IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANIEL HAWKES FEARS,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2004-1279
	)	
THE STATE OF OKLAHOMA,	)	**FILED**
	)	IN COURT OF CRIMINAL APPEALS
Appellee.	)	STATE OF OKLAHOMA

JUL - 7 2006

MICHAEL S. RICHIE
CLERK

OPINION

CHAPEL, PRESIDING JUDGE:

Daniel Hawkes Fears was tried by jury in the District Court of Sequoyah County, Case No. CF-2002-568, and convicted of Counts I and II, Murder in the First Degree in violation of 21 O.S.2001, § 701.7; Counts III – X, Shooting with Intent to Kill in violation of 21 O.S.2001, § 652(A); Counts XI, Discharging a Firearm with Intent to Kill in violation of 21 O.S.2001, § 652(A); Count XII, Feloniously Pointing a Firearm in violation of 21 O.S.2001, § 1289.16; and Counts XIII – XVII, Drive By Shooting in violation of 21 O.S.2001, § 652(B).[1] In accordance with the jury's recommendation the Honorable John Garrett sentenced Fears to two terms of life imprisonment without the possibility of parole, to run consecutively (Counts I and II); nine terms of life imprisonment in Counts III - XI, each to be served consecutively to Counts I and II and concurrently to one another; nine (9) years and one (1) day imprisonment in Count XII, to be served consecutive to Counts III – XI; and five terms of imprisonment for nineteen (19) years and one (1) day in Counts XIII – XVII,

[1] The trial court sustained Fears's demurrer to the evidence on Count XVIII, Drive By Shooting.

each to be served consecutively to Counts III – XI and concurrently with Counts XII – XVI. Fears appeals from these convictions and sentences.

On October 26, 2002, eighteen-year-old Daniel Fears drove to his father's house in Sallisaw, Oklahoma. His father was not home. Fears entered the neighborhood at a high rate of speed. He almost hit Ashley Hobbs, who was riding a bicycle. Fears parked in front of his father's house and started around to the back. Greg Caughman was in his yard nearby with several children. As he walked, Fears told Caughman to watch his kids. Caughman told Fears to watch his mouth. When Fears told Caughman again to watch his kids, Caughman invited him to come over if he had a problem. Fears never stopped moving throughout this exchange. Jill Caughman heard some of this conversation, and told Fears to watch his driving, but could not understand his reply. Fears said something the Caughmans could not understand and continued to the back door. He broke the glass with a posthole digger, got a shotgun from the attic and a duffel bag full of birdshot from the garage, and came out the front door. Patsy Wells, Ashley's grandmother, had come to the door to talk to Fears but started back to her house next door when nobody answered. As Fears left the house, he pointed the shotgun at Greg Caughman, across the street, and shot him. Greg's two-year-old daughter, Bethany, was also hit by pellets from that shot. Fears shot Patsy Wells at least once in the chest (she had other pellet injuries which could have been from the same shot or a different shot). Patsy fell to her knees. Her husband, Elvie Wells, came into the yard, and Patsy said, "He shot me", then fell. Elvie could not see

Fears, who was behind a garage partition. Elvie saw the shotgun barrel, and Fears shot him twice. After he fell, Elvie heard Fears say, "I bet you don't get up now." Ashley heard it as, "Who wants to get up now." Elvie and Ashley heard Fears mumbling something they could not understand, which sounded rehearsed. Two witnesses saw Fears's tailgate up when he left. Nobody remembered seeing Fears wear a coat, though one witness thought he had a long shirt on that covered the gun. Patsy Wells died of the gunshot injuries to her chest. Elvie Wells and Greg and Bethany Caughman survived their injuries.

Fears left the neighborhood quickly and got on U.S. 64, going through Sallisaw. He pulled into the Sallisaw Pontiac/Buick/GMC dealership. Fears left his truck, wearing an open long dark shirt or jacket which covered the gun, and walked in the lot to where Jimmy Nunn was showing Rita Spangler a truck. Fears shot Spangler in the head at close range, and she fell underneath the truck. He shot Nunn across the chest and, as Nunn ran, in the back. Nunn hid. He heard Fears get in his truck and saw him pull out of the dealership onto Highway 64, checking for traffic first. Nunn testified that the tailgate on Fears's truck was tilted at a 45% angle and it was difficult to see the license plate. Spangler died of a gunshot wound to the head. Nunn survived his injuries.

As Fears drove east on Highway 64 through Sallisaw and Muldrow, he began shooting at vehicles and people on and near the road. Several witnesses saw Fears steer with one hand while pointing the shotgun at traffic, and

shooting, with the other. Michael Girdy saw Fears pointing the shotgun out the window toward Girdy's truck, but Fears did not shoot.[2] Fears shot at Amy Rogers's car, hitting the door and breaking the window but missing the driver and three passengers. Fears veered in the roadway to shoot at Darlene Pearson's car, but missed. Sharon and Ernest McMahon and Sharon's grandmother, Grace Jones, were walking on the fence line of a statuary store next to the highway. Fears again veered across the roadway, shot all three from his truck, and continued driving east. Jesse Crawford was parked at a convenience store on the highway. He saw Fears drive by, heard four shots, and saw his car was hit. Fears shot Randy Harris's truck, grazing the hood, and shot Steve Strick's pick-up, but missed both men. He shot at Matthew Tabor's truck, blew out both windows, and hit Tabor in the arm and chest. Fears hit Morris Herring's car, but missed Herring and his wife. In Muldrow, Melinda Dutton took her baby and five-year-old girls for a walk beside the road. As she heard police sirens behind her, Fears shot her, hitting her scalp, chest, stomach, leg, arms and hands. Neither child was injured, though pellets were found in the baby's bottle. As police pursuit caught up with Fears, Muldrow Police Officer Peters tried to intercept him. Fears shot Peters's car as he drove past, and shot five times out his back window at Peters's car as Peters followed him through Muldrow. Steve Gholston was driving on the highway when Deputy Sheriff Coleman stopped him. Gholston pulled off the road and began stopping traffic, and watched as Fears shot his truck.

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[2] The trial court sustained the demurrer to the evidence as to Count XVIII, drive by shooting,

Fears continued driving on Highway 64, pursued by Peters, Coleman, and other officers, until he lost control of his truck near Roland. Fears immediately threw the gun and a bag out of the passenger window. He got out of the driver's side, moved to the back of the truck, and either went down on the ground (Officer Peters) or was taken down by officers (Deputy Coleman). Fears was bleeding from a cut on his head. Fears asked Coleman whether he "was taking me where I was going." Fears told Peters he was glad Peters was there to help him. Fears told Trooper Sharp that aliens were controlling him and his brain. Several officers remarked on Fears's unemotional demeanor, and testified that he mumbled or said things they could not understand. Sharp and Lyons testified that some of Fears's actions after arrest were not normal, and were consistent with mental illness. At the hospital Fears said he deserved the death penalty. Fears was later diagnosed with severe schizophrenia. He admitted the crimes but claimed he could not distinguish right from wrong at the time of the shootings, and pleaded not guilty by reason of insanity.

We first address Fears's claim in Proposition IV that the trial court erred in failing to instruct the jury on the consequences of a verdict of not guilty by reason of insanity. Fears admits that this Court held in *Ullery v. State* that trial courts are not required to instruct jurors regarding the consequences of a verdict of not guilty by reason of insanity.[3] He urges this Court to revisit that conclusion and we agree that we should. The state of the law, the will of the

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with reference to Mr. Girdy.

Legislature regarding truth in jury instruction and in sentencing, and the circumstances of this case combine to compel a change of the law in this area.

Fears was charged with eighteen counts of murder, shooting with intent to kill, and drive-by shooting. He admitted the crimes but pleaded insanity. As defense counsel recognized from the start, this would be a difficult decision for any jury. The trial court denied counsel's pretrial request to instruct jurors on the consequences of a not guilty by reason of insanity verdict. In voir dire, after receiving pledges that a juror could, in the abstract, consider the insanity defense, counsel would ask whether jurors could consider that defense eighteen times. In discussing the burden of proof and consequences of an insanity verdict, prospective juror Childers asked, in open court, whether a verdict of innocent by reason of insanity meant the defendant was innocent. [Tr. I at 122] The parties immediately held a bench conference. Because the question was asked in open court, the entire panel was tainted. As the trial court noted, "the question that's in everyone's mind is what happens when you find him guilty by reason of insanity." [Tr. I at 122] Fears again requested the jury be instructed on the law. While unwilling to instruct jurors on the statutory procedure which the law requires for such verdicts, the trial court recognized that "[w]e've got to answer that question now." [*Id.*] The trial court instructed the prospective juror, and the entire venire, that case law and Oklahoma's high court would not allow him to address that issue. The trial court explained, "There is an entirely different process that does occur. I will

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[3] 1999 OK CR 36, 988 P.2d 332, 346.

tell you that. But to advise you as to that process, it is not proper in this proceeding." [Tr. I at 124-25] In response to further voir dire questioning, Childers said, "even if I found that I felt he was insane, if that meant that there was no mental hospital, no nothing, I can't – I don't feel like I would be – feel free to give that verdict." [Tr. I at 125] She then stated she could follow the law.[4] With the trial court's permission, counsel referred back to Ms. Childers's comments in closing argument. Counsel noted that the trial court had told jurors there was a separate process distinct from the criminal proceeding that occurred in the event of a finding of not guilty by reason of insanity, and jurors would have to trust that. [Tr. VII at 945]

The consequences of a verdict of not guilty by reason of insanity in Oklahoma are well settled. The court "shall thereupon order the defendant committed to the state hospital for the mentally ill, or other state institution provided for the care and treatment of cases such as the one before the court, until the sanity and soundness of mind of the defendant be judicially determined, and such person be discharged from the institution according to law."[5]

