A05-1747

STATE OF MINNESOTA

IN SUPREME COURT

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State of Minnesota,

Respondent,

vs.

Eric Maurice Wright,

Appellant.

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# APPELLANT'S BRIEF


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A05-1747

STATE OF MINNESOTA

IN SUPREME COURT

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State of Minnesota,

Respondent,

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Eric Maurice Wright,

Appellant.

---

## PROCEDURAL HISTORY

1. **October 27, 2004** A Stearns County grand jury returned an indictment charging appellant Eric Maurice Wright with first-degree premeditated murder, first-degree murder while committing a robbery, two counts of first-degree murder while committing a kidnapping, and second-degree murder. See Minn. Stat. § § 609.185, subd. (a)(1); 609.185, subd. (a)(3); 609.19, subd. 1(1); 609.106, subd. 1(a)(2) & 1(b); 609.106, subd. 2(2), (3); 609. 107 (2004).

2. **May 22 to June 2, 2005** Wright was tried by a jury before the Honorable Bernard E. Boland. The jury found him guilty on all counts.

3. **June 2, 2005** Judge Boland sentenced Wright to life without the possibility of release for first-degree premeditated murder.

4. **September 1, 2005** Wright filed a notice of appeal from the judgment of conviction.

## STATEMENT OF THE CASE

On October 27, 2004, a Stearns County grand jury returned an indictment charging appellant Eric Maurice Wright with first-degree premeditated murder, first-degree murder while committing a robbery, two counts of first-degree murder while committing a kidnapping, and second-degree murder. See Minn. Stat. § § 609.185, subd. (a)(1); 609.185, subd. (a)(3); 609.19, subd. 1(1); 609.106, subd. 1(a)(2) & 1(b); 609.106, subd. 2(2), (3); 609. 107 (2004).

Wright was tried by a jury and found guilty on all counts, the Honorable Bernard E. Boland presiding. At sentencing, Judge Boland concluded that Wright had been previously convicted of a heinous crime and sentenced him to life without the possibility of release.

Wright now appeals. He asserts that he was deprived of a fair trial by the cumulative effect of the jury hearing inadmissible other-act evidence to show he was the perpetrator and the prosecutor's disparaging remarks attacking his defense, character and credibility. He also argues that the evidence was insufficient to sustain his convictions for murder during the course of a kidnapping and challenges the imposition of a sentence that does not afford him the possibility of release.

## LEGAL ISSUES

II. Did the trial court commit reversible error by admitting evidence of Wright's first-degree assault conviction when it was dissimilar to the charged offenses, the state did not need the evidence to prove identity and it was highly prejudicial?

*Ruling below:* The trial court admitted the evidence over defense objection.

*Apposite authority:* State v. Washington, 693 N.W.2d 195 (Minn. 2005); State v. Asfeld, 662 N.W.2d 534 (Minn. 2003); State v. Shannon, 583 N.W.2d 579 (Minn. 1998); State v. Cogshell, 538 N.W.2d 120 (Minn. 1995); State v. LeCompote, 99 F.3d 274 (8th Cir. 1999)

II. Did the prosecutor's misconduct in arguing Wright lied and by belittling his defenses so infringe on Wright's right to a fair trial that he is entitled to a new one?

*Ruling below:* The defense did not object, and the trial court did not rule on this issue.

*Apposite authority:* State v. MacLennan, 702 N.W.2d 219 (Minn. 2005); State v. Hunt, 615 N.W.2d 294 (Minn. 2000); State v. Porter, 526 N.W.2d 359 (Minn. 1995); State v. Ture, 353 N.W.2d 502 (Minn. 1984)

III. Did the cumulative effect of the erroneous admission of prior-assault evidence and prosecutorial misconduct deprive Wright of a fair trial?

*Ruling below*: The trial court did not address this issue.

*Apposite authority:* State v. Litzau, 650 N.W.2d 177 (Minn. 2002); State v. Williams, 525 N.W.2d 538 (Minn. 1995)

IV. Must four of Wright's convictions be vacated because he may only be formally adjudicated guilty of, at most, one count of first-degree murder?

*Ruling below:* The trial court entered judgment for each of the 5 counts.

*Apposite authority:* State v. Earl, 702 N.W.2d 711(Minn. 2005); State v. Johnson, 616 N.W.2d 720 (Minn. 2000); Minn. Stat. § 609.04 (2002)

V. Where the grand jury did not determine whether there was probable cause that Wright had a prior conviction for a heinous crime, and the trial court, rather than a jury, made the requisite findings under the heinous crime statute, did the court violate the federal constitution by sentencing Wright to life imprisonment with no opportunity for release?

*Ruling below*: The trial court sentenced Wright to life without possibility of release.

*Apposite Authority:* State v. Earl, 702 N.W.2d 711 (Minn. 2005); State v. Leake, 699 N.W.2d 312 (Minn. 2005); State v. Smith, 669 N.W.2d 19 (Minn. 2003)

## STATEMENT OF FACTS

### The Offense

On March 25, 2004, appellant Eric Wright requested that someone check on his girlfriend's father, 82-year-old R[redacted] W[redacted] because he believed W[redacted] may have been stabbed. (T. 1201; Ex. 65 at 15-17). W[redacted] was found dead in the basement of his home in Elrosa, lying face down with his hands tied behind his back. (T. 1057, 1065-66, 1084-85). An autopsy showed four stab wounds on his upper abdomen, three on his lower back and four incise wounds to his neck. (T. 1457-64). The medical examiner concluded that W[redacted] was the victim of a homicide by slashes to his neck causing asphyxiation. (T. 1664).

A Stearns County grand jury returned an indictment charging Wright with first-degree premeditated murder, first-degree murder while committing a robbery, two counts of first-degree murder while committing a kidnapping, and second-degree murder. See Minn. Stat. § § 609.185, subd. (a)(1); 609.185, subd. (a)(3); 609.19, subd. 1(1); 609.106, subd. 1(a)(2) & 1(b); 609.106, subd. 2(2), (3); 609. 107 (2004). The grand jury did not determine whether there was probable cause that Wright had a prior conviction for a heinous crime.

### Wright's Jury Trial

At trial, the state presented evidence of Wright's actions during the day before and day of W[redacted]'s death. Its theory was that Wright went to W[redacted]'s house alone to get money to buy drugs, and when W[redacted] refused to give it to him, Wright tied him up and

killed him. (T. 1582-83, 1589-90, 1596, 1678-79). In contrast, the defense theory was that one of Wright's companions that night committed the murder, or if it was Wright, he was too intoxicated to have intended W[redacted]'s death. (T. 1621-22, 1663-70).

**The Day Preceding W[redacted]'s Death**

The state's evidence showed that at the time of the offense, Wright had been on a two or three-day crack cocaine and marijuana high. (T. 1221-23; Ex. 63 at 5; Ex. 81 at 9). While he had struggled with substance abuse for years, at this time he was working and in college. (T. 1264-65; Ex. 81 at 3-4). During this substance binge, on March 23 Wright and another man bought a television at Target and exchanged it for crack cocaine in Minneapolis. (T. 1223-26, 1382-84; Ex. 81 at 53).

That evening, Wright and this man went to Wright's home and asked Wright's girlfriend, Mary Jane Wander, to withdraw $250 from Wright's bank account. (T. 1242-49). Though she concluded that Wright was drinking and doing drugs, she withdrew the money from his account for him. (T. 1244-49). Wright bought crack cocaine two more times that night, the last purchase was at midnight. (T.1221-26). The dealer who sold the drugs did not see anyone with Wright. Id. At some point on this night, Wright and the man with whom he had been at Target stole a purse for more money. (Ex. 75 at 3; Ex. 81 at 10).

