IN THE SUPREME COURT OF FLORIDA

ROSALYN ANN SANDERS,	:	
Petitioner,	:	
v.	:	CASE NO. SC00-1688
STATE OF FLORIDA,	:	
Respondent.	:	
_____	:	

PETITIONER'S REPLY BRIEF

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On Review from the District Court
of Appeal, First District,
State of Florida

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STATEMENT OF THE FACTS

In the initial brief, petitioner asserted that, according to the state's version of events, as Larry Moore drove off, Rosalyn Sanders discovered some of her cocaine had been stolen, she shouted at the truck to stop, and when the truck was ten or fifteen feet away, she fired five shots, and all of this occurred in short order, with no interruptions or hesitation. The version of the facts presented in the state's answer brief is identical, except that the state asserts, based on the testimony of Myron Davis, that four to five minutes elapsed between Sanders's discovery, as Moore's truck pulled off, that cocaine was missing, and the shooting when the truck was ten to fifteen feet away. (Answer brief, 4). This four to five minute delay figures in the state's assertion that Sanders had time to reflect before the shooting. (Answer brief, 18). Petitioner contends that the supposed four to five minute delay is not supported by a reasonable reading of the record.

The trial prosecutor certainly did not take the position that there was a several minute delay between Sanders's discovery of the missing cocaine and the shooting. In closing argument, the prosecutor said:

> As soon as the truck began to drive away, as soon as she believed that Larry Moore had stolen some of her cocaine, she immediately pulled that deadly weapon and began blasting away at the truck.

(3T384).

The state's contrary view on appeal is based on the

testimony of Myron Davis. On direct examination by the state, Davis said that as Moore started driving away, Sanders and Davis shouted at the truck and then Sanders pulled out a revolver and started shooting. (2T244-245).

On cross-examination, Davis gave the testimony the state is relying on:

> Q. How long, Mr. Davis – in your words, how long between the time – you say Rosalyn was concerned about the loss of the piece of crack cocaine, right?
> A. Yeah.
> Q. You say she thought that Moore was taking something he hadn't paid for, right?
> A. Right.
> Q. How long between the time she gave you that indication and the time the shots were fired?
> A. Minutes apart, maybe, about – oh, yeah.
> Q. How long?
> A. Probably about minute – minutes apart. They wasn't that many minutes, four or five minutes maybe.
> Q. He's driving away, how far could he get in –
> A. He didn't get too far.
> Q. He was driving away –
> A. Uh-huh.
> Q. – and she was wanting him to come back?
> A. Right. I even called for them. We both were calling for them to stop.
> ...
> Q. As the truck was driving away, how far did it get before the shots were fired?
> A. Probably 10 or 15 feet to me.
> Q. So it must have been a very brief time –
> A. Yeah.
> Q. – between the time she took – had the gun and when she fired it?
> A. Right.
> Q. Seconds perhaps?
> A. Yeah.
> Q. It's not something she discussed with you –
> A. No.
> Q. – I'm going to shoot this guy?
> A. No, no, no. No, it wasn't a discussion.
> Q. Just like bang, bang, it was done?

A. Yeah, that's just how it happened.
Q. Did she do anything that suggested that she thought about it, what she was doing?
A. I can't recall, no.
Q. As the truck was driving away — and it was just a few seconds before the shots were fired, right?
A. Yeah.

(2T257-259). (Emphasis added).

Moore could not have driven for four or five minutes and have gotten only fifteen feet. If he averaged fifteen miles per hour, in four minutes he would have driven a mile. Even at five miles per hour, in four minutes he would drive 1760 feet, and driving fifteen feet would only take about two seconds.[1] Davis's reference to minutes must either have been to the non-technical meaning of the word, as "an indefinitely short space of time," see Random House Dictionary of the English Language, Unabridged, or to have been a misstatement, which was corrected by his agreement (the underlined portion of his testimony above) that the time period was just a few seconds. Davis's confused reference to minutes, in context, does not support the state's assertion on appeal of a four to five minute delay.[2]

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[1]The figures cited here are based on simple arithmetical calculations. Sixty miles per hour = one mile per minute, because a minute is 1/60 of an hour. Fifteen miles per hour = 1 mile per 4 minutes, because 15 miles is 1/4 of 60 miles. Five miles per hour = (5 x 5280) feet per hour = (5 x 5280 divided by 60) feet per minute = 440 feet per minute. In four minutes, a car going five miles per hour travels 440 feet per minute x 4 minutes = 1760 feet. The same car travels (440 divided by 60) feet per second = 7 1/3 feet per second.

