047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,474

JAMES BARNES,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

The petitioner, James Barnes, was the defendant in the trial court and the appellant in the Third District Court of Appeal. The respondent, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. In this brief, the parties will be referred to as they stood in the trial court. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

On August 5, 1987, James Barnes was arrested and later charged with the attempted first-degree murder of his wife and unlawful possession of a firearm while engaged in a criminal offense. (R. 1-2A). A jury convicted Mr. Barnes of these charges on February 19, 1988. (R. 28).

On August 25, 1988, the trial court imposed sentence. (R. 29). The recommended guidelines range for these charges was twelve to seventeen years imprisonment. (Tr. 34-34A). The trial court deviated from the recommended guidelines range and imposed a sentence of life for the attempted first-degree murder count and a consecutive fifteen year sentence for the firearm possession count. (R. 31-34A). The trial court wrote the following reasons as grounds for the departure sentence:

> 1. Victim suffered trauma beyond normal. 2. Breached trust with wife. 3. Used children to accomplish goal. 4. Committed in front of children. Tried to fire 2nd time. (sic) Tried 3rd time. (sic) Tried 4th time. (sic).

(R. 34).

Mr. Barnes then appealed his conviction and sentence to the Third District Court of Appeal. (R. 35). The district court vacated his conviction and sentence for possession of the firearm, but affirmed the conviction and sentence for attempted first degree murder. Barnes v. State, 562 So.2d 729, 729-30 (Fla. 3d DCA 1990). In affirming, the district court found that since the defense did not request a Williams Rule instruction during the charge conference, "the defendant cannot now complain of the trial court's failure to give that instruction." Id. at 729.

Regarding the departure sentence, the district court stated only:

> Also, defendant used familial trust to effectuate the crime, thus justifying a departure sentence. See Turner v. State, 510 So.2d 920 (Fla. 1st DCA 1987).

Id. at 730. The Third District did not address the merits of any of the other grounds for departure.

Thereafter Mr. Barnes applied for discretionary review by this Court, arguing that the district court's decision regarding the Williams Rule instruction omission and the departure sentence were in express and direct conflict with the decisions of this court and of other district courts. This Court accepted jurisdiction on January 11, 1991.

STATEMENT OF THE FACTS

The facts regarding the omission of the Williams rule instruction are set forth in the district court opinion as follows:

> Evidence of prior acts proved intent and lack of mistake, both facts at issue. See Goldstein v. State, 214 So.2d 903 (Fla. 1st DCA 1984). When this evidence was first introduced, defendant requested a shortened form of the Williams Rule instruction. See Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); § 90.404(2), Fla. Stat. (1989). When this request was denied, defendant waived the reading of the full instruction which the court was prepared to give in order to point out the limited purpose for which the evidence was being admitted. Thereafter, during the jury conference, the defendant did not request a Williams Rule instruction. Therefore, the defendant cannot now complain of the trial court's failure to give that instruction. See Skipper v. State, 420 So.2d 877 (Fla. 1982) (a request is necessary in order to preserve for appellate review the right to receive an instruction).

Barnes v. State, 562 So.2d at 729-30.

The collateral crimes evidence admitted at trial, concerned two separate incidents. In the first incident, Mr. and Mrs. Barnes went together to a lake on Tamiami Trail, where Mr. Barnes accused his wife of having an affair and put a gun to her head. (Tr. 648-649). Mrs. Barnes then accompanied her husband to the store, where he bought bullets. (Tr. 649-650). After returning to the same lake, Mr. Barnes ordered Mrs. Barnes out of the truck and began firing the weapon in an unspecified direction. (Tr. 650). In the second incident Mr. Barnes woke up Mrs. Barnes, and, after an argument, took her into the children's room, and

pointed a gun at one of the sleeping children. (Tr. 652-653).

The facts regarding those grounds for departure not addressed in the district court opinion reveal that Mr. Barnes told his stepson, Toshaumbay, to call Judy Barnes, petitioner's wife, at work and tell her to come home because the house had been burglarized and was in shambles. (Tr. 457). At the end of this telephone call, Mr. Barnes got on the line and told his wife to come home right away. (Tr. 655) The house, however, had not been burglarized, but Mr. Barnes had broken some household items. (Tr. 481-82). Once Mrs. Barnes arrived home, Toshaumbay saw Mr. Barnes point a gun at Mrs. Barnes in the back yard, and tell her to go in the house. (Tr. 463). After Mr. and Mrs. Barnes went inside the house, Toshaumbay stayed in the back yard and did not see what else occurred, although he heard Mr. Barnes tell Mrs. Barnes he would kill her. (Tr. 464, 472, 486).