**The Night of the Homicide**

Sometime after midnight, as he had done on prior occasions, Wright made the almost two hour drive from Minneapolis to Elrosa to borrow money from W[redacted] to buy

more crack cocaine. (Ex. 74 at 4; T. 1402; Ex. 81 at 8, 10). Wright had visited W[redacted] many times during his relationship with Mary Jane, and the two men got along very well. (T. 1233-36; Ex. 81 at 6-7). Wright described W[redacted] as easy going, funny, caring, meticulous and one who had shown him fatherly kindness. (Ex. 73 at 5; Ex. 81 at 7).

According to statements Wright later made to authorities and Mary Jane, he had three other men in the car with him. (Ex. 65 at 17; Ex. 81 at 11-12, 20, 28-29). One was the man with whom he went to Target earlier; Wright could not identify the man by name. (T. Ex. 81 at 13, 29). Authorities later identified him from a Target video as Travis Wright; Travis was not related to appellant Wright. (T. 1260). Wright did not know the names of the other men either; they were all together that night for the sole purpose of doing drugs. (Ex. 74 at 2; Ex. 81 at 28). They had been drinking, smoking marijuana and using crack cocaine. (Ex. 81 at 29-32, 49-50).

W[redacted]'s neighbor, C[redacted] L[redacted], reported hearing a ruckus on the street at about 2:30 a.m. (T. 1335; Ex. 68 at 1). She looked out to see W[redacted] standing at his door. (Ex. 68 at 1-2). She heard an argument among people in the road, and believed W[redacted] must have said something to them. (Ex. 68 at 3-5).

Wright's statements are the only direct evidence presented to the jury regarding what occurred at W[redacted]'s that night. Given that he was high, Wright's recollection was sketchy. (Ex. 81 at 45). His statements indicated that, as was W[redacted]'s practice, he opened the garage door for Wright to pull in his car; Wright told the others to stay down. (Ex. 81 at 11). Wright entered the house alone. (Ex. 81 at 12).

Wright remembered talking to W[redacted] in the living room, and W[redacted] giving him $80 from his wallet. (Ex. 81 at 21, 37). He recalled at some point seeing two of the other men from his car standing in W[redacted]'s kitchen—Travis Wright and a tall, black man. (Ex. 81 at 12, 28-29). The other stayed in the car as requested. (Ex. 81 at 20).

Wright and W[redacted] went down to the basement for Wright to get some alcohol. (Ex. 74 at 3; Ex. 81 at 12-13 ). Wright remembered seeing the tall, black man following them down the basement stairs. (Ex. 81 at 12, 42). Once in the basement, Wright looked through liquor boxes for Captain Morgan. (Ex. 81 at 13). Within five minutes he turned around and about 10 feet away saw the man standing over W[redacted], who was lying on the floor. (Ex. 81 at 13-14, 16, 41). Wright wondered what the man was doing. (Ex. 81 at 15). He had not heard W[redacted] or the man say anything. (Ex. 81 at 16). The man repeatedly said, "let's go." (Ex. 81 at 15). Wright approached W[redacted], saw a knife in his back and pulled it out. (Ex. 81 at 13). He then went back upstairs and saw Travis Wright leaving W[redacted]'s bedroom carrying a piggy bank. (Ex. 81 at 13).

Though Wright did not check on W[redacted] or call for help, Wright remembered being very angry at the assailant. (Ex. 81 at 20-21, 51). The trip back to Minneapolis was also somewhat of a blur. (Ex. 81 at 51). Wright recalled stopping at a gas station where he thought the two men in the backseat robbed someone. (Ex. 81 at 13-14). When they arrived in North Minneapolis, they smoked some more crack cocaine and then the other men left. (Ex. 81 at 14).

**The Day Following the Homicide**

At about 5:30 a.m. on March 25, Wright arrived home. (Ex. 65 at 5; T. 1253). He was wearing the same clothing as when Mary Jane last saw him with Travis Wright. (T.1262). He spoke briefly with Mary Jane before she went to work. (T. 1254). She noticed that Wright was antsy and his hands were shaking. (T. 1254-55).

After Mary Jane went to work, Wright continued to drink and ingest what crack cocaine remained. (Ex. 65 at 5). He called Mary Jane and told her he needed help to overcome his problems with substance abuse. (T. 1255). He was despondent and disappointed in himself for being unable to overcome his addiction. (Ex. 65 at 5-6). As he had done on other occasions after a binge, Wright attempted to commit suicide, this time by carbon monoxide poisoning. (Ex. 65 at 5-6, 21). He awoke in his car. He then borrowed money from neighbors and coworkers to buy more cocaine and alcohol. (Ex. 65 at 8-9; T. 1359-63, 1378, 1221, 1223). After consuming these substances, he sliced his wrists with a box cutter in another attempt to kill himself. (Ex. 65 at 2-4, 9-10). Though he fell asleep, he awoke to find himself driving out of town. (Ex. 65 at 10). According to Mary Jane, it was common for Wright to forget what he said and did after drinking or using drugs. (T. 1265).

Wright kept driving until he arrived in Durand, Wisconsin, where he admitted himself to a hospital. (Ex. 62 at 4; Ex. 65 at 15). He was transferred to a hospital in Eau Claire where he was placed on a 72-hour hold because of his suicide attempts. (Ex. 63 at 4; Ex. 65 at 15). While speaking with a nurse on the psychiatric ward there, he had a

flashback and, for the first time since being at W's house, Wright thought about W (Ex. 74 at 4; Ex. 63 at 5; Ex. 65 at 17). He felt W's presence and saw flashes of himself pulling a knife from his back. (Ex. 63 at 2; Ex. 74 at 4).

Wright asked the nurse to call Mary Jane and request that she check on her father. (Ex. 65 at 17). As a result of this request, W's body was discovered in his basement shortly thereafter. (Ex. 63, T. 1065, 1256-58). When Wright was told that W was dead, he began to sob. (Ex. 64, 65 at 22). When questioned, Wright acknowledged being at W's house earlier that day while on a crack high, pulling a knife from W's back and being angry at the person who had stabbed him. (Ex. 63 at 5; Ex. 65 at 5, 16-17). Wright took full responsibility for causing W's death by bringing the assailant to his home. (T. 1278; Ex. 73 at 1, 5-6; Ex. 74 at 6; Ex. 75 at 1, 5, 8; ex. 76 at 1-2; Ex. 81 at 1, 57, 63).

**Other Evidence the State Uncovered during its Investigation**

In addition to Wright's statements about what occurred that night, the state presented evidence discovered during its investigation. At W's house, authorities discovered that W's body had only one slipper on; the other was found on the living room floor. (T. 1073, 1075). A steak knife from the kitchen with a broken handle was found on W's bed, as was a smear of blood with a DNA profile that matched that of Wright's DNA. (T. 1071-72, 1122, 1126, 1304-5). The broken piece of the knife handle was found in the basement. (T. 1126, 1166-67). A spot of blood that matched the profile of Wright's DNA was also found on the kitchen floor at the top of the basement stairs.

(T. 1076, 1304-5). Authorities determined that the electrical cord on W's hands came from a battery charger. ( T. 1135, 1141). There were no other signs in the house of any struggle between W and an assailant. (T. 1072-73, 1076-77, 1147).

A dusting of various items in the house revealed no identifiable fingerprints. (T. 1103-6; 1120-21, 1128-30, 1134). Nor did authorities find evidence of blood in an examination of W's sinks. (T. 1173-74).

Authorities found four cigarette butts on and near W's driveway. (T. 1212-13). Two were unfiltered Camels, the brand of cigarettes Wright smokes. (T. 1214, 1259). They could not identify the brand of the other two butts. (T. 1214). One of the unfiltered butts had DNA material matching Wright's DNA profile. (T. 1214, 1308-9).

