IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

v.

STEVEN EUGENE ISELEY,

Respondent.
_____/

Case No.: SC04-0485
5D03-120

ON DISCRETIONARY REVIEW
FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF FACTS AND OF THE CASE

The Respondent, STEVEN EUGENE ISELEY, cannot accept Petitioner's version of the facts as set forth in Petitioner's Brief On The Merits. A fair rendition of the facts presented at trial, is as follows:

On June 28, 2002, STEVEN EUGENE ISELEY, was charged by Information with "aggravated assault (deadly weapon)", a third degree felony (R. 67).[1] In due course this matter came on for jury trial before the Honorable R. Michael Hutcheson, Volusia County Circuit Court Judge. Jury selection was held on October 14, 2002, (Tr. 1-120). Trial was held on October 16 and 17, 2002 (Tr. 121-475). The testimony at the trial showed the following:

Deputy Chief Mike Hensler testified that he has been with the Volusia County

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[1] Reference to the Record On Appeal before the Fifth District Court of Appeal will be designated by the symbol "(R. ___)", followed by the applicable record page number. Reference to the trial transcript will be designated by the symbol "Tr. ____)", followed by the applicable court reporter page number. Reference to the Transcripts from hearings will be designated by the appropriate symbol, i.e., Motion For New Trial "M/NT. ____)", and Sentencing Hearing "(S. ___)", followed by the applicable court reporter's page number. The Respondent, STEVEN EUGENE ISELEY, will be referred to either by name, or as the Respondent. The Petitioner, STATE OF FLORIDA, will be referred to either as Petitioner or as the State.

Beach Patrol for approximately 27 years. On May 7, 2002, Deputy Chief Hensler was driving a beach patrol vehicle westbound on Main Street in Daytona Beach. When he got down to the Peninsula Drive area he saw a driver on a scooter pull in front of his vehicle and waived him to stop (Tr. 168-170). The driver was an adult, black male, fairly tall, and fairly animated. When the scooter driver pulled alongside Deputy Chief Hensler's window, he told Deputy Chief Hensler that he had been threatened by the driver of a white pick-up truck (Tr. 171-172). At that point Deputy Chief Hensler told him to follow, and he turned around, followed the pick-up eastbound on Main Street, and asked another unit to meet him to effect a traffic stop (Tr. 173).

The white pick-up truck was stopped on Ocean Avenue. The driver and the passenger got out of the pick-up truck and came to the tailgate. Deputy Chief Hensler asked the driver, Steven Iseley, and the passenger for identification, which they both provided. Deputy Chief Hensler asked if there was a gun in the truck, and Mr. Iseley indicated that there was one in the center console (Tr. 176-177). Deputy Chief Hensler requested permission to search the truck, Mr. Iseley agreed, and Deputy Chief Hensler located a handgun under some paperwork in the center console (Tr. 177). Deputy Chief Hensler identified the gun and it was placed into evidence (Tr. 179-182).

After Deputy Chief Hensler stopped the white pick-up truck, Mr. Squire

arrived and sat on the curb on the opposite side of the street (Tr. 182-183).

On cross-examination Deputy Chief Hensler testified that when he was stopped by Mr. Squire, Mr. Squire was animated, flailing his arms and swerved in front of him. When Mr. Squire told him what happened he did not describe a gun (Tr. 187). When Deputy Chief Hensler questioned Mr. Iseley and his passenger, Mr. Mauer, they both agreed that there was a traffic confrontation, but both denied that gun was involved (Tr. 189). There was no bullet in the chamber of the gun (Tr. 192). From the evidence form completed at the time of the arrest, it appeared that the gun was in its holster when Deputy Chief Hensler retrieved it (Tr. 193), although he could not specifically remember that.

On redirect examination by the State, Deputy Chief Hensler testified that he followed Mr. Iseley's truck for approximately one or two minutes before the stop. To eject a bullet from the chamber without firing the gun, you would have to disconnect the magazine so that it was lowered and wouldn't admit another bullet into the chamber (Tr. 199-200). When Deputy Chief Hensler was approached by Mr. Squire on Main Street, the white pick-up truck had already passed him and was approximately one block east of his location (Tr. 202).

Deputy Chief Hensler further testified that when the scooter and the white pick-up truck had been stopped at Halifax Avenue, it would have had to be the

pick-up truck that took off first from the traffic light. This is so because the pick-up

truck was well past him before he was stopped by the scooter (Tr. 204). If the scooter driver said that he had taken off first from the traffic light, that would not fit the physical evidence as the officer saw it.

