IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC93108
	)	
DENFORD JACKSON,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 29
THE HONORABLE MICHAEL F. STELZER, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

In the Circuit Court of St. Louis City, Cause No. 0922-CR04521-01, the State of Missouri charged Appellant, Denford Jackson, with the class A felony of robbery in the first degree in violation of § 569.020, RSMo, and the unclassified felony of armed criminal action in violation of § 571.015, RSMo.[1]

After a jury trial on May 3-5, 2011, Mr. Jackson was found guilty of both charges; and on July 22, 2011, he was sentenced to concurrent terms, in the Missouri Department of Corrections, of thirty years and ten years, respectively. On July 28, 2011, he filed a notice of appeal.

The Court of Appeals, Eastern District, issued an order and supporting memorandum affirming the Mr. Jackson's sentences and convictions. This Court ordered transfer on February 26, 2013 after Ms. Jackson's application. Mo. Const., Art. V § 9; Rule 83.04

[1] All statutory references are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

The State of Missouri charged Appellant, Denford Jackson, with the class A felony of robbery in the first degree and the unclassified felony of armed criminal action, alleging that he forcibly stole currency from an employee of the Laclede Coffee shop on August 27, 2009, and that he had "displayed or threatened the use of what appeared to be a deadly weapon" in the commission of that robbery (L.F. 10, 11; Vol. I: Tr. 166, 172-174).[2] A jury trial was held before the Honorable Michael F. Stelzer on May 3-5, 2011 (Vol. I: Tr. 1-186; Vol. II: Tr. 1-137).

The transcript on appeal is incomplete, containing omissions from the record (listed as "**equipment failure**" or "**equipment failed**") (*See e.g.*, 13, 14). In all, the transcript is missing portions of pretrial discussions between the parties and the court, of *voir dire*, and of the evidence on nineteen separate transcript pages (Vol. I: Tr. 5, 10, 11, 12, 13, 14, 15, 16, 42, 51, 95, 110, 113, 140, 143, 166, 167, 179, 186).

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[2] Denford Jackson will cite to the record as follows: "(L.F.)" for the legal file; "(Vol. I: Tr.)" for the May 3-4, 2011 trial transcript; "(Vol. II: Tr.)" for the May 5, 2011 trial transcript; "(S.Tr.)" for the sentencing transcript of July 22, 2011; "(Appx.)" for the appendix; and "(M. Remand)" for appellant's motion to remand for a new trial, or alternatively to supplement transcript record, filed in the Court of Appeals (*See* ED97113).

On August 27, 2009, around 7:00 a.m., employee Leslie Shifrin opened the Laclede Coffee shop, began setting up pastries, and making coffee (Vol. I: Tr. 166-167). Ms. Shifrin was the only employee that morning and the store was not busy (Vol. I: Tr. 167). Sometime after 7:00a.m., two women entered the store and introduced themselves in connection with a fundraiser that the store was participating in to raise money for a charity (Vol. I: Tr. 167, 172; Vol. II: Tr. 4). Ms. Shifrin worked both in and out of the kitchen in the back, as the two women set up their brochures for the fundraiser (Vol. I: Tr. 172). Later, when she was in the back kitchen a man appeared and, because people frequently got lost due to the layout of the store, she approached him to see if he was confused and needing to get to a different part of the store (Vol. I: Tr. 172).

As she got close, the man grabbed her arm and guided her to the cash register (Vol. I: Tr. 172). At that time she felt something in her back and saw a gun (Vol. I: Tr. 172). She said she "looked down and [she] could see it after [she] had looked down and he guided [her] forward" (Vol. I: Tr. 173). She said it was a "silverish" revolver (Vol. I: Tr. 173).

Both walked to the cash register and she handed him the money inside (Vol. I: Tr. 173-174). He instructed her to go into the kitchen and lay on the ground (Vol. I: Tr. 174). He patted her pockets, then left the store (Vol. I: Tr. 174-175). She got up and, because her hands were shaking, one of the other

two women connected with the charity called the police (Vol. I: Tr. 175-176; Vol. II. Tr. 32). A description of the robber was given to the police (Vol. I: Tr. 176).

The next day police brought photographs to Ms. Shifrin's home and she picked out Mr. Jackson from the photographs (Vol. I: Tr. 178-181). She identified him in court (Vol. I: Tr. 178-181).[3]

Laclede Coffee shop had a video surveillance system that captured the robbery (Vol. I: Tr. 182). The prosecutor informed the judge that he would "want . . . to play one or two shots of the video for the jury" (Vol. I: Tr. 182-187). The video was played and questions posed, by the prosecutor, to Ms. Shifrin: "It would appear that the defendant's left hand is in the small of your back"; "Is that where you were feeling the gun"; "Again . . . now the defendant – or I'm sorry, the person who robbed you, defendant's hand is still pointed in your back at that point"; "You still feel something in your back at that point"; "Now the entire time was the gun still in your back" (Vol. I: Tr. 183-185). The prosecutor received, for each question, the answer suggested by the question (*See* Vol. I: Tr. 183-185). The direct-examination of Ms. Shifrin is not

[3] The testimony of Detective Michael Herzberg, at Vol. II: Tr. 59-77, concerns how, through nearby video surveillance and the knowledge of another officer, the police came to include Mr. Jackson's photograph in the photo spread presented to the witnesses.

completely recorded and the transcript ends abruptly with the court reporter's notation that her recording equipment failed (Vol. I: Tr. 187).

The cross-examination of Ms. Shifrin does not exist in the written transcript (*See e.g.,* Vol. I: Tr. 187; Vol. II: Tr. 2; *see also* (M. Remand)).[4] Sometime on May 4, 2011, the proceedings ended for the day and on May 5, 2011, the proceedings resumed with the judge noting that the court reporter's equipment had failed, that they had checked the record, and that they may need to repeat some of the testimony (Vol. II: Tr. 3). The judge added that he had been told that the equipment failure they experienced was the second one in twenty years (Vol. II: Tr. 3).

On that day of trial, the two women in the coffee shop testified (Vol. II: Tr. 4-25, 25-47). Jenna Schoenborn testified that she was present sometime after 7:00 a.m. at Laclede Coffee shop to set up for the charity (Vol. II: Tr. 4-5). Jenna was there with her sister, Sara, to ease her sister's nerves in her giving her first presentation and to give her advice on how to approach and talk to the coffee shop's customers about the charity (Vol. II: Tr. 5-6).

