No. SC93435

IN THE SUPREME COURT OF MISSOURI

State of Missouri,

Respondent,

v.

Nicholas R. Hillman,

Appellant.

From the Circuit Court of Warren County, Missouri
12th Judicial Circuit, Hon. James D. Beck, Judge
Underlying Cause No. 11BB-CR00112-01

Appellant's Brief in Reply

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ORAL ARGUMENT REQUESTED

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ARGUMENT IN REBUTTAL

I. Mo. S.Ct. Rule 30.04(h) requires the Appellant to exercise due diligence to supplement the record on appeal in the event of errors or omissions that exist and thus, could be corrected or procured – the rule does not require Appellant to recreate testimony that went unrecorded.

Discussion:

Rule 30.04(h) does not require the impossible. Rather, the rule requires that an appellant must exercise due diligence to provide the Court exhibits or testimony that is *available* by supplementing the record via stipulation or correction. *See* Mo. S.Ct. Rule 30.04(h)[1]. Contrary to the State's argument, Missouri precedent does not require that

[1] Mo. S.Ct. Rule 30.04(h) provides:

> Errors--Omissions--Supplemental Record on Appeal. If anything material is omitted from the record on appeal, the parties by stipulation, or the appellate court, on a proper suggestion or of its own initiative, shall direct that the omission or misstatement be corrected. The appellate court may, if it deems necessary, order that a supplemental record on appeal be prepared and filed by either party or by the clerk of the trial court including any additional part of the trial record, proceedings and evidence, or the clerk may be directed to send up any original documents or exhibits.

an appellant endeavor to correct or stipulate to testimony that was never recorded and is completely unavailable.

The State's reliance on *State v. Middleton* is inapposite because the claimed omissions in *Middleton* were corrected by the court reporter or were sufficiently discernible to be held immaterial. *See State v. Middleton*, 995 S.W.2d 443 (Mo. 1999). The omissions claimed here are both material and indiscernible such that no judgment could be made. An entire colloquy regarding an offer of proof was unrecorded and not transcribed. The issue is central to the case and to Appellant's right to present a defense: the offer of proof concerned the exclusion of all of the witnesses for the defense at trial.

An appellant bears the burden of compiling the record, not creating it from memory. A recent decision by the Southern District Court of Appeals demonstrates this fact and that there is no contention in the case law:

> The record shows that Defendant's written statement to Sergeant Worley was admitted into evidence at trial as Exhibit 2. Defendant did not include the exhibit in the record on appeal. In fact, none of the exhibits referenced in this opinion have been deposited with this court. It is Appellant's ***duty to compile*** the record on appeal which should contain all of the exhibits and evidence necessary for this Court's determination of the questions presented. When an exhibit is omitted from the transcript and is not filed with the appellate court, the intendment and content of the exhibit will be taken as favorable to the trial court's ruling and as unfavorable to Defendant.

State v. Shinn, -- S.W.3d --, 2013 WL 3969617, July 26, 2013 at *10, n.3 (Mo.App. S.D. 2013) (*internal citations omitted*) (*citing State v. Holman*, 230 S.W.3d 77, 79 n. 4 (Mo.App. S.D.2007) (*citing* Rule 30.04) *and citing State v. Creech*, 983 S.W.2d 169, 171 (Mo.App. E.D.1998)). The colloquy and testimony at issue are not "missing" in the sense that those items could have and should have been gathered, compiled and submitted to the Court. The words at issue are missing from the record because they were never recorded and thus, do not exist. That Appellant was prejudiced is assured; such an omission cannot be remedied without a remand as ordered in *Loitman*. *See Loitman v. Wheelock*, 980 S.W.2d 140 (Mo.App. E.D. 1998). The convictions must be reversed and the matter remanded for a new trial.

II. The exclusion of all of the defense witnesses at trial was fundamentally unfair and far too drastic a remedy where six of the ten excluded witnesses were previously endorsed – though by name only – by counsel who later withdrew; thus the State was on notice that the witnesses were likely to be called by the defense upon the entry of new counsel for the defendant.