When Deputy Chief Hensler located the hand gun in Mr. Iseley's vehicle, there was not a bullet in the chamber, nor evidence of a loose bullet in the truck. The magazine was locked in place, and the gun was under paperwork. The gun may or may not have been holstered (Tr. 205).

The State's second witness was Officer John T. Johnson of the Daytona Beach Police Department (Tr. 210). When he arrived at the scene of the stopped white pick-up truck, Officer Johnson's job was to see that witness statements were completed, he received the gun into evidence, and then he took the Defendant into custody (Tr. 213). On cross-examination, Officer Johnson testified that when he received the gun into evidence, the gun was in its holster (Tr. 216). That is a good indication that the gun was recovered that way.

The complainant, Kevin Eugene Squire, admitted that he is a six time convicted felon (Tr. 229-230). In May 2003, he had a job working for the Fuel Nightclub on North Grandview Blvd., in Daytona Beach, Florida. He worked

security and bar-back. He owned a 1998 Orange Mosquito Scooter (Tr. 230-232).

At or about 5:30 p.m., on May 7, 2003, Mr. Squire was driving over the Main

Street Bridge. As he crossed the bridge, he stopped at the first red light (Tr. 232-234). He entered the right hand lane to turn right to go to a convenience store to buy some dip, and he had his turn signal on (Tr. 235). All of a sudden a white truck which was travelling fast, pulled up behind and close to him, within a couple of feet from him, and stopped (Tr. 236). Mr. Squire testified that the passenger side window was down a little bit and the driver said, "Hey nigger, didn't you see me?" Mr. Squire tried to pay him no mind, and the driver repeated, "Hey nigger, I know you hear me talking to you." Mr. Squire then identified Mr. Iseley as the driver of that truck (Tr. 237-238). According to Mr. Squire, the driver then reached into a console and pulled out a small black handgun. The driver clicked it back, and the driver said that he would not be driving on the streets again. Mr. Squire testified he heard the gun click and saw the hand motion, and that's when Mr. Squire took off. He was scared when he saw the gun (Tr. 239-241).

Mr. Squire testified that he had not seen the white truck behind him until the truck pulled right beside him at the red light. He had been stopped at the red light for a couple of minutes (Tr. 242). The witness then identified in court the gun that

he said had been pulled out of the truck's console (Tr. 243). Mr. Squire testified that the driver pulled the gun out fast, he was two feet away and he could hear the gun click. The gun was not in its holster, it was in the driver's hand (Tr. 244-245).

The driver appeared angry and Mr. Squire testified he was in fear for his life (Tr. 245).

When Mr. Squire took off from the traffic light, it was still red, but he took off anyway to get away from the truck. Mr. Squire testified that he was looking for the police. He saw one coming down the road, and he went into his lane to stop him (Tr. 245-246). Mr. Squire then followed the beach ranger to where Mr. Iseley was stopped and sat down across the street until the police came over and talked to him (Tr. 248). Mr. Squire then went on to work (Tr. 249).

During cross-examination of Mr. Squire, certified copies of his six prior felony convictions were admitted into evidence (Tr. 249-255; R. 81-122).

The defense then called Stanley Mauer (Tr. 338). Mr. Mauer had been employed by Mr. Iseley in the retail leather business, for approximately three years (Tr. 339). Mr. Mauer accompanied Mr. Iseley to Daytona Beach approximately one year prior to the trial, when Mr. Iseley met the lady he was to marry, Melony. They returned to Daytona Beach in May 2003, for Mr. Iseley's wedding to Melony. They had a lot of preparations to do, arranging for tables, balloons, tuxedos, etc.

(Tr. 339-341). On May 7, 2002, they took Melony's ten year old son to be fitted for a tuxedo, then dropped him off at his grandmother's home and headed back to the beachside to get ready to go out for supper (Tr. 341-342).

Mr. Mauer was riding as a passenger as they went over the Main Street Bridge in Mr. Iseley's Chevrolet pick-up truck. As they were coming across the bridge, approaching the first stop light which is at Halifax Avenue, they approached a black man on a scooter. The scooter veered to the right as if to make a right turn, but then came back over toward them, almost causing a collision (Tr. 342-344).

