IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : CASE NO. 69,838

PAUL CLAIR LENTZ, :

Respondent. :

_____ :

RESPONDENT'S BRIEF ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER

GLENNA JOYCE REEVES
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : CASE NO. 69,838

PAUL CLAIR LENTZ, :

Respondent. :

_____:

INITIAL BRIEF OF RESPONDENT

Respndent, PAUL CLAIR LENTZ, was the defendant in the trial court, appellant in the First District Court of Appeal and will be referred to herein by name or as respondent. Petitioner, the State of Florida, was the prosecuting authority.

The record on appeal consists of six volumes, consecutively numbered, which will be referred to as "R."

II STATEMENT OF THE CASE AND FACTS

Since respondent's statement of the case and facts are incomplete, the following are submitted in lieu thereof.

An amended information charged respondent with the attempted first degree murder with a firearm of Charles B. Kelley on September 7, 1983 (R-1). The defense interposed at the trials [the initial trial resulted in a mistrial following a hung jury (R-116-118)] was insanity at the time of the offense. (E.g., R-17, 536-553).

Charles Kelley was a business associate of respondent, Paul Lentz, as well as a close personal friend (R-187-191, 219-223, 920-924). In 1981, Paul Lentz' wife, Suzanne, returned to the real estate business with Mr. Kelley, a salesman with Chip Hartung and Associates which marketed Lentz' homes, essentially taking her under his wing (R-192-194, 219-220, 926-927). During this period of time, Kelley became aware through conversations with Paul Lentz that he and Suzanne were having marital difficulties (R-194-195, 238, 926-927). Simultaneously, Kelley developed an intimate relationship with Suzanne Lentz, Paul's wife, unbeknownst to him (R-195-197, 223-225, 232-234).

Because Mr. Lentz considered himself a happily married man with three children whom he adored, he made every effort, including marriage and psychological counseling, even as often as three times weekly, to save his marriage (R-674-676, 927-928). Around a year or a year and a half prior to the shooting incident, Paul became suspicious that Suzanne and Charles

Kelly might have more than just a business relationship. Suzanne, however, denied this, allaying his suspicions (R-930-932). In spite of intensive counseling and efforts, the marriage continued to deteriorate, and Paul became increasingly depressed (R-927-930, 933-936).

In late July 1983, Paul tearfully confided in friends that he had learned that Suzanne had been having an affair with Charlie Kelly (R-812, 814-815, 932-933, see also 677). For Paul, this knowledge destroyed any hope that his marriage and family could be salvaged (R-936). Friends then noted marked behavioral changes in Paul: uncharacteristically, he began neglecting his business affairs (R-823-826, 934-935, 938); allowing his living quarters to be unkempt and cluttered (R-826-827, 833); and disregarding his personal hygiene (R-827). By August, Paul was not sleeping or eating well, and he seemed so unhappy that his close friends decided that someone needed to be with him as much as possible (R-828-830, 937, 677, 873). August 8th, Paul was seen by Dr. J. David Moore, a Tallahassee psychiatrist. Dr. Moore felt Paul was in need of out-patient psychiatric care at that time for a stress-caused depression and, in addition, recommended some over-the-counter drugs to use as a mood stabilizer and to help with sleep (R-847-850, 867-869, 937, 678). Paul began entertaining suicidal thoughts; a few days before the shooting, he finally decided that he indeed was going to kill himself (R-938-939, 679-680, 873). During these two or three days preceding the shooting, Paul did not sleep and ate only very little (R-941, 766-767, 873).

September 6th, Paul purchased a .38 Smith and Wesson revolver and ammunition from the Outdoor Shop. Although Paul recalled telling the salesclerk that he was buying the gun for his wife for self-protection, he truly purchased the gun so he could kill himself (R-939-940, 557-561, 749, 680, 889). Paul also sent a handwritten will and a suicide note to his sister Susan Brimmer imploring that she take care of his son Shawn and forgive him for not being able to "handle things better" (R-840-843, 953, 680).

Paul's recollection of the events of September 7th was somewhat patchy (R-873-878, 680-683, 879, 941-943). According to Charles Kelly, around 3:00 p.m., as he started to leave his house to return to work, Paul's truck pulled into the driveway blocking his exit (R-198). Paul, who appeared to be his normal, calm self except for the fact that his shirt tail was out, asked if they could talk (R-199, 216-218, 241, 243-244). As they walked down the street, Paul expressed his hurt and disappointment caused by Charles' affair with Suzanne and asked for an explanation (R-201-202). As they returned towards Charles' house, Paul apparently pulled a gun from his pants, wheeled around, pointed a gun at Charles' chest and fired (R-204). As Charles grabbed for Paul's arm, another shot went off which hit no one (R-205). Charles ran; Paul followed, firing another bullet, which hit Charles in the back (R-206). Charles continued running, Paul continued the chase and fired again (R-206). Paul appeared to click the gun several times even though there was obviously no bullets left (R-595-596,

587). Neighbors who observed the shootings described Paul as calm and as displaying a blank look on his face (R-582, 587,588, 594, 805-806). Much of Paul's recollection of the shooting could be described as surrealistic - he saw himself as a "robot," "outside of himself" (R-942, 873-874, 681-682, 745-748, 694). Paul had formed no conscious decision to kill Charles (R-943, 873, 680-681). He recalled that he would be shooting himself, rather than shooting Charles (R-683).

