IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI



FRANK SANDERS TIPTON — APPELLANT

VERSUS — NO: 2008-KA-02060-SCT

STATE OF MISSISSIPPI — APPELLEE

APPEALED FROM THE CIRCUIT COURT
OF JACKSON COUNTY, MISSISSIPPI

# APPELLANT'S REPLY BRIEF

(Oral Argument Not Requested)

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**Response I.**
**It is clear under *Russell* and the Mississippi Supreme Court cases which undergird it, that the trial court, through Instruction C-2, instructed the jury that Court Programs, Inc., was, in fact, a contractor providing incarceration services for the City of Gulfport. This was a peremptory instruction on an element of the crime, and as such C-2 amounts to plain and reversible error.**

**It is also clear that the jury recognized and accepted that the trial judge had defined Court Programs as set out above, as evidenced by Exhibit C-2, the note it sent to the judge. When the trial court had the opportunity to clarify the instruction, it failed to do so and left the peremptory instruction intact.**

Q: Was the elemental error which caused the reversal in *Russell* Identical to the error in Court Instruction 2 in Mr. Tipton's Case?

A: Yes.

Here follows the instruction from *Russell v. State*, 832 So.2d 551 (Miss. App. 2002)[1] prefaced by the Court of Appeals's introductory sentence describing it as "serious error", and followed by the court's rationale for reversing Russell's conviction . The Court of Appeals followed Mississippi Supreme Court precedent and reversed because the instruction included a peremptory finding which deemed an element of the crime to have already been found by the trial court and which usurped the jury's power to deliberate on the element to determine whether or not the state had proved it:

> We also recognize that a serious error occurred in the judge's decision to give the State's jury instruction S-1 which reads:
>
> **If you find from the evidence in this case, beyond a reasonable doubt, that on or about the 29th day of**

[1] *Russell* is a case on all fours with Mr. Tipton's, but was not recognized or addressed in Appellee's Brief. It is a Court of Appeals decision, but reaches its conclusion by citing a holding from this Court and it is further supported by years of Mississippi Supreme Court precedent forbidding the granting of peremptory instructions to the state on elements.

**April, 1999, in Rankin County, Mississippi, the Defendant Danny Wayne Russell, did:**

**1. Unlawfully, feloniously, knowingly and intentionally,**

**2. attempt to cause serious bodily injury to Jerri McDaniel, a human being, by repeatedly shocking her with a stunn [sic] gun, *a deadly weapon*;**

**Then you shall find the defendant guilty of the crime of aggravated assault . . . . (emphasis added by the court).**

The instruction listed above is a peremptory instruction since it instructs the jury that a stun gun is indeed a deadly weapon. We find that the judge erred in giving this instruction, and for this reason we reverse and remand.

*Russell* at para. 5

The peremptory language occurs when the participial phrase "a deadly weapon" directly follows and modifies "stun[] gun" to further define stun gun as a deadly weapon. The instruction makes it a given that a stun gun is a deadly weapon, rather than requiring the jury to debate and determine on its own whether the state had proven this element.

Here—again as set out in Mr. Tipton's Appellant's Brief— are the relevant paragraphs of instruction C-2, in which the identical problem of the instruction which caused the reversal of Russell's conviction should cause the reversal of Mr. Tipton's.

**JURY INSTRUCTION C-2**

**The Court instructs the jury that the defendant has been charged by Indictment with the crime of extortion. For you to find him guilty of extortion, you must believe from all the evidence in this case beyond a reasonable doubt that the Defendant did:**

. . .

**2. While employed as a probation officer with Court Programs, Inc., *a contractor providing incarceration services for the City of Gulfport, Mississippi*, and under the color of said office;**

. . .

CP 49, RE 8; emphasis added by Appellant

It is easily seen that the same reversible error in *Russell* is also present in Mr. Tipton's case. The instruction's syntax and the placement of "a contractor providing incarceration

services for the City of Gulfport, Mississippi" improperly remove from jury deliberation the question of whether or not Court Programs, Inc., was "a contractor providing incarceration services for the City of Gulfport, Mississippi." The jury knew that the trial court had done this when it sent out its second question recognizing that "...Court Programs, Inc. *is defined* as "a contractor providing incarceration services for the City of Gulfport, Mississippi..." Exhibit C-2 (RE 9, emphasis added).

Q: Can a Trial Court peremptorily instruct jurors that an element has been found by the Court?

