

A05-0031

STATE OF MINNESOTA

IN SUPREME COURT

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State Of Minnesota,

Respondent,

vs.

Jamie Leigh Larson,

Appellant.

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**RESPONDENT'S BRIEF**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....iii

LEGAL ISSUES ..... 1

STATEMENT OF THE CASE..... 3

STATEMENT OF FACTS ..... 3

ARGUMENT ..... 8

I. There Was More Than Sufficient Evidence To Convict Appellant  
Of First-Degree Murder ..... 8

    A. Standard Of Review..... 8

    B. Analysis ..... 8

II. The Trial Court Did Not Prejudicially Abuse Its Discretion In  
Restricting Evidence. .... 10

    A. Standard Of Review..... 10

    B. The Trial Court Did Not Abuse Its Discretion In Limiting  
The Introduction Of Alternative-Perpetrator Evidence. .... 10

    C. The Trial Court Did Not Abuse Its Discretion In Preventing  
The Introduction Of Ramon Andujar’s Immigration Status  
And Alleged Criminal Activity. .... 13

    D. The Trial Court Did Not Abuse Its Discretion In Preventing  
Unauthenticated Transcripts From Being Entered Into Evidence. .... 14

III. Appellant’s Three Complaints About Jury Instructions Do Not Entitle  
Her To A New Trial..... 15

    A. Standard Of Review..... 15

    B. The Trial Court Did Not Plainly Err In Instructing The  
Jury On Accomplice Liability With An Unaltered CRIMJIG. .... 16

C.	The Additional Instruction On Intent Was Not Erroneous Because It Properly Stated The Law And Was Supported By Evidence. ....	17
D.	The Trial Court Did Not Plainly Err By Failing To Provide An Accomplice-Testimony Instruction. ....	19
CONCLUSION.....		20

## TABLE OF AUTHORITIES

### State Cases

<i>Bernhardt v. State</i> , 684 N.W.2d 465 (Minn. 2004) .....	18
<i>Huff v. State</i> , 698 N.W.2d 430 (Minn. 2005) .....	11
<i>State v. Amos</i> , 658 N.W.2d 201 (Minn. 2003) .....	10
<i>State v. Atkinson</i> , 774 N.W.2d 584 (Minn. 2009) .....	12
<i>State v. Baird</i> , 654 N.W.2d 105 (Minn. 2002) .....	15
<i>State v. Bergeron</i> , 452 N.W.2d 918 (Minn. 1990) .....	8
<i>State v. Bliss</i> , 457 N.W.2d 385 (Minn. 1990) .....	8
<i>State v. Crow</i> , 730 N.W.2d 272 (Minn. 2007) .....	18
<i>State v. Czech</i> , 343 N.W.2d 854 (Minn. 1984) .....	13
<i>State v. Earl</i> , 702 N.W.2d 711 (Minn. 2005) .....	16
<i>State v. Evans</i> , 756 N.W.2d 854 (Minn. 2008) .....	19
<i>State v. Flores</i> , 418 N.W.2d 150 (Minn. 1988) .....	16

<i>State v. Fort</i> , 768 N.W.2d 335 (Minn. 2009) .....	8
<i>State v. Glaze</i> , 452 N.W.2d 655 (Minn. 1990) .....	12
<i>State v. Gutierrez</i> , 667 N.W.2d 426 (Minn. 2003) .....	10
<i>State v. Hall</i> , 722 N.W.2d 472 (Minn. 2006) .....	16
<i>State v. Hannon</i> , 703 N.W.2d 498 (Minn. 2005) .....	11
<i>State v. Hollins</i> , 765 N.W.2d 125 (Minn. Ct. App. 2009).....	18
<i>State v. Jones</i> , 678 N.W.2d 1 (Minn. 2004) .....	11
<i>State v. Mahkuk</i> , 736 N.W.2d 675 (Minn. 2007) .....	17
<i>State v. Moore</i> , 438 N.W.2d 101 (Minn. 1989) .....	8
<i>State v. Swanson</i> , 707 N.W.2d 645 (Minn. 2006) .....	19
<i>State v. Ulvinen</i> , 313 N.W.2d 425 (Minn. 1981) .....	17
<i>State v. Vang</i> , 774 N.W.2d 566 (Minn. 2009) .....	16
<i>State v. Yang</i> , 774 N.W.2d 539 (Minn. 2009) .....	16, 18