The statutory language regarding the commitment procedure is mandatory, ensuring that the same procedure is followed in each case. When a defendant is acquitted of a crime on the grounds that he was insane at the time the crime was committed, he *shall not* be discharged from custody until the

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[4] Another prospective juror, Ms. Barr, said on her questionnaire that she believed there should be some consequences for a legitimate plea of insanity. During voir dire, she said she could leave that belief out of the equation when considering the insanity defense. [Tr. II at 231]

court determines that he is not presently dangerous to the public peace and safety, where the danger is due to the person's requiring treatment under Oklahoma's mental health laws.[6] Upon acquittal, the court *shall* order the defendant confined to a particular state hospital for the mentally ill, the sheriff shall deliver the defendant, and he must remain confined for no less than thirty (30) days.[7] Within forty-five days of the initial confinement, the court must hold a hearing on the defendant's status; both parties may be represented by counsel and may present evidence.[8] The trial court may hold more than one hearing. To assist the court in making its determination, within thirty-five days of confinement the defendant must be examined by two qualified psychiatrists or psychologists, who shall present the court, the district attorney and defense counsel with individual reports on the defendant's psychiatric findings and an evaluation of the defendant's present danger to the public.[9] If necessary, the court may order a third examination.[10] At the hearing, the district attorney must establish by a preponderance of the evidence (a) whether the defendant is presently dangerous to public peace or safety because he is a person requiring mental health treatment; or (b) if not, whether the defendant needs continued supervision as a result of unresolved symptoms of mental illness or a history of treatment noncompliance.[11] If the court answers "no" to both questions, the person must be discharged

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[5] 22 O.S.2001, § 924.
[6] 22 O.S.2001, § 1161 (A)(2) (emphasis added).
[7] 22 O.S.2001, § 1161 (B)(1) (emphasis added).
[8] 22 O.S.2001, § 1161 (B)(2).
[9] 22 O.S.2001, § 1161 (C)(1).
[10] 22 O.S.2001, §§ 1161 (C)(2), (C)(3)(b).

immediately.[12] If the court finds the person is a present danger to the public, he shall be committed to the custody of Department of Mental Health and Substance Abuse Services.[13] If the court finds the person is not a danger, but needs continued supervision, the court may discharge him, commence involuntary civil commitment, or order conditional release.[14] In essence, the procedure mandates a court proceeding, plus mental health evaluation and treatment, to ensure that mentally ill and dangerous people are confined in a secure state-supervised setting.

The State relies on our opinion in *Ullery* to argue that trial courts are not required to instruct jurors on the law. However, shortly after *Ullery* was decided, the Legislature passed "truth in sentencing" legislation. An important goal of the truth in sentencing laws is to give jurors accurate information about sentencing. Where a statute mandates a sentence or procedure which will have a direct effect on a sentence, jurors should know what that law is. Accurate instruction on the law allows jurors in Oklahoma to confidently render a verdict and impose a sentence free of speculation.[15] As I noted in *Ullery*, "There is no guesswork involved in Oklahoma's law mandating commitment. The trial court and both parties knew exactly what would happen to Ullery under the statute."[16] This Court has recognized that a better

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[11] 22 O.S.2001, § 1161 (C)(3)(a).
[12] 22 O.S.2001, §§ 1161 (D)(1).
[13] 22 O.S.2001, §§ 1161 (D)(2).
[14] 22 O.S.2001, §§ 1161 (E).
[15] *Anderson v. State*, No. F-2004-882, slip op. at 8.
[16] *Ullery*, 988 P.2d at 346 n. 39.

informed jury may better perform its functions.[17] We have encouraged trial courts, to the extent the law permits, to answer juror's questions using clear and plain language.[18] Prospective juror Childers raised a question before the whole venire, which could have been answered by reference to existing statutory law.

In *Ullery*, we relied on previous cases which characterized the statutory procedures as "merely a procedural statement of disposition subsequent to the verdict and [are] immaterial to the process of rendering a verdict concerning the sanity of the accused."[19] We noted that the United States Supreme Court had earlier held in *Shannon v. United States* that this instruction is not required under federal law.[20] However, *Shannon* was based in large part on the principle, particularly applicable in the federal system, that juries are to render a verdict of guilt or innocence without regard to the consequences of their verdict, since the jury has no sentencing function; the jury's job is to find guilt but the judge's job is to impose the sentence.[21] The Court commented that providing jurors with information about sentencing "invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion."[22]

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[17] *Littlejohn v. State*, 2004 OK CR 6, 85 P.3d 287, 293; *Cohee v. State*, 1997 OK CR 30, 942 P.2d 211, 212.
[18] *Littlejohn*, 85 P.3d at 283; *Cohee*, 942 P.2d at 215.
[19] *Ullery*, 988 P.2d at 346, *quoting Ellis v. State*, 1992 OK CR 45, 867 P.2d 1289, 1298 and cases cited therein.
[20] 512 U.S. 573, 575, 114 S.Ct. 2419, 2422, 129 L.Ed.2d 459 (1994).
[21] 512 U.S. at 579, 114 S.Ct. at 2424.
[22] *Id.* The Court also took notice of the fact that the statute creating the federal commitment procedures in these cases did not specifically require jurors to be instructed on the procedures.

Oklahoma jurors are in a completely different position. Their duties include both finding guilt or innocence and recommending punishment. Oklahoma defendants have a statutory right to have jurors determine punishment.[23] Thus Oklahoma jurors are explicitly required to consider the consequences of their verdict, as jurors themselves determine those consequences. In most cases, there is no confusion or misunderstanding surrounding the consequences of a guilty verdict – jurors may impose a term of imprisonment for a specific number of years, or impose a fine, or both, depending on the statutory range of sentence for that particular crime. In circumstances where confusion may arise, this Court has held that jurors should be accurately informed regarding the law. It is not error, and is the better practice, to tell jurors the meaning of the possible sentence of life without parole.[24] In appropriate cases, trial courts must instruct juries on the statute mandating that defendants serve 85% of their sentences for certain enumerated crimes (the 85% Rule).[25] In fact, the State argues that this case use the same reasoning as it has in the 85% Rule, as the issues are "akin" and "the same rationale applies". [Appellee's Brief at 26] We agree.

Before and since *Ullery*, several other states have considered this question. Twenty-five states now require jury instruction on the consequences

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Of course, Oklahoma criminal statutes do not generally contain such provisions; the Oklahoma Court of Criminal Appeals promulgates uniform jury instructions for use in criminal cases.

[23] 22 O.S.2001, § 926.1.

[24] *Littlejohn*, 85 P.3d at 293-94.

[25] *Anderson v. State*, No. F-2004-882, slip op. at 17.

of a verdict of not guilty by reason of insanity.[26] Eleven states require the instruction by statute.[27] In most of these jurisdictions, juries do not impose

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[26] *Schade v. State*, 512 P.2d 907, 918 (1973) (no jury sentencing, but jury must be instructed on consequences of verdict upon defendant or jury request); *People v. Moore*, 166 Cal.App.3d 540, 211 Cal.Rptr. 856 (Cal.App. 2 Dist. 1985) (no jury sentencing, but instruction given upon defendant or jury request); *People v. Thomson*, 591 P.2d 1031, 1032 (Colo. 1979) (defendant entitled upon defendant or jury request to jury instruction on commitment procedures); *State v. Wood*, 208 Conn. 125, 545 A.2d 1026, 1035-36 (1988) (statute requires jury instruction on consequences of verdict, but no error in non-jury sentencing state where, after required instruction, trial court also instructs jurors to base decision on the evidence rather than the consequences of verdict); *Lyles v. United States*, 254 F.2d 725, 728 (D.C.Cir. 1957) (no jury sentencing, but defendant entitled to instruction because risk of jury confusion); *Roberts v. State*, 335 So.2d 285, 289 (Fla.1976) (after *Lyles*, non-sentencing jury should be instructed on consequences of verdict, particularly since jurors are instructed about possibility of probation and parole for guilty verdict); *Spraggins v. State*, 258 Ga. 32, 364 S.E.2d 861, 863 (1988) (error to fail to instruct jurors as mandated by statute, since "the purpose of OCGA § 17-7-131(b)(3)(B) is to ensure that the jury understands that a verdict of guilty but mentally ill does not mean that the defendant will be released." Court noted that prosecutor's argument, that jury could find defendant guilty but not want to punish, contributed to reversible error); *State v. Amorin*, 58 Haw. 623, 574 P.2d 895, 898-99 (1978) (statute requires instruction on consequences in non-jury sentencing state as a matter of information for jury, no error where trial court modified instruction to tell jury that consequences should not influence decision); *Georgopulos v. State*, 735 N.E.2d 1138, 1143 (Ind. 2000) (adopting procedure requiring trial courts to give appropriate instruction on consequences of verdict); *State v. Hamilton*, 216 Kan. 559, 534 P.2d 226, 230-31 (1975) (statute requires instruction on substance of commitment procedure; trial court did not err in instructing over defendant's objection, but instruction which incorporated statutory procedures was too detailed and potentially confusing); *State v. Babin*, 319 So.2d 367 (La.1975) (on rehearing) (jury instructed upon defendant or jury request, particularly in light of statute requiring generally that when defendant pleads insanity the jury shall be instructed "with respect to the law applicable thereto"); *Erdman v. State*, 315 Md. 46, 553 A.2d 244, 250 (1989) (jury should be instructed on consequences of verdict at defendant's request); *Commonwealth v. Mutina*, 366 Mass. 810, 323 N.E.2d 294, 301-02 (1975) (no jury sentencing, but jury must be instructed on consequences of verdict upon defendant or jury request); *People v. Cole*, 382 Mich. 695, 172 N.W.2d 354, 366 (1969) (no jury sentencing, but instruction *should* be given, after *Lyles*), extended to *sua sponte* instructions in *People v. Rone*, 109 Mich.App. 702, 311 N.W.2d 835, 839 (1981); *Hill v. State*, 339 So.2d 1382, 1386 (Miss.1976) (statute provides that "if the jury certify that such person is still insane and dangerous the judge shall order him to be conveyed to and confined in one of the state asylums for the insane." [Miss. Ann. § 99-13-7]; jurors should be instructed on statutory directions); *State v. Pike*, 516 S.W.2d 505, 507 (Mo.App.1974) (error not to instruct on consequences, at defendant's request, as required by statute); *Kuk v. State* 80 Nev. 291, 392 P.2d 630, 634 (1964), extended in *Bean v. State* 81 Nev. 25, 398 P.2d 251 (1965) (error to fail to give the instruction when requested, but error was harmless where counsel's summation accurately told the jury what the consequences were); *State v. Krol* 68 N.J. 236, 344 A.2d 289, 304-05 (1975) (invalidating commitment statute and setting forth constitutional provisions for commitment procedures after verdict of not guilty by reason of insanity, court held that jurors must be instructed on consequences of verdict); *Novosel v. Helgemoe*, 118 N.H. 115, 384 A.2d 124, 125 (1978) (jury must be instructed on consequences of verdict); *State v. Hammonds* 290 N.C. 1, 224 S.E.2d 595, 604 (1976) (upon defendant or jury request a trial court must instructed jury on consequences of verdict); *State v. Amini*, 175 Or.App. 370, 28 P.3d 1204, 1214 (Or.App. 2001) (no error to instruct jury on consequences of verdict, as mandated by

