

FILED \_\_\_\_\_

AT \_\_\_\_\_ O'clock \_\_\_\_ M  
CLERK, DISTRICT COURT

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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE**

**STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**STATE OF IDAHO,**

Plaintiff,

vs.

**DAVID DARWIN DONK**

DOB: 4-18-62

SSN: 532-76-0101

IDOC:

Defendant.

Case No. **CRF 2005 17485**  
**CRF 2005 17633**

**MEMORANDUM DECISION AND  
ORDER ON PART II**

**I. INTRODUCTION.**

On January 5, 2006, a jury found David Darwin Donk guilty of Aggravated Assault in Kootenai County Case No. CRF 2005 17485. Part II of the Information alleges Donk used a shotgun to commit the crime of Aggravated Assault. After the jury returned its verdict on the Aggravated Assault charge (and all other charges in CRF 2005 17633 as well), and before the jury was discharged, the Court asked the parties if there were a stipulation as to Part II of the information. Defendant did not waive his right to a jury trial on this issue. Rather than put on additional evidence and request a verdict, the State of Idaho took the position that since the State had alleged and proven the use of a deadly weapon at trial, it was willing to submit as a

matter of law for the court to find whether Part II was proven. The parties were given until January 19, 2006 to submit briefing on the issue. Defendant submitted a brief, the State submitted one case authority without briefing. The matter is now at issue.

## **II. ANALYSIS.**

Jury instruction 13A required the jury to find that Donk used a “deadly weapon and/or instrument” in committing the crime of Aggravated Assault. Jury instruction 13C reads: “‘Deadly weapon or instrument’ as used in this chapter is defined to include any firearm, though unloaded or so defective that it cannot be fired.”

The State of Idaho claims *State v. Tucker*, 138 Idaho 296, 62 P.2d 644 (Ct.App. 2003) allows the Court to make this finding as a matter of law. Donk acknowledges *Tucker* stands for the proposition that when a crime involves the use of a deadly weapon as an essential element of a crime, the jury need not make a special finding of using that deadly weapon. Memorandum on Weapons Enhancement, p. 2. Donk argues that *State v. McLeskey*, 138 Idaho 691, 69 P.2d 111 (2003) shows the definition of “deadly weapon or instrument” which includes a firearm in the Aggravated Assault statute (I.C. § 18-905(d)), “though unloaded or so defective that it cannot be fired”, is different from the definition of “firearm” in the weapons enhancement provision of I.C. § 19-2520, where firearm means any deadly weapon capable of ejecting or propelling one or more projectiles by the action of any explosive or combustible propellant, and includes unloaded firearms and firearms which are inoperable but which can readily be rendered operable.

Memorandum on Weapons Enhancement, p. 2. Donk quotes from *McLeskey*:

These two statutes are obviously not identical. Under the aggravated assault statute, a deadly weapon includes a firearm that is “So defective that it can not be fired.” Under the firearm enhancement statute, however, an inoperable firearm must be one “which can readily be rendered operable.” Because the firearm enhancement statute increases the maximum penalty for the charged offense by fifteen years, the jury must find the facts that trigger the enhancement. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Although the failure to instruct the jury on the definition of firearm under the firearm enhancement statute may have been harmless in this case, *see, Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), on remand the district court should properly instruct the jury regarding the facts they must find under the firearm enhancement statute.

*Id.*, pp. 2-3, citing *McLeskey*, 138 Idaho at 698, 69 P.3d at 118. Donk argues there was no evidence as to the exact status of the shotgun at the time of the aggravated assault, only what condition the gun was in about 18 hours later (when several police entered the residence to arrest Donk and serve the warrant for the Aggravated Assault the day before). *Id.*

First, Donk ignores that underlying facts may be proven from circumstantial evidence as well as direct evidence. If the gun was operable when the police entered and found Donk asleep in the same room as the gun, and there was no evidence that Donk had been servicing an inoperable gun to make it operable (indeed the evidence was just the opposite, that he did not know much about guns), then it logically follows that the gun was just as operable 18 hours earlier when the aggravated assault took place.

Second, Donk argues that it was not harmless error to fail to instruct the jury as to the facts they must find under the firearms enhancement statute. *Id.*, p. 3. Donk ignores the fact that the parties agreed to have this matter submitted to the Court, to determine the issue as a matter of law. The jury was never instructed on

the issue because the jury did not and will not decide the issue.

Third, *McLeskey* was issued by the State of Idaho Supreme Court on April 24, 2003, over three months after the Court of Appeals issued its *Tucker* opinion on January 14, 2003. The Supreme Court in *Tucker* did not overrule *McLeskey*, in fact, the Supreme Court did not even mention *McLeskey* in its *Tucker* decision. Both cases discussed *Apprendi*. *McLeskey* concerned the situation where the jury determined the firearm enhancement issue, but without a specific instruction on that issue. *Tucker* dealt with the fact situation similar to the present case, where the jury decided a deadly weapon was used in their verdict on Aggravated Assault, and then the court subsequently decided the firearm enhancement issue.

