

A05-1386

STATE OF MINNESOTA

IN SUPREME COURT

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State of Minnesota,

Respondent,

vs.

John Russell Heden,

Appellant.

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## APPELLANT'S BRIEF

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**PROCEDURAL HISTORY**

1. March 1, 2004: In rural Pennington County, appellant telephoned 911 to report the death of his three-month-old daughter.
2. March 1, 2004: Appellant was questioned about the circumstances of the death by police officers.
3. March 2, 2004: Appellant was questioned again and arrested.
4. March 3, 2004: Complaint filed in Pennington County District Court charging appellant with the following: Count I – Murder in the Second Degree in violation of Minn. Stat. § 609.19, Subd. 2 (felony murder); Count II – Criminal Sexual Conduct in the First Degree in violation of Minn. Stat. § 609.342, Subd. 1(a).
5. April 19, 2004: Appellant was indicted in Pennington County District Court for Count I - Murder in the First Degree (Felony Murder – Criminal Sexual Conduct)

in violation of Minn. Stat. §§ 609.185 (a)(2); 609.342, Subd. 1(a) (life without possibility of release); Count II – Murder in the First Degree (child abuse) in violation of Minn. Stat. §§ 609.185 (a)(5); 609.224, Subd. 1(2); 609.342, Subd. 1(a) (life imprisonment); III – Murder in the Second Degree (Felony Murder) in violation of Minn. Stat. §§ 609.19, Subd. 2(1); 609.221, Subd. 1.

6. December 8, 2004: Omnibus hearing held on appellant's motion to suppress his statements. Judge Dennis J. Murphy, presiding in Pennington County District Court, denied appellant's motion for a change of venue.
7. February 23, 2005: Court order was filed denying the motion to suppress.
8. March 23, 25, 28, 29, 30, 31, 2005; April 1, 4, 2005: Jury trial held.
9. April 4, 2005: Jury returned the following verdict: Guilty on all counts.
10. April 18, 2005: Appellant was sentenced on murder in the first degree (criminal sexual conduct) to life imprisonment with no possibility of release.
11. July 12, 2005: Notice of appeal filed.
12. October 5, 2005: Trial transcript received.
13. November 22, 2005: Extension for filing of appellant's brief granted to January 16, 2006.

## **LEGAL ISSUES**

- I. THIS COURT HAS HELD THAT THE UNDERLYING PREDICATE FELONY FOR FELONY MURDER MUST BE A FELONY COMMITTED IN A MANNER THAT INVOLVED SOME SPECIAL DANGER TO HUMAN LIFE. ACCORDINGLY, UNDER MINN. STAT. § 609.185 (A) (2), THE UNDERLYING PREDICATE FELONY MUST BE AN ACT OF CRIMINAL SEXUAL CONDUCT PERFORMED WITH FORCE OR VIOLENCE. HERE, HOWEVER, THE DIGITAL PENETRATION OF A THREE-MONTH-OLD

INFANT, BY NATURE OF THE ACT ITSELF, DID NOT INVOLVE FORCE OR VIOLENCE OR ANY SPECIAL DANGER TO LIFE.

The trial court was not asked to rule.

*State v. Mitchell*, 693 N.W.2d 891 (Minn. Ct. App. 2005)

*State v. Back*, 341 N.W.2d 273 (Minn. 1983)

*State v. Anderson*, 666 N.W.2d 696 (Minn. 2003)

*King v. State*, 649 N.W.2d 149 (Minn. 2002)

- II. APPELLANT DID NOT CAUSE THE DEATH OF THE INFANT WHILE COMMITTING CRIMINAL SEXUAL CONDUCT BECAUSE THE CRIMINAL SEXUAL CONDUCT WAS SEPARATE IN TIME AND INTENT FROM THE ACT OF VIOLENT SHAKING THAT CAUSED DEATH.

The trial court was not asked to rule but stated at sentencing that the offenses all arose out of the same course of conduct.

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

*State v. McBride*, 666 N.W.2d 351 (Minn. 2003)

*State v. Harris*, 589 N.W.2d 782 (Minn. 1999)

- III. THE TRIAL COURT VIOLATED DUE PROCESS BY SENTENCING APPELLANT TO LIFE WITHOUT PAROLE WHERE THE STATE DID NOT PROVE THAT APPELLANT COMMITTED AN INTENTIONAL MURDER.

The trial court was not asked to rule.

*Edmund v. Florida*, 458 U.S. 782 (1982)

*Harmelin v. Michigan*, 501 U.S. 957 (1991)

*Gregg v. Georgia*, 428 U.S. 153 (1976)

*Lockett v. Ohio*, 438 U.S. 586 (1978)

- IV. THE STATUTORY ELEMENT OF "PAST PATTERN OF CHILD ABUSE" DEMANDS PROOF BEYOND A REASONABLE DOUBT OF (1) A PATTERN (A CAUSAL OR INTENTIONAL LINK BETWEEN THE ALLEGED PAST ACTS) AND (2) AT LEAST TWO PRIOR ACTS OF CHILD ABUSE. ALTHOUGH, AS THIS COURT HAS RULED, THE JURY NEED NOT UNANIMOUSLY AGREE ON WHICH TWO PRIOR ACTS HAVE BEEN PROVED BEYOND A REASONABLE DOUBT, AT LEAST TWO PRIOR ACTS MUST BE SUPPORTED BY EVIDENCE BEYOND A REASONABLE DOUBT.

The trial court ruled in the negative that the jury did not have to unanimously agree on the past acts but was not specifically asked to rule on the meaning of the statutory element.

*State v Cross*, 577 N.W.2d 721 (Minn. 1998)  
*State v. Crowsbreast*, 629 N.W.2d 433 (Minn. 2001)  
*State v. Manley*, 664 N.W.2d 275 (Minn. 2003)  
*State v. Kelbel*, 648 N.W.2d 690 (Minn. 2002) *cert. denied*, 537 U.S. 1175 (2003)

V. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE DEFINITION OF "PATTERN" WHICH REQUIRES PROOF OF AT LEAST TWO PRIOR INCIDENTS.

The trial court was not asked to rule.  
*State v. Crace*, 289 N.W.2d 54 (Minn. 1979).  
*State v Malaski*, 330 N.W.2d 447 (Minn. 1983)  
*State v Grube*, 531 N W.2d 484 (Minn. 1995)  
*State v. Sanchez-Diaz*, 683 N.W.2d 824 (Minn. 2004)

VI. APPELLANT'S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE POLICE FAILED TO READ THE MIRANDA WARNINGS AFTER APPELLANT CONFESSED TO SHAKING THE INFANT.

The trial court ruled in the negative  
*Miranda v Arizona*, 384 U.S. 436 (1966)  
*Dickerson v United States*, 530 U.S. 428 (2000)  
*State v Champion*, 533 N.W.2d 40 (Minn. 1995)  
*State v. Rosse*, 478 N.W.2d 482 (Minn. 1991)

### STATEMENT OF THE CASE

In March 2004, appellant called 911 to report that his three-month-old daughter had stopped breathing. Appellant was questioned by police without being read his Miranda warnings. After he admitted he had shaken the infant, he was asked to provide another statement and then administered his rights. He was indicted in Pennington County District Court on murder in the first degree (criminal sexual conduct), murder in the first degree (child abuse), and felony murder (unintentional). The court denied appellant's motion to suppress his statements. Following a jury trial, appellant was

convicted on all counts and sentenced to life imprisonment without possibility of release for first degree murder (criminal sexual conduct). This appeal follows.

### STATEMENT OF FACTS

On March 1, 2004, in rural Pennington County, at 6:45 a.m., appellant telephoned 911 to report that his three-month-old daughter had stopped breathing. T.50.<sup>1</sup> Appellant had been living on his family's old homestead – a farm that he was remodeling. T.532. Appellant told the operator that he had been trying to perform CPR but that blood was leaking from the infant's nose. T.51.