sentence.[28] However, these courts have determined that knowledge of the consequences of the verdict may influence a jury's ability to reach that verdict.

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statute, over defendant's objection); *Commonwealth. v. Mulgrew*, 475 Pa. 271, 380 A.2d 349 (1977) (no jury sentencing, but jury must be instructed on consequences of verdict); *Matlock v. State*, 566 S.W.2d 892, 895 (Tenn.Crim.1978) (although statute requires instruction in proper case, no error in failure to instruct where no evidence presented that defendant was insane at the time of the crime); *State v. Shickles*, 760 P.2d 291, 298 (Utah 1988), *abrogated on other grounds State v. Doporto*, 935 P.2d 484, 308 (Utah 1997) (no jury sentencing, but defendant entitled to instruction because risk jurors will not consider insanity verdict); *State v. Nuckolls*, 273 S.E.2d 87, 90 (W.Va.1980) (defendant entitled to argument and instruction on consequences of verdict, explicitly overruling previous case law otherwise). *See also State v. Shoffner*, 31 Wis.2d 412, 143 N.W.2d 458, 465-66 (1966) (no jury sentencing, although normally no instruction on consequences of verdict, exception justified due to danger that juries, believing insane defendant will be freed, may be biased against insanity verdict; court "prefer" that instruction be given, though no find error in failure to give). Wisconsin subsequently enacted a statute requiring instruction on the consequences of a verdict of not guilty by reason of insanity.

[27] Conn. Gen. Stat. Ann. .§ 54-89a (requires instruction on the consequences of verdict absent defendant's affirmative objection); Georgia Code Ann. § 17-7-131(b)(3) (requires jury instruction that on verdict, "the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant."); Hawaii Rev. Stat. § 704-402(2) (jury shall be instructed on consequences at defendant's request); Kan. Stat. Ann. § 22-3423 (in any case where insanity defense is raised "the court shall instruct the jury on the substance" of statute setting forth commitment procedure); Louisiana Stat. Ann. C.Cr.P. Art. 803 (when defendant pleads insanity, court shall instruct jurors with respect to the law applicable thereto – interpreted to include consequences of verdict, commitment process); Miss. Ann. § 99-13-7 ("if the jury certify that such person is still insane and dangerous the judge shall order him to be conveyed to and confined in one of the state asylums for the insane."]; Mo.Rev.Stat. (Vernon) § 552.030(7) (jury must be instructed on consequences at defendant's request); N.Y. C.P.L. § 300.10 (McKinney's 2002) ("Where a defendant has raised the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, as defined in section 40.15 of the penal law, the court must, without elaboration, instruct the jury as follows: 'A jury during its deliberations must never consider or speculate concerning matters relating to the consequences of its verdict. However, because of the lack of common knowledge regarding the consequences of a verdict of not responsible by reason of mental disease or defect, I charge you that if this verdict is rendered by you there will be hearings as to the defendant's present mental condition and, where appropriate, involuntary commitment proceedings.'"); Or. Rev. Stat. Ann. § 161.313 ("When the issue of insanity under ORS 161.295 is submitted to be determined by a jury in the trial court, the court shall instruct the jury in accordance with ORS 161.327."); Tenn. Code Ann. (1984) § 33-7-303(e) (requires instruction where defense is raised "as to the provisions of this section" setting forth commitment procedures); Wisc. Stat. Ann. § 971.165 (2) requires instruction on consequences of verdict, enacted after *Shoffner*).

[28] A minority of states have jury sentencing. On the whole the jurisdictions refusing instruction on the consequences of a verdict of not guilty by reason of insanity do not have jury sentencing, and base their holdings on the principle that jurors should not be told about the effect of their verdicts, as the information might confuse or hinder their fact-finding duties. The Supreme Court of Maryland, comparing the case law permitting and forbidding the instruction, noted that the instruction was generally permitted in states which mandated commitment proceedings upon a verdict of not guilty by reason of insanity and ensured that a defendant would not be released while he posed a danger to the public (such as Oklahoma) and

The decisions reflect a common recognition that, although jurors commonly understand the consequences of a guilty or not guilty verdict, "a verdict of not guilty by reason of insanity has no such commonly understood meaning. . . . It means neither freedom nor punishment."[29] "[T]he postverdict status of one acquitted on the grounds of insanity is not 'punishment' in the true sense or usage of that word."[30] "[I]nstructions as to a sentence following a guilty verdict concern only the length of a defendant's incarceration whereas possible confusion in a juror's mind as to the ramifications of a verdict of not guilty by reason of insanity pertains to the very nature of the defendant's disposition – whether or not he will be detained and the circumstances of the detention."[31] "Not to inform the jury of these possible consequences. . . invites unnecessary speculation into their deliberations. Assuredly, the jurors will discuss this phase of a case in which a plea of insanity has been entered, and such discussion without the benefit of correct instruction may very well cause them to proceed on an erroneous basis."[32]

As discussed above, Oklahoma requires jurors to impose sentence, and accurate information about sentencing consequences is important to the jury's

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was generally prohibited in states where commitment was not mandatory. The Court concluded, "So, the weight of authority is not to be ascertained simply by the number of jurisdictions which require or permit the instruction as against the number of jurisdictions which preclude it. The decision in a particular jurisdiction must be viewed in the context of the status of the law with regard to commitment in that jurisdiction. [citation omitted] When the cases are examined in that light, a clear majority of the jurisdictions which have mandated commitment require or permit the instruction." *Erdman*, 553 A.2d at 247.

[29] *Lyles v. United States*, 254 F.2d 725, 728 (D.C.Cir. 1957). This opinion was co-authored by Judge Burger, the future Chief Justice of the United States Supreme Court.

[30] *People v. Cole*, 382 Mich. 695, 172 N.W.2d 354, 365 (1969).

[31] *People v. Moore*, 166 Cal.App.3d 540, 211 Cal.Rptr. 856, 864 (Cal.App. 2 Dist. 1985)

[32] *Commonwealth v. Mutina*, 366 Mass. 810, 323 N.E.2d 294, 301 (1975).

determination. We have held that it is the duty of trial courts to instruct jurors on the applicable law, even where defendants wish to waive such instruction.[33] Applying that principle to this issue, the Michigan Supreme Court has said, "Basic to the function of a trial court is its duty to instruct a jury on all elements of a charged crime, whether requested by the parties or not. . . . Central to this requirement is the necessity that instructions make understandable to a jury the legal concepts they are to apply."[34] Holding that juries should be instructed on the consequences of a not guilty by reason of insanity verdict, even where jurors had no sentencing responsibilities, that Court noted:

> This appeal makes it mandatory that this Court choose between: 1) the possible miscarriage of justice by imprisoning a defendant who should be hospitalized, due to refusal to so advise the jury; and 2) the possible "invitation to the jury" to forget their oath to render a true verdict according to the evidence by advising them of the consequence of a verdict of not guilty by reason of insanity.[35]

Oklahoma law requires no such choice. Put in these terms, this Court must decide between (1) a possible miscarriage of justice by imprisoning a defendant who should be hospitalized because the jury was not instructed on the law governing the case, and (2) continued adherence to case law which reflects neither the will of the Legislature as expressed by statute, nor the reality of jury decision-making.

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[33] *McHam v. State*, 2005 OK CR 38, ¶ 20, 126 P.662.
[34] *Cole*, 172 N.W.2d at 366.
[35] *Cole*, 172 N.W.2d at 366.

Fears's situation is extraordinarily similar to one considered by the Massachusetts Supreme Judicial Court, finding that a jury faced with a mentally ill defendant who was dangerous and likely to remain so, and which desired to protect the public, was likely to refuse an insanity verdict without any information on the consequences of that verdict.

> Implicit in the jury's guilty verdict was a determination that the Commonwealth had proven the defendant's sanity beyond a reasonable doubt. On the record before us, we have found no rational justification or basis for such a finding, except the jury's understandable concern for the need to confine an insane and still dangerous killer for the protection of society. The jury, lacking knowledge of the commitment necessarily flowing from a verdict of not guilty by reason of insanity, applied their own standards of justice in arriving at a verdict designed to ensure the confinement of the defendant for his own safety and that of the community.[36]

At a young age, Fears committed a series of horrible crimes. The evidence showed that, although his behavior could improve with medication, he would not be cured of the schizophrenia which prompted his criminal actions. Particularly given the prosecution's emphasis on the gruesome and overwhelming nature of the crimes, it is impossible to conclude that Fears's jurors did not take the possibility of continued danger to the public into account when considering Fears's plea of insanity.

