

A05-0320

A05-320

STATE OF MINNESOTA

IN SUPREME COURT

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State of Minnesota,

Respondent,

vs.

Demetrius Devell Dobbins,

Appellant.

---

**APPELLANT'S BRIEF**

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**PROCEDURAL HISTORY**

1. December 5, 2003: Date of shooting.
2. January 6, 2004: Indictment filed in Anoka County District Court charging appellant with the following: Murder in the First Degree (premeditated) in violation of Minn. Stat. § 609.185(1), 609.05.
3. May 5, 2004: Contested omnibus hearing to suppress statements and evidence, the Honorable Nancy J. Logering presiding in Anoka County District Court.
4. September 2, 2004: Order filed denying suppression motion.
5. October 22, 25, 26, 27, 28, 29, 2004 and November 1, 3, 4, 5, 2004: Jury trial, Judge Logering presiding in Anoka County.
6. November 5, 2004: Jury returned verdict of guilty of first-degree premeditated homicide.

7. November 15, 2004: Sentencing hearing. Appellant sentenced to life in prison (minimum 30 years before possibility of parole).
8. February 14, 2005: Notice of appeal filed.
9. May 16, 2005: Transcripts received.
10. July 7, 2005: Order filed granting appellant's request for thirty-day extension of time to file brief.

## LEGAL ISSUES

### **I. THE TRIAL COURT ERRONEOUSLY ALLOWED THE ONLY AFRICAN-AMERICAN PROSPECTIVE JUROR TO BE STRUCK FROM SERVING.**

The trial court denied appellant's *Batson* challenge.

*Batson v. Kentucky*, 476 U.S. 79 (1986)

*Miller-El v. Dretke*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 2317 (2005)

*State v. Buggs*, 581 N.W.2d 329 (Minn. 1998)

### **II. THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVELY CROSS-EXAMINE THE STATE'S KEY WITNESS.**

The trial court ruled that appellant could not cross-examine about the exact amount of sentence reduction.

*Delaware v. Van Arsdall*, 475 U.S. 673 (1986)

*Davis v. Alaska*, 415 U.S. 308 (1974)

*State v. White*, 300 N.W.2d 176 (Minn. 1980)

*Delaware v. Fensterer*, 474 U.S. 15 (1985)

### **III. THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY TO DETERMINE IF APPELLANT'S GIRLFRIEND COULD ALSO HAVE BEEN CONSIDERED AN ACCOMPLICE.**

The trial court was not asked to rule.

*State v. Shoop*, 441 N.W.2d 475 (Minn. 1989)

*State v. Flournoy*, 535 N.W.2d 354 (Minn. 1995)

*State v. Jensen*, 184 N.W.2d 813 (Minn. 1971)

*State v. Russell*, 503 N.W.2d 110 (Minn. 1993)

### **IV. THE PROSECUTOR'S REPEATED MISCONDUCT DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.**

The trial court sustained some objections and was not asked to rule on other instances of misconduct addressed in this appeal.

*State v. Clifton*, \_\_\_ N.W.2d \_\_\_, No. A \_\_\_, No. A03-1964, 2005 WL 1836929 (Minn. Aug. 4, 2005)

*State v. Buggs*, 581 N.W.2d 329 (Minn. 1998)

*State v. Billups*, 264 N.W.2d 137 (Minn. 1978)

*State v. Pilot*, 595 N.W.2d 511 (Minn. 1999)

## **STATEMENT OF THE CASE**

On December 5, 2003, a shooting occurred in Anoka County. Appellant and several others were present. Eventually, a co-defendant present at the shooting agreed to inculcate appellant in exchange for a plea bargain. Appellant was indicted for first-degree premeditated homicide. The trial court denied appellant's pretrial motions to suppress his statements and evidence from the scene. The jury returned a verdict of guilty of first-degree premeditated homicide and appellant was sentenced to life in prison (minimum thirty years). This appeal follows.

## STATEMENT OF FACTS

### *The Events Leading Up To The Shooting.*

On December 5, 2003, appellant and his girlfriend, Convona Sims, were at [REDACTED] [REDACTED] in Columbia Heights. T.142.<sup>1</sup> That morning, Convona, along with her young daughter, and Andrea (appellant's cousin) left the house with appellant to take the bus to the City Center in downtown Minneapolis. T.143. Appellant did not get on the bus with them but, instead, found a ride downtown. T.143. When Convona arrived at the City Center, she saw appellant talking to some people, including Q [REDACTED] L [REDACTED], who died later that day after allegedly being shot by appellant. T.148.

### *Co-Defendant's Involvement.*

Around 3:00 p.m. that same afternoon, the co-defendant, Myshohn King, arrived at the City Center. T.524. King heard appellant and L [REDACTED] arguing about money that L [REDACTED] owed appellant for selling marijuana. T.526. The group, which included appellant, King, L [REDACTED], Convona, and Andrea, took the bus from City Center back to the house at [REDACTED]. T.152. When they arrived, some others, including Gregory Elting, Joshua Sims (Convona's brother) and Jeanne Stoddard, were at the house bagging marijuana. T.529, 534, 534. Convona and Andrea went into a bedroom. T.608.

After about forty-five minutes at the house, Convona decided she wanted to leave. She asked Elting and Stoddard to give her a ride. T.1174. Convona testified that her reasons for wanting to leave were that, "there was too many n\*\*\*\*\* and me and Andrea

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<sup>1</sup> "T." refers to the transcript of the jury trial, which is bound in ten volumes, consecutively paginated.

had got into it.” T.1175. Convona testified, “I told ‘em I’m not gonna stay in this house ‘cuz I don’t feel right.” T.1203. Later on she told the police that she believed “somethin’ gonna get done in this house.” T.1204.

King, however, maintained at trial that he had not known that anything might have been going on in the house. T.537. While L [REDACTED] was sitting in a chair waiting, King told appellant that L [REDACTED] wanted to talk. T.531, 536. Appellant came into the living room and told everyone but King and L [REDACTED] to leave. T.556. Appellant asked Elting and Stoddard to go get him some cigarettes. T.557.

Appellant’s cousin, Andre Coleman, arrived at the house. T.564. At trial, Convona testified that she had lied to the grand jury when she had said that appellant had telephoned Coleman and asked him to bring a gun over. T.1164.

According to King, after Coleman arrived, Coleman and appellant went into the back of the house. T.558. Loud music began to play: Coleman came into the living room. Appellant came out and shot L [REDACTED], wearing the gloves that Coleman had been wearing when he arrived. T.558, 568. L [REDACTED] was shot twice. T.57, 471, 472. A subsequent autopsy confirmed that L [REDACTED] had been shot in the upper back and in the front of his right thigh. T.761.

King did not call 911 but just stood there looking at L [REDACTED]. T.575. Appellant moved the body into the bathroom and asked King to help clean up. T.576. King complied because appellant had asked him to help and King was not going to talk back. T.576-577. Appellant and King wrapped the body in an air mattress and moved it out the

back door into a shed. T.588. King helped appellant put appellant's clothing into bags to be removed from the house. T.590.

Appellant telephoned for a taxi: he and King took it to Coleman's house. T.591. From Coleman's house, appellant and King walked to a nearby store. T.593. Appellant bought some lighter fluid that he and King were going to use to burn down the house and shed. T.594. At 6:35 p.m., the police were dispatched to the scene. T.971. On the way back to the house where L [REDACTED] had been shot, appellant and King were arrested. T.597.

King's initial statement to the police was that he had just been cutting through the yard on his way to see a girl. T.620. At trial, he said that he had lied because he thought it would be to his benefit. T.620-621. Eventually, he "cut a deal" in exchange for testifying against appellant. T.622. He testified at trial because he wrongly helped cover-up the shooting. T.601. King's deal was that he could plead guilty to being an accessory-after-the-fact, with a guaranteed maximum sentence of no more than 120 months, instead of facing a life sentence for aiding and abetting first-degree murder. T.514. The jury was told only that King had received a guarantee of at least a 75% reduction in his sentence for inculcating appellant. T.650.

*Other Witnesses' Involvement.*

About an hour after the shooting, Convona's sisters, Shiniqua Elting and Thaijuana Sims, and their children, arrived at the house. T.885, 883. According to Shiniqua, appellant met her in the driveway and asked her not to come inside because he

was cleaning up something that the children should not see. T.888. Shiniqua did not leave or call 911: instead, she went inside. T.894.

Inside the house, Shiniqua gathered up her clothes and papers to remove them from the house. T.896. She saw the body but still did nothing. T.907. She took some of the bags of appellant's clothes out of the house for him and dropped them off at Coleman's house. T.914. At trial, she admitted that she had helped appellant conceal evidence by removing his clothes from the house. T.914.

