IN THE MISSOURI SUPREME COURT

Cause No. SC100247

STATE OF MISSOURI,
Respondent,

v.

LORANDIS PHILLIPS,
Appellant.

Appeal from the Circuit Court of Scott County
The 33rd Judicial Circuit
The Honorable David Dolan

APPELLANT'S SUBSTITUTE INITIAL BRIEF

MATTHEW G. MUELLER, MBE # 66097
3407 SOUTH JEFFERSON AVENUE
SAINT LOUIS, MISSOURI 63118
PHONE: 573-823-3180
FAX: 314-632-6488
E-MAIL: mueller@mgmlawstl.com
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes & Other Authorities

JURISDICTIONAL STATEMENT

Appellant, Lorandis Phillips, was convicted of the class A felony of robbery in the first degree, section 570.023, RSMo, and the class D felony of assault in the second degree, section 565.052, RSMo, and was sentenced to a term of ten years and five years, respectively. Appellant appeals from the final judgment rendered after trial, pursuant to Mo. Rev. Stat. § 547.070 & Rule 30.01(a).

On September 26, 2023, this Court ordered transfer of this case from the Missouri Court of Appeals, Southern District, in Cause No. SD37382, on application for transfer by Appellant under Rule 83.01, and so the jurisdiction of this Court over this direct appeal is proper, pursuant to Mo. Const. Art. V, § 10.

INTRODUCTORY STATEMENT

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."[1]

"The assistance of counsel is needed for there are choices to be made -- choices which may have an effect on the subsequent proceedings. Counsel is needed so that the choices may be exercised with understanding."[2]

"[T]he assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself."[3]

"In these circumstances, we must turn again to the Bar of Missouri. We do so without apology."[4]

"Wolff hopes the right case gets to the Missouri Supreme Court so it can issue a ruling that forces every criminal defendant in the state to have proper access to an attorney from their first appearance."[5]

---

[1] Walter Schaefer, "Federalism and State Criminal Procedure," 70 Harvard L. Rev. 1, 8 (1956).

[2] Edward Hunvald, Jr., "The Right to Counsel at the Preliminary Hearing," 31 MO. L. REV. 109, 112 (1966).

[3] *Maine v. Moulton*, 474 U.S. 159, 170 (1985).

[4] *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 65 (Mo. banc 1981).

[5] Tony Messenger, "This Missouri man had no lawyer for a criminal court hearing. We need a fix," St. Louis Post-Dispatch, October 19, 2022.

STATEMENT OF FACTS

On December 20, 2018, Appellant was charged by felony complaint with the following three offenses:

Count I: the class B felony of robbery in the second degree, Charge Code: 570.025-001Y20172990

Count II: the class D felony of assault in the second degree, Charge Code: 565.052-001Y20173990

Count III: the class D felony of stealing, Charge Code: 570.030-035Y20173990

See Legal File, D54.

Appellant appeared for his Initial Appearance on the felony complaint on January 9, 2019. The Court also proceeded to Formal Arraignment at this hearing, as shown in the following docket entry:

> "State appears by APA. Defendant appears in person. Waives formal arraignment. Plea of Not Guilty. Preliminary hearing scheduled for 02-19-19 at 10:30 a.m.

See Legal File, D1, p. 28.

The felony complaint alleged in Count II that Appellant committed the offense of second-degree assault in that he "knowingly caused physical injury to [Victim] by hitting him in his face and body causing multiple lacerations and sever[e] bruising to his face and both legs."

Nowhere was it alleged in Count II that Appellant caused the injuries "by

means of deadly weapon or dangerous instrument," an essential element of the offense of second-degree assault under Mo. Rev. Stat. § 565.052.1(1), however.

It was this felony complaint, and specifically Count II, among the others, that the circuit called upon Appellant to plead to at his designated arraignment.

There is no record that the court advised Appellant at this initial appearance of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel. There is also no record that the court ascertained or required a showing of Appellant's indigency for purposes of having counsel appointed under Rule 31.02(a).

In any event, counsel was ***not*** appointed for Appellant at either this Initial Appearance hearing or the purported Formal Arraignment hearing, which was held on January 9, 2019, nor is there a transcript or recording of these proceedings.

Indeed, it does not appear that the court made any oral or written findings with respect to the appointment of counsel at Appellant's first appearance.

Counsel subsequently entered an appearance for Appellant approximately nineteen (19) days later, on January 28, 2019.

See Legal File, D59.

A preliminary hearing was held on the felony complaint on March 5, 2019, after which the court found Probable Cause and Ordered that the "Matter is bound over to circuit court; Arraignment set on 4/11/2019 at 9:00 AM."

See Legal File, D1, p. 29.

The felony Information was filed on March 11, 2019, and charged Appellant with same following three offenses contained in the felony complaint:

Count I: the class B felony of robbery in the second degree, Charge Code: 570.025-001Y20172990

Count II: the class D felony of assault in the second degree, Charge Code: 565.052-001Y20173990

Count III: the class D felony of stealing, Charge Code: 570.030-035Y20173990

See Legal File, D6.

On September 20, 2021, the State filed an amended felony information, which changed the offense charged in Count I from the class B felony of robbery in the second degree to the class A felony of robbery in the first degree, with the CHARGE CODE: 570.023-001Y20172990.

See Legal File, D22.

On the morning of trial, held on September 30, 2021, the prosecutor told the trial court the following as regards the amended felony information,

> "MRS OESCH: Judge, I'm sorry. One other thing. I did previous last week or the week before filed an amended information which was basically filed because the original information in this case was filed in error. At one point Mr. Phillips' indication was he might plead guilty and the information was filed as robbery second.
>
> I did review the Casenet entries from both the associate level and circuit level case and it was bound over as robbery first. I did amend

it and file it as robbery in the first degree.

"THE COURT: In this case the Defendant is now arraigned on the amended information for felony.

(The Defendant is formally re-arraigned.) ...

THE COURT: ... The Defendant maintains his plea of not guilty. Opening statements for the State?"

See Transcript, pp. 20-21.

The following evidence was adduced at trial.

****

On December 14, 2018, D. H. traveled to Sikeston from Illinois, and eventually met with Jamerio Scott at 821 Ruth Street in Sikeston to "smoke." See Transcript, p. 25.

D. H. and Jamerio Scott were later joined by Ricky Scott and Elgin Moore. They hung out in a shed at the back of the house listening to music and smoking. See Transcript, p. 28.

At some point, D. H. got hit from behind and lost consciousness. After regaining consciousness, D. H. had seen "all of them hitting me." See Transcript, p. 29.

D. H. testified that "It was multiple people." See Transcript, p. 30. D. H. clarified on cross-examination, however, that he never saw the Appellant, Mr. Phillips. See Transcript, p. 41.

D. H. later realized that he was missing his "wallet, my iPhone, my car keys,

[and] I believe a piece of clothing, if I can remember right."

See Transcript, p. 32.

D. H. testified that he had a family member take him to the ER afterwards, which is where he found out that he had a "fractured orbital bone and broken nose." He did not require any surgery, however.

See Transcript, pp. 34-35.

Detective Ben Quick investigated this incident and testified that he recovered D. H.'s cell phone "laying on [Appellant's] bed."

See Transcript, p. 51.

The SIM card had been removed and replaced with another SIM card belonging to Elgin Moore. See Transcript, p. 52.

D. H.'s car keys were recovered in the front yard of 821 Ruth Street, but the wallet was never recovered. See Transcript, p. 61.

Two of the co-defendants testified at trial. Jamerio Scott testified that D. H. "got struck by Lorandis." Appellant struck D. H. with "his hand."

See Transcript, p. 93.

Jamerio Scott further testified that he slept on a couch in the bedroom belonging to Appellant, which is where D. H.'s iPhone was recovered.

See Transcript, p. 108.

Ricky Scott also testified that "Lorandis came in and attacked him."

See Transcript, p. 113.

Both co-defendants denied hitting or assaulting D. H., even though D. H. testified that "[i]t was multiple people" and that "I felt more than two people punching and kicking me." See Transcript, pp. 30, 42.

Cf. Transcript, p. 105, Jamerio Scott testified that "I never touched him."

Cf. Transcript, p. 119, Ricky Scott testified that "I never hit Mr. [H]."

****

Appellant testified in his own defense at trial and denied being at the house at 821 Ruth Street at the time that D. H. was assaulted.

See Transcript, p. 143.

Specifically, Appellant testified that he was at church at the time that D. H. was assaulted, and that he had left his phone at home.

See Transcript, pp. 140-141.

Another witness, Takira Ranson, corroborated this testimony by Appellant.

See Transcript, p. 129.

Appellant further testified that the co-defendants, Jamerio Scott, Ricky Scott, and Elgin Moore, were all staying at his house at 821 Ruth Street, and that they would sleep overnight, and that Ricky Scott was also using Appellant's phone.