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[4] It is also not known for certain whether re-direct and re-cross examinations occurred (*See* Vol. I: Tr. 187); however, the court reporter does indicate only that a "few more questions" were asked during direct, and then cross examination was conducted (Vol. I: Tr. 187). No mention is made of re-direct and re-cross (Vol. I: Tr. 187).

When the first customer walked in, Sara greeted him and talked to him about the charity (Vol. II: Tr. 5-6, 28-29). After Sara talked to the man, he left and said that he would be back in a minute (Vol. II: Tr. 29-30). Both sisters identified Mr. Jackson as the person whom Sara spoke to that morning (Vol. II: Tr. 14, 16, 36-41).

Jenna Schoenborn testified that she never saw a pistol or weapon (Vol. II: Tr. 20). After watching the video, she recalled that Mr. Jackson had his hand in his right pocket while he spoke with her sister (Vol. II: Tr. 24). Sara Schoenborn said that she saw Mr. Jackson and Ms. Shifrin at the cash register (Vol. II: Tr. 30-31). She could see their bodies "from the waist up from behind the counter" (Vol. II: Tr. 31). She also never saw a weapon (Vol. II: Tr. 44).

Like the prosecution, the defense introduced portions, or stills, of the videotape (*See* Vol. II: Tr. 79-80). Following that, defense counsel and the prosecutor engaged Detective Herzberg in a volley of questions about whether what was depicted in video stills could be a gun or whether it could be a cell phone (Vol. II: Tr. 84-88).

During the instruction conference, defense counsel offered a lesser-included instruction for robbery in the second degree (Vol. II: Tr. 94-95). Defense counsel argued that there was evidence to dispute or refute Ms. Shifrin's testimony that there was a gun, as well as her belief that there was a gun (Vol. II: Tr. 95). The prosecutor responded that the video showed

"something in the defendant's hand" and reminded the court that Ms. Shifrin had no doubt in her mind that what she saw was a gun (Vol. II: Tr. 96). The trial court denied counsel's request for the lesser-included instruction, indicating that the court did not think "the facts as submitted here would support a reasonable finding that there is no robbery first, but in fact a robbery second" (Vol. II: Tr. 97). The trial court also believed that if it were to submit a lesser-included instruction in this case, it would have to every time a robbery in first degree was charged (Vol. II: Tr. 97-98).

In closing, the prosecutor argued among other things:

> Understand that the fourth element, displays or threatens the use of what appears to be a deadly weapon, means that I could walk into a 7-Eleven or a coffee shop or a bank or walk up to anybody and say give me your money, alright? Under the law, that is first degree robbery.

(Vol. II: Tr. 108).

The case was submitted to the jurors (Vol. II: Tr. 128). They requested the video and still photographs (Vol. II: Tr. 128; L.F. 68). The jurors returned guilty verdicts on robbery in the first degree and armed criminal action (Vol. II: Tr. 133; L.F. 70, 71).

On July 22, 2011, Mr. Jackson was sentenced to concurrent sentences of thirty years and ten years on robbery in the first degree and armed criminal

action, respectively (S. Tr. 5; L.F. 85-88). On July 28, 2011, he filed a notice of appeal (L.F. 92-96).

The Court of Appeals, Eastern District, issued an order and supporting memorandum, affirming Mr. Jackson's sentences and convictions (ED97113). This Court ordered transfer on February 26, 2013 after Ms. Jackson's application. Mo. Const., Art. V § 9; Rule 83.04.

This appeal follows. Denford Jackson states the above facts, and will adduce other facts, as necessary, in the argument portion of his brief.

POINT RELIED ON - I

The failure of the court reporter to prepare a full and complete transcript, but instead one that omits the entire cross-examination of the victim and sole witness to the use of a dangerous or deadly weapon by the defendant as well as other portions of the trial, has denied Mr. Jackson of his right to due process, right to a full and complete transcript, right to access to the courts, and right to meaningful appellate review, as guaranteed to the Fifth and Fourteenth Amendments to the United States Constitution, Article I, §§ 10 and 14 of the Missouri Constitution, and 485.050, RSMo, in that despite Mr. Jackson's diligence in attempting to supplement the omissions, the omitted transcript portions remain missing and the missing transcript testimony and record prevents this Court from meaningful appellate review, *inter alia*, on the issue of whether the trial court erred in failing to provide a lesser-included instruction, and prejudices Mr. Jackson by the near impossibility of him presenting, or this Court reviewing, any claim concerning the confrontation of the State's critical witness, and the only one to establish an essential element of the charge of robbery in the first degree. Because the missing transcript is more than an isolated or trivial omission, and concerns a critical witness (and the confrontation of her), Mr. Jackson respectfully requests that this Court

vacate his convictions and sentences and remand his case for a new trial, or in the alternative, for other such relief that this Court deems just and fair.

State v. Barber, 391 S.W.3d 2 (Mo. App. W.D. 2012);

Jackson v. State, 514 S.W.2d 532 (Mo. 1974);

R.R.M. v. Juvenile Officer, 226 S.W.3d 864 (Mo. App. W.D. 2007);

United States v. Margetis, 975 F.2d 1175 (5th Cir. 1992);

Mo. Const., Art. I §§ 10 and 14; and,

U.S. Const., Amend. V and XIV.

POINT RELIED ON - II

The trial court erred and abused its discretion by refusing defense counsel's request to submit the lesser-included offense instruction of robbery in the second degree on Count I, because there was a basis in the evidence for an acquittal of the higher offense and a conviction on the lesser offense, in that the State's videotape evidence as well as the cross-examination testimony of Ms. Shifrin, provided evidence by which the jurors could have concluded that the defendant was not armed with what reasonably appeared to be a dangerous and deadly weapon and that Mr. Shifrin's belief that a gun existed, to the extent she may have maintained that belief during cross-examination, was unreasonable. The failure to instruct the jury on the lesser-included offense violated Mr. Jackson's right to due process of law, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 10 and 18(a) of the Missouri Constitution, and § 556.046.3, RSMo. Mr. Jackson requests that this Court vacate and set aside his convictions and sentences and remand for a new trial.

State v. Barber, 391 S.W.3d 2 (Mo. App. W.D. 2012);

State v. Pond, 131 S.W.3d 792 (Mo. banc 2004);

State v. Williams, 313 S.W.3d 656 (Mo. banc 2010);

State v. Coker, 210 S.W.3d 374 (Mo. App. S.D. 2006);

Mo. Const., Art. I §§ 10 and 18(a);

U.S. Const., Amend. V, VI, and XIV; and,

§ 556.046.3, RSMo.