Inside the house Mr. Barnes tried to fire the gun at Mrs. Barnes while she was looking at some destroyed clothes. (Tr. 663). The gun, however, did not discharge. (Tr. 663). The couple began arguing by the refrigerator, where Mr. Barnes pointed a gun at Mrs. Barnes' face and pulled the trigger, and again the gun did not discharge. (Tr. 664). The only persons in the house during these events were Mr. and Mrs. Barnes. (Tr. 681). Mrs. Barnes stated she was not sure how many times her husband pulled the trigger. (Tr. 666, 716).

Mrs. Barnes testified at trial regarding her injuries as follows:

> Q. Were you hurt at all during this ordeal? Did you suffer any bruises?

A. I've been going to therapists. Mental anguish.

Q. Did you suffer any physical--

A. Not this day.

Q. On this time, when you said Mr. Barnes attempted to kill you, I think, were you hurt in any way?

A. He didn't physically hurt me.

(Tr. 682). During the sentencing hearing, Mrs. Barnes testified as follows about what injury she incurred as a result of this incident:

Q. [By the prosecutor] Now, I want for you to tell the Judge what happened to you since that day in August when your husband took a gun, pointed it in your face, and pulled the trigger three or four times.

Go ahead and tell the Court.

[Defense objection made and overruled.]

* * *

A. After the incident, I took a leave of absence. I went to the clinic for battered women counseling.

THE COURT: Does this have anything to do with the incident?

* * *

MS. ROSENBAUM: Judge, this has to do with psychological trauma to the victim, which is a ground for departure.

* * *

BY MS. ROSENBAUM:

Q. Would you continue telling the Judge what you have done and what treatment you have sought since the incident in August of 1987?

A. Well, I took a leave of absence from work for awhile to try to cope with the problem.

I did go to the program for battered women.

Q. And did you remain in the house after this happened?

A. No.

Q. What did you do?

A. I moved out.

Q. Why?

A. Because I can't stay there anymore.

Q. To this day, are you willing to supply in court your home address where you are living?

A. No.

Q. Why is that?

A. Because I'm still scared of him.

I won't give my address here.

(Tr. 962-65). Mrs. Barnes also stated that she had requested a job transfer to another state because she is scared to stay in Florida. (Tr. 966). She returned to work on October 25, 1987. (Tr. 971). At the time of sentencing on April 25, 1988, Mrs. Barnes was no longer undergoing therapy, and was not under treatment by a medical doctor. (Tr. 974).

QUESTIONS PRESENTED

I.

WHETHER THE FAILURE TO GIVE ANY INSTRUCTION TO THE JURY ON HOW TO CONSIDER COLLATERAL CRIME EVIDENCE CONSTITUTED FUNDAMENTAL ERROR?

II.

WHETHER USE OF FAMILIAL TRUST TO EFFECTUATE THE CRIME IS NOT A VALID GROUND FOR DEPARTURE IN THIS ATTEMPTED FIRST-DEGREE MURDER CASE?

SUMMARY OF ARGUMENT

The uniquely inflammatory nature of collateral crime evidence requires that the jury receive some instruction regarding its consideration. In this case, fundamental error occurred where the jury received no guidance or instruction on how to treat the collateral crime evidence introduced. Without such instruction, the jury was free to consider this uniquely inflammatory evidence for its improper purpose of proving the accused's bad character or propensity to commit the offense. The legislative mandate that an instruction on collateral crime evidence be given at the close of the evidence, as well as the law's cautious treatment of such evidence generally, stress the fundamental harm the law seeks to avoid by requiring a jury instruction on collateral crime evidence. Without this instruction in this case, the jury was free to decide the key issue of whether the incident ever occurred, by using the collateral crime evidence as proof of propensity and bad character. The interests of justice compel a finding here of fundamental error.

The district court erred in upholding use of familial trust to effectuate the crime as a ground for departure in this case in which Mr. Barnes received consecutive sentences of life and fifteen years imprisonment. The trial court departed, inter alia, based on the grounds of "breached trust with wife" and "used children to accomplish goal". The district court relied on Turner v. State, 510 So.2d 920 (Fla. 1st DCA 1987), which upheld a departure sentence based on breach of familial trust where the defendant was charged with a lewd and lascivious act upon a child

under sixteen. This Court, in Wilson v. State, 15 F.L.W. 429 (Fla. Sept. 6, 1990), rejected breach of familial trust as a ground for departure in such cases, and through that decision rejected Turner.

In Davis v. State, 517 So.2d 670 (Fla. 1987), this Court held that breach of trust was not a basis for a guidelines departure in a second-degree murder case in which a wife, distraught over financial difficulties, had shot her husband six times while he lay sleeping. The Davis court established that in order for breach of trust to be a valid ground for departure, the crime committed must be directly related to a specific trust conferred on the defendant by the victim, and that trust must be the factor that made the crime possible and formed the foundation of the crime. Here, the trust between Mr. and Mrs. Barnes was not a particular trust, but only that generally held between husband and wife. When Mr. Barnes instructed his stepson to call Mrs. Barnes and lie to her about a burglary at their home and to ask her to come home, this instruction did not constitute a violation of a particular and specific trust, which was the factor making the crime possible and which formed the foundation of the crime. Since Mrs. Barnes was still living with her husband and thus would have returned home that day anyway, the burglary story only caused the incident to occur at a certain time, but did bring about the offense itself.

