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IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,474

JAMES BARNES,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

This is on discretionary review from an order of the Third District Court of Appeal affirming a criminal conviction, adjudication of guilt and imposition of sentence which followed a jury trial. The Petitioner, **JAMES BARNES**, is referred to as "**DEFENDANT**" and the Respondent, **THE STATE OF FLORIDA**, is referred to as "**STATE**".[1]

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[1] All references to the record on appeal and transcript of proceedings are designated by the symbols "R" and "TR" respectively.

SUMMARY OF THE ARGUMENT

I

The rules of criminal procedure require an objection before a reviewing court will assign error for the failure to give an instruction. The failure to give a Williams Rule instruction is reversible error only if it is applicable and the court fails to give it when requested. The mere use of mandatory language in a statute or rule when coupled with one failure to comply do not automatically constitute per se reversible error.

II

The reasons provided by the trial court support the deviation. The defendant used his position as the spouse to lure the victim to the crime scene. The fact that the victim conferred her trust on the defendant made the crime possible. Secondly, the trial judge correctly found that the defendant's actions left a lasting effect on the victim. The departure based on "victim trauma" is supported by the record. Third, the defendant used the children to effect the crime and the trial court properly departed. Fourth, the record supports the next reason for departure in that the defendant attempted to kill and terrorized the victim in front of the children. Finally, although pulling the trigger is an element of the crime, pulling it repeatedly is not; the last reason for departure is similarly valid.

STATEMENT OF THE CASE AND FACTS

The state respectfully rejects the statement of the case and facts as presented by the defendant, and would substitute the following:

The state charged the defendant by information with attempted first degree murder and unlawful possession of a firearm while engaged in a criminal offense for events which occurred on August 5, 1987. (R. 1-2a). The defendant filed two motions seeking to suppress oral statements and evidence. (R.15-19). The motion to suppress oral statements alleged that the statements were made during a custodial interrogation and prior to Miranda [2] warnings. (R. 15). The motion to suppress physical evidence alleged that the officers "improperly compelled answers from the Defendant in a direct accusatory nature in a fashion denoted to intimidate and coerce the Defendant," into confessing where the gun was. (R. 18). The defendant filed a memorandum of law in support of his motions. (R. 20-26).

The court conducted a hearing on the motions to suppress. (TR. 16-138). Following the argument of counsel the court made the following findings of fact:

---

[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

> 1. The defendant invited the police into the house;
>
> 2. The invitation was free and voluntary;
>
> 3. The defendant made statements which were not in response to any question;
>
> 4. The questioning had already stopped when they found the shell and the defendant went for the gun; and,
>
> 5. That was a voluntary statement and not the result of any coercion or custodial matter.

(TR. 138-139). The court denied both motions to suppress. (TR. 139).

The case then proceeded to trial. The court conducted jury selection. (TR. 155-396). Following which, the parties delivered opening statements to the jury. (TR. 419-453). During the opening statement by the state the defendant objected to certain statements based on the Williams Rule.[3] The court conducted a hearing during which the following transpired:

> **THE COURT:** Yes.
>
> (Thereupon, counsel for the respective parties and the court reporter approached the Bench, after which time the following sidebar conference was had:)

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[3] Williams v. State, 110 So.2d 654 (Fla. 1959); cert. den. 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

THE COURT: Yes.

DEFENSE COUNSEL: Judge, I have a feeling that the State is going to intend to rely on evidence of other crimes or wrong acts pursuant to a notice which they've furnished.

We object to that, based upon the case law, in that I believe it's irrelevant to the issues here. It's only going to try to prove a possible bad character of the defendant or the propensity for violence and is not relevant to the particular charges here.

Based upon the case law of--let's see--Williams v. State, Supreme Court of Florida, 1959, 110 Southern Reporter, 654--

THE COURT: Can I see that, please?

DEFENSE COUNSEL: Yes.

(Thereupon, hands over documents.)

DEFENSE COUNSEL: I have certain portions underlined a few pages on that ask the court to proceed very cautiously in a case such as this in determining the relevancy of any of these matters independently.

ASSISTANT STATE ATTORNEY: Whenever the court is ready for my response, just let me know.

THE COURT: It seems to me--using your underlining quote of the case--I guess I have to read this:

It has some bearing on relevancy of this trial.

It's admissible.

And unless-the only issue is bad character, propensity, and it seems to me that it would be, bearing on

the relationship between these two people.

It's not like he committed an act some place--

ASSISTANT STATE ATTORNEY: I have a number of cases all involving either boyfriend, girlfriend or husband and wife.

I'm relying on Ledlover (phonetic) vs. State.

I'll give you the cite later.

Goldstein v. State. 447 So.2d, at 903.

Outler (phonetic) vs. State, a Third District case, at 322 So.2d, 623.

THE COURT: All right.

DEFENSE COUNSEL: Judge, there's several acts that the State, I believe, will intend to--

THE COURT: This is only in relationship to his wife, not anybody else.

