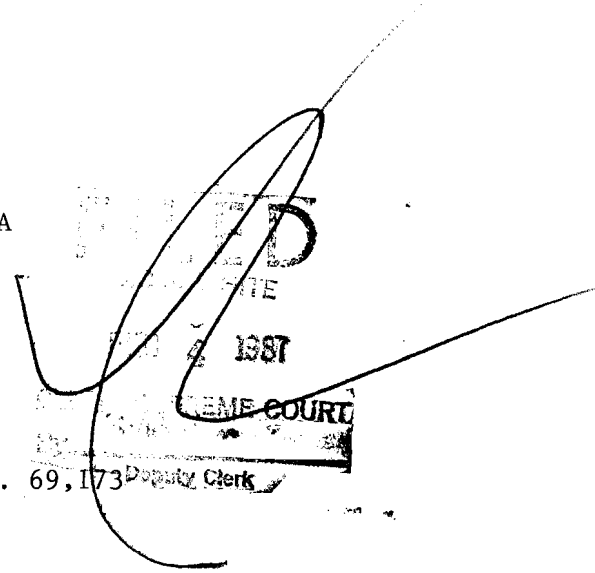
IN THE SUPREME COURT OF FLORIDA



CHRISTIAN D. MASSARD, Petitioner,	)	
v.	)	CASE NO. 69,173
STATE OF FLORIDA, Respondent.	)	

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida 32301

RICHARD G. BARTMON
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Counsel for Respondent

TABLE OF CONTENTS

LIST OF CITATIONS

PRELIMINARY STATEMENT

Petitioner, CHRISTIAN D. MASSARD, was the Appellant, and Respondent, STATE OF FLORIDA, was the Appellee, in the direct appellate proceedings held in the Fourth District Court of Appeal, State of Florida.

The symbol "R" refers to the Record on Appeal before the Fourth District in this case, and "e.a." means emphasis added. "SR" refers to the Supplemental Record on Appeal, before the Fourth District. The District Court's opinion in this cause, officially cited as Massard v. State, 11 FLW 1561 (Fla. 4th DCA, July 16, 1986), is attached, in its slip opinion form, to Petitioner's brief, and will be referred to as "PA", followed by the slip op. page number.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement to its limited extent, and makes the following additions, clarifications and corrections:

The express language of the indictment (R, 1, 2), charged Petitioner with attempted first-degree murder of R. Lee and R. Carl Gillen, in Counts I and III, "by beating (each victim) about the head with a blunt instrument." Petitioner was charged in Counts II and IV with having committed armed robbery while "carrying a deadly weapon, to-wit, a blunt instrument". (R, 1, 2).

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts to its limited extent, and makes the following additions, clarifications and corrections:

The State's evidence presented against Petitioner, as the perpetrator and individual who committed the attempted murder of the Gillens, included, inter alia, the lack of any evidence of an attempt to forcibly enter the Gillen residence, including a lack of pry marks on doors, or broken or open windows (R, 87-88, 105, 134); the fact that all doors and windows were locked, when Petitioner and the two victims, the only individuals in the house, went to sleep the night of the attack (R, 123-124, 134, 174, 175, 199); the fact that R. Carl Gillen went to sleep with his car keys in his pants pocket, which he was wearing when he went to sleep, and that there were no other keys to his Pointiac Firebird Trans-Am (R, 176, 182); the closed door to the father's separate bedroom, when the father testified he never closed his bedroom door (R, 211); the location of a wet claw hammer, belonging to the father and ordinarily kept in a toolbox on a shelf in the garage, in a garage sink (R, 89-90, 99, 107, 114, 220-224); and the nature of both victim's severe head injuries, consistent with having been made by blows with a claw hammer to each victim's head (R, 102, 250, 298, 299); and the identification by the father of the Petitioner from a photo display. (R, 148-153, 216-218). Further evidence was presented, showing that Petitioner was stopped, while driving the son's car, in Miami, subsequent to the crimes, and that said vehicle had Dade County tags (R, 276-278), and that Petitioner subsequently admitted taking R. Carl Gillen's car

keys, leaving house, and driving the Pontiac Firebird to Miami. (R, 287).