The other written reasons for the departure life sentence are equally invalid. Victim trauma is an improper departure ground because no extraordinary trauma not inherent in the crime

and no physical manifestations of psychological trauma were proved below. The evidence of psychological trauma showed only that Mrs. Barnes took a leave from work in order to get counseling and moved out of her home to an address she did not want to supply publicly. She returned to work within three months of the incident, and at the time of sentencing was no longer seeking therapy and was not under treatment by a medical doctor. This evidence does not meet the definition of victim psychological trauma established by this Court in State v. Rousseau, 509 So.2d 281, 284 (Fla. 1987).

The reason of "committed (sic) in front of children" is invalid here because the record refutes that the children were present when the actual attempted shooting occurred in the house. Furthermore, since the record contains no evidence that any child suffered emotional trauma as a result of this incident, this ground cannot be upheld.

The last ground, that defendant attempted to fire the weapon four times clearly violates Rule 3.702(d)(11) of the Florida Rules of Criminal Procedure, prohibiting deviations from the guidelines based on factors relating to the charged offense for which no conviction has been obtained. Moreoever, this reason is not supported by the evidence, since the victim described two occasions when the defendant pulled the trigger, but otherwise testified she was unsure exactly how many times the trigger was pulled.

Since fundamental error occurred when no collateral crime jury instruction was read, and since no legal grounds for

departure were written by the trial court, the decision of the district court upholding the conviction and departure sentence should be quashed.

ARGUMENT

I.

THE FAILURE TO GIVE ANY INSTRUCTION TO THE JURY ON HOW TO CONSIDER COLLATERAL CRIME EVIDENCE CONSTITUTED FUNDAMENTAL ERROR.

The Florida legislature has specified that at the close of all the evidence, the jury "shall" be instructed on the limited purpose for which collateral crime or Williams Rule evidence can be used in deciding a criminal case. §90.404(2)(b)2., Fla. Stat. (1988). Section 90.404(2)(b)2. states as follows:

> 2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury **shall be instructed** on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

Id. The instruction required to be read after the close of the evidence reads as follows:

> The evidence which has been admitted to show similar crimes, wrongs, or acts allegedly committed by the defendant will be considered by you only as that evidence relates to proof of [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [the absence of mistake or accident] on the part of the defendant.

Fla. Std. Jury Instr. (Crim.) "Williams' Rule" F.S. 90.404 (1988).

The Fourth District Court of Appeal has held that a trial court's failure to instruct the jury on the limited use of collateral crime evidence constituted reversible error. Lowe v. State, 500 So.2d 578, 580 (Fla. 4th DCA 1986). Where the

collateral crime instruction has not been given prior to the admission of such evidence, courts, including the Third District, have relied upon the occurrence of the mandatory reading of the collateral crime instruction at the close of the evidence in affirming such cases. Wills v. State, 494 So.2d 530, 531 (Fla. 1st DCA 1986); Milton v. State, 438 So.2d 935, 935 n. 1 (Fla. 3d DCA 1983). Fundamental error occurred in this case when the jury received no instruction whatsoever on how to consider the collateral crime evidence.

In this trial, after both sides had rested, Mr. Barnes' trial counsel failed to request that the jury be instructed on how to consider the collateral crime evidence. The reading of this instruction had been affirmatively waived prior to the admission of such evidence. (Tr. 643). Therefore the collateral crimes instruction was never read to the jury during the entire course of the trial. Barnes v. State, 562 So.2d at 729. The district court held that, since defense counsel did not request the collateral crime instruction during the charge conference, the error was not preserved for appellate review and was therefore waived. Id. The question thus presented here is whether the failure to give the jury any instruction on how to consider evidence of other crimes constituted fundamental error.

This Court has defined fundamental error as "error which goes to the merits of the cause of action." Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970). This Court has determined that fundamental error should be found "only in the rare cases where a jurisdictional error appears or where the interests of justice

present a compelling demand for its application." Ray v. State, 401 So.2d 956, 960 (Fla. 1981). The failure to give any instruction to a jury concerning collateral crime evidence is such a rare case where the interests of justice compel a finding of fundamental error.

In Franklin v. State, 403 So.2d 975, 976 (Fla. 1981), this Court held that fundamental error had occurred when a trial court failed to read the jury an instruction on the underlying felony of a felony murder first-degree murder charge. In Franklin neither the state nor the defense had requested any instruction on the underlying felony. In finding fundamental error had occurred when the jury received no definition of the underlying felony, this Court stated,

> [counsel's failure does not relieve a trial court of the duty to give all charges necessary to a fair trial of the issues.

