

A05-1747

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STATE OF MINNESOTA

IN SUPREME COURT

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State of Minnesota,

Respondent,

vs.

Eric Maurice Wright,

Appellant.

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**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. Did the trial court properly exercise its discretion in allowing limited testimony about a *Spreigl* incident that was highly probative of appellant's identity?

*The trial court ruled in the affirmative.*

*State v. Blom*, 682 N.W.2d 578 (Minn. 2004).

*State v. Cogshell*, 538 N.W.2d 120 (Minn. 1995).

*State v. Bailey*, 677 N.W.2d 380 (Minn. 2004).

- II. Appellant claims the prosecutor committed misconduct in his opening statement and closing argument. Appellant did not object but instead chose to counter the prosecutor's statements with his own argument. Did the prosecutor's statements amount to plain error?

*The trial court was not asked to rule.*

*State v. Young*, \_\_\_ N.W.2d \_\_\_, 2006 WL 488665 (Minn. March 2, 2006).

*State v. Booker*, 348 N.W.2d 753 (Minn. 1984).

- III. Did the trial court improperly enter judgment on more than one conviction?

*It appears that the trial court only entered judgment on the premeditation count.*

*State v. LaTourelle*, 343 N.W.2d 277 (Minn. 1984).

- IV. Did the trial court properly sentence appellant to life without the possibility of release based on appellant's prior conviction?

*The trial court ruled in the affirmative.*

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

*Apprendi v. New Jersey*, 530 U.S. 466 (2000).

*State v. Leake*, 699 N.W.2d 312 (Minn. 2005), *cert. denied*, 126 S. Ct. 745 (2005).

Minn. Stat. § 609.106 (2004).

V. Do appellant's *pro se* arguments warrant relief?

*The trial court was not asked to rule.*

*State v. Krosch*, 642 N.W.2d 713 (Minn. 2002).

## STATEMENT OF THE CASE

A Stearns County grand jury returned an indictment charging appellant Eric Maurice Wright with the following five counts of murder for stabbing his girlfriend's father: (1) first-degree murder (premeditated) in violation of Minn. Stat. § 609.185(a)(1) (2004); (2) first-degree felony murder (aggravated robbery) in violation of Minn. Stat. § 609.185(a)(3) (2004); (3) first-degree felony murder (kidnapping) in violation of Minn. Stat. § 609.185(a)(3); (4) first-degree felony murder (kidnapping) in violation of Minn. Stat. § 609.185(a)(3); and (5) second-degree murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2004).

After a jury trial in Stearns County before the Honorable Bernard E. Boland, appellant was convicted on all counts. The court sentenced appellant only on count one, first-degree premeditated murder. Appellant was sentenced to life without the possibility of release based on the heinous crime statute, Minn. Stat. § 609.106, subd. 2(3) (2004).

This direct appeal followed.

## STATEMENT OF FACTS

### I. APPELLANT'S RELATIONSHIP WITH THE VICTIM, R [REDACTED] W [REDACTED]

Appellant Eric Wright dated Mary Jane Wander, whose 82-year-old father R [REDACTED] W [REDACTED] lived in Elrosa, Minnesota (T. 1057-58, 1233).<sup>1</sup> R [REDACTED] lived by himself since 1998, the year his wife died (T. 1059). Appellant and Mary Jane had lived

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

together in Richfield, Minnesota, since the fall of 2002 (T. 1233-34). Appellant knew R [REDACTED] and had seen him on approximately two dozen occasions (T. 1234-35). Appellant and Mary Jane had gone to R [REDACTED]'s house numerous times and had spent the night there (T. 1235).

Mary Jane found out from appellant after the murder that appellant had in the past visited her father alone in Elrosa (T. 1264). Appellant admitted in letters to Mary Jane that the night of the murder was the third time R [REDACTED] had given appellant money (T. 1520). Based on the relationship appellant had with R [REDACTED], Mary Jane believed her father would have opened the door to appellant in the middle of the night (T. 1239).

R [REDACTED] was known to keep a very clean and tidy house (T. 1061, 1484-85). He typically paid for items with cash, which he kept in his bedroom in a filing cabinet (T. 1061, 1489). If he gave money to a family member, he always retrieved it from the bedroom (T. 1063, 1237). Mary Jane could not recall any specific time where appellant was at the residence when her father retrieved money out of his bedroom, but she would not have been surprised if appellant had observed that since it was typical behavior for her father (T. 1238).

Bank records indicated that R [REDACTED] wrote a check to himself in the amount of \$300.00 to \$500.00 approximately once every three weeks (T. 1396-97). He last did this on March 4, 2004 (T. 1397).

One of R [REDACTED]'s sons was storing alcohol in his father's basement (T. 1488). It would have been out of character for R [REDACTED] to give this alcohol to another person since it did not belong to R [REDACTED] (T. 1488-89).

## II. THE EVENTS SURROUNDING THE MURDER

Appellant purchased crack cocaine throughout the day on March 23, 2004. Investigators learned of three transactions that day (T. 1221). During the first transaction, at approximately 3:00 p.m., appellant traded a 27-inch television set for five \$20.00 rocks of cocaine (T. 1222-24).<sup>2</sup> Someone was with appellant during this transaction (T. 1222). At around 6:00 p.m., appellant purchased \$200.00 worth of crack cocaine; he was alone (T. 1222, 1224-25).

Appellant arrived home with the man who wore the red jacket (T. 1242-43). Appellant told Mary Jane that he owed people money and was in trouble (T. 1244). He said he needed \$250.00 (T. 1244-45). Mary Jane concluded that appellant had probably been drinking and doing drugs (T. 1244). She drove appellant and the man in the red jacket to the ATM, where she retrieved \$250.00 (T. 1245-47). She handed appellant the money, who then gave it to the man in the red jacket (T. 1248). Appellant appeared to be in a hurry, which was out of character for him (T. 1249). Appellant and the man left at approximately 7:00 p.m. (T. 1251). Shortly after 8:00 p.m., appellant called Mary Jane and said he was on his way home (T. 1253). He did not come home until the next morning, however (*Id.*).

Between 11:30 p.m. and 12:00 a.m., appellant purchased more crack cocaine (T. 1222, 1225). He was alone (T. 1222-23).

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<sup>2</sup> Investigators located a videotape from a Target store in Minneapolis in which appellant had purchased a television set that day; appellant was with a man wearing a red and white jacket (T. 1382-83).

Appellant told investigators that he drove to R [REDACTED]'s house at approximately 2:00 a.m. on March 24, 2004 (Ex. 81 at 10)<sup>3</sup>. An elderly neighbor of R [REDACTED] W [REDACTED] heard a "ruckus" on the street at 2:30 a.m. (Ex. 68 at 1)<sup>4</sup>. She heard people arguing and saw R [REDACTED] standing in his doorway (Ex. 68 at 1-3). She never saw anybody but R [REDACTED], however (Ex. 68 at 5).

Appellant arrived home between 5:15 and 5:30 a.m. on March 24th (T. 1253). Appellant was shaking, which was abnormal for him (T. 1254). He was also very "antsy" (T. 1255). He said he was tired and needed to lie down (T. 1254). Appellant was not having trouble understanding Mary Jane or functioning; in fact, he ironed her pants before she left for work (T. 1255, 1271).

Appellant called Mary Jane shortly after 8:00 a.m., told her he loved her, and said he needed help for his drinking and drug addiction (T. 1255). At various times throughout the day, appellant borrowed a total of approximately \$270.00 from neighbors and co-workers (T. 1359-79). Neighbors said appellant was slightly nervous or agitated, but nothing about his physical condition was unusual (T. 1361). Investigators learned that appellant purchased approximately \$120.00 worth of crack cocaine on March 24th (T. 1221, 1225). The transactions took place between 12:00 p.m. and 2:00 p.m. and 9:00 p.m. and 11:00 p.m.; appellant was alone both times (T. 1223).

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<sup>3</sup> "Ex. 81" refers to the transcript of appellant's April 13, 2004 statement to investigators. The jury heard the tape of this statement.

<sup>4</sup> "Ex. 68" refers to the transcript of the neighbor's statement, which was played for the jury.

In his letters to Mary Jane and in statements to investigators, appellant said he tried to commit suicide on March 24th (T. 1502, 1509, 1511-12; Ex. 65 at 2-14; Ex. 81 at 16-18)<sup>5</sup>. Appellant claimed he was tired of living and disappointed that he was addicted to drugs (Ex. 65 at 2, 6). He also said he was afraid (Ex. 81 at 18). After his suicide attempts were unsuccessful, he drove himself to a hospital in Wisconsin (T. 1502).