The State's evidence against Petitioner, demonstrating his theft of R. Lee Gillen's wallet, included, inter alia, the father noticing his wallet and keys missing from the place in his room where he habitually left such articles, on the morning after the attack, before leaving for the hospital with his son, and mentioning same to police officers who were then present to secure the crime scene (R, 214); the observation by Petitioner of R. Lee Gillen's removal of his wallet from his pocket, during the previous evening, in order to give his son birthday money, and his son's response to his father to hold it for him until he was to leave (R, 173, 206); the fact that the father started to pull a $50.00 bill from the wallet, in Petitioner's presence (R, 207); the absence of any forced entry into the house, and Petitioner's status as the only individual therein, besides the victims (R, 87-89, 105, 123-124, 134, 175, 199); the photo identification of Petitioner (R, 158-163, 216-218), and the father's bedroom door, having been closed by someone other than R. Lee Gillen. (R, 211).

In arguing his motions for judgment of acquittal, Petitioner maintained, inter alia, that there was insufficient evidence of attempted first-degree murder, as to elements of premeditation and identity, and that there was insufficient evidence of theft of R. Lee Gillen's wallet, with the evidence on this point being consistent with the fact that the wallet was missing, after police officers left the house unsecured. (R, 312-314). The State responded by arguing that Petitioner sought to discount and refuse to accept the facts and inferences therefrom, which he was bound to accept as a matter of law, and that the evidence showed

the father's notice of the theft of his wallet, before police officers left the scene of the house. (R, 315-316). The trial court denied Petitioner's j.o.a. (judgment of acquittal) motion. (R, 315-316).

On direct examination, Petitioner testified that he was on five years' probation, for a breaking and entering offense in New Jersey, and had been convicted of breaking and entering in Pinellas County. (R, 343). When questioned on this subject on cross-examination, Petitioner confirmed, in four responses, that his testimony was that he had two prior felony convictions, for two prior "breaking and entering" offenses (R, 350). The State then recalled a fingerprint expert as a rebuttal witness, who testified that the fingerprint records, within two certified copies of convictions Petitioner had not admitted, matched those taken from Petitioner. (R, 404). Said certified copies were admitted into evidence. (R, 405-408).

After the State concluded its rebuttal testimony, Petitioner stated that he had rebuttal testimony to the State's rebuttal, and wanted an opportunity to "explain" the other two prior convictions. (R, 413). The trial court, finding that no authority had been given by Petitioner to permit allowing rebuttal to rebuttal testimony, denied Petitioner's request. (R, 413). Petitioner did not seek or request to "reopen" his case. (R, 413).

The State requested an enhancement of penalties, and further asked that the trial court declare Petitioner a habitual felony offender, based on the nature of the case, and Petitioner's prior convictions. (R, 504-508). The State had previously filed a notice of intent to request enhanced penalties, and had therein presented certified copies of

prior convictions. (R, 407, 504). The trial court determined that Petitioner was a habitual felony offender, based, in part, on a prior felony conviction within five years, without restoration of rights. (R, 508-509). The trial court further classified Petitioner's attempted first-degree murder convictions, as life felonies. (R, 508-509). The trial court departed from the guidelines, in imposing sentence, based on the need to deter others, from committing similar crimes; the nature of the disabling and permanent injuries to the victim; and the need to remove Petitioner from society for a substantial period of time, as a "clear and present danger" to the community. (R, 510).

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT'S ENHANCEMENT AND RECLASSIFICATION OF ATTEMPTED FIRST-DEGREE MURDER, TO LIFE FELONY ADJUDICATION, WAS PROPERLY SUPPORTED BY SUFFICIENT JURY FINDING, OF USE OF WEAPON IN COMMITTING CRIME?

POINT II

WHETHER THE TRIAL COURT'S DEPARTURE SENTENCE OF PETITIONER WAS APPROPRIATE?

POINT III

WHETHER THE TRIAL COURT APPROPRIATELY EXERCISED ITS DISCRETION, IN REJECTING DEFENSE REQUEST TO PRESENT PETITIONER SURREBUTTAL, ON EXISTENCE OF PRIOR CONVICTIONS, WHICH PETITIONER HAD PRIOR OPPORTUNITY TO ADMIT OR DENY?

POINT IV

WHETHER THE TRIAL COURT APPROPRIATELY DENIED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL, AS TO ARMED ROBBERY?

SUMMARY OF ARGUMENT

Petitioner's attempted first-degree murder convictions were properly re-classified to life felonies, by virtue of the jury's verdict of guilt "as charged", which encompassed charging document language that a blunt instrument was used, based in part on instructions defining a deadly weapon. The Fourth District correctly viewed these circumstances, as supporting its conclusion that there was a sufficient factual finding by the jury that a weapon was used. Petitioner's "form over substance" argument should be rejected, in favor of the Fourth District's common sense interpretation of the circumstances, in accordance with fulfilling the purpose and intent of the enhancement statute.

