

A05-1386

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

John Russell Heden,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

- I. In a first-degree murder prosecution for causing the death of another while committing first-degree criminal sexual conduct with force or violence does proof that the criminal sexual conduct inflicted physical pain or injury satisfy the “force or violence” element of the statute?

The trial court was not asked to rule and did not rule.

State v. Gutierrez, 667 N.W.2d 426 (Minn. 2003)

Minn. Stat. § 609.02, subd. 7 (2004)

Minn. Stat. § 609.341, subd. 3 (2004)

- II. Was the evidence legally sufficient to prove that appellant caused his infant daughter’s death while committing first-degree criminal sexual conduct?

The trial court was not asked to rule and did not rule.

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

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

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

- III. Is the statute mandating appellant’s life sentence without possibility of release constitutional?

The trial court was not asked to rule and did not rule.

State v. Gutierrez, 667 N.W.2d 426 (Minn. 2003)

- IV. Did the trial court commit plain error by instructing the jury that Minn. Stat. § 609.185(a)(5) requires the state to prove a pattern of child abuse beyond a reasonable doubt but does not require proof beyond a reasonable doubt as to each of the acts constituting the pattern?

The trial court was not asked to rule and did not rule.

State v. Kelbel, 648 N.W. 2d 690 (Minn. 2002)

State v. Cross, 577 N.W.2d 721 (Minn. 1998)

- V. Was the evidence of a past pattern of child abuse legally sufficient to support appellant's conviction of first-degree, child-abuse murder?

The trial court was not asked to rule and did not rule.

State v. Kelbel, 648 N.W. 2d 690 (Minn. 2002)

- VI. Did the trial court commit plain error in instructing the jury on the "past pattern of child abuse" element of first-degree, child-abuse murder?

The trial court was not asked to rule and did not rule.

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

State v. Griller, 583 N.W.2d 736 (Minn. 1998)

- VII. Did the trial court properly admit appellant's statements to the police prior to his arrest?

The trial court ruled in the affirmative.

State v. Champion, 533 N.W.2d 40 (Minn. 1995)

State v. Hince, 540 N.W.2d 820 (Minn. 1995)

STATEMENT OF FACTS

A. Background

Shawna Heden grew up in Illinois and gave birth to a daughter, F█████ J█████, on November 21, 1997 (T. 730-31).¹ She married appellant on May 31, 2003, after meeting him in an Internet chat room for single parents (*Id.*). Shawna moved to Minnesota in February 2003 and began living with appellant in appellant's rural Pennington County home (T. 732-33). She became pregnant by appellant, and RH was born November 29, 2003 (T. 730, 733).

¹ "T." refers to the trial transcript.

Shortly after RH was born, appellant lost his job at a local Conoco station, and Shawna Heden became the family breadwinner (T. 734-35). In January 2004, Shawna was hired as a breakfast cook at DW's, a restaurant and bar in Goodrich, Minnesota (T. 504-05). It soon became apparent that Shawna could not handle the cook job, and she was reassigned to a cleaning job (T. 504-05, 735-37). Shawna only worked part time (T. 505). The Hedens' finances were inadequate, and they received several forms of public assistance (T. 738).

RH was seen by medical professionals on a number of occasions during her brief life. On December 8, 2003, Shawna Heden brought RH to Inter-County Nursing Service for a newborn check (T. 573, 582-83). Constance Hagen, a registered nurse, conducted the examination (T. 582-83). RH appeared healthy and normal and Hagen saw no injuries. Dr. David Lofgren examined RH again on December 19 (T. 545-46, 550). He also found that RH was normal (T. 551-52). Hagen visited Shawna and RH at their home on December 16 to demonstrate some infant massage techniques (T. 588). Once again, the baby seemed healthy (T. 589-93). Hagen did not see signs of any injuries anywhere on RH's body (T. 592). RH was alert and active and interacted well with her mother (T. 591-92). Hagen and Shawna made plans for Hagen to return on December 29 to provide more infant massage instruction (T. 593).

Shawna Heden spent December 26 and 27, 2003, in the hospital undergoing gallbladder surgery (T. 742-43). During that time, both of her daughters were in appellant's care (T. 745). When Shawna returned home following her surgery, she saw a purple bruise on the side of RH's face extending from her hairline to her jawline (*Id.*).

When Shawna questioned appellant about it, he told her that RH had been lying in bed with him and rolled over into a wall (T. 596, 745-46). Shawna also noticed two scratches on RH's nose but assumed that RH had scratched herself (T. 752).

When Constance Hagen returned to the Heden residence on December 29, she noticed a dark, purple-red bruise on one side of RH's face, extending above and below her eye (T. 595). Shawna said that the bruise occurred while she was in the hospital and RH was in appellant's care and repeated appellant's explanation that RH had been lying on the bed with him and rolled into a wall (T. 595-96). Hagen was skeptical of appellant's explanation because, in her experience, one-month-old babies do not usually roll over (*Id.*). The bruise seemed too large to have been caused by rolling into a wall (*Id.*). Hagen reported RH's bruise to Pennington County Child Protection Services and to Dr. Lofgren, who shared Hagen's opinion that a one-month-old infant would not likely be able to roll over (T. 555-57, 600-01, 613, 617-18).

Melani Reuter, a Pennington County child welfare social worker, visited the Hedens on January 7, 2004 (T. 620-21). Appellant told Reuter that while Shawna was in the hospital for surgery, he had RH in bed with him and the baby rolled over and hit her head on the wall (T. 623, 627). When Reuter questioned whether an infant as young as RH could roll over, Shawna placed RH on the floor to demonstrate that she could, but RH did not roll over in Reuter's presence (T.626).²

² Reuter was also somewhat concerned about the interaction between RH and appellant, who simply held the baby against his leather jacket and smoked (T.627).

Dr. Lofgren saw RH on January 12. Her parents expressed concern about RH repeatedly turning pale (T. 553). Upon examination, however, RH's color was normal and she seemed healthy (T. 553-54, 557). Dr. Lofgren next saw RH for a check-up on February 2 (T. 558). Whoever brought RH in for that visit told the nurse that RH had a rash under her chin possibly from a bonnet strap, and a sore on her labia (T. 559). When Dr. Lofgren examined RH, he noticed a rash on her neck but it was not severe (*Id.*). When he looked at RH's genital area, it was covered with some type of ointment, and he did not actually see any visible sore (T. 560). He did not remove the diaper ointment to examine her more closely (T. 564). Whoever brought RH in for the February 2 two-month check-up again expressed concern about RH becoming pale (T. 561). The doctor examined RH, and her color looked good (T. 562).

RH otherwise appeared normal in the weeks preceding her death. A number of witnesses testified about their observations of RH on December 29, January 7, January 18, February 13, 14 and 15, February 18, 19, or 20, and February 29, mere hours before her death (T.101, 104-09, 111-12, 532, 535-39, 541-42, 599, 626, 647-48, 652-54, 666-68, 672, 677-80). RH appeared normal, happy, alert, and injury-free (*Id.*). She was able to move her arms and legs, responded to the sound of her name, reacted to others, interacted appropriately with her mother and others, and had a healthy appetite (*Id.*).

B. The Circumstances Of RH's Death

On Sunday evening, February 29, Shawna Heden changed RH's diaper shortly before putting her to bed (T. 759). Shawna did not notice any injury on RH's bottom or

any blood on her diaper (T. 759-60). Shawna went to bed herself at 12:30 a.m. on March 1 (T. 762-63). Appellant said he would come to bed later (*Id.*).

When Shawna Heden was awakened by her alarm clock at 4:00 a.m., appellant was on the computer in the bedroom, and Shawna did not know whether he had ever come to bed at all that night (T. 763-64). Shawna got dressed and drove to work, arriving at DW's at 5:22 a.m. (T. 508, 765).

At 6:40 a.m., appellant called Pennington County 911 and reported that "my baby has stopped breathing" and said that he had tried CPR to revive her unsuccessfully (T. 42, 47, 48; Exhs. 1 and 1A). When first responders Doug and Heidi Horachek arrived at the home a short while later, they saw appellant and RH in the master bedroom with appellant apparently providing CPR to RH while continuing to talk on the telephone with the 911 operator (T. 63-64). The baby was still and showed no signs of life (T. 65). Her skin was blue from lack of oxygen (*Id.*). Heidi Horachek asked appellant how long the baby had been like that, and appellant said, "about a half an hour" (T. 67). Appellant appeared to have blood on his fingers and on his beard around his mouth (T. 65-66). Stains on the sweatpants that appellant was wearing appeared to have resulted from appellant wiping his bloody hands on the lap of his sweatpants (T. 66).

Heidi Horachek took RH into the kitchen, and a number of other first responders soon arrived and began to administer CPR to RH (T. 68, 70-73, 75, 77). As the first responders attempted to revive RH, appellant stood in the living room and smoked a cigarette (T. 71-72). He showed no emotion, even though a number of the first responders were crying as a result of the baby's tragic death (*Id.*).

Paramedic Jeffrey Olson arrived at 7:08 a.m., examined RH, and decided that she was dead (T. 158-60). After calling the hospital emergency room and confirming that any further effort to resuscitate the infant would be futile, Olson told appellant that RH was dead (T. 165). Appellant shrugged his shoulders, said, "shit happens," then paused and said, "unfortunately" (T. 165-66). Appellant was smoking a cigarette and displayed no emotion to Olson (T. 166). Appellant did not ask any questions or make any further remark (*Id.*).