A: No.

This Court has long recognized that the constitution does not allow the granting of peremptory instructions to the state on elements of a crime: "Of course, the constitution precludes a directed verdict for the prosecution on any essential element of the offense charged." *Saucier v. State*, 562 So. 2d 1238 (Miss. 1990). "[T]here is no such thing as a directed verdict for the prosecution in a criminal case. *Hutchinson v. State*, 594 So. 2d 17 (Miss.1992) (addressing , as the Court of Appeals did in *Russell, supra*, the deadly weapon issue. " [T]here is no such thing as a directed verdict of guilty in a criminal case, either on the principal charge in general or on any of its components." *Fairchild v. State*, 459 So.2d at 793, 800-01 (Miss. 1984).

Q: Did trial counsel raise a sufficient objection to the instruction?

A: Yes.

Mr. Tipton does not concede, as Appellee argues, that trial counsel did not make a sufficient objection. That he did is addressed in Argument I. of Appellant's Brief p.24-25. Additionally, throughout trial and during the Motion for a Directed verdict, trial counsel

consistently argued that the state had not proved that Court Programs, Inc., was a contractor that provided *incarceration* services to the City of Gulfport. (Tr. 212). Since the trial court held the element to be already proven—as Instruction C-2 indicates—and since the jury recognized it was bound to accept the trial court's position and follow the court's instruction, trial counsel's argument that the state had not proved this element to the jury is sufficient to allow this court to consider the error and reverse.

Further, as noted in Appellant's Brief, this issue presented itself squarely before the trial court for a ruling (and the trial court did make a ruling) because the court openly recognized while finding fault with S-1 (which the court replaced on its own volition with C-2) that it could not direct a verdict on an element of the crime, even as it did so in crafting C-2. (Tr 289-290. Appellant's Brief p. 25).

Q: Was it Plain Error to give Instruction C-2?
A: Yes.

Whether or not this Court finds the objection sufficient, or the issue properly before the trial court through its own recognition of the principle, this Court's prior holdings allow it to address this issue as plain error. It can do so because this Court has held that directing of a verdict to the state on an element of a crime is so anathema to our system of justice that it is plain and fundamental error. Thus, this Court has both the duty and the power to reverse even if no objection is made to the repugnant instruction.

This Court has found a fundamental right to have a jury fully instructed on the elements of a crime, and therefore reversed as plain error a trial court's failure to instruct the jury properly. *Berry v. State*, 728 So.2d 568, 570 (Miss. 1999), citing *Hunter v. State*, 684 So.2d

625, 636 (Miss. 1996)(Failure to submit to the jury the essential elements of the crime is 'fundamental' error."). Further, this Court, in *Lester v. State*, 744 So.2d 757 (Miss. 1999) considered as plain error an instruction argument that had been abandoned by the appellant in his Petition for a Writ of Certiorari and reversed a conviction because an instruction gave the jury the power to convict even if had not found all elements of the crime charged.

The Appellee cites cases holding, generally, that trial courts enjoy considerable discretion regarding the form and substance of jury instructions. (Appellee's Brief, p. 7-8). No one could argue with that premise. However, there is no case which holds that a trial court's discretionary powers shield it from reversal when it directs a verdict in favor of the state, or grants a peremptory instruction on any element of a criminal charge. To argue this would be absurd.

Q: Did the Jury understand that the trial court had relieved it of the burden of finding the element?

A: Yes.

In the jury's question to the judge (Exhibit C-2), it told the trial court that it knew that Court Programs, Inc., had already been *defined* for it as "a contractor providing incarceration services for the City of Gulfport, Mississippi...":

> "The program, Court Programs, Inc. *is defined* as "a contractor providing incarceration services for the City of Gulfport..."
>
> Exhibit C-2, question from jury, emphasis added

This was the logical and correct conclusion for the jury to reach as the trial court had written the instruction, and written it in a way that did, in fact, define Court Programs, Inc., as a contractor providing incarceration services. It was certainly not the trial court's intent (as it also

certainly was not in *Russell*) to remove this element from the jurors's deliberations, as Mr. Tipton acknowledges in his Appellant's Brief. However, the Appellee's argument that it "was not the trial court's intent [to grant a directed verdict on the element argued here.]"(Appellee's Brief at p. 8) does not protect the trial court from reversible error, as this Court held in *Berry*, *supra*, para. 12 , that "...just because the ruling was made inadvertently, does not make it any less erroneous."