During the police investigation, Shiniqua provided a statement. T.911, 925, 926. Although she had initially told an investigator that she had not heard appellant admit to the shooting, at trial she said that he told her that he had shot someone who owed him money and that the body was inside the house. T.943, 950, 889, 890. According to Shiniqua, appellant said that he had asked Coleman to bring a gun over. T.912. At trial, the court precluded the defense from asking Shiniqua whether she had been charged with any crime for her involvement in the incident. T.933.

When Thaijuana entered the house and saw the body, she did not leave or call 911 either. T.897. Instead, she asked if she could be shown the person's face. T.962. Appellant moved the body so Thaijuana could get a better look. T.962. When appellant and King took the body out to the shed, Thaijuana followed them. T.966. She held the door for them while they carried out the body. T.588. She provided a suggestion to King about how to clean up the blood and she advised him to burn down the house to cover-up the evidence. T.978. Although Shiniqua had admitted at trial that she had helped remove appellant's clothing, at trial Thaijuana said the clothes had not been put into her car.

T.970. While Shiniqua was gathering up her clothes, Thaijuana went outside and moved her car from the driveway of the house to the driveway next door. T.969.

Thaijuana testified that when she asked appellant how he had killed L [REDACTED] appellant told her that he had turned up the music real loud and shot him. He said that Coleman had brought over the gun and then left with it soon after the shooting. T.977. Thaijuana admitted at trial, however, that when the detective asked her if anyone had told her who had done the shooting, she said no. T.989. At trial, she could not remember telling the 911 operator that she did not know who did the shooting. T.990. When Thaijuana arrived home, she told her father about what had happened. Her father called 911. T.987, 73. When the police asked to speak to Thaijuana, she provided a statement. T.971, 73, 75.

*Appellant's Trial Testimony.*

Appellant testified at trial that he had not shot L [REDACTED]. Appellant told the jury that he was originally from Chicago and had just turned twenty-three years old. T.1300. He had gone into the Job Corps and then worked at various jobs including being a certified security guard. T.1303, 1308. He had enjoyed working in manufacturing. T.1309. He had come to Minnesota to see his father and get to know him. T.1303. Before his arrest, he had been living at the [REDACTED] house. T.1309.

When he was arrested for the shooting, he had not worked for about two months. To support Convona, who was pregnant with his child, he had been selling marijuana. T.1325. He was, however, trying to find a real job. T.1325.

Appellant had met the co-defendant, Myshohn King, through appellant's youngest brother. T.1337 L [REDACTED] had been a friend of Convona's brother and cousin. T.1339. Sometimes L [REDACTED], nicknamed "Glock," would visit the house at [REDACTED]. T.1339, 148.

L [REDACTED] used to spend a lot of time downtown. T.1340. One time when appellant was at the City Center selling marijuana he asked L [REDACTED] to sell some for him while appellant went with Convona, pregnant and hungry, to eat. T.1340-1341. When appellant returned, L [REDACTED] was gone. T.1343. L [REDACTED] left owing appellant about \$60.00. T.1345. A couple of weeks later, appellant saw L [REDACTED] downtown. T.1343. Appellant asked for his money and arranged to meet L [REDACTED] at another location. Appellant's efforts to get his money were unsuccessful. T.1345.

Appellant did not see L [REDACTED] again until the day of the shooting. T.1356. The morning of the shooting, appellant had planned to go downtown to sell marijuana. T.1347-1348. After giving Convona some bus money, appellant let her and Andrea get on the bus without him because they had been arguing. Appellant found a ride with a passer-by. T.1349, 1351.

At the City Center, appellant ran into L [REDACTED]. They talked about the money L [REDACTED] owed. They took the bus to appellant's house so that L [REDACTED] could make a call to get the money he owed to appellant. T.1356.

At the house, appellant borrowed a telephone from Elting and took it with him into the bathroom. T.1362. Then, appellant brought the telephone to L [REDACTED]. T.1363.

Appellant left with Elting and Stoddard to get some cigarettes. T.1364. When appellant returned, he did not see Convona. Andrea was sitting in King's lap. T.1366.

Appellant had telephoned Coleman to ask for a ride to wherever it was that L [REDACTED] would be picking up the money owed to appellant. T.1368. Appellant was surprised that Coleman arrived wearing gloves. T.1369. When Coleman arrived, appellant was in the bedroom getting a CD. T.1367. Coleman lifted up his shirt and showed appellant a gun. T.1372. As appellant was in his bedroom getting his clothes ready to go out later that night to celebrate his brother's birthday, appellant heard a gunshot. T.1374, 1349. He ran out into the hallway and saw King shooting. Appellant heard a second shot and saw L [REDACTED] fall. T.1375. Appellant saw that Coleman was standing there watching. T.1376. Afterwards, appellant saw Coleman wrapping up the gun in a pillowcase to get rid of it. T.1378.

Appellant did not call the police: he was not sure what was going on. T.1382. Coleman did not want anyone to take L [REDACTED] to the hospital. T.1382. The others wrapped up the body and put it into the bathtub. T.1383. Appellant decided to remove all of his belongings from the house. T.1384.

After Shiniqua and Thaijuana arrived, appellant and King moved the body out to the shed. T.1388. Appellant telephoned a taxi and went to Coleman's house. T.1398. Appellant unloaded his bags of clothing at Coleman's and then walked to the store to get some lighter fluid. T.1399. He was going to use it to burn his clothing. T.1400. Appellant headed back to the house where the shooting had occurred to let Convona know not to bring her child there. As appellant got near the house, he was stopped by the police.

T.1402. Police officer testimony at trial confirmed that appellant was cooperative and had no weapons on him. T.102. The weapon used to shoot L [REDACTED] was never found.

T.1042.

## ARGUMENT

### I. THE TRIAL COURT ERRONEOUSLY ALLOWED THE ONLY AFRICAN-AMERICAN PROSPECTIVE JUROR TO BE STRUCK FROM SERVING.

#### A. Standard Of Review.

Whether appellant's federal and state constitutional rights to a fair trial with an impartial jury of his peers representing a cross-section of the community were violated should be reviewed de novo. *State v. Leroy*, 604 N.W.2d 75, 77 (Minn. 1999).

Additionally, a reviewing court should determine, based on the record, whether a prosecutor has articulated a race-neutral reason for striking a minority person from the jury. *State v. McRae*, 494 N.W.2d 252, 257 (Minn. 1992). The trial court's determination of whether the prosecutor intended to discriminate is entitled to "great deference" on review. *State v. Moore*, 438 N.W.2d 101, 107 (Minn. 1989). The harmless error doctrine does not apply to cases where a defendant is convicted by a jury selected through racial discrimination. *See State v. Reiners*, 664 N.W.2d 826, 835 (Minn. 2003) (harmless error impact analysis inappropriate if prosecutor had discriminatory intent for striking juror).

#### B. A Representative Jury is Constitutionally Mandated.

Criminal defendants have a constitutional right to a fair trial by an impartial jury. U.S. Const. amends. VI, XIV; Minn. Const. art I, §§ 2, 6, 7; *State v. Varner*, 643 N.W.2d 298, 304 (Minn. 2002). Further, the United States and Minnesota State constitutions prohibit the state from denying any person equal protection of the laws. U.S. Const. amend. XIV; Minn. Const. art. I, § 2. In *Batson*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibited "purposeful

discrimination” in the selection of petit jurors. *Batson v. Kentucky*, 476 U.S. 79, 84 (1986). The Court reasoned that such exclusion denied the defendant the protection that a jury trial is intended to secure – trial by a body composed of the defendant’s peers or equals who have the role of protecting the defendant against the arbitrary exercise of power by a judge or prosecutor. *Batson*, 476 U.S. at 84. More recently, the Court has reaffirmed the harm to defendants, jurors, the criminal justice system, and society when discrimination is perpetrated in jury selection:

‘It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.’...Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury,...but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish ‘state-sponsored group stereotypes rooted in, and reflective of, historical prejudice,’....

Nor is the harm confined to minorities. When the government’s choice of jurors is tainted with racial bias, that ‘over wrong...casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial....’....That is, the very integrity of the courts is jeopardized when a prosecutor’s discrimination ‘invites cynicism respecting the jury’s neutrality,’...and undermines public confidence in adjudication,...So, ‘[f]or more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause.’....

*Miller-El v. Dretke*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 2317, 2323-2324 (2005) (internal citations omitted).

