of “brandishing” and the commencement of “otherwise used.”

LaFortune, 192 F.3d at 161-62. In a footnote, the court further explained:

The parade of rockets, tanks, aircraft, marching soldiers, and all the rest of the military accouterments through the main square of an unfriendly nation is “brandishment.” The lowering of the barrels protruding from a tank so as to aim them at another nation's vehicle at Checkpoint Charlie is “otherwise used.”

LaFortune, 192 F.3d at 162, n.12. Other federal courts have repeated the same basis for defining the difference between “use” and “brandish.” See *United States v. Williams*, 520 F.3d 414, 423

(5th Cir. 2008); *United States v. Bowen*, 527 F.3d 1065, 1073 (10th Cir. 2008); *United States v. Paine*, 407 F.3d 958, 964 (8th Cir.2005); *United States v. Beaudion*, 416 F.3d 965, 968 (9th Cir. 2005); *United States v. Orr*, 312 F.3d 141, 144-45 (3d Cir.2002); *United States v. Burton*, 126 F.3d 666, 678 n. 22 (5th Cir.1997).

The recent opinion in *State v. Germain*, __ N.H. __, Slip Op. 2012-0145, 2013 WL 5912500 (decided Nov. 5, 2013), is readily distinguished from the facts here. In *Germain* the defendant pointed a weapon at a person's head and then hit him in the face with it in his hand. Although this Court used the word "brandish" in its description of the defendant's action, the case turned on whether the weapon was a "firearm," did not construe the word "use" in the statute, and avoided precedent on the matter presented here.

Thus, bare brandishing means merely pompously advising that violence is generally available, but not actually causing or imminently threatening the violence.

II. Indictment Fails to Allege Adequate *Actus Reus*

As noted, violation of New Hampshire's criminal threatening statute is generally a misdemeanor, but is a felony if the defendant "uses" a deadly weapon. RSA 631:4, II(a)(2) & II(b).

As also noted, the indictment against Mr. Benninghove alleged a felony for "brandishing the firearm," INDICTMENT (Sept. 20, 2012), *Appx.* at 27, but did not allege he "used" it.

To be sufficient, an indictment must inform the defendant of the crime with which he is charged. But "[i]t is not enough merely to state the crime with which a defendant is being charged; the indictment must include the elements of the offense with sufficient allegations to identify the offense in fact." *State v. Marshall*, 162 N.H. 657, 661 (2011); *Hamling v. United States*, 418 U.S. 87 (1974). Tracking the words of the statute is adequate. *State v. MacElman*, 154 N.H. 304 (2006); *State v. Farwell*, 102 N.H. 3 (1959). Here, "use" of a weapon is an element of the felony. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because "brandish" is a lesser act than "use," the indictment did not allege a felony.

Where an indictment alleges an *actus reus* lesser than required by statute, the indictment is insufficient. *State v. Donovan*, 97 N.H. 190, 192 (1951) ("[T]he complaint ... fails to allege any particular act of the defendant which would constitute a violation of the statute.").

In *State v. Corey*, 127 N.H. 56 (1985), on the other hand, this Court held the indictment was sufficient because "[i]n its entirety, the indictment plainly informed the defendant that the crime charged involved the *use* of a deadly weapon and that he was charged with a class A felony." *Corey*, 127 N.H. at 61 (emphasis added). In *Corey*, it must be emphasized, the indictment charged an act *greater* than required by the statute, whereas in Mr. Benninghove's case and like *Donovan*, the indictment charged an act *lesser* than required by statute. This

difference is crucial, because although Mr. Benninghove's indictment purports a felony, the physical act alleged constitutes merely a misdemeanor.

Mr. Benninghove's case must also be distinguished from *State v. Higgins*, 149 N.H. 290, 299 (2003). There this Court approved a felony criminal threatening conviction where the indictment alleged the defendant "by physical conduct, purposely placed the victim in fear of imminent bodily injury by brandishing a firearm ... at her head while saying 'you're in big trouble now' or words to that effect." The *Higgins* indictment alleged "brandishing a firearm at her head," whereas Mr. Benninghove's indictment alleges bare "brandishing" without any specific object of the alleged brandish. In other words, "brandishing at her head" connotes exactly what the facts were in *Higgins* – "a gun pointed to her head," *Higgins*, 149 N.H. at 292, which is semantically the same as the "use" required by the statute. Mr. Benninghove's indictment, lacking words connoting an object of the action, does not allege the imminence of *Higgins*, and so lacks the "use" required by the statute.

The indictment here alleged only "brandishing," which is a lesser *actus reus* than "use." Accordingly, it did not charge a felony, and if Mr. Benninghove is guilty of anything, it is at most a misdemeanor.

III. Pointing a Gun at the Roof of his Car is Neither Using nor Brandishing

As noted, to feloniously “use” his gun, Mr. Benninghove would have had to discharge his pistol, or at least point it toward Mr. Frazier and threaten to imminently discharge it. He did neither.

