IN THE SUPREME COURT

STATE OF GEORGIA

SANTRON DEON PRICKETT,	*	
APPELLANT	*	
vs.	*	CASE NO. S22A0531
THE STATE,	*	
APPELLEE	*	

BRIEF OF APPELLANT

Submitted by:

Michael S. Webb
Attorney for Appellant
Georgia Bar No. 744637
Office of the Appellate Defender
270 Washington Street, Suite 5161
Atlanta, GA 30334
(404) 795-2500
mwebb@gapublicdefender.org

Appellant's address:
SANTRON PRICKETT
GDC ID: 0001255421
Wheeler Correctional Facility
195 Broad Street
Alamo, GA 30411

TABLE OF CONTENTS

Part I. Procedural History and Statement of Facts....................................3

A. Procedural History..3

B. Statement of Facts..4

Part II. Enumeration of Errors.. 9

A. Jurisdiction.. 9

B. Enumeration of Errors.. 9

Part III. Argument and Citation of Authority..10

Part V. Conclusion and Prayer for Relief 36

Certificate of Service.. 38

PART I. PROCEDURAL HISTORY AND STATEMENT OF FACTS

A. Procedural History

Appellant, Santron Deon Pricket, was charged June 15, 2010, in a six-count indictment with malice murder; felony murder (predicated on aggravated assault); felony murder (predicated on possession of a firearm by a convicted felon); aggravated assault; possession of a firearm during the commission of a crime; and possession of a firearm by a convicted felon. (R-3-6; 471-474).

The indictment alleged that Appellant committed the offense of malice murder on March 15, 2010, when he unlawfully and with malice aforethought caused the death of Antwan Curry by shooting him with a handgun. (R-3-6; 471-474).

The indictment further alleged that Appellant committed the offense of felony murder in two different ways: (1) by shooting him with a handgun during an aggravated assault: and (2) by shooting him while illegally possessing a handgun because he was a convicted felon. (R-3-6; 471-474).

Appellant's trial began on May 2, 2010 and ended in a jury verdict of guilty on May 10, 2011, of all counts except for malice murder. (R-475-477). He was sentenced to life imprisonment with the possibility of parole, plus five years, on May 11, 2010. (R-467-470).

Appellant's motion for new trial was filed on May 19, 2010. (R-485). However, the eight-volume trial transcript was not filed by the court reporter with the clerk's office until May 27, 2015, for reasons unknown to Appellant's counsel. (R-85-2043.)

Furthermore, the trial transcript did not contain a record of 26 bench conferences between the trial court, the prosecutor and Appellant's defense counsel, during which Appellant was absent. (R-85-2043; 687-707).

An amended motion for new trial was not filed on behalf on Appellant until January 10, 2020.[1] (R-524). Furthermore, the amended motion for new trial was not heard until July 21, 2021, when the trial court entertained argument from counsel for Appellant and counsel for his co-defendant, Jaquavious Reed, over a three-day period. (R-2114-2445).

On October 21, 2021, the trial court issued an order denying Appellant's motion for new trial. (R-687). Appellant's notice of appeal was timely filed on October 28, 2021. (R-1).

B. Statement of Facts

On March 15, 2010, Antwan Curry (hereinafter "Curry") went to a neighborhood in Atlanta to purchase marijuana. (T3-748). While there, Curry and

---

1 Appellant's counsel does not know the reason for this delay, either.

Appellant got into a physical altercation. (T3-553). Shots were fired. Appellant was shot in the hand and was seen by a witness running away from the scene, bleeding, while being chased by Curry. (T3-557-559). Curry was shot three times and wounded in the leg, then he was shot in the chest and died. (T-1214-1227). Witnesses reported that Reed, Appellant's co-defendant, shot Curry. (T3-622-696; T5-1269-1276).

Detective David Quinn was called to the scene, located at 960 New Town Circle, Atlanta, Fulton County, at 1:26 p.m. He arrived at 1:55 p.m. and canvassed the area, but he was unable to find any witnesses to the shooting. (T5-1064-1066, 1070). Later that evening, at a press conference, the Detective requested that anyone with information about the shooting contact the police or Crime Stoppers, which offered a reward for any information that would aid in the apprehension of the suspect(s). (T-1075-1077, 1086). Multiple witnesses then came forward, each with a different story about what they saw or "heard" in the neighborhood where the shooting occurred.

Lakeyta Smith was across the street in a parking lot when she saw Prickett and Curry arguing. Ms. Smith said she said saw them struggling over something and heard gunshots. (T3-557-559).

Prickett was shot in the hand. Smith said she saw Prickett running away

from the scene while being chased by Curry. (T3-553, 557-559, 748). Forensic evidence collected at the scene revealed a blood trail left by Prickett. (T3-908).

Although Smith was unable to identify Jaquavious Reed, Appellant's co-defendant, Smith's statement to the police indicated that Reed then approached Curry; shot him; and Curry fell to the ground. Smith said she knew Prickett from the neighborhood. (T3-542-543).

Another witness, Willie Wilson, saw Curry running around in the neighborhood prior to the shooting, visibly angry. Wilson watched Curry get into Curry's truck and bend over, as if grabbing something under his seat. Wilson said he believed Curry grabbed a gun. (T3-622-696).

Wilson said Curry and Prickett began fighting, and it looked like they were struggling over a gun. Wilson said the gun went off during the struggle. Wilson said Prickett was defending himself from Curry, and he heard Prickett exclaim, "Get this man off me!" Wilson said Prickett ran away after he was shot in the hand. (T3-622-696).