ARGUMENT – I

The failure of the court reporter to prepare a full and complete transcript, but instead one that omits the entire cross-examination of the victim and sole witness to the use of a dangerous or deadly weapon by the defendant as well as other portions of the trial, has denied Mr. Jackson of his right to due process, right to a full and complete transcript, right to access to the courts, and right to meaningful appellate review, as guaranteed to the Fifth and Fourteenth Amendments to the United States Constitution, Article I, §§ 10 and 14 of the Missouri Constitution, and 485.050, RSMo, in that despite Mr. Jackson's diligence in attempting to supplement the omissions, the omitted transcript portions remain missing and the missing transcript testimony and record prevents this Court from meaningful appellate review, *inter alia*, on the issue of whether the trial court erred in failing to provide a lesser-included instruction, and prejudices Mr. Jackson by the near impossibility of him presenting, or this Court reviewing, any claim concerning the confrontation of the State's critical witness, and the only one to establish an essential element of the charge of robbery in the first degree. Because the missing transcript is more than an isolated or trivial omission, and concerns a critical witness (and the confrontation of her), Mr. Jackson respectfully requests that this Court

vacate his convictions and sentences and remand his case for a new trial, or in the alternative, for other such relief that this Court deems just and fair.

Preservation and Standard of Review

"A losing party is entitled to appellate review based upon a full, fair and complete transcript on appeal." *State v. Fults*, 719 S.W.2d 46, 48 (Mo. App. E.D. 1986) (quoting *Jackson v. State*, 514 S.W.2d 532, 533 (Mo. 1974). A transcript that is defective in its completeness does not automatically require reversal. *Id*. In order to obtain a retrial, an appellant must show: (1) that he or she exercised due diligence to correct the transcript's accuracy or to supply an omission; and (2) that he or she is prejudiced as a result of the inability to present an accurate and true record. *Id*. (citing *State v. Borden*, 605 S.W.2d 88, 92 (Mo. banc 1980)).

Prior to the filing of his appeal, Mr. Jackson filed, in the Eastern District Court of Appeals, a motion to remand for a new trial, or alternatively to correct or supplement the omissions in the trial transcript (*See* ED97113; M. Remand, 1-5). In that motion, he requested "that this case be remanded for a new trial so that a complete record can be made. Alternatively, he requests that this Court remand the case to the trial court to supplement, if possible, all omissions in [the] trial transcript, or for any appropriate relief this Court deems necessary, so that Mr. Jackson will be found to have exercised due

diligence in providing this Court with a complete transcript" (M. Remand, at 5). The Eastern District Court of Appeals ordered that motion to be "taken with the case" (*See* ED97113, Order of June 11, 2012).

Argument

"You've got to be very careful if you don't know where you're going, because you might not get there."

-Yogi Berra

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A Georgia appellate court has said, in the context of a missing transcript on appeal, that "a general unspecified hope of reversible error during [the trial] does not win a new trial on the ground that a record should have been made so as to accommodate a search for error now buried in unrecorded history." *Primas v. State*, 501 S.E.2d 28, 30 (Ga. App. 1998).

Maybe that is as it should be, since in general not all of the transcribed testimony in a trial will always reach an objectively high level of significance. But in this trial, the unrecorded testimony includes that from the sole victim, Ms. Shifrin, not some tangential witness or venire person who never made the jury, and from the only witness to testify about an essential element of the State's case - an object that may or may not have reasonably appeared to her to be a deadly weapon or dangerous instrument (*See* Vol. I: Tr. 172-173). Missing from the transcript is a portion of her direct-examination and her

entire cross-examination testimony (*See* Vol. I: Tr. 187). Also missing from the transcript are statements from the parties surrounding the trial court's pretrial rulings, including statements about defense counsel's motion to suppress identification evidence, where counsel expressed the specific concern that Ms. Shifrin's identification of Mr. Jackson had been suggested to her by the police (*See* Vol. I: Tr. 6-10; *see also* L.F. 77, where defense counsel assigned error to the trial court's failure to suppress the identification evidence).

All the same, Mr. Jackson does not solely rely on an unspecified hope, but asserts that through Ms. Shifrin's cross-examination answers (the video tape notwithstanding), the trial court would have been obligated to instruct jurors on the lesser-included offense of robbery in the second degree, as requested by defense counsel (*See* Vol. II: Tr. 94-95; *see* Point Relied On - II). Additionally, however, Mr. Jackson does assert in this point relied on that he is, on appeal, at a major disadvantage by the missing testimony of the State's most critical witness, and by other omissions in the record; that he would have raised a Sixth Amendment confrontation issue, a challenge to the trial court's ruling on counsel's motion to suppress Ms. Shifrin's identification, or any number of other viable and meritorious issues if he only had the

complete transcript to review.[5] In truth, however, memories of judges, prosecutors, and defense attorneys, fade; evidence, unrecorded, will and does disappear into "unrecorded history." *Primas v. State*, 501 S.E.2d at 30. Mr. Jackson urges this Court, aside from any specific allegations of prejudice, to realistically consider the problems associated with, and the effect on this appeal, of the missing testimony and other omissions in this case.

This Court has said that an appellant "is entitled to a full and complete transcript for the appellate court's review." *State v. Middleton*, 995 S.W.2d 443, 446 (Mo. banc 1999); *Jackson v. State*, 514 S.W.2d 532, 533 (Mo. 1974). For an incomplete transcript to have any significance on appeal, however, an appellant must show that he "exercised due diligence to correct the deficiency in the record *and* he was prejudiced by the incompleteness of the record." *Id*. (citing *State v. Borden*, 605 S.W.2d 88, 92 (Mo. banc 1980)). (emphasis in original).

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[5] Appellant also notes that the missing transcript testimony would follow him, like a thorn in his side, through all stages of his case including state and federal collateral review. *See e.g.*, *Mitchell v. Wyrick*, 536 F.Supp. 395, 402-403 (Mo. E.D. 1982); *see also State v. Koenig*, 115 S.W.3d 408, 417 (Mo. App. S.D. 2003) (declining to speculate on future post-conviction effect of single discrepancy in transcripts, but going on to indicate the unlikelihood that a post-conviction court would make use of the particular discrepancy).