In *Batson*, the Court ruled that once a defendant makes a prima facie showing of prosecutorial discrimination in striking a minority juror, the burden shifts to the state to come forward with a race-neutral explanation for the strike. “[T]he prosecutor must give

a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge[s].” *Miller-El*, 125 S.Ct. at 2324 (citations omitted). The trial court has the duty to determine if the defendant has shown purposeful discrimination by the state. *Miller-El*, 125 S.Ct. at 2325.

In *Miller-El*, the Court conceded that *Batson* has been a problematic remedy. Once the prosecutor claims a race-neutral reason as the basis for a strike, the minority juror and defendant often have no recourse.

...for *Batson*’s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson*’s explanation that a defendant may rely on ‘all relevant circumstances’ to raise an inference of purposeful discrimination.

*Miller-El*, 125 S.Ct. at 2325 (citations omitted). The *Miller-El* court focused on ferreting out if the reasons a prosecutor proffers for striking a minority juror apply to similar non-minority jurors. “If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination....” *Miller-El*, 125 S.Ct. at 2325. Other probative evidence of discriminatory intent is different voir dire questions posed to minority and non-minority jurors. *Miller-El*, 125 S.Ct. at 2333.

### **C. The Prosecutor’s Reason Was Race-Based.**

*Prosecutor Claimed Juror Was Sympathetic to Her Family.*

Here, the prosecutor claimed that his reason for striking the only African-American juror was race-neutral. The prosecutor claimed his reason was that the juror had been engaged in prisoner rehabilitation efforts with her parents, was sympathetic to a cousin who was a drug addict, and sympathetic to a sister who had been stopped by police for making an illegal right-hand turn but who thought she had been stopped based on her race.

Although the juror stated that she did not know if her cousin had been charged and she never expressed any approval for his drug use, the prosecutor's comments implied that he was overly suspicious of the juror's answers, without any factual basis. The prosecutor told the court the following:

[i]n particular with this cousin, the reason why I was pressing her on that issue is because it was clear she wasn't giving us all of the information. Was he charged? Was he convicted? What was his involvement? All she talked about is the sympathy and the effect of the drugs. And then the comment from a family member 'Don't leave money around because he's a drug addict.' It's the sympathy for the person involved and her inability to have looked objectively at what might have been going on in that person's situation.

V.44.<sup>2</sup>

Further, the prosecutor mischaracterized all the juror's answers about her sister's traffic stop. According to the prosecutor, the juror talked about how her sister expected leniency when she was stopped and how the juror, herself, seemed to think leniency would have been appropriate. V.145. The prosecutor summed up his view by asserting that, "the best that the State was able to glean is that because her sister might have made

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<sup>2</sup> "V." refers to the separately bound and paginated transcript of the voir dire proceedings.

an innocent mistake, that the officer might be overreacting, and according to the sister was reacting that way based on race.” V.145.

What the juror actually said, however, was that she felt bad that her sister had to pay a “hefty” fine of \$117 and she had urged her sister to consider that she had been stopped only because of making an illegal turn, albeit by mistake after having missed the road sign on the unfamiliar road. V.106-107. When the juror was asked about her feelings on the incident, she did not talk about the officer having been wrong, but, instead, said that her sister most likely had made an illegal turn. V.107. The juror stated, “[t]here was a sign there.” V.107.

As the defense counsel noted, this juror was the only juror who could have the kind of affinity with the appellant and, for that matter, with the deceased, because of her understanding of racial issues and her being of the same racial background. V.137.

Just a few comments about what [prosecutor] indicated his reasons were for striking that juror. He talked about [the juror] speculating on why persons were convicted and explaining herself, but it was [the prosecutor] that asked her the questions. [The prosecutor] was the one that forced her to speculate on what was really just a pretty basic statement that some people are convicted that are wrongfully accused and others are convicted because they are guilty. And specifically these particular cases.

I think it’s unfair for [the prosecutor] to cite her discussions about her family members as evidence that she has a defense bias, and she expressed a belief in her sister and her sister’s truthfulness. That’s what she talked about. She didn’t express the same feelings about even her cousin who she said may, in fact, have been guilty or at least properly accused of what he was accused of. And it seemed pretty clear to me she didn’t know the outcome of his case. [The prosecutor] said she didn’t give us all the information on it. I don’t think she knew the outcome of his case. She knew that he was using drugs, though, and it made sense to her that he had gotten involved in the system because of that.

Again, you know, [the prosecutor] apparently offering as a basis for exercising a peremptory, [the juror's] statement of support for her sister. Well, again I think it was pretty clear that [the juror] confused a traffic ticket with having an intent element, and she believed her sister that her sister didn't intentionally make the turn on the red. That her sister didn't see the sign. You know, that if her sister did, in fact, make that turn, she didn't see the sign that said you can't make a right turn on red. She was merely professing a belief in her sister's truthfulness, and believing that as a result of that, she would have a defense. There's some naivety [*sic*] there because we know that if her sister didn't see the sign, there's not an intent element in the traffic offense such as that, and the officer would be within his bounds to stop her and give her a ticket. I think that's all she was saying. She didn't understand that.

In terms of the work in the prison, [the juror] made it clear the reason that her parents went there was to improve the morals of the inmates. It wasn't to believe in the inmates themselves or certainly believe in a cause or to believe in their innocence. In fact, she said her parents have never expressed any opinions at all about that any of those inmates were innocent. And again she expressed her feeling of intimidation about being among the inmates. There is no reason at all to conclude that [the juror] had any race-bias in favor of African-Americans.

And finally the question 59 that [the prosecutor] discussed regarding, you know, her sympathies for family members of both victims and the accused. And [the juror] was very candid about that. That she could feel sympathy for jurors [*sic*] of the victim and the accused in a case. But she also said emphatically that she could put that aside. That was the important part of that question and answer series was that she said that everybody feels sympathy, and we know that's true. I think it's even in a jury instruction. That everybody feels sympathy. But you have to put that sympathy aside when you're sitting as a juror in a case. And she said she could do that. She was emphatic about it.

V.148-151.

The trial court found that the prosecutor's reason for the strike was a concern that the juror "had expressed opinions leading the prosecutor to believe that she had sympathies to those that are accused of crimes or convicted of crimes specifically based on some of her responses relating to inmates, the situation with her sister." V.153-154.

But, if African-American jurors are only able to serve if they can convince prosecutors that they are unsympathetic to friends and family who have experienced discrimination or been involved with the criminal justice system, this Court will have sanctioned a recipe for jury segregation.

*Prosecutor Knew the Jurors' Racial Backgrounds Before Voir Dire.*

Because the African-American juror was the first to be examined during voir dire, the trial court had no other voir dire examinations for comparison. In addition, the court noted that it believed it did not have to find the prosecutor's reason to be persuasive, but only to be phrased as any reason except a statement that the juror was removed solely due to her race. V.154. This is unrealistic.

If the parties, as they did here, have juror questionnaires which disclose the prospective juror's race before voir dire begins (*see* juror questionnaire, question number 6), a party would simply know to ask all or most of the prospective jurors similar types of questions. The challenge to the minority juror would then be insulated from *Batson*, as long as anything particular to that juror, except race, was cited as the reason for the challenge. This type of system is unworkable as anything more than an illusory remedy to the lack of African-Americans allowed to serve as jurors.

*Minority Jurors Should Not Be Over-Scrutinized.*

The jury system can scarcely maintain credibility and comport with constitutional mandates when minority jurors must be repeatedly subjected to a gauntlet of questions designed to expose their "sympathies" for relatives in trouble with the law, their tendencies to favor rehabilitation, their beliefs that discrimination does occur, and that the

courts and police are not always right or fair. The very nature of the discrimination that *Batson* seeks to remedy has tended to imbue minority jurors with beliefs and characteristics that, then, are used against them as “race-neutral” reasons to deny them their right to participate in the court system. This Court has recently reiterated that, “[t]he issue of racial or ethnic bias in the courts .... is an issue that must be confronted whenever improperly raised in judicial proceedings.” *State v. Cabrera*, \_\_ N.W.2d \_\_, No. A04-1306, 2005 WL 1774105, at \*6 (Minn. July 28, 2005) (citing *Varner*, 643 N.W.2d at 305). As this Court observed, “[b]ias often surfaces indirectly or inadvertently and can be difficult to detect.” Nevertheless, “the improper injection of race ....’ must be removed from courtroom proceedings to the fullest extent possible.” *Cabrera*, 2005 WL 1774105 at \*6 (citing *Varner*, 643 N.W.2d at 305).

This untoward circumstance of few African-Americans serving as jurors has not gone unnoticed by the community. The Supreme Court Racial Bias Task Force noted that the minority community has perceived discrimination in the criminal justice system.

