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REPLY ARGUMENT

The State attempts to take to task each and every argument contained in Appellant's Brief with respect to whether the jury was properly instructed, whether Tyler waived his presence at his trial, and the ineffective assistance rendered by trial and appellate counsel. In reply, Appellant now reaffirms that his witness, Robert Tyler, Sr. (his father), clearly heard what former Circuit Judge Ready instructed the jury to do, via the bailiff, and, therefore, his testimony was credible; that Appellant's rights to object to the instruction at issue was denied given that he did not waive his presence when it was given; and that his counsel had a duty, but failed, therein, to inquire into what appeared to be, facially, a due process violation.

A. WITNESS ,WHO HEARD INSTRUCTION, WAS CREDIBLE

While the parties do not dispute that this Court reviews fact determinations of the lower court using a clearly erroneous standard, and that the lower court determines the credibility of witnesses, Appellant's witness, herein, was not, as argued by the State, impeached in reference to his testimony regarding the jury instruction given.

All parties agree that the disputed jury instruction alleged to have been made by former Circuit Judge George Ready was (i.e., according to the witness) as follows: "Go back and tell them do not come out until they can reach a verdict." However, the State failed to acknowledge or observe that the lower court did not analyze whether the **positive** testimony of the witness was either contradicted by other evidence or determined to be improbable, incredible, or unreasonable. Lucedate Veneer Co. v. Rogers, 53 So.2d 69, 75 (1951); Quitman County v. State, 910 So.2d 1032 (Miss. 2005). Unless the testimony failed this test, the evidence could not have be arbitrarily or capricously discredited, disregarded or rejected. Id.

First, George Ready did not contradict the witness with positive testimony and, in fact, no one did. When asked about the instruction, Ready stated, "I could - - like I just testified. I could have told them to continue deliberating. I could have told him to tell them to continue deliberating, especially since Mr. Walls was not present." T. 43. The witness, Robert Tyler, Sr., did not speculate in his affidavit or in his testimony. Second, the testimony of the witness was not improbable, incredible, or unreasonable. When asked if he ever gave the instruction, Ready could only say that he did not think so. T.48. Ready's response here is a far cry from saying that the instruction had never been given. Ready left the door open that the comment could have been made.

At best, the State, in supporting the lower court, could only argue that the witness suffered from, perhaps, **testimonial defects of memory** as to the exact courtroom the trial took place, who was present when the instruction was given, and what bailiff received the jury note and instructed the jury at Ready's direction. If he were confused on these facts—according to the State -- it was reasonable to question whether he had an accurate recollection of what Ready said to the bailiff. Appellee's Brief, p. 8. But the State did not dispute that the witness was present when the instruction was given and in position to hear what was said. The State, during the evidentiary hearing, did not call the trial prosecutor or any other witness to the stand to rebut the witness's testimony.[1]

In an effort to salvage its position, the State points out that the witness erroneously claimed that the jury was actually brought in the courtroom when the disputed instruction was

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[1]While not brought up at the evidentiary hearing, Appellant is not opposed to the Court ordering a further hearing to determine if the jurors can be located and examined solely on what they were instructed to do by the bailiff when they were initially unable to make a decision.

read. Appellee's Brief, p. 7. But here, the State raised an issue of concern not even raised by the lower court and, therefore, this Court should not consider it either. Nevertheless, from the context of his testimony, the witness misspoke, although there was an attempt to clarify his comment on direct examination, as follows:

Q. Now, when you came back into the courtroom at that point in time, who was in the courtroom? Was anybody in the courtroom?
A. Wasn't nobody in the courtroom.
Q. All right.
A. Wasn't nobody in the courtroom then.
Q. And where did you sit again, the same spot?
A. We sat over in the same place.
Q. Who was the next person you saw come in the courtroom?
A. **The jury.**
Q. **The judge?**
A. **The bailiff come in.**
Q. Okay. And from what direction?
A. From the side door.
Q. Which side door?
A. The side door over here.
Q. Okay. And what did you see and what did you hear next?
A. Well, the bailiff called for them to come in.
Q. All right. Did the bailiff go to these double doors?
A. He go to the double doors and call for us to come in.
Q. All right. So you and your wife were already sitting here?
A. We sat here.
Q. Was anybody else sitting in the courtroom at the time the bailiff called for everyone to come in?
A. Well, the girl and her mother came in at a point later.
Q. All right. The alleged victim and her mother–
A. – and her mother came in at a point later.
Q. And where did they sit?
A. They sat on the opposite side.
Q. On this side?
A. Right.
Q. Okay. All right. So what happened next?
A. Well, the bailiff went to the other side door as he was looking for someone.
Q. What other side door, sir?
A. The side door on the right – on the right –on the left. He went to the side door on the left as if he was looking for someone.
Q. Okay.