Accidental or not, the effect of the poison pill in instruction C-2 is the same, and the jury acted on the instruction as it was written, as directed to by the trial court in its response to the jury's question. Additionally, this is an unusual case because this Court need not speculate on whether or not the jury was confused or if the verdict was affected by the trial court's mis-instruction, because the jury documented its recognition that one of the elements had already been *defined* (read found) by the trial court.

Q: Did the trial court's response to the jurors's question about Instruction C-2 cure the fatal error of the instruction?

A: No.

The Appellee argues that the trial court's response (Exhibit C-4) to the jury's question (Exhibit C-2) cured the error of the instruction by directing the jury that each element had to be proven beyond a reasonable doubt. (Appellee's Brief, p. 9). The court's response actually caused more confusion for the jury as the court did not explain that it had not intended to define (again, this was the jury's choice of words) the status of Court Programs, Inc., as well as what type of services it provided, and if it provided those services to the City of Gulfport. With the jury recognizing that the trial judge had already defined the nature and scope of Court Programs,

Inc., for it, how could it have not been confused by a new and conflicting message from the judge who had already found an element proved and which did not address that conflict? *McHale v. Daniel*, 233, So.2d 764 (Miss. 1970) (an erroneous instruction cannot be cured by a correct instruction, and a prejudicial instruction cannot be cured by a correct instruction which does not call the jury's attention to the prejudicial instruction).

The trial court missed a golden opportunity to adequately respond to the jury's question. The court should have recognized the error and explained that it had not intended to define for it the business status and activities of Court Programs, Inc., and, further, that the jury was still responsible for holding the state to proof of those elements. When the court failed to correct the jurors's impression that it had found the element for the jury, it left intact their misapprehension that the state need not prove that element.

Q: Did other instructions cure the error in C-2

A: No.

The Appellee argues the well-established concept that "[if] the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." (Appellee's Brief p. 10). No one will argue that this is not the time-honored rule. But no instruction in Mr. Tipton's case cured the error in C-2, and when the instructions are read as a whole, C-2 still tells the jurors that they need not find an element because the court had found it for them. Additionally, when a trial court directs a verdict on an element of a crime, it does not fairly announce the law of the case. Instead, it flies in the face of hundreds of years of jurisprudence, and creates an injustice by abolishing the established procedures that require jurors to consider and reject or accept disputed proof in our criminal cases. For these reasons,

and all those cited in Appellant's Brief, this Court should reverse Mr. Tipton's conviction.

**Response II.**

**The trial court reshaped the statute and construed it against Mr. Tipton to allow the function of Court Programs, Inc., to come within the statute's purview, and consequently to place Mr. Tipton's alleged actions within the statute. In using this rationale to deny Mr. Tipton's Motion for a Directed Verdict, the trial court committed reversible error.**

Mr. Tipton argued in his Motion for a Directed Verdict (Tr. 205) that the state failed to make a *prima facie* case that Court Programs, Inc., provided "incarceration services" as required by the statute. Nevertheless, the trial court commingled the concepts of "house arrest" and "intensive supervision" into the equivalent of "incarceration services", (Tr. 218-219), allowing the court to conclude that the state had proven that Court Programs, Inc., provided incarceration services although the proof clearly showed that the business provided probation services only. This allowed the court to fit the services offered by Court Programs, Inc., into the extortion statute under which Mr. Tipton was tried, and therefore to place Mr.Tipton in the employ of a company whose business functions were contemplated by the statute. When a trial judge assists the state by both expanding the scope of the state's proof and opening the statute up to dilute the proof required for a conviction, it violates long-accepted tenet of jurisprudence that penal statutes are to be construed liberally in favor of an accused.

The Appellee devotes two pages of its three page argument on this issue toward its effort to defeat an argument that Mr. Tipton did not make, i.e. "whether the Appellants's position at Court Programs, Inc. falls under one of the positions listed in the statute." (Quote from Appellee's Brief p. 10, p, 10-12). Mr. Tipton did not and does not argue this point. What he

argues is that Court Programs, Inc., did not have the status of a contractor providing *incarceration* services as required by the statute and that the trial court was not permitted to tweak the statute to allow a contested element of proof to fit within it and thereby construe a penal statute in favor of the state rather than in favor of the accused. *McInnis v. State*, 97 Miss. 280, 52 So. 634 (1910), *Ratcliff v. State*, 234 Miss. 724, 107 So.2d 728 (Miss. 1958).

