VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 31st day of May, 2018.

Present: All the Justices

Darryl Sylvester Jackson, No. 1415951, Petitioner,

against Record No. 170843

Harold W. Clarke, Director of the DOC, Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the petition for a writ of habeas corpus, the record, briefs, and argument of counsel, the Court is of the opinion that the writ should not issue and the petition should be dismissed.

Darryl S. Jackson, Jr. filed this petition for a writ of habeas corpus contending that his trial counsel was constitutionally ineffective for inadequately challenging the sufficiency of the evidence that he possessed a firearm as a person convicted of a felony under Code § 18.2-308.2. He claims that this ineffective assistance prejudiced him because there was a reasonable probability a properly framed motion to strike the evidence would have been granted. We disagree.

The trial record establishes that on the night of the robbery, while spending time with friends at an apartment, Jackson announced that he was going to "hit a lick," meaning to commit a robbery, or, alternatively, he may have said "let's go get some money," which those present understood to mean "[j]ust go rob somebody off the street." Javon Johnson and Dajuan Doleman left with him. Jackson had a weapon with him, which several witnesses described as a gun. Johnson saw the gun, testifying that it was a black and silver handgun. According to Johnson, when the three reached the Caribbean Food Store, Jackson and Doleman went inside, while Johnson waited outside.

The owner of the business, Clifford "Shorty" Farquharson, saw the men burst into his store. The men demanded that he open the register. When Farquharson said he needed to get the key, one of the men slid under the counter, grabbed some money that was under the register, and took some cigarettes and cigars as well. Farquharson recalled that the robber had a "gun or a knife" in his hand. He also testified he did not initially call the police when the men entered the store because "they had a gun." When Johnson walked in, he could see Jackson with the gun in his hand saying "give me the money."

When Jackson returned from the robbery, his gun was in his waistband. The trio returned with cigarettes and money. Nicole Thompson saw the gun when Jackson returned from the robbery. The group divided up the money and cigarettes, and took celebratory photographs. The gun was never found. It is undisputed that Jackson was previously convicted of a felony.

Jackson was tried first for robbery, use of a firearm in the commission of robbery, and conspiracy to rob. After the jury convicted Jackson of these charges, the same jury proceeded to hear the felon in possession of a firearm case. At the conclusion of the trial's second phase on the possession of a firearm charge, counsel moved to strike "for the reasons [he] stated" in the trial's first phase. Counsel further clarified that "I don't want to go through them all again but I would move to strike on the grounds that really the evidence never established that Mr. Jackson actually committed this robbery." Counsel's motion to strike the charge under Code § 18.2-308.2 did not parse the differences between the proof required under that statute and proof required under other firearm statutes, notably the statute that prohibits the use of a firearm in the commission of a felony, Code § 18.2-53.1. The trial court denied the motion to strike. The jury found Jackson guilty of possession of a firearm after having been convicted of a felony.

A defendant's right to counsel under the Sixth Amendment includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). The two-part test articulated in *Strickland* establishes the standard for assessing a claim that counsel was constitutionally ineffective. First, a habeas petitioner must demonstrate that "counsel's performance was deficient," *i.e.*, "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. Second, "actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Id.* at 693. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The petitioner must show both deficient performance and prejudice; the two are separate and distinct elements of an ineffective assistance claim. *Id.* at 687. The Supreme Court has noted that "*Strickland*'s standard, although by no means insurmountable, is highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). We conclude that the "prejudice" component of the test is dispositive and, accordingly, we do not address the "performance" component of the test.

Jackson correctly notes that what constitutes a "firearm" can vary depending on the statute. For example, under Code § 18.2-53.1, a defendant can be convicted either if the object he used in the commission of a defined crime is "an actual firearm that has the capability of expelling a projectile by explosion," or "upon proof that [the] defendant employed [that] instrument [in a manner to give it] the appearance of having a firing capability." *Startin v. Commonwealth*, 281 Va. 374, 379, 706 S.E.2d 873, 877 (2011).

Code § 18.2-308.2 provides in relevant part:

> A. It shall be unlawful for (i) any person who has been convicted of a felony . . . to knowingly and intentionally possess or transport any firearm or ammunition for a firearm, any stun weapon as defined by § 18.2-308.1, or any explosive material, or to knowingly and intentionally carry about his person, hidden from common observation, any weapon described in subsection A of § 18.2-308.

In *Armstrong v. Commonwealth*, 263 Va. 573, 562 S.E.2d 139 (2002), we held that the term "firearm" under Code § 18.2-308.2 means "any instrument designed, made, and intended to fire or expel a projectile by means of an explosion." *Id.* at 583, 562 S.E.2d at 145. That definition, however, does not require the firearm to have a present capacity to fire or any operability. *Id.* at 583-84, 562 S.E.2d at 145. We further clarified that definition by explaining that neither a replica gun nor a BB gun would be sufficient to convict a person under Code § 18.2-308.2 for possession of a firearm by a convicted felon because those items were not "designed, made, and intended to fire or expel a projectile by means of an explosion." *Startin*, 281 Va. at 382, 706 S.E.2d at 878 (internal quotation marks and citation omitted).

