IN THE SUPREME COURT OF FLORIDA

CHRISTIAN DANIEL MASSARD, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. 69,173

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the court below and the defendant in the trial court. Respondent was the Appellee in the court below and the prosecution in the trial court. In the brief the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R"	Record on Appeal
"T"	Trial Transcript
"SR"	Supplemental Record

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ADJUDICATING PETITIONER GUILTY OF A LIFE FELONY FOR THE OFFENSES OF ATTEMPTED FIRST DEGREE MURDER.

In its brief Respondent claims that the jury made the factual finding required by State v. Overfelt, 457 So.2d 1385 (Fla. 1984). Respondent specifically argues that even though the present conviction did not require the jury to find that the crime involved a weapon in reaching their verdict on the statutory elements, enhancement would be permissible. However, this is precisely why one cannot look to a verdict form's reference to the charging document in determining what the jury's findings are. At bar, to find Petitioner guilty "as charged" the jury merely made a finding that the prosecution had proven the statutory elements beyond a reasonable doubt. One cannot assume that the jury found every non-essential allegation in the charging document to be true when they were only requested to determine whether the essential elements of the offense were proven. To do so would place the form of the charging document over the substance of the jury's decision.

This Court's opinion in Overfelt, supra, made it clear that the findings required for enhancement under § 775.087 must be specifically made by the jury. In essence, Section 775.087 provides an additional element which the prosecution must prove before enhancement may take place. This Court's opinion in Overfelt, supra, logically concludes that it is the function of the jury, and no one else, to determine if the offense involved a

weapon. A finding of guilt as charged only means that the defendant is guilty of the elements of the crime as charged. For example, in Hough v. State, 448 So.2d 628, 629 (Fla. 5th DCA 1984) the district court held that a finding of guilt of armed robbery "does not necessarily require that defendant actually possessed the gun" so as to permit the application of § 775.087. Petitioner maintains that the jury's verdict only consists of those findings which the jury was instructed to make. Since the jury was never instructed to determine whether a weapon was used, it cannot be assumed that such a determination was made. Respondent's argument requires one to interpret whether jury made a specific finding and what such a finding was. When such interpretations are necessary, no specific jury finding exists.

Instead of guessing whether the jury had determined that Petitioner merely was guilty of the essential elements as charged, or was additionally guilty of the surplus allegation that he used a blunt instrument, the jury should have been given the instructions on Page 47 of the Florida Standard Jury Instructions (Crim. 1981 ed.) which are as follows:

> **3.05(b) AGGRAVATION OF A FELONY BY CARRYING A WEAPON OTHER THAN A FIREARM**
> **F.S. 775.087(1)**
>
> **Note to Judge** This instruction should not be given in conjunction with the instructions pertaining to any felony in which the use of a weapon is an essential element.

If you find that (defendant) committed (felony, as identified by F.S. 775.087(1)) and you also find that during the commission of the crime he

[carried]
[displayed]
[used]
[threatened to use]
[attempted to use]

a weapon, you should find him guilty of (felony) with a weapon.

Definition A "weapon" is legally defined to mean any object that could be used to cause death or inflict serious bodily harm.

If you find only that defendant committed (felony, as identified in F.S. 775.087(1)), but did not

[carry]
[display]
[use]
[threaten to use]
[attempt to use]

a weapon, then you should find him guilty only of (felony).

This instruction, combined with a verdict form which permits one verdict for "with a weapon" and an alternative verdict for "without a weapon," yields the jury's specific determination on whether the defendant had a weapon. Petitioner maintains that only this type of instruction can yield the required jury determination for the imposition of § 775.087.

Petitioner would also note that Respondent's hypothesis that a jury verdict finding one guilty "as charged" is a determination that the prosecution has proven all the facts as alleged, as opposed to only the elements instructed on, could result in improper jury acquittals. For example, if the jury had determined during its deliberation that the prosecution had proven all

the elements instructed on, but had not proven the factual allegation of a weapon, Respondent's argument would lead to the conclusion that the jury would not find the defendant guilty "as charged." This would clearly be a miscarriage of justice. If juries function as Respondent maintains, by making determinations in reaching their verdicts on elements not instructed on, then many guilty defendants would be acquitted by the failure to prove non-essential facts alleged. Fortunately, juries do not function as perceived by Respondent. They decide the issues they were instructed to decide. In the present case the jury instructions never provided that the jury was to determine whether a weapon was involved in the offense. Consequently, the jury did not make such a determination. The jury merely determined that Petitioner was guilty of attempted first degree murder.

Finally, Respondent assumes that the jury had considered the lesser included offense of aggravated battery.[1] This assumption defies all logic. The jury was specifically instructed that <u>if they found Petitioner not guilty of the main offense</u> to consider the next lesser offense (T471). Since, Petitioner was not acquitted of attempted murder, the jury did not have to consider the aggravated battery charge. In addition, it is presumed that the jury will exercise its pardon power by choosing the immediate lesser included offense (one step removed) and not

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[1] The aggravated battery was the only offense in the relevant counts where the jury was instructed on the definition of "deadly weapon."

an offense which is two steps removed from the crime of conviction. See, DeLaine v. State, 262 So.2d 655 (Fla. 1972). The aggravated battery offense which Respondent assumes the jury considered in deciding not to exercise its pardon power was more than two steps removed from the attempted murder conviction (R40,41). Consequently, it cannot be logically assumed that the jury had considered the aggravated battery charge when deliberating. The only observation from the jury's verdict is that they believed Petitioner to be guilty of the elements of attempted murder. The manner in which the jury determined Petitioner had committed the offense is not represented by a specific jury finding. This is because they were never requested to do so. Petitioner relies on his initial brief on the merits for further argument on this point.