When firefighter Douglas Horachek and his wife, Heidi, entered appellant's house in response to being paged, they found appellant in the bedroom, kneeling beside the bed where the infant was laying. The infant had streaks of blood on her face. T.96, 63, 64, 89. She looked silent and still. T.65.

Heidi picked her up. The infant had a gray pallor: she had a burn mark on her chin, a bruise on her forehead, and a rash on her skin. T.118. Appellant seemed "severely scared" and had blood on his pants and in his beard. T.65, 66. Appellant told them that Rose had been that way for about half an hour. Appellant looked like a "deer caught in the headlights" and began running around the living room nervously. T.67. Still upstairs was appellant's wife's daughter, F[REDACTED]. T.132.

While Horachek was waiting for the ambulance to come, others volunteered to retrieve appellant's wife, Shawna, from her job at DW's restaurant. T.79. Shawna and appellant were taken by a neighbor to be interviewed at the police station. T.80. While

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<sup>1</sup>"T." refers to the trial transcript.

they were at the police station, Shawna called Horacheck to ask him to bring appellant's epilepsy medication. T.85, 86.

Appellant and Shawna fully cooperated with the authorities. T.275. They signed consent forms allowing the police to search the house. T.495, 496. In his police interview, appellant admitted to shaking the infant. T.842. Appellant admitted having placed the middle finger of his right hand, up to the second knuckle, inside the infant's vaginal canal. T.962.

The paramedic, Jeffrey Olson, arrived at 6:40 a.m. He determined that the infant had died. T.160. The paramedic estimated death may have occurred as of 6:15 a.m. T.174. He described the condition of the body as having a bluish discoloration around the eyes, mouth, and fingertips, a pale face, blood oozing from the nose, two small bruises on the upper chest, no pulse, and not breathing. T.160. When the deputy sheriff asked the paramedic if the injuries were consistent with SIDS, the paramedic said no: he believed the bleeding was suspicious. T.236, 237.

There were, however, no signs of any external trauma. T.168. The bruise on the chin was scabbed over. T.168. Appellant related that he had been up earlier when Shawna left the house between 5:00 a.m. and 5:15 a.m. The infant had seemed fine and was sleeping. About half an hour later, appellant checked on her and found that she was not breathing. He tried to resuscitate her and called 911. T.168.

Medical examiner Michael McGee, ruled that the death was a homicide. T.342. He opined that the infant had died from craniocerebral injuries due to or associated with shaken infant assault. T.342. Dr. McGee did not believe that the fatal injuries had

occurred earlier than the day of death. He noted that in a photograph taken on February 15, 2004, the infant's eyes were wide-open and responsive and her hands were grasping. She appeared normal. T.346.

Results from the autopsy indicated that the infant had a tear inside her lips (of her labila frenulum). This injury was older and most likely resulted from direct pressure on or impact to her mouth. T.356, 357. Additionally, a laceration to the lower portion of the internal genitalia (the vaginal canal), about a quarter inch deep, was discovered: that injury appeared to be recent. T.359, 360. In addition to a fresh-appearing subdural hemorrhage that would have occurred at the time of the fatal assault, the brain showed evidence of an old injury most likely dating from about a week or two before death. T.369, 400.

Dr. McGee believed that the infant had been previously shaken to the point of causing brain damage. T.410. He explained that the infant would have died fairly soon after being shaken. He explained that her nose had not been bleeding: a pulmonary edema mixed with hemorrhage from the airway had been purging. T.451. That symptom could also be present in a SIDS death. T.452. He believed the infant was alive when the internal genitalia was scratched and he could not rule out that the fatal injury may have been inflicted as early as 5:00 a.m. – before Shawna left for work. T.410, 419, 423.

Shawna had not been any better parent than had appellant. Shawna “nourished” the infant with Kool-Aid. T.792. On February 27, 2004, a friend, Beth Limesand, had noticed a bruise the size of an egg on the infant's forehead. T.649, 647, 651. Shawna told

Limesand that the infant had tried to sit up in her swing but had fallen forward and hit her head on the tray attached to the swing T.656.

Earlier, on December 29, 2003, Pennington County Human Services had received a report which led to a child protection investigation. T.613, 627, 628. A child protection worker, Melani Reuter, was told that the infant had a bruise on her left cheek. She arranged a home visit for January 7, 2004. T.618, 619. During the visit, Shawna was cooperative. T.620. She said that under appellant's care, the infant had rolled over and hit her head on a wall. T.620.

Reuter described the home as clean: she had no concerns about the infant's home environment. T.621. Reuter offered services to the family. Shawna and appellant were cooperative. T.630. Reuter learned that appellant had been laid off from his job since January 2004. He cared for the children while Shawna was at work. T.645.

Shawna admitted that she had previously shaken her other daughter, F█████, but had stopped before injuring her. T.632. A county child protection agency had been involved with Shawna over her abuse of F█████. In fact, F█████ had been removed temporarily from Shawna's care. T.632, 639.

According to twenty-five-year-old Shawna, she began living with appellant in January 2003. T.729, 732. On December 26, 2003, she had been admitted into the hospital for gallbladder surgery. T.743. She did not remember the infant having any injuries before that date, but when Shawna returned home she noticed that the infant had a bruise on the side of her face. T.745. Appellant explained that while napping, the infant must have rolled off his chest. T.746. Shawna believed that the infant had an ongoing

problem with becoming pale (“paling”) for periods of time – she had these paling episodes about six times each day. T.783.

On the morning of the infant’s death, Shawna had gotten up and taken a sponge bath since their well had so much rust she would not bathe or drink in the water. T.764. She got into her van at 5:18 a.m. and punched into work at 5:22 a.m. T.765. Before leaving for work, Shawna had not checked on the infant. T.768.

Following the infant’s death, Shawna continued to talk to and write to appellant, who was in custody. T.774. Shawna claimed that when she asked appellant what had happened, he said that he had “snapped.” In a letter appellant sent to Shawna from jail, he told her that something mentally must have happened to him that day because he never imagined he would do something like that. T.945. He told her that he had shaken the infant and placed his finger in her vaginal canal. He had only done that once or twice. T.779, 780.

After the infant’s death, F [REDACTED] was removed from Shawna’s care and Shawna’s parental rights to F [REDACTED] were terminated. T.776. Shawna left the area with a new boyfriend and went to Montana. T.780. That relationship ended and Shawna began a new one. She found work at a carnival and began traveling with it. T.780-782. At the trial, she expressed her anger that Reuter had reported her for child abuse and could not understand an “accident.” T.782. She was mad that Reuter had made a note of Shawna saying that the only difference between her and appellant was that appellant got caught. T.797. What Shawna had meant was that she, unlike appellant, had not got caught for being involved in underage sexual conduct. T.798.

Defense witness, Janice Ophoven, a pediatrician who had completed a forensic pathology fellowship to study injuries to children, disagreed with Dr. McGee and the state's other expert witness, Dr. Daniel Davis, about the cause of death. Dr. Ophoven testified that the infant had showed no evidence of having sustained a fresh head injury on the morning of her death. T.1011. The infant could have died for a number of reasons that morning related to a prior injury. T.1012.

The evidence showed that prior to the morning of her death, the infant had been experiencing lack of brain growth, had not been feeding properly, had been losing weight, may have been dehydrated, and may not have been able to protect her airway. T.1012. The evidence of abnormalities in her brain from prior injuries would certainly have caused her to be vulnerable to any number of mechanisms that could result in death. T.1013.

Thus, Dr. Ophoven's findings showed that the infant did not die from being shaken on the morning of her death. T.1042. Instead, the infant had suffered a devastating fatal injury to her head some months before. T.1042. This fatal brain injury occurred sometime after the infant's last well-baby visit to the doctor and long enough before her death for her brain to have begun to start dissolving and for her head to have shrunken in size. T.1031. A microscopic inspection of the brain tissue slides verified that no fresh injury to the brain occurred on the morning of the infant's death. T.1051.