See Transcript, pp. 139-140.

On cross-examination, Appellant clarified that all three of the co-defendants were living in his bedroom at his house at 821 Ruth Street.

See Transcript, p. 153.

Appellant's mother, Jameka Phillips, who also lived at 821 Ruth Street, testified at trial that she never said that her son had anything to do with this and that "in my heart I don't believe it is true." See Transcript, p. 157.

The trial court found Appellant guilty on Count I and Count II.[6] See Transcript, p. 174.

****

At the sentencing hearing, held on November 24, 2021, the trial court sentenced Appellant to ten years in the Missouri Department of Corrections on Count I, and to five years in the Missouri Department of Corrections on Count II. See Transcript, p. 177.

This appeal follows.

[6] The State dismissed Count III before trial. See Transcript, p. 18.

POINTS RELIED ON

I. The Circuit Court plainly erred in failing to appoint counsel for Appellant at his first appearance, *because* Rule 31.02(a) requires that it shall be the duty of the court to appoint counsel at the first appearance upon a showing of indigency, unless the right is waived, *in that* the first appearance is a critical stage of the criminal proceedings, and that the failure to appoint counsel and/or to certify compliance with Rule 31.02(a) resulted in manifest injustice and a miscarriage of justice.

Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008)
State ex rel. Mo. Pub. Def. Comm'n v. Pratte, 298 S.W.3d 870 (Mo. 2009)
State ex rel. Wolff v. Ruddy, 617 S.W.2d 64 (Mo. 1981)
In re Mennemeyer, 505 S.W.3d 282 (Mo. 2017)
Mo. Const. Art. I, § 18(a)
U.S. Const., amend. VI
U.S. Const., amend XIV
Mo. Rev. Stat. § 600.064
Mo. Sup. Ct. Rule 4-6.1
Mo. Sup. Ct. Rule 4-6.2
Mo. Sup. Ct. Rule 31.02(a)

II. The Circuit Court plainly erred in failing to appoint counsel for Appellant at his designated arraignment, *because* the Court's failure to appoint counsel was in violation of Appellant's constitutional right to counsel, *in that* an arraignment hearing is a critical stage for purposes of the Sixth Amendment right to counsel, and that the failure to appoint counsel resulted in manifest injustice and a miscarriage of justice.

Hamilton v. Alabama, 368 U.S. 52 (1961)
White v. Maryland, 373 U.S. 59 (1963)
State v. Sullivan, ED109305 (February 15, 2022)
State ex rel. Mo. Pub. Def. Comm'n v. Pratte, 298 S.W.3d 870 (Mo. 2009)
Mo. Const. Art. I, § 18(a)
U.S. Const., amend. VI
U.S. Const., amend XIV
Mo. Rev. Stat. § 545.820
Mo. Rev. Stat. § 600.064
Mo. Sup. Ct. Rule 4-6.1
Mo. Sup. Ct. Rule 4-6.2
Mo. Sup. Ct. Rule 31.02(a)

III. The Circuit Court plainly erred in failing to preserve a transcript or recording of the initial appearance and purported arraignment that occurred on January 9, 2019, which prevents Appellant from receiving meaningful appellate review to challenge his claim that the Court failed to appoint him counsel, *because* Appellant cannot test the adequacy of the Circuit Court's compliance with the requirements of Rule 31.02(a), *in that* Appellant's claim that he was denied counsel at this proceeding is based on the Circuit Court failing to inform Appellant of the Court's willingness to appoint counsel if he is unable to employ counsel, in failing to require a showing of indigency, and in failing to secure an intelligent waiver of counsel after informing Appellant as to his rights.

State v. Barber, 391 S.W.3d 2 (Mo. App. 2012)
S.H. v. P.B., 588 S.W.3d 553 (Mo. App. 2019)
K.S. v. J.D., 404 S.W.3d 900 (Mo. App. 2013)
State v. Sullivan, ED109305 (February 15, 2022)
Mo. Sup. Ct. Rule 81.12

IV. The Trial Court erred in allowing the State to Amend the felony Information, *because* the Amended felony information charged a different offense and prejudiced the substantial rights of Appellant, *in that* the new charge should have been filed in the associate division subject to Appellant's right to have a preliminary hearing, and *in that* his planned alibi defense to the original charge was no longer available.

State v. Hicks, 221 S.W.3d 497 (Mo. App. 2007)
State v. McKeehan, 894 S.W.2d 216 (Mo. App. 1995)
State v. Thompson, 392 S.W.2d 617 (Mo. 1965)
Fry v. Levy, 440 S.W.3d 405 (Mo. 2014)
Mo. Rev. Stat. § 544.250
Mo. Rev. Stat. § 545.300
Mo. Rev. Stat. § 562.042.1(1)
Mo. Sup. Ct. Rule 23.08

V. The Trial Court plainly erred in allowing the State to Amend the felony Information, *because* a deliberate misstatement of fact by a prosecutor that substantially prejudices the rights of the defendant is prosecutorial misconduct that violates the guarantee of due process in U.S. Const. Amend. XIV and Mo Const. Art. I, § 10 and requires a new trial, *in that* the prosecutor told the Trial Court that Count I was bound over from the associate division as robbery in the first degree, which caused the Trial Court to promptly re-arraign Appellant on the Amended felony Information and proceed to trial, and that such statement was false.

State v. Zink, 181 S.W.3d 66 (Mo. 2005)
State v. Johnson, 599 S.W.3d 222 (Mo. App. 2020)
State v. Roberts, 948 S.W.2d 577 (Mo. 1997).
Mo. Const. Art. I, § 10
U.S. Const., amend. XIV

VI. The Trial Court erred in overruling Appellant's motions for judgment of acquittal on Count I, robbery in the first degree in violation of § 570.023, a class A felony, *because* the State failed to prove beyond a reasonable doubt the necessary elements of Count 1 that in the course of committing the offense of robbery in the first degree, the defendant, or another participant in the offense: (1) Causes serious physical injury to any person, *in that* viewing the evidence in the light most favorable to the State, there was no evidence that Daniel Houston suffered serious physical injury.

State v. Jeffrey, 400 S.W.3d 303 (Mo. 2013)
State v. Roggenbuck, 387 S.W.3d 376 (Mo. 2012)
State v. Glass, 439 S.W.3d 838 (Mo. App. 2014)
State v. Jackson, 896 S.W.2d 77 (Mo. App. 1995)

VII. The Trial Court erred in overruling Appellant's motions for judgment of acquittal on Count II, assault in the second degree in violation of § 565.052, a class D felony, *because* the State failed to charge the offense of assault in the second degree in the amended felony information by not including language that Appellant knowingly caused physical injury to another person by means of a deadly weapon or dangerous instrument, *in that* merely knowingly causing physical injury to another person suffices only for the offense of assault in the third degree, a class E felony, but not for the offense of assault in the second degree, a class D felony.

State v. Fernow, 328 S.W.3d 429 (Mo. App. 2010)
State v. Hicks, 221 S.W.3d 497 (Mo. App. 2007)
State v. Briscoe, 847 S.W.2d 792 (Mo. 1993)
State v. Sumlin, 820 S.W.2d 487 (Mo. 1991)

ARGUMENT

I. The Circuit Court plainly erred in failing to appoint counsel for Appellant at his first appearance, *because* Rule 31.02(a) requires that it shall be the duty of the court to appoint counsel at the first appearance upon a showing of indigency, unless the right is waived, *in that* the first appearance is a critical stage of the criminal proceedings, and that the failure to appoint counsel and/or to certify compliance with Rule 31.02(a) resulted in manifest injustice and a miscarriage of justice.

Standard of Review

This appeal involves the interpretation of a rule of criminal procedure. "We interpret Missouri Supreme Court rules in the same fashion as statutes. Statutory interpretation is a question of law which we review de novo." ***Muhm v. Myers***, 400 S.W.3d 846, 849 (Mo. App. 2013). And, specifically, "[t]he issue of whether the Sixth Amendment has been violated is a question of law, and therefore, we review de novo." ***State v. Washington***, 9 S.W.3d 671 (Mo. App. 1999).

Preservation Statement

This claim of prejudicial error was not made during trial. Accordingly, because Appellant did not bring this alleged error to the trial court's attention, appellant's claim is reviewed for plain error under Rule 30.20. ***State v. Brandolese***, 601 S.W.3d 519, 525 (Mo. banc 2020).

"Rule 30.20 alters the general rule by giving appellate courts discretion to

review 'plain errors affecting substantial rights may be considered in the discretion of the court ... when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.' Rule 30.20. Plain error review is discretionary, and this Court will not review a claim for plain error unless the claimed error 'facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted.' ... Finally, the defendant bears the burden of demonstrating manifest injustice entitling him to plain error review." ***Id***. at 526.

Once manifest injustice is shown, this Court is then permitted to jump into a merits analysis of the alleged statutory error. ***Id***. at 528.