Between 5:15 and 5:30 a.m. on the morning of March 25, 2004, the Durand Wisconsin Police Department called Mary Jane and informed her of appellant's suicide attempts (T. 1256-57). Later in the morning, she was told that appellant was concerned about R ██████'s safety and was asked to confirm whether he was okay (T. 1257). When she was unable to reach her father by telephone, she contacted family members to check on him (T. 1257-58). At 1:08 p.m., Lorraine Wander called 911 and reported that R ██████ was lying on the basement floor with his hands tied behind his back (Ex. 37 at 1-2)<sup>6</sup>. There was blood all over the floor (Ex. 37 at 2).

At 4:55 p.m. the Durand Wisconsin Police Department called the Stearns County Sheriff's Department regarding comments that appellant made to hospital staff about having flashbacks of pulling a knife of R ██████ W ██████'s back (Ex. 63 at 2-5)<sup>7</sup>.

### III. THE INVESTIGATION

Stearns County Sheriff's Deputy Craig Pogatshnik arrived at R ██████ W ██████'s house around 1:30 p.m. (T. 1064-67). The service door to the garage was unlocked as

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<sup>5</sup> "Ex. 65 refers to the transcript of appellant's March 25, 2004 statement to investigators. A tape of the statement was played for the jury.

<sup>6</sup> "Ex. 37" refers to the transcript of the 911 call, which was played for the jury.

<sup>7</sup> "Ex. 63" refers to the transcript of this call, which was played for the jury.

was the door from the garage into the house (T. 1068-70). There were no signs of a forced entry (T. 1073). The house was clean and neat (*Id.*). In the middle of the living room floor, however, there was a single slipper (*Id.*). There was a knife on the bed in one of the bedrooms (T. 1070-71). R ██████ was lying face down on the basement floor with his head in a pool of blood (T. 1075). R ██████'s hands were tied behind his back (T. 1075-76). He was wearing one slipper (*Id.*). At the top of the basement stairs, in the kitchen, there was a spot on the floor which appeared to be dried blood (T. 1076).

The BCA processed the crime scene (T. 1092). The spot at the top of the stairs on the kitchen floor was blood; the DNA profile from this blood matched appellant's DNA profile (T. 1122, 1304-05). On R ██████'s bed was a bent steak knife with blood on it (T. 1123-25, 1547-48).<sup>8</sup> The DNA profile from the blood on the knife matched the DNA profile of R ██████ (T. 1303). There was also a blood stain on the victim's bed sheet (T. 1127). The DNA profile from that blood matched appellant's profile (T. 1304).

The blood on the bed sheet was relatively close to R ██████'s dresser (T. 1127). R ██████ typically kept his wallet on the dresser (T. 1496). That wallet was missing (T. 1497). The piggy bank that R ██████ kept on his dresser was also missing (T. 1218). A separate wallet and a bank bag were found in the filing cabinet in R ██████'s bedroom (T. 1216). There was no money in either, and no paper currency was found during a search of the house (T. 1219).

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<sup>8</sup> A piece of the handle was broken off; the broken piece was found in the basement (T. 1125).

In the basement, the BCA discovered a battery charger that had a cut cord (T. 1135). The victim's hands were bound with this cord (T. 1141). The BCA compared the tool marks on the cord to a box cutter found in appellant's car; the results were inconclusive, indicating that the box cutter could not be identified as the source but could not be excluded either (T. 1162-63).

Bottles of alcohol and gun boxes were in the basement (T. 1136). Nothing seemed like it had been "rifled through" (T. 1145). The BCA searched the house for fingerprints, but none of the prints found had sufficient detail for identification (T. 1159-61).

Investigators discovered four cigarette butts in R [REDACTED]'s driveway (T. 1210-11). All were unfiltered and two appeared to be Camel cigarettes (T. 1214). Appellant smokes filterless Camel cigarettes (T. 1259). One of the cigarette butts contained a small amount of DNA (T. 1308-09). Of the DNA markers that could be examined from the cigarette butt, the DNA profile matched that of appellant's (*Id.*). A search of appellant's residence resulted in the discovery of a Camel cigarette pack outside by the garage (T. 1345). There were plastic baggies in appellant's basement that field tested positive for cocaine (T. 1344-45).

Investigators searched appellant's car and found no evidence of controlled substances in the vehicle (T. 1148, 1153-56). There was also no evidence of smoking or alcohol bottles in the car (T. 1153-56).

Assistant Ramsey County Medical Examiner Kelly Mills performed the autopsy of R [REDACTED] W [REDACTED] (T. 1444). R [REDACTED] had wounds to his neck, right lateral chest, upper abdomen, and his back (T. 1456). R [REDACTED] had four separate stab wounds on his right

lateral chest and upper abdominal region (T. 1457). The stab wounds had a blunt edge, consistent with the steak knife that was found in R [REDACTED]'s bedroom (T. 1457-58). The three stab wounds on R [REDACTED]'s back also displayed this blunt edge (T. 1458). One of the wound tracks on R [REDACTED]'s back hit his vertebral column; Dr. Mills testified that the knife's blade could have bent upon impact with this bone (T. 1458-59).

R [REDACTED] W [REDACTED]'s neck had four incised wounds caused by the sharp end of the knife (T. 1460). One of the incised wounds started at the front of R [REDACTED]'s neck and continued to the right side (T. 1462). Another incised wound started at the left side of the neck and went to the right side; that wound severed the wind pipe (T. 1462-64). The incised wounds caused R [REDACTED]'s death (T. 1464).

Dr. Mills opined that all of the stab wounds occurred in a short time frame because there was not much internal bleeding (T. 1465-66). Dr. Mills opined that the wounds to the back occurred last (T. 1464-65).

R [REDACTED] had an abrasion on his nose that could have been caused by falling forward or rubbing on a cement floor (T. 1470). An abrasion on the back of his arm would have occurred within minutes before or minutes after his death (T. 1470-71). R [REDACTED] had contusions on his shoulder, arms, and wrists, all of which occurred within the 24 hours prior to his death (T. 1472-75). Bruising on the top of R [REDACTED]'s hand also occurred on the day of his death and was consistent with a bruise received when punching someone (T. 1475-76).

BCA Agent Steven Banning opined that, based on the location of the blood spatter near R [REDACTED], he was not standing when he was stabbed (T. 1186-87). The blood

spatter was more consistent with R [REDACTED] being on either his knees or his hands and knees at the time he was stabbed (T. 1187).

Investigators later learned that the person wearing the red jacket, who was with appellant when he purchased the TV set from Target and when he went to the ATM with Mary Jane, was Travis Wright; he was not related to appellant (T. 1383-91). Travis declined to speak with investigators (T. 1391-92). No physical evidence present at the scene of the murder verified appellant's statement that Travis was with him there (T. 1391).

#### IV. APPELLANT'S STATEMENTS AND LETTERS

In a statement to law enforcement on March 25, 2004, appellant said he could have been at R [REDACTED] W [REDACTED]'s house on the night R [REDACTED] was murdered, but appellant did not know (Ex. 65 at 19). He denied going to R [REDACTED]'s house to borrow money and said he would not ask R [REDACTED] for money (Ex. 65 at 20).

Appellant claimed that while he was in the hospital in Wisconsin he asked a staff member to call Mary Jane and check on her father because he could see himself pulling a knife out of R [REDACTED] and being angry at someone (Ex. 65 at 16). Appellant said three men were with him (Ex. 65 at 17). He could not remember seeing faces of the people that were with him (*Id.*). Appellant said he told them "what the fuck is your problem, let's go, you know" (*Id.*).

Appellant said he did not remember when he last put gas in the car, but later claimed that he saw the men that were with him take a female to the back of a gas station (Ex. 65 at 16-17). Appellant claimed that when he is using drugs he has trouble recalling

what happened (Ex. 65 at 2-3). Appellant gave the police a detailed account of what happened after he got home at 5:00 a.m. on March 24th (Ex. 65 at 4-10).<sup>9</sup>

In a letter to Mary Jane dated April 7, 2004, appellant said that R [REDACTED] did not die by his hands but that appellant was responsible for going to R [REDACTED]'s home with "drug heads" (T. 1499-1500). Appellant stated that there were three men with him that night, including the one who had gone to the ATM with Mary Jane and appellant (T. 1500).

In a statement to investigators on April 13, 2004, appellant said he wanted to talk to them because he had been thinking about what happened and now remembered more (Ex. 81 at 1). He said he wanted to admit that he was there on the night of the murder (*Id.*). Appellant admitted to driving up to the house and arriving around 2:00 a.m. (Ex. 81 at 10). When asked how he ended up at R [REDACTED]'s house, appellant said he thought he was "so stoned out of my mind I'm [sic] probably suggested going up there to borrow the money" (Ex. 81 at 8). He thought he went to R [REDACTED]'s house to ask for money for drugs and to ask R [REDACTED] not to tell anyone he had been there (Ex. 81 at 10, 31).