Afterwards, Paul went to his truck and loaded his gun. He put the gun to his heart to shoot himself, but was unable to pull the trigger (R-683, 874). He then drove several blocks, parked his truck and waited for the police to arrive. Paul thought that the arrival of the police would serve as an impetus for him to shoot himself (R-682-683, 947, 874, 272, 892). During the three to four hours he waited there (R-607-612), Paul wrote notes on a tablet (R-266, 269-270, 945-946, 949, 987-989, 699-701). When the police did not come, Paul aimlessly drove to Pensacola, and then without luggage, caught a bus to Mobile, then New Orleans, and Jacksonville Beach (R-949-951, 263-264, 683). At libraries in Mobile and Jacksonville, Paul looked for a Tallahassee paper "to see if there was any indication that what I was afraid I had done had actually occurred" (R-950-951, 683, 694-695). When he learned in Jacksonville that Charles had, in fact , been shot, Paul decided he would shoot himself and if that couldn't be done, he would turn himself in to the police the next morning (R-951-952, 683-684). Paul spent the night of September 15th

on the beach trying to kill himself, but being unable to do so, on the morning of the 16th he went to the Neptune Beach Police Department and advised that he had shot his wife's boyfriend in Tallahassee and gave the officer the gun he had used (R-952-953, 248-260, 684).

All of the expert psychiatrists and psychologists, including the state's expert, agreed that at the time of the offense Paul Lentz was actively suicidal and mentally ill (R-327-330, 855). Dr. Merin, a Diplomate, board certified in clinical psychology and neuropsychology, who treated Paul from October 25, 1983 until September 24, 1984, testified that Paul was not legally sane on September 7 (R-646-660, 733-787-788). He opined that Paul suffered from a major depressive episode with depersonalization features, which is a recognized mental defect or illness (R-662-668, 746, 789, 742-743). His condition caused a loss of the ability to understand or reason accurately (R-668-669, 747). Further, he did not know his actions were wrong, although he knew what he was doing and its consequences (R-669-670, 755-769). Dr. Merin indicated that this violent incident was totally inconsistent with Paul's personality as revealed by numerous clinical interviews and objective testing (R-688-694, 783-784). Dr. Merin further opined that his mental condition was such that he was incapable of entertaining specific criminal intent (R-793). Dr. J. David Moore, a psychiatrist, who had seen Paul once prior to the incident and then again in January 1985, agreed that he was insane at the time of the offense

since he suffered from a major affective disorder, aggravated by sleep deprivation and stress, in conjunction with a dissociative state from which he lost his ability to reason and understand the difference between right or wrong (R-847-848, 850-857, 861-864, 897-878). The state's rebuttal expert, Dr. Berland, did not think Mr. Lentz' mental disturbances were severe enough to impair his ability to reason (R-296, 301-302, 304, 308, 313, 327). Dr. Berland also thought that Mr. Lentz knew what he was doing and knew it was wrong, and was sane (R-309, 314). Even Dr. Berland admitted, however, that the violent act was out of character for Lentz' personality (R-320-321).

Respondent moved for judgment of acquittal on the ground that the state failed to adequately rebut the claim of insanity, which motion was denied (R-140-141, 991, 465-469).

During its initial closing argument, the state argued, inter alia,:

> Sympathy. Sympathy. People could feel sympathy in this case. The Judge will tell you not to consider sympathy, although it's almost impossible to dismiss that from what you are as a person. It's hard to see the anguish and the pain that was involved in this case and not feel sympathy for the Defendant in this case, for all the problems that he was having and the pressures and how they got to him.
>
> I can understand that. You can understand that. But that's not what your job is today. You could also feel sympathy for Charles Kelly. He had to get up on the stand today and he had to -- yesterday -- and tell you that he had been intimate with a friend's wife while they were separated.
>
> He wasn't proud of it. He didn't like it. He felt badly he had gotten into it. He

> said he shouldn't have done it. He said it was the wrong thing to do. But he also said -- and we're saying -- that it is not a defense for premeditated attempted murder.
>
> The judge will tell you -- please listen to this. Please listen to this in the jury instruction. He will tell you that part of your job is not to consider sympathy. Do not consider sympathy for the Defendant and do not consider sympathy for the victim. Sympathy is not to be part of your consideration in your decision. You want to feel it, fine. But you are not to consider it when you sit down and consider the facts.
>
> Penalties. The Judge will tell you you are not to consider the penalty. We have all different jobs. We're all here for the same purpose, to see justice done. We have different jobs. Mr. Garringer and mine are to prove the case. The Defense Attorney's is obvious. The Judge is the finder of law and to instruct you, to make sure it's a fair law.
>
> It's also the Judge's job -- and he will tell you -- that at the end of this case, if you find the Defendant guilty of the charge or any lesser included, that it is his job and his job exclusively to assign any penalty which he feels is appropriate. It is up to him to consider the appropriate penalty. He's heard every single thing that you've heard, and he will have an opportunity to think about it and reason through it and decide for himself what penalty is appropriate. He'll tell you that's his job and not yours.
>
> I'm asking in closing that you disregard sympathy and listen to the Judge. You disregard the penalty. That's his province and that's his job.

(R-355-357). Prior to the jury being discharged, respondent requested that the jury be advised of the mandatory minimum penalties applicable in the case (3 years for firearm; 30 years for life felony) since the prosecutor's argument was misleading in that "the fact of the matter is there are three

mandatory minimum sentencing verdicts in this case, and you can't -- you don't have the discretion. You can't decide" (R-441-444). The trial court denied this request since "the Supreme Court could have made an exception if it wanted . . . they didn't" (R-444). The denial of this request was the subject of extensive argument in respondent's motion for new trial (R-142-143, 470-476, 482-490).

The jury was instructed, without objection, on the standard instruction relating to insanity (R-429-430, 445). After deliberations, the jury requested reinstruction on the Florida sanity law and on the verdicts number one and two (R-446). The jury was reinstructed on the standard insanity instruction and on first and second degree murder (R-446-452). Approximately three hours later, the jury returned a verdict finding respondent guilty of attempted first degree murder with a firearm (R-452-454, 138-139). Respondent's timely motion for new trial and its supplement (R-142-143, 147-152), was denied, following extensive arguments (R-465-491). At the sentencing hearing, the state successfully argued that the offense of attempted first degree murder with a firearm should be reclassified from a felony of the first degree punishable by a maximum penalty of 30 years imprisonment with a minimum mandatory of 3 years for use of a firearm to a life felony punishable by life with a minimum 30 year term of imprisonment (R-492-506). In spite of his total lack of a record (R-144-146), Mr. Lentz was adjudicated guilty and was sentenced to 30 years in the state prison with the mandatory minimum

three year applicable (R-509, 153-165).