At that time they had almost hit the scooter. When they stopped at the next intersection, Mr. Iseley rolled down the passenger window and told the man that it was a good way to cause an accident or to get hit or killed. The scooter driver then rolled backwards because it appeared the scooter driver could not quite hear, and he started coming closer to the truck window. When the scooter driver got very close, Mr. Iseley said, "Don't come any closer nigger, I have a gun in here" (Tr. 345). That was in response to the scooter driver first saying that if there was an accident, he would end up driving the white truck (Tr. 344-346).

After the verbal confrontation, the stop light turned green and Mr. Iseley drove through the intersection. As they passed the scooter at the traffic light, the scooter driver was waiving his arms and appeared upset. They passed a beach

patrol vehicle and continued on towards State Road A1A. Just as they turned the corner onto A1A, they saw the beach patrol vehicle behind them with its lights on, and they pulled over (Tr. 347).

Mr. Mauer then testified that they got out of the vehicle. The beach patrol officer checked their ID and asked if they have an incident involving a black man, and did they pull a gun on him. Mr. Mauer and Mr. Iseley both told the officer that they had not pulled a gun, they had almost hit him on his scooter (Tr. 347-348). They agreed that there had been a confrontation, but it did not involve a gun.

The officer asked if Mr. Iseley had a gun in the vehicle, Mr. Iseley said that he did, and the officer retrieved the gun from the console. The officer had to search under some paperwork to find it (Tr. 349). During this search Mr. Squire was sitting on the opposite side of the street in clear view of the officer (Tr. 350).

At the time of the verbal confrontation with Mr. Squire, Mr. Iseley did not pull a gun, he never charged a gun, he never reached into his console (Tr. 350). Mr. Iseley was subsequently arrested but bonded out in time for his wedding (Tr. 351).

On cross-examination, Mr. Mauer agreed that Mr. Iseley called Mr. Squire a "nigger" (Tr. 359). Mr. Mauer admitted that he is not familiar with guns (Tr. 363-365). Mr. Mauer testified that he was convicted once of felony possession of

marijuana (Tr. 368-369).

The next witness was the Defendant, Steven Iseley (Tr. 373). Mr. Iseley testified that he lives in Burlington, North Carolina, and is 42 years old. He had been in the leather business for almost 11 years. Mr. Iseley owns a 1999 Chevrolet

4-dr. dually pick-up truck, approximately 25' long and a 1-ton capacity. It has a diesel engine (Tr. 373-374).

Approximately one year before trial, Mr. Iseley had come to Daytona Beach to work his leather sales at Biketoberfest, and he met his future wife. On May 6, 2002, Mr. Iseley returned to Daytona Beach to get married. Mr. Mauer was with him (Tr. 374-375).

The next morning Mr. Iseley and Mr. Mauer went to prepare for the wedding. After making preparations they drove easterly over the Main Street Bridge. Right before they got to the first stop light, a scooter in front of them whipped to the right and then to the left, about ran into them and then went back over to the right hand lane again. When they stopped at the stop light, Mr. Iseley rolled down the window and said, "That's a good way to get run over". The scooter driver backed up and said, "Yea whitey, I'll be owning that white truck" (Tr. 375-376). Mr. Iseley took the scooter driver's statement as a threat, told him, "Look nigger I have a gun in here, back off" (Tr. 377).

When the traffic light turned green, Mr. Iseley continued down towards A1A, with the scooter driver following him. After they passed a beach patrol vehicle, the scooter driver stopped and talked to the beach patrol officer. They continued down towards A1A and the beach patrol officer turned around and began following them.

Mr. Iseley then pulled over, and he and Mr. Mauer got out of the pick-up truck and walked to the back. They provided the police with identification and one of the officers asked if there was a gun in the truck. Mr. Iseley said there was one in the center console under all of the papers (Tr. 378-379). The police asked if there was a confrontation and they told him that there had been a few words. Later the police advised Mr. Iseley that he was accused of pulling a gun, and Mr. Iseley said he never did touch the gun. The gun was holstered, there was no bullet in the chamber, and the gun was underneath all of the paperwork (Tr. 379-380). Mr. Iseley explained that he carries a gun because he often carries a large amount of money for his leather business, and on that day he had approximately $6,000.00 cash for his wedding. He used $5,000.00 of that money to bond out of jail (Tr. 380). Mr. Iseley testified that he never exhibited his gun, never pointed it, and never took it out of his holster. On cross-examination, Mr. Iseley testified that he had previously been convicted of two misdemeanors involving dishonesty or false

statements, for cashing two bad checks (Tr. 388).