A few minutes later, Heidi Horachek wrapped RH in a blanket and began holding her (T. 127). Heidi Horachek turned to appellant and asked him if he would like to hold RH (T. 128-29, 198, 222). Appellant responded, "I suppose," put his cigarette in his mouth, and held her while ashes from his cigarette fell on the dead infant (T. 128-29, 198, 222-23). Rather than holding the infant closely and hugging her, appellant held her away from his body like "a piece of wood" and showed no emotion (T. 129, 198, 200, 222).

C. Appellant's Statements And Confession

1. Initial statements at scene

The first law enforcement personnel at the scene were Pennington County Deputies Kyle Miller and James Jesme. Appellant told Deputy Miller that when his wife had left for work around 5 or 5:15 a.m., RH was fine and sleeping in her crib (T. 242). Appellant said that around 6:00 a.m. he could no longer sleep and decided to get up and feed the baby (*Id.*). At that time, he noticed that the baby was not moving and had blood on her face (*Id.*). According to appellant, he began to administer CPR for 10 or 15

minutes before calling 911 (*Id.*). Deputy Jesme then contacted the Minnesota Bureau of Criminal Apprehension for assistance (T. 241).

2. Initial statements at law enforcement center

BCA Special Agent Philip Hodapp arrived at the Pennington County Law Enforcement Center on the morning of March 1 to interview appellant and Shawna Heden (T. 807-08). He interviewed them separately in an interview room and tape recorded both interviews (T. 808). He interviewed Shawna Heden first and then interviewed appellant, beginning at 11:17 a.m. (T. 812; Exhs. 101 and 101A).

Appellant told Agent Hodapp that he had been up most of the night and laid down after Shawna left at about 5:00 a.m. (Exh. 101A at 3). At about 5:30 or 5:45, RH cried out for about 30 seconds before stopping (*Id.* at 5). Appellant tossed and turned but could not sleep and got up around 6:00 a.m. to check on RH and change her diaper (*Id.* at 3, 5). RH had no heartbeat and was not breathing (*Id.* at 6). Appellant picked RH up and tapped her on the back as if burping her and may have also pinched her nose, called out her name, and wiggled her a little while she was in the crib (*Id.* at 14). Appellant claimed that he then put a towel down on the carpeted bedroom floor and tried to give her CPR for a total of about 10 minutes before calling 911 (*Id.* at 3-4, 9-11, 15). Appellant said that while RH was lying on the floor, he rolled her over and gave her a tap on her back that might have been too hard, possibly causing the injury to her chin (*Id.* at 16).

When Agent Hodapp asked appellant if he had done anything to the baby as a result of losing his temper because the baby was crying, appellant said that he did not do anything to harm the baby and did not pick her up and shake her (*Id.* at 14, 22).

Appellant admitted, however, that he had lost his temper on Valentine's Day, February 14, and shook RH "a little bit" (*Id.* at 23). He also mentioned performing "rescue breathing" on RH on another occasion (*Id.* at 24).

Agent Hodapp asked appellant's permission to search his residence and also requested a DNA sample and a urine sample (T. 810). Agent Hodapp asked appellant if he would consent to giving up the clothing that he had been wearing that morning; appellant agreed (T. 810-11). Agent Hodapp suggested that they return to appellant's residence, where appellant could change clothes (T. 811).

3. Appellant's statement at his home.

Appellant's half-sister drove appellant and Shawna Heden back to the house and Agent Hodapp drove there separately (T. 812, 818). Agent Hodapp arrived first and met with a number of police officers at the scene, who showed him apparent blood they had found (T. 819). Agent Hodapp also looked at RH's body (*Id.*). These observations prompted Agent Hodapp to seek to re-interview appellant (*Id.*).

While appellant was in the bedroom changing clothes, Agent Hodapp activated his tape recorder and placed it out of sight inside a pocket of his notebook, entered the bedroom, and began to engage appellant in a conversation beginning at 1:58 p.m. on March 1 (T. 819-20; Exhs. 102, 102A). Agent Hodapp told appellant that the police were having a problem with his original account because it did not explain the presence of blood on the floor, on a shirt, on a couple of hangers, and on the bed (Exh. 102A at 1-2). Appellant responded that perhaps he administered chest compressions too hard and caused her nose to bleed (*Id.* at 2). Appellant said he was positive he found RH not

breathing at around 6:00 a.m. because he glanced at his alarm clock and that clock is accurate (*Id.* at 3-4).

Agent Hodapp confronted appellant with the fact that he had told a deputy earlier that morning that the abrasion on RH's chin had come from an accident on a swing (*Id.* at 5). Appellant conceded that he had said that and told Agent Hodapp that after RH made a "fuss" around 5:30 a.m. after Shawna left, he had her on the swing for five or ten minutes (*Id.*). He claimed that it simply did not cross his mind to tell Agent Hodapp about the swing when they talked earlier at the law enforcement center (*Id.*). When Agent Hodapp asked appellant to explain how blood came to be spattered on the floor and deposited on a shirt and on some clothes hangers, appellant said that he had lifted RH from the crib "kind of in a hurry" while blood was coming from her nose (*Id.* at 6).

Appellant admitted that RH's crying had awakened him about 6:00 a.m. (*Id.* at 8). He tried to give her a pacifier but it did not work (*Id.*). He shook her "about five times" (*Id.*). He shook her "too hard" and "pretty violently," and her head "snapped back and forth a few times" (*Id.* at 8-9). Appellant explained that he had been under a lot of personal stress and was extremely frustrated (*Id.* at 9).

At that point Agent Hodapp pretended to turn on the tape recorder and had appellant restate what he had just admitted (*Id.*). Appellant explained that the baby started crying real bad (*Id.* at 10). He tried putting a pacifier in her mouth but that did not work (*Id.*). He then tried to give her a bottle, but she did not want a bottle (*Id.*). Appellant then became fairly frustrated and "shook her" (*Id.*). Her head "swung back a few times," and she stopped breathing (*Id.*).

After having appellant acknowledge that he came to the house to get some new clothes and was not under arrest, Agent Hodapp gave appellant a Miranda advisory, explained that he did so because appellant was now "the focus of investigation," and asked appellant to give "a full statement" (*Id.* at 10-11). Appellant then explained for yet a third time what he had done. He said that when the baby was crying at about 6:00 a.m., he tried giving her a pacifier and a bottle but the baby did not want either (*Id.* at 11). He tried holding her, but that did not help (*Id.*). He admitted that he "probably just blew up and started shaking her" (*Id.*). He estimated that he shook her around five times and that he must have done so "pretty hard" because she began bleeding from her mouth (*Id.*).

Appellant reiterated that he had performed CPR for five or ten minutes and then called 911 (*Id.* at 12). Agent Hodapp then pointed out to appellant that his account still involved a time discrepancy because he did not call 911 until 6:40 (*Id.*). Appellant acknowledged that he got up around 6:00 a.m. and did not call 911 until 40 minutes later (*Id.*).

Appellant also admitted that he had never placed RH in the swing and that she injured her chin when she hit the floor when he set her down (*Id.* at 12, 14). He acknowledged that he put her on the floor "kind of hard" and that the chin injury was from "schmuckin' her to the floor" (*Id.*). Appellant speculated that the blood "up there" happened when he shook RH (*Id.* at 15).

Appellant demonstrated how he shook RH by standing up and using both arms, palms out in front, and moving back and forth (T. 826). Throughout the entire second statement on March 1, appellant never referred to RH by name (*Id.*).

4. Appellant's post-arrest statement on March 2

Agent Hodapp attended RH's autopsy on March 2, 2004, and learned that RH's vagina had been lacerated (T. 339, 831). This prompted the police to seek another statement from appellant about RH's vaginal injuries (T. 832).

BCA agents Steven Hagenah and Paul Gherardi interviewed appellant at the Pennington County jail beginning at 4:02 p.m. on March 2, 2004 (T. 955-56; Exhs. 103 and 103A). After giving appellant Miranda warnings and confronting him with the autopsy finding that RH's vaginal area had been torn, appellant confessed that he had penetrated RH's vagina with his finger (Exhs. 103A at 1-2, 12-13, 15, 19, 25, 30-31). Appellant explained that he had been under stress because he was unemployed and his former employer was attempting to prevent him from receiving unemployment benefits (*Id.* at 6). RH started crying and woke him up (*Id.* at 6, 15). He tried to feed her with a bottle to stop her crying, but that did not work (*Id.* at 5-6, 15). He tried to placate RH with a pacifier, but that did not work either (*Id.* at 5, 15). She just kept "screaming bloody murder" (*Id.* at 6). Appellant said that he then decided to change her diaper (*Id.* at 15). By this point, appellant was quite aggravated (*Id.*). He decided to insert his finger in her vagina to see if that would make the baby stop crying and screaming (*Id.* 12-13, 15). Appellant stated that he inserted his finger probably to the second knuckle three times (*Id.* 13, 25). He noticed that his finger was bloody (*Id.* 13), and wiped it on his sweatpants (*Id.* 17).