**Rules and Statutes**

CRIMJIG 4.01 ..... 16

Minn. R. Evid. 103..... 14

Minn. R. Evid. 403..... 13

Minn. R. Evid. 901..... 15

## LEGAL ISSUES

1. Was the evidence sufficient to convict appellant of first-degree murder?

*The trial court was not asked to rule.*

*State v. Fort*, 768 N.W.2d 335 (Minn. 2009)

*State v. Moore*, 438 N.W.2d 101 (Minn. 1989)

2. Did the trial court prejudicially abuse its discretion in barring some alternative-perpetrator evidence, when the evidence proffered only provided a possible motive, and did not connect the alleged alternative perpetrators to the murder?

*The trial court ruled in the negative.*

*Huff v. State*, 698 N.W.2d 430 (Minn. 2005)

3. Did the trial court prejudicially abuse its discretion in barring impeachment evidence intended to show benefit received in exchange for testimony, when there was no evidence of benefit?

*The trial court ruled in the negative.*

*State v. Czech*, 343 N.W.2d 854 (Minn. 1984)

4. Did the trial court prejudicially abuse its discretion in barring unauthenticated transcripts from being entered into evidence?

*The trial court ruled in the negative.*

5. Did the trial court plainly err in instructing the jury with CRIMJIG 4.01?

*The trial court was not asked to rule.*

*State v. Vang*, 774 N.W.2d 566 (Minn. 2009)

6. Did the trial court prejudicially err in instructing the jury that a person's conduct before or after an offense is a relevant circumstance from which criminal intent may be inferred?

*The trial court ruled in the negative.*

*State v. Ulvinen*, 313 N.W.2d 425 (Minn. 1981)

7. Did the trial court plainly err in failing to instruct the jury on accomplice testimony, when appellant contended at trial that the alleged accomplices were alternative perpetrators?

*The trial court was not asked to rule.*

*State v. Evans*, 756 N.W.2d 854 (Minn. 2008)

## STATEMENT OF THE CASE

Respondent accepts appellant's statements of the procedural history and the case, and provides the following summary. A jury trial – beginning September 20, 2004, presided over by the Honorable Edward S. Wilson – resulted in appellant's first-degree murder conviction for helping kill her ex-boyfriend, T■■■■ C■■■. Judge Wilson sentenced appellant to life in prison on the same day the jury returned the verdict, October 4, 2004.

Appellant filed a notice of appeal on January 5, 2005. By order of this Court, appellant was granted an extension to August 5, 2005, to file her brief. On August 2, 2005, appellant substituted counsel and requested a stay. On August 5, 2005, appellant was granted a stay of appeal in order to file for postconviction relief. This stay was dissolved on May 5, 2009. Appellant was then granted multiple extensions to file her brief, and ultimately filed a motion for acceptance of her untimely brief. *See* this Court's Order of December 7, 2009.

## STATEMENT OF FACTS

For purposes of the issues appellant raises on appeal, respondent accepts the relevant portions of appellant's statement of facts, and provides the following summary.

Nineteen-year-old T■■■■ C■■■'s body was found by deputies at 8:59 a.m. on Friday, November 28, 2003, in a ditch alongside Edgerton Street in Little Canada. T. 941, 1326.<sup>1</sup> There was a track in the snow from the top of the ditch down to the body.

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<sup>1</sup> "T." refers to the seven-volume, consecutively-paginated trial transcript.

T. 1326. One set of footprints went down to the body and back up to the road. T. 1327. It appeared that someone dragged C■■■■'s body into the ditch. T. 1327, 1596.