A. Then he came back.
Q. All right. Now, when you said your left, it seemed like you were going to your right. What side door are you referring to?
A. I'm referring to the — it was a side door in the courtroom on the left side.
Q. On my left side?
A. Right.
Q. Oh, I'm sorry. Okay. All right. My left; your right?
A. Right.
Q. I understand. I apologize. All right. So what happened next?
A. And the bailiff came back and passed the judge a note.
Q. Okay. All right.
A. And the judge looked at it. It might have been two or three seconds, and he said, "Go back and tell them do not come out until they have a verdict."

The point here is that when the witness earlier said that the jury came in, he was then asked, in essence, if he meant that the "judge came in." Thereafter, he clarified that the "bailiff" and others had come in and then stated what the bailiff and judge did with respect to the jury note. The Court is reminded that in his sworn affidavit, the witness clearly exclaimed that the jury was not there when the jury instruction was given. Again, the witness was not **impeached** as to where he was at the time the instruction was given and what he heard.

Further, there was no proof, at the evidentiary hearing, that the timing or the sequence of events that lead to the witness's recollection developed out of some type of sinister plot to defraud the court. There was no proof that he, Robert Tyler, Sr., had a motive to be untruthful or if he even knew the significance of the instruction at the time he heard it. Recall that he, once again, was not questioned or challenged by the State at all as to these issues.

Finally, the lower court's transcript would have been the best proof available to dispute the witness's recollection. To deny Appellant relief because of a lack thereof would be to penalize him for a deficiency not caused nor controlled by him. Given that Appellant produced the best proof available at the evidentiary hearing that was not discredited, unreliable, or

unreasonable, this Court should grant Appellant the relief sought.

B. LACK OF PRESENCE OF APPELLANT DURING EX PARTE JURY INSTRUCTION WAS PREJUDICIAL

As to whether the lower court erred in its finding that Tyler waived his presence has been adequately briefed by the parties. But added to the State's argument was that even if the lower court committed error here, there was no prejudice to Tyler. The only response necessary here is that given Ready's improper jury instruction, the defense was denied the opportunity to object to it and move for a mistrial. Cite ommitted.

C. APPELLATE WAS NOT WITHOUT A REMEDY TO RAISE THE DUE PROCESS VIOLATION

The issue of ineffective assistance of **trial counsel** with respect to not raising the due process violation at trial received significant more attention in Appellant's Brief than that of **appellate counsel**. The latter will, therefore, be discussed very briefly here in direct response to the State's position.

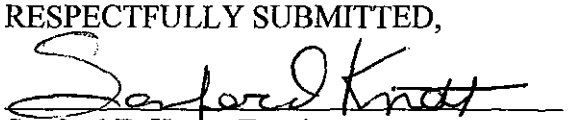
The State concedes that the record was, perhaps, sufficient to raise the due process issue, but that it was insufficient to determine what was said to the jury. Appellee's Brief, p. 14. But without a transcript, and in light of the expressed comments by Ready that he did not give a Sharplin instruction, more was required than just a passive review of the issue by appellate counsel. It is through the examination of the transcript and other parts of the record wherein prejudicial errors are contained, developed, and brought to this Court's attention. Once the warning flags, herein, were raised, appellate counsel could not sit idly by without probing and questioning the clerk's office, court reporter, and even trial counsel as what may have occurred, via writs of mandamus or other remedies, as provided in the Rules of Appellate Procedure. Lack

of inquiry into a due process violation cannot be said to be a strategic decision. Therefore, appellate counsel, too, was ineffective.

CONCLUSION

Recognizing that it is the State's position to uphold judicial decisions on appeal, there is a greater obligation to assure fairness in the justice system. Appellant received a thirty (30) year, day for day, sentence as a result of a trial, part of which, excluded him at a critical stage of the proceedings. Beyond every other argument, Robert Tyler, Jr., did not waive his presence at the trial, was not notified that, at one point, the jury could not reach a decision, did not know his father, Robert Tyler, Sr., was present when the judge instructed the jury until after the trial and appeal proceedings had run, and did not know that the court reporter would not be able to transcribe the critical communication to the jury. What he does know is that he now deserves a fair trial and unless the State can produce, beyond a reasonable doubt, evidence that the jury verdict was not influenced by the judge's comment, the State should join in Appellant's request for relief. Therefore, this Court is asked to grant the relief requested herein and remand the case back to the active trial docket.

RESPECTFULLY SUBMITTED,

By: 

Sanford E. Knott, Esquire,
Attorney for Appellant Robert L. Tyler, Jr.

Of Counsel:
Sanford E. Knott, MSB No. [redacted]
Sanford Knott & Associates, P.A.
P.O. Box 1208
Jackson, Mississippi 39225
Telephone: (601) 355-2000
Facsimile: (601) 355-2600
Email: knottlaw@bellsouth.net

CERTIFICATE OF SERVICE

I, Sanford E. Knott, attorney for Appellant Robert Tyler, do hereby certify that I have on this date mailed via, United States Postal Services, postage prepaid, a true and correct copy of the foregoing to the following:

Office of the District Attorney
365 Losher Street, Suite 210
Hernando, MS 38632

Office of the Attorney General
550 High Street, Ste. 1200
Jackson, MS 39205

So, this the 8th day of April, 2009.

Sanford E. Knott, Esquire