According to appellant, RH continued to cry (Exh. 103A at 15). Her continued crying got the "best of [him]," and he started shaking her (*Id.*). Appellant said that she

kept crying and “screaming bloody murder” and he could not take it anymore (*Id.* at 6-7). Appellant said, “The adrenaline just took over and I shook her too hard” (*Id.* at 6).

When one of the agents asked appellant what finger he used to penetrate RH, appellant indicated the middle or index finger of his right hand (*Id.* at 31). Appellant demonstrated how he shook RH, using a doll or teddy bear as a prop (T. 963). He demonstrated how he had held RH in front of him, facing him, and then shook her with his hands underneath her armpits and his thumbs over her chest (*Id.*). Appellant thought that the blood on the coat hangers above RH’s crib by the closet was deposited when he shook her while blood was flowing from her nose (Exh. 103A at 33).

Appellant explained that RH subsequently stopped breathing and he attempted to revive her for the next 30 to 45 minutes before calling 911 (*Id.* at 15-16).

5. Appellant’s admissions to his wife

Following RH’s death, Shawna Heden continued to communicate with appellant (T. 774). When she asked him what had happened, he said that he “snapped” and “wound up shaking” RH and “doing the other charge” (T. 779). With respect to “the other charge,” appellant told Shawna that he “[s]tuck his fingers in on that day” but only “once or twice” (T. 779-80).

In a letter to Shawna from jail on March 6, 2004, appellant wrote:

Something mentally had to happen to me that day, hon, I never imagined I’d do such a thing like that, especially when I don’t like killing or horror movies. You know, hon, it’s just crazy.

(T. 945; Exh. 104B.)

D. Crime-Scene And Forensic Evidence

Investigators detected blood on RH's right hand, left ankle, right mouth area, the perineal region around her genitals, and her external genitalia (T. 890-92). Investigators also identified blood on various articles of clothing that RH was wearing at the time of her death, including four areas on her jumper, two areas on the front of her t-shirt, one area on the back of her t-shirt, and two areas of the front of the diaper taken from her body (T. 892-94).

Blood was also detected on a flannel sheet and pink and white comforter in RH's crib (T. 907-08). DNA profiles obtained from those spots of blood matched RH's DNA profile and did not match appellant or Shawna Heden (T. 908).

A DNA profile from the blood found on appellant's face indicated a mixture of two or more individuals (T. 915-16). The predominant type matched RH with a random-match probability of 1 in 500 billion (T. 916). Shawna Heden could be excluded as a potential contributor to the weaker DNA profile, but appellant could not be excluded (*Id.*).

The clothing taken from appellant on March 1 consisted of a t-shirt, sweatpants, a pair of blue jeans, and a pair of socks (T. 322-24; Exhs. 85-88). The clothing was submitted to the BCA laboratory for scientific testing (T. 322-23). Five areas of appellant's t-shirt tested positive for blood (T. 909-10). A DNA profile extracted from two different areas matched RH with a random-match probability of 1 in 500 billion and did not match appellant or Shawna Heden (T. 910).

Blood was detected in two areas of the blue jeans obtained from appellant, one on the left back pocket and the other just below that pocket (T. 913-14). A DNA profile

from one of the areas of blood matched RH with a random-match probability of 1 in 1.6 billion and did not match appellant or Shawna Heden (T. 914).

One area of blood was found on each of the two socks obtained from appellant (*Id.*). A partial DNA profile obtained from the blood on one of the socks matched RH with a random-match probability of 1 in 47 million and did not match appellant or Shawna Heden (T. 914-15).

Six areas of appellant's sweatpants tested positive for blood (T. 911). One particular area was subjected to DNA testing (T. 912). The DNA profile obtained as a result of that testing matched appellant and did not match RH or Shawna Heden (T. 912-13).

When the police searched appellant's residence on March 1, they found at the foot of the bed in the master bedroom a blue plastic wastebasket full of clothing (T. 296, 299; Exh. 26). Marks on the basket appeared to be from blood having moved downward slightly from the top left to the bottom right (T. 300-02; Exh. 26). Subsequent forensic testing confirmed the presence of blood in two areas on the blue plastic basket (T. 902; Exh. 79). A DNA profile extracted from the blood matched RH with a random-match probability of 1 in 500 billion and did not match appellant or Shawna Heden (T. 903-04).

A gray, terrycloth, blood-stained towel was found along the side of the tub (T. 309). Five areas on the towel subsequently tested positive for the presence of blood (T. 908-09). A DNA profile obtained from the blood matched RH and did not match appellant or Shawna Heden (T. 909).

The police seized a white plastic hanger, a metal hanger, and a black and white flannel shirt hanging in a closet area above RH's crib (T. 318-19, 899, 901, 904). All three items tested positive for the presence of blood (T. 899, 901, 904). DNA profiles obtained from the blood on the metal hanger and black and white flannel shirt matched RH with a random-match probability of 1 in 500 billion and did not match appellant or Shawna Heden (T. 901-02, 904-05). A partial DNA profile obtained from the blood found on the white plastic hanger matched RH and did not match appellant or Shawna Heden (T. 899-901).

The police recovered a baby wipe and several return mailing cards from a yellow trash can in the bedroom (T. 305, 317, 895-96). The baby wipe and one of the three reply cards tested positive for the presence of blood (T. 896).

The police also collected and seized a number of items from a kitchen trash can, including a bloody diaper near the top, several baby wipes, and other paper products (T. 475-77, 898-99). The three baby wipes all tested positive for blood (T. 898). Four of eleven tissues tested positive for blood (*Id.*), and one of three cardboard cylinders tested positive for blood (*Id.*). Subsequent testing confirmed the presence of blood on the diaper (*Id.*). DNA typing was attempted but no results could be obtained (*Id.*).

E. The Autopsy

Ramsey County Medical Examiner Michael McGee performed an autopsy on RH beginning at 11:30 a.m. on March 2, 2004 (T. 339). He concluded that RH's death was a homicide caused by craniocerebral injuries due to, or associated with, shaken infant, due

to or associated with assault, with contributing conditions consisting of injuries to her external genitalia (T. 342-43, 346, 419-20).

After removing the top of RH's skull, Dr. McGee, upon gross examination and manual manipulation, found a fresh-appearing subdural hemorrhage that occurred at the time of the fatal assault (T. 368-69). Dr. McGee explained that if the blood had been there for a significantly longer period of time, it would not have been in a semi-liquid state as he found it, but in a harder state; almost a membrane (T. 369). Dr. McGee also found scattered areas of subarachnoid hemorrhage on the surface of the brain itself, as well as perioptic hemorrhage in both eyes (T. 370, 373-74). Perioptic hemorrhage is typically the result of shaking a baby (T. 374). In Dr. McGee's opinion, RH was killed because of shaking that caused angular acceleration to her brain, causing the brain to twist on itself and hemorrhage (T. 401). RH would not have been able to take six to eight ounces of formula from a baby bottle after the fresh injuries to her brain had been inflicted (T. 402). His examination of her stomach contents was consistent with her having taken a bottle between 10:00 and 12:00 p.m. on February 29 and dying at approximately 7:00 a.m. on March 1 (T. 402-03).

Some of RH's external injuries also confirmed Dr. McGee's conclusions about the manner and cause of death. Specifically, Dr. McGee believed that the circular or oval bruises on the left side of RH's torso and her right upper chest are fingerprint injuries resulting from being held by her shoulders or chest with a thumb pushing into her chest (T. 390). Dr. McGee had previously observed similar bruising in arm pit areas in other

shaken baby cases, although the ones he observed on RH were some of the most pronounced he had ever seen (T. 391).

When Dr. McGee examined microscopic slides of RH's brain tissue, he found evidence of RH's body attempting to repair itself from an older brain injury caused by a previous non-fatal shaking incident (T. 400, 410). Dr. McGee's finding of a prior shaking injury based on the microscopic evidence was consistent with appellant's admission to the police that he had previously shaken RH sometime around February 14, Valentine's Day (T. 411).

Dr. McGee found a v-shaped laceration in RH's vagina 1.1 centimeters or approximately one-half inch in length and five millimeters or approximately one-quarter inch deep (T. 359-60, 391-92). Dr. McGee believed that the vaginal tear was fresh based on the hemorrhage associated with the wound (T. 360, 392). On gross examination, Dr. McGee saw no scab formation, no dried blood, and no evidence of any healing injury (*Id.*).

Based on his training and experience, Dr. McGee believed that the laceration in RH's genital area was caused by some oversized object being placed in her vaginal opening with enough force to overstretch and tear the tissue (T. 363). Dr. McGee was of the opinion that appellant's fingers were of sufficient size to cause the injury (T. 363-64), and that the injury was consistent with the penetration of an adult finger to the second knuckle (T. 417). Dr. McGee testified that the genital tearing resulting from the penetration was painful and that RH reacted to it (T. 365).

Dr. McGee's examination of microscopic slides of tissue from RH's genital area also found evidence of a prior genital injury where RH's body was attempting to repair itself (T. 399). Based upon the microscopic evidence, Dr. McGee believed that the old laceration to RH's vaginal opening occurred at least four days prior to her death and maybe even earlier (T. 405). He believed that it had started to heal but was split apart again on March 1 and started to bleed again (*Id.*).