T■■■■ C■■■■ had a zip-strip tightened around his neck and abrasions on his body. T. 1600. The abrasions were likely inflicted immediately prior to death. T. 1602. He died of asphyxia caused by being choked by the zip-strip. T. 1626. More than 66 pounds of pressure were placed around his neck by the zip-strip, enough to cut off all blood and oxygen from his brain. T. 1610-1611.

The events that led up to the murder began earlier that morning, when appellant entered room 208 of the Travelodge in St. Paul. She and her brother, Robert Larson, began telling everyone in the room that they wanted to kill appellant's ex-boyfriend, T■■■■ C■■■■. T. 1183, 1527. The occupants of room 208 were appellant's cousin Dan Iacarella and appellant's friends Dustin Grosz and Jennifer Stoffers. T. 1078, 993, 1032. Stoffers had used methamphetamine a few hours before appellant arrived, and Grosz had consumed painkillers. T. 1179, 1076.

Brandishing a handgun, appellant told them that C■■■■ was asleep in his truck. T. 1183-1184. Appellant was angry at C■■■■ for hitting her, and began planning an attack. T. 1080-1081, 1183. Appellant and her brother spoke of shooting him, tying him up, and then burying him. T. 1183. They had even planned where to bury him, and how to transport his body – in the tool box of his truck, up north to Pine City. T. 1183. Appellant and her brother discussed using zip-strips to tie C■■■■ up, and Grosz overheard them mention putting one around C■■■■'s neck. T. 1081, 1183. Two people in the room, Stoffers and Iacarella, were concerned with the seriousness of appellant's planning, and

attempted to persuade appellant and her brother not to kill C█. T. 1185. Appellant left room 208 to speak with her friends in room 206, while her brother went to retrieve several zip-strips. T. 1186-1187.

Appellant was still angry at C█ and “flashing around” a gun when she entered room 206. T. 997-998, 1112. She said she wanted to get even with C█ for hitting her, and made a comment about “putting him six feet under” to the occupants of the room, Ramon Andujar,<sup>2</sup> Tammy Oberg, and Ron Anderson. T. 1000, 991-992, 1109-1110. Appellant asked Andujar to help her kill C█. T. 1001, 1110. Andujar refused and told her not to do it. T. 1006, 1110. Appellant called Andujar and the others a “bunch of pussies,” and said that she and her brother would deal with C█. T. 1006. Everyone in the room expressed concern because appellant appeared to be serious about her threats toward C█. T. 1006, 1112.

A few minutes after appellant left room 206, Andujar decided to try to stop her. T. 1006. When he left the room, he saw the Larson siblings walking down the staircase towards the parking lot where C█’s truck was parked. T. 1006-1007, 1113. Robert Larson was carrying a zip-strip in his hands, and showed it to Andujar. T. 1007. Andujar told him not to do it, but appellant and her brother ignored him. T. 1007. Andujar then went to room 208 to ask Iacarella to come with him, to stop appellant and her brother from killing C█. T. 1008.

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<sup>2</sup> Appellant’s brief often refers mistakenly to Andujar as “Anjubar.”

In the parking lot, appellant got in the driver's seat of C■■■■'s truck. T. 1113, 1188. C■■■■ was sleeping in the front passenger seat. T. 1188. Appellant's brother also got in the truck, behind C■■■■. T. 1188. Appellant then drove the truck out of the parking lot. T. 1188. Appellant's and her brother's fingerprints were later found on C■■■■'s truck. T. 1409, 1412.

Andujar and Iacarella got in Andujar's SUV and began to follow appellant. T. 1010. Appellant went west on I-94, then north on I-35. T. 1011. She took the exit for Little Canada Road. T. 1011. Prior to the exit, Andujar noticed the person in the front seat appear to wake up. T. 1011. On Little Canada Road, appellant made a right-hand turn onto a side street, Edgerton, causing Andujar to temporarily lose sight of C■■■■'s vehicle. T. 1013. Andujar turned his SUV around and took a left onto Edgerton. T. 1013. Shortly after that, Iacarella spotted C■■■■'s truck behind them on Edgerton; Andujar turned his car around. T. 1013-1014.