Appellant is entitled to plain error review. Every day, in state courts all across Missouri, countless numbers of people who are charged with crimes appear in court for their first appearance, and every day these Missouri state courts fail to cause to have counsel appointed for them, nor is any effort made at this first appearing hearing to secure an intelligent waiver of counsel from them.[7]

To make things worse, the prosecuting attorney is required to attend these first appearance hearings, and often makes recommendations regarding bail and other pre-trial matters at these hearings.[8]

---

[7] The one exception to this rule is the City of St. Louis, which in the wake of a federal class action lawsuit against several of their judges did begin to arrange for the appointment of private counsel at the defendant's Rule 33.01 bail hearing. (*See* ***Dixon v. City of St. Louis***, cited in Appellant's Appendix, at A16.)

[8] A prosecuting attorney, for example, is subject to a fine if he "shall fail to attend any term of the court having criminal jurisdiction in his county, held in pursuance of law," see Mo. Rev. Stat. § 56.140. See also Mo. Rev. Stat. §§ 50.060, 56.090.

Appellant argues this is error and results in manifest injustice. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." Walter Schaefer, "Federalism and State Criminal Procedure," 70 Harvard L. Rev. 1, 8 (1956), quoted in ***Penson v. Ohio***, 488 U.S. 75, 84 (1988), and "the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." ***Maine v. Moulton***, 474 U.S. 159, 170 (1985).

The question of the proper scope of the circuit court's obligation to appoint counsel in criminal cases under the directives of Rule 31.02(a) remains unclear. Recent decisions by our Missouri Supreme Court hold that counsel is required at the defendant's initial appearance, and that our circuit courts have the ability to appoint almost any lawyer from the Missouri bar to fill this need. *See* ***State ex rel. Missouri Public Defender Comm'n v. Pratte***, 298 S.W.3d 870, 888 (Mo. 2009); & ***In re Mennemeyer***, 505 S.W.3d 282, 287 n. 4 (Mo. 2017) (Wilson, J., concurring).

This Court should follow this earlier Missouri Supreme Court precedent. Accordingly, the judgment and sentence heretofore entered must be set aside and the cause remanded to the Circuit Court with the direction to order that Appellant shall be brought before the Court for his initial appearance and there advised of the Court's willingness to appoint him counsel, and to further facilitate the creation of a system for the appointment of counsel from members of the Bar of Missouri.

Presumably this has already been done in the area of guardianship and other probate court proceedings. See, e.g., Mo. Rev. Stat. §§ 475.075.5 & 632.415.1, "**Court to maintain register of attorneys available to represent patients.**"

The circuit courts must also maintain a similar register of attorneys available to represent defendants at their initial appearance, pursuant to Rule 31.02(a). *Accord* ***Pratte***, *supra*, at 888, "**Appointing Lawyers to Fill the Need.**" (Emphases in original.) This is not currently being done.

To be sure, the General Assembly recently approved House Bill 12, which allocates an additional 3.6 million in funding to the Public Defender System, and which presumably is aimed at hiring "53 new public defenders[.]" See "ACLU of Missouri Applauds the Legislature for Effort to Uphold Constitutional Obligation to Fund the Public Defender System," news release, May 10, 2021. See also "Senate budget plan calls for big boost in spending on public defenders in Missouri," St. Louis Post-Dispatch, April 22, 2021.

But it is unlikely that this additional funding will help to ensure that counsel is provided to defendants at their initial hearing if for no other reason than the circuit courts "lack authority to appoint a full-time public defender" even in the event that the Public Defender should determine that the defendant qualifies for their services. See ***Pratte***, *supra*, at 886. See also Matthew Mueller, "Letters: Missouri should emulate St. Louis on public defenders," St. Louis Post-Dispatch, February 25, 2021. The appointment must come from members of the private bar.

There is similar litigation being raised in ***David v. State***, 20AC-CC00093, in which the circuit court has requested suggestions discussing the issue of whether the court is authorized to "appoint private counsel for the defendant and require that the State pay the necessary and reasonable fees and expenses of such counsel." See Order, January 19, 2021.

Mo. Rev. Stat. § 600.064 specifically authorizes the circuit court to appoint **private counsel** to represent an indigent defendant. Lawyers, moreover, have a responsibility under the Rules of Professional Conduct to "render public interest legal service ... to persons of limited means[.]" *See* Rule 4-6.1. And lawyers shall not seek to avoid appointment except for good cause. *See* Rule 4-6.2.

As explained by this Court, "Lawyers ... are members of a profession and have an obligation to perform public service[.]" ***Pratte***, at 888.

An example of the manifest injustice of permitting a defendant to proceed without the assistance of counsel at the initial appearance can be seen in the following exchange from a Maryland state court criminal proceeding,

> "COURT: Is there anything you'd like to tell me about yourself, sir?
> DEFENDANT: ... I mean I'm not denying what happened. ...
> COURT: Sir, you need a lawyer just as soon as you can."

See Douglas Colbert, "Coming Soon to a Court Near You - Convicting the Unrepresented at the Bail Stage: An Autopsy of a State High Court's Sua Sponte Rejection of Indigent Defendant's Right to Counsel," 36 Seton Hall L. Rev. 653, 653 (2005-2006).

In his comprehensive survey on the subject, moreover, Professor Colbert explained that in some Missouri Circuit Courts, such as Jackson and Nodaway County, representation can take up to "twenty-one days." Douglas Colbert, "Prosecution without Representation," 59 Buff. L. Rev. 333, 406 n. 375 (2011).

During this time, the defendant may find himself having to appear at the initial appearance, their Rule 33.01 bail hearing, and even potentially their subsequent Rule 33.05 release hearing, all without the assistance of counsel.[9]

Finally, as a result of this Court's recent amendment to Court Rule 22.09 (effective March 1, 2021), the circuit courts are now required to hold a preliminary hearing "no later than 30 days following the defendant's initial appearance if the defendant is in custody and no later than 60 days if the defendant is not in custody." This change to Rule 22.09 impacts several of the defendant's important time-sensitive rights, including the right to change of judge, which requires that any such application be made not later than ten days prior to the initial date set for preliminary hearing, pursuant to Rule 32.06, and/or not later than ten days after the initial plea is entered, pursuant to Rule 32.07.

Plain error review is appropriate here.

---

[9] If the defendant is confined, they must be brought to the Court "no later than 48 hours, excluding weekends and holidays," pursuant to Rule 22.07, during which time the Court shall determine the conditions of release, pursuant to Rule 22.08, and after which the Court shall again determine the conditions of release "no later than seven days," if the defendant remains confined, pursuant to Rule 33.05.

Analysis and Argument

Rule 31.02(a) provides that,

> "In all criminal cases the defendant shall have the right to appear and defend in person and by counsel. If any person charged with an offense, the conviction of which would probably result in confinement, shall be without counsel upon his first appearance before a judge, *it shall be the duty of the court to advise him of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel*. Upon a showing of indigency, *it shall be the duty of the court to appoint counsel to represent him*. If after being informed as to his rights, the defendant requests to proceed without the benefit of counsel, and the court finds that he has intelligently waived his right to have counsel, the court shall have no duty to appoint counsel. If at any stage of the proceedings it appears to the court in which the matter is then pending that because of the gravity of the offense charged and other circumstances affecting the defendant, the failure to appoint counsel may result in injustice to the defendant, *the court shall then appoint counsel.*" (Emphasis mine.)

This rule mandates a clear and simple directive to the Court when a defendant appears in court without counsel upon his first appearance. Specifically, when the defendant appears without counsel upon his initial appearance, the judge must do the following: (1) The Court should first determine if a conviction of the charged offense "would probably result in confinement[.]" If that is true, then the Court has the following duty: (2) the Court *shall* advise the defendant of his right to counsel, and of the willingness of the Court to appoint counsel to represent him if he is unable to employ counsel. (3) After that is done, and "upon a showing of indigency," the Court *shall* then appoint counsel to represent the defendant, ***unless*** the defendant has "intelligently waived his right to have counsel[.]"

Rule 31.02(a) clearly requires that the appointment of counsel shall be made ***at*** the initial appearance. There is absolutely no authority permitting "postponing" the appointment of counsel. *Accord* ***In re Mennemeyer***, *supra*, at 284, observing that "the Commission issued a notice to Respondent to appear and answer the charge of engaging in 'a practice of ***postponing*** the appointment of counsel to indigent defendants[.]" (Emphasis mine.)

However, "reading the rule with section 600.021.2 indicates that the only lawyers a trial judge may appoint in their private capacities are those who are not also public defenders. Section 600.021.2 mandates that public defenders cannot be appointed in their private capacity—as lawyers, they do not have private capacities." ***Pratte***, *supra*, at 886. "The appointment of specific counsel within the public defender system, and particularly the Director, to represent indigent defendants is beyond the court's jurisdiction." ***Missouri State Public Sys. v. Franklin, Jr.***, 48 S.W.3d 64 (Mo. App. 2001).