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[36] *Mutina*, 323 N.E.2d at 301-02. *See also Krol*, 344 A.2d at 304-05, where the New Jersey Supreme Court noted: The purpose of the instruction is to inform the jurors that if they find the defendant insane, and acquit, he will not walk out of the courtroom a free man, but will be confined for medical treatment. A verdict of not guilty by reason of insanity means neither freedom nor punishment. It does mean that the accused will be confined in a hospital for the mentally ill until he has recovered his sanity and will not, in the reasonable future, be dangerous to himself or others. [Citation omitted] We think that the jury should know the consequences of such a verdict."

Fears requested several instructions on this issue. Before trial, Fears proposed an instruction modeled on a uniform California jury instruction:[37]

> You are not to decide whether the defendant is now sane. You are to decide only whether the defendant was sane at the time he committed the crimes charged. If upon consideration of the evidence you believe the defendant was insane at the time he committed the crimes charged, you must assume that those officials charged with the operation of our mental health system will perform their duty in a correct and responsible manner, and they will not release this defendant unless he can be safely returned to society.[38]

Fears proposed a second instruction:

> A verdict of not guilty by reason of insanity does not mean the defendant will be released from custody. Instead he will remain in confinement in a hospital for the mentally ill until the superintendent of such hospital certifies, and the court is satisfied, that such person has recovered his sanity and will not in the reasonable future be dangerous to himself of others.[39]

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[37] The full California jury instruction is: CALJIC 4.01. Effect Of Verdict Of Not Guilty By Reason Of Insanity. A verdict of "not guilty by reason of insanity" does not mean the defendant will be released from custody. Instead, [he] [she] will remain in confinement while the courts determine whether [he] [she] has fully recovered [his] [her] sanity. If [he] [she] has not, [he] [she] will be placed in a hospital for the mentally disordered or other facility, or in outpatient treatment, depending upon the seriousness of [his] [her] present mental illness. Moreover, [he] [she] cannot be removed from that placement unless and until the court determines and finds the defendant's sanity has been fully restored, in accordance with the law of California, or until the defendant has been confined for a period equal to the maximum period of imprisonment which could have been imposed had [he] [she] been found guilty. So that you will have no misunderstandings relating to a verdict of not guilty by reason of insanity, you have been informed as to the general scheme of our mental health laws relating to a defendant, insane at the time of [his] [her] crimes. What happens to the defendant under these laws is not to be considered by you in determining whether the defendant was sane or insane at the time [he] [she] committed [his] [her] crime[s]. Do not speculate as to if, or when, the defendant will be found sane. You are not to decide whether the defendant is now sane. You are to decide only whether the defendant was sane at the time [he] [she] committed [his] [her] crime[s]. If upon consideration of the evidence, you believe defendant was insane at the time [he] [she] committed [his] [her] crime[s], you must assume that those officials charged with the operation of our mental health system will perform their duty in a correct and responsible manner, and that they will not release this defendant unless [he] [she] can be safely returned into society. It is a violation of your duty as jurors if you find the defendant sane at the time [he] [she] committed [his] [her] offense[s] because of a doubt that the Department of Mental Health or the courts will properly carry out their responsibilities.

[38] O.R. p. 137, Defendant's Requested Instruction No. 14.

[39] O.R. p. 138, Defendant's Requested Instruction No. 15.

Finally, Fears proposed this supplemental instruction in lieu of the first two, based on the trial court's oral instruction during *voir dire*: "If a verdict of not guilty by reason of insanity is reached, another process separate and apart from these criminal proceedings will take place. You are not to consider that process or those matters in reaching the verdict herein. That process is the court's responsibility."[40]

Any of Fears's proposed instructions would have captured the spirit, if not the letter, of Oklahoma's procedures for involuntary confinement of persons found not guilty by reason of insanity.[41] We agree with the Kansas Supreme Court that a trial court should not instruct on the commitment details provided by statute, which could prove unnecessarily confusing for jurors.[42] That Court, interpreting a mandate to instruct on the statutory procedures, stated, "We cannot presume a legislative intent that all the statutory details be incorporated in an instruction to the jury. . . . It is our opinion the legislature intended only that the jury be apprised that the defendant, if found not guilty because of insanity, would be committed to the state security hospital for safekeeping and treatment until granted discharge or convalescent leave as provided by law. This seems to us to be the substance of the statute and we believe an instruction to such effect will fulfill the spirit of the law."[43] Other jurisdictions which have promulgated such instructions have

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[40] O.R. p. 163.
[41] 22 O.S.2001, § 1161(A)(2).
[42] *Hamilton*, 534 P.2d at 231, citing *Lyles*, 254 F.2d 725, 728.
[43] *Id.*

included a clear statement of the outline of the applicable law, using plain language.[44] This Court now does the same.

Law, logic, fundamental fairness and common sense require that juries be told the consequences of their verdict, not guilty by reason of insanity. Fears's jury should have been so instructed. This proposition is granted.

We now turn to Fears's claims of prosecutorial misconduct. In Proposition I Fears claims that prosecutors engaged in systematic misconduct

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[44] Georgia statutes require an instruction that upon a verdict of not guilty by reason of insanity, "the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant." Georgia Code Ann. § 17-7-131(b)(3) The Maryland Supreme Court approved of this instruction: "If the defendant is found not criminally responsible, the court will commit the defendant to the Department of Health and Mental Hygiene for institutional inpatient care. In the future, the defendant will be entitled to release from custody of the Department of Health and Mental Hygiene only if this court or a jury finds he will not be a danger to himself or the person or property of another." *Erdman*, 315 Md. 46, 553 A.2d at 246. Mississippi statutes require instruction that "if the jury certify that such person is still insane and dangerous the judge shall order him to be conveyed to and confined in one of the state asylums for the insane." Miss. Ann. § 99-13-7. The Nevada Supreme Court held it was not error to instruct: "The purpose of the instruction is to inform the jurors that if they find the defendant insane, and acquit, he will not walk out of the courtroom a free man, but will be confined for medical treatment. A verdict of not guilty by reason of insanity means neither freedom nor punishment. It does mean that the accused will be confined in a hospital for the mentally ill until he has recovered his sanity and will not, in the reasonable future, be dangerous to himself or others." *Kuk*, 392 P.2d at 634. New York statutes require this instruction: "A jury during its deliberations must never consider or speculate concerning matters relating to the consequences of its verdict. However, because of the lack of common knowledge regarding the consequences of a verdict of not responsible by reason of mental disease or defect, I charge you that if this verdict is rendered by you there will be hearings as to the defendant's present mental condition and, where appropriate, involuntary commitment proceedings." N.Y. C.P.L. § 300.10 (McKinney's 2002) *But see Georgopulos*, 735 N.E.2d at, 1143 ,in which the Indiana Supreme Court proposed the following instructions: "Whenever a defendant is found guilty but mentally ill at the time of the crime, the court shall sentence the defendant in the same manner as a defendant found guilty of the offense. At the Department of Correction, the defendant found guilty but mentally ill shall be further evaluated and treated as is psychiatrically indicated for his illness;" and "Whenever a defendant is found not responsible by reason of insanity at the time of the crime, the prosecuting attorney shall file a written petition for mental health commitment with the court. The court shall hold a mental health commitment hearing at the earliest opportunity after the finding of not responsible by reason of insanity at the time of the crime, and the defendant shall be detained in custody until the completion of the hearing. If, upon the completion of the hearing, the court finds that the defendant is mentally ill and either dangerous or gravely disabled, then the court may order the defendant to be committed to an appropriate facility, or enter an outpatient treatment program of not more than ninety (90) days".

throughout argument which was unduly prejudicial. Fears objected to several of these comments, and some objections were upheld. Normally this would cure any error as to those comments, unless the comments are unusually egregious and so prejudicial that they would undoubtedly taint the verdict.[45] We review the comments without objection for plain error. Parties have the right to freely argue both the evidence presented and reasonable inferences from the evidence.[46] Errors in argument will only require relief where grossly improper and unwarranted argument affects the defendant's rights.[47] A thorough review of the record here shows that the pervasive misconduct, combined with the paucity of evidence supporting Fears's sanity (see Proposition V), were both egregious and prejudicial, and improperly encouraged jurors to reach a verdict based on sympathy and emotion rather than the evidence presented. The cumulative effect of the improper argument deprived Fears of a fair trial and a fair sentencing proceeding.[48]

In closing, Fears emphasized his mental illness and evidence of insanity. Fears complains about the prosecutor's rebuttal argument. Fears objected unsuccessfully to argument that counsel did not question many of the State's witnesses because he didn't want to hear the facts. This is not a reasonable inference from the evidence; the witnesses testified to the facts of the attacks in great detail, and counsel did not question them further because those facts

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[45] *DeRosa v. State*, 2004 OK CR 19, 89 P.3d 1124, 1144, *cert. denied*, 543 U.S. 1063, 125 S.Ct. 889, 160 L.Ed.2d 793 (2005); *Harris v. State*, 2000 OK CR 20, 13 P.3d 489, 500; *Ybarra v. State*, 1987 OK CR 31, 733 P.2d 1342, 1347.
[46] *Hanson v. State*, 2003 OK CR 12, 72 P.3d 40, 49.
[47] *Hanson*, 72 P.3d at 49; *Childress v. State*, 2000 OK CR 10, 1 P.3d 1006, 1013.

were not contested. The prosecutor stated that Fears's defense was merely "psycho-babble." Contrary to the State's suggestion, the gist of this argument was not that defense experts were "paid a lot of money" and jurors should consider that in weighing their testimony. [Appellee's Brief at 13] The gist of the argument was that the experts (apparently including the State's own expert witness) testified to unintelligible gibberish which was intended to obscure the facts of the case.