Since Petitioner's sentence was vacated and remanded for resentencing, Petitioner's claims in this regard should not be considered by this Court, because of mootness, and the only advisory effect any opinion of this Court would have on the case. Assuming arguendo this Court chooses to consider the issue, two of the four reasons given for departure were proper, such that the inclusion of two invalid reasons was demonstrably harmless, so as to permit affirmance of the sentence.

The trial court's denial of Petitioner's request to present surrebuttal testimony was an appropriate exercise in discretion, in conducting the trial, since Petitioner had a prior opportunity to admit, deny or explain the existence and number of his prior felony convictions, on direct and cross-examination. Furthermore, Petitioner failed to make a specific proffer of his surrebuttal testimony, barring appellate review, and additionally appeared to desire to testify beyond the scope of the State's rebuttal testimony. Petitioner's request cannot

be considered the equivalent of seeking to re-open the case; assuming arguendo it can, Petitioner's awareness of said convictions, and the State's intent to use them, mandates that the court's ruling was correct.

The trial court appropriately denied Petitioner's motion for judgment of acquittal, or the element of a "taking" of R. Lee Gillen's wallet, as to the armed robbery offense, by virtue of the sufficiency of the State's case-in-chief, demonstrating circumstances and inferences therefrom supporting the existence of a "taking". Since the conviction on attempted murder was supported by substantial competent evidence, on a premeditation theory, such conviction was not contingent on the validity of an underlying felony of armed robbery.

ARGUMENT

POINT I

TRIAL COURT'S ENHANCEMENT AND RECLASSIFICATION OF ATTEMPTED FIRST-DEGREE MURDER, TO LIFE FELONY ADJUDICATION, WAS PROPERLY SUPPORTED BY SUFFICIENT JURY FINDING, OF USE OF WEAPON IN COMMITTING CRIME.

Petitioner has challenged the Fourth District's ruling, approving the trial court's re-classification of his conviction for attempted first-degree murder, to an adjudication of a life felony, as wrong, and in conflict with this Court's prior pronouncement in State v. Overfelt, 457 So.2d 1385 (Fla. 1984). However, Petitioner's argument, far from demonstrating such an erroneous ruling[1], adopts form over substance, and selectively ignores a common-sense interpretation of the verdict, charging document, and instructions given to the jury at trial.

Petitioner correctly re-states this Court's opinion in Overfelt, supra, which mandated that, prior to enhancement of punishment, based on the use of a weapon in the commission of a felony, a jury must make a factual finding that a defendant used a weapon or firearm in the commission of the crime, by alternatively finding him guilty of a crime involving such a weapon or firearm. Overfelt, at 1387. However, Petitioner's interpretation of the charging document, verdict and instructions, is based on erroneous assumptions concerning jury deliberations, and consideration of evidence as to a charged offense, and lesser included offenses, in a way which would pervert the clear intent of the enhancement statute, to increase the severity of punishment for the use of weapons in

[1] Respondent consistently maintains herein that, for the reasons and arguments stated in its jurisdictional brief, at 4-6, Petitioner has not appropriately invoked the "conflict" jurisdiction of this Court.

felonies. §775.087(1), Fla. Stat. (1981); Whitehead v. State, 446 So.2d 197 (Fla. 4th DCA 1984), cert. denied, 462 So.2d 1108 (Fla. 1985); Miller v. State, 438 So.2d 83, 85 (Fla. 4th DCA 1983), approved, 460 So.2d 373, 374 (Fla. 1984).

Petitioner first suggests that, since the jury was not required to find that he used a deadly weapon in committing the attempted murder, as a necessary element of proof for conviction, and that this fact was "immaterial" to the jury's finding. Petitioner's Brief, at 14. In the event the jury had been required to make such a finding, as a constituent element of the charged crime, such a felony would have clearly been exempt from re-classification, under the specific language of said statute, as already enhanced. §775.087(1), supra; State v. Brown, 476 So.2d 660 (Fla. 1985); Strickland v. State, 437 So.2d 1150 (Fla. 1983). This argument by Petitioner ignores the very intent of enhancement, based on use of a weapon in committing a felony which does not involve a constituent element of such use, as a means to impose harsher punishment. Id.; State v. Whitehead, 472 So.2d 730, 732 (Fla. 1985); Carter v. State, 464 So.2d 172, 173 (Fla. 2nd DCA 1985), affirmed, 479 So.2d 117 (Fla. 1985). Thus, since it is clear that reclassification and enhanced punishment for weapon use is NOT contingent upon, or even relevant to jury consideration of such use of weapon, as an element of the charged crime, Petitioner's analysis has no application or meaning, and is not germane to the issue, along these lines.