There is a widespread belief throughout communities of color that the criminal justice system treats them unfairly. The exclusion of people of color from juries can do nothing but perpetuate this belief, which in effect renders the whole justice system illegitimate in the eyes of communities of color. This negative perception fosters feelings among communities of color that, in the eyes of the criminal justice system, their lives and safety simply don’t matter as much as the lives and safety of others. On the other hand, there is evidence that successfully finding ways to select jurors from diverse groups infuses the judicial system with community values and tends to legitimize the system in the eyes of the wider community as well.

*Minnesota Supreme Court Task Force on Racial Bias in the Judicial System*, Final Report, May 1993 at 63. Justice is not served without diversity of jurors.

Without the broad range of social experiences that a group of diverse individuals can provide, juries are often ill equipped to evaluate the facts presented. An all-white jury simply may not understand the language or context of the facts involved in a case, and may act on this misunderstanding to the detriment of the process. Lack of understanding also creates an opening for unconscious prejudice.

Bias Task Force at 35.

Substantiating the Bias Task Force's concerns, here, at least one juror explicitly noted his discomfort that an African-American defendant was being tried for the most serious crime, first-degree premeditated homicide, but appellant faced a jury with no African-Americans, no one who would have a deep comfort level and familiarity with appellant's Black Vernacular speech, no one who could understand his family history and relationships, no one who would not first have to overcome an initial feeling of otherness when confronted with him. *See e.g.* V.1436-1437 ("In fact, since we were talking about the race issue and everything else, when we filed in here or into the courtroom and were sworn in as prospective jurors, um, I personally in a way felt a little sorry for Mr. Dobbins because there wasn't any black jurors."); *see also e.g.* T.1441 ("A. It wasn't that type of video and shit like that. Q. It wasn't that type – A. Type of video. Just slang talk I use.").

The sheer number of prospective jurors who had to be struck for cause from this case because they expressed racist views and the number of prospective jurors who stated they were uncomfortable around African-Americans, would prefer not to associate with African-Americans, claimed to have had unpleasant experiences with African-Americans, believed African-Americans were more violent than other racial groups, or had only

casual contact with African-Americans showed that the problem still remains to be remedied. *See* V.66, 75, 81, 83, 86, 172, 213, 240, 597, 599, 626, 688, 716, 793, 943, 957, 958, 1011, 1222, 1392, 1466, 1485.

Thus, it is time for this Court to disallow strikes of minority jurors by prosecutors based on the prosecutor's explanation that the juror may be sympathetic to her fellow African-Americans. African-American jurors should not be interrogated as to their political beliefs and beliefs about their family members, and be made to justify or feel bad about sympathy for the trials and hardships of their community. African-Americans should not have to choose between their feelings of empathy for the plight of their fellow African-Americans and their desire to serve as jurors.

A prosecutor's striking an African-American juror because the juror has empathy for the effect discrimination has had on that community should be deemed to be race-based, not race-neutral. Allowing prosecutors, for example, to strike minority jurors based on the prosecutors' beliefs that minority jurors are more likely to discount police testimony, "creates an endless cycle of suspicion and exclusion." Martin and Thompson, *Removing Bias from the Minnesota Justice System*, Bench & Bar (August 2002). Unless the prosecutor states a reason that is rationally related to some issue or difficulty for the state in presenting its case, this Court should no longer affirm the wholesale removal of African-Americans from our jury pools.

**D. The African-American Juror Had A Constitutional Right To Serve.**

The Racial Bias Task Force has found that juries are not being composed of a cross-section of the community.

People of color waiting for justice or judgment abound. Yet somehow, people of color on the *other* side of the courtroom – in the jury box – are very hard to find. In fact, jury pools rarely are representative of the racial composition of our communities.

Bias Task Force at 32 (footnote omitted, emphasis in original). *Batson* provides a remedy for minority jurors as well as for a defendant who objects to the prosecutor's strike. *See State v. Buggs*, 581 N.W.2d 329 (Minn. 1998). By purposefully excluding minority jurors, the state unconstitutionally discriminates against the excluded juror and undermines public confidence in the fairness of the criminal justice system. *Batson*, 476 U.S. at 87 (stating that in view of our heterogeneous population, "public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of race.").

Similarly, this Court has stated that, "[p]ermitting prospective jurors to be excluded from service because of their personal experiences bears out what we said in our Task Force Report [concerning racial bias]...[and] make[s] a mockery of our efforts to bring about racial fairness." *Buggs*, 581 N.W.2d at 346. Consequently, because the juror in this case was ready, willing, and able to serve, had no strong biases or prejudices that the state could rationally believe would affect the juror's fairness, and was the only African-American in the jury pool, this Court should find that the trial court erred in denying the *Batson* challenge and reverse and remand for a new trial.

**II. THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVELY CROSS-EXAMINE THE STATE'S KEY WITNESS.**

**A. Standard Of Review.**

Where a defendant's Sixth Amendment constitutional rights have been violated, this Court uses a de novo standard of review. *State v. Hagen*, 690 N.W.2d 155, 157 (Minn. Ct. App. 2004).

**B. The Right To Cross-Examine Was Improperly Limited.**

*Background.*

In his opening statement, the defense told the jury that the state's key witness, Myshohn King, was going to receive a significant reduction to six years and eight months in exchange for a plea. T.56. The prosecutor objected and the court clarified that the defense could not mention or elicit through cross-examination the amount of time by which King's sentence was to be reduced. T.24, 25, 60. In fact, King faced a possible life sentence and was going to receive a sentence of 120 months or less in exchange for his guilty plea and trial testimony against appellant. T.11.

Here, the trial court had to weigh competing interests: minimizing opportunities for the jury to speculate on extraneous matters versus appellant's Sixth Amendment right to engage in effective cross-examination. Because the interests are not of equal weight under the law, the trial court erred by limiting the scope of appellant's cross-examination to specifying only the percentage amount by which King's sentence was to be reduced. Limiting appellant to exposing that King might receive 75% less time in prison was far different than revealing that King had escaped possibly spending his entire life in prison

(or a minimum of thirty years) and, instead, is eligible to be released on supervised release after 3 ½ years in prison.

*The Constitutional Right To Cross-Examination.*

The United States and Minnesota State constitutions guarantee a defendant the right to confront the witnesses against him. U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 6. “The essence of confrontation is the opportunity to cross-examine opposing witnesses.” *State v. Greer*, 635 N.W.2d 82, 89 (Minn. 2001). The opportunity to demonstrate that a witness has a “motive for favoring the prosecution in his testimony” is critical to the fundamental right of confrontation. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). The United States Supreme Court has long recognized that where a witness is himself “vulnerable” to criminal sanction, his status provides “a basis for an inference of undue pressure” and thus a “claim of bias.” *Davis v. Alaska*, 415 U.S. 308, 317-18 (1974). The jury is entitled to hear evidence of a witness’ possible “concern that he might be a suspect in the investigation,” and a defendant has a constitutional right to present such evidence.” *Id.* at 318.

Consequently, federal courts have routinely enforced the right to examine a witness’ bias. The courts have enforced the Confrontation Clause’s guarantee that a defendant must be allowed to question a witness about even a hope or expectation of leniency.

A review of the cases clearly shows that a defendant has a right to cross-examine an accomplice as to the nature of any agreement he has with the government or any expectation or hope that he may have that he will be treated leniently in exchange for his cooperation.

*United States v. Barrett*, 766 F.2d 609, 614 (1st Cir. 1985) (citations omitted); *United States v. Chandler*, 326 F.3d 210, 220 (3d Cir. 2003); *United States v. Ambers*, 85 F.3d 173, 176 (4th Cir. 1996); *Carrillo v. Perkins*, 723 F.2d 1165, 1169 (5th Cir. 1984); *Burr v. Sullivan*, 618 F.2d 583, 586 (9th Cir. 1980).

*Minnesota Law.*

Sentencing is not a proper consideration for the jury in Minnesota. *State v. Gensmer*, 51 N.W.2d 680, 685 (Minn. 1951). Similar to federal law, however, Minnesota law recognizes that a defendant has the right to cross-examine a witness about whether the witness received less time in exchange for testifying at trial. *See e.g. State v. White*, 300 N.W.2d 176, 178 (Minn. 1980) (right to confrontation was not violated because the defendant was allowed to fully cross-examine the witness about the promise of a 5-year prison term if he “turned state’s evidence” and that this was lenient treatment). Although in *Greenleaf*, this Court affirmed a trial court’s having limited the scope of cross-examination to a percentage of sentence reduction, that decision was particular to the facts of that case. *Cf. e.g. State v. Greenleaf*, 591 N.W.2d 488, 502 (Minn. 1999) (“It is for the court to sentence, and not the jury, and thus the court, by allowing the jury to only know the percentages of the plea agreement, properly prevented the jury from speculating about possible sentences.”)