Id. (citation omitted).

The error that occurred here is as fundamental as that which occurred in Franklin. Just as the uninstructed jury in Franklin was free to rely on its own notions of what acts constituted the underlying felony, the uninstructed jury here was at liberty to consider the collateral crimes as evidence of defendant's propensity to commit the charged crime. This collateral crime evidence told the jury of two prior times when Mr. Barnes had used a different gun to frighten his wife. Without any instruction on how to treat this evidence, the jury was free to decide the key factual question of whether Mrs. Barnes had fabricated the incident or whether Mr. Barnes had attempted to kill her by treating

the collateral crimes evidence as proof of bad character or propensity. The admission of the collateral crimes evidence without giving the required instruction to the jury violated Section 90.404(2)(b)2. and deprived defendant of a fair trial.

The compelling nature of this error is evident from the nature of collateral crime evidence and its treatment generally. Collateral crime evidence, while admissible for certain limited purposes, has been traditionally viewed with caution because of the concern that such evidence will only prove an accused's bad character or propensity to commit the charged the offense. To safeguard against the improper admission of collateral crime evidence and its use for improper purposes, Section 90.404(2)(b) and case law require adherence to certain procedural safeguards.

Unlike other relevant evidence, collateral crime evidence cannot be admitted until these procedural safeguards are met. The prosecution must provide the defense with written notice of the collateral crimes evidence at least ten days prior to trial. §90.404(2)(b)1., Fla. Stat. (1988). This written notice must allege the wrongs with at least as much specificity as is required in an information. Id. Prior to the admission of any collateral crimes evidence for which a conviction has not been obtained, the trial court must make a determination that there exists sufficient evidence of the collateral act to place it before the jury. Chapman v. State, 417 So.2d 1028, 1031 (Fla. 3d DCA 1982); Parnell v. State, 218 So.2d 535, 538 (Fla. 3d DCA 1969)(before collateral crime evidence can be admitted, clear and convincing evidence must establish a connection between the

defendant and the collateral acts). Finally, once a trial court has determined that collateral crime evidence is admissible, the Evidence Code requires that a special instruction must be given explaining to the jury the proper purpose of the evidence.[1] Because of the extreme danger that such evidence will be considered for an improper purpose, the trial court must go to great lengths to assure that such collateral crime evidence is admissible under Section 90.404(2)(b)2., and then to safeguard that the jury will properly consider such evidence. See Williams v. State, 110 So.2d 654, 662 (Fla. 1959)("We emphasize that the question of the relevancy of this type of evidence should be cautiously scrutinized before it is determined to be admissible.").

This type of evidence is so cautiously considered, that 90.404(2)(b)2. is the only provision of the evidence code requiring the reading of a special jury instruction.[2] That the legislature requires such a special jury instruction after the close of a case containing collateral crime evidence, stresses the uniquely inflammatory nature of such evidence and the fundamental

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[1] In the seminal case of Williams v. State, 110 So.2d 654, 658 (Fla. 1959), this Court, noted that the trial trial judge had admonished the jury that the collateral crimes evidence admitted there could be considered only as evidence regarding the issues of identity, intent, and scheme.

[2] Other evidence code provisions refer to permissive jury instructions or jury instructions that must be given if requested, but no section of chapter 90, except 90.404(2)(b)2. provides for a mandatory jury instruction. See §90.107 (if requested the trial court generally must give a limiting instruction where evidence is admissible regarding one purpose or party, but is inadmissible regarding another purpose or party); §90.206 (trial court may instruct jury to accept as a fact a matter judicially noticed).

harm that the legislature sought to avoid through requiring such an instruction. Therefore in a case such as this, where that fundamental harm has occurred, fundamental error has also occurred, requiring reversal and a new trial.

II.

USE OF FAMILIAL TRUST TO EFFECTUATE THE CRIME IS NOT A VALID GROUND FOR DEPARTURE IN THIS ATTEMPTED FIRST-DEGREE MURDER CASE.

This Court has recently held in Wilson v. State, 15 F.L.W. 429 (Fla. Sept. 6, 1990) that abuse of a position of familial authority over a victim may not constitute a clear and convincing reason for justifying a departure sentence for a conviction of lewd and lascivious assault upon a child under sixteen years of age. In Davis v. State, 517 So.2d 670 (Fla. 1987), this Court held that breach of trust was not a basis for departing from the guidelines in a second degree murder case in which a wife, distraught over financial difficulties, had shot her husband six times while he lay sleeping. The district court's affirmance of the departure sentence based on use of familial trust to effectuate the crime expressly and directly conflicts with these decisions.