In perhaps the easier type of case, this Court and the Missouri Courts of Appeal have held that no relief was required due to the appellants' failure to attempt to correct the record. *See e.g.*, *Borden*, 605 S.W.2d at 92 ("If material omissions occurred it was incumbent upon the defendant-appellant to attempt to correct the record by stipulation or by motion to the appropriate appellate court . . . Nothing suggests an attempt to obtain by stipulation or motion the substance of the missing testimony or argument"); *Jackson v. State*, 514 S.W.2d at 534 ("no attempt . . . was made to supply the missing portion of the transcript); *State v. Baldridge*, 857 S.W.2d 243, 253 (Mo. App. W.D. 1993) (defendant failed "to follow a specific procedure governing the discovery of defects or omissions in the record").[6]

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[6] In older case law, Missouri courts spoke about resolving these issues on "principles analogous to equitable doctrines." *See Stevens v. Chapin*, 227 S.W. 874, 875-876 (Mo. App. W.D. 1921) (Where after a fire destroyed, *inter alia*, the stenographer's notes, the Court asked, "Under the foregoing circumstances, are we justified in reversing the judgment and ordering a new trial? . . . [and the answer] . . . must, in a large degree, depend upon the circumstances of each case. And the question whether appellant is to be granted relief on such ground should be determined upon principles analogous to equitable doctrines rather than the strict rules of law. Appellant is not asking for something to which he is entitled as a matter of strict,

Arguably the more difficult or unclear type of case, analytically, and as appellant here argues the more problematic in terms of his burden of proof, are the cases that analyze the requirement that an appellant demonstrate prejudice from an incomplete or inaccurate transcript. In most respects Missouri law appears to require and to reward a great deal of specificity to satisfy the prejudice requirement, while ignoring the idea that "you don't know what you don't know." For example, the Southern District reversed a modification order due to a "gap" in the transcript. *Francisco v. Hendrick*, 197 S.W.3d 628, 632 (Mo. App. S.D. 2006). Despite the father's testimony that addressed the income of both parties, and despite that the trial court's ruling would "not be disturbed 'unless the evidence is 'palpably insufficient' to support it[,]'" the Court held that, in light of the claims raised by the mother, that the "gap" in her testimony about the parties' incomes precluded appellate review, or that it was "impossible" to review the mother's claims. *Id*. at 629-632.

In contrast to *Francisco*, the Western District did not have a problem upholding a defendant's criminal conviction where the *voir dire* proceeding was missing from the trial transcript. *State v. Clark*, 263 S.W.3d 666, 674 (Mo.

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absolute, legal right but for that which the court, in the exercise of inherent extraordinary powers, will grant to prevent a possible injustice being done to one who is himself wholly without fault or blame").

App. W.D. 2008). In response to the defendant's allegation that he was prejudiced by the lack of a complete record and that the Court could not, therefore, review the fairness and impartiality of the jurors, the Court noted, "[h]e is correct, but he did not ask us to review any issues that arose during *voir dire*. These gaps have not thwarted our review of the claims that he has raised; hence, the missing *voir dire* transcript has not prejudiced [his] case." *Id*. Presumably, then, had the defendant in *Clark* drafted some claim that could not be "thwarted," he might have been entitled to relief.

Other cases support the observation that Missouri Courts reward specificity in the context of a missing transcript, while ignoring general claims of the unfairness of not knowing what is in the transcript and, therefore, of being prejudiced in that respect. *See State v. Christian*, 184 S.W.3d 597, 604-605 (Mo. App. E.D. 2006) (no remand for a new motion to suppress hearing ordered where defendant argued that if there had been a complete transcript he might have raised two additional claims on appeal); *State v. McVay*, 852 S.W.2d 408, 414-415 (Mo. App. E.D. 1993) (where appellant suggested that he had been prejudiced by the unavailability of the partial motion to suppress transcript . . . [and had] . . . nothing to review for errors[,]" the Court declined to remand since "appellant ha[d] failed to show specifically how he has been prejudiced by the incomplete record").

But Missouri law does not appear to be entirely unsympathetic to claims of possible, unknown, or unspecified error in the context of a missing transcript record. In *A.J.M. v. Greene County Juvenile Office*, in reversing a trial court's judgment based, in total or in part, on the inability to consider the appellant's specific claim of error, the Southern District at least gave voice to the appellant's assertion that, "[s]he also claims that the missing testimony could provide additional grounds for appeal." 158 S.W.3d 878, 878-879 (Mo. App. S.D. 2005). Missouri Courts have also sometimes stated that "[w]here a transcript of trial court proceedings is not complete and '[q]uestions, answers and rulings are not available to the parties or this court[,]' this Court's determination of the evidence received and considered by the trial court is precluded." *Francisco*, 197 S.W.3d at 632 (quoting *Loitman v. Wheelock*, 980 S.W.2d 140, 141 (Mo. App. E.D. 1998)).

Most recently, in *State v. Barber*, the Western District found meaningful appellate review impossible where a portion of the trial transcript was missing. 391 S.W.3d 2 (Mo. App. W.D. 2012). While *Barber* could be read to rest its holding solely on the court's inability to consider a specific allegation of error brought by the appellant – whether an attorney/client relationship existed – Mr. Jackson argues for a more different reading of *Barber*. Indeed, some of the language in *Barber* may signal a shift in Missouri's focus in these types of cases. In addition to a concern shown for the impossibility of

reviewing a specific claim brought in that case, the court highlighted that the missing transcript could give "crucial context" to other claims. *Id*. The Western District, in the process of setting out its decision, dismissed the *status quo* argument by the State –that the jury heard whatever evidence was not recorded and transcribed and they convicted the defendant, therefore, the missing testimonial evidence must not have been helpful to the defense. *Id*.

Instead, the court focused on the importance of a transcript to the appeal process, and indicated that the missing transcript testimony "of the very individual accused of criminal wrongdoing by the State" would impede the court's review of "Barber's criminal trial." *Id*. The Western District announced that "[d]ue process and fundamental fairness" required that the State ensure the right of the accused to have the testimony. *Id*.

Objectively, then, missing portions of the direct-examination and entire cross-examination from the victim and the State's most critical witness in Mr. Jackson's trial would seem to implicate the concerns raised in *Barber*, and to mandate a new trial.

If, however, *Barber* is to be read as focusing on a specific allegation of prejudice, Mr. Jackson respectfully requests that the Court expand *Barber*, and lessen the burden of proof required to meet Missouri's "prejudice" requirement in the context of a missing or incomplete transcript.