Appellant recalled parking his car in the driveway (Ex. 81 at 34). Appellant said he thought when he got to the house he went to the door leading to the garage and

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<sup>9</sup> For example, appellant remembered borrowing money from various neighbors and co-workers; he even remembered the amounts borrowed (Ex. 65 at 8-9). Appellant recalled going to Mounds Park, having one cigarette, taking off his watch, throwing it away, sitting on a bench, and cutting his wrists with a razor blade from a box cutter (Ex. 65 at 4-5, 9-10).

knocked on the window (Ex. 81 at 11). Appellant also claimed that he could not remember knocking on the door (*Id.*). He did recall that when R [REDACTED] came to the door, he had clothes on (Ex. 81 at 32). Appellant said that R [REDACTED] opened the garage door and appellant drove in, telling the others in the car to stay down and wait for him (Ex. 81 at 11, 35).

Appellant and R [REDACTED] went into the living room and talked (Ex. 81 at 12, 36). He could not remember what they discussed, but he remembered specifically what chair R [REDACTED] sat in; appellant guessed he asked R [REDACTED] for a loan (Ex. 81 at 12, 36). Appellant claimed that while they were talking, he heard something in the kitchen and saw one of the men from the car standing in the kitchen (Ex. 81 at 12). Later on in his statement, appellant said after he and R [REDACTED] talked, he recalled being in front of R [REDACTED]'s bedroom dresser and getting money from R [REDACTED] (Ex. 81 at 37). He said nobody else was in the house at that point (*Id.*). Appellant thought R [REDACTED] gave him \$80.00 from the wallet on his dresser (Ex. 81 at 21).

From the bedroom they went down to the basement (Ex. 81 at 37). Appellant denied asking R [REDACTED] for alcohol (*Id.*). Appellant said he did not know why R [REDACTED] went down to the basement with appellant because appellant knew from previous occasions that the alcohol was there (Ex. 81 at 37-38). Appellant claimed that one of the men from the car came down to the basement as well (Ex. 81 at 12-13, 14, 29, 39, 42).

Appellant said he thought he was looking for a bottle of Captain Morgan in the boxes in the basement, that he grabbed a bottle, and that when he turned around, R [REDACTED] was lying on the floor with a knife in his back and one of the men from the car

standing over him (Ex. 81 at 13-14). Appellant said he was approximately 10 feet away from R [REDACTED] (Ex. 81 at 15). Appellant claimed he did not hear anything before turning around and seeing R [REDACTED] on the floor with a knife in his back (Ex. 81 at 24).

Appellant said he pulled the knife out of R [REDACTED]'s back (Ex. 81 at 13, 15). He did not know what kind of knife it was, but thought it was a steak knife (Ex. 81 at 25). Appellant said he probably dropped the knife; he denied taking it upstairs or giving it to anyone else (Ex. 81 at 26-27). When he went into the kitchen, he claimed the man in the red jacket was coming from the bedroom with R [REDACTED]'s piggy bank (Ex. 81 at 13, 29). He remembered saying "let's go man, ya know" (Ex. 81 at 13).

Appellant said he did not check on R [REDACTED] and did not think about calling anyone at that time to check on him (Ex. 81 at 20-21). Appellant did not know how his own blood got upstairs (Ex. 81 at 47).

He felt mad when they were leaving the house, but he did not remember thinking about R [REDACTED] (Ex. 81 at 51). Appellant recalled opening the garage door and going back to the service door to the house to close it (*Id.*).

Appellant said once they were in the car, they all drank the alcohol appellant had taken from the house (Ex. 81 at 29). They threw the empty bottle out of the car (Ex. 81 at 30). Appellant said all of them that night were smoking marijuana, doing crack, and drinking (Ex. 81 at 48-49). Appellant said one of the guys in the car was "cracked out, putting stuff in his mouth, spitting it out and just constantly going in his pockets" (Ex. 81 at 51).

Appellant said they stopped at a gas station, but he did not recall which one (Ex. 81 at 30). He did remember, however, paying a white, female cashier with a \$20.00 bill (Ex. 81 at 30-31). Appellant said when he came out of the gas station, one of the men that was with him robbed somebody there (Ex. 81 at 13). Appellant said he drove to the Twin Cities, and the other men got out of the car in North Minneapolis and left (Ex. 81 at 14). Appellant could not describe the men that were in the back of the car and did not know how they ended up with him (Ex. 81 at 13, 28).

Appellant admitted previously borrowing money from R [REDACTED]'s oldest daughter and asking her not to tell Mary Jane (Ex. 81 at 60).

In another letter to Mary Jane dated April 14, 2004, appellant said he assumed he went to R [REDACTED]'s house to borrow money (T. 1510). He sat in the living room with R [REDACTED] and remembered standing in the bedroom with him (*Id.*). Appellant said R [REDACTED] counted out some money and gave it to appellant (*Id.*). Appellant assumed R [REDACTED] loaned him \$100.00 because he spent \$80.00 on drugs (T. 1511).

In a letter to Mary Jane dated October 25, 2004, appellant said he received a letter from Stearns County indicating that a grand jury was going to be convened. He wondered for the first time whether or not he was by himself or if he was hallucinating (T. 1524-25). Appellant said he did not kill R [REDACTED] but that R [REDACTED] was dead because of appellant (T. 1525).

Appellant gave another statement to police on September 7, 2004 (T. 1397). Although in other statements he indicated that he had not previously borrowed money from R [REDACTED], he acknowledged that he had done so on three prior occasions

(T. 1397-98). Appellant said that on the night of the murder he went to R [REDACTED]'s house to borrow money for drugs and that he got \$80.00 or \$100.00 from him (*Id.*). When asked if appellant had cut himself while there, he did not believe he had (T. 1398). When asked if he was in R [REDACTED]'s bedroom that night, this time he claimed he was only in the doorway of the bedroom (*Id.*). He also denied going into R [REDACTED]'s room after the stabbing (T. 1399).

#### V. *SPREIGL* EVIDENCE

The prosecutor read from the transcript of appellant's guilty plea to first-degree assault, which occurred on March 25, 1991 (T. 1548). Appellant was at the apartment of a woman he had been doing drugs with during the weekend (*Id.*). He went back to her apartment at 12:30 a.m. on March 25, 1991, and they got into an argument about drugs (T. 1549). Appellant was not quite clear as to what happened, but he recalled hitting her and having blood all over him; he also remembered that she was stabbed (*Id.*). The victim received some lacerations to her neck and had puncture wounds on her back (T. 1549-50). Appellant pled guilty to first-degree assault for giving her injuries with a knife that caused great bodily harm (T. 1550).

Appellant did not call any witnesses and did not testify.

## ARGUMENT

### I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING LIMITED *SPREIGL* EVIDENCE THAT WAS PROBATIVE OF APPELLANT'S IDENTITY.

#### A. Standard Of Review

It is well established that the appropriate standard of review for evidentiary rulings is abuse of discretion. *State v. Ashby*, 567 N.W.2d 21, 25 (Minn. 1997). Appellate courts will not reverse a trial court's decision regarding the admission of evidence of other crimes or bad acts absent a clear abuse of discretion. *See State v. Rainer*, 411 N.W.2d 490, 497 (Minn. 1987). "On appeal, the defendant has the burden of proving both that the trial court erred in admitting evidence of other crimes, and that the admitted evidence prejudiced the defendant." *State v. Landin*, 472 N.W.2d 854, 859 (Minn. 1991) (citing *State v. Slowinski*, 450 N.W.2d 107, 113, n.1 (Minn. 1990)). Appellant has not met that burden.

#### B. The *Spreigl* Evidence Was Highly Relevant.

In general, evidence of past acts is inadmissible to show a defendant's character in order to prove that the defendant's conduct was in conformity with that character. *See* Minn. R. Evid. 404(b). Such evidence may be admissible, however, for other purposes, including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b).

*Spreigl* evidence is admissible when "(1) the evidence is clear and convincing that the person participated in the other offense; (2) the *Spreigl* evidence is relevant and

material to the case; and (3) the probative value of the *Spreigl* evidence is not outweighed by its potential for unfair prejudice.”<sup>10</sup> *State v. Greenleaf*, 591 N.W.2d 488, 505 (Minn. 1999) (citations omitted), *cert. denied*, 528 U.S. 863 (1999). In this case, the trial court did not abuse its discretion in finding that these criteria were met. *See State v. Cogshell*, 538 N.W.2d 120, 124 (Minn. 1995) (holding that the trial court did not abuse its discretion regardless of how other courts may have exercised their discretion differently).