Wilson was unsure whether Curry's gunshot wound to his leg was from the same bullet that hit Prickett or whether Curry was shot in the leg when the gun clattered to ground. However, Wilson said that a few minutes later, Reed ran up to Curry and shot Curry several times. (T3-622-696).

Another Witness, Keown Burns, was standing in his doorway when he saw Curry go to his car and get what Burns believed was a gun. Burns testified that he saw Prickett run from the scene, holding his hand. Burns admitted that he couldn't really see anything from his vantage point and could only could see the back of Prickett. Furthermore, Burns subsequently recanted, admitting he didn't see anyone shoot Curry. Burns admitted he only heard "things from the street." Once he heard gunshots, Burns testified, he closed his apartment door. Burns testified that he saw Prickett run past his apartment from his kitchen window, bleeding from his hand. (T3-726-730).

Monique Reed, who lived in the community, placed Jaquavious Reed at the scene that afternoon, shortly before the shooting. (T4-843).

Another witness, Bianca Haney, said she was walking to the store when she saw Curry go to his vehicle, then come back and "charge" at Prickett. (T4-859).

Haney testified that Curry tackled Prickett and was on top of Prickett, fighting him. Haney testified she heard a gunshot; saw Prickett run past her; and then she heard series of gunshots. However, Haney testified that she did not see Curry or Prickett with a gun. (T4-861-862).

Harriett Fagan was in the neighborhood that afternoon, visiting a friend, when she witnessed Curry get into his truck and pull out a gun. Fagan said Curry

ran towards Prickett, then she saw both of them "wrestling." Fagan testified she heard gunshots. Like Haney, Fagan did not see Curry or Prickett with a gun. Fagan saw Prickett run away from the scene. (T5-1269-1276).

Fagan identified Jaquavious Reed at the scene as the person sitting on a "green transformer box." After Prickett ran away, Fagan saw Reed get up from the transformer box and approach Curry, who was attempting to get up from the ground. Fagan testified that Reed shot Curry multiple times, saying, "You ain't do shit. I'm going to show you." (T-1269-1276).

Law enforcement officers investigating the shooting found 9-millimeter and .40 caliber spent shell cartridges. (T3- 523-524). A forensic pathologist from the Office of the Fulton County Medical Examiner testified that although Curry suffered three gunshot wounds, an autopsy did not reveal any bullets in Curry's body. (T5-1226). The forensic pathologist determined one gunshot wound, which was non-fatal, came from a bullet which entered Curry's shoulder and exited his back. The wound showed signs of "stippling," the medical examiner testified, but not "soot," which indicated a range of one to three feet between the shooter and Curry. (T5-1214-1218).

A second gunshot, also non-fatal, hit Curry in the lower left leg and exited from the back of his left leg. (T-1220-1223). This gunshot wound did not have any

"soot" or "stippling" surrounding it, which indicated a firing range of more than three feet. (T5-1227). The pathologist did not, however, test Curry's clothing for evidence of "soot" or "stippling" from this gunshot. (T5-1234).

The medical examiner concluded the fatal gunshot entered Curry's back and went through his chest cavity, hitting his heart and a lung and exiting from the front of his torso. (T3- 1223).

PART II. ENUMERATION OF ERRORS

A. Jurisdiction

The Supreme Court, rather than the Court of Appeals, has jurisdiction of this case because this is an appeal from a final judgment of a superior court in a capital felony case, and it does not fall within any of the areas designated to be heard before the Court of Appeals under Article VI, Section V, Paragraph III, Georgia Constitution of 1983. Jurisdiction of this category of appeal is conferred upon this Court under the provisions of Article VI, Section VI, Paragraph VIII, Georgia Constitution of 1983.

B. Enumeration of Errors

I. The trial court erred in denying Appellant's amended motion for new trial because Appellant received ineffective assistance of counsel within the meaning of the Sixth Amendment, Art. I, Sec. I, Para. XIV of the Georgia Constitution and Strickland v.

Washington when trial counsel failed to stipulate that Appellant was a convicted felon, thereby exposing Appellant's criminal history to the jury and tainting his trial.

II. The trial court erred in denying Appellant's amended motion for new trial because the trial court conferred with defense counsel out of the presence of Appellant 26 times during bench conferences, which were a fundamental and critical part of his trial under both the federal and state constitutions, and Appellant did not waive his right to be present and participate in the bench conferences.

III. The trial court erred in denying Appellant's amended motion for new trial because the trial court failed to rebuke the prosecutor and declare a mistrial, or in the alternative, give a curative instruction to the jury following defense counsel's objection to an improper comment by the prosecutor during closing arguments.

PART III. ARGUMENT AND CITATION OF AUTHORITY

A. Standard of Review

The standard of review for Enumeration of Error I, alleging ineffective assistance of counsel, is a clearly erroneous standard. *Bennett v. State*, 298 Ga. App. 464, 467 (680 SE2d 538) (2009), citing *Johnson v. State*, 266 Ga. 380, 382-383(2) (467 SE2d 542) (1996).

The standard of review for Enumeration of Error II, alleging the involuntary absence of Appellant during a critical stage of his prosecution, is plain error review. *Wilson v. State*, 301 Ga. 83, 88 (799 SE2d 757) (2017).