During the autopsy, Dr. McGee also observed a number of additional injuries: a band-like area of injury underneath RH's chin, and injuries to the left anterior cheek region, to the front of the chin, beneath the right eye, and on another portion of the chin (T. 349). Dr. McGee believed that the circular or oval abrasion at the midline of the undersurface of RH's chin and the band of contused and abraded tissue extending under her chin was fresh and was caused by the collar of the jumper she was wearing (T. 387-88). The circular or oval abrasion under her chin is almost the exact size of the button or snap and matches almost perfectly to the injury on the underside of her chin (T. 388-89). Dr. McGee also noticed that the ridge of the jumper matched the area of abrasion extending out from underneath her chin (T. 389). Dr. McGee concluded that these injuries were caused when someone grabbed RH by the jumper and applied force such that the neckline and the button came into contact with the underneath side of her chin (*Id.*).

Dr. McGee also noticed fresh injuries to RH's nostrils and a crescent-shaped injury left of her nostril (T. 354-55). Dr. McGee thought that the crescent-shaped injuries

to RH's cheeks were due to a fingernail of a larger individual, not the fingernail of a three-month-old infant (T. 352).

During the autopsy, Dr. McGee also found that the superior labial frenulum -- the piece of skin connecting the inner surface of the upper lip to the upper gum -- had been torn (T. 356). Based upon the microscopic evidence, Dr. McGee concluded that this particular injury was older (T. 357). Based upon his training and experience, Dr. McGee believes that this sort of injury to a three-month-old child is caused by direct pressure or impact to the mouth (*Id.*). This sort of tear classically occurs when a child is screaming or crying and an adult forcefully places his or her hand over the child's mouth in an attempt to quiet the crying (*Id.*).

Dr. Lofgren's January 12, 2004, entry in RH's medical record that RH was a perfectly healthy looking baby suggested to Dr. McGee that RH's fatal brain injury had not been inflicted as of that date (T. 414). Based on RH's normal appearance in three photographs taken on January 18, 2004, Dr. McGee did not believe that RH was suffering from a head injury as of that date (T. 413).

Dr. McGee testified that appellant's statement that he had to perform "rescue breathing" when RH had previously stopped breathing was a description of one of the symptoms to be expected from a previous nonfatal brain injury (T. 456). As Dr. McGee explained, absent an obstructed airway, a child would stop breathing only if something had affected the child's normal brain stem function (T. 411).

In summary, Dr. McGee concluded that all of the evidence was consistent with someone having inserted a finger several times up to the second knuckle inside RH's

genital opening between 6:00 and 7:00 a.m. on March 1, 2004, and shaken RH violently five to six times (T. 456-57).

F. Appellant's Defense And The State's Rebuttal

Dr. Janice Ophoven was the only defense witness. Dr. Ophoven believed that a microscopic inspection of RH's brain tissue slides indicated that no fresh brain injury had occurred on the morning of her death and that she had suffered a fatal head injury some months before (T. 1031, 1042, 1051). Dr. Ophoven conceded on cross-examination, however, that she had no reason to doubt Dr. McGee's finding of liquid blood consistent with a fresh subdural hemorrhage, that some of the autopsy microscopic slides confirmed fresh hemorrhage in RH's brain, and that a severe shaking of a child might trigger a fatal event in the presence of a pre-existing injury (T. 1021, 1022, 1041).

Dr. Daniel Davis of the Hennepin County Medical Examiner's Office testified as a rebuttal witness for the state. Based upon his review of the entire autopsy file, Dr. Davis concluded that although there was evidence that RH had suffered a previous subdural hematoma, the autopsy showed an obviously fresh subdural hemorrhage in RH's skull (T. 1078, 1081, 1092).

ARGUMENT

I. IN A FIRST-DEGREE MURDER PROSECUTION FOR CAUSING THE DEATH OF ANOTHER WHILE COMMITTING FIRST-DEGREE CRIMINAL SEXUAL CONDUCT WITH FORCE OR VIOLENCE UNDER MINN. STAT. § 609.185(A)(2), PROOF THAT THE CRIMINAL SEXUAL CONDUCT INFLECTED PHYSICAL PAIN OR INJURY UPON THE VICTIM SATISFIES THE “FORCE OR VIOLENCE” ELEMENT OF THE STATUTE.

Appellant argues that in a first-degree murder prosecution for causing the death of another while committing first-degree criminal sexual conduct with force or violence, the state must prove that the criminal sexual conduct involved some special danger to human life (App. Br. 12-17). This claim is without merit.

The meaning of the “force or violence” element of Minn. Stat. § 609.185(a)(2) is a matter of statutory construction. Statutory construction is a question of law subject to *de novo* review by this Court. *State v. Kelbel*, 648 N.W.2d 690, 699 (Minn. 2002).

When the legislative intent is clearly discernable from plain and unambiguous language, this Court applies the statute’s plain meaning. *Kelbel*, 648 N.W.2d at 701-02; Minn. Stat. § 645.16 (2004). The plain meaning of the statutes at issue here clearly lead to the conclusion that proof that the criminal sexual conduct inflicted physical pain or injury upon the victim satisfies the “force or violence” element of Minn. Stat. § 609.185(a)(2), and that the state need not prove that the criminal sexual conduct involved any special danger to life by the nature of the act itself.

The statute expressly states that whoever causes the death of another while committing first-degree criminal sexual conduct “with force or violence” is guilty of first-degree murder. The statute governing criminal sexual conduct defines “force” to mean

the infliction of “bodily harm.” Minn. Stat. § 609.341, subd. 3 (2004). Minn. Stat. § 609.02, subd. 7 (2004), defines “bodily harm” to mean “physical pain or injury, illness, or any impairment of physical condition.” The plain and unambiguous language of these three statutes, considered together, compels the conclusion that the “force or violence” element of Minn. Stat. § 609.185(a)(2) requires only the infliction of some pain or physical injury, not some special danger to human life.

The same conclusion is supported by this Court’s recent decision in *State v. Gutierrez*, 667 N.W.2d 426 (Minn. 2003). Gutierrez was charged with first-degree murder while committing criminal sexual conduct in violation of Minn. Stat. § 609.185(a)(2). The trial court instructed the jury on the “force or violence” element as follows:

A person acts with force or violence if a person intentionally inflicts or attempts to inflict bodily harm upon another person or intentionally causes fear in the other person of immediate harm or death. Bodily harm means physical pain or injury, illness or any impairment of physical condition.

Id. at 434. The instruction was taken verbatim from the model jury instruction promulgated by the Minnesota District Judges Association, 10 Minn. Practice, CRIMJIG 11.07 (4th ed. 1999), as was the “force or violence” instruction given to appellant’s jury (T. 1126).

Following his conviction, *Gutierrez* claimed on appeal that the instruction was erroneous. This Court rejected the claim on the ground that the instruction correctly stated the law. 667 N.W.2d at 434.

In arguing that “force or violence” element requires an act posing a “special danger to life,” appellant relies on three decisions of this Court and one decision of the court of appeals: *State v. Anderson*, 666 N.W.2d 696 (Minn. 2003); *King v. State*, 649 N.W.2d 149 (Minn. 2002); *State v. Back*, 341 N.W.2d 273 (Minn. 1983); and *State v. Mitchell*, 693 N.W.2d 891 (Minn. Ct. App. 2005). These decisions are inapposite.

One of the defendants in *Back* was convicted of aiding and abetting second-degree, felony murder and sentenced to an upward durational departure. In affirming the upward departure and in explaining why the trial court reasonably believed that defendant’s conduct was significantly more serious than that typically involved in the commission of second-degree, felony murder, this Court observed as follows:

If there is such a thing as a typical felony-murder, it probably is an unintentional killing that occurs in the course of robbery or some other crime against the person. However, as we made clear in *State v. Nunn*, 297 N.W.2d 752 (Minn. 1980), the felony-murder rule can be used even when the underlying felony is a property offense if that offense, as committed, involves special danger to human life.

Id. at 276-77. The foregoing dicta concerned what property crime is sufficient to support a conviction for second-degree, felony murder; it has nothing whatsoever to do with the elements of first-degree murder for causing death while committing first-degree criminal sexual conduct with force or violence.

The defendant in *King* was convicted of first-degree murder for causing the death of a person while committing first-degree criminal sexual conduct with force or violence. He claimed that the statute violated due process because it does not require finding of intent to cause death. 649 N.W.2d at 159. In rejecting this claim, this Court concluded

that due process does not require an intentional killing, at least when the predicate felony is an intentional felony. The opinion's brief dicta about felony murder involving a felony posing some special danger to human life does not suggest that the "force or violence" element of Minn. Stat. § 609.185(a)(2) requires anything more than the intentional infliction of "bodily harm."

Anderson is also inapposite. There, this Court held that the predicate offenses of felon in possession of a firearm and possession of a stolen firearm cannot support a conviction of unintentional, second-degree felony murder because those predicate offenses are not inherently dangerous. Once again, case law concerning what predicate offenses would support a conviction for second-degree, felony murder under Minn. Stat. § 609.19, subd. 2(1), has nothing to do with the statutorily defined "force or violence" element of first-degree murder for causing the death of another while committing first-degree criminal sexual conduct under Minn. Stat. § 609.185(a)(2). If anything, the historical analysis undertaken in *Anderson* squarely refutes appellant's claim in this appeal.