In *Greenleaf*, this Court relied upon a United States Supreme Court case that ruled only that a witness’ inability to remember the basis for his opinion did not render that witness unavailable to be cross-examined. *See Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (“We need not decide whether there are circumstances in which a witness’ lapse

of memory may so frustrate any opportunity for cross-examination that admission of the witness' direct testimony violates the Confrontation Clause.”). There is no statute, rule, or case law that precludes the jury from knowing the length of a sentence if the jury does not use the information improperly. Consequently, the *Greenleaf* ruling should be limited to holding only that a trial court may, under some circumstances, limit the scope of cross-examination to lessen the chance that a jury may speculate improperly about sentencing. *Greenleaf*, 591 N.W.2d at 502.

Further, although a trial court may preclude repetitive, harassing, or only marginally relevant questioning, its discretionary authority is always limited by the protections of the Sixth Amendment. *State v. Lanz-Terry*, 535 N.W.2d 635, 639-640 (Minn. 1995). The Sixth Amendment demands that a jury receive sufficient information that it can make “a discriminating appraisal of the possible biases and motivation of the witness.” *Chandler*, 326 F.3d at 220 (citations omitted).

Where, however, as happened here, the exact amount of sentence reduction was key to effective impeachment, no law or rule bars allowing that type of cross-examination. There is no proscription on a jury's knowing the penalty for a particular offense, as long as the jury is cautioned to reach its verdict without regard to what sentence might be imposed. *Shannon v. United States*, 512 U.S. 573, 579 (1994) (citations omitted); see also e.g. *Lawson v. Com.*, 53 S.W.3d 534, 541 (Ky. 2001) (“It is true that our current criminal trial procedure generally precludes the jury from hearing purely ‘sentencing information’ during the guilt or innocence phase of a trial, [but] it does not absolutely preclude their being given some information of that type incidental to

a proper voir dire examination. In order to be qualified to sit as a juror in a criminal case, a member of the venire must be able to consider any possible punishment. If he cannot, then he properly may be challenged for cause. This type of questioning, of course, must come before the guilt or innocence phase since there is no separate voir dire thereafter but before the punishment phase.”).

The remedy to any perceived problem of having the jury improperly speculate about the sentence would be to provide a cautionary instruction, not to limit the scope of cross-examination. *See State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998) (jurors are presumed to follow the district court’s instructions); *State v. Forcier*, 420 N.W.2d 884, 885 n.1 (Minn. 1988). District courts routinely guard against unfair prejudice by providing cautionary instructions. *State v. Ostlund*, 416 N.W.2d 755, 764-765 (Minn. Ct. App. 1987); *see also State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998) (concluding that cautionary instruction to jury “lessened the probability of undue weight being given by the jury to the evidence”) (citations omitted). Cautionary instructions have been deemed sufficient to cure any prejudice from a jury being told about possible penalties:

When a jury is exposed to potentially prejudicial material, the accused's right to an impartial jury has been threatened. *State v. Scruggs*, 421 N.W.2d 707, 716 (Minn. 1988). Here, although the prosecutor's statements alluding to possible penalties for perjury and first-degree aiding and abetting were improper, appellant was not denied his right to trial by a fair and impartial jury based upon the prosecutor's statements.

First, the district court issued a curative instruction. The district court is the first line of defense against misconduct and should be given the opportunity to issue a curative instruction or grant a mistrial. *State v. Morgan*, 477 N.W.2d 527, 531 (Minn. Ct. App. 1991). And reviewing courts will presume that the jury followed the district court's instructions. *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998).

*State v. Flowers*, No. C4-02-1287, 2003 WL 21321446, at \*3 (Minn. Ct. App. June 10, 2003) (unpublished and attached in appendix). If a curative instruction can remedy a prosecutor's improperly mentioning possible punishments, then it surely can remedy any possible prejudice from a defendant eliciting that information to engage in effective cross-examination.

Moreover, under Minnesota law, a jury instruction telling the jurors not to consider any possible punishment is an approved means to forestall any improper speculation by the jury.

The responsibility of imposing punishment upon a defendant in a criminal case rests exclusively with the court. The jury go outside their province as triers of the facts if they include the matter of punishment in their deliberations. It was not error on the part of the court so to instruct. It is proper in criminal cases to admonish the jury that in the event of a verdict of guilty their responsibilities as triers of the facts do not extend to a consideration of the punishment. 6 Dunnell, Dig. & Supplement § 9789; *see also State v. Brinkhaus*, 34 Minn. 285, 25 N.W. 642.

*State v. Finley*, 8 N.W.2d 217, 218 (Minn. 1943) (cited with approval by Hodsdon, Richard, *Minnesota Jury Instruction Guides*, CRIMJIG 3.01, Comment (3d ed. 1990)). Thus, here, the trial court not only failed to remedy any possible prejudice with a curative instruction but failed to instruct the jury with an already-approved jury instruction that would have remedied the problem.

Further, in some cases juries are intentionally provided with sentencing information before reaching a verdict, when it is necessary to do so. It is routine in capital punishment cases for juries to know the penalty. Any possible prejudice that might accrue from the jury knowing the penalty is remedied by extensive inquiry during voir dire. *See*

*e.g. United States v. Battle*, 979 F.Supp. 1442, 1450 (N.D.Ga. 1997) (juries are “death-qualified” to insure they will render a verdict despite the punishment being death). Thus, when germane to the prosecutor’s interests in convicting a defendant, juries are told sentencing information: where, as here, providing sentencing information is germane to the theory of defense, the same standards should apply. Furthermore, here, the jurors were extensively questioned during voir dire to make certain that they would and could follow the law. The prosecutor had no basis to assume this jury could not render a fair verdict if it knew the punishment for homicide. And, it is unlikely that many, if not most of the jurors, did not, from television, newspapers, movies, and magazines, already know that the severest crime would carry the most severe penalty.

In sum, appellant’s Sixth Amendment rights were violated. The court could have and should have provided a cautionary instruction instead of limiting the scope of cross-examination which is the only means of insuring reliability of the trial process. *See Crawford v. Washington*, 541 U.S. 36 (2004) (re-interpreting the Sixth Amendment Confrontation Clause as having no exceptions).

**C. The Error Was Not Harmless.**

Confrontation Clause errors are subject to harmless error analysis. *Van Arsdall*, 475 U.S. at 679; *State v. Pride*, 528 N.W.2d 862, 867 (Minn. 1995). The conviction should be reversed unless the state carries its “heavy burden,” *Seiler v. Thalacker*, 101 F.3d 536, 539 (8th Cir. 1996), of proving that the error “was harmless beyond a reasonable doubt.” *Chapman v. California*, 386 U.S. 18, 24 (1967). Courts, however, have been reluctant to find violations of the right to cross-examination to be harmless.

*See e.g. Davis*, 415 U.S. at 317-318; *Chandler*, 326 F.3d at 224-225; *Hoover v. Maryland*, 714 F.2d 301, 306-307 (4th Cir. 1983); *Burr*, 618 F.2d at 586-587; *DuBose v. LeFevre*, 619 F.2d 973, 979 (2d Cir. 1980). More specifically, in analyzing a court's ruling limiting the defense's cross-examination intended to impeach a state's witness, an appellate court should consider "the importance of the witness to the prosecution case." *State v. Schilling*, 270 N.W.2d 769, 772 (Minn. 1978).

Here, appellant was allowed to cross-examine King, the state's key witness, about his expecting to receive a 75% reduction in sentence. But, appellant was prejudiced by not being able to specify the exact numbers involved. Simply knowing that a person will receive a 75% reduction, without knowing 75% of what, fails to persuade.

A jury that would likely be highly skeptical of a witness' motive where the witness was allowed to bargain down from life in prison to 120 months or less, would not likely be impressed to learn that a witness received a 75% reduction of a short sentence to an even shorter sentence. Such a small benefit would not likely impeach the witness' credibility.

Abstract concepts such as a reduction expressed only as a percentage, constitutes ineffective impeachment when the defense seeks to impeach based on the real and concrete consequences of a plea bargain representing "an offer too good to refuse." For appellant's cross-examination to have had any impact on the jury, the jury needed to know the truth and the jury should have been told the truth – not a misrepresentation of the circumstances. King, twenty-years-old and facing a possible life sentence with parole

discretionary and maybe never to be granted, bargained for an anticipated release date of June 2008. That was the point – not that he was likely to receive a 75% reduction.