The ruling only goes to his wife.

If you try to get it with anybody else, don't do it until we have a discussion out of the presence of the jury.

ASSISTANT STATE ATTORNEY: Let me then tell Your Honor the incidents that I'm going into.

THE COURT: Just a moment. (Thereupon, the following proceedings were had in open court:)

THE COURT: Members of the jury, step back into the jury room, please.

(Thereupon, the jury retired from the courtroom, after which time the following proceedings were had in open court:)

THE COURT: All right.

As far as the defendant's act towards his wife, the victim in this case, I'll permit those.

Now, you have some act you say that involves other people?

ASSISTANT STATE ATTORNEY: Course of conduct, Your Honor.

Let me run through the point I'll be making.

The first point is approximately two to three weeks before the attempted murder of his wife, the defendant had taken his wife out on the Tamiami Trail, threatened her with a gun, fired several rounds off.

That's the incident I was about to go into.

I think Your Honor has already ruled on the admissibility of that.

DEFENSE COUNSEL: Judge, if I might just comment.

The shots were not fired at Mrs. Barnes.

They were merely fired. And I don't know that that particular--

THE COURT: I don't know.

The testimony will have to bear that out.

ASSISTANT STATE ATTORNEY: The next incident happened four days--four to five days before the attempt on Mrs. Barnes' life, Your Honor.

The defendant came home while the victim was asleep, woke her up, brought her into the--on this.

ASSISTANT STATE ATTORNEY: If you'd let me--

THE COURT: You're on third-party people.

ASSISTANT STATE ATTORNEY: Brought her into the children's room, put gun to the children's head and she said to the defendant, "Please don't kill them, they're innocent.

"Take my life instead."

It's five days after that that the defendant makes an attempt on her life.

THE COURT: That's an incident between the two of them.

The children are the only third-party people.

Correct?

ASSISTANT STATE ATTORNEY: That's it.

DEFENSE COUNSEL: Judge, I would object, that that's totally inflammatory, and if it were to come out, it would not be relevant and it would totally prejudice the defendant's case.

THE COURT: I think the Supreme Court has answered that.

I don't believe there's grounds to exclude it, so I'll overrule your objection.

Is that it?

DEFENSE COUNSEL: That's it.

THE COURT: Marty, bring them out.

The first witness called to the stand was Toshaumbay Turnquist. Toshaumbay testified that he is twelve years old and the victim's son. (TR. 454, 456). Toshaumbay testified that on the day in question the defendant had him call the victim at work and tell her that someone had broken into the house, however, no one had really broken in. (TR. 457-458). Toshaumbay testified that he saw the defendant with a gun that day in the bedroom and on the back porch, the defendant was putting the gun together. (TR. 462). He saw the defendant putting bullets in the clip and putting the clip on the gun. (TR. 462).

Toshaumbay testified that he saw the defendant put the gun to the victim and tell her to walk in the house. (TR. 463). The defendant had the gun to the victim's back. (TR. 470). The victim signaled to him to call the police and he did. (TR. 463). Toshaumbay testified that the defendant told the victim that he was going to kill her. (TR. 464).

The state then called Officer Valencia Wallace. Officer Wallace testified that she was the lead investigator and that she was dispatched on an emergency basis with headlights, hazards and flashing lights. (TR. 507). As Officer Wallace approached the residence she heard the defendant say, "If I ever catch you with

him again, I'll kill you bitch," and the victim crying. (TR. 512). Officer Wallace knocked and identified herself, thirty (30) seconds to a minute passed before the defendant came to the door. (TR. 512).

The defendant looked upset and mad and the living room looked ransacked. (TR. 513). The fish tank and the television set were broken, bleach was poured over clothing and there was glass everywhere. (TR. 514). The victim was very upset and scared, she could hardly talk, she was mumbling, "He's going to kill me, he tried to kill me." (TR. 575). The defendant was saying that it hurts to find out that your wife is seeing someone else. (TR. 577).

Officer Wallace testified that the victim was hysterical and did not stop crying. (TR. 521). When Officer Wallace went outside with the victim the defendant mouthed to the victim, "Don't let them take me to jail." (TR. 519). Once outside the victim told her that the defendant was going to kill her if she talked. (TR. 519). The victim told Officer Wallace that the defendant put a gun to her back and walked her inside the house, he directed her to the refrigerator, put the gun to her face and said, "I'm going to kill you, bitch, for doing this to me." (TR. 523-524, 545). The victim told Officer Wallace that she thought she was dead but when he pulled the trigger the weapon misfired and did not go off. (TR. 523-524). The defendant fired the gun four times but it did not discharge. (TR. 564).

Officer Wallace testified that she asked the defendant if there was a gun for their safety. (TR. 524-525). The defendant was asked three (3) times if there was a gun and each time he said there was no gun in the house. (TR. 525).