The First District Court of Appeal agreed with respondent's contention that a new trial was required because the jury was never properly and accurately instructed concerning the state's burden of proof in an insanity case. Lentz v. State, 498 So.2d 986 (Fla. 1st DCA 1986).

III SUMMARY OF ARGUMENT

The jury rejected Paul Lentz' insanity defense, thereby subjecting him to adjudication of guilt for attempted first degree murder and to a mandatory term of imprisonment of 30 years. Respondent argues that the cumulative effect of several errors occurring here deprived him a fundamentally fair trial (Issue III). Prosecutorial argument suggesting that probation or a light sentence would be within the judge's discretion, when in fact mandatory sentences were unquestionably applicable, impeded the fairness of the trial, and the trial court's failure to cure the clear misstatement of law constitutes reversible error (Issue II). A new trial was properly awarded since the jury was never properly and accurately instructed concerning the state's burden of proof in an insanity case (Issue I). Even if these errors considered singly might not justify a new trial, these considered in conjunction with other examples of prosecutorial misconduct, such as improper cross-examination of Paul Lentz, necessitate a new trial in the interest of justice.

IV ARGUMENT

ISSUE I

THE TRIAL COURT FUNDAMENTALLY ERRED IN FAILING TO INSTRUCT THE JURY FULLY AND ACCURATELY AS TO THE DEFENSE OF INSANITY.

Without objection, the jury was instructed in accordance with the former Florida Standard Jury Instruction (Criminal) 3.04(b).[1] These instructions have now been recognized to be wholly incomplete and inaccurate with respect to the state's burden to prove that the defendant was sane at the time of the offense, once there was sufficient evidence presented to rebut the presumption of sanity. Yohn v. State, 476 So.2d 123 (Fla.

---

[1] The jury was told:

> An issue in this case is whether the Defendant was legally insane when the crime allegedly was committed. You must assume he was sane unless the evidence causes you to have a reasonable doubt about his sanity. If the Defendant was legally insane, he is not guilty.
>
> To find him legally insane, these three elements must be shown to the point that you have a reasonable doubt about his sanity. One, the Defendant had a mental infirmity, defect or disease. Two, this condition caused the Defendant to lose his ability to understand or reason accurately. Three, because of the loss of these abilities, the Defendant did not know what he was doing or did not know what would result from his actions or did not know it was wrong, although he knew what he was doing and its consequences.
>
> In determining the issue of insanity, you may consider the testimony of an expert and nonexpert witness. The question you must answer is not whether the Defendant is legally insane today or has always been legally insane, but simply if the Defendant was legally insane at the time the crime was allegedly committed.

1985); Walker v. State, 479 So.2d 274 (Fla. 2nd DCA 1985). See also, Standard Jury Instructions re: Criminal Cases (Supplemental Report No. 85-2), 483 So.2d 428 (Fla. 1986). Respondent contends that where, as here,[2] the evidence presented clearly raised a reasonable doubt concerning his sanity, the misleading instructions concerning respondent's sole defense constitutes fundamental reversible error.

In Yohn v. State, supra, this Court held that Standard Jury Instruction 3.04(b) does not accurately state the law with respect to the state's burden of proof in an insanity case. In rejecting the contention that the general standard instructions on reasonable doubt and burden of proof could cure the deficiencies in the insanity instruction, the court stated:

> The general standard jury instructions on reasonable doubt and burden of proof in Standard Jury Instruction 2.03 do not rectify the failure of Standard Jury Instruction 3.04(b) to set forth the state's burden of proof as to the defendant's sanity. These instructions were general, whereas the instructions on insanity were specific. Also, the general instruction in 2.03 refers to the state's burden to prove every element

---

1 (cont'd) (R-429-430). This instruction took effect July 1, 1981. In the Matter of the Use by Trial Court's of Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981).

2 Unquestionably, the evidence, both expert and lay, as to Mr. Lentz' insanity at the time of the offense was strong. The fact that Lentz' initial trial ended in a hung jury, that the jury sought reinstruction on the defense of insanity and that even after reinstructions the jury deliberated another three hours is powerful evidence of the closeness of the insanity question.

> of the offense beyond a reasonable doubt. The instruction on insanity in 3.04(b) says nothing about insanity being an element of the offense, which it clearly is. See Parkin v. State. Therefore, we cannot conclude that the erroneous specific instruction was cured by the general one.
>
> In sum, the law in Florida provides for a rebuttable presumption of sanity, which if overcome by the defendant, puts the burden on the state to prove sanity beyond a reasonable doubt just like any other element of the offense. The standard jury instructions given in this case do not completely and accurately state that law.

Id., at 128.

In the present case, the jury was given the insanity instruction, which this Court has recognized as wholly incomplete and accurate. Admittedly, there was no objection made to the jury instructions as given. This omission is not, however, fatal.[3]

In Williams v. State, 400 So.2d 542 (Fla. 3rd DCA 1981),[4] the court recognized that although the contemporaneous objection rule is generally applicable to jury charges, certain exceptions to that rule exist. Of particular import here, the court

---

[3]Even if the omission of counsel were considered fatal, respondent would nonetheless be entitled to relief under Johnson v. Wainwright, 498 So.2d 938 (Fla. 1987). Since Yohn v. State, 450 So.2d 898 (Fla. 1st DCA 1984) was available, counsel should have requested specific instructions, and the failure to do so establishes ineffectiveness.