Furthermore, Petitioner's argument, as to the alleged lack of the jury's consideration of the use of a weapon herein, ignores a common-sense understanding and review of the charge, and the verdict. As the

Fourth District correctly noted, (PA, 1), the attempted first-degree murder counts, as stated in the charging document, stated in part that, in committing the attempted first-degree murders of the two victims herein, Petitioner "did attempt to kill and murder [the victims], by beating about the head, with a blunt instrument, the said [victims]". (R, 1-2). (e.a.). The jury's verdict on these counts, were clearly designated, "guilty of attempted first-degree murder, as charged". (PA, 1); (R, 39, 40). (e.a.). Since the verdict thus clearly incorporated the charge, as a whole, by reference, on these counts, Whitehead, 446 So.2d, supra, at 198, it can certainly be concluded that, as a factual matter, the jury specifically found that Petitioner used a blunt instrument, in his attempt to kill both of the victims. Thus, Petitioner's argument that the jury was not required to find such use of a blunt instrument, in order to convict him of attempted murder, is factually irrelevant, given that the jury made such a finding.

Petitioner has additionally maintained that the jury did not have to, and cannot be deemed to have considered the use of a weapon in its deliberations, because the instructions given, on the definition of a "deadly weapon" (R, 479, 480), referred to a lesser included offense of aggravated battery, not the greater offense for which he was convicted. Petitioner's Brief, at 15. Petitioner essentially argues that, because the jury convicted him of the offense charged, it must be assumed the jury did not even consider the lesser-included offense, or the instructions (including the "weapon" definitions), pertaining to said lesser offense. Id.; (R, 471, 479, 480). This viewpoint assumes a literal, mechanistic and myopic perspective of jury deliberations, and

consideration of charged crimes and lesser offenses, that bears little resemblance to reality, and would frustrate the rights of the State and the defendant.

Petitioner's argument assumes that his jury, in determining the guilt or innocence of a defendant, restricted its initial deliberations and considerations to the charged crime only, and would have not gone beyond such restrictive consideration, without first determining that Petitioner was not guilty of the charged attempted murders. However, this defies the jury's discretionary power to convict a defendant of any lesser included offense, or any lesser degree of the charged offense, in evaluating evidentiary weight and issues. State v. Bruns, 429 So.2d 307, 309-310 (Fla. 1983); State v. Abreu, 363 So.2d 1063, 1064 (Fla. 1978); Brown v. State, 206 So.2d 377, 380-382 (Fla. 1968). It is obvious that, in determining the jury question of whether the existing evidence "is susceptible of an inference that the defendant is guilty of a lesser offense", Bruns, supra, at 309-310, or of whether to apply their pardon power, Bruns, at 310; Abreu, supra, at 1064, Petitioner's jury would have necessarily considered the charged offense, and the aggravated battery lesser included offense[2], to which the definition of a deadly weapon "pertained". (PA, 2). Furthermore, Petitioner's restrictive interpretation of deliberations, if valid, would have effectively deprived the State of its right to have the jury consider Petitioner's culpability for those lesser included offenses, including aggravated battery, which the State could have charged, and was

[2] It should be noted that Petitioner's counsel requested, or at the very least acquiesced to, the giving of instructions on aggravated battery, as a lesser included offense, at the trial's charge conference. (R, 414-415).

entitled to try and prove. Gallo v. State, 472 So.2d 491, 492 (Fla. 4th DCA 1985). From a legal and practical standpoint, Petitioner's reliance on the greater offense verdict, as creating an assumption of a lack of consideration of lesser included offenses or their instructions, has no validity.

An examination of the Record, demonstrates that the Fourth District's evaluation of the circumstances, as a sufficient jury finding that a weapon was used in the commission of the attempted murders, was in accord with this Court's mandate in Overfelt. As the Fourth District held, the jury's verdict, convicting Petitioner "as charged", necessarily reflects the jury's consideration of the definition of a deadly weapon, as instructed, and its application of that definition in its verdict. (PA, 2). The jury's clear decision, in its verdict, that Petitioner did attempt to kill and murder the victims, by use of a blunt instrument (R, 1, 2, 39, 40), must necessarily encompass the use of a deadly weapon, defined as an object which could be used to cause death or serious bodily harm. (R, 483, 484); (PA, 2). The reference in the information to the use of a blunt instrument, with which to beat the victim around the head, in an attempt to kill them, and the jury instructions defining a deadly weapon in a manner encompassed by the verdict, incorporating the crime as charged by reference, equalled a sufficient specific finding that the attempted murders involved the use of a weapon. Whitehead, 446 So.2d, at 198.