[2]The state's other two eyewitnesses also made it clear there was no delay. Iris Crenshaw: "he [Moore] just jumped in the car and he started to pull off. And then I heard shots firing ..." (1T151-152). Larry Moore: "Q. As you began to drive away, what

ARGUMENT

ISSUE I. CONVICTION OF PREMEDITATED MURDER WITHOUT PROOF OF PREMEDITATION IS FUNDAMENTAL ERROR.

A. Sufficiency. The state recognizes that premeditation requires a fully conscious purpose to kill that exists prior to the killing (Answer brief, 15), and the state reviews what it thinks the evidence shows (Answer brief, 16-19), but the state has failed to indicate how any one fact, or the facts as a whole, show that Sanders decided to kill before firing the shot that killed Felix Parker. First, the state says it has shown a motive in that Sanders fired shots at Moore's truck because she believed somebody in the truck had stolen her crack cocaine. (Answer brief, 16). This motive arose immediately before the shooting, however, so it does not support the existence of premeditation, and if anything, goes to show that this was an unpremeditated killing.

Next, the state asserts that the evidence showed inadequate provocation because the amount of cocaine stolen was small. (Answer brief, 16-17). The state's reasoning seems to be that no one would kill without thinking over a mere $50 worth of cocaine. Petitioner suggests the opposite is true. It is totally irrational to risk life in prison or the death penalty for $50 of crack cocaine. In order to recover a fortune in drugs, however, some people would, even upon reflection, decide to take the risk. If there had been evidence that Sanders had a previous grievance

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happened? A. We heard gunshots." (2T204).

against Moore or Parker, then the small amount of cocaine involved might have suggested that the provocation was a mere pretense to carry out a preexisting plan to kill. There was no such evidence here, however, and nothing to indicate that this shooting was anything other than an unpremeditated, irrational, immediate response to the discovery of a theft.[3]

The state asserts that Sanders had time to reflect before she shot Parker. (Answer brief, 18). Partly, this is based on the state's unreasonable reading of Davis's testimony as indicating that four or five minutes went by during which Moore drove his truck ten or fifteen feet. As discussed in the fact section, a reasonable reading of the record does not support the existence of this delay. Even aside from the supposed four or five minute delay, the state argues that Sanders could have reflected while she said, "That ain't all of it, that ain't all of it!", she could have reflected while Davis said, "that's all you gave me, and that's all he gave me", she could have reflected while she yelled at the truck to stop, she could have reflected while she pulled out the gun, and she could have reflected while she fired the gun. The state cites no evidence, however, that establishes Sanders did reflect during this short episode. The state's burden is to prove that the defendant actually made a considered decision to kill prior to the killing, not that it is possible the defendant might have made such a decision.

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[3]The state also points out that Florida law does not permit the use of deadly force to retrieve stolen property. Petitioner does not assert that the shooting was justified, however, only that the state failed to prove that it was premeditated.

The state asserts that the deadly weapon used, the manner in which the homicide was committed, and the nature of Parker's wound, all go to establish premeditation. (Answer brief, 18-19). Underlying the state's argument is the notion that Sanders must have been aiming at what she hit. If the state only meant that Sanders was pointing the gun at the truck, petitioner would not dispute this, particularly since Larry Moore testified that when he heard the shots and turned back, he saw Sanders pointing a gun at the truck. (2T203-204).

The state goes further, though, saying that because two of the five shots entered the cab of the truck, Sanders must have been aiming at the cab, and because one of the bullets that entered the cab hit Parker in the face, Sanders must have been aiming to kill. The assumption that Sanders hit what she aimed at might have had some validity if this had been a close range shot, but the truck was at least ten to fifteen feet away, and moving. Four out of five bullets did not hit any person. The fact that one bullet hit a person does not prove that Sanders was trying to hit a person any more than the fact that four bullets did not strike a person proves that Sanders was trying not to hit a person.