Anderson explained that Minnesota's felony-murder statutes codify the common law felony-murder rule. 666 N.W.2d at 698. The common law felony-murder rule was limited to the common law felonies of homicide, mayhem, rape, arson, robbery, burglary, larceny, prison breach, and rescue of a felon *Id.* at 698, 699 (citations omitted). The statutory crime of first-degree criminal sexual conduct is comparable to the common law felony of rape. Accordingly, given this Court's conclusion in *Anderson* that Minnesota's felony-murder statutes codify the common law felony-murder rule, it follows that the

“force or violence” element of Minn. Stat. § 609.185(a)(2) does not require proof of any special danger to human life any greater than the danger to human life involved in the common law felony of rape.

Finally, in *State v. Mitchell*, 693 N.W.2d 891 (Minn. Ct. App. 2005), the court of appeals held that child neglect or endangerment qualifies as a predicate felony under the second-degree, felony murder statute. *Mitchell* is not only factually distinguishable, its analysis and reasoning affirmatively refute appellant’s claim:

[The Minnesota Supreme Court] has repeatedly noted that crimes against persons -- by their very elements -- more readily pose a special danger to human life than due property crimes. Thus in [*State v. Cole*, 542 N.W.2d 43, 53 (Minn. 1996)], the court wrote that “assault in the second degree itself forms a proper predicate felony to a felony murder conviction -- assault is not a property crime, but a crime against the person.” And in *State v. Mitjans*, 408 N.W.2d 824, 833-34 (Minn. 1987), the court suggested that the special-danger standard only arises in the context of property crimes, writing that “[b]y definition, felony murder involves an unintentional killing resulting from the commission of a crime against the person *or* from the commission of some other felony that, as committed, involves some special danger to human life.”

693 N.W.2d at 891 (emphasis in original).

Appellant also claims that his penetration of RH was not performed with force or violence. This claim is contradicted by the evidence. Appellant’s statement that digital penetration “accomplished in the usual manner” is “an act devoid of any violence” is unsupported by the record (App. Br. 14). Whatever may have been appellant’s prior experience in the “usual manner” of digitally penetrating babies, his penetration of three-month-old RH on the morning of March 1 was unquestionably an act of force or violence. Dr. McGee found a fresh, v-shaped laceration in RH’s vagina approximately one-half

inch long and a quarter of an inch deep and extending almost to her anal opening. Dr. McGee testified on the basis of his training and experience that the laceration was caused by an oversized object placed in her vaginal opening with enough force to overstretch and tear the tissue. Dr. McGee testified that the genital tearing resulting from the penetration was painful and that RH reacted to it. Based upon Dr. McGee's autopsy findings and testimony, appellant's suggestion that his penetration of RH shortly before he shook her to death on the morning of March 1 was not an act of force or violence is preposterous. Appellant's conviction is not, as he claims, based upon "speculation that penetration may have caused discomfort" to RH. Finally, appellant's assertion that RH's "bleeding and discomfort and abrasion were, even under the State's theory and evidence, a result of a prior incident," represents a fundamental mischaracterization of Dr. McGee's testimony. Dr. McGee testified -- consistent with appellant's own admission -- that RH had suffered a previous tearing of her vaginal canal. The fact remains that RH also experienced bleeding and discomfort when appellant penetrated her again shortly before her death.

In summary, in a first-degree murder prosecution for causing the death of another while committing first-degree criminal sexual conduct with force or violence, proof that the criminal sexual conduct inflicted physical pain or injury upon the victim satisfies the "force or violence" element of the statute. Moreover, appellant's factual arguments that

his penetration of RH on the morning of her death did not inflict pain or injury is contradicted by the record.³

II. THE EVIDENCE WAS SUFFICIENT TO PROVE THAT APPELLANT CAUSED HIS INFANT DAUGHTER'S DEATH WHILE COMMITTING FIRST-DEGREE CRIMINAL SEXUAL CONDUCT.

Appellant claims that the evidence was legally insufficient to support the jury's verdict finding him guilty of first-degree murder for causing death while committing first-degree criminal sexual conduct with force or violence (App. Br. 17-19). Specifically, he claims that the criminal sexual conduct was unrelated to the homicide. This claim is without merit.

A defendant who requests a reviewing court to reverse the factual findings of the jury bears a "heavy burden." *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001). Appellate review is limited to determining whether a jury could reasonably have concluded that the defendant was guilty of the offense charged. *Kelbel*, 648 N.W.2d at 703. In doing so, this Court views the evidence in the light most favorable to the verdict and assumes that the jury disbelieved any testimony and conflict with the result it reached. *Id.*

As appellant himself concedes (App. Br. 18), to prove that a defendant caused the death of another while committing criminal sexual conduct, the state need only prove that

³ In this particular portion of his brief, appellant also argues that "force or violence" element of the statute was not satisfied because the state failed to prove that the penetration caused RH's death. He fails to cite any authority, however, for the proposition that the penetration must directly cause the death. As explained *infra* at pp. 28-30, the state need only prove that the criminal sexual conduct and the killing were during the same chain of events or part of a single, continuous transaction.

the criminal sexual conduct and the killing were during the same chain of events or were part of one continuous transaction. See *State v. McBride*, 666 N.W.2d 351, 365-66 (Minn. 2003); *State v. Harris*, 589 N.W.2d 782, 791-92 (Minn. 1999); *State v. Russell*, 503 N.W.2d 110, 113 (Minn. 1993); *State v. Nielson*, 467 N.W.2d 615, 618 (Minn. 1991). Indeed, so long as the criminal sexual conduct and homicide are parts of a single continuous transaction, it does not matter whether the criminal sexual conduct preceded the homicide or vice versa. *McBride*, 666 N.W.2d at 365-66; *Nielson*, 467 N.W.2d at 618; *State v. LaTourelle*, 343 N.W.2d 277 (Minn. 1984).

Here, appellant's actions in sexually penetrating RH and then fatally shaking her to death were unquestionably part of the same chain of events and a single continuous transaction. By his own admissions, all of appellant's actions on the morning of the homicide were motivated by a single objective -- to do whatever it took to remove the irritant of RH's crying. Appellant first sought to mollify RH by changing her diaper, feeding her, and giving her a pacifier. When those innocent tactics did not achieve the desired result, appellant sexually penetrated her and, when that did not work, fatally shook her to death to cause her finally to stop crying.

That the evidence here was sufficient to show the same chain of events or a single continuous course of conduct is well-illustrated by this Court's decision in *McBride*. *McBride* was convicted of first-degree murder while committing criminal sexual conduct in violation of Minn. Stat. § 609.185(a)(2). The evidence showed that he had been alone with his victim for five hours and did not establish when the criminal sexual conduct occurred relative to when the fatal blows were inflicted. *Id.* at 366. *McBride* argued that

such evidence was legally insufficient to prove that the homicide occurred while he was committing criminal sexual conduct. *Id.* at 365-66. This Court rejected McBride's claim, noting that "[w]hile the jury may not have known from the testimony at trial precisely when the various injuries... occurred, a jury may have, nevertheless, reasonably believed that the beating and the criminal sexual conduct occurred as part of 'the same chain of events.'" *Id.* at 366. Here, the evidence of a single continuous chain of events is even more compelling. Appellant was alone with RH for less than an hour and a half, and he admitted that he shook her to death directly after his sexual penetration did not cause her to stop crying. Appellant's own admissions established the requisite time, distance, and causal relationship between the criminal sexual conduct and the fatal assault.

Appellant argues that his conduct in sexually penetrating RH and then shaking her to death did not occur during the same chain of events and were not part of one continuous transaction because the sexual penetration, as he characterizes it, was "an unrelated, prior act" (App. Br. 18-19). Appellant is mistaken. The sexual penetration and the fatal shaking occurred at the same time and place and were committed for the same purpose -- to cause RH to stop crying. Appellant's observation that the penetration was not the "mechanism of death," is irrelevant. Under settled Minnesota law, the criminal sexual conduct need not be the mechanism of death. *See McBride*, 666 N.W.2d at 365-66; *Nielson*, 467 N.W.2d at 618; *LaTourelle*, 343 N.W.2d at 277.

III. THE STATUTE MANDATING APPELLANT'S SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF RELEASE IS CONSTITUTIONAL.

The trial court sentenced appellant under Minn. Stat. § 609.106, subd. 2(1) (2004), which provides for a mandatory life sentence without the possibility of release when a person is convicted of first-degree murder in the course of criminal sexual conduct in violation of Minn. Stat. § 609.185(a)(2).⁴ Appellant claims for the first time on appeal that this sentencing statute is unconstitutional (App. Br. 19-22). Appellant has forfeited his right to raise this constitutional challenge in this appeal because he did not raise it at trial. “The law is clear in Minnesota that the constitutionality of a statute cannot be challenged for the first time on appeal.” *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980).

Appellant’s “cruel or unusual punishment” challenge fails on its merits as well. In *State v. Gutierrez*, 667 N.W.2d 426 (Minn. 2003), this Court specifically rejected the very same constitutional claim.