[4]In Williams, the issue on appeal was whether the omission from the definition of robbery in the jury charge of the intent to deprive held in Bell v. State, 394 So.2d 979 (Fla. 1981) to be an element of that crime constituted fundamental error. The defendant therein had not objected to the omission and the jury was instructed in accordance with the standard instructions:

recognized that the failure to instruct the jury on an element of a crime constitutes fundamental error when the omission or error in the definition of the crime is pertinent or material to what must actually be considered by the jury in order to convict. The court noted that fundamental error has repeatedly been found where the omission or misstatement in the jury charge related to a critical and disputed jury issue in the case:

> While there are several broad references to an affirmative duty of the trial court to instruct the jury on the elements of the crime charged, e.g., Croft v. State, 117 Fla. 832, 158 So. 454, 456 (1935); Whitehead v. State, 245 So.2d 94, 99 (Fla. 2nd DCA 1971), the fact is that every such omission or misstatement which has actually been found to constitute fundamental error concerned a critical and disputed jury issue in the case. Croft v. State, supra (omission of then-element of armed robbery that, if resisted, defendant have intent to kill or maim person assaulted); Gerds v. State, 64 So.2d 915 (Fla. 1953) (omission of intent element of breaking and entering with intent to commit rape; "[f]or all that appears under this charge, the jury could have had for its sole determination the question of whether defendant broke and entered the dwelling house of the prosecutrix and nothing else."); Anderson v. State,

---

4 (cont'd)

> The issue in this case is common to all, or nearly all, robbery convictions secured in Florida between 1976 and 1980. It arises because the standard jury instruction given by the trial court on the crime of robbery under Section 812.13, Florida Statutes (1975), as amended by Chapter 74-383, § 38, Laws of Florida, although generally approved by the supreme court itself, see Standard Jury Instructions in Criminal Cases, 327 So.2d 6 (Fla. 1976), did not include - incorrectly, as it turned out - the intent element required by Bell. The appellant contends here that this mistake fatally infects the judgment below and requires reversal notwithstanding his failure to raise the issue at trial.

[Footnotes omitted]. Id., at 543

> 276 So.2d 17 (Fla. 1973) (failure to define premeditation in first degree murder case); Polk v. State, 179 So.2d 236 (Fla. 2nd DCA 1965) (same); Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945) (omission from self-defense instruction of right to resist if defendant believed himself in imminent danger of harm, although, as the evidence in the case showed, no actual assault was made; error "goes to the essence and entirety of the defense")' Whitehead v. State, supra (omission from definition of justifiable homicide of defense which "from appellant's version of the tragedy . . . was relevant to the exculpatory argument . . . that he was lawfully attempting to 'keep the peace'"); Bagley v. State, 119 So.2d 400 (Fla. 1st DCA 1960) (omission from justifiable homicide instruction of right to lawful defense of relative; defendant claimed she was acting in defense of son); Canada v. State, 139 So.2d 753 (Fla. 2nd DCA 1962) (omission of intent to deprive element from cattle stealing instruction; "the defense . . . was . . . that [the defendant] had no intention of stealing the cattle, but that his actions were the result of instructions received from the agent of the owner . . ."); Ingram v. State, 393 So.2d 1187 (Fla. 3rd DCA 1981) (omission of disputed and basic element of receipt of value for check from instructions on felony charge of obtaining property through worthless check).

[Footnotes omitted]. Id., at 544-545. Although the Williams court found no fundamental error since there was no dispute as to the intent issue, subsequent cases have reversed on a fundamental error rationale where there was an issue at trial with respect to the omitted element. E.g., Graham v. State, 406 So.2d 503 (Fla. 3rd DCA 1981) (failure to instruct on specific intent to permanently deprive in robbery case fundamental reversible error where intent made a material issue of trial by defense voluntary intoxication); Jackson v. State, 412 So.2d 381 (Fla. 3rd DCA 1982), pet. for review denied

419 So.2d 1200 (Fla. 1982) (failure to instruct on specific intent in robbery case fundamental error where intent made material issue of trial by defense of duress and coercion; "Since the intent question was thus a real issue at the trial, and even though the omission was not objected to, the trial court committed fundamental error in failing to instruct the jury that intent to deprive is, as held in Bell v. State, 394 So.2d 979 (Fla. 1981), indeed an element of the crime." Id., at 382). See also, Ramadanovic v. State, 480 So.2d 112 (Fla. 1st DCA 1985) (trial judge's inadvertent omission of essential phrase from standard instruction which could lead to confusion in the juror's minds constitutes reversible error); Doyle v. State, 483 So.2d 89, 90 (Fla. 4th DCA 1986) ("The instruction was, or certainly could have been, misleading to the jury by suggesting that if they believed the defendant's version of self-defense, they would have to find the defendant guilty of murder in the third degree. The giving of a misleading instruction constitutes both fundamental and reversible error."); and Carter v. State, 469 So.2d 194 (Fla. 2nd DCA 1985), where the court, in holding that the trial judge's unintentional misstatement of law relating to self-defense constituted reversible error, stated:

> We further recognize the fact that counsel made no objection to these instructions as given by the court. However, where as here, a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it

> is fundamental error and highly prejudicial to the defendant. Failure to give a complete and accurate instruction is fundamental error, reviewable in the complete absence of a request or objection. Rodriguez v. State, 396 So.2d 798 (Fla. 3rd DCA 1981); Bagley v. State, 119 So.2d 400 (Fla. 1st DCA 1960); Motley v. State 155 Fla. 545, 20 So.2d 798 (1945). Considering the facts of this case, we hold that these instructions constitute fundamental error.
>
> In this instance, it is even more prejudicial to the defendant. The trial court emphasized the erroneous instruction by rereading it to the jurors just prior to their retiring to the jury room to consider their verdict. "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." Bollenbach v. United States, 326 U.S. 607, 612, 66 S.Ct. 402, 405, 90 L.Ed. 350, 354 (1946).