During the jury instruction conference, the Defendant, Mr. Iseley, objected to the State's package of proposed jury instructions, which reflected that he was charged with the crime of "aggravated assault with a firearm." The Defendant objected that he was charged with "aggravated assault with a deadly weapon"; that

"aggravated assault with a firearm", which carries a mandatory minimum sentence of three years, is not the same as aggravated assault with a deadly weapon, which does not carry a mandatory minimum sentence (Tr. 285-324, 401-403). Notwithstanding Mr. Iseley's objections, the trial judge declined to instruct the jury on aggravated assault with a deadly weapon or to allow it as either a lesser included offense or as an alternative charge on the verdict. The instructions and the verdict allowed the jury to select between only "aggravated assault with a firearm, as charged in the Information", or misdemeanor assault, or not guilty.

The jury returned a verdict of guilty of "aggravated assault with a firearm, as charged in the Information" (R. 80; Tr. 466-468).

Mr. Iseley's Motion For New Trial Or For Arrest Of Judgment (R. 131-142) was heard by the trial court on November 25, 2002 (R. 143; M/NT 1-28). The motion raised two issues. First, the Motion argued that the trial court erred in instructing the jury on the offense of "aggravated assault with a firearm" and in not

instructing the jury or allowing the jury the option of considering the offense of "aggravated assault with a deadly weapon." Second, the motion argued that the jury verdict of "guilty" was contrary to the manifest weight of the evidence, and resulted from the prosecutor having inflamed the jury by calling Mr. Iseley a "racist" and repeatedly stressing that Mr. Iseley had called Mr. Squire a "nigger" during their

traffic confrontation. The motion for a new trial was thereafter denied (R. 143).

A sentencing hearing (R. 29-59) was held on January 9, 2003. At the conclusion of the testimony presented at that hearing, Mr. Iseley was adjudicated guilty and sentenced to 3 years state prison, which is the minimum mandatory sentence, together with various costs and fines. Mr. Iseley's Motion For Post Trial Release (R. 157) was granted (S. 26-27).

The Judgment And Sentence was filed on January 9, 2003, (R. 148-156). Mr. Iseley's Notice of Appeal to the Fifth District Court of Appeal was likewise filed on January 9, 2003 (R. 160).

On appeal, Mr. Iseley raised the same two issues as he had raised in his motion for a new trial. On January 2, 2004, the Fifth District issued its opinion reversing Mr. Iseley's conviction, and remanding for a new trial. Iseley v. State 865 So.2d 580 (Fla. 5th DCA 2004). The district court opinion began by noting that

there is no statutory offense of "aggravated assault with a firearm". The offense is more accurately labeled aggravated assault with a deadly weapon, with the use of a firearm being a sentencing enhancer.

After reviewing the applicable statutes and case law, the district court determined that it was reversible error for the trial court not to allow the jury to determine whether or not the deadly weapon used in the aggravated assault was a

firearm. The district court thus remanded this case for a new trial.

The State's Motion For Rehearing/Rehearing En Banc was filed on January 16, 2004, and denied on February 18, 2004. The State's Notice To Invoke Discretionary Jurisdiction of this Court, alleging conflict jurisdiction, was filed on March 16, 2004. This Court accepted jurisdiction on July 7, 2004.

SUMMARY OF THE ARGUMENT

Steven Eugene Iseley was charged with the crime of "Aggravated Assault (Deadly Weapon)" for allegedly threatening Kevin Squire with a firearm during a traffic confrontation. He was subsequently convicted of "aggravated assault with a firearm as charged in the Information".

The trial court erred in merging the elements of aggravated assault (deadly weapon), as defined in §784.021 Fla. Stat., with the sentencing enhancement provisions of §775.087(2)(a)(1) Fla. Stat., and in then instructing the jury on "aggravated assault with a firearm". The jury was never instructed on the elements of aggravated assault with a deadly weapon, nor were they ever given the option of finding Mr. Iseley guilty of aggravated assault with a deadly weapon. The district court properly reversed the trial court and remanded this case for a new trial.

ARGUMENT

THE DISTRICT COURT WAS CORRECT IN REVERSING THE TRIAL COURT AFTER IT ERRED IN INSTRUCTING ON, AND IN ALLOWING THE JURY TO CONVICT MR. ISELEY OF AGGRAVATED ASSAULT WITH A FIREARM, WITHOUT ALLOWING THEM TO CONSIDER THE OFFENSE OF AGGRAVATED ASSAULT WITH A DEADLY WEAPON.

