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**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT IV**

January 8, 2016

*To:*

Hon. Patrick J. Fiedler  
Circuit Court Judge  
215 South Hamilton, Br 8, Rm 8103  
Madison, WI 53703

Hon. William E. Hanrahan  
Circuit Court Judge  
215 South Hamilton, Br. 7, Rm. 4103  
Madison, WI 53703

Carlo Esqueda  
Clerk of Circuit Court  
Room 1000  
215 South Hamilton  
Madison, WI 53703

Corey C. Stephan  
Asst. District Attorney  
Rm. 3000  
215 South Hamilton  
Madison, WI 53703

Stacy Taeuber  
Law Offices of Stacy Taeuber  
P. O. Box 259938  
Madison, WI 53725

Warren D. Weinstein  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

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2015AP757-CR

State of Wisconsin v. Eddie Blake (L.C. # 2006CF2603)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

A jury found Eddie Blake guilty of robbery, and the circuit court sentenced Blake to seven years of initial confinement and three years of extended supervision. Blake moved for a new trial because the transcript of the jury selection had not been prepared. The circuit court denied Blake's motion. Based upon our review of the briefs and record we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup> We affirm.

This appeal is controlled by *State v. Perry*, 136 Wis. 2d 92, 401 N.W.2d 748 (1987). In that case, our supreme court considered the parties' responsibilities when a portion of a trial transcript cannot be produced. The supreme court approved the rationale and methodology previously set forth by the court of appeals in *State v. DeLeon*, 127 Wis. 2d 74, 377 N.W.2d 635 (Ct. App. 1985). *See Perry*, 136 Wis. 2d at 100-04.

The absence of the jury selection transcript does not automatically entitle Blake to a new trial. *See id.* at 100. "Error in transcript preparation or production, like error in trial procedure, is subject to the harmless-error rule." *Id.* The initial requirement is that "the appellant ... assert that the portion of the transcript that is missing would, if available, demonstrate a 'reviewable error.'" *Id.* at 101 (quoting *DeLeon*, 127 Wis. 2d at 80). "Reviewable error" is "a facially valid claim of error," one which "were there evidence of it revealed in the transcript, might lend color to a claim of prejudicial error." *Id.* (quoting *DeLeon*, 127 Wis. 2d at 80). If a "colorable need" for the missing transcript is asserted, the circuit court then must ascertain whether the missing transcript can be reconstructed. *Id.* at 101-02 (quoted source omitted).

When confronted with an incomplete record, the circuit court must ensure "that the defendant's right to a fair and meaningful review is not frustrated by transcript errors or omissions." *Id.* at 109. The circuit court's decision is discretionary, and a reviewing court will uphold the circuit court decision "if due consideration is given to the facts then apparent,

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

including the nature of the claimed error and the colorable need for the missing portion—and to the underlying right under our constitution to an appeal.” *Id.*

In this case, the circuit court held that Blake had not claimed that any error occurred during jury selection and, therefore, he had not shown the existence of a colorable need for the missing transcript. We concur with the circuit court’s decision. Blake only asserts that the transcript of the jury selection has not been prepared.<sup>2</sup> He has not alleged any likelihood that the missing transcript would have shown an arguably prejudicial error. *See id.* at 103. Blake is not entitled to a new trial merely because a transcript cannot be produced. To hold otherwise would eviscerate the holding of *Perry*. *See id.* at 105 n.5 (*per se* rule “would lend itself to manipulation”).

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

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<sup>2</sup> Blake also claims that the transcript cannot be reconstructed. While the State disputes that assertion, we need not determine whether reconstruction is possible.