In rebuttal, the state's witness, Dr. Davis, said that the autopsy showed an obvious fresh subdural hemorrhage in the infant's skull. T.1078. He had to concede, however, that the evidence showed proof of a previous subdural hematoma. T.1081. He did not find

any evidence of a fresh hemorrhage in the vaginal canal but did find evidence of an old injury, about a week old, that had caused a severe tear in that area. T.1089, 1090, 1106.

Dr. Davis framed the controversy between himself and Dr. Ophoven as centering on whether there was evidence of a fresh or an old brain hemorrhage. T.1092. Although Dr. Davis found evidence of both, he believed that because there was no testimony from friends or relatives having observed the infant acting significantly different before the day of death, that the shaking on the day of death would have been the mechanism to have caused the fatal injury. T.1093.

## ARGUMENT

**I. THIS COURT HAS HELD THAT THE UNDERLYING PREDICATE FELONY FOR FELONY MURDER MUST BE A FELONY COMMITTED IN A MANNER THAT INVOLVED SOME SPECIAL DANGER TO HUMAN LIFE. ACCORDINGLY, UNDER MINN. STAT. § 609.185 (A) (2), THE UNDERLYING PREDICATE FELONY MUST BE AN ACT OF CRIMINAL SEXUAL CONDUCT PERFORMED WITH FORCE OR VIOLENCE. HERE, HOWEVER, THE DIGITAL PENETRATION OF A THREE-MONTH-OLD INFANT, BY NATURE OF THE ACT ITSELF, DID NOT INVOLVE FORCE OR VIOLENCE OR ANY SPECIAL DANGER TO LIFE.**

**A. Standard of Review.**

The determination of whether a crime may properly serve as a predicate offense to a felony-murder charge is a question of law, which this Court reviews de novo. *State v. Mitchell*, 693 N.W.2d 891, 893 (Minn. Ct. App. 2005) (citation omitted).

Constitutional claims may be considered for the first time on appeal in the interests of justice if the parties had adequate briefing time and the issues were implied in the district court. *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Minn. 1982).

**B. Force or Violence Requires More than a Showing of Discomfort or the Inadvertent Infliction of Injury.**

This Court has held that unless the predicate felony in a felony murder charge is a violent felony against a person, the underlying felony must be shown to involve special danger to human life. *State v. Back*, 341 N.W.2d 273, 277 (Minn. 1983). A proper analysis of whether the underlying felony involves a special danger to life must consider both "the elements of the underlying felony in the abstract [and] the facts of the particular case and the circumstances under which the felony was committed." *Mitchell*, 693 N.W.2d at 893-8941 (citing *State v. Cole*, 542 N.W.2d 43, 53 (Minn. 1996)); *State v.*

*Anderson*, 666 N.W.2d 696, 701 n. 6 (Minn. 2003) (observing that "Minnesota's special danger to human life standard is not merely a totality of the circumstances standard but rather a two-part inquiry into the inherent danger of the offense and the danger of the offense as committed").

The *Anderson* court explicitly held that the two-part inquiry must be employed:

We reject the state's argument that the standard to determine whether an underlying felony can support a charge of second-degree felony murder is a one-part inquiry--whether the offense involves a special danger to human life *as committed*. Minnesota's special danger to human life standard is not merely a totality of the circumstances standard but rather a two-part inquiry into the inherent danger of the offense *and* the danger of the offense as committed. Looking only at the circumstances of a particular case--i.e. the facts--would eviscerate the special danger to human life standard because the predicate offense would always be found to have been committed in a particularly dangerous manner if a death occurs.

*Anderson*, 666 N.W.2d at 701. Consequently, in *Anderson* this Court reasoned that because the crime of felon in possession did not pose any special danger to human life, it could not serve as a predicate for felony murder, despite the fact that the defendant's gun possession led to him shooting his friend. *Id.*

Recognizing that the underlying felony must involve a special danger to human life, the legislature did not make criminal sexual conduct in the first or second degree the underlying predicate felony for the offense defined by Minn. Stat. § 690.185. Instead, the legislature specifically required that the underlying predicate offense be criminal sexual conduct in the first or second degree committed with force or violence. The added language, "force or violence," is the equivalent of the requirement that the felony be one

posing a special danger to human life. *King v. State*, 649 N.W.2d 149, 159-160 (Minn. 2002) (citing *State v. Mitjans*, 408 N.W.2d 824, 833 (Minn. 1987)).

Moreover, the legislature did not intend that “force or violence” would be proved merely by a showing of pain or discomfort. Under Minn. Stat. § 609.341, Subd. 3, “force” is defined as the infliction of bodily harm. Thus, proof of “force or violence” requires more than just a showing that the actions caused some pain. The defendant must be proved to have intentionally inflicted pain or harm. Moreover, the dual requirement of force and violence specifies that the legislature intended to require a showing of violent acts that posed a danger to life – not just a showing of some pain or discomfort equaling bodily harm.

Because the offense is homicide in the first degree that carries a penalty of life without the possibility of parole, speculation that penetration may have caused discomfort cannot serve as the predicate offense. It makes little sense that felony murder in the second degree, as charged in the indictment under Count III, would require a more serious act – death caused by a violent felony of assault – than would first degree homicide carrying the most serious penalty allowable under law. To so interpret the first degree felony murder statute would be to interpret it against its plain meaning defining a more serious offense than second degree felony murder.

Here, the offense itself, digital penetration, was not an offense involving any special danger to human life. Digital penetration is, without more, an act devoid of any violence. Where the digital penetration is accomplished in the usual manner – simply by

insertion of a finger into the vaginal canal – the offense has not been committed in a manner involving special risk to life.

The state asserted that its evidence showed that the initial penetration, which it believed had happened on a prior day, had caused an internal abrasion of the infant's vaginal canal— an inadvertent result of the penetration, not the goal of the penetration. The state speculated that, since the autopsy showed an abrasion in the vaginal canal had not wholly healed and appellant stated he had blood on his finger after the penetration, that appellant's having inserted his finger on the morning of the infant's death would have caused pain to the infant.

But, even if the penetration caused pain or injury, it was not accomplished violently. Appellant did not accompany the digital penetration with force or violence – he had no need to do so. The three-month-old infant could offer no resistance and would not have known that she was being penetrated. For example, inserting a rectal thermometer would have caused as much or more discomfort to the infant, yet is not an act accomplished with force or violence. The bleeding and discomfort and abrasion were, even under the State's theory and evidence, a result of a prior incident. Appellant would not have known that a healing abrasion existed in the vaginal canal when he penetrated the infant with his finger on the morning of her death. Moreover, the digital penetration was unrelated to the death: the force and violence of the shaking leading to the death was unrelated to the penetration.

The facts of this case are, consequently, less compelling than even those in *Anderson*, where this Court reversed. In *Anderson*, the act (possessing a weapon) was not

violent but the possession resulted in violence. Even so, the possession was not of sufficient danger to life. Here the act was similarly not violent (digital penetration) but, unlike *Anderson*, the act did not result in violence (death occurred from the shaking, not the sexual act). Because the predicate felony, in this case, was even less related to violence than in the *Anderson* case, the predicate felony was insufficient to support a felony murder conviction.

If the State's theory were accepted, any touching of an infant's intimate areas could constitute an act of special danger to life – or an act of force or violence. Many non-violent and non-forceful actions can cause pain and discomfort to an infant or an adult. Hugging someone who is sore from a fall or exercise will cause pain and discomfort. But hugging is not a violent, forceful act. It is not non-consensual sexual activity or uncomfortable touching that the felony murder statute seeks to prevent and punish: it is sexual activity accompanied by and accomplished with physical danger that places the victim's life at risk. It requires some force or violence that is separate from and additional to the fact of penetration. That did not happen here.

This case improperly extends the parameters of the felony murder rule beyond its original purpose and meaning. First degree felony murder does not occur anytime there is criminal sexual misconduct and a death. The legislature carefully and particularly crafted a statute requiring a causal link between the force or violence, the sexual activity, a special risk to life, and a resulting death. Because digital penetration of an infant will most likely always engender some discomfort or pain, digital penetration, without more, does not constitute the crime of criminal sexual conduct accomplished with force or

violence. Where digital penetration is not done to cause pain or injury or no violence is needed to accomplish the penetration, the act has not been done with force or violence.