Mr. Iseley was charged by Information with a single Count of "AGGRAVATED ASSAULT (DEADLY WEAPON)". The factual recitation in the Information alleged that Mr. Iseley did intentionally and unlawfully threaten Mr. Squire with a deadly weapon, to wit, a firearm. Aggravated Assault is defined by §784.021 Fla. Stat. as follows:

> (1) An "aggravated assault" is an assault:
>
> (a) With a deadly weapon without intent to kill; or
>
> (b) With an intent to commit a felon
>
> (2) Whoever commits an aggravated assault shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla.Std.Jury Instr. (Crim.) 8.2 sets forth the elements of aggravated assault as follows:

> Before you can find the defendant guilty of Aggravated Assault, the State must prove the following four elements beyond a reasonable doubt. The first three elements define assault.

> 1. The defendant intentionally and unlawfully threatened, either by word or act, to do violence to the victim.
>
> 2. At the time the defendant appeared to have the ability to carry out the threat.
>
> 3. The act of the defendant created in the mind of the victim a well-founded fear that the violence was about to take place.
>
> 4. [The assault was made with a deadly weapon].
>
> * * *
>
> A weapon is a "deadly weapon" if it is used or threatened to be used in a way likely to produce death or great bodily harm.
>
> It is not necessary for the State to prove that the defendant had an intent to kill.

Separate and apart from the definition and instructions on aggravated assault, are the sentencing enhancement provisions of §775.087(2)(a)(1), Fla. Stat. That statute provides in relevant part that:

> Any person who is convicted of a felony or an attempt to commit a felony, regardless of whether the use of a weapon is an element of the felony, and the conviction was for:
>
> * * *
>
> (f) Aggravated assault;

* * *

> and during the commission of the offense, such person actually possessed a "firearm" or "destructive device" as those terms are defined in s. 790.001, shall be ... sentenced to a minimum term of imprisonment of 3 years if such person possessed a "firearm" or "destructive device" during the commission of the offense.

Fla.Std.Jury Instr. (Crim.) 3.05(d) provides for the jury to be instructed as follows:

> If you find that the defendant committed (felony identified by F.S. 775.087(2)) and you also find that during the commission of the crime the defendant possessed
>
> [a firearm]
>
> * * *
>
> you should find the defendant guilty of (felony) with (applicable firearm(s)/device).
>
> Give applicable definitions as contained in F.S. 790.001(4), F.S. 790.001(6), F.S. 775.087(2)(b), and F.S. 790.001(9).
>
> If you find only that defendant committed (felony, as identified in F.S. 775.087(2)) but did not possess a (applicable firearm(s)/device), then you should find the defendant guilty only of (felony).

Notwithstanding Mr. Iseley's objections that the Information charged him with aggravated assault with a deadly weapon, the jury was instructed on, and

provided with a verdict that allowed them to find him "guilty of the offense of AGGRAVATED ASSAULT WITH A FIREARM as charged in the Information". The trial judge declined to instruct the jury on aggravated assault with a deadly weapon, nor to allow it as a lesser included offense or as an alternative charge on the verdict (Tr. 284-290, 294-298, 324-327, 402-404). It may be noted that no reference to the sentencing enhancement provisions of §775.087(2)(a)(1), Fla. Stat. was contained in the charging Information (R. 67).

The standard for appellate review of the denying of a jury instruction is abuse of discretion. However, as noted in Worley v. State 848 So.2d 491 (Fla. 5th DCA 2003), in a criminal proceeding the discretion of the trial court in this regard is rather narrow, however, because a criminal defendant is entitled to have the jury instructed on his or her theory of defense if there is any evidence to support this theory, and so long as the theory is recognized as valid under the law of the state. In the present case, the trial court's decision not to instruct the jury or allow them to consider the offense of aggravated assault with a deadly weapon is reversible error. See, Fernandez v. State 557 So.2d 1008 (Fla. 2d DCA 1990). The trial court itself later conceded at the hearing on Mr. Iseley's motion for new trial that it was troubled by its earlier decision not to instruct the jury on aggravated assault with a deadly weapon (M/NT. 4, 21-22), but nevertheless decided to stick with his original

ruling.