Moreover, King's testimony was the state's case. He was the only alleged eyewitness to the shooting who testified besides appellant. The physical evidence was inconclusive as to who pulled the trigger. Although some other witnesses, Shiniqua and Thaijuana, claimed that appellant admitted guilt, it was only King who provided the jury with a detailed story about how appellant shot L [REDACTED].

Further, during closing argument the prosecutor relied heavily on King having been, in the prosecutor's view, a credible witness. The prosecutor argued that it was the "corroborated facts from witnesses who were there" that proved the case. T.1484. The prosecutor argued that the jury should find King credible because he had allowed himself to be held responsible by pleading guilty and accepting the consequences of his plea. T.1488.

The jury should have been told the truth about how little the consequences for pleading guilty were in relation to what might have happened had King not accused appellant at trial. Because King's testimony was the foundation of the state's case, the state cannot prove beyond a reasonable doubt that impeaching King's credibility with the actual numbers, would not have affected the jury's verdict.

### **III. THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY TO DETERMINE IF APPELLANT'S GIRLFRIEND COULD ALSO HAVE BEEN CONSIDERED AN ACCOMPLICE.**

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

The decision to give a requested jury instruction lies in the discretion of the trial court and will not be reversed absent an abuse of that discretion. *See State v. Daniels*, 361 N.W.2d 819, 831 (Minn. 1985). A reviewing court should evaluate the erroneous omission of a jury instruction under a harmless error analysis. *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004) (citing *Shoop*, 441 N.W.2d at 480). If the erroneous omission of the instruction “might have prompted the jury, which is presumed to be reasonable, to reach a harsher verdict than it might have otherwise reached, defendant must be awarded a new trial.” *State v. Shoop*, 441 N.W.2d 475, 481 (Minn. 1989). If, however, beyond a reasonable doubt “the omission did not have a significant impact on the verdict, reversal is not warranted.” *Id.*

If no objection is made to the error, this Court will reverse only if the instruction constitutes plain error. *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). To establish plain error, a defendant must prove that there was error, the error was plain, and the error affected substantial rights. *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001). An instruction is erroneous if it materially misstates the law. *Ihle*, 640 N.W.2d at 917. The error is plain if it is “clearly contrary to the law at the time of appeal.” *Johnson v. United States*, 520 U.S. 461, 466-467 (1997). Substantial rights are affected if, for example, the defendant’s right to a fair trial was compromised. *State v. Griller*, 583 N.W.2d 736, 740-

41 (Minn. 1998); *see also* Minn. R. Evid. 103(d) (observing that nothing in rule precludes review of plain error affecting substantive rights).

The duty of the trial court to instruct the jury that it may consider whether a witness was an accomplice exists regardless of whether counsel requests the instruction. *Lee*, 683 N.W.2d at 316; *State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002). Here, where the law is clear and it is a fundamental error of law not to provide the instruction, plain error occurred.

**B. A Person, At The Scene, Is A Potential Accomplice.**

*Definition Of An Accomplice.*

The pattern accomplice testimony instruction provided in the Criminal Jury

Instruction Guide 3.18 provides the following:

You cannot find the defendant guilty of a crime on the testimony of a person who could be charged with that crime, unless that testimony is corroborated by other evidence that tends to convict the defendant of the crime. Such a person who could be charged for the same crime is called an accomplice.

\* \* \*

(If you find that (any person who has testified in this case) is a person who could be charged with the same crime as the defendant, you cannot find the defendant guilty of a crime on that testimony unless that testimony is corroborated.)

10 Minn. Dist. Judges Ass'n, Minnesota Practice -- Jury Instruction Guides, Criminal, CRIMJIG 3.18 (4th ed. 1999); *Lee*, 683 N.W.2d at 316. An accomplice instruction “must be given in any criminal case in which any witness against the defendant might

reasonably be considered an accomplice to the crime.” *Shoop*, 441 N.W.2d at 479. If it is unclear whether a witness is an accomplice, the jury should make the determination. *Id.*

The general test for determining whether a witness is an accomplice is whether the witness could have been indicted and convicted for the crime with which the accused is charged. *State v. Pederson*, 614 N.W.2d 724, 733 (Minn. 2000). A person may be held criminally liable for a crime committed by another if the person aided and abetted the other in the commission of the crime. *See* Minn. Stat. § 609.05, subd. 1 (2004). When imposing liability for aiding and abetting, this Court distinguishes between playing “a knowing role in the crime” and having “[a] mere presence at the scene, inaction, knowledge and passive acquiescence.” *State v. Palubicki*, \_\_\_ N.W.2d \_\_\_, No. A04-1318, 2005 WL 1774110, at \*8 (Minn. July 28, 2005) (citing *State v. Gates*, 615 N.W.2d 331, 337 (Minn. 2000)). The basis for this rule is that the credibility of an accomplice is inherently untrustworthy. *State v. LaJambe*, 219 N.W.2d 917, 919 (Minn. 1974).

Consequently, if the state is able to prove “some knowing role in the commission of the crime” by a defendant who does nothing to stop the act, then the state has proven accomplice culpability. *State v. Russell*, 503 N.W.2d 110, 114 (Minn. 1993) (quoting *State v. Merrill*, 428 N.W.2d 361, 367 (Minn. 1988)). Where the facts are undisputed and there is only one inference to be drawn as to whether the witness is an accomplice, then it is a question for the court to decide. But if the evidence is disputed or susceptible to different interpretations, then the question whether the witness is an accomplice is one of fact for the jury to decide. *Jensen*, 184 N.W.2d at 815 (citing *State v. Hopfe*, 82 N.W.2d 681, 686 (Minn. 1957)). It is unconstitutional for the court to usurp the jury’s role by

failing to allow the jury to consider whether a party at the scene of the crime was an accomplice. *See Blakely v. Washington*, 542 U.S. 296 (2005) (only jury may make factual findings).

**C. Appellant's Girlfriend Was A Potential Accomplice, Similar To King.**

*King Denied Participating In The Shooting But Was Considered An Accomplice.*

Here, the trial court instructed the jury that only King could be considered an accomplice:

Accomplice testimony. You cannot find the Defendant guilty of a crime on the testimony of a person who could be charged with that crime unless that testimony is corroborated by other evidence that tends to convict the Defendant of the crime. Such a person who could be charged for the same crime is called an accomplice. In this case, Myshohn King is a person who could be charged with the same crime as Defendant. You cannot find the Defendant guilty of a crime on Myshohn King's testimony unless that testimony is corroborated.

T.1479-1480.

Unlike in *Palubicki*, Convona was present at the scene. Insofar as the witness in *Palubicki* was only, at most, an accessory-after-the-fact, she was not an accomplice: the holding should have rested on that point of law.

Whether a witness played a knowing role in the commission of an offense is a question of fact for the jury to decide, not this Court. If the law only provided that an accomplice instruction should be given if the witness was an accomplice, then this Court could determine if a witness was an accomplice. The law, however, provides that in cases where it is unclear if a witness is an accomplice, then the jury should decide.

The prosecutor conceded at trial that King could have been charged with aiding and abetting first-degree murder but was allowed to plead to being an accessory after-the-fact. At his guilty plea hearing, King told the court that he had met up with appellant at the City Center on the morning of the shooting. P.17.<sup>3</sup> King stated that he knew that L [REDACTED], nicknamed “Glock,” had accompanied appellant back to the house because L [REDACTED] owed appellant drug money. P.21. King denied having any role in bringing L [REDACTED] to the house to be shot. P.26. King claimed to have been scared when the shooting occurred. P.38. King only helped move the body and clean up the blood, because he was afraid that if he did not help, appellant would shoot him. P.48. He told the court at this plea hearing that he had not been involved in the shooting and only participated because he was afraid for his life. P.57. He was, however, allowed to plead guilty and was designated an accomplice. P.57. His efforts to minimize his involvement were betrayed by his actions.

*Convona Helped Lure L [REDACTED] To The House.*

Similarly, although Convona minimized her involvement, her participation, similar to King’s, was sufficient for the court to at least instruct the jury to determine whether she was an accomplice. King and Convona were both involved in helping bring L [REDACTED] to the house, in staying at the house with L [REDACTED] until he was shot, in failing to report the shooting, and in the cover-up. She had told the grand jury that she had heard appellant on the telephone telling his cousin, Coleman, to “bring it,” meaning a gun to the

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<sup>3</sup> “P.” refers to the transcript of King’s guilty plea hearing, attached in the appendix to this brief.

house. T.164. At trial, she admitted that she had told some of the others who were outside the house, that the situation inside the house right before the shooting did not feel right. T.203. She claimed at trial that she did not remember telling the police that she had told one of the others who had been inside the house when appellant returned from the City Center that something was “going to get done in the house.” T.204. Simply because Convona may not have been as involved as King, she could not automatically be determined to not be an accomplice.