The trial court determined that the *Spreigl* evidence was relevant in establishing identity (T. 1538). *Spreigl* evidence is relevant and material when there is a sufficiently close relationship between the charged offense and the *Spreigl* offense in time, place or modus operandi, although this is not an “absolute necessity.” *State v. Filippi*, 335 N.W.2d 739, 743 (Minn. 1983); *accord State v. DeWald*, 464 N.W.2d 500, 503 (Minn. 1991); *State v. Kennedy*, 585 N.W.2d 385, 390 (Minn. 1998). Absolute similarity between the *Spreigl* evidence and the crime being tried is not necessary. *Filippi*, 335 N.W.2d at 743; *DeWald*, 464 N.W.2d at 503; *Kennedy*, 585 N.W.2d at 391.

Given the numerous and substantial similarities between the *Spreigl* incident and the current offense, the trial court reasonably concluded that the *Spreigl* evidence helped to establish identity. These similarities are as follows:

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<sup>10</sup> Appellant does not dispute that the first factor was satisfied. He pled guilty to the *Spreigl* offense.

- Appellant knew both the *Spreigl* victim and R [REDACTED] W [REDACTED] (P. 6; T. 1234-35).<sup>11</sup>
- Appellant went to the homes of both victims (P. 6; Ex. 81 at 10).
- Appellant had previously been in both victims' homes (P. 6; T. 1235).
- Appellant had been using an extensive amount of drugs prior to both offenses (P. 6; Ex. 81 at 2-3).
- The *Spreigl* incident occurred at approximately 12:50 a.m. and the current offense occurred at approximately 2:00 a.m. (P. 6; Ex. 81 at 10).
- Appellant and the *Spreigl* victim got into an argument about drugs (P. 6). He told her he needed drugs (Complaint). Appellant went to W [REDACTED]'s house in search of money for drugs (T. 1397-98).
- Appellant stabbed both victims with a knife (P. 7; T. 1456-64).
- Both the *Spreigl* victim and W [REDACTED] had lacerations to their necks and puncture wounds on their backs (*Id.*). The injuries to both victims were substantial (*Id.*).
- At both crime scenes, investigators discovered a knife with a bent blade (Complaint; T. 1125).
- Appellant told investigators in both cases only that he was at the victims' houses (Complaint; Ex. 65 at 19).
- In both cases, appellant claimed he could not recall specifically what happened (P. 6-7; Ex. 65 at 2-3, 16-20).

These facts contradict appellant's argument that his modus operandi was different with respect to the *Spreigl* incident and the charged offense (App. Br. 24). In fact, when

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<sup>11</sup> "P." refers to the transcript of appellant's guilty plea hearing from the *Spreigl* incident. He pled guilty to first-degree assault (P. 4).

defense counsel argued below that the *Spreigl* incident could not be used for impeachment purposes, he said, the current offense “is almost precisely the same offense” as the *Spreigl* offense, “absent the sex criteria” (App. Br. 42).

This Court has repeatedly held that the *Spreigl* offense need not be a “signature” crime in order for the evidence to be relevant in establishing identity. *See, e.g., State v. Blom*, 682 N.W.2d 578, 612 (Minn. 2004); *Slowinski*, 450 N.W.2d at 114; *Cogshell*, 538 N.W.2d at 123-24; *State v. Lewis*, 547 N.W.2d 360, 362-64 (Minn. 1996).<sup>12</sup> Moreover, the *Spreigl* incident need not be identical to the charged offense. *State v. Nelson*, 632 N.W.2d 193, 204 (Minn. 2001); *State v. Berry*, 484 N.W.2d 14, 17 (Minn. 1992); *Landin*, 472 N.W.2d at 860. The *Spreigl* crime only needs to be “sufficiently similar to the incident at issue before the jury.” *Blom*, 682 N.W.2d at 612 (citing *Cogshell*, 538 N.W.2d at 123).<sup>13</sup>

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<sup>12</sup> Appellant cites to Eighth Circuit decisions in arguing that the trial court “misapplied the law” in this case (App. Br. 23-24). The Eighth Circuit essentially requires a signature crime. *See United States v. Carroll*, 207 F.3d 465, 469-70. If this Court were to adopt appellant’s argument, it would have to overrule numerous prior decisions.

<sup>13</sup> Appellant, citing *State v. Ness*, 707 N.W.2d 676 (Minn. 2006), suggests that the crimes must have a “marked similarity” and not just a “substantial similarity” (App. Br. 23). *Ness*, however, involved the common scheme or plan exception, not the identity exception. *Id.* at 688 (stating, “Our cases make clear, however, that *the common scheme or plan exception* includes evidence only of offenses that have a ‘marked similarity’ in modus operandi to the charged offense . . . We take this opportunity to clarify that in determining whether a bad act is admissible *under the common scheme or plan exception*, it must have a marked similarity in modus operandi to the charged offense”) (emphasis added). Even if *Ness* somehow required a “marked similarity” with respect to *Spreigl* evidence admitted to establish identity, such a similarity was present in this case for the reasons listed above.

This court has on numerous occasions affirmed the admission of *Spreigl* evidence in cases similar to this. In *Blom*, 682 N.W.2d at 612, the defendant argued “that the *Spreigl* evidence was lacking a modus operandi connection because the 1983 case was a sexual assault, not a murder, but here the state alleged a murder, but not a sexual assault.” This Court held that the *Spreigl* incident and current offense were sufficiently similar because “[b]oth incidents involved the kidnapping of young, petite women to remote, wooded areas. Both incidents also involved subduing the women by applying force at their neck and throat areas.” *Id.* Similarly, in this case, the *Spreigl* incident involved a sexual assault and this case did not. Both incidents, however, involved appellant attacking his known victims with a knife, in a similar manner, at their homes in the middle of the night, while on a drug binge, and while searching for drugs or money for drugs.

Other cases involving the proper admission of *Spreigl* evidence to establish identity include *State v. Bailey*, 677 N.W.2d 380, 402 (Minn. 2004) (rejecting the defendant’s argument that three burglaries were not relevant to identity in the present case involving murder while committing sexual assault); *Cogshell*, 538 N.W.2d at 124 (holding that the trial court did not abuse its discretion in admitting evidence of defendant’s prior sale of crack cocaine to establish identity where both offenses “occurred in the same general area . . . both involved the sale or attempted sale of crack cocaine, and . . . the crack cocaine was packaged in the same way in both cases”); *Lewis*, 547 N.W.2d at 362-64 (holding that the trial court did not abuse its discretion in admitting violent robberies to establish identity in felony murder case).

Appellant argues that the *Spreigl* evidence was irrelevant due to its age (App. Br. 21-22).<sup>14</sup> With respect to the time factor, this Court has repeatedly emphasized: “We have never held that there must be a close temporal relationship between the charged offense and the other crime.” *State v. Wermerskirchen*, 497 N.W.2d 235, 242, n.3 (Minn. 1993); *accord Kennedy*, 585 N.W.2d at 390 (stating “This Court has ‘been flexible in applying this [relationship] test on appeal, upholding admission notwithstanding a lack of closeness in time or place if the relevance of the evidence was otherwise clear’”) (citations omitted); “Older offenses sometimes are relevant, sometimes not.” *Wermerskirchen*, 497 N.W.2d at 242, n.3; *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995). Relevancy concerns about remote bad acts are lessened if

(1) the defendant spent a significant part of that time incarcerated and was thus incapacitated from committing crimes; (2) there are intervening acts that show a repeating or ongoing pattern of very similar conduct; or (3) the defendant was actually convicted of a crime based on the prior bad act, thus reducing the prejudice of having to defend against claims of acts that occurred years before.

*Ness*, 707 N.W.2d at 689 (citations omitted).

Appellant was convicted of the *Spreigl* incident in 1991; he committed the current offense on March 25, 2004. The relevancy of the *Spreigl* incident in this case was not altered by the passage of time for three reasons. First, appellant was incarcerated for the majority of the time between the offenses. Appellant was released in 2001 (T. 47).

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<sup>14</sup> Appellant also argues that the incidents did not occur at similar locations (App. Br. 22). While the incidents occurred in different cities, they were similar in location in the sense that both took place in the victims’ homes in the middle of the night while the victims were alone.

Between 2001 and the current offense, however, appellant was confined again; he was not released from confinement until March of 2004 (T. 46-47).<sup>15</sup> Second, appellant pled guilty to the *Spreigl* offense. Appellant's confinement and guilty plea decrease any concern about the gap of time between offenses. *Ness*, 707 N.W.2d at 689. Third, the similarity between the offenses increases the relevancy of the *Spreigl* evidence. *Blom*, 682 N.W.2d at 612.

The *Spreigl* incident in this case was substantially similar to the current offense. The trial court did not abuse its discretion in determining that the prior incident was relevant in establishing identity.

**C. The *Spreigl* Evidence Was More Probative Than Unfairly Prejudicial.**

With respect to the third *Spreigl* requirement, a trial court has discretion in determining whether the probative value of the *Spreigl* evidence outweighs its potential for unfair prejudice, particularly in close cases. *Filippi*, 335 N.W.2d at 744. "Prejudice in this context does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999) (internal quotations omitted). In balancing the probative value with the potential for unfair prejudice, the trial court should consider how necessary the *Spreigl* evidence is with respect to the issue for which it is offered. *Ness*, 707 N.W.2d at 690.