Gutierrez was convicted of first-degree murder while committing or attempting to commit criminal sexual conduct in the first- or second-degree and sentenced to life imprisonment without the possibility of release under Minn. Stat. § 609.106, subd. 2(1). He claimed that his sentence constituted cruel or unusual punishment in violation of Art. I, § 5, of the Minnesota Constitution. In rejecting this claim, this Court reasoned as follows:

⁴ Minn. Stat. § 609.106, subd. 2 was amended in 2005 to provide that *all* forms of first-degree murder are punishable by a mandatory life sentence without the possibility of release. *See* 2005 Minn. Laws, ch. 136, art. 17, § 9.

In general, to determine whether a sentence is unconstitutional, the court focuses on whether the punishment is proportional to the crime. . . . Because statutes are presumed constitutional, the defendant bears a heavy burden and is required to show that “our culture and laws emphatically and well nigh universally reject” the sentence the defendant is claiming is cruel or unusual. . . .

Minnesota has a long tradition of classifying murder while committing criminal sexual conduct in the first or second degree as first-degree murder. *See* Minn. Stat. § 609.185(2) (1963). Since 1989, this crime has been classified as a “heinous crime,” which is punishable by the imposition of a mandatory life sentence without the possibility of release. *See* Minn. Stat. § 609.184 (1989), *recodified at* Minn. Stat. § 609.106 (1998). While making a number of arguments in support of his challenge to his sentence, Gutierrez offers no factual support that would allow this court to conclude that “our culture and laws emphatically and well nigh universally reject” incarceration for life without the possibility of release as a legislatively mandated sentence for murders committed during the commission of criminal sexual conduct in the first or second degree.

667 N.W.2d at 438 (citations omitted). The present case warrants the same conclusion. Appellant offers no factual support that would allow this Court to conclude that “our culture and laws emphatically and well nigh universally reject” incarceration for life without the possibility of release as a legislatively mandated sentence for murder committed during the commission of first-degree criminal sexual conduct.

Appellant’s alternative appeal to this Court’s supervisory powers is unconvincing. It is the exclusive province of the legislature to specify the appropriate penalty or range of penalties. *State v. Dietz*, 264 Minn. 551, 555, 119 N.W.2d 833, 835 (1963). This Court has never exercised its supervisory powers to invade the province of the legislature in determining the appropriate penalty for a given crime and certainly should not do so in this case.

IV. IN A FIRST-DEGREE MURDER PROSECUTION FOR CAUSING THE DEATH OF A MINOR WHILE COMMITTING CHILD ABUSE WHEN THE PERPETRATOR HAS ENGAGED IN A PAST PATTERN OF CHILD ABUSE UNDER MINN. STAT. § 609.185(A)(5), THE STATE NEED NOT PROVE BEYOND A REASONABLE DOUBT EACH OF THE ACTS CONSTITUTING A PAST PATTERN OF CHILD ABUSE.

Appellant claims that the trial court erroneously instructed the jury only to find whether a past pattern of child abuse had been proved beyond a reasonable doubt, thus permitting the jury to find him guilty without proof beyond a reasonable doubt as to each of the acts constituting the past pattern (App. Br. 23-27). Because appellant was sentenced on his conviction of first-degree murder for causing the death of another while committing first-degree criminal sexual conduct with force or violence, this Court need not reach this claim or any of appellant's other claims concerning his first-degree, child abuse murder conviction. In any event, this Court recent decision in *Kelbel* demonstrates that his claim is without merit.

After being convicted of first-degree, child-abuse murder, *Kelbel* asserted -- as does appellant -- that the district court violated his due process rights by not instructing the jury that each incident of abuse that comprises the past pattern of child abuse must be proven beyond a reasonable doubt. 648 N.W.2d at 699. This Court rejected the claim, reasoning as follows:

In [*State v.*] *Cross*, [577 N.W.2d 721 (Minn. 1998)], we rejected the argument that each underlying act offered as evidence of "past pattern of domestic abuse" is a separate element of the crime of domestic abuse homicide, requiring proof beyond a reasonable doubt as to each underlying act of abuse. . . . We said that such an argument "ignores the plain language of the statute." . . . Thus, we concluded that the state need not prove each of the alleged underlying acts beyond a reasonable doubt as long as the state has proven sufficient acts to establish, beyond a reasonable

doubt a pattern of such acts of domestic abuse. . . . While the plain language of the statute supported our conclusion, we also pointed out that in the absence of clear statutory direction, requiring proof beyond a reasonable doubt as to each of the acts constituting a “past pattern of domestic abuse” would “create an unnecessarily heavy burden on the state” in light of the fact that domestic abuse offenses are “among the most unreported crimes in America.”

Id. at 699-700.

* * *

Here, for the same reasons as *Cross*, we conclude that the plain language of section 609.185(5) does not require proof beyond a reasonable doubt as to each of the acts constituting a “past pattern of child abuse.” Thus, section 609.185(5) requires that the state establish, beyond a reasonable doubt, the pattern of abuse. Although the jurors may disagree about which particular acts make up the pattern, they must agree that the state has proven a pattern beyond a reasonable doubt.

Id. at 702. *See also State v. Manley*, 664 N.W.2d 275, 281-83 (Minn. 2003) (specifically holding that the plain language of Minnesota’s domestic abuse murder statute does not require proof beyond a reasonable doubt of each of the acts constituting a past pattern of domestic abuse).

Appellant acknowledges that *Kelbel* is dispositive but argues that it should be overruled in light of *Blakely v. Washington*, 542 U.S. 296 (2004); *Schad v. Arizona*, 501 U.S. 624 (1991); and *Richardson v. United States*, 526 U.S. 813 (1999). None of these decisions suggests that *Kelbel* was wrongly decided.

Blakely held that the Sixth Amendment requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum or the presumptive sentence must be submitted to a jury, and proved beyond a reasonable doubt. For purposes of the Sixth Amendment, however, the “fact” that must be proved beyond a

reasonable doubt is “a past pattern of child abuse,” not every prior instance of child abuse that comprises the pattern. For example, in a prosecution for first-degree, premeditated murder, the state might introduce evidence of numerous specific acts for the purpose of convincing the jury beyond a reasonable doubt that the killing was performed with premeditation. The state might offer evidence that the defendant had a motive, that the killing was planned, that the defendant armed himself in advance, that the defendant traveled to confront his victim, and that the fatal attack involved multiple shots or blows. In such a case, the Sixth Amendment would not require the jury to find all these specific facts beyond a reasonable doubt. The jury would need only find the ultimate fact that the defendant acted with premeditation.

Kelbel is also completely consistent with *Schad v. Arizona*. There, the United States Supreme Court affirmed the first-degree murder conviction of a defendant who had been found guilty under instructions that did not require the jurors to agree whether the defendant was guilty of premeditated murder or felony murder. Justice Souter’s plurality opinion reasoned that due process does not require that jurors reach agreement upon a single means of commission of a crime or on the preliminary factual issues underlying the verdict. 501 U.S. at 632-33. Justice Scalia, writing separately, noted the long-standing general rule that “when a single crime can be committed in various ways, jurors need not agree upon the mode of commission.” 501 U.S. at 649 (citations omitted).

Finally, the United States Supreme Court’s decision in *Richardson* likewise fails to provide any basis for overruling *Kelbel*. Indeed, this Court undertook a lengthy and detailed analysis of *Richardson* in *Kelbel*, 648 N.W.2d at 700-03, and concluded that

“[e]ven if we did apply the rules of statutory construction specified in *Richardson*, as Kelbel urges us to do, we would reach the same conclusion.” *Id.* at 703.

V. THE EVIDENCE WAS CLEARLY SUFFICIENT TO CONVICT APPELLANT OF FIRST-DEGREE MURDER BASED ON A PAST PATTERN OF CHILD ABUSE.

Appellant claims that the evidence was legally insufficient to prove the “past pattern of child abuse” element of first-degree, child-abuse murder (App. Br. 22-36). This claim is without merit.

For purposes of the first-degree, child-abuse murder statute, “child abuse” includes first-degree criminal sexual conduct and fifth-degree assault. *See* Minn. Stat. § 609.185(b) (2004). Fifth-degree assault is committed by the intentional infliction or attempt to inflict bodily harm -- bodily harm meaning physical pain or injury, illness, or any impairment of a person’s physical condition. *See* Minn. Stat. §§ 609.02, subds. 7, 10, 609.224 (2004). Viewing the evidence in the light most favorable to the state and presuming that the jury believed the state’s witnesses, the jury could have reasonably found the following facts beyond a reasonable doubt:

- Appellant lost his job shortly after RH’s birth and was her primary caretaker while RH’s mother was at work.
- Sometime on December 26 and 27, while RH’s mother was in the hospital undergoing surgery and RH was home alone with appellant, RH suffered an injury to her head that resulted in a purple bruise on the side of her face extending from her hairline to her jawline. Appellant gave a false explanation about how the head injury occurred both to RH’s mother and to a Pennington County child welfare social worker.
- Sometime prior to her death on the morning of March 1, RH’s superior labial frenulum -- the piece of skin connecting the inner surface of the upper lip to the upper gum -- was torn. This sort of an injury to a three-month-old infant may be caused by direct pressure or impact to the mouth

and typically occurs when a child is screaming or crying and an adult forcefully places his or her hand over the child's mouth in an attempt to quiet the crying.