POINT II

THE TRIAL COURT ERRED IN SENTENCING PETITIONER.

Petitioner relies on his initial brief for argument on this point.

POINT III

THE TRIAL COURT ERRED IN DENYING PETITIONER'S REQUEST TO PRESENT SURREBUTTAL EVIDENCE.

Respondent claims that this issue was not properly preserved because of the lack of a proffer. However, where the intentions of the attorney are obvious as to what the excluded testimony would entail, a proffer of the testimony is not necessary to preserve the point for appellate review. See, Brown v. State, 362 So.2d 437 (Fla. 4th DCA 1978) (proffer not necessary where intent of attorney on cross-examination was obvious). From the record it's obvious that Petitioner wanted to explain about the two judgment forms and four convictions.[2] Additionally, the trial court's ruling was based on the assumption that there was no authority for allowing surrebuttal:

> THE COURT: Do you have any authority that would allow rebuttal to rebuttal?
>
> MR. GARLAND: Your Honor, there's evidence now that was not in before.
>
> THE COURT: I said do you have any authority to allow rebuttal to rebuttal?
>
> MR. GARLAND: No sir, no, I wasn't --
>
> THE COURT: I'm not aware of any.
>
> MR. WALSH: I'm objecting --
>
> THE COURT: I'll deny your request.
>
> (T413).

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2 As explained in the initial brief, Petitioner had no real opportunity to explain his testimony until after he had been aware of his misapprehension about terminology (see pages 23-24).

Finally, Appellant's attorney tried to explain the two prior convictions:

> (Mr. Garland): I am distressed by one piece of evidence and I'd like to address it right now up front with each of you. The State has introduced on rebuttal a certified copy of conviction from New Jersey for the crime of burglary and I'd ask you to consider that Christian Massard admitted that he was convicted of burglary. The other judgment is from Pinellas County, Florida, the Sixth Circuit, it says Pinellas County, and it lists three different crimes, burglary, grand theft and burglary. This is but a single judgment. A single judgment. Christian told you that he had been placed on probation from St. Petersburg. He told you Pinellas County, Florida, he said from New Jersey and from Pinellas County and he said for burglary and he told you that he had been charged with grand theft auto and he thought that the charges had been dropped. And now the State has sought to introduce this to show -- I think that the State will argue Christian was lying. It's simply not true. This is the same date, the same place, the same time and I'd ask you to consider that when you look at these two pieces of evidence because I'm distressed by it and I hope that you give these two pieces of evidence the weight they are due and conclude that Chris did not try to pull the wool over anybody's eyes about this. He told you the truth.
>
> (T431-432).

The prejudice to Petitioner was that he was not given the opportunity to explain the two judgment forms which showed four convictions in front of the jury. Prosecution's rebuttal evidence, which the trial court would not allow to be rebutted or explained, was used to destroy Petitioner's credibility and his defense. Petitioner relies on his Initial Brief for further argument on this Point.

POINT IV

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR JUDGMENT OF ACQUITTAL ON THE COUNTS OF ROBBERY AND ATTEMPTED MURDER OF R. LEE GILLEN.

Respondent claims that Petitioner has failed to present a reasonable hypothesis of innocence. As Petitioner explained in his initial brief, there is absolutely no evidence of any taking of R. Lee Gillen's wallet. R. Lee Gillen merely stated that his wallet was not where he remembered placing it. It is not unreasonable to believe that Mr. Gillen had merely forgotten where he had placed his wallet or that it had been lost. There was no evidence that the wallet was taken by anyone, let alone by Petitioner. This fact distinguishes the present case from those cited by Respondent. Furthermore, the fact that Petitioner was found in possession of the property of R. Carl Gillen, and not in possession of any other property, is inconsistent with the hypothesis that Petitioner had taken R. Lee. Gillen's wallet. There simply is no substantial competent evidence that R. Lee Gillen's wallet was stolen. Petitioner relies on his initial brief for further argument on this point.

CONCLUSION

For the reasons stated in Point I, Petitioner respectfully requests this Honorable Court to direct that his adjudications for the life felonies of attempted murder in the first degree be reversed and this cause be remanded with directions that Petitioner be adjudicated guilty of the first degree felonies of attempted murder in the first degree.

For the reasons stated in Point II, Petitioner respectfully requests this Honorable Court to direct that Petitioner be sentenced within the recommended guideline sentence.

For the reasons stated in Point III, Petitioner respectfully requests this Honorable Court direct that the District Court vacate the convictions and sentences and remand this cause for a new trial.

For the reasons stated in Point IV, Petitioner respectfully requests that this Honorable Court direct that Petitioner's convictions and sentences for the robbery and attempted first degree murder of R. Lee Gillen be vacated.

Except for the arguments presented in Points I - IV, the District Court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to RICHARD GORDON BARTMON, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 9th day of February, 1987.

Jeffrey L. Anderson
Of Counsel