When the police located the gun, on top of the kitchen cabinet, the victim identified it as the weapon that the defendant used. (TR. 540). The gun looks like a machine gun but is a nine (9) millimeter semi-automatic. (TR. 541). Officer Wallace testified that the bullet apparently went in sideways that is why it did not discharge. (TR. 54). There were two spent rounds and two live rounds in the cylinder. (TR. 533).

After the defendant was arrested, the victim showed Officer Wallace another weapon, a Smith & Wesson .38. (TR. 530). That weapon was in the pantry. (TR. 557).

The state then called Officer Daniel Artesani; Officer Artesani testified that he was dispatched on an emergency basis to an assault in progress as backup to Officer Wallace. (TR. 572, 576). Once he arrived at the house he could hear a woman; once he entered the house he saw that it was in shambles with broken furniture and glass everywhere. (TR. 573).

Officer Artesani identified the defendant in open court and testified that when they arrived at the house the defendant was

sweating profusely and very angry. (TR. 574). The victim was in the back of the house, hysterical and afraid; she was crying. (TR. 574). The victim would not talk to him, so Officer Wallace went to talk to her. (TR. 575).

Prior to putting on the victim, the defendant requested a cautionary instruction from the court to the jury because the state intended to put on evidence of prior acts. (TR. 639). The defendant asked for a full Williams Rule instruction, but, as the court was looking over the standard instruction, the defendant changed his mind and said, "if the instruction is going to included all of that I'd rather the instructions not be given." (TR. 643).

The state then called the victim. She testified that the defendant once took her out to Tamiami Trail, threatened to kill her and that he had a gun. (TR. 648-650). The witness identified the gun used in the Tamiami incident. (TR. 651). The victim also testified that the defendant once put a gun to her eldest son's head and threatened to kill him. (TR. 652-653).

The victim also testified that on the day in question she came home because her eldest son Toshaumbay called her at work and told her to come home because the house had been broken into. (TR. 655). The victim testified that her supervisor, Christine Sasnaukas, helped her make the arrangements so that she could leave in the middle of her shift. (TR. 656-657).

When the victim arrived home things seemed normal because there were no broken windows or doors. (TR. 658). She looked inside and the house was a shambles; she walked around to the back of the house where the defendant confronted her. (TR. 659). The defendant had a gun; the victim testified that the defendant tried to kill her and said, "Get in the home, bitch." Once inside the house the defendant never put the gun down. (TR. 661).

The victim testified that she and the defendant argued about his accusation that she was having an affair. (TR. 662). The defendant tried to shoot the victim, but the gun did not go off. (TR. 662). The defendant pointed the gun at the victim, when it did not fire he got crazy and started pulling the clip. (TR. 663). At that point, the victim testified, that she tried to get out of the house, but they met by the refrigerator and again he pointed the gun at her and said, "I'll kill you, bitch." (TR. 664). The defendant again tried to fire the gun. (TR. 664). Each time the defendant tried to pull the trigger it did not work. (TR. 666).

The state then called Christine Sasnaukas, the victim's supervisor who testified that the victim had told her about the Tamiami incident. (TR. 735). The victim called her and told her that the defendant put a gun to her head and threatened to kill her. (TR. 740).

The state rested and the defendant moved for a judgment of acquittal. (TR. 768-769). The trial court denied the motion. (TR. 769). The defendant rested. (TR. 769-770). The trial court conducted a jury instruction conference, the defendant never requested, nor submitted a Williams Rule instruction. (TR. 770-804). The parties delivered closing statements and the court delivered the jury instructions. (TR. 811-906). The defendant agreed that all requested instructions were given. (TR. 906).

The jury returned a guilty verdict on each count of the information. (TR. 913-915). The jury was polled. (TR. 915-916). The court found the defendant guilty. (TR. 944).

The defendant scored 12-17 years in the state penitentiary. (R. 34). The court sentenced the defendant following a hearing. (TR. 951-984). The court made the following oral pronouncements:

> **THE COURT:** All right.
>
> The Court, in hearing nothing else, will find that Mr. Barnes is guilty.
>
> At this time, then, I will adjudicate Mr. Barnes guilty and I will find that the State has accurately scored their guidelines scoresheet, which 197 points, listing the prior findings of guilt or whatever the appropriate language is.
>
> In addition to that, I will find that the victim suffered trauma beyond normal and that the

defendant breached his duty and trust with his wife.

I will find that he committed the act, using his children to participate in the events, in order to accomplish his goal and that he committed it in front of the children.

Now, finding all of that--

Ms. Prosecutor, how far up would that bounce him?

ASSISTANT STATE ATTORNEY: Well, you have the option of sentencing the defendant up to life, plus 15 years.

You can go up to life plus 15 years.

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?

ASSISTANT STATE ATTORNEY: 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?

ASSISTANT STATE ATTORNEY: 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.

ASSISTANT STATE ATTORNEY: 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?