Mr. Frazier was in a truck behind Mr. Benninghove, and testified that at most Mr. Benninghove pointed the gun *up* at the roof of Mr. Benninghove’s car, not *back* toward Mr. Frazier’s truck. Moreover, because discharge of the weapon inside Mr. Benninghove’s own car would have risked ricochet and self-harm of a shower of glass from the sunroof overhead, there was little threat of imminent violence. Thus he did not “use” the firearm and is therefore not guilty of a felony.

As also noted, to “brandish” his gun, Mr. Benninghove would have had to pompously advise Mr. Frazier that he had violence generally available. Mr. Frazier, who obviously knew enough about guns to testify it was a semiautomatic pistol and describe it in some detail, also claimed Mr. Benninghove cocked it, a claim which the arresting officer proved was not true. The gun was not cocked and Mr. Frazier knew it. Mr. Benninghove created no possibility that violence was available, and Mr. Frazier knew that too. Thus Mr. Benninghove did not “brandish” the firearm, and therefore is not guilty of any crime.

IV. No Crime Because No Fear

To be guilty of criminal threatening, the defendant must purposely “place another in fear of imminent bodily injury or physical contact.” RSA 631:4, I(a). The statute does not contain a reasonableness standard such that a jury determines whether a hypothetical reasonable person would be placed in fear by the physical conduct, but rather requires that the alleged victim be actually afraid, regardless of actual danger. “Whereas the criminal threatening statute requires proof that the defendant placed . . . [victim] *in fear* of imminent bodily injury, it does not require proof that [victim] was actually placed in danger.” *State v. Gingras*, 162 N.H. 633, 637 (2011) (emphasis in original).

Although when pushed Mr. Frazier eventually uttered the word “scared,” it is apparent that his emotion was anger, or hurt pride, or retribution, or something similar – but not fear. It is possible Mr. Frazier is an uncommonly fearless citizen, or that given Mr. Frazier’s familiarity with firearms the situation was just not dangerous. In any event, it did not place *him* in fear for his safety, and thus Mr. Benninghove committed no crime.

V. Several Stories Told by the Witness so Internally Unreliable a New Trial is Necessary

There are problems with Mr. Frazier's several versions of events.

First, Mr. Frazier indisputably and admittedly lied about at least two things he claimed to the operator during the 911 call. He lied by saying the pistol was pointed out the window at him, and lied again by saying the gun was cocked.

Second, Mr. Frazier admitted in testimony that he saw the gun only *after* the 911 call began, and not before.

Third, at no time during the call, which spanned the entire incident, did Mr. Frazier say anything like "I see the BMW driver messing behind his seat retrieving a gun," or "I see the gun now," or "The gun is pointed at the roof of the BMW," or anything else indicating the gun was in his view during the call.

Fourth, Mr. Frazier probably saw something resembling a gun at some point because he correctly foretold that Mr. Benninghove possessed it.

Fifth, Mr. Benninghove and Mr. Frazier were involved in some sort of mutual road-rage incident in which they both got unreasonably angry at the other's behavior – Mr. Benninghove for the truck having separated him from and cutting off his girlfriend Audrey, and Mr. Frazier for the BMW repeatedly braking and slowing in front of him.

This leads to two inescapable conclusions:

- Despite his denial, Mr. Frazier had to have seen the gun before the 911 call because he would not have called 911 about some mere finger-brandishing. This suggests Mr. Frazier saw the gun, perhaps when he was in the right lane alongside the BMW before he merged left, and corroborates Mr. Benninghove's contemporaneous assertion that the gun was on his lap.

- In all likelihood, Mr. Benninghove never brandished or pointed his gun, because Mr. Frazier would have said so during the call. Rather Mr. Frazier concocted his first story – the one he twice told to the 911 operator that Mr. Benninghove pointed the gun out the window – in order to get attention of law enforcement focused on Mr. Benninghove out of vengeance for having caused him truck-driver stress. And then Mr. Frazier concocted the second story – the one he wrote in his statement and told on the stand that Mr. Benninghove pointed his gun toward the sky – when he realized the first story could not possibly be true because he neglected to tell it to the 911 operator in his contemporaneous narration.

The Court evaluates credibility of witnesses upon the defendant raising the issue in a motion to set aside the verdict. *State v. Hill*, 163 N.H. 394, 396 (2012) (“[I]n considering a motion to set aside the verdict based on the weight of the evidence, the trial court ‘sits as a ‘thirteenth juror’ and disagrees with the jury’s resolution of the conflicting testimony.”); *State v. Spinale*, 156 N.H. 456 (2007). Because both of Mr. Frazier’s stories are internally inconsistent and cannot be reconciled with objective facts, this Court, sitting now as a fourteenth juror, must set aside the verdict and order a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse the conviction; alternatively, this Court should vacate the conviction and order a new trial.

