

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. SC04-0485
5D03-120

STEVEN EUGENE ISELEY,

Respondent.

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ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

Iseley's argument, if adopted, would require this Court to adopt a rule that the jury be instructed as to the potential sentencing consequences of every factual determination the jury makes in rendering its verdict. Since this rule would unduly invade the province of the court in fashioning a sentence and violate other rules of this court, Iseley's arguments should be rejected, and his conviction and sentence affirmed.

ARGUMENT

**THE TRIAL COURT PROPERLY
INSTRUCTED THE JURY ON THE
ELEMENTS OF AGGRAVATED ASSAULT
WITH A DEADLY WEAPON.**

Iseley argued on direct appeal and now argues to this Court that it was improper for the trial court to instruct the jury on and provide a verdict form for aggravated assault with a firearm without also instructing the jury on and providing a verdict form for aggravated assault with a deadly weapon without reference to the firearm. However, the real argument Iseley makes goes only to the verdict form, because the trial court actually instructed the jury as Iseley argues they should have been instructed.

Iseley was charged with a single count of aggravated assault with a deadly weapon. Specifically, the Information alleged:

In that Steven Eugene Iseley on or about May 07, 2002, in the County of Volusia and State of Florida, did intentionally and unlawfully threaten by word or act to do violence to the person of Kevin E Squire, coupled with an apparent ability to do so, and did exhibit a firearm, ready it for firing by charging it (placing a round in the chamber) and then verbally threatening Kevin E Squire, which created a well-founded fear in Kevin E Squire that such violence was imminent, and further did commit the assault with semi-automatic handgun or pistol, a deadly weapon, contrary to Florida Statute 784.021(1)(a).

(R. Vol. I, p. 67). At trial, the trial court gave the following instruction to the jury in connection with the single count of the Information:

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

Elements

1. Steven Eugene Iseley intentionally and unlawfully threatened, either by word or act, to do violence the [sic] Kevin Squire.
2. At the time Steven Eugene Iseley appeared to have the ability to carry out the threat.
3. The Act of Steven Eugene Iseley created in the mind of the [sic] Kevin Squire a well-founded fear that the violence was about to take place.
4. The assault was made with a deadly weapon, to wit: a firearm.

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.

A firearm means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by action of an explosive, the frame or receiver of any such weapon.

It is not necessary for the State to prove that the defendant had the intent to kill.

(R. Vol. I, p. 71). The trial court instructed the jury on the elements of aggravated assault with a deadly weapon. The trial court also instructed the jury about what constitutes a deadly weapon and what constitutes a firearm. Based on this instruction, the jury found that Iseley committed an aggravated assault with a deadly weapon, that weapon being a firearm. Iseley's real argument revolves solely around the verdict form.

Iseley, and the Fifth District, confuse the elements of the crime with the sentencing enhancement fact. Iseley essentially demands, and the Fifth District Court's opinion mandates, that the jury always be instructed separately on the existence of the sentencing enhancement fact and that the jury also always be given a separate verdict form to find the existence of a sentencing enhancer. According to Iseley, this rule would apply even in cases like the instant case, where the factual finding of an element of the crime is identical to the factual finding for the sentencing enhancer.

It is axiomatic the function of the jury is to determine the existence of facts. The function of a jury instruction is to guide the jury to determine only legally relevant facts. Once the jury has determined the existence of the legally relevant facts, we ask only that they make a single conclusion; do those

facts convince them beyond a reasonable doubt that the defined offense has been committed? We specifically do not ask the jury to determine the appropriate sentence for the defendant who has been convicted. Fla. R. Crim. P. 3.390(a) ("Except in capital cases, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial.").

Once the jury has determined the facts, some of those facts may have legal consequences for the defendant beyond guilt or innocence. The amount of illegal drugs possessed, for example, or as in the instant case, the possession or use of a firearm in the commission of the crime. It is for the judge to determine the sentence and the application of the law to the facts the jury has found.

Iseley directs this Court to *Tucker v. State*, 726 So. 2d 768 (Fla. 1999), for the proposition that the jury should always be permitted to find the defendant guilty of the crime charged without finding that the defendant used a firearm in its commission, even when the evidence of firearm use is unrebutted. However, that is not what this Court said in *Tucker*. What this Court said was that, even if use of the firearm is unrebutted, the jury must still make the factual finding that the defendant used the firearm before the judge can use that fact at the

defendant's sentencing to enhance the sentence. Tucker, 726 So. 2d at 771. This court then said, again, that when the judge determines whether the jury has made that finding of fact, the judge may rely either on a special verdict or on the finding of guilt of the charged crime, if the crime necessarily included use of a firearm in its commission. *Id.*

What this court has never required, and what would be a mistake to now require, is that the jury always be required to answer a special verdict form for a sentence enhancing fact. Iseley argues that the jury be informed of the consequences of their factual findings so that they may exercise their "pardon power." Iseley's interpretation of the law would require this court to mandate that the jury always be given a special verdict form and that the jury always be instructed as to the potential consequence of every factual finding they make. This rule would impermissibly involve the jury with the sentencing process, in direct violation of Rule 3.390, and the entire body of law based upon that rule.

CONCLUSION

Based upon the foregoing, the trial court gave a clear instruction on the law of aggravated assault with a deadly weapon when the only evidence in the record was that the weapon was a firearm. Iseley's due process right to have a sentencing enhancement fact determined by the jury was honored. The Fifth District Court of Appeal's opinion is in direct conflict with this Court's rules and its prior opinions. Iseley's conviction and sentence should in all respects be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Reply Brief has been furnished by U.S. Mail to Nathan G. Dinitz, Esq., 555 Ballough Rd., Daytona Beach, Florida 32114, this 18th day of October, 2004.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced, in compliance with Fla. R. App. P. 9.210(a)(2).

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