- Appellant previously shook RH approximately two weeks prior to her death. This previous incident caused RH to stop breathing temporarily and resulted in a non-fatal brain injury.
- Four or more days prior to RH's death on the morning of March 1, appellant tore RH's vagina by digitally penetrating her.

The totality of the foregoing facts were clearly sufficient for the jury to find that appellant committed two or more acts of first-degree criminal sexual conduct or fifth-degree assault against RH prior to her death and that those acts represented a past pattern of child abuse. *Cf. Kelbel*, 648 N.W.2d at 704 (holding that evidence that the defendant was alone with the victim when the victim sustained prior injuries was sufficient to prove a past pattern of child abuse).

VI. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN THE MANNER IN WHICH IT INSTRUCTED THE JURY ON THE "PAST PATTERN OF CHILD ABUSE" ELEMENT OF FIRST-DEGREE, CHILD-ABUSE MURDER.

When it instructed the jury on the "past pattern of child abuse" element of first-degree, child-abuse murder, the trial court did not define the term "pattern" (T.1127-28). Although he did not object below, appellant claims that the trial court should have told the jury that a "pattern" of child abuse requires at least two prior instances of child abuse (App. Br. 36-39). Appellant is mistaken.

A defendant who fails to object to jury instructions at trial forfeits his right to object on appeal unless the error was plain error affecting substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The test for plain error has three parts:

(1) there must be “error,” (2) it must be “plain,” and (3) it must “affect substantial rights.” *Id.* at 740. Even if a defendant satisfies the three-part test, the appellate court must decide whether the forfeited error seriously affects the fairness, integrity, or public reputation of judicial proceedings before granting relief. *Id.* at 742.

Further, “If the court’s charge to the jury read as a whole correctly states the law in language that can be understood by the jury, there is no reversible error.” *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998) (citation omitted). In explaining the terms of a statute to a jury, words with commonly understood meaning need not be defined by the court. *Peterson v. State*, 282 N.W.2d 878, 881 (Minn. 1979); *State v. Heinzer*, 347 N.W.2d 535, 537 (Minn. Ct. App. 1984), *rev. denied* (Minn. July 26, 1984). In *State v. Sanchez-Diaz*, 683 N.W.2d 824, 834 (Minn. 2004), this Court held that the term “pattern” is a “commonly understood” term and that a pattern “constitutes more than one act.” Since appellant’s jury was instructed that it must find a “past” pattern, it was adequately instructed that it must find at least two prior acts of child abuse in order to find appellant guilty. Accordingly, there was no error.

Even if it were assumed that the trial court’s instructions on the “past pattern of domestic abuse” element contained some error, it clearly was not “plain error.” “Plain error” is error that is clear or obvious. *Griller*, 583 N.W.2d at 741. The trial court’s instruction on the “past pattern” element of first-degree, child-abuse murder was taken verbatim from the model instruction promulgated by the Minnesota District Judges Association. *See* 10 Minn. Practice, CRIMJIG 11.13 (4th ed. 1999). Appellant fails to cite a single authority holding that this model instruction is erroneous. It is well-settled

that the trial court need not define commonly understood terms for the jury, and *Sanchez-Diaz*, the authority upon which appellant principally relies, held that the “pattern” was such a term. Accordingly, even if the trial court committed error here by not defining the term “pattern,” the error was certainly not “plain” error.

Appellant’s claim also fails the third part of the plain-error test, which requires that the error affect his substantial rights. *Griller*, 583 N.W.2d at 740. “Substantial rights” are affected “if the error was prejudicial and affected the outcome of the case.” *Id.* at 741. Error is “prejudicial” if there is a “reasonable likelihood” that it had a significant effect on the jury’s verdict. *Id.* The defendant bears “a heavy burden” of persuasion to demonstrate prejudice. *Id.* Appellant has failed altogether to satisfy his heavy burden of showing that he was prejudiced by the trial court’s instructions on the “past pattern of child abuse” element of first-degree child-abuse murder. As detailed above, the state produced strong evidence that appellant committed two or more acts of child abuse. Indeed, appellant admitted to one prior act of digital penetration (first-degree criminal sexual conduct) and one prior act of shaking his infant daughter (fifth-degree assault). Moreover, in its closing argument, the state summarized all the evidence of prior acts of child abuse that appellant committed and did not state or suggest that a single prior act would constitute a past pattern. In these circumstances, there is no reasonable likelihood that the court’s failure to provide the jury with a definition of “past pattern” had a significant effect on the jury’s verdict.

VII. THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S STATEMENTS TO THE POLICE PRIOR TO HIS ARREST.

Appellant claims that the trial court erred in denying his motion to suppress his statements to the police prior to his arrest on the afternoon of March 1, 2004, because he was not given the Miranda warning (App. Br. 39-42). Where, as here, the facts are not in dispute, the appellate court independently reviews them and determines, as a matter of law, whether the evidence needs to be suppressed. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). When the applicable law is applied to the undisputed facts concerning the circumstances surrounding appellant's statements, it is clear that the trial court correctly denied his motion to suppress.⁵

An individual must be advised of the right to be free from compulsory self-incrimination and to the assistance of counsel only before "custodial" interrogations. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "In determining whether the circumstances render the suspect 'in custody' necessitating a Miranda warning, the analysis begins with whether the suspect's freedom of action was restrained." *State v. Hince*, 540 N.W.2d 820, 823 (Minn. 1995) (citing *State v. Rosse*, 478 N.W.2d 482, 484 (Minn. 1991)). Where some form of restraint occurs but no arrest is made, the court must view the surrounding circumstances to determine "whether the restraints on the defendant's freedom were comparable to those associated with a formal arrest." *Id.* at

⁵ The trial court's findings of fact, conclusions of law, and order and memorandum are contained in the appendix to respondent's brief.

823 (citing *California v. Beheler*, 463 U.S. 1121, 1125 (1983); *Rosse*, 478 N.W.2d at 484).

The test of whether a person was “in custody” is not whether the interview had coercive aspects to it or whether the investigation has focused upon the interviewee. *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Beckwith v. United States*, 425 U.S. 341 (1976); *State v. Palm*, 299 N.W.2d 740, 741 (Minn. 1980). Rather, the question is “whether a reasonable person under the circumstances would have believed that he or she was in police custody of the degree associated with the formal arrest.” *State v. Champion*, 533 N.W.2d 40, 43 (Minn. 1995); see also *Stansbury v. California*, 511 U.S. 318, 322 (1994); *Hince*, 540 N.W.2d at 823-24.

As set forth below, the circumstances of appellant’s statements at the law enforcement center and his subsequent statements in the bedroom of his home prior to his arrest would not have led a reasonable person to believe that he or she was in police custody of the degree associated with a formal arrest.

A. Appellant Was Not In Custody When He Was Interviewed At The Law Enforcement Center On March 1

Deputy Jesme asked appellant and Shawna Heden if they would come to the law enforcement center for an interview (O. 4).⁶ Neither of them was under arrest, and both of them voluntarily agreed (O. 5). Because the Hedens’ only vehicle was still at the restaurant in Goodrich where Shawna worked, one of the first responders gave them a ride to the law enforcement center in Thief River Falls (O. 6).

⁶ “O.” refers to the transcript of the omnibus hearing.

Agent Hodapp questioned appellant in an interview room at the law enforcement center from 11:17 a.m. to approximately 12:15 p.m. The interview was tape-recorded (O. 32). Agent Hodapp did not place appellant under arrest prior to or during the interview and never told him that he was under arrest (O. 34). Nor was appellant physically restrained in any way (O. 34-35). Appellant agreed to provide a biological sample and permitted Agent Hodapp to take a swab of the apparent blood on his face (O. 39-40). Appellant also agreed to provide a urine sample and to provide law enforcement with the clothing that he had been wearing, which had some apparent blood on it (O. 35-36, 43). When the interview ended, appellant's sister was in the lobby and volunteered to give appellant and Shawna Heden a ride home so that they could change out of the clothing they had agreed to turn over (O. 45).

Based on all of the foregoing circumstances, appellant clearly was not in custody at any point during his voluntary interview at the law enforcement center.

First, as noted in *State v. Shoen*, 578 N.W.2d 708, 717 (Minn. 1998), a person who called 911 for assistance because a family member had died in an accident "would expect to talk with the police about what had happened." At the time of appellant's statement provided at the law enforcement center, the police had little information about what had happened to RH other than she had been pronounced dead and appellant had called for assistance because he found her not breathing.

Second, "[t]he mere fact that the interrogation occurs at a police station does not require determination that the questioning was custodial in nature." *State v. Sirvio*, 579 N.W.2d 478, 481 (Minn. 1998); see also *California v. Beheler*, 463 U.S. at 1125

(holding that a suspect is not in custody simply because the questioning occurred at the police station or because the person was a prime suspect); *Mathiason*, 429 U.S. at 495 (holding that Miranda warning was not required when a parolee voluntarily submitted to questioning at a state patrol office even though the questioning by the officer occurred in a room with the door closed); *Hince*, 540 N.W.2d at 823-24 (holding that questioning of police chief's son was not custodial even though the chief of police commanded his son come with him to the police station and his son accompanied his father reluctantly); *State v. Marhoun*, 323 N.W.2d 729, 731 (Minn. 1982) (holding that interrogation of defendant at BCA headquarters was not custodial where defendant came there voluntarily knowing that he was under no legal compulsion to do so, just as he had four days earlier at the St. Paul Police Department).