Id., at 195-196.

Under the rationale of the foregoing cases, the failure to fully and accurately instruct on the burden of proof with respect to sanity constitutes fundamental error. Here, of course, Paul Lentz' sanity at the time of the offense was clearly in dispute and critically at issue. Once the presumption of sanity has been rebutted, as it was here, sanity is an element of the offense. Yohn v. State, supra at 128 ("The instruction on insanity in 3.04(b) says nothing about insanity being an element of the offense, which it clearly is."; "In sum, the law in Florida . . . puts the burden on the state to prove sanity beyond a reasonable doubt just like any other element of the offense."); Parkin v. State, 238 So.2d 817 (Fla. 1970); Hodge v. State, 26 Fla. 11, 7 So. 593 (1890). Thus, the erroneous and misleading instructions on this critical

element constitutes fundamental error.

The decision in Snook v. State, 478 So.2d 403 (Fla. 3rd DCA 1985), holding to the contrary, is erroneous. Firstly, Snook totally fails to discuss Williams v. State, 400 So.2d 542 (Fla. 3rd DCA 1981) and its progeny, which unquestionably supports respondent's contention that the instruction given here constitutes fundamental error.[5] Secondly, that court's reliance upon federal cases, which hold that it does not deny due process to place the burden of proof upon the defendant in an insanity case, to conclude that the error is not fundamental is totally misplaced. As Yohn notes, Florida law differs from federal law. Id. at 126. As a matter of state law, the burden of proof has not been placed on the defendant, but rather "we have chosen . . . to create a rebuttable presumption of sanity which if overcome, must be proven by the state just like any other element of the offense." Id. Since, as a matter of state law, sanity is an element of the offense, due process would be violated if the burden of proof were shifted to the defense. See, Sandstrom v. Montana, 422 U.S. 510 (1979).

---

[5]The decision in Roman v. State, 475 So.2d 1228 (Fla. 1985) also fails to discuss the Williams rationale. The briefs show that the argument presented here - i.e., the Williams rationale - was not presented to the court in Roman and for that reason, that decision does not reject the issue.

In Smith v. State, 497 So.2d 910 (Fla. 3rd DCA 1986), the Third District similarly questioned the rationale of Snook. The Court noted:

> The rationale of Snook - that no fundamental error is involved because states may, consistent with federal due process, impose an affirmative burden of proof as to insanity upon the defendant - may not be persuasive in the light of the Yohn holding that the charge is contrary to the established Florida law on the subject. Indeed the Snook holding may also be called into question by the line of United States Supreme Court decisions that a jury charge which impermissibly shifts the burden of proof from the prosecution rises to the level of a due process violation. See Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

Id. at 911, n.1.

Respondent maintains therefor that the failure to instruct fully and accurately as to the defense of insanity constitutes fundamental error entitling him to a new trial.

ISSUE II

THE TRIAL COURT ERRED IN FAILING TO ORDER A NEW TRIAL BASED UPON PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT WHICH DEPRIVED RESPONDENT HIS RIGHT TO A FUNDAMENTALLY FAIR TRIAL.[6]

In its closing arguments, the state urged the jury to disregard their sympathy for Paul Lentz[7] and to disregard the penalty which might be imposed upon him if the jury rejected his insanity defense. The state argued, inter alia,:

> It's also the Judge's job -- and he will tell you -- that a the end of this case, if you find the Defendant guilty of the charge or any lesser included, that it is his job and his job exclusively to assign any penalty which he feels is appropriate. It is up to him to consider the appropriate penalty. He's heard every single thing that you've heard, and he will have an opportunity to think about it and reason through it and decide for himself what penalty is appropriate.

---

[6] Once this Court acquires jurisdiction, it has the authority to consider the entire case on the merits. Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982); Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977). See also Bell v. State, 394 So.2d 979, 980 (Fla. 1981); Zirin v. Charles Pfizer and Co., 128 So.2d 594 (Fla. 1961).

[7] Even in closing, the prosecutor admitted the sympathy properly due Mr. Lentz:

> This is a difficult case. We are not trying to tell you that the Defendant is an evil man. That is not our intention. You heard from the defendant. You've had an opportunity to observe him. You've heard a lot of people talk about him. That's not the case (R-341).
>
> It's hard to see the anguish and the pain that was involved in this case and not feel sympathy for the Defendant in this case, for all the problems that he was having and the pressures and how they got to him (R-355).

[Emphasis supplied] (R-356-357). Before the jury retired to deliberate (R-445), respondent requested that the prosecutor's misstatements be cured by an instruction concerning the mandatory minimum sentences[8] applicable here:

> I think that you would be obligated to give at least the mandatory minimum penalties in this case for three separate reasons.
>
> * * *
>
> Mr. Norris -- they like the idea that the penalty is not an issue and then they play upon it and say, it's not an issue. It's up to the Judge and the Judge has the discretion. . . . You shouldn't worry about it. The Judge will decide what he can do.
>
> The fact of the matter is there are three mandatory minimum sentencing verdicts in this case, and you can't -- you don't have the discretion. You can't decide.
>
> Even if it is the law that you [do not] instruct on penalties, I think the instructions are almost compelled by his argument. He's created the impression that you can give this man probation for something like that. That's just not fair.

7(con'td)

> I'm not saying he's a criminal . . . I'm not saying he's a psychopathic killer. The State has never said that (R-393).
>
> By the way, Dr. Berland never said and no one has ever intimatd that the Defendant was on the way to becoming a criminal (R-405).

[8]Three of the verdict options required imposition of the mandatory minimum three year sentence pursuant to Section 775.087 (2) since a firearm was involved (R-138-139). Further, the use of the firearm in the attempted first degree murder charge mandated a minimum sentence of 30 years imprisonment, § 775.082(3) (a), Fla. Stat.; Strickland v. State, 437 So.2d 150 (Fla. 1983), thus making the prosecutor's misstatement all the more egregious.