Respectfully submitted,

James Dylan Benninghove
By his Attorney,

Law Office of Joshua L. Gordon

Dated: November 14, 2013

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
75 South Main Street #7
Concord, NH 03301
(603) 226-4225
www.AppealsLawyer.net

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for James Dylan Benninghove requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the portion of the statute referenced herein has not heretofore been construed, and because Mr. Benninghove's status as a felon – burdensome in many ways – turns on the matters to be determined in this appeal.

I hereby certify that the decision being appealed is added to this brief. I further certify that on November 14, 2013, copies of the foregoing will be forwarded to the Office of the Attorney General.

Dated: November 14, 2013

Joshua L. Gordon, Esq.

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STATE OF NEW HAMPSHIRE

PISTOL/REVOLVER LICENSE

R 476559

Date 12-16-2011

In accordance with Chapter 159 of New Hampshire Revised Statutes Annotated 1955, as Amended 1979, a License to Carry a Pistol or Revolver is issued to the Following Individual:

DOB 12-15-82

HGT 600

WGT 200

JAMES BENNINGHOVE
7 HACKETT HILL RD
MANCHESTER, NH 03102

EYE BRO THIS LICENSE EXPIRES ON 12-31-2015

HAIR BRO ISSUED BY Manchester Police Dept. NEW HAMPSHIRE

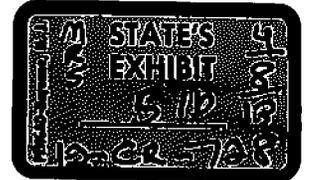
SIGNATURE OF APPLICANT
[Signature]

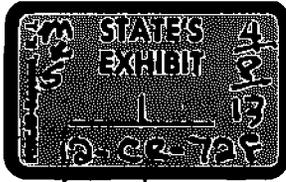
BY CT Coombs
AUTHORIZED SIGNATURE

TITLE Det. Lt.

DSSP175

PRINTED ON RECYCLED PAPER





STATE OF NEW HAMPSHIRE
Dept. of Safety - Div. of State Police
STATEMENT FORM

D12-11548

Date: 8/8/12 Time: 1:28 Place: Rte 3A Hooksett #453

I: James Benninghove 12-15-87 give the following voluntary statement
to: Trapper J. Waldvogel who has identified himself as a member
of the New Hampshire State Police. He has advised me of the following:

- 1. I have the right to remain silent; JS
- 2. Anything I say can and will be used against me in a court of law; JS
- 3. I have the right to talk to a lawyer for advice before any questioning and to have one with me during questioning; JS
- 4. If I cannot afford a lawyer, one will be appointed for me; and JS
- 5. If I decide to answer questions now without a lawyer present, I still have the right to stop answering at any time. JS

WAIVER

- 1. Do you understand each of these rights? JS yes
- 2. Understanding these rights are you willing to answer questions? yes JS

Witness: _____ Signature: _____

Witness: _____

I was driving towards Hooksett/Bow from Manchester, on my way to drop off my dad's car to the mechanic. I was in following a group of cars past a tractor trailer and my girlfriend was following me. ~~She was driving a truck~~ I had a fireman on my lap and was moving it after I noticed it under my foot. I was next to the truck for a few seconds and then passed him. As I was waiting for my girlfriend to pass I see the truck cut her off and she slammed ~~on~~ her brakes. I put my hands up like what the heck was that about. The driver returned w/ hand gestures as I did. He told me to pull over so I hit my brakes and slowed to 25.30mph or around there and he kept on right til he was almost touching then he told me to pull over, he was flipping out andirate. His head and half of his body was out the window. I pulled over and he ^{started} ~~had~~ to pull past me, I didn't know if he was running me off the road or just blocking me in and getting in front of me. So I pulled out and drove away. I thought it was over b/c he was almost out of sight. He then came up behind me and told me to pull over in the weigh station. I thought about it and

STATE OF NEW HAMPSHIRE
Dept. of Safety - Div. of State Police
STATEMENT FORM

Dtd-111112
Pg 2.

Date: 8/8/12 Time: 1:28 PM Place: Rte 3A Hooksett #452

I: James Benninghove 12-15-82 give the following voluntary statement
to: Trooper J. Waldvogel who has identified himself as a member
of the New Hampshire State Police. He has advised me of the following:

- 1. I have the right to remain silent;
- 2. Anything I say can and will be used against me in a court of law;
- 3. I have the right to talk to a lawyer for advice before any questioning and to have one with me during questioning;
- 4. If I cannot afford a lawyer, one will be appointed for me; and
- 5. If I decide to answer questions now without a lawyer present, I still have the right to stop answering at any time.

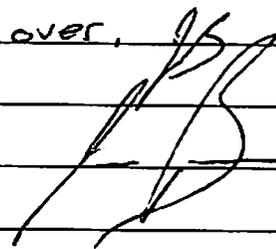
WAIVER

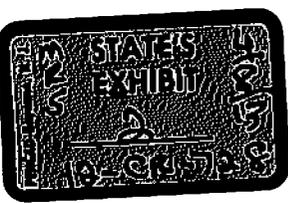
- 1. Do you understand each of these rights? _____
- 2. Understanding these rights are you willing to answer questions? _____

Witness: _____ Signature: _____

Witness: _____

~~then I saw a DOT officer and decided it wasn't worth it and drove on.~~
Then I saw a DOT officer and pulled over.