Family members believed a piggy bank and a wallet were missing from W's house, neither of which was ever recovered. (T. 1217, 1227). They were aware of W's habit of paying in cash and keeping small amounts of cash in his bedroom file cabinet. (T. 1061-63, 1237-38, 1412). Authorities found coins, including numerous jars that the family used when playing cards, but no currency at the house. (T. 1219, 1268). Wright knew the location of those jars. (T. 1268). He, like all family members, knew W had his son's liquor in the basement. (T.1235, 1486). One of W's daughters testified that W would never offer her brother's alcohol to anyone. (T. 1486).

Before washing it, Mary Jane gave the authorities the clothing Wright had worn the night of the homicide. (1262-64). DNA analysis revealed none of W[redacted]'s blood on the clothing. (T. 1298, 1314).

At the time the officers took Wright's statements, they checked his hands for cuts. (T. 1425-25). They found none. (T. 1425).

When authorities located Travis Wright three months after the homicide, they seized a jacket matching the one he had worn that night, a hat, and a box with shoes in it. (T. 1301, 1386, 1388). An examination did not uncover W[redacted]'s blood on any of those items. (T. 1301, 1305). Authorities did not obtain a DNA sample from Travis Wright. They were not interested in comparing his DNA with evidence relating to the homicide. (T. 1314-16, 1391-92). Travis Wright refused to speak with the authorities about that night. (T. 1314-16, 1391-92).

Authorities also searched the car appellant Wright was driving that night and dusted it for fingerprints. (T. 1148, 1152). The car was clean, and they found nothing of forensic value. (T. 1155-56).

When conducting W[redacted]'s autopsy, the medical examiner determined that his stab wounds were consistent with having been inflicted by the knife found at the scene. (T. 1457). The stab wounds to the back occurred last. (T. 1465). She also discovered a scrape on the back of W[redacted]'s arm, which occurred within minutes before or after his death. (T. 1470-71). Bruises found on his shoulder, arms, wrist and fist appeared to have happened on the day of his death. (T. 1472-76).

**Presentation of Other-Crime Evidence**

At the close of the state's case, to show identity the prosecutor renewed an earlier motion for admission of evidence of Wright's 1991 first-degree assault conviction related to a rape of a drug companion. (T. 40-46, 1526, 1532-33, 1537). The defense objected on the grounds that the state's case was not weak, the assault was not relevant and its probative value was substantially outweighed by the danger of prejudicing the defense. (See Notice of Motions and Motions in Limine at 2-3). The trial court granted the state's motion and permitted the prosecutor to read the guilty plea transcript relating to that conviction. (T. 1530-32, 1526, 1532-33, 1537).

**Closing Argument, Instructions, Verdict and Sentence**

After presenting this evidence, the state and defense both rested. In his closing argument, the prosecutor argued that Wright's statements were lies and urged the jury not to let Wright "get away with" his not guilty and intoxication defenses. (T. 1598-99, 1600, 1616).

In its final charge, the trial court instructed the jury on voluntary intoxication. (T. 1697). The jury found Wright guilty on all counts. (T. 1703). After finding he had been previously convicted of first-degree assault, the court sentenced him to life without possibility of release. (T. 1706).

## ARGUMENT

## I.

## THE TRIAL COURT DEPRIVED WRIGHT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY ADMITTING EVIDENCE THAT FOURTEEN YEARS EARLIER, WHILE ON DRUGS, WRIGHT REPEATEDLY STABBED A WOMAN IN THE BACK AND NECK DURING AN ARGUMENT.

### A. The trial court's admission of the prior-crime evidence.

Over defense objection, the trial court permitted the state to present evidence of a prior offense committed by Wright. (T. 1530-37). This evidence, commonly referred to as Spreigl evidence, related to an incident occurring in the early morning hours of March 25, 1991, when, while on drugs, Wright beat and raped a woman in Minneapolis. (See March 27, 2001 Complaint; State v. Moorman, 505 N.W.2d 593, 600 (Minn. 1993) (citing State v. Spreigl, 272 Minn. 488, 491, 139 N.W.2d 167,169 (1965)).

According to the complaint relating to that offense, a woman said that she was in bed asleep at her apartment when she heard a knock on the door. (See March 27, 2001 Complaint). Wright identified himself and stated he was bringing her cigarettes from her sister. The woman opened the door halfway, and Wright kicked the door open and said, "B*&?!, I came to rape you and I'm going to kill you." He said that he needed drugs and that he was going to kill her. She told Wright that she did not have any drugs in the house and that he could have the little money that she had. Wright then grabbed her, put his hand over her mouth, and began cutting her. He told her to get on the bed and take off her clothes.

As she began to undress, Wright pulled off her clothing, ordered her to lie on her stomach and put the knife near her rectum as if he were going to cut her there. She began begging Wright not to cut her. He told her to be quiet and grabbed a vase or a statue and began hitting her in the head. Wright then forced anal penetration. When the woman reacted, he beat her over the head again and told her to be still because she made him want to kill her and himself. When she pleaded with him not to kill her, he hit her across the neck with the knife and continued to hit her with the vase or statue.

The victim was able to free herself and hit Wright, but he followed her out of the apartment. He was approaching her with the knife when a neighbor opened the door and let her in. A month later, Wright pleaded guilty to first-degree assault.

Fourteen years later at this trial, the state moved the trial court to admit evidence of the incident to show identity. (T. 40-46; 1526, 1532-33, 1537). The prosecutor argued that because the two offenses were so close in modus operandi, they were relevant to identity. (T. 1533-34, 1536).

Over defense objections that the state's case was not weak, the other crime was not relevant and its probative value was substantially outweighed by the danger of prejudice, the trial court admitted the evidence to show identity or modus operandi. (T. 1530-32, 1526, 1532-33, 1537; Notice of Motions and Motions in Limine at 2-3). The court stated that the state's case on identity was weak because there was no confession, eyewitness or DNA indicating Wright held the knife. (T. 1538). The court reasoned the evidence was critical because it would tip the jury one way or the other. (T. 1538). It

found the evidence was both very probative and very prejudicial. (T. 1539). The incidents were very similar because in both

> the defendant had known the victim for some time, was engaged in a robbery in order to obtain money for drugs, was under the influence of drugs ***following extensive use of drugs. Assaulted the victim, used the knife in the assault and in the commission of the crime, and inflicted lacerations and puncture wounds on the back.

(T. 1539).

The trial court acknowledged that it was on "the outer limit of Spreigl evidence," and twice indicated that it was a close case. (T. 1539). The prosecutor then informed the court that in a close case the evidence must be excluded and asked if the court meant that the state's case was sufficiently weak to admit the evidence. (T. 1539-40). The court agreed with the state's interpretation of its comments, and repeated its belief that, "this is evidence that very well can determine the outcome of this case." (T. 1540). But later, the court reiterated that this was a very close case, on the outer limits of permissible Spreigl evidence, which case law required be excluded. (T. 1541).

Agreeing with both parties that the transcript of Wright's guilty plea to first-degree assault was less graphic and prejudicial than the complaint, the trial court permitted the prosecutor to read the transcript to the jury. (T. 1532, 1541).

> Question: Eric, is it true that on March 25, 1991, you were at [redacted], Apartment 3206, which is in the City of Minneapolis, Hennepin County, State of Minnesota?
>
> Answer: Yes.

Question: And that was an apartment that belonged to a J[redacted] C[redacted]: is that correct?

Answer: Yes.

Question: And J[redacted] C[redacted] is known to you by the name of C[redacted]; is that correct?

Answer: Yes.

Question: And the two of you had known each other a long time, but you hadn't seen her in a while except for the Friday before this incident; is that correct?

Answer: Yes.

Question: All right. And the two of you had some use of drugs during the weekend, but you had used an extensive amount of drugs during the weekend?

Answer: Yes.