The standard of review for Enumeration of Error III, alleging the failure to give a curative instruction regarding improper argument following an objection, is an abuse of discretion review. *State v. Parks*, 350 Ga. App. 799, 807 (830 SE2d 284) (2019).

B. Method of Preservation of Error for Appellate Review

Each Enumeration of Error was raised in the trial court in Appellant's amended motion for new trial and supporting brief; argued by Appellant's counsel at the motion for new trial hearing; and denied by the trial court. (R-524-568; 687-707; MNT-2114-2445).

C. Argument

I. The trial court erred in denying Appellant's amended motion for new trial because Appellant received ineffective assistance of counsel within the meaning of the Sixth Amendment, Art. I, Sec. I, Para. XIV of the Georgia Constitution, and Strickland v. Washington, when trial counsel failed to stipulate that Appellant was a convicted felon, thereby exposing Appellant's criminal history to the jury and tainting his trial.

Appellant's trial counsel was ineffective for not properly dealing with the count in the indictment charging Appellant with the offense of possession of a firearm by a convicted felon. Appellant's trial counsel should have offered to stipulate to Appellant's status as a convicted felon, thereby keeping Appellant's criminal history from the jury during the trial and preventing prejudice to the Appellant.

This Court has adopted the rule first enunciated in *Old Chief v. U.S.,* 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d (1997), which is that a that trial court abuses its discretion when it rejects a defendant's offer to stipulate to his status as a convicted felon when the defendant is charged with possession of a firearm by a convicted felon. The evidence of the prior conviction is unnecessary to prove anything other than the defendant's status as a convicted felon, and evidence of the prior felony conviction raises the risk of the jury returning a guilty verdict tainted by improper considerations. *Ross v. State,* 279 Ga. 365 (614 SE2d 31) (2005).

The Supreme Court of Georgia in *Ross,* supra, stated, "The U.S. Supreme Court thereby struck a proper balance between the State's entitlement t0 prove its case and the defendant's right to have the jury decide his case free from unnecessary and unfairly prejudicial information." Id.

In the case at bar, the felony conviction used by the State to prove Prickett

was a convicted felon in possession of a firearm was possession of cocaine with intent to distribute. Prickett's indictment charged him with malice murder, felony murder predicated upon aggravated assault, felony murder predicated on possession of a firearm by a convicted felon, and aggravated assault with a deadly weapon. The State's theory at trial was that Prickett killed Curry during a drug deal gone awry.

In *Old Chief,* the Supreme Court held, "[T] here can be no question that evidence of the name or nature 0f the prior offense generally carries a risk of unfair prejudice to the defendant ... Where a prior conviction was similar to other charges in a pending case the risk of unfair prejudice would be especially obvious." *Old Chief*, supra, 519 U.S. at 185 (II)IB) (2). Given the State's theory in the instant case, a criminal charge of possession of cocaine with intent to distribute would likely inflame the passions of the jury and unduly prejudice the Appellant.

Appellant's trial counsel's performance was deficient because of the failure to offer, prior to the presentation of evidence, a stipulation to Appellant's status as a convicted felon and seek an order redacting that charge from the indictment which was read to the jury and sent to the jury room with the jury during its deliberations.

Appellant was prejudiced by his trial counsel's deficient performance in this

regard, because the jury otherwise would not have known about Appellant's prior felony drug conviction while considering his guilt or innocence of the murder. Instead, Appellant's trial counsel facilitated the State's presentation of evidence to the jury of the particulars of Appellant's prior felony drug conviction. Objectively viewing this decision, one cannot say that it was a reasonable trial strategy.

In *Starling V. State,* 285 Ga. App. 474 (646 SE2d 695) (2007), the Court of Appeals deemed Starling's trial counsel ineffective for failing to stipulate and obtain a stipulation order regarding two prior crimes. The prior crimes were the same crimes for which Starling was on trial. The Court of Appeals held that trial counsel's failure to stipulate did not fall within the range of reasonable professional conduct:

"In this scenario, failing to either obtain an effective stipulation or a limiting instruction, and not objecting to the evidence detailing the facts surrounding the two prior crimes – which were the same as those at issue during trial – was not within the range of reasonable professional conduct to which a criminal defendant is entitled." *Starling,* supra.

It is unfathomable that the failure of Appellant's trial counsel to stipulate to his prior felony conviction in the instant case could have been an objectively reasonable trial strategy under *Strickland v. Washington,* 466 U.S. 668 (1984). In a

murder trial based upon the theory that the defendant shot and killed the victim during a drug deal that went south, there is absolutely no way that the defendant's prior conviction for possession of cocaine with intent to distribute could not have prejudiced the jury reaching a unanimous verdict finding Appellant guilty of felony murder. Clearly, "a reasonable probability exists that the trial results would have been different but for counsel's performance." *Bragg v. State*, 295 GA. 676, 678 (2014).

Contrary to the trial court's finding in its Order Denying Motion for New Trial that trial counsel's "strategic" decision, that allowing the jury to know about Appellant's prior conviction would help bolster his credibility with the jury was reasonable,[2] that decision still constituted ineffective assistance under *Emilio v. State,* 263 Ga. App. 604 (588 SE2d 797) (2003); *White v. State*, 265 Ga. App. 302, (596 SE2d) (2003) ("the trial court erred in reading the indictment to the jury without redacting the references to White's recidivism and prior convictions"); and *Eiland v. State,* 213 Ga. App. 838 (445 SE 2d) (1994) ("The trial court's failure to either excise the objectionable material or keep the indictment from the jury mandates a reversal.").