Unfortunately, there is no recording or transcript available of Appellant's initial appearance. LF, D1, p. 23. Nor is there any Order or other docket entry certifying by written findings of record compliance with Rule 31.02(a).

Additionally, there is no record that the circuit court advised Appellant at his initial appearance of "his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel." There is also no record that the circuit court ascertained or required a showing of Appellant's

"indigency" for purposes of having counsel appointed under Rule 31.02(a).

Appellant, moreover, cannot be said to have intelligently waived his right to have counsel appointed because he was never "informed as to his rights."

Finally, the "gravity of the offense charged and other circumstances" should have demonstrated to the court that the failure to appoint counsel "may result in injustice to the defendant," which under Rule 31.02(a) additionally requires that "the court shall then appoint counsel."

"When properly adopted, the rules of court are binding on courts, litigants, and counsel, and it is the court's duty to enforce them." ***Dorris v. State***, 360 S.W. 3d 260, 268 (Mo. 2012).

It was plain error for the circuit court to conduct the initial appearance in Appellant's case without informing him of his right to appointed counsel and without Appellant intelligently waiving counsel. *Accord* ***State ex rel. Boyle v. Sutherland***, 77 S.W.3d 736, 739 (Mo. App. 2002). Specifically, it was plain error for the court to conduct the initial appearance without certifying compliance with Rule 31.02(a) by either written or oral findings entered into the record.

This error affected Appellant's substantial rights, and specifically his right to appointed counsel, and plain error review is therefore appropriate.

"[T]here must be strict and literal compliance with the statutes affecting this right [to counsel], and failure to strictly comply results in reversible error." ***In re D.J.M.***, 259 S.W.3d 533, 535 (Mo. banc 2008).

Ultimately, the problem presented in this appeal is that our circuit courts are simply unprepared to provide for the appointment of private counsel because there is currently no system in place to make this available for criminal defendants at their initial appearing hearing under Rule 31.02(a).

This Court must provide for such a system in its Order and Opinion in this case. Recall that this Court in ***State ex rel. Wolff v. Ruddy***, 617 S.W.2d 64, 67 (Mo. banc 1981) previously included a list of eight "temporary guidelines" to be used by the Missouri courts and members of the legal profession "until the problem of defense of the indigent can be resolved in an orderly process by the Executive, Legislative, and Judicial branches of our government."

This Court must provide similar "temporary guidelines" in ensuring that the directives of Rule 31.02(a) are being followed. To be clear, Appellant is not suggesting that the only way to ensure compliance with Rule 31.02(a) is to "record" the first appearance. Compliance can be done by written documentation.

WHEREFORE, the judgment and sentence heretofore entered must be set aside and the cause remanded to the Circuit Court with the direction to order that Appellant shall be brought before the Court for his initial appearance and there advised of his right to appointed counsel, and of the willingness of the Court to appoint counsel to represent him if he is unable to employ counsel, and to further facilitate the creation of a system for the appointment of counsel from members of the Bar of Missouri. See Rule 31.02(a).

II. The Circuit Court plainly erred in failing to appoint counsel for Appellant at his designated arraignment, *because* the Court's failure to appoint counsel was in violation of Appellant's constitutional right to counsel, *in that* an arraignment hearing is a critical stage for purposes of the Sixth Amendment right to counsel, and that the failure to appoint counsel resulted in manifest injustice and a miscarriage of justice.

Standard of Review

"The issue of whether the Sixth Amendment has been violated is a question of law, and therefore, we review de novo." ***State v. Washington***, 9 S.W.3d 671 (Mo. App. 1999). "[T]he issue is to be determined against the totality of all the circumstances." ***State v. Scott***, 404 S.W.2d 699, 704 (Mo. 1966), holding that "the cause is reversed and remanded to the end that instead of a piecemeal record all possible circumstances may be adduced." ***Id***.

Preservation Statement

For the reasons previously explained in Appellant's first Point Relied On, which are fully incorporated herein, Appellant requests plain error review under Rule 30.20. *See* ***Brandolese***, *supra,* at 525-526. "A demonstrated violation [of the right to counsel] sustains an accused's burden to prove the manifest injustice or miscarriage of justice required by the second step of plain-error review." *See* ***State v. Sullivan***, ED109305 (February 15, 2022), Slip Op. at 11-12.

Analysis and Argument

Arraignment has long been a critical stage in a criminal proceeding. ***Hamilton v. Alabama***, 368 U.S. 52, 53 (1961). Arraignment under Missouri law consists of stating to the defendant the substance of the charges and calling on him to plead thereto. See Rule 24.01. It is then that the time-sensitive deadline for entering a plea of not guilty by reason of mental disease or defect excluding responsibility begins. See Mo. Rev. Stat. § 552.030.2. Thereafter any such plea may be made only if the court may for good cause permit. Arraignment is also when the time-sensitive deadline for filing a bill of particulars begins. See Rule 23.04. Thereafter any such motion may be made only as the court may permit.

There are also certain time-sensitive rights that begin to run at this stage for which there does not appear to be any authority to waive or extend the deadline, such as the right to change of judge under Rule 32.06 and Rule 32.07.

Whatever else may be the function and importance of arraignment, it is clear that it is a critical stage in a criminal proceeding, and that what happens there may affect the whole trial. Available defenses and rights may be "irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." ***Hamilton v. Alabama***, *supra*, at 54.

In such cases, "the degree of prejudice can never be known." ***Id***. at 55. See also ***State v. Scott***, *supra*, at 702. See also Mo. Rev. Stat. § 545.820.

Missouri law specifically requires that the courts make sure that counsel is appointed at the first appearance for an indigent defendant charged with a criminal offense which would probably result in confinement. *See* Rule 31.02(a). The defendant has a constitutional right to state-furnished counsel at his first appearance. *See* Mo. Const. Art. I, § 18(a), and U.S. Const., amends. VI & XIV.

Notably, Rule 31.02(a) became effective January 1, 1980. Hence, any state opinions prior to this date holding that appointed counsel is not required at the defendant's first appearance in Missouri state court should no longer be followed. *See, e.g.,* ***State v. Benison***, 415 S.W.2d 773, 775 (Mo. 1967), quoting ***State v. Owens***, 391 S.W.2d 248 (Mo. 1965); *see also* ***State v. Engberg***, 391 S.W.2d 868, 870 (Mo. 1965), quoting ***State v. Turner***, 353 S.W.2d 602, 604 (Mo. 1962).

The associate division of the circuit court purported to conduct Appellant's arraignment on January 9, 2019. LF, D1, p. 28. The docket entries reflect that formal arraignment was waived and a Plea of Not Guilty was entered.

It was plain error for the circuit court to conduct Appellant's arraignment without informing him of his right to appointed counsel and without Appellant waiving counsel. This error affected Appellant's substantial rights, and specifically his constitutional right to appointed counsel, and plain error review is appropriate.

And although conducting the defendant's formal arraignment upon the filing of the felony complaint may have been improper, the record is clear that the formal procedures associated with an arraignment were followed at this first appearance.

Accordingly, in such cases, "we do not stop to determine whether prejudice resulted: ... We therefore hold that Hamilton v. Alabama governs and that the judgment below must be and is reversed." ***White v. Maryland***, 373 U.S. 59, 60 (1963).[10]

The fact that Appellant -- or any defendant -- may subsequently retain private counsel at later proceedings does not obviate the requirement of an indigency determination by the circuit court at the time of the first appearance under the directives of Rule 31.02(a). *Accord* ***Ruddy***, *supra*, at 67, holding that the "circuit judge is admonished by this Court to hold all accused to a high standard of proof of indigency and to make every reasonable effort possible to fully verify indigency."

Appellant was prejudiced by the circuit court's failure to call upon him to plead without first complying with Rule 31.02(a) because the defendant must raise any objection based on defects in the institution or the prosecution by motion made "before the plea is entered[.]" See Rule 24.04(b)(3). Any such motion can only be made after the plea is entered by permission of the court. Rule 24.04(b)(3).

---

[10] Incidentally, this problem is applicable to misdemeanor offenses because the defendant's initial appearance is also the defendant's arraignment on the information, unlike in felony offenses initiated by complaint, in which case the applicable time-sensitive rule for making application for change of judge in misdemeanor offenses is Rule 32.07(b). This is also true for felony offenses initiated by indictment rather than by complaint. See Rule 22.01.

It does not matter that the defendant was required at this hearing to plead to the charges in the felony complaint, and not an indictment or information, because Rule 24.04(b)(2) specifically contemplates objections based on defects in the institution of the prosecution as contained in the felony complaint by distinguishing this from defects based in the indictment or information (*viz*., "Defenses and objections based on defects in the institution of the prosecution ***or*** in the indictment or information ...) (emphasis mine).