The sentencing hearing in this case reflects the type of arbitrary and capricious reasoning for sentencing that establishment of the sentencing guidelines sought to prohibit. During the sentencing hearing the trial court stated the following before pronouncing the life sentence in this case:

> Ms. Prosecutor, how far up would that bounce him?
>
> MS. ROSENBAUM: Well, you have the option of sentencing the defendant up to life plus 15 years.
>
> You can go up to life plus fifteen years.
>
> THE COURT: Life plus 15?

MS. ROSENBAUM: That's the maximum sentence, yes, Your Honor.

THE COURT: Okay.

How about the fact that after the defendant pulled the trigger once and the gun didn't go off, he pulled it the second time?

MS. ROSENBAUM: He pulled it somewhere between three and four times, Judge.

THE COURT: **Isn't that a brand new case:**

Doesn't that bounce it up?

MS. ROSENBAUM: It was somewhere between three and four times, Your Honor.

THE COURT: I know that.

I know that I may be a little bit unique, but I once had a German soldier with a machine pistol no further away from me than this defendant, pull the machine gun and it went off.

I may be unique from all of the other judges in this building, having had people shoot directly at me. I can honestly tell you that it is not a pleasant thing.

MS. ROSENBAUM: It happened three or four times to this lady, Judge.

THE COURT: The testimony here was four times.

You know, I really think that he ought to be punished separately for each one of those, so I will up him on each one.

I believe her testimony was that he actually fired and the gun misfired, so he tried to repair the gun.

Isn't that correct?

MS. ROSENBAUM: That is correct, Your Honor.

He was pulling on the slide repeatedly to try to chamber another bullet.

MR. LESLIE: Judge, I believe the testimony of the wife was that he was pulling the slide, allegedly, to her.

THE COURT: **And your argument to the jury that he purposely put a bullet in there backwards.**

Come on, that's kind of ridiculous, isn't it?

He purposely put the bullet in backwards?

MR. LESLIE: The gun was made safe, according to the defendant, Your Honor.

THE COURT: **Actually, I think that's kind of ridiculous.**

Now, in addition to the four times that the State has recommended, I will do it three more times for each time that he pulled the trigger and tried to repair his gun.

What will that be, then?

MS. ROSENBAUM: It's still life, plus 15, Judge.

THE COURT: **That's the most that I can do?**

MS. ROSENBAUM: Yes, Judge.

THE COURT: **Well, that's too bad.** Where do I fill that out?

(Tr. 985-88).

The trial court then wrote the following as grounds for the guidelines departure life sentence imposed in this case:

1. Victim suffered trauma beyond normal.

2. Breached trust with wife.

3. Used children to accomplish goal.

4. Committed in front of children.

Tried to fire 2nd time. (sic) Tried 3rd time. (sic) Tried 4th time. (sic)

In affirming the departure sentence of life, the district court stated only:

> Also, defendant used familial trust to effectuate the crime, thus justifying a departure sentence. See Turner v. State, 510 So.2d 920 (Fla. 1st DCA 1987).

Barnes v. State, 562 So.2d at 730.

In this case no appropriate reason for departure exists. Each ground for departure shall be discussed separately below, however, beginning with the ground described in the district court opinion.

Use of familial trust to effectuate the crime.

This ground for departure described by the district court does not exactly reflect any of the trial court's written grounds for departure. It most closely relates to the trial court's grounds of "breached trust with wife" and "used children to accomplish goal;" thus those two grounds will be discussed here.

According to this Court's decision in Davis, the departure ground of "breached trust with wife" is invalid. In Davis, this Court found breach of trust an invalid ground for a departure sentence where the defendant-wife had pled guilty to second degree murder for shooting her husband six times while he lay sleeping. This Court in Davis stated that in order for breach of trust to be a valid ground for departure, the crime committed must be directly related to a specific trust conferred on the defendant by the victim and that trust must be the factor that made the crime possible and formed the foundation of the crime. Davis v. State, 517 So.2d at 674. In Davis the trust breached

was only that generally held between husband and wife. In declining to find this breach of trust a ground for departure, this Court stated:

> Further, were we to uphold a departure from the guidelines in this case based on abuse of the trust of a family relationship, it would serve as authority to do the same in most cases involving the killing of a spouse or other family. If the sentencing commission had intended to impose a harsher sentence on those convicted of second degree murder when the victim was the defendant's spouse, it would have created a separate category for spousal homicide for purposes of establishing a score under the guidelines.

Id. at 674 (citation omitted).

The trust violated here, as in Davis, was not a particular trust bestowed on Mr. Barnes by his wife, but was that trust commonly held between spouses. Mr. Barnes' conduct of telling his stepson to lie to Mrs. Barnes about a burglary and Mr. Barnes' telling his wife to come home early did not relate directly to the crime committed here. Rather than breaching a particular trust which Mrs. Barnes had bestowed upon her husband and which formed the foundation of the crime, the burglary story only caused Mrs. Barnes to come home where the incident occurred.