Appellant later told a friend, Jeremy Hackbarth, that she was driving C■■■■'s truck while C■■■■ was sleeping, her brother snapped, and C■■■■ wound up dead. T. 1133. Her brother put a zip-strip around C■■■■'s neck and pulled it tight. T. 1134. C■■■■ woke up and jumped out of the moving truck. T. 1134. Appellant's brother left the truck to chase him, and eventually choked C■■■■ to death. T. 1134. Appellant provided the same description of C■■■■'s death to her best friend, Jennifer Stoffers. T. 1205.

Several other witnesses corroborated aspects of this story. A man resembling C■■■■ banged on the front of a SUV as it drove down Edgerton. T. 1226. An occupant of that SUV also saw a person standing on the side of the road, in the direction from which

the first man ran. T. 1227. Between 5:45 a.m. and 5:50 a.m., two other drivers independently observed a man lying in the road, with another man standing above him, possibly trying to drag him off the road. T. 1235, 1243.

After turning their vehicle around, Andujar and Iacarella spotted appellant coming on foot towards them. T. 1016. Appellant got in Andujar's SUV; they followed her directions to pick up her brother. T. 1016. After picking him up on Edgerton, Andujar and Iacarella asked where C ■ was. T. 1018. Appellant's brother pointed down the street toward a ditch. T. 1019. Andujar then drove the group to the Blaine White Castle, where appellant got out to pick up her brother's truck. T. 1019-1021. Andujar next drove to a gas station, where appellant's brother got out; Andujar and Iacarella continued to the Travelodge. T. 1026. This portion of events was corroborated by camera footage from these locations, and by DNA evidence that appellant's brother's blood was in Andujar's vehicle. T. 1266, 1274, 1465.

When appellant's brother returned to the Travelodge, his knuckles were cut; he washed blood off his hands. T. 1084. Eventually, he was given a ride to Hackbarth's house. T. 1087. When he arrived, appellant was already there. T. 1087. Appellant told Hackbarth what she and her brother did to T ■ C ■. T. 1133-35.

Appellant did not testify or present any evidence at trial. T. 1633-38.

## ARGUMENT

### I. There Was More Than Sufficient Evidence To Convict Appellant Of First-Degree Murder.

Respondent begins with appellant's third argument – that the evidence is insufficient – because if this Court agrees with appellant on this issue then there can be no new trial and the Court need not reach appellant's other arguments. Appellant claims that the evidence supports another rational hypothesis – that she never left the Travelodge – because the jury should not have believed the state's witnesses. Appellant's Brief ("App. Br.") 27-30. Appellant's argument is frivolous.

#### A. Standard Of Review

When reviewing the sufficiency of evidence, this Court views the evidence "in a light most favorable to the verdict and assumes that the fact-finder disbelieved any testimony conflicting with that verdict." *State v. Fort*, 768 N.W.2d 335, 343 (Minn. 2009). The reviewing court defers to the jury regarding the credibility of witnesses. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990). It must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). All inconsistencies in the evidence are resolved in favor of the state. *State v. Bergeron*, 452 N.W.2d 918, 924 (Minn. 1990).

#### B. Analysis

Appellant contends that the evidence is susceptible to the hypothesis that she never left the Travelodge. App. Br. 28. But appellant's hypothesis runs counter to the testimony of numerous witnesses.

Jennifer Stoffers and Ron Anderson observed appellant enter C■■■■'s truck. Ramon Andujar and Dan Iacarella followed her as she drove it. They were present when she got into their vehicle, and when she got out at the Blaine White Castle.