In any event, as the state points out, three bullets hit the back of the truck (i.e., the back of the bed) and two hit the back of the cab, just below the glass. (Answer brief, 19). In other words, no bullet hit a window. Every bullet hit a solid part of the truck. If it could be inferred that Sanders hit what she aimed at, then this would indicate Sanders did not aim for

the truck's window. If she were shooting with the intent to hit a person, though, she would have aimed for the window, not the solid body of the truck. It turned out that the body of the truck was not strong enough to stop a bullet, but there is no reason to think Sanders would have known that would be the case. Aiming at the body of the truck rather than the window does not show intent to kill.

In sum, the facts the state relies on do not prove premeditation. In petitioner's view, there is simply no evidence from which the jury could reasonably find premeditation, so the evidence is insufficient. This conclusion may be reached without regard to the circumstantial evidence rule.

The evidence could be analyzed under the circumstantial evidence rule though. The state asserts that at trial, the only defense hypothesis of innocence was that Larry Moore was the shooter, not that the shooting was committed without premeditation. (Answer brief, 13). In fact, petitioner asserted both theories at trial. Lack of premeditation was argued in defense counsel's closing statement:

> Myron Davis said that as the truck was leaving, she produced a gun and fired, boom, boom, boom. Where was the reflection? Where was the time to make a decision, to think about it, to reflect on it? There was none.

(3T391-392). This argument made lack of premeditation a defense theory. Since the evidence did not refute the possibility that Sanders, upon discovering that cocaine was missing, yelled and shot without engaging in premeditation, the evidence, analyzed under the circumstantial evidence rule, was insufficient to prove

premeditation.

B. Fundamental Error. It is not clear from the state's brief that the state and petitioner have any disagreement as to whether or not legally insufficient evidence is fundamental error. The state concedes that when there is a total lack of evidence, this should be treated as fundamental error. (Answer brief, 14, 25, 29, 32, 34).[4] When there is some evidence, the state says, the evidence is legally sufficient to send the case to the jury, so there is no error at all. (Answer brief, 25-26, 34). Hence, the state does not recognize any situation in which a preserved sufficiency issue would require reversal but an unpreserved sufficiency issue would not. In other words, the state seems to agree that if the evidence was insufficient, then conviction is fundamental error.

The state nonetheless asserts that not every sufficiency claim should be treated as fundamental error. (Answer brief, 27, 30). It appears that what the state means by this is that only meritorious sufficiency claims should be treated as fundamental

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[4]By a total lack of evidence, the state means no evidence of an essential element of the crime. This is clear from the state's discussion of and quotations from federal cases. (Answer brief, 26). By no evidence, the state means no legally sufficient evidence. This is clear from the state's citation of Negron v. State, 306 So.2d 104 (Fla. 1974), as an example of case in which there was no evidence of the value element of theft. (Answer brief, 25). In Negron, the state proved that the wholesale cost to the victim, Sears, Roebuck, was $96.70. What the state failed to prove was that the retail value was over $100. Although the cost to Sears of $96.70 suggested that the retail value would be over $100, there was no legally sufficient evidence of retail value, so conviction of the crime of theft of property worth over $100 was fundamental error.

error; valid sufficiency claims should get de novo review, but non-meritorious sufficiency claims should not. (Answer brief, 33). Petitioner would agree, of course, that a non-meritorious claim would not be fundamental error. In order to determine whether any given claim is meritorious or not, however, the appellate court must review it. It is not clear what advantage there is if, after reviewing a sufficiency claim and finding the evidence sufficient, the appellate court affirms based on lack of preservation, rather than on the merits. So long as the law is clear that a valid claim of insufficient evidence is fundamental error, however, unpreserved sufficiency claims will be reviewed on direct appeal, and convictions based on insufficient evidence will be reversed. This is what petitioner seeks.

The state asserts that it wants sufficiency issues raised in the trial court, in part, so there will be a chance for the prosecutor to present more evidence after the insufficiency is pointed out. (Answer brief, 30). The state concedes, though, that the motion for judgment of acquittal may be made for the first time ten days after trial pursuant to Fla. R. Crim. Proc. 3.380(c). (Answer brief, 23). Thus, without relying on fundamental error, the defendant can deny the state any opportunity to reopen, so the possibility of reopening does not militate against a holding that insufficient evidence is fundamental error.