See also *Cobb v. State,* 283 Ga. 388 (3)(b) (658 SE2d 750) (2008), in which

[2] (R-687; see page 6 of Order Denying Motion for New Trial).

this Court reversed the appellant's murder conviction because his trial counsel failed to object to or seek a redaction of the indictment; and *Whitaker v. State,* 276 Ga. App. 226 (622 SE2d 916) (2005)l (convictions reversed due to ineffective assistance where the jury was allowed to consider an unredacted exhibit showing that Whitaker has previously been charged with an identical crime, as well as two closely related crimes).

The trial court's finding in its Order Denying Motion for New Trial that Appellant suffered no prejudice as a result of the jury's consideration of his prior conviction, "because the evidence of Defendant's guilt was overwhelming, and this Court provided clear jury instruction strictly limiting the jury's consideration of the prior felony conviction evidence,"[3] is clearly erroneous.

Appellant intends no disrespect toward the trial court, but this finding is simply disingenuous. One cannot unring the bell.[4]

Moreover, the evidence was not overwhelming that Appellant committed the crime of felony murder. The State charged the Appellant with felony murder in alternate ways – felony murder predicated upon aggravated assault and felony murder predicated upon possession of a firearm by a convicted felon. Interestingly,

---

[3] (R-687; see page 6 of Order Denying Motion for New Trial).

[4] See *State of Oregon v. Rader,* 62 Ore. 37, 124 P. 195 (1912).

while the State claimed that Appellant committed felony murder during a drug deal gone bad, the State did not include a count in the indictment charging Appellant with a felony drug offense. And why not?

The answer is that the State had no evidence to prove beyond a reasonable doubt that Appellant committed a felony drug offense. Instead, the State introduced Appellant's prior felony conviction for possession of cocaine with intent to distribute, to create the illusion (quite slyly) that Curry, the victim, was killed while the Appellant was committing a felony drug offense.

Furthermore, the evidence was shaky, at best, that Appellant committed either aggravated assault with a deadly weapon or possessed a firearm during the incident. No witnesses testified that Appellant had a gun. (T4-861-862; T5-1269-1276). No witnesses testified that Appellant assaulted Curry; if anything, the evidence showed that Prickett was defending himself from Curry in a physical altercation, during which Prickett was shot in the hand and ran from the scene while being chased by Curry. (T3-622-696).

It strains credulity to argue that the evidence against Prickett for the crime of felony murder was overwhelming. The evidence was insufficient to satisfy the State's burden of proving Prickett guilty beyond a reasonable doubt.

Finally, whether the evidence was or was not overwhelming is not a

consideration sufficient to override Mr. Prickett's absolute right to effective assistance of counsel at his trial under the Sixth Amendment to the United States Constitution and Article I, Section I, Paragraph XIV of the Constitution of Georgia of 1983, as amended.

The Supreme Court of Georgia has a duty to protect the Appellant's constitutional right to effective assistance of counsel, and the Court should find trial counsel was ineffective for failing to stipulate to Appellant's status as a convicted felon. The trial court's failure to recognize that Appellant received ineffective assistance of counsel was clearly erroneous. Appellant's conviction must be reversed, and the case must be remanded to the trial court, with instructions to grant Appellant a new trial.

II. The trial court erred in denying Appellant's amended motion for new trial because the trial court conferred with defense counsel out of the presence of Appellant 26 times during bench conferences, which were a fundamental and critical part of his trial under both the federal and state constitutions, and Appellant did not waive his right to be present and participate in the bench conferences.

A criminal defendant has a due process right to be present during all portions of his or her trial, and the defendant's absence during a critical stage of the trial proceedings, absent a waiver of the defendant's right to be present, is not subject to

harmless error analysis. 1983 Ga. Const., Art. I, Sec. I, Par. XII; *Tiller v. State*, 96 Ga. 430 (1) (23 SE 825) (1895).

This Court has held that a critical stage in a criminal prosecution is one where the defendant's presence is necessary to contribute to the fairness of the proceedings. If the proceeding is one in which the defendant's rights may be lost; defenses may be waived; privileges may be claimed or waived; or the outcome of the case can be substantially affected in some way, it is a critical stage of the trial. *Huff v. State,* 274 Ga. at 111 (quoting *Ballard v. Smith*, 225 Ga. 416, 418 (2)) (169 SE2d 329) (1969).[5]

Granted, this Court has held that when a trial court improperly communicates with trial counsel outside the defendant's presence, the error can be harmless, if the communication did not materially affect the outcome of the case or did not prejudice the defendant by providing a causal link to the jury's verdict. *Benton v. State*, 271 Ga. p. 207 (609 SE2d 163, 164) (2005).

But to determine whether the communication did not materially affect the outcome of the case or prejudice the defendant, there must be a record available for judicial review of the ex parte communication between the trial court and trial

[5] For a detailed outline of the history and scope of a criminal defendant's right to be present at critical stages of their trial, see Justice Hunstein's dissent in *Moore v. State,* 290 Ga. 805 (2012).

counsel. Simply put, it is a matter of due process.

In Appellant's case, 26 bench conferences were conducted between the trial court, trial counsel and the prosecutor, in the absence of the defendant, and no record was made of a single bench conference. A court reporter did not take down the bench conferences, and the trial court did not perfect the record after each bench conference by reciting in the presence of the Appellant, on the record, what transpired. Inevitably, this deprived the Appellant of his right to participate in a meaningful way during a critical stage of his trial proceedings.