The Fourth District's reliance on Whitehead, is thus in accord with both the Overfelt requirement that a jury verdict reflect a finding of guilt of a crime involving a weapon, and the rejection of the "re-

strictive interpration" of §775.087, as urged by Petitioner, and rejected by this Court in a similar context, in approving the Fourth District's decision in Miller, supra. Miller, 438 So.2d, at 85, approved, Miller, 460 So.2d, at 374. The common-sense approach of the Fourth District herein, thus fulfilled the statutory substantive purpose, of increased punitive measures for those who use guns in the course of their felonious conduct. Miller, at 85; Whitehead, supra; Brown, supra.

POINT II

TRIAL COURT'S DEPARTURE SENTENCE OF PETITIONER WAS APPROPRIATE.

As Petitioner has noted, the Fourth District, in its opinion, vacated and remanded the cause for re-sentencing. (PA, 4). The Court specifically noted that "the trial court will have another opportunity to evaluate the bases for departure in any event", based on the Court's rejection of scoring for victim injury, and retention of jurisdiction. Id. Since it cannot be determined at this point which, if any, departure reasons will be retained by the trial court, on re-sentencing, and since Petitioner will have the avenue of direct appellate review to the Fourth District in such event, any opinion by this Court, on this issue, would be moot, or at best, an advisory opinion. This Court need not address a claim by Petitioner, as to a sentence which has been vacated, thus not prejudicing Petitioner in any way.

Assuming arguendo this Court nevertheless chooses to address the propriety of the Fourth District's ruling, as to those reasons relied on for departure by the trial court, it is apparent that two of the four reasons given were proper. Despite its disagreement with this Court's recent decision in Whitehead v. State, 11 FLW 553 (Fla., October 30, 1986), Respondent nevertheless acknowledges the binding effect of Whitehead, to invalidate the Fourth District's approval of Petitioner's habitual felony offender status, as a basis for departure. Furthermore, as conceded in Respondent's brief to the Fourth District, removal of the Petitioner from society, as a clear and present danger, was properly disapproved by the Fourth District as an invalid basis for departure.

(PA, 3); (R, 510); Respondent's Brief, Fourth District, at 31.

Petitioner has challenged the District Court's approval of the trial court's reliance on the cold, calculated manner in which the crime was committed, with the intent to "brutally kill" the two victims, leaving each with permanent and disabling injuries. (R, 510).[3] This reason appears to be with regard to the attempted murder offenses, and not the armed robberies. In any event, victim injuries continue to be a viable basis for departure, reflecting one of the most vital, significant and subjective bases for punishment in sentencing. Copeland v. State, 11 FLW 2648 (Fla. 2nd DCA, December 10, 1986); Vanover v. State, 481 So.2d 31, 33 (Fla. 2nd DCA 1985), approved in relevant part, Vanover v. State, 11 FLW 614 (Fla., November 26, 1986); Jakubowski v. State, 494 So.2d 277 (Fla. 2nd DCA 1986); Williams v. State, 492 So.2d 1171 (Fla. 5th DCA 1986); Bailey v. State, 492 So.2d 738 (Fla. 1st DCA 1986); Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984), affirmed, 477 So.2d 565 (Fla. 1985). This is a particularly valid basis for departure, where victim injury is not factored in scoring[4], and when the injuries are exceedingly disabling, beyond the "norm" of a particular crime. Vanover, 11 FLW, supra, at 615; Jakubowski, supra; Copeland, supra; Williams,

[3] Petitioner's challenge to this reason for departure, as improperly based on inherent components of the offense, is being raised now, for the first time, before this Court.

[4] As a result of the Fourth District's ruling, rejecting the victim injury scoring in this case (PA, 3, 4), Petitioner cannot claim the benefit of decisions which have disapproved victim injury as a basis for departure, when such injury is factored in scoring, e.g., see Lerma v. State, 497 So.2d 736 (Fla. 1986); Vega v. State, 11 FLW 2383 (Fla. 5th DCA, November 13, 1986).

supra; Davis, supra; see, also, Stewart v. State, 489 So.2d 176 (Fla. 1st DCA 1986). It would certainly appear that the facts presented by this Record, particularly those to Robert Gillen's head, right side, and right hand (R, 84-86; 164-166; 211, 212, 215, 216, 250, 295-299), go beyond any requirements for conviction for attempted murder, and constitute a sufficient basis for departure. Vanover; Copeland; Williams; Bailey; Davis, supra.