 8-8-12



NEW HAMPSHIRE STATE POLICE

Date: 8/8/72

Case No. D12-11548

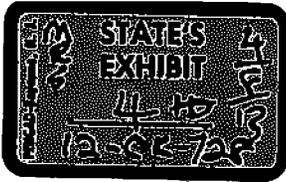
STATEMENTS OF: Jeffrey T. Frazier 8-20-68

going N. ON 93 GOT OFF EXIT 10 3A.N
 STOPPED AT light IN RIGHT LANE light CHANGED
 STARTED TO move RIGHT LANE END HAD TURN SINGLE
 ON TO move TO LEFT NEXT THING BLACK BMW
 CAR STARTS SLAMING ON HIS BRAKES IN FRONT OF
 ME GIVEING ME THE MIDDLE FINGER THEN PUTS
 HIS HAND OUT WINDOW LIKE HE IS POSITION SOMETHING
 AT ME SO I CALLED 911 THEN I SEE HIM MESSING
 AROUND IN THE BACK SEAT OR BEHIND THE SEAT.
 THEN HE HOLDS A GUN UP SO I COULD SEE IT AND
 HE COCKS THE GUN TO ME THIS IS A TRUCK I SEE
 A TRUCKER AT THE SCALE HOUSE ON 3A AND STOPPED
 AND TOLD HIM AS I WAS ALSO ON THE PHONE WITH
 911 THE TRUCKER PULLED HIM OVER.

AS I WAS FOLLOWING HIM I SEE THE DRIVER OF
 THE BMW HOLD A GUN LIKE A 9mm SEMI PISTOL
 HE HELD IT UP WITH RIGHT HAND POINTED UP TO THE
 ROOF OF THE CAR THEN HE COCKED THE GUN ~~AND~~
 AND I COULD SEE WHAT LOOKED TO BE A DARK GUN
 BUT THE WINDOWS OF THE CAR WERE DARK TOO.
 CLEARLY NOT A REVOLVER

Jeffrey T. Frazier

page 1 of 1 pages



STATE OF NEW HAMPSHIRE
Dept. of Safety - Div. of State Police
STATEMENT FORM

D12-11548

Date: 8/8/12 Time: 1312 Place: 455 WEST RIVER RD.

I: Ausley Charter 1/15/85 give the following voluntary statement
to: 7 Hackett Hill^{ed} Manchester NH who has identified himself as a member
05102
of the New Hampshire State Police. He has advised me of the following:

(603) 230-9731

WAIVER

- | | |
|--|--|
| 1. I have the right to remain silent; | 1. Do you understand each of these |
| 2. Anything I say can and will be used against me in a court of law; | rights? <u>Ac</u> |
| 3. I have the right to talk to a lawyer for advice before any questioning and to have one with me during questioning; | 2. Understanding these rights are you |
| 4. If I cannot afford a lawyer, one will be appointed for me; and | willing to answer questions? <u>Ac</u> |
| 5. If I decide to answer questions now without a lawyer present, I still have the right to stop answering at any time. | |

Witness: _____ Signature: Mindy Chini

Witness: I was driving on Rt 3 following my boyfriend to drop his car off at an auto body shop. When the lanes started to merge I was ahead of a truck, but as I started to merge into the one lane he started to speed up. I had to slam on my breaks and almost got in an accident. I continued driving until I saw the cops turn on blues. I wasn't aware that anything else had happened.

INDICTMENT

At the Superior Court, held at Concord, in the County of Merrimack on the 20th day of SEPTEMBER, 2012 the Grand Jurors for the State of New Hampshire, upon their oath, present that

JAMES BENNINGHOVE
of **HOOKSETT, NEW HAMPSHIRE**

did commit the crime of **CRIMINAL THREATENING**
contrary to **RSA 631:4, a CLASS B FELONY**

on or about the 8th day of **AUGUST, 2012**
at **HOOKSETT, New Hampshire**

2012 SEP 20
PM 11:38

SUPERIOR COURT

002303

In that:

1. James Benninghove placed or attempted to place Jeffery Frazier in fear of imminent bodily injury with a handgun, which is a deadly weapon, by brandishing the firearm at him while driving a car in front of the truck Frazier was driving;
2. James Benninghove committed the above acts purposely.

contrary to the form of the statute, in such cases made and provided, and against the peace and dignity of the State. This is a true bill.