ASSISTANT STATE ATTORNEY: That is correct, Your Honor.

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

DEFENSE COUNSEL: 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 was 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?

DEFENSE COUNSEL: 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?

ASSISTANT STATE ATTORNEY: It's still life, plus 15, Judge.

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

ASSISTANT STATE ATTORNEY: Yes, Judge.

THE COURT: Well, that's too bad.

Where do I fill that out?

ASSISTANT STATE ATTORNEY: Right here, Your Honor.

It's life, with a three year minimum mandatory, followed by 15 years consecutive. That is the maximum.

THE COURT: It's three years minimum mandatory, plus 15 years?

ASSISTANT STATE ATTORNEY: Yes, Your Honor.

That would be as to Count II, possession of a firearm during the course of a felony.

THE COURT: Okay.

Mr. Barnes, sir, what can I tell you? I've been there. It's a terrible thing to have to be through.

(TR. 985-989). The court then entered a written order giving the following reasons for departure:

> 1. Victim suffered trauma beyond normal;
>
> 2. Breached trust with wife;
>
> 3. Used children to accomplish goal;
>
> 4. Committed the crime in front of children; and,
>
> 5. Tried to fire second time, third time, and fourth time.

(R. 34).

A direct appeal followed and the defendant raised the following points, as restated by the state:

> I
>
> WHETHER THE TRIAL COURT ERRED IN CONVICTING THE DEFENDANT FOR ATTEMPTED MURDER WITH A FIREARM AND POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY?
>
> II
>
> WHETHER THE TRIAL COURT'S DEPARTURE SENTENCE IS SUPPORTED BY VALID REASONS?
>
> III
>
> WHETHER THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF PRIOR ACTS COMMITTED BY THE DEFENDANT?

IV

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN FAILING TO SUA SPONTE GIVE A WILLIAMS RULE INSTRUCTION?

V

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS TO SUPPRESS ORAL STATEMENTS AND PHYSICAL EVIDENCE WHERE THE RECORD DEMONSTRATES THAT THE DEFENDANT SPONTANEOUSLY AND VOLUNTARY, WITHOUT POLICE COERCION, SPOKE AND SHOWED THEM WHERE THE GUN WAS?

After hearing oral argument the Third District Court of Appeal issued the following opinion:

> (PER CURIAM.) Appellant seeks reversal of his convictions for attempted murder first-degree and unlawful possession of a firearm while engaged in a criminal offense. Defendant's conviction for attempted murder first-degree was enhanced from a first-degree felony to a life felony by reason of his use of a firearm. Therefore, as the state concedes, defendant's conviction and sentence for possession of a firearm while engaged in a criminal offense must be vacated. *See Carawan v. State,* 515 So.2d 161 (Fla. 1987); *see also Hall v. State,* 517 So.2d 678 (Fla. 1988); *Brown v. State,* 538 So.2d 116 (Fla. 5th DCA), *review denied,* 545 So.2d 1366 (Fla. 1989); *Burgess v. State,* 524 So.2d 1132 (Fla. 1st DCA 1988).
>
> All other errors raised by the defendant are without merit. 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). 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).
>
> Accordingly, defendant's conviction for unlawful possession of a firearm while engaged in a criminal offense is reversed and his sentence as to that conviction is vacated. Defendant's conviction and sentence for attempted murder first-degree is affirmed.

Barnes v. State, 562 So.2d 729 (Fla. 3d DCA 1990). After a motion for rehearing and clarification was denied, the defendant sought discretionary review in this Court.

POINTS ON APPEAL

We respectfully restate the defendant's points on appeal as follows:

I

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN FAILING TO SUA SPONTE GIVE A WILLIAMS RULE INSTRUCTION?

II

WHETHER THE TRIAL COURT'S DEPARTURE SENTENCE IS SUPPORTED BY VALID REASONS?

ARGUMENT

I

THE TRIAL COURT DID NOT COMMIT FUNDAMENTAL ERROR IN FAILING TO SUA SPONTE GIVE A WILLIAMS RULE INSTRUCTION.

The defendant contends that the trial court committed fundamental error in failing to give the Williams Rule instruction. The defendant argues that the failure of the court to give the instruction, despite the fact that the defendant refused the instruction when the evidence was admitted, and later failed to request the instruction, was fundamental error, and further, that the statutue's language is mandatory, and therefore, the court's failure to give the instruction is per se reversible error. The state urges that the defendant's point is without merit because pursuant to Rule 3.390(d), Fla.R.Crim.P., an objection is necessary to preserve the issue for appellate review and no fundamental error exists.