Similarly, the mere instructing of the stepson to tell the burglary story to his mother would hardly fall within a violation of a particular and specific trust, and could scarcely be considered the very foundation of this crime. There was not a unique relationship between Mr. Barnes and his stepson which would distinguish any trust between them from that normally had between parent and child. Compare, Hawkins v. State, 522 So.2d 488 (Fla. 1st DCA 1988) (special trust between defendant nephew and mental-

ly retarded 25-year old aunt confined to wheelchair by cerebral palsy violated when defendant had nonconsensual sexual intercourse with victim aunt). Moreover, the foundation of this crime is the attempted shooting, which occurred in the house while the children were out in the backyard. (Tr. 464, 680). Therefore, the trial court's ground of "used children to accomplish goal," does not withstand the requirements of Davis.

In finding that a departure sentence was justified because of the use of "familial trust to effectuate the crime," the district court relied solely upon Turner v. State, 510 So.2d 920 (Fla. 1st DCA 1987). In Turner the district court upheld a departure sentence based upon breach of familial trust between a father-defendant and a fifteen-year old daughter victim in a case in which the accused pled guilty to committing a lewd and lascivious act upon a child under sixteen. This Court has rejected breach of familial trust as a departure grounds in lewd and lascivious assault cases in Wilson, in which a defendant father was convicted of lewd assault upon his mildly retarded stepdaughter. Thus, this Court has rejected the holding of Turner upon which the district court solely relied in upholding this departure grounds. The use of familial trust to effectuate the crime therefore cannot stand here as a ground of departure.

Even if this departure ground were considered valid here, the record in this case does not establish by a preponderance of the evidence that Mr. Barnes used familial trust in the specific act of committing the crime of attempted first degree murder. Instead, the record shows that Mr. Barnes had his stepson lie to

Mrs. Barnes about a burglary at their home in order to get her home from work earlier. (Tr. 457). Then, once Mrs. Barnes came home, the actual attempted shooting eventually occurred. (Tr. 655, 663-664). At the time of this incident, Mr. Barnes was living with his wife, who would have returned home that day anyway. Thus, although having the stepson tell the burglary story to Mrs. Barnes caused the incident to occur at a certain time during that day, the burglary story did not allow Mr. Barnes to gain any access to the marital home or his wife that he did not otherwise have. Since this ground was not proven by a preponderance of the evidence, it cannot stand as a ground for the departure life sentence.

Victim trauma.

Regarding a victim's psychological as a ground for departure, this Court has stated that "the type of psychological trauma to a victim that usually and ordinarily results from being a victim of the charged crime is inherent in the crime and may not be used to justify departure." State v. Rousseau, 509 So.2d 281, 284 (Fla. 1987). In Rousseau this Court held that a victim's psychological trauma may constitute a ground for departure "[w]hen the victim's trauma results from extraordinary circumstances clearly not inherent in the crime charged or when the victim has a discernible physical manifestation resulting from the trauma." Id.

In this case the evidence clearly does not meet the Rousseau standards. Mrs. Barnes testified at trial regarding her injuries

as follows:

> Q. Were you hurt at all during this ordeal? Did you suffer any bruises?
>
> A. I've been going to therapists. Mental anguish.
>
> Q. Did you suffer any physical--
>
> A. Not this day.
>
> Q. On this time, when you said Mr. Barnes attempted to kill you, I think, were you hurt in any way?
>
> A. He didn't physically hurt me.

(Tr. 682). During the sentencing hearing, Mrs. Barnes testified as follows about what injury she incurred as a result of this incident:

> Q. [By the prosecutor] Now, I want for you to tell the Judge what happened to you since that day in August when your husband took a gun, pointed it in your face, and pulled the trigger three or four times.
>
> Go ahead and tell the Court.
>
> [Defense objection made and overruled.]
>
> * * *
>
> A. After the incident, I took a leave of absence. I went to the clinic for battered women counseling.
>
> THE COURT: Does this have anything to do with the incident?
>
> * * *
>
> MS. ROSENBAUM: Judge, this has to do with psychological trauma to the victim, which is a ground for departure.
>
> * * *
>
> BY MS. ROSENBAUM:

Q. Would you continue telling the Judge what you have done and what treatment you have sought since the incident in August of 1987?

A. Well, I took a leave of absence from work for awhile to try to cope with the problem.

I did go to the program for battered women.

Q. And did you remain in the house after this happened?

A. No.

Q. What did you do?

A. I moved out.

Q. Why?

A. Because I can't stay there anymore.

Q. To this day, are you willing to supply in court your home address where you are living?

A. No.

Q. Why is that?

A. Because I'm still scared of him.

I won't give my address here.

(Tr. 962-65). Mrs. Barnes also stated that she had requested a job transfer to another state because she is scared to stay in Florida. (Tr. 966). She returned to work on October 25, 1987. (Tr. 971). At the time of the sentencing hearing on April 25, 1988, she was no longer in therapy and was not being treated by a medical doctor. (Tr. 974).