One of the problems associated with an incomplete transcript is that an appellant's counsel simply may not know what occurred at trial, and what errors to argue.[7] Therefore, in the context of a missing transcript, especially where appellate counsel is not the same attorney that conducted the trial, Mr. Jackson urges this Court to consider and apply analysis such as that set forth in *United States v. Margetis*, 975 F.2d 1175, 1176-1177 (5th Cir. 1992). In *Margetis*, the Fifth Circuit wrote:

> A complete and accurate record of trial court proceedings is essential to the appellate process. When a defendant is represented by an appellate lawyer different from the trial lawyer, a complete and accurate transcript is an imperative. In such a situation a criminal defendant typically need not show specific prejudice in order to obtain relief. In *United States v. Selva*, [559 F.2d 1303 (5th Cir.1977)] we so held. In *Selva* the court reporter became ill and failed to transcribe the closing argument of the prosecutor. The trial court declined to grant a

[7] Undersigned counsel, as an officer of the Court, does not specifically assert (because he has no knowledge or basis to) for example, that the trial court unfairly impeded trial counsel's cross-examination of Ms. Shifrin, that prejudicial hearsay information was disclosed by Ms. Shifrin, or that any other specific, detailed error occurred because undersigned counsel was not present at Mr. Jackson's trial and reads the record the same as this Court.

> new trial. We held that a showing of prejudice was not necessary because *Selva* was represented on appeal by new counsel. Our reasoning was straightforward . . .
>
> When, as here, a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal ... [w]hen a defendant is represented on appeal by counsel not involved at trial, counsel cannot reasonably be expected to show specific prejudice. To be sure, there may be instances where it can readily be determined from the balance of the record whether an error has been made during the untranscribed portion of the proceedings. Often, however, even the most careful consideration of the available transcript will not permit us to discern whether reversible error occurred while the proceedings were not being recorded.

975 F.2d at 1176-1177 (footnote and citations omitted).

The Eleventh Circuit followed *Silvia*. In *United States. v. Preciado-Cordobas*, citing to *Silva*, the Court stated "[i]f a defendant is represented by the same attorney at trial and on appeal, a new trial may be granted only if the defendant can show that the failure to record and preserve a specific portion of the trial visits a hardship on him and prejudices his appeal.

However, if the defendant is represented on appeal by an attorney who did not participate in the trial, a new trial is necessary if there is a substantial and significant omission from the trial transcript." 981 F.2d 1206, 1212 (11th Cir. 1993).

Although the Fifth and Eleventh Circuits' approach to this issue – imposing a different burden depending on whether the appellant was represented by the same or a different attorney during the original proceeding – is a minority view, the reason that the other circuits do not follow their approach is unconvincing. *See United States v. Huggins*, 191 F.3d 532, 537 (4th Cir. 1999) (showing majority view). In *Huggins*, the court stated that, "[a]lthough we recognize the Fifth and Eleventh Circuits' reasoning for the two-part standard has its advantages - namely fairness to defendants who procure new counsel on appeal - we think such a rule creates the perverse incentive of encouraging defendants to dismiss trial counsel and seek new appellate counsel whenever questions arise over the sufficiency of a trial transcript." *Id*.[8] But it does not follow that the concerns acknowledged

[8] *See also United States v. Gallo*, 763 F.2d 1504, 1531 FN 40 (6th Cir. 1985) ("To apply a different standard as a matter of course may invite counsel to plant the seeds of reversible error during the course of trial, and permit a resourceful defendant to reap the benefit by utilizing a different counsel on appeal).

in *Huggins* should be scrapped for the fear they contemplate, or that courts would be entirely helpless to address the manipulation described in *Huggins*. In *Huggins*, the error in the transcript was known at the time of trial. The Court wrote:

> Perhaps the most damaging counter to Huggins' argument, however, is the fact that the district court gave Huggins ample opportunity to correct any remaining transcript errors and he declined to do so. In response to Huggins' initial motion for a new trial, the district court held a hearing to discuss the sufficiency of the transcript. In an effort to correct alleged errors and omissions, the district court supplemented the transcript with copies of documents and trial notes retained by the court. The court then certified the record stating its complete satisfaction that after careful review the transcript provided Huggins with sufficient information to perfect an appeal. Convinced that all transcript errors had been corrected, the district court still invited Huggins to submit a proposed statement indicating what he believed remained missing from the transcript. Huggins failed to submit such a statement and instead filed a renewed motion for a new trial, reiterating the same claims of error.

191 F.3d at 538.

A court, in the circumstances presented in cases similar to *Huggins*, could easily decide that a defendant that then purposely seeks out a different appellant counsel should not benefit from the different standard set out in *Silva* and *Preciado-Cordobas*. On the other hand, a court not convinced that an appellant had purposely attempted to manipulate the circumstances, could apply the rule in *Silvia* and *Preciado-Cordobas*, and honor the fairness concerns contemplated in *Silvia*, *Preciado-Cordobas*, and even stated in *Huggins*.

In a series of decisions, the Florida Supreme Court had occasion to decide whether to adopt a clear cut rule that supplements prejudice where it cannot be shown that an error did not occur, or whether to require a showing of specific prejudice. *See Jones v. State*, 923 So.2d 486 (Fla. 2006); *Jones v. State*, 870 So.2d 904 (Fla. 4th Dist. 2004); *Vargas v. State*, 902 So.2d 166 (Fla. 3d Dist. 2004). The Florida Supreme Court, in *Jones v. State*, ultimately decided that it would require a showing of specific prejudice where the transcript omitted the *voir dire* proceedings - and that the evidence adduced at a hearing from a remand to attempt to reconstruct the record did not rise to a level high enough to demonstrate that any specific prejudice occurred. 923 So.2d 486, 487-490 (Fla. 2006). Mr. Jackson, however, cites and argues for the dissent in that case because it, quite frankly, makes the most sense, particularly in the posture Mr. Jackson's case comes to this Court. 923 So.2d

486, 487-488, 490 (Fla. 2006). The dissent in *Jones* did not want to adopt a bright line rule that would always reverse cases where portions of the transcript were missing, but also thought that a too strict requirement of forcing the appellant to establish specific prejudice was too demanding:

> In my view, Jones has been deprived of his right to meaningful appellate review because of the lack of a complete record through no fault of his own. It is conceded that the court reporter was unable to transcribe the jury selection proceedings because the hard drive on her computer "crashed" and she was unable to read her written notes. . .
>
> The issue in this case pits the defendant's constitutional right to meaningful appellate review against the defendant's burden to demonstrate reversible error. A defendant who has potential grounds for reversal of a criminal conviction should not be penalized when the record of the trial court proceedings is lost in whole or part because of circumstances beyond his or her control. Yet this is the effect of the majority's requirement that the defendant demonstrate a basis for a claim of prejudicial error. The majority's requirement imposes an almost insurmountable burden on the defendant to demonstrate that a reversible error occurred during jury selection proceedings that cannot be reconstructed because of a missing record. This creates too great a

danger that convictions will be upheld in cases in which reversible errors have occurred.