A vague description of an item as "a long black gun" from a store clerk who admitted she was "not familiar with guns" "is insufficient, alone, to prove that the object possessed the

"ability to expel a projectile by the power of an explosion." *Redd v. Commonwealth*, 29 Va. App. 256, 259, 511 S.E.2d 436, 438 (1999) (quotation marks omitted). Nevertheless, in *Redd*, the Court of Appeals held that the defendant's "threat, upon presenting the weapon, to kill the clerk was an implied assertion that the object was a functioning weapon, being in fact the firearm that it appeared to be and possessing the power to kill." *Id.* "This implied assertion, which was corroborated by the appearance of the object and was uncontradicted by any other evidence, was evidence sufficient to support the trial court's finding that the object was a firearm." *Id.*

Similarly, in *Jordan v. Commonwealth*, 286 Va. 153, 158, 747 S.E.2d 799, 801-02 (2013), which expressly reaffirmed the ongoing validity of *Redd*, we held that when the defendant pointed a gun, although not verbally threatening to kill the victim, when combined with the description of the gun as a specific type of gun, a "Raven," sufficed to sustain a conviction under Code § 18.2-308.2. We stated that "[i]t was within the province of the jury to conclude that Jordan's conduct [of pointing the gun at the victim] was an implied assertion that the object he held was a firearm." *Id.* at 158, 747 S.E.2d at 801.

A motion to strike the evidence "is in substance the same as a directed verdict; that is, the party making the motion is attempting to deprive his opponent of a trial by jury." *Williamson v. Commonwealth*, 180 Va. 277, 280, 23 S.E.2d 240, 241 (1942). Such a motion should not be granted "unless it plainly appears that the trial court would be compelled to set aside any verdict for the party whose evidence it is sought to strike out." *Id.* The evidence in this case presented a jury question under our existing caselaw, and, therefore, there is no reasonable probability of a different outcome. In *Jordan*, we concluded that the act of pointing a firearm at the victim raised a jury question as to whether that conduct was an implied assertion of the firearm's ability to function. 286 at 158, 747 S.E.2d at 801. Viewed in the light most favorable to the Commonwealth, the evidence established that Jackson pointed a firearm at the store owner and demanded money. The store owner felt threatened to comply and testified he did not call the police because of the gun. As in *Redd* and *Jordan*, the conduct in question could be found by the jury to constitute an implied assertion of the firearm's functionality. Jackson challenges these facts, by noting that the store owner at one point described the item as either a knife or a gun, and by attacking the truthfulness of Johnson's account that it was Jackson who held the gun. However, resolution of those factual questions was a matter for the jury rather than an issue for the court to resolve under a motion to strike. In addition, unlike the store clerk in *Redd*, who

provided a vague description of a gun and who admitted she was not familiar with guns, here, four separate individuals had the opportunity to see the gun up close and described it unambiguously as a gun. One of those witnesses, Johnson, evidently had at least some familiarity with guns.[1] Although he did not state the model of the gun, as in *Jordan*, the testimony of these four individuals, combined with the manner of the gun's use during the robbery, sufficed for the case to go to the jury under existing precedent.[2] It is axiomatic that the prosecution can prove its case through circumstantial evidence, and that "it is within the province of the jury to determine what inferences are to be drawn from proved facts, provided the inferences are reasonably related to those facts." *Inge v. Commonwealth*, 217 Va. 360, 366, 228 S.E.2d 563, 567-68 (1976). Therefore, we conclude that Jackson's claim does not meet the prejudice component of the standard for constitutionally ineffective counsel.

Accordingly, the petition is dismissed and the rule is discharged.

JUSTICE POWELL, with whom CHIEF JUSTICE LEMONS and JUSTICE GOODWYN join, dissenting.

The majority dismisses Jackson's petition finding that his "claim does not meet the prejudice component of the standard for constitutionally ineffective counsel." The majority finds that "the conduct in question could be found by the jury to constitute an implied assertion of the firearm's functionality." For the following reasons, I respectfully dissent and would find that

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[1] Part of Johnson's plea agreement involved a commitment by the prosecution not to charge him with possession of a stolen gun. That gun was unrelated to the robbery of the Caribbean Food Store.

[2] We note that counsel is tasked only with being familiar with existing caselaw. The constitutional standard does not require counsel to anticipate the direction of future developments. *See, e.g.*, *Ostrander v. Green*, 46 F.3d 347, 355 (4th Cir. 1995) ("We cannot expect criminal defense lawyers to be seers, but we must demand that they at least apprise themselves of the applicable law."), *overruled on other grounds by O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996). *See also Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989) ("[T]here is no general duty on the part of defense counsel to anticipate changes in the law.") (citing *Morse v. Texas*, 691 F.2d 770, 772 n.2 (5th Cir. 1982)). This case, therefore, does not call upon us to anticipate future refinements based on the distinct facts of particular cases.