Verdict

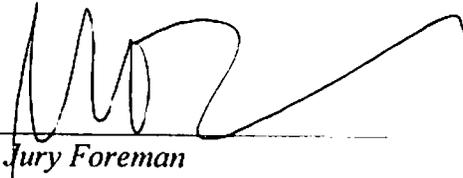
Plea: **GUILTY**

Date: 4.9.13

Steno: M. Seymour

Clerk: W.S. McGowan

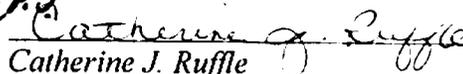
Judge: R.B. McNamee P.J.


Grand Jury Foreman

James Benninghove
7 Hackett Hill Road
Manchester, NH 03102

WPC

Tony Polled


Catherine J. Ruffe
Deputy Merrimack County Attorney

State v. James Benninghove
Date of Birth: 12/15/82

MCSC #217	<u>2012 CR 728</u>
CHG ID#	<u>691146C</u>

MERRIMACK, SS.

SUPERIOR COURT

STATE OF NEW HAMPSHIRE SUPERIOR COURT

V.

2013 APR 15 PM 3 19

JAMES BENNINGHOVE

12-CR-728

MOTION TO SET ASIDE

NOW COMES undersigned counsel, Evan F. Nappen, Esq., and respectfully requests that this Honorable Court:

- A. Set aside the jury guilty verdict of one count of criminal threatening because it was contrary to the weight of the evidence;
- B. Order a new trial;
- C. Hold a Hearing on this Motion on the date of the scheduled Sentencing Hearing;
- D. Grant any other relief deemed in the interest of justice.

In Support of this Motion it is stated that:

- 1. The New Hampshire Supreme Court has recently distinguished how a trial court should treat a motion to set aside based on the weight of the evidence from a motion to dismiss for insufficient evidence. State v. Hill, 163 NH 394 (2012)
- 2. In Hill, the defendant argued on appeal that the jury verdict was against the weight of the evidence but the Supreme Court found that the argument was not preserved because the defendant had not made a post-verdict motion to set aside based on the weight of evidence. Id. at 844.
- 3. On a post-verdict motion challenging the weight of evidence, as opposed to a motion to dismiss for insufficient evidence made during or after trial, “the trial court sits as a “thirteenth juror”. Id. (quotation omitted). If the trial court disagrees with the jury’s decision, “the trial court’s difference of opinion no more signifies acquittal than does a disagreement among juror’s themselves.” Id. Indeed “a motion addressed to the weight of the evidence primarily presents a question of fact for the trial court, and *the trial court has much more discretion when considering such a motion.*” Id. (emphasis added).

M

4. The remedy for a motion to set aside based on the weight of the evidence is a new trial not an acquittal. Id.
5. Rather than regurgitating closing argument to the jury made on the record on April 9, 2013, the defendant incorporates that argument into this motion and will only highlight a few key points here.
6. As the Court recalls the key witness against Mr. Benninghove was Mr. Jeffrey T. Frazier.
7. Mr. Frazier admitted on the stand under cross examination that he lied to the 911 operator.
8. Mr. Frazier claimed that Mr. Benninghove pointed a gun out the window. He made this false claim twice on the 911 recorded call. He added to that by saying how he "...doesn't take to kindly to someone sticking a gun out the window..."
9. Mr. Frazier admitted on the stand under cross examination that he had only seen Mr. Benninghove point his fingers before he called 911.
10. Mr. Frazier further admitted that he had not even seen a gun before he called 911.
11. His admission on the witness stand of knowingly reporting false information to 911 is a crime under *RSA §641:4 False Reports to Law Enforcement*. Mr. Frazier caused 911 and law enforcement officer(s) alerted by 911 to believe that Mr. Benninghove committed an offense.
12. Additionally, it is a crime under *RSA §641:3 Unsworn Falsification* because he made an electronic false statement (via cellphone and recorded by 911) "with a purpose to deceive a public servant in the performance of his or her official function."
13. Mr. Frazier's subsequent claim in his written statement that Mr. Benninghove pointed the gun at the roof and cocked it by operating the slide on the gun was demonstrated in Court to also be a false claim.
14. Trooper Waldvogel meticulously went through the action and function of the firearm with Counsel in which it was explained that every time the slide is operated a new round goes in the chamber and the previous cartridge would be extracted. This would drop six cartridges all over Mr. Benninghove's passenger compartment.
15. The 911 recording documents the entire episode. Mr. Frazier was on the phone with 911 before he even allegedly saw a gun and lied to the 911 operator, yet at no time did he tell the 911 operator that he saw Mr. Benninghove point the gun at the roof and cock it by operating the slide on the gun. Why would an observation that important and "threatening" not be mentioned to the 911 operator if he actually saw it?