Where no transcript of trial is available and reconstruction of the record is impossible, I would require a new trial if the appellant can point with specificity to potential reversible error and the State cannot establish there is no reasonable possibility error occurred. This test is neither the "per se" reversible rule of the Third District nor the "specific, identifiable issue" test of the Fourth District.

In this case, Jones should receive a new trial because his appellate counsel has raised the possibility of reversible error in the exercise of peremptory challenges . . .

. . .

Rather than adopt either approach used by the district courts of appeal, I would steer a middle course and erect a test that does not create a potentially impossible burden but still requires the defendant to make some showing that a complete review is not possible without the missing transcript, and also gives the State an opportunity to rebut the defendant's assertion. Accordingly, if the defendant can point with specificity to potential reversible error, I would hold that the burden shifts to the State to establish that there is no reasonable possibility that reversible error occurred during that portion of the trial.

Jones v. State, 923 So.2d at 490-491, 492 (PARIENTE, C.J., dissenting).

In Missouri, an appellate court's "duty to dispose finally of a case unless justice requires otherwise presupposes a record and evidence upon which this court can perform that function with some degree of confidence in the reasonableness, fairness, and accuracy of its conclusion." *R.R.M. v. Juvenile Officer*, 226 S.W.3d 864, 866 (Mo. App. W.D. 2007) (citing *Francisco v. Hendrick*, 197 S.W.3d 628, 632 (Mo. App. S.D. 2006) (internal quotation omitted). "Absent preservation of the proceeding on the record, 'full and meaningful review cannot be made.'" *Id*. (quoting *Rivard v. Director of Revenue*, 969 S.W.2d 864, 865 (Mo. App. S.D.1998)).

Mr. Jackson asks that this Court consider seriously, in the absence, *inter alia*, of the cross-examination of Ms. Shifrin, the confidence and fairness with which this Court could put finality to this case. He requests that this Court consider a reading of *Barber* that lessens that which is required to demonstrate prejudice in the context of a missing transcript. Mr. Jackson prays that this Court will recognize that with the missing transcript of the State's most critical witness, it must have some doubts about the "reasonableness, fairness, and accuracy" of its review of his conviction.

Undersigned counsel is not in a position to detail any specific error occurring in the direct or cross-examination (and possibly re-direct and re-cross examinations) of Ms. Shifrin, or error, for example, related to the trial

court's failure to suppress the identification made by Ms. Shifrin, but instead faces the "insurmountable burden"[9] of showing prejudice out of something that is unknown. Because of this "insurmountable burden" Mr. Jackson is prejudiced in this appeal, and he asks that this Court to recognize the objective importance of the transcript on appeal in this case – one that includes missing portions of the direct and cross examinations of the State's most critical witness – and to lessen the burden of proof that he needs to satisfy Missouri's current prejudice requirement in the context of missing transcript records.

For the foregoing reasons, Mr. Jackson was denied his right to due process, right to a full and complete transcript, right to access to the courts, and right to meaningful appellate review, as guaranteed to the Fifth and Fourteenth Amendments to the United States Constitution, Article I §§ 10 and 14 of the Missouri Constitution, and 485.050, RSMo. He requests that this Court order a new trial, or for other such relief that this Court deems just and fair.

[9] *Jones*, 923 So.2d at 490-491, 492 (PARIENTE, C.J., dissenting).

ARGUMENT – II

The trial court erred and abused its discretion by refusing defense counsel's request to submit the lesser-included offense instruction of robbery in the second degree on Count I, because there was a basis in the evidence for an acquittal of the higher offense and a conviction on the lesser offense, in that the State's videotape evidence as well as the cross-examination testimony of Ms. Shifrin, provided evidence by which the jurors could have concluded that the defendant was not armed with what reasonably appeared to be a dangerous and deadly weapon and that Mr. Shifrin's belief that a gun existed, to the extent she may have maintained that belief during cross-examination, was unreasonable. The failure to instruct the jury on the lesser-included offense violated Mr. Jackson's right to due process of law, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 10 and 18(a) of the Missouri Constitution, and § 556.046.3, RSMo. Mr. Jackson requests that this Court vacate and set aside his convictions and sentences and remand for a new trial.

Preservation and Standard of Review

During the instruction conference, defense counsel requested that the court submit a lesser-included instruction for robbery in the second degree

(Vol. II: Tr. 94-98; L.F. 72, 73). The court denied defense counsel request to submit that instruction (Vol. II: Tr. 97-98). Defense counsel assigned error to the court's denial of the instruction in a timely filed motion for new trial (L.F. 77-78). The trial court denied Mr. Jackson's motion for new trial, including the claimed failure to submit the lesser-included instruction (S. Tr. 1-5). This claim is preserved for appeal.

"A defendant is entitled to an instruction on any theory the evidence establishes." *State v. Williams*, 313 S.W.3d 656, 659 (Mo. banc 2010) (citing *State v. Pond,* 131 S.W.3d 792, 794 (Mo. banc 2004). "Section 556.046.2 ... requires only that there be *a basis* for the jury to acquit on the higher offense in order for the court to submit an instruction for the lesser included offense." *Id*. at 659-660 (citing *State v. Santillan,* 948 S.W.2d 574, 576 (Mo. banc 1997) (emphasis added). "If the evidence supports differing conclusions, the judge must instruct on each." *Pond,* 131 S.W.3d at 794.

A reviewing court "leaves to the jury determining the credibility of witnesses, resolving conflicts in testimony, and weighing evidence." *Pond*, 131 S.W.3d at 794. "If a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established, the trial court should instruct down." *State v. Derenzy,* 89 S.W.3d 472, 474 (Mo. banc 2002) (citing *State v. Hineman,* 14 S.W.3d 924, 927 (Mo. banc 1999)). "The jury is permitted to draw such reasonable inferences

from the evidence as the evidence will permit and may believe or disbelieve all, part, or none of the testimony of any witness." *Hineman,* 14 S.W.3d at 927; *see also Pond,* 131 S.W.3d at 794 ("A jury may accept part of a witness's testimony, but disbelieve other parts."). "Doubts concerning whether to instruct on a lesser included offense should be resolved in favor of including the instruction, leaving it to the jury to decide." *Derenzy,* 89 S.W.3d at 474–75.