The record shows that Mrs. Barnes suffered no physical manifestation because of the psychological trauma she described. (Tr. 682, 970, 974). Moreover, the manifestations of the trauma she

described, taking a leave from work in order to obtain counseling and moving out of her home to an address she does not want to supply publicly, do not meet the Rousseau standard of constituting the type of trauma which "results from extraordinary circumstances clearly not inherent in the crime charged." State v. Rousseau, 509 So.2d at 284. This is especially so considering that Mrs. Barnes returned to work by October 25, 1987, and at the time of sentencing was not seeking any therapy or being treated by a medical doctor. (Tr. 970, 974). See State v. Simpson, 554 So.2d 506 (Fla. 1989)(victim suffered no extraordinary emotional trauma in robbery and attempted first-degree murder case where defendant wounded victim who got off the floor and started in his direction); Hoover v. State, 553 So.2d 764 (Fla. 1st DCA 1989) (fact that defendant had paid victim after sexual battery did not warrant finding of extraordinary trauma not inherent in offense); Miller v. State, 549 So.2d 1106 (Fla. 2d DCA 1989)(emotional trauma suffered by victims' families not valid ground for departure in three-count manslaughter case, where such trauma was an inherent component of the offenses and record lacked evidence of physical manifestations); Harris v. State, 533 So.2d 1187 (Fla. 2d DCA 1988)(deceased's mother's trauma in second degree murder case in which record reflected that mother suffered emotional pain from not knowing where her daughter was for seven months did not meet Rousseau test and thus was not valid ground for departure). Cf. Harris v. State, 531 So.2d 1349 (Fla. 1988)(departure based on psychological trauma upheld where victim in sexual battery case suffered recurring headaches, extreme depression

requiring medication, sexual dysfunction, and was still unable to work at the time of sentencing hearing and was then receiving workers' compensation due to her psychological trauma); Sapp v. State, 543 So.2d 400 (Fla. 4th DCA 1989)(nine-month pregnant armed robbery victim's physical and psychological trauma valid ground for departure where victim passed blood clots at hospital after incident). Since this departure ground is neither valid nor supported in the record, it must be stricken.

The crime was committed in front of children.

Not only is this ground for departure not established by a preponderance of the evidence; to the contrary, the record clearly establishes that when Mr. Barnes attempted to shoot his wife, no one else was in the house or saw what occurred. (Tr. 464, 680).

The stepson, Toshaumbay, testified as follows regarding what occurred after he saw Mr. Barnes and Mrs. Barnes go into the house:

> Q.[By the prosecutor]: After your mom and your stepfather went inside of the house, do you know what happened between them?
>
> A. No.
>
> Q. Did you hear anything?
>
> A. Yes.
>
> Q. Tell the members of the jury what you heard?
>
> A. He told her that he was going to kill her and she told him no.

(Tr. 464). The victim's testimony also reveals that she was alone with Mr. Barnes when the incident occurred:

> Q.[By defense counsel]: Where was your son, Toshaumbay, all this time?
>
> A. To my knowledge, my kids were still outside. It was just James and myself in the house.

(Tr. 680). Only pointing the gun, without any simultaneous threats or pull of the trigger does not constitute the attempted first-degree murder offense as charged. The information in this case clearly defines the attempt acts of the charge as pointing and attempting "to shoot". (R. 1). The attempt to shoot Mrs. Barnes occurred outside the presence of the children. Additionally, the record contains no evidence of any injury the children suffered from being present during the incident.

In Davis, this Court held that presence of a child in the house while his mother killed his father was not a valid reason for departure where no evidence existed showing the child witnessed the actual shooting or that the child suffered emotional trauma. Davis v. State, 517 So.2d at 674. In Scurry v. State, 489 So.2d 25 (Fla. 1986) this Court found that where the record only showed that the family members had been nearby, there was insufficient evidence to support the ground for departure based on commission of the crime in front of family members. Id. at 28-29. Cf. Casteel v. State, 498 So.2d 1249 (Fla. 1986)(upward departure valid where grounded on psychological trauma to sexual battery victim and her son suffered after son witnessed rape of his mother). Since the record here refutes the assertion that he viewed the actual crime and contains no evidence of any psycholo-

gical trauma suffered by the stepson, under Davis and Scurry this cannot constitute a ground for departure from the sentencing guidelines.

Defendant attempted to fire the gun four times.

The number of times defendant attempted to fire the gun is a clearly impermissible ground for departure. Rule 3.701(d)(11) of the Florida Rules of Criminal Procedure (1987), in pertinent part, states as follows:

> **Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained.**

The number of times Mr. Barnes fired at his wife constitute a factor relating to the offense of attempted first-degree murder, but for which convictions were not obtained. Each time the trigger was pulled could have constituted a separate act of attempted first-degree murder for which defendant was not charged and thus for which no conviction was attained.