Moreover, after being arrested as a material witness and called to the stand, Convona invoked her Fifth Amendment privilege not to incriminate herself. T.1106. Convona told the court that she was concerned about being charged in relation to the shooting. T.1108. She asked to be appointed an attorney and the court appointed one for her. T.1108.

Subsequently, the prosecutor offered her immunity to testify. T.1138. The trial court noted that Convona was being granted immunity for having given false statements about the case. T.1134, 1137, 1138.

It makes little sense that Convona was offered immunity to testify but the jury was not instructed to determine whether she was an accomplice. She would not have had any reason to invoke the Fifth Amendment had she not had some culpability and she would not have been granted immunity unless she was culpable. Although the prosecutor argued to the court that there was no basis for Convona to invoke the Fifth Amendment and that she should be made to testify, the court disagreed. T.1108. This ruling by the court

showed that the court did believe Convona had some complicity and, therefore, the court should have known to provide the jury with an accomplice instruction.

**D. The Error Was Not Harmless.**

The state cannot show beyond a reasonable doubt that had the jury been instructed to find whether Convona was an accomplice, the verdict would have been affected. *Chapman*, 386 U.S. at 24. The state's key witness, King, was an accomplice and his testimony was inherently trustworthy. Even at trial he continued to minimize his involvement, although he had pled guilty to being involved. Even if corroboration existed for his testimony, the corroboration could only serve to bolster what was self-serving testimony by King.

Under these circumstances, it would have made a difference had the jury determined that one of the other three witnesses was also an accomplice whose testimony was inherently untrustworthy and which, therefore, needed to be corroborated. It was not fair for the state to be able to offer Convona's testimony as not being inherently untrustworthy and being, therefore, corroborative of appellant's guilt. Most likely, that is why the state so vigorously argued against the court allowing Convona to invoke the Fifth Amendment and, thereby, self-designating herself as an accomplice. Even though the state had to have the court issue a warrant for Convona who had to be dragged out from her hiding place in a clothes dryer, the state brought her forward. T.465. If she had been determined to be an accomplice, the state would have lost a major piece of its case. Further, the jury most likely would have assessed her credibility differently.

In closing argument the prosecutor stressed that the case had been proved because there were other credible witnesses besides King. The prosecutor stressed that the evidence corroborating King's testimony was the testimony of Shiniqua, Thaijuana, and Convona. *See* T.1484. ("They corroborate each other.").

In fact, think if you would you never heard from Myshohn King. What evidence would you be looking at as you went back to that deliberation room? Without Myshohn King. What would you know? You'd still know the same thing. The person who caused this is sitting right there. You know what was happening before, you know what happened right after when Shiniqua and Thaijuana showed up and the things that they heard this man say about shooting Q [REDACTED] L [REDACTED] and the reasons why. You know from Convona. You don't need Myshohn King for this. You know from Convona after they got back from City Center, he makes a call, bring it, Dre shows up, go to the back room, people leave. You would convict if you had never heard from Myshohn King.

T.1494.

Even if this Court did not believe that Convona was an accomplice, the law demands that the jury make this determination, not the court. This Court cannot and should not second-guess what the jury would have determined about whether Convona was an accomplice. This Court did not have the opportunity, as did the jury, to hear Convona on the witness stand or to observe her demeanor. Second-guessing the jury is tantamount to usurping the jury's role. Because Convona was a potential accomplice, the accomplice instruction should have been provided.

#### **IV. THE PROSECUTOR'S REPEATED MISCONDUCT DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.**

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

Prosecutorial misconduct warrants reversal “when the misconduct, considered in the context of the trial as a whole, was so serious and prejudicial that the defendant’s constitutional right to a fair trial was impaired.” *State v. Johnson*, 616 N.W.2d 720, 727-728 (Minn. 2000). Reversal is required if the misconduct is not harmless beyond a reasonable doubt. *State v. Bradford*, 618 N.W.2d 7782, 798 (Minn. 2000). The misconduct is harmless beyond a reasonable doubt only if the jury’s verdict is “surely unattributable to the error.” *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000).

If a defendant fails to object to alleged prosecutorial misconduct at trial or to seek cautionary instructions, this Court should review the defendant’s claim to determine if it is plain error. *Griller*, 583 N.W.2d at 740q; *see also State v. Parker*, 353 N.W.2d 122, 127 (Minn. 1984). Plain error requires that the following be established: (1) error; (2) that is plain; and (3) that affects substantial rights. *Griller*, 583 N.W.2d at 740.

##### **B. The Pattern Of Serious Misconduct Requires Reversal.**

###### *Improper Comments On Appellant’s Right To Be Present.*

In *Buggs*, the prosecutor argued that the defendant took advantage of his opportunity to observe the full presentation of the case in the courtroom by attending his trial and then taking the witness stand with a story concocted to exonerate himself. *State v. Buggs*, 581 N.W.2d 329, 341 (Minn. 1998). This Court held that the prosecutor’s unobjected-to remarks were not prejudicial error, but, warned prosecutors against

“extensive dwelling on a defendant’s presence during the trial.” *Buggs*, 581 N.W.2d at 341. Despite this warning issued at least six years prior, the prosecutor in this case cross-examined appellant with “questions” designed only to emphasize to the jury that appellant had been present at trial to be able to fabricate a defense. The prosecutor questioned appellant in the following manner:

[t]hroughout the course of the trial, you’ve listened to all the witnesses?...Heard the testimony?...And you’ve come to realize that you’re the only witness who’s gotten to hear anybody else’s testimony; right?...You’ve had time to create what you told us today as it relates to the physical evidence?...You’ve had time now to plan what you were going to say when you were on the stand?...Didn’t plan it?...You understand that no other witness had the access like you did to all of the information and all the testimony before they testified?

T.1449-1450. Although the court sustained the defense objection, the cumulative prejudice from these improper comments and the others, denied appellant a fair trial.

T.1450.

Additionally, the prosecutor implied that appellant had gained an unfair advantage by having an attorney and by being informed about the issues in his case. The prosecutor questioned appellant about having had in his possession “a large number of police reports about this case.” T.1446. He emphasized that appellant had the reports “since January or even December probably.” T.1446. When defense counsel objected, the trial court sustained the objection. T.1447.

*Improper Questioning About Pre-trial Silence and Right to Counsel.*

It is misconduct for the prosecutor to question a defendant about his pre-trial silence. *State v. Billups*, 264 N.W.2d 137 (Minn. 1978). Similarly, the state may not refer to or elicit testimony about a defendant's post-arrest silence. *State v. McCullum*, 289 N.W.2d 89, 92 (Minn. 1979). Evidence of a defendant's silence penalizes him for exercising his constitutional right against self-incrimination and deprives him of a fair trial. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976); *State v. Roberts*, 208 N.W.2d 744, 747 (Minn. 1973). It is fundamentally unfair and a deprivation of due process to allow an arrested person's silence to be used to impeach an explanation subsequently offered at trial. *Doyle*, 426 U.S. at 618; *State v. Beck*, 183 N.W.2d 781, 783-84 (Minn. 1971) (testimony about a defendant's silence which is not a foundation for admitting the confession potentially is sufficiently prejudicial to warrant a new trial).

Additionally, it is improper for the prosecutor to imply guilt by eliciting that a defendant has requested counsel. *See State v. Robinson*, 427 N.W.2d 217, 224 (Minn. 1988). When a defendant requests counsel, the context of his request determines whether the request raises a strong inference of guilt. *See Roberts*, 208 N.W.2d at 747 (requesting counsel after officer asked whether he had committed crime raised strong inference of guilt).

Here, however, the prosecutor cross-examined appellant about what he had not said to the detective after he was arrested. T.1431, 1432, 1436.

- Q. He [the detective] was asking you questions?  
A. Yeah. He tried to ask me questions, but I said I'll just take a lawyer. I still want a lawyer. Talk to a lawyer.

- Q. And before that, you never told them anything about that you saw Myshohn King shoot anybody?
- A. I was – That’s what I was gonna tell ‘em.
- Q. That’s – Answer my question.
- A. Yeah.
- Q. You didn’t tell him?
- A. I didn’t tell ‘em anything.
- Q. Anything about Myshohn King shooting anybody; did you?
- A. I didn’t tell ‘em anything.
- Q. You didn’t tell him at the time as it happened you were in your back bedroom ironing your new Globetrotters outfit; did you?
- A. I didn’t tell ‘em anything.
- Q. And he was asking you at that time?
- A. He asked me if I still wanted a lawyer, and I told ‘em, you know, then again I think I might be comfortable with a lawyer present, so that’s how that conversation ended, and all the conversation with the police was nothin’ but a few seconds. It wasn’t a long conversation. Once he told me I had a right to have a lawyer there, that’s what I requested.