For several months Fears had abused Coricidin, an over-the-counter cold remedy which could exacerbate hallucinations and delusions. Fears took a large dose of this medicine the night before the crimes but had not taken any on October 26. He introduced this evidence to support his claim that he was mentally ill (self-medicating and enhancing his delusions and violent fantasies), but did not claim the medication made him insane. The prosecutor argued that Fears's evidence of mental impairment by schizophrenia and his use of Corcidin were like a schizophrenia Corcidin soup, and stated, "I think it's for confusion." Despite the State's suggestion otherwise, the record shows this was, indeed, an expression of personal opinion.

The prosecutor said "wouldn't it be great, if there were no deceit, no lies." [Tr. VII at 967] He went on to tell jurors that Fears's defense misrepresented what happened, exaggerated his testing symptoms and hid behind experts, and that the jury could not respect those experts because they had sold their testimony. Despite the State's suggestion otherwise, this line of argument did

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[48] *DeRosa*, 89 P.3d at 1145; *Spears v. State*, 1995 OK CR 36, 900 P.2d 431, 445.

in fact call Fears's defense a lie. This is improper.[49] In addition, the argument was not supported by the evidence. The State's own expert, paid for her testimony, stated that Fears was mentally ill and did not testify he had misrepresented his perception of what happened. Fears complains that the prosecutor called him a killer; this argument is certainly supported by the evidence and was not error.

The prosecutor made several comments about the fact that Fears's experts were paid. The State responds to all these claims of error by arguing that the arguments mentioning defense experts were all proper comments going to the witness' potential bias and motives to testify. This Court has certainly held that prosecutors may comment on the relationship between an expert's fee for services and the truth of his testimony.[50] However, these arguments went beyond that observation. Initially, the prosecutor argued that defense counsel was muddying the waters with his experts. The trial court upheld Fears's objection but did not admonish the jury. The State's suggestion that this was a comment on the "amount of money paid" [Appellee's Brief at 11] is not supported by the record; the prosecutor was arguing that defense counsel was trying to confuse jurors with expert opinion, not that the defense experts might be biased because they were paid.[51] The prosecutor repeatedly stated that Fears had bought a defense by calling expert witnesses—in fact,

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[49] *DeRosa*, 89 P.3d at 1144; *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1220- 21; *Stout v. State*, 1984 OK CR 94, 693 P.2d 617, 627.

[50] *See Duckett v. State*, 1995 OK CR 61, 919 P.2d 7, 19. We recognize that *Duckett* has no precential value, but it is persuasive on this issue.

almost his last statement to the jury was, "I submit to you the defendant cannot buy his way out of these murders." While the trial court overruled the objection to that comment, Fears's first objection to the same comment, made earlier in argument, was upheld. This Court has never condoned a claim in argument that a defendant attempted to buy his way out of a criminal conviction,[52] and the comments were error under any standard of review. The prosecutor noted that, while defense experts were paid, the State's witnesses "paid their price in blood" and, after the defense objection was sustained, that they "paid their price in pain." Fears's objection was again sustained. This argument was only partially supported by the evidence; of course, some witnesses for the State were badly injured or described seeing Wells and Spangler die, many of the State's victim witnesses were not injured and the police and expert witness were paid for their time. In addition, this argument encouraged jurors to base their verdicts on sympathy for the victims, not (as the State suggests) to consider the evidence that the experts were paid when weighing their credibility. We have held that, while the State may argue inferences from the evidence, the guilt stage of trial is no place for even subtle appeals to sympathy for the victims.[53]

The trial court erred in overruling Fears's continuing objections to a particularly damaging line of argument. The prosecutor began, "Why are we

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[51] This characterization is supported by other argument, discussed above, which explicitly stated that defense counsel was trying to confuse the jury and that the experts were merely mouthing "psycho-babble" which obscured the facts of the case.

[52] *See Martinez v. State*, 1999 OK CR 33, 984 P.2d 813, 826 (condemning as "clearly improper" argument that the defendant paid an expert to testify as instructed for the defense).

[53] *Garrison v. State*, 2004 OK CR 35, 103 P.3d 590, 610-11; *Spears*, 900 P.2d at 445.

here. What are we doing. We know he did it. The issue is insanity, obviously. Defendant has a right to a trial. He has a right to present his defenses. He's exercising that right to trial, and that's fine and dandy. I'm glad he is. Folks, what ever happened to people taking responsibility for their actions." [Tr. VII at 956] When Fears objected, the prosecutor said, "Previous sentence I said he had the right to trial and he's exercising it and that's great." After the objection was overruled the prosecutor continued for two more paragraphs to discuss accountability, trying to get out of the consequences of one's actions, passing the blame, and abandoning the truth. Taking the comments as a whole, the prosecutor clearly suggested that Fears should not have exercised his constitutional right to a jury trial. This right is at the very foundation of the privileges afforded every citizen of this state and country.[54] The prosecutor paid lip service to this right, while eviscerating Fears's decision to have a jury hear his case, by noting that the right existed. This Court should not condone this "magic words" tactic. The State claims this argument was not error because the prosecutor used the magic words and then contrasted the "difference between raising a legitimate insanity defense and trying to use such a defense to avoid responsibility for one's actions." [Appellee's Brief at 12] This makes no sense in light of the evidence presented. There is no question that Fears's insanity defense was legitimate; all four experts who testified agreed that Fears was seriously mentally ill, and three believed he met the legal definition for insanity. The fact that the prosecutors may not have believed,

[54] See Okl. Const. art. 2, § 20; U.S.Const. amend. VI.

despite their own expert's opinion, that Fears was mentally ill or insane does not justify this argument.[55]

Fears correctly claims that the prosecutor gave his personal opinion about the proper outcome of the case. The prosecutor ended his argument by stating that justice required a finding of guilt and sentences of life without parole for the murders of Wells and Spangler, and maximum sentences on the remaining counts. He said that, if jurors believed Fears was insane at the time of the crimes, the State had failed and the "manipulation of the facts by the defense has prevailed." Fears's objection was sustained and the jury admonished. However, the prosecutor continued in the same vein, "[I]f he's found not guilty by reason of insanity, I submit to you justice took a very, very slap [sic] right square in the face." [Tr. VII at 970] Fears's objection was overruled. We have condemned similar arguments in previous cases.[56] The State apparently concedes the specific claim that the argument about "justice" was improper, merely suggesting the prosecutor was arguing the State's view and any error was cured when the objection was sustained and the jury admonished. The State suggests the "slap in the face" comment was "simply

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[55] The prosecutor's comments and arguments throughout trial, including pretrial matters and conversations at the bench, indicate that prosecutors rejected not only Fears's insanity defense but his claim of mental illness.

[56] In the context of capital cases, we have warned prosecutors not to argue that the only just verdict was the death penalty, that the facts justified only the harshest possible punishment, and that the system, the victims, and justice required the most severe punishment. *Malicoat v. State*, 2000 OK CR 1, 992 P.2d 383, 402; *Le v. State*, 1997 OK CR 55, 947 P.2d 535, 555; *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1220; *Brown v. State*, 1988 OK CR 59, 753 P.2d 908, 913. These improper statements took the form of personal opinion, and prosecutors here did not, as in some previous cases, mitigate this error by reminding jurors that punishment was up to them. *See Harris v. State*, 2004 OK CR 1, 84 P.3d 731, 753; *Lockett v. State*, 2002 OK CR 30, 53 P.3d 418, 425, *cert. denied*, 538 U.S. 982, 123 S.Ct. 1794, 155 L.Ed.2d 673 (2003).

another way of stating that the evidence supported a guilty verdict" [Appellee's Brief at 16], without addressing the argument that it is, in fact, an improper way to make that claim.

Fears does not specifically raise this, but we are compelled to note one further very troubling instance of prosecutorial misconduct. Both prosecutors, in first and last closing, seriously misstated the law on the insanity defense. The law provides a person may be found not guilty by reason of insanity if he does not know or understand the consequences of his actions, *or* if he cannot distinguish between right and wrong at the time of the offense.[57] One prosecutor argued that jurors must find Fears had proved he did not know right from wrong, *and* that he did not understand the consequences of his actions. Fears did object to this misstatement and the prosecutor read the instruction verbatim, but then continued to misstate the law in argument. [Tr. VII 919, 922] The second prosecutor noted that the instruction was worded in the disjunctive, but then argued Fears's experts could not give an opinion as to both parts of the definition, and Fears could not prove he met both criteria. [Tr. VII at 952-53] Fears did not object to these statements. However, despite the fact that the jury was properly instructed on the application of the insanity defense, they rise to the level of plain error. Fears was not required to raise a reasonable doubt concerning both clauses of the definition, and he did not attempt to do so. The clear consensus among the experts was that Fears knew the consequences of his actions – that is, he knew he was shooting people and

[57] *Ullery v. State*, 1999 OK CR 36, 988 P.2d 332, 348.

they were likely to die. Fears claimed that he could not distinguish right from wrong at the time he was shooting. Fears could never have proved the insanity defense as prosecutors defined it to the jury. In combination with the other improper argument, and given the clear weight of the evidence (see Proposition V), these misstatements of law deprived Fears of a substantial statutory right.[58]

In Proposition II, Fears claims prosecutors erred in presenting a witness and witness questioning. Using the standard of review above, we find merit to the claims.