This Court has consistently ruled that unless the defendant waives his right to be present or acquiesces in his absence, an enumeration of error raising the issue is not subject to harmless error analysis on direct appeal. See *Brooks v. State,* 271 Ga. 456, 457 (2) (519 SE2d 907) (1999); *Holsey v. State,* 271 Ga. 856, 860-861 (5) & n. 11 (524 SE2d 473) (1999).

Previous decisions of the Supreme Court of Georgia have concluded that the defendant has the right to be present during jury selection, the presentation of evidence, a hearing on a motion to disqualify defense counsel, closing arguments; substantive communications with jurors, and resentencing. See, e.g., *Fair v. State,* 288 Ga. 244 (3) (702 SE2d 420) (2010) (evidentiary hearing on motion to disqualify a codefendant's attorneys); *Dawson v. State*, 283 Ga. 315 (5) (658 SE2d

755) (2008) (presentation of testimony to the jury); *Shaheed v. State,* 274 Ga. 716 (559 SE2d 466) (2002) (amendment of a sentence, imposing harsher punishment); *Brooks,* supra, 271 Ga. at 456—457 (striking of jurors); *Hanifa v. State,* 269 Ga. 797 (6) (505 SE2d 731) (1998) (colloquy between the trial judge and jury); and *Wilson v. State*, 212 Ga. 73, 75-78 (90 SE2d 557) (1955) (solicitor-general's argument to the jury).

Both the Sixth Amendment and Art. I, Sec. I, Par. XII of the Georgia Constitution of 1983, as amended, guarantee a criminal defendant's "right to be present, and see and hear, all the proceedings which are had against him on the trial before the Court." *Wade v. State,* 12 Ga. 25, 29 (1852). See also *Martin v. State,* 51 Ga. 567, 568 (1871).

A colloquy between the trial judge and his attorney is a trial proceeding at which the defendant and their counsel are entitled to be present. *Seay y. State*, 11 Ga. App. 22 (3) (140 SE2d 283) (1965); *Hanifa v. State,* 269. Ga. 797, 807 (1998).

In *Dunn v. State*, 308 Ga. App. 103, 107 (2011), the Court of Appeals specifically ruled that a criminal defendant's right to be present is guaranteed by the state constitution and the state constitutional right to be present is not subject to harmless error review on appeal. The Court of Appeals further held in *Payne v. State,* 290 Ga. App. 591-592 (4) that "if a defendant is denied the right to be

present at a critical stage, prejudice is presumed and a new trial is mandated."

In *Peterson v. State,* 284 Ga. 275, 279 (663 SE2d 164) (2008), the Supreme Court distinguished the standards of review for an alleged violation of the federal constitutional right of a criminal defendant to be present at all critical stages of the proceedings against him and a violation of the corresponding right to be present under the Georgia Constitution. The latter is not subject to a harmless error review on appeal. If the issue is properly raised on direct appeal, absent a valid waiver by the defendant of the right to be present, a violation of the right requires reversal of the defendant's conviction and remand of the case for a new trial.

The issue of Mr. Prickett's absence during 26 bench conferences between the trial court, trial counsel and the prosecution – which took place during a critical phase of his trial -- was properly preserved in the trial court and has been properly raised in this direct appeal from Mr. Prickett's conviction. (R-524-568; 687-707; MNT-2114-2445). Thus, there are three questions at issue here for the Supreme Court to answer:

(1) Was there a violation of Mr. Prickett's right to be present? If so, then
(2) Did the violation occur during a critical stage of Mr. Prickett's trial? If so, then
(3) Was there a valid waiver by Mr. Prickett of the of the right to be present"?

Regarding the first question, "The rule is well established in this state, that the defendant on trial must be present when the court takes any action materially affecting his case." *Locklin v. State,* 228 Ga. App. 696, 697(2) (492 SE2d 712) (1997). This means that the accused and his counsel have the right to be present at every stage of the proceedings and personally see and know what is being done in the case.

"To say that no injury results when it appears that what occurred in their absence was regular and legal would, in effect, practically do away with this great and important right, one element of which is to see to it that what does take place is in accord with law and good practice." *Goodroe v. State,* 224 Ga. App. 378, 380

Regarding the second question, there can only be one correct answer, which is yes. Although the trial court in its Order Denying Motion for New Trial made a finding that the 26 bench conferences "dealt with either logistical/procedural matters or questions of law," this was plain error, because none of the bench conferences were taken down by a court reporter, transcribed and made a part of the record.

A trial judge simply cannot declare, by judicial fiat, ten years after a trial, that what took place during an unrecorded bench conference (much less 26 unrecorded bench conferences) was unimportant to the defendant. To ratify such

action by a trial judge would be to allow the trial judge to usurp the function and duties of a certified court reporter enlisted to take down the trial and prepare a transcript.

OCGA Section 5-6-41(a) states, "In all felony cases, the transcript of evidence and proceedings shall be reported and prepared by a court reporter as provided in Code Section 17-8-5 or as otherwise provided by law."

OCGA Section 17-8-5 (a) provides in pertinent part, "On the trial of all felonies the presiding judge shall have the testimony taken down and, when directed by the judge, the court reporter shall exactly and truly record or take stenographic notes of the testimony and proceedings in the case, except the argument of counsel." Clearly, the legislature's intent in enacting this statute was to make sure that "proceedings," in addition to testimony (except the argument of counsel) be taken down by a court reporter.