Further, appellant spoke with Jennifer Stoffers the day after the murder. Stoffers was appellant's best friend, and had to be subpoenaed to testify. Stoffers testified that during that conversation, appellant confessed to being present when her brother put the zip-strip around C■■■■'s neck. Appellant also confessed to Stoffers that she parked C■■■■'s truck after C■■■■ and her brother jumped out. Appellant's confession to Stoffers supports the independent accounts of other trial witnesses, and provides an explanation why appellant's fingerprints were found in C■■■■'s vehicle.

Appellant also confessed to Jeremy Hackbarth, with whom she was involved in a relationship. This confession mirrored her confession to Stoffers and accounts of other witnesses. Appellant told Hackbarth that C■■■■ had fallen asleep, she was driving his truck, and her brother was in the back seat. She told him that her brother pulled the zip-strip tight, causing C■■■■ to wake up and jump out of the car; after her brother followed C■■■■, appellant pulled the truck over and got out.

Assuming that the jury believed the state's witnesses, as this Court must, the evidence indisputably refutes appellant's alternate hypothesis that she never left the Travelodge. Given this Court's well-established refusal to second-guess jury determinations of credibility, the evidence here is plainly sufficient.

## **II. The Trial Court Did Not Prejudicially Abuse Its Discretion In Restricting Evidence.**

Appellant also argues that, “[b]y severely limiting the defense’s ability to impeach state’s witnesses . . . the court deprived [appellant] of the right to confront witnesses and the right to present a defense.” App. Br. 16. Specifically, appellant argues that Judge Wilson abused his discretion by barring alternative-perpetrator evidence relating to Jeremy Hackbarth and Blake Eckman, by preventing her from impeaching a witness based on uncharged criminal activity, and by preventing her from impeaching witnesses with unauthenticated transcripts. Appellant cannot meet her burden of showing abuse of discretion, or prejudice.

### **A. Standard Of Review**

Evidentiary rulings are left to the discretion of the trial court. *State v. Gutierrez*, 667 N.W.2d 426, 436 (Minn. 2003). Such rulings may only be overturned when that discretion is abused. *Id.* If this Court determines that the trial court erred, it must then determine whether that error was harmless. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). An error is harmless if the jury’s verdict is unattributable to the error. *Id.* “Appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced.” *Id.*

### **B. The Trial Court Did Not Abuse Its Discretion In Limiting The Introduction Of Alternative-Perpetrator Evidence.**

Appellant claims that Judge Wilson improperly barred the defense from showing that other individuals – namely, Jeremy Hackbarth and Blake Eckman – had the means and opportunity to murder C■■■. App. Br. 17-18. But appellant never offered any

evidence that had an “inherent tendency” to connect these two individuals to the commission of the crime. Appellant’s purported alternative-perpetrator evidence only showed possible motive, which alone is insufficient.

Defendants have a right to present a complete defense, including the right to present evidence of alternative perpetrators. *State v. Jones*, 678 N.W.2d 1, 15-16 (Minn. 2004). However, this right does not remove the trial court’s duty and ability to limit the scope of evidence presented. *State v. Hannon*, 703 N.W.2d 498, 506 (Minn. 2005). In determining the admissibility of alternative-perpetrator evidence, a trial court must employ a two-step process. *Huff v. State*, 698 N.W.2d 430, 436 (Minn. 2005).

The first step requires a determination of whether the defendant laid the proper foundation for alternative-perpetrator evidence, by offering evidence that has “an inherent tendency to connect the alternative party with the commission of the crime.” *Id.* If the defendant meets this burden, only then may the trial court admit evidence of the alternative perpetrator’s motives, actions, and other facts that show this third party committed the crime. *Id.* Here, appellant failed to lay proper foundation that has an “inherent tendency” to connect Blake Eckman or Jeremy Hackbarth to the commission of the murder.