Bethany Caughman, two at the time of the crimes, was hit by some of the shotgun pellets from the shot which injured her father, Greg, as the shooting spree began. Greg, the first witness, testified that Bethany was near him when he was shot and was hit by pellets. Prosecutors initially endorsed Bethany, who was four years old by the time of trial, as a witness. However, they neither provided a witness statement for her nor included her in the list of witnesses the State expected to call at trial. Early in the trial, immediately after emotional eyewitness testimony regarding Patsy Wells's shooting and death, the State called four-year-old Bethany Caughman. As she approached the witness stand Fears objected, asking for an *in camera* hearing to determine whether she could remember and testify to events occurring when she was two. Prosecutors immediately offered to wait until later to call the witness and she

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[58] 20 O.S.2001, 3001.1. This Court has held, in an opinion answering a certified question of law, that improper instruction on this issue ("and" vs. "or") is not reversible error where the weight of the evidence shows that no reasonable jury would have found the defendant sane if correctly instructed. *Ellis v. Ward*, 2000 OK CR 18, 13 P.3d 985, 987. That is not the case here (see Proposition V).

left the courtroom. Fears moved for a mistrial, arguing that the only possible reason to call and display a four-year-old witness was to improperly influence the jury. The trial court denied the motion. No hearing was held, and Bethany Caughman was never called to testify.

The record clearly supports Fears's claim of error. At the least, this was a discovery violation. Prosecutors failed to include Bethany Caughman on the State's list of trial witnesses and did not turn over a summary of her expected testimony. The State argues that Fears was not prejudiced by any discovery violation, as the girl did not testify. This neatly avoids addressing Fears's main point: that he was prejudiced when the jury saw a little girl victim, who was obviously very young at the time of the crimes, approach the witness stand. Fears claims the prosecutors never intended to have Bethany testify, but merely wished to display her to tug at jurors' heartstrings. This is a grave accusation, and one hesitates to endorse it. However, the record of the entire trial suggests this surmise is not only correct, but is the only possible reading of the situation. Throughout, prosecutors emphasized the terrible and tragic facts of this case, including the number and age ranges of the victims, the pain, shock and horror felt by the surviving victims and probably felt by the deceased, and the consequences of Fears's reprehensible actions. They introduced pictures of every victim, alive and dead, along with pictures of bloody accessories and gunshot vehicles, autopsy reports, and the deceased

victims' clothing.[59] Prosecutors asked every victim witness – particularly the drive-by victims – if they had children or a family, whether or not any children or family members were present at that victim's shooting incident. Discovery orders in this case were strictly followed, but prosecutors neither included Bethany in the trial witnesses nor provided a summary of her expected testimony, as they did for every witness actually called. When Fears objected to Bethany's testimony, prosecutors immediately offered to wait to call her. The trial court didn't even have time to rule on Fears's motion for an *in camera* hearing. Prosecutors made no move to have such a hearing and never called Bethany. These actions, taken together with the prosecutor's method of presenting the case, including excesses in argument and the very personal tone often reflected in the record, support a conclusion that prosecutors used Bethany Caughman for an improper purpose.

Fears also complains correctly that prosecutors attempted to ridicule his insanity defense during their examination of witnesses. Fears told officers that the aliens controlling him had told him to kill as many people as he could, as quickly as he could. Prosecutors began during voir dire, and continued for the first few witnesses, referring to whether Fears talked about little green men or Mars. The trial court sustained some of Fears's objections and overruled some. The State admits that the prosecutor "could have more artfully posed its questions" but argues the State was merely attacking the defense theory of

[59] We do not suggest these items were inadmissible, or that their use would be inappropriate. However, their introduction, in a case where the defendant did not contest any facts regarding any of the crimes, shows the way in which prosecutors chose to focus the evidence.

insanity. On the contrary, in combination with the State's closing argument and tone throughout the proceedings the record shows these comments were intended as a personal attack on the defendant and counsel, and were intended to make fun of the defense. Ordinarily any prejudice would have been cured in the instances where the objections were sustained. However, not all the objections were sustained, and prosecutors returned to the theme in closing argument. The only issue in this case was Fears's sanity. Given the extremely thin margin of evidence offered to support a finding that Fears was sane, prosecutors spent an inordinate amount of time personally attacking Fears, his witnesses, and counsel. In combination with the errors raised in Proposition I, the misconduct here casts serious doubt on the jury's finding that Fears was not insane at the time of the crimes. Error in this proposition contributes to our resolution of this case.

Finally, we turn to Fears's claim in Proposition V that the evidence was insufficient to show that he was sane at the time of the commission of the crimes beyond a reasonable doubt. Oklahoma law provides that mentally ill persons are not capable of committing crimes "upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness."[60] This Court has interpreted this statute to require proof that mental illness so impairs a defendant's judgment that, at the time of the crimes, he was incapable of appreciating the nature and consequences of his

[60] 21 O.S.2001, § 152.

acts or knowing right from wrong.[61] Criminal defendants in Oklahoma are presumed sane.[62] A defendant must first raise a reasonable doubt regarding his sanity; if he succeeds, the presumption ends and the State has the burden to prove the defendant is sane beyond a reasonable doubt.[63] Fears met his initial burden, to show that he could not distinguish between right and wrong at the time of the crimes, and the State was required to prove beyond a reasonable doubt that Fears did know right from wrong at the time.[64] Whether the State met this burden is a question of fact for the jury, which may disregard expert opinions entirely and find sanity from testimony of lay witnesses.[65] As the evidence supporting Fears's sanity is so sparse, we analyze the evidence both as presented and in the context of the prosecution's arguments to the jury regarding Fears's sanity.

There was little expert disagreement. Every expert witness agreed Fears is mentally ill.[66] All four experts – including Dr. Hall, the State's forensic psychologist – testified that Fears is seriously schizophrenic and has probably been so since childhood. While Dr. Hall thought Fears had been exaggerating his symptoms on one test administered by Dr. Gelbort, she testified that he was not faking, but was seriously mentally ill. [Tr. VI at 870-71] Drs. Gelbort and Halleck used the term "crazy", one experts normally avoid like the plague.

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[61] *Ullery*, 988 P.2d at 348; *Valdez v. State*, 1995 OK CR 18, 900 P.2d 363, 375.
[62] *Cheney v. State*, 1995 OK CR 72, 909 P.2d 74, 85.
[63] *Van White v. State*, 1999 OK CR 10, 990 P.2d 253, 275; *Cheney*, 909 P.2d at 85.
[64] *Cheney*, 909 P.2d at 85.
[65] *Ullery*, 988 P.2d at 349; *McGregor v. State*, 1994 OK CR 71, 885 P.2d 1366, 1376.
[66] Dr. Gelbort, for the defense, is a clinical neuropsychologist. Dr. Halleck, for the defense, is a psychiatrist specializing in schizophrenia. Dr. John Call, for the defense, is a forensic psychologist. Dr. Hall, for the State, is a forensic psychologist.

One defense expert, Dr. Gelbort, examined Fears shortly after the crimes, before he had begun taking medication. A second defense expert, Dr. Halleck, examined him shortly after he had begun treatment. The last defense expert, Dr. John Call, and the State's expert, Dr. Hall, examined him after his treatment was well under way. All the experts agreed about certain characteristics of Fears's mental illness. All agreed that, during the crimes, Fears suffered from a delusion that he was being controlled by aliens, who had instructed him to shoot and kill as many people as he could in as brief a time period as possible, and that he expected some consequence or reward from the aliens as a result. Fears initially told Drs. Halleck and Hall he had intended to kill himself, but followed the aliens' instructions instead. Fears told Drs. Halleck and Hall that he had homicidal thoughts while talking with friends the night before the crimes. He told the doctors that after that evening he felt he was transformed, and that he wanted to kill himself, but then the aliens instructed him to start killing other people. Fears told Drs. Gelbort, Halleck and Hall, as well as Trooper Sharp, that, shortly before the crimes, he asked a friend whether he wanted to join Fears on a ride to oblivion. Fears also indicated during the psychiatric interviews that he thought he was a monster.

There was no expert disagreement regarding Fears's ability, as Dr. Gelbort put it, to "respect and respond to the physical laws of the world." [Tr. VI at 776] The experts agreed that a schizophrenic in the grip of a severe delusion could engage in everyday behavior. Such a person can drive, including checking for oncoming traffic; can try to avoid recognition; can know

that it is dangerous for children to play in the street; and can understand that being shot may hurt. Such a person may know where he is and what time it is. He can use proper grammar, hold a job, brush his teeth and wash his hair. Evidence also showed that, in the months before the crimes, Fears had taken large quantities of Coricidin, an over-the-counter cold medication containing dextromethorphan, an hallucinogenic. Dr. Hall testified that Fears told her the drug expanded his mind, and he believed that combining Coricidin with violent images from movies enhanced his violent fantasies. [Tr. VI at 856-57] The experts, including the State's expert, agreed that Coricidin abuse could exacerbate Fears's schizophrenic symptoms, but would not itself have caused his mental illness or provided an explanation other than mental illness for the crimes.