Question: And you went over there about 12:30 at night, is that correct, on the date of March 25th, or just after 12:30?

Answer: Yes

Question: You had been over there earlier in the day, but just before this happened, you were over there late in the evening; is that correct?

Answer: Yes.

Question: It was about 12:30, 12:50; is that right?

Answer: Yes.

Question: And the two of you, to the best of your recollection, got into some sort of argument about drugs. You're not quite clear as to what happened, but you do recall hitting her and then having blood all over you and the fact that she was stabbed; is that correct?

Answer: Yes.

Question: And I've shown you medical reports and told you that she did have injuries that constitute great bodily harm; is that correct?

Answer: Yes.

Question: And you have no reason to doubt that?

Answer: No.

Question: In fact, she received some lacerations to her neck, apparently had some puncture wounds on her back. That's what the medical reports state; is that right?

Answer: Yes.

Question: Okay. And you understand that that constitutes First Degree Assault, giving her injuries with a knife causing her great bodily harm; do you understand that?

Answer: Yes.

(T. 1548-50). Before the evidence was presented and in the court's final charge, the court read a cautionary instruction. (T. 1547-48, 1698). The trial court committed reversible error by admitting this evidence.

**B. Standard of Review**

Although trial courts have discretion in deciding evidentiary issues, a reviewing court will overturn an evidentiary decision when the trial court abused its discretion. See State v. Shannon, 583 N.W.2d 579, 585 (Minn. 1998). Furthermore, a court's discretion is limited by a defendant's constitutional right to a fair trial. See, e.g. State v. Litzau, 650 N.W.2d 177, 182 (Minn. 2002); State v. Keeton, 589 N.W.2d 85, 90 (Minn. 1998).

When the trial court's admission of evidence infringes on the defendant's constitutional right to a fair trial, this Court must reverse and remand for a new trial if the verdicts are not surely unattributable to the jury hearing that evidence. Litzau, 650 N.W.2d at 187; Shannon, 583 N.W.2d at 586. The burden is on the appellant to show that the court so erred. State v. Washington, 693 N.W.2d 195, 200 (Minn. 2005).

**C. Requirements for the admission of Spreigl evidence.**

Under Minnesota's rules of evidence, evidence of a defendant's prior crimes, wrongs, or acts is generally inadmissible to prove that the defendant committed the charged crime or acted on the offense date in conformity with his or her character. See Moorman, 505 N.W.2d at 600 (quoting Minn. R. Evid. 404(b)). This rule exists to protect a defendant's right to a fair trial. See State v. Hannuksela, 452 N.W.2d 668, 678 (Minn. 1990). The central concern is that the jury might use the evidence for an improper purpose such as viewing it as showing that the defendant acted in conformity with the propensity to commit bad acts or, given his prior act, that the defendant is a proper candidate for punishment. Washington, 693 N.W.2d at 200-1.

There are exceptions to the rule excluding Spreigl evidence. Hannuksela, 452 N.W.2d at 678. Such evidence is admissible to show, among other things, identity. Id. Even under this exception, there are limitations to admitting the evidence. The state must comply with certain procedural safeguards. See State v. Billstrom, 276 Minn. 174, 178, 149 N.W.2d 281, 284 (1967). The prosecution must: (a) give the defense prior notice of the other act it is offering; (b) at the time of offering the evidence, specify what the

evidence is being offered to prove; and, (c) prove the defendant's participation in the other act by clear and convincing evidence. Id., 276 Minn. at 178-79, 149 N.W.2d at 284-85. In addition, the trial court must: (a) find the evidence of the defendant's guilt to be weak or inadequate and that the evidence offered is relevant and necessary to support the state's burden of proof on that point; and, (b) before admitting the evidence, find that its probative value is not substantially outweighed by its potential for unfair prejudice it could cause. Id.; see also State v. Landin, 472 N.W.2d 854, 859 (Minn. 1991). Finally, both at the time the evidence is received and in the final charge, the court must caution the jury about the limited purpose for which the evidence is received. See Billstrom, 276 Minn. at 179, 149 N.W.2d at 284-85.

If it is a close call as to whether this type of evidence should be admitted at trial, the trial court must give the benefit of the doubt to the defendant and exclude the evidence. See State v. Ness, ___ N.W.2d ____ (Minn. 2006). The trial court here erred by admitting evidence of Wright's prior conviction because it was not relevant to identity, the state's case on identity was not weak, and any probative value the evidence had was substantially outweighed by the danger of prejudicing the jury.

**D. The trial court erred by admitting this evidence because it was not relevant.**

Courts must analyze a prior conviction for relevance and probative value in relation to the precise purpose for which it was admitted. Ness, ___ N.W.2d at ___.

Here, the state had the burden of proving the prior conviction was relevant to identity. [1] The trial court was charged with evaluating whether there was a sufficiently close relationship between the charged offense and the Spreigl offense in time, place and modus operandi to show that Wright committed both offenses. Washington, 693 N.W.2d at 201. But the court failed to consider the time and place factors. (T. 1538-39). The court erred in concluding that the evidence was admissible after evaluating only one of the three relevant factors. Balancing all factors here demonstrates that the evidence should have been excluded.

The prior offense occurred 14 years before the charged crime. The more distance there is in time between acts, to retain relevance there must be greater similarities in place and modus operandi. Id. at 202. Wright's conviction and incarceration for the prior crime lessens the impact of the 14-year time lapse on the evidence's relevance. See id. (stating that concerns about remoteness in time are lessened by a defendant's incarceration and the state having secured a conviction for that act). But even factoring

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[1] While the trial court stated that it was admitting the evidence for identity and modus operandi, the state never requested the evidence be admitted to show modus operandi. (T. 1532-34). The state argued, consistent with this Court's case law, that to be admissible to show identity a prior crime must be similar in modus operandi to the charged offenses. Id.; State v. Bolte, 530 N.W.2d 191, 198 (Minn. 1995) (holding that when deciding the relevance of other-crime evidence pursuant to 404(b), the preferred approached is to focus on the closeness in relationship between the other crime and the charged crime in terms of time, place and modus operandi). The court also indicated that the purpose of arguing modus operandi is to show the evidence is relevant to identity. (T. 1536). As the Eighth Circuit has indicated, modus operandi evidence is merely a subset of evidence offered to prove identity. United States v. Carroll, 207 F.3d 465, 470 (8th

in his incarceration for the assault, four years passed between the two incidents.[2] See id. Thus, the prior offense was not closely related to the crime charged in temporal terms. See State v. Cogshell, 538 N.W.2d 120, 124 (Minn. 1995) (holding that offense committed 15 months earlier "clearly not closely related to the crime charged in temporal terms").

Consequently, to be relevant the assault must be close in place and modus operandi. See, e.g. State v. Angus, 695 N.W.2d 109, 120-22 (Minn. 2005) (holding admission of prior incident occurring within 5 months and two incidents occurring within 1 month of the charged offense in same city was error given they were not sufficiently similar in modus operandi); State v. Asfeld, 662 N.W.2d 534, 540-43 (Minn. 2003) (holding admission of two prior incidents, occurring 2 and 4 years before the charged offense, was error given they were not sufficiently similar in modus operandi); Shannon, 583 N.W.2d at 585 (holding admission of prior incident occurring 5 months before the charged offense was error despite occurring in the same neighborhood because the modus operandi was not similar).

The locations of the incidents also weigh against admission. The two incidents occurred in different cities located two hours apart. (T. 1402).

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Cir.2000) (analyzing prior conviction to determine whether it is relevant to prove "identity through modus operandi").

[2] The sentencing transcript indicates a 180-month prison sentence was imposed on the assault conviction. August 6, 1991, Sentencing Transcript at 6. Assuming Wright served the required two-thirds of that sentence, he was incarcerated for 120 months, or 10 years during the fourteen-year gap between these incidents.