[Emphasis supplied] (R-441-443). In light of the amended version of Rule 3.390(a), Florida Rules of Criminal Procedure,[9] the trial court denied this request (R-444). In his motion for new trial and supplement thereto (R-142-143, 147-152), respondent argued the prosecutor's remarks mandated a new trial since they amounted to prosecutorial misconduct which denied him a fair and impartial trial (R-470-475, 487-489). The trial court denied the motion (R-490-491). In so ruling, the trial judge erred since the prosecutor's misstatement of law should have prompted a curative instruction or alternatively, a new trial is required because the argument fundamentally deprived respondent his right to a fair trial.

Florida caselaw clearly provides that misleading prosecutorial argument or misstatements of law may constitute prejudicial error. Pait v. State, 112 So.2d 380 (Fla. 1959); Harvey v. State, 448 So.2d 578 (Fla. 5th DCA 1984). The prosecutor's argument here constituted a blatantly misleading misstatement of law since the applicability of the mandatory minimum three year sentence for possession of a firearm totally precluded the trial judge from assigning "any penalty which he feels is appropriate." Further, the prosecutor's veiled suggestion that probation might be imposed was improper, as

---

[9]Effective January 1, 1985, that rule provides:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial.

well, since it may have denigrated the importance of the jury's deliberations. While no Florida cases appear directly on point, decisions from other jurisdictions persuasively demonstrate that the comments mandate a new trial.

In State v. Torres, 16 Wash.App. 254, 554 P.2d 1069 (1976), a new trial was ordered because, among other things, the prosecutor argued that the defendant might be placed on probation if found guilty. There, in rebuttal to defense counsel's arguments as to the "serious consequences" facing the defendant, the prosecutor argued:

> You are the triers of the fact. You have to determine what happened and when it happened. Punishment, if any, in this case will be determined by Judge Stephens. He has heard all this testimony, all the background.
>
> * * *
>
> Judge Stephens will have total discretion as to what happens to these defendants after you make your determination and render your verdict in the matter. He has a lot of alternatives available to him.
>
> * * *
>
> Judge Stephens has a lot of alternatives open to him, and he can choose anything from a deferred sentence on this --

Id., at 1074. Although, in marked contrast to the present case, probation was, in fact, a viable sentencing alternative, the court nevertheless condemned these arguments, noting:

> Prosecutorial argument that an accused may receive probation is generally considered to be improper, and the issue then arises whether the impropriety has been prejudicial. See Lovely v. United

> States, 169 F.2d 386 (4th Cir. 1948), Fryson v. State, 17 Md.App. 320, 301 A.2d 211 (1973); Annot., 16 A.L.R.3d 1137, 1140 (1967). Such comment may distract the jury from its function of determining whether the defendant was guilty or innocent beyond a reasonable doubt by informing them, in substance, that it does not matter if their verdict is wrong because the judge may correct its effect.

Id. Similarly, in Fryson v. State, 17 Md.App. 320, 301 A.2d 211 (1973), prosecutorial rebuttal argument that if the defendant were found guilty he would "be put on probation" was held to be reversible error necessitating a new trial.[10] The court reasoned that prosecutorial remarks concerning probation or parole were highly prejudicial since:

> [t]he argument, as made by the prosecutor, may have led the jury to conclude that although the evidence might be weak, no real harm could be done to the appellant because he would be placed on probation and thus receive some form of beneficial supervision.

Id. at 213-214. See also, State v. Jaramillo, 520 P.2d 1105 (Ariz. 1974) (remarks of prosecutor concerning the possibility of probation improper; not reversible because remarks invited by defense). Singer v. State, 109 So.2d 7 (Fla. 1959) (discussion of parole improper). Cf. Blackwell v. State, 76 Fla. 124, 79 So. 731 (1918) (argument that any error in case could

---

[10] The trial court in Fryson had sustained defense objection to the improper argument. The appellate court held, however, that the trial judge did not go far enough: "the trial judge should not only sustain an objection to a highly prejudicial remark, but should admonish the jury and instruct them to disregard the improper argument." Fryson v. State, supra, at 213.

be corrected on appeal prejudicial error; "The purpose and effect of this remark was to suggest to the jury that they need not be too greatly concerned about the result of their deliberations, because if they committed an error in forfeiting the lives of the prisoners, the Supreme Court could correct it.... Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court." 76 Fla. 138-139); Pait v. State, supra (argument concerning defendant's right to appeal if convicted improper); State v. Jones, 296 N.C. 495, 251 S.E. 2d 425 (1979) (argument concerning defendant's right to appeal improper because effectively told jurors that they could rely upon the Supreme Court to correct their verdict if it were wrongful or improper); Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed. 2d 231 (1985) (in capital sentencing context, unconstitutional for prosecutor, by argument, to shift sentencing responsibility from jury to appellate court).

The prosecutorial argument here possesses all the vices recognized by the foregoing cases, and more. By inferring that probation or a light sentence was probable here, the prosecutor invited the jury to take their deliberations less seriously since "it does not matter if their verdict is wrong because the judge may correct its effect." The argument here was not even a correct statement of law, but rather was totally inaccurate and misleading. Since the prosecutor interjected this inaccurate misleading information into the proceeding, at

a minimum, the trial court should have removed the erroneous impression by advising that mandatory minimum sentences were applicable and thus placed "the cause back on an even keel so that it might be decided by the jury with complete fairness to all parties."[11]

Warfel v. State, 454 N.E.2d 1218 (Ind. 1983) recognizes the propriety of such a curative instruction. The Court therein noted:

> It is axiomatic in this area that the judge and not the jury performs the entire sentencing function in non-capital cases, and consequently the jury should be confined to determining guilt or innocence of the accused. The jury should not be encouraged to gauge guilt or innocence by what it believes to be an appropriate penalty. It is impermissible for the court or counsel to inform the jury of the range of possible penalties. However if jury speculation on penal consequences of guilty verdict is somehow triggered during trial, the judge should give an instruction fully outlining those possible consequences, and further commanding the jury to disregard them. Feggins v. State, (1977) 265 Ind. 674, 359 N.E.2d 517.