The jury's reaction to the trial court's expansion of the statute and the state's failure to prove that Court Programs, Inc., provided "incarceration services" illustrates the serious consequences of the trial court's actions. The second question sent to the trial judge by the jury (Exhibit C-2) illuminates the jury's confusion regarding this question, centering as it does on the question of whether Court Programs, Inc., provided probation or incarceration services. In the question the jury sent to the judge, it asked if the trial judge had made a "typographical error in definition" (the jury's choice of words) in placing the term "incarceration services" in the instruction, rather than "probation services". The jury further asked if it should read the questioned paragraph of the instruction as "Court Programs, Inc., a contractor providing probation services for the City of Gulfport?" (Jury question, Exhibit C-2, RE 9, underscore provided by jury). It is clear that the jury did not believe that incarceration services and probation services are one and the same. It is also impossible to determine whether or not the jury reached a unanimous finding on the element of probation/incarceration services, it could have been divided on which element was proved.

The statute, Miss. Code Ann. 97-11-33, makes no mention of probation services. Nor does the indictment on which Mr. Tipton was tried. Nor does Instruction C-2, the source of great confusion for the jury. When the jury sought to have the court allow it to constructively amend

Instruction C-2 to require that the state only prove that Court Programs, Inc., provided "probation services" rather than "incarceration services" as required by the statute, it showed that it did not find that the state had proven that Court Programs, Inc., provided incarceration services.

The trial court erred when it expanded the statute to fit the state's proof, rather than directing a verdict for Mr. Tipton. The court's error caused confusion in the jury room as evidenced by the jury's questions to the court and its attempt to modify the court's instruction to fit the state's proof. For these reasons, and all others cited in Mr. Tipton's Appellant's Brief, this Court should reverse.

**Response III.**

**Mr. Tipton's indictment was vague and confusing in the charge it attempted to lay, and fatally defective in that it did not allege that Court Programs was a "contractor" and that it provided "incarceration services".**

"[A]ll defendants facing felony criminal charges in this state...are entitled to an indictment which sets out, inter alia, "a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify [them] of the nature and cause of the accusation." *Champluvier v. State*, 942 So.2d 145, 2003-CT-02581-SCT (Miss. 2006) para. 16.

When one travels through the tortuous syntax of Mr. Tipton's indictment in an attempt to arrive at its meaning, one finds that he has been charged with both "ask[ing]" and "demand[ing]" that some event occur. The gravamen of the offense is that a person in authority "demand" something from another. The crime cannot be committed by the opposite acts of asking someone to do something, and with both options appearing in the indictment it is confusing and

defective. If the statute contemplated that either a demand or a request created the charge of extortion, that would be one thing, and the state could indict as an either/or proposition. However, Mr. Tipton's indictment charges that he both demanded and asked. It cannot be had both ways. Further it cannot be discerned what reward Mr. Tipton is charged with seeking. Is it a reward to agree to pay a person's fines, in order to keep a judge from issuing an arrest warrant?

Additionally, the indictment fails to set out two critical elements that were to be proven by the state: 1) that Court Programs, Inc., contracted with the City of Gulfport, and, 2) that the contract was for "incarceration services." The indictment refers only to Mr. Tiptons' employment status with Court Programs, Inc., and gives no further description of the status and duties of that business entity.

**Response IV.**

**The jury did not find that "Court Programs, Inc., was a "contractor providing services for the City of Gulfport, Mississippi", because the trial court made that finding for it. The state's proof was therefore insufficient on that element and on the charge.**

The state is required to prove every element of the offense charged beyond a reasonable doubt. *Heidel v. State*, 587 So. 2d 835, 843 (Miss. 1991). When the trial court—via Instruction C-2— *defined* [2] Court Programs, Inc., as an entity that provided incarceration services for the City of Gulfport, it removed from jury consideration any deliberation on the two parts of that essential element. Mr. Tipton respectfully directs the Court to his arguments on this issue in his Appellant's brief and also the corresponding subsection of the argument addressing the weight and sufficiency of the evidence presented against Mr. Tipton.

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[2]"defined" is the specific term used by the jurors to interpret what the the trial court had done. "[J]urors are presumed to have followed the trial judge's instructions." *McNeal v. State*, 658 So.2d 1345, 1348 (Miss. 1995).