Furthermore, interpreting the plain meaning of the phrase, "and, when directed by the judge," it clearly does not say a judge can order a court reporter to omit something from the record so that the judge can declare what transpired.

Also, OCGA Section 5-6-41(d) states in pertinent part, "Where a trial in any civil or criminal case is reported by a court reporter, all motions, colloquies, objections, rulings, evidence, whether admitted or stricken on objection or

otherwise, … and all other proceedings which may be called in question on appeal or other post trial procedure shall be reported: …"

Moreover, in this case, the trial was reported, with an obtainable transcript, and thus, the transcript was not prepared from recollection under OCGA Section 5-6-41(g). Yet, the trial court, in its Order Denying Motion for New Trial, claimed that by reading portions of the transcript immediately before and immediately after each bench conference, it possessed the sole authority to interpolate what transpired at each bench conference. This in itself is plain error. No one can say for sure what transpired at each bench conference without a written transcript of the colloquies between the trial court, trial counsel and prosecutor.

If the Supreme Court approves the trial court's actions in this case, a dangerous precedent will be established for a trial judge to rule, any time a criminal defendant is not present during their trial and a record is not made of the proceedings, that the defendant's presence would be useless. This would pave the way for the unbridled abuse of judicial power. In fairness to all, and to preserve the integrity of the judicial process, this Court should find that the bench conferences were a critical stage of the Appellant's trial.

Regarding the third question, it is true that the right to be present belongs to the defendant, and the defendant is free to relinquish that right if he or she so

chooses. But the Appellant did not waive his right to be present during the 26 bench conferences held in this case. The trial court's determination that he did waive the right to be present is plain error, because there is no record of the bench conferences and no record of the Appellant waiving his right to be present in the trial transcript.

The right to be present is waived if (1) the defendant personally waives it in court; or (2) counsel waives it at the defendant's express direction; or (3) counsel waives it in open court while the defendant is present; or (4) counsel waives it and the defendant subsequently acquiesces in the waiver. *Ward v. State,* 288 Ga. 641, 646(4) (706 SE2d 430) (2011).

The burden is on the State to establish a waiver of the right to be present when this serious issue arises. Where there is no evidence in the record of a valid waiver or subsequent acquiescence by the defendant, any conviction obtained as the result of a violation of this right must be reversed. *Locklin,* supra, at 698 (2); *Goodroe,* supra, at (381) (1).

None of the four ways of waiving the right to be present enumerated in *Ward,* supra, occurred here. Appellant did not (1) personally waive it in court; (2) Counsel did not waive it at the Appellant's express direction; (3) Counsel likewise did not waive it in open court while the Appellant was present; and (4) Counsel did

not waive it, with the Appellant subsequently acquiescing in the waiver.

If anything, trial counsel arguably may have waived Appellant's right to be present without Appellant's express direction, which does not constitute a valid waiver. See *Ward,* supra, at 646 (4) ("Although neither counsel objected to the court's action, such inaction on the part of counsel does not constitute waiver for their clients.").

Moreover, in the case at bar, it cannot be said that Mr. Prickett acquiesced in any waiver by trial counsel of his right to be present at the 26 bench conferences. "Acquiescing" in such a waiver necessarily implies that one knows of the right one is consenting to relinquish. A waiver is an intentional relinquishment or abandonment of a known right or privilege. One cannot acquiesce in a wrong while ignorant that a wrong has been committed.

Therefore, to determine whether Appellant acquiesced, "… we must therefore first determine whether Appellant knew that he had the right to be present …We cannot assume such knowledge." *Russell v. State,* 236 Ga. App. 645, 648(2) (512 SE2d 913) (1999) (internal citations and quotation marks omitted, emphasis added).

Ward, supra, is particularly instructive on the issue of knowledge. In *Ward,* a juror was dismissed at the conclusion of the defense's closing arguments, outside

the defendant's presence. Ward's lawyers did not object. The juror's sudden absence was obvious. *Ward, supra,* at 644 (4). By the time counsel realized this created a serious problem, the juror "had already left the courthouse and was no longer available." *Ward,* at 645 (4).

So how could Mr. Ward have been unaware that a juror had been dismissed? After all, the jury that was deciding his fate - the jury that sat through the state's closing argument and the jury instructions - was suddenly smaller. And since Mr. Ward had not been present when the juror was dismissed, it is reasonable to assume that he was aware that the juror was dismissed when he was not present.

Yet, the Supreme Court of Georgia held that Ward's mere knowledge that this juror had been dismissed outside his presence was insufficient to be a waiver of his right to be present. For it to be a valid waiver, a finding was required that the "appellants knowingly acquiesced in waiver on the part of their attorneys." *Ward,* at 646 (4). "Acquiescence may arise where person who knows that he is entitled to enforce right neglects to do so." *Ward,* at 646 (4) (internal quotation marks omitted).

In the instant case, Mr. Prickett did not know what had been presented to the court on his behalf by his trial counsel during these bench conferences, nor was he brought up to the bench during the conferences so that he could participate in a

meaningful way. If Appellant's trial counsel did waive Appellant's presence, it was done without his client's knowledge. Appellant was not aware of any questions posed to the trial court. Appellant was not informed that he had the right to prohibit his counsel from posing any questions to the trial court during the bench conferences. For that matter, it is likely that Appellant didn't know that he had a voice in the decisions being made on his behalf at the 26 bench conferences.