Third, at the end of his statements at the law enforcement center, appellant was free to leave and did leave with his sister to return to his home. One of the factors to consider in determining whether a person is in custody is whether the suspect was placed under arrest at the end of the questioning. *Matter of Welfare of M.E.P.*, 523 N.W.2d 913, 919 (Minn. Ct. App. 1994), *rev. denied*, 528 N.W.2d 240 (Minn. 1995).

Finally, appellant's liberty was not restrained in any way at any point during the interview at the law enforcement center. Nothing about the matter in which the interview was conducted or the circumstances under which it was conducted would have led a reasonable person in appellant's position to believe that he or she was in custody. Accordingly, appellant's motion with regard to the initial interview at the law enforcement center was properly denied.

B. Appellant Was Not In Custody When He Was Interviewed At His Home On The Afternoon Of March 1

After the interview at the law enforcement center, Agent Hodapp drove separately to appellant's home to meet with the other investigators there (O. 45). At that time, he did not intend to conduct any further interview of appellant that day (*Id.*).

Agent Hodapp arrived at appellant's home before the Hedens and learned from other law enforcement agents that several blood spots and blood splatters had been observed around the crib in the bedroom and that some bloody items had been found in the trash (O. 46). These findings prompted Agent Hodapp to try to talk to appellant again (O. 47). Agent Hodapp surreptitiously turned on his digital tape recorder, placed it out of sight in his notebook, and went into the bedroom where appellant was changing his clothes (O. 48-50).⁷ Agent Hodapp explained to appellant that there were discrepancies between what the police were finding at the scene and what appellant had said earlier at the law enforcement center (O. 49). Agent Hodapp did not threaten appellant or physically restrain him in any way (O. 50).

Appellant then began to provide a different account of what had happened that morning (O. 51). He explained that the apparent blood on the floor was caused by his efforts to revive RH with CPR on the floor (O. 52). When Agent Hodapp pointed out a blood spot on clothing hanging over the crib, appellant admitted that he had violently

⁷ The consent of one party is all that is required under Minnesota law to electronically record a conversation. *See State v. Bellfield*, 275 N.W.2d 577 (Minn. 1978); Minn. Stat. § 626A.02, subd. 2(c) (2004).

shaken the baby five times and that that might explain the blood splatters in the higher areas above the crib (O. 52-53).

At that juncture, Agent Hodapp told appellant that he wanted to turn on his recorder and get another statement from him (O. 52). He produced his recorder, which was already on, and pretended to turn it on (*Id.*). Agent Hodapp then had appellant repeat what he had said earlier about shaking the infant (O. 53). Agent Hodapp also asked appellant if he thought he was under arrest, and appellant said, "no" (*Id.*).

Agent Hodapp then permitted appellant to go to the bathroom (O. 53-54). Upon his return to the bedroom, Agent Hodapp told him that he had become the focus of the investigation and gave him a Miranda card and orally explained his Miranda rights (O. 54-55). Appellant asked if he was going to be arrested, and Agent Hodapp said that he was not sure (O. 55). Agent Hodapp confirmed that appellant was willing to talk further about what happened that morning, and appellant did so (O. 55-56).⁸

The interview in the bedroom began at 1:58 p.m. and concluded at 2:25 p.m. (O. 56-57). Agent Hodapp then spoke with Deputy Kyle Miller and BCA Special Agent Gary Peterson about what appellant had disclosed and the officers decided that they should arrest appellant (O. 59-60). Deputy Miller then placed appellant under arrest and handcuffed him (O. 60).

⁸ In *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601 (2004), the United States Supreme Court held that police agencies may not adopt and carry out a question-first protocol for suspects who are known to be in custody. The Minnesota Bureau of Criminal Apprehension does not have any such protocol (O. 74-75).

Agent Hodapp did not tell appellant he was under arrest at any point during the interview and appellant had no reason to think he was under arrest at any point during the interview (O. 60-61).

Agent Hodapp never detected any sign that appellant was under the influence of alcohol or any drug on March 1 (O. 43). Appellant's urine sample tested negative for alcohol or controlled substances (O. 43-44).

During the interview, appellant disclosed that he had had previous experiences with the criminal justice system (O. 61-62). Specifically, he indicated to Agent Hodapp that he had previously been in jail for criminal sexual assault, and that he had a previous felony conviction and also made reference to a drug paraphernalia charge (O. 62).

Based on the foregoing circumstances, the district court properly concluded that appellant's voluntary statements in the bedroom of his home were not custodial.

During the interview, he was never subjected to any of the normal conditions associated with a formal arrest, such as handcuffing, being locked in a room, or being told that he was under arrest. If the questioning by the police "is non-custodial at the outset and the police do not change any of the circumstances of the interrogation during the course of the interrogation, they should be free to continue to ask questions after the suspect makes a significant incriminating statement without first stopping and giving the suspect a Miranda warning, *provided* that a reasonable person under the circumstances would not believe that he or she was in police custody of the degree associated with a formal arrest." *Champion*, 533 N.W.2d at 43 (emphasis in original) (citing *Rosse*, 478 N.W.2d at 484).

As noted in *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004):

Stansbury explained that “the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. *Id.* at 323, 114 S. Ct. 1526. Courts must examine “all of the circumstances surrounding the interrogation” and determine “how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.” *Id.* at 322, 325, 114 S. Ct. 1526 (internal quotation marks and alteration omitted).

Thus, even if Agent Hodapp had decided to arrest appellant after he had admitted on tape that he had violently shaken his child, a “policeman’s unarticulated plan has no bearing on the question whether a suspect was ‘in custody’ at a particular time.” *Id.* at 662 (citation omitted).

The facts that appellant was not told he was under arrest, that he was not restrained in any way, that Agent Hodapp made no threats or promises to him, that appellant made no effort to leave, and that Agent Hodapp did not tell appellant he was not free to leave, all support the district court’s finding that the interrogation was non-custodial. *Sirvio*, 579 N.W.2d at 481.

In the instant case, appellant was questioned in his own home. This Court has upheld the admission of numerous Miranda-free, in-home interrogations of suspects not in custody. *See Palm*, 299 N.W.2d at 741-42; *State v. Bekkerus*, 297 N.W.2d 136 (Minn. 1980); *State v. Carlson*, 267 N.W.2d 170 (Minn. 1978); and *State v. Ousley*, 254 N.W.2d 73 (Minn. 1977).

Significantly, even appellant did not believe he was in custody up through the time he had confessed, despite knowing that he was being tape recorded. It was only once he

was told that he was going to be advised of his Miranda rights that he questioned whether he was under arrest. Even at that time, he was not told he was under arrest but was rather advised of his rights. He knowingly and voluntarily waived his Miranda rights and continued to provide information.

In citing this Court's decision in *Champion*, appellant argues that an interrogation automatically becomes custodial once the interviewee confesses (App. Br. 41). *Champion* stands for no such proposition, and this is clearly not the law. In *Champion*, the court of appeals appeared to have adopted a "bright line rule" that any reasonable person would believe that he or she was in custody after confessing to a murder. 533 N.W.2d at 43. Although this Court affirmed the decision of the court of appeals, it explicitly disavowed the court of appeals' "bright line rule." *Id.* ("Case law, however, does not support that rule"). This Court noted that the totality of the circumstances must be considered in determining whether a reasonable person would believe that he or she was in police custody of the degree associated with a formal arrest:

The ultimate issue for the trial court to decide in this case was whether a reasonable person, having just confessed that he attempted to suffocate the victim, would, under *all* the circumstances, believe he or she was in police custody of the degree associated with a formal arrest.

Id. (emphasis in original).

Finally, if this Court were to find that appellant was in custody and suppressed the initial portion of the statement, the post-Miranda portion should be admitted. *See Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285 (1985) (holding that failure to give Miranda warning prior to incriminating statement during custodial interview did not bar

admission of subsequent confession, even though defendant not told that his prior statement could not be used against him).

In summary, because neither the one-hour statement at the law enforcement center nor the half-hour statement at appellant's home was custodial, appellant was not entitled to a Miranda warning. Nevertheless, in overabundance of question, Agent Hodapp did advise appellant of his Miranda rights during the second interview at appellant's home, and appellant knowingly and voluntarily waived them and proceeded to confess again. For these reasons, the district court properly denied appellant's motion to suppress.

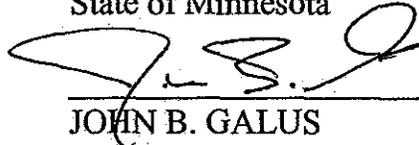
CONCLUSION

Respondent respectfully requests that appellant's conviction be affirmed.

Dated: February 17, 2006

Respectfully submitted,

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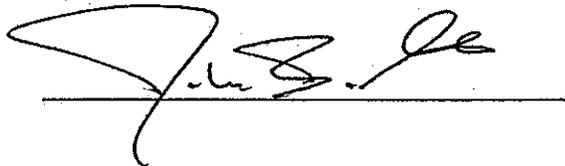
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CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 13,916 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2002, the word processing system used to prepare this Brief.



A handwritten signature in cursive script, appearing to read "J. S. Je", is written above a solid horizontal line.