At least two district courts have previously discussed aggravated assault with a deadly weapon as a lesser-included offense to aggravated assault with a firearm. In Fernandez v. State 570 So.2d 1008 (Fla. 2d DCA 1990), the second district court approved a trial court's jury instructions listing aggravated assault with a deadly weapon as a lesser included offense to aggravated assault with a firearm. While reversing on other grounds, the district court stated:

> Regarding the assault, the trial court instructed the jury on aggravated assault with a firearm, aggravated assault with a deadly weapon, and assault. The jury instructions and the verdict form logically treated aggravated assault with a deadly weapon as the next lesser-included offense of aggravated assault with a firearm. The penalty for aggravated assault with a firearm mandated that Mr. Fernandez receive at least three years imprisonment, while the penalty for an aggravated assault with any other deadly weapon would have permitted Mr. Fernandez to receive any nonstate prison sanction.

Similarly, in Wadman v. State 757 So.2d 655 (Fla. 4th DCA 1999), the fourth district court noted, "The court merged the charge on aggravated assault with a firearm with the charge on the lesser included offense of aggravated assault with a deadly weapon. As a result, the charge was confusing as read."

As in Wadman, supra, the trial court in the present case modified the jury instructions on the elements of aggravated assault to include the sentencing

enhancement by adding that "The assault was made with a deadly weapon, to wit: a firearm." The Court then also instructed, over objection (Tr. 294-299), that "a weapon is a 'deadly weapon' if it is used or threatened to be used in a way likely to produce death or great bodily harm." (R. 71; Tr. 454). As in Wadman, this merger of jury instructions did not cure the problem created by mixing the substantive charge with the sentencing factor. Rather, it simply confused the issues.

As stated by the district court in Iseley, "the jury in this case should have been instructed on aggravated assault with a deadly weapon and then been asked to make a special finding as per the charging document and evidence adduced at trial as to whether that weapon was a firearm. The effect of the instructions given and the verdict form was to bypass the 'deadly weapon' aspect and go directly to the firearm aspect." Id. In effect, the trial court in this case directed a verdict against the defendant on the firearm aspect. The jury was not permitted to determine whether Mr. Iseley should be found guilty of aggravated assault with a deadly weapon without the sentencing enhancement of a firearm. As further recognized by the district court in Iseley, "this streamlining or 'short cut' deprived the jury of a fair opportunity to exercise its inherent 'pardon' power by returning a verdict of guilty to the less onerous offense of aggravated assault with a deadly weapon. See, State v. Abreau 363 So.2d 1063 (Fla. 1978)." Id.

Petitioner's reliance upon State v. Overfelt 457 So.2d 1385 (Fla. 1984), and Tucker v. State 726 So.2d 768 (Fla. 1999), is misplaced. Those cases merely allow that the jury may make its determination as to the use of a firearm in the commission of a felony, either by finding a Defendant guilty of a crime which specifically involves a firearm, or by answering a specific question on a special verdict form. Those cases simply approve of alternate ways for the jury to select on the verdict form whether it found that the defendant used a firearm in the commission of the felony charged. Neither case permits the trial court to deny the jury an opportunity to find a defendant guilty of the crime charged without finding him guilty of the use of a firearm in its commission. This would be true even if the evidence of use of a firearm were unrebutted, Tucker v. State 726 So.2d 768 (Fla.1999) (citing to Hargrove v. State 694 So.2d 729 (Fla. 1997)). See also, State v. Estevez 753 So.2d 1 (Fla. 1999). And as noted by the district court herein, there is no specific crime of aggravated assault with a firearm.

The form of the verdict is not the focus of the district court decision in this case. Iseley simply requires that the trial court instruct the jury on the crime actually charged, aggravated assault, and allow the jury to determine whether the defendant is or is not guilty of the use of a firearm in the commission of that crime. The case at bar is consistent with the holding in Overfelt, Tucker and Hargrove, and

not in conflict with the remainder of the caselaw on this issue.[2] The present case is the logical correlary of the other cases; it holds that the jury that has the right to determine whether a defendant is not guilty of the use of a firearm in the commission of the crime charged.