While the trial court did evaluate the similarities in modus operandi, it misapplied the law. Regarding modus operandi, the greater the similarity between the incidents, the greater the relevance the Spreigl evidence has. State v. Rainer, 411 N.W.2d 490, 497 (Minn. 1987). The prior offense need not be identical in every way to the charged offense. Washington, 693 N.W.2d at 203. But because the evidence here was admitted to prove identity, the state had the burden of showing a much greater degree of similarity between the prior and charged crimes than it would have if offering the evidence to show the defendant's state of mind. See, e.g. Ness, ___ N.W.2d at ____ (holding evidence offered to show common scheme or plan must have a "marked similarity" in modus operandi to the charged offense, not merely a substantial similarity as needed when admitting the evidence under other exceptions); State v. LeCompote, 99 F.3d 274, 278 (8th Cir. 1999) (holding that where other crime evidence is offered to prove identity rather than state of mind, the government must show a much greater degree of similarity between the prior and charged crimes). See also McCormick on Evidence, § 190(8), at 668 (5th ed. 1999).

The Eighth Circuit, whose rule on other-crimes evidence is one of inclusion rather than exclusion as in Minnesota, has developed a rule controlling the admission of other-crime evidence to prove identity. It requires the trial court make a threshold determination that, based solely on the evidence comparing the past and charged offenses, a reasonable juror could conclude that the same person committed both crimes

based on the distinctiveness of the facts. United States v. Carroll, 207 F.3d 465, 469 (8th Cir. 2000).

Both the Spreigl and charged offenses here show Wright, while on drugs, violently cutting the victims on the back and neck with a knife. But the similarities end there. The state alleged that, to obtain money to buy drugs, Wright kidnapped an elderly man, and slit his throat after stabbing him in the stomach. After slitting W[redacted]'s throat, he then stabbed him in the back. In contrast, in the prior incident, Wright entered a fellow drug companion's apartment stating he was going to rape and kill her. He then stated that he wanted drugs. Despite her assertions that she had neither money nor drugs, he repeatedly hit her over the head with an object and cut her in the back and neck area to subdue her to accomplish the rape. Because of these significant differences in modus operandi, the similarities are not enough to overcome the time and place factors in the relevance balancing test. Compare Asfeld, 662 N.W.2d at 543 (holding admission of two prior unprovoked violent assaults, occurring 2 and 4 years before the charged offense, were not sufficiently similar given the victims were not as vulnerable as the infant in the charged offense); Shannon, 583 N.W.2d at 585 (holding two shootings with handguns in same neighborhood within five months were not sufficiently similar because the motives were different: only one was a gang-related drug robbery); with, Washington, 693 N.W.2d at 202-3 (holding that concerns about passage of time are outweighed by modus operandi being strikingly similar: victims were same age, suffered same type of sexual assault, were forced to cover-up the offenses in same manner, were photographed in provocative

poses and threatened with physical harm if they disclosed the offense). See also United States v. Carroll, 207 F.3d at 470 (8th Cir. 2000) (holding that state did not meet heightened burden for admission of evidence to show identity where robberies were too generic given that wearing a nylon mask, carrying a gun and vaulting over a counter to put money in bag are merely common characteristics of bank robberies not distinguished by unique costumes or a distinctive use of a weapon, the banks were not in same neighborhood, and time spent incarcerated did not sufficiently undercut the significance of the ten-year span between the two).

The trial court repeatedly acknowledged that whether the evidence should be admitted was a close call. (T. 1538-39, 1541). Balancing the lapse of time and the very distinct locations of the incidents against any similarity in modus operandi tips the balance toward exclusion, particularly given the requirement that any doubt must be resolved in favor of the defendant. Bolte, 530 N.W.2d at 197.

**E. The trial court erred by admitting the Spreigl evidence because its probative value was substantially outweighed by the danger of unfairly prejudicing the defense.**

Even if the evidence was sufficiently relevant, it was not admissible because its probative value was substantially outweighed by its danger of unfair prejudice. See Washington, 693 N.W.2d at 203 (citing Minn. R. Evid. 403). In balancing the probative value against potential prejudice, courts must consider the strength of the state's case on identity. Angus, 695 N.W.2d at 119-120. The evidence is admissible only if it is necessary to support the state's burden of proof because its evidence of the defendant's

identity is weak or inadequate. Id. at 119. The evidence may be necessary despite sufficient other evidence to go to the jury if it is unclear whether the jury will believe the state's evidence bearing on identity. Id. at 120.

It was undisputed that Wright went to W[redacted]'s house on crack cocaine to get money from W[redacted]. While blood found near the knife used to kill W[redacted] matched Wright's DNA, there was no physical evidence of anyone else being present in W[redacted]'s house. Because it is not unclear whether the jury would have believed the state's DNA evidence bearing on identity, the state did not show it "needed" evidence of Wright's prior crime to prove identity. See Angus, 695 N.W.2d at 121 (given the risk of the jury using Spreigl evidence for an improper purpose, it should be reserved for cases where the evidence is sufficiently crucial to the state's case). The only evidence questioning the state's evidence on identity was statements made by Wright, which the state introduced at trial, that another unidentified man slit W[redacted]'s throat.

While having virtually no probative value, the evidence proffered by the state had great potential to unfairly prejudice Wright. Prejudice results when the trial court creates an unfair advantage for the state by admitting evidence that has the capacity to persuade by illegitimate means. State v. Townsend, 546 N.W.2d 292, 296 (Minn. 1996). Other-crime evidence is inherently prejudicial in that it may influence the jury to convict to punish the defendant for his character and past misdeeds. State v. Strommen, 648 N.W.2d 681, 687 (Minn. 2002).

The evidence here did just that. There is the distinct likelihood that jury concluded that because of Wright's propensity to commit violent crimes, he committed the offenses for which he was on trial. At the very least, the jury may have perceived Wright as a threat who needed to be removed from the community.

And the manner in which the evidence was presented increased the prejudice to the defense. In order to remove prejudicial information about Wright's rape and assault of the woman in the prior incident, the guilty plea transcript rather than the complaint was presented to the jury. See Washington, 693 N.W.2d at 204 (holding trial court's must take great care to limit Spreigl evidence to minimize the potential for unfair prejudice by excluding information not needed or relevant). Removing this information also made the offenses appear more similar, which on its face would appear to further reduce the probability of the jury misusing the evidence. Cf. Cogshell, 538 N.W.2d at 124 (holding that when the prior crime is very similar to the charged offenses, the chances increase that the evidence in fact legitimately helps to identify the defendant as the perpetrator of the charged offense).

But by making the prior incident look much more similar to the charged offense than it was, the trial court actually increased the danger of prejudice. The jury heard that Wright thought he had an argument with the victim about drugs and then inflicted lacerations to her neck and puncture wounds to her back, instead of hearing what actually happened: that Wright inflicted the wounds with a vase and knife while forcibly raping her. (See Complaint). Because the events, as presented, seemed very similar to the

charged crime, the Spreigl evidence appeared more probative than it was. See Cogshell, 538 N.W.2d at 124 (holding that the closer relationship between the two offenses the greater the probative value). The court misled the jury by presenting the prior offense as being practically a "signature" crime. Consequently, the manner in which the evidence was presented here actually increased the capacity of it persuading the jury by illegitimate means. See Cogshell, 538 N.W.2d at 124 (stating that the less similar the offenses are, the greater is the possibility that the jury will use the evidence improperly--for example, the jury might conclude that defendant is the type of person who would commit the charged crime and therefore it should not doubt the state's other evidence, however weak, identifying the defendant as the person who committed the offense).