T.1431-1432. The prosecutor questioned appellant about how appellant had not admitted he lived at the house, about appellant’s having invoked his right to counsel, appellant having remained silent about King being the shooter, and about not having mentioned that he had been ironing his clothing. Following this improper line of questioning, the trial court, *sua sponte*, asked the parties to approach the bench. T.1432. A discussion was held at the bench after which the questioning resumed, but on a different topic. T.1432.

*A Series Of Improper “Are They Lying” Questions Was Asked.*

It is misconduct for the prosecutor to ask “are they lying” questions if, in context, that type of question has no probative value and does not assist the jury in assessing witness credibility. *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999). Here, the extensive nature of these improper questions by the prosecutor should constitute error, even if not objected-to by the defense. Appellant did not testify that none of the events

testified to by the state's witnesses occurred. Appellant challenged only inconsistencies in the witnesses' testimonies and emphasized how the witnesses had changed their stories. Consequently, in context, the "are they lying" questions were not probative.

Additionally, this Court should note that appellant was even asked if Derrick Hamilton was lying, although the prosecutor never elicited any statements from Hamilton accusing appellant. The prosecutor called Hamilton as a witness mainly to imply by innuendo that what Coleman may have said to Hamilton inculpated appellant. The trial court should have stopped this line of improper questioning. *See* T.1440, 1462, 1468, 1483 (appellant asked if his girlfriend, King, Coleman, Thaijuana, Shiniqua, and Hamilton were all lying).

*Jury's Attention Diverted From Issues Of Guilt Or Innocence.*

It is error for a prosecutor to make remarks about issues that are not directly relevant to the defendant's guilt or innocence. *State v. Clifton*, \_\_ N.W.2d \_\_, No. A03-1964, 2005 WL 1836929, at \*4 (Minn. Aug. 4, 2005). The A.B.A.'s standards governing the conduct of prosecutors provide that, "[t]he prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law." I ABA Standards, *The Prosecution Function*, Standard 3-5.8(d) (2d ed. 1982); *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994); *State v. Kelley*, 295 N.W.2d 521, 523 (Minn. 1980).

Here, however, the prosecutor asked a series of questions that invited the jury to find that appellant's decision to seek counsel instead of confessing to the crime showed

he was not of good character. Further, these questions served to improperly imply appellant's guilt.

- Q. What you saw that day was shocking?  
A. Hell yeah.  
Q. Surprising to you?  
A. Yeah.  
Q. It was wrong?  
A. Yeah.  
Q. And it would be appropriate to tell authorities when we know things about murder and things that are wrong; correct?  
A. Well, I mean, they asked me did I want to have a lawyer present and I thought that would be the best thing.  
Q. Mr. Dobbins, the question is it would be appropriate to tell authorities –  
A. No.  
Q. -- when we see things or know things are wrong.  
A. Not actions, not the way they was comin' at me. They was comin' at me.  
Q. Let's just talk about this.  
A. He was – He was –  
Q. It would be good for society and communities when people saw things shocking and surprising or ugly –  
A. Well –  
Q. -- that they would tell people.  
A. Huh?  
Q. That they would tell people.  
A. I don't know – I know what I do. I don't know what other people will do.  
Q. You wouldn't tell?  
A. (Shrugs). The way they came at me –  
Q. You don't like people who would tell.  
A. The way they came at me –  
Q. Mr. Dobbins, you don't like people who would tell about something like that; do you?  
A. I don't have a problem. It's not my business.  
Q. You don't like people who tell what they saw?  
A. That's none of my business.  
Q. You don't like people who tell what they heard?  
A. None of my business. Got nothin' to do with me.

\* \* \* \*

- Q. In the world you live in, Mr. Dobbins, people shouldn't tell about things they saw; correct?
- A. What world? I live in the same world you live in.
- Q. And people shouldn't tell, in your world, even if it's the truth?
- A. I live in the same world you live in.
- Q. And it takes courage to tell the truth about what you see?
- A. Like I say, I ain't got nothin' to do with all that.
- Q. Don't know if it would take courage?

T.1453, 1454, 1455. The prosecutor's references to "your world" meaning appellant's circle of friends, family, and acquaintances which the testimony showed was a world of lower-class and working class African-Americans, indirectly and impermissibly injected race into the argument. *Cabrera*, \_\_ N.W.2d \_\_, 2005 WL 1774105, at \*6 (citing *Varner*, 643 N.W.2d at 305 (impermissible to inject issues of race into closing argument)).

Further, in closing argument, the prosecutor then made himself a witness and provided the jury with the "right" answer to the badgering set of questions he had cross-examined appellant with by stating the following: "...I would know the difference and I would be honest when I testify. Desperation and self-preservation can lead to some pretty fanciful tales." T.1501.

The prosecutor improperly attempted to demean appellant's character with issues not relevant to the trial. The prosecutor asked appellant if he knew whether he was the father of his girlfriend's son and then asked him if he was faithful to her. T.1444.

*The Cumulative Effect Constituted Serious Misconduct.*

Each of the above errors was sufficient to constitute serious misconduct. The cumulative effect of the errors, however, should be viewed as reversible error. The prejudice arising from the cumulative and repeated misconduct serves to violate a

defendant's right to a fair trial. *See State v. Hoppe*, 641 N.W.2d 315 (Minn. Ct. App. 2002) (reversed on basis of cumulative effect of 3 instances of misconduct). Here, the misconduct was extensive, repeated, and cumulative.

Additionally, this Court has the inherent authority to reverse in the interests of justice and prophylactically in the exercise of this Court's supervisory powers. *See e.g. Cabrera*, \_\_\_ N.W.2d \_\_\_, 2005 WL 1774105, at \*6 (citations omitted). Just as in *Cabrera*, the type of misconduct that occurred here, in a first-degree premeditated murder trial where appellant faced life in prison, should constitute a proper subject for this Court's supervisory authority. In the interests of justice, convictions should not be obtained by overzealous prosecutions. Therefore, this Court should reverse and remand for a new trial.

**C. In the Alternative, Trial Counsel Was Ineffective.**

If this Court finds that the prosecutor's misconduct was not reversible error because the issue was waived at trial, or because the record at trial is insufficient, then appellant requests that these issues be preserved for a postconviction proceeding. The Sixth Amendment of the United States Constitution guarantees an accused in all criminal prosecutions the right to effective assistance of counsel. *United States v. Cronin*, 466 U.S. 648, 654 (1985); see also Minn. Const. art. 1 § 6. Trial counsel must zealously and competently protect his client's rights:

[Trial counsel] is obliged to serve the accused as his counselor and advocate 'with the courage, devotion and to the utmost of his learning and ability' in order to protect against any conviction, however overwhelming the evidence of guilt, save one based upon strict adherence to both procedural and substantive rules of law.

*State v. Williams*, 210 N.W.2d 21, 26 (Minn. 1973). Where the right to effective trial counsel is violated, a defendant is entitled to a new trial. *State v. Moore*, 458 N.W.2d 90 (Minn. 1990). An appellate court reviews ineffective assistance of counsel claims *de novo*. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Generally, courts presume that a defendant has been represented effectively. *Cronic*, 466 U.S. at 658. To prevail on an ineffective assistance of counsel claim “the defendant must affirmatively meet a two prong test: 1) he must prove that his counsel’s representation “fell below an objective standard of reasonableness” and 2) he must prove “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability “is a probability sufficient to undermine confidence in the outcome.” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987); *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Where counsel has failed to properly challenge the evidence at trial or to object to prejudicial evidence and that failure did not result from a reasoned, professional judgment, then counsel has been ineffective. *State v. Strodtman*, 399 N.W.2d 610, 616 (Minn. Ct. App. 1987); *Strickland*, 466 U.S. at 690. If, but for an objection, reversible error was committed, then counsel’s failing to object should constitute reversible error. If the record fails to show whether failing to object was the result of error or a reasonable tactic, then this Court should preserve appellant’s right to file a postconviction petition alleging ineffective assistance of counsel.

**CONCLUSION**

Based on the record and the proceedings, this Court should reverse and remand the proceedings for a new trial.

*August 10, 2005*

Respectfully Submitted,

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A05-320

STATE OF MINNESOTA

IN SUPREME COURT

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State of Minnesota,

Respondent,

vs.

CERTIFICATION OF BRIEF LENGTH

Demetrius Devell Dobbins,

Appellant.

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional font. The length of this brief is 13,146 words. This brief was prepared using Microsoft Word 2002.

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