This Court in Vanover v. State, 498 So.2d 899, 901 (Fla. 1986), held invalid a trial court's ground for departure where the reason was "based on a crime with which petitioner was not charged, tried on, or convicted of. Florida Rule of Criminal Procedure 3.701(d)(11)." Id. In Vanover, the defendant had been charged with one count of aggravated battery on each of his two brother, one whom he shot in the mouth, and the second whom he shot in the arm and back. After the jury acquitted the defendant of the count involving the brother shot in the mouth, the trial departed from the guidelines because it thought Vanover had

intended to murder that brother. Since Vanover had not been charged with, tried on or convicted of attempted murder, this Court found that Rule 3.701(d)(11) prohibited a guidelines departure on that basis. Compare Lerma v. State, 497 So.2d 736 (Fla. 1986)(departure valid where defendant entered guilty plea to one count of sexual battery in exchange for dropping of kidnapping charge and where sentencing hearing revealed defendant had committed intercourse and fellatio, as well as other brutal acts).[3]

In Ponder v. State, 530 So.2d 1057, 1059 (Fla. 1st DCA 1988), the district court held that where the defendant had been charged with one count of armed robbery in a case involving two victims, the trial court was precluded from basing a departure sentence on the fact that two distinct robberies had occurred.

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[3] Lerma is distinct from this case and from Vanover, because of the peculiar circumstances involving Lerma's negotiated plea. Lerma originally had been charged with a first-degree felony punishable by life, kidnapping, which was dropped as part of the plea negotiations. Even if Vanover and Lerma are read to be inconsistent, as the district court in Ponder v. State, 530 So.2d 1057, 1059 (Fla. 1st DCA 1988) stated:

> Although Vanover appears to be inconsistent with Lerma, we do not read Lerma as broadly standing for the proposition that a trial judge may independently find a defendant guilty of an offense with which the defendant was not charged, tried or convicted, and use that finding of guilt as a basis for departing from the recommended guidelines sentence.

The Second and Fifth District Courts of Appeal have also followed the Ponder line of reasoning in applying Rule 3.701(d)(11) when Lerma was available as authority. Bradley v. State, 509 So.2d 1137 (Fla. 2d DCA 1987)(trial court could not depart from guidelines where defendant convicted of burglary on grounds that defendant intended to rape a young girl in the burglarized home, where defendant was neither charged nor convicted of attempted rape); Dowling v. State, 495 So.2d 874 (Fla. 5th DCA 1986)(continuing and repeated nature of offense could not be valid ground for departure sentence in familial authority sexual battery case, relying on Rule 3.701(d)(11)).

In so holding, the district court stated:

> To permit the enhancement of a sentence based on the commission of an offense of which the defendant has not been convicted smacks of a violation of due process and is inconsistent with the manifest purpose of rule 3.701(d)(11).

Id. at 1059. See Dowling v. State, 495 So.2d 874 (Fla. 5th DCA 1986)(continuing and repeated nature of offense could not be valid ground for departure sentence in familial authority sexual battery case, relying on Rule 3.701(d)(11)) Thus, under Vanover and Ponder, as well as Rule 3.701(d)(11), this departure life sentence, based on the number of times Mr. Barnes attempted to fire the gun, cannot stand.

Even if this ground were legally allowed, it is not established by the facts of this record by a preponderance of the evidence. The following victim's testimony clearly reveals that, other than two described occasions when Mr. Barnes pulled the trigger at her, she was not sure exactly how many times he had pulled the trigger.

> Q. [by defense counsel] What happened when Mr. Barnes allegedly pulled the trigger?
>
> A. The gun didn't fire.
>
> Q. How many times was that?
>
> **A. I'm not exactly sure.**
>
> Q. I'm sorry?
>
> **A. I'm not sure how many times he pulled the trigger, sir.**

(Tr. 666). The only possible source for concluding that Mr. Barnes pulled the trigger four times is the testimony of Officer

Wallace who generally stated that Mrs. Barnes had told her that Mr. Barnes had fired the gun four times after it initially had discharged. (Tr. 564). This hearsay testimony, which is in conflict with Mrs. Barnes' eyewitness testimony, certainly does not establish that the gun was fired four times. Thus, the record does not even support this impermissible ground for departure, which must be found invalid.

There being no valid grounds for departure written by the trial court, Mr. Barnes' life sentence must be vacated, and this cause remanded for resentencing within the sentencing guidelines.

CONCLUSION

Based on the foregoing facts, authorities and arguments, defendant respectfully requests this Court to quash the decision of the district court of appeal, and remand the case to the district court with directions that a new trial be granted or that defendant be resentenced within the sentencing guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite N-921, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 15th day of February, 1991.

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