[Emphasis supplied] Id. at 1220.[12]

---

[11] See State v. Rhodes, 275 N.C. 584, 169 S.E.2d 846 (1969) and cases cited therein, where court noted that where defense counsel made erroneous argument as to law with reference to minimum punishment for offense, trial court could outline penalties to jury.

[12] In rebuttal, the prosecutor argued that the court could suspend any or all of the sentence. While the court held this argument to be improper, reversal was not required since the comments had been invited by the defense.

Respondent's requested instruction regarding the applicable mandatory minimum sentences would have cured the mistaken impression concerning the penalties which the prosecutor had intentionally triggered. The fact that the penalty instructions are not now authorized does not obviate the trial court's obligation to correct the mistaken impression concerning penalties caused by the prosecutor's arguments. Warfel v. State, supra. Respondent contends therefore that in the present case the refusal to instruct the jury as to the applicable mandatory minimum sentences constitutes reversible error.

ISSUE III

RESPONDENT IS ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE SINCE THE ERRORS OCCURRING IN THE TRIAL COURT COMBINED IN SUCH A WAY AS TO DEPRIVE HIM HIS RIGHT TO A FAIR TRIAL.

Florida Rule of Appellate Procedure 9.140(f) authorizes this Court to grant a new trial "in the interest of justice." It is not uncommon for appellate courts to reverse criminal convictions based upon the cumulative effect several errors have upon the fairness of the trial court proceedings. Collins v. State, 423 So.2d 516 (Fla. 5th DCA 1982) ("None of the errors and failures of proof at trial alone would be persuasive, but their total effect convinces us there was here a miscarriage of justice that can only be remedied by requiring a new trial." Id. at 518); Dukes v. State, 356 So.2d 873 (Fla. 4th DCA 1978) ("While we might be persuaded to overlook any one of the errors about which appellant complains, the totality of the circumstances in this case leads us to believe the appellant was not afforded a fair trial." Id. at 874); Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977) ("While either of these harmful comments, standing alone, may not be cause for reversal, we believe their cumulative effect substantially prejudiced appellant's defense.... While a defendant is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error. Id. at 778); Bullard v. State, 436 So.2d 962 (Fla. 3d DCA 1983) (Ferguson, J., concurring) ("Whether the errors complained of were preserved for review by timely and informative objection

is not, in my opinion, a crucial issue. The prosecution of the case was, in totality, so grossly improper as to render the trial fundamentally unfair. On the record before us, reversal would have been required even if defense counsel had failed to interpose a single objection." Id. at 964); Jones v. State, 440 So.2d 313 (Fla. 5th DCA 1984), pet. for review denied 456 So.2d 1182 (Fla. 1984)("Jones also argues that the prosecutor's closing arguments were improper and deprived him of a fair and impartial trial. Despite the fact that most of the remarks were not objected to, in view of the weak case presented against Jones, we cannot view the prosecutor's improper arguments as harmless, and we reverse for a new trial. Pait v. State, 112 So.2d 380 (Fla. 1959); Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979), cert. denied, 386 So.2d 642 (Fla. 1980). The combination of the prosecutor's improper comments and argument and the state's tenuous case against Jones convinces us that on balance Jones did not receive a fair and impartial trial, Peterson, and that fundamental error occurred." Id. at 315); Singletary v. State, 483 So.2d 8 (Fla. 2d DCA 1985) ("The comments which are the subject of either of those grounds, viewed alone, might be argued to have constituted insufficient grounds for requiring a mistrial.... Nonetheless, we believe the two contentions, taken together, require a reversal." Id. at 9); Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1977) ("The effect on the verdict of the evidence of the expert here was so obvious and extensive that its admission falls within the definition of fundamental error which this Court may and should review, in the interest of

justice, regardless of objection at the trial level." Id. at 31). As noted in Tibbs v. State, 397 So.2d 1120 (Fla. 1981), an "in the interest of justice" reversal is a viable and independent ground for appellate reversal and is properly used to correct fundamental injustices, unrelated to evidentiary shortcomings, which occurred at trial. See also, Greene v. Massey, 706 F.2d 555 (5th Cir. 1983). In the present case, the errors discussed, infra, coupled with those discussed previously in Issues I and II combined in such a way that a miscarriage of justice occurred which should, in the interests of justice, be remedied by the award of a new trial.

The prosecutor's closing argument was not limited in its impropriety to the erroneous remarks concerning penalties, but, as well, included the assertions that "[y]ou could also feel sympathy for Charles Kelly" (R-355-356). Appeals to the sympathy of the jury on behalf of the victims are, of course, clearly prohibited. Singer v. State, 109 So.2d 7 (Fla. 1959); Breniser v. State, 267 So.2d 23 (Fla. 4th DCA 1972); Knight v. State, 316 So.2d 576 (Fla. 1st DCA 1975); Harper v. State, 411 So.2d 235 (Fla. 3d DCA 1982); Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1983). See also R 91-92, 624-625, 209-215 where state insisted upon display of victim's scars as well as introduction of blood stained clothing.