Appellant did not commit criminal sexual conduct in an especially violent or dangerous manner. He did not use force or violence. He may have engaged in disturbing and highly inappropriate actions. But, nevertheless, inserting a finger to penetrate an infant and startle her into not crying, is not first degree felony murder under the current Minnesota statute. Under these facts, this Court should reverse the conviction of first degree felony murder and dismiss the charge for lack of sufficient evidence. *Burks v. United States*, 437 U.S. 1 (1978).

**II. APPELLANT DID NOT CAUSE THE DEATH OF THE INFANT WHILE COMMITTING CRIMINAL SEXUAL CONDUCT BECAUSE THE CRIMINAL SEXUAL CONDUCT WAS SEPARATE IN TIME AND INTENT FROM THE ACT OF VIOLENT SHAKING THAT CAUSED DEATH.**

**A. Standard of Review.**

In analyzing a challenge to the sufficiency of the evidence, this Court should review the record to determine "whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). In so doing, this Court assumes 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). The review is "limited to ascertaining whether a jury, giving due regard to the presumption of innocence and to the state's burden of proof beyond a reasonable doubt, could reasonably conclude that the

defendant was guilty based on the facts in the record and any legitimate inferences therefrom." *State v. Wallace*, 558 N.W.2d 469, 472 (Minn. 1997).

**B. The Sexual Act Was Unrelated to the Act Leading to Death.**

To prove that fatal blows were inflicted while committing criminal sexual conduct, the state must prove that "the 'fatal wound' was inflicted during the same 'chain of events' [in which the underlying felony took place] so that the requisite time, distance, and causal relationship between the felony and killing are established." *State v. Russell*, 503 N.W.2d 110, 113 (Minn. 1993) (citing 2 Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law*, § 7.5(f) at 223, 366 n. 88 (1986)). "So long as the underlying felony and the killing are part of one continuous transaction, it is irrelevant whether the felony took place before, after, or during the killing." *State v. McBride*, 666 N.W.2d 351, 365 - 366 (Minn. 2003); *State v. Harris*, 589 N.W.2d 782, 791-792 (Minn. 1999) (the evidence led the medical examiner to testify that, to a reasonable degree of medical certainty, the victim had been sexually assaulted at or about the time of death).

Here, the act of criminal sexual conduct did not occur during the same chain of events leading to death. The penetration, shaking, and death were not part of one continuous transaction, although related in time. There was not a causal relationship between the digital penetration and the violent shaking that caused death. The digital penetration had nothing to do with the mechanism of death: death was not caused while trying to accomplish the digital penetration. The digital penetration was related to the infant's crying and to appellant's interest in performing that act, which he had done on past occasions. The shaking was what appellant did after he "lost it" because the infant

would not stop crying. The digital penetration was an unrelated, prior act. Because the digital penetration was not part of the chain of events leading to death, and death did not occur as a result of appellant attempting to engage in criminal sexual conduct, appellant did not cause the infant's death while committing criminal sexual conduct.

**III. THE TRIAL COURT VIOLATED DUE PROCESS BY SENTENCING APPELLANT TO LIFE WITHOUT PAROLE WHERE THE STATE DID NOT PROVE THAT APPELLANT COMMITTED AN INTENTIONAL MURDER.**

**A. Standard of Review**

Generally, issues not argued below are waived on appeal. *State v. Ferguson*, 645 N.W.2d 437, 448 (Minn. 2002). Constitutional claims, however, may be considered for the first time on appeal in the interests of justice if the parties had adequate briefing time and the issues were implied in the district court. *Tischendorf*, 321 N.W.2d 410.

Moreover, an appellate court may address any issue as justice requires. *See* Minn. R. Civ. App. P. 103.04.

**B. The Most Severe Punishment Should Be Reserved for Intentional Homicide.**

The mandatory life sentence without possibility of release authorized under Minn. Stat. § 609.185 for first degree murder where death is caused unintentionally (felony murder – criminal sexual conduct) is cruel and unusual punishment in violation of the Eighth Amendment of the federal constitution and the due process and equal protection provisions of the federal and Minnesota state constitutions. *See* U.S. const. amend. VIII, XIV, V; Minn. const. art. 1, § 5; *cf. Edmund v. Florida*, 458 U.S. 782, 787 (1982) ( under the Eighth and Fourteenth Amendments, death is not a valid penalty for one who neither

took life, attempted to take life, nor intended to take life). A punishment is excessive if it is grossly out of proportion to the severity of the crime. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Lockett v. Ohio*, 438 U.S. 586, 623-26 (1978) (White, J., concurring in part, dissenting in part, and concurring in the judgment) (arguing that the Court should have held that, absent evidence proving the intent to kill, the death penalty was grossly disproportionate to the severity of the crime); *cf. Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) (only “extreme sentences which are ‘grossly disproportionate’ to the crime” are disproportional in non-capital cases.).

To determine whether a punishment is disproportional or excessive, a court should examine (1) the history of the punishment, and (2) legislative attitudes. *Gregg*, 428 U.S. at 183, *Coker v. Georgia*, 433 U.S. 584, 592 (1977). In analyzing these factors under the Minnesota state constitution, however, the analysis requires recognition that Minnesota’s constitution differs from the United States Constitution: the state constitution provides that no “cruel *or* unusual punishments be inflicted,” Minn. const. art. I, § 5 (emphasis added) while the federal constitution states that no “cruel *and* unusual punishments” be inflicted. “This difference is not trivial. The United States Supreme Court has upheld punishments that, although they may be cruel, are not unusual.” *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998).

To determine whether a punishment is cruel or unusual under the state constitution, therefore, a court should focus on the proportionality of the crime to the punishment. *See e.g. State v. Walker*, 235 N.W.2d 810, 814 (Minn. 1975) (citing *Trop v. Dulles*, 356 U.S. 86 (1958) (whether a punishment is cruel and unusual involves deciding

if the punishment comports with “evolving standards of decency that mark the progress of a maturing society.”). The harshest penalty is proportional only if the crime is one of the most heinous – for example, intentional first degree murder during an aggravated robbery. *See Mitchell*, 577 N.W.2d at 489.

Here, appellant was punished with a mandatory life sentence although the charge did not require proof of intent to take life. In violently shaking the infant, he was not engaging in behavior intentionally designed to accomplish death: he was acting more in a rage or heat-of-passion, seeking to quiet an infant who would not stop crying. Both he and the infant’s mother had shaken the infant and the mother had shaken her other daughter on other occasions where death and injury had not occurred. Both parents evidenced limited understanding of an infant’s developmental needs.

Appellant, therefore, should not have been sentenced to the maximum sentence under Minnesota law reserved for the most heinous and purposeful of crimes. *Cf. Walker*, 235 N.W.2d at 815 (twenty-five-year minimum sentence less time off for good behavior is not excessive or out of proportion to the offense of first-degree intentional murder, § 609.185 (1)). Appellant has been sentenced to a much harsher term than is demanded for many defendants convicted of intentional murder.

Although first degree murder is not included in the Minnesota Sentencing Guidelines, most offenses are included, evidencing that under Minnesota law, punishments for criminal offenses should fit within an overall sentencing scheme. The sentencing guidelines embody a procedure based on state public policy to maintain uniformity, proportionality, rationality, and predictability in sentencing. Consequently,

Consequently, this Court should, at the least, exercise its supervisory powers to insure that the particular offense of unintentional murder while committing criminal sexual conduct does not undo a fair and proportional scheme so carefully crafted to insure the integrity of the criminal justice system. *See e.g. State v. Kaiser*, 486 N.W.2d 384, 386-87 (Minn.1992) (reversing harmless disclosure violations in the exercise of its supervisory powers).