All three defense experts concluded that Fears was unable to distinguish right from wrong at the time of the crimes, while Dr. Hall disagreed. All the experts agreed that Fears did not apply the concepts of right and wrong to his behavior at the time of the crimes. Dr Gelbort testified that right and wrong, as concepts, had no meaning to Fears during the crimes. [Tr. VI at 780] In Dr. Gelbort's opinion, Fears's subsequent conversations suggesting he knew what he had done was against the law did not mean he knew right from wrong during the crimes. [Tr. VI at 781] Dr. Halleck testified Fears was compelled to act as he did; Fears told him he had no consciousness of right and wrong during the crimes, and that the issue was the furthest thing from his mind and never occurred to him. [Tr. VI at 827, 838] Dr. Halleck also distinguished

between the knowledge of right and wrong at the time of the shootings and Fears's subsequent apparent knowledge that his acts were not legal. Dr. Call testified that Fears did not know right from wrong at the time of the crimes because right and wrong did not apply to him, based on his delusion. [Tr. VI at 895-96] In Dr. Call's opinion, the fact that Fears knew his actions might result in legal consequences – such as arrest – did not mean he knew right from wrong, because his delusion that he was a superior being controlled by aliens was so great that he did not recognize right from wrong; he "could not conform his behavior to society's rules". [Tr. VI at 896-97] Fears spent more time talking to Dr. Hall, the State's expert, about good and evil than about right and wrong, and she distinguished between the two concepts. [Tr. VI at 859] Dr. Hall concluded that "he knew the difference between good and evil or right and wrong but felt he was devoid of the ability to have any feeling about that." [Tr. VI 857] She was testifying not about Fears's comments regarding the crimes, but about his feelings before the crimes occurred, as he began to believe he had no conscience. [Tr. VI at 857] Dr. Hall also testified that, after the fact and on medication, Fears told her he knew his actions were wrong in the eyes of society and the law and he understood he would have to pay the consequences for that. She went on to say that, at the time of the crimes, Fears was operating outside society's morality. [Tr. VI at 872] Drs. Gelbort and Halleck agreed that Fears had his own value system that was rigid and required him to live to a high standard – for example, not missing work or school – but that in the grip of his delusion he was not in contact with that

system. Dr. Hall would not apply the concept of a value system to Fears, because she concluded that he did not live by ordinary values of right and wrong unless he chose to. [Tr. VI at 859]

No lay witness specifically testified that Fears was sane. Fears called several friends and family members who testified about his bizarre statements and actions in the months and years preceding the crime. Fears's father testified that Fears had always been withdrawn and had not fit in well, but that he had not suspected a mental illness. Fears's sister testified that she and other family members had unsuccessfully tried to discuss Fears's condition with his mother, but that his mother was afraid he might be hospitalized or put on medication if she sought medical help for him. His aunt testified that a few months before the crimes, Daniel had changed, and told her he heard voices. His aunt had spoken to Daniel's mother, who had also talked with another aunt. She testified that Mrs. Fears would not take Daniel to a doctor because she was afraid he would be medicated and she thought he might be getting better. One school friend testified Daniel told him he thought something was wrong with him and he was afraid he was going crazy. Another school friend and her mother testified about a highly peculiar incident earlier in the same year, where Fears called himself by a different name, brandished a machete, threatened others and himself and exhibited paranoia, and talked in a different accent. The friend testified that Daniel was liked in school and people thought he was intelligent, but believed he had something wrong mentally.

The State offered lay testimony from witnesses who encountered Fears in his father's neighborhood. Fears's initial encounter with the Caughmans was belligerent. Fears drove too fast into the neighborhood, almost hit a child, and told Greg Caughman twice to watch his kids. Fears mumbled as he walked away. Greg did not hear Fears say anything out of the ordinary. Jill Caughman heard most of this exchange, and testified that Fears was mumbling things she could not understand, although she could hear them, after the exchange of words with Greg. Both Greg and Jill testified that Fears did not linger as he talked with Greg, but walked purposefully to the back of his father's house, where they immediately heard the noise he made as he broke in. After Fears shot Patsy Wells, she tried to rise. Fears shot her again, and shot Elvie Wells. Ashley Hobbs, their granddaughter, heard him ask who wants to get up now. She also heard him mumbling other things she couldn't understand, but they sounded to her like something memorized, scripture or military in nature. After he was shot, Elvie Wells heard Fears say, "I bet you don't get up now."[67] He also heard Fears say something he couldn't understand, which sounded rhythmic, like something rehearsed.

The State also offered evidence from several police officers who encountered Fears after the shooting ended. When Fears wrecked his truck after the police chase, he threw out his weapon and ammunition and came out with his hands up. He was bleeding from his forehead. Officer Peters testified

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[67] In argument, prosecutors noted this, then said Fears went on "in a proud and boastful manner who will stand up to me now." [Tr. VII at 913] No evidence supports this statement;

that Fears lay on the ground but Deputy Coleman said they had to take him down. When Deputy Coleman approached him, Fears asked if Coleman was taking him where he was going. Coleman did not hear Fears say anything else out of the ordinary. After he was handcuffed, he told Officer Peters, "I'm glad you were there to help me." [Tr. IV at 515] Agent Lyons talked with Fears at the hospital after his arrest. She was surprised to discover that he was familiar with police pursuit procedure, and testified that he was cooperative and, for the most part, coherent. However, Fears mumbled and said several things that Lyons could not understand and had a dazed look that, she testified, could have been a sign of mental illness. Several officers were struck by Fears's calm, unemotional demeanor. While he was being treated at the hospital, Fears said he deserved the death penalty.

Trooper Sharp arrested Fears and transported him to the station, and had the most substantial conversation with Fears of any witness. Sharp testified that, although Fears was cooperative and oriented as to time and place, and appeared coherent, he talked about aliens, rambled from one subject to the next, and made statements Sharp could not understand, that he thought were not normal. Fears said aliens were controlling him and messing with his brain. [Tr. V at 608] Regarding Patsy Wells's death, Fears told Sharp that he didn't want to end up like his father, though he knew he already was. He told Sharp he shot the victims at the car dealership to make it worthwhile.

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witnesses did not testify they heard Fears say that, and did not say Fears was either proud or boastful in his delivery.

[Tr. V at 600] Fears also told Sharp that he was surprised his victims screamed and were not killed immediately when he shot them. In this context, he said he was going to have police kill him, but backed out because he knew it would hurt. He asked whether Sharp would have shot him in the chest and head – a "double tap" – at the end of the chase. He asked Sharp how it felt to be sitting next to him. [Tr. V at 601] Sharp agreed that Fears's withdrawn aspect and rambling conversation were consistent with his training in identifying mental illness.[68] [Tr. V at 609-10]

Prosecutors did not argue that witnesses testified Fears was sane. Rather, the State vigorously argued at trial, and on appeal, that Fears's actions, and some of his comments to officers after his arrest, showed he was sane. In so arguing, the State attempts to greatly expand the commonly understood meaning of the requirement that a defendant know right from wrong. This requirement refers to a moral compass – the understanding that some actions are morally or ethically correct according to religious or societal norms, and others are not. Prosecutors claimed Fears was sane because he knew that children should not be playing in the street, and admonished Greg Caughman to watch his kids. This is a safety issue, not a moral imperative;

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[68] When discussing the circumstances of his stop and surrender, Fears wondered whether he would get "gassed". While prosecutors and the State assert that this meant Fears knew he could get the death penalty, and thus knew his actions were wrong, that is speculation. No evidence at trial suggested that is what Fears meant by this statement. The officer testified that he had heard that term in the past referring to the use of a gas chamber as punishment for a crime. However, Oklahoma has never had a gas chamber. At seventeen, Fears was highly unlikely to associate being "gassed" with a death sentence. Fears was obsessed with police procedure and talking about what police might have done when they stopped him. In context, his comment most likely referred to tear gas, pepper gas, or Mace, all gaseous substances which, in common understanding, police may use when stopping or arresting a suspect.

the experts agreed that schizophrenics in the grip of a delusion can still function effectively in the world and apply basic notions of safety. Prosecutors pointed to Fears's ability to drive and check for traffic, and his possible attempts to conceal his identity (including shooting Elvie Wells from the shadows, possibly concealing his license plate with his tailgate, and putting on his jacket to hide his shotgun) as evidence that he was sane. Of course, as the experts noted, ability to carry out these actions did not mean Fears knew right from wrong.

Prosecutors also argued Fears was sane because he surrendered, rather than be killed by police, since he knew it would hurt. Again, in context, the record shows that Fears appears to have realized being killed by police would hurt only after hearing his victims scream, rather than fall dead immediately when they were shot. This does not suggest a firm grip on reality. Prosecutors argued his surrender showed he knew what he was doing, and therefore he knew right from wrong. These things do not automatically follow. Everyone agreed that Fears knew to some extent what he was doing, both in shooting and in surrendering. However, if his original plan, carrying out the aliens' instructions, included being shot by police (as, according to testimony, it may have), then revising that plan to include surrender does not show that Fears knew his actions were wrong. It merely shows he could make and revise a plan to carry out his delusion; Drs. Gelbort, Halleck and Hall agreed this can occur as a schizophrenic acts on a delusion.

Given the meager evidence of sanity, prosecutors consistently directed the jury's attention away from the issue of knowledge of right and wrong. Prosecutors argued throughout that Fears's entire sequence of actions showed that he was not insane, because he knew what he was doing when he drove, shot, and surrendered. Whether Fears knew what he was doing as he acted does not mean that he knew that what he was doing was wrong. That was the issue in this trial, and the evidence does not support the jury's conclusion that he did. Prosecutors argued, and the State asserts on appeal, that Fears knew the consequences of his actions because his statements show he knew he was killing people. Again, this was not the issue in this trial. Fears was only required to provide proof beyond a reasonable doubt of one prong of the test for insanity. Fears never claimed he did not know the consequences of his actions. He continues to claim, on appeal as at trial, that he did not know right from wrong during the crimes. In final closing argument, the prosecutor told jurors he would discuss the evidence showing Fears knew right from wrong. Instead, he talked for six pages about how the defense was bought and paid for (see Proposition I), how Fears had lied to get out of trouble, how Fears believed he was smarter than everyone else, and how he was trying to make a name for himself. Only after that interlude, which was rife with error, did the prosecutor spend one paragraph on the evidence he said supported a finding Fears knew right from wrong: (a) knowing children should not be in the road; (b) concealing his identity and hiding; (c) fleeing the first crime scene; (d) checking for traffic as he drove and obeying traffic lane laws; (e) surrendering

to police. Finally, the prosecutor argued, Fears had to know right from wrong because he shot his victims in the back of the head and the face with a shotgun, and the recognition that killing another human is wrong is "inherent in the human psyche." [Tr. VII at 966] This was precisely the issue – whether Fears's mind was capable of understanding that what he did was wrong at the time of the crimes. Rather than attempting to show by the evidence that Fears was sane, the prosecutor encouraged jurors to disregard that evidence and Fears's claim of insanity, since a normal person would know that Fears's actions were wrong.