In sum, even if this evidence had some probative value, there was simply no way to present it to sufficiently reduce the danger of prejudicing the defense. If the rape had been included, it would have increased the likelihood that the jury would be swayed to convict because it viewed Wright as a bad person deserving of punishment. On the other hand, by excluding the information the court increased the likelihood that the jury would erroneously conclude that Wright had committed an almost identical crime once so he must have done it again. Given that either scenario inherently involved a great risk of the evidence persuading by illegitimate means, the trial court erred by not excluding it.

### F. The admission of the Spreigl evidence was not harmless beyond a reasonable doubt.

The erroneous admission of other-crime evidence requires reversal unless the error was harmless beyond a reasonable doubt. Shannon, 583 N.W.2d at 585-86. The state, no doubt, will argue that the error in this case was harmless because the evidence of guilt was strong. The correct inquiry, however, is "not whether a jury would have convicted the defendant without the error, but 'whether the error reasonably could have impacted [sic] upon the jury's decision.'" Id. at 586 (citation omitted). While overwhelming evidence is often a very important factor in determining whether erroneous admission of evidence impacted the verdict, it is only one factor to be considered. State v. Al-Naseer, 690 N.W.2d 744 (Minn. 2005). Reviewing courts also consider, "the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defendant." Id.

Any doubt the jury had about the state's case against Wright based on his and L[redacted]'s statements that others were present that night surely vanished once the jury learned Wright had pleaded guilty to a prior violent crime which was presented as being almost identical to the charged offense. While the prosecutor did not highlight the evidence in his closing, there was simply no way for the defense to counter the impact of that highly persuasive evidence once it was admitted. The trial court acknowledged the significance of the evidence to the verdict when, at the time of admission, it stated that the evidence was critical because it would tip the jury one way or the other. (T. 1538).

Because evidence of the prior assault tipped the jury to convict, the verdict was not surely unattributable to it being admitted. Thus, Wright's convictions must be reversed and this matter remanded for a new trial. Compare Shannon, 583 N.W.2d at 586 (reversing where the trial court erred in admitting evidence of a prior shooting even though the state presented an eyewitness's identification of defendant, albeit weak, and a gang member's testimony that defendant confessed); with Asfeld, 662 N.W.2d at 544 (holding verdicts surely unattributable to admission of Spreigl evidence relating to assaults against others where evidence properly admitted showed that defendant had previously shaken and caused severe injuries to the victim).

## II.

## THE PROSECUTOR'S MISCONDUCT DEPRIVED WRIGHT OF A FAIR TRIAL WHERE, THROUGHOUT THE STATE'S OPENING STATEMENT AND CLOSING ARGUMENT, HE IMPROPERLY INFLAMED THE JURY'S PASSIONS AGAINST WRIGHT BY ATTACKING WRIGHT'S CHARACTER AND CREDIBILITY AND BY DISPARAGING WRIGHT'S DEFENSE.

A prosecuting attorney has a constitutional duty to ensure that a criminal defendant receives a fair trial. State v. Haney, 222 Minn. 124, 125, 23 N.W.2d 369, 370 (1946). Accordingly, rather than seek a conviction at any price, a prosecutor must guard the "rights of the accused" as well as "enforce the rights of the public." State v. Salitros, 499 N.W.2d 815, 817 (Minn. 1993).

> [While a prosecutor] may strike hard blows, he [or she] is not at liberty to strike foul ones. It is as much his [or her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

State v. Silvers, 40 N.W.2d 630, 632 (1950) (citation omitted). To secure a verdict here, the prosecutor abandoned his role as a minister of justice and used improper methods to persuade the jury to disbelieve Wright's statements and discount his defense.

### A. The prosecutor committed misconduct when he inflamed the jury's prejudices, negatively commented on Wright's credibility and attacked his character by referring to Wright as a liar.

"An advocate may indeed point to circumstances which cast doubt upon a witness' veracity or which corroborate his or her testimony, but he may not throw onto the scales of credibility the weight of his own personal opinion." State v. Ture, 353 N.W.2d 502, 516 (Minn. 1984). Nor may a prosecutor inflame the jury's passions and prejudices

against the defendant or impermissibly attack his character. See State v. Porter, 526 N.W.2d 359, 363 (Minn. 1995); State v. Washington, 521 N.W.2d 35, 39 (Minn. 1994). Here, the prosecutor violated all of these obligations by repeatedly characterizing Wright as a liar.

The state's overall theme at trial was that the physical and testimonial evidence told a different story than Wright's statements concerning what occurred at W[redacted]'s house that night; one was the truth and one was a lie. (T. 1015-16, 1610). In both his opening remarks and closing argument, the prosecutor asked the jury to determine which was true and which was a lie. (T. 1016, 1042-43, 1598, 1610). The prosecutor ended his closing by asserting that in comparing the two accounts, the jury could "only reach one conclusion: That the defendant's story is a lie." (T. 1616).

But Wright's statements could have been incorrect without him intentionally engaging in deception. Cf. State v. Pilot, 595 N.W.2d 511, 516-17 (Minn. 1999) (recognizing that "were they lying" questions are prohibited as misleading and unfair in part because they ignore the possibility that a witness' testimony could have differed even though witnesses were all endeavoring in good faith to tell the truth). The state's evidence indicates Wright was on a multiple-day drug binge, which certainly could have affected his memory. Stating that Wright's account could only be a lie was serious misconduct. See State v. Powers, 654 N.W.2d. 667, 678-79 (Minn. 2004) (finding prosecutor committed misconduct by stating that defendant was lying and sarcastically indicating his testimony was not worth discussing).

The prosecutor committed further misconduct by explicitly accusing Wright of lying in his letters to Mary Jane, in which he accepted responsibility for causing W[redacted]'s death by bringing the man who stabbed W[redacted] to W[redacted]'s house.

> He knows if he admits that I'm the one that went up there, I'm the one that stuck the knife in your father, he's past redemption. Mary Jane Wander won't have anything to do with him. *So he spins a yarn*. He says I'm—he pretends to accept responsibilities. I'm guilty. I'm the one that did it. I'm the cause of [W[redacted]'s] death. But at the same time, saying, it was all somebody else. I didn't do anything. I didn't take any money. I didn't stab him. I didn't do anything. I was simply there. He's trying to have his cake and eat it too. Feel sorry for me because I'm taking responsibility, but I'm not going to admit that I did it.

(T. 1600) (emphasis added). Asserting that Wright spun a yarn was just another way of stating that he lied about what occurred and constituted misconduct. See Ture, 353 N.W.2d at 516 (criticizing prosecutor's misconduct in characterizing defendant's testimony as "incredible," "a lot of nonsense" and a "joke, joke," and suggesting that defendant was "not only wrong, but not exactly telling the truth on the stand").

**B. The prosecutor committed misconduct by disparaging the defense.**

Not only did the prosecutor attack Wright's character and credibility by arguing he was a liar, the prosecutor also improperly disparaged his intoxication defense. See State v. Griese, 565 N.W.2d 419, 427 (Minn. 1997) (holding a prosecutor commits misconduct by disparaging the defense in closing argument). The prosecutor told the jury not to let Wright use intoxication as an excuse and not to let Wright get away with stating that he only remembered parts of the night.

> But one thing you cannot allow the defendant do in the case, you cannot allow the defendant to have his cake and eat it too. Okay? Either the defendant has no recollection of what happened up at the crime scene, okay, and if he has no recollection of what happened at that crime scene, then he could have had that knife in his hand and he could have put it into the victim's back and the victim's neck whether he remembers it or not. *But if he does have a recollection up at that crime scene, you cannot let him use intoxication as an excuse.* What the defendant wants you to do is believe that, I don't have any recollection, but believe the recollection that I do have. Okay? I can't tell you all the details because I was too drunk or too stoned, but I do—the memories I do have, don't challenge me on. This is what happened. This is my version of the events. *You can't let him get away with that.* Either he remembers or he doesn't remember. Okay?