Discussion:

The trial court's calculation of the prejudice suffered by the State due to defense counsel's late endorsement of witnesses is unfairly inflated. Of the ten defense witnesses that were excluded, the State concedes in its brief that the parties were aware of six of them and thus no claim of unfair surprise is credible. *See* State's Br. at 33.

"The remedy of disallowing the relevant and material testimony of a defense witness, however, essentially deprives the defendant of his right to call witnesses in his defense." *State v. Simonton*, 49 S.W.3d 766, 781 (Mo.App. W.D.2001) (*quoting State v. Mansfield*, 637 S.W.2d 699, 703 (Mo. banc 1982)).

The State could not have suffered surprise from the late endorsement of the witnesses here because the witnesses were previously identified in prior counsel's (incomplete) endorsement or were named in the police reports. The *Martin* Court's holding, and the only case upon which the State relies, concerns facts that are not analogous to the instant case. *See State v. Martin*, 103 S.W.3d 255, 260 (Mo.App. W.D. 2003). The situation before the *Martin* Court was twofold: "[a]t no time prior to [the defendant's] attempt to call [his wife] and his offer of proof after the State rested its case was the State aware that the defense would offer evidence that a man other than [the defendant] was driving the car." *Id.* Not only did the endorsement in *Martin* arrive *after* the State rested its case-in-chief, but the content of the testimony would have altered the theory of the case. Neither is true here.

The trial court abused its discretion by permitting the State to claim unfair surprise when the names of six of the excluded defense witnesses were provided on February 22, 2012 – a year before the case went to trial. The other witnesses were named by nicknames or reference in the police reports. The defendant surely bears the burden of a timely endorsement; but such a failure should be weighed against the State's responsibility to know the content of the investigation and evidence upon which it relies to prove guilt. The trial court failed to exercise "the utmost caution" in

excluding the defense witnesses. *Id*. at 260 (*quoting Simonton*, 49 S.W.3d at 781; *Mansfield*, 637 S.W.2d at 703)). The matter must be reversed for a new trial.

III. Appellant did not waive plain error review of the admission of evidence seized upon the warrantless, unconstitutional search of his home because defense counsel's failure to move to suppress the evidence was not indicative of trial strategy.

Plain error review is appropriate here because waiver exists only where counsel does not object to the evidence as a matter of strategy. A waiver exists where counsel "affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence." Here, counsel appeared to be unaware that s motion to suppress evidence was never filed.

Counsel exercised no strategy in failing to address the evidence seized as the product of an unlawful warrantless search. The transcript demonstrates that defense counsel was merely negligent; thus there was no waiver of plain error review:

Prosecutor: The rest of my evidence from this officer is from the search and seizure – or the statement, so that's my foundation; that –

The Court: Do you want to voir dire the witness now?

Defense: I think so.

Prosecutor: Strictly on this issue.

The Court: On this issue.

Defense: On the search and seizure?

Prosecutor: On the statements. There is no motion to suppress any evidence.

Defense: Oh, on his statements?

Prosecutor: Yeah.

(Tr. at 139). There is no strategy where counsel has not considered the issue. Plain error review is not precluded. Appellant prays the Court will exercise its authority under Rule 30.20 and review his claim for plain error.

CONCLUSION

For all of the foregoing reasons, the judgment of the trial court must be vacated, Appellant's convictions overturned, or the matter remanded for a new trial. Appellant respectfully requests the above relief as well as any other relief the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has caused a true and correct copy of the foregoing Brief and an electronic copy of this brief were served on Respondent via operation of the Court's electronic filing system on this 8th day of August, 2013:

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type-volume limitation and typeface requirements of Missouri Supreme Court Rule 84.06. This brief contains 1,761 words, excluding the parts of the brief exempted from that calculation by Rule 84.06(b). The brief is set in proportionally spaced typeface, no smaller than 13-point Times New Roman, using Microsoft Word 2003. The undersigned further certifies that the electronic copy provided on disk is virus-free.

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