Contrary to the trial court's finding in its Order Denying Motion for New Trial, no showing was made by the State that Appellant learned at any point during the trial that he had right to be present during the 26 bench conferences. "One cannot acquiesce in a wrong while ignorant that it has been committed …" *Ward,* at 646 (4).

Appellant certainly did not knowingly acquiesce to his absence from the proceedings in this felony murder case. This Court must reverse Appellant's conviction due to this harmful, plain error.

III. <u>The trial court erred in denying Appellant's amended motion for new trial because the trial court failed to rebuke the prosecutor and declare a mistrial, or in the alternative, give a curative instruction to the jury following defense counsel's objection to an improper comment by the prosecutor during closing arguments.</u>

During her closing argument, the assistant district attorney – a seasoned prosecutor – quoted part of a recorded telephone conversation between the Appellant and Zakkiah Robinson, a witness for the State, that had been redacted before it was played for the jury by the State. The quote was a statement made by the Appellant to Robinson whereby Appellant said, "I couldn't go the doctors; I had to go to the CVS because knew I knew they were looking for me." (T7-1593).

Appellant's trial counsel immediately asked to approach the bench, and a bench conference was then conducted by the trial court with trial counsel and the prosecutor. However, the bench conference was not taken down by the court reporter, and the trial court neither rebuked the prosecutor nor gave a curative instruction to the jury to disregard the comment.

The assistant district attorney then concluded her closing argument on behalf of the State, and the jury was excused for a ten-minute recess. (T-1593-1615).

Appellant's trial counsel objected to the prosecutor's improper comment, the trial court noted the objection, and the prosecutor agreed the objection was being noted on the record. (T7-1615-1616). The trial court then summoned the jury back to the courtroom, but did not give any curative instruction to the jury to disregard the prosecutor's improper comment following Appellant's objection. (TT., pg. 1615-1616). Instead, the trial court gave its charge to the jury. (T7-1617-

1646).

The trial court's failure to rebuke the prosecutor and to give the jury a curative instruction was an abuse of the trial court's discretion and also in violation of the requirements of OCGA Section 17-8-75, which states:

> "Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the prosecuting attorney is the offender."

"The plain language of OCGA Section 17-8-75 speaks in terms of the trial court's duty to give a curative instruction when a proper objection is made to the State's introduction of improper argument on matters that are not in evidence, and because our most recent precedents interpreting the statute make clear that a mere objection is sufficient to preserve the issue for appellate review..." *O'Neal v. State*, 288 Ga. 219, 220-222, 702 SE2d 288, 290-292 (2010).

"In construing this statute, we apply the fundamental rules of statutory construction that require us to construe [the] statute according to its terms, to give words their plain and ordinary meaning, and to avoid construction that makes some language mere surplusage. At the same time, we must seek to effectuate the intent

of the legislature." *Slakman V. Cont'l Cas. Co.*, 277 Ga. 189, 191 (587 SE2d 24) (2003).

"[T]he language of the statute being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent" (Citations and punctuation omitted). The statute unambiguously indicates that where, as here, a prosecutor has made "statements [to the jury] of prejudicial matters which are not in evidence," and where proper objection has been raised, "the court shall rebuke the counsel [who made the inappropriate statements] and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds." *O'Neal,* supra, at 220-222.

OCGA Section 17-8-75 also expressly gives the trial judge the discretion to grant a mistrial in lieu of rebuking the prosecutor and giving an appropriate curative instruction to the jury.

"Nowhere in the statute is there requirement for defense counsel to specifically request additional remedies after interposing an objection to the improper statements made by prosecutor. To the contrary, the plain language of OCGA 17-8-75 refers to the trial court's independent duty, after defense counsel's objection, to rebuke the prosecutor, give an appropriate curative instruction, or grant a mistrial in the event that the prosecutor has injected into the case

prejudicial statements on matters outside of the evidence." *O'Neal*, supra, at 220-222.

"Consistent with the plain language of OCGA Section 17-8-75, this Court's most recent authorities interpreting the statute have allowed appellate review of a trial court's failure to rebuke a prosecutor or give a curative instruction where defense counsel did nothing more than interpose an objection to the prosecutor's improper statements." See *Stinski v. State*, 286 Ga. 839, 858 (64) (691 SE2d 854) (2010) (opinion makes no mention of any request by defense counsel for rebuke of prosecutor for making improper statements, but nevertheless concludes "that the trial court erred by failing to rebuke counsel and to instruct the jury to disregard the unauthorized argument, as was required by OCGA 17-8-75") (emphasis supplied.

See also *Zackery v. State,* 286 Ga. 399, 401 (2), n. (688 SE2d 354) (2010) ("OCGA 17-8-75 requires the trial court to act when counsel makes timely objection") (emphasis supplied); *Arrington v. State*, 286 Ga. 335, 345 (16) (687 SE2d 438) (2009) (where counsel merely interposed objection to prosecutor's improper closing argument, "the trial court erred in not fulfilling its duty under OCGA 17-8—75" to rebuke counsel and instruct the jury to remove the improper impression from their minds or order a mistrial) (emphasis supplied); *Walker v. State*, 281 Ga. 521, 523 (5) (640 SE2d 274) (2007) (where defense counsel's

objection to improper closing argument was overruled and trial court made no further comment to the jury, "[t] he trial court ... failed to perform the duty imposed [upon it] by OCGA [Section] 17-8-75") (emphasis supplied).