The state also points out that legislative and judicial efforts in recent years have sought to enhance efficiency by ensuring that trial courts rule on issues before they are

reviewed by the appellate courts. (Answer brief, 27-28). The problem of unpreserved sufficiency issues is similar to the problem of unpreserved sentencing issues, which this Court addressed in Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800, 675 So.2d 1374 (Fla.1996)("Amendments I"), Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103 (Fla.1996)("Amendments II"), Amendments to Florida Rules of Criminal Procedure 3.111(e) and 3.800 and Florida Rules of Appellate Procedure 9.020(h), 9.140, and 9.600, 761 So.2d 1015 (Fla.1999)("Amendments III"), and Maddox v. State, 760 So. 2d 89 (Fla. 2000).

Previously, appellate courts had routinely addressed sentencing issues for the first time on appeal pursuant to State v. Rhoden, 448 So. 2d 1013 (Fla. 1984). Rhoden held that the contemporaneous objection rule was not applicable to sentencing errors because such errors can be corrected by a simple remand to the sentencing judge. In light of the Criminal Appeal Reform Act of 1996, which evinced a preference for sentencing issues to be addressed by trial courts first, this Court in Amendments I, amended Fla. R. Crim. Proc. 3.800 to authorize a motion to correct sentence up to ten days after sentence was imposed. The intent was to ensure that late discovered sentencing errors would be ruled on by trial judges, and to ensure that defendants would be able to preserve adverse sentencing rulings. In Amendments II, it was recognized that ten days was not enough time to accomplish this purpose, and the time for moving to correct sentences was enlarged to thirty days after sentencing.

Amendments III found that sentencing errors were still not being brought to the trial court's attention, in part because trial counsel relied on appellate counsel to detect sentencing errors. Amendments III established the procedure currently found in rule 3.800(b). Now, if trial counsel fails to bring a sentencing error to the attention of the trial judge, appellate counsel may do so, up until the filing of the initial brief. This way, the lawyer who would have been arguing the unpreserved sentencing error in the appellate court, is instead preserving (and sometimes correcting) the error in the trial court. Maddox ruled that unpreserved sentencing issues that were asserted on appeal before Amendments III, would be reviewed as fundamental error, so long as they were serious, patent errors, that is, discernible from the appellate record, and actually affecting the length of sentence.

The error of a conviction based on insufficient evidence, like a sentencing error, is corrected without a new trial. As with sentencing errors prior to Amendments III, there is a mechanism for preserving sufficiency issues after trial, rule 3.380, but too often trial lawyers miss sufficiency issues, which are then detected for the first time by appellate counsel.[5] Detecting sufficiency issues, like detecting sentencing issues,

[5]The Florida Association of Criminal Defense Lawyers brief and the state's brief suggest that meritorious unpreserved sufficiency issues are rare, but in the experience of the undersigned, such issues are not so rare. The cases finding insufficient evidence to be fundamental error, cited in the initial brief, demonstrate that trial lawyers fail to recognize insufficient evidence with some frequency.

generally requires legal research. Given the excessive caseloads in public defenders' offices, the time that trial lawyers have for research is clearly limited.[6] As with the thirty day window for motions to correct sentence, the ten day period for raising sufficiency issues contained in rule 3.380 as a practical matter can only be utilized by the trial lawyer who failed to recognize the error in the first place.

Allowing conviction of a crime not proved is just as contrary to the purpose of our judicial system as is allowing a sentence beyond that authorized by the legislature. The goal of bringing alleged errors to the trial judge first is a worthy one, but, as with sentencing errors, this Court should not allow that goal to interfere with the remedying of error as serious as conviction of a crime not proved. A rule allowing appellate counsel to preserve sufficiency issues, similar to rule 3.800(b), may well be warranted. Until there is such a rule, however, this Court should make it clear that a conviction based on insufficient evidence is fundamental error reviewable on appeal.

ISSUE II. THE TRIAL JUDGE ABUSED HIS DISCRETION IN FORCING PETITIONER TO TRIAL WITH PATENTLY UNPREPARED COUNSEL RATHER THAN ALLOWING A CONTINUANCE SO PETITIONER COULD RETAIN DIFFERENT COUNSEL.