Argument

The trial court abused its discretion, or acted contrary to the logic of the circumstances before it, when during the instruction conference it refused defense counsel's request that the court instruct the jurors on the offense of second degree robbery (*See* Vol. II: Tr. 94-98). A factual question, or a questionable element, clearly existed –whether Mr. Jackson "displayed or threatened the use of what appeared to be a deadly weapon" – at the time defense counsel made his request for the lesser-included second degree robbery offense instruction (*See e.g.*, Vol. I: Tr. 166-187; Vol. II: Tr. 20, 44, 80-88).

In support of its case and to provide an answer to that question, the State presented evidence through the testimony of Ms. Shifrin and through the admission of a videotape of the incident (*See* Vol. I: Tr. 166-187).

The defense too, however, sought to provide an answer to that question, through the cross-examination of the two other witnesses, the use

of still images of the videotape admitted by the State – and presumably through the cross-examination of Ms. Shifrin (*See* Vol. I: Tr. 20, 44, 80-88).

Mr. Shifrin said that, when she turned around, what she saw was "[n]ot a super long barrel but a six inch barrel, silverish" (Vol. I Tr: 173). The defense, in turn, introduced still images of the videotape (Vol. II: Tr. 79-80). A police detective testified for the State that the object he saw in the video was "[d]ark colored. Blue or black" (Vol. II: Tr. 86). The State suggested, through its questions to the detective, that the object shown in the pictures, and in the videotape, was obviously a gun (*See* Vol. II: Tr. 88). The defense, on the other hand, introduced the idea that the object could have been a cell phone (*See* Vol. II: Tr. 87-88).

If a defendant requests a lesser-included instruction for robbery in the second degree and there is a "basis" for acquitting him of the charged offense and convicting him of the lesser-included offense, then the trial court is obligated and mandated to provide the instruction to jurors; the failure to do so being reversible error. *See State v. Derenzy*, 89 S.W.3d 472, 474-475 (Mo. banc 2002) (citations omitted).

Mr. Jackson requested an instruction for robbery in the second degree and the issue is whether there was a "basis" for the court to have provided that instruction.

"For there to be a basis for an acquittal of the greater offense, there must be a questionable essential element of the greater offense." *State v. Whiteley*, 184 S.W.3d 620, 623 (Mo. App. S.D. 2006). If a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established, the trial court should instruct down. *State v. Hineman,* 14 S.W.3d 924, 927 (Mo. banc 1999). Doubts concerning whether to instruct on a lesser included offense should be resolved in favor of including the instruction, leaving it to the jury to decide. *Id.*

The instruction offered by defense counsel, and denied by the trial court read as follows:

> As to Count I, if you do not find the defendant guilty of robbery in the first degree as submitted in Instruction No. _____, you must consider whether he is guilty of robbery in the second degree.
>
> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about August 27, 2009, in the City of St. Louis, State of Missouri, the defendant took U.S. currency, which was property in the charge of Leslie Shifrin, and
>
> Second, that defendant did so for the purpose of withholding it from the owner permanently, and and [sic]

> Third, that defendant in doing so used physical force or threatened the immediate use of physical force on or against Leslie Shifrin for the purpose of preventing resistance to the taking of the property, and [sic]
>
> then you will find the defendant guilty under Count I of robbery in the second degree.
>
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(L.F. 72; Appx. A6; *see also* MAI-CR3d 323.04).

Notwithstanding the missing cross-examination testimony of Ms. Shifrin which may have, itself, provided a basis for the lesser-included instruction in this case, the available and known evidence in this case showed that there was, at least, a questionable essential element – whether a "gun" was used, and relatedly whether Ms. Shifrin reasonably believed that the object was a gun.

The video evidence, though by no means conclusive evidence that the object in the man's hands was not a gun, at least provided a question for reasonable jurors to use their eyes and determine that question of fact, and to determine, too, the reasonableness of whether that object could have appeared to be a gun or a dangerous or deadly weapon to Ms. Shifrin, and

whether she had the ability to perceive the object. Defense counsel argued this as the basis in this case: that "in the video there is evidence to dispute or refute her testimony that there was, in fact, a gun; therefore, the jury could take that video evidence and not only disbelieve her and disbelieve that there is a gun, but disbelieve her that she believed there was a gun" (Vol. II: Tr. 95).

In keeping with case law that provides that jurors are to weigh the evidence, that jurors can believe some testimony and evidence but disbelieve other testimony and evidence, that jurors are to make inferences, and that any doubt about whether to provide an instruction should be resolved by providing the instruction, the instruction should have been given in this case. *See e.g.*, *Pond*, 131 S.W.3d at 794.

But the trial court took this issue away from the jurors (*See* Vol. II: Tr. 97-98). Part of the court's reasoning seems to suggest an erroneous understanding of the law, or that Mr. Jackson would need to present affirmative evidence that the object was not a gun (*See* Vol. II: Tr. 97, where the court indicates that "I think then there has to be evidence that would negate one of the elements…).[10] Perhaps the court believed that Mr. Jackson would need to present a witness to say that the object was not a gun, but in

[10] *See Williams*, *supra*, at 660-661 (reiterating case law that the defendant is not required to present affirmative evidence of the lack of an essential element).

any event the court was incorrect in its ruling. The negating evidence was the State's evidence – the video tape. It is true that Ms. Shifrin testified, on direct, that she saw a gun (*see* Vol. I: Tr. 172-173), but because of that testimony, the issue should not, therefore, be automatically taken away from the jurors.

Moreover, as argued by defense counsel and referenced in the instruction for robbery in the first degree, an issue was whether, from Ms. Shifrin's perspective, what was displayed or threatened reasonably "appeared to be a deadly weapon or dangerous instrument" (Vol. II: Tr. 95; L.F. 59). The jurors were therefore called to judge not only whether a deadly weapon or dangerous instrument – a gun testified to by Ms. Shifrin - in truth existed, but also whether Ms. Shifrin's belief that one existed (that the object reasonably appeared to be one) was reasonable.[11] The video evidence presented a question, and evidence, on each of those scores.