16. The 911 recording covers from Mr. Frazier's first admitted lie to the 911 operator to him screaming at the Trooper. That is all of approximately 2 minutes and 30 seconds. The Trooper further testified that it took him all of a minute to stop Mr. Benninghove in his vehicle.
17. When the trooper recovered the handgun in question it had a fully loaded magazine containing all six cartridges and there was no cartridge in the chamber. The only other occupant in Benninghove car was his dog.
18. It was also demonstrated in the court that the firearm is a two-tone, a black frame with bright silver top and that upon griping the gun would appear bright silver not "dark" as claimed by Mr. Frazier.
19. Given that both claims are either admittedly or demonstratively false it is clear that the weight of the evidence was insufficient for a finding of guilt.
20. In short, acting as a thirteenth juror, the Court should find that the state did not meet its burden of proving these indictments beyond a reasonable doubt, and should set aside the verdict.

WHEREFORE, The defendant respectfully requests that this Honorable Court grant prayers for relief A.-D. above.

WHEREFORE, the Defendant respectfully prays this Honorable court for the following relief:

1. That this Honorable Court grant this motion;
2. That this Honorable Court grant the Defendant such other and varied relief as may be deemed just and fair.

Respectfully submitted,

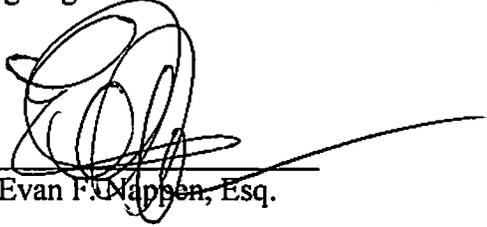


~~E.F. Nappen, Esq.~~

E.F. Nappen Attorney at Law, PC
280 Pleasant Street
Concord, NH 03301
(603) 223-0001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was forwarded on this date, to Attorney
Wayne P. Coull, Esq.



Evan F. Napsen, Esq.

April 15, 2013

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

V.

JAMES BENNINGHOVE

12-CR-728

MOTION TO SENTENCE CRIMINAL THREATENING AS A MISDEMEANOR

NOW COMES undersigned counsel, Evan F. Nappen, Esq., and respectfully moves this Honorable Court to sentence the above defendant for a misdemeanor conviction on the criminal threatening charge.

In support thereof, it is stated:

1. Mr. Benninghove was convicted on April 9, 2013 of one count of criminal threatening.
2. The body of the indictment for criminal threatening reads in pertinent part as follows:

“James Benninghove placed or attempted to place Jeffrey Frazier in fear of imminent bodily injury with a handgun, which is a deadly weapon, by brandishing the firearm at him while driving a car in front of the truck Frazier was driving;”

“James Benninghove committed the above acts purposely.”

2013 APR 16 PM 3 41

SUPERIOR COURT

022290

B

3. In order for criminal threatening to be the felony variant under RSA 631:4 I and II(a)(2) it requires the follows:

I. **By physical conduct**, the person purposely places or attempts to place another in fear of imminent bodily injury or physical contact.

II. (a) Criminal threatening is a class B felony if the person:

(1) Violates the provision of subparagraph I(e); or
(2) **Uses** a deadly weapon as defined in RSA 625:11, V in the violation of provisions of subparagraph I(a) I(b) I(c) or I(d).

(b) **All other criminal threatening is a misdemeanor.**
(Emphasis added)

4. The Supreme Court in State v. Bird 8 A.3d 146, at 152 (NH 2010) clearly set out what is required in an indictment to be sufficient to charge the “variant of felony criminal threatening”:

“To be sufficient to charge the variant of felony criminal threatening involved here, the indictment **must** have set out the following elements: That **by physical conduct**, the defendant “ purposely place[d] or attempt[ed] to place another in fear of imminent bodily injury or physical contact” while **using** a deadly weapon. RSA 631:4, I(a) II(a)(2). A deadly weapon is “any firearm , knife, or other substance or thing which, in the manner it is used, intended to be used, or threatened to be used, is known to be capable of producing death or serious bodily injury. ”RSA 625:11, V; *Kousounadis*, 159 NH at 425, 986 A.2d 603. (Emphasis added)

5. At no time does the indictment charge “by physical conduct.”

6. At no time does the indictment charge “using.”

7. The indictment lacks BOTH the elements of “by physical conduct,” and “using” and therefore the “variant of felony criminal threatening” was not sufficiently charged. Mr. Benninghove was convicted of a misdemeanor because “*All other criminal threatening is a misdemeanor*” under RSA 631:4II (a) (2).
8. Furthermore, “brandishing” is not “using.” The United States Court of Appeals for the First Circuit, which includes New Hampshire, clearly explained the difference between the two in United States v. David Holis LaFortune 192 F.3d 157 (1st Cir. 1999).
9. The difference between the terms became an issue in Lafortune because under the Federal Sentencing Guidelines if a firearm is “used” instead of “brandished” there is a higher level of punishment at sentencing.
10. The LaFortune decision distinguishes between “*used and not merely brandished*” as follows:

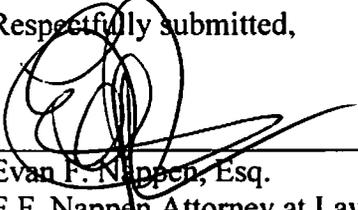
LaFortune’s conduct amounted to **more than brandishing**, the general pointing or waiving the weapon about in a threatening manner. As we view it, a person may “brandish” a weapon to “advise” those concerned that he possesses the general ability to do violence, and that violence is imminently available. A general or even pompous, showing of weapons, involving what one would consider an arrogant demonstration of their presence, constitutes the generalized warning that these weapons may be, in the future, **used and not merely brandished**. Altering this general display of weaponry by specifically leveling a cocked firearm at the head or body of a bank teller or customer, ordering them to move, or be quiet according to one’s direction, is a cessation of “brandishing” United States v. David Holis LaFortune 192 F.3d 161 (Emphasis added)

11. The indictment only charged “brandishing” it did not charge “used” a deadly weapon. Brandishing is not used. It is less than used.
12. Furthermore, “physical conduct” was not alleged in the indictment. Without “physical conduct” there can be no “use” because to actually “use” a deadly weapon would requires “physical conduct.”
13. Therefore, Mr. Benninghove was at most convicted of a misdemeanor.

WHEREFORE, the Defendant respectfully prays this Honorable court for the following relief:

1. That this Honorable Court grant this motion and sentence the defendant for a misdemeanor conviction;
2. That this Honorable Court grant the defendant such other and varied relief as may be deemed just and fair.

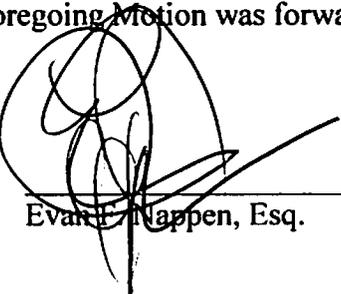
Respectfully submitted,



Evan F. Nappen, Esq.
E.F. Nappen Attorney at Law, PC
280 Pleasant Street
Concord, NH 03301
(603) 223-0001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was forwarded on this date, to Attorney Wayne Coull.



Evan F. Nappen, Esq.

April 16, 2013

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Merrimack Superior Court
163 North Main St./PO Box 2880
Concord NH 03302-2880

Telephone: (603) 225-5501
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

RETURN FROM SUPERIOR COURT – HOUSE OF CORRECTIONS

Case Name: **State v. James Dylan Benninghove**
Case Number: **217-2012-CR-00728**

Name: **James Dylan Benninghove**, 7 Hackett Hill Road Manchester NH 03102
DOB: December 15, 1982

Charging document: Indictment

Offense: Criminal Threatening
Charge ID: 691146C
RSA: 631:4
Disposition: Guilty/Chargeable By: Jury T/N: _____

Date of Offense: August 08, 2012
2013 MAY 23 PM 3 31
SUPERIOR COURT
026058

A finding of GUILTY/CHARGEABLE is entered.
Conviction: Felony
Sentence: see attached

May 08, 2013 Richard B McNamara William S. McGraw
Date Presiding Justice Clerk of Court

MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **Merrimack County House of Corrections**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

5-23-13 Attest: Karen's Ingers
Date Dep Clerk of Court

SHERIFF'S RETURN

I DELIVERED THE DEFENDANT TO THE **Merrimack County House of Corrections** and gave a copy of this order to the Superintendent.

May 23, 2013 Sgt. Dubalway
Date Sheriff

C: State Police DMV Dept. of Corr. Offender Recs Sheriff
 Defendant Pros. Atty Wayne P. Coull, ESQ Defense Attorney Evan F. Nappen, ESQ
 Office of Cost Cont. Sex Offender Registry Other mchoc _____ Dist Ct. _____

(21)

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

http://www.courts.state.nh.us

Court Name: Herrinck Superior
 Case Name: State v. James Benninghoe
 Case Number: 12-CR-728 Charge ID Number: 691146C
 (if known)

HOUSE OF CORRECTIONS SENTENCE

Plea/Verdict: <u>Guilty</u>	Clerk: <u>William S. McGraw</u>
Crime: <u>Criminal Threatening</u>	Date of Crime: <u>Aug 8, 2012</u>
Monitor:	Judge: <u>R.B. McNamara, J.</u>

A finding of GUILTY/TRUE is entered.

This conviction is for a Felony Misdemeanor Violation of Probation

If this box is checked, the conviction is for a misdemeanor crime of domestic violence which is defined in federal law as, "...the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent or guardian of the victim." The defendant is prohibited from possessing, receiving or purchasing a firearm including a rifle, pistol or revolver, or ammunition according to federal law.

1. The defendant is sentenced to the House of Corrections for a period of 12 day(s)/month(s)/year

2. This sentence is to be served as follows:

Stand committed Commencing _____

Consecutive weekends from 6 PM Friday to 6 PM Sunday beginning May 31, 2013

9 month(s) of the sentence is suspended during good behavior and compliance with all terms and conditions of this order.

Any suspended sentence may be imposed after hearing at the request of the State brought within 5 year(s) of today's date _____.