**IV. THE STATUTORY ELEMENT OF “PAST PATTERN OF CHILD ABUSE” DEMANDS PROOF BEYOND A REASONABLE DOUBT OF (1) A PATTERN (A CAUSAL OR INTENTIONAL LINK BETWEEN THE ALLEGED PAST ACTS) AND (2) AT LEAST TWO PRIOR ACTS OF CHILD ABUSE. ALTHOUGH, AS THIS COURT HAS RULED, THE JURY NEED NOT UNANIMOUSLY AGREE ON WHICH TWO PRIOR ACTS HAVE BEEN PROVED BEYOND A REASONABLE DOUBT, AT LEAST TWO PRIOR ACTS MUST BE SUPPORTED BY EVIDENCE BEYOND A REASONABLE DOUBT.**

**A. Standard of Review.**

To evaluate a constitutional due process claim, concerning what the “past pattern of child abuse” element of Minn. Stat. § 609.185 (a)(5) requires to be proved, this Court should interpret the statute. This determination is a matter of statutory construction, which should be reviewed *de novo*. *State v. Kelbel*, 648 N.W.2d 690, 699 (Minn. 2002) *cert denied*, 537 U.S. 1175 (2003) (citation omitted).

In a motion filed October 1, 2004, appellant requested that Count II of the indictment charging murder in the first degree (child abuse) be dismissed or amended because Minnesota law did not permit trials on one count of criminal conduct that alleged different acts (assault in the fifth degree and criminal sexual conduct in the first degree) without requiring the prosecution to elect the act upon which it would rely for conviction.

Appellant cited to Minn. R. Crim. P. 26.02, Subd. 1(5), *Richardson v. United States*, 526 U.S. 813, 824 (1999), and *State v. Stempf*, 627 N.W.2d 352, 356 (Minn. Ct. App. 2001). Appellant noted that the way in which the offense was charged would create the possibility of a non-unanimous verdict on the element of child abuse. The trial court did not agree.

The trial court erroneously instructed the jury only to find whether a past pattern of child abuse had been proved beyond a reasonable doubt. The court did not define the term “past pattern.” Because the jury was not instructed to find that at least two prior incidents of child abuse were proved beyond a reasonable doubt, the jury was not properly instructed on the pattern element and was not required to unanimously agree on the facts supporting the “past pattern element.” Further, because the state did not admit evidence proving beyond a reasonable doubt that appellant had committed at least two prior past acts of child abuse, the evidence of “pattern” was not proved beyond a reasonable doubt.

In analyzing a challenge to the sufficiency of the evidence, this Court should review the record to determine whether the evidence, when viewed in a light most favorable to the state, supports the conviction. *Webb*, 440 N.W.2d at 430; *see* Argument, II.A, *infra*.

**B. This Court Should Re-Evaluate Whether the Underlying Offenses Should Be Proved Beyond a Reasonable Doubt.**

In *Cross*, this Court held that the statutory language, “past pattern of domestic abuse,” in Minn. Stat. §609.185 (6), refers to a single element and that the incidents

offered to prove the pattern need not be proven beyond a reasonable doubt. *See State v. Cross*, 577 N.W.2d 721, 726-27 (Minn. 1998); *see also State v. Crowsbreast*, 629 N.W.2d 433, 436-38 (Minn. 2001) (refusing to reach question of erroneous jury instruction where defendant failed to object because it would not be “plain error”); *State v. Manley*, 664 N.W.2d 275 (Minn. 2003). Subsequently, in *Kelbel*, this Court affirmed that the state was not required to prove beyond a reasonable doubt each predicate act of the “past pattern of child abuse” element in the child abuse first degree felony murder statute. *Kelbel*, 648 N.W.2d at 703.

As the United States Supreme Court has ruled in *Blakely*, however, each fact that is responsible for a conviction and sentence must be found beyond a reasonable doubt.

“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the “truth of every accusation” against a defendant “should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,” 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769), and that “an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason,” 1 J. Bishop, *Criminal Procedure* § 87, p. 55 (2d ed. 1872). These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing;

*Blakely v. Washington*, 542 U.S. 296, 302 (2004) (footnotes omitted).

Crimes are made up of factual elements, which are ordinarily listed in the statute that defines the crime. The law distinguishes, however, between “every fact necessary” to constitute the criminal offense and several possible means of proving that necessary fact. *See Schad v. Arizona*, 501 U.S. 624, 630-45 (1991) (plurality opinion).

“[I]n determining what facts must be proved beyond a reasonable doubt the state legislature’s definition of the elements of the offense is usually dispositive[.]” *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) (citing *Patterson v. New York*, 432 U.S. 197, 210 (1977)). Decisions about what facts are material and what are immaterial, or, in terms of *Winship*, . . . what “fact[s] are necessary to constitute the crime,” and therefore must be proved individually, and what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court. *Schad*, 501 U.S. at 638.

The Supreme Court, however, cautioned that “there are obviously constitutional limits beyond which the States may not go,” *id.*, at 639 (quoting *Patterson*, 432 U.S. at 210), and there is no bright-line test for determining when the “inherent nature of the offense charged requires the State to prove as an element of the offense some fact that is not an element under the legislative definition.” *Schad*, 501 U.S. at 639. Instead, in *Schad*, the United States Supreme Court held that federal due process principles of fundamental fairness and rationality should serve as a guide. *Id.* at 640. A plurality of the Supreme Court did articulate some “concrete indicators” of fairness and rationality, however:

[W]e have often found it useful to refer both to history and to the current practice of other States in determining whether a State has exceeded its discretion in defining offenses. . . . Where a State’s particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has . . . defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant’s burden.

*Id.* The plurality noted that although history and current practice are significant indicators of fundamental fairness and rationality, it is a flexible inquiry. *See id.* at 642-43.

In *Richardson*, the United States Supreme Court determined whether the federal “continuing criminal enterprise” statute’s requirement of “a series of violations” of drug laws referred to one element, i.e., a “series,” in respect to which the underlying crimes constitute the underlying means, or “create[d] several elements, namely the several ‘violations.’” *See Richardson*, 526 U.S. at 817-18. The Court considered three factors: (1) the language of the statute, (2) the risk of unfairness posed by the statute, and (3) the constitutional limits on defining a crime. The Court held that each individual violation comprising the “continuing series of violations,” was an element on which the jury must unanimously agree. *See id.* at 815, 818-820, 824.

The Court found that the words, “series of violations,” permitted interpretation as either one element or more than one separate element. The statute’s use of the words “violates” and “violations,” however, was most consistent with treating each violation as a separate element, as these are words which the criminal law usually and traditionally entrusts to a jury for determination. *See id.* at 818-19. The Court next found that, given the breadth of the statute—reaching approximately ninety drug offenses—treating violations simply as alternative means aggravated the risk of unfairness because it would permit “a jury to avoid discussion of the specific factual details of each violation,” and “cover up wide disagreement among jurors about just what the defendant did, or did not,

do.” *Id.* at 819. Moreover, treating the violations as simply means would increase the risk that the jury would fail to focus on the specific factual detail, “simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.” *Id.*

Relying on *Schad*, the Court concluded that, where the definition of an offense risks serious unfairness and lacks support in history or tradition, the federal constitution limits a State’s power to define crimes in ways which would permit a jury to convict while disagreeing about the means. The Court found no suggestion that Congress intended to test those limits with the continuing criminal enterprise statute. See *id.* at 820. For all these reasons, the Court found that the continuing criminal enterprise statute created a number of elements with its use of the phrase “series of violations.” See *id.* at 817-18.

This Court, therefore, under *Richardson*, *Schad*, and *Blakely* should re-evaluate whether a “pattern of child abuse,” instead of the underlying incidents that comprise the pattern, can be considered to be one of the elements of child abuse murder.