Appellant’s evidence purportedly linking Eckman to the murder is that C█ allegedly threatened to shoot Eckman. There is, however, no evidence connecting Eckman to the murder of C█. Appellant did not offer evidence that Eckman ever

threatened C█. This unrelated incident does not satisfy the first part of the *Huff* analysis.<sup>3</sup>

As for Hackbarth, according to appellant he left a voicemail for C█, threatening to kill him, after C█ threatened Hackbarth and his children. Although this allegedly happened within 24 hours of C█'s murder, appellant offered no evidence connecting Hackbarth to the murder. Appellant mentions that police found a sweatshirt at the crime scene that did not belong to C█, and cites *State v. Glaze*, where this Court found that a hat similar to one worn by a third party sufficiently connected that third party to the crime. App. Br. 18, *citing* 452 N.W.2d 655, 661 (Minn. 1990). However, *Glaze* is easily distinguished by the fact that the third party was known for wearing a hat similar to the one found at the scene of the crime. *Id.* Here, no item found at the crime scene, or involved in the crime, was shown to be in any way connected to Hackbarth.

Contrary to appellant's misunderstanding of Minnesota law, rank speculation about what might have happened, unsupported by any evidence, is not enough to mandate the admission of evidence that a third party did not like the decedent. Judge Wilson did not abuse his discretion given appellant's patently insufficient offer of proof regarding the alleged alternative perpetrators.

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<sup>3</sup> See, e.g., *State v. Atkinson*, 774 N.W.2d 584, 590-91 (Minn. 2009) (explaining that evidence of motive is admissible only if the defendant lays a proper foundation for alternative-perpetrator evidence by offering evidence that has an inherent tendency to connect the alternative perpetrator to the commission of the charged crime).

**C. The Trial Court Did Not Abuse Its Discretion In Preventing The Introduction Of Ramon Andujar's Immigration Status And Alleged Criminal Activity.**

Appellant sought to impeach witness Ramon Andujar with his status as an illegal alien. Judge Wilson denied appellant's request to impeach Andujar on this basis, as there was no evidence that he was receiving any consideration for his testimony. T. 907. Appellant also sought to introduce evidence that Andujar was not charged for possession of methamphetamine residue and some items that could be used in making false identification documents. T. 1303. Judge Wilson sustained a relevancy objection to this line of questioning. T. 1303. He reasoned that the methamphetamine residue was irrelevant because Andujar had already indicated that he was a methamphetamine user. T. 1303. On the lack of charges from the possession of false identification materials, Judge Wilson ruled that without a showing of a benefit offered in exchange for testimony, the evidence was irrelevant. T. 1303.

Even if relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403. The basic test is thus whether the "potential of the evidence for unfair prejudice outweighs its probative value." *State v. Czech*, 343 N.W.2d 854, 857 n.1 (Minn. 1984).

Because illegal immigration is a controversial subject that can stir heated passions, the probative value, if any, of such an inquiry was outweighed by the unfair prejudice it would have caused. Judge Wilson did not abuse his discretion by refusing to allow

appellant to impeach Andujar based on his immigration status. Importantly, appellant had the opportunity to question Andujar about his testimony, his alleged motive, and the events preceding and following C■■■■'s murder. In closing argument, appellant argued that Andujar lied, implying that Andujar was the perpetrator of the crime.

Questions about Andujar's later possession of methamphetamine residue were also correctly barred. Because Andujar had already admitted to frequent use and possession of methamphetamine, delving into the details of an unrelated possession incident would have been cumulative and unfairly prejudicial.

Appellant also suggests that because Andujar was not charged for possession of equipment to manufacture false identification documents, or for possession of methamphetamine residue, he had a greater incentive to provide testimony favorable to the state. App. Br. 19. But appellant failed to make any offer of proof on this claim. *See* Minn. R. Evid. 103(a)(2). Appellant has failed to meet her burden of showing that Judge Wilson clearly abused his discretion.