The standard Williams Rule instruction in criminal cases is:

> "Williams Rule" F.S. 90.404
>
> **Note to Judge:**
>
> To be given at the time the evidence is admitted, if requested.
>
> The evidence you are about to receive concerning evidence of other crimes allegedly committed by the defendant will be considered by you for the limited purpose of proving [motive][opportunity][intent]

> [preparation][plan][knowledge][identity][the absence of mistake or accident] on the part of the defendant and you shall consider it only as it relates to those issues.
>
> However, the defendant is not on trial for a crime that is not included in the [information][indictment].
>
> **Note to Judge:**
>
> To be given after the close of evidence, if applicable.
>
> 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).

Normally, the failure to object to error, even constitutional error, results in a waiver of appellate review. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970). Rule 3.390(d), Fla.R.Crim.P., states:

> No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury returns to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection.

> Opportunity shall be given to make the objection out of the presence of the jury.

While Rule 3.390(d), Fla.R.Crim.P., does not require the use of any "magic words," it does require that the trial judge be made fully aware of the objection and that he clearly understands the request made. Hubbard v. State, 411 So.2d 1312, 1314 (Fla. 1st DCA 1982).

In Thomas v. State, 419 So.2d 634, 636 (Fla. 1982), this Court held that the contemporaneous objection rule is satisfied,

> where the record shows, clearly and unambiguously, that the request was made and that the trial court clearly understood the request and, just as clearly, denied that specific request.

See, also, Spurlock v. State, 420 So.2d 875 (Fla. 1982)(where the trial court was aware of the request made and denied it, the issue was properly preserved for appellate review); Skipper v. State, 420 So.2d 877, 878 (Fla. 1982)(a request is necessary in order to preserve for appellate review the right to receive an instruction); Rivers v. State, 425 So.2d 101, 105 (Fla. 1st DCA), pet. for rev. denied, 436 So.2d 100 (Fla. 1983)(failure to give a Williams Rule instruction is reversible error if the court fails to give it when requested).

In the instant case the record is uncontroverted, the defendant asked for a Williams Rule instruction prior to the

evidence being admitted and later refused the instruction because he did not want the full instruction. (TR. 640-643). During the jury conference, the defendant did not request a Williams Rule instruction. (TR. 770-804). After the jury was instructed, the defendant agreed that all requested instructions were given. (TR. 906). The defendant did not want the instruction because, as a trial tactic, he did not want the jury's attention focused on the two incidents; the defendant now, in retrospect, seeks another bite of the apple. Without having requested an instruction, and alerting the trial court, at the time of the alleged error, the defendant cannot now complain because the trial court did not sua sponte give the instruction.

The defendant seeks to circumvent the requirements of the contemporaneous objection rule as set out in Rule 3.390, Fla.R.Crim.P., by arguing that fundamental error occurred in this case because the trial court did not follow the "mandatory" language of the statute and sua sponte instruct the jury on how to consider the collateral crime evidence. The defendant's argument focuses on the use of the word "shall" in F.S. § 90.404(2)(b)(2)(1988). The defendant contends that since the legislature used the word "shall," the failure to give the instruction at the close of the case constitutes per se reversible error. The state urges that the defendant's point is without merit because while the language requires the court to give the instruction, the failure to do so only raises to the level of reversible error, not fundamental error.

An error is "fundamental" when it goes to the foundation of the case or to the merits of the cause of action. Clark v. State, 363 So.2d 331, 333 (Fla. 1978). For an error to be so fundamental that it may be urged on appeal, though not properly preserved below, the error must amount to a denial of due process. Ray v. State, 403 So.2d 956, 960 (Fla. 1981). The doctrine of "fundamental error" is an exception to the contemporaneous objection rule and "should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." Ray, 403 So.2d at 960, quoting, Porter v. State, 356 So.2d 1268 (Fla. 3d DCA)(Hubbart, J., dissenting), remand, 364 So.2d 892 (Fla. 1978), rev'd on remand, 367 So.2d 705 (Fla. 3d DCA 1979).

In Ray this Court reasoned that the failure to object, and/or the failure to correct an error when the court affords the opportunity, are all good indications that at the time the defendant did not regard the alleged fundamental error as harmful or prejudicial. Ray, 403 So.2d at 960. See, also, Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982)(the failure to request an instruction precludes a later contention that the instruction should have been given). Similarly, in Smith v. State, 573 So.2d 306 (Fla. 1990) this Court agreed with the district court when it said that "to hold fundamental error occurred because of the

failure to give a long-form instruction on excusable homicide when it was not requested would place an unrealistically severe burden upon the trial judges concerning a matter which would properly be within the providence and responsibility of defense counsel as a matter of trial tactics and strategy." Smith, 573 So.2d 308, quoting, Smith v. State, 539 So.2d 514, 517 (Fla. 2nd DCA 1989).

Moreover, this Court has refused to hold that the failure to comply with the mandatory language in a rule is fundamental error requiring per se reversal. In D'Oleo-Valdez v. State, 531 So.2d 1347, 1348 (Fla. 1988), the defendant contended that the failure to appoint a second expert to examine his mental competency was reversible error. Rule 3.210(b) provides:

> If before or during the trial the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable ground to believe that the defendant is not mentally competent to stand trial, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of the filing of the motion and shall order the defendant to be examined by no more than three nor fewer than two experts prior to the date of said hearing.