And one such objection based on defects in the institution of the prosecution was that the offense charged in Count II of the felony complaint was that failed to charge the offense of assault in the second degree. (See Point Relied On VII.)

A successful argument as to this objection may have resulted in the court dismissing Count II, and the defendant therefore could not have been convicted and sentenced under Count II for the offense of assault in the second degree. Counsel would have reviewed the charges with Appellant prior to his first appearance and designated arraignment, and would have identified this objection.

WHEREFORE, the judgment and sentence heretofore entered must be set aside and the cause remanded to the Circuit Court with the direction to order that Appellant shall be brought before the Court for his arraignment and there advised of his right to appointed counsel, and to actually appoint counsel for Appellant if he is otherwise qualified, and to further facilitate the creation of a system for the appointment of counsel from members of the Bar of Missouri.

III. The Circuit Court plainly erred in failing to preserve a transcript or recording of the initial appearance and purported arraignment that occurred on January 9, 2019, which prevents Appellant from receiving meaningful appellate review to challenge his claim that that the Court failed to appoint him counsel, *because* Appellant cannot test the adequacy of the Circuit Court's compliance with the requirements of Rule 31.02(a), *in that* Appellant's claim that he was denied counsel at this proceeding is based on the Circuit Court failing to inform Appellant of the Court's willingness to appoint counsel if he is unable to employ counsel, in failing to require a showing of indigency, and in failing to secure an intelligent waiver of counsel after informing Appellant as to his rights.

Standard of Review

"An appealing party is entitled to a full and complete transcript for the appellate court's review. However, a record that is incomplete or inaccurate does not automatically warrant a reversal of the appellant's conviction. [Appellant] is entitled to relief on this basis only if he exercised due diligence to correct the deficiency in the record ***and*** he was prejudiced by the incompleteness of the record." ***State v. Barber***, 391 S.W.3d 2, 5 (Mo. App. 2012). (Emphasis in original.)

"The appropriate remedy when the record on appeal is inadequate through no fault of the parties is to reverse and remand the case to the trial court." ***Goodman v. Goodman***, 165 S.W.3d 499, 501 (Mo. App. 2005).

Preservation Statement

Appellant timely sought to perfect the record on appeal in this Court. Accordingly, this issue is preserved for appeal.

Analysis and Argument

As applicable here, Rule 81.12 provides, "[t]he record on appeal shall contain all of the record, proceedings and evidence necessary for the determination of all questions to be presented ... to the appellate court for decision." And as further provided in Rule 81.12(c), it is the duty of Appellant to order the transcript.

In this effort, Appellant requested a transcript of the proceedings in this case by correspondence dated January 12, 2022. Legal File, D50 & D51.

Through no fault of his own, Appellant has been informed that the transcript and/or recording of the proceedings occurring on January 9, 2019 is unavailable. Legal File, D1, p. 23.

Clearly, Appellant has exercised due diligence to correct the deficiency in the record in this respect. Unfortunately, the lack of a transcript or recording relating to the proceedings occurring on January 9, 2019 prevents meaningful appellate review of his claims relating to the violation of Rule 31.02(a) and the denial of his right to counsel because we are unable to determine from the record whether the court complied with the mandates of Rule 31.02(a) at Appellant's first appearance hearing held on January 9, 2019. *Accord* ***Pratte***, *supra*, at 888, "**Appointing Lawyers to Fill the Need.**" (Emphasis in original.)

This issue was recently addressed by the Eastern District in ***S.H. v. P.B.***, 588 S.W.3d 553 (Mo. App. 2019). The Court held, "while P.B. exercised due diligence in seeking preparation of a complete transcript, the circuit clerk could provide no transcript to P.B., and P.B., in turn, could file no transcript with this Court. The record on appeal, therefore, is incomplete." ***Id***. at 555. The Court reversed and remanded so that a proper record could be made. ***Id***.

Respondent may argue that Appellant is not prejudiced because there is nothing in the record to suggest that counsel was requested or even required at this initial appearance hearing. But the issue is not whether the Court was ultimately required to appoint counsel in these circumstances, but whether it is possible for this Court to review the propriety of the lower court's compliance with the mandates of Rule 31.02(a) in determining whether counsel was necessary. *Accord* ***Glover v. Saint Louis County Circuit Court***, 157 S.W.3d 329, 331 (Mo. App. 2005), "Without an evidentiary record, however, we are unable to determine what evidence was before the circuit court, or if that evidence was sufficient to satisfy the statutory requirements for [not appointing counsel]."

"A judgment may not stand where there is no evidence to support it." ***Id***. "When there is no transcript of the [hearing] at all, prejudice is assumed." ***Barber***, at 5. The Rules of Appellate Procedure mandate inclusion of the transcript in the record on appeal for a reason: "meaningful appellate review of material issues in dispute on appeal requires a transcript relating to the issues raised." ***Id***. at 6.

Through no fault of his own, Appellant is unable to provide this Court with the transcript of the initial appearance that occurred on January 9, 2019.

Respondent may also argue that "[u]nless there is a statutory mandate requiring that a hearing be held on the record, ***it is the appellant's responsibility***, not the court's, to ensure that a transcript is made in order to preserve the record." ***Poke v. Mathis***, 461 S.W.3d 40, 43 (Mo. App. 2015). (Emphasis mine.) But it is unfair to attribute this responsibility to Appellant when he was without counsel at the very hearing that is in issue, and the claim that is being made relates to the right to appointed counsel under Rule 31.02(a). *Accord* ***State v. Floyd***, WD83890 (November 9, 2021), Slip Op. at 3-4, "a self-represented defendant's failure to object at trial regarding the knowing, voluntary, and intelligent nature of his waiver of the right to counsel is generally excused. This is because a *pro se* defendant cannot be expected to object that a waiver-of-counsel was not voluntary because of alleged inadequacies in an on-the-record inquiry designed to determine whether [the] waiver is knowing, voluntary, and intelligent."

The State has the burden in these circumstances to prove that the Court complied with the mandates of Rule 31.02(a) in ensuring that counsel was either appointed or waived at the initial appearance hearing held on January 9, 2019. The State has not met its burden here because the Circuit Court failed to conduct the necessary inquiry under Rule 31.02(a) ***on the record***. *See* ***Sullivan***, *supra*, at 9.

We cannot and do not know what the Circuit Court discussed with Appellant at the initial appearance with respect to the right to counsel and of the willingness of the court to appoint counsel if Appellant is unable to employ counsel. We cannot and do not know if the Circuit Court ascertained or required a showing of Appellant's "indigency" for purposes of having counsel appointed. And we cannot and do not know if Appellant can be said to have intelligently waived his right to appointed counsel at the initial appearance hearing upon a showing of indigency. *See* ***Sullivan***, *supra*, at 6-7.

The Circuit Court may have conducted a "penetrating and comprehensive" examination under Rule 31.02(a), and determined that appointed counsel was not necessary at the initial appearance, but the Court should have conducted that examination and determination "***on the record***." ***Id***. at 7 (emphasis in original).

"We will not presume acquiescence in the deprivation of such a fundamental right, nor will waiver be presumed from the echoes of a silent record." ***Id***.

A transcript of the initial appearance held on January 9, 2019 is necessary to this appeal. The record on appeal is incomplete. "In the absence of the required transcript, there is nothing for us to review because we are unable to determine whether the trial court erred." ***K.S. v. J.D.***, 404 S.W.3d 900, 901 (Mo. App. 2013).

WHEREFORE, the judgment and sentence heretofore entered must be set aside and the cause remanded for a new trial so that a proper record can be made.

IV. The Trial Court erred in allowing the State to Amend the felony Information, *because* the Amended felony information charged a different offense and prejudiced the substantial rights of Appellant, *in that* the new charge should have been filed in the associate division subject to Appellant's right to have a preliminary hearing, and *in that* his planned alibi defense to the original charge was no longer available.

Standard of Review

"This Court reviews a trial court's decision to allow an amendment of a charging document for abuse of discretion. A trial court abuses its discretion when it hands down a ruling so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration." ***State v. Lambert***, 589 S.W. 3d 116, 118 (Mo. App. 2019).

Preservation Statement

This case was tried to the court without a jury and so a motion for new trial is not necessary to preserve any matter for appellate review. See Rule 29.11(e)(2).

Additionally, a claim that a felony information "is not sufficient to charge the defendant, which would necessarily include the complete lack of a formal charging instrument, can be raised for the first time on appeal." ***State v. Hicks***, 221 S.W.3d 497, 502 (Mo. App. 2007). "This is in keeping with Rule 24.04(b)2, which provides, in pertinent part, that the defense of lack of jurisdiction or the failure of the indictment or information to charge an offense is not waived if not raised by

motion with the trial court." ***Id***.

Alternatively, Appellant requests plain error review under Rule 30.20. *See* ***Brandolese***, *supra,* at 525-526.