**D. The Trial Court Did Not Abuse Its Discretion In Preventing Unauthenticated Transcripts From Being Entered Into Evidence.**

Judge Wilson denied appellant's use of unauthenticated transcripts prepared by appellant's counsel. T. 891. Appellant claims that this denial was unfair when compared to the State's use of an authenticated transcript during the trial. App, Br. 19-20. The trial court did allow appellant to confront witnesses based on what she believed the transcript to say. T. 892. The trial court's exclusion of the unauthenticated transcripts was within

its discretion, as the authenticity of a document is essential to its admissibility. Minn. R. Evid. 901(a).

There is no question that the transcripts produced by appellant were not authenticated. At trial, appellant did not provide any evidence showing that the transcripts were accurate. They were simply transcribed by appellant's counsel without being reviewed by anyone present at the interview. Conversely, the transcripts used by the state were transcribed and then reviewed by the officer who conducted the interview. Appellant complains about "unfairness," but does not claim that at any point prior to trial she asked an interviewer to authenticate a transcript. App. Br. 20.

Finally, appellant does not even try to show any particular prejudice from Judge Wilson's ruling. Appellant cannot meet her burden of showing prejudice on this or any of her other evidentiary claims, given the numerous witnesses who contradicted her defense that she had nothing to do with the murder.

### **III. Appellant's Three Complaints About Jury Instructions Do Not Entitle Her To A New Trial.**

Finally, appellant contends that the unobjected-to use of a CRIMJIG, use of an objected-to additional instruction, and failure to give an unrequested accomplice-testimony instruction entitle her to a new trial. App. Br. 21-26. Appellant is wrong.

#### **A. Standard Of Review**

Trial courts are given "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). This Court must view instructions in their entirety to determine whether they fairly and adequately explain the

law of the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). An instruction is erroneous if it materially misstates the law. *State v. Yang*, 774 N.W.2d 539, 562 (Minn. 2009). A party is entitled to a jury instruction if the evidence supports it. *State v. Hall*, 722 N.W.2d 472, 476 (Minn. 2006). An unobjected-to instruction is subject only to plain-error analysis. *State v. Vang*, 774 N.W.2d 566, 581 (Minn. 2009).

**B. The Trial Court Did Not Plainly Err In Instructing The Jury On Accomplice Liability With An Unaltered CRIMJIG.**

Judge Wilson instructed the jury on accomplice liability by using the then-current version of CRIMJIG 4.01, which used the language “reasonably foreseeable” to describe crimes for which an accomplice is liable. T. 1657-58. Appellant did not object to this language. In a case decided *after* this trial, this Court suggested that trial courts should use the phrase “reasonably foreseeable to the person,” rather than “reasonably foreseeable.” *State v. Earl*, 702 N.W.2d 711, 721 (Minn. 2005).

As in *Earl*, the use of “reasonably foreseeable” here was not reversible error. This Court recently reaffirmed that failure to use the “reasonable foreseeable to the person” language “does not automatically constitute plain error that affects a defendant’s substantial right.” *Vang*, 774 N.W.2d at 582 (Minn. 2009). Appellant has not met her burden of showing plain error, because appellant has not made any argument that she was prejudiced by use of the CRIMJIG.

**C. The Additional Instruction On Intent Was Not Erroneous Because It Properly Stated The Law And Was Supported By Evidence.**

Appellant next contends that Judge Wilson erred in providing an additional instruction that “[a] person’s conduct before and after an offense is a relevant circumstance from which a person’s criminal intent may be inferred.” App. Br. 22 (quoting T. 1658). Appellant asserts that it is possible that the jury understood this additional language to mean that a person’s “conduct before or after a criminal incident can somehow supplant or satisfy the element of the intent.” App. Br. 23. This instruction was not erroneous because it does not misstate the law.

The state requested that the trial court provide an addition jury instruction based on *State v. Ulvinen*, 313 N.W.2d 425 (Minn. 1981). The requested instruction read, “Presence, companionship and conduct before and after the offense are circumstances from which a person’s participation in the criminal intent may be inferred.” T. 1640. Appellant objected to the instruction, claiming that it was “superfluous.” T. 1641. The trial court allowed the instruction because, based on the evidence presented at trial, “the defendant was not, by all accounts present at the actual scene of the offense.” *Id.* The jury was then given the instruction that, “A person’s conduct before an after an offense is a relevant circumstance from which a person’s criminal intent may be inferred.” T. 1658.