**Response V.**

**The passing reference in Instruction C-1, that Mr. Tipton's jurors "made an oath" when they were seated in the jury box, is contradicted by the complete record which indicates that the jury was not sworn.**

The Appellee lifts a boilerplate quote from Instruction C-1 and relies on it for the inference—thoroughly contradicted by the record of Mr. Tipton's trial—that Mr. Tipton's jury was sworn. In fact, the only record reference to the jurors having been administered any oath appears at Tr. p. 7, when the trial court specifically refers to an oath—separate and distinct from the one required of petit jurors by Miss. Code Ann. 13-5-71—which had the limited purpose of admonishing the as-yet-unselected venire members to answer truthfully during voir dire the questions about their qualifications for jury service.

At the three places in the record where the oath would be logically and properly administered to the selected petit jury members, there is absolutely no reference to it, and no proof that an oath was administered: It does not appear when the selected jurors were seated in the jury box (Tr. 59-60). It does not appear when the jurors returned to the courtroom after pre-trial motions to be seated by the court just before opening statements were made (Tr. 73). And it does not appear just before the state called its first witness, the point at which the jury's duty to consider the evidence and perform its duties within the parameters of the oath engages.

It should also be noted that the Court Reporter took pains to properly record all trial events, and, if the reading and accepting of the petit juror oath had occurred, it would have been, at the least, noted. For example, when the trial court read the instructions to the jury immediately preceding closing arguments, the record noted: "JURY INSTRUCTIONS WERE READ TO THE JURY", (Tr.305), although the actual word-for-word reading of the instructions

was not transcribed. Had the required oath been administered, but for some reason was not transcribed in its entirety in the record, the court reporter would have at the least noted it in the same way that the reading of the instructions was indicated to have occurred.

The content of the transcribed record defeats the Appellee's argument that Mr. Tipton's jury was, in fact, sworn. While perhaps an impotent inference could be drawn from the instruction cited by the Appellee, it is more likely that the jury was not sworn as shown by the absence of the event at the critical points in the record where evidence of it would have appeared, and by lack of a court reporter notation that it had, in fact, occurred. Further, as the overall record has been found by this Court to control even when contradicted by a court order, *Gaskin v. State*, 2001 -CT-01153-SCT (Miss. 2003), certainly, a fragment of boilerplate in an instruction cannot conjure up an oath sufficient to overcome the record.

Six members of the Court of Appeals, in a specially concurring opinion, have recommended that trial courts take pains to ensure that they "...place, in every official record, evidence that the trial jury took the official oath to well and truly try the issues" to prevent the possibility that the failure to swear a jury would some day emerge as a successful plain error argument. *Allen v. State*, No. 2005-KA-00755-COA (Miss.App. 2006) para. 19. Mr. Tipton asks this Court to review the entire record and find that there is no credible evidence that his jury was sworn, and to recognize as plain error the trial court's failure to swear in the jury that heard the evidence against Mr. Tipton and returned a verdict without the authority conveyed by the oath.

## Conclusion

Mr. Tipton renews and incorporates all arguments made in his Appellant's Brief, and

does not waive them simply by not referencing them here. Further, he requests the same relief sought in his Appellant's Brief, that this Court either reverse and render his conviction, or that it reverse and remand it for a new trial where the asserted errors will not occur again.

RESPECTFULLY SUBMITTED,

Ross Parker Simons

ROSS PARKER SIMONS MSB [redacted]

## CERTIFICATE OF SERVICE

I, Ross Parker Simons, hereby Certify that I have this date filed via U.S. Mail or FedEx, the original and three (3) copies of the foregoing Appellant's Reply Brief in *Frank Sanders Tipton v. State of Mississippi*, 2008-KA-02060-SCT, with the Clerk of the Mississippi Supreme Court, and that I have provided to Jean Smith Vaughn and Brandon Lee Ogborn, Office of the Attorney General P.O. Box 220, Jackson, Mississippi 39205 and trial judge Wm. T. Dale Harkey, P.O. Box 998, Pascagoula, Mississippi, 39568 copies of the same via U.S. Mail, FedEx or hand-delivery at their usual addresses.

This, the 4th day of November, 2009, A.D.

Ross Parker Simons

ROSS PARKER SIMONS, MSB # [redacted]