**C. Because a Pattern of Child Abuse Exists Only if Underlying Predicate Offenses Have Been Proved and Shown to be Linked, the State Must Prove at Least Two Underlying Offenses Beyond a Reasonable Doubt.**

Under *Kelbel*, the element of “past pattern of child abuse” must be proved beyond a reasonable doubt. *Kelbel*, 648 N.W.2d at 699. The element of “past pattern of child abuse” has two parts: (1) past pattern; and (2) child abuse. Although this Court has clarified that “pattern,” must be proved beyond a reasonable doubt, it needs to clarify that “child abuse,” needs also to be proved beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358 (1970).

As this Court has ruled, a jury need not unanimously agree on which two prior incidents of child abuse the defendant has committed, as long as the jury unanimously agrees that the pattern (two or more incidents) has been proved beyond a reasonable doubt. *Kelbel*, 648 N.W.2d 690. This Court, however, needs to further clarify that a jury must find that at least two of the underlying, past acts of child abuse have been proved beyond a reasonable doubt, even if the jurors do not agree on which two have been proved. On appeal, this Court's review would then extend to determining whether, as a matter of law, any two of the proposed underlying incidents of child abuse, viewed in a light most favorable to the state, are supported by proof beyond a reasonable doubt. To rule otherwise would be to require a finding beyond a reasonable doubt of an abstract concept termed "pattern" but not require that the facts comprising and proving the pattern be proved. An element of a statute that must be found to be true beyond a reasonable doubt cannot be based upon unproved facts. The two past acts of child abuse that comprise the pattern are not alternative means of committing a pattern – they are the pattern.

As an element, pattern merely refers to the concept that a series of offenses or incidents have a linking principle. In this case, the linking principle is that the acts are done to a particular child to hurt the child. Although a jury may not need to unanimously agree on which two incidents comprise the pattern, at least two prior incidents must be found to exist by proof beyond a reasonable doubt. Analogously, in another case, this Court explained that offenses underlying a pattern of criminal conduct must be proved by clear and convincing evidence.

The defendant in *Gorman* appealed, arguing that his conduct did not fall within the meaning of "a pattern of criminal conduct." *Id.* at 8. The defendant claimed that the offense for which he was convicted, felony murder, was unrelated to his prior felony convictions, such that no pattern was established. *Id.* In responding to the defendant's argument, we first noted that "pattern" had been defined in previous case law and in other statutes. *Id.* at 8-9 (citing *United States v. Oliver*, 908 F.2d 260, 265-66 (8th Cir. 1990); *State v. Robinson*, 539 N.W.2d 231, 237 (Minn. 1995); Minn. Stat. § 609.902, subd. 6(3)(i) (1994)). We concluded that this precedent revealed a common understanding of "pattern" as "the organizing principle or relationship binding certain things, in this case incidents of criminal conduct, together. Such a 'pattern of criminal conduct' may be demonstrated by proof of criminal conduct similar, but not identical, in motive, purpose, results, participants, victims or other shared characteristics." *Gorman*, 546 N.W.2d at 9. In addition, we held that a pattern of criminal conduct "may be demonstrated by reference to past felony or gross misdemeanor convictions or by proof, through clear and convincing evidence, of prior, uncharged acts of criminal conduct, where such acts are similar to the present offense in motive, purpose, results, participants, victims or other characteristics." *Id.*

*State v. Henderson*, 706 N.W.2d 758, 761 (Minn. 2005) (citing *State v. Gorman*, 546 N.W.2d 5, (Minn. 1996)). Significantly, this Court in *Henderson* did not absolve the state from its burden of proof to prove the offenses underlying the statutory element of "past pattern of criminal conduct." To have done so would have been to allow the state to admit unsupported allegations without any burden of proof and to have allowed juries to find a pattern based on no proof or insufficient evidence.

*Henderson* confirmed that a pattern of criminal conduct requires proof of the underlying acts by clear and convincing evidence, not just proof of an abstract element called "pattern." Accordingly, a pattern of past child abuse must require proof beyond a reasonable doubt of at least two prior acts of child abuse, not just proof of an abstract element called "pattern."

**D. The Element Of “Pattern Of Child Abuse” Cannot Be Proved Where None Of The Underlying Incidents Were Proved Beyond a Reasonable Doubt.**

Although the ruling in *Kelbel* was a negative answer to a defendant’s challenge that the State should be required to prove beyond a reasonable doubt each incident comprising the pattern, the *Kelbel* court’s ruling did not remove the State’s burden of proving beyond a reasonable doubt that at least two or more of the alleged incidents occurred. *See State v. Grube*, 531 N.W.2d 484, 491 (Minn. 1995) (“a lone act, under any reasonable definition of the word ‘pattern,’ does not and cannot constitute a pattern”).

In effect, the *Kelbel* court held only that there need not be proof of juror unanimity as to which incidents constituted the pattern. Under *Kelbel*, if some but not all the alleged incidents comprising the pattern have been proved beyond a reasonable doubt, a guilty verdict need not be examined as to whether jurors disagree as to which incidents were proved. To otherwise interpret *Kelbel* would mean that the State can prove a pattern beyond a reasonable doubt even if none or only one of the underlying incidents have been established beyond a reasonable doubt – a violation of the fundamental legal principle requiring proof beyond a reasonable doubt. *Winship*, 397 U.S. 358; *Grube*, 531 N.W.2d 484.

This Court’s prior rulings imply that at least two prior acts must be proved beyond a reasonable doubt. In *Manley*, this Court noted that proof beyond a reasonable doubt is not required only “as to each act of the past pattern” because to require otherwise would “create an unnecessarily heavy burden on the state.” *Manley*, 664 N.W.2d at 282 (citation omitted). The *Manley* court did not absolve the state of proving any predicate

beyond a reasonable doubt. To do so, would have allowed the State to merely allege, without even a good faith basis, prior incidents and argue that the jury could use unproved incidents as the basis to find a pattern.

This Court's reasoning in *Manley* was that the "past pattern" element referred to the "means of committing the underlying offense and not the offense itself." *Manley*, 664 N.W.2d at 282 (citation omitted). In a typical criminal statute, a jury need not agree on the means of how the offense was committed. For example, the jury need not agree as to whether a defendant illegally entered a building through the door or window, if proof beyond a reasonable doubt of illegal entry existed. The jury does have to unanimously agree that it was proved beyond a reasonable doubt that the defendant illegally entered. The jury cannot do so unless either one or both of the alternative means of committing the crime has been proved beyond a reasonable doubt. Thus, there should exist sufficient evidence to support either alternative theory beyond a reasonable doubt. If not, the charge should be dismissed in a motion for judgment of acquittal or on appeal for insufficiency of the evidence

Thus, in *Sanchez*, this Court conducted a review of the record to determine if at least two prior incidents of domestic abuse had been proved sufficiently, despite that the jury had returned a verdict of guilty on domestic abuse murder, indicating it had found the "past pattern" element to have been proved beyond a reasonable doubt. In fact, not only did this Court review the sufficiency of the evidence to determine that at least two prior acts of domestic abuse had occurred, this Court reviewed the evidence to determine whether these prior incidents formed a pattern. Thus, this Court implicitly recognized the

two-part nature of the “past pattern of abuse” element in statutes such as the domestic abuse murder statute and the child abuse murder statute.

In order to determine whether a reasonable jury could have found a past pattern of domestic abuse, it is necessary to carefully examine the evidence presented regarding the abuse and the nature of appellant and victim's relationship as a whole. It is uncontested that sometime after March of 2001, appellant committed an act of domestic abuse when he choked the victim. Three people witnessed the event, and appellant admitted it to police and at least one other individual. Appellant's own statement that he had slapped the victim on two or three occasions before the night of the murder is also compelling evidence of other incidents of domestic abuse. This statement is buttressed by the testimony of a family member of the victim who testified that appellant told him that he hit the victim sometime after March of 2001. However, the evidence of bruising on the victim's face cannot support the finding of a past pattern of abuse because there is no evidence that appellant caused the bruising.