Jackson's sole claim satisfies the "deficient performance" and the "prejudice" prongs of *Strickland*, 466 U.S. at 687.

As the majority discusses, counsel's motion to strike on the possession of a firearm charge did not distinguish the differences in Code § 18.2-308.2 and Code § 18.2-53.1 as to what proof is required. Counsel only emphasized that the Commonwealth had not proven that Jackson committed the robbery. During closing argument, counsel merely stated, "I would ask you to consider finding [Jackson] not guilty but I realize what you have done based on the evidence . . . so I won't repeat the arguments." Counsel did not seek a jury instruction on what the Commonwealth must prove to show that an object constitutes a firearm for purposes of Code § 18.2-308.2.

While the majority relies heavily on *Jordan*, this case is distinguishable in two significant aspects. In *Jordan*, the Court determined that the defendant's implied assertion that he would shoot the weapon, coupled with the victim's identification of a specific and well-known firearm, a Raven, provided the jury a sufficient basis to find that the object was a firearm covered by the felon-in-possession statute. 286 Va. at 158, 747 S.E.2d at 800-01. Neither of the dispositive factors found in *Jordan* are present in this case.

First, unlike in *Jordan*, there was insufficient evidence of an implied assertion that Jackson would shoot the object in his hand. The basis for the finding of an "implied assertion in *Jordan* was the victim's testimony that the defendant "pointed 'a gun' at his head and told him to get out of [his] truck." *Id.* at 155, 747 S.E.2d at 800. The facts in this case differ from those in *Jordan*, in that, here, there is scant, arguably no, evidence to support a finding by a rational fact-finder that the defendant made an implied assertion that the object was a firearm. Johnson testified that Jackson "had the gun saying give me the money." The store owner testified that one of the robbers had "something like a gun or knife" in his hand, but he could not describe what the man was doing with the object in his hand. However, neither the store owner nor Johnson testified that the man pointed the object at the store owner or made any gestures or threats with the object. At best, the evidence demonstrates the store owner's awareness of the instrument because when questioned whether he attempted to call the police while the men were in the store, the store owner said he did not because "they had a gun." None of these facts rationally support a finding that Jackson made any implied assertion that he possessed a firearm akin to the facts in *Jordan* or within the meaning of Code § 18.2-308.2.

Likewise, the second *Jordan* factor, the identification of a specific well-known firearm, demonstrating familiarity with firearms, is absent in this case. The majority's reliance on the fact that Johnson had some familiarity with firearms is misplaced. Detective Keller testified that a gun was found "several years later" in Johnson's home. This fact cannot be used to establish that at the time of the robbery, he knew what a firearm looked like. Moreover, none of the other witnesses testifying regarding a gun gave any indication of familiarity with firearms. The Commonwealth did not elicit any testimony from Owens or Thompson regarding the gun's characteristics, the caliber of the gun, or any details about the manner in which Jackson handled or displayed the gun in their presence. Therefore, the Commonwealth is left with four witnesses, none of whom were shown to have any familiarity with a gun, testifying that Jackson possessed a gun. At most, this testimony is exactly like that given in *Redd*, where the victim gave a vague description of a gun, stating that the defendant placed a "long, black gun" on the convenience store's counter. *Redd*, 29 Va. App. at 259, 511 S.E.2d at 438. The Court of Appeals found that this vague description was insufficient, alone, to support a finding that the object was actually a firearm within the meaning of Code § 18.2-308.2. *Id.* Here, Johnson described the object as a "gray, black and silver colored handgun," the same type of vague description found insufficient in *Redd*.

At best, at the time of the trial the law relevant to this case held two types of situations sufficient, (1) an implied assertion by the defendant that the object would fire by pointing the object and threatening to kill the victim coupled with a vague description of the object as a firearm or (2) a less than definitive assertion that the object would fire by pointing the object at the victim, coupled with a description of the gun as a specific type of firearm. Because the evidence in the present case fell outside both scenarios, resulting in a vague description and no direct evidence of a verbal threat or Jackson pointing the object at the victim, a reasonable attorney would have challenged the sufficiency of the evidence to support the felon-in-possession charge.

Based on the case law and the evidence in this case, if trial counsel had raised a challenge to the sufficiency of the evidence to support the felon-in-possession charge, there is a reasonable probability the outcome of the proceeding would have been different. No evidence supported an inference that Jackson made an implied assertion that the object was a firearm. The witnesses' descriptions of the object as a "gun" or "handgun" or possibly a "knife" were not specific enough

to provide a factfinder a basis to conclude this object was designed, made, and intended to expel a projectile by means of an explosion. *See Armstrong*, 263 Va. at 583, 562 S.E.2d at 145. For these reasons, I would have granted the petition for a writ of habeas corpus, finding that Jackson's claim satisfies both prongs of *Strickland.*

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Teste:

Clerk