3.210(b), Fla.R.Crim.P. (emphasis supplied). The defendant in D'Oleo-Valdez objected to the sole expert for the first time on

appeal. D'Oleo-Valdez v. State, 516 So.2d 1125 (Fla. 3d DCA 1987). Despite the mandatory language in Rule 3.210(b), Fla.R.Crim.P., this Court held that "the failure to appoint a second expert to examine the defendant's mental competency to stand trial is not fundamental error." D'Oleo-Valdez, 531 So.2d at 1348. Therefore, contrary to defendant's position, the use of the word shall and the failure to comply with the mandatory language do not automatically constitute per se reversible error.

Finally, even in cases where testimony is admitted which may convey to the jury that the defendant has committed other crimes, Florida courts require the defendant to request a curative instruction before error will be found on appeal. See, Williams v. State, 438 So.2d 152 (Fla. 3d DCA 1983)(any prejudice to the defendant arising from the possible suggestion in the testimony that the defendant is a suspect in another crime was subject to a curative instruction which was not requested); Evans v. State, 422 So.2d 60 (Fla. 3d DCA 1982)(if the defendant had requested a curative instruction, any error in admitting testimony about the mug shot in the police files would have been cured); Moore v. State, 418 So.2d 435 (Fla. 3d DCA 1982). Certainly, if evidence of prior criminal activity is erroneously admitted, and Florida law requires a request for a curative instruction, and, a denial of the request in order to reverse, in a case such as this where

the evidence was properly admitted, no reversible error exists. In such a case, where evidence is improperly admitted an instruction would cure any error. In this case the evidence was properly admitted, certainly no fundamental error exists.

II

THE TRIAL COURT'S DEPARTURE SENTENCE IS SUPPORTED BY VALID REASONS.

The defendant contends that the departure sentence must be reversed because the abuse of a position of familial authority over a victim does not constitute a clear and convincing reason for departure. The state urges that the defendant's point is without merit for two reasons: 1. The defendant's reading of this Court's decision in Wilson v. State, 567 So.2d 425 (Fla. 1990) is overly broad; and, 2. The court's other reasons for departure support the sentence. [4]

In Wilson v. State, 567 So.2d 425 (Fla. 1990), this Court held that the "abuse of a position of authority over a victim (does not) constitute a clear and convincing reason justifying the imposition of a departure sentence for convictions of lewd

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[4] In its opinion the Third District Court of Appeal only addressed one of the four reasons provided by the court; the trial court based its departure on the following reasons:

1. Victim suffered trauma beyond normal;

2. breached trust with wife;

3. used children to accomplish goal;

4. committed the crime in front of children; and,

5. tried to fire two times, three times and four times.

and lascivious assault upon a child under 16 years of age." In Wilson this court approved of the holding in Laberge v. State, 508 So.2d 416 (Fla. 5th DCA 1987). Wilson, 567 So.2d at 426 The Laberge court recognized that in almost all cases involving violations of F.S. § 800.04 (1984)(lewd assault), such acts are most commonly committed "by persons who take advantage of a trust position involving the care, custody, teaching, and training of children, such as educational, religious, social and child care workers, relatives, slip-parents and baby sitters." Laberge, 508 So.2d at 417. Therefore, this Court, as well as the Fifth District Court of Appeal, recognized that only because of the particular conviction did the reason fail to sustain the departure sentence. See, also, Hall v. State, 517 So.2d 692 (Fla. 1988)(since the use of familial authority exists in so many child abuse cases it cannot justify departure); Graham v. State, 537 So.2d 669 (Fla. 5th DCA 1990)(breach of trust not a valid reason for departure in child molestation cases).

The defendant further argues that the breach of trust is not a valid reason because if the "sentencing commission intended to impose a harsher sentence upon those convicted of assaults upon a spouse, it would have enacted a special category for spousal homicide," relying on Davis v. State, 517 So.2d 670 (Fla. 1987). However, the defendant misreads Davis and misapplies the law to the facts in this case. In Davis the wife did not abuse any particular trust bestowed on her by the victim. Davis shot her

husband five times while he slept, she did not "take advantage of a position of authority." Davis, 517 So.2d at 674.

By contrast, in this case, the defendant did abuse his authority; the defendant used his position as the spouse to convince the victim that she should come home from work because they had been burglarized. (TR. 457). This case is distinguishable from Davis, supra, because in Davis, the trust was not the factor which made the commission of the crime possible, but rather the fact that they were married, sleeping in the same bed that made it possible. In this case the fact that the victim conferred her trust on the defendant was precisely what made the crime possible; if the victim had not trusted the defendant, she would not have rushed home in the middle of her work shift and walked into an ambush. Therefore, unlike in Davis, where the defendant did not have to exert any authority or abuse any trust, the defendant in this case could not have lured the victim home without a breach of the trust. The key in this case is the trust, not the marriage.