Nevertheless, other statements of appellant and his actions on the night of the murder reveal that the choking and slapping were not "isolated" incidents but rather part of a "regular way of acting by committing acts of domestic abuse." *Robinson*, 539 N.W.2d at 237. Appellant's statement that "everybody knew how we lived" in response to a line of questioning about whether other people in the mobile home park would tell authorities about other times he hit the victim is telling. That statement makes it clear that the abuse appellant admitted was part of the regular way in which he related to the victim. The meaning of the statement "everybody knew how we lived" is not ambiguous as appellant contends.

*State v. Sanchez-Diaz* 683 N.W.2d 824, 832 -833 (Minn. 2004).

It does not make sense that the evidence would be insufficient as a matter of law unless two prior incidents were proved, but that, at the same time, a jury need not be instructed to find that at least two prior incidents have been proved beyond a reasonable doubt. It is only where alternate means of committing a crime have been proved with sufficient evidence, that the jury need not be required to unanimously agree on the means. Where the underlying acts of a predicate offense need not satisfy any burden of

proof, the pattern element cannot be held to have been proved. The jury cannot find facts based on allegations that, themselves, have not been proved.

As noted by the U.S. Supreme Court in *Andersen v. United States* nearly a century before, in a case where the victim's body was found floating in the ocean with a bullet in it after being thrown from a ship, it is immaterial "whether the vital spark had fled" from the victim when the defendant shot him on the ship or only later from drowning in the ocean. Is it likewise immaterial in *Tillman* "whether the vital spark had fled" during the burglary or during the arson? Surely no confusion exists that the defendant killed the victim; no confusion exists that the defendant committed burglary by entering the house at night; and no confusion exists that the defendant intentionally set fire to the house. In either case, the defendant killed the victim during the course of committing another crime. In this way, the use of alternative aggravating factors resembles the use of alternative mens rea. No confusion exists among the jurors as to the acts in which the defendant engaged. The only question is the defendant's motivation for committing these acts.

Brian M. Morris, *Something Upon Which We Can All Agree: Requiring A Unanimous Jury Verdict in Criminal Cases*. 62 Mont. L. Rev. 1, 13 (Winter 2001). Similarly, in another case, a jury that could not agree on the specific firearm that the defendant illegally possessed nevertheless convicted him of using a firearm during a drug trafficking offense because several guns were found with the defendant and his drugs at the time of his arrest. Sterling P.A. Darling, Jr., *Mitigating the Impressionability of the Incorporeal Mind: Reassessing Unanimity Following the Obstruction of Justice Case of United States v. Arthur Anderson, L.L.P.*, 40 Am. Crim. L. Rev. 1625, 1650-1651 (Fall 2003). The state was not, through use of an alternate means theory, allowed to evade its burden to prove, beyond a reasonable doubt, that guns were found: it was merely not required to have the jury agree on which of the guns was the specific firearm leading to conviction.

This Court's prior rulings have acknowledged that the pattern element is an evidentiary standard for the jury, not an admissibility standard for the district court. Under the felony child abuse murder statute, the district court is not involved in making any threshold determinations as to whether the underlying pattern incidents are admissible, as the court does for Spreigl and relationship evidence (by a clear and convincing standard). *See e.g. State v. Lee*, 645 N.W.2d 459, 466 (Minn. 2002). Consequently, because it is the jury that determines the past pattern, the jury must determine whether the incidents comprising the pattern were proved beyond a reasonable doubt. To require less means that, like here, the prosecutor is essentially relieved from its burden of proof on the facts and the prosecutor is allowed an unprecedented opportunity to admit testimony consisting of rumor, innuendo, allegations, and suspicion, without even a showing of good faith.

In sum, the "past pattern of child abuse" element only releases the State from having to specify which of several alternate means constituted the method of committing the abuse. The State may submit evidence of several alternate means: the jury need not unanimously agree on the means if the requisite number of prior incidents has been proved beyond a reasonable doubt. If the evidence meets the sufficiency test and if the jury has been instructed to find the "pattern" beyond a reasonable doubt, the due process guarantee is met. Here, however, the due process guarantee was not met because the state was allowed to rely upon unproved allegations to meet its burden of proof on the "pattern" element.

**E. At Least Two Prior Incidents Were Not Proved Beyond a Reasonable Doubt.**

Here, because the State did not prove beyond a reasonable doubt at least two prior acts of child abuse and because the jury was not even instructed to find at least two prior acts to have been proved beyond a reasonable doubt, this Court should reverse and remand appellant's conviction for child abuse murder. Under the statute, the prior acts of child abuse had to be either acts of criminal sexual conduct or assault in the fifth degree, as defined by the criminal sexual conduct and assault statutes. T.1127.

One prior act referred to by the prosecutor was an older vaginal abrasion noticed during the autopsy. T.1146. Another incident referred to by the prosecutor was the bruise the infant sustained when she rolled off appellant's chest and hit her head on the wall. T.1149. Although the doctor made a report to the child protection agency about the bruise, even if it was negligent for appellant to fall asleep with the infant on his chest, the bruise did not result from an intentional act by appellant and the act did not constitute assault in the fifth degree.

Similarly, the other incidents noted were not incidents of child abuse, as defined by statute. Appellant's having admitted to doing "rescue breathing" on the infant in the past, was not an act of child abuse. T.1195. Appellant's having admitted that he had shaken the child in the past was, without proof of intent and injury, not an act of child abuse. T.1195. The rash under the infant's chin from the bonnet strap being too tight was not an assault in the fifth degree. T.1151. A sore on the labia from diaper rash is not an assault in the fifth degree. T.1152. Moreover, as stated by defense counsel in closing

argument, there was “no proof he [appellant] intentionally caused any of those [prior] injuries.” T.1186.

**V. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE DEFINITION OF “PATTERN.”**

**A. Standard of Review.**

District courts have "considerable latitude" in the selection of language for jury instructions. *State v. Gray*, 456 N.W.2d 251, 258 (Minn. 1990). But the district courts' considerable latitude notwithstanding, a jury instruction is erroneous if it materially misstates the law. *State v. Kuhnau*, 622 N.W.2d at 552, 556 (Minn. 2001). Furthermore, it is well settled that the court's instructions must define the crime charged. In accordance with this principle, it is desirable for the court to explain the elements of the offense rather than simply to read statutes. *Kuhnau*, 622 N.W.2d at 556 (citations omitted). Thus, in determining whether an instruction materially misstates the law, this Court should review the jury instructions in their entirety to determine whether they fairly and adequately explained the law. *Id.* at 555-56.

Generally, an appellate court will not consider an alleged error in jury instructions unless the instructions have been objected to at trial. *Cross*, 577 N.W.2d at 726. Even in the absence of an objection, the appellate court may, however, review jury instructions if the instructions contain plain error affecting substantial rights or an error of fundamental law. *Crowsbreast*, 629 N.W.2d at 437; *see also State v. Malaski*, 330 N.W.2d 447, 451 (Minn. 1983) (holding that lack of objection does not preclude appellate review when

errors affect substantial rights or involve fundamental law in jury instructions); *see* Minn. R. Crim. P. 26.03, Subd. 18(3), 31.02.

Under the plain error rule, the challenging party should establish the following 1) error, 2) that is plain, and 3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). When a jury instruction is inaccurate or misleading, a new trial is required unless this Court concludes beyond a reasonable doubt that the improper instruction had no significant impact on the verdict. *State v. McCuiston*, 514 N.W.2d 802, 806 (Minn. Ct. App. 1994) (citation omitted).

**B. A Pattern Constitutes at Least Two Prior Incidents.**

“The interests of justice require that the jury have a full understanding of the case and the rules of law applicable to the facts under deliberation.” *Stayberg v. Henderson*, 151 N.W.2d 290, 292 (Minn. 1967) (citation omitted). A jury instruction should define the crime charged by separating it into its various elements. *See State v. Crace*, 289 N.W.2d 54, 59 (Minn. 1979). A court may not give an instruction which misstates the law, is confusing, or misleads the jury. *Malaski*, 330 N.W.2d at 451-3. It is confusing to the jury when an instruction excludes language contained in the charged offense: where the instruction omits an element, the law has not been adequately explained and reversible error has occurred. *Kuhnau*, 622 N.W.2d at 558.