The state's response on the merits seems to be that the trial judge made an extensive inquiry into petitioner's complaint

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[6]See "Lawyer Turnover Causing Big Delays," Tallahassee Democrat, Nov. 6, 2000, page A1. In this case, petitioner was represented by private counsel, whose failure to recognize the insufficiency of the evidence of premeditation may have been a result of his lack of preparation for trial, as argued in Issue II.

and reasonably concluded that defense counsel was competent, effective, and prepared for trial. (Answer brief, 47-48). The state's view is totally refuted by the transcript, which is described and in pertinent parts reproduced at pages 6 to 12 of petitioner's initial brief. The record makes it clear that the trial judge did not engage in any impartial inquiry at all. Rather, the judge set out to refute the obvious fact, which defense counsel tried to tell him, that petitioner's lawyer was simply not prepared. The judge argued that because Overby was trying the case, not Sanders, it did not matter that Overby had not had a chance to discuss the testimony from the first trial with Sanders; she had heard that testimony herself, anyway, as she was present at the trial. The important facts, the judge thought, were that Overby had received the depositions taken by the lawyer who tried the case the first time, and that Overby had received and read the first trial transcript and the police reports. It is good that defense counsel read these materials, but this does not mean that he was prepared for trial. He did not receive the transcript or the police reports until the day of jury selection, and he admitted that although, as of the morning of trial, he had read the transcript five times, there were "numerous, numerous" instances in which former counsel's questioning made no sense to him, and he had wanted to get petitioner's help with this, but had been unable to do so because he had been out of state.

The state's assertion that Overby had adequate time to prepare, is immaterial. Petitioner's complaint is not that

Overby did not have time to prepare, but rather that there was good reason for Sanders to believe that Overby did not prepare. The record makes it clear that Overby was not prepared for trial, and therefore, under all the circumstances, the judge's refusal to allow an opportunity to replace him was an abuse of discretion violating petitioner's right to choose counsel.

The state asserts that petitioner's request to replace Overby came too late because the jury had already been sworn and jeopardy had attached. A mistrial at the request of the defendant because the defendant's privately retained lawyer was not prepared would not have barred a new trial. In any event, the trial judge did not deny petitioner's request as untimely. He ruled that defense counsel was effective and prepared, and therefore petitioner had no valid basis for replacing him at a time when doing so would delay the trial.

The state asserts that this was a simple case. Apparently, the state thinks that a "simple" first degree murder case can be tried without much preparation. The apparent simplicity of the case, may, however, itself be a result of defense counsel's lack of preparation. Three eyewitnesses who were involved in the incident testified against petitioner. Three other eyewitnesses, who were not shown to have any involvement in the incident or interest in the outcome of the case, immediately after the shooting gave statements to the police implicating Larry Moore, not Sanders as the shooter. Four days later those witnesses recanted the statements they had given at the crime scene. (2T365-367). At trial, they once again implicated Moore. No one

asked these witness why they recanted four days after the crime. The impression the record leaves is that there may well have been complexities that were simply not explored.

Finally, the state contends that because petitioner has not asserted prejudice from the denial of her right to counsel of her own choosing, no relief may be granted. The state seems to be confusing this issue with a claim of ineffective assistance of counsel. Petitioner's counsel was ineffective for failing to move for judgment of acquittal, and may have been ineffective in other ways, but petitioner's argument is based on the right to choose counsel, not the right to effective counsel. As discussed in the initial brief, when the trial court unreasonably interferes with the defendant's right to choose counsel, this error is reversible without a specific showing of prejudice. The denial of the right to choose counsel is itself prejudice.

CONCLUSION

Petitioner's conviction for first degree murder is fundamentally flawed by the state's failure to prove premeditation. Petitioner's right to counsel was violated by the trial court's insistence that she go to trial with a patently unprepared lawyer. Petitioner seeks reversal of her convictions and a new trial on the charges of second degree murder and shooting into an occupied dwelling.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Karen M. Holland, Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and by mail to Richard J. Sanders, Assistant Public Defender, P.O. Box 9000 - Drawer PD, Bartow, FL 33831, on this ___ day of January, 2001.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. Proc. 9.210. This brief was printed in Courier New 12-point font.

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STEVEN A. BEEN