It is respectfully suggested that the decision of the district court in the present case, that the jury must be given the opportunity to convict a defendant of the crime he is charged with committing without necessarily applying any sentencing enhancements, is consistent with the decisions in other areas of the criminal law. For example, in Pride v. State 511 So.2d 1068 (Fla. 1st DCA 1987), the district court affirmed that a trial court has no discretion to refuse to instruct a jury on robbery while carrying a weapon, as a necessarily included offense of armed robbery. The district court in Pride also cited to State v. Abreau 363 So.2d 1063 (Fla. 1978), as did the district court in Iseley, for the proposition that failing to instruct the jury on commission of a felony with a deadly weapon as a lesser

[2] The other cases cited by Petitioner are either not in conflict, or are not relevant. Except for Pride v. State, infra, they deal primarily with instructing the jury on attempts to commit a crime where there is no evidence of an unconsummated attempt. They do not deal with sentencing enhancement statutes, nor with lesser offenses.

offense to commission of that felony with a firearm, constitutes error that is per se reversible.

Had the trial court in this case followed the standard jury instructions, and had it presented to the jury the choice of either aggravated assault with a deadly weapon or with a firearm, either by special interrogatory verdict or by listing them separately on the verdict, then the jury could have performed its duty and selected the appropriate alternative. The trial court erred by failing to allow it to do so.

In section "C" of Petitioner's Brief On The Merits, the State argues that instructing the jury of aggravated assault with a deadly weapon, where the evidence shows that the weapon was a firearm, would violate various criminal rules of procedure. That argument was considered and rejected in Pride v. State 511 So.2d 1068 (Fla. 1st DCA 1987), supra (citing to State v. Wimberly 498 So.2d 929 (Fla. 1986)):

> Lest there be any question, the 1981 changes in Fla.R.Cr.P. 3.510 and 3.490 and in the schedule of lesser included offenses, see In re Florida Rules of Criminal Procedure, 403 So.2d 979 (Fla. 1981), did not change the previously established rigid requirement that the trial court instruct on necessarily lesser included offenses regardless of the evidence. Any doubt in that respect has been laid to rest by the Supreme Court:
>
> > The modification of the schedule of lesser included offenses and rules 3.510 and 3.490 was a major change because it substantially reduced the number of lesser offenses on which the trial

> judge must instruct the jury. It broadened the trial judge's authority to determine the
>
>
>
> appropriateness of instructing on attempts and degrees of offenses. It did not, however, extend that discretionary authority to necessarily lesser included offenses. State v. Wimberly, 498 So.2d 929, 931 (Fla. 1986).
>
> Id.

Likewise, in drug trafficking cases where the sentencing penalties may be enhanced based upon the quantities of drugs involved, it is the jury that must find the applicable quantities of drugs involved, even if the Information charges a greater than minimum quantity, and where the evidence as to quantity is uncontradicted. State v. Weller 590 So.2d 923 (Fla. 1991); Limose v. State 656 So.2d 947 (Fla. 5th DCA 1995). The trial court cannot bypass instructing the jury, nor have them bypass consideration of the less onerous offenses.

In State v. Estevez 753 So.2d 1 (Fla. 1999), supra, a drug trafficking case, this court approved the district court's analysis of reclassification and minimum sentences for crimes involving use of a weapon or firearm under §775.087 Fla. Stat., and the earlier decisions in Tucker, supra, Hargrove, supra, State v. Tripp 642 So.2d 728 (Fla. 1994), and Overfelt, supra, as they apply to enhancements under the drug trafficking laws. This Court in Estevez then stated that,

> In the instant case, the state argues that when the evidence

> as to quantities uncontroverted, the jury should not be allowed to "pardon" the defendant by failing to make a specific finding as to the amount of cocaine involved ...
>
> 24
>
> Importantly, however, while section 893.135 limits a trial judge in sentencing once a specific conviction is secured, none of its provisions obviates the jury's inherent power to 'pardon' the defendant by convicting the defendant of a lesser offense (citations omitted).

The merged jury instructions herein were prejudicial to Mr. Iseley, and the jury verdict based upon those instructions and the resultant Judgment and Sentence herein, were therefore correctly reversed by the district court

.

CONCLUSION

Mr. Iseley was charged with aggravated assault with a deadly weapon. "The trial court committed reversible error in failing to instruct on aggravated assault with a deadly weapon. A new trial is required" Iseley. The district court was correct. It should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via U.S. Mail delivery this ___ day of September, 2004, to Kellie A. Nielan, Esquire and Timothy D. Wilson, Esquire, Assistant Attorneys General, 444 Seabreeze Blvd., Daytona Beach, Florida 32118.

_____

ATTORNEY

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14 point Times New Roman, in compliance with Fla.R.App.P. 9.210(a)(2).

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ATTORNEY