Analysis and Argument

Rule 23.08 provides that an information may be amended at any time before verdict or finding if:

"**(a)** No additional or different offense is charged, and

(b) A defendant's substantial rights are not thereby prejudiced."

See Rule 23.08. See also Mo. Rev. Stat. § 545.300.

"The rule has been consistently interpreted as prohibiting an amendment to an information if the effect is to charge an offense different from the one originally charged. In determining whether the amended information charges a new or different offense, courts inquire to determine whether the elements of the two offenses are different. An amendment is not prohibited, however, if the subsequent charge is a lesser included offense of the initial charge." ***State v. McKeehan***, 894 S.W.2d 216, 222 (Mo. App. 1995).

In this case, Count I of the original felony information charged the offense of robbery in the second degree under section 570.025.

The amended felony information, however, which the trial court permitted on the morning of trial, changed the charge in Count I to the offense of robbery in the first degree under section 570.023.

Robbery in the first degree in violation of section 570.023 is a different offense and is not a lesser offense included in the offense of robbery in the second degree under section 570.025. The reason is the difference in the physical injury required to be inflicted upon another person in the course of the robbery. Cf. § 570.023.1(1), "serious physical injury" and § 570.025, "physical injury" only.

Another important difference is that robbery in the first degree permits liability for the conduct of another, whereas robbery in the second degree does not.

Cf. Mo. Rev. Stat. § 570.023.1(1), "A person commits the offense of robbery in the first degree if he or she forcibly steals property and in the course thereof he or she, ***or another participant in the offense***: (1) Causes serious physical injury to any person;" and Mo. Rev. Stat. § 570.025.1, "A person commits the offense of robbery in the second degree if he or she forcible steals property and in the course thereof causes physical injury to another person." (Emphasis mine.)

See also Mo. Rev. Stat. § 562.041.1(1), providing that a person is criminally responsible for the conduct of another when: "The statute defining the offense makes him or her so responsible[.]"

Under the original charge, the State was required to prove that Appellant himself had caused physical injury to another person in the course of the alleged robbery. Under the amended charge, however, the State was required only to prove that "another participant" in the offense – and not Appellant himself – had caused serious physical injury to any person in the course of the same alleged robbery.

This amendment prejudiced Appellant's substantial rights because the planned alibi defense was no longer available as regards this element if the State was now required only to prove that it was another participant in the offense, and not necessarily Appellant himself, who had caused the injury in the course of the alleged robbery. A person can establish an alibi defense, and yet still be considered a "participant" in the offense, which would therefore still potentially make him criminally responsible for the conduct of another under section 562.041.1(1).

The main defense theory at trial was that Appellant "was not there." See Transcript, p. 23. The defense did not dispute that an assault had occurred or that others may have been involved in the assault, but only that he himself "***was not there at the time of the alleged assault***." (Emphasis mine.)

See Transcript, p. 23.

Appellant even filed a Notice of alibi in this respect.

See Legal File, D18.

The State's theory, however, was that "the Defendant, as well as several other individuals, robbed Mr. [D. H.]." Transcript, p. 21. The State specifically argued in closing that "[Appellant], Mr. Jamerio Scott, Mr. Ricky Scott, Mr. Elgin Moore ***acted in consort with one another*** in stealing the property from [D. H.] and ***in assaulting Mr. [H]***." (Emphasis mine.)

See Transcript, p. 168.

In finding the defendant guilty at trial, the trial court specifically stated that "the primary alibi witness, Mr. Bonner, he didn't help the Defendant's case at all." See Transcript, p. 173.

The alibi defense as regards the element that Appellant himself had caused physical injury was subverted by the filing of the amended felony information because Appellant would have been able to proceed with the alibi defense on the original felony information in a way that was not available to him under the amended felony information charging the offense of robbery in the first degree.

Specifically, Appellant testified at trial in his own defense as follows:

> "Q. Okay. You basically have seen evidence and you're not denying that he suffered injuries.
>
> A. Yes, sir.
>
> Q. Okay. You're just saying, Hey, you weren't there.
>
> A. Yes, sir.
>
> MRS. OESCH: Objection, Your Honor. Leading.
>
> THE COURT: Alright. I will sustain.
>
> MR. NEWELL: I will withdraw.
>
> Q. (By Mr. Newell) Were you there when Mr. [H] was assaulted?
>
> A. No, sir.
>
> Q. Had you been with Jamerio Scott, Elgin Moore and Ricky Scott earlier that day?
>
> A. Yes, sir."

See Transcript, pp. 143-144.

Appellant testified that he had been with the participants of the robbery "earlier that day", but that he was not there when D. H. was "assaulted." These statements do not support an alibi defense in cases of robbery in the first degree per § 562.041.1(1), which may be the reason why the trial court stated at trial that the "primary alibi witness ... didn't help the Defendant's case at all."

Secondly, Appellant "would have been entitled to a preliminary hearing upon the charge of [robbery in the first degree] had it been properly charged, but that is now immaterial. The new charge could not legally be engrafted upon the old one, and it must fall." ***State v. Thompson***, 392 S.W.2d 617, 621 (Mo. 1965).

Mo. Rev. Stat. § 544.250 is clear that no prosecuting attorney shall file any information charging any person with any felony until such person shall first have been accorded the right to a preliminary hearing.

The right to a preliminary hearing under this statute is mandatory. "In deciding whether a statute is 'mandatory' or 'directory,' however, the relevant statutory construction question is not whether the statute actually imposes an obligation (i.e. whether 'shall' means 'shall'). ... Instead, ... the statutory construction question ... is whether the legislature intended to make all actions that fail to comply with that obligation void or ineffective." ***Fry v. Levy***, 440 S.W.3d

405, 409 (Mo. 2014). In other words, "***the only point is, what shall be the consequences of a disobedience of its directions***." ***Id***. (Emphasis in original.)

In this case, not only has our legislature by statute directed what shall be done under Mo. Rev. Stat. § 544.250 (i.e. the person shall been accorded the right of a preliminary hearing), but Mo. Rev. Stat. § 544.250 additionally declares what consequences shall follow disobedience (i.e. no prosecuting attorney shall file any information charging any person with any felony until such person has first been accorded the right of a preliminary hearing).

"The rationale for the 'mandatory' vs. 'discretionary' dichotomy ... is to ensure that decisions regarding what sanctions (if any) are appropriate when a party fails to comply with a statutory deadline or other obligation ... are ***legislative*** decisions - no more or less[.]" ***Levy***, *supra*, at 414. (Emphasis in original.)

Accordingly, the final judgment entered in this case must be reversed and held to be "null and void" because the circuit court judge failed to comply with this '***mandatory***' statute. *See* ***Countryclub Homes, LLC v. Missouri Department of Natural Resources***, 591 S.W.3d 882, 892 (Mo. App. 2019).

In summary, the offense of robbery in the first degree and robbery in the second degree are distinct and different, "both in degree and in severity and range of punishment. While certain amendments to information as to form or substance may be permitted, it has long been held that such amendments are not permissible if the effect thereof is to charge an offense different from that charged in the

original information." ***State v. Couch***, 523 S.W.2d 612, 614 (Mo. App. 1975).

It follows as a matter of irresistible logic that the amended information herein was both basically impermissible (as an attempt to charge a new and different offense) and technically imperfect (as failing to accord Appellant his right to a preliminary hearing). That Appellant's substantial rights were thus affected is obvious, because he was sentenced to an offense in the amended information that falls within the definition of a "dangerous felony" and Appellant must therefore serve at least 85% of his sentence.

See Mo. Rev. Stat. §§ 558.019.3 and 556.061(19).

WHEREFORE, the judgment and sentence heretofore entered must be set aside and the cause remanded to the Circuit Court with the direction to order that, the State may proceed further upon the original information, it may dismiss the cause and file a new information subject to any possible question of limitations, or it may proceed otherwise, as it may see fit. It may not proceed further in this cause on the charge of robbery in the first degree.

WHEREFORE, in the alternative, the judgment and sentence with respect to Count I heretofore entered must be set aside and the cause remanded to the Trial Court with the direction to re-sentence Appellant on a lesser-included offense charge other than robbery in the first degree. See ***State v. O'Brien***, 857 S.W.2d 212 (Mo. 1993); cited in ***State v. Payne***, 250 S.W.3d 815, 821 (Mo. App. 2008).

V. The Trial Court plainly erred in allowing the State to Amend the felony Information, *because* a deliberate misstatement of fact by a prosecutor that substantially prejudices the rights of the defendant is prosecutorial misconduct that violates the guarantee of due process in U.S. Const. Amend. XIV and Mo Const. Art. I, § 10 and requires a new trial, *in that* the prosecutor told the Trial Court that Count I was bound over from the associate division as robbery in the first degree, which caused the Trial Court to promptly re-arraign Appellant on the Amended felony Information and proceed to trial, and that such statement was false.