In Grant v. State, 510 So.2d 313, 314 (Fla. 4th DCA 1987) and Steiner v. State, 469 So.2d 179 (Fla. 3d DCA 1985), the courts held that "breach of trust," in cases, like this one, where "trust" afforded the defendant access to the victim and/or opportunity to commit the crime, was a valid reason for departure. See, also, Hankey v. State, 485 So.2d 827, appeal

after remand, 505 So.2d 701 (Fla. 1986)(breach of trust warranted departure where victim gave defendant a job and entrusted him with key and defendant returned after hours and stole money and items of value). Similarly, in Gardener v. State, 462 So.2d 874 (Fla. 2nd DCA 1985), breach of trust was upheld as a reason for departure where the defendant was a teacher selling cocaine on school property. Therefore, since the victim's trust in the defendant--the trust that led her to believe him when he summoned her home from work on a pretext--afforded the defendant access to the victim and opportunity to commit the crime, the trial court properly departed.

The defendant also contends that there was no clear and convincing evidence to support the trial court's departure based on the first reason, victim trauma. In Green v. State, 455 So.2d 586, 587 (Fla. 2d DCA 1984), the court approved the use of psychological trauma to the victim as justifying departure in that case because the defendant stalked the victim, forced her to drive her vehicle across the grass to the nearest point of refuge, and the victim was further traumatized when the armed defendant cursed the victim's mother and threatened to kill the victim. In Green the court observed that "the sentencing judge is in the best position to observe the vicious and malevolent intentions of the accused together with their marked and lasting effect on the victim." Green, 455 So.2d at 587. Similarly, in Ross v. State, 478 So.2d 480, 481 (Fla. 1st DCA 1986), the trial

court properly considered the "possible life-time emotional impact on the victim" arising from an attempted sexual battery and first degree murder conviction, as a valid reason for an upward departure.

In this case the victim testified that she was afraid to provide her address because she feared for her safety despite the fact that the defendant was incarcerated. (TR. 965). The victim testified that after the incident she took a leave of absence and went to a clinic for battered women. (TR. 962). Ms. Barnes testified as follows:

> **Q. [By Assistant State Attorney]:** Would you continue telling the Judge what you have done and what treatment you have sought since the incident in August of 1987?
>
> **A. [By Victim]:** Well, I took a leave of absence from work for a while 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 couldn'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.

Q. If your husband, James Barnes, is released from prison, what do you think will happen to you?

A. I think he might try to bother me again.

Q. Okay.

Did you make any requests at work concerning any sort of a transfer?

A. Yes, I did.

Q. What did you request?

A. I put in for a transfer.

Q. Please tell the Judge what that was.

Tell him what you did and who you spoke to about it.

A. I spoke to my supervisor about transferring out of state, because I'm scared to stay here.

Q. And if and when James Barnes ever gets out of prison, what is it that you plan to do?

A. I'm going to leave.

Q. I'm sorry.

A. I'm leaving the state.

(TR. 964-966). The defendant took an almost three months leave of absence. (TR. 971). Ms. Barnes testified that she was not currently under the psychiatric treatment of a doctor because of the hours she had to work; her financial situation did not allow her to take time off like she used to. (TR. 974). However, she did testify that she still called the organization for battered women when she had a relapse. (TR. 974). Ms. Barnes also testified at the sentencing hearing that her life was still not in order, that she still could not sleep at night. (TR. 976). Clearly, the trial judge observed the marked and lasting effect of the defendant's vicious intentions, and sentenced the defendant accordingly.

The cases cited by the defendant are factually distinguishable. In State v. Rousseall, 509 So.2d 281, 283 (Fla. 1987), this Court invalidated the use of psychological trauma as a reason for departure because the trauma suffered was "simply the type of trauma that any victim of burglary experiences when the sanctuary of his or her home is violated and his or her possession are taken." Similarly, in Miller v. State, 549 So.2d 1106 (Fla. 2d DCA 1989), rev'd on other grounds, ____So.2d____, 16 FLW 148 (Fla. February 1, 1991), [5] the victim's family

[5] This court only addressd the jury instruction issue in its opinion.

suffered the trauma of the death of their relatives; a trauma which is inherent in the crime.

The trauma felt by the victim in this case was not like the trauma felt by most murder victims. In this case the victim's fear was so great that she could not reveal her address, despite the fact that the defendant was in jail without bond; this type of fear is not typical by any means. (TR. 75, 645-646). Furthermore, the "sentencing judge is in the best position to observe the vicious and malevolent intentions of the accused together with their marked and lasting effect on the victim." Green v. State, 455 So.2d 586, 587 (Fla. 2d DCA 1984). Therefore, this reason should be upheld as valid.