Furthermore, see *Bolden v. State,* 272 Ga. (525 SE2d 690) (2000), in which the Supreme Court stated, "When an improper argument is made, opposing counsel may obtain appellate review of the trial court's ruling simply by objecting.") (footnote omitted).

Accordingly, the trial in the case at bar erred by failing to fulfill its duty under OCGA Section 17-8-75 to rebuke the assistant district attorney and instruct the jury in order to remove any improper impression that may have been left in their minds.

Moreover, it is disturbing that the trial court appeared to gloss over this prosecutorial misconduct in its colloquy with Appellant's trial counsel and the assistant district attorney when trial counsel objected outside the presence of the jury to the prosecutor's remark:

THE COURT: Well, I've got a rough copy of the record. She says she doesn't need – you will have to rely on your notes what they did. I don't think that violates what you all indicated.

MR. FRANCIS: Right, yeah, she doesn't –

THE COURT: I mean; she's making a comment on the argument –

MR. FRANCIS: Right.

THE COURT: -- she's not linking jail recordings to whatever. She is just saying in general: This is what we concluded. Do you still wish me to note your objection?

The trial court seemed unconcerned that the assistant district attorney had quoted a redacted statement from a jail telephone call made by the Appellant of an incriminating nature. Moreover, since the statement had been redacted from the jail telephone call, which was played for the jury by the State in its case in chief, it must be assumed that the use of the statement in closing argument by the very experienced assistant district attorney (now the District Attorney of Fulton County) was intentional.

Appellant's trial counsel did not have an opportunity to rebut the use of this improper statement which was not in evidence, since he had already given his closing argument. The proper remedy at that point was for the trial court to declare a mistrial, sua sponte, or at a minimum, rebuke the prosecutor and instruct the jury to disregard the redacted quote. Yet, it appears that the trial court, for reasons unknown, ignored its statutory duty under OCGA Section 17-8-75 and did neither.

Clearly, the trial court abused its discretion in this matter, and as a result, the

trial court committed a harmful error which cannot be glossed over on appeal. Appellant is entitled to a new trial.

CONCLUSION AND PRAYER FOR RELIEF

A. Conclusion

Appellant was the victim of ineffective assistance rendered by his trial counsel in this case when his trial counsel failed to stipulate to his status as a convicted felon, to his prejudice, and the trial court's finding that trial counsel's actions were objectively reasonable was clearly erroneous.

Furthermore, Appellant did not waive his right to be present during 26 bench conferences during a critical stage of his trial, and the trial court's finding from the record that a valid waiver existed was plain error.

Finally, the trial court abused its discretion in failing to rebuke the prosecutor and either declare a mistrial or give an appropriate curative instruction when the prosecutor made prejudicial statements on matters out outside of the evidence during closing argument.

B. Prayer for Relief

Accordingly, the Supreme Court should reverse Appellant's conviction for felony murder, aggravated assault and possession of a firearm by a convicted felon and remand the case to the trial court with instructions to the trial court to grant

Appellant's amended motion for new trial.

Respectfully submitted this 11th day of February, 2022.

/s/ MICHAEL S. WEBB
Michael S. Webb
Attorney for Appellant
Georgia Bar No. 744637
Office of the Appellate Defender
270 Washington Street, Suite 5161
Atlanta, GA 30334
(404) 795-2500
mwebb@gapublicdefender.org

IN THE SUPREME COURT

STATE OF GEORGIA

SANTRON DEON PRICKETT,	*	
APPELLANT	*	
vs.	*	CASE NO. S22A0531
THE STATE,	*	
APPELLEE	*	

CERTIFICATE OF SERVICE

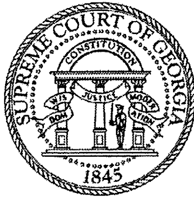
This is to certify that I have this day served the party below with a copy of the foregoing **BRIEF OF APPELLANT** by electronic delivery as well as by First Class USPS Mail in an envelope, with adequate postage affixed thereon, addressed to the following prosecuting attorney designated as counsel of record for the Appellee:

Hon. Fani T. Willis
District Attorney
Atlanta Judicial Circuit
Attention: Mathew Eli Plott, Assistant District Attorney
Attention: Lyndsey Hurst Rudder, Assistant District Attorney
136 Pryor Street, S.W. 3rd and 4th Floors
Atlanta, GA 30303

Hon. Christopher M. Carr
Attorney General
Department of Law
Attention: Paula Khristian Smith, Assistant Attorney General
Attention: Patricia B. Attaway Burton, Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This 11th day of February, 2022.

/s/ MICHAEL S. WEBB
Michael S. Webb
Attorney for Appellant
Georgia Bar No. 744637
Office of the Appellate Defender
270 Washington Street, Suite 5161
Atlanta, GA 30334
(404) 795-2500
mwebb@gapublicdefender.org



SUPREME COURT OF GEORGIA
Case No. S22A0531

January 5, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

SANTRON PRICKETT v. THE STATE

Upon consideration of the Appellant's motion for an extension of time to file appellant's brief in the above case, it is hereby ordered that the motion be granted. An extension is given until February 21, 2022, to file.

A copy of this order MUST be attached as an exhibit to the document for which an extension is received.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

[signature], Clerk