Standard of Review

"In situations involving prosecutorial misconduct, the test is the fairness of the trial, not the culpability of the prosecutor. Where prosecutorial misconduct is alleged, the erroneous action must rise to the level of 'substantial prejudice' in order to justify reversal. The test for 'substantial prejudice' is whether the misconduct substantially swayed the judgment." ***State v. Zink***, 181 S.W.3d 66, 71-72 (Mo. 2005).

Preservation Statement

Unfortunately, this misstatement by the prosecutor was not brought to the attention of the Trial Court.

Accordingly, Appellant requests plain error review under Rule 30.20. *See* ***Brandolese***, *supra,* at 525-526.

Analysis and Argument

A new trial is required when a prosecutor tells the trial court something that is not true, and the misstatement then causes the trial court to make an erroneous ruling that renders the trial unfair.

In this case, the prosecutor on the morning of trial told the trial court the following,

> "MRS OESCH: Judge, I'm sorry. One other thing. I did previous last week or the week before filed an amended information which was basically filed because the original information in this case was filed in error. At one point Mr. Phillips' indication was he might plead guilty and the information was filed as robbery second.
>
> I did review the Casenet entries from both the associate level and circuit level case and it was bound over as robbery first. I did amend it and file it as robbery in the first degree.
>
> "THE COURT: In this case the Defendant is now arraigned on the amended information for felony.
>
> (The Defendant is formally re-arraigned.) ...
>
> THE COURT: ... The Defendant maintains his plea of not guilty. Opening statements for the State?"

See Transcript, pp. 20-21.

The trial court immediately formally re-arraigned Appellant on the amended felony information, and the case proceeded to trial. But the prosecuting attorney's statement and representation to the trial court was false because the felony complaint filed at the associate level was charged as robbery second, not as robbery first, and the case was "bound over" on the charge of robbery second.

See Legal File, D2. The felony complaint specifically charges Appellant in Count I with the class B felony of robbery in the second degree, with the Charge Code: 570.025-001Y201712990.

The preliminary hearing was held on this felony complaint with Count I charging Appellant with committing the offense of robbery in the second degree on March 5, 2019. Legal File, D1, p. 29.

The original felony information was filed with this same charge in Count I. See Legal File, D6.

The statement by the prosecuting attorney that the original felony Information was filed "in error" was also therefore false and untrue. The record therefore proves that the prosecuting attorney made false and untrue statements to the trial court as regards the filing of the amended felony information on the morning of trial. Cf. ***State v. Oglesby***, 621 S.W.3d 500, 520 (Mo. App. 2021).

Prosecutorial misconduct is an "erroneous action" by the prosecutor that must "rise to the level of substantial prejudice in order to justify reversal." ***Zink***, *supra*, at 71-72. If the prosecutorial misconduct substantially swayed the judgment and renders the trial unfair, then a new trial is required as a matter of due process. ***State v. Johnson***, 599 S.W.3d 222, 231 (Mo. App. 2020).

"The touchstone of due process in cases involving prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." ***State v. Roberts***, 948 S.W.2d 577, 605 (Mo. 1997).

The misstatement of the prosecuting attorney as regards the filing of the amended felony information prevented Appellant from receiving a fair trial because it charged a different offense and thereby prejudiced his substantial rights, in violation of Rule 23.08.

Immediately after the false statements were made as regards the filing of the amended felony information, the prosecuting attorney proceeded with her opening statement, in which she concluded by saying,

> "That would be the State's evidence to prove Count I, robbery in the first degree, that ***they*** forcibly stole items from Mr. [H] and ***they*** caused severe physical injury to Mr. [H] with the fractures to his face, and, further assault in the second degree with the injuries to Mr. [H]." (Emphasis mine.)

See Transcript, p. 22.

Appellant was therefore prejudiced and was denied a fair trial as a result of these false statements by the prosecuting attorney, which caused the trial court to "formally re-arraign[]" Appellant on the amended felony information, because robbery in the first degree, unlike robbery in the second degree, provides that either the defendant or "another participant in the offense" may be the person who committed the act of causing serious physical injury to D. H.

According to the MAI-CR "Notes on Use," "This creates a special type of accessorial liability and is not created by virtue of general principles of liability as prescribed by Sections 562.036 and 562.041, RSMo 2016." MAI-CR 4th 424.00.

Robbery in the second degree does not permit or create this same type of accessorial liability. See MAI-CR 4th 424.01.

This amendment worked to subvert Appellant's main theory at trial, which was the alibi defense as regards the element of the offense charging that Appellant himself had caused physical injury to D. H. in the course of the robbery.

"Making knowing, affirmative false statements to a court is among the most serious acts of professional misconduct an attorney can commit." ***Int'l Ass'n of Fire Fighters v. Jackson Cnty.***, 527 S.W.3d 103, 113 (Mo. App. 2017).

That Appellant's substantial rights were thus affected is obvious, because he was sentenced to an offense in the amended information that falls within the definition of a "dangerous felony" and Appellant must therefore serve at least 85% of his sentence. See Mo. Rev. Stat. §§ 558.019.3 and 556.061(19).

WHEREFORE, the prosecuting attorney's deliberate, knowing misconduct in misrepresenting to the Trial Court that the case was "bound over" from the "associate level" on the charge of robbery in the first degree, which caused the Trial Court to formally arraign Appellant on the Amended felony Information charging Appellant with the offense of robbery in the first degree, was false, swayed the Judgment in this case, and substantially prejudiced Appellant's defense at trial, in violation of his right to due process, and requires a new trial.

VI. The Trial Court erred in overruling Appellant's motions for judgment of acquittal on Count I, robbery in the first degree in violation of § 570.023, a class A felony, *because* the State failed to prove beyond a reasonable doubt the necessary elements of Count 1 that in the course of committing the offense of robbery in the first degree, either the defendant, or another participant in the offense: (1) Causes serious physical injury to any person, *in that* viewing the evidence in the light most favorable to the State, there was no evidence that Daniel Houston suffered serious physical injury.

Standard of Review

"This Court review of the sufficiency of the evidence is limited to whether the State has introduced sufficient evidence for any reasonable juror to have been convinced of the defendant's guilt beyond a reasonable doubt." ***State v. Jeffrey***, 400 S.W.3d 303, 312-313 (Mo. 2013). The Court "accept[s] as true all evidence tending to prove guilt together with all reasonable inferences that support the verdict and ignore[s] all contrary evidence and inferences." ***Id***. at 313.

If no "rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt," this Court will reverse the trial court's judgment and discharge the defendant. ***Id***. "Substantial evidence is evidence from which a juror could reasonably find the issue in harmony with the verdict." ***State v. Bruce***, 53 S.W.3d 195, 198 (Mo. App. 2001).

Preservation Statement

This point is preserved for appellate review. Appellant moved for a judgment of acquittal at the close of both the State's evidence and all evidence, making the argument in this point. Transcript, pp. 126 & 168, respectively. Additionally, in a criminal case, "arguments concerning the sufficiency of the evidence, even those not preserved for appeal, are reviewed on the merits, not for plain error." ***State v. Zetina-Torres***, 482 S.W.3d 801, 808-809 (Mo. 2016).

This case was tried to the court without a jury and so a motion for new trial is not necessary to preserve any matter for appellate review. See Rule 29.11(e)(2).

Analysis and Argument

To convict an individual of a crime, the State must prove each element of the offense beyond a reasonable doubt. ***State v. Roggenbuck***, 387 S.W.3d 376, 382 (Mo. 2012). "The state is held to proof of elements of the offense actually charged, not one that might have been charged." ***State v. Glass***, 439 S.W.3d 838, 842 (Mo. App. 2014). "When the evidence fails to show that a defendant committed a crime in the specific manner charged, reversal is required." ***Id***. Notably, the State is "held to proof of that act; and a defendant may be convicted only on that act." ***State v. Jackson***, 896 S.W.2d 77, 82 (Mo. App. 1995).

Count I of the amended felony information charged Appellant with robbery in the first degree in violation of section 570.023, a class A felony, because: "on or about December 14, 2018, in the County of Scott, State of Missouri, Appellant

forcibly stole a phone owned by [D. H.], and in the course thereof defendant caused ***serious physical injury*** to [D. H]." (Emphasis mine.) Legal File, D22.

An essential element of this offense the State had to prove is that in the course of forcibly stealing D. H.'s phone, Appellant caused "serious physical injury" to D. H.

"Serious physical injury" is defined as "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body" pursuant to Code definitions found in Mo. Rev. Stat. § 556.061(44).

D. H. testified that he had "lost consciousness" after the "first hit" and then woke up to "being struck with fists and being kicked[.]" Transcript, pp. 29, 30. D. H. further testified that he had a "fractured orbital bone and broken nose." Transcript, p. 34-35. However, D. H. did not have to have surgery as a result. Transcript, p. 35.