The third reason for departure is: "used children to accomplish goal." [6] The uncontroverted testimony was that the defendant forced the victim's child to call the victim and lie to her about the house being burglarized. (TR. 457, 655). In essence what the defendant did was use the boy's trust in order to effectuate the crime. In Nodal v. State, 524 So.2d 476, 478 (Fla. 2nd DCA 1988), the court held that the trial court could depart based on the fact that the defendant "intentionally involved his 12-year-old daughter in his cocaine trafficking

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[6] The defendant does not address this reason in his initial brief.

business." The fact that the defendant used the children to accomplish his goal is a valid reason for departure.

The next reason used by the trial court to support the departure sentence is: "committed in front of children." The defendant contends that there is no clear and convincing evidence that the child was present during the crime. The defendant's point is not supported by the record.

In Casteel v. State, 498 So.2d 1249, 1253 (Fla. 1986), this Court stated that the mere fact that a child witnesses a "brutal violation of his mother would constitute a clear and convincing reason for departure," pursuant to Fla.R.Crim.P. 3.701(b)(3); See, also, Mora v. State, 515 So.2d 291, 293 (Fla. 2d DCA 1987)(the trial court's indication that the victim's children witnessed the attack, can constitute a clear and convincing reason for departure); Fryson v. State, 506 So.2d 1117, 1119 (Fla. 1st DCA 1987); Melton v. State, 501 So.2d 96 (Fla. 1st DCA 1987)("act committed in presence of victim's children' valid reason for departure).

In this case, Toshaumbay Tumquist, the victim's twelve year old son, testified that the defendant made him call his mother and ask her to come home. (TR. 457). Toshaumbay testified that he saw the defendant put bullets in the gun and then put the gun to the victim's back and force her into the house. (TR. 463-464,

468, 470). Toshaumbay also testified that he heard the defendant tell his mother that he was going to kill her. (TR. 464). In fact, it was one of the children that called the police and one of them that pointed to the bullet that led to the defendant pointing out the gun. (TR. 71, 463, 470). Therefore, the defendant's argument that the facts do not support the reason for deviation must fail; the trial court's fourth reason for departure is valid.

The last reason given by the trial court to support the departure sentence is: "tried to fire two times, tried third time, tried fourth time." The defendant contends that since pulling the trigger is an inherent element of the crime and since there is no evidence that the defendant pulled the trigger four times, this reason is invalid.

First, the sentencing guidelines rule does not prohibit a trial court from considering circumstances and actions of the accused in the commission of the offense, including the amount of force used as a basis for departure from the guidelines. Smith v. State, 454 So.2d 90, 91 (Fla. 1984). In Smith, the defendant struck the victim when the victim had not offered any resistance at all, the victim had a gun at his head and pointed at him. Smith, supra, at 91. Similarly, in Mincey v. State, 460 So.2d 396, 398 (Fla. 1st DCA 1984), the trial court departed based on the fact that the defendant actively threatened the victim with

death; the appellate court affirmed the departure. Therefore, the manner in which the crime is committed can support a departure sentence.

Second, in the instant case the victim repeatedly testified that the defendant threatened to kill her. (TR. 661, 664). Furthermore, unlike indicated by the defendant, the record does support the conclusion that the defendant tried to fire the gun more than once. The victim testified that the defendant pointed the gun at her various times and fired, but the weapon did not discharge. (TR. 662, 663, 664, 666). Therefore, although pulling the trigger is an element of attempted murder with a firearm, pulling the trigger more than once is not; the reason is valid and the sentencing order should be affirmed.

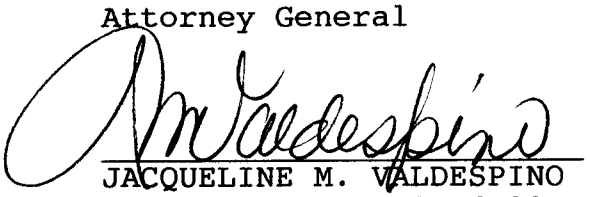
If this court finds that any of the reasons for departure are invalid, because the underlying criminal offense occurred after July 1, 1987, the court must look to Florida Statute, § 921.001(5)(1988), and affirm the sentence as long as "one circumstance or factor justifies the departure regardless of the presence of other circumstances or factors found not to justify departure." Therefore, the departure sentence under review must be affirmed.

CONCLUSION

Based on the foregoing citations of authority and arguments of counsel, the order appealed from should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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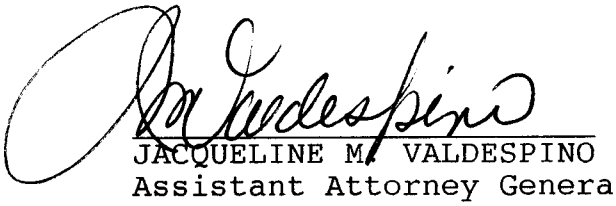
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was furnished by mail to CAROL J. Y. WILSON, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125, on this 15th day of March, 1991.



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