At the close of trial, the court instructed the jury on the elements of Count II. The court’s instruction to the jury consisted of the following:

The statutes of Minnesota provide that whoever, while committing child abuse, when the actor engaged in a past pattern of child abuse upon the child and the child’s death occurs under circumstances manifesting an

extreme indifference to human life, causes the death of a child is guilty of murder in the first degree, child abuse.

The elements of murder in the first degree, child abuse are as follows: First, the death of \_\_\_\_\_ must be proven. Second, \_\_\_\_\_ was a minor. A minor is a person under the age – under the age of 18 years of age. Third, the death of \_\_\_\_\_ occurred when the defendant was committing child abuse. Minnesota statutes define child abuse as criminal sexual conduct in the first degree or assault in the fifth degree or both. Fourth, defendant engaged in a past pattern of child abuse upon \_\_\_\_\_ Fifth, the death of \_\_\_\_\_ occurred under circumstances that manifested an extreme indifference to human life.

T.1127-1128.

The trial court failed to define the meaning of “pattern.” In analyzing the meaning of the term “pattern” in the domestic abuse murder statute, this Court held that pattern has a specific definition. As has already been noted, a lone act of domestic abuse cannot constitute a pattern. *Grube*, 531 N.W.2d at 491.

In *Sanchez-Diaz*, 683 N.W.2d 824, this Court indicated that the jury instruction should indicate that multiple prior acts of domestic abuse were required to establish a "past pattern." The CRIMJIG now provides, for the analogous domestic abuse felony murder statute, that the court instruct the jury with the following meaning of “pattern:” “Third, the defendant engaged in a past pattern of domestic abuse against \_\_\_\_\_ (and) (or) upon another family or household member. A ‘past pattern’ consists of prior acts of domestic abuse which form a reliable sample of observable traits or acts which characterize an individual's behavior. More than one prior act of domestic abuse is required for there to be a past pattern.” 10 Minnesota Practice, CRIMJIG 11.15 (Supp. 2006) (footnotes omitted).

Here, without being instructed on the meaning of “pattern,” the jury could not have known what that term meant. The term, itself, does not obviously imply that at least two other incidents constituting the crimes of either criminal sexual conduct or assault in the fifth degree, in addition to the child abuse incident occurring at the time of death must be proved. Moreover, it was not harmless error for this instruction not to have been provided, even if the State argued in its closing that numerous acts of child abuse had been committed. First, the court instructed the jury not to rely on the arguments of the lawyers. T.1123. Second, as already discussed, there was not more than one past act of child abuse that occurred. *See* Argument, IV.D., *infra*.

**VI. APPELLANT’S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE POLICE FAILED TO ADMINISTER THE MIRANDA WARNINGS AFTER APPELLANT CONFESSED TO SHAKING THE INFANT.**

**A. Standard of Review.**

An appellate court reviews a district court's suppression order de novo. *State v. Wiegand*, 645 N.W.2d 125, 129 (Minn. 2002). A reviewing court should give considerable, but not unlimited, deference to a trial court's fact-specific resolution of such an issue when the proper legal standard is applied. *Minnesota v. Olson*, 495 U.S. 91, 100, 102 (1990).

**B. The Authorities Should Not Manipulate Time of Arrest To Induce an Un-Mirandized Statement.**

There is perhaps no more basic right for an accused than the Fifth Amendment right against self-incrimination. *See* U.S. Constit. amend. V, XIV. So basic is this right that once an individual is taken into custody or otherwise deprived of his freedom by the

authorities and is subjected to questioning, the privilege against self-incrimination is deemed jeopardized and procedural safeguards must be employed to protect the privilege. Prior to any custodial questioning, and after an arrest, officers are required to inform the accused of his rights, including his right to remain silent and his right to consult an attorney. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *see also Dickerson v. United States*, 530 U.S. 428 (2000) (Miranda warnings held to be constitutionally based). The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it has demonstrated the use of these procedural safeguards or other similar safeguards to secure the privilege against self-incrimination. *Id.*

A person is in custody when the circumstances would indicate to a reasonable person that his liberty has been restrained to the degree commonly associated with a formal arrest. *State v. Champion*, 533 N.W.2d 40 (Minn. 1995); *State v. Rosse*, 478 N.W.2d 482, 484 (Minn. 1991) (citation omitted). Factors indicating that a person is in custody are the following: location at which the questioning occurs; the officer's informing the person he is the prime suspect; restraint of the person's freedom; the person making an incriminating statement; the presence of multiple officers; a show of police authority. *State v. Staats*, 658 N.W.2d 207, 211 (Minn. 2003). Proper constitutional analysis of custodial interrogation should focus primarily on the perspective of the suspect, rather than the subjective intent of the police. *State v. Edrozo*, 578 N.W.2d 719, 725 (Minn. 1998).

In *Champion*, the Minnesota Supreme Court held that although not custodial at the outset, the defendant's interrogation became custodial in nature after he admitted choking the victim. *State v. Champion*, 533 N.W.2d 40, 43-44 (Minn. 1995). The standard is whether the questioning, express or implied, is "reasonably likely to elicit an incriminating response from the suspect." *State v. Tibiatowski*, 590 N.W.2d 305, 309 (Minn. 1999) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

In *G.S.P.*, the court held that the nature of the interrogation reinforced the conclusion that the defendant had been subject to custodial interrogation. Where the defendant was repeatedly asked whether he had something "inappropriate in his backpack," told he would have to deal with law enforcement, was explained the process by which he would likely be charged, was questioned about his intentions and gang involvement, the questions were reasonably likely to elicit an incriminating response. A Miranda warning must be given by "all that use the power of the state to elicit criminally incriminating responses." *In re G.S.P.* 610 N.W.2d 651, 657-659 (Minn. Ct. App. 2000).

Here, appellant was initially questioned at the police station on the morning of the day of the charged offense. *See* Exhibit 1A. Appellant was informed that a tape recording of his statement was being made. Exh. 1A at 5. He admitted that about a month prior he had lost his temper "just a tad" and "shook her \_\_\_\_\_ a little bit." Exh. 1A at 23. The second statement was made on the same day but about three hours later. *See* Exh. 102A. Appellant had been transported from the police station back to his house and was being interviewed in his bedroom. *Id.*

During that interview, appellant admitted that he had shaken the baby violently about five times. O.52.<sup>2</sup> Agent Hodapp asked appellant to repeat the story. After appellant had done so, Hodapp told appellant he was a suspect and informed him of his Miranda warnings. Appellant was asked to again repeat his story, which he did. Then, appellant was arrested. Court Order filed Feb. 23, 2005 at 2. At the omnibus hearing, Hodapp admitted that once appellant admitted to shaking the infant, Hodapp assumed that the autopsy would reveal evidence of traumatic brain injury. O.63. Hodapp conceded that once appellant had admitted that he shook the infant, appellant was not going to be able to voluntarily leave or go free. O.71. He conceded that even though he told appellant that he did not know if appellant was going to be arrested, Hodapp did know that appellant was going to be arrested. O.73.

Just as the defendant in *Champion* would have known he was not free to leave after confessing, appellant would not have believed he was free to go after confessing that he had shaken the infant. Appellant should have been provided the Miranda warnings after he admitted the act that the authorities believed had caused the infant's death.

Further, any statements appellant made, after he was administered the Miranda warnings, should have been suppressed. Where police use the tactic of taking a statement without providing Miranda and then read Miranda to immunize a subsequent statement from suppression, the subsequent statement is similarly involuntary. *United States v. Aguilar*, 384 F.3d 520 (8th Cir. 2004) (citation omitted).

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<sup>2</sup> "O." refers to the separately paginated transcript of the Omnibus hearing.

## CONCLUSION

Based on the record and the proceedings, this Court should reverse and dismiss the charge of murder in the first degree (criminal sexual conduct) and remand the proceedings for a new trial on the remaining charges.

1-13-06

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