The record abounds with other examples of prosecutorial overreaching or misconduct, most notably during the state's cross-examination of Paul Lentz. Over objection, the prosecutor made reference to respondent bugging his wife's phone and breaking into her house (R 961-964, 965, 966, 967; see also

R 343, 357). Florida law has consistently deemed inadmissible evidence tending to show that the accused was suspected of crimes for which he was not on trial, the theory being that a jury is bound to be unfairly prejudiced against the accused by reason of their knowledge of the unrelated crime. Marrero v. State, 343 So.2d 883 (Fla. 2d DCA 1977). Accord, Kelly v. State, 371 So.2d 163 (Fla. 1st DCA 1979); Harmon v. State, 304 So.2d 121 (Fla. 1st DCA 1980); Clark v. State, 337 So.2d 858 (Fla. 2d DCA 1976); Whitehead v. State, 279 So.2d 99 (Fla. 2d DCA 1973). See Jackson v. State, 451 So.2d 458, 461 (Fla. 1984), where the court stated:

> [t]his testimony is precisely the kind forbidden by the Williams rule and section 90.404(2). As the Third District Court of Appeal said in Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), cert. denied, 348 So.2d 953 (Fla. 1977),
>
> [t]here is no doubt that this admission [to prior unrelated crimes] would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded [citing to Williams].

This prohibition also stems from the fundamental principle that unless a defendant has first chosen to place his good character in issue, the state is not permitted to attack his character. E.g., Jordan v. State, 171 So.2d 418 (Fla. 1st DCA 1965); Andrews v. State, 172 So.2d 505 (Fla. 1st DCA 1965); Roti v. State, 334 So.2d 146 (Fla. 2d DCA 1976); Carter v. State, 332 So.2d 120 (Fla. 2d DCA 1976); Perkins v. State, 349 So.2d

776 (Fla. 2d DCA 1977); Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1979); Wilt v. State, 410 So.2d 924 (Fla. 3d DCA 1982); Perez v. State, 434 So.2d 347 (Fla. 3d DCA 1983); Machara v. State, 272 So.2d 870 (Fla. 4th DCA 1970). See also, Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981) (error to allow state to cross-examine the defendant as to whether he had ever threatened his son James with a weapon since such was improper evidence of bad character); Sneed v. State, 397 So.2d 931 (Fla. 5th DCA 1981) (error to allow state to cross-examine defendant regarding nature of prior conviction for assaulting his daughter, "Cross examination regarding an irrelevant criminal incident constitutes reversible error." Id. at 933); Layton v. State, 348 So.2d 1242 (Fla. 1st DCA 1977) (in trial for lewd and lascivious act in presence of child under age of 14, error to allow state to cross-examine defendant as to whether he had been examined by psychiatrists who advised that he had a sociopathic personality, could be considered dangerous to small children, and had certain sociopathic problems). The testimony concerning the wiretapping and burglary showed only bad character or propensity, and as such its admission is presumed harmful error. Straight v. State, 397 So.2d 903, 908 (Fla. 1981). Even assuming arguendo, that such error may be considered harmless, it is clear that Williams rule violations may be harmless only "where proof of guilt is clear and convincing so that even without the collateral evidence introduced in violation of Williams, the defendant would clearly have been found guilty." Bricker v. State, 462 So.2d 556, 559 (Fla. 3d DCA 1985).

In the present case, while respondent's involvement in the shooting was undisputed, the issue of Lentz' accountability for his actions -- i.e., whether he was sane at the time of the offense -- was hotly contested, and, in fact, the overwhelming weight of the evidence showed that Paul Lentz should not be held legally accountable for his actions since he was insane at the time of the offense. While concededly the jury was free to find that Dr. Berland's testimony, based upon his one-time examination of respondent on May 22, 1984 (R 284), was sufficient to rebut Lentz' strong showing of insanity, which was supported not only by expert witnesses, but lay witnesses as well, see State v. McMahon, 485 So.2d -84 (Fla. 2d DCA 1986), it is undeniable that the state's efforts at establishing respondent's sanity beyond every reasonable doubt were tenuous at best. The fact that this jury[13] requested reinstruction on the insanity defense and then, even after those instructions, deliberated several more hours irrebuttably shows the weakness of the state's case. In these unique circumstances, the grievousness of any error, much less the coalescence of those transpiring here, is pellucid. Although the critical (and, in fact, only) issue here was Lentz' sanity at the time of the offense, the jury was never properly instructed concerning the state's burden of proof regarding sanity. The jury was never told that once a reasonable doubt

---

13 The initial jury was so moved by the state's presentation that they were unable to reach a verdict.

as to sanity was created by the evidence, then "the state must prove beyond a reasonable doubt that the defendant was sane." Rather, the jury was given instructions which the court has now recognized as being wholly incomplete and inaccurate. These erroneous instructions were not only given once, but were re-read upon the jury's request. This error alone may well have been determinative of the jury's verdict and a properly instructed jury may very well have concluded that the state failed to adequately rebut the defense showing of insanity. The fairness of Mr. Lentz' trial was further compromised, irremediably so, he contends, by prosecutorial misconduct which subtly, yet insidiously, depreciated the ponderousness of the jury's deliberations. The prosecutor's blatant mis-statement of the law regarding penalties could readily have been cured by an instruction advising of the applicability of the mandatory minimum sentences and advising that the jury should not be thereby swayed. Uncorrected, however, the jury was left with the blatantly false impression that the trial judge, taking into consideration all the admitted mitigating circumstances of this case, would and could assign any penalty he deemed appropriate, even possibly probation. In a case such as this one, allowing the falsity of the prosecutor's arguments to stand uncorrected was utterly and fundamentally unfair. Thus, considering the tenuousness of the state's case as well as the cumulative effect of the trial improprieties occurring here, the interests of justice mandate that Paul Lentz be awarded a new trial.

V CONCLUSION

The decision of the First District ordering a new trial should be affirmed.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER

GLENNA JOYCE REEVES
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to Gary Printy, Assistant Attorney General, The Capitol, Tallahassee, Florida; and by U.S. mail to Mr. Paul Clair Lentz.

GLENNA JOYCE REEVES