"There is no minimum degree of trauma which must be inflicted to satisfy the portion of the statutory definition dealing with protracted loss or impairment. The question is whether the injuries inflicted in the assault, viewed objectively, are of a degree of severity sufficient to raise a legitimate concern either that the victim could expire or that the victim could suffer more than a momentary impairment of a bodily function." ***In Interest of N.A.G.***, 903 S.W.2d 664, 667 (Mo. App. 1995).

There was no evidence that D. H. continued to have pain weeks or months after the assault. *Cf.* ***State v. Quinn***, 717 S.W.2d 262, 264-265 (Mo. App. 1986) (at time of trial, three months after shooting, victim testified that he continued to have pain in his foot and that he was not able to do what he could before the shooting); ***State v. Trimmer***, 849 S.W.2d 725 (Mo. App. 1993) (pain and loss of sleep for at least one month and continued itching from burn scars at time of trial nearly four months after assault); ***N.A.G.***, *supra*, at 668 (victim continued to experience pain and loss of function two months after the accident).

"When courts have considered the effects of an assault to determine whether they constitute 'protracted' impairment, the time frames found to be sufficient vary depending on the facts of each case." ***State v. Carpenter***, 592 S.W.3d 801, 805 (Mo. App. 2019) (at trial, approximately a year and a half after the collision, Victim testified he continued to suffer from back pain "every day since then").

And although D. H. testified that he had lost consciousness, previous cases have discussed this in terms of creating substantial risk of death in cases involving choking or asphyxiation *See* ***State v. Crudup***, 415 S.W.3d 170, 174 (Mo. App. 2013) & ***State v. Carlock***, 242 S.W.3d 461, 465 (Mo. App. 2007), respectively.

Finally, there was no evidence presented at trial that D. H. suffered serious disfigurement as a result, such as "facial scars." *See* ***State v. Bledsoe***, 920 S.W.2d 538, 540 (Mo. App. 1996).

Accordingly, the State failed to prove an essential element of Count I,

robbery in the first degree in violation of section 570.023, a class A felony, because the State failed to prove beyond a reasonable doubt that Appellant caused serious physical injury to D. H. That Appellant's substantial rights were thus affected is obvious, because he was sentenced to an offense in the amended information that falls within the definition of a "dangerous felony" and Appellant must therefore serve at least 85% of his sentence.

See Mo. Rev. Stat. §§ 558.019.3 and 556.061(19).

WHEREFORE, the judgment and sentence with respect to Count I heretofore entered must be set aside and Appellant discharged, without remand.

WHEREFORE, in the alternative, the judgment and sentence with respect to Count I heretofore entered must be set aside and the cause remanded to the Trial Court with the direction to re-sentence Appellant on a lesser-included offense charge other than robbery in the first degree. See ***State v. O'Brien***, 857 S.W.2d 212 (Mo. 1993); cited in ***State v. Payne***, 250 S.W.3d 815, 821 (Mo. App. 2008).

VII. The Trial Court erred in overruling Appellant's motions for judgment of acquittal on Count II, assault in the second degree in violation of § 565.052, a class D felony, *because* the State failed to charge the offense of assault in the second degree in the amended felony information by not including language that Appellant knowingly caused physical injury to another person by means of a deadly weapon or dangerous instrument, *in that* merely knowingly causing physical injury to another person suffices only for the offense of assault in the third degree, a class E felony, but not for the offense of assault in the second degree, a class D felony.

Standard of Review

"[T]he test for the sufficiency of an indictment or information is whether it contains all the essential elements of the offense as set out in the statute." ***State v. Fernow***, 328 S.W.3d 429, 430-431 (Mo. App. 2010). "The standard of review to determine whether the trial court erred ... requires that the information: (1) properly advise the defendant of the nature and cause of the accusation against him; (2) consist of a plain, concise and definite written statement of the essential facts constituting the offense charged; (3) state facts which constitute the offense charged with reasonable certainty; and (4) make the averments so clear and distinct that there could be no difficulty in determining what evidence would be admissible under them." ***Id***. at 430.

And although Appellant couches his claim in terms of the failure to charge

an offense, his true claim is a question of statutory interpretation, as this Court is required to determine whether the State properly charged the offense of assault in the second degree in violation of section 565.052, a class D felony. "Statutory interpretation is a question of law, and questions of law are reviewed de novo." ***State v. Downing***, 359 S.W.3d 69, 70 (Mo. App. 2011).

Preservation Statement

This point is preserved for appellate review. Appellant moved for a judgment of acquittal at the close of both the State's evidence and all evidence, making the argument in this point. Transcript, pp. 126 & 168, respectively.

Additionally, a claim that a felony information "is not sufficient to charge the defendant ... can be raised for the first time on appeal." ***State v. Hicks***, *supra*, at 502 (Mo. App. 2007). "This is in keeping with Rule 24.04(b)2, which provides, in pertinent part, that the defense of lack of jurisdiction or the failure of the indictment or information to charge an offense is not waived if not raised by motion with the trial court." ***Id***.

Finally, this case was tried to the court without a jury and so a motion for new trial is not necessary to preserve any matter for appellate review. See Rule 29.11(e)(2).

Alternatively, Appellant requests plain error review under Rule 30.20. *See* ***Brandolese***, *supra,* at 525-526.

Analysis and Argument

"It has long been held that an indictment or information must contain the essential elements of the offense charged as set out in the statute or statutes that define the offense." ***State v. Briscoe***, 847 S.W.2d 792, 794 (Mo. 1993).

Count II of the amended felony information charged Appellant with assault in the second degree in violation of section 565.052, a class D felony, because: on or about December 14, 2018, in the County of Scott, State of Missouri, Appellant "knowingly caused physical injury to [D. H.] by hitting him in his face and body and causing multiple lacerations and sever bruising to his face and both legs." See Legal File, D22.

As relevant here, Mo. Rev. Stat. § 565.052.1 provides: "A person commits the offense of assault in the second degree if he or she: (2) ... knowingly causes physical injury to another person ***by means of a deadly weapon or dangerous instrument***[.]" (Emphasis mine.)

Hence, in order to properly charge Appellant with the offense of assault in the second degree for ***knowingly*** causing physical injury to another person, the State had to plead that the physical injury must be knowingly caused "***by means of a deadly weapon or dangerous instrument***[.]" (Emphasis mine.)

Merely knowingly causing physical injury to another person suffices only for the offense of assault in the third degree in violation of section 565.054, a class E felony.

The amended felony information failed to plead that Appellant knowingly caused physical injury by means of a deadly weapon or dangerous instrument. Accordingly, the amended felony information was insufficient, and the amended felony information for assault in the second degree in violation of section 565.052, a class D felony, therefore fails to state a charge against Appellant.

Accordingly, the State alleged facts with respect to Count II that, if proven, would have constituted assault in the third degree only, a class E felony. In fact, there was no evidence at trial that Appellant, or any participant, caused physical injury to D. H. by means of a deadly weapon or dangerous instrument.

That Appellant's substantial rights were thus affected is obvious, because he was sentenced to a term of years exceeding the range of punishment for assault in the third degree in violation of section 565.054, a class E felony.
See Mo. Rev. Stat. § 558.011.1(5), "For a class E felony, a term of years not to exceed four years[.]"

WHEREFORE, the judgment and sentence with respect to Count II heretofore entered must be set aside and Appellant discharged, without remand, and/or alternatively to remand the cause for a new sentencing procedure and hearing on Count II, pursuant to Rule 30.22. See ***State v. Sumlin***, 820 S.W.2d 487, 490 (Mo. 1991), "until a judgment becomes final, the appellate court can remand the case to the circuit court for a ... new sentencing procedure at which a new penalty shall be assessed. See Rule 30.22."

CONCLUSION

WHEREFORE, based on the foregoing reasons, Appellant prays that this Court reverse the Trial Court's judgment on both counts without remand and order Appellant discharged. Alternatively, Appellant prays that this Court reverse the Trial Court's judgment and remand the case for a new trial and/or sentencing procedure.

Respectfully submitted,

MGM LAW LLC

by: /s/ Matthew Mueller

Matthew G. Mueller, MBE# 66097
3407 South Jefferson Avenue
Saint Louis, Mo 63118
Phone: 573-823-3180
Fax: 314-632-6488
Email: mueller@mgmlawstl.com
Attorney for Appellant

CERTIFICATION

I hereby certify that this brief complies with the information required by Rule 55.03, that it complies with the limitations contained in Rule 84.06(b), and that it contains 14,620 words in the brief as determined by the word count of the word-processing system used to prepare this brief.

Respectfully submitted,

MGM LAW LLC

by: /s/ Matthew Mueller

Matthew G. Mueller, MBE# 66097
3407 South Jefferson Avenue
Saint Louis, Mo 63118
Phone: 573-823-3180
Fax: 314-632-6488
Email: mueller@mgmlawstl.com
Attorney for Appellant