In *McLeskey*, the Idaho Supreme Court found that due to a plethora of errors by the trial court, *McLeskey*'s convictions and sentence must be vacated and he must be granted a new trial. 138 Idaho at 696. At that new trial, "the district court should properly instruct the jury regarding the facts they must find under the firearm enhancement statute." 138 Idaho at 698. As noted above in the quotation of *McLeskey* given by Donk in his brief, the Idaho Supreme Court noted that failure to instruct the jury on the definition of firearm under the firearm enhancement statute may have been harmless in *McLeskey*'s case, citing *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). *Id.* On this point, the United States Supreme Court held:

A reviewing court making this harmless-error inquiry does not, as Justice Traynor put it, "become in effect a second jury to determine whether the defendant is guilty." Traynor, *supra*, at 21. Rather a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is "no," holding the error harmless does not "reflec[t] a denigration of the constitutional rights involved." *Rose*, 478 U.S., at 577, 106

S.Ct. 3101. On the contrary, it "serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S., at 22, 87 S.Ct. 824. We thus hold that the District Court's failure to submit the element of materiality to the jury with respect to the tax charges was harmless error.

527 U.S. at 19-20, 119 S.Ct. at 1839. Applying that analysis to the present case, as mentioned above, if the gun was operable when the police entered and found Donk asleep in the same room as the gun, and there was no evidence that Donk had been servicing an inoperable gun to make it operable (indeed the evidence was just the opposite, that he did not know much about guns), then it logically follows that the gun was just as operable 18 hours earlier when the aggravated assault took place. As *Neder* mandates, the record in Donk's case contains no evidence that could rationally lead to a contrary finding with respect to the omitted element, an operable firearm or an inoperable firearm that can readily be rendered operable.

Turning our attention to *Tucker*, which this Court has indicated is more factually on point, the Idaho Court of Appeals stated:

After the jury returned a guilty verdict, the district court sentenced Tucker to an enhanced term of imprisonment pursuant to I.C. § 19-2520 for use of a deadly weapon in the commission of the aggravated assault. Tucker argues that the jury did not decide upon the weapons enhancement question as required by the recent case of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In *Apprendi*, the United States Supreme Court held that due process requires that any fact, other than of a prior conviction, that increases the penalty for a crime beyond the statutory maximum, must be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 490, 120 S.Ct. at 2362, 147 L.Ed.2d at 455.

This Court has held that when the use of a deadly weapon is an essential element of the crime charged, upon rendering its verdict, the jury has already made its factual determination as to whether a deadly weapon has been used. *State v. Hernandez*, 120 Idaho 653, 659, 818 P.2d 768, 774 (Ct.App. 1991). *Hernandez* is consistent with *Apprendi*. *Hernandez* permits the district court to

rely on the jury's determination that the defendant used a deadly weapon if the crime of which the defendant was found guilty already involves the use of a deadly weapon as an *essential element*. Consequently, in those cases, the district court need not specially submit the issue to the jury for a separate finding that the defendant used a deadly weapon. *Id.*

In this case, we conclude that *Apprendi*'s requirement was satisfied. The district court instructed the jury on the elements of aggravated assault in Instruction 13A, which states in relevant part, with emphasis supplied:

In order for DARRELL RAY TUCKER to be guilty of Aggravated Assault, the state must prove each of the following:

On or about November 16, 1999 in the state of Idaho DARRELL RAY TUCKER committed an assault upon Donald Keith Roberts, *with a deadly weapon*.

If any of the above has not been proven beyond a reasonable doubt, then you must find the defendant not guilty of Aggravated Assault. If each of the above has been proved beyond a reasonable doubt, you must find the defendant guilty of Aggravated Assault....

Additionally, the district court instructed the jury that a firearm was a "deadly weapon" in Instruction 13B, and instructed the jury on the definition of reasonable doubt in Instruction 5. The jury determined that Tucker was guilty of aggravated assault. Thus, it was the trier of fact who determined that Tucker had used a deadly weapon prior to the district court's imposition of the weapon enhancement. Accordingly, the district court's weapon enhancement to Tucker's sentence was not error.

138 Idaho at 300-01, 62 P.3d at 648-49. The jury in Donk's case was instructed exactly as set forth in *Tucker*. As set forth in *Tucker*, it is not error for the Court to impose the weapons enhancement as set forth in Part II of the Information.

### III. ORDER.

**IT IS HEREBY ORDERED** that as a matter of law, Donk is GUILTY of the weapons enhancement provision (I.C. § 19-2520) of Part II of the Information, as he used a shotgun to commit the felony crime of Aggravated Assault, as found by

the jury's verdict on Aggravated Assault which had as an included element the use of a "deadly weapon or instrument".

DATED this 6th day of February, 2006.

\_\_\_\_\_  
John T. Mitchell, District Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2006, copies of the foregoing Memorandum Decision and Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Dennis Reuter  
Prosecuting Attorney - Arthur Verharen  
Probation & Parole RE: PENDING PRE-SENTENCE INVESTIGATION

**CLERK OF THE DISTRICT COURT  
KOOTENAI COUNTY**

BY: \_\_\_\_\_  
Deputy