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[11] "Robbery in the first degree may be found where the victim is in fear even though there was no real possibility of injury." *State v. Archer*, 814 S.W.2d 315, 317 (Mo. App. S.D. 1991) (quoting *State v. Collins*, 567 S.W.2d 144, 146 (Mo. App. E.D. 1978)). And, "[t]he fact that a victim perceives there to be a weapon that remains unseen is sufficient whether or not, in fact, such a weapon exists." *Id*. "Whether or not *the object that is perceived as* a deadly weapon or dangerous instrument is in fact capable of producing harm is unimportant. The threat to use *the object* to produce harm transmogrifies *it*

Analogous is the case of *State v. Hineman*, 14 S.W.3d 924, 927 (Mo. banc 1999), where the defendant requested a lesser-included instruction whereby the jurors would have been charged with the task of assessing the mental state of the defendant – whether he acted knowingly or recklessly in the commission of an assault. This Court held that the failure to provide that instruction to jurors (that the defendant may have acted recklessly) was reversible error. *Id*. The Missouri Supreme Court wrote:

> [The defendant's] mental state can be determined only by making an inference from the evidence. The jury is permitted to draw such reasonable inferences from the evidence as the evidence will permit and may believe or disbelieve all, part, or none of the testimony of any witness. The defendant's mental state may be determined from evidence of the defendant's conduct before the act, from the act itself, and from the defendant's subsequent conduct. *State v. Johnson*, 948 S.W.2d 161, 166 (Mo. App. E.D. 1997).

Hineman, 14 S.W.3d at 927-928.

The video tape provided evidence from which the jurors could question whether Ms. Shifrin reasonably believed that the defendant displayed what reasonably appeared to be a dangerous or deadly weapon.

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into a dangerous instrument [emphasis added]". *Archer*, 814 S.W.2d at 317 (citing *State v. Anderson*, 663 S.W.2d 412, 416 (Mo. App. S.D. 1983)).

While the judge and prosecutor may have come to their own conclusions (*see* Vol. II: Tr. 96-98), the jurors should have been allowed to assess the State's video evidence in connection with the lesser-included instruction for robbery in the second degree. While it could be determined and found from that video evidence that a gun existed and that Ms. Shifrin reasonably believed a gun existed, the jurors could have concluded differently. Ms. Shifrin's ability or inability to perceive the object was also presented in the video tape, her believability and perception would have (presumably) been challenged in cross-examination.

As with Jenna Schoenborn, who – shown during cross-examination - did not notice a tattoo on the man's neck, though she was focused on him (Vol. I: Tr. 6-7, 22-23) and Sara Schoenborn, who stood only a few inches away from the man and did not notice a tattoo (Vol. I: Tr. 29, 45), perception and the credibility of perception should always be appropriate subjects for jurors.[12]

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[12] Jurors may know that perception can be adversely affected by highly intense stress. *See e.g., State v. Body*, 366 S.W.3d 625, 628-629 (Mo. App. E.D. 2012) (citing Morgan et al., Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, 27 Int'l J.L. & Psychiatry 265, 274 (2004) (eyewitness identification is adversely affected by presence of a stressful environment during witness's perception).

If not compellingly in favor of the defendant's position, the video at least provided a question, and a basis, for the court to instruct down and to let the jurors determine the facts. On this issue, the video does provide critical evidence about Ms. Shifrin's ability to perceive the object, as she said "after I had looked down and he guided me forward" in that in the video shows (and through the different camera angles) Ms. Shifrin's head forward at all times, and not looking back (*See* State's Exhibit No. 1). Through one of the camera angles, where the perspective shows a half-closed, red door and Ms. Shifrin laying on the floor before she is patted down, the video does show her perhaps looks slightly to the right, and possibly at the man's right hand (*See* State's Exhibit No. 1). But that right hand is then the same hand that the man uses, without any apparent object in it, to pat down Ms. Shiffrin (*See* State's Exhibit No. 1).

In cross-examination, Ms. Shifrin's perception may have been called into question, as it was for Jenna and Sara Schoenborn – though that testimony is forever missing – and may have provided a further basis for the instruction requested by defense counsel.[13]

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[13] Recently, in *State v. Barber*, the Western District found appellate review of an alleged error "impossible" when the transcript contained omissions, which in part, related to the claim raised. 391 S.W.3d 2 (Mo. App. W.D. 2012). In the

In *State v. Coker*, the Court of Appeals, in a trial involving an issue concerning whether penetration occurred or not, held it to be reversible error to fail to instruct jurors on the lesser-instruction of child molestation in the first degree on charges related to statutory sodomy in the first degree. 210 S.W.3d 374, 384 (Mo. App. S.D. 2006). The reason for the court's decision lay in the cross-examination testimony of the victim and the varying language used to describe the act committed upon the child. *Id* at 383-384. The court did not decide the issue for the jurors, but reflected on its awareness "that a "jury may accept part of a witness's testimony, but disbelieve other parts." *Id*. at 384 (citing *Pond*, 131 S.W.3d at 794).

In this case there was a basis for acquitting Mr. Jackson of robbery in the first degree, and convicting him of second degree robbery. That basis was the State's video evidence (State's Exhibit No. 1) and the jurors'

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same way that the missing transcript precluded the Western District from ruling on the error in that case, the missing cross-examination testimony of Ms. Shifrin - combined with the allegation that that testimony may have provided an additional basis for the court to instruct the jurors on second degree robbery – should be found (to the extent that this Court is unconvinced that the trial court would have be obligated to instruct based on the video tape alone) to preclude meaningful appellate review on this issue.

determination about the presence or absence of what reasonably appeared to be a gun, and the believability of Ms. Shifrin about whether she reasonably believed the object to be a dangerous or deadly weapon. In this case, too, there was a basis for convicting Mr. Jackson of robbery in second degree in that he used physical force . . . for the purpose of preventing resistance to the taking of the property" (*See* Vol. I: Tr. 172; L.F. 73; § 569.030, RSMo, § 569.010.(1), RSMo).

For the foregoing reasons, the trial court's refusal to instruct the jury on the lesser-included offense of robbery in the second degree violated Mr. Jackson's right to due process of law, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 10 and 18(a) of the Missouri Constitution, and § 556.046.3, RSMo. Mr. Jackson requests that this Court vacate and set aside his sentences and convictions and remand for a new trial.

CONCLUSION

WHEREFORE, based on his argument in Points I, Appellant, Denford Jackson, requests this Court to vacate and set aside his convictions and sentences, and remand his case for a new trial or for other such relief that this Court deems just and fair; and in Point II, he requests that this Court reverse the judgment of the trial court, and remand his case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on April 2, 2013 a true and correct copy of the foregoing brief was sent via the Efiling System to Mary H. Moore, Office of the Attorney General, using the email registered with the System. In addition, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word limitations of Rule 84.06. This brief was prepared with Microsoft Word for Windows, uses Cambria 13 point font, and contains 9, 590 words, excluding the cover page, signature block, and certificates of service and of compliance.

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