(T. 1598-99) (emphasis added). The prosecutor went beyond merely arguing that the evidence did not support Wright's intoxication defense; he committed misconduct by improperly belittling that defense. See State v. MacLennan, 702 N.W.2d 219, 236 (Minn. 2005) (holding it was misconduct to refer to the defendant's self-defense claim as the "abuse-excuse"); Griese, 565 N.W.2d at 427 (holding a prosecutor improperly disparaged defendant's intoxication defense by arguing that, because there was little direct evidence of drinking, defense counsel scrounged up a retired felon expert to testify that mixing a particular medication with alcohol would cause impairment).

### C. The prosecutorial misconduct deprived Wright of a fair trial.

Generally, prosecutorial misconduct requires reversal unless it is harmless beyond a reasonable doubt. State v. VanWagner, 504 N.W.2d 746, 749 (Minn. 1993). But when defense counsel fails to object at trial, appellate courts review the record to determine whether alleged prosecutorial conduct was

> so clearly erroneous under applicable law and so prejudicial to the defendant's right to a fair trial that the defendant's right to a remedy should not be forfeited.

State v. Hunt, 615 N.W.2d 294, 302 (Minn. 2000). A conviction may also be reversed prophylactically or in the interests of justice when a prosecutor persists in committing misconduct. Salitros, 499 N.W.2d at 820.

The prosecutor's misconduct here was very prejudicial to the fairness of Wright's trial. The misconduct permeated the state's opening statement and closing argument, presenting its overarching theory that Wright's account could only be a lie. See Griese, 565 N.W.2d at 428 (noting that extensive comments are more egregious than isolated remarks). Moreover, this Court pays "special attention to statements that may inflame or prejudice the jury where credibility is a central issue." Porter, 526 N.W.2d at 363. As the prosecutor repeatedly told the jury, its verdicts turned on whether it believed Wright's statements about what occurred at W[redacted]'s house that night. Given that the case turned on Wright's credibility, the prosecutor's efforts to disparage his defense and the attack on his credibility and character so affected the jury that he was deprived of a fair trial. Therefore, this matter must be reversed and remanded. Compare Van Buren v. State, 556 N.W.2d 548, 551-52 (Minn. 1996) (reversing for new trial despite no objection where credibility was central issue in case and prosecutor elicited and emphasized in closing argument improper testimony vouching for complainant's credibility); and, State v. Turnbull, 267 Minn. 428, 435, 127 N.W.2d 157, 162 (1964) (reversing for a new trial because the key issue at trial was credibility of the complaining witness and the

defendant, and the prosecutor's closing argument may have inflamed the jurors' passions); with, State v. Buggs, 581 N.W.2d 329, 342-43 (Minn. 1998) (holding misconduct in calling a defense witness a liar was harmless given that each juror was questioned and indicated his or her ability to assess the credibility of the witness would not be affected).

## III.

## THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS IN IMPROPERLY ADMITTING EVIDENCE OF A PRIOR CRIME AND THE PROSECUTOR'S MISCONDUCT WAS TO DEPRIVE WRIGHT OF A FAIR TRIAL.

Even if each error standing alone is not sufficiently prejudicial to warrant a new trial, a reviewing court must reverse where the verdict was not surely unattributable to the cumulative effect of several errors. See State v. Litzau, 650 N.W.2d 177, 187 (Minn. 2002) (granting defendant a new trial when several errors, taken cumulatively, had the effect of depriving defendant of a fair trial). The only issue at trial was the identity of the perpetrator. Resolving this issue turned on Wright's credibility. The two errors here went directly to identity and Wright's credibility. If neither the erroneous admission of other-crime evidence to prove identity or the prosecutor's misconduct in both disparaging Wright's defense and asserting he was a liar deprived Wright of a fair trial, the cumulative effect of the two certainly did. Thus, he is entitled to a new trial. See State v. Williams, 525 N.W.2d 538, 544 (Minn. 1995) (finding that several errors, including admission of evidence and prosecutorial misconduct, deprived defendant of fair trial).

## IV.

## FOUR OF WRIGHT'S FIVE MURDER CONVICTIONS MUST BE VACATED BECAUSE, AT MOST, HE ONLY COMMITTED ONE MURDER.

Wright was convicted of four courts of first-degree murder and one count of second-degree murder. The trial court appears to have entered judgment against him on all five counts. (T. 1707). This was error.

Minnesota prohibits multiple convictions for the same conduct committed against the same victim. See Minn. Stat. § 609.04 (2002); State v. Johnson, 616 N.W.2d 720, 730 (Minn. 2000) (citations omitted). A defendant cannot legally be convicted of multiple counts of murder where each count was based upon the same offense for the same act committed against the same victim. State v. Earl, 702 N.W.2d 711, 723-724 (Minn. 2005); State v. Pippitt, 645 N.W.2d 87, 96 (Minn. 2002). Therefore, four of Wright's five convictions must be vacated.

## V.

## THE TRIAL COURT ERRED IN IMPOSING A LIFE SENTENCE WITHOUT POSSIBILITY OF RELEASE.

### A. Wright's Sentence

Prior to trial, defense counsel moved to dismiss counts 1 and 4 of the indictment because Wright's prior offense was not presented to the grand jury for a determination of probable cause on the element of a prior heinous crime conviction. (T. 55-56, 61-62, citing (State v. Smith, 669 N.W.2d 19, 33 (Minn. 2003) and State v. Stewart, 486 N.W.2d 444, 447 (Minn. App. 1992)). The trial court concluded that the statute required the court rather than the jury to make a finding of whether the prior offense was a heinous crime and denied the motion. (T. 62).

At sentencing, the state moved the trial court to sentence Wright to life without possibility of release based on him having a prior conviction for a heinous crime. (T. 1705-6). The court concluded that Wright's prior conviction for first-degree assault required it to impose a sentence of life without possibility of release, which it did. (T. 1706). This was error.

### B. Because a jury did not make a finding that Wright had a prior heinous crime conviction, the trial court erred by imposing a sentence of life without possibility of release.

Under Minnesota law, a conviction for first-degree premeditated intentional murder is punishable by a term of life in prison. See Minn. Stat. § 609.185. A defendant convicted of that offense who has a prior conviction for a "heinous crime" is subject to a

life sentence without possibility for release. See Minn. Stat. §§ 609.106, subd. 2(3) & 244.05, subd. 4. Minnesota Statutes define first-degree assault as a heinous crime. See Minn. Stat. § 609.106, subd. 1(2) (citing Minn. Stat. § 609.221).

Recently in State v. Leake, this Court held that the Sixth Amendment requires a jury to make a finding that a defendant has a prior conviction for a heinous crime before a trial court can increase a defendant's presumptive life sentence to life without possibility of release. State v. Leake, 699 N.W.2d 312, 324 (Minn. 2005) (construing Minn. Stat. § 609.106, subd. 1(3)). Here, the trial court used Wright's prior first-degree assault conviction to form the basis for its departure, apparently believing that under "the prior conviction exception" to the constitutional rule announced in Apprendi v. New Jersey, a jury need not make this finding. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); State v. Shattuck, 704 N.W.2d 131,142, n. 10 (Minn. 2005). The exception has its origins in the United States Supreme Court's decision in Almendarez-Torres v. United States, 523 U.S. 224, 235, 247 (1998) (refusing to interpret statute to make fact of previous conviction element, and thus fact question for jury). The constitutional rule announced in Apprendi stated that "[o]ther 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." Apprendi, 530 U.S. at 490.

