

Air Guns

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I've had several questions about BB guns, pellet guns, and airsoft guns, and whether certain criminal offenses can be predicated on the use or possession of such weapons. I'll try to answer them in this far-too-long post.

First, some terminology. Generally, a [BB gun](#) is an air-powered gun designed to shoot round, metal .177 caliber projectiles. BB guns may be powered by an air cartridge or by air that is compressed by pump or lever action. Typical muzzle velocities are below 500 feet per second. Many guns that shoot BBs can also shoot .177 caliber [pellets](#), non-spherical projectiles usually made of lead. (The lack of a bright line between BB guns and pellet guns is a point that will become relevant later.) Some air guns are designed to shoot only pellets, not BBs; these are often higher-end, and often higher-powered, competition and varmint hunting weapons, some with muzzle velocities up to 900 feet per second. Although less common, there are even some pellet guns with calibers larger than .177, such as .20 and .22. Again, these tend to be higher-end products. [Airsoft guns](#) are spring- or air-powered guns designed to fire round *plastic* projectiles, usually at muzzle velocities of approximately 300 feet per second. These guns are sometimes used by military and police forces for training purposes. Many of them are designed to replicate the appearance of genuine firearms.

Broadly speaking, pellet guns are the most dangerous air guns, followed by BB guns (some of which can also shoot pellets), and then airsoft guns. Now let's look at some criminal charges and whether they can be predicated on the possession or use of these weapons.

Firearms Offenses

None of these weapons are firearms, because they do not use gunpowder explosions to propel their projectiles. See G.S. 14-409.39(2) (defining a firearm as a weapon that "expels a projectile *by action of an explosion*"); G.S. 14-415.1 (defining a firearm as a weapon that "expel[s] a projectile *by the action of an explosive*"). See also G.S. 14-269.2 (prohibiting the possession of weapons on school grounds, and distinguishing between "any gun, rifle, pistol, or other firearm," a Class I felony under subsection (b), and a "BB gun . . . air rifle, [or] air pistol," a Class 1 misdemeanor under subsection (d)). Therefore, possession or use of these weapons cannot support charges such as possession of a firearm by a felon, G.S. 14-415.1, or assault by pointing a gun, G.S. 14-34. See *In re N.T.*, ___ N.C. App. ___, 715 S.E.2d 183 (2011) (airsoft gun is not a "gun" for purposes of assault by pointing a gun).

Robbery with a Dangerous Weapon

The appellate courts have stated that armed robbery can be committed using an air gun in the following cases: *State v. Westall*, 116 N.C. App. 534 (1994) (there was sufficient evidence to submit armed robbery to the jury where the defendant pointed a pellet pistol at the kidney of the clerk of a convenience store; the court emphasized that the weapon was a pellet pistol, that it was pointed at a vital organ from a short distance away, and that the state's evidence showed that the pellets were capable of penetrating a quarter inch of plywood; "a pellet gun may be a dangerous weapon per se, or at a minimum . . . such a determination [may] be made upon a consideration of the instrument's use"); *State v. Alston*, 305 N.C. 647 (1982) (the defendant was charged with armed robbery; an accomplice testified variously that the weapon used was a "pellet rifle" and a "BB gun"; the supreme court placed

great weight on the difference, holding that the jury was properly permitted to consider armed robbery based on the suggestion that the gun was a pellet rifle, but that common law robbery should also have been submitted based on the possibility that the weapon was a BB gun).

By contrast, the court of appeals vacated an armed robbery conviction in *State v. Fleming*, 148 N.C. App. 16 (2001) (vacating the defendant's armed robbery conviction because the state failed to introduce evidence of the capabilities of the BB gun used by the defendant, and stating that "[w]e decline to hold, as a matter of law, that a BB gun can *never* be a dangerous weapon[, but f]or a jury to find that a BB gun *is* a dangerous weapon, there must be evidence in the record of the BB gun's capability to inflict death or great bodily injury").

The bottom line, for me, is that at the charging stage, evidence that an air gun was used is probably sufficient to provide probable cause to *charge* armed robbery, unless the available evidence conclusively shows that the air gun in question was benign enough to fall below the dangerousness threshold. But the state may not be able to sustain a *conviction* without evidence of the weapon's destructive capabilities, particularly if it is – or is described as – an airsoft or a BB gun rather than a pellet gun.

Assault with a Deadly Weapon

The situation is similar with respect to assault with a deadly weapon. Consider *In re Lawson*, 2002 WL 31166914 (N.C. Ct. App. Oct. 1, 2002) (unpublished). In *Lawson*, a juvenile was adjudicated delinquent for AWDWIS after he shot someone with a BB gun causing a bleeding wound in the victim's thigh. The court of appeals found the evidence insufficient to support the adjudication, emphasizing that the weapon was a BB gun; that the shot was not from close range; and that the state introduced little to no evidence "as to the deadly nature of the weapon." By contrast, in *State v. Pettiford*, 60 N.C. App. 92 (1982), the court of appeals held that it would not have been error to instruct the jury that a pellet pistol was a deadly weapon *per se* in a case in which the defendant shot the victim in the head, at close range, with what the defendant claimed was a .38 caliber pellet pistol, leaving a bullet fragment in the victim's head. (As an aside, I'm not aware of the existence of .38 caliber air guns, or of air gun ammunition that is likely to fragment, so I'm not sure what was really going on in *Pettiford*.)

Based on the foregoing, my view is that evidence that A assaulted B with an air gun is probably sufficient to charge AWDW, unless there is conclusive evidence that the gun is sufficiently weak that it could not be considered deadly. However, in order to support a conviction, the state may need to introduce evidence of the weapon's deadliness, including its status as a pellet gun; its muzzle velocity; its penetrating ability; the range at which it was used; the part of the body at which it was fired; and the injury it caused, if any.

Possession of a Concealed Weapon

Possession of an air gun can't support the charge of possession of a concealed gun under G.S. 14-269(a1) (concerning "any pistol or gun"), because it isn't a firearm, as discussed above. But can it support the general charge of carrying a concealed weapon under G.S. 14-269(a) (concerning "any bowie knife, dirk, dagger, slung shot, loaded cane, metallic knuckles, razor, shurikin, stun gun, or other deadly weapon of like kind")?

There are two issues here. First, while air guns are clearly weapons, are they "deadly"? It's hard to apply the analysis used in the armed robbery and assault cases, because that analysis depends in part on how the weapon is used, while concealed weapons, as long as they remain concealed, aren't used at all. But I still think that some variant of that analysis would apply, considering factors such as the type of projectile fired by the weapon, the muzzle velocity, and the like. So I think that at least some air guns could be deadly for purposes of G.S. 14-269(a). Second, what does "of like kind" mean? To be a weapon "of like kind" to the listed items, is it enough that a weapon is deadly and concealable, or must it operate in a similar manner as one of the listed items? If the latter, air guns likely would not fall under the statute, as they are not similar in operation to the weapons listed in the statutory text. I'm not aware of any significant cases on this issue. *Cf. State v. Greene*, 2010 WL 1960723 (N.C. Ct. App. May 18, 2010) (unpublished)

(affirming a conviction under G.S. 14-269(a) based on a .357 handgun). My inclination is to say that “of like kind” means that only weapons that function similarly to the listed items fall within the statute, since otherwise the phrase “of like kind” lacks meaning. So I tend to think that air guns fall outside the scope of the concealed weapons statute as presently written. But I can imagine a contrary view, interpreting the statute broadly in keeping with its purposes. If you’ve litigated this issue in the trial courts or have other thoughts about it, please post a comment or send me an email.