Although the Fourth District rejected the trial court's reliance on deterrence to others as a basis for departure (PA, 4), the court did note decisions of the First District, which permit departure on such a basis as appropriate. Mincey v. State, 460 So.2d 396, 398 (Fla. 1st DCA 1984); Williams v. State, 454 So.2d 751, 753 (Fla. 1st DCA 1984). On the strength of these decisions, which appear to remain viable, and those of subsequent courts approving deterrence as a basis for departure, this Court should approve this reason for departure. Floyd v. State, 495 So.2d 872 (Fla. 5th DCA 1986); Ball v. State, 487 So.2d 350 (Fla. 4th DCA 1986); Riggins v. State, 477 So.2d 663 (Fla. 5th DCA 1985).

Since Petitioner has not shown an abuse of discretion, regarding the two proper bases for departure, this Court should approve said reasons, and the Fourth District's application of Albritton v. State, 476 So.2d 158 (Fla. 1985), to find harmless error. Lerma v. State, 497 So.2d 736 (Fla. 1986); State v. Mischler, 488 So.2d 523 (Fla. 1986); Albritton, supra.

POINT III

TRIAL COURT APPROPRIATELY EXERCISED ITS DISCRETION, IN REJECTING DEFENSE REQUEST TO PRESENT PETITIONER SURREBUTTAL, ON EXISTENCE OF PRIOR CONVICTIONS, WHICH APPELLANT HAD PRIOR OPPORTUNITY TO ADMIT OR DENY.

It is axiomatic that a trial court has discretion to conduct a trial, so as to avoid repetition and needless consumption of time. §90.612, Fla. Stat. (1976). The trial court properly exercised such discretion herein, particularly in view of the nature of the testimony that Appellant sought surrebuttal of, and the Fourth District's rejection of this point, was proper.

As the Record demonstrates, Petitioner testified, both on direct and during cross-examination, to the existence of two prior felony convictions. (R, 343, 350). Once Petitioner was given this opportunity to admit or deny the existence and number of prior convictions, the State was properly authorized to seek admission of certified copies of Petitioner's four prior felony convictions. (R, 404-405, 407-409); Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982); McArthur v. Cook, 99 So.2d 565 (Fla. 1957); Mead v. State, 86 So.2d 773 (Fla. 1956). It is clear, as these cases require, that Petitioner was afforded a full opportunity to admit to the existence and number of said felony convictions. Cummings, supra; Mead, supra. The trial court thus did not deny Petitioner due process, by not permitting Appellant a second opportunity to admit, deny or explain the existence of said convictions, when Appellant was provided initially with such a chance. Stuart v. State, 360 So.2d 406, 408 (Fla. 1978). Extending Appellant's argument to its logical

conclusion, would lead to a result which would make the required procedure for giving a witness an opportunity to admit or deny prior convictions, a superfluous and meaningless one. In fact, the ability of the State to extrinsically prove prior convictions, is entirely contingent on a witness' answer to a question on the existence and number of prior felony convictions. Cummings.

Petitioner additionally argues, for the first time before this Court, that his request for "surrebuttal" was tantamount to a request to "re-open" his case. Assuming arguendo that such an equation is valid, it is clear that Petitioner and his counsel were obviously "aware", prior to the State's rebuttal testimony, of his prior felony convictions. Petitioner was further made aware by the State, prior to trial, that the State would use such convictions, in seeking enhanced penalties against Petitioner. (R, 407). Finally, the absence of a proffer, of the specific testimony Petitioner sought to introduce on rebuttal (R, 412, 413), not only barred the claim before the Fourth District, but prevents this Court from determining what prejudicial effect, if any, resulted from the trial court's ruling. Ketrow v. State, 414 So.2d 298 (Fla. 2nd DCA 1982); Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979). Under such circumstances, Petitioner has failed to show an abuse of discretion by the trial court, in failing to allow Petitioner to "re-open" his case, assuming Petitioner's request (R, 412, 413) to be deemed such an attempt. Brown v. State, 477 So.2d 609, 612 (Fla. 1st DCA 1985); Sylvia v. State, 210 So.2d 286 (Fla. 3rd DCA 1968). Assuming arguendo that Petitioner's statement was based on defense counsel's explanation of his client's discrepancy in admitting only two prior convictions, on

closing argument to the jury (R, 431-432), it is hard to find any prejudice to Petitioner, on this point.