The record, including comments, argument, and questioning throughout the trial process, reflects that the prosecutors were personally offended by Fears's plea of not guilty by reason of insanity. The tone, tenor, and words of the closing arguments reflect the prosecutors' opinion that Fears had committed terrible crimes and was trying to get out of the consequences. The prosecutors argued that Fears meant to kill himself, and only changed his mind after the encounter with Greg Caughman. It was this encounter, they argued, and not any mental disability, which made Fears angry and convinced him to go on an approximately fifteen-mile, nineteen-victim shooting spree. Looked at objectively, this simply is not supported by the record. Even Greg and Jill Caughman testified that Fears did not appear particularly angry and did not stay to fight, even after invited to do so by Greg.

Prosecutors also argued that Fears acted out of vanity, because he had always said he would go crazy and go on a shooting spree. Dr. Hall testified

that Fears told her this while explaining the shooting spree. [Tr. VI at 873] However, no other witness testified that Fears in fact had ever said anything like that, and one close friend testified he had not. Fears also told Dr. Hall that, since childhood, he had had violent fantasies about killing people, including blowing up the school. This statement was in the context of his schizophrenia. Assuming the statement was true and taking the prosecutors' argument at face value, it still does not resolve the question of sanity. If Fears planned this shooting spree in the grip of a schizophrenic delusion, the fact that he talked about it first would not conclusively prove anything about his ability to distinguish right from wrong.

Fears raised a reasonable doubt as to his sanity. Several lay witnesses testified that Fears had serious mental problems and made bizarre or unusual statements before, during and after the crimes. Only one witness testified to a completely unremarkable conversation, and that was when Fears gave his name, address, etc., at booking. Four experts said Fears was (a) seriously mentally ill; (b) acting under a severe schizophrenic delusion at the time of the crimes; and (c) unable to apply the concepts of right and wrong to his actions at the time of the crimes. One expert testified that, nevertheless, she believed Fears knew right from wrong and chose not to apply that system of morality to his actions. The State relied on this opinion, and on Fears's acts themselves and his statements, to show that he knew right from wrong. However, all the experts agreed that many of those actions had no bearing on Fears's ability to distinguish right from wrong, as they involved instead Fears's ability to

function in the real world while in the grip of a delusion. Fears's statements regarding punishment are ambiguous on the issue of right or wrong; some may indicate that Fears knew what he did was wrong after the fact, and some may or may not refer to the issue at all, but none clearly show he knew his actions were wrong when he did them. Taking all the evidence in the light most favorable to the State, it is insufficient to show beyond a reasonable doubt that Fears was sane. This proposition should be granted and the case remanded for entry of a not guilty by reason of insanity verdict.

Fears does not formally include a Proposition VI. However, in his conclusion he claims that cumulative error requires relief. We have found reversible error for prosecutorial misconduct in Propositions I and II, reversible error in instruction in Proposition IV, and insufficient evidence to support the verdict in Proposition V. These errors, standing alone and in accumulation, require relief.

Decision

The Judgment and Sentence of the District Court is **REVERSED** and **REMANDED** for **ENTRY OF A VERDICT OF NOT GUILTY BY REASON OF INSANITY**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR IN RESULTS
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	SPECIALLY CONCUR

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART, DISSENT IN PART

I agree the issue of prosecutorial misconduct raised in proposition one requires relief. The prosecutor repeatedly crossed over the line of what could even arguably be called proper argument and, although I do not agree with all the syntax and analysis in the opinion, I do agree the cumulative effect of those comments cannot be said to be harmless in this case.

Also, I am also not opposed, in theory, to the idea of informing a jury of the consequences of a verdict of not guilty by reason of insanity, as addressed in proposition four. The opinion relies on the fact the Oklahoma Legislature passed "Truth in Sentencing" legislation to require giving an instruction on the procedure for someone found not guilty by reason of insanity. However, the opinion fails to mention that legislation was repealed shortly after it was passed. For that reason, our previous decision is still good, valid law. *See, Ullery v. State*, 1999 OK CR 36, 988 P.2d 352. Regardless, proper instruction, crafted by the Court of Criminal Appeals' OUJI-CR Instruction Committee, would likely be useful in assisting jurors with their decision and help prevent verdicts from being based upon fears of what might conceivably happen if they do not convict.

Therefore, I concur with the Court's opinion—to the extent that it grants relief on these two issues. But I part ways with the Court's resolution of proposition five, insufficiency of the evidence regarding Appellant's claimed

insanity at the time, and I strongly dissent to the analysis of that issue and the remedy the Court fashions.

The proper remedy in this case is to reverse the judgment and sentence and then remand the case for a new trial. In that way, the questions of fact may be decided by a jury of the defendant's peers, rather than by a few judges who never saw the defendant or witnesses testify.

Here, eerily similar to the "sleight of hand" analysis recently used by the Court in reviewing mental retardation claims, the Court claims to be using a deferential *Spuehler*-based review. Thus, the Court would ask, after viewing the evidence in the light most favorable to the prevailing party (here, the State) and accepting all reasonable inferences and credibility choices that tend to support the jury's verdict (here, that Appellant was sane at the time of the trial), can we say that any rational trier of fact *could have found* Appellant sane when the crime occurred? *See Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

But a close reading of the Court's opinion demonstrates that what is actually happening here is *de novo* review, i.e., the Court is reviewing the facts as though no jurors had been involved, substituting its own view without giving proper deference to the jury's factual determinations.

The question of insanity is primarily a factual issue. The only legal component of that decision is the legal definition for insanity. Jurors take the factual evidence presented and make a determination of whether or not it fits within the legal definition, under proper instructions.

Judge Chapel's opinion in *Valdez v. State*, 1995 OK CR 18, 900 P.2d 363, 376 makes that point clear:

> Once the trial court makes the legal determination that the defendant has raised a reasonable doubt as to his or her sanity, the sanity issue becomes "a question of fact for the sole determination of the jury, ... [which] must consider all of the evidence presented, not merely the testimony of the expert witnesses...." [footnote omitted] In reviewing the jury's conclusion, this Court "will [neither] inquire into the credibility of the witnesses nor weigh conflicting testimony." [footnote omitted] Accordingly, we must uphold the jury's finding if there was sufficient evidence from which a rational trier of fact could have concluded that [the defendant] was sane when he murdered [the victim]."

(parentheticals added.) Judge Chapel later reiterated those same positions in *Cheney v. State*, 1995 OK CR 72, 909 P.2d 74, 85-86:

> "It is a well established rule that the question of whether the State has carried its burden of proving the defendant's sanity at the time of the crime is a question of fact for the sole determination of the jury and where there is any evidence tending to support its finding, it is not the province of the appellate court to weigh the same." [footnote omitted] The State can disprove insanity by lay testimony as well as expert testimony, and it is within the province of the jury to disregard the medical evidence and give greater weight to the lay testimony.

Here, however, the Court's Opinion does not take a deferential stance, but instead takes personal positions on witness credibility and weighs conflicting testimony. That is the sole responsibility of the jury under our Constitution.

The principals are not new. In *Wiswell v. State*, 55 Okl.Cr. 254, 29 P.2d 134 (Okl.Cr.1934), the Court laid out similar ideals long ago:

> It is a fixed and settled rule that this court will not disturb a judgment, when to do so it must weigh the evidence and pass on the credibility of the witnesses. Those questions are for the jury.

> The rule has its basis in reason. The jury sees the witnesses, observes their demeanor and appearance on the stand, their candor and fairness or the lack thereof, and is in a better position to determine the weight and value of the evidence and the credibility of the witness than any appellate court could be. It was for them to say whether the witnesses for the state identifying the defendants as the persons committing the crime or the testimony of defendants and their witnesses on the question of alibi was true. Certainly, if the jury believed the state's testimony and did not believe the defendants' testimony tending to prove an alibi, as from the verdict returned they must have done, this court is not justified in interfering with the judgment.

While we are talking about a legal defense, not an alibi, in this case, the rules regarding a jury's factual determinations are the same.

This issue caused serious debate during the formation of our Federal Constitution. To alleviate the fears an appellate court would abuse its power and overturn the fact finding of a jury, Alexander Hamilton wrote in The Federalist No. 81

> But it does not follow that the re-examination of a fact once ascertained by a jury, will be permitted in the supreme court. Why may it not be said, with the strictest propriety, when a writ of error is brought from an inferior court to a superior court of law in this state, that the latter has jurisdiction of the fact, as well as the law? It is true it cannot institute a new enquiry concerning the fact, but it takes cognizance of it as it appears upon the record, and pronounces the law arising upon it. This is jurisdiction of both law and fact, nor is it even possible to separate them. . . . I contend therefore on this ground, that the expressions, 'appellate jurisdiction, both as to law and fact,' do not necessarily imply a re-examination in the supreme court of facts decided by juries in the inferior courts.

It is interesting that some 218 years later we must deal with the same fears that Courts will not exercise the self-discipline required to function in their limited role as a part of our Republic. While this Court is well within its role to

interpret and apply the law, it must exercise the self-discipline to be bound by the facts as determined by the trier of fact. If a jury has not been properly instructed on the law as to how they should apply their determination of the facts and evidence in the case, then the proper remedy is to remand the case for retrial under a proper instruction of the law.

Based upon the errors that occurred in this trial and even conceding that Appellant was entitled to an improved jury instruction on the consequences of a not guilty by reason of insanity finding, I would reverse and remand for a new trial. We are not jurors, and it is dangerous when we start believing we are.

LEWIS, JUDGE, SPECIALLY CONCURS:

I cannot concur with the opinion insofar as it takes away from the jury the issue of the appellant's sanity at the time that these horrible crimes were committed. This court's prior opinions have held that this is a jury question. I would reverse this matter due to prosecutorial misconduct for a new trial.