However, the Almendarez-Torres prior-conviction exception no longer commands a majority of Justices on the Supreme Court. In Apprendi the Court noted that it was "arguable that Almendarez-Torres was incorrectly decided, and that a logical application

of our reasoning today should apply if the recidivist issue were contested," however, it explicitly refused to overrule that decision because the question of prior convictions was not before the Court. Apprendi, 530 U.S. at 489-90. A close examination of Apprendi and subsequent Supreme Court cases casts further doubt on the future viability of Almendarez-Torres because Justice Thomas has explicitly repudiated his crucial fifth vote for the Almendarez-Torres majority. Shepard v. United States, 125 S. Ct. 1254, 1264 (2005) (Thomas, J., concurring) ("Almendarez-Torres . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that Almendarez-Torres was wrongly decided. . . . The parties do not request it here, but in an appropriate case, this Court should consider Almendarez-Torres ' continuing viability."); see also Apprendi, 530 U.S. at 520-21 (Thomas, J., concurring) (noting that fact of prior conviction is element of offense under recidivism statute, contrary to rule stated in Almendarez-Torres ); Almendarez-Torres, 523 U.S. at 248-49 (Scalia, J., with whom Stevens, Souter and Ginsburg, JJ., joined dissenting) (stating that issue of recidivism should be treated as element of offense).

Therefore, while Wright recognizes that Almendarez-Torres appears not to have been explicitly overruled, it is his position that it was wrongly decided. He objects to the use of his prior conviction to justify a departure to a sentence of life without possibility of release. The trial court's use of his prior conviction to do so was an upward departure violating his Sixth Amendment jury-trial right and the Fourteenth Amendment's Due Process Clause.

### C. The trial court erred by ruling that the grand jury's failure to determine that there was probable cause that Wright had a prior heinous crime conviction did not require dismissal of count 1 of the indictment or at least prohibit sentencing based on such a conviction.

Wright could only be prosecuted for first-degree murder by indictment. See Minn. R. Crim. Pro. 17.01 (2002). An indictment must contain the elements of the charged offense and fairly inform the defendant of the charge against which he must defend. United States v. Davis, 103 F.3d 660, 675 (8th Cir. 1996); see also Minn. R. Crim. Pro. 17.02, subd. 2 (stating indictment must contain "a statement of the essential facts constituting the offense charged"). Thus, for first-degree murder requiring a life sentence without possibility of release, the indictment must contain an additional element--whether Wright had a conviction for a heinous crime. Apprendi, 120 S.Ct. at 2365, n. 19 (stating that fact increasing a sentence beyond the maximum authorized statutory sentence is the functional equivalent of an element of a greater offense); U.S. Const. amend V, VI & XIV; Minn. Const. art. I, § 6. Consistent with Wright's position that Almendarez-Torres was improperly decided, this requirement applies equally where the finding of a heinous crime relates to a defendant's prior conviction for first-degree assault. Almendarez-Torres, 523 U.S. at 226.

Wright's indictment was defective in that the grand jury did not determine whether the state had evidence supporting probable cause of that element. See, e.g., United States v. Robinson, 367 F.3d 278, 284 (5th Cir. 2004) (holding that the government is required to charge, by indictment, the statutory aggravating factors it intends to prove to subject a

defendant to the death penalty); United States v. Higgs, 353 F.3d 281, 298 (4th Cir. 2003) (same); United States v. Benitez-Hernandez, 2004 WL 2359668 (D. Neb. 2004) (holding that, under Apprendi, indictment properly included sentencing enhancement). Therefore, his convictions for those counts must be vacated and the charges dismissed. In the alternative, the portion of the sentence prohibiting Wright from ever being released must be vacated.

**D. A sentence of life without possibility of release may not be imposed on the convictions for murder in the course of a kidnapping because there was insufficient evidence to support those convictions.**

A conviction for committing first-degree murder in the course of a kidnapping requires a sentence of life in prison without the possibility of release. See Minn. Stat. § 609.106, subd. 2(2). Therefore, even if the sentence of life without possibility of release imposed on the first-degree premeditated murder conviction is reversible error, the same sentence may be imposed on one of his convictions for first-degree murder in the course of a kidnapping. Because there is insufficient evidence to support those convictions, Wright must be sentenced to a term of no more than life in prison.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution places on the state the burden of proving beyond a reasonable doubt the existence of each and every element of the crime charged. See State v. Robinson, 539 N.W.2d 231, 238 (Minn. 1995). In determining whether the state has met its burden, a reviewing court "must not consider whether there was evidence to support [the] conviction but whether there was sufficient evidence to justify a rational trier of fact to

find guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 312-13 (1979). When evaluating sufficiency-of-the-evidence claims, this Court must review the record in the light most favorable to the conviction. State v. Webb, 440 N.W.2d 426, 430 (Minn. 1989). Wright's two convictions for first-degree murder while committing kidnapping must be reversed because the evidence was insufficient to show that the confinement or removal elements of kidnapping were anything other than completely incidental to the homicide. See Minn. Stat. § 609.185(a)(3) (2002).

In order to convict a defendant of kidnapping, the defendant must confine or remove the victim. See Minn. Stat. § 609.25, subd. 1 (2002). To prove kidnapping occurred during the course of one or more felonies, the state must show that the confinement or removal was "criminally significant in the sense of being more than merely incidental to the underlying crime." State v. Smith, 669 N.W.2d 19, 32 (Minn. 2003); see also State v. Earl, 702 N.W.2d 711, 723 (Minn. 2005) (affirming first-degree murder during the commission of kidnapping where confinement or removal of victims was not merely incidental to burglary because defendants awoke the family, removed them to another room, bound them and one defendant stood by them while the other searched the house).

In contrast, when a defendant confines or removes another against his or her will during the commission of another felony, no kidnapping has occurred where the confinement or removal is completely incidental to the perpetration of the separate felony. See, e.g., Smith, 669 N.W.2d at 32 (reversing first-degree murder while

committing kidnapping conviction after concluding that the "confinement" at issue, blocking a doorway to prevent the murder victim's possible escape, "was completely incidental to the murder for which [the defendant] was convicted"); see also State v. Welch, 675 N.W.2d 615, 620-21 (Minn. 2004) (reversing kidnapping conviction where confinement that formed the basis of the kidnapping was the very force and coercion that supported a criminal sexual conduct conviction).

The state's theory here was that Wright took W[redacted] downstairs and bound him to kill him because W[redacted] would not give Wright money to buy drugs. (T. 1582-83). Under this theory, while the removal to the basement may not have been necessary, it was incidental to the murder and aggravated robbery. Cf. Earl, 702 N.W.2d at 723 (distinguishing "necessary to" carry out from "merely incidental to" the commission of a felony). The only purpose in taking him there and tying him up was to murder him and take his money. Cf. Smith, 669 N.W.2d at 31 (distinguishing, "revisit[ing]," and "clarify[ing]" potentially contrary holdings in prior cases, including State v. Crocker, 409 N.W.2d 840 (1968) (holding removal of victim from one room to another to rape her was sufficient to show kidnapping)). Unlike the situation in Earl, where the defendant unnecessarily woke the victims up, removed and confined them to commit a burglary, Wright removed and confined W[redacted] incidental to committing the murder and aggravated robbery. As in Smith and Welch, the evidence is insufficient to support Wright's convictions for first-degree murder while committing kidnapping, requiring this Court to reverse them.

## CONCLUSION

Because of the prejudice caused by the erroneous admission of other-crime evidence to prove identity and prosecutorial misconduct, Wright respectfully requests that this Court grant him a new trial. He also asks that his convictions for first-degree murder during the course of a kidnapping be reversed. In the alternative, he requests that his adjudications of guilt on four of his convictions be vacated and his sentence be modified to life without the possibility of release.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief contains 11,406 words (exclusive of the table of contents and table of authorities), as computed by the word processing program used to prepare this brief, MicroSoft Word 2003, and it complies with the type face provisions of the Rule of Civil Appellate Procedure 132.01, subd. 3.

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