Furthermore, there are additional justifications for upholding the trial court's ruling, as "right for any reason". Stuart, supra. It is clear from the Record that Petitioner was impeached, on the issue of his prior convictions, because he lied about the existence and number of convictions. (R, 343, 350, 407). However, Petitioner stated he sought surrebuttal to "explain" the two felony convictions he had denied, in previous testimony. (R, 412, 413). As such, Petitioner sought rebuttal, to go beyond the scope of the subject matter of the State's rebuttal witness, whose testimony was limited to linking Petitioner to the two additional prior convictions, by fingerprint comparison. (R, 404-405). Petitioner clearly had no right to present testimony, beyond the scope of the State's rebuttal evidence. Vause v. State, 424 So.2d 52, 54-55 (Fla. 1st DCA 1982).

Petitioner relies on Merrill v. United States, 338 F.2d 764 (5th Cir. 1964), in his support. In Merrill, supra, the Fifth Circuit mandated that surrebuttal testimony should have been admitted, due to the enormous conflict in testimony on a crucial issue of sanity, the burden of proof on the government to rebut the defense showing of insanity; and the fact of government rebuttal testimony which claimed an admission by the defendant of faking insanity, for the first time. Merrill, supra, at 766. The court also found the refusal to permit such testimony dispositive, only in conjunction with additional errors in jury instructions, which failed to define elements of the charges. Merrill, at 767-768. This decision is thus readily distinguishable especially since

therein, there was no prior opportunity for Petitioner, as a witness, to testify to and explain the evidence which the State herein used in rebuttal, as in the case sub judice.

Petitioner has further cited Moore v. United States, 123 F.2d 207 (5th Cir. 1941), in support, and this decision is equally inapposite herein. Close examination of said decision, demonstrates that the court concluded that the defendant therein should have been permitted "to question the [Government's rebuttal] witnesses ... and search out, if he could, any interest or bias of the witnesses". Moore, supra, at 210. Thus, because the defendant was not permitted, either on direct or cross-examination, to attempt to intrinsically rebut certain testimony, the Fifth Circuit found error. Id. Such circumstances have no application herein, where Petitioner initiated all inquiries into prior convictions, by testifying to same, and was given additional opportunities to explain, admit or deny such convictions on cross-examination, and cross-examine the State's rebuttal witness.

Petitioner maintains that he was prejudiced by references by the State, in closing argument, to the effect of Appellant's false testimony, as to prior convictions, on his credibility. Such comments involved the only appropriate use of the State's rebuttal evidence, as a factor bearing on the credibility of Petitioner as a witness. McArthur, supra, at 567. Kelly v. State, 281 So.2d 594 (Fla. 4th DCA 1973). Additionally, Petitioner did not object to the State's characterizations of Petitioner's false account of his prior convictions. (R, 448-456). Furthermore, such argument would have been appropriate, regardless of whatever "explanation" Petitioner sought to make, since it is undisputed

that Petitioner, for whatever reason, misrepresented the number of his prior felony convictions. (R, 343, 350, 405-406). Finally, as already argued, it is impossible for this Court to determine the extent of any prejudice the State's comments in closing argument, caused Petitioner, because the absence of a proffer of Petitioner's explanation, leaves any possible prejudicial effect to rank speculation. Applegate, supra. Of final significance is the fact that the State's comments on closing argument, were expressly invited by defense counsel's attempts to explain away Petitioner's representations on prior convictions, in his closing argument. (R, 431-432); Lynn v. State, 395 So.2d 621 (Fla. 1st DCA 1981), cert. denied, 402 So.2d 611 (Fla. 1981); White v. State, 377 So.2d 1149 (Fla. 1979), cert. denied, 449 U.S. 845 (1980).

Since there was no showing that the challenged ruling denied Petitioner his rights to a fair trial or due process, this claim should be rejected.

POINT IV

TRIAL COURT APPROPRIATELY DENIED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL, AS TO ARMED ROBBERY.

Petitioner maintains that there was insufficient evidence, in the State's case-in-chief, to present a question for the jury, on the charge of armed robbery of R. Lee Gillen's wallet. On this issue, Petitioner has selectively ignored the lack of any evidence in the Record, that supports a finding of a reasonable hypothesis of Petitioner's innocence of this charge.