_____ of the sentence is deferred for a period of _____ years/months. The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ years/months.

Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest.

Other: _____

3. The sentence is consecutive to _____
 concurrent with _____

4. Pretrial confinement credit: _____ days.

5. The court recommends to the county correctional authority:

- A. Work release consistent with administrative regulations.
- B. Drug and alcohol treatment and counseling.
- C. Sexual offender program.
- D. _____

Pursuant to RSA 499:10:a, the clerk shall notify the appropriate health care regulatory board if this conviction is for a felony and the person convicted is licensed or registered as a health care provider.

nine
PBY

Case Name: _____

Case Number: _____

RETURN FROM SUPERIOR COURT – HOUSE OF CORRECTIONS

PROBATION OR CONDITIONAL DISCHARGE

6. The defendant is placed on probation for a period of 2 year(s), upon the usual terms of probation and any special terms of probation determined by the probation/parole officer.

PPM

Effective: 5/31/13 Forthwith Upon Release _____

The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

7. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 5 days in response to a violation of a condition of probation.

8. A conditional discharge is entered for a period of _____ year(s). As a condition of the discharge, the defendant shall comply with all terms of this sentencing order. Successful completion of the discharge period does not annul this record. Defendant must petition the Court for annulment of any conviction and sentence entered herein.

9. **Violation of probation, ~~conditional discharge~~ or any of the terms of this sentence may result in revocation of probation or ~~discharge~~ and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

10. Other conditions of this sentence are:

A. The defendant is fined \$ _____, plus statutory penalty assessment of \$ _____.

The defendant shall also pay the time payment fee of \$25.00.

The fine, penalty assessment and any fees shall be paid:

Now By _____ Through the Department of Corrections as directed by the Probation/Parole Officer.

\$ _____ of the fine is suspended for _____ year(s).

\$ _____ of the statutory penalty assessment is suspended for _____ year(s).

B. The defendant is ordered to make restitution of \$ _____ plus statutory 17% administrative fee.

Through the Department of Corrections as directed by the Probation/Parole Officer

Through the Department of Corrections on the following terms:

At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.

Restitution is not ordered because:

C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

D. The defendant's license privilege to operate in New Hampshire is revoked for a period of _____ effective _____.

E. Under the direction of the Probation/Parole Officer, the defendant shall tour the New Hampshire State Prison House of Corrections

F. The defendant shall perform _____ hours of community service under the direction of Probation/Parole Officer.

G. The defendant is ordered to have no contact with Jeff Frazier either directly or indirectly, including but not limited to contact in-person, by mail or telephone or by means of any communications, electronic or otherwise.

H. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

I. Other: The defendant shall undergo Anger Management counseling to the satisfaction of Probation Picked B. Melendez

5/8/13

Date Sentenced

Presiding Justice

TITLE LXII

CRIMINAL CODE

CHAPTER 631

ASSAULT AND RELATED OFFENSES

Section 631:4

631:4 Criminal Threatening. –

I. A person is guilty of criminal threatening when:

(a) By physical conduct, the person purposely places or attempts to place another in fear of imminent bodily injury or physical contact; or

(b) The person places any object or graffiti on the property of another with a purpose to coerce or terrorize any person; or

(c) The person threatens to commit any crime against the property of another with a purpose to coerce or terrorize any person; or

(d) The person threatens to commit any crime against the person of another with a purpose to terrorize any person; or

(e) The person threatens to commit any crime of violence, or threatens the delivery or use of a biological or chemical substance, with a purpose to cause evacuation of a building, place of assembly, facility of public transportation or otherwise to cause serious public inconvenience, or in reckless disregard of causing such fear, terror or inconvenience; or

(f) The person delivers, threatens to deliver, or causes the delivery of any substance the actor knows could be perceived as a biological or chemical substance, to another person with the purpose of causing fear or terror, or in reckless disregard of causing such fear or terror.

II. (a) Criminal threatening is a class B felony if the person:

(1) Violates the provisions of subparagraph I(e); or

(2) Uses a deadly weapon as defined in RSA 625:11, V in the violation of the provisions of subparagraph I(a), I(b), I(c), or I(d).

(b) All other criminal threatening is a misdemeanor.

III. (a) As used in this section, "property" has the same meaning as in RSA 637:2, I; "property of another" has the same meaning as in RSA 637:2, IV.

(b) As used in this section, "terrorize" means to cause alarm, fright, or dread; the state of mind induced by the apprehension of hurt from some hostile or threatening event or manifestation.

IV. A person who responds to a threat which would be considered by a reasonable person as likely to cause serious bodily injury or death to the person or to another by displaying a firearm or other means of self-defense with the intent to warn away the person making the threat shall not have committed a criminal act under this section.

Source. 1971, 518:1. 1983, 338:1. 1994, 187:2. 1996, 92:1. 2002, 222:7. 2003, 69:1, eff. Jan. 1, 2004. 2010, 361:2, eff. Jan. 1, 2011.