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<sup>15</sup> The prosecutor gave this timeline at a pre-trial hearing while discussing the admissibility of the *Spreigl* evidence.

The trial court weighed the probative value of the evidence in this case with the potential for unfair prejudice and concluded that the *Spreigl* evidence was necessary with respect to identity (T. 1538). The court explained:

There is in the case no eyewitness testimony, no confession, no DNA evidence that establishes the defendant is the perpetrator of the crime or the person whose hand held the knife. And while defendant's statements place him at the scene of the crime, he also makes the claim that others were at the scene and that others must have murdered Mr. W█████ and that he did not know or participate in harming Mr. W█████ and only knew that Mr. W█████ had been harmed after the act had taken place, and he then pulled the knife out of his back.

(T. 1538). The court determined that the evidence was "necessary for the State to meet its burden of proof." (T. 1539).<sup>16</sup>

Appellant also cannot demonstrate unfair prejudice in light of the fact the trial court cautioned the jury twice not to convict appellant based on his prior crime (T. 1547, 1698). *See, e.g., State v. Waukazo*, 374 N.W.2d 563, 565 (Minn. Ct. App. 1985) (noting that a court guards against undue prejudice by giving a cautionary instruction before *Spreigl* evidence is presented and in final charge), *rev. denied* (Minn. Nov. 1, 1985).

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<sup>16</sup> "[I]f the issue of admissibility of other-crime evidence is, in the trial court's view unclear, the trial court should give the benefit of the doubt to the defendant and exclude the evidence." *Bolte*, 530 N.W.2d at 197. The court did say that the evidence appeared to be on the outer limit of *Spreigl* evidence; the court determined, however, that the probative value outweighed the potential for unfair prejudice (T. 1538-41). Appellant tries to make much out of the fact that the trial court referred to this as a "close case" (T. 1539-41) (App. Br. 16, 25). The court appeared to be discussing a "close case" in the context of the necessity of the *Spreigl* evidence. After a request for clarification by the prosecutor, the court said, "I'm saying it's close because the State's evidence is sufficiently weak" (T. 1540). The court never stated that it was unclear about the admissibility of the *Spreigl* evidence.

Appellant claims that he was unfairly prejudiced by the manner in which the evidence was presented (App. Br. 27). He objects to removal of the information contained in the complaint relating to the rape of the *Spreigl* victim, saying the removal made the two offenses seem more similar. Defense counsel, however, requested the complaint *not* be read because appellant pled guilty to first-degree assault, not criminal sexual conduct (T. 1531-32). Once the court admitted the *Spreigl* evidence, defense counsel could have requested that the complaint be read instead of the guilty-plea transcript and then could have argued to the jury that the prior offense was not similar. He made a tactical decision not to do so. He cannot now claim that it was error for the prosecutor to read the guilty plea transcript instead of the complaint. Moreover, it was appropriate to read the transcript instead of the complaint where appellant never admitted to and was never convicted of raping the *Spreigl* victim.<sup>17</sup>

In *State v. Ture*, 681 N.W.2d 9, 16 (Minn. 2004), the defendant claimed on appeal that the manner in which the state presented the *Spreigl* evidence was unduly prejudicial. In rejecting that argument, this Court said, “Without Ture’s objection to the manner in which the Edwards murder evidence was presented, we are reluctant to second-guess the court’s sound discretion.” *Id.* This holds true even more in the present case, where defense counsel specifically requested that the complaint not be read.

The trial court properly exercised its discretion in determining that the probative value of the *Spreigl* evidence outweighed the potential for unfair prejudice.

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<sup>17</sup> In fact, it is unclear if the state could even prove by clear and convincing evidence that the rape occurred.

**D. Any Error In Admitting The *Spreigl* Evidence Was Harmless.**

Even if this Court determines that the trial court abused its discretion in admitting the *Spreigl* evidence, any error was harmless. Any error in admitting other-crime evidence is harmless unless “there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *State v. Stewart*, 643 N.W.2d 281, 298 (Minn. 2002) (citing *Bolte*, 530 N.W.2d at 198); accord *Ness*, 707 N.W.2d at 691. Appellant incorrectly states that the harmless error standard is whether the evidence was harmless beyond a reasonable doubt (App. Br. 19, 29-30). As this Court explained in *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003), however, the harmless error standard for admission of improper *Spreigl* evidence is whether the evidence significantly affected the verdict; the beyond-a-reasonable-doubt harmless error standard is reserved for evidentiary rulings of constitutional magnitude.

There is no reasonable possibility that the *Spreigl* evidence significantly affected the verdict. First, the trial court gave two separate cautionary instructions about the *Spreigl* evidence (T. 1547, 1698). See *Bolte*, 530 N.W.2d at 198-99 (noting that the improperly admitted *Spreigl* evidence was harmless in part because of the court’s cautionary instructions). An appellate court presumes that the jurors followed the judge’s instructions. See *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998).

Second, as in *State v. Harris*, 560 N.W.2d 672, 678 (Minn. 1997), the *Spreigl* evidence in this case was presented in a straightforward manner and was not likely to emotionally charge the jury. The total amount of evidence the state presented regarding the *Spreigl* incident accounted for only three pages of the nearly 700-page transcript

(T. 1548-50).<sup>18</sup> See *id.* (noting that the *Spreigl* testimony took only a portion of a morning). Moreover, in its closing argument, the state never even referred to the *Spreigl* evidence. See *Bolte*, 530 N.W.2d at 198 (noting that the evidence was harmless in part where the prosecutor did not rely on it in its closing argument).

Third, appellant's claim that he was 10 feet away from R [REDACTED] while he was bound and stabbed, but that appellant did not hear R [REDACTED] or know anything was wrong with the victim, was absurd. Admittedly, the state had to establish that the *Spreigl* offense was necessary for identity. As the *Bolte* court explained, however,

“Need” for other-crime evidence is not necessarily the absence of sufficient other evidence to convict, nor does exclusion necessarily follow from the conclusion that the case is sufficient to go to the jury. A case may be sufficient to go to the jury and yet the evidence of other offenses may be needed because, as a practical matter, it is not clear that the jury will believe the state's other evidence bearing on the disputed issue.

*Bolte*, 530 N.W.2d 197, n.2.

The *Spreigl* evidence here did not significantly affect the verdict where appellant's blood was found at the scene, where appellant admitted being present, and where there was no physical evidence that others were present with him as he claimed. The prosecutor's closing argument effectively highlighted the many flaws with appellant's various explanations of the events to investigators and his girlfriend (T. 1600-10). While the prosecutor's argument was obviously not evidence, it highlighted the flaws and

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<sup>18</sup> In discussing the *Spreigl* offense, appellant extensively cites the information from the complaint (App. Br. 14-15). Much of this information was not presented to the jury. The jury heard only a portion of the guilty plea transcript (T. 1548-50).

inconsistencies in appellant's defense and thus minimized the impact of the *Spreigl* evidence.

The trial court properly exercised its discretion in admitting the limited *Spreigl* evidence to establish identity. Any error in admitting this evidence was harmless.

**II. APPELLANT HAS FAILED TO ESTABLISH THAT ANY ALLEGED MISCONDUCT BY THE PROSECUTOR CONSTITUTED PLAIN ERROR.**

**A. Standard Of Review**

To begin with, defense counsel in this case did not object to any of the prosecutor's statements about which appellant now complains. Therefore, appellant's prosecutorial misconduct claim fails in the first instance because of his failure to object or to seek cautionary instructions at trial.

As a general rule, the failure to object or seek cautionary instructions waives the right to have the issue considered on appeal. *State v. McDonough*, 631 N.W.2d 373, 389 (Minn. 2001). A defendant has an affirmative duty to promptly object or ask for a cautionary instruction because "carefully worded instructions by the trial court can ameliorate the effect of improper prosecutorial arguments." *State v. Brown*, 348 N.W.2d 743, 747 (Minn. 1984). If the general rule were otherwise, defendants would be encouraged to forego objections at trial, knowing that if they are convicted they can raise the issue in a subsequent appeal and possibly obtain a new trial. *State v. Stofflet*, 281 N.W.2d 494, 497 (Minn. 1979).

This Court has cautioned defense attorneys on failing to raise timely objections to perceived prosecutorial misconduct, stating:

[D]efense counsel did not object at trial to the prosecutor's closing argument. We would be concerned if defense counsel were deliberately passing on such an objection with the hope of securing reversible error for appeal and, as a result, getting two chances at a jury trial. We again caution defense counsel that the failure to object to improper closing argument may waive any claim of prosecutorial misconduct on appeal.

*State v. Ray*, 659 N.W.2d 736, 747 n.4 (Minn. 2003). Accordingly, this Court has indicated that defense counsel's failure to object or seek a curative instruction has "weighed heavily" in previous decisions not to reverse on the basis of prosecutorial misconduct. *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994).

Where there has been no timely objection, appellate courts review issues under the plain-error rule. *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006); *State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005). *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998), described the test for plain error as follows:

The United States Supreme Court has established a three-prong test for plain error, requiring that before an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs were met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.

*Id.* (citing *Johnson v. United States*, 520 U.S. 461 (1997)). In order to constitute plain error, the law on the issue must be clear or obvious. *See Griller*, 583 N.W.2d at 741, (citing *Johnson*, 520 U.S. at 467). *Griller* held that "[t]he third prong, requiring that the error affect substantial rights, is satisfied if the error was prejudicial and affected the outcome of the case. The defendant bears the burden of persuasion on this third prong. We consider this to be a heavy burden." *Id.* 741.

Appellant mistakenly says that prosecutorial misconduct requires reversal if it is not “harmless beyond a reasonable doubt” (App. Br. 34). This standard of review, however, refers to the two-tiered test for determining prejudice in cases where the defendant *has* objected in the trial court to the prosecutor’s statements.<sup>19</sup> In *State v. Ramey*, 2005 WL 832054 (Minn. Ct. App. April 12, 2005) (attached), *rev. granted* (Minn. July 19, 2005), this Court is currently considering what standard of review to apply with respect to prosecutorial misconduct claims raised for the first time on appeal. This Court has on numerous, recent occasions applied the plain-error standard to misconduct claims. *See, e.g., State v. Young*, \_\_\_ N.W.2d \_\_\_, 2006 WL 488665, at \*5 (Minn. March 2, 2006); *Blanche*, 696 N.W.2d at 375. Appellant here has not met his heavy burden of establishing plain error affecting his substantial rights.

**B. The Prosecutor Did Not Commit Misconduct.**

**1. The prosecutor did not attack appellant’s character and did not commit misconduct by arguing that appellant’s story lacked credibility.**

Appellant claims that the prosecutor “negatively commented on [appellant’s] credibility and attacked his character by referring to [appellant] as a liar” in both his opening statement and closing argument (App. Br. 31-33). Appellant cites two comments made by the prosecutor in his opening statement and four comments made in

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<sup>19</sup> Except in cases involving unusually serious prosecutorial misconduct, the test is whether the misconduct likely played a substantial part in influencing the jury to convict. *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn. 1980). In cases involving egregious misconduct, the reviewing court requires certainty beyond a reasonable doubt that the error was harmless. *State v. Ashby*, 567 N.W.2d 21, 27-28 (Minn. 1997).

the closing argument (App. Br. 32-33). Appellant did not object below to any of these comments that he now claims are improper.

In his opening statement, the prosecutor told the jurors that they would hear two stories about what happened inside the victim's house and that their job would be to determine which story was true (T. 1015-16). The prosecutor explained that the story told by the defendant in letters and statements to the police would not be consistent with the other evidence (T. 1016). The prosecutor said it was going to be the jury's primary function to determine which story was true and which was a lie (*Id.*). The prosecutor said he would ask the jury during closing argument to compare the two stories "[a]nd if they don't match, then one of them is the truth and one of them is a lie" (T. 1042-43).

In his closing argument, the prosecutor reiterated that the jury's job was to determine credibility (T. 1598). He said the judge would instruct them on how they could determine credibility, and that they could use that instruction in determining whether the defendant's story was the truth or a lie (*Id.*).

The prosecutor argued that the story told by the defendant and the story told by the other evidence "cannot match up" (T.1610, 1616). The prosecutor described in detail how appellant's story did not fit the evidence and how it belied common sense (T. 1605-10). He also discussed how appellant "spins a yarn" by pretending to accept responsibility for the murder in his letters to Mary Jane while refusing to admit he killed her father (T. 1600). The prosecutor said that when comparing the reasonableness of the defendant's version to the other evidence, one conclusion could be reached: "That the

defendant's story is a lie. And if it's a lie, it's a lie to cover the fact that he" murdered the victim (T. 1610, 1616).

Appellant has failed to establish that these comments constitute error, let alone plain error affecting his substantial rights. It is perfectly appropriate to attack the credibility of the particular story offered by appellant, as contrasted against all of the other evidence presented by the state. It is, of course, not misconduct for a prosecutor to analyze the evidence and "vigorously argue" that the state's witnesses are worthy of belief whereas the defendant is not. *See, e.g., State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977); *State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991) (stating that prosecutors should not be prevented "from arguing that particular witnesses were or were not credible"); *State v. Danielski*, 374 N.W.2d 322, 325 (Minn. Ct. App. 1985) (stating that there is "nothing improper about a prosecutor vigorously arguing that defense witnesses and their evidence lack credibility), *rev. denied* (Minn. Dec. 13, 1985).

The comments made by the prosecutor in this case were proper comments on credibility. It was not improper for the prosecutor to argue that appellant's story lacked credibility given the physical evidence at the scene and the unreasonableness of appellant's story. The prosecutor did not express a personal opinion about witness credibility as was held improper in *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984), where the prosecutor personally endorsed the credibility of the state's witnesses and

injected personal opinion as to the defendant's credibility.<sup>20</sup> Nor did the prosecutor improperly attack appellant's character as was held improper in *Washington*, 521 N.W.2d at 39, where the prosecutor stated that the defendant killed the victim because it "was just the way the defendant is."

The prosecutor in this case properly told the jurors that it was their job to determine credibility, and the trial court would give them instructions on that (T. 1598). The prosecutor has the right to urge the jury to consider, when determining credibility, any witness's interest in the outcome of the case and the reasonableness or unreasonableness of a witness's testimony. 10 Minn. Dist. Judges Ass'n, *Minnesota Practice-Jury Instructions Guides, Criminal*, CRIMJIG 3.12 (4th ed. 1999).

The prosecutor did not commit misconduct by commenting on appellant's motivation to lie. As the court held in *State v. Tennin*, 437 N.W.2d 82, 88 (Minn. Ct. App. 1989), *rev. denied* (Minn. Apr. 24, 1989), such a comment "is not that different from the court's own proper instruction to consider the witness's motive for testifying and interest in the outcome of the case."

Appellant argues that the prosecutor's comments were akin to the state asking a testifying defendant whether the state's witnesses were lying (App. Br. 32). Citing *State v. Pilot*, 595 N.W.2d 511 (Minn. 1999), appellant says such questions are "prohibited." Appellant's argument is without merit for two reasons. First, *Pilot* does not prohibit such questions. Although *Pilot* broadly agreed in principle that "were they lying" questions

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<sup>20</sup> In spite of being improper, the comments in *Ture* were held not to be prejudicial. *Id.* at 516-17.

generally have no probative value, this Court refused to adopt a blanket rule that such questions on cross-examinations are improper. 595 N.W.2d at 518. Instead, questions concerning lying may have probative value in clarifying testimony and evaluating credibility in certain specified circumstances. *Id.*; *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005).

Second, appellant's reliance on *Pilot* is misplaced. Asking a defendant who is testifying "were they lying" questions is not the same thing as arguing in the closing that the defendant's story conflicts with the story told by the other evidence and that both cannot be believed. "Were they lying" questions are problematic because "asking one witness to express an opinion as to the veracity of another witness calls for improper comment on another witness' testimony" and invades the province of the jury to determine credibility. *Pilot*, 595 N.W.2d at 516. *Id.* This concern is not present in this case. The prosecutor here was not asking a witness to comment on another's credibility; in fact, the prosecutor here told the jurors that it was their job to determine credibility.

In addition to relying on *Pilot*, appellant relies on *State v. Powers*, 654 N.W.2d 667 (Minn. 2004). Appellant inaccurately states that the prosecutor in *Powers* "committed misconduct by stating that defendant was lying and sarcastically indicating his testimony was not worth discussing" (App. Br. 32). The prosecutor in *Powers* said, "Well, I'm not sure I have the energy to dignify and talk to you about Vernon Powers' testimony in here. I just don't think I can do it, and I'm not going to." *Id.* at 678-79. This Court held that

[t]he comment does seem to disparage the defense and express an opinion on the credibility of the defendant . . . when viewed in the context of the closing argument taken as a whole, as required under our case law, the statement does *not* amount to misconduct.

*Id.* at 679 (emphasis added) (citation omitted). Contrary to appellant's argument, the *Powers* Court found no misconduct. Moreover, while the *Powers* Court disapproved of this particular comment, this Court did not hold that it is improper for a prosecutor to argue that a defendant's story, which conflicts with the other evidence, is not believable.

Assuming only for the sake of argument that appellant established error, he has failed to show plain error. Appellant has not cited any cases where comments similar to the ones made in this case amounted to misconduct. In *State v. Booker*, 348 N.W.2d 753, 755 (Minn. 1984), the defendant claimed that it was improper for the prosecutor in closing argument to argue "that although defendant claimed that the victim lied in her testimony, that in truth it was defendant who lied in his testimony." This Court held that "The prosecutor's statement, at worst, was a statement on the borderline between proper and improper comment and it clearly was not so serious and prejudicial a misstatement as to deny defendant his right to a fair trial." *Id.* Thus, even if the comments in this case are deemed improper, given *Booker*, they are not clear or obvious error as required by *Griller*, 583 N.W.2d at 741.

## **2. The prosecutor did not disparage the defense.**

Citing one of the prosecutor's statements in closing argument, appellant claims the prosecutor disparaged the defense (App. Br. 33-34). Specifically, appellant claims it was improper for the prosecutor to argue that appellant could not "have his cake and eat it

too” by claiming that he was so intoxicated that he could not remember exactly what happened that night while at the same time claiming that he was certain he did not stab the victim (T. 1598-99).

While a prosecutor may not generally belittle a defense in the abstract, the prosecutor is free to argue that there is no merit to a particular defense or argument. *See Ashby*, 567 N.W.2d at 28 (holding that it was not misconduct for the prosecutor to comment on the defense’s main theory); *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994) (holding that the prosecutor was free to argue that there was no merit to the defense’s theory in view of the evidence). It is also permissible for a prosecutor to anticipate a defendant’s argument and attempt to counter it. *State v. Whittaker*, 568 N.W.2d 440, 451 (Minn. 1997). Moreover, a prosecutor’s argument, need not be colorless. *State v. Williams*, 586 N.W.2d 123, 127 (Minn. 1998) (“The prosecutor has considerable latitude and is not required to make a colorless argument”). Given these cases, appellant has not shown error, let alone plain error, with respect to this statement by the prosecutor.

The prosecutor’s comment at issue here did not belittle the defense. The comment appellant complains of in this case is not at all similar to the comments constituting misconduct in *State v. Griese*, 565 N.W.2d 419, 427-28 (Minn. 1997), where the prosecutor suggested that the defense “scrounge[d] up” an expert witness and used a standard defense offered by defendants “when nothing else will work.” In this case, the prosecutor did not argue that the intoxication defense was a standard defense raised where nothing else will work.

The comment in this case is also dissimilar to the “abuse excuse” comments made by the prosecutor in *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005), where this Court said the state “took unnecessary liberties that were not supported by the evidence” in characterizing the defendant’s motivations for raising a defense of self-defense.<sup>21</sup> The comment made by the prosecutor in this case was supported by the evidence. In his statements to police and in his letters to Mary Jane, appellant claimed that he was so intoxicated that he could not remember portions of the evening, but he was certain he did not stab R [REDACTED]. It was not improper for the prosecutor to point out the conflict in appellant’s statements.

Appellant has failed to establish error let alone clear or obvious error with respect to this comment.

**C. Appellant Was Not Prejudiced By The Prosecutor’s Comments.**

Even assuming that the prosecutor’s comments were improper in any respect, appellant is not entitled to a new trial. Appellant has failed to show that any of the statements amount to plain error affecting his substantial rights. The prosecutor’s opening statement and closing argument were not prejudicial for the following reasons.

First, the trial court fully and correctly instructed the jury on all relevant matters. *See Washington*, 521 N.W.2d at 40 (stating that the trial court’s jury instructions are factors to consider in determining whether a jury was unduly influenced by the

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<sup>21</sup> In both *Griese*, 565 N.W.2d at 427-28, and *MacLennan*, 702 N.W.2d at 235-36, this Court held that the improper comments did not rise to the level of plain error affecting substantial rights.

prosecutor's conduct). The jury here was specifically instructed that the arguments of the attorneys were not evidence and any argument containing a statement of the law differing from that given by the court should be disregarded (T. 1684-85). The court also instructed the jurors that it was their duty to determine witness credibility (T. 1685). The jury is presumed to have followed the court's instructions. *State v. James*, 520 N.W.2d 399, 405 (Minn. 1994). Having been fully and correctly instructed, it is doubtful that the jury here was influenced by the prosecutor's comments.

Second, it is unlikely that the prosecutor's brief, isolated comments had a substantial impact on the jury. *See State v. Daniels*, 332 N.W.2d 172, 180 (Minn. 1983) (stating that prosecutor's argument must be evaluated as a whole, without solitary comments being taken out of context); *State v. Glaze*, 452 N.W.2d 655, 662 (Minn. 1990) (finding no prejudice to defendant when remarks are isolated and not representative of closing argument viewed in its entirety). Contrary to appellant's argument on page 35 of his brief, the comments did not permeate the opening statement and closing argument. Appellant complains of only two brief comments in the opening statement and four brief comments in the closing argument. These comments took only a fraction of the state's 28-page opening statement and approximately 50-page closing arguments.

Third, contrary to appellant's assertion in his brief, this case did not turn on appellant's credibility (App Br. 35). Appellant did not even testify. Moreover, defense counsel argued to the jurors that even if they believed that appellant lied in his statements and letters, the state had not proven beyond a reasonable doubt that appellant murdered W [REDACTED] (T. 1620-21). The physical evidence in this case was of utmost importance.

Appellant's blood was found at the top of the basement stairs and on R [REDACTED]'s bed sheet. There was no physical evidence indicating that anyone other than appellant and R [REDACTED] were at the house on the night of the murder.<sup>22</sup>

Fourth, defense counsel countered many of the prosecutor's comments in his own opening statement and closing argument. For example, in his opening statement he said, "[the prosecutor] says that there are widely divergent paths. The defense does not believe there are" (T. 1043). In his closing argument he argued that:

- The prosecutor's account of the events was "fictionalized" and that the prosecutor was "urging you to misinterpret the circumstances of this case" (T. 1617).
- Appellant had no reason to lie in his letters to Mary Jane Wander (T. 1630).
- "The state promised you in the opening, hard evidence the defendant was lying. They didn't give it to you" (T. 1631).
- "Counsel seems to believe that you black out and you don't remember anything and that's okay, but if you remember some things, then you must be lying" (T. 1649).
- "Physical evidence in this case, the State said, would prove the defendant was lying. It establishes to the contrary, to the extent it exists, a reasonable doubt" (T. 1654).
- "[T]he physical evidence they promised to give you that would establish that [appellant] was lying. It doesn't establish that. It establishes a bad investigation" (T. 1672).

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<sup>22</sup> In arguing that cumulative error requires reversal, appellant also claims that resolution of the identity of the perpetrator "turned on Wright's credibility" (App. Br. 37). Appellant's credibility was not central to the case, as explained above. There were no individual errors or cumulative errors that warrant a new trial. Appellant relies on *State v. Litzau*, 650 N.W.2d 177, 187 (Minn. 2002), but that case involved numerous errors. *Williams*, 525 N.W.2d at 544-49, (Minn. 1994), also relied upon by appellant, involved three obvious errors.

When determining the prejudicial effect of prosecutorial misconduct, courts consider the conduct of defense counsel in response to the alleged improprieties. *State v. McDaniel*, 534 N.W.2d 290, 294 (Minn. Ct. App. 1995), *rev. denied* (Minn. Sept. 20, 1995). Appellant here chose not to object to the comments he complains of for the first time on appeal; instead, he decided to address them in his own opening statement and closing argument.

For all of these reasons, any impropriety in the prosecutor's closing argument clearly did not affect appellant's substantial rights.

### **III. THE TRIAL COURT DOES NOT APPEAR TO HAVE ENTERED JUDGMENT AGAINST APPELLANT ON ALL FIVE COUNTS OF MURDER.**

Appellant correctly states that multiple convictions for the same conduct committed against the same victim are not allowed. Minn. Stat. § 609.04 (2004); *State v. Johnson*, 616 N.W.2d 720, 730 (Minn. 2000) (vacating conviction and sentence for first-degree felony murder and affirming conviction and sentence for first-degree premeditated murder); *State v. Grayson*, 546 N.W.2d 731, 739 (Minn. 1996). Appellant murdered one victim, R [REDACTED] W [REDACTED]. Therefore, he should only be convicted on one count of murder.

It appears that the trial court properly followed this rule. The court sentenced appellant only on the count pertaining to premeditated murder and said, "Pursuant to *State vs. LaTourelle*, the Court does not sentence on the remaining counts" (T. 1706-07). Similarly, on the Felony Criminal Judgment/Warrant of Commitment, the judge only

included the premeditated murder conviction, and stated “No action on remaining counts per *State vs. LaTourelle*.”<sup>23</sup>

This Court in *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984), stated, “We hold that the proper procedure to be followed by the trial court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time.” The trial court in this case appears to have followed this procedure and formally adjudicated and sentenced appellant on only the premeditated murder count.

#### **IV. THE TRIAL COURT SENTENCED APPELLANT TO LIFE WITHOUT THE POSSIBILITY OF RELEASE BASED ON APPELLANT’S PRIOR CONVICTION FOR A HEINOUS CRIME.**

The trial court sentenced appellant pursuant to Minn. Stat. § 609.106, subd. 2(3) (2004), to life without the possibility of release because of appellant’s prior conviction for first-degree assault (T. 1705-06). Appellant’s claim that this sentence violated his Sixth Amendment right to a jury trial is utterly meritless because the sentence was based entirely on appellant’s prior conviction and did not require any fact-finding by the court.

At the time appellant murdered R [REDACTED] W [REDACTED], Minn. Stat. § 609.106, subd. 2(3) (2004),<sup>24</sup> stated:

The court shall sentence a person to life imprisonment without the possibility of release under the following circumstances . . .

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<sup>23</sup> A copy of this document is included in the appendix to this brief.

<sup>24</sup> The statute was amended in 2005. Those amendments do not apply to appellant.

(3) the person is convicted of first degree murder under section 609.185, clause (1) . . . and the court determines on the record at the time of sentencing that the person has one or more previous convictions for a heinous crime.

Minn. Stat. § 609.106, subd. 2(3). “Heinous crime” is defined as “a violation of section 609.221 [first-degree assault] . . .” Minn. Stat. § 609.106, subd. 1a(2).

A sentence enhancement based solely on a prior conviction does not violate the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)); see also *State v. Allen*, 706 N.W.2d 40, 47 (Minn. 2005).

In *State v. Leake*, 699 N.W.2d 312, 323 (Minn. 2005), *cert. denied*, 126 S. Ct. 745 (2005), this Court specifically addressed the application of *Apprendi* and *Blakely* to Minnesota’s heinous crime statute. This Court explained:

In *Apprendi*, the Supreme Court held 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.” 530 U.S. at 490, 120 S. Ct. 2348 (emphasis added). *Blakely* “appl[ied] the rule \* \* \* expressed in *Apprendi*” and defined the “statutory maximum” under that rule. *Blakely*, 542 U.S. at ---, 124 S. Ct. at 2536. Thus, it appears that, after *Blakely*, the prior conviction exception recognized in *Apprendi* retains vitality and it is constitutional for a defendant’s sentence to be increased based on a prior conviction without submitting the fact of the conviction to the jury.

*Leake*, 699 N.W.2d at 323. Adopting appellant’s argument that “he objects to the use of his prior conviction to justify a departure to a sentence of life without the possibility of release” (App. Br. 41), would require this Court to overturn *Leake*.<sup>25</sup>

Appellant misstates the holding in *Leake*. He claims, “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 sentence to life without possibility of release” (App. Br. 40). As explained above, however, *Leake* reiterated that the jury does not need to determine whether there is prior conviction. *Id.* at 323. The *Leake* Court did say:

Our conclusion that a prior conviction permits an enhanced sentence without additional jury findings, however, does not end the inquiry in this case because, under Minnesota’s heinous crime statute, the fact of prior conviction *alone* is not always determinative.

*Id.* (emphasis in original).

The provision of the heinous crime statute at issue in *Leake* was subdivision 1(3), which states that certain prior convictions for criminal sexual conduct are considered a “heinous crime” if “committed with force or violence.” Minn. Stat. § 609.106, subdivision 1(3) (2004).

Thus, given the language of subdivision 1(3) of the heinous crime statute, a judge cannot enhance a defendant’s sentence based on a prior conviction

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<sup>25</sup> Such a holding would also be in conflict with *Apprendi* and *Blakely*. Appellant’s discussion of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), is unclear. *Apprendi* and *Blakely* clearly state that a jury need not determine whether a defendant has a prior conviction for purposes of an enhanced sentence. Although appellant believes *Almendarez-Torres* “was wrongly decided,” it has not been overruled by the United States Supreme Court.

[for criminal sexual conduct] alone, unless it is clear, as required by *Apprendi* and *Blakely*, that the jury found or the defendant admitted that the prior crime was committed with “force or violence” . . . .

*Leake*, 699 N.W.2d at 324. In this case, unlike *Leake*, subdivision 1(2) of the heinous crime statute was at issue. That subdivision requires only that there is a prior conviction for first-degree assault; there is no additional requirement such as the “force or violence” requirement in subdivision 1(3). In this case, the judge imposed life without the possibility of release based solely on appellant’s prior conviction.

Appellant additionally claims that the indictment was defective because “the indictment must contain an additional element -- whether Wright had a conviction for a heinous crime” (App. Br. 42). This argument also fails under *Apprendi*, *Blakely*, and *Leake* because appellant’s prior conviction is not an element.<sup>26</sup> Moreover, as this Court explained in *Allen*, 706 N.W.2d at 47, “[t]he primary reason for excluding a prior conviction from the constitutional rule is that the prior conviction itself has been established by procedures that satisfy constitutional jury-trial and reasonable-doubt guarantees” (citations omitted).

None of the cases from other jurisdictions cited by appellant (App. Br. 42-43) hold that sentencing enhancements based on prior convictions must be submitted to the grand jury. In fact, the Fourth Circuit in *United States v. Higgs*, 353 F.3d 281 (4th Cir. 2003), held to the contrary. The *Higgs* court said that while statutory aggravating factors must be alleged in the indictment and submitted to the jury, the United States Supreme Court

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<sup>26</sup> In addition, the indictment actually references Minn. Stat. § 609.106, subs. 1(a)(2) and 2(3).

does not require the same of a prior conviction. *Id.* at 304. Ultimately, “[t]he Fifth Amendment Indictment Clause does not require an indictment to allege prior convictions that expose a defendant to an enhanced penalty.” *Id.*

Appellant’s argument that he was improperly sentenced to life without the possibility of release based on his prior first-degree assault conviction is contrary to both United States Supreme Court and Minnesota precedent.<sup>27</sup>

**V. THE ARGUMENTS RAISED IN APPELLANT’S *PRO SE* SUPPLEMENTAL BRIEF ARE WITHOUT MERIT.**

Appellant’s *pro se* brief appears to raise ineffective assistance of trial counsel, but it does not contain any citation to legal authority. Therefore, the issues raised in it should be deemed waived. *See State v. Krosch*, 642 N.W.2d 713, 719-20 (Minn. 2002) (“The [*pro se*] brief contains no argument or citation to legal authority in support of the allegations and we therefore deem them waived.”).

In addition, appellant’s brief contains matters outside of the record and not properly before this Court.<sup>28</sup> *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. Ct. App. 2001).

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<sup>27</sup> Appellant further claims that “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 kidnapping” (App. Br. 43). He then goes on to argue that the evidence was insufficient to support his kidnapping conviction (App. Br. 43-45). Because appellant’s argument regarding his sentence for premeditated murder is contrary to established precedent, respondent does not address whether he could be sentenced to life without the possibility of release under the first-degree murder counts related to kidnapping.

<sup>28</sup> This includes such things as appellant’s statements that he requested that defense counsel subpoena certain witnesses (Pro Se Br. 2, 6-7) that he did not agree to the (Footnote Continued on Next Page)

Appellant claims, without citation to legal authority, that the court should have granted his request for a change of venue (*Pro Se* Br. 8). Many of his citations to the record, however, have nothing to do with voir dire or with that motion. In addition, he inaccurately states that Juror Karen Koehler had “personal information about me (and the case)” (*Id.*). While Koehler worked with the wife of the victim’s nephew, she did not know much about the case (T. 367-70). The only thing she knew was that the victim’s extended family was frustrated because they had not been given much information about the case (T. 370, 387). She did not feel her relationship with her co-worker would impact her service as a juror (T. 370, 376). Defense counsel did not move to strike her for cause (T. 394). Thus, to the extent appellant is challenging her service as a juror, his argument should be rejected.

Lastly, no prejudicial error is obvious on inspection and thus, appellant’s conviction should be affirmed. *Louden v. Louden*, 221 Minn. 338, 339, 22 N.W.2d 164, 166 (1946) (“An assignment of error based on mere assertion and not supported by any argument or authorities in appellant’s brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.”). Therefore, appellant’s claims do not warrant relief.

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(Footnote Continued From Previous Page)

stipulations made by defense counsel (*Pro Se* Br. 6), and that he voiced his concern to defense counsel about a particular juror (*Pro Se* Br. 8).

**CONCLUSION**

Respondent respectfully requests that this Court affirm appellant's conviction and sentence.

Dated: March 20, 2006

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

**CERTIFICATE OF COMPLIANCE**

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

The undersigned certifies that the Brief submitted herein contains 12,750 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 black ink, appearing to be "R. J. ...", written over a horizontal line.