The State's evidence demonstrated that R. Lee Gillen noticed his wallet was not where he remembered leaving it every night, before he left for the hospital with his son, the morning after both were attacked. (R, 214). At this time, officers remained present in his home, and the area had not been left unsecured. (R, 214). Additionally, the only persons present in the house, when R. Lee Gillen placed his wallet on the dresser the night before, were his son, and Petitioner. (R, 175). Furthermore, there was testimony that there was no indication of a forced entry or break-in, and that no prymarks were found on any doors or windows to the house. (R, 87-89, 105, 134). All points of entry were locked by R. Carl Gillen before going to sleep (R, 123-124, 175, 199). Finally, Petitioner knew of the existence of the father's wallet, because the father had taken it out of his pocket, and started to pull out money for his son's birthday, in Petitioner's presence, in the house, on the night of the crimes. (R, 173, 206-207).

It is axiomatic that by virtue of Petitioner's motion, he admitted all evidence, and reasonable inferences therefrom, in the State's

favor, and that the trial court could have ruled favorably on said motion only upon a conclusion that the jury could not reasonably exclude every reasonable hypothesis from the evidence, but that of guilt. Herman v. State, 472 So.2d 770 (Fla. 5th DCA 1985); Woods v. State, 426 So.2d 69 (Fla. 1st DCA 1983); Ferguson v. State, 417 So.2d 631 (Fla. 1982). Petitioner has failed to suggest any reasonable or plausible hypothesis of innocence, that can be reasonably drawn from the evidence. Lowery v. State, 450 So.2d 587 (Fla. 1st DCA 1984). The only offer of such a hypothesis, by defense counsel at trial, was that Petitioner did not notice the theft until after his home was no longer secured by police, inferring that some individual other than Petitioner entered the home, after the victims or police left the same, and then took the victim's wallet. (R, 314). As has already been discussed, this was factually contradicted by the victim's awareness of the theft, before he or the police officers left the home. (R, 214, 315-316).

Significantly, defense counsel's lone suggestion of a hypothesis, and the Record itself, fully supports the conclusion that the jury could reasonably conclude that the evidence excluded every reasonable hypothesis, except guilt. Herman, supra; Lowery, supra; Ferguson, supra. The Florida Supreme Court, in Ferguson, affirmed a denial of a motion for judgment of acquittal, even though the State's evidence merely showed the victim had valuables in their possession before they were killed, but not afterwards. Ferguson, at 635. Based on other evidence, the Court concluded that it was not reasonable to suggest that individuals other than the defendant passed through woods, where the victims were left after being killed, and stole the valuables. Id.

Similarly, the court in Woods determined that denial of acquittal was appropriate, (even though the defendant's co-defendant therein expressly and fully exonerated the defendant of any knowledge or participation in a store theft), by finding that the jury could conclude that the location of the theft proceeds in the glove compartment of the defendant's car, excluded all reasonable hypothesis, save that of guilt. Woods, supra, at 70.

From the Record herein, it is equally clear that the jury could have rejected any hypothesis of innocence presented by the Record, as unreasonable. Lowery, supra; Ferguson; Herman. Since there was no one in the house besides Petitioner and the two victims, and no forced entry occurred, the only other explanation would be that one of the crime scene investigators took the wallet. This is certainly unreasonable, particularly when viewed in light of uncontradicted evidence (and all inferences favorable therefrom to the State) that Petitioner was in possession of other items stolen from the Gillen home, when arrested. (R, 258, 261-262, 264, 273, 187). Thus, the evidence and inferences therefrom, present undisputed circumstantial proof, from which a jury could reasonably conclude that the only reasonable hypothesis was that of guilt. Herman; Ferguson.

Because the evidence presented was sufficient, under the aforementioned legal standards, to warrant a denial of Petitioner's j.o.a. motion, the trial court's ruling should be affirmed.

Furthermore, Petitioner's suggestion that his attempted murder conviction is flawed, because of its felony-murder basis on the invalid robbery conviction, is without merit, due to the sufficiency of evidence

to establish premeditation in the attempted murder. Statement of Facts, supra, and the validity of the robbery conviction, assuming a felony-murder basis.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited therein, Respondent respectfully requests that this Honorable Court APPROVE the opinion of the Fourth District in this case, affirming Petitioner's judgment and sentence, with the modifications as to sentence referred to in Point II.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida 32301

Richard G. Bartmon

RICHARD G. BARTMON
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been furnished, by courier delivery, to JEFFREY L. ANDERSON, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, West Palm Beach, Florida 33401, on this 2nd day of February, 1987.

Richard G. Bartmon
Of Counsel