In an aiding and abetting case, the state is required to prove, beyond a reasonable doubt, that the defendant knew that her alleged accomplice was going to commit a crime and that the defendant intended her presence or actions to further the commission of that crime. *State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007). It is well established that

“[p]resence, companionship, and conduct before and after an offense are circumstances from which a person's criminal intent may be inferred.” *See, e.g., Yang*, 774 N.W.2d at 562; *State v. Crow*, 730 N.W.2d 272, 280 (Minn. 2007); *Bernhardt v. State*, 684 N.W.2d 465, 477 (Minn. 2004).<sup>4</sup>

The additional instruction here not only correctly stated the law, but was supported by evidence. Appellant was not present at the actual scene of the offense. Appellant was present in the hotel room when she and her brother discussed killing T■■■■ C■■■; she was there when they got into C■■■'s truck; she drove the truck to the site of the murder; she never stopped her brother from chasing C■■■ after he escaped; and she never went back to check on C■■■ after he was killed. But she was not at her brother's side when he completed their task of murdering C■■■. Based on these facts, the evidence supported the instruction.

Further, nothing in the record suggests that the jurors misread this instruction and concluded that they did not need to find intent. Because this instruction clearly and correctly stated the law, because the jurors were clearly and correctly instructed that they needed to find criminal intent beyond a reasonable doubt, and because the proof of appellant's intent is overwhelming, appellant cannot meet her burden of showing prejudice and is not entitled to relief. T. 1649, 1655-58.

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<sup>4</sup> The court of appeals has ruled that an instruction stating this is not erroneous. *State v. Hollins*, 765 N.W.2d 125, 131 (Minn. Ct. App. 2009).

**D. The Trial Court Did Not Plainly Err By Failing To Provide An Accomplice-Testimony Instruction.**

Finally, appellant contends that Judge Wilson erred by not providing an accomplice-testimony instruction. App. Br. 26. However, her claim that Ramon Andujar and Dan Iacarella were accomplices contradicts her trial theory that they were alternative perpetrators. T. 1703-1704. Further, appellant does not point to any evidence introduced at trial that shows that Andujar or Iacarella aided in the murder of T. C.

When it is reasonable for a witness to be considered an accomplice, the trial court must give an accomplice-testimony instruction. *State v. Evans*, 756 N.W.2d 854, 877 (Minn. 2008). This instruction must be given regardless of whether the instruction is requested. *Id.* However, a “witness who is alleged to have committed the crime instead of the defendant is, as a matter of law, not an accomplice.” *Id.* (citing *State v. Swanson*, 707 N.W.2d 645, 653 (Minn. 2006)).

In *Evans*, the defendant argued at trial that one of the state’s witnesses against him actually committed the murder. *Id.* This Court held that because the defendant’s version of the facts would not make the state’s witness an accomplice, but rather an alternative perpetrator, the trial court did not err by failing to give the jury an accomplice-testimony instruction. *Id.* Similarly, in her closing statement, appellant strongly suggested that Andujar and Iacarella were the actual perpetrators of the crime. T. 1703-1709. Appellant contrasted her motivation and Andujar’s, claiming that Andujar had the stronger motive. T. 1703, 1709. Appellant compared the description of an unidentified person at the scene of the crime to the appearance of Iacarella. T. 1703.

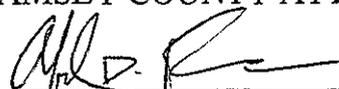
Because Andujar and Iacarella were not accomplices – under appellant’s theory at trial, or based on any evidence offered at trial – Judge Wilson did not err by failing to provide an accomplice-testimony instruction.

**CONCLUSION**

Respondent respectfully requests that this Court affirm appellant’s conviction.

